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Malaysian state criminalizes proselytizing, Christian conversions; violators face jail and canings

By Anugrah Kumar

The Christian Post (08.11.2021) - https://bit.ly/30g6DaD - The northeastern Malaysian state of Kelantan has implemented amendments to its criminal code based on sharia law, banning about two dozen activities, including attempts of converting out of Islam. Violators could face prison, fines or canings.

The Kelantan Syariah Criminal Code (I) Enactment 2019 went into effect on Nov. 1, making 24 activities illegal, The Star newspaper reports.

Banned activities include proselytizing, distorting Islamic teachings, disrespecting the month of Ramadan, destroying houses of worship, tattooing, undergoing plastic surgery, engaging in sexual intercourse with corpses and non-humans, witchcraft and false claims.

The new offenses are punishable by imprisonment up to three years and a fine up to RM5,000 (US$1,202) or six strokes of the cane.

The amendments to the state's criminal code, proposed in 2019, are based on the Syariah Criminal Code (II) 1993 and the existing 1985 Syariah Criminal Code. The state sultan, Muhammad V, gave consent to the amendments in July 2020.

Kelantan Chief Minister Ahmad Yakob has said during a program on Oct. 31 that the enforcement of the new bans will help strengthen the sharia law not only in Kelantan but also in other states in the Muslim-majority Southeast Asian country.

He was also quoted as saying that the enforcement seeks to educate and bring the violators back to the right path of Islam and is not simply a means to punish them.
Malaysia is 66% Muslim and less than 10% Christian, according to The Pew-Templeton Global Religious Futures Project.

Open Doors USA's 2021 World Watch List ranks Malaysia as the 46th-worst country globally when it comes to Christian persecution. In Malaysia, Christians have suffered from many forms of Islamic repression.

According to Open Doors USA, which monitors persecution in over 60 countries, Catholics and Methodists are monitored by authorities in Malaysia. Still, nontraditional Protestant

groups are more often targeted because they tend to be more active in evangelism. Open Doors reportsthat it is illegal to share the Gospel with Malaysian Muslims.

Responding to the new ban, the U.S.-based persecution watchdog International Christian Concern notes that critics in Malaysia are concerned the new enactment could contribute to an exclusive and intolerant Islam.

The women's rights group Sisters in Islam expressed concern that these developments violate fundamental principles of democracy because they suppress critical thought and expression.

The new enactment comes as the case of Malaysian Pastor Raymond Koh remains unsolved. Koh has been missing since he was abducted in a well-organized, military-style operation more than four years ago after being accused of preaching to Muslims.

Photo: A woman prays at church in Malaysia. (Reuters)

Federal Court unanimously declares Selangor Shariah law criminalising 'unnatural sex' void, unconstitutional

By Ida Lim

Malay Mail (25.02.2021) - https://bit.ly/3reQjPS - The Federal Court's nine-judge panel today unanimously declared that a Selangor state law's provision which made unnatural sex a Shariah offence is invalid and having gone against the Federal Constitution, as such offences fall under Parliament's powers to make laws and not under state legislatures' law-making powers.

Reading out a summary of the unanimous judgment, Chief Justice Tun Tengku Maimun Tuan Mat said the Federal Court granted the order sought by a Malaysian Muslim man who was challenging the constitutionality and validity of Section 28 of the Shariah Criminal Offences (Selangor) Enactment 1995.

Section 28 makes it a Shariah offence for "any person" performing "sexual intercourse against the order of nature with any man, woman or animal", with the punishment being a maximum fine of RM5,000 or a maximum three-year jail term or a maximum whipping of six strokes or any combination.

The order sought by the man and granted by the Federal Court today is for a declaration that Section 28 is invalid on the ground that it makes provision with respect to a matter which the Selangor state legislature has no power to make laws and is therefore null and void.

Other judges on the nine-member panel who agreed with the chief justice's grounds of judgment include President of the Court of Appeal Tan Sri Rohana Yusuf, Chief Judge of Malaya Tan Sri Azahar Mohamed, Chief Judge of Sabah and Sarawak Datuk Abang Iskandar Abang Hashim, Federal Court judges Datuk Seri Zawawi Salleh, Datuk Nallini Pathmanathan, Datuk Vernon Ong, Datuk Zabariah Mohd Yusof, and Datuk Seri Hasnah Mohammed Hashim.

Justice Azahar read out a summary of his separate grounds of judgment to explain the important constitutional issues in this case and why he felt the order should be granted to the Malaysian Muslim man, with the chief justice and all the other judges on the panel also agreeing with his judgment.

The facts in this case

In August 2019, the Malaysian Muslim man was charged in the Selangor Shariah High Court under Section 28 of the 1995 Selangor state law read together with Section 52 for attempted offences, where he was alleged to have in November 2018 in a house in Bandar Baru Bangi attempted to commit sexual intercourse against the order of nature with other men.

The man filed for leave directly at the Federal Court on November 28, 2019 to start court proceedings against the Selangor government to seek a declaration that Section 28 is invalid as the Selangor state legislature has no powers to make such law, with the Federal Court on May 14, 2020 then granting leave for the man to proceed to have his constitutional challenge heard at the Federal Court.

On October 6, 2020, the Federal Court allowed the Selangor Islamic Religious Council (Mais) to be an intervener and join the court case as the second respondent, while the Federal Territories Islamic Religious Council (Maiwp) was not allowed to be an intervener but was allowed to be an amicus curiae.

On December 14, the nine-judge panel at the Federal Court heard the constitutional challenge on Section 28 in the Selangor state law, with all parties including the man's lawyers, the Selangor government, Mais and also Maiwp as the amicus curiae allowed to present arguments to the court.

In the Federal Court's judgments today, two lists in the Federal Constitution's Ninth Schedule were examined, with these two lists stating the different matters that the federal government and state governments have powers to make laws on.

In the Federal Constitution's Ninth Schedule, List I which is also known as the Federal List states what the federal government via Parliament can make laws on, while List II which is also the State List states the matters which state governments through their respective state legislative assemblies can make laws on.

Essentially, the court case was about whether the Selangor state government should not have made a state law — via Section 28 — which makes unnatural sex a Shariah criminal offence, if unnatural sex is a matter which comes under Parliament's power to make laws on instead, based on the Federal Constitution.

Chief Justice of Malaysia Tan Sri Tengku Maimun Tuan Mat speaks during a press conference in Putrajaya January 10, 2020. — Picture by Choo Choy May

What the chief justice said

Under Item 1 of the Federal Constitution's State List, state legislatures can make laws on Islamic law, including the "creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List".

The phrase "except in regard to matters included in the Federal List" was described in this court case as a "preclusion clause", or a provision that excludes the state legislatures from making laws on matters falling under the federal jurisdiction.

Justice Tengku Maimun noted that the Muslim man's lawyer Datuk Malik Imtiaz Sarwar had said the Selangor state legislature could not make Section 28 into law, as Section 377 and Section 377A of the Penal Code which is a federal law already governs the same subject matter in Section 28, and due to the preclusion clause.

The judge noted that the Selangor state government and Mais had both argued that the Selangor state legislature has jurisdiction or power to enact Section 28 as it comprises an offence "against the precepts of Islam", and that they had argued that Section 28 is worded differently from the Penal Code provisions and that this meant Selangor could make such a state law to co-exist with federal laws and that Section 28 would be constitutionally valid.

In presenting the Federal Court's decision, Justice Tengku Maimun however said the Selangor government and Mais had failed to answer satisfactorily on how Section 28 can still be valid despite the preclusion clause.

Examining the phrase "precepts of Islam" and its constitutional limitations, the judge said it was undisputed that "liwat" or sodomy which Section 28 covers is against the precepts of Islam, but said it is not enough to argue that Section 28 is valid simply because it is an offence against the precepts of Islam.

The judge noted that the bigger question that was put forward for the Federal Court to consider was whether the Selangor state legislature is competent or had the powers to enact Section 28 in light of the Federal Constitution's preclusion clause.

Looking at the preclusion clause in Item 1 of the state list which placed a limit on what the state legislatures can enact or make laws on, the judge noted that the preclusion clause states "except in regard to matters included in the Federal List" and not "except in regard to matters included in the Federal Law".

The judge explained that this does not mean that state legislatures have power to make law on matters that Parliament has not already made law on, and that state legislatures are instead unable to make law on matters that fall within Parliament's jurisdiction, even if there is no such federal law yet.

In other words, it would be a case-by-case basis, where the question is not necessarily whether there is already a federal law on a matter, but whether the matter comes under the federal jurisdiction.

"It remains to be tested in every given case where the validity of a state law is questioned, for the courts to first ascertain whether a law in question is within the jurisdiction of Parliament to enact and not necessarily whether there is already a federal law in existence such that the state-promulgated law is displaced," the judge said.

With no challenge by any of the parties in the case over Parliament's powers to make the Penal Code provisions that cover the same matter as Section 28, the judge said the Federal Court must accept that Parliament had competently enacted the Penal Code provisions in line with the Federal Constitution.

After going through judgments by the Federal Court in three other relevant court cases, Justice Tengku Maimun said that the nine-member panel is of the view that these judgments show that the issue is not about the "co-existence" of federal and state laws,

but instead more about the independent application of the two streams of laws — civil and Shariah laws — within their respective jurisdictions.

Looking through other provisions in the Federal Constitution including Article 3, Article 74(3), the chief justice also looked at the Reid Commission Report 1957 which she cited as showing that the main powers to make law in Malaysia is with the federal government via Parliament, while states are to only have limited powers to make laws on specific matters.

"Unlike countries such as the United States where the primary power of legislation lies with the individual states with residual powers in the Federation, the terms of our Federal Constitution and the history of its founding make it abundantly clear that the primary legislative powers of the Federation shall lie ultimately with Parliament save and except for specific matters over which the states shall have legislative powers," she explained.

She also cited the Federal Constitution's Article 75 and Article 77 as showing that Parliament has the primary legislative power or power to make laws, while state legislatures have residual powers to make laws.

The judge listed out the Federal List's Items 3 and 4 which gave the power to Parliament to make criminal law and to create offences on matters listed within the Federal List, while noting that the State List does allow the creation of offences against the "precepts of Islam" but that these powers were limited by the "preclusion clause" and only on matters listed in the State List. She also noted that the entire State List does not carry any of the same matters listed in the Federal List's Items 3 and 4.

The judge also said the argument by the Selangor government and Mais on Section 28 allegedly being worded more broadly than the Penal Code provisions was "wholly immaterial" or irrelevant, pointing out that what matters in this case is that Section 28 covers a matter which falls under the Federal List.

The judge then concluded that it could be put forward that when Parliament and the state legislature make laws on the same subject matter of criminal law, the two laws cannot co-exist even if the offence is said to be against the precepts of Islam, due to the "preclusion clause" in Item 1 of the State List.

"Given the above, the natural consequence is that the subject-matter upon which section 28 of the 1995 Enactment was made falls within the preclusion clause of Item 1 of the State List.

"As such, it is our view that the said section was enacted in contravention of item 1 of the State List which stipulates that the state legislatures have no power to make law 'in regard to matters included in the Federal List'. To that extent, section 28 of the 1995 Enactment is inconsistent with the Federal Constitution and is therefore void," the judge said when noting that Section 28 in the Selangor state law had went against the Federal Constitution.

To avoid any doubt, the chief justice noted that the range of offences against the precepts of Islam that can be enacted by state legislatures in Malaysia is "wide" as the Federal Court had in another case previously decided that the "precepts of Islam" is wide and not limited to the five pillars of Islam.

But she pointed out the wide range of such offences against precepts of Islam that state legislatures can make law on is subjected to limits under Malaysia's Federal Constitution: "Thus, the range of offences that may be enacted are wide. Having said that, the power to enact such range of offences is subject to a constitutional limit."

File picture shows Chief Judge of the High Court of Malaya Tan Sri Datuk Sri Azahar Mohamed speaks during a press conference in Putrajaya January 10, 2020. — Picture by Choo Choy May

What the chief judge of Malaya said

Justice Azahar cited two previous Federal Court judgments which he said showed the phrase "precepts of Islam" as being wide to include "every single rule, conduct, principle, commandment and teaching of Islam prescribed in the Shariah, including Islamic criminal law".

He considered the wide meaning of "precepts of Islam" and cited two expert opinions by Professor Emeritus Tan Sri Mohd Kamal Hassan and Professor Emeritus Datuk Paduka Mahmood Zuhdi Abd Majid, before saying that Section 28 which relates to unnatural sex including "liwat" or sodomy is undeniably an offence against the precepts of Islam.

The judge said Section 28 which relates to unnatural sex including "liwat" or sodomy is undeniably an offence against the precepts of Islam.

But he also said whether Section 28 was validly enacted by the Selangor state legislature within the limits of its powers under the Federal Constitution was a question that must be dealt with separately.

He noted that this is the first time that the Federal Court has had to directly address the point of whether Section 28 cannot be valid due to the "preclusion clause" in the Federal Constitution and as it had intruded into an area that belongs to Parliament.

He concluded that the "preclusion clause" was worded in a "compellingly clear and unequivocal" manner, adding that he had no doubt that it meant that the state legislature's powers to make laws on offences against the precepts of Islam is regulated by the phrase "except in regard to matters included in the Federal List".

"The preclusion clause functions as a limitation imposed by the Federal Constitution on the state legislatures to make laws on Islamic criminal law," he said.

Justice Azahar also pointed out that it is important to note that the Federal Constitution's State List itself expressly recognises that certain areas of Islamic criminal law are part of Parliament's jurisdiction, and that as a result, any matter falling under Parliament's jurisdiction would not be something that the state legislature can make laws on.

"Although the range of the state legislature to enact "offences against the precepts of Islam" appears to be so extensive as to comprise almost 'every single rule, conduct, principle, commandment, and teaching of Islam prescribed in the Shariah', in reality there is constitutional limitation upon the subject matter of the legislation enforced by the preclusion clause.

"So construed, there could be no doubt, to my mind, that the state legislature cannot create offence already dealt with in the Federal List," the judge said.

Based on this reason, Justice Azahar concluded that the state legislature does not have the sole or exclusive right to make laws on Islamic criminal offences, stating that the preclusion clause clearly implies that the state legislature only has residual powers to make such laws and that it is subject to the federal jurisdiction on criminal laws.

He noted that "criminal law" comes under Parliament's law-making powers under Item 4 of the Federal List and said the offence of unnatural sex in Section 28 obviously falls within that category.

"By that I mean, in practical terms, that even if Parliament has yet to make legislation with respect to an offence of sexual intercourse against the order of nature, still the State Legislature is precluded from legislating on this subject matter," he said.

The judge however highlighted that the Penal Code — which applies to both Muslims and non-Muslims and is administered in civil courts — was enacted much earlier than Selangor's Section 28.

The Penal Code is a written law by Parliament that covers most of the criminal offences and punishments in Malaysia.

In explaining his conclusion, the judge said: "Put another way, only Parliament has power to make such laws with respect to the offence of sexual intercourse against the order of nature."

Justice Azahar disagreed with Mais' claim that the state legislature would not be able to make any laws on offences if every offence is a criminal law and that the state legislature's law-making powers would be redundant.

Instead, the judge said the Federal Constitution guarantees that states have the power to make laws on offences against the precepts of Islam unless already covered in the Federal List, explaining his view that this meant states could still validly make laws on offences that are "purely religious" in nature.

Justice Azahar noted that there are three categories of Shariah criminal offences in Malaysia that would remain valid as state laws, despite the "preclusion clause", namely offences relating to "aqidah" or the Muslim faith (including wrongful worship, deviating from Islamic belief, teaching false doctrines), offences relating to the sanctity of Islam and its institution (including insulting the Quran, failure to perform Friday prayers, disrespecting Ramadan and not paying zakat), offences against morality (including consuming intoxicating drinks, khalwat or close proximity and zina or sexual intercourse outside marriage).

"As can be seen, these are offences in relation to Islamic religion practiced in this country that must conform to the doctrine, tenets and practice of the religion of Islam. In short, I refer to these offences as religious offences," he said, adding that this is a non-exhaustive list of examples of religious offences that can be validly enacted by state legislatures, based on the facts of each case.

"In my opinion, all these offences are purely religious in nature that is directly concerned with religious matters or religious affairs," he said, citing Article 74(2) when saying that these religious offences which regulate Muslims' beliefs and practices can only be created through laws passed by state legislatures and that such religious offences would not fall under the category of "criminal law" in the Federal List.

He noted that such religious offences come under the Shariah courts' jurisdiction and only apply to Muslims.

The judge said that such laws should be made by the state legislature — instead of Parliament — due to the State List, and as it is only the states that have the powers to make laws on such matters.

"It is the states alone that can say what should be the religious offences, which are reserved expressly for legislation by the state legislatures," he said.

Stressing that "criminal law" is a federal matter for Parliament to make laws on and that Islamic criminal law that is not caught by the preclusion clause is for state legislature to make laws on, the judge noted that the reason for this complicated division of federal and state law-making jurisdictions would require a close look at Malaysia's legal history which stretches back to the beginning of the Malay states and the colonial rule period.

In his summary, Justice Azahar did not agree with the Selangor government's and Mais' arguments that Section 28 is constitutionally valid as the federal and state laws on unnatural sex could allegedly co-exist, noting that this was because of the Federal Constitution's Article 8 which provides for equal protection of the law and non-discrimination against Malaysians.

In this case involving the Malaysian Muslim man for example, Justice Azahar noted that the other male persons in the man's Shariah case included three non-Muslims.

Justice Azahar pointed out that Section 28 of the Selangor state law which only applies to Muslims is punishable by a maximum sentence of jail up to three years, fine up to RM5,000, or whipping up to six strokes or any combination, while Section 28 would not apply to non-Muslims and the non-Muslims could instead be charged in the civil courts under the Penal Code's Section 377 which is punishable with a maximum jail term of up to 20 years and also fine or whipping.

With Article 8 of the Federal Constitution providing for all persons to be equal before the law and no discrimination against citizens only on grounds such as religion, the judge had said it would be hard to deny that a non-Muslim would be discriminated in such a situation as a Muslim would have the benefit of a lesser sentence for a substantially similar offence.

Justice Azahar said this was among the reasons why he concluded that Section 28 is invalid as it was ultra vires or went beyond the Federal Constitution, noting that the state legislature had made Section 28 when it had no power to make law on the unnatural sex offence and that "only Parliament could enact such a law".

The Shariah trial for the Malaysian Muslim man has yet to start, as it has been put on hold while waiting for the Federal Court's decision today, his lawyer confirmed. The man's name is being withheld on the lawyers' request, due to concern over the potential harm or risks he may face if namely publicly.

In the online proceedings via Zoom where the Federal Court had delivered its decision, the legal teams for all the related parties had attended, with Datuk Salim Soib@Hamid leading the team for the Selangor state government, Halimatunsa'diah Abu Ahmad leading for Mais, Abdul Rahim Sinwan leading for Maiwp, while Imtiaz, Surendra Ananth, Honey Tan Lay Ean, Tay Kit Hoo attended for the Malaysian Muslim man. Lawyer Andrew Khoo held a watching brief for the Human Rights Commission of Malaysia.