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THE MALAYSIAN LEGAL SYSTEM: A TALE OF TWO COURTS

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The Federal Constitution of Malaysia was crafted during the birth pangs of the nation in 1957 and provides the framework for Malaysia's modern legal system. The Federation of Malaya emerged from British colonialism to achieve independence on 31 August 1957 and was joined six years later by the Borneo states – Sabah and Sarawak – and Singapore to form the new nation of Malaysia. Singapore left Malaysia in 1965 to become its own sovereign nation, and the current Federation of Malaysia comprises the Peninsula, Sabah, and Sarawak. Malaysia was born in a climate of multicultural compromise as a constitutional monarchy governed by secular laws. Islam was acknowledged as the religion of the Federation, according to article 3(1) of the Federal Constitution, 'but other religions may be practised in peace and harmony in any part of the Federation'.

The Malaysian court system is based on the UK legal system familiar to those from common law jurisdictions, but it also incorporates distinct characteristics in the form of Islamic religious courts and two separate High Courts for the Peninsula and for the Borneo states. The judiciary in Malaysia can be assessed according to its external relationship with the other branches of government as well as its own internal dynamics with the different court systems. The external aspect is its relationship with the other two branches of government, i.e. the executive and the legislature. The internal aspect relates to the relationship of the civil courts with the religious Syariah courts – a relationship that has raised jurisdictional issues in certain areas, such as apostasy.

External Relationship: The Vesting of Judicial Power

The relationship between the courts and the executive and legislature in Malaysia has been a delicate, and sometimes tense, one. The Westminster style model on which the Malaysian government is based has meant that

in practice there is no strict separation of powers between the executive and legislature, where members of the executive (the Prime Minister and Ministers) are also members of Parliament. The judiciary is hugely significant in checking a powerful executive and legislature. In line with this, article 121(1) of the Malaysian Federal Constitution, before it was amended in 1988, 'vested' judicial power in the High Courts and such inferior courts as might be provided by federal law.

The Constitutional Amendment Act 1988 passed during the administration of Malaysia's fourth Prime Minister, Mahathir Mohamad, amended article 121(1) by removing the terms 'judicial power' and 'vested'. Article 121(1) now specifies instead that the courts 'shall have such jurisdiction and powers as may be conferred by and under federal law.' The 1988 Act was passed following increasing tension between the Mahathir executive and the judiciary after the judiciary had struck down several decisions made by the executive (see A Harding, 'The 1988 Constitutional Crisis in Malaysia' (1990) 39 ICLQ 57). The 1988 Amendment was one development in several events that eventually led to the removal of the head of the judiciary, the Lord President Tun Salleh Abas, and two other Federal Court judges at the height of the 1988 judicial crisis – an event that has been criticised heavily as a constitutional crisis and unwarranted intrusion on judicial independence.

The court has so far not dealt directly with the issue of whether the exclusive vesting of judicial power in the ordinary courts has indeed been removed by the amendment. Andrew Harding in *Law, Government and the Constitution in Malaysia*, pp. 135-36, argues that the intention to vest judicial power in the judiciary can be implied from other provisions of the Constitution and that the amendment must be given a restricted meaning. The Malaysian judiciary has adopted a restrictive approach toward the protection of individual

rights and a generally pro-Executive approach after 1988, but the causes for this are broader than the amendment of article 121(1). The constitutional crisis in 1988, culminating in the removal of the Lord President, has led to an undermining of public confidence in the judiciary and a perceived judicial reluctance to challenge Executive power.

A Tale of Two Courts: Civil Courts and Syariah Courts

The internal relationship of the civil courts with the Syariah courts has also raised issues related to the jurisdiction of both courts and the position of Islam in the Constitution. The civil and Syariah courts exist in a dual court structure produced following Malaysia's independence in an effort to ensure that there would be a federal secular legal system in the form of the civil courts, as well as a religious forum for Muslims under which to dispense Islamic personal and family law.

Civil Courts

Malaysia's civil court structure is largely based on a court structure familiar to those from common law jurisdictions. It consists of the Subordinate Courts and the Superior or Appellate Courts. The Superior Courts are made up of the High Court of Malaya, the High Court of Sabah and Sarawak, the Court of Appeal, and the Federal Court.

The Federal Court is the highest and final court of appeal. It has *appellate* jurisdiction to hear appeals from the Court of Appeal; *original* or federal-state jurisdiction over whether a federal or state legislative body has legitimately made a law within its power; *referral* jurisdiction to determine constitutional questions referred to it by another court; and *advisory* jurisdiction to give an advisory opinion on any question referred to it by the Yang di-Pertuan Agong (His Majesty) concerning the effect of any provisions of the Constitution. Prior to 1 January 1985, appeals could be made to the Judicial Committee of the Privy Council. After the abolition of Privy Council appeals, however, the Federal Court became the final court of appeal in the country. The Federal Court consists of a Chief Justice, the head of the Malaysian judiciary; the President of the Court of Appeal; the two Chief Judges of the High Courts in Malaya and Sabah and Sarawak; and, at present, four other Federal Court judges.

The Court of Appeal was created in 1994 to act as an appellate court to hear appeals against decisions of the High Courts. It has only appellate jurisdiction. The creation of the Court of Appeal in 1994 reinstated a three-level system of appeal, lost with the abolition of appeals to the Privy Council, and provided necessary relief for the Federal Court.

There are two High Courts of co-ordinate jurisdiction and status: the High Court of Malaya for the states of Peninsular Malaysia and the High Court of Sabah and Sarawak for the Borneo states. There is a Chief Judge that heads each High Court. The separation of the two Courts is partly for practical reasons as the principal registry of the High Court of Malaya is in Kuala Lumpur and the registries for the Borneo states are in the respective states. The independence of the High Court of Borneo is also important symbolically and as matter of principle for the Borneo states, which remain keen to have their own High Court. Both High Courts have general supervisory and appellate jurisdiction, and have unlimited civil and criminal jurisdiction.

The Subordinate Courts consist of the Sessions Court, the Magistrates' Court and the *Penghulu* Court in Peninsular Malaysia. The Sessions Court and the Magistrates' Court have general jurisdiction in both civil and criminal matters. The Sessions Courts have criminal jurisdiction over all offences not punishable by death, and civil monetary jurisdiction over claims between RM 25,000 and RM 250,000 (£1 sterling equals approximately 5 ringgits; \$US1 3 ringgits). Magistrates' Courts deal with minor civil and criminal cases. It may hear disputes for civil claims below RM 25,000 and has criminal jurisdiction over offences that are punishable by a maximum term of imprisonment that does not exceed 10 years or by fine only. The Magistrates' Courts may also hear appeals from the *Penghulu* Courts. These rural courts are presided over by the *Penghulu* or village headman and are meant for informal settlement of small village disputes.

Syariah Courts

In Malaysia, the civil and Syariah courts exist side by side in a dual court structure. The civil courts were established as federal courts to deal with federal matters, whereas the Syariah courts are provided for in the Federal

Constitution as state courts that can be established to deal with matters of Islamic law. The understanding of the Syariah courts as subordinate to the civil courts has arguably been altered following the introduction of an amendment to article 121(1A) of the Constitution following the Constitutional Amendment Act 1988. Article 121(1A) now provides that the civil courts 'shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.'

The question of whether the Syariah Court has jurisdiction over any particular matter is therefore significant: once an issue is within the jurisdiction of the Syariah Court, by definition, the civil courts' jurisdiction is excluded. It is unclear whether the civil High Courts continue to have the power to intervene as a matter of judicial review. The view that article 121(1A) does not exclude the supervisory review power of the High Court is supported by several commentators, such as Andrew Harding (*Law, Government and the Constitution of Malaysia*, 136-7 (1996)), Thio Li-Ann (in an essay in *Constitutional Landmarks in Malaysia: The First 50 Years*, 197 at 202), and the Malaysian Bar Council (in its Amicus Brief in *Lina Joy*) who argue that article 121(1A) simply states the obvious, i.e. that each court deals with matters within its own jurisdiction, but it does not transfer additional powers to the *Syariah* courts. Another view is that the very objective of the amendment was to prevent the High Court from having the power of judicial review over the *Syariah* Court as had happened in certain family law cases: see, e.g. Hassan Saeed, in *Freedom of Religion, Apostasy and Islam* (2004) 149 at 150.

The judicial trend recently has appeared to lean towards the latter view. In *Subashini Rajasingam v Saravanan Thangathoray* ([2007] 7 CLJ 584), a case concerning the custody of children when one parent had converted to Islam, the demarcation between the civil and *Syariah* courts was interpreted to mean that the *Syariah* courts 'are not lower in status than the civil courts . . . they are of equal standing under the [Federal Constitution]' (at [23]). This clear separation between the civil and *Syariah* courts appears to have resulted in an either/or jurisdictional relationship: a matter is either within the jurisdiction of the civil court or the *Syariah* court; it cannot be under both.

The general jurisdiction of the *Syariah* Court is expressly provided for in the Federal Constitution under article 74(2) and List II, Schedule 9. *Syariah* courts have jurisdiction over 'Islamic law and personal and family law of persons professing the religion of Islam', which includes, *inter alia*, matters such as betrothal, marriage, divorce, legitimacy, dowry, maintenance, adoption, succession, and religious endowments. This is consistent with the idea that the *Syariah* courts are meant to be state courts established to deal with Islamic law 'only over persons professing the religion of Islam' according to List II, Schedule 9. State legislatures are then meant to specify the jurisdiction of the *Syariah* courts of their particular states, within the general jurisdiction laid down by the Federal Constitution.

Conversion Cases: A Matter for the Civil or *Syariah* Courts?

Conversion cases in general have raised particular complexities in navigating jurisdictional issues. Difficult issues include the conversion and custody of minors by one parent who has converted, such as in the *Subashini* case above; posthumous disputes regarding whether the deceased had converted to Islam for burial purposes; and apostasy cases. Apostasy cases, in particular, lie at very heart of the jurisdictional complexities arising from the relationship between the civil and religious courts because it concerns the sensitive issue of Muslims who wish to leave the religion, compounded by Malays being constitutionally defined as Muslims under article 160 of the Federal Constitution: "Malay" means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay customs...'.⁵

The 2007 case of *Lina Joy* ([2007] 3 All Malaysia Reports 693) is an illustration of this. *Lina Joy* was a woman born to a Malay-Muslim family who had converted from Islam to Christianity and had applied to have this officially recognised as her legal status in order to marry her Christian fiancé. The Federal Court, in a two to one judgment, ruled that Muslims who wish to convert out of Islam could not do so without a certificate of apostasy from the *Syariah* Court. Such a condition creates a situation of practical impossibility for a Muslim who wishes to convert: no *Syariah* court has ever granted

such an order of apostasy to a living person; indeed, apostasy is regarded as an offence by the Syariah courts in certain states.

As a result, Lina Joy continues to be officially recognized as Muslim by the State and cannot marry her non-Muslim fiancé as Muslims cannot enter into marriage with non-Muslims under Islamic law and the civil law in Malaysia only covers marriages between non-Muslim persons. The decision throws into sharp focus the tension between article 11 of the Federal Constitution, which guarantees ‘the right to profess and practice [one’s] religion’, and article 3, which declares Islam as the religion of the Federation of Malaysia.

Apostasy is not listed in the Constitution as a matter under the purview of the Syariah Court. Many state laws deal with conversion into Islam, but not conversion out of Islam. In states where express provision regarding apostasy had *not* been made in the state laws regulating the Syariah courts, the crucial question was whether the jurisdiction of the Syariah Court over apostasy in that particular state could be *implied*. There have been two lines of cases dealing with this matter. The first approach affirms that the Syariah Court has no jurisdiction without express jurisdiction from the written laws of the state or Parliament; by definition, the Syariah Court owes its existence to such statutes. This was the approach adopted in *Ng Wan Chan v Majlis Ugama Islam* ((1991) 3 MLJ 487) and *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang* ((1996) 3 CLJ 23).

The second line of decisions expands the jurisdiction of the Syariah Court significantly by finding that ‘the jurisdiction of the Syariah courts to deal with the conversion *out* of Islam, although not expressly provided for in the State Enactments, can be read into them *by implication* derived from the provisions concerning conversion *into* Islam’, as was decided in *Soon Singh v Pertubuhan Kebajikan Islam Malaysia* ((1999) 1 MLJ 489, 502). The Federal Court’s decision in *Soon Singh* is based on the assumption that Syariah courts are the most appropriate forum for the determination of a Muslim’s apostate’s conversion out of Islam as it ‘involves inquiring into the validity of his purported renunciation out of Islam under Islamic law...’ (at 502). The Federal Court in this case refused to consider the appli-

cant’s right to religious liberty under article 11(1) on the basis that the issue was not properly raised before the Court.

The stage was set in *Lina Joy* for a clarification of the constitutional and jurisdictional issues at stake. Significantly, it pointedly raised the precise question of whether a Muslim convert’s fundamental religious liberty under the Constitution had been infringed under the implied jurisdiction approach, which the court had been able to avoid in *Soon Singh*. The majority opinion affirmed the implied jurisdiction approach taken in *Soon Singh*, agreeing that since matters on conversion into Islam are under the jurisdiction of the Syariah courts, conversion out of Islam should also fall under the same jurisdiction by implication.

The Federal Court’s response is significant for two distinct, but interrelated, reasons. First, the majority held that jurisdiction of the Syariah court regarding apostasy need not be expressly laid out in the state laws. Richard Malanjum, Chief Justice of Sabah and Sarawak and the only non-Muslim on the bench, argued in a powerful dissent that implied jurisdiction ‘must be limited to those matters that are incidental to a power already conferred or matters that are necessary for the performance of a legal grant’ (at para [82]). Syariah Court jurisdiction over apostasy falls under neither of these categories and is unwarranted, particularly since ‘there must be as far as possible express authorization for curtailment or violation of fundamental freedoms’ (at para [82]). There is an intrinsic difference between allowing jurisdiction for conversion *into* Islam and conversion *out* of Islam, which the doctrine of implying the latter from the former ignores entirely.

Secondly, and crucially, the majority’s interpretation of the right ‘to profess and practice’ one’s religion under article 11(1) of the Constitution leaves the content of the right devoid of the freedom to choose one’s religion. The Federal Court concluded that forcing apostates to go through the Syariah court system in order to convert is not an infringement of the individual’s constitutional right because ‘[i]f a person professes and practices Islam, it would definitely mean that he must comply with Islamic law which has prescribed the way to embrace Islam and converting out of Islam’ (at [17.2]). According to the Chief

Justice, ‘one cannot renounce or embrace a religion at one’s own whims and fancies’ (at [14]). This restrictive interpretation of a ‘person [who] professes and practices Islam’ effectively makes the definition dependent on third party affirmation, rather than on individual freedom of conscience.

Lina Joy represented a crucial juncture in clarifying where the line should be drawn between the jurisdiction of the civil court and Syariah court. The Federal Court’s decision effectively shifted responsibility for the substantive issue of allowing conversion out of Islam to the Syariah Court. Jurisdictional complexities should not obscure the fact that constitutional issues remain in the ambit of the civil courts, and that proper engagement with these issues is required to provide meaningful protection of these fundamental constitutional rights.

Conclusion

The Malaysian legal system is a relatively young one, barely over half a century old. The courts have had to deal with complex issues arising out of an evolving legal system over the past 50 years, but there remains much to be developed. The next generation of the Malaysian judiciary will need to continue to decide and clarify issues that will invariably arise over the coming years. In order to do so, an independent and impartial judiciary is vital: meaningful development of the legal landscape is dependent on respect for the separation of powers on the part of the other branches of government as well. The evolution of the legal landscape as Malaysia moves forward in the 21st century will hopefully be guided by an approach that is true to the spirit of the Constitution and the safeguarding of the fundamental liberties enshrined therein.

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