# IKI PUTRA MUBARRAK

**v.**

# KERAJAAN NEGERI SELANGOR & ANOR

Federal Court, Putrajaya
Tengku Maimun Tuan Mat CJ, Rohana Yusuf PCA, Azahar Mohamed CJM, Abang Iskandar Abang Hashim CJSS, Mohd Zawawi Salleh, Nallini Pathmanathan, Vernon Ong Lam Kiat, Zabariah Mohd Yusof, Hasnah Mohammed Hashim FCJJ
[Case No: BKA-3-11-2019(W)]
25 February 2021

***Constitutional Law:*** *Federal and State Laws — Matters of Islamic law — Validity of s 28 Syariah Criminal Offences (Selangor) Enactment 1995 — Whether said provision ultra vires Federal Constitution and invalid — Federal Constitution, arts 74(3), 75, 77*

The present case concerned the effect of the words 'except in regard to matters included in the Federal List' contained in Item 1, List II, Ninth Schedule of the Federal Constitution ('State List'), *vis-à-vis* the power of the State legislatures to make laws under the said Item. The petitioner was granted leave to file this petition pursuant to art 4(3) and (4) of the Federal Constitution ('FC'). In this petition, the petitioner sought to challenge the competency of the Selangor State Legislature to enact s 28 of the Syariah Criminal Offences (Selangor) Enactment 1995 ('1995 Enactment').

**Held** (allowing the petitioner's appeal):

Per Tengku Maimun Tuan Mat CJ

**(1)** It was quite clear from the wordings of arts 74(3), 75 and 77 of the FC that the primary power of legislation in criminal law resided in Parliament. This was further borne out by the State List in terms of the powers of the State Legislatures to enact criminal laws, namely that the powers were subjected to the preclusion clause in Items 1 and 9 of the State List. In terms of Item 1, the power to legislate on offences was wide insofar as the 'precepts of Islam' were concerned but limited by the preclusion clause. Item 9 in turn allowed the State Legislatures to enact offences but strictly within the confines of what the State List and State law might allow. Conspicuously absent from the entirety of the State List was any entry of the likes of Items 3 and 4 of the Federal List. The natural conclusion, reading all the entries harmoniously and in context suggested that primacy in terms of the enactment of offences was reposed by the FC in Parliament. (paras 74-75)

**(2)** The respondents submitted that s 28 of the 1995 Enactment was worded more broadly than the federal versions. This was wholly immaterial. What mattered was whether, in pith and substance, s 28 of the 1995 Enactment related to a matter which fell under the Federal List. In this instance, it did. States did not have an overriding power of legislation on the subject of criminal law. Their power was strictly designated to matters which Parliament did not otherwise have power to make laws on. In the result, having regard to the preclusion clause in Item 1 of the State List, when the two Legislatures (Federal and State) legislated a law concerning the subject matter of criminal law, and the two laws touched on the same matter, the said laws could not co-exist even if the said law was said to be against the precepts of Islam. (paras 79-81)

**(3)** There was no reason to doubt that the Penal Code provisions which were substantively mirrored in s 28 of the 1995 Enactment, were within the purview of Items 3 and 4 of the Federal List. Hence, the natural consequence was that the subject matter upon which s 28 of the 1995 Enactment was made fell within the preclusion clause of Item 1 of the State List. As such, the said section was enacted in contravention of Item 1 of the State List which stipulated that the State Legislatures had no power to make law 'in regard to matters included in the Federal List'. To that extent, s 28 of the 1995 Enactment was inconsistent with the FC and was therefore void. (paras 83-85)

Per Azahar Mohamed CJM (concurring):

**(4)** The preclusion clause "except in regard to matters included in the Federal List", functioned as a limitation imposed by the FC on the State Legislatures to make laws on Islamic criminal law. An important point to note was that the State List itself expressly recognised that certain areas of Islamic criminal law were admittedly part of the jurisdiction of Parliament and as a result any matter assigned to Parliament was outside the legislative competence of the State Legislature. Although the range of the State legislature to enact "offences against the precepts of Islam" appeared to be so extensive as to comprise almost "every single rule, conduct, principle, commandment, and teaching of Islam prescribed in the Syariah", in reality there was constitutional limitation upon the subject matter of the legislation enforced by the preclusion clause. Therefore, the State legislature's competence to legislate over Islamic criminal offences was neither exclusive nor comprehensive. (paras 106-107)

**(5)** In the Malaysian jurisdiction, most of the penal provisions were contained in the legislation enacted by Parliament. The Penal Code, for example, declared what acts or omissions were offences and also provided for their punishment. Importantly, it also determined the nature and quantum of punishment to be given for specific offences. In relation to s 28 of the 1995 Enactment, when viewed in light of "criminal law", the true nature of the impugned provision was a legislation upon a criminal matter. Consequently, the offence of sexual intercourse against the order of nature was a matter that obviously fell within the ambit of "criminal law" pursuant to the Federal List which conferred

upon Parliament the power to enact laws relating to that. Therefore, even if Parliament had yet to make legislation with respect to an offence of sexual intercourse against the order of nature, the State Legislature was still precluded from legislating on the said subject matter. (paras 112-113)

**(6)** In determining whether s 28 of the 1995 Enactment fell within the subject matter of "criminal law", it was the substance and not the form or outward appearance of the provision that must be considered. On the principle of pith and substance, the impugned provision fell within the entry "criminal law" under the Federal List. (*Mamat Daud & Ors v. The Government Of Malaysia (refd)*). (para 117)

**(7)** According to the concept of Federalism, the FC guaranteed the States with legislative power over offences and punishments against the precepts of Islam with the exception of matters included in the Federal List. Therefore the contention of the 2nd respondent, that if every offence was "criminal law" then no offence might be created by the State Legislature pursuant to Item 1 of the State List, rendering the State Legislature's power to legislate redundant, was without merit. (paras 119-120)

**(8)** In this petition, the petitioner had successfully displaced the presumption of the constitutional legitimacy of the impugned provision. Therefore, s 28 of the 1995 Enactment was invalid as being ultra vires the FC. (para 131)

Per Zabariah Mohd Yusof FCJ (*obiter dicta*):

**(9)** Inherent powers of the courts were not provided under art 4(1) of the FC, but were provided under O 92 r 4 of Rules of Court 2012, r 137 of the Rules of the Federal Court 1995 and s 25 of the Courts of Judicature Act 1964. Such provision for inherent powers of the courts did not confer new jurisdiction. Such inherent powers were general powers which were subjected to the existing jurisdiction as provided under the FC, the Courts of Judicature Act 1964 and other relevant special statutes applicable to any given case. Hence, supervisory jurisdiction of the courts, entailed appellate and revisionary jurisdiction, which was provided in art 121(1), (1B), (2) of the FC, Courts of Judicature Act 1964 and federal law, not art 4(1) of the FC (*Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor (refd)*). (para 137)

**(10)** Jurisdiction of the courts must be provided by the law/statutes. If it was not provided, then the jurisdiction was not there. Caution must be exercised here in interpreting the issue of jurisdiction in relation to art 121(1A) of the FC. (para 138)

**Case(s) referred to:**

*Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor [2008] 1 MLRA 581 (refd)*

*Abdul Kahar Ahmad v. Kerajaan Negeri Selangor Darul Ehsan; Kerajaan Malaysia & Anor (Interveners) [2008] 1 MLRA 326 (refd)*

*Ah Thian v. Government Of Malaysia [1976] 1 MLRA 410 (refd)*

*Attorney-General for Ontario & Ors v. Canada Temperance Federation & Ors [1946] AC 193; [1951] AC 179 (refd)*

*Che Omar Che Soh v. PP & Another Appeal [1988] 1 MLRA 657 (refd)*

*Dato' Seri Ir Hj Mohammad Nizar Jamaluddin v. Dato' Seri Dr Zambry Abdul Kadir [2012] 6 MLRA 259 (refd)*

*Fathul Bari Mat Jahya & Anor v. Majlis Agama Islam Negeri Sembilan & Ors [2012] 3 MLRA 371 (folld)*

*Gin Poh Holdings Sdn Bhd v. The Government Of The State Of Penang & Ors [2018] 2 MLRA 547 (refd)*

*Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 2 MLRA 1 (refd)*

*James v. Commonwealth of Australia [1936] AC 578 (refd)*

*Ketua Pegawai Penguatkuasa Agama & Ors v. Maqsood Ahmad & Ors And Another Appeal [2021] 1 MLRA 286 (refd)*

*Latifah Mat Zin v. Rosmawati Sharibun & Anor [2007] 1 MLRA 847 (refd)*

*Letitia Bosman v. PP & Other Appeals [2020] 5 MLRA 636 (refd)*

*Liyanage v. The Queen [1967] 1 AC 259 (refd)*

*Mamat Daud & Ors v. The Government Of Malaysia [1987] 1 MLRA 292 (refd)*

*Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor [2021] 3 MLRA 1 (refd)*

*Ong Chan Tow v. Regina [1963] 1 MLRH 416 (refd)*

*Proprietary Articles Trade Association and others v. Attorney-General for Canada and others [1931] AC 310 (refd)*

*PP v. Datuk Harun Haji Idris & Ors [1976] 1 MLRH 611 (refd)*

*Rethana M Rajasigamoney v. The Government Of Malaysia [1984] 1 MLRA 233 (refd)*

*Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors And Other Appeals [2021] 3 MLRA 260 (refd)*

*Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 4 MLRA 554 (refd)*

*Sukma Darmawan Sasmitaat Madja v. PP [1999] 1 MLRH 596 (refd)*

*Sulaiman Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) & Other Cases [2008] 3 MLRA 257 (folld)*

*The Government Of The State Of Kelantan v. The Government Of The Federation Of Malaya And Tunku Abdul Rahman Putra Al-Haj [1963] 1 MLRH 160 (refd)*

*ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor; Kerajaan Malaysia & Anor (Interveners) [2015] 5 MLRA 690 (refd)*

**Legislation referred to:**

Courts of Judicature Act 1964, ss 25, 83,84

Federal Constitution, arts 3(1), (4), 4(1), (3), (4), 5(1), 7(2), 8(1), (2), 74(3), 75, 76(1)(a), (2), 77, 121(1), (1A), (1B), (2), 128(1)(a), 162, Ninth Schedule, List I, Items 3, 4(e)(ii), (h), 6(e), List II, Items 1, 9

Penal Code, ss 377, 377A, 377B, 377C, 377D, 377E

Rules of Court 2012, O 92 r 4

Rules of the Federal Court 1995, r 137

Syariah Criminal Offences (Selangor) Enactment 1995, ss 28, 52(1)(a), (2)

**Other(s) referred to:**

Constance Chevallier-Govers, *Shari'ah and Legal Pluralism in Malaysia*, IAIS Malaysian Monograph Series No 2, p 20

**Counsel:**

*For the petitioner: Malik Imtiaz Sarwar (Honey Tan, Surendra Ananth & Tay Kit Hoo with him); M/s Tan Law Practice*

*For the 1st respondent: Salim Soib @ Hamid (Nur Irmawatie Daud, Husna Abdul Halim with him); SFCs*

*For the 2nd respondent: Halimatunsa'adiah Abu Hamad (Azlan Sulaiman, Yap Chen Hong with her); M/s Adi & Co*

*For the Amicus Curiae Majlis Agama Islam Wilayah Persekutuan (MAIWP): Rahim Sinwan (Muhamad Hisham Marzuki with him); M/s Nailah Ramli & Partners*

*Watching Brief for Suruhanjaya Hak Asasi Manusia Malaysia (Suhakam): Andrew Chew Chin Hock; M/s Andrew Khoo & Daniel Lo*

**JUDGMENT**

**Tengku Maimun Tuan Mat CJ:**

**Introduction**

**[1]** The issue for our determination is rather narrow. It concerns the interpretation or effect of the words 'except in regard to matters included in the Federal List' contained in Item 1, List II, Ninth Schedule of the Federal Constitution ('State List'), *vis-a-vis* the power of the State legislatures to make laws under the said Item.

**[2]** The petitioner was granted leave to file this petition pursuant to art 4(3) and (4) of the Federal Constitution ('FC'). He sought to challenge the competency of the Selangor State Legislature ('SSL') to enact s 28 of the Syariah Criminal Offences (Selangor) Enactment 1995 ('1995 Enactment').

**[3]** The prayers for relief in the Amended Petition in encl 101 read as follows:

> "(1) A declaration that s 28 of the Syariah Criminal Offences (Selangor) Enactment 1995 is invalid on the ground that it makes provision with respect to a matter to which the Legislature of the State of Selangor has no power to make laws and is therefore null and void;

(2) Costs; and/or

(3) Such further and/or other reliefs as deemed fit by this Honourable Court.".

**Background Facts**

**[4]** On 21 August 2019, the Syarie Prosecutor preferred a charge against the petitioner in Selangor Syariah High Court. The charge essentially alleged that the petitioner had, on 9 November 2018, sometime between 9pm and 10.30pm in a house at Bandar Baru Bangi, attempted to commit sexual intercourse against the order of nature with certain other male persons. The governing provision of the charge is s 28 of the 1995 Enactment read together with s 52 (attempted offences).

**[5]** The Syariah proceedings have since been stayed pending the determination of this court on the constitutionality of s 28 of the 1995 Enactment.

**The Main Arguments**

**[6]** Section 28 of the 1995 Enactment reads as follows:

"Sexual intercourse against the order of nature

28. Any person who performs sexual intercourse against the order of nature with any man, woman or animal is guilty of an offence and shall be liable on conviction to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.".

**[7]** The relevant portion of Item 1 of the State List in turn provides:

"Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to... 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... Syariah courts... shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law...".

[Emphasis added]

**[8]** The federal 'versions' of s 28 of the 1995 Enactment in this context are respectively ss 377 and 377A of the Penal Code which provide:

"**Buggery**

377. Whoever voluntarily has carnal intercourse with an animal shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to whipping.

**Carnal intercourse against the order of nature**

377A. Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature.".

**[9]** The petitioner's argument is that the above two sections of the Penal Code, comprised in federal law already govern the very subject matter of s 28 of the 1995 Enactment and accordingly, the SSL is incompetent to pass s 28 by virtue of the words 'except in regard to matters included in the Federal List' in Item 1 of the State List.

**[10]** Learned counsel for the petitioner, Dato' Malik Imtiaz stressed that this is a very important petition as it raised important questions on the structure of our criminal justice system more specifically - how the Federal and State legislative dichotomy is to co-exist.

**[11]** He argued that the starting point for this discussion is the judgment of this Court in *Sulaiman Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) & Other Cases* [2008] 3 MLRA 257 ('*Sulaiman Takrib*') although the court in that case was not ultimately required to interpret the phrase 'except in regard to matters included in the Federal List' in Item 1 of the State List which is described as the 'preclusion clause'.

**[12]** It was argued that while *Sulaiman Takrib* undertook to define the words 'precepts of Islam' in Item 1 of the State List, the Court was not called upon to interpret the preclusion clause on the facts of that case. This petition, it was submitted, breaks new ground. Learned counsel further argued that in *Sukma Darmawan Sasmitaat Madja v. PP* [1999] 1 MLRH 596 ('*Sukma Darmawan*'), this court did not consider the preclusion clause. Hence, it was contended that *Sukma Darmawan* is not authority for the proposition that s 28 of the Enactment can co-exist with its Federal counterparts.

**[13]** We shall deal with both cases and other related cases in greater detail later in this judgment.

**[14]** Learned State Legal Advisor for the State of Selangor, Dato' Salim and Ms Halimatunsa'adiah, counsel for the 1st and 2nd respondents respectively argued, in essence, that the SSL has jurisdiction to enact s 28 for the reason that it comprises an 'offence against the precepts of Islam'. They did not, with respect, deal extensively with the issue of the preclusion clause save to submit that s 28 is differently worded from its federal counterparts. They asserted that the Federal and State provisions can co-exist and that accordingly, the said s 28 is constitutionally valid.

**Preliminary Issues**

**[15]** Before proceeding to consider this petition on its merits, we will first deal with certain preliminary issues. The first issue concerns two affidavits affirmed respectively by Dato' Setia Haji Mohd Tamyes bin Abd Wahid, the

Mufti of Selangor ('encl 129') and by Professor Dr Shamrahayu binti A Aziz ('encl 130') filed by the 1st respondent in support of their case.

**[16]** The second preliminary issue concerns our observations on the limited scope of this court's jurisdiction to deal with certain issues of law posed by the petitioner on matters, which Dato' Malik argued, are incidental to this case.

**Enclosure 129 And Enclosure 130**

**[17]** The respondents relied heavily on encls 129 and 130 as a means to interpret s 28 in light of the relevant constitutional provisions. The petitioner rejected this approach and maintained that the opinion of the experts is irrelevant in the construction of the law more so of the FC. The respondents conceded that it is only the Superior Courts and not the experts who have the jurisdiction to decide issues of law more so to construe provisions of the FC. The respondents nonetheless maintained that encls 129 and 130 should not be expunged in their entirety and that this court should still give the opinions contained therein some weight.

**[18]** It is trite that experts only assist the court to determine issues of fact. They do not otherwise have any locus to provide opinions on issues of law. As far back as 1963, Winslow J said this in *Ong Chan Tow v. Regina* [1963] 1 MLRH 416:

> "Further, questions relating to the existence of debris or broken glass on the road which help to pin-point the site of a collision are clearly matters for the court and not the expert. Such an expert should not be asked to give his conclusions on matters which are eminently matters for the court to decide, otherwise he would tend to arrogate to himself the functions of the court.".

**[19]** If the above passage applies to ordinary law and how experts are in no position to provide their opinion as to the interpretation and application of it, then the same must equally be true and apply with greater force to the interpretation and application of the FC. In fact, this Court has already held in *Abdul Kahar Ahmad v. Kerajaan Negeri Selangor Darul Ehsan; Kerajaan Malaysia & Anor (Interveners)* [2008] 1 MLRA 326 ('*Abdul Kahar*'), that it is singularly the civil Superior Courts that have the jurisdiction and power to interpret the FC.

**[20]** In this vein, we are unable to see how encls 129 and 130 shed any further light or lend any assistance to the fundamental question of law posed in this petition. The two affidavits are otherwise rendered meaningless if we were to ignore the portions of them which purport to interpret the provisions of the FC. In the circumstances, we uphold the preliminary objection of the petitioner. Enclosures 129 and 130 are accordingly expunged and disregarded.

**Original Jurisdiction Of The Federal Court**

**[21]** The other issue which we find necessary to address is the scope of the arguments before us, having regard to the narrow confines of the original jurisdiction of this Court as prescribed by arts 128, 4(3) and (4) of the FC.

**[22]** The seminal case on the narrow breadth of the original jurisdiction of this Court is the judgment of Suffian LP in *Ah Thian v. Government Of Malaysia* [1976] 1 MLRA 410 ('*Ah Thian*'). In that case, His Lordship held that where a matter is not strictly for the original jurisdiction of this court, the point can be raised in the course of submission in the ordinary way before the High Court. In short, unless this court is called upon to determine constitutional questions arising from the High Court through a reference under s 84 of the Courts of Judicature Act 1964 ('CJA 1964'), this court's original jurisdiction is restricted to competency challenges.

**[23]** In *Rethana M Rajasigamoney v. The Government Of Malaysia* [1984] 1 MLRA 233, Azmi FJ explained not only the rationale for how an incompetency challenge ought to be differentiated from an inconsistency challenge, but also the reason for this Court's very narrow original jurisdiction. His Lordship said:

> "Under our Constitution, the Federal Court is an appellate court and its exclusive original jurisdiction is limited. In my opinion, this particular original jurisdiction of the Federal Court conferred by art 128(1)(a) read with s 45 of the Courts of Judicature Act 1964 should be strictly construed and confined to cases where the validity of any law passed by Parliament or any State Legislature is being challenged on the ground that Parliament has legislated on a matter outside the Federal List or Concurrent List; or a State Legislature has enacted a law concerning a matter outside the State List or the Concurrent List as contained in the Ninth Schedule to the Federal Constitution. To extend the exclusive original jurisdiction of the Federal Court to matters which are not expressly provided by the Constitution would apart from anything else, deprive aggrieved litigants of their right of appeal to the highest court in the land.".

**[24]** The powers of the Federal and State Legislatures in Malaysia are conferred and governed primarily by Chapter 1 of Part VI of the FC, the fulcrum of which is art 74 read together with the Ninth Schedule.

**[25]** The Legislative Lists are prescriptive in that the Legislature (Federal or State) has no power to enact laws on a matter unless it is permitted to do so by the FC. However, once a general permissive provision is found to exist to permit legislation to that effect, then the cannons of construction require that the said entries are not to be read narrowly or pedantically. They must instead be interpreted liberally with the widest possible amplitude, extending to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended therein (see generally: *Gin Poh Holdings Sdn Bhd v. The Government Of The State Of Penang & Ors* [2018] 2 MLRA 547 ('*Gin Poh*').

**[26]** In this regard, the effect of any 'law' passed after Merdeka Day which is inconsistent with the FC is stipulated by art 4(1) thereof which provides that:

> "This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.".

**[27]** Anyone reading the above constitutional provision would at once appreciate the potential confusion that may arise between the use of the phrases 'inconsistency challenge' and 'incompetency challenge' when art 4(1) only refers generally to the word 'inconsistent'. To appreciate the context, we find it necessary to reproduce arts 4(3) and 128(1) of the FC which substantively cater for the original jurisdiction of the Federal Court. These provisions provide as follows:

> "Article 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...
>
> Article 128
>
> (1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction:
>
> (a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State **has no power** to make laws;".
>
> [Emphasis added]

**[28]** The words used in arts 4(3) and 128(1)(a) of the FC are that the relevant Legislature (Federal or State) 'has no power' to make laws which is another way of saying that they are 'incompetent' to do so. Where a law is made incompetently it would be void and invalid and liable to be struck down under art 4(1).

**[29]** In this regard, the phrases 'inconsistency challenge' and 'incompetency challenge' are purely convenient nomenclature serving as a means to identify the procedure to mount the different challenges given their nature. As identified earlier, the High Courts have jurisdiction to hear inconsistency challenges while incompetency challenges are reserved for the original jurisdiction of the Federal Court. The original jurisdiction of this court is exclusive simply because of the gravity of the allegation that the relevant legislature has no power to make that law. This is clearly suggested by Suffian LP in *Ah Thian (supra)*, as follows:

> "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 the land.".

**[30]** As mentioned at the outset, this is a petition filed in the original jurisdiction of the Federal Court. The arguments articulated by learned counsel Dato

Malik in respect of the constitutional validity of the Syariah Courts (Criminal Jurisdiction) Act 1965, that Syariah Courts do not exercise judicial power, that Syariah Courts are not constitutionally empowered to pass sentences of whipping and imprisonment, and that they must equally observe Part II of the FC (more specifically arts 5(1) and 8(1)), are in part, of the nature that they relate to matters which may be raised before the High Courts in the ordinary way. Thus, we do not think these arguments merit discussion in this petition.

**[31]** We also find no necessity to deal with the rest of the arguments that might perhaps relate to the original jurisdiction of this court but are not strictly relevant to the question on the constitutionality of s 28 of the 1995 Enactment which is the crux of this petition.

**[32]** To reiterate, this petition only concerns the very narrow issue of the constitutional question of whether the SSL was constitutionally empowered to enact s 28 of the 1995 Enactment. That is the only issue that we find necessary to deal with.

**Our Analysis/Decision**

**[33]** The respondents were unable to address us to our satisfaction on how s 28 of the 1995 can be reconciled with the preclusion clause in Item 1 of the State List. Their limited response is twofold and to the following extent.

**[34]** Firstly, the respondents argued that Item 4(h) of the Federal List which provides for the creation of offences in respect of the matters included in the Federal List or dealt with by federal law, makes no reference to offences against the precepts of Islam. And since s 28 of the 1995 Enactment concerns unnatural sex offences which are offences against the precepts of Islam, the SSL is empowered to enact it. With respect, that is only half the argument as it does not address the preclusion clause.

**[35]** Secondly, the respondents contended that s 28 of the 1995 Enactment and its federal counterparts are differently worded and as such, the States, in this case Selangor through the SSL, are competent to pass such laws to co-exist with federal laws. They argued that their contention is supported by judgments of this court such as *Sukma Darmawan (supra)* for the proposition that Muslims are subject to both sets of laws.

**[36]** At this juncture, we shall discuss the extent of the phrase 'precepts of Islam' and its constitutional limitations.

**Precepts Of Islam And Federal Criminal Jurisdiction**

**[37]** In *Sulaiman Takrib*, the petitioner argued that certain provisions of State Enactments of the State of Terengganu were unconstitutional on the basis that the Legislature of the State had no power to make it. Several provisions were canvassed before the courts but in substance the said provisions generally made it an offence for Muslims to print, publish, produce, record, distribute,

possess, etc, of any book, pamphlet, document, etc, containing anything which is contrary to 'Hukum Syarak' as determined by fatwa. The trials before the Syariah Courts in that case were regarding a VCD which contained teachings of 'Ayah Pin'. There were also other charges for acting in contravention of a fatwa which declared that 'Ayah Pin' is a belief contrary to Hukum Syarak.

**[38]** The argument against those provisions of the law were that they did not essentially concern offences against the precepts of Islam. Basically, it was contended by the petitioner that precepts of Islam refer specifically to the five pillars of Islam and that publication of material as regards the issue of Ayah Pin was not part of the said precepts. This court in *Sulaiman Takrib* was referred to the opinion of three expert witnesses as to the interpretation of the phrase 'precepts of Islam'. Abdul Hamid Mohamad CJ held that 'precepts of Islam' can be interpreted to mean as follows:

> "[67] We have seen that the three experts agree that 'precepts of Islam' include 'law' or 'Shariah'. We should also note that the Federal Constitution uses the term 'Islamic law' which, in the Malay translation, is translated as 'Hukum Syarak'. Indeed, all the laws in Malaysia, whether Federal or state, use the term 'Islamic Law' and 'Hukum Syarak' interchangeably. It is true that, jurisprudentially, there is a distinction between 'syariah' and 'fiqh', as pointed out by Professor Dr Hashim Kamali. However, in Malaysia, in the drafting of laws and in daily usage, the word 'syariah' is used to cover 'fiqh' as well. A clear example is the name of the 'Syariah Court' itself. In fact, 'Syariah' laws in Malaysia do not only include 'fiqh' but also provisions from common law source - see, for example the respective Syariah Criminal Procedure Act/Enactments, Syariah Civil Procedure Act/Enactment; the Syariah Evidence Act/Enactments, and others. We will find that provisions of the Criminal Procedure Code, the Subordinate Courts Rules 1980 and the Evidence Act 1950, used in the 'civil courts' are incorporated into those laws, respectively.
>
> [68] Coming back to the offences created by s 14 of the SCOT, the key words are contrary to Hukum Syarak, which necessarily means the same thing as precepts of Islam. Even if it is not so, by virtue of the provision of the Federal Constitution, the words 'Hukum Syarak' as used in s 14 of the SCOT and elsewhere where offences are created must necessarily be within the ambit of 'precepts of Islam'".

**[39]** In the same case, Zaki Azmi PCA (as he then was) agreed with the interpretation of Abdul Hamid Mohamad CJ. The then PCA said:

> "[105] If the precepts of Islam, as contended by the petitioner, are only the five pillars of Islam, then all the other previous arguments by the respondent will all crumble. This court is not an expert in Islamic law. It therefore has to rely on opinions given by experts in this field. In our present case, three experts have given their opinions. They are Tan Sri Sheikh Ghazali bin Hj Abdul Rahman, Professor Dr Mohd Kamal bin Hassan and Professor Muhammad Hashim Kamali. Their curriculum vitae are spelt out in detail in the judgment of my learned Chief Justice. All the three, in principle, unanimously agree that the term 'precepts of Islam' includes the teachings in the al-Quran and

as-Sunnah. The Chief Justice has also gone at great length in his judgment to discuss and come to a conclusion why he holds that the precepts of Islam go beyond the mere five pillars of Islam. I agree with their opinions and the conclusion arrived at by the learned Chief Justice and I have nothing to add on this issue."

**[40]** In *Sulaiman Takrib*, this court unanimously accepted that the offence in question was certainly one against the precepts of Islam. Be that as it may, Abdul Hamid Mohamad CJ explained the limits of the State Legislatures to enact law in respect of such kind of offences, by setting out the following criteria:

"[34] However, this should not be confused with creation and punishment of offences. Creation and punishment of offence have further limits:

(a) it is confined to persons professing the religion of Islam;

(b) it is against the precept of Islam;

(c) it is not with regard to matters included in the Federal List; and

(d) it is within the limit provided by s 2 of the SC (CJ) Act 1965.".

**[41]** The approach taken in *Sulaiman Takrib* in respect of its interpretation of the phrase 'precepts of Islam' was adopted by this Court in *ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor; Kerajaan Malaysia & Anor (Interveners)* [2015] 5 MLRA 690 ('*ZI Publications*').

**[42]** It is not in dispute in this case that liwat which is one of the offences contemplated by s 28 of the 1995 Enactment and with which the petitioner is charged, is against the precepts of Islam. Having articulated the law on the interpretation of the phrase 'precepts of Islam', it is clear at this stage that it is insufficient for learned counsel for the respondents to simply maintain that s 28 of the 1995 Enactment is valid in view of it being an offence against the precepts of Islam. The larger question posited for our consideration is whether notwithstanding its nature as being against the precepts of Islam, the SSL is competent to enact it in light of the preclusion clause.

**Construing The Preclusion Clause In Item 1 Of The State List**

**[43]** There is not much guidance in terms of judgments from this court or any other court in Malaysia on the interpretation of the preclusion clause contained in Item 1 of the State List. It would perhaps be useful to refer to pre-existing cases to ascertain its possible meaning.

**[44]** Counsel for the petitioner referred us to case law from other jurisdictions such as Canada. The unique feature of the dichotomy in our civil and Syariah laws is peculiar to our country and exists in our FC on account of our historical circumstances. In this regard, we recall the words of Thomson in *The Government Of The State Of Kelantan v. The Government Of The Federation Of*

*Malaya And Tunku Abdul Rahman Putra Al-Haj* [1963] 1 MLRH 160, that 'the Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries'. We accordingly consider reference to our own case law sufficient.

**[45]** The first case that warrants discussion is the judgment of this court in *Gin Poh (supra)*. In that case, the court was concerned with the type of construction to be afforded to legislative entries to which the ejusdem generis rule does not typically apply to limit or restrict them. The court also cautioned that where there is a conflict between two similar provisions, the court ought to be minded to apply the rule of harmonious construction.

**[46]** Thus, while we agree with the previous decisions of this court which accorded the phrase 'precepts of Islam' the widest possible construction, we must also be mindful of the preclusion clause attached to the same entry. If we were to adopt the rather simplistic approach advanced by the respondents that it is sufficient to simply satisfy ourselves that s 28 of the 1995 Enactment is squarely encapsulated within the definition of 'precepts of Islam' without regard to the preclusion clause, that would render the preclusion clause otiose.

**[47]** The preclusion clause was considered in passing by this court in *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 1 MLRA 847 ('*Latifah*'). Most critically, Abdul Hamid Mohamad FCJ (as he then was) observed as follows:

> "[26] 'Criminal law' is a federal matter - Item 4. However, State Legislatures are given power to make law for 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' - Item 1 of State List. The two qualifications at the end of that sentence (ie 'against precepts of that religion' and 'except in regard to matters included in the Federal List') limit the offences that can be created by a State Legislature. So, where an offence is already in existence in, say, the Penal Code, is it open to a State Legislature to create a similar offence applicable only to Muslims? Does it not fall within the exception 'except in regard to matters included in the Federal List' ie, criminal law? To me, the answer to the last-mentioned question is obviously in the affirmative. Furthermore, art 75 provides:
>
> > 75. If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void.
>
> [27] Item 4(k) provides: 'Ascertainment of Islamic Law and other personal laws for purposes of federal law' is a federal matter. A good example is in the area of Islamic banking, Islamic finance and takaful. Banking, finance and insurance are matters enumerated in the Federal List, Items 7 and 8 respectively. The ascertainment whether a particular product of banking, finance and insurance (or takaful) is Shariah-compliance or not falls within Item 4(k) and is a federal matter. For this purpose Parliament has established the Syariah Advisory Council - see s 16B of the Central Bank of Malaysia Act 1958 (Act 519)."

**[48]** His Lordship appeared to suggest that the determination of whether the matter exists in federal law is indicative of the fact that the State is accordingly incompetent to make law on that same matter. In this light, learned counsel for the respondents attempted to convince us using the same line of argument that because Parliament has already enacted law on theft and rape (for example), the States are not minded to legislate similar laws in light of the existence of such federal provisions even though such offences are clearly against the precepts of Islam.

**[49]** Abdul Hamid Mohamad, sitting as Chief Justice in *Sulaiman Takrib* appeared to hold the same view as His Lordship did in *Latifah*. Indeed, in *Sulaiman Takrib*, His Lordship observed as follows:

> "CRIMINAL LAW
>
> [69] It was also argued that the offences are 'criminal law' and therefore within the federal jurisdiction to legislate. I admit that it is not easy to draw the dividing line between 'criminal law' and the offences that may be created by the State Legislature. Every offence has a punishment attached to it. In that sense, it is 'criminal law'. However, if every offence is 'criminal law' then, no offence may be created by the State Legislatures pursuant to Item 1, List II of the Ninth Schedule. To give effect to the provision of the Constitution a distinction has to be made between the two categories of offences and a line has to be drawn somewhere. The dividing line seems to be that if the offence is an offence against the precept of Islam, then it should not be treated as 'criminal law'. That too seems to be the approach taken by the Supreme Court judgment in *Mamat Daud & Ors v. The Government Of Malaysia* [1987] 1 MLRA 292. In that case the issue was whether s 298A of the Penal Code was invalid on the ground that it made provisions with respect to a matter with respect to which Parliament had no power to make. It was argued that the section was ultra vires the Constitution because, having regard to the pith and substance of the section, it was a law which ought to be passed NOT by Parliament but by the State Legislative Assemblies, it being a legislation on Islamic religion, according to art 11(4) and Item 1 of List II, Ninth Schedule of the Federal Constitution. On the other hand, it was contended by the respondent that the section was valid because it was a law passed by Parliament on the basis of public order, internal security and also criminal law according to art 11(5) and Items (3) and (4) of List I of the Ninth Schedule of the Federal Constitution.".

**[50]** His Lordship further observed that:

> "[72] Considering the difficulty to draw the line between the two categories of offences and the fact that the Supreme Court in *Mamat Daud* too did not attempt to lay down the principles for the distinctions to be made, I too shall refrain from attempting to do it as I fear that it might do more harm than good. **I would prefer that the issue be decided on a case to case basis. However, if, for example, a similar offence has been created and is found, in the federal law, since even prior to the Merdeka Day, that must be accepted as 'criminal law'. But, where no similar 'criminal law' offence has been created, then, as in the case of *Mamat Daud*, the court would have decide on it.**

> [73] In the instant case, as the offences are offences against the precept of Islam, as there are no similar offences in the federal law and the impugned offences specifically cover muslims only and pertaining to Islam only, clearly it cannot be argued that they are 'criminal law' as envisage by the Constitution.".
>
> [Emphasis added]

**[51]** With respect, we are unable to agree with His Lordship's observations as regards his categorisation of which legislature (Federal or State) is empowered to make law within the context of Item 1 of the State List. The words employed by Item 1 since Merdeka Day have always been 'except in regard to matters included in the Federal List'. The words are not: 'except in regard to matters included in the Federal Law'. There is a critical distinction between the two categorisations and His Lordship appears to favour the latter approach over the former. Analysing the constitutional validity of State-legislated law on the basis of whether the same subject matter has already been included in the Federal Law, again would render the words 'Federal List' in the preclusion clause to Item 1 nugatory.

**[52]** Hence, we are of the view that it is untenable to take the position that the power of the State Legislature to make laws by virtue of the preclusion clause is limited to the federal laws that Parliament has not already enacted. 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. Ultimately, as cautioned by this court in *Sulaiman Takrib*, the distinction would have to be drawn on a case by case basis.

**[53]** In this regard, we note that none of the parties before us have challenged the competency of Parliament to enact the federal counterparts of s 28 of the 1995 Enactment as contained in the Penal Code. Absent any challenge by any party as to Parliament's power to enact them, we must assume that the relevant Penal Code provisions were competently enacted by Parliament within the meaning of Items 3 and 4 of the Federal List and any other related legislative entries (see generally *PP v. Datuk Harun Haji Idris & Ors* [1976] 1 MLRH 611).

**[54]** We will now proceed to discuss briefly the co-existence of Federal and State-legislated criminal law in Malaysia within the context of their respective jurisdictions.

**Co-Existence Of Federal And State Laws**

**[55]** In *Sukma Darmawan (supra)*, briefly, the issue before this court concerned the charge preferred against one Sukma Darmawan Sasmitaat Madja principally under s 377D of the Penal Code. The argument before the court was that the civil courts did not have jurisdiction to try the offence and that the proper forum ought to have been the Syariah Courts. Eusoff Chin CJ observed as

follows as regards the validity of the Penal Code provision *vis-a-vis* its Syariah counterpart:

> "Section 25 of Act 559 and s 377D of the Penal Code are not *in pari materia*. While s 25 of Act 559 deals only with sexual relations between male persons, s 377D of the Penal Code deals with any act of gross indecency involving any person, and it can be between male persons, between female persons, or between male and female persons. As to what act constitutes indecency or gross indecency, the legislature itself has seen it fit not to give it a definition, but has left it entirely to the court to determine. It is not possible to define what is an indecent or grossly indecent act...".

**[56]** His Lordship made a technical distinction between the civil and Syariah versions of the offence. It is this very distinction that the respondents seek to make in their argument that the Syariah provision is constitutionally valid in spite of the Penal Code provisions. The respondents' arguments appear to resonate with the following passage of the learned Chief Justice's judgment in Sukma Darmawan:

> "We would, therefore prefer to construe both cls (1) and (IA) of art 121 together and choose a construction which will be consistent with the smooth working of the system which this article purports to regulate, and reject an interpretation that will lead to uncertainty and confusion into the working of the system. Since cl (1) of art 121 and the provisions of federal law referred to earlier confer jurisdiction on a sessions court to try offences in the Penal Code (other than those punishable with death) and has been doing so for a very long time, it would lead to grave inconvenience and absurd results to now say that the sessions court should not try an offence under s 377D because the accused is a person professing the religion of Islam.
>
> To ensure the smooth running of the system, we would apply the provisions of s 59 of the Interpretation Act so that where an act or omission is an offence under two or more written laws the offender may be prosecuted and punished under any of those laws, so long as he is not prosecuted and punished twice for the same offence. It follows that where an offender commits an offence triable by either the civil court or a syariah court, he may be prosecuted in either of those courts."

**[57]** Raus Sharif PCA (as he then was) made a similar observation in *ZI Publications (supra)*, as follows:

> "[31] In conclusion we wish to highlight that a Muslim in Malaysia is not only subjected to the general laws enacted by Parliament but also to the state laws of religious nature enacted by Legislature of a state. This is because the Federal Constitution allows the Legislature of a state to legislate and enact offences against the precepts of Islam. Taking the Federal Constitution as a whole, it is clear that it was the intention of the framers of our Constitution to allow Muslims in this country to be also governed by Islamic personal law. Thus, a Muslim in this country is therefore subjected to both the general laws enacted by Parliament and also the state laws enacted by the Legislature of a state.".

**[58]** Another general illustration that Muslims are subject to two types of laws is the judgment of the Court of Appeal in *Ketua Pegawai Penguatkuasa Agama & Ors v. Maqsood Ahmad & Ors And Another Appeal* [2021] 1 MLRA 286 ('*Maqsood Ahmad*'). The Court of Appeal in that case took pains to examine the history of Islamic law in Malaysia and its co-existence with the civil laws in the country. We find that we are in complete agreement with it and have nothing further to add as such exposition also appears to be concomitant with that of Salleh Abas LP's in *Che Omar Che Soh v. Public Prosecutor & Another Appeal* [1988] 1 MLRA 657.

**[59]** While Muslims in this country are undoubtedly subject to both kinds of law, namely, civil laws on the one side and Syariah laws on the other, the extent of the application of Syariah laws to Muslims is limited by Item 1 of the State List. The preclusion clause in Item 1 further restricts the power of the State Legislatures to enact such laws by subjecting it to the Federal List.

**[60]** Sukma Darmawan is with respect, not the authority for the proposition that the Federal and State provisions may co-exist much in the way the respondents suggested. This is because the question in that case was not in relation to a petition filed in the original jurisdiction of this court where the competency of a State Legislature to make such law was challenged. Instead, the question was quite the opposite, namely, whether the civil courts are empowered to hear such offences in light of art 121(1A) of the FC. Accordingly, that was the extent of the decision of the Federal Court. In a same way, the dictum of Raus Sharif PCA cannot be extended beyond the context in which His Lordship made that observation.

**[61]** A clear example of how the Federal and State legislative dichotomy exists can be seen in *Latifah (supra)*. The case concerned a dispute between Muslim parties as regards the proprietorship of monies contained in the deceased's bank account. The 1st respondent had taken out a petition for letters of administration and the monies were included in the deceased's account which the appellant contended were gifted to her by the deceased. The exact nature of the gift, as contended, was a 'hibah'. The sole question before the High Court was whether the 'hibah' existed and the court accordingly assumed jurisdiction and decided that there was no such 'hibah' upon relying on principles of Islamic law. On appeal, the Court of Appeal reversed and held that the question of 'hibah' should have been ventilated in the Syariah Court having regard to art 121(1A) of the FC. The judgment of the Court of Appeal was upheld by this court.

**[62]** Most critically, Abdul Hamid Mohamad FCJ (as he then was) observed that upon a proper construction of the Federal and State Lists, it was true that 'succession, testate and intestate; probate and letters of administration' are contemplated as a part of federal law but that Islamic personal law (which is essentially what the dispute was) was for the jurisdiction of the Syariah Courts. His Lordship's observations are reproduced to illustrate the concurrent yet unmingling application of both civil and Syariah laws, as follows:

"[56] In the case of letters of administration (again I am only referring to non-small estates), an application is made to the civil High Court for the grant of a letter of administration. When the letter of administration is obtained, the administrator is appointed, and in case of an estate of a Muslim, the administrator will obtain a 'Sijil Faraid' from the syariah court which states who are the beneficiaries and their respective shares, in accordance with Islamic law. If the estate consists of immovable property, another application is made to the civil High Court for a vesting order. All that the civil High Court does in such an application is that, being satisfied with all the procedural requirements, the civil High Court makes a vesting order in accordance with the 'Sijil Faraid'. This second application is not necessary where the assets to be distributed are movable assets. However, the Administrator still requires a 'Sijil Faraid' for purpose of distribution.".

**[63]** Earlier in the judgment, His Lordship had stated thus:

"[45] The point to note here is that both courts, civil and Syariah, are creatures of statutes. Both owe their existence to statutes, the Federal Constitution, the Acts of Parliament and the State Enactments. Both get their jurisdictions from statutes, ie Constitution, federal law or State law, as the case may be. So, it is to the relevant statutes that they should look to determine whether they have jurisdiction or not. Even if the Syariah Court does not exist, the civil court will still have to look at the statutes to see whether it has jurisdiction over a matter or not. Similarly, even if the civil court does not exist, the Syariah Court will still have to look at the statute to see whether it has jurisdiction over a matter or not. Each court must determine for itself first whether it has jurisdiction over a particular matter in the first place, in the case of the Syariah Courts in the States, by referring to the relevant State laws and in the case of the syariah court in the Federal Territory, the relevant Federal laws. Just because the other court does not have jurisdiction over a matter does not mean that it has jurisdiction over it. So, to take the example given earlier, if one of the parties is a non-Muslim, the Syariah Court does not have jurisdiction over the case, even if the subject matter falls within its jurisdiction. On the other hand, just because one of the parties is a non-Muslim does not mean that the civil court has jurisdiction over the case if the subject matter is not within its jurisdiction.

...

[47] The problem is, everyone looks to the court to solve the problem of the Legislature. Judges too, (including myself), unwittingly, took upon themselves the responsibility to solve the problem of the legislature because they believe that they have to decide the case before them one way or the other. That, in my view is a mistake. The function of the court is to apply the law, not make or to amend law not made by the Legislature. Knowing the inadequacy of the law, it is for the Legislature to remedy it, by amendment or by making new law. It is not the court's function to try to remedy it.

[48] There are cases in which some of the issues fall within the jurisdiction of the civil court and there are also issues that fall within the jurisdiction of the syariah court. This problem too will have to be tackled by the Legislature. Neither court can assume jurisdiction over matters that it does not have just because it has jurisdiction over some of the matters arising therein.

Neither court should give a final decision in a case only on issues within its jurisdiction.".

**[64]** We agree with His Lordship generally on the approach to be taken by the courts in determining jurisdiction. However, in light of the judgments of this court in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 4 MLRA 554 and *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 2 MLRA 1, in all cases, the civil Superior Courts retain supervisory jurisdiction which is inherent in their function under arts 4(1) and 121(1) of the FC. Thus, unless their jurisdiction is very clearly excluded by virtue of subject matter under art 121(1A), the question that the civil Superior Courts have no jurisdiction to determine any form of dispute does not arise.

**[65]** The cases cited above, in our view illustrate that the question is not so much about 'co-existence' but more about the independent application of the two streams of laws - civil and Syariah - within their respective jurisdictions. So long as the two streams exist within the confines of their jurisdiction, the two laws can co-exist - so to speak. However, where the laws concern the same subject matter, does the same rationale hold? Clearly, reading the preclusion clause harmoniously with the rest of Item 1 of the State List suggests that it is not legally possible.

**[66]** The FC must be interpreted in light of its context. The relevant part of art 3(1) of the FC provides that Islam is the religion of the Federation. However, art 3(4) very clearly stipulates that nothing in art 3 derogates from any other provision of the FC.

**[67]** In terms of legislative power, art 74(3) of the FC provides that:

"The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.".

**[68]** The conditions and restrictions referred to in art 74(3) must surely include the preclusion clause in Item 1 of the State List. 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 FC 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. This is borne out by the Reid Commission Report 1957, as follows:

"82. We have already explained the way in which powers are now divided between the Federation and the States and we have noted some of the difficulties which have arisen from this division. We think that it would be impracticable to continue the present system in so far as, with regard to many matters, it confers legislative power on the Federation and executive power on the States. If Malaya is to be a democratic country the Government of each

State must be controlled by its elected Legislative Assembly, and we must envisage the possibility that from time to time the party in power in one or more of the States may differ in outlook, and policy from the party in power in the Federation. It appears to us that in such circumstances the present division of powers would probably lead to friction and might well have graver consequences. We therefore recommend that in future legislative power and executive responsibility should always go together. We have specified those subjects which we think ought to be Federal and those which we think ought to be State subjects, and where necessary we shall give our reasons later for our allocation. We shall also explain why we propose that there should be concurrent powers. But, before proceeding to deal with specific subjects, we wish to emphasise that with regard to any which are in the Federal List not only should the Federal Parliament have the sole power to legislate but the Federal Government should also have the ultimate responsibility for determining policy and controlling administration. And similarly, with regard to any subject in the State List, in general the State Legislature should have the exclusive power to legislate and the State Government should have the exclusive responsibility for determining policy and controlling administration. **We say that 'in general' the State Legislative Assembly and the State Government should have these powers and responsibilities because we think it necessary to recommend that in certain particular circumstances which we shall explain later the Federation should have overriding powers.**".

[Emphasis added]

**[69]** The above passage becomes clearer when read with arts 75 and 77 of the Federal Constitution which provide:

"Article 75

Inconsistencies between federal and State laws

75. If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void.

Article 77

Residual power of legislation

77. The Legislature of a State shall have power to make laws with respect to any matter not enumerated in any of the Lists set out in the Ninth Schedule, not being a matter in respect of which Parliament has power to make laws.".

**[70]** The above constitutional provisions set out the general character of our FC that the primary legislative power resides with Parliament subject to any residual powers conferred unto the State Legislatures.

**[71]** With that, we now turn our attention to the specific question of power of legislation on 'criminal law'. The petitioner referred us to numerous authorities on the definition of 'criminal law'. We do not think those cases (local and international) need to be relied upon given that there is no dispute that we are dealing with criminal law on the facts of this petition.

**[72]** The general power of Parliament to enact criminal law is provided for in Items 3 and 4 of the Federal List. Item 3 provides:

> "3. Internal security, including:
>
> (a) Police; criminal investigation; registration of criminals; public order;
>
> (b) Prisons; reformatories; remand homes; places of detention; probation of offenders; juvenile offenders;
>
> (c) Preventive detention; restriction of residence;
>
> (d) Intelligence services; and
>
> (e) National registration.".

**[73]** Item 4 in turn provides as follows:

> "4. Civil and criminal law and procedure and the administration of justice, including:
>
> (a) Constitution and organization of all courts other than Syariah Courts;
>
> (b) Jurisdiction and powers of all such courts;
>
> (c) Remuneration and other privileges of the judges and officers presiding over such courts;
>
> (d) persons entitled to practise before such courts;
>
> (e) ...
>
> (f) Official secrets; corrupt practices;
>
> (g) ...
>
> (h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;
>
> (i) ...
>
> (j) ...
>
> (k) ...; and
>
> (l) Betting and lotteries.".

**[74]** It is quite clear from the wordings of arts 74(3), 75 and 77 that the primary power of legislation in criminal law resides in Parliament. This is further borne out by the State List in terms of the powers of the State Legislatures to enact criminal laws, namely that the powers are subjected to the preclusion clause in Item 1 of the State List and Item 9 of the State List. For clarity, these provisions are reproduced as follows:

"Item 1

1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam... 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...

Item 9

9. Creation of offences in respect of any of the matters included in the State List or dealt with by State law, proof of State law and of things done thereunder, and proof of any matter for purposes of State law.".

**[75]** In terms of Item 1, the power to legislate on offences is wide insofar as the 'precepts of Islam' are concerned but limited by the preclusion clause. Item 9 in turn allows the State Legislatures to enact offences but strictly within the confines of what the State List and State law may allow. Conspicuously absent from the entirety of the State List is any entry of the likes of Items 3 and 4 of the Federal List. The natural conclusion, reading all these entries harmoniously and in context suggests that primacy in terms of the enactment of offences is reposed by the FC in Parliament.

**[76]** The only clear limitation on Parliament to make laws apart from the general *modus operandi* of the FC is in respect of Islamic personal law. This is clear from Item 1 of the State List which only allows Parliament the full breadth of its powers on Islamic personal law in respect of the Federal Territories. This power is also expressly limited in art 76(2) read together with art 76(1)(a) which provide:

"76. (1) Parliament may make laws with respect to any matter enumerated in the State List, but only as follows, that is to say:

(a) for the purpose of implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organization of which the Federation is a member...

...

(2) No law shall be made in pursuance of para (a) of cl (1) with respect to any matters of Islamic law or the custom of the Malays or to any matters of native law or custom in the States of Sabah and Sarawak and no Bill for a law under that paragraph shall be introduced into either House of Parliament until the Government of any State concerned has been consulted.".

**[77]** A similar preclusion on the powers of Parliament is present in Item 4(e)(ii) of the Federal List in that Parliament is not permitted to enact civil laws mentioned in Item 4(e)(ii) which generally touch on substantially the same subject matters contained in Item 1 of the State List. The meaning derived from reading Item 4(e) and even Item 6(e) of the Federal List with Item 1 of the State List harmoniously is that Parliament's power to make laws on Islamic personal law is confined to the Federal Territories therein specified.

**[78]** The authority on the limitation on Parliament to do this whether directly or in pith and substance is the judgment of the Supreme Court in *Mamat Daud & Ors v. The Government Of Malaysia* [1987] 1 MLRA 292 ('*Mamat Daud*'). And, while *Mamat Daud* was a split decision, all Justices agreed on the existence of the Federal and State dichotomy but disagreed on the extent of its application on pith and substance on the facts of that case. In fact, in a passage upon which the petitioner in this case also relied and which supports our reasoning above, Abdoolcader SCJ in His Lordship's dissenting judgment observed, as follows:

> "It is now necessary to examine and consider the Federal and State Lists in the Ninth Schedule to the Constitution to ascertain the Items relevant for the purpose of determining the validity of s 298A. In the Federal List, Item 3 deals with internal security genjnerally and includes in paragraph (a) thereof public order. I would pause to observe that I have given an exegesis on public order and what it involves in my judgment in *Re Application Of Tan Boon Liat @ Allen; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 1 MLRH 107 which was affirmed by the Federal Court ([1977] 1 MLRA 521). Item 4 in the Federal List refers, *inter alia*, to criminal law and procedure and includes in paragraph (h) thereof the creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law.
>
> Item 1 in the State List provides specifically for matters relating to the religion of Islam including, *inter alia*, the creation and punishment of offences by persons professing the religion of Islam against the precepts of that religion, except in regard to matters included in the Federal List. **The preclusion clause must clearly envisage and give effect to the power of Parliament under Items 3 and 4 in the Federal List to legislate in regard to public order and criminal law and procedure and under paragraph (h) of Item 4 for the creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law, unlike the specific exception made in relation to Islamic personal law in paragraph (e)(ii) of Item 4 and the matters specified in subparagraph (i) thereof.**
>
> Item 1 in the State List, however, excludes its application to the Federal Territories of Kuala Lumpur and Labuan as the subject matter of that Item in respect of the Federal Territories comes within the federal legislative power under Item 6(e) in the Federal List. When it comes to different aspects of personal law affecting persons other than those professing the religion of Islam, in the field of such areas as family law, marriage, divorce, adoption and succession, federal law provides for these matters under Item 4(e)(i) in the Federal List even though it might perhaps be arguable, predicated on the premise that the matter of religion other than Islam (which is specifically provided for in Item 1 in the State List) comes within the residual power of legislation of the Legislature of a State under art 77 of the Constitution, that in doing so Parliament may appear to trench into the sphere of religious precepts and practice, but paragraph (k) of Item 4 in the Federal List which provides for the ascertainment of Islamic law and other personal laws for the purposes of federal law would militate against any such argument, quite apart from the likely eventuation of the double aspect doctrine in the circumstances.".
>
> [Emphasis added]

**[79]** Learned counsel for the respondents submitted that s 28 of the 1995 Enactment is worded more broadly than the federal versions. In our view, that is wholly immaterial. What matters is whether, in pith and substance, s 28 of the 1995 Enactment relates to a matter which falls under the Federal List. In our judgment it does.

**[80]** Overall, the entire tenor of all the foregoing Articles read as whole and harmoniously suggests that the States do not have an overriding power of legislation on the subject of criminal law. Their power is strictly designated to matters which Parliament does not otherwise have power to make laws on.

**[81]** Based on the foregoing discussion, it can be postulated that having regard to the preclusion clause in Item 1 of the State List, when the two Legislatures (Federal and State) legislate a law concerning the subject matter of criminal law, and the two laws touch on the same matter, the said laws cannot co-exist even if the said law is said to be against the precepts of Islam.

**[82]** This leaves us with the substantive question on the validity of s 28 of the 1995 Enactment.

**Constitutional Validity Of Section 28 Of The 1995 Enactment**

**[83]** As stated earlier, there is no issue as regards the constitutionality of the provisions contained under the header 'Unnatural Offences' of the Penal Code. And we have no reason to doubt that the said Penal Code provisions which are substantively mirrored in s 28 of the 1995 Enactment, are within the purview of Items 3 and 4 of the Federal List.

**[84]** Section 377A was first introduced pre-Merdeka but is deemed as an 'existing law' under art 162 of the FC. In any event, the entire portion on 'Unnatural Offences' in the Penal Code has undergone several amendments post-Merdeka Day to the extent that the said provisions are no longer what they were pre-Merdeka Day. For all intents and purposes, we deem such laws to be post-Merdeka Day law passed by Parliament under the powers conferred on it under Items 3 and 4 of the Federal List as aforementioned.

**[85]** Given the above, the natural consequence is that the subject matter upon which s 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, s 28 of the 1995 Enactment is inconsistent with the FC and is therefore void.

**Conclusion**

**[86]** For the avoidance of doubt, the State Legislatures throughout Malaysia have the power to enact offences against the precepts of Islam. As decided by this court in *Sulaiman Takrib (supra)* and other related judgments, the definition

of 'precepts of Islam' is wide and is not merely limited to the five pillars of Islam. 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.

**[87]** As suggested during the hearing of this petition and by way of example: corruption and corrupt practices, rape, theft, robbery, homicide (including murder and culpable homicide) are all offences against the dictates, injunctions and precepts of Islam. The existence of the preclusion clause however serves to restrict the States from making laws on these subjects which, as rightly conceded by the respondents, remain within the domain of Parliament to regulate and enact within the general design curated by our FC.

**[88]** The carefully selected use of the words 'Federal List' in Item 1 of the State List as opposed to 'Federal Law' provides sufficient answer to the respondents' general argument that the State Legislatures are empowered to make laws upon matters not already provided in federal law.

**[89]** In light of all the above, we unanimously grant Prayer (1) of the amended petition. As for Prayer (2), we make no order as to costs in view of s 83 of the CJA 1964 which stipulates that the Federal Court shall not make any order as to the costs of any proceeding had under its original jurisdiction.

**Azahar Mohamed CJM:**

**Introduction**

**[90]** This Petition that is moved pursuant to cl (3) of art 4 and cl (1)(a) of art 128 of the Federal Constitution ("FC") is important. In essence, we are asked to decide on who should legislate the offence with respect to sexual intercourse against the order of nature? Is it Parliament or the State Legislatures that have powers to enact such a law? In the context of our unique federal system of Government in which a dual legal system of Civil and Syariah operates in parallel to each other, this question has significant implication pertaining to the legislative competence of State Legislatures to enact on offences against the precepts of Islam, or commonly referred to as Syariah or Islamic criminal offences.

**[91]** I have had the benefit of reading the judgment of the learned Chief Justice in draft. With which I fully agree. I write this concurring judgment to clarify the important constitutional issues that were raised by the parties and to give my views why the remedies sought by the Petitioner should be granted.

**Federal System Of Government**

**[92]** First and foremost, it is relevant to reiterate that Malaysia is a federation of 13 States with a division of legislative power between the Parliament and the States Legislatures. In our federal system of Government, only the FC is supreme; Parliament and the States Legislatures are subject to the FC. Under

Part VI of the FC, the legislative competence of Parliament and the State Legislatures is clearly demarcated. There are certain subjects that can only be legislated upon by Parliament, some subjects only by the State legislatures, and others by both Parliament and State legislatures. These are distinctly set out and regulated in the Ninth Schedule of the FC (List I for Federal matters, List II for State matters, and List III for Concurrent matters).

**[93]** Under List I (Federal List), "criminal law" is a Federal matter that is reserved for Parliament and therefore beyond the legislative competency of State Legislatures. On the other hand, "offences against the precepts of that religion (Islam)" are in List II (State List) with respect to which the State Legislatures have legislative powers to make law. It was pursuant to the State List, the Selangor State Legislature ("the State Legislature") enacted s 28 of the Syariah Criminal Offences (Selangor) Enactment 1995 ("1995 Enactment"), the subject matter before us, which created the offence of sexual intercourse against the order of nature ("the impugned provision"). It is also significant to note that almost all the States have criminalised sexual intercourse against the order of nature under their respective Syariah Criminal Offences Enactments.

**[94]** Parliament and the State Legislatures' legislative powers and authority to make laws are therefore derived explicitly from the FC. This means that both the Legislatures must not exceed their constitutional authority to legislate. In *Liyanage v. The Queen* [1967] 1 AC 259, the Privy Council held that powers in countries with written constitutions must be exercised in accordance with the terms of the constitution from which the powers were derived. It cannot therefore promulgate laws, which are contrary to the constitution; otherwise, it is unconstitutional. This has been explained in *Mamat Daud & Ors v. The Government Of Malaysia* [1987] 1 MLRA 292 ("*Mamat Daud*") where Abdoolcader SCJ said:

> "In a federal structure which is based upon the distribution of legislative powers between the Central or Federal Legislature (Parliament) and Provincial or State Legislatures, the powers of the legislatures are limited by the Constitution. A legislative act would be unconstitutional and invalid if not warranted by the Items of legislative power in the appropriate legislative list. When a controversy arises whether a particular legislature is not exceeding its own and encroaching on the other's constitutional power, the court has to consider the real nature of the legislation impugned, its pith and substance, to see whether the subject dealt with is in the one legislative list or in the other. When a legislature purports to enact legislation with reference to a particular head of legislative power, it has to comply with the conditions circumscribing that power."

**[95]** The FC has vested the Federal Court with the exclusive power to strike down laws made without legislative power under cl (3) of art 4 and cl (1)(a) of art 128 of the FC. The learned Chief Justice has explained in the judgment that with the exception of the Federal Court, no other court in the land has this distinct and exclusive jurisdiction. In this regard, it has to be noted that it is well settled principle of law that there is always a presumption in favour of the

constitutionality of a legislation enacted by the Legislatures and the burden is upon him who attacks it to establish the contrary. That is to say, in this Petition we are concerned with the question of whether the Petitioner has in any way displaced the presumption of the constitutional legitimacy of the impugned provision. And it is to his case that I now turn.

**The Petitioner's Case**

**[96]** The learned Chief Justice has set out the background facts and the contentions of the Petitioner as well as the respondents. I shall not repeat them here, save to emphasise that the Petitioner's principal contention is that the State Legislature's competence to legislate offences against precepts of Islam pursuant to the State List is qualified by the phrase 'except in regard to matters included in the Federal List' ("Preclusion clause"). There is also no necessity for me to quote the impugned provision and the relevant provisions of the FC as they are fully set out in the learned CJ's judgment.

**[97]** Suffice for me to say that for the present purpose, the validity of the impugned provision depends upon its fulfilling the stipulations as found in Item 1 of the State List, and they are:

(i) The offence provided therein is against the precepts of the religion of Islam ("Precepts of Religion Point"); and

(ii) The offence is not in respect of the matters included in the Federal List ("Preclusion Clause Point")

**Precepts Of Religion Point**

**[98]** The phrase "precepts of Islam" is significant. It should be the starting point in the analysis to determine whether or not the impugned provision is within the legislative competency of the State Legislature. The judgments of this court in *Sulaiman Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) & Other Cases* [2008] 3 MLRA 257 ("*Sulaiman Takrib*") and *Fathul Bari Mat Jahya & Anor v. Majlis Agama Islam Negeri Sembilan & Ors* [2012] 3 MLRA 371 ("*Fathul Bari*") represent the law on the subject matter as we apply today. Based on the two authorities, the law as it stands is this. The phrase "precepts of Islam" is wide and that would include every single rule, conduct, principle, commandment, and teaching of Islam prescribed in the Syariah, including Islamic criminal law. Precepts of Islam should not be confined to the five basic pillars of Islam only. Islamic criminal law is therefore, included within the phrase 'the creation and punishment of offences against the precepts of Islam'.

**[99]** This, of course, raises an important question whether the impugned provision is an offence against the precepts of Islam. Before addressing this issue, it is relevant to consider the legislative history of the impugned provision. The State of Selangor had a specific legislation on Islamic criminal law, that is, the Administration of Muslim Law Enactment 1952 (Selangor) ("the 1952

Enactment"). This Enactment contained 27 provisions under Part IX, titled "Offences" which included, among others, offences on intoxicating liquor, 'kheluat', illicit intercourse between divorce persons, religious teaching, false doctrines and attempts and abetment. The unnatural sex offence as in the impugned provision was not made as an offence in the 1952 Enactment. Four decades later, the State Legislature enacted the 1995 Enactment. The 1995 Enactment was granted Royal Assent on 10 January 1996 and came into force from 22 November 1996. The preamble encapsulates that it is an enactment to provide for Syariah criminal offences and matters relating thereto, whereby the commission or omission of such acts are against the precepts of Islam. The impugned provision was enacted with the passing of the 1995 Enactment, which governs on the offence and punishment of sexual intercourse against the order of nature for Muslims in the state of Selangor.

**[100]** The 2nd respondent has tendered two opinions of experts to support the contention that the impugned provision is an offence against the precepts of Islam. The first is Professor Emeritus Tan Sri Dr Mohd Kamal bin Hassan who is the Advisor for Centre for lslamisation (CENTRIS) at the International Islamic University Malaysia (IIUM). And secondly, Professor Emeritus Dato' Paduka Dr Mahmood Zuhdi bin Haji Abd Majid who is an Associate Research Fellow in Syariah at University of Malaya (UM). The reference made to the expert opinions of qualified and eminent Islamic scholar is permissible as it is in tandem with the position made by this court in *Sulaiman Takrib* and *Fathul Bari*, which have referred to the opinions of expert in understanding the concept of precepts of Islam.

**[101]** Professor Emeritus Tan Sri Dr Mohd Kamal bin Hassan who also previously gives an opinion in *Sulaiman Takrib*, *inter alia*, states as follows:

> "2.2 In the context of the religion of Islam, the expression 'precepts of Islam' has a broad meaning to include commandments, rules, principles, injunctions -all derived from the Qur'an, the Sunnah of the Prophet, the consensus of the religious scholars ("ljma") and the authoritative rulings (fatwas) of legitimate religious authorities, for the purpose of ensuring, preserving and/ or promoting right beliefs, right attitudes, right actions and right conduct amongst the followers of Islam.
>
> 2.3 Withregard to the scope of applicability of the precepts of Islam, human actions and behavior fall into three major and interrelated domains, namely creed (aqidah), law (shari'ah) and ethics (akhlaq). The creed is concerned with right beliefs and right attitudes (deemed as actions of the heart), the law with right actions and ethics with right conduct, right behavior and right manners.
>
> 2.4 Therefore the precepts of Islam possess the force of enjoining or commanding or prohibiting actions or behavior which Islam considers good (ma'ruf) or bad (munkar), correct or deviant, obligatory (wajib), recommendatory (sunnah), undesirable (makruh), permissible (halal), prohibited (haram), allowable (mubah).

8. Dalam Konteks Petisyen ini, precepts of Islam turut merangkumi kesemua jenis kesalahan dalam Hukum Syarak dan perbuatan kelakuan jenayah yang melanggar Hukum Syarak, termasuk persetubuhan bertentangan dengan hukum tabi'i."

**[102]** Professor Emeritus Dato' Paduka Dr Mahmood Zuhdi bin Haji Abd Majid produced an opinion with regard to the "Hukum Melakukan Hubungan Seks Di Luar Tabi'i" according to Islamic law. Among others he said that."Pengharaman liwat adalah jelas menunjukkan liwat adalah satu kesalahan di bawah undang-undang Syariah dan ianya terpakai kepada semua orang yang beragama Islam tanpa sebarang pengecualian."

**[103]** In my opinion, applying the meaning of the phrase 'precepts of law' as stated earlier and based on the two expert opinions, the impugned provision that relates to unnatural offence namely 'seks luar tabi'i' or 'liwat' is undeniably an offence against the precepts of Islam. It is considered haram (prohibited).

**[104]** That being the case, I find that the impugned provision enacted by the State Legislature clearly falls within the scope of precepts of Islam enumerated in the State List. In other words, the impugned provision falls within the precept of Islam legislative field. Whether the impugned provision was validly enacted by the State Legislature, and not *ultra vires* the FC, is a question that must be dealt with separately. This leads me to the preclusion clause point.

**Preclusion Clause Point**

**[105]** The central question that we must ask here is whether or not the impugned provision is precluded by the preclusion clause as it is being under the Federal List. In other words, whether the impugned provision intrudes into area where it does not belong. The Petition turns principally upon this question. This is the first time this Court addresses this point directly.

**[106]** The preclusion clause is an important constitutional provision that I must look at carefully. I begin the task of interpretation of the clause by carefully considering the language used. Indeed, the meaning and scope of the preclusion clause is one of construction, and the ultimate resort must be determined upon the actual words used, read not *in vacuo* but as occurring in a single complex instrument, in which one part may throw light on another (see *James v. Commonwealth of Australia* [1936] AC 578). As can be seen, the FC deliberately used specific language in describing the nature of the preclusion clause. In my opinion, the wordings of the preclusion clause are compellingly clear and unequivocal and admit of no other interpretation. The clause is as plain and clear as language can express it. It is an established canon of constitutional construction that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument and effect should be given to every part and every word of a Constitution (see *Dato' Seri Ir Hj Mohammad Nizar Jamaluddin v. Dato' Seri Dr Zambry Abdul Kadir* [2012] 6 MLRA 259). This clause is expressed

in wide-ranging phraseology and I have no doubt that according to the terms the power of the State Legislature to legislate on offences against the precepts of Islam is regulated by the words "except in regard to matters included in the Federal List". The preclusion clause functions as a limitation imposed by the FC on the State Legislatures to make laws on Islamic criminal law An important point to note is that the State List itself expressly recognises that certain areas of Islamic criminal law are admittedly part of the jurisdiction of Parliament and as a result any matter assigned to Parliament is outside the legislative competence of the State Legislature. 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 Syariah", 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. In this context, on the preclusion clause, Abdoolcader SCJ had this to say in Mamat Daud as follows:

> "Item 1 in the State List provides specifically for matters relating to the religion of Islam including, *inter alia*, the creation and punishment of offences by persons professing the religion of Islam against the precepts of that religion, except in regard to matters included in the Federal List. The preclusion clause must clearly envisage and give effect to the power of Parliament under Items 3 and 4 in the Federal List to legislate in regard to public order and criminal law and procedure and under paragraph (h) of Item 4 for the creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law, unlike the specific exception made in relation to Islamic personal law in paragraph (e)(ii) of Item 4 and the matters specified in subparagraph (i) thereof."

**[107]** It is for this reason that I conclude the State legislature's competence to legislate over Islamic criminal offences is neither exclusive nor comprehensive. Viewed in this perspective, I agree with the views of Dr Constance Chevallier-Govers in his IAIS Malaysian Monograph Series No 2 entitled *Shari'ah and Legal Pluralism in Malaysia* (at p 20), that the preclusion clause "clearly imply that the State power over Islamic law offences is subordinated to federal power and is residual and not inherent". There is an important point to make about all of this: the State Legislature is not a legislative body with the sole right to legislate on Islamic criminal offences. For this reason, I reject the main contention of both the respondents to the effect that if the offence is an offence against the precepts of Islam, then it should not be treated as 'criminal law' under Item 4 of the Federal List. Such an argument needs to be clearly justified by reference to the constitutional language of the terms of the FC. I see nothing in the State List, or elsewhere in the FC that is capable of such a construction. Both of the respondents' arguments tend to miss the point that without any express provision to the contrary, the clear wordings of the preclusion clause must be given full effect. The respondents failed to accord this clause the importance it deserved.

**[108]** It is at this point that it is imperative to consider the extent of the Federal's legislative power through Parliament to make laws with respect to 'criminal law' enumerated in the Federal List. Clause 1 of art 74 of the FC provides the Parliament power to make laws with respect to any matters enumerated in Item 4 of the Federal List.

**[109]** Two things can be said of the above constitutional provision. First, the words "with respect to" in art 74 must be interpreted with extensive amplitude. The widest possible construction, according to the ordinary meaning of the words in the entry, must be put upon them. I have discussed this area of the law in *Letitia Bosman v. PP & Other Appeals* [2020] 5 MLRA 636. And secondly, it is one of the canons of constitutional interpretation that a constitution can be interpreted in the light of its historical records during the drafting stage. The FC was the work of the Reid Commission. In its report, among others, the Reid Commission stated as follows:

> "To make recommendations for a federal form of constitution for the.whole country as a single, self-governing unit within the Commonwealth based on Parliamentary democracy with a bicameral legislature, which would include provision for :
>
> (i) The establishment of a strong central Government with the States and Settlements enjoying a measure of autonomy (the Question of the residual legislative power to be examined by, and to be the subject of recommendations by the Commission and with machinery for consultation between the central Government and the States and Settlements on certain financial matters to be specified in the Constitution."

**[110]** Undeniably, the federal-state relationship and allocation of powers reveal a FC with a central bias. The structure created in 1957 clearly bestows a preponderance of power on the centre (see *50 years of Malaysia, Federalism Revisited*, Edited by Andrew J Harding and James Chin. And as submitted by learned counsel for the Petitioner "...The Preclusion Clause reinforces Parliament's exclusivity over the criminal justice system (which encompasses offences created under para 9, State List". In the context of our case, this is reflected in Item 4 of the Federal List, particularly Item 4(h) which authorises Parliament to make laws for criminal law and procedure and the administration of justice, including the "Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law". The FC recognises Parliament's primacy over the administration of criminal justice system in our country. In *Mamat Daud*, Hashim Yeop A Sani SCJ observed as follows:

> "The words used in Item 4 of the Federal List are 'civil and criminal law and procedure'. The power conferred by Item 4 of the Federal List is wide and is subject only to creation of offences in respect of matters included in the State List as stated in Item 9 of the State List in the Ninth Schedule to the Federal Constitution. Article 74(4) of the Constitution provides that where general as well as specific expressions are used in the List, the generality of the former

shall not be taken to be limited by the latter. The words 'civil and criminal law and procedure' when read with art 74(4) of the Constitution would thus clearly vest Parliament with the power to enact the law."

**[111]** Criminal law is a matter within the domain of Parliament. Laws with respect to "criminal law" and criminal justice system are provided for in Item 4 of the Federal List in broad terms. Parliament is only precluded from creating offences in respect of matters in the State List. What is "criminal law" is not defined in the FC or any other statutes.

**[112]** To take the argument further, the term 'criminal law' traditionally refers to acts and omissions that are prohibited by penal provisions (see for instance, *Proprietary Articles Trade Association and others v. Attorney-General for Canada and others* [1931] AC 310. In our jurisdiction, most of the penal provisions are contained in the legislations enacted by Parliament. The Penal Code, for example, declares what acts or omissions are offences and also provides for their punishment. This includes act or omission done intentionally, knowingly, voluntarily, fraudulently or dishonestly. It classifies offences such as those affecting the human body (eg, murder, causing hurt, carnal intercourse against the order of nature), affecting property (eg, theft, robbery), affecting reputation (eg, criminal defamation, insult), affecting public peace (eg, unlawful assembly, rioting) and those affecting public health and safety (eg, adulteration of food). Importantly, it also determines the nature and quantum of punishment to be given for specific offences.

**[113]** Coming back to the impugned provision, I fully agree with the views of the learned CJ "that we are dealing with criminal law on the facts of this Petition". When viewed in light of "criminal law", I have no doubt in my mind that the true nature of the impugned provision is a legislation upon criminal matter. I conclude that the offence of sexual intercourse against the order of nature is a matter that obviously falls within the ambit of "Criminal law" pursuant to the Federal List which confers upon Parliament the power to enact laws relating to that. 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.

**[114]** But what's more conspicuous, the impugned provision is in effect reflected in specific provisions of the Penal Code, which was enacted much earlier in time. The Penal Code, which is applicable to all (including both Muslims or non-Muslims) and administered by the Civil Courts, is a law that codifies most criminal offences and punishments in our country. It was first introduced through Straits Settlement Penal Code (Ordinance No IV of 1871). The Ordinance developed through passage of time: from Straits Settlement to the Federated Malay States by the Penal Code of the Federated Malay States (FMS Penal Code) ('FMS Cap 45'). In 1948, the Federation of Malaya was formed which amalgamated the States of Penang, Malacca, the Federated Malay States and the Unfederated Malay States, which consist of the States

of Johar, Kedah, Perlis and Kelantan. The FMS Cap 45 was then extended to the Federation of Malaya by the Penal Code (Amendment and Extended Application) Ordinance (No 3, 1948). The Code was extended throughout Malaysia through the Penal Code (Amendment and Extension) Act 1976 (Act A327). The Code was completely revised as Act 574 under the Laws of Malaysia series in 1997. The revised edition came into operation on 7 August 1997. The Penal Code of the Federated Malay States (FMS Penal Code) 1936 consisted of 511 sections and 23 chapters, which included s 377 governing on unnatural offences.

**[115]** It is worth noting that s 377 of the FMS Penal Code is almost similar to the impugned provision. On 22 March 1989, Parliament amended the Penal Code to break down s 377 into various sections, which are ss 377 (Buggery with an animal), 377A (Carnal intercourse against the order of nature), 377B (Punishment for committing carnal intercourse against the order of nature) and 377C (Committing carnal intercourse against the order of nature without consent, etc). Apart from that, offence governed on outrage on decency was renumbered to s 377D (Outrage of decency) and the word male in the provision was deleted. Further, s 377E was introduced to provide for the punishment of inciting a child to an act of gross indecency.

**[116]** Evidently, Parliament had made provision for the offence of sexual intercourse against the order of nature in two provisions of the Penal Code, ie s 377 and s 377A of the Penal Code. Hence, the offence of sexual intercourse against the order of nature that is prescribed as an offence under the impugned provision has equivalent in the Penal Code. It cannot be disputed that offences contained in the Penal Code are clearly within the term "criminal law".

**[117]** In determining whether the impugned provision, in pith and substance, falls within the subject matter of "Criminal law", it is the substance and not the form or outward appearance of the provision that must be considered. On the principle of pith and substance, I consider the analysis by Mohamed Azmi SCJ in *Mamat Daud* to be pertinent and directly to the point. It cannot be disputed that in pith and substance, the impugned provision falls within the entry"Criminal Law" under the Federal List.

**[118]** Based on all the foregoing reasons, on this constitutional issue I conclude by saying that even though the impugned provision falls within the precepts of Islam legislative field, the preclusion clause catches it. The true character and substance of the impugned provision in reality belongs to the subject matter "Criminal law". The term "criminal law" in Federal List would include within it "offences against precepts of religion of Islam" as assigned to the State Legislature. Put another way, only Parliament has power to make such laws with respect to the offence of sexual intercourse against the order of nature.

**[119]** But there is still one important constitutional question that remains, and this requires clarification, as it was claimed by the 2nd respondent that if every offence is Criminal Law then no offence may be created by the State

Legislature pursuant to Item 1 of the State List, rendering the State Legislature's power to legislate redundant. At [17] and [18], I have expressed my views that the State Legislature's power to legislate on offences against the precepts of Islam is limited. It is neither exclusive nor comprehensive and is residual and not inherent. Does that render Item 1 of the State List completely otiose and denuded of all meaning?

**[120]** I do not agree with this contention. It cannot stand in law. According to our concept of Federalism, the FC guarantees (as is clear from its terms) the States with legislative power over offences and punishments against the precepts of Islam with the exception of matters included in the Federal List. That itself refutes the contention of the 2nd respondent.

**[121]** What is important then is to determine the parameter of the real nature of the offence that is within the ambit of the phrase "offences and punishments against the precepts of Islam except in regard to matters included in the Federal List". This raises the question of how to formulate a test to demarcate the boundary that defines the extent of the legislative competence of the State Legislatures over this matter. In the main, there are three distinct categories of offences that shaped Syariah Criminal offences in Malaysia. These are:

(i) Offences relating to aqidah. For example wrongful worship, deviating from Islamic belief or contrary to hukum syarak and teaching false doctrines;

(ii) Offences relating to sanctity of religion and its institution. For example insulting the Qur'an and Hadith, religious teaching without tauliah, failure to perform Jumaat prayers, disrespecting the holy month of Ramadan and non-payment of zakat or fitrah; and

(iii) Offences against morality. For example consuming intoxicating drinks, sexual intercourse out of wedlock (zina) and close proximity (khalwat).

**[122]** 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. The list of offences enumerated at [32] above is undoubtedly not exhaustive, and there may be other religious offences that possibly be validly enacted by the State Legislatures that may emerge from the facts and circumstances of each case. In my opinion, all these offences are purely religious in nature that is directly concerned with religious matters or religious affairs. Any attempt to regulate the right of persons professing the religion of Islam to a particular belief, tenets, precepts and practices by way of creation of offences can only be done by legislation passed by State Legislatures pursuant to cl 2 of art 74 of the FC. As stated by Mohamed Azmi SCJ in *Mamat Daud* "… to create an offence for making an imputation concerning such subject matter is well within the

legislative competence of the State Legislatures and not that of Parliament". When the true test is applied, the inevitable conclusion is that these religious offences have nothing to do with "criminal law". I find it hard to think that the religious offence is a law with respect to "Criminal law" as envisaged by the Federal List. As Hashim Yeop A Sani SCJ said in *Mamat Daud* (citing *Attorney-General for Ontario & Ors v. Canada Temperance Federation & Ors* [1946] AC 193 and [1951] AC 179), "....The true test is always to see the *Canadian Federation of Agriculture v. Attorney-General for Quebec & Ors* real subject matter of the legislation". These are ta'zir offences punishable with imprisonment and/or fine in accordance with Syariah Courts (Criminal Jurisdiction) Act 1965. Ta'zir, according to established Islamic law principle are offences and punishment that are not divinely prescribed and therefore, are left for the authority to formulate. Another point is that, these are religious offences under the Syariah Court's jurisdiction and applicable only to persons professing the religion of Islam and ought to be passed not by the Federal Parliament but by the State Legislatures on the basis of the State List. Surely, in my opinion, a legislation pertaining to such prohibited acts or omissions amounts to a legislation upon Islamic religion, on which only states have legislative competence. In its applicability to the religion of Islam, the religious offences must be within the competence of the State Legislatures. It is the States alone that can say what should be the religious offences, which are reserved expressly for legislation by the State Legislatures.

**Demarcation Of Legislative Powers On Offences Against Precepts Of Islam And Criminal Law**

**[123]** What I have discussed thus far, underlined an important point: "Criminal law" is a Federal matter within the legislative competence of Parliament. On the other hand, Islamic criminal law that is not caught by the preclusion clause is within the legislative competence of the State Legislatures.

**[124]** Why are the jurisdictions divided or arranged in such a complicated and problematic manner? To answer this, we must look closely at our legal history that can be traced back to the beginning of the Malay States and the period of colonial rule. There are many connected reasons for this. In this regard, I think it is important that I repeat here what Abdul Hamid Mohamed, the former Chief Justice, said on this in an article entitled *"Implementation Of Hudud In Brunei and Malaysia With Particular Reference To Kelantan Hudud Enactment" in Islamic Law In Malaysia, Issues, Development and Challenges* (2018 Edition) (at pp 352-353). I have summarised the article as follows:

(a) Throughout the history of the Malay States, the Sultan is the head of the Religion of Islam in his State and matters concerning Islam have always been within the State jurisdiction. Since the establishment of the Malayan Union and the Federation of Malaya, "criminal law" came under the jurisdiction of the Federal Government.

(b) One of the Terms of Reference given to the Reid Commission was for the creation of a strong Federal Government. For this reason, amongst others, general laws that apply to everyone and involving public order and national security were made Federal law; the application of which is not limited to Muslims only or within the borders of any of the States.

(c) No State or group had sent any memorandum to the Reid Commission to make a representation that "criminal law" be placed under the jurisdiction of the State Governments.

(d) That time too, religious matters, which were under the State jurisdiction, were limited to family law. In most States, there were no Syariah Courts yet. Almost all Muslims were Malays. They lived in villages or in the interior. There was no movement of people across the State border as it is now.

(e) If criminal law were placed under the State jurisdiction, most likely, there will be differences between the law of one State and another. This situation could lead to legal uncertainty and might undermine law and order of the country.

(f) Implementation and enforcement of criminal law would be less effective, because the law is confined to the borders of each State only.

**Implication Of Co-Existence Of The Impugned Provision And Section 377 Etc Of The Penal Code**

**[125]** Lastly, I need to consider one additional argument advanced by both respondents. They argued to the effect that the Federal and State legislation on the same subject matter can co-exist and that as a result, the impugned provision is constitutionally valid. The learned Chief Justice has explained why this submission is untenable. I agree.

**[126]** The essential difficulty that I have with this line of argument is that the equal protection of the law under art 8 of the FC, as pointed out quite rightly by learned counsel for the Petitioner, militates against the co-existence of the impugned provision and s 377 etc of the Penal Code on the same subject matter.

**[127]** The reason is this. Take now the very factual matrix of the present case as an example. The Petitioner is a Muslim man. He was charged in Selangor Syariah High Court under s 52(1)(a) of the Enactment, which is punishable under s 28 read together with s 52(2) of the Enactment. Primarily, it was alleged that the Petitioner had on 9 November 2018, between 9.00 pm to 10.30 pm in a house in Bandar Baru Bangi, attempted to commit sexual intercourse against the order of nature with certain other male persons. In the charge sheet, the other male persons included three non-Muslims.

**[128]** If the Syariah Court were to decide that the Petitioner guilty as charged, the maximum sentence that can be imposed under the Syariah Courts (Criminal Jurisdiction) Act 1965 is imprisonment not exceeding three years, a fine not exceeding RM5,000.00 or whipping not exceeding six strokes or any combination thereof.

**[129]** On the other hand, as the impugned provision is not applicable to the three non-Muslims and the Syariah Court has no jurisdiction over them, they can be prosecuted in the Civil Court and the provision of s 377 Penal Code is applicable to them which carries a sentence of imprisonment for a term, which may extend to 20 years and also fine or whipping. The same sentence is provided for an offence under s 377A where it is committed voluntarily (see s 377B). Where there is no consent, the punishment of imprisonment shall be for a term of not less than five years and not more than 20 years and shall also be punishable with whipping (see s 377C).

**[130]** It is hard to deny that a non-Muslim would be discriminated against by virtue of a Muslim having the benefit of a lesser sentence for a substantially similar offence under the impugned provision. Clause (1) of art 8 of the FC provides that all persons are equal before the law and entitled to the equal protection. Generally, cl (2) of art 8 provides that there shall be no discrimination against citizens on the ground only, among others, of religion. Once acquitted or convicted by the Syariah Court that Muslim person would have the protection against repeated trials under cl (2) of art 7 of the FC.

**Conclusion**

**[131]** In the result, based on all the reasons given, I conclude that the Petitioner has successfully displaced the presumption of the constitutional legitimacy of the impugned provision. I have no doubt in my mind that the impugned provision is invalid as being ultra vires the FC; the State Legislature made the impugned provision with respect to a matter to which it has no power to make. Only Parliament could enact such a law. I therefore agree with the learned Chief Justice that we grant Prayer 1 of the Petition. And as explained by the learned Chief Justice as for Prayer 2, we make no order as to costs.

**[132]** The learned Chief Justice and the other members of the panel have read this judgment in draft and have expressed their agreement with it.

**Zabariah Mohd Yusof FCJ:**

**[133]** I have read the judgment of the learned CJ and learned CJM and I agree with the conclusion in both of the judgments that the existence of the preclusion clause serves to restrict the States Legislature from enacting laws on these subjects which, remain within the domain of Parliament to regulate and enact within the general design provided for by the FC. As a result we grant prayer (1) of the amended petition.

**[134]** However, with regard to para 64 of the grounds of the learned CJ, with the greatest of respect, I have some reservations to the said paragraph.

**[135]** Firstly, on the second sentence of the said paragraph which states that in view of "the judgments of this Court in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 4 MLRA 554 and *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 2 MLRA 1, in all cases, the civil Superior Courts retain supervisory jurisdiction which is inherent in their function under arts 4(1) and 121(1) of the FC..."

**[136]** The application of arts 4(1) and 121(1) of the Federation Constitution (FC) was addressed in the majority judgment of *Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors And Other Appeals* [2021] 3 MLRA 260 which was delivered on 19 February 2021, where it was held that powers of the courts (be it original jurisdiction or supervisory jurisdiction), are derived from art 121(1), not art 4(1) as stated in the said sentence. The application of art 4(1) was also addressed in the majority judgment of *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 3 MLRA 1. Article 4(1) is a declaratory provision on the supremacy of the FC as the law of the Federation and the rest of art 4 deals with the manner of challenging any law which is inconsistent with the FC or the incompetency of the relevant legislature in enacting any particular law. Article 121(1) is the provision that deals with judicial power of the courts which includes supervisory jurisdiction. Article 121(1) expressly provides that the jurisdiction and powers of the courts are conferred by federal law.

**[137]** In relation to the same second sentence, mention must also be made of the "inherent powers" of the courts although the said sentence mentioned "... inherent in their function under art 4(1)...". Inherent powers of the courts are not provided under art 4(1) of the FC, but are provided under O 92 r 4 of the Rules of Court 2012, r 137 of the Rules of the Federal Court 1995 and s 25 of the Courts of Judicature Act 1964. Such provision for inherent powers of the courts does not confer new jurisdiction. Such inherent powers are general powers which are subjected to the existing jurisdiction as provided under the FC, the Courts of Judicature Act 1964 and other relevant special statutes applicable to any given case, eg the POCA, SOSMA and Dangerous Drugs Act 1974 to name a few (*Rovin Joty*). As held in *Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor* [2008] 1 MLRA 581 which relates to r 137 of the Rules of the Federal Court 1995 in relation to the rights of appeal, it was held by this court in the said case that:

> "Rule 137 of the Rules of the Federal Court cannot be construed as to confer any new jurisdiction to the existing jurisdiction of the FC as spelt out under the Federal Constitution, the CJA 1964 and other statutes...It is not within the jurisdiction of the courts to create appeals when the statute does not provide or...permit. That is the intention of the legislature, and it is incumbent upon this court to give effect to it."

Hence, supervisory jurisdiction of the courts, entails appellate and revisionary jurisdiction, which is provided in art 121(1), (1B), (2) of the FC, Courts of Judicature Act 1964 and federal law, not art 4(1).

**[138]** In respect to the last sentence of para 64 in the said judgment, which implies that if the jurisdiction is not excluded in the law, then the jurisdiction is there, by the words "Thus, unless their jurisdiction is clearly excluded by virtue of subject matter under art 121(1A) the question that the civil Superior Courts have no jurisdiction does not arise." Jurisdiction of the courts must be provided by the law/statutes. If it is not provided, then the jurisdiction is not there. Caution must be exercised here in interpreting the issue of jurisdiction in relation to art 121(1A) as such. What was held in *Indira Ghandi Mutho*, is that art 121(1A) did not prevent civil courts from continuing to exercise jurisdiction in determining matters under federal law, notwithstanding the conversion of a party to Islam. In *Indira Ghandi Mutho*, it involves a couple where the husband has converted to Islam whereas the wife did not, which means that she had no locus to appear before the Syariah Courts and that Syariah Court did not have jurisdiction over her. Hence, it was held that art 121(1A) does not constitute a blanket exclusion of the jurisdiction of civil courts whenever a matter relating to Islamic law arises. One needs to understand what was held in the context of the facts of the case.

**[139]** *Semenyih Jaya* indirectly acknowledged that the jurisdiction of courts is provided by the law when it held that the jurisdiction of the Court of Appeal to hear appeals from the High Court should be exercised by reference to the Courts of Judicature Act 1964:

> "[5] The unconstitutionality of s 40D of the LAA was only because of the decision-making process, ie, the determination of the amount of compensation by the assessors The provision limiting appeal in s 40D(3) was a separate and distinct issue. Section 40D(3) was a finality clause which declared any decision made under s 40D to be final. It did not contribute to the invalidity of s 40D. To hold otherwise would be contrary to s 68(1)(d) of the Courts of Judicature Act 1964... . The law recognised the Legislature's power to enact laws limiting appeals by declaring the finality of a High Court Order. On the other hand, the ouster of the right of appeal in respect of an award of compensation under the proviso to s 49(1) of the LAA had to be narrowly and strictly construed to give meaning to the constitutional protection afforded to a person's right to his property. The proviso to s 49(1) was not a complete questions of compensation. The bar to appeal was limited to issues of fact on ground of quantum of compensation. An Aggrieved party had the right to appeal against the decision of the High Court on questions of law (see paras 136-137, 139, 148 and 155).
>
> [6] The proviso to s 49(1) of the LAA was not *ultra vires* art 121(1B) of the Constitution. The latter was a general provision empowering the Court of Appeal to hear appeals from the High Court. The jurisdiction of the Court of Appeal to hear appeals from the High Court should be exercised by reference to the CJA. The bar to appeal against the amount of compensation awarded

by the High Court as contained in the proviso to s 49(1) operated within the framework of s 68(1) of the CJA."

**[140]** Apart from the aforesaid, I agree with the final conclusion of both the judgments of the learned CJ and CJM.


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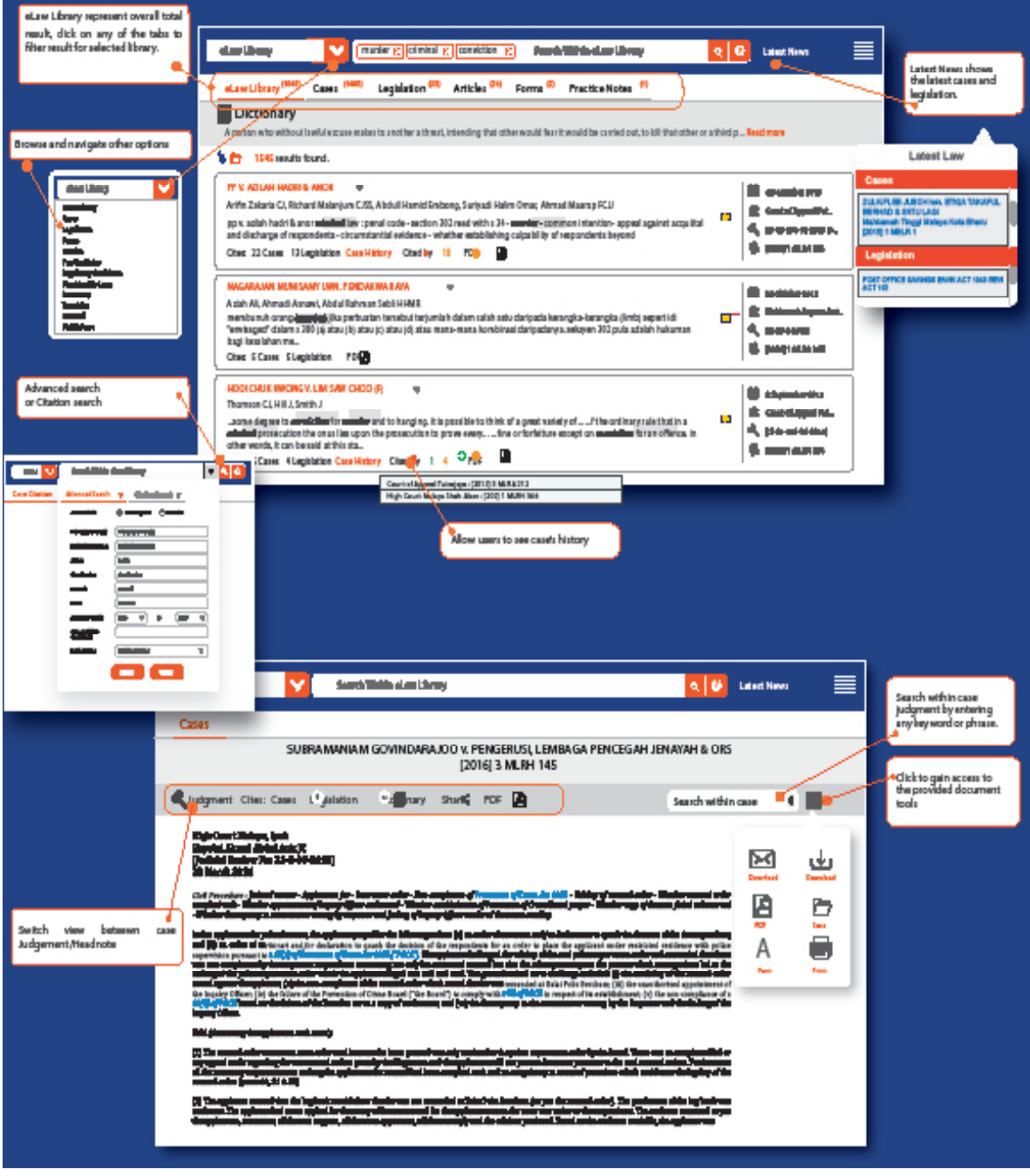

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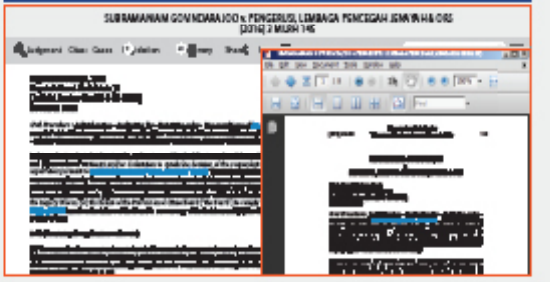

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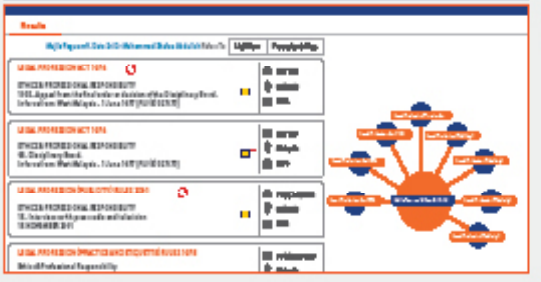

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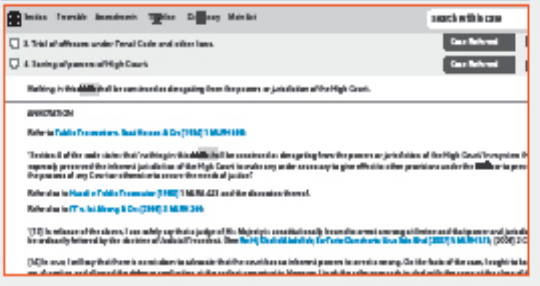

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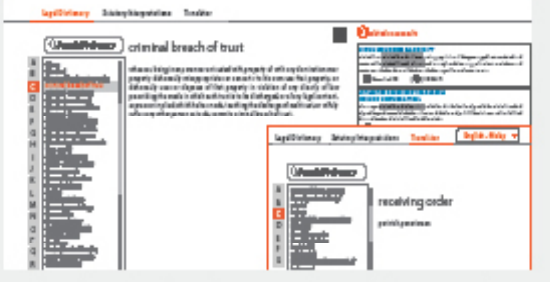


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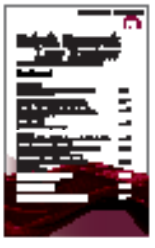

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