

**A Abdul Kahar bin Ahmad v Kerajaan Negeri Selangor
(Kerajaan Malaysia, intervener) & Anor**

B FEDERAL COURT (PUTRAJAYA) — APPLICATION NO 1–2007
ABDUL HAMID MOHAMAD CHIEF JUSTICE, ZAKI AZMI PCA
AND ZULKEFLI MAKINUDDIN FCJ
22 MAY 2008

C *Constitutional Law — Courts — Federal Court — Whether jurisdiction to interpret the Federal Constitution exclusive to the Federal Court — Whether Syariah Court seized with jurisdiction to interpret provisions of the Federal or State Constitutions — Federal Constitution arts 121(1A) & 128(1)*

D *Islamic Law — Jurisdiction — Syariah Court — Whether Syariah Court seized with jurisdiction to determine Islamic Law matters for purpose of interpreting the Constitution — Whether Syariah court seized with jurisdiction to interpret the Federal Constitution*

E Abdul Kahar was charged in the Syariah High Court with five offences under various provisions ('the said provisions') of the Syariah Criminal Offences (Selangor) Enactment No 9 of 1995 ('the Enactment'). Abdul Kahar obtained leave and then filed a petition to the Federal Court for a declaration that the said provisions of the Enactment were null and void. The Government of Malaysia and the Majlis Agama Islam Selangor ('MAIS') were allowed to intervene. MAIS subsequently applied, inter alia, for an order that the issue of law whether the said provisions were in accordance with precepts of Islam as provided by Paragraph 1, State List of the Ninth Schedule of the Federal Constitution ('the Constitution'), 'must be decided' by the Syariah High Court as provided by Article 121 (1A) of the Constitution. Thus, the Federal Court had to determine whether the Federal Court or the Syariah High Court that was seized with jurisdiction to decide whether the said provisions were in accordance with the Constitution.

I **Held**, dismissing the application with no order as to costs:

- (1) The motion by MAIS was asking for the interpretation of the provision of the Constitution. It is not stated anywhere in the Constitution that the interpretation of the Constitution, Federal or State is a matter

within the jurisdiction of the Syariah Court. The jurisdiction of Syariah Court is confined to the limited matters enumerated in the State List and enacted by the respective state Enactments. Further, there is no provision in the state Enactments granting jurisdiction to the Syariah Court to determine Islamic Law for the purpose of interpreting the Constitution (see paras 10 & 11).

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- (2) Article 121(1A) does not confer jurisdiction on Syariah Courts to interpret the Constitution to the exclusion of the Federal Court. Article 121(1A) was inserted to avoid the ousting of the jurisdiction of the Federal Court in matters that rightly belonged to it. Before the jurisdiction of the Federal Court is excluded, it must be shown that the Syariah Court has jurisdiction over the matter first. Pursuant to Article 128(1) of the Constitution, this was not the case. Whether the impugned provisions were within the jurisdiction of the State Legislature to make or not and whether they were valid or not, would be decided by the Federal Court when it determined Abdul Kahar's application (see paras 12–14).

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Obiter:

Counsel for Abdul Kahar, the senior federal counsel appearing for the Government of Malaysia and the State Legal Advisor appearing for the State of Selangor Darul Ehsan all adopted a common stand that it was the Federal Court and not the Syariah High Court that had the jurisdiction to determine whether the said provisions were in accordance with the Constitution. However, counsel for MAIS, though a department of the Selangor State Government, took the opposing view, thereby giving rise to a very peculiar situation and the question of whether a State Government department was entitled to go against the stand taken by the State Government. The Federal Court declined to answer that question (see para 7).

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[Bahasa Malaysia summary

Abdul Kahar telah dituduh di Mahkamah Tinggi Syariah dengan lima kesalahan di bawah beberapa peruntukan ('peruntukan-peruntukan tersebut') di bawah Enakmen Kesalahan Jenayah Syariah (Selangor) No 9 Tahun 1995 ('Enakmen tersebut'). Abdul Kahar mendapat kebenaran dan kemudiannya memfailkan petisyen ke Mahkamah Persekutuan untuk deklarasi bahawa peruntukan-peruntukan Enakmen tersebut adalah batal dan tidak sah. Kerajaan Malaysia dan Majlis Agama Islam Selangor ('MAIS') telah dibenarkan mencelah. MAIS kemudiannya memohon, antara lain, untuk perintah bahawa isu undang-undang sama ada peruntukan-peruntukan tersebut adalah menurut ajaran Islam seperti yang diperuntukkan oleh Perenggan 1, Senarai Negeri Jadual Kesembilan Perlembagaan Persekutuan ('Perlembagaan), 'must be decided' oleh Mahkamah Tinggi Syariah seperti

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A yang diperuntukkan oleh perkara 121(1A) Perlembagaan. Oleh itu, Mahkamah Persekutuan perlu memutuskan sama ada Mahkamah Persekutuan atau Mahkamah Tinggi Syariah yang mempunyai bidang kuasa untuk menentukan sama ada peruntukan-peruntukan tersebut adalah menurut Perlembagaan.

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Diputuskan, menolak permohonan tanpa perintah terhadap kos:

C (1) Usul oleh MAIS adalah untuk memohon pentafsiran peruntukan Perlembagaan. Tidak dinyatakan di mana-mana di dalam Perlembagaan bahawa pentafsiran Perlembagaan, sama ada Persekutuan atau Negeri adalah perkara dalam bidang kuasa Mahkamah Syariah. Bidang kuasa Mahkamah Syariah terbatas kepada perkara-perkara terhad yang disenaraikan di dalam Senarai Negeri dan digubal oleh Enakmen negeri masing-masing (lihat perenggan 10–11).

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E (2) Perkara 121(1A) tidak memberikan bidang kuasa kepada Mahkamah Syariah untuk mentafsir Perlembagaan dan mengecualikan Mahkamah Persekutuan. Perkara 121(1A) dimasukkan untuk mengelakkan daripada penyingkiran bidang kuasa Mahkamah Persekutuan dalam perkara-perkara yang di bawah bidang kuasanya. Sebelum bidang kuasa Mahkamah Persekutuan disingkir, perlu ditunjukkan dahulu bahawa Mahkamah Syariah mempunyai bidang kuasa terhadap perkara tersebut. Menurut perkara 128(1) Perlembagaan, ini bukan apa yang berlaku. Sama ada peruntukan yang dipersoalkan termasuk dalam bidang kuasa Perundangan Negeri untuk membuatnya atau tidak dan sama ada ia sah atau tidak, akan diputuskan oleh Mahkamah Persekutuan apabila ia memutuskan permohonan Abdul Kahar (lihat perenggan 12–14).

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Obiter:

H Peguam Abdul Kahar, peguam kanan persekutuan yang mewakili Kerajaan Malaysia dan penasihat undang-undang negeri yang mewakili Negeri Selangor Darul Ehsan kesemuanya mengambil pendirian yang sama bahawa Mahkamah Persekutuan dan bukan Mahkamah Tinggi Syariah yang mempunyai bidang kuasa untuk memutuskan sama ada peruntukan-peruntukan tersebut adalah menurut Perlembagaan. Walau bagaimanapun, peguam MAIS, walaupun adalah sebuah jabatan Kerajaan Negeri Selangor mengambil pandangan yang bertentangan, oleh itu menyebabkan situasi yang luar biasa dan membangkitkan persoalan sama ada sesebuah jabatan Kerajaan Negeri berhak untuk mengambil pendirian yang bertentangan dengan pendirian yang diambil oleh Kerajaan Negeri. Mahkamah Persekutuan menolak dari menjawab persoalan tersebut (lihat perenggan 7).]

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Notes

For cases on Syariah Court, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 561–589.

For cases on Federal Court, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1919–1921.

Cases referred to

Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor [2007] 5 MLJ 101 (refd)

Myriam v Mohamed Ariff [1971] 1 MLJ 265 (refd)

Legislation referred to

Administration of Islamic Law Enactment (Selangor) No 1 of 2003 s 49
Federal Constitution arts 121(1A), 128(1), Paragraph 1, State List of the Ninth Schedule, item 4(k) of List I, Federal List of the Ninth Schedule
Syariah Criminal Offences (Selangor) Enactment No 9 of 1995 ss 7, 8(a), 10(b), 12(c), 13

Malik Imtiaz (Edmund Bontai Soon & Syamsuriatina Ishak with him) (Chooi & Co) for the applicant.

Zauyah Be bte Loth Khan (Aimi Hajar bte Mohamad Ridzwan with her) (Penasihat Undang-Undang Negeri Selangor) for the first respondent.

Azizah Nawawi (Mahamad Naser bin Disa with her) (Senior Federal Counsels, Attorney General's Chambers) for the intervener.

Mubashir Mansor (Abdul Rahim Sinwan & Abdul Halim Bahari with him) (Azra & Associates) for the second respondent.

Abdul Hamid Mohamad Chief Justice (delivering judgment of the court):

[1] For the sake of clarity, I shall refer to the parties in their respective names and state the events in chronological order.

Abdul Kahar bin Ahmad ('Abdul Kahar') was charged in the Syariah High Court of Selangor ('the Syariah High Court') with five counts briefly stated as follows:

First Charge

For expounding the doctrine contrary to Islamic Law under s 7 of the Syariah Criminal Offences (Selangor) Enactment No 9 of 1995 ('Enactment No 9 of 1995').

Second charge:

For stating, claiming and declaring himself as a Malay prophet of this era under s 8(a) of the Enactment No 9 of 1995.

- A** Third charge:
For ridiculing the practices relating to the religion of Islam under s 10(b) of the Enactment No 9 of 1995.
Fourth charge:
- B** For defying and disobeying the lawful orders or directions of the Mufti, expressed or given by way of a fatwa under s 12(c) of the Enactment No 9 of 1995.
Fifth Charge:
- C** For disseminating opinions concerning an issue contrary to Islamic Law and fatwa for the time being in force in the State under s 13 of the Enactment No 9 of 1995.
- D** [2] As Abdul Kahar had failed to attend the Syariah High Court and the warrant of arrest issued by the court could not be executed, the case had not proceeded to trial. In the meantime, Abdul Kahar made an application to this court praying for leave to issue a petition for a declaration that the said provisions of the State Enactments are null and void. Leave was granted by this court. The Government of Malaysia and the Majlis Agama Islam Selangor ('Majlis Agama Islam') were allowed to intervene.
- E** [3] Abdul Kahar then filed the petition. Subsequently, the Majlis Agama Islam filed the instant notice of motion [encl 35(a)] for the following orders:
- F** [4] First, for an order that the issue of law whether the provisions of ss 7, 8(a), 10(b), 12(c) and 13 of the Syariah Criminal Offences Enactment (Selangor) No 9 of 1995 and s 49 of the Administration of Islamic Law Enactment (Selangor) No 1 of 2003 are in accordance with the precepts of Islam as provided by Paragraph 1, State List of the Ninth Schedule of the Federal Constitution must be decided ('mestilah diputuskan') by the Syariah High Court as provided by art 121(1A) of the Federal Constitution.
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- H** [5] Secondly, for an order that all proceedings in this court be stayed until the issue has been disposed of by Syariah High Court as provided by art 121(1A) of the Federal Constitution.
- I** [6] The issue is simple: Is it this court or the Syariah High Court that is seized with jurisdiction to decide whether the stated provisions of the said Enactments are in accordance with the provision of the Federal Constitution? That is the net effect of the issue posed in this application.
- [7] Before this court, learned counsel for Abdul Kahar, the senior federal counsel appearing for the Government of Malaysia and the State Legal

Advisor appearing for the State of Selangor Darul Ehsan took a common stand that it was this court and not the Syariah High Court that has the jurisdiction to determine the issue. Learned counsel for the Majlis Agama Islam, though a Department of the Government of State of Selangor, took the opposing view. This is a very peculiar situation. Is a department of a State Government entitled to go against the stand taken by the State Government? I shall not answer that question.

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[8] Learned counsel for Majlis Agama Islam concedes, and rightly so, that interpretation of the Federal Constitution is a matter for this court, and not the Syariah Court to decide. I have said in *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101, at p 123:

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Interpretation of the Federal Constitution is a matter for this court, not the Syariah Court.

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[9] However, the learned counsel argued that he was not saying that it was the Syariah Court that had jurisdiction to interpret the Constitution. Neither was he saying that it was for the Syariah Court to decide whether the said provisions were consistent ('selaras') with the provisions of the Constitution or not. All he was saying was that it was for the Syariah Court to decide whether the said offences were offences against the precepts of Islam or not. Then, it is for this court to decide whether the impugned provisions are void or not. He drew an analogy with what I have said in *Latifah* where a double proceeding is necessary in a distribution petition: the Syariah Court determines the shares of the beneficiaries according to 'faraid' and the civil court makes the distribution order accordingly.

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[10] Actually, that is not the case here, nor what was prayed for in the notice of motion. The motion clearly prays for an order that the issue whether the impugned provisions are consistent with precepts of Islam as provided by Paragraph 1, State List, Ninth Schedule of the Federal Constitution *must be decided* by the Syariah High Court as provided by art 121(1A) of the Federal Constitution. That clearly is asking for the interpretation of the provision of the Constitution. Nowhere in the Constitution says that interpretation of the Constitution, Federal or State is a matter within the jurisdiction of the Syariah Court to do. The jurisdiction of Syariah Courts are confined to the limited matters enumerated in the State List and enacted by the respective state enactments. What happens in an administration of estate cases is different. There, while letters of administration is a matter within the jurisdiction of the 'civil court', the Constitution also provides that that 'Islamic law relating to succession, testate and intestate...' is a matter within

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A the jurisdiction of the State Legislature to make law to grant jurisdiction to the Syariah Court. That is followed by specific provisions in the relevant state enactment — see *Latifah*.

B [11] That is not the case here. Nowhere in the Constitution is there a provision that the determination of Islamic Law for the purpose of interpreting the Federal Constitution is a matter for the State Legislature to make law to grant such jurisdiction to the Syariah Court. Hence, there is no such provision in the State Enactments to grant such jurisdiction to Syariah Courts. In fact, it cannot be done. On the other hand, item 4(k) of List I, Federal List of the Ninth Schedule goes further to provide that:

(k) Ascertainment of Islamic Law and other personal laws for purposes of federal law

is a federal matter.

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[12] Reliance was made on the provision of art 121(1A) of the Constitution. With respect, this article does not confer jurisdiction on Syariah Courts to interpret the Constitution to the exclusion of this court.

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[13] As I have said a number of times, ending with *Latifah*, that provision was inserted to avoid a situation as in *Myriam v Mohamed Ariff* [1971] 1 MLJ 265, not to oust the jurisdiction of this court in matters that rightly belong to it. Before the jurisdiction of this court is excluded, it must be shown that the Syariah Court has jurisdiction over the matter first. That is not the case here. In fact, the Constitution provides to the contrary. Article 128(1) of the Federal Constitution provides:

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128(1) The Federal Court shall, *to the exclusion of any other court*, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction —

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(a) 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; and

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[14] That, in effect, is what the Majlis Agama Islam is saying that Syariah High Court should determine. That is a matter for this court to decide, not the Syariah High Court. Whether the impugned provisions are within the scope that the State Legislature has jurisdiction to make or not and whether they are valid or not, will be decided when we hear the petition.

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[15] I would dismiss this application and also the prayer for a stay of the proceedings before this court with no order as to costs.

[16] Both my brothers Zaki Tun Azmi PCA and Zulkefli Ahmad Makinudin FCJ have read this judgment and agreed with it. A

Application dismissed with no order as to costs.

Reported by Andrew Christopher Simon B

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