INTERNATIONAL SEMINAR ON ISLAMIC LAW IN CONTEMPORARY WORLD
24 – 25 October, 2000

CIVIL AND SYARIAH COURTS IN MALAYSIA: CONFLICT OF JURISDICTIONS

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(ABRIDGED VERSION)

Background

Islamic law was the law of the land until sometime after the arrival of the British in the 18th century. However, there were no syariah courts then as we know them today.

The British introduced the courts based on their model with judges and lawyers trained in the English common law. Through legislation and the courts, the English common law and the rules of equity became the principal law of the country, replacing Islamic law except in matrimonial and family matters of Muslims.

When the then Malaya obtained her Independence, it was these courts that were entrenched as "The Judiciary" in the Federal Constitution.

Malaysia is a Federation of States. Besides the Federal Parliament, each State has its own Legislature.

The Federal Constitution provides for the "Federal Legislative List" and the "State Legislative List". The Federal Legislative List contains matters over which the Federal Parliament may make laws. Likewise, the State Legislative List contains matters over which the State Legislature may make laws.

Examples of matters in the Federal List:

(a) Civil and **criminal law**,
(b) Contract,
(c) Actionable wrongs,
(d) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law,
(e) Ascertainment of Islamic law and other personal law for purposes of federal law,
(f) Betting and lotteries.

Examples of matters included in the State List:

(a) **Islamic law**,
(b) **Personal and family law** of persons professing the religion of Islam,

(c) **Wakafs**,
(d) Creation and punishment of offences by person professing the religion of Islam against precepts of that religion, **except** in regard to matters included in the Federal List,
(e) 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 paragraph 1 of the State List, but shall **not** have jurisdiction in respect of offences **except** in so far as conferred by federal law.

Laws (called "Enactments") made soon after Independence (1957) were "all-in-one" laws. For example, the Administration of Muslim Law Enactment 1959 (Penang) provided for the establishment of the Muslim Religious Council, establishment of the Syariah Courts including provisions regarding procedure and evidence, financial provisions, provisions regarding mosques, marriage and divorce, maintenance of dependants, converts, offence and general provisions.

Very limited jurisdiction was given to the syariah courts. Civil jurisdiction was confined mainly to matrimonial and family matters, from the State List. Criminal offences were few, none of which overlapped with offences already in existence in the federal criminal law statutes e.g. Penal Code.

The all-in-one Enactment was replaced by a number of Enactments. In Penang, for example:

(a) Administration of Islamic Religious Affair Enactment, 1985,
(b) Islamic Family law Enactment, 1996,
(c) Syariah Criminal Offences Enactment, 1996,
(d) Syariah Criminal Procedure Enactment, 1996,
(e) Syariah Evidence Enactment, 1996,
(f) Syariah Civil Peocedure Enactment, 1999.

The Enactments on procedure and evidence are modelled from those in use in the civil court, with necessary modifications.

Conflict in Civil Jurisdiction

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

(It should be noted that 23 years later, in G. Rethinasamy v. Majlis Agama Islam Pulau Pinang (1993) 2 M.L.J. 166, **had** the High Court followed the ruling of the Syariah Committee (i.e. the Fatwa Committee) of the First Defendant (the Religious Council), 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 to the Committee by the Plaintiff. **The Committee failed to consider whether the land in question 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. Thus the mosque and the Muslim burial ground were saved by the High Court by not following the ruling of the Syariah Committee (Fatwa Committee). In this case they should thank the High Court!)

In 1971 the High Court decided the case of Myriam v. Mohamed Ariff (1971) 1 M.L.J. 265. That was a custody case. The High Court had jurisdiction over such cases **prior to** the establishment of the syariah court. With the establishment of the syariah court, the syariah court had jurisdiction over such cases in respect of Muslims.

To prevent the civil courts from adjudicating such cases, Article 121 was amended to include Clause (1A) which says that the High Court shall not have jurisdiction over matters within the jurisdiction of the syariah court.

The Supreme Court and the Federal Court, in a number of cases decide that the effect of the amendment is that **if** the syariah court has jurisdiction over a matter, the civil court does not have jurisdiction over it. To decide whether the syariah court has jurisdiction over a matter or not one should look at the State Enactments establishing the syariah courts and giving them jurisdictions - See, for example, Dalip Kaur (1992) 1 M.L.J. 1 (S.C.), Mohamed Habibullah (1992) 2 M.L.J. 793 (S.C.) and Soon Singh (1999) 1 M.L.J. 489 (F.C.). In apostasy cases, it is now settled by the Federal Court that where all the parties to the suit are Muslims, the matter is within the jurisdiction of the syariah court – Soon Singh. In that case the Federal Court held that where the State Enactment makes provision for conversion **to** Islam, conversion **out** of Islam **may be inferred**. That case shows how far the Federal Court was prepared to go to give jurisdiction to the syariah court.

However, problems in two areas remain unsolved:

(1) Where, even though the subject matter is within the jurisdiction of the syariah court, **one of the parties is not a Muslim**. Bear in mind that the syariah court **has** jurisdiction over Muslims only and that Malaysia is a mutli-religious country.
(2) When, in a case, even though all the parties are Muslims, **some of the issues/matters are within the jurisdiction of the syariah court and some are within the jurisdiction of the civil court.**

Regarding the first, a good example is the case of Dalip Kaur. The issue was apostasy. But the Plaintiff was a non-Muslim, the mother of the deceased convert. To which court should/could she go?

Regarding the second, the case of G. Rethinasamy (1993) 2 M.L.J. 166 is a good example. In that case the Plaintiff was a non-Muslim. He claimed for vacant possession of land registered in his name as owner and in respect of which he had an indefeasible title. So, both he and the subject matter of his suit were outside the jurisdiction of the syariah court and within the jurisdiction of the High Court. The Defendants, one of them was the Muslim Religious Council of Penang, put up defences of adverse possession and estoppel (which were common law defences and within the jurisdiction of the civil court). The Defendants also raised the defence of wakaf which was within the jurisdiction of the syariah court.

Both parties did not raise the issue of jurisdiction of the High Court for obvious reasons: where else could they have their dispute adjudicated. However, in my judgment I did touch on it.

What should the High Court do in the circumstance?

Should the court tell the Plaintiff that since the Defendants had raised the defence of wakaf which was within the jurisdiction of the syariah court, he should go and file his suit in the syariah court? He would say: “I can’t go there. I am a non-Muslim. Furthermore, my action is rightly commenced in this court. It is the Defendants who have raised a defence that is outside the jurisdiction of this court. Since this court has no jurisdiction to entertain that defence, that defence should be struck out!”

(Do you know what would have been the outcome of the case if the defence of wakaf was struck out? The Plaintiff would have won the case hands down because, as it turned out to be, it was on the defence of wakaf that the Defendants won the case.)

Should the Court tell the Defendants that they could not raise the defence of wakaf in this court? They would say: “That is not fair. We are deprived of a valid defence.”

Should the court tell the Defendants: “If you want to raise the issue of wakaf which is within the jurisdiction of the syariah court, you should go to the syariah court and file a suit there for a declaration?” The Plaintiff would say: “ That is not fair. I can’t go there and defend myself.” And **both** of them would say: “What about the other issues?”

Anyway, I heard the case, decided all the issues and decided in favour of the Defendants because, as I found it, the land was a wakaf land. The Plaintiff appealed to the Court of Appeal. But the appeal was withdrawn after a few hours of argument in the Court of Appeal. So, rightly or wrongly, my judgment stands. So is the mosque.

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

In that case, a Muslim died leaving a considerable amount of property and quite a large number of beneficiaries. The beneficiaries applied for the Letter of Administration in the High Court. By consent, the Public Trustees Berhad was appointed administrator of the undisputed assets. Subsequently, two of the beneficiaries applied to the **Syariah** High Court for an order of declarations:

(a) that a certain shares held by Respondent at the time of death of the deceased formed part of the estate of the deceased,

(b) that all shares, dividends, bonus shares etc. received in respect of those shares and held by the respondent since the death of the deceased also formed part of the estate,

(c) that all the beneficiaries were entitled to their respective shares of those assets in accordance with the "faraid".

Two preliminary issues were raised:

(1) Whether the Applicants had locus standi to make the application,

(2) Whether the Syariah High Court had jurisdiction over the matter.

Both the Syariah High Court and the Syariah Court of Appeal decided that the Applicants had no lucus standi to make the application and that syariah courts had no jurisdiction over the matter.

It is interesting to note that on question of locus standi, the **Syariah** Court of Appeal relied heavily on authorities from the civil courts including the House of Lords of England in spite of the fact that the Administration of Islamic Law (Federal Territories) Act 1993, in section 50, provides that an application " to determine the persons entitled to share in the estate or to shares to which such persons are respectively entitled" may be made by **"any person claiming to be a beneficiary."**

It is also interesting to note the reason given by the **Syariah** Court of Appeal in holding that it had no jurisdiction over the matter. The Court held that as the court had no jurisdiction to issue probate and letters of administration and therefore the court had no jurisdiction to determine the application.

With greatest respect, I would have thought that the question of which court had jurisdiction to issue probate and letters of administration was of no relevance to the application. The application was **not for the distribution** of the estate, **but for declarations that the shares formed part of the estate of the deceased and that the beneficiaries were entitled to their respective shares in accordance with Islamic law (faraid**). Are these issues not issues that should be determined according to Islamic law? Do they not fall under para. 1 of the State List i.e. "..**Islamic law relating to succession**, testate and intestate" of

persons professing the religion of Islam? Do they not fall under the provisions of section 46 (2) (b) (iii) i.e. "**the determination of persons entitled to share in he estate of a deceased Muslim or of the shares to which such persons are respectively entitled**" and section 50 of the Act?

It is ironical that in this case the **Syariah** Court of Appeal decided on the question of locus standi following authorities from the civil courts but declined to decide issues of Islamic law relating to succession of a Muslim estate!

Conflict in Criminal Jurisdiction

The conflict as in Sukma Darmawan (1999) 1 M.L.J. 266 (C.A.) would not have arisen under the old Administration of Muslim Law Enactment 1959 (Penang), for example, as none of the offences therein provided overlapped with he existing offences in the federal criminal statutes e.g. the Penal Code. But, after article 121 was amended, new offences were created in the State Enactments, some of which overlapped with offences already existing in the federal criminal law statutes e.g. the Penal Code. A good example is "liwat" which overlap with the provisions in sections 377A and 377D of the Penal Code. "Gambling" appears to overlap with the provisions in sections 6 and 7 of the Common Gaming Houses Act 1953. So, it was a matter of time that such a conflict would arise. You will remember that in that case the Court of Appeal held that that only in a case where an offence is within the **exclusive jurisdiction** of the syariah court that the civil court has no jurisdiction over it.

I wonder what would have been the answer had the issue whether the offence of "liwat" under the State Enactments (and the Federal Territories Act) was ultra vires the Federal Constitution was referred to the Federal Court under Art. 128 of the Federal Constitution on the ground that it overlapped with an offence already in existence in the Penal Code, a "criminal law" under the Federal List.

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 two Lists. Besides referring the issues to the Federal Court under Article 128 of the Federal Constitution, the judgment of the Court of Appeal in Sukma Darmawan may provide a solution, like it or not.

In **civil matters,** the problem is more complex. **First,** a matter may be under the jurisdiction of the syariah court but one of the parties may be a non-Muslim over whom the syariah court has no jurisdiction. **Secondly**, in one case, even where all the parties are Muslims, there may be issues that fall within the jurisdiction of civil court and there may also be issues that are within the jurisdiction of the syariah court. To which court should such cases go?

I have, in the case of Lim Chan Seng (1996) 3 C.L.J. 231 and again in Abdul Shaik (1999) 5 M.L.J. 618 advanced two suggestions.

First, that such cases be tried in the civil court. The civil court judge sits with a syariah court judge. The syariah court judge decides issues involving Islamic law. The civil court judge decides other issues and the case.

The alternative is to unify the two courts. Appoint judges from people who are qualified in Civil law and also people who are qualified in Islamic law. Judges with Islamic law qualification hear Islamic law cases. Judges with Civil law qualification hear non-Islamic law cases. If in a case there are issues involving Civil law as well as Islamic law, two Judges, one from each discipline hear the case. Decisions are made as in the first alternative. Or, both of them may give a joint judgment. Unification the two courts and federalisation the sariah courts will also help solve a host of other problems now faced by the syariah courts, e.g. personnel, administrative and enforcement of judgments and orders etc. (This topic requires a separate paper.)

I know that it is not an easy thing to do. But that should not stop us from discussing the problems and the suggestions. Someone may come up with other and better ideas.

(In the limited time that we have for discussion, I hope that participants will focus on how to solve the problems rather than arguing who is right and who is wrong.)