
DETERMINATION OF ISLAM IN THE VIEW OF MALAYSIA FEDERAL CONSTITUTION

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ABSTRACT: The Federal Constitution does recognise the position of religion in the country. Citizens have been guaranteed with the right to profess and practice the religion of choice in this country. The position of religions in this country is equal, with a special position given to Islam, which it is acknowledged as the religion of the federation. Under the concept of separation of power between the federal and states government, the matters relating to Islam are placed under the control of the state government. On top of that, separation of powers also occurred between the courts whereby the Syariah courts are granted judicial right to hear matters relating to Islam. Though separation of powers is enforced, there are no structured policies available in determining the status of Islam for the citizen of Malaysia. However, it has to be noted that there are few decisions made by the court pertaining to the matter.

KEYWORDS: *Islam in Federal Constitution, approach of the courts, recognition of law and regulations, separation of powers between courts*

INTRODUCTION

Malaysia is well known for diversity of its races and religions among its citizens. In a nation where religions are recognised as one of the pillars of the country, Malaysia, through its Federal Constitution, has positioned religion as a fundamental liberty. By having such provision, it has indirectly positioned the right of professing and practising the religion in the hand of the citizens. Equal treatment has been given to all religion in the country except for Islam. Under Article 3 of the Constitution, Islam had been mentioned as the religion of the federation, which indirectly positioned Islam in a special position in the Federation. But, even so, the position as the religion of the federation does not position the Syariah law as the highest law of the Federation, which is the requirement for an Islamic state. Under Article 4 of the Federal Constitution, it states that the Federal Constitution is the highest law of the Federation and any law that is against the Constitution will be considered as null and void. Particularly mentioned by the previous Prime

Minister of Malaysia, Abdul Rahman and Hussein Onn, Malaysia is not an Islamic country. In an interview with Bernama on 18 June 2002, Mahathir Mohamad, who was then the Prime Minister of Malaysia, had made a declaration stating that Malaysia is an Islamic state. However, in a report of The Star newspaper dated 19 June 2014, the stand of Malaysia is stated as neither an Islamic nor a secular state. Malaysia is an ordinary state that recognises Islam as the official religion of the country. The fifth Prime Minister of Malaysia had also clarified his earlier statement by stating that during his tenure, Malaysia had declared itself as an Islamic state, but that does not mean that Malaysia should practice all the bits and pieces to make the country Islam in nature. Prior to that, in another article of The Star dated 16 June 2014, Jamil Khir Baharom, who is the minister in the Prime Minister's office in-charge for Islamic religion has clarified that Malaysia situation differs from other secular states that do not fix a particular religion as the state religion.¹ Even though there are different perceptions on the status of Malaysia as whether it is an Islamic state or not, but the recognition of Islam as the religion of the federation is acknowledged and accepted.

With the recognition of Islam in the Constitution, it has indirectly granted the Syariah law a position in the federal legislation. Under the Ninth Schedule of the Constitution, under the separation of power between the Federal and states government, the Syariah law, which concerns on Islamic matters, had been positioned under the state matters. The Constitution had separate Islamic matters from civil matters. This also includes the jurisdiction of the courts established under the Syariah law. Under Article 121 (1A), it had stipulated that the civil courts own no jurisdiction over the Syariah courts in Malaysia. In this particular case, the Constitution had made a proper separation of power between the civil and Syariah law in the country. The separations of power between these courts suggest that Islamic matters should be directed to the Syariah courts. In reality, such practices had not been properly done in Malaysia, when there are conflicts between laws. In the case such as *Meor Atiqulrahman bin Ishak & Os. v Fatimah Binti Sihi & Ors.*² and *Hajah Halimatussaadiyah lwn Suruhanjaya Perkhidmatan Awam Malaysia*³, the court had ruled that the Islamic practice recognised is subjected to compulsory practices only and not the circumcision practices. In such circumstance, the civil court had ruled such decision.

Even though Islam position, including the Syariah law position is well mentioned in the Constitution, but the Constitution has not mentioned as to how to determine the Islam status of a person. Such unavailability of regulations has opened the possibilities of legal developments specifically for it. The decision made by the courts for such issues is yet to achieve a standard to be use collectively. There are cases that have gone through the civil courts to be justified and there also cases that enter into Syariah courts for judgments. The case of Lina Joy⁴ went through the civil court for judgment of her application of religious changed status but were turned down

¹ Sivanandam, H., Meikeing, Y., & Carvalho, M. (2014, June 16). Malaysia is not a secular state, Jamil Khir tells Parliament. *The Star*. Retrieved August 2, 2014, from <http://m.thestar.com.my/story.aspx?hl=Malaysia is not a secular state Jamil Khir tells Parliament&sec=news&id={8F3CBC62-E8E6-40B9-BE96-32E77EA85BE4}>

² (2000) 1 CLJ 393

³ [1994] 3 MLJ

⁴ [2007] 3CLJ 557 FC

as she is suppose to apply her case to the Syariah court. Similarly in the case of Nyonya Taher⁵ and M. Moorthy,⁶ where both cases were decided in Syariah court.

The damning problem faced is the decision on how Islamic status of a citizen will be determined varies, where there are cases that had been decided based on legal documentations and there are also cases where the courts adapted evidences over legal documentations in the event of disputes. The uniformity between the courts and the legislations has not been achieved yet on the issue of determining the status of Islam of a citizen, in the event of dispute on the Islam status. This particular problem concerns more on how the Syariah legislation and judiciary approach towards the determination of Islamic status of a citizens rather than the definition of religion legally.

RELUCTANT OF THE CIVIL COURTS

The civil court seems a bit reluctant to discuss Syariah matter in their venue. Since 1988, the civil courts have generally shown a great reluctance and restrain in any matter where there is the slightest whiff on the Islamic religious issue. Barring some exceptions they have generally hidden behind Article 121 (1A) to give way to Syariah courts and to adroitly evade or evade constitutional issue. Previously, the Syariah was regarded as subordinate to the High Court until 10 June 1988. But by Act A704, it was provided that High Courts and the inferior courts referred to in Article 121(1) " shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts". This amendment catapulted the Islamic religious court to equal constitutional status.⁷

The use of such generic words as "matters of Islamic law" has given rise to an engaging debate about the extent of the powers of the states to legislate on Islamic matters. One view is that State Assemblies have legislative monopoly whenever a measure, in its pith and substance, deals with an Islamic civil or criminal matter. The decision in *Mamat Daud v. Government*⁸ lends credence to this view. The other view is that states have only a limited power confined to the explicitly mentioned areas of Islamic law in Schedule 9, List II, Paragraph I. The rest of the field of Islamic law is open to Federal jurisdiction. In another case, *Bank Islam v. Adnan Omar*⁹, it was argued that Syariah courts and not the civil courts that own the jurisdiction over Islamic banking. The contention was rejected. Banking, whether Islamic or conventional, is a matter of Federal jurisdiction and thus, the civil courts are the proper forum to adjudicate disputes. There are some situations where it is judicially accepted that topics in the Federal List are in federal hands even though they may involve an Islamic component. Thus, banking and insurance – whether Islamic or conventional – are federal matters.¹⁰

⁵ [2006] 1 CLJ (SYA) 335

⁶ Kaliammal Sinnasamy lwn. Pengarah Jabatan Agama Islam Wilayah Persekutuan & Yang Lain 2005 [HCKL]

⁷ Dr. Shad Saleem Faruqi, Document of Destiny, Star Publication Malaysia Berhad (2008) page 128

⁸ [1988] 1 MLJ 119

⁹ [1994] 3 CLJ 735

¹⁰ Dr. Shad Saleem Faruqi, Jurisdiction of State Authorities to punish offences against the precepts of Islam: A Constitutional Perspective, Malaysian Bar Article and Judgments, 28 September 2005.

Although civil courts have taken a lot pro active step in handling jurisdiction clashes but once the dispute involved Syariah jurisdiction, their reluctance is apparent. Case on point is the Federal Court decision in Lina Joy. By a majority, the court decided that whether Lina Joy was a Muslim or had converted out of Islam was an issue for the Syariah Court and not the civil authorities. Lina Joy was born as Azlina Jailani in 1964. Her family is a Muslim family and practice and profess Islam. She had converted to Christianity at the age of 26. Only in 1998, she was baptized and applied to have her conversion to be legally recognised. She had applied for her name and religion to be changed in her legal documents by the National Registration Department (NRD). Her application for change of name was recognised approved on 25 October 2009 but her application to change her religious status was denied. The rejection of application was accompanied with reason as follows:

"This notation was made because the information contained in the National Registration Department's record showed that the Applicant is a Muslim and the Applicant had not forwarded any documentation from the Syariah Court nor any Islamic Authority concerned to prove her statement that she had renounced her Islamic faith."

Due to the rejection and the fear of an action would be taken against her by the Islamic religious authority, she had sought relief in the High Court praying for several declaratory orders against Majlis Agama Islam Wilayah Persekutuan (MAIWP) and the Government of Malaysia in respect of her right to freedom of religion. She had also prayed for an inapplicability of Syariah Enactment to her who had professed Christianity and question the issue of constitutionality of the state and federal legislation forbidding renouncement of Islam. She had also ordered for her name to be entered in the registry book as having converted out of Islam. The respondents had filed a striking out application and succeed in doing so.

She had appeal the issue and narrow down her prayers of appeal and focused purely on administrative law of whether the Director General of NRD had correctly exercised the discretion vested in him under the law. By majority, the Court of Appeal had affirmed the decision made by Director General of NRD. On leave by the Court of Appeal she had applied to remove her Islam status to the Federal Court. The court held by majority 2-1 in favour of the NRD. The judges' decisions for the case are as follows:

1. Ahmad Fairuz Sheikh Abdul Halim decreed:

"On the question that the National Registration Department has the right to demand a certification from the Islamic court that confirms the appellants renunciation of Islam, my answer is that NRD has the right."

2. Halim said apostasy came under the jurisdiction of the Syariah courts. He said:

"Civil courts cannot interfere. In short, she cannot, at her own whim, simply enter or leave her religion... She must follow rules. The appeal has been rejected with cause."

3. Richard Malanjum, the dissenting judge said the demands of the NRD were "discriminatory and unconstitutional". He also said that by applying to an Islamic court (which has powers to rule against apostasy which is illegal in some states) the decision would lead to Lina Joy being made to "self-incriminate" herself.

The issue become more complex since the actual practice of the civil court towards any issue connected with Islamic law even though the issue of jurisdiction, constitutionality and human right involve, the courts are extremely reluctant to pronounce judgement. By all mean, Article 121(1A) was not meant to give superiority to Syariah Courts over the civil court and It has been stated admirably that Article 121(1A) does not say that all disputes in which all the parties are Muslims should only be heard in the Syariah Court.¹¹ Fundamentally, civil courts cannot interfere with Syariah courts when the issue is within the exclusive jurisdiction of the Syariah courts. But if an act is an offence both under the Penal Code and the Syariah Criminal Offences (Federal Territories) Act 1997, as in the case of *Sukma Darmawan v. KP Penjara*¹², then both sets of laws and both sets of courts may operate. If the charge is sodomy, then the Sessions Court has no jurisdiction. But as the charge in the case was of gross indecency under the Penal Code, therefore Article 121(1A) did not apply.

RECOGNITION OF SYARIAH DECISION

Article 121(1A) added by Act A704 in 1998, insulates the Syariah courts from interference by the civil court in matters within the jurisdiction of the Syariah court. Since the main focus is regarding the determination of Islam status of a citizen, there are several cases that had been brought to the civil court pertaining that matter. In *Priyathaseny v Pegawai Penguatkuasa Agama*¹³, the first plaintiff was born Malay and Muslim. She renounced Islam, adopted Hinduism and later changed her name. She married the second plaintiff, who is an Indian professing Hinduism and gives birth to two children. She subsequently was arrested and charged at the Syariah court by her act of conversion and cohabitation outside of lawful Muslim wedlock with non-Muslim. The second plaintiff later has converts to Islam. The first plaintiff sought a declaration that she was a Hindu and not subject to Muslim law. Also she claimed that her constitutional right have been violated.

¹¹ Sarwari a/p Ainuddin v. Abdul Aziz [2006] 6 MLJ 737

¹² [1999] 2 MLJ 241

¹³ [2003] 2 MLJ 302

As for the second plaintiff, the husband also sought a declaration that he was not subject to Islamic law because he has been coerced into converting to Islam in order to save his wife from jail. The High Court denied both declaration and refused to answer the constitutional issue. Although the court admit that interpretation of the word "profess" was involved, but the court insist that the core issue touched on the issue of conversion and held both issue were for Syariah court judgement. This lead towards the notion that civil courts gives recognition to the Syariah courts in matter pertaining Islamic matter specifically in determination of Islam.

Nyonya Taher was born in 1918 in Alor Gajah, Malacca. She was born from a mixed parentage of Muslim and a Chinese, who convert to Islam. During her childhood, she was taken cared by her grandmother on her father side, who s a Buddhism. At the age of 18, she marries a Buddhist, who did not convert to Islam. She practices Buddhist religious rites for her whole life. She had made a written declaration and applied to change her religion from Islam to Buddha. Her application to change her religion was rejected by Alor Gajah religious office. When she died, there was a rising issue on her religion status as there are different opinions on her religion status. The arising issues for this case were the determination on whether she is still a Muslim or whether she had converted to be a Buddhist.

During the trial, the Syariah Public Prosecutor has applied to Syariah High Court to declare her as a Muslim and thus she should be buried as a Muslim. The prosecutor had argued that:

- a) The deceased identification card carries the name "Nyonya Binti Taher", which resembled a Muslim identity. The prosecutor argued that on registration of Identity card, only Muslims are allowed to use the words "Binti" to denote that the person is a Muslim. Further, the name "Taher", customarily referred to a Muslim name.
- b) Based on the National Registration Department record, her race was indicated as Malay and according to Federal Constitution:

"Malay: shall refer to a person who professes the religion of Islam, habitually speaks the Malay language and conforms to Malay custom."

On the other hand, her family members opposed that she is a Muslim. The first testimony was made by her daughter, which had provided oral evidence during court examination. She mentioned that she was with Nyonya Taher until her last breath and Nyonya Taher practised Buddha for all her life. Her son made the second testimony. He had also confirmed that he had lives with his mother for his whole life and she was a Buddhist. He affirms that his mother had never followed Muslim teachings and had lived and prays as a Buddhist. She had also mention to him that she wishes to be buried next to her late husband burial plot in a Chinese cemetery. Her son also states that she had a Chinese name, Wong Ah Kiew.

Abdul Azit Abdullah, the investigator for Alor Gajah Religious Affairs Department, provided the third testimony. During his investigation on the case, he found that there was an altar in Nyonya Taher house where she had performed her prayers. He had also affirmed that all of her children were married to Chinese Buddhist and according to Chinese custom. In conclusion to his report, Abdul Azit has concluded that Nyonya Taher did not intend to return to Islam and she had practised Buddhism since she was a child.

Judge Mohd Shukor Sabudin ShHCJ in delivering his judgement had quote a book written by a well-known Islamic scholar Syaikh Abu Syujak entitled Kifayatul-Akhyar and states:

"A person who had left the Muslim faith should be asked to repent three times and if he refuse, he should be killed, his body cannot be bathed according to muslim rites, prayers cannot be performed for him and he cannot be buried in a Muslim cemetery".

He conclude that based on the circumstances surrounding the case, Nyonya Taher was not a Muslim when she died and she may be buried according to Buddhist rites. The case of Nyonya Taher is unique case and shall be regarded as a precedent in future Syariah Court decision. In any case where a dispute arise on the issue of determining a decease religion, the Syariah Court would determine his religious status by accessing his religious practice, personal inclination and his declaration of faith during his life time.

DISCUSSION

The Federal Constitution is very clear on the issue touching on the aspect of religion, especially the religion of the federation. Even so, the application of the Islamic law is not so clear in the Constitution, resulting into the making of separation of powers, on the government and the courts level. Thus, the situation resulted in the application and administration of Islamic law to fall under the authority of the state government. Even so, on the issue of Islam status of a citizen, the view, which the Constitution chooses to look through, is quite different and varies. Rather than stipulated directly the means to determine the status, the Constitution uses the Malaysia judiciary system to determine the said issue. Based on cases presented before the courts, it is clear that there are different perspectives on how to determine the Islam status of a citizen. Comparing the circumstances in the case of Lina Joy and Nyonya Taher particularly, there are a few important factors that will be looked into by the court in determining the said status.

Based on the said cases, the biggest different that could be seen is on the status of the applicant. For the case of Lina Joy, the application is made for a living persona. Meanwhile, as for Nyonya Taher, the application had been made on the status of a dead person. Another

important aspect of consideration by the court is on the content of the application. Based on the two cases, even though both cases concerns on the status of Islam, which eventually need to be determined using Syariah law, but the content or basis of the application had landed both cases to the different courts of different jurisdiction.

For the case of Lina Joy, the core of the application is on changing of status in her legal documents. In the said case, the court had made it clear that the changes could only be done as if the matter is brought to the attention of Syariah court to legalise the change of religious status and document to affirm such conversion is issued. If the said document could not be presented, the change of status in the legal document could not be made. Looking at the approach that the court took, it can be said that for civil courts, the determination of a citizen status of Islam is basically based on the legal documentations of them. As in the case of Lina Joy, until the legal documents presented to enable her religious status changed, even though there are evidences that the said even had eventually occurred and confirmed, the court will not eventually grant her request. Thus, legally, she is still a Muslim.

In another case, Nyonya Taher, the situation is different as on the status of the applicant. In this case, the application is made for the determination of Islam status over the deceased Nyonya Taher. Looking at the case, the deceased had eventually applied for the conversion during her lifetime. Eventually the religious office had rejected the said application. After her death, then the case had caught the attention of the court. As the proceeding went through, the Syariah court had looked into the evidence presented by the witnesses, whose happen to be the deceased children. On top of that, the testimony from the investigation also had been looked into and used as the element of consideration to determine the status. Learning from the case, it can be said that if the status application is made for a dead person, the approach of the court would be different. Rather than looking at the legal document available, the court considered the surrounding evidence presented by the witnesses if there is claim to differ.

CONCLUSION

In dealing with Islamic matters in Malaysia, there are different views on which court could interfere with the issue. Accordingly, the Islamic matters will fall under the jurisdiction of Syariah law. But, in determining the Islam status of a citizen, the courts divided their jurisdiction based on the status of application. If the matters touch on the formalities and documentation declaration, the civil courts will be interested to step in and looked into the matters. But if it related to the core of determination of Islam, which goes beyond the legal documentation, the Syariah court will own the privilege and rights to trial such matters. Normally, the determination of Islam status of a person, which goes beyond the documents aspects, is the determination of Islam status of a dead persona.

Looking at the example available cases, the determination of Islam status of a citizen is done by the power granted by the Constitution to the courts. As the conclusion, the Constitution will determine the Islam status of a citizen by using the judiciary branch. As for living person, the determination of the status will be based on the legal documentations available. Meanwhile, for

a dead person, if there is claim made over the Islam status, the Syariah courts will see the matter and shall make the decision, using different approach, which is using the evidence available

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