

Kelantan shariah case procedurally 'irregular', cannot stand, says retired judge

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PETALING JAYA: A retired judge has questioned the propriety of proceedings in the Federal Court case that saw multiple provisions of a Kelantan shariah enactment struck down as unconstitutional on Friday.

Former Court of Appeal judge Hamid Sultan Abu Backer said the application was a “non-starter” without the participation of the federal government and the attorney-general (AG).

He said although the majority decision may be correct in law, the proceedings were “irregular” as neither the federal government nor the AG was named a party to the action.

“In my view, the AG is duty-bound to intervene immediately to set aside the proceedings as a procedural miscarriage of justice has occurred in an important case involving public interest.

“It may well be that the matter would need to be re-argued, even if the outcome is unlikely to change, as the position of the federal government must be part of the record in the case,” he told FMT.

Hamid said the federal government was a necessary party in the proceedings, since the case revolved around whether a matter was within the domain of federal laws as listed in the Federal Constitution.

“If not named, the AG, as the guardian of public interest, was under a legal obligation to intervene in the action.

“How did this application get past the leave stage in the Federal Court? Were the court, the federal government and the AG content to allow two ordinary citizens to fight the battles of the federal government?”

Hamid was commenting on the apex court’s 8-1 majority decision on Friday which struck down 16 criminal offences contained in Kelantan’s Syariah Criminal Code (I) Enactment 2019 on grounds that its state assembly did not have jurisdiction to legislate on those matters.

The motion was brought by lawyer Nik Elin Zurina Nik Abdul Rashid and her daughter, Tengku Yasmin Nastasha Tengku Abdul Rahman.

Hamid lauded the sole dissenting opinion delivered by Chief Judge of Sabah and Sarawak Rahman Sebli, saying judges must not override longstanding procedural rules simply to correct what they believe is unlawful.

“The procedural law which formed the basis of the dissenting opinion is entirely correct,” he said, pointing out that Rahman’s opposition had nothing to do with the substantive law involved.

Hamid said the majority in the Federal Court fell into “grave error” by not declining to hear the motion altogether since not all the necessary and interested parties to the dispute were before the court.

“In such circumstances, natural justice would require the court to decline hearing the matter. Natural justice is the foundation of procedural law in many countries, including Malaysia,” he said.

Alternatively, Hamid said the court should have directed that the AG be added as a party to the proceedings.

“The error in this case may open the floodgates for private individuals who are not aggrieved parties to take out similar challenges to federal and state laws without involving the government or the AG.”

In his dissenting opinion, Rahman questioned the federal government’s absence from the proceedings.

He also said it was of utmost importance that the judiciary ensure that only petitioners with locus standi (legal standing to bring a case) are allowed to do so.

“The petitioners failed to demonstrate the actual controversy between them and the Kelantan state government or how they were affected by those provisions which came into force in 2021,” the dissenting judge said.

The judgment of the majority was delivered by Chief Justice Tengku Maimun Tuan Mat.

Hamid questioned the “silence” of the remaining seven judges who formed the majority, asking why none among them set out their views in separate judgments.

He said the norm in leading jurisdictions such as England and India is for all or some on the coram to set out their views in cases involving matters of public interest.

“None of the seven judges wrote judgments, which is disappointing given the importance of this case.

“How did they address the issue of the absence of the AG and the locus standi of the applicants? What were their views on the substantive points of law argued?

“The coram in a lawsuit is not meant to be a showpiece or a rubberstamp. Why empanel nine members if seven are going to be silent? If that was going to be the case, three judges would have been sufficient,” said Hamid.

He said during his time in the Court of Appeal, a practice developed requiring each judge to write a separate judgment in final appeals involving landmark constitutional issues.

As an example, Hamid cited the case of Nik Nazmi Nik Ahmad v. Public Prosecutor (2014), when Justice Ariff Yusof, who chaired the bench, directed Justice Mah Weng Kwai and himself to write separate judgments.

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