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Syariah courts are inferior to civil courts

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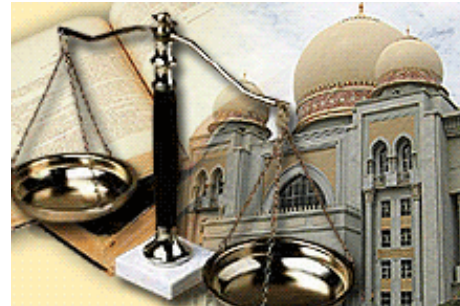
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Dr M Bakri Musa [opines](#) that since the constitutional amendment of 1988, the status of the syariah courts have been elevated so that they are now separate and equal with the secular system.

With respect, the doctor's view is erroneous on three counts.

Firstly, the syariah courts have always been separate from the secular courts, dealing only with specific matters of syariah law that have been legislatively placed within their jurisdiction.

Secondly, the constitutional amendment of 1988 never had the effect of 'elevating' the status of the syariah courts. Article 121 (1A) merely states that the secular courts referred to in Clause (1) 'shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts'.



There is nothing in the language of Article 121 (1A) that would allow for a construction that the status of the syariah courts was being thereby altered.

Thirdly, Article 121 (1A), again by its very terms, does not raise the stature of the syariah courts to a position equal with the secular civil court system. This postulation, by implication, accepts that prior to the amendment of 1988, the syariah courts were, at least vis-a-vis the secular High Courts and Federal Court, inferior. This implication, in my view, is correct and, for the reasons that follow, I contend that the syariah courts today continue in that status, that is, inferior courts.

The judicial arm of the government of the federation of Malaya, at the time of independence, was intended to comprise only the courts created under the unamended Article 121 (1) and (2). These were the Federal Court and the High Courts of Malaya and Borneo. These were the superior courts created by the constitution.

The constitution allowed for the creation of inferior courts by federal or state law. These would include the inferior courts referred to in Article 121 (1) or the syariah courts referred to in Item 1, List II, 9th schedule of the constitution. Later, the constitution was amended to include a new List IIA to the 9th schedule wherein, Item 13 allows for the creation of native courts by the legislative assemblies of Sabah and Sarawak.

These native courts, too, like the syariah courts created by state legislative assemblies pursuant to Item 1, were never intended to

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form part of the judicial arm of the government of the federation.

Inferior tribunals

The enabling provisions of the constitution for the statutory establishment of courts have, since independence, been extensively utilized. What has been put in place is an array of inferior tribunals adjudicating within a limited and often specialised jurisdiction, which may be conveniently divided into three categories.

The first category are those inferior tribunals in respect whereof the enabling statute not only does not make any provision for appeal, but also expressly prohibits, by virtue of what is often called a privative clause, the decision of that tribunal from being questioned in any court. Two instances of such tribunals are the Industrial Court established under the Industrial Relations Act, 1967 and the Consumer Tribunal established under the Consumer Protection Act, 1999. Let us call this the 'No Appeal' category.

Secondly, in respect of some inferior tribunals, statutory provision may have been made for an appeal process from those tribunals to an appellate tribunal of a similarly limited and specialised jurisdiction. An example of such a tribunal is the Rent Tribunal established under the Control of Rent Act, 1966 (CRA) which deals with rent control of premises completed before 31/1/1948. The CRA provides that appeals from any decision of the Rent Tribunal shall be to an Appeal Board whose decision is, again by way of a privative clause contained in the CRA, 'final' and cannot be questioned in any court.



It is my contention that the syariah courts come under this category, provision being made in the relevant state and federal legislation creating the Syariah Lower and High Court to an Appeal Committee. Let us call these the 'Specialised Appellate Tribunals' category.

Finally, there are the Magistrates and Sessions Courts, established under the Subordinate Courts Act, 1948, whose decisions are appealable to the secular High Courts. Let us call these the 'secular High Court Appeal' category.

As stated above, the secular High Courts stand as the appellate courts to the Magistrates and Sessions Courts. Additionally, the secular High Courts exercise supervisory powers of judicial review over the tribunals in the 'No Appeal' category and the 'Specialised Appellate Tribunals' category.

The narration above clearly illustrates that since the inception of the federation, the syariah courts created pursuant to the enabling provisions of Item 1, List II, 9th schedule were part of the numerous inferior tribunals that adjudicated within their respective limited jurisdiction.

That the syariah courts were inferior tribunals and susceptible to the supervisory powers of judicial review of the secular High Courts is borne out by the decision of Mustapha Hussain J in Abdul Rahim Bahaudin v Chief Kadhi, Kedah (1983) 2 MLJ 370, where the High

Court issued a writ of Prohibition to prohibit the syariah court from proceeding with criminal charges against the applicant, an acknowledged Ahmadia, following upon confirmation by the Fatwa Committee that the Ahmadia were not Muslim, so that the applicant was outside the jurisdiction of the syariah court.

If the above narration is correct, it is my contention that the amendment to Article 121 in 1988 with the introduction of the new Article 121 (1A) :-

- 1) has not altered the status of syariah courts as inferior tribunals;
- 2) has not removed the supervisory powers of judicial review of the Article 121 high courts over the syariah courts; and
- 3) has not enlarged the judicial arm of the government of the federation to now include the syariah courts.

The amended Article 121 (1) now provides, inter alia, that the Article 121 High Courts 'and such inferior courts as may be provided by federal law... shall have such jurisdiction and powers as maybe conferred by or under federal law'.

No jurisdiction

The supervisory powers of judicial review of the Article 121 High Courts as provided for under the Courts of Judicature Act, 1964, to this day, remain intact.

The new Article 121 (1A) states: 'The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts'.

The first point to be observed is that Article 121 (1A) is not couched in terms ordinarily framed in privative or ouster clauses where the intention is to prevent the decision of a tribunal from being reviewed. The language of Article 121 (1A) is so plainly unambiguous that recourse to any extrinsic aid for the construction of the same is uncalled for.

In this regard, the approach taken by the Court of Appeal in *Sukma Dermawan* (1999) 1 CLJ 481 to refer to *Hansard* in construing Article 121 (1A) may have led to a construction that simply cannot be reconciled with the plain words of the Article.

The construction adopted by the Court of Appeal that the purpose of the Article was to prevent the Article 121 High Courts from reviewing the decisions of the syariah courts, unless understood to be subject to the 'Anisminic' principle, may form the foundation for a contention that Article 121 (1A) had the effect of neutering the supervisory powers of judicial review of the Article 121 High Courts, offending a long established and accepted principle that the jurisdiction of a superior court might only be ousted by express words in a statute or by necessary implication.

Secondly, Article 121 (1A) does not, per se, confer jurisdiction on the syariah courts but is merely declaratory of the consequences of the conferment of such jurisdiction.

Plain and unambiguous

Thirdly, the intended ouster of jurisdiction in Clause (1A) is directed at all the 'courts referred to in Clause (1)'. This would include the

'inferior courts as may be provided by federal law' referred to in Clause (1). It is therefore not open to argument that 'inferior courts as may be provided by federal law' referred to in Clause (1) also includes syariah courts established by Parliament pursuant to Item 1, List II, 9th schedule.

The language of Article 121 (1A) is plain and unambiguous. "The High Court, in the plain and distinct language of Art. 121 (1A), has no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts."

It means, abiding by the meaning of unambiguous words, that the High Court will have no jurisdiction if jurisdiction in respect of any matter is given to the Syariah Court, and that the High Court will have jurisdiction if jurisdiction in respect of any matter is not given to the Syariah Court. Any other construction, *verbis standum ubi nulla ambiguitas*, is not permitted." (emphasis is mine).

Jeffrey Tan J in *Shaik Zolkaffily Shaik Natar & Ors v Majlis Ugama Islam Pulau Pinang & Seberang Perai* [1997] 4 CLJ 70.

Jeffrey Tan J found support for his construction of Article 121 (1A) in the following pronouncement of Harun Hashim SCJ in *Mohamed Habibullah Mahmood v Faridah Dato' Taib* [1993] 1 CLJ 264: "It is obvious that the intention of Parliament by Art. 121 (1A) is to take away the jurisdiction of the High Court in respect of any matter within the jurisdiction of the Syariah Court".

Harris Ibrahim is a prominent lawyer.

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