Article 121(1A) — what does it really mean?

The Sun - 11/12/2006

Comment

by **K. Shanmuga**

IN 1964, the family of the late Mohd Said Nabi had a dispute over his estate.

Some of his kin argued that he was no longer a Muslim when he died because he used to eat pork and drink alcohol. Others said he remained a Muslim.

His religious status would determine how his valuable assets would be distributed and who would inherit them.

Justice Chua in the Singapore High Court (then a part of Malaysia) refused to inquire if Said Nabi was a "good" Muslim or not. His Lordship applied a simple test: What religion would Said Nabi have said if he was asked during his lifetime?

The answer to that was clear: Said Nabi had always professed Islam as his religion. He was therefore confirmed "a Muslim" and his estate was administered in accordance with Islamic law.

In Malaysia, our supreme law is the Federal Constitution. All other laws must comply with the Constitution. The judiciary's job is to make sure that Parliament and the government honour the Constitution.

Parliament, the government and the judiciary are all meant to be equal and independent bodies, checking and balancing one another so that no one person or body usurps too much power onto itself.

But in 1988, two very significant amendments were made to the Federal Constitution. The material part of clause (1) of Article 121 used to say: "... the judicial power of the Federation shall be vested in" the High Court. After 1988, Article 121(1) said that the High Court "shall have such jurisdiction and powers as may be conferred by or under federal law".

Thus, before 1988 the courts derived their powers from the Constitution. Now, the courts are only meant to have those powers which Parliament decides to give them. The Judiciary was in this way made subservient to Parliament (and hence in our realpolitik the ruling government of the day).

The second significant amendment in 1988 was the inclusion of a new clause (1A) into Article 121 that stated: "The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the syariah courts."

Syariah courts are the courts created by State Assemblies to administer certain Islamic laws. The Constitution says syariah courts can only have jurisdiction "over persons professing the religion of Islam" and in respect only of certain specific matters of Islamic law, listed in the Constitution.

If two Muslims have a problem involving their personal law (for example, a divorce between a Muslim couple), then this is a "matter within the jurisdiction of

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the syariah courts".

The civil courts should not interfere if one party comes to the civil court after losing a case in the syariah courts.

This was all that was intended with the inclusion of Article 121(1A).

Nothing in the Constitution says that the syariah courts are of equal standing to the civil courts, nor does it say that the civil courts cannot maintain their traditional supervisory role over the syariah courts.

We see this in 1991 when the civil High Court decided that the late Ng Wan Chan was a Buddhist despite his purported conversion to Islam.

The court looked at the evidence, heard both parties and decided that the documents allegedly proving Ng's conversion to Islam were not credible.

The judge also found that the so-called conversion had been superceded by Ng professing and practising Buddhism thereafter. Although this was after 1988, nobody said the High Court had no jurisdiction to make this determination.

Problems now occur because the powers and jurisdiction of the syariah courts have slowly been expanded beyond the limits permitted by the Constitution.

Syariah courts began to give orders dissolving non-Muslim marriages registered under civil law when only one spouse converted to Islam, and converted infant children to Islam without the knowledge of the non-Muslim parent.

I have seen a syariah court order directing the exhumation of a corpse buried in a Hindu burial ground – something only a magistrate is empowered to do under the provisions of the Local Government Act.

Syariah courts routinely direct government officers and the police to assist in the enforcement of its orders against non-Muslims.

Matters such as the determination of whether a person was a "Muslim" and questions of apostasy from Islam began to be considered matters "within" the jurisdiction of the syariah courts.

In fact, the Constitution does not use the word "Muslim" but uses the phrase "person professing the religion of Islam". The correct question therefore is whether someone is "a person professing the religion of Islam" at the material time i.e. what does or did that person say was his or her religion when he or she was asked.

Whether or not that person is a "Muslim" under Islamic law is not the relevant question, and should not be an issue at all.

The plain words of Article 121(1A) are innocuous. What it says is that the civil courts should not interfere in matters which fall "within" the jurisdiction of the syariah courts.

When the syariah courts overstep their boundaries, the civil courts should stop them but unfortunately the latter now feel they cannot because of the way Article 121(1A) is currently being interpreted.

The constitutional safeguard affirming the civil courts as the repository of the Federation's judicial power must be restored.

We need to also expressly and clearly limit the syariah courts' powers. They must not interfere in any matter where the interests of any non-Muslim is affected; and they should only determine issues where persons professing Islam are involved in a dispute regarding Islamic personal, family or criminal laws.

If there are mixed questions of civil law or matters involving non-Muslims, the syariah courts must not usurp jurisdiction.

This may be a start to ensuring that those caught in this quandary have access to a court which can properly hear and determine their grievances.

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