A Mere Matter of Words

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The Setting

The Titular Roman Catholic Archbishop of Kuala Lumpur was dissatisfied with the Home Minister's refusal to permit *Herald — the Catholic Weekly* to use the word "Allah" in its publications. He moved for judicial review. All the grounds of challenge were based on what has become known to lawyers as an Anisminic[1] error. Its origins lie in the Wednesbury case[2]. The proposition of law that these authorities and their progeny support is this. A public decision-taker, whether he exercises a quasi-judicial or purely administrative function must act in accordance with law. If he takes into account irrelevant matters or fails to take into account relevant matters or if he asks himself the wrong question or if he misapplies or misinterprets a relevant statutory provision or a material document or if he makes a decision no reasonable decision-maker armed with the material before him would make, then his decision is liable to be set aside in proceedings for judicial review. In the local context, his decision is also liable to be set aside if he violates a right found to be guaranteed by the Constitution. The Archbishop's complaint encompassed all these grounds of challenge. In particular, he asserted that the Minister had "acted in violation of the applicant's legal rights in line with the spirit, letter and intent of arts 3, 10, 11 and 12 of the Federal Constitution."

The learned judge (who must be given full credit for the analysis of the law on this rather difficult area of the law) said this, among other things:

> "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 Muslims, it is open to the applicant in these proceedings to challenge by way of collateral attack the constitutionality of the said Enactments on the ground that s 9 infringe the applicant's fundamental liberties under arts 3, 10, 11 and 12 of the Federal Constitution"[4].

It is the words upon which emphasis is placed that upset an otherwise upright applecart when it arrived at the Federal Court.

Modes of Challenge

The starting point is the characterisation of the nature of the challenge. Under our Constitution there are two ways in which a legislature — State or Federal — may violate the provisions of the Federal Constitution. Either State or Federal law may contain a provision that invades any of the rights guaranteed by Part II of the Constitution. A complainant may then seek to enforce the right allegedly infringed. The statutory basis for this enforcement is Paragraph 1 of the Schedule to the Courts of Judicature Act 1964. It says our High Courts have the following additional power:

> "Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose."

So, *prima facie* at least, if a State Enactment contains a provision that violates a Part II right, the High Court may be approached for any of the relief provided by Paragraph 1. A State Legislature is an authority: a legislative authority. The procedure by which a complainant seeking

1 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.
2 *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] KB 223.
3 See *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor* [2010] 2 MLJ 78 at 91.
4 At paragraph 80 of the judgment. (Author's emphasis).

relief must adopt is an application for judicial review under Order 53 of the Rules of Court 2012. And if, after hearing argument, the court finds a violation it may quash the legislation by a direction in the nature of *certiorari*. Or it may declare the Enactment in question void because Order 53 has now made declaratory relief a public law remedy. This is not a collateral attack. It is a direct challenge.

Now take proceedings to which the relevant arm of the State or Federal authority is one of the parties. Assume that that arm asserts a right vested in it by State legislation to do what it did and the issue arises whether the law vesting it violates any of the Part II rights. The court enforcing the particular guaranteed right may hold (if that be the case) that the State Enactment is void for being violative of the guaranteed right in question. Again, that is not a collateral attack. It is a head on challenge.

The judge in the Archbishop's case made clear the route that was being taken. This is what the High Court said in paragraph 81 of the judgment:

> "The court can review the constitutionality of federal and state legislation relied on by the decision maker following the test in Nordin bin Salleh."

The reference to "Nordin bin Salleh" is pertinent. In that case[5], the Supreme Court dealt with a case where it was asserted by the supplicant that the legislature of the State of Kelantan had enacted a law that violated the right of freedom of association guaranteed by Article 10(1)(c). The High Court declared the offending law invalid. And the apex court entertained no difficulty in upholding that declaration.

Collateral or Direct

Was the judge in the case of the Archbishop correct in describing what was being done as "collateral"? If she was not then what she said was a mere matter of words. It was mislabelling the creature. The law has never had any regard to labels, be it in private or public law. Calling a cat a dog will not deprive it of its feline qualities and metamorphose it into a canine.

Return to the question. Was what the Archbishop arguing for a collateral attack? The answer must be in the negative. What then is a collateral as opposed to a direct attack? **Boddington's case[6]** provides the answer. There, the defendant was prosecuted for an offence under certain regulations. Before the magistrates he contended that the subsidiary legislation in question was *ultra vires* the Act that enabled its making. The magistrates would have none of it. They said that if he wanted to question the *vires* of the subordinate legislation in question he must do it by way of judicial review. He could not do it collaterally in the criminal proceedings brought against him. The House of Lords disagreed. They said that a collateral challenge that the law under which the defendant was being prosecuted was *ultra vires* the enabling statute was consonant with the Rule of Law. Lord Irvine LC said:

> "The question of the extent to which public law defences may be deployed in criminal proceedings requires consideration of fundamental principle concerning the promotion of the rule of law and fairness to defendants to criminal charges in having a reasonable opportunity to defend themselves. However, sometimes the public interest in orderly administration means that the scope for challenging unlawful conduct by public bodies may have to be circumscribed.
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> Where there is a tension between these competing interests and principles, the balance between them is ordinarily to be struck by Parliament. Thus whether a public law defence may be mounted to a criminal charge requires scrutiny of the particular statutory context in which the criminal offence is defined and of any other relevant statutory provisions. That approach is supported by authority of this House."

In the same case, Lord Steyn said:

> "There is no good reason why a defendant in a criminal case should be precluded from arguing that a byelaw is invalid where that could afford him with a defence."

There you have it. An obvious example of a collateral challenge. A defendant in criminal proceedings may (unless he is prevented by statute) challenge the validity of the law under which he is charged on the ground that it is *ultra vires* the parent Act under which it was made.

For a local statement of the principle we have *Eu Finance v Lim Yoke Foo*[7]. The Federal Court there held as follows:

> "The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In Harkness v Bell's Asbestos and Engineering Ltd [1967] 2 QB 729, 736, Lord Diplock L.J. (now a Law Lord) said (at page 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it

5 *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697.
6 *Boddington v British Transport Police* [1999] 2 AC 143.
7 [1982] 2 MLJ 37.

or of going to the court and asking for it to be set aside'.

Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal 'but he is not bound to (do so), because he is at liberty to treat the act as void' [Birmingham (Churchwardens and Overseers) v Shaw (1849) 10 QB 868 880; 116 ER 329 at page 880 (per Denman C.J.)]. In Barnard v National Dock Labour Board [1953] 2 QB 18, 34 it was said that, as a notice of suspension made by the local board was a nullity, 'the fact that there was an unsuccessful appeal on it cannot turn that which was a nullity into an effective suspension' (at page 34 per Singleton L.J.). Ridge v Baldwin [1964] AC 40 is to the same effect.

Lord Denning said in Director of Public Prosecutions v Head [1959] AC 83 (at page 111) that if an order was void, it would in law be a nullity and there would be no need for an order to quash it as it would be automatically null and void without more ado. Lord Denning as Master of the Rolls so held too in Regina v Paddington Valuation Officer & Anor, Ex parte Peachey Property Corporation Ltd (No 2) [1966] 1 QB 380 (at page 402), 402."

It may be added in parentheses that wherever you see the word "order" or "decision" in the foregoing passage, please read "any state action".

The doctrine of *ultra vires* in the context of administrative law is understood easily enough. Any form of subsidiary legislation that is not authorised by the Act under which it purports to be made is *ultra vires* and null and void. Now transpose that proposition to our Constitution and this is what you get: any written law made wither by Parliament or by the legislature of any State upon a subject not falling within its legislative authority is void. Once the proposition is put that way then you have to hearken to the provisions in the Constitution itself that regulate the procedure by which such a challenge may be made. And that will take you to articles 4(3) and 4(4). These read as follows:

"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."

The majority judgment of the Federal Court in the Archbishop's case[8] when denying the applicant leave to appeal treated what the learned High Court judge said as referring to a collateral attack coming within article 4(3). Hence they ruled that a collateral challenge as to the validity of a written law on the ground that the particular legislative body did not have power to enact was not possible. A challenge on the ground of legislative competence was only possible (so the court ruled) in proceedings brought for that purpose under article 4(4). The majority speaking through the learned Chief Justice was entirely correct in so holding.

But was the learned judge of the High Court referring to a collateral challenge of a subject matter legislative competence? In fairness to the judge that question must be answered in the negative.

To recall her words:

"…it is open to the applicant in these proceedings to challenge by way of collateral attack the constitutionality of the said Enactments on the ground that s 9 infringe the applicant's fundamental liberties under arts 3, 10, 11 and 12 of the Federal Constitution"[9].

As you can see, she was not saying that the Enactments in question were bad because they were enacting law upon a subject with respect to which the State Legislatures in question had no power to make. What she was saying is this. These Enactments all violate the rights guaranteed by articles 3, 10, 11 and 12 of the Constitution and therefore their constitutionality may be challenged collaterally. But there was no collateral attack in the real sense: that is to say in the sense explained in **Boddington** or **Lim Yoke Foo**. The parties relying on the Enactments were before the High Court. They relied on those Enactments. The question was whether those Enactments violated the applicant's guaranteed rights. It was held that they did. This is, with respect, a direct and not a collateral challenge.

8 [2014] 4 MLJ 765.

9 At paragraph 80 of the judgment.

It would have been different if the argument before the High Court had been that the respective State Legislatures were not competent to enact those laws upon the subject in question. Then, it would have been a collateral attack on legislative competence. And then it could be held that that is not possible because an attack of that nature was only possible in the manner set out in article 4(4).

Unfortunately (and this is purely a subjective view), the High Court used the wrong words to describe what was being sought to be done in the proceedings before it. If you remove the phrase "by way of collateral attack" from the sentence in the passage quoted, then everything will be alright. Because it would read:

> "it is open to the applicant in these proceedings to challenge the constitutionality of the said Enactments on the ground that s 9 infringes the applicant's fundamental liberties…"

And there would have been nothing wrong with that because there was a positive joinder on that issue between the parties before the court so that the matter was res integra and not collateral to the joinder.

So the majority of the Federal Court addressed the wrong target. It overlooked the substance of what had been said.

Getting it Wrong

The reasoning of the majority turns on the correct procedure that must be adopted when mounting a constitutional challenge. Having regard to the structure of our Constitution there are five circumstances in which its violation may be challenged. First, where the complaint is that there has been a violation of Part II rights. Here the case comes within Paragraph 1 of the Schedule to the Courts of Judicature Act 1964. Because what is sought is the enforcement of Part II rights. The procedure to challenge such a violation is an application for judicial review under Order 53 of the Rules of Court 2012.

Second, where the complaint is that there has been a violation of the Constitution. A complaint that a law is bad because it violates the doctrine of separation of powers entrenched in our Constitution would be such a challenge.

Third, a challenge that any article other than one falling under Part II is said to have been violated to the detriment of the complainant. An example is a challenge that provisos (a) and (b) to section 29(1) as well as section 29(2) of the Government Proceedings Act 1956 fall foul of article 69(2).

Fourth, a challenge that State law is inconsistent with a Federal law. So, if a State law purports to exclude the operation of prerogative relief, it would be invalid as being inconsistent with the Courts of Judicature Act 1964.

Fifth, where the challenge is made on the ground that the particular written law falls outside the legislative power conferred by the appropriate List created by article 74. So, if Parliament makes a law with respect to a subject that falls under List II then the law is bad because it is only the State that can legislate with respect to that subject. An opposite example is where a State Enactment creates criminal offences and prescribes punishment for those offences. Such a law would be bad because under List I it is only Parliament that can make penal law.

These five types of cases in which a constitutional challenge may be mounted were discussed by Suffian LP in *Ah Thian v Government of Malaysia*[10]. The facts in that case were these.

The applicant was charged with committing armed robbery under sections 392 and 397 of the Penal Code, an offence punishable under section 5 of the Firearms (Increased Penalties) Act 1971. He applied under article 4(3) to have that Act struck down on the ground that it contravened article 8(1). Suffian LP (sitting as a single judge of the Federal Court under article 4(4) dismissed the application because no leave was required under article 4(3) to mount the challenge. He said this:

> "The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.
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> Under our Constitution written law may be invalid on one of these grounds:
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> (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 which respect to which the State legislature has no power to make law, article 74; or
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> (2) in the case of both Federal and State written law, because it is inconsistent with the Constitution, see article 4(1); or
>
> (3) in the case of State written law, because it is inconsistent with Federal law, article 75.
>
> The court has power to declare any Federal or State law invalid on any of the above three grounds.
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> 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.

[10] [1976] 2 MLJ 112.

> But the power to declare any law invalid on ground (1) is subject to three restrictions prescribed by the Constitution."

Suffian LP's unmistakeable style for simplicity makes it absolutely clear that it is only when subject matter legislative competence is raised that article 4(3) and (4) are triggered. Yet the majority in the Archbishop's case identified an error in the judgment of the High Court. With great respect to the majority, they got it wrong. The High Court did not say that the State Enactments were bad because the respective Legislatures had no subject matter competence to make the law because it was only Parliament that could enact it. All that the High Court said is that the Enactments in question violated certain provisions of the Constitution, including Part II guarantees. That does not, and cannot, mean subject matter legislative incompetence.

To remind, in the first set of circumstances earlier identified (let us call it Type 1), the Order 53 procedure must be followed. In the second, third and fourth circumstances (let us call these Types 2, 3 and 4), either the Order 53 procedure or any other suitable mode of moving the court may be adopted, that is to say, either by writ or originating summons.

In the fifth circumstance (let us call this Type 5), it is the procedure set out by article 4(3) read with article 4(4) that must be resorted to. Leave must first be sought and obtained from a single judge of the Federal Court to commence proceedings for the declaratory relief prescribed by the Constitution. We cannot in other proceedings, eg in judicial review proceedings seek to strike down law for an article 74/Ninth Schedule violation. That would be a collateral attack prohibited by the Constitution because it has prescribed a specific method of challenging the law in those circumstances and provided the specific remedy to be granted.

To be fair counsel who appeared in the Archbishop's case, a challenge was never put forward under article 74 read with the Ninth Schedule. In other words it was not argued that the State Enactments relied upon were bad for subject matter legislative incompetence. And to be fair to the High Court it merely held that the particular provision in the Enactments in question violated Part II rights as well the right under article 3. That is a far cry from what was attributed to the High Court by the majority of the Federal Court.

And it all happened because the primary judge used the wrong expression. She said "collateral" when what she should have said is "frontal". At the risk of repetition, the persons who raised and relied on the Enactments were before the judge. The impact of those Enactments upon the process was *res integra*. It was a frontal attack on the Enactments because of the way in which the lis arose and upon which there was a joinder. The Federal Court in majority could have easily identified the error in nomenclature. After all it was a mere matter of words.

Or better yet. Things went wrong in the Archbishop's case in the majority judgment because it was a mere matter of the words used.

The Fallout

Now, if you use the words in your application or submission or in a judgment "the law is bad because it violates article 8(1)" you could end up with a preliminary objection, as happened in the Negeri Sembilan transgender case that the challenge comes within article 4(3) and (4). And worse, as happened in that case, the objection may succeed.

The framers of the Constitution are probably turning in their respective graves. They probably thought that anyone could see the difference between a subject matter legislative competence challenge and a complaint that a law — be it Federal or State — violated a provision of the Constitution or a doctrine housed within the structure of that document.

They probably never realised that a mere matter of words would render the distinction opaque.