State Government of Negeri Sembilan & Ors v Muhammad Juzaili bin Mohd Khamis & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 01(f)-8–02 OF 2015(N) & 01–7–02 OF 2015(N)
RAUS SHARIF PCA, AHMAD MAAROP, HASAN LAH, AZAHAR MOHAMED AND ZAHARAH IBRAHIM FCJJ
8 OCTOBER 2015

Constitutional Law — Courts — Jurisdiction — Validity of State Enactment — Challenge to — Whether to mount such challenge respondents had to comply with arts 4(3) and (4) of the Federal Constitution — Whether respondents' failure to comply with arts 4(3) and (4) denied High Court and Court of Appeal of jurisdiction to hear their application and appeal respectively

Constitutional Law — Legislature — Scope of State Legislature's powers — Section 66 of the State's Syariah Criminal Enactment 1992 made it an offence for any male Muslim to wear women's attire or pose as woman in public — Respondents applied to High Court for judicial review to declare s 66 inconsistent with articles guaranteeing freedom of speech and expression under Federal Constitution — Application dismissed by High Court but allowed by Court of Appeal ('COA') declaring s 66 unconstitutional — Whether respondents' argument that s 66 had to comply with fundamental liberties provisions in Federal Constitution directly challenged legislative powers of State Legislature

The respondents were bridal make-up artists who suffered a medical condition called gender identity disorder ('GID') which caused them to dress and behave like women. They applied to the High Court for judicial review under O 53 r3 of the then Rules of the High Court 1980 seeking: (a) a declaration that s 66 of the Syariah Criminal Enactment (Negeri Sembilan) 1992 ('s 66') was inconsistent with arts 5(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution ('Constitution'); (b) alternatively, a declaration that s 66 had no effect and did not apply to any person who was psychologically a woman and suffered from GID; and (c) alternatively, a prohibition order or a revision against the fourth and fifth appellants restraining them from investigating an offence against the respondents under s 66 if the latter could submit a report from a psychologist stating that they were psychologically women or suffered from GID. Section 66 made it an offence, punishable with a fine or jail or both, for any male person to wear women's attire or pose as a woman in any public place. The High Court dismissed the judicial review application but the Court of Appeal ('the COA') reversed that decision on appeal and, inter alia, declared s 66 unconstitutional for being inconsistent with arts 5(1), 8(2), 9(2) and 10(1)(a)

of the Constitution. The COA held that s 66 curtailed the respondents' constitutionally guaranteed right to freedom of speech and expression by imposing an unreasonable restriction on how they should dress and behave in public. The COA held that only Parliament, and not the state legislative assembly in Negeri Sembilan, had power to impose reasonable restrictions on freedom of speech and expression in limited situations. In the instant appeal against the COA's decision, the appellants raised a preliminary issue arguing that since the net effect of the COA's ruling was that the Negeri Sembilan State Legislature had no power to enact s 66, the respondents had to – but did not – comply with cll (3) and (4) of art 4 of the Constitution and a proceeding to declare s 66 invalid on the ground the State Legislature had no power to enact it could, under art 4(4), only be commenced with leave of a judge of the Federal Court. It was submitted that under art 128(1) of the Constitution, only the Federal Court had jurisdiction to determine whether a law made by Parliament or a State Legislature was invalid on the ground it related to a matter with respect to which the relevant legislature had no power to make law. Consequently, the appellants contended, the High Court should have rejected the respondents' application on the ground it had no jurisdiction to hear the matter. The respondents, however, submitted that they did not have to follow the provisions of cll (3) and (4) of art 4 because they were not questioning the legislative powers of the State Legislature.

Held, allowing the appeal solely on the preliminary issue raised by the appellants and setting aside the judgments of the courts below:

(1) The judicial review action by the respondents was incompetent by reason of substantive procedural non-compliance with cll (3) and (4) of art 4 of the Constitution (see para 29).

(2) Since the respondents failed to follow the specific procedure laid down in cll (3) and (4) of art 4 of the Constitution, the courts below gravely erred in entertaining their application to question the validity or constitutionality of s 66 by way of judicial review. The courts below were not seized with the jurisdiction to do so and it was trite that any proceeding heard without jurisdiction or power to do so was null and void ab initio (see para 28).

(3) The respondents' argument that the legislation on Islamic law passed by the State Legislature had to comply with the provisions on fundamental liberties in arts 5(1), 8(2), 9(2) and 10(1)(a) of the Constitution was an argument that directly questioned the legislative powers of the State Legislature. For all intents and purposes, it was a direct challenge to the validity or constitutionality of s 66 passed by the State Legislature of Negeri Sembilan. Such a challenge had to be in accordance with the specific procedure prescribed in cll (3) and (4) of art 4 of the Constitution (see para 27).

(4) What the respondents attempted to do was to limit the legislative powers of the State Legislature by saying that despite the powers to legislate on matters on Islamic law having been given to the State Legislature by art74 of the Constitution read with List II in the Ninth Schedule to the Constitution, that legislation still had to comply with the provisions on fundamental liberties in arts 5(1), 8(2), 9(2) and 10(1)(a) of the Constitution. The application for the declarations sought by the respondents should have been dismissed by the High Court on the ground it had no jurisdiction to hear the matter (see para 26).

[Bahasa Malaysia summary

Responden-responden ialah artis solekan pengantin yang mengalami keadaan perubatan yang dikenali sebagai gangguan identiti jantina ('GIJ') yang menyebabkan mereka berpakaian dan berkelakuan seperti wanita. Mereka telah memohon kepada Mahkamah Tinggi untuk semakan kehakiman di bawah A 53 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk: (a) satu deklarasi bahawa s 66 Enakmen Jenayah Syariah (Negeri Sembilan) 1992 ('s66') adalah tidak konsisten dengan perkara-perkara 5(1), 8(2), 9(2) dan 10(1)(a) Perlembagaan Persekutuan ('Perlembagaan'); (b) secara alternatif, satu deklarasi bahawa s 66 tiada kesan dan tidak terpakai kepada mana-mana orang yang secara psikologi seorang wanita dan mengalami GIJ; dan (c) secara alternatif, satu perintah larangan atau semakan terhadap perayu-perayu keempat dan kelima yang menghalang mereka daripada menyiasat kesalahan terhadap responden-responden di bawah s 66 jika mereka boleh mengemukakan laporan daripada pakar psikologi yang menyatakan bahawa mereka secara psikologi adalah wanita atau mengalami GIJ. Seksyen 66 menjadikannya satu kesalahan, yang boleh dihukum dengan denda atau penjara atau kedua-duanya, untuk mana-mana orang lelaki memakai pakaian wanita atau berlagak sebagai wanita dalam mana-mana tempat awam. Mahkamah Tinggi menolak permohonan semakan kehakiman tetapi Mahkamah Rayuan ('MR') mengakas keputusan tersebut atas rayuan dan, antara lain, mengisytiharkan s 66 tidak berperlembagaan kerana tidak konsisten dengan perkara-perkara 5(1), 8(2), 9(2) dan 10(1)(a) Perlembagaan. MR memutuskan bahawa s 66 mengekang hak responden yang dijamin oleh perlembagaan untuk bebas bercakap dan bersuara dengan mengenakan sekatan yang tidak munasabah mengenai bagaimana mereka patut berpakaian dan berkelakuan di khalayak ramai. MR memutuskan bahawa hanya Parlimen, dan bukan Dewan Undangan Negeri di Negeri Sembilan, mempunyai kuasa untuk mengenakan sekatan yang munasabah ke atas kebebasan bercakap dan bersuara dalam keadaan terhad. Dalam rayuan ini terhadap keputusan MR itu, perayu membangkitkan isu awal dengan berhujah bahawa oleh kerana kesan daripada keputusan MR adalah di mana keadaan Badan Perundangan Negeri Sembilan tidak mempunyai kuasa untuk menggubal undang-undang s 66, responden-responden perlu – tetapi tidak – mematuhi fasal (3) dan (4) kepada perkara 4 Perlembagaan dan prosiding untuk mengisytiharkan s 66 tidak sah

atas alasan Badan Perundangan Negeri tidak mempunyai kuasa untuk menggubalnya boleh, dibawah perkara 4(4), hanya dimulakan dengan kebenaran hakim Mahkamah Persekutuan. Ia dihujahkan bahawa di bawah perkara 128(1) Perlembagaan, hanya Mahkamah Persekutuan mempunyai bidang kuasa untuk menentukan sama ada undang-undang yang dibuat oleh Parlimen atau Badan Perundangan Negeri adalah tidak sah atas alasan ia berkaitan dengan perkara yang mana badan perundangan relevan tiada kuasa untuk membuat undang-undang. Akibatnya, perayu-perayu berhujah, Mahkamah Tinggi patut menolak permohonan responden-responden atas alasan ia tiada bidang kuasa untuk mendengar perkara itu. Responden-responden, walau bagaimanapun, berhujah bahawa mereka tidak perlu mengikut peruntukan fasal-fasal (3) dan (4) perkara 4 kerana mereka tidak mempersoalkan kuasa perundangan badan perundangan negeri.

Diputuskan, membenarkan rayuan semata-mata atas isu awal yang dibangkitkan oleh perayu-perayu dan mengetepikan penghakiman-penghakiman mahkamah bawahan:

(1) Tindakan semakan kehakiman oleh responden-responden tidak kompeten disebabkan ketidakpatuhan prosedur penting dengan fasal-fasal (3) dan (4) perkara 4 Perlembagaan (lihat perenggan 29).

(2) Oleh kerana responden-responden gagal mengikut prosedur spesifik yang dinyatakan dalam fasal-fasal (3) dan (4) perkara 4 Perlembagaan, mahkamah-mahkamah bawahan terkhilaf dalam melayan permohonan mereka untuk mempersoalkan kesahan atau keperlembagaan s 66 melalui semakan kehakiman. Mahkamah-mahkamah bawahan tidak mempunyai bidang kuasa untuk berbuat demikian dan ia adalah undang-undang nyata bahawa apa-apa prosiding yang didengar tanpa bidang kuasa atau kuasa untuk berbuat demikian adalah terbatal dan tidak sah *ab initio* (lihat perenggan 28).

(3) Hujah responden-responden bahawa Badan Perundangan berhubung undang-undang Islam yang diluluskan oleh Badan Perundangan Negeri pelru mematuhi peruntukan-peruntukan tentang kebebasan asasi dalam perkara-perkara 5(1), 8(2), 9(2) dan 10(1)(a) Perlembagaan adalah hujah yang secara langsung mempersoalkan kuasa perundangan Badan Perundangan Negeri. Bagi tujuan dan maksud, ia adalah satu cabaran langsung kepada kesahan atau keperlembagaan s 66 yang diluluskan oleh Badan Perundangan Negeri Negeri Sembilan. Cabaran sebegini perlu mengikut prosedur tertentu yang ditetapkan dalam fasal-fasal (3) dan (4) perkara 4 Perlembagaan (lihat perenggan 27).

(4) Apa yang cuba dilakukan oleh responden adalah untuk mengehadkan kuasa perundangan Badan Perundangan Negeri dengan mengatakan bahawa walaupun kuasa untuk menggubal undang-undang mengenai perkara-perkara berhubung undang-undang Islam telah diberikan

kepada Badan Perundangan Negeri oleh perkara 74 Perlembagaan dibaca bersama Senarai II dalam Jadual Kesembilan kepada Perlembagaan, badan undang-undang tersebut masih perlu mematuhi peruntukan mengenai kebebasan asasi dalam perkara-perkara 5(1), 8(2), 9(2) dan 10(1)(a) Perlembagaan. Permohonan untuk deklarasi-deklarasi yang dipohon oleh responden-responden patut ditolak oleh Mahkamah Tinggi atas alasan ia tidak mempunyai bidang kuasa untuk mendengar perkara itu (lihat perenggan 26).]]

Notes

For cases on jurisdiction of court, see 3(2) *Mallal's Digest* (5th Ed, 2015) paras 2533–2564.

For cases on Legislature in general, see 3(2) *Mallal's Digest* (5th Ed, 2015) paras 3000–3062.

Cases referred to

Abdul Karim bin Abdul Ghani v Legislative Assembly of Sabah [1988] 1 MLJ 171, SC (refd)

Ah Thian v Government of Malaysia [1976] 2 MLJ 112, FC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 MLJ 765, FC (refd)

Legislation referred to

Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003 ss 4, 78(1), 79

Courts of Judicature Act 1964

Federal Constitution arts 4, 4(3), 4(4), 5(1), 8(1), (2), 9(2), 10(1)(a), 74, Item 1, List II, State List, Part II, Ninth Schedule

Rules of the High Court 1980 O 53 rr 3, 3(1)

Syariah Criminal Enactment (Negeri Sembilan) 1992 ss 9, 66

Appeal from: Civil Appeal No N-01–498–11 of 2012 (Court of Appeal, Putrajaya)

Muhammad Shafee Abdullah (Iskandar Ali bin Dewa, Muhammad Fairuz Iskandar, Sarah Abishegam, Farhah Mustaffa, Fakrul and Fazrein with him) (Negeri Sembilan State Legal Advisor's Chambers) for the first to fifth appellants.

Sulaiman bin Abdullah (Haniff Kahtri, Fakhrul Azman bin Abu Hasan and Mohamed Reza bin Abu Hasan with him) (Azaine & Fakhrul) for the sixth appellant.

Aston Paiva (Fahri Azzat and Siti Zabedah Kasim with him) (Azzat & Izzat) for the respondents.

Farez Jinnah (Syahredzan Johan with him) (Malaysian Bar) as amicus curiae.

Honey Tan Lay Ean (Malaysia Aids Council, PT Foundation, All Woman's Action Society (AWAM), SIS Forum Malaysia, Women/s Aid Organisation (WAO), Persatuan Pergerakan Komuniti Selangor (EMPOWER)) as amicus curiae.

Mubashir bin Mansor (Ridha Abdah bin Subri with him) (Majlis Agama Islam Negeri Johor) as amicus curiae.

Shaharudin Ali (Adzly Ab Manas with him) (United Malay National Organisation (UMNO)) as amicus curiae.

Suzana Atan (Iskandar Bolhasan with her) (Senior Federal Counsel, Attorney General's Chambers) as amicus curiae.

Zainul Rijal bin Abu Bakar (Abdul Rahim Sinwan and Muhammad Zaki bin Sukery with him) (Majlis Agama Islam Pulau Pinang and Majlis Agama Islam dan Adat Melayu Perak) as amicus curiae.

Zulkifli bin Che Yong (Ilyani bt Noor Kuszairy with him) (Majlis Agama Islam Wilayah Persekutuan) as amicus curiae.

New Sin Yew (Andrew Yong with him) (International Commission of Jurists) as amicus curiae.

Mohd Fasha Musthafa (Persatuan Peguam Muslim Malaysia (PMM)) watching brief.

Mohd Khairul Anwar bin Ismail (Mohd Raimi Ab Rahim, Kamarul Arifin Wafa, Bakhtiar Roslan, Persatuan Peguam Syafie Malaysia (PGSM) and Rosfinah Rahmat with him) (ABIM) watching brief.

Raus Sharif PCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the Court of Appeal declaring s 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 ('s 66') to be invalid as being unconstitutional due to inconsistency with arts 5(1), 8(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution.

[2] The first appellant is the State Government of Negeri Sembilan. The second appellant is the Islamic Affairs Department of Negeri Sembilan, which is a department of the first appellant responsible for Islamic affairs within the State of Negeri Sembilan. The third appellant is the director of the second appellant.

[3] The fourth appellant is the Chief Religious Enforcement Officer of Negeri Sembilan, who is appointed pursuant to s 79 of the Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003. Amongst his duties is the carrying out of investigations under any written law in Negeri Sembilan prescribing offences against the precepts of the religion of Islam.

[4] The fifth appellant is the Chief Syahrie Prosecutor of Negeri Sembilan

who is appointed pursuant to s 78(1) of the Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003. The fifth appellant has the power exercisable at his discretion to institute, conduct or discontinue any proceedings for an offence before a Syariah Court in Negeri Sembilan.

[5] The sixth appellant is a body established under s 4 of the Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003 to aid and advise the Yang di-Pertuan Besar of Negeri Sembilan in matters relating to the religion of Islam.

[6] The three respondents are bridal make-up artists professing the religion of Islam. They are men suffering from a medical condition called gender identity disorder ('GID'). Due to their condition, the respondents have been expressing themselves as women and showing mannerisms of the feminine gender such as wearing women's clothes and make-up.

BACKGROUND FACTS

[7] On 4 November 2011, the respondents were granted leave to file an application for judicial review by the Seremban High Court under O 53 r 3 of the Rules of the High Court 1980 ('the RHC 1980'). The reliefs sought by the respondents are as follows:

(a) a declaration that s 66 is inconsistent with arts 5(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution and is thus null and void;

(b) alternatively, a declaration that s 66 has no effect and does not apply to any person who is:

  (i) psychologically a woman; and

  (ii) suffering from 'GID'.

(c) alternatively, a prohibition order or a revision according to para 1 of the schedule to the Courts of Judicature Act 1964 to be issued to the Chief Religious Enforcement Officer of Negeri Sembilan ('the fourth appellant') and the Chief Syarie Prosecutor of Negeri Sembilan ('the fifth appellant') restraining them from carrying out an investigation or proceeding with an investigation for an offence under the impugned s66 against the respondents and against any person, if they submit a report from a psychologist that they are psychologically women or suffer from 'GID'.

[8] On 11 October 2012, the respondents' application for judicial review was dismissed by the High Court. Aggrieved, the respondents filed an appeal to the Court of Appeal.

[9] On 7 November 2014, the Court of Appeal allowed the appeal and amongst others declared that s 66 was unconstitutional as being inconsistent with arts 5(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution.

[10] The first to the fifth appellants then filed an application for leave to appeal to the Federal Court. At the same time, the sixth appellant, together with Majlis Agama Islam Wilayah Persekutuan, Majlis Agama Islam dan Adat Melayu Perak, Majlis Agama Islam Negeri Pulau Pinang, Majlis Agama Islam Negeri Johor, applied for leave to intervene.

[11] The applications to intervene by the proposed interveners were heard together with the application for leave to appeal by the first to the fifth appellants. On 27 January 2015, the Federal Court granted the first to the fifth appellants leave to appeal against the decision of the Court of Appeal. At the same time the Federal Court allowed only the Majlis Agama Islam Negeri Sembilan to intervene as a party in the substantive appeal. The Majilis Agama Islam Negeri Sembilan now appears herein as the sixth appellant and the Federal Court also extended an invitation to the other proposed interveners (whose applications to intervene were dismissed) to appear as amicus curiae to assist the court on legal and/or constitutional issues at the hearing of the appeal.

QUESTION OF LAW

[12] The principal question of law posed by the appellants in this appeal is as follows:

> Whether section 66 of the Syariah Criminal Enactment (Negeri Sembilan) 1992 [Enactment No 4/1992] contravenes Article 5(1), 8(2), 9(2) and 10(1)(a)of the Federal Constitution.

[13] Section 66 provides:

> Any male person who, in any public place, wears a woman's attire or poses as a woman shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.

[14] As stated earlier, the Court of Appeal was of the view that s 66 is invalid and unconstitutional. Firstly, it offends the fundamental liberties as enshrined in arts 5(1), 8(2) and 9(2) of the Federal Constitution. Secondly, s 66 has the effect of restricting the freedom of speech and expression under art 10(1)(a) when under art 10(2) only Parliament has the power to enact such law and the State Legislature has no power to enact the same. Additionally, it was held that the restriction to freedom of expression imposed by s 66 is unreasonable which renders it unconstitutional. The relevant judgment of the Court of Appeal speaking through Mohd Hishamuddin JCA is reproduced below:

[73] Section 66 directly affects the appellants' right to freedom of expression, in that they are prohibited from wearing the attire and articles of clothing of their choice.

[74] Article 10(2)(a) states that only Parliament may restrict freedom of expression in limited situations; and so long as such restrictions are reasonable.

[75] The State Legislative Assemblies in Malaysia (and this includes the State Legislature of Negeri Sembilan) have no power to restrict freedom of speech and expression. Only Parliament has such power. This is confirmed by the Supreme Court in *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Sal leh & Anor* [1992] 1 MLJ 697 at p 717; [1992] 1 CLJ (Rep) 72 at p 82:

> Next it must be observed that art 10(2) of the Federal Constitution provides that only Parliament may by law impose those restrictions referred to in arts 10(2), (3) and (4) of the Federal Constitution. Therefore even if any such restriction purported to have been imposed by the Constitution of the State of Kelantan was valid, and it is not, it is clear that the restriction could not be imposed by a law passed by any State Legislature. That would be another ground why Article XXXIA of the Constitution of Kelantan should be invalidated.

[76] Section 66 is a state law that criminalises any male Muslim who wears a woman's attire or who poses as a woman in a public place. Hence, s 66 is unconstitutional since it is a law purporting to restrict freedom of speech and expression but it is a law not made by Parliament.

[77] Moreover, any restriction on freedom of expression must be reasonable. In *Sivarasa Rasiah* the Federal Court held:

> [5] The other principle of constitutional interpretation that is relevant to the present appeal is this. Provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively. Take art 10(2) (c). It says that Parliament may by law impose – (c) on the right conferred by para (c) of cl (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation orany part thereof, public order or morality'. Now although the article says 'restrictions', the word 'reasonable' should be read into the provision to qualify the width of the proviso. The reasons for reading the derogation as 'such reasonable restrictions' appear in the judgment of the Court of Appeal in *Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia* [2007] 1 CU 19 which reasons are now adopted as part of this judgment.
>
> (see also *Dr Mohd Nasir Hashim* and *Muhammad Hilman*)

[78] Clearly, the restriction imposed on the appellants and other GID sufferers by s 66 is unreasonable. Thus, also from the aspect of reasonableness, s 66 is unconstitutional.

PRELIMINARY ISSUE

[15] It was submitted by learned counsel for the first to the fifth appellants that the net effect of the findings of the Court of Appeal is that the Negeri Sembilan State Legislature has no power to enact s 66. It was pointed out that when such validity or constitutionality of the law is challenged on that ground,

namely that the State Legislature has no power to enact the law, the specific procedure as laid down in cll (3) and (4) of art 4 of the Federal Constitution must be complied with.

[16] Clauses (3) and (4) of art 4 of the Federal Constitution provides:

> 4(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or –
>
> (a) if the law was made by Parliament, in proceedings between the Federation and one or more States;
>
> (b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.
>
> (4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

[17] It was pointed out by learned counsel that cll (3) and (4) of art 4 of the Federal Constitution were extensively deliberated upon by the Federal Court in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 where Suffian LP held as follows:

> Under our Constitution written law may be invalid on one of these grounds:
>
> (1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter with respect to which the State Legislature has no power to make law, art 74; or
>
> (2) in the case of both Federal and State written law, because it is inconsistent with the Constitution, see art 4(1); or
>
> (3) in the case of State written law, because it is inconsistent with Federal law, art 75.
>
> The court has power to declare any Federal or State law invalid on any of the above three grounds.
>
> The court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any court in the land and in any proceeding whether it be started by Government or by an individual.
>
> But the power to declare any law invalid on ground (1) is subject to three restrictions prescribed by the Constitution.
>
> First, cl (3) of art 4 provides that the validity of any law made by Parliament or by

a State Legislature may not be questioned on the ground that it makes provision with respect to any matter with respect to which the relevant legislature has no power to make law, except in three types of proceedings as follows:

(a) in proceedings for a declaration that the law is invalid on that ground; or

(b) if the law was made by Parliament, in proceedings between the Federation and one or more States; or

(c) if the law was made by a State legislature, in proceedings between the Federation and that State.

It will be noted that proceedings of types (b) and (c) are brought by government and there is no need for anyone to ask specifically for a declaration that the law is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. The point can be raised in the course of submission in the ordinary way. Proceedings of type (a) may however be brought by an individual against another individual or against government or by government against an individual, but whoever brings the proceedings must specifically ask for a declaration that the law impugned is invalid on that ground.

Secondly, cl (4) of art 4 provides that proceedings of the type mentioned in (a) above may not be commenced by an individual without leave of a judge of the Federal Court and the Federation is entitled to be a party to such proceedings, and so is any State that would or might be a party to proceedings brought for the same purpose under type (b) or (c) above. This is to ensure that no adverse ruling is made without giving the relevant government an opportunity to argue to the contrary.

Thirdly, cl (1) of art 128 provides that only the Federal Court has jurisdiction to determine whether a law made by Parliament or by a State legislature is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. This jurisdiction is exclusive to the Federal Court, no other court has it. This is to ensure that a law may be declared invalid on this very serious ground only after full consideration by the highest court in land.

[18] Learned counsel also referred to the case of *Abdul Karim bin Abdul Ghani v Legislative Assembly of Sabah* [1988] 1 MLJ 171 where Hashim Yeop Sani SCJ, explained the underlying purposes of cll (3) and (4) of art 4 of the Federal Constitution:

The object and purport of art 4(4) of the Federal Constitution has already been interpreted before in *Stephen Kalong Ningkan v Tun Abang Haji Openg & Tawi Sli (No 2)* [1967] 1 MLJ 46 by Pike CJ (Borneo) with which interpretation I agree. Article 4(3) *and* (4) of the Federal Constitution *is designed to prevent the possibility of the validity of laws made by the Legislature being questioned on the ground mentioned in that article incidentally.* The article requires that such a law may only be questioned in proceedings for a declaration that the law is invalid. *The subject must ask for a specific declaration of invalidity. In order to secure that frivolous or vexatious proceedings for such declarations are not commenced,* art 4(4) *requires that the leave of a judge of the Supreme Court must first be obtained.* (Emphasis added.)

[19] Learned counsel for the sixth appellant fully adopted the submission on the issues raised above. He further pointed out that the declaration sought by the respondents that s 66 is void for being inconsistent with arts 5(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution should have been rejected by the High Court on the ground that the High Court had no jurisdiction to hear the matter. According to him, the respondents should have filed an application for leave to a judge of the Federal Court pursuant to cl 4 of art 4 of the Federal Constitution and thereafter, if leave is granted, the respondents may then proceed to file the case as an original action for those declarations before the Federal Court, and not by way of judicial review before the High Court, as was done in this case.

[20] In response, learned counsel for the respondents submitted that the respondents were not questioning the legislative power of the State Legislature and therefore their application does not fall strictly within cll (3) and (4) of art4 of the Federal Constitution. For that reason the respondents did not have to follow the procedure as specified in cll (3) and (4) of art 4 of the Federal Constitution. Further and in the alternative, it was submitted that the respondents' application by way of judicial review has not in any way prejudiced the appellants. Thus, he urged this court to hear the case on its merit.

[21] With respect, we are unable to agree with learned counsel for the respondents. The issue here is not whether the appellants are in any way being prejudiced by the mode of action undertaken by the respondents. This case raises a larger issue. It is about the jurisdiction of the courts. The fundamental question is could the validity or constitutionality of s 66 be challenged in the High Court by way of a collateral attack in a judicial review proceeding?

[22] The Federal Court in the recent decision of *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765, had held that the validity or constitutionality of the laws could not be questioned by way of collateral attack in a judicial review proceeding. In that case, the applicant filed an application for judicial review under O 53 r 3(1) of the RHC 1980, challenging the decision of the Minister which imposed the condition that the applicant was prohibited from using the word 'Allah' in Herald – The Catholic Weekly. In the judicial review application before the High Court, the applicant challenged the validity or constitutionality of s 9 of the relevant State Enactment which made it an offence for a person who is not a Muslim to use the word 'Allah' except by way of quotation or reference. The High Court held that:

> [53] ... the correct way of approaching s 9 is it ought to be read with art 11(4). If s 9 is so read in conjunction with art 11(4), the result will be that a non-Muslim could be committing an offence if he uses the word 'ALLAH' to a Muslim but there would

be no offence if it was used to a non-Muslim. Indeed art 11(1) reinforces this position as it states 'Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate if. Clause 4 restricts a person's right only to propagate his religious doctrine or belief to persons professing the religion of Islam. So long as he does not propagate his religion to persons not professing the religion of Islam, he commits no offence. It is significant to note that art 11(1) gives freedom for a person to profess and practise his religion and the restriction is on the right to propagate.

[57] ... On the other hand the object of art 11(4) and the State Enactments is to protect or restrict propagation to persons of the Islamic faith. Seen in this context by no stretch of imagination can one say that s 9 of the State Enactments may well be proportionate to the object it seeks to achieve and the measure is therefore arbitrary and unconstitutional. Following this it shows the first respondent has therefore taken an irrelevant consideration.

[80] With regard to the contention that the publication permit is governed by the existence of the State Enactments pertaining to the control and restriction of the propagation of non-Islamic religions among Muslim, it is open to the applicant in these proceedings to challenge by way of collateral attack the constitutionality of the said Enactment on the ground that s 9 infringe the applicant's fundamental liberties under arts 3, 10, 11 and 12 of the Federal Constitution.

[23] The decision of the High Court was set aside by the Court of Appeal. In the applicant's application to obtain leave to appeal to the Federal Court, Arifin Zakaria CJ delivering the majority judgment held that:

The net effect of the finding of the learned High Court judge is that the impugned provision is invalid, null and void, and unconstitutional as it exceeds the object of art 11(4) of the Federal Constitution. The respective State Legislature thus has no power to enact the impugned provision. The issue is, could the High Court judge entertain such a challenge in light of specific procedure in cll (3) and (4) of art 4 of the Federal Constitution.

[24] In answering the question Arifin Zakaria CJ held:

[42] The effect of cl (3) and (4) of art 4 as explained by the Supreme Court in *Abdul Karim bin Abdul Ghani* is that the validity or constitutionality of the laws could not be questioned by way of collateral attack, as was done in the present case. This is to prevent any frivolous or vexatious challenge being made on the relevant legislation. Clause (3) of art 4 provides that the validity or constitutionality of the relevant legislation may only be questioned in proceedings for a declaration that the legislation is invalid. And cl (4) of art 4 stipulates that such proceedings shall not be commenced without the leave of a judge of the Federal Court. This procedure was followed in a number of cases (see *Fathul Bari bin Mat Jahya*; *Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354; [2009] 2 CLJ 54 (FC); *Mamat bin Daud & Ors v Government of Malaysia* [1986] 2 MLJ 192; [1986] CLJ Rep 190 (SC)).

[25] It was on the above premise that the Federal Court, by a majority,

following the earlier cases of *Ah Thian v Government of Malaysia* and *Abdul Karim bin Abdul Ghani v State Legislative Assembly of Sabah*, ruled that the validity or constitutionality of the laws could not be questioned by way of collateral attack in a judicial review proceeding before the High Court. Such challenge could only be made by way of the specific procedure as provided for in cll (3) and (4) of art 4 of the Federal Constitution.

[26] Similarly, in the present case, the application for judicial review filed by the respondents was, inter alia, to seek a declaration that s 66 is null and void for being inconsistent with arts 5(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution. We are of the view that the application for the declarations sought by the respondents before the High Court by way of judicial review was in fact, a challenge to the legislative powers of the State Legislature of Negeri Sembilan. What the respondents attempted to do was to limit the legislative powers of the State Legislature, by saying that despite the powers to legislate on matters on Islamic law having been given to the State Legislature by art 74 of the Federal Constitution read with List II in the Ninth Schedule to the Federal Constitution, that legislation must still comply with the provisions on fundamental liberties in arts 5(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution. The application for the declarations sought by the respondents should have been dismissed by the High Court on the ground that the High Court has no jurisdiction to hear the matter.

[27] Thus, we are not persuaded by the submissions of learned counsel for the respondents that the respondents are not questioning the legislative powers of the State Legislature. The respondents' argument, that the legislation on Islamic law passed by the State Legislature must comply with the provisions on fundamental liberties in arts 5(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution, is an argument that directly questions the legislative powers of the State Legislature. For all intent and purposes, it was a direct challenge to the validity or constitutionality of s 66 passed by the State Legislature of Negeri Sembilan. As stated earlier, such a challenge must be in accordance with the specific procedure as specified in cll (3) and (4) of art 4the Federal Constitution.

[28] We are of the view that since the respondents had failed to follow the specific procedure as laid down in cll (3) and (4) of art 4 of the Federal Constitution, the learned judges of the Court of Appeal as well as the High Court were in grave error in entertaining the respondents' application to question the validity or constitutionality of s 66 by way of judicial review. The courts below were not seized with the jurisdiction to do so. It is trite that any proceeding heard without jurisdiction or power to do so is null and void ab initio (see *Ah Thian v Government of Malaysia*; *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* and *Badiaddin bin*

Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393).

[29] In the circumstances, for the reasons stated above, we allow the appeal solely on the preliminary issue raised by the appellants. We hereby set aside the judgments of the Court of Appeal as well as the High Court and declare that the judicial review action by the respondents is incompetent by reason of substantive procedural non-compliance with cll (3) and (4) of art 4 of the Federal Constitution.

[30] As the appellants are not asking for costs, we made no order as to costs.

Appeal allowed solely on preliminary issue raised by appellants and judgments of the courts below set aside.

Reported by Ashok Kumar