NIK ELIN ZURINA NIK ABDUL RASHID & ANOR

v.

KERAJAAN NEGERI KELANTAN

Federal Court, Putrajaya
Tengku Maimun Tuan Mat CJ, Abang Iskandar Abang Hashim PCA, Mohamad Zabidin Mohd Diah CJM, Abdul Rahman Sebli CJSS, Nallini Pathmanathan, Mary Lim Thiam Suan, Harmindar Singh Dhaliwal, Nordin Hassan, Abu Bakar Jais FCJJ
[Petition No: BKA-2-05-2022(D)]
9 February 2024

Constitutional Law: *Legislation — Validity of — Petition seeking declaration that ss 5, 11, 13, 14, 16, 17, 30, 31, 34, 36, 37(1)(b), 39, 40, 41, 42, 43, 44, 45, 47 and/or 48 of Kelantan Syariah Criminal Code (I) Enactment 2019 [Enactment 14] invalid — Locus standi — Correct party to petition — Expert evidence — Whether respondent, via Legislature of State of Kelantan, constitutionally empowered to make said impugned sections of Enactment — Federal Constitution, arts 4(1), (3), (4), 128*

This was a petition filed in the exclusive original jurisdiction of the Federal Court seeking a declaration that ss 5, 11, 13, 14, 16, 17, 30, 31, 34, 36, 37, 39, 40, 41, 42, 43, 44, 45, 47 and/or 48 ("Impugned Sections") of the Kelantan Syariah Criminal Code (I) [Enactment 14] Enactment 2019 ("Enactment") were invalid, and hence null and void, on the ground that the Legislature of the State of Kelantan ('LSK') and thereby the respondent had no power to make those provisions. The petitioners subsequently withdrew their challenge against ss 5 and 37(1)(a) of the Enactment. The only issue in this case was whether the respondent, *via* the LSK, was constitutionally empowered to make the Impugned Sections.

The respondent, however, raised several preliminary objections. The first objection was contained in encl 68, an application seeking to move this Court to hold that leave in this case was granted erroneously. The premise of the respondent's first preliminary objection was that the petitioners had no *locus standi* to file this petition or that, in any event, the present petition was academic or abstract. Another preliminary objection taken by the respondent was that the petitioners had failed to name the correct party or that they had named a party who had no nexus to this petition. The sole respondent in this suit was the Government of the State of Kelantan. The respondent submitted that the petitioners should have instead named the LSK or the Jabatan Hal Ehwal Agama Islam Kelantan, because these executive bodies were responsible for the enforcement of the Impugned Sections as they were concerned with the execution of the law and were able to defend it while the respondent had no such jurisdiction to do the same. They further averred that the LSK and the

respondent were separate legal entities. The final preliminary issue concerned encls 41, 42 and 43 filed in Court by the respondent, which purported to be expert opinions on the respondent's behalf on the constitutional interpretation of the Impugned Sections.

Held (allowing the petition in part):

Per Tengku Maimun Tuan Mat CJ delivering the majority judgment of the court:

(1) The fact that legislation had been passed created a factual circumstance in which it could be challenged. Article 4(1) of the Federal Constitution ("FC"), which formed the substantive constitutional basis for all constitutional judicial review cases, did not discriminate between the circumstances and situations in which such challenges could be brought or the categories of persons that could bring them, apart from differentiating between the nature and procedure for those proceedings, ie, between 'incompetency' and 'inconsistency' challenges. 'Incompetency challenges' were a specific kind of 'inconsistency challenge' which, in addition to being governed by art 4(1), were also governed by art 4(3) and 4(4) of the FC. There was nothing express or implied within art 4(3) and 4(4) to suggest that anyone who sought to challenge the constitutionality of a legal provision must first prove his or her reasons *per se* for bringing the challenge (apart from having to advance arguments on why the provisions they challenged were invalid on grounds stated in art 4(3)). All citizens (and, in some cases, all persons) were entitled to rely on the FC for protection and to approach the Federal Court for competency challenges under arts 4(4) and 128 of the FC. The passing of a law (whether Federal or State) was a legislative act or conduct which always remained subject to judicial scrutiny in line with the principle of separation of powers. There was no constitutional basis to limit the types of people or category of persons who could, at the very minimum, challenge the existence of the law as a separate constitutional cause of action in addition to cases where a person affected by the exercise of such powers against them could also challenge the validity of that same law. Enclosure 68 should, therefore, be dismissed. (paras 29-32)

(2) Considered as a whole, had the petitioner been the Federation, the FC contemplated that suing the State concerned would not only have been sufficient but actually a mandatory act of compliance with art 4(3) of the FC. In the case of a party that was neither the Federation nor the State, even in such a case, art 4(4) of the FC recognised that the State would be entitled to be a party. Thus, considering art 4(4) in light of paras (a) and (b) of art 4(3), the Government of the State in question was a proper party to a petition where a declaration to the effect of the present petition was sought. Therefore, it defied any logical interpretation of art 4(3) and 4(4) to assert that the Government of a State was not capable at all of being named as a party to petitions such as this. Irrespective of any other executive bodies falling within the Federation or that State's jurisdiction, the Government of that State was a proper party to be sued. Following from the above reasoning, the only question remaining was whether the Government of that State could be named as the sole respondent in

a petition where leave was granted under art 4(4). The answer to that question was in the affirmative. While for prudence and completeness the Legislature of that State should be made a party to the proceedings, the fact that they were not, was not fatal to the petition. At the very minimum, it was sufficient if the Government of the State was named as the respondent. After all, any executive bodies in the State and any legislative bodies of that State, including its State Legislature, were organs of the Government of the State in question. With these bodies at its disposal, the State was thus in a position to defend the validity of the law or laws challenged on the grounds that its Legislature had no power to make. Hence, naming only the respondent in the present case was sufficient to sustain this petition. This preliminary objection was, accordingly, also dismissed. (paras 44-49)

(3) The final issue of expert evidence had been beyond clarified and dealt with in this Court's prior decision in *Iki Putra Mubarrak v. Kerajaan Negeri Selangor & Anor* ("*Iki Putra*"). In summary, only the Courts were entitled to interpret the FC; no other party was allowed to expound a legal opinion on how those provisions could be interpreted as a matter of law. Parties were entitled to canvass their rivalling opinions in the form of legal submissions which could be decided by this Court, but providing "expert" evidence on the interpretation to be afforded was not an accepted method of constitutional interpretation. Enclosures 41, 42 and 43 were hereby expunged and had no bearing on the outcome of this case. (para 51)

(4) In determining the constitutionality of the Impugned Sections, the principles to be applied were: (i) first, determine whether the impugned section legislated by the State Legislature was an offence against the 'precepts of Islam' which constitutionally referred to one of the two broad categories: (ii) the first broad category was related to any matter specifically referenced in Item 1 of the State List and to other relevant provisions in the FC. If the impugned section in pith and substance could be referenced to any matter of Item 1 or any other relevant provisions in the FC, and the law was applicable only to persons professing the religion of Islam, then it was a religious offence and the law was validly enacted by the State Legislature as it clearly fell under the State List; (iii) the second broad category covered a purely religious offence relating to (i) aqidah; (ii) sanctity of the Islamic religion or its institutions; or (iii) one purely relating to morality in Islam; (iv) if the impugned section was in pith and substance a purely religious offence, the court must test the impugned section against the Federal List. If the impugned section in pith and substance was related to a purely religious offence which could not be referenced to the Federal List and it concerned only the Muslims in this country, then it was within the State Legislature's power to make; and (v) if it was a purely religious offence, but in pith and substance it fell under matters of criminal law in the Federal List or general criminal law which involved an element of public order, safety, health, security, morality, etc., of general application, then it would be caught by the preclusion clause. Examples of these offences were murder, theft, robbery, corruption which could be considered offences against the precepts

of Islam but, in pith and substance, fell under the criminal law of general application to everyone in this country. (para 121)

(5) Section 11 of the Enactment, in pith and substance, dealt with hate crimes. This was because the section as a whole was a religious offence enacted to punish acts that affected public order and harmony either among Muslims or non-Muslims. This was apparent in both s 11(1) and 11(2) because the acts of destroying, defiling or littering, whether in places of worship for Muslims or non-Muslims, could not be established without proving either the intention to degrade or insult either Islam or a non-Muslim religion. Dealing with hate crimes was a matter of 'general criminal law' within the second broad category of 'criminal law' in Item 4. As such, s 11 as a whole could not be deemed as a 'purely religious offence'. In other words, s 11 was clearly a matter for Parliament having direct nexus to the 'criminal law' purpose envisioned in Item 4 of the Federal List. Section 11 was thus caught by the preclusion clause. Therefore, the respondent had no power to make s 11 and it was unconstitutional on that ground. (paras 127, 132-134)

(6) Section 13 of the Enactment as a provision was specific in that it criminalised a Muslim person from parting with a child in his or her custody in the *actus reus* described in s 13 by delivering that child to either a non-Muslim or a morally reprehensible Muslim. The respondent via the LSK had determined that part of the precepts of Islam and Islamic family on custody was that a Muslim child could not be given to a morally reprehensible Muslim or a non-Muslim. While Parliament could make general laws to protect the welfare of children, the basis of s 13 was on the grounds of religion. The purpose of s 13 was, in pith and substance, to prevent the propagation of faiths other than Islam (including the improper practices of Islam) to Muslim children. The States had power over this, not only by virtue of Item 1 of the State List but also by virtue of art 11(4) of the FC. Given the above situation, the respondent had the power to make s 13 and the section was not unconstitutional. For the sake of clarity, this finding on s 13 did not in any way affect the issue of custody of children of non-Muslim marriages, who had been unilaterally converted by one parent without the consent of the other. (paras 141-144)

(7) Sections 14, 16, 17, and 47 of the Enactment could be dealt with together as they related to the same larger subject matter – sexual offences. Sections 14, 16 and 17 were caught squarely by the decision of this Court in *Iki Putra*. Section 14 dealt, in pith and substance, with sexual intercourse against the order of nature. Section 17 too, as vague as it was, appeared to carry with it features of offences that included buggery with an animal. As for s 16, it dealt with necrophilia. As stated in *Iki Putra*, these offences were caught by the preclusion clause to Item 1 of the State List, meaning that they were matters of general 'criminal law' upon which only Parliament could legislate. Inasmuch as these religious offences did seem to relate to the second broader meaning of 'precepts of Islam', these offences, if enacted into law, could apply equally to non-Muslims as well as

Muslims. That being the case, these were not purely religious offences such that the States, including the respondent, could legislate on. The respondent had no power to make ss 14, 16, and 17 and they were, accordingly, unconstitutional. While ss 14, 16 and 17 were housed in Part III which dealt with takzir offences related to protection of person and dignity, s 47 (concerning the act of incest) fell within Part VI which dealt with takzir offences related to protection of offspring. For the reasons stated earlier regarding ss 14, 16 and 17, and upon the direct application of *Iki Putra*, incest was a general offence which was a matter that ought to be dealt with by federal law as 'criminal law' in Item 4 of the Federal List. It was an offence that affected not just Muslims even if it was an offence against the precepts of Islam in its second broad category. As such, s 47 was caught by the preclusion clause. Hence, s 47 was also unconstitutional on the grounds that the respondent had no power to make it. (paras 145-156)

(8) Section 30 of the Enactment did not *per se* deal with the preservation of peace or religious harmony, which was a matter of general criminal nature. Rather, it was a purely religious offence enacted with a view to restricting the propagation of false doctrines and teachings by persons professing the religion of Islam to others professing the same faith. While the section did use the phrase 'and is likely to cause breach of peace', it must be presumed that the LSK enacted the section in this way so as to be able to select between cases where someone merely wilfully uttered or disseminated words simpliciter or out of ignorance on the one hand, and one that breached restrictions on propagation of faith with the calculated intent of breaching peace. Section 30, when read in its context, suggested that the provision's primary focus was the wilful uttering or dissemination of words which itself accorded with art 11(4) of the FC. The additional requirement of "breach of peace" itself (though a general criminal law matter) merely watered down the application of the first part of s 30. Therefore, s 30 had, in pith and substance, been validly enacted by virtue of Item 1 of the State List and/or art 11(4) and was not caught by the preclusion clause to Item 1 of the State List. Section 30 was thus not unconstitutional. (paras 165-169)

(9) It was patently obvious that s 31 of the Enactment, in pith and substance, sought to penalise the offence of sexual harassment. Its pith and substance were clear irrespective of whether the commission of it was limited to a non-mahram or not. Sexual harassment *per se* could fall within the ambit of the precepts of Islam in its second broad category, as any permissible entry in Item 1 of the State List or anywhere else in the FC for the first broad category of precepts of Islam to apply could not be found. There was similarly no applicable entry in the Federal List other than Item 4 of the Federal List to suggest that the preclusion clause applied on this ground. Sexual harassment could not be classified as a 'purely religious offence' given its general character as a criminal offence that was capable of general application in this country. It was quite clear that s 31 fell, in pith and substance, within the general category of 'criminal law' as employed in Item 4 of the Federal List, and was caught by the preclusion clause of Item

1 of the State List. In the circumstances, the LSK and, by extension, the respondent, had no power to make s 31 and it was therefore unconstitutional on that ground. (paras 172-176)

(10) Section 34 of the Enactment dealt with the possession and giving of false documents or information or aiding in such falsification of such documents or information and, in pith and substance, dealt with the obstruction of justice, perjury and false evidence, specifically in relation to proceedings before the Syariah Courts. Item 1 of the State List created the categories in which the States might enact laws and even create or punish offences against the precepts of Islam. However, the matters over which the Syariah Courts could have substantive jurisdiction was 'in respect only of any of the matters included in this paragraph', which was only in respect of Item 1 of the State List. Thus, there was no merit to the argument that the respondent could enact s 34 on the basis of it having to do with the 'constitution, organization and procedure of Syariah courts' because in order to punish the offences in s 34, the pith and substance of perjury and obstruction of justice must refer back to Item 1 of the State List, either in the first or second broad category of those subject-matters. There was no referable entry in Item 1 of the State List to suggest that independently of the entry 'the constitution, organization and procedure of Syariah courts', there was any other entry that could justify the making of laws related to perjury, false evidence or obstruction of justice. On the other hand, the Federal List did contemplate the acts of obstruction of justice, perjury and false evidence as specifically identifiable field of offences in Item 4(e)(i) of the Federal List. By s 34, the LSK created an offence with respect to which the Federal List already had demarcated for Parliament by virtue of the entry in Item 4(e)(i) of the Federal List. Hence, s 34 was caught by the preclusion clause. For that reason, the respondent had no power to make s 34 and it was thus unconstitutional. (paras 178-184)

(11) Given that s 35 of the Enactment (which was not under challenge) dealt specifically with 'intoxicating drinks', it stood to reason (applying general canons of statutory construction) that 'anything intoxicating' or 'intoxicating substance' in s 36 of the Enactment meant anything intoxicating other than intoxicating drinks dealt with by s 35. But even with that distinction, it was clear that s 36 was too vague in language to demarcate a clear enough parameter within which it could be deemed to operate. As there was hardly any form of definition in s 36, the breadth of what could fall within the definition of 'anything intoxicating' was endless. It could be concluded, after attempting to limit the scope of s 36, was that its intent was to criminalise and punish the consumption of virtually anything intoxicating, by Muslims. Reading the entry 'intoxicating drugs and liquors' in Item 14(d) of the Federal List with the rest of the phrases quoted above, it was apparent that, in general, it was within Parliament's purview to enact laws that dealt with such matters, including the passing of laws that created and punished offences in relation to them. Section 36 dealt, in pith and substance, with matters included in Item 14 of the Federal List read with Item 4 of the Federal List. Hence, s 36 was

caught by the preclusion clause. It followed that the respondent had no power to make s 36 and it was unconstitutional on that ground. (paras 188-194)

(12) Section 37(1)(b) of the Enactment dealt with the situation of organising gambling activity within a place in the person's possession or control, or providing a place or permitting such activity in such premises. It was distinct from s 37(1)(a) in that it dealt distinctly with the act of engaging in gambling, irrespective of whether the place of gambling was a lawful gaming house and also irrespective of whether the game itself was lawful. In most jurisdictions, including Malaysia, gambling was a regulated leisure activity. It was considered a vice and could certainly fall within the banner of something against the precepts of Islam within its second broad category, as there was no clear referable entry in Item 1 of the State List. This necessitated asking the question of whether the preclusion clause applied. Betting and lotteries were subject matters under Item 4(l) of the Federal List. 'Betting and lotteries' could clearly and reasonably be taken to include gambling. The organisation of gaming houses and the regulation of betting and lotteries, as well as the creation of offences and their punishments, were within the jurisdiction of Parliament. Section 37(1)(b) purported to deal with a matter that was included in Item 4(l) of the Federal List which should be read together with the general header of Item 4 on 'criminal law'. The subject matter of s 37(1)(b) was thus caught by the preclusion clause. Therefore, s 37(1)(b) was unconstitutional on the ground that the respondent did not have the power to make it. (paras 197-202)

(13) Section 39 of the Enactment (reducing scale, measurement and weight), even upon a simple reading, quite clearly, in pith and substance, dealt with matters that fell within the ambit of Item 8(f) of the Federal List. It would also attract Item 4 of the Federal List in relation to 'criminal law' because federally promulgated criminal legislation included offences in relation to any of the other matters enumerated in the Federal List. Given this line of reasoning, s 39 was therefore caught by the preclusion clause and was unconstitutional. (paras 203, 205 & 206)

(14) Sections 40 and 41 of the Enactment could be dealt with concurrently as both were generally related to financing matters. Islamic banking was a matter which was related strictly to finance and was caught by Item 7 of the Federal List. For purposes of ascertaining principles of Islamic banking and for ensuring uniformity and congruity in this field, Item 4(k) specifically empowered Parliament to ascertain Islamic law and other personal laws for use in federal laws. The federal law in this regard and with respect to Item 4(k) would be Islamic finance laws and regulations. The scope of Item 4(k) of the Federal List differed from Item 1 of the State List. The former allowed for the ascertainment of Islamic law principles for the creation of federally legislated matters such as Islamic banking and finance. The latter was related to the enactment of laws that actually concerned personal law and were matters which only the States could enact. Sections 40 and 41 quite patently dealt with matters that fell within Items 4(k) and 7 of the Federal List. Even if ss 40 and 41 dealt with offences which were related to the precepts of Islam

in any of its two broad categories, the States were nevertheless precluded from legislating such laws by virtue of the preclusion clause to Item 1 of the State List. For the above reasons, both in outward form as well as in pith and substance, ss 40 and 41 were unconstitutional because the respondent had no power to make them. (paras 207-217)

(15) Item 8 of the Federal List made it clear that food control, which when interpreted broadly and including the phrase that appeared after it in 'adulteration of foodstuffs and other goods', would include food standards and safety. Accordingly, reading Item 8 of the Federal List with Item 4 of the same, any offence that could capture the essence of Item 8 would also include Parliament's power to legislate on 'criminal law'. These entries must also be read in light of Item 4(k) of the Federal List which allowed Parliament to ascertain Islamic law for federal law purposes. In this regard, as food safety and adulteration of food safety was a matter for Parliament, the use and abuse of the halal logo would also constitute a matter included in the Federal List. The pith and substance of s 42 of the Enactment (abuse of the halal label and connotation) dealt with matters that fell within the Federal List, specifically Items 8 and 4. Section 42 was thus caught by the preclusion clause to Item 1 of the State List which meant that the respondent had no power to make it. Therefore, s 42 was unconstitutional on that ground. (paras 220-222)

(16) Sections 43, 44, 45 and 48 of the Enactment did, in pith and substance, collectively deal with the offence of solicitation of prostitution in one form, shape or another. Prostitution was a general offence that fell within Parliament's purview to legislate upon under Item 4 of the Federal List. The solicitation of vice services and prostitution was a crime that affected not just persons professing the religion of Islam but any person in this country. In that sense, it was not a 'purely religious offence' as it was a matter of 'general criminal law' relating to public order, safety, health, morality, etc., in a manner similar to the reasoning concerning ss 14, 16, 17 and 47 of the Enactment. Hence, ss 43, 44, 45 and 48 were caught by the preclusion clause and were thus unconstitutional on the ground that the respondent had no power to make them. (paras 237-238)

(17) For the avoidance of doubt, this Court had not expressed any view on the validity of ss 5 and 37(1)(a) of the Enactment as the petitioners withdrew their challenge against these provisions. Sections 5 and 37(1)(a) should therefore continue to be presumed to be constitutional. Further, for reasons stated in this judgment, the respondent did have the power to make ss 13 and 30 of the Enactment. Sections 13 and 30 were, hence, not unconstitutional. As for the rest of the Impugned Sections, and in terms of the sole remedy that could be granted in this case, for the reasons contained in this judgment, the following declaration was hereby granted: ss 11, 14, 16, 17, 31, 34, 36, 37(1)(b), 39, 40, 41, 42, 43, 44, 45, 47 and 48 of the Enactment were invalid on the ground that they made provisions pertaining to matters with respect to which the LSK had no power to make laws and the said provisions were accordingly null and void by virtue of art 4(1) and (3) of the FC. (paras 240-241)

Per Abdul Rahman Sebli CJSS (dissenting):

(18) The petitioners had no factual basis to support their claim for *locus standi* or standing to sue. Their application was an abuse of the court process and ought to be struck out. Leave should not have been granted in the first place and ought to be set aside. It was clear that the petitioners had no *locus standi* to maintain the action and, consequently, this court had no basis in law to exercise its exclusive original jurisdiction under art 128(1)(a) of the FC to hear and decide on the merits of the application. The court could not assume jurisdiction where there was none. The majority view was that if the petition was struck out merely because the petitioners had no *locus standi* to maintain the action, the striking out would be on an issue that was an unimportant technicality compared to the larger issue of merits of the case. However, technicality or not, it was an abuse of the court process for anyone with no *locus standi* to drag the Government, Federal or State, to court to ventilate his or her personal grievances by invoking art 4(4) read with art 128(1)(a) of the FC. A technical knockout was still a knockout. An abuse of process occurred when a person or party used the legal system in a way that did not serve the underlying goal of a legal action but to achieve a collateral purpose. Such abuse of the court process at any level of the court hierarchy was unacceptable and must not be countenanced by this court. Condoning the abuse would render the rule on *locus standi* completely redundant and bereft of all meaning. It would be as good as tossing the rule aside in order to give way to the merits of the case. *Locus standi* was Latin for "place to stand". *Black's Law Dictionary* (Deluxe Ninth Edition) defined it to mean "the right to bring an action or to be heard in a given forum". It determined whether a party had sufficient interest or stake in the matter to justify his participation in the proceedings. There could be no right to bring an action or to be heard in a given forum where there was no standing to sue. A person with no standing to sue was an incompetent litigant. (paras 267-271)

Case(s) referred to:

Adesanya v. President Of The Federal Republic And Others [1981] 5 SC 112 (refd)

AG Fed v. AG Lagos State [2017] 8 NWLR (PT1566) 20 (refd)

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

Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society [2012] SCR 524 (refd)

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

Council Of Civil Service Unions v. Minister For The Civil Service [1985] 1 AC 374 (refd)

Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals [2023] 4 MLRA 114 (refd)

Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor [2021] 2 MLRA 190 (refd)

Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor [2020] 2 MLRA 1 (refd)

Durning v. Citibank, NA 950 F2d 1419 [1991] (refd)

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

Government Of Malaysia v. Lim Kit Siang [1988] 1 MLRA 178 (refd)

Iki Putra Mubarrak v. Kerajaan Negeri Selangor & Anor [2021] 3 MLRA 384 (folld)

Iki Putra Mubarrak v. Kerajaan Selangor [2020] 4 MLRA 1 (refd)

IRC v. Ex Parte National Federation Of Self-Employed And Small Businesses [1982] AC 617 (refd)

Janata Dal v. HS Chowdhary And Ors [1992] SUPP 1 SCR 226 (refd)

Karim Abdul Ghani v. Legislative Assembly Of The State Of Sabah [1987] 1 MLRA 242 (refd)

Karpal Singh v. Sultan Of Selangor [1987] 1 MLRH 215 (refd)

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

Liba v. Koko [2017] 11 NWLR (PT1576) 335 (refd)

Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air & Komunikasi & Anor [2014] 2 MLRA 1 (refd)

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

Michigan Millers Mutual Ins Co v. Bronson Plating Co 197 Mich App 482; 496 NW2d 373 [1992] (refd)

Myriam v. Mohamed Ariff [1971] 1 MSLR 5 (refd)

PP v. Dato' Yap Peng [1987] 1 MLRA 103 (refd)

Robert Linggi v. The Government Of Malaysia [2011] 1 MLRH 389 (refd)

Shanti Kumar R Canji v. Home Insurance Co Of New York [1974] AIR 1719 (refd)

SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener) [2022] 3 MLRA 219 (folld)

Straman v. Lewis 220 Mich App 448; 559 NW2d 405 [1996] (refd)

Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 1 MLRA 175 (refd)

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

Tan Eng Hong v. Attorney-General [2012] 4 SLR 476 (refd)

Wong Shee Kai v. Government Of Malaysia [2022] 6 MLRA 797 (refd)

Yong Tshu Khin & Anor v. Dahan Cipta Sdn Bhd & Anor And Other Appeals [2021] 1 MLRA 1 (refd)

Legislation referred to:

Constitution (Amendment) Act 1983, s 12

Constitution (Amendment) Act 1984, s 2

Constitution (Amendment) Act 1994, s 8

Courts of Judicature Act 1964, ss 83, 84

Federal Constitution, arts 4(1), (3)(a), (b), (4), 8, 11(4), 71(4), 74, 77, 121(1A), 128(1)(a), 160(2), 162

Penal Code, ss 298A, 376

Planning (Development) Rules 1970, r 5(3)

Rules of Court 2012, O 53 r 2(4)

Rules of the Federal Court 1995, rr 7, 33, 137

Syariah Criminal Code (I) Enactment 2019, ss 1(3), 2(1), 5, 11(1), (2), 13, 14, 16, 17, 30, 31, 34, 36, 37(1)(a), (b), 39, 40, 41, 42, 43, 44, 45, 47, 48

Syariah Criminal Offences (Selangor) Enactment 1995, s 28

Other(s) referred to:

Professor MP Jain, *Administrative Law Of Malaysia And Singapore,* Malayan Law Journal, Malaysia 1997, p 749

Counsel:

For the petitioners: Malik Imtiaz Sarwar (Surendra Ananth, Lim Yvonne with him); M/s Surendra Ananth

For the respondent: Idham Abdul Ghani (Adam Mohamed, Mohd Syazwan Muhsin Negara, Kamaruzaman Muhammad Arif, Nik Suhaimi Nik Sulaiman, Arham Rahimy Hariri, Muhammad Izzat Dzulkafli with him); State Legal Advisor's Office

For the Jabatan Hal Ehwal Agama: Yusfarizal Yusoff (Mohd Faizi Che Abu with him); Islam Kelantan M/s Faizi & Associates

For the Majlis Agama Islam dan Adat: Tabian Tahir (Noor Amalina Mursiedy with Istiadat Melayu Negeri Kelantan him); M/s Hashim Amran Tabian Ahmad

For the Majlis Agama Islam Wilayah: Adnan Seman @ Abdullah (Muhammad Persekutuan Rafique Rashid Ali with him); M/s Adnan Sharida & Associates

For the Sisters in Islam: New Sin Yew (Siti Summaiyah Ahmad Jaafar with him); M/s AmerBON

Watching Briefs for Malaysian Bar: Roshalizawati Muhammad; M/s Shaliza & Partners
Md Faiez Md Suhaimi; M/s Faiez & Co
Fahri Azzat; M/s Fahri, Azzat & Co

Watching Briefs for Badan Peguam Syarie: Mohd Tajuddin Abd Razak (Majdah Muda Wilayah Persekutuan with him); M/s Hasshahari & Partners

Watching Briefs for Persatuan: Haniff Khatri (Zainul Rijal Abu Bakar, Aidil Khalid Peguam-Peguam Muslim with him); M/s Chambers of Zainul Rijal Malaysia

Watching Briefs for Persatuan Peguam: Hanif Hassan; M/s Hanif Hassan & Co Syarie Malaysia Rosfinah Rahmat; M/s Rosfinah & Co

Watching Briefs for Majlis Agama Islam dan Adat Istiadat Melayu Perlis: *Fakhrul Azman Abu Hassan (Ahmad Edham Abdulwani Mohamad with him); M/s Azaine & Fakhrul*

Watching Briefs for Majlis Agama Islam Negeri Sembilan: *Hanif Hassan; M/s Hanif Hassan & Co*

Watching Briefs for Majlis Ugama Islam Sabah: *Zakaria Ahmad; M/s Zakaria Ahmad & Co*

Watching Briefs for Majlis Agama Islam dan Adat Melayu Perak: *Adham Jamalullail Haji Ibrahim (Norazali Nordin with him); M/s Adham & Associates*

Watching Briefs for Majlis Agama Islam dan Adat Melayu Terengganu: *Sallehudin Harun (Yusfarizal Yusoff with him); M/s Sallehudin & Partners*

Watching Briefs for Majlis Agama Islam Melaka: *Mohd Adli Ithin (Hajah Rosfinah Rahmat with him); M/s Adli & Co*

JUDGMENT

Tengku Maimun Tuan Mat CJ (majority):

Introduction

[1] My learned brother Abdul Rahman Sebli, CJSS is dismissing the petition on the sole ground that the petitioners had no *locus standi* to file the petition. The other members of the Coram have seen my judgment in draft and have expressed their agreement with it. This is the majority judgment of the Court.

[2] In this judgment, unless otherwise expressly or impliedly stated, any references to 'Articles', 'Clauses', 'Schedules', 'Lists' shall be taken to mean any references to those of the Federal Constitution ('FC'). Likewise, any references to 'sections' means any reference to the sections of the Kelantan Syariah Criminal Code (I) Enactment 2019 [Enactment 14] which incidentally by virtue of s 1(3) of the same, applies to Muslims only and that too, only in the State of Kelantan.

The Federal Court's Exclusive Original Jurisdiction

[3] This is a petition filed in the exclusive original jurisdiction of the Federal Court. The original jurisdiction of the Federal Court is very narrow and limited and the type of cases that can be filed directly in the Federal Court's original jurisdiction are therefore very specific (see arts 4(3), 4(4) and 128(1)).

[4] The first type of cases involves disputes on any question between States or between the Federation and any State. Purely by way of example, if the Federation were to sue or be sued by the State of Pahang, or if the State of Perak were to sue or be sued by the State of Perlis, these suits can be filed directly in the Federal Court - without leave.

[5] The second category of cases that can be filed directly in the Federal Court is any dispute where the petition seeks a declaration that a law is invalid on the ground that Parliament or the State Legislature of any State had no power to make the law in question. These kinds of petitions unlike the first category of cases, cannot be filed straight away in the Federal Court if the party filing them is neither the Federation nor any State in Malaysia. These kinds of petitions can only be filed after a single Judge of the Federal Court has granted leave to file the petition - again assuming that the party filing such a case is neither the Federation nor a State.

[6] "Leave of Court" simply means something that requires prior permission from the Court. In other words, a potential petitioner must first seek the permission of a single Judge of the Federal Court before he or she can begin to file the petition in which he or she will challenge the law on the ground that either Parliament or the State Legislature had no power to make. For a deeper understanding on leave, see the judgment of this Court in *Wong Shee Kai v. Government of Malaysia* [2022] 6 MLRA 797 ('*Wong Shee Kai*').

[7] The judgment in *Wong Shee Kai* also explains why the second category of cases are called 'incompetency challenges' as opposed to the more generic challenges called 'inconsistency challenges'. In other words, in practice, we call a case that is filed in the Federal Court's original jurisdiction to seek a declaration that a law is invalid on the grounds that Parliament or the State Legislature had no power to make it as 'incompetency challenges'.

[8] The two types of categories stated above that invoke the Federal Court's original jurisdiction are exclusive to the Federal Court. This means that such kinds of cases can only be filed in the Federal Court and no other Court.

[9] In this original jurisdiction petition the petitioners seek a declaration that ss 5, 11, 13, 14, 16, 17, 30, 31, 34, 36, 37(1)(a), 39, 40, 41, 42, 43, 44, 45, 47 and/or 48 of the Kelantan Syariah Criminal Code (I) Enactment 2019 [Enactment 14] ('Enactment 2019') are invalid, and hence null and void, on the ground that the Legislature of the State of Kelantan ('LSK') and thereby the respondent had no power to make those provisions. We shall collectively refer to the sections under challenge as the 'Impugned Sections'.

[10] At this stage we also find it appropriate to address the submissions of Majlis Agama Islam & Adat Istiadat Melayu Negeri Kelantan ('MAIK') as *amicus curiae* to the effect that it suggests that in petitions such as this, filed pursuant to arts 128(1), 4(3) and 4(4), this Court can only issue a declaration of "invalidity" without the attendant phrase that the impugned law is "void". This argument must be rejected for it fails to understand that as explained in *Wong Shee Kai*, 'incompetency challenges' are a specific category of 'inconsistency challenges'. 'Incompetency challenges' in addition to arts 128(1), 4(3) and 4(4) are also covered by art 4(1). As such, where a law is invalid on the ground that the relevant Legislature had no power to make it, it would, by virtue of art 4(1), be null and void. And thus, in making a declaration of invalidity under cls (3)

and (4) of art 4, the Court can and should also declare those laws void under art 4(1).

[11] At the outset of the oral arguments, the petitioners withdrew their challenge against ss 5 and 37(1)(a). Those two provisions are thus no longer included in the Impugned Sections.

Judicial Independence And Public Controversy

[12] Before proceeding into the issues raised in this petition, we must first note our observations that of late, certain decisions of the Judiciary especially of this Court have been called into question on grounds other than the reasons for those decisions. Our judgments are publicly available and it would behove the public, including politicians, to read them and all persons are free to criticise or comment on our judgments on legitimate and educated grounds.

[13] In fact, it has even been brought to our attention that an advocate appearing before this Court, Yusfarizal Yusoff has made certain remarks regarding this case and this Court's prior decision in *Iki Putra Mubarrak v. Kerajaan Negeri Selangor & Anor* [2021] 3 MLRA 384 ('*Iki Putra*') to the effect these cases have or might adversely affect Islam or Syariah Courts in this country. And while he has filed an affidavit responding to or refuting these allegations in these proceedings, the fact remains that any explanation, given the nature of the statements made, remains an afterthought as the damage has been done. It only proves the adage that one, especially a lawyer arguing the case in question, should think before he speaks. We are not quick to say at this stage that he has committed contempt of Court, we are merely saying he has given enough reason to the Attorney General, as the guardian of public interest, to exercise his discretion, to take the necessary course of action so that the matter can be decided in the right forum.

[14] The record must be set straight. The present case, contrary to erroneous and politically-fuelled suggestions, has absolutely nothing to do with undermining the religion of Islam. The allegation that any decision of this Court could destroy or even uphold Islamic law in this country is therefore not even remotely close to what the present petition actually entails.

[15] As was explained regarding the Federal Court's exclusive original jurisdiction earlier, the only issue in this case is whether the respondent, via the LSK, was constitutionally empowered to make the Impugned Sections. Put another way, the only issue in this case is, which is the correct legislative body to enact the Impugned Sections: Parliament or the respondent through the LSK? The petition has nothing to do with the substantive principles of Islamic law or its position in this country.

Preliminary Issues

Locus Standi

[16] Before we consider the merits of the petition, we will deal with several preliminary objections raised by the respondent.

[17] The first objection is contained in encl 68, an application seeking to move this Court to hold that leave in this case was granted erroneously.

[18] Legally speaking, the respondent is allowed to file such an application having regard to *Wong Shee Kai*. Simply put, if we agree with the respondent that leave was improperly granted by the single Federal Court Judge, then this petition will have no basis. As a result, we would have to strike out this petition on a technicality.

[19] The premise of the respondent's first preliminary objection is that the petitioners have no *locus standi* to file this petition or that in any event, the present petition is academic or abstract. The respondent contends that the petitioners are busybodies who have no basis to initiate this case in that the petitioners are not even adversely affected by any of the Impugned Sections. In addition, there is no real dispute or controversy between them and the respondent.

[20] In response, the petitioners suggest that they either do, or intend later on in life, to reside in Kelantan. The petitioners suggest that they have properties in Kelantan and do have some semblance of a life there. They are therefore residents of Kelantan and Enactment 2019 is a law that can be used against them. Their argument suggests, at its core, that the Impugned Sections exist as law, and can be enforced against them. They therefore maintain that they have a basis to challenge the Impugned Sections.

[21] It is our view that the petitioners do have *locus standi* to maintain the present petition which is neither academic nor abstract. Our reasons are as follows.

[22] *Locus standi* refers to the standing or right of the person to sue. The most recent decision by this Court on this issue is that in *Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals* [2023] 4 MLRA 114 ('*Taman Rimba*'). In that case, the Court endorsed the minority judgment of Eusoffe Abdoolcader SCJ in *Government of Malaysia v. Lim Kit Siang* [1988] 1 MLRA 178 ("*Lim Kit Siang*"). Summarising the analysis therein, *locus standi* ought to be relaxed as much as possible to allow any public-spirited person to file a public law suit provided that he has some interest in the matter.

[23] *Taman Rimba* is an apt example of administrative judicial review. There, the decision of certain public bodies was challenged on the basis of statutes and regulations relating to town and country planning. The present case is a constitutional judicial review wherein the Federal Court is obligated to decide the constitutionality of the Impugned Sections.

[24] In a case such as the present one involving constitutional judicial review, we opine that *locus standi* must be adjudged on principles even broader than the ones already applicable in *Taman Rimba*. The starting point for this is the words in art 4(1), as follows:

> "Supreme law of the Federation
>
> 4. (1) 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.".

[25] The keywords are 'passed after Merdeka Day'. Any challenge brought under art 4(1) must have been so brought on the premise of that law having been 'passed after Merdeka Day'. Thus, the fact that a law exists by virtue of it having been passed is a factual situation in which the law can be challenged. For if that law is inconsistent with the FC upon its passing, art 4(1) dictates that the said law is invalid. In light of the presumption of constitutionality, until and unless that law is challenged and struck down in the appropriate forum, then the law must continuously be presumed valid.

[26] Giving the respondent's proposition its deepest possible consideration, what they suggest is that if a law has been passed either by Parliament or the State Legislatures, and it is constitutionally invalid, then going by the rules of *locus standi* the Courts must pause on deciding the validity of that law until in effect the "correct person" shows up before the Courts to challenge that law. This proposition is not supported by the language of art 4(1) because nowhere is it suggested in art 4(1) that the Courts should now filter the litigants that come before them seeking to challenge the constitutional validity of legal provisions for the reason that the question of validity comes second to the personality before the Court.

[27] In our view, the following passage in the judgment of Abdoolcader SCJ in *PP v. Dato' Yap Peng* [1987] 1 MLRA 103 ('*Yap Peng*'), is instructive (at p 107):

> ".... The power of the Public Prosecutor under s 418A is uncanalized, unconfined and vagrant. The Deputy however assures us that this power will only be exercised reasonably. Sankey J, however, had no difficulty in holding the Executive action illegal, and he pointed out (at p 791) that the Crown's argument that the Executive could be trusted begs the question, for the court could concern itself only with the bare issue of the possession of the claimed power, and not whether it would be reasonably exercised.".

[28] The above passage, if read within its larger context, suggests that the very existence of a legal power is enough of a reason for question quite apart from the question on the manner in which it was exercised. *Taman Rimba* has extended and clarified the scope of *locus standi* in relation to the manner in which administrative power was exercised. This is typical in a statutory judicial review because the question of the manner of exercise of power will, to some extent, depend upon against whom it is exercised. Even in that situation,

Taman Rimba has watered down the test of *locus standi* in the manner suggested by this Court in the judgment. What more in this case where we are dealing with constitutional judicial review.

[29] We therefore take the view that the fact that legislation has been passed creates a factual circumstance in which it can be challenged. Article 4(1), which forms the substantive constitutional basis for all constitutional judicial review cases, does not discriminate between the circumstances and situations in which such challenges can be brought or the categories of persons that can bring them, apart from differentiating between the nature and procedure for those proceedings ie, between 'incompetency' and 'inconsistency' challenges.

[30] As explained in *Wong Shee Kai*, 'incompetency challenges' are a specific kind of 'inconsistency challenge' which in addition to being governed by art 4(1), are also governed by art 4(3) and 4(4). There is nothing expressed or implied within art 4(3) and 4(4) to suggest that anyone who seeks to challenge the constitutionality of a legal provision must first prove his or her reasons *per se* for bringing the challenge (apart from having to advance arguments on why the provisions they challenge are invalid on grounds stated in art 4(3)).

[31] All citizens (and in some cases all persons) are entitled to rely on the FC for protection and to approach the Federal Court for competency challenge under arts 4(4) and 128 of the Federal Constitution. The passing of a law (whether Federal or State) is a legislative act or conduct which always remains subject to judicial scrutiny in line with the principle of separation of powers. We find no constitutional basis to limit the types of people or category of persons who can at the very minimum, challenge the existence of the law as a separate constitutional cause of action in addition to cases where a person affected by the exercise of such powers against them can also challenge the validity of that same law.

[32] We therefore dismiss encl 68 as did the single Federal Court Judge who heard the same *locus standi* arguments when granting leave to file the present petition.

Failure To Name The Correct Parties

[33] Another preliminary objection taken by the respondent is that the petitioners have failed to name the correct party or that they have named a party who has no nexus to this petition. The respondent claims that this procedural infirmity is fatal, meaning that the petition should and can be dealt with on this ground alone.

[34] The sole respondent in this suit is the Government of the State of Kelantan. The respondent submits that the petitioners should have instead named the LSK or the Jabatan Hal Ehwal Agama Islam Kelantan ('JAHEAIK'). This is because, in their submission, these executive bodies

are responsible for the enforcement of the Impugned Sections as they are concerned with the execution of the law and are able to defend it while the respondent has no such jurisdiction to do the same. They further submit that the LSK and the respondent are separate legal entities.

[35] In reply, the petitioners submit that this issue of suing the correct party was raised at the leave stage. It is their position that the respondent, though having raised that issue then, appeared to have abandoned the issue at the hearing of the leave application. As such, they submit that the respondent appeared to have acknowledged that it is the correct party to be sued alone in this matter.

[36] Whatever the position taken by the parties in this case, we are of the view that whether or not the respondent is the correct party is an issue of law and it should therefore be addressed even if it was raised and abandoned earlier.

[37] As a matter of law, the respondent's position is that there is nothing in the Constitution of the State of Kelantan ('Kelantan State Constitution') to define what the Government of the State of Kelantan means. The respondent however referred us to the provisions on the State Executive Council and other provisions on executive power.

[38] With respect, we are unable to agree with the respondent's submission. The fact remains that this is a petition seeking a declaration in terms of art 4(3) and (4) namely that the LSK had no power to make the Impugned Sections. As such, the provisions of the FC should apply before any other provisions including the Kelantan State Constitution. In this regard, art 160(2) defines "Executive Council" as follows:

> "Executive Council" means the Cabinet or other body, however called, which in the Government of a State corresponds, whether or not the members of it are Ministers, to the Cabinet of Ministers in the Government of the Federation (and in particular includes the Supreme Council in Sarawak)".

[39] While there is no express definition of "Government of a State" in the FC, art 162 and numerous other Articles refer to the phrase "Government of a State" or "State Government" interchangeably. In addition, the definition above clarifies that the Executive Council of the State (howsoever called) comprises a part of that State. The Government of a State is, in this sense, regarded by the FC as a separate entity such that "in the Government of a State", the Executive Council is a part of.

[40] The impugned act in this case relates to the power to make the Impugned Sections and not the enforcement of the law. In other words, in petitions such as this, the Federal Court is concerned with whether the law was enacted within the powers conferred onto the relevant State Legislature and not so much on how it is enforced.

[41] Viewed in this way, art 4(3) and 4(4) warrant closer attention and they state as follows:

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

[42] Paragraph 4(3)(b) in particular says that if the law is made by the State Legislature and it is challenged on the grounds that the State Legislature had no power to make it, and the party making such a challenge is the Federation, then the proceedings in that case would have to be between the Federation and the State in question. And thus, if the petitioner in this case was the Federation, the present respondent, being the Government of the State of Kelantan would be the correct respondent as representing the State of Kelantan.

[43] Article 4(4) then deals with a situation where the potential petitioner is someone other than the Federation or any of the State Legislatures. In relation to such a petitioner, art 4(4) says that in such proceedings, the Federation shall be entitled to be a party to the proceedings as would or might be any State that is so concerned. Interpreting it in this way, where the petitioner is someone other than the Federation or a State, art 4(4) does contemplate that the respondent can be someone other than the State where the declaration sought is against a State-legislated provision.

[44] Considered as a whole, had the petitioner been the Federation, the FC contemplates that suing the State concerned would not only have been sufficient but actually a mandatory act of compliance with art 4(3). In the case of a party that is neither the Federation nor the State, even in such a case, the FC in art 4(4) recognises that the State shall be entitled to be a party. And thus, considering art 4(4) in light of paras (a) and (b) of art 4(3), the Government of the State in question is a proper party to a petition where a declaration to the effect of the present petition is sought.

[45] We are therefore of the view that it defies any logical interpretation of art 4(3) and 4(4) to assert that the Government of a State is not capable at all of being named as a party to petitions such as this.

[46] In other words, since art 4(3)(a) and (b) mandatorily require the State (and this logically means the Government of that State) to be a party, and in all other cases mentioned in art 4(4) the States are entitled to be a party, it means that irrespective of any other executive bodies falling within the Federation or that State's jurisdiction, the Government of that State is a proper party to be sued.

[47] Following from the above reasoning, the only question remaining is whether the Government of that State can be named as the sole respondent in a petition where leave is granted under art 4(4). In our view, that can be so.

[48] While for prudence and completeness the Legislature of that State should be made a party to the proceedings, the fact that they are not, is not fatal to the petition. At the very minimum, it is sufficient if the Government of the State is named as respondent. After all, any executive bodies in the State and any legislative bodies of that State including its State Legislature are organs of the Government of the State in question. With these bodies at its disposal, the State is therefore in a position to defend the validity of the law or laws challenged on the grounds that its Legislature had no power to make.

[49] We therefore hold that naming only the respondent in the present case is sufficient to sustain this petition. This preliminary objection is accordingly also dismissed.

Purported Expert Evidence

[50] There is a final preliminary issue. Counsel for the petitioners has referred us to encls 41, 42 and 43 that have been filed in Court by the respondent. These enclosures purport to be expert opinions on behalf of the respondent on the constitutional interpretation of the Impugned Sections. Enclosures 42 and 43 in particular, also alluded to: (i) 'precepts of Islam' encompass aqidah, syariah and akhlak; and (ii) 'precepts of Islam' are derived from the Quran and Sunnah.

[51] This issue of expert evidence has been beyond clarified and dealt with in *Iki Putra*. In summary, the only party entitled to interpret the FC is the Courts and no other party is allowed to expound a legal opinion on how those provisions can be interpreted as a matter of law. Parties are entitled to canvass their rivalling opinions in the form of legal submissions which can be decided by this Court but providing "expert" evidence on the interpretation to be afforded is not an accepted method of constitutional interpretation. In any event, the Islamic principles of aqidah, syariah or akhlak are not matters for our consideration. What falls for our consideration is whether the respondent/LSK has exceeded its legislative powers. Enclosures 41, 42 and 43 are hereby expunged and have no bearing on the outcome of this case.

Analysis/Decision

Item 1 Of The State List And The Doctrine Of Pith And Substance

[52] We now come to the main point of this petition - the constitutional validity of the Impugned Sections. Before we proceed to consider the arguments, we must note again that the petitioners have withdrawn their challenge against ss 5 and 37(1)(a). This is because according to counsel for the petitioners, the petitioners concede that they are constitutional. Thus, for clarity, we accept the withdrawal of their challenge against the said ss 5 and 37(1)(a) and in light of this withdrawal and the doctrine of presumption of constitutionality, ss 5 and 37(1)(a) continue to be presumed constitutional.

[53] In respect of the Impugned Sections, in the course of his oral argument, counsel for the petitioners alluded to a table in his written submission wherein among other things, comparisons are made between Enactment 2019 on the one side, and federal law on the other side dealing with the same subject matter. On this basis, part of the petitioners' submission is that because there is a federal law in existence on that subject matter, the States are incompetent to enact laws on the same subject-matter as the corresponding federal law.

[54] In their defence of the validity of the Impugned Sections, the respondent maintains that the petitioners have failed to establish how the Impugned Sections are in *pari materia* to any of their possible federal equivalents. In fact, the respondent argues that the Impugned Sections are different from any federal counterpart.

[55] This line of argument by the petitioners and the respondent was expressly explained and rejected in *Iki Putra*. And so, we find the need to remind all counsel that as officers of the Court, whose duties are foremost to the Court, ignoring propositions from recent cases that they cite or even citing older cases that have been overruled is not a practice befitting of the legal profession.

[56] The relevant portion of Item 1 of the State List, in granting the States power to legislate on Syariah law, stipulates thus:

> "1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, ... 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; ...".

[57] In direct response to the incorrect way of interpreting Item 1 based on a prior decision of this Court in *Sulaiman Takrib v. Kerajaan Negeri Terengganu (Kerajaan Malaysia, Intervener) & Other Cases* [2008] 3 MLRA 257 ('*Sulaiman Takrib*') this Court said the following in *Iki Putra*:

> "[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 has 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.".

[58] The above clarifies and belies the simplistic approach of comparing federal law with State law and concluding that the basis for a State to make law can be nullified or justified on the existence or absence of a federal law (as the case may be). To reiterate, the words employed in Item 1 are 'except in regard to matters included in the Federal List and not 'except in regard to matters included in Federal Law. As such, any argument that takes the approach in *Sulaiman Takrib* is rejected.

[59] In *Iki Putra*, this Court conveniently referred to this phrase 'except in regard to matters included in the Federal List as the preclusion clause to Item 1 of the State List. Construing the preclusion clause in its proper sense, it would stand to reason that, except in the Federal Territories, Parliament too cannot base its jurisdiction to make laws within the purview of Item 1 of the State List simply because the States have yet to enact the applicable law. This view was also clearly articulated by Mohamed Azmi SCJ, who in dealing with the constitutionality of s 298A of the Penal Code in *Mamat Daud & Ors v. Government of Malaysia* [1987] 1 MLRA 292 (*'Mamat Daud'*), said at p 298:

> "... The fact that the Administration of Muslim Law Enactment of the states has yet to provide specifically for punishment against such acts cannot, in the absence of express provision in the Constitution, confer Parliament with the power to legislate over such religious matters, and that is why the Muslim Courts (Criminal Jurisdiction) Act 1975 has been enacted to confer on state religious courts jurisdiction over offences against precepts of the religion.".

[60] Earlier at pp 293-294, His Lordship said:

> "In determining whether s 298A, in pith and substance, falls within the class of subject matter of "religion" or "public order", it is the substance and not the form or outward appearance of the impugned legislation which must be considered. The impugned statute may even declare itself as dealing with religion, but if on investigation as a whole, it is in fact not so, the court must so declare.".

[61] We endorse the approach advocated in *Mamat Daud* as the correct one and it is in relation to the doctrine of pith and substance. It is not the outward appearance of the law in question and the words it uses that matter, rather the law must be examined as a whole to ascertain whether it deals, in pith and substance, with a subject-matter upon which the body making it has the power to enact in accordance with the Legislative Lists. This is the second part of the petitioners' approach and this is the only approach that we will consider, not the earlier approach of merely determining whether there is in existence federal laws against which the State law can be compared and deemed beyond the scope of legislative jurisdiction.

[62] And thus, except for matters that fall within the Concurrent List, when the two Lists (Federal and State) are understood and applied correctly, both Parliament and the State Legislatures cannot then ordinarily legislate on matters that fall within the purview of the other. This is an important feature of our FC because we are a federation of States all of whom, between themselves and the Federation, have been allowed their own respective fields of power of legislation.

[63] In fact, it is our view that in light of the most recent pronouncements by this Court especially in *Iki Putra* and *SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener)* [2022] 3 MLRA 219 ('*SIS Forum*') which followed settled reasoning in earlier cases such as *Mamat Daud*, the law on this subject is very clear. In other words, the present case requires only a direct application of the law to determine the outcome, premised only on the facts. And for the record, we are not at all persuaded by the respondent's and Yusfarizal Yusoff's submissions that *Iki Putra* was wrongly decided.

Principles Of Federalism In Malaysia

[64] As we see it, cases such as the present petition arise because of two misapprehensions which relate to the understanding of 'criminal law'.

[65] The first misapprehension that arises is that the States can enact any law, even if that law deals with criminal law, if there is no federal law dealing with that issue. This misapprehension is also manifest when it is assumed that even if there is a federal law on that subject-matter, the States can still enact State criminal law if that criminal law is worded differently or achieves the same outcome as the federal legislation but by different means.

[66] The second misapprehension that arises is that the States can enact any law so long as that law deals with the precepts of Islam. This ties in with the first misunderstanding that even if there is a federal law on that subject, as long as the State law deals with the same issue from an Islamic perspective and from the lens of Islamic precepts, then the said impugned law is validly enacted in accordance with Item 1 of the State List.

[67] There is a method to our FC and this method is borne out of history. To get a fuller understanding of history, we agree with and endorse 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*').

[68] In summary, prior to the British occupation of this land, Malaya, Sabah and Sarawak had their own legal systems prior to 1957, there was a huge clarion call for independence from the British. As a result, parties from various divides discussed the creation of the Federal Constitution.

[69] The British legal system is different from ours in many ways but the biggest and most fundamental difference is that in Britain, Parliament is supreme. This means that Parliament is the ultimate constitutional authority and its Parliament may make any laws that can change even the constitutional basis of the United Kingdom ('UK'). The same is not true here as here, we have a written constitution.

[70] Our FC forms the basis of the existence of all three arms of our Federal Government and all the State Governments. There are portions within it which govern Malaysian territory, the Yang Di-Pertuan Agong, the Executive, the Legislatures (federal and State), the Judiciary, various important public commissions, fundamental rights, citizenship and so on.

[71] In relation to the States and their governments, the Eighth Schedule caters for a template State Constitution. And thus, minimally, the Constitution of every State in our Federation must contain the provisions as set out in the Eighth Schedule. Given the strong federalist nature of our FC, the States cannot legislate their own written constitutions as they please. In fact, by virtue of art 71(4), if it appears to Parliament that in any State any provision of the FC or of the State Constitution is being disregarded, Parliament may by law make provision for securing compliance with those provisions.

[72] We then also have the Ninth Schedule which creates three different legislative fields. The first is the Federal List which provides for the general fields upon which Parliament can legislate. The second is the State List which stipulates what fields of laws within which the State Legislatures can enact State laws. And finally, we have the Concurrent List which sets out joint areas upon which Parliament and the State Legislature can both make laws. Sabah and Sarawak also have additional supplements to the State List.

[73] As clarified by Azahar Mohamed CJM in *Iki Putra*, the FC was formulated with a central bias meaning that the primary powers of legislation are to be accorded to Parliament with certain other limited powers to the States. This fact is apparent not only in the structure of our FC, but is also clarified by the Reid Commission, which is the Commission principally responsible for the creation of our FC.

[74] In particular, in the Reid Commission Report ('RCR'), the Reid Commission noted that a part of its terms of reference included as follows:

> "3. The members of the Commission were appointed in the name of Her Majesty the Queen and Their Highnesses the Rulers with terms of reference 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;...".

[75] In commenting on the creation of a strong federal government with a defined set of matters that it can legislate, coupled with a list for autonomous State Governments, the Reid Commission observed as follows in the RCR:

> "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 (Chap II). 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...
>
> 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]

[76] Again, the above historical document clarifies that there is a clear demarcation of powers between the Federation and the States. There is no overlap and the primary powers of legislation were given to the Federation including the powers to legislate generally on civil and criminal law, and procedure.

[77] The drafters did keep in mind the possibility of reserve powers as is apparent with the inclusion of art 77 which states as follows:

> "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.".

[78] Yet, in commenting on the initial draft version of art 77, the Reid Commission noted that because the division of legislative powers between the Federation and the States was so clear and distinct, any cause for the States to legislate on residual powers might never actually arise. This is what they said, and we think it strongly proves the point on the general federalist nature of the Malaysian system of government, as per the following observation in the RCR:

> "121. Our terms of reference contain the following passage: "The question of residual legislative power to be examined by and to be the subject of recommendations by the Commission." The present position is that the Rulers have agreed to specific powers being exercised by the Federation under the Federation Agreement of 1948 but that any residual powers that may exist have been retained by the States. We see no advantage in altering the position and we recommend (art 73) that it should continue. The situation of the residual powers makes no difference to the construction of any of the specific powers in the Federal List: for example the defence power is just as wide under our recommendation as it would be if the residual powers were transferred to the Federation. Moreover it is unlikely that the residual power will ever come into operation because the Legislative Lists, read in the light of the clauses in art 68, appear to us to cover every foreseeable matter on which there might be legislation. The only real effect of leaving the residual power with the States is that if some unforeseen matter arises which is so peculiar that it cannot be brought within any of the items mentioned in any of the Legislative Lists, then that matter is within the State powers.".

[79] And so, that deals with the first aspect of the misapprehension on the powers to legislate. Both Parliament and the State Legislatures are confined to their respective Legislative Lists and ordinarily, they can only make laws within their own respective Legislative Lists subject to certain exceptions that are neither applicable nor relevant to the present petition.

[80] This leads us to the second misapprehension which is to wit, that the States can enact any law so long as that law was enacted in accordance with the precepts of Islam.

[81] On this misapprehension, we note as an adjunct to the clear Federal-State legislative divisions, our historical documents that led to the FC (as does the FC itself), indicate that matters relating to Islamic law would be conferred and confined to the States except in the Federal Territories. As such, not only were the States accorded a limited power to legislate by what is confined to the State List, the inclusion of Islamic law and personal law into the State List was done historically with the clear intention of limiting the kinds of laws that the States can enact on that subject matter.

[82] The further addition to the preclusion clause to Item 1 of the State List was to ensure that the powers of the States cannot extend to the point of legislating on matters included in the Federal List. The fact that 'criminal law' is generally mentioned in Item 4 of the Federal List means that the primary powers of legislation were intended to be solely reposed in Parliament leaving only certain limited powers of legislation to the States in Item 1 of the State List including legislation dealing with the creation and punishment of offences against the precepts of Islam.

[83] Thus, inasmuch as the official religion of Malaysia is Islam, the application of Islamic law is itself limited to what is provided for mostly in the State List and with some exceptions in the Federal List. In this regard, we find it necessary to refer to the historical analysis undertaken by the former Supreme Court in *Che Omar Che Soh v. PP & Another Appeal* [1988] 1 MLRA 657 ('*Che Omar*'). In particular, this is what Salleh Abas LP (speaking for the unanimous Supreme Court), said at p 658:

> "... When the British came, however, through a series of treaties with the sultans beginning with the Treaty of Pangkor and through the so-called British advice, the religion of Islam became separated into two separate aspects, *viz* the public aspect and the private aspect. The development of the public aspect of Islam had left the religion as a mere adjunct to the ruler's power and sovereignty. The ruler ceased to be regarded as God's vicegerent on earth but regarded as a sovereign within his territory. The concept of sovereignty ascribed to humans is alien to Islamic religion because in Islam, sovereignty belongs to God alone. By ascribing sovereignty to the ruler, ie to a human, the divine source of legal validity is severed and thus the British turned the system into a secular institution. Thus all laws including administration of Islamic laws had to receive this validity through a secular fiat.".

[84] His Lordship explains how with the arrival of the British, our general legal system started to lean more towards secularity. The Islamic aspects of it became more confined to private law. On the same page, the Supreme Court continued to observe as follows:

"... [T]he establishment of the Federated Malay States in 1895, with the subsequent establishment of the Council of States and other constitutional developments, further resulted in the weakening of the ruler's plenary power to such an extent that Islam in its public aspect had become nothing more than a mere appendix to the ruler's sovereignty. Because of this, only laws relating to family and inheritance were left to be administered and even this was not considered by the court to have territorial application binding all persons irrespective of religion and race living in the state. The law was only applicable to Muslims as their personal law. Thus, it can be seen that during the British colonial period, through their system of indirect rule and establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only. (See MB Hooker, *Islamic Law in South-east Asia*, 1984.)"

[85] And at pp 658-659, the Supreme Court concluded:

"In our view, it is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word "Islam" in the context of art 3. If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void. Far from making such provision, art 162, on the other hand, purposely preserves the continuity of secular law prior to the Constitution, unless such law is contrary to the latter.

...

We thank counsel for the efforts in making researches into the subject, which enabled them to put the submissions before us. We are particularly impressed in view of the fact they were not Muslims. However, we have to set aside our personal feelings because the law in this country is still what it is today, secular law, where morality not accepted by the law is not enjoying the status of law. Perhaps that argument should be addressed at other forums or at seminars and, perhaps, to politicians and Parliament. Until the law and the system is changed, we have no choice but to proceed as we are doing today.".

[86] Clauses (1) and (4) of art 3 provide thus:

"Religion of the Federation

3. (1) Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.

...

(4) Nothing in this Article derogates from any other provision of this Constitution.".

[87] What we can explain from the foregoing is this. The general legal system in Malaysia leans more towards secularity without being purely secular. What this means is that the source of our law is not purely from divine or Islamic law and the reason why we are not a purely secular State is because limited

allowance has been made in the FC for the legislation and application of Islamic law. In this sense, we are a unique nation with a mixed or dual secular and Islamic law legal systems that are meant to operate independently of each other.

[88] In the past, the Superior Civil Courts had delved into matters involving purely Islamic law such as the case of *Myriam v. Mohamed Ariff* [1971] 1 MSLR 5. However, upon the introduction of art 121(1A), that division is now clear. The Superior Civil Courts cannot adjudicate on the substance of Islamic issues just as the Syariah Courts cannot adjudicate upon matters that are not contained within their jurisdiction.

[89] We postulate, from historical and academic references that Islamic law was not made the overarching law of the land and the basis of the Malaysian legal system because Malaysia is a multiracial and multireligious society. And so, our general criminal law needed to be developed such that it could be applied equally to all persons regardless of race or religion. This power was conferred unto Parliament generally by virtue of Item 4 of the Federal List which says, in relevant part to criminal law:

> "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;
>
> ...
>
> (e) subject to para (ii), the following:
>
> (i) contract; partnership, agency and other special contracts; master and servant; inns and inn-keepers; actionable wrongs; property and its transfer and hypothecation, except land; *bona vacantia*; equity and trusts; marriage, divorce and legitimacy; married women's property and status; interpretation of federal law; negotiable instruments; statutory declarations; arbitration; mercantile law; registration of businesses and business names; age of majority; infants and minors; adoption; succession, testate and intestate; probate and letters of administration; bankruptcy and insolvency; oaths and affirmations; limitation; reciprocal enforcement of judgments and orders; the law of evidence;
>
> (ii) the matters mentioned in para (i) do not include Islamic personal law relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession, testate and intestate;
>
> ...
>
> (f) official secrets; corrupt practices;

...

(h) creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;...".

[90] By contrast, and at the risk of repetition, Item 1 of the State List provides, in part relevant to this case:

"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, including 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;...".

[91] Having regard to the central bias in favour of the Federal Parliament when it comes to criminal legislation, and when the two lists (Federal and State) are read together, the intention behind Item 1 of the State List is that it was intended to apply only to offences that are purely religious in nature. In other words, offences that relate purely to the precepts of Islam and nothing else. The following was also made amply clear by Azahar Mohamed CJM in *Iki Putra*, as extensively quoted as follows:

"[119] But there's still one important constitutional question that remains, and this requires clarification, as it was claimed by the second 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 paras [106] and [107], 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 second 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:

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

(b) 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

(c) 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 [121] 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* (at p 298) '... 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 Sani SCJ said in *Mamat Daud* (at p 305) (citing *Attorney-General For Ontario & Ors v. Canada Temperance Federation & Ors* [1946] AC 193 and *Canadian Federation of Agriculture v. Attorney-General for Quebec & Ors* [1951] AC 179), '...The true test is always to see the 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.".

[92] The other reason why the FC was drafted in this way is so that Muslims would not be subject to different laws and legal systems for the same offences when compared to non-Muslims for example on general laws like rape, corruption, theft, robbery, etc. If the demarcation between the Federal and State Lists is understood and applied correctly, it will be noticed that Muslims and non-Muslims are subject to the same general set of criminal laws. However, because of the duality of our legal system, Muslims are, in addition to the

earlier-mentioned laws, also subject to Islamic law and offences. In terms of personal law and adat, the Muslims follow their own set of laws as opposed to non-Muslims who are bound by laws passed by Parliament.

[93] It was in this context that in [59]-[60] of *Iki Putra*, this Court clarified the limited scope of application of the judgment of this Court in *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 MLRA 175 ('*Sukma Darmawan*'). What we have alluded to earlier provides a full answer to the respondent's proposition that State-legislated 'criminal law' offences which should be passed by Parliament can be disguised as purported offences that deal with precepts of Islam, and that such State-passed legislation can somehow co-exist with federally-legislated criminal law on the same subject.

[94] It must be said again as it was said in *Iki Putra* that many criminal law offences such as theft, robbery, rape and corruption would naturally also encompass and are caught by the precepts of Islam. But, because these offences fall within the general purview of criminal law, only Parliament has the power to enact such laws to the exclusion of the State Legislatures. This is the general system dictated by our FC - specifically the separation of legislative powers between the Federal Legislature (Parliament) and the State Legislatures.

[95] When all these technicalities are appreciated properly, it will be understood that the placement of Islamic law including the powers to create and punish offences against the precepts of Islam (except with regard to matters in the Federal List) in Item 1 of the State List, was done to preserve the sanctity of the religion of Islam and to ensure its continuous survival in our legal system. In addition, the inclusion of art 121(1A) was a celebrated act to preserve the substantive validity and integrity of the Syariah Courts.

Interpretive Principles On 'Precepts Of Islam', 'Purely Religious Offences' And 'Criminal Law'

Fundamental Principles

[96] Given the brief historical analysis above and the dichotomy between Federal and State powers of legislation, it comes as no surprise why there is, sometimes, confusion in relation to how the Federal and State Lists should be interpreted especially where it concerns the preclusion clause. This confusion arises because of the complex and finely interwoven language in which the Federal and State Lists are worded and a need to to find a means to preserve and protect both Malaysia's secular and Syariah dual legal systems.

[97] The most confusing phrase in the entry: '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 in Item 1 of the State List is the emboldened portion, ie the 'preclusion clause'.

[98] Upon reading the first part of the phrase in the entry, one has to ask the question: what are the precepts of Islam which is the phrase that exists by

virtue of the entry 'by persons professing the religion of Islam against precepts of that religion'? Without attempting to water down the meaning of the phrase, it is our view that 'precepts of Islam' constitutionally, refers to one of two of its broad categories. Both these categories are applicable in relation to the offences that the States can create and punish by virtue of Item 1 of the State List.

[99] The first broad category of 'precepts of Islam' in relation to offences that can be created and punished under Item 1 of the State List is specific and it includes, in our view, any matter included in the specific entries of Item 1 of the State List or any other applicable provision of the FC including art 11(4). For example, Item 1 of the State List provides in part the power of the States to enact laws with respect to 'Islamic law relating to testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts...'. Since these laws are only applicable to persons professing the religion of Islam and are enacted on the basis of them complying with Islamic law, it can be said that such laws will encompass the precepts of Islam.

[100] And thus logically, if any offence is enacted by the States for the creation and punishment of offences against the 'precepts of Islam' by reference to any of the expressly stated entries in Item 1 of the State List, it cannot possibly fall within the Federal List. The preclusion clause cannot therefore apply in such cases.

[101] That said, in our reading of Item 1 of the State List, the meaning of 'precepts of Islam' is not just confined to the entries included specifically in Item 1 of the State List or anywhere else in the FC which deals with the exclusive power of the States to enact laws such as art 11(4).

[102] This is because the portion of Item 1 that deals with the creation and punishment of offences does not say anything to the effect: 'creation and punishment of offences by persons professing the religion of Islam against precepts of that religion as included herein ...'. Instead, it specifically mentions in effect, 'precepts of Islam' without expressly limiting the meaning of that phrase specifically to the entries in Item 1 of the State List. As such, because the phrase adopted is larger in meaning than that is already included and spelt out in Item 1, it follows that the meaning of 'precepts of Islam' though it includes the entries in Item 1 of the State List, it is not expressly limited to the said Item 1 entries.

[103] The inclusion of the preclusion clause lends credence to the interpretation that 'precepts of Islam' in Item 1 of the State List though it includes State-legislated offences enacted by reference to Item 1 of the State List, is not only confined to those entries. This is because, following the earlier stated logic, if any State-legislated offence was enacted by reference to any entry in Item 1 of the State List, it would then have been within the State Legislature's jurisdiction and there would have been no reason to include the preclusion clause if that is all was meant by 'precepts of Islam'.

[104] This brings us to the second broad category of 'precepts of Islam'. It is our view that the second broad category of the phrase 'precepts of Islam' is its more open-ended definition of anything that can possibly be an offence in the religion of Islam and its laws that is not otherwise directly referenced to any of the express entries in Item 1 of the State List.

[105] Even though this is the second meaning of that phrase, and it is a broad category, it is by no means an unbridled invitation to the States to enact any criminal law they so wish. Following *Iki Putra*, this aspect of 'precepts of Islam' offences, considered in its proper context, can only truly include (in the words of Azahar Mohamed CJM in [122] of *Iki Putra*) offences that are 'purely religious in nature'.

[106] What this means is that any law that is enacted by the States with a view to creating or punishing offences against the precepts of Islam whether in its first broad category or second broad category can, for convenience, be called a 'religious offence'.

[107] What then is a 'purely religious offence'? Although the second meaning of 'precepts of Islam' is open-ended, we would postulate that a 'purely religious offence' is an offence in the second broad category (which is not included in the Federal List). Because this aspect of State legislation deals with the creation and punishment of offences, the specific aspect of the Federal List with which there runs a risk of being breached is Item 4 of the Federal List which deals with Parliament's power to make 'criminal law'.

[108] It does not therefore come as a surprise that in all the cases of this kind, at least one party will call upon the Courts to provide a definitive interpretation of 'criminal law' as employed in Item 4 of the Federal List. In fact, Dato' Malik Imtiaz who is not only counsel in this case but was also counsel for the petitioner in *Iki Putra*, again seeks for us to adopt a particular definition of 'criminal law' by applying cases in other jurisdictions.

[109] We repeat here what was said in *Iki Putra* that we must reject these unrelenting invitations to apply a definition, what more foreign definitions, to 'criminal law'. As any person who can appreciate the gravity of these kinds of cases should recognize, the phrase 'criminal law' is simply far too broad and nebulous to be accorded a set definition in the context of our FC that can stand the test of time.

[110] While we cannot define 'criminal law', we can state our observations on the implications that arise from that phrase. As was the case just now with how we derived two broad categories of the phrase 'precepts of Islam', we similarly derive two broad categories of 'criminal law' in Item 4 of the Federal List.

[111] The first broad category of 'criminal law' refers to the power of Parliament to create and punish any offences with respect to any of the entries included in the Federal List. As such, if the Federal List empowers Parliament

to make a law on any given subject matter, then the creation of any offences or punishments in relation to that subject matter must be deemed to be a part of 'criminal law'. This is also made apparent by a direct reading of Item 4(h) of the Federal List which provides:

> "4. Civil and criminal law and procedure and the administration of justice, including:
>
> ...
>
> (h) creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;...".

[112] But, just as is similarly the case with the use of the phrase 'precepts of Islam' in Item 1 of the State List, Item 4 of the Federal List also does not expressly confine 'criminal law' to only matters included in the Federal List. What this means is that there is a whole entire second broad category of criminal law that is incapable of a set definition either in substance or by direct reference to the Federal List. For convenience, we shall call this second broad category, which deals with all offences other than by direct reference to the Federal List, as 'general criminal law'.

[113] We are thus left with two legal phrases that are incapable of being expressly defined. What they mean must be determined on a case-by-case basis. We are here referring to the two indefinable phrases of 'purely religious offences' that are on the one side, constituted within 'precepts of Islam' in Item 1 of the State List and on the other side, 'general criminal law' that is constituted in 'criminal law' in Item 4 of the Federal List.

[114] The inability to define them however poses a problem because it is only when we understand the two concepts can we determine if the preclusion clause applies or not. And thus, to alleviate these problems, what we suggest is to draw out their general characteristics. This is done by having regard to our earlier analysis that there is a central bias and that Parliament holds the primary power to legislate on 'criminal law' to the exclusion of the States. Similarly, except in the Federal Territories, the States enjoy the power to create and punish 'purely religious offences' to the exclusion of Parliament.

[115] In this regard, because the limiting factor in Item 1 of the State List is the preclusion clause, we think this would be a useful starting point in particular in understanding the broad characteristics of 'general criminal law'.

[116] Given the structure of our FC that leans in favour of secularity, 'general criminal law' includes any law that Parliament can enact to create or punish offences the nature of which can apply to any person in Malaysia irrespective of their status, race or religion, and grounded upon the general preservation of public order, health, safety, security, morality, etc. These categories are not closed but what is common to them is the feature that they are intended to apply to all persons or classes of persons equally, and are not grounded on any notions of Islamic law.

[117] This then leaves us with 'purely religious offences'. In light of what has been determined above, what constitutes a 'purely religious offence' requires a two-step approach. The first step is to determine whether the State-legislated offence in question is, in the first place, a 'religious offence'. Taking heed from the reasoning of Azahar Mohamed CJM in *Iki Putra*, and without closing any categories, the general characteristics of what can constitute a 'religious offence' is one that might relate, among other things, to (1) aqidah; (2) sanctity of the Islamic religion and its institution; or (3) one purely relating to morality in Islam.

[118] The second and final step in that assessment requires the Court to determine if the 'religious offence' is a 'purely religious offence'. This is where the balancing exercise is done by comparing that 'religious offence' to the general features of 'general criminal law'.

[119] If the State-legislated offence is one that can apply only to Muslims, enacted only for purposes of Islamic law or religious reasons, and confined only to the religion of Islam relating to (1) aqidah; (2) sanctity of the Islamic religion and its institution; or (3) one purely relating to morality in Islam, then it is a 'purely religious offence' and is validly enacted by the State.

[120] If however, the State-legislated offence in question is a 'religious offence' but can, in pith and substance, be deemed as applying principles of 'general criminal law' which relates to overall public order, safety, health, security, morality, etc then it cannot be said to be a 'purely religious offence' and would be invalid by virtue of it having been caught by the preclusion clause.

[121] For convenience, we would summarise the principles alluded to above, as follows:

(i) First, determine whether the impugned section legislated by the State Legislature is an offence against the 'precepts of Islam' which constitutionally refers to one of the two broad categories.

(ii) The first broad category relates to any matter specifically referenced in Item 1 of the State List and to other relevant provisions in the FC. If the impugned section in pith and substance can be referenced to any of Item 1 or any other relevant provisions in FC, and the law is applicable only to persons professing the religion of Islam, then it is a religious offence and the law is validly enacted by the State Legislature as it clearly falls under the State List.

(iii) The second broad category covers a purely religious offence relating to (i) aqidah; (ii) sanctity of the Islamic religion or its institutions; or (iii) one purely relating to morality in Islam.

(iv) If the impugned section is in pith and substance a purely religious offence, the court must test the impugned section against the Federal List. If the impugned section in pith and substance relates

to a purely religious offence which could not be referenced to the Federal List and it concerns only the Muslims in this country, for example, someone claims that he is a Prophet, then it is within the State Legislature's power to make it.

(v) If it is a purely religious offence, but in pith and substance it falls under matters of criminal law in the Federal List or general criminal law which involves an element of public order, safety, health, security, morality, etc, of general application, then it will be caught by the preclusion clause. Examples of these offences are murder, theft, robbery, corruption which can be considered offences against the precepts of Islam but in pith and substance it falls under the criminal law of general application to everyone in this country.

[122] In applying the aforesaid principles, at all times the proposition expounded by this Court in *Gin Poh Holdings Sdn Bhd v. The Government Of The State of Penang & Ors* [2018] 2 MLRA 547 must be kept in mind in that when construing entries in any of the Lists (Federal, State or Concurrent), the widest possible or widest conceivable interpretation must be taken.

Constitutionality Of The Impugned Sections

[123] With all the above principles in mind, we come now to the crux of this petition - the constitutionality of the Impugned Sections. And we will begin by quoting Suffian LP that "... Parliament and State Legislatures in Malaysia is limited by the Constitution and they cannot make any law they please." (see *Ah Thian v. Government of Malaysia* [1976] 1 MLRA 410).

[124] We shall deal with the Impugned Sections (except ss 5 and 37(1)(a) which have been withdrawn), in the following portion of this judgment in accordance with the principles as summarised in para [121].

Section 11

[125] Section 11 states thus:

"11. Destroying or defiling place of worship

(1) Any person who destroys, damages or litters any place of worship for Muslims or any of its equipments with intention to insult or degrade Islam commits an offence and upon conviction shall be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(2) Any person who destroys, damages or litters any place of worship for non-Muslims which is recognized by the law or any of its equipments with intention to insult or degrade the religion of the non-Muslims commits an offence and upon conviction shall be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(3) If the court has convicted any person of the offence, the court, if it is satisfied, in addition to any punishment prescribed for the offence, may order for payment of reasonable compensation and any appropriate order.".

[126] The operative portions of s 11 are subsections (1) and (2). The *actus reus* defined in those subsections relate to the destruction or defiling of, or littering in, a place of worship of Muslims in subsection 11(1) and places of worship of non-Muslims in subsection 11(2). The *mens rea* aspect of the section appears to relate to an intention to insult or degrade Islam in subsection 11(1) and likewise with non-Muslims in subsection 11(2).

[127] We find in pith and substance that s 11 deals with hate crime. This is because upon considering the section as a whole, we find that it is a religious offence enacted to punish acts that affect public order, and harmony either among Muslims or among non-Muslims. This is apparent in both subsections 11(1) and 11(2) because the acts of destroying, defiling or littering whether in places of worship for Muslims or non-Muslims cannot be established without proving either the intention to degrade or insult either Islam or a non-Muslim religion.

[128] There is nothing in the submission of the respondent suggesting that the offence in s 11 can be referred to any of the entries in Item 1 of the State List and the closest we can find such an entry, in relation to subsection 11(1) is the entry that provides: '... mosques or any Islamic public place of worship...'.

[129] Giving "... mosques or any Islamic public place of worship..." its widest possible construction, we find that this entry allows States to enact the establishment of mosques and other such public places of Islamic worship. It is our view that establishing a place of worship for persons professing the religion of Islam should also reasonably include creating offences or punishing acts that seek to destroy, defile or litter in such places as part of the 'precepts of Islam'. The same cannot be said in respect of subsection 11(2) which deals with non-Muslim places of worship and thereby has no nexus to any entry in Item 1 of the State List.

[130] Having made these observations, it is our view that at least in relation to subsection 11(1), when the provision is read in its own context and in light of the rest of s 11, subsection 11(1) has no nexus to Item 1 of the State List even the entry on '... mosques or any Islamic public place of worship...' because the aim of the section appears to be targeted at punishing hate crime. Outwardly and at first glance, s 11(1) appears to have a nexus to Item 1 of the State List *vis-à-vis* the entry relating to "... mosques or any Islamic public place of worship...", but considered as a whole, and as stated earlier, we think that in pith and substance, the purpose of the section is targeted more at public order, harmony and safety than the *per se* intention of legislating on "... mosques or any Islamic public place of worship...".

[131] In this regard, we proceed to determine if the preclusion clause is engaged by reference to any of the two broad categories of 'criminal law' in Item 4 of the Federal List. We note that there is nothing generally in the Federal List other than Item 4 that can be said to deal with hate crime.

[132] We find that dealing with hate crime is a matter of 'general criminal law' within the second broad category of 'criminal law' in Item 4. As such, s 11 as a whole cannot be deemed as a 'purely religious offence'.

[133] Put another way, s 11 is clearly a matter for Parliament having direct nexus to the 'criminal law' purpose envisioned in Item 4 of the Federal List.

[134] Section 11 is thus caught by the preclusion clause. We therefore find that the respondent had no power to make s 11 and it is therefore unconstitutional on that ground.

Section 13

[135] Section 13 provides thus:

> "Selling or giving away child to non-Muslim or morally reprehensible Muslim
>
> 13. (1) Any person who sells, gives or surrenders his child or children under his custody to:
>
> (a) any person who is not a Muslim; or
>
> (b) any morally reprehensible Muslim, commits an offence and upon conviction shall be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping by six strokes or to any combination thereof.
>
> (2) The court may make any order that it considers appropriate in respect of the child or the children.".

[136] The petitioners' submission is that this provision is unconstitutional because it deals with child welfare or social services. They also suggest that human trafficking (including child trafficking) is an offence relating to a subject-matter which only Parliament can make laws.

[137] The petitioners suggest that the words "selling, giving or surrendering" a child within someone's custody which form the *actus reus* of the offence appear similar to matters of concern under the general criminal law which remains under Parliament's exclusive jurisdiction.

[138] With respect, we are not convinced that the petitioners are correct. This is because, we find that in pith and substance, s 13 deals with the creation and punishment of offences relating to the custody of children. Upon a closer and more wholesome analysis of the section, its purpose does not appear to be targeted at curbing child trafficking or child welfare for that matter. It deals instead with the religious offence against a person professing the religion of Islam, removing a child in his custody and giving him specifically to either

a non-Muslim or a Muslim of morally reprehensible character (whatever the interpretation of that phrase may be).

[139] We are convinced that the pith and substance of s 13 deals with the creation of offences and punishment of such offences against the subject of the custody of Muslim children which can reasonably be construed as being included in the entry of '... Islamic law and personal and family law of persons professing the religion of Islam...' in Item 1 of the State List.

[140] In other words, under Item 1 of the State List, the States have the power to legislate on Islamic law including personal law and family law of persons professing the religion of Islam. We view the power to criminalise an act of unlawful departure from custody as an adjunct to this power to make custody orders and to decide generally on custody arrangements. In this regard, it is not entirely correct for the petitioners to say that child welfare as a subject is itself a matter only for Parliament or in the Concurrent List.

[141] We find that s 13 as a provision is specific in that it criminalises a Muslim person from parting with a child in his or her custody in the *actus reus* described in s 13 by delivering that child to either a non-Muslim or a morally reprehensible Muslim. The respondent via the LSK has determined that part of the precepts of Islam and Islamic family on custody is that a Muslim child cannot be given to a morally reprehensible Muslim or a non-Muslim.

[142] While Parliament can make general laws to protect the welfare of children, we find that the basis of s 13 is on the grounds of religion. The purpose of s 13 is in pith and substance, to prevent the propagation of faiths other than Islam (including the improper practices of Islam) to Muslim children. This the States have power over, not only by virtue of Item 1 of the State List but also by virtue of art 11(4).

[143] Given the above situation, we agree with the respondent that they had the power to make s 13. We therefore hold that s 13 is not unconstitutional.

[144] For the sake of clarity, our finding on s 13 does not in any way affect the issue of custody of children of non-Muslim marriage, who have been unilaterally converted by one parent without the consent of the other.

Sections 14, 16, 17 And 47

[145] Sections 14, 16, 17, and 47 can be dealt with together as they relate to the same larger subject matter - sexual offences.

[146] This is what s 14 provides:

> "Sodomy
>
> 14. (1) Any man who commits an act of sodomy which is not liable to the punishment of hadd according to hukum syarak commits an offence and upon conviction shall be liable to a fine not exceeding five

thousand ringgit and to imprisonment for a term not exceeding three years and to whipping not exceeding six strokes.

(2) Any man who attempts to commit an act of sodomy commits an offence and upon conviction shall be liable 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.

(3) For the purpose of this section, "sodomy" means sexual intercourse performed unnaturally which is through the anus between a man with someone else.

(4) If the court has convicted any person of the offence, the court, if it is satisfied, in addition to any punishment prescribed for the offence, may order any appropriate order.".

[147] Section 16 reads thus:

"Sexual intercourse with corpse

16. (1) Any person who performs sexual intercourse with a corpse commits an offence and upon conviction shall be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(2) Any person who attempts to perform sexual intercourse with a corpse commits an offence and upon conviction shall be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(3) If the court has convicted any person of the offence, the court, if it is satisfied, in addition to any punishment prescribed for the offence, may order any appropriate order.".

[148] Finally, s 17 says this:

"Sexual intercourse with non-human

17. (1) Any person who performs sexual intercourse with a non-human commits an offence and upon conviction shall be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(2) Any person who attempts to perform sexual intercourse with a non-human commits an offence and upon conviction shall be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(3) If the court has convicted any person of the offence, the court, if it is satisfied, in addition to any punishment prescribed for the offence, may order any appropriate order.".

[149] It is our view that all three of the above provisions are caught squarely by the decision of this Court in *Iki Putra*. Section 14 deals, in pith and substance with sexual intercourse against the order of nature. Section 17 too, as vague as it is, appears to carry with it features of offences that include buggery with an animal. As for s 16, it deals with necrophilia.

[150] As was stated in *Iki Putra*, these offences are caught by the preclusion clause to Item 1 of the State List meaning that they are matters of general 'criminal law' upon which only Parliament can legislate.

[151] Inasmuch as these religious offences do seem to relate to the second broader meaning of 'precepts of Islam', these offences if enacted into law, can apply equally to non-Muslims as they can to Muslims. That being the case, we are fortified in our opinion that these are not purely religious offences such that the States including the respondent can legislate on.

[152] Accordingly, we find that the respondent had no power to make ss 14, 16, and 17 and they are accordingly unconstitutional.

[153] While ss 14, 16 and 17 are housed in Part III which deals with ta'zir offences relating to protection of person and dignity, s 47 falls within Part VI which deals with takzir offences relating to protection of offspring. Since s 47 deals with a direct sexual offence in the same way suggested in ss 14, 16 and 17, we think this is the right place in this judgment to deal with s 47.

[154] Section 47 reads as follows:

> "Act of incest
>
> 47. (1) Any person who performs an act of incest which is not liable to the punishment of hadd according to hukum syarak commits an offence and upon conviction shall be liable to a fine not exceeding five thousand ringgit and to imprisonment for a term not exceeding three years and to whipping not more than six strokes.
>
> (2) Any person who attempts to commit an act of incest which is not liable to the punishment of hadd according to hukum syarak commits an offence and upon conviction shall be liable 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.
>
> (3) If the court has convicted any person of the offence, the court, if it is satisfied, in addition to any punishment prescribed for the offence, may order any appropriate order.".

[155] Section 2(1) defines "incest" as follows:

> "(1) In this Act, unless the context otherwise requires:
>
> "incest" means sexual intercourse between man and woman who are prohibited from marrying each other under hukum syarak;".

[156] For the reasons stated earlier regarding ss 14, 16 and 17, and upon the direct application of *Iki Putra*, it is our view that incest is a general offence which is a matter that ought to be dealt with by federal law as 'criminal law' in Item 4 of the Federal List. It is an offence that affects not just Muslims even if it is an offence against the precepts of Islam in its second broad category. As such, s 47 is caught by the preclusion clause.

[157] Hence, we conclude, for the same reasons as we do on ss 14, 16 and 17, that s 47 is unconstitutional on the grounds that the respondent had no power to make it.

Section 30

[158] Section 30 provides as follows:

> "Words capable of breaking peace
>
> 30. Any person who wilfully utters or disseminates words contrary to hukum syarak and likely to cause breach of peace in any place commits an offence and upon conviction shall be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.".

[159] The petitioners submit that s 30, which deals with the wilful uttering or dissemination of words that are likely to cause a breach of peace are matters which relate to public order and accordingly, fall within the ambit of Parliament's power to legislate on 'criminal law'. The argument adopted in this regard is similar to the ones raised against s 11.

[160] Having dealt with s 11 earlier, we tend to agree with the petitioners that if s 30 deals, in pith and substance, with public order or security, then the section would very clearly be dealing with a subject-matter that is within Parliament's exclusive jurisdiction. Whether this is the case merits a proper analysis of the provision in its pith and substance.

[161] Do the words 'likely to cause breach of peace in any place' connote the implication that the purpose of the section is to deal with public order and security? In our view, that phrase can be read down in light of the preceding phrase which stipulates: '[a]ny person who wilfully utters or disseminates words contrary to hukum syarak...'. The fact that this reading down is possible is because both phrases are conjoined by the word 'and'. In other words, the operative part of s 30 is that a person must have wilfully uttered or disseminated words that are contrary to hukum syarak.

[162] The preservation of hukum syarak is a matter which falls squarely within the scope of the State Legislatures. One of the central tenets of our FC has been the control and restriction of the propagation of any faith other than Islam to Muslims. This is borne out by art 11(4) and even the portion of Item 1 of the State List which states in relevant part:

"... the control of propagating doctrines and beliefs among persons professing the religion of Islam;...".

[163] Thus, this section deals in pith and substance with the first broad category of 'precepts of Islam' which can be referenced to art 11(4) which in turn deals with the power of the States to make laws against propagation of religions other than Islam to Muslims. This includes the propagation of any views contrary to accepted interpretations of Islam contrary to the accepted tenets of hukum syarak in Malaysia. An example of this would be the case of *Maqsood Ahmad (supra)* which noted the restriction of the propagation to Muslims of the Ahmadi belief (a State-declared deviant sect of Muslims). This is also apparent in the enactments of virtually all the States requiring that only someone with a tauliah may preach on the religion of Islam.

[164] Viewed in this way, we agree with the respondent to the extent that there is a difference, not so much in wording, but on substance between s 30 and the general idea of preservation of public order which is a matter for Parliament.

[165] In our view s 30 does not *per se* deal with the preservation of peace or religious harmony which is a matter of general criminal nature. Rather, it is a purely religious offence enacted with a view to restricting the propagation of false doctrines and teachings by persons professing the religion of Islam to others professing the same faith.

[166] While the section does use the phrase 'and is likely to cause breach of peace', we have to presume that the LSK enacted the section in this way so as to be able to select between cases where someone merely wilfully utters or disseminates words simpliciter or out of ignorance on one hand, and one that breaches restrictions on propagation of faith with the calculated intent of breaching peace.

[167] In this vein, the difference between ss 11 and 30 though seemingly subtle, is clear. The issue with s 11 is that it is in pith and substance a provision dealing with hate crime which in turn is a matter for Parliament to legislate, as explained. The other major difference is that the destruction or defiling of or littering in any place much more so a place of worship (whether for Muslims or non-Muslims) is a matter which carries a 'general criminal law' connotation. When s 11 is read in the entirety of its context, it is clear that the *mens rea* requirements of degrading or insulting Islam or a non-Muslim religion is inseparable from the acts of destruction, defiling or littering which bolsters the inference that s 11 on a whole, is meant to cater to hate crimes.

[168] In contrast, s 30 when read in its context suggests that the provision's primary focus is the wilful uttering or dissemination of words which itself accords with art 11(4). The additional requirement of "breach of peace" itself (though a general criminal law matter) merely waters down the application of the first part of s 30.

[169] We find that s 30 has, in pith and substance, been validly enacted by virtue of Item 1 of the State List and/or art 11(4) and it is not caught by the preclusion clause to Item 1 of the State List. Section 30 is not unconstitutional.

[170] For completeness, in addition to Items 3 and 4 of the Federal List that do not apply, the petitioners suggest that s 30 conflicts with Item 22 of the Federal List on censorship. With respect we disagree because as has been observed, s 30 can be justified on the basis of propagation under art 11(4).

Section 31

[171] Section 31 provides as follows:

> "Sexual harassment
>
> 31. Any person who sexually harasses a non-mahram person at any place with an act or word that can degrade the dignity of such person, that person commits an offence and upon conviction shall be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both."

[172] It is patently obvious that s 31, in pith substance, seeks to penalise the offence of sexual harassment. The pith and substance of it is clear irrespective of whether the commission of it is limited to a non-mahram or not.

[173] We can accept that sexual harassment *per se* could fall within the ambit of the precepts of Islam in its second broad category as we cannot find any permissible entry in Item 1 of the State List or anywhere else in the FC for the first broad category of precepts of Islam to apply.

[174] There is similarly no applicable entry in the Federal List other than Item 4 of the Federal List to suggest that the preclusion clause applies on this ground.

[175] We find that sexual harassment cannot be classified as a 'purely religious offence' given its general character as a criminal offence that is capable of general application in this country. It is quite clear that s 31 falls, in pith and substance, within the general category of 'criminal law' as employed in Item 4 of the Federal List, and is caught by the preclusion clause of Item 1 of the State List.

[176] In the circumstances we find and hold that the LSK and by extension the respondent had no power to make s 31 and it is therefore unconstitutional on that ground.

Section 34

[177] This is what s 34 says:

> "Possessing false document, giving false evidence, information or statement
>
> 34. (1) Any person who has in possession false document, gives false information or falsifies evidence for the purpose of being used in any stage of court proceedings commits an offence and upon conviction

shall be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(2) Any person who knows or has reason to believe that an offence has been committed under this Enactment or under any written law relating to the religion of Islam, has in possession documents or provides any information relating to the offence which he knows or believes to be false commits an offence and upon conviction shall be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.".

[178] Section 34 deals with the possession and giving of false documents or information or aiding in such falsification of such documents or information and in pith and substance, deals with the obstruction of justice, perjury and false evidence specifically in relation to proceedings before the Syariah Courts (see definition of "court" in s 2(1)).

[179] Further, under Item 1 of the State List, the States are empowered to establish Syariah Courts and make laws in relation to such Courts by virtue of the following entry in Item 1 of the State List:

"... the constitution, organization and procedure of Syariah courts, which 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;...".

[180] Item 1 of the State List creates the categories in which the States may enact laws and even create or punish offences against the precepts of Islam. However, the matters over which the Syariah Courts can have substantive jurisdiction is 'in respect only of any of the matters included in this paragraph' that is to say only in respect of Item 1 of the State List. And thus, there is no merit to the argument that the respondent can enact s 34 on the basis of it having to do with the 'constitution, organization and procedure of Syariah courts' because in order to punish the offences in s 34, the pith and substance of perjury and obstruction of justice must refer back to Item 1 of the State List either in the first or second broad category of those subject-matters.

[181] There is no referable entry in Item 1 of the State List to suggest that independently of the entry 'the constitution, organization and procedure of Syariah courts', there is any other entry that can justify the making of laws relating to perjury, false evidence or obstruction of justice.

[182] On the other hand, the Federal List does contemplate the act of obstruction of justice, perjury and false evidence as a specifically identifiable field of offences in the following words in Item 4(e)(i) of the Federal List:

"4. Civil and criminal law and procedure and the administration of justice, including:

...

(e) subject to para (ii), the following:

(i) ... the law of evidence;...".

[183] By s 34, the LSK created an offence with respect to which the Federal List already has demarcated for Parliament by virtue of the above entry in Item 4(e)(i) of the Federal List. It is therefore our view that s 34 is caught by the preclusion clause.

[184] For that reason, we agree with the petitioners that the respondent had no power to make s 34 and it is thus unconstitutional on that ground.

Section 36

[185] Section 36 is worded as follows:

"Anything intoxicating

36. (1) Any person who uses any intoxicating substance commits an offence and upon conviction shall be liable 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.

(2) Any person who causes another person to use or attempt to use any intoxicating substance commits an offence and upon conviction shall be liable 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.

(3) For the purposes of this section, "uses" includes eats, chews, sucks, swallows, drinks, inhales, smells or inserts such substance into the body by any means whatsoever or by using any tool whatsoever.

(4) If the court has convicted any person of the offence, the court, if it is satisfied, in addition to any punishment prescribed for the offence, may order any appropriate order.".

[186] In order to determine whether s 36 is constitutionally valid, we must first understand what the section exactly entails. From our analysis of it, the words 'intoxicating substance' are not defined anywhere in the section or Enactment 2019.

[187] To gain some indication of its meaning, we refer to s 35 which is not under challenge and it provides:

"Intoxicating drinks

35. (1) Any person who, in any opened or closed place, drinks any intoxicating drink which is not liable to the punishment of hadd according to hukum syarak or attempt to drink it commits an offence and upon conviction shall be liable to a fine not exceeding five

thousand ringgit or to imprisonment for a term not exceeding three years and to whipping not exceeding six strokes.

(2) Any person who causes someone else to attempt to drink any intoxicating drink commits an offence and upon conviction shall be liable 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.

(3) Any person who makes, sells, offers or exhibits for sale, keeps or buys or has in his possession or manufactures, imports, exports, stores, conceals, buys, sells, gives, receives, stocks, handles, transports, carries, delivers, sends, obtains, supplies, distributes, controls or maintains any intoxicating drink commits an offence and upon conviction shall be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.

(4) For the purposes of this section, "drink" includes when a person is tested positive in intoxication detection.

(5) If the court has convicted any person of the offence, the court, if it is satisfied, in addition to any punishment prescribed for the offence, may order any appropriate order.".

[188] Given that s 35 deals specifically with 'intoxicating drinks', it stands to reason (applying general canons of statutory construction) that 'anything intoxicating' or 'intoxicating substance' in s 36 means anything intoxicating other than intoxicating drinks dealt with by s 35. But even with that distinction, it is clear that s 36 is too vague in language for us to demarcate a clear enough parameter within which it can be deemed to operate.

[189] As there is hardly any form of definition in s 36, we think the breadth of what can fall within the definition of 'anything intoxicating' is endless. What we can conclude, after attempting to limit the scope of s 36 is that its intent is to criminalise and punish the consumption of virtually anything intoxicating, by Muslims.

[190] In this regard, we determine whether the provision can be considered as dealing with 'the precepts of Islam'. There is no referable entry in Item 1 of the State List that we can find or that we have been referred to. We now have to consider whether the preclusion clause applies.

[191] We ask ourselves whether the criminalisation of 'anything intoxicating' or 'intoxicating substances' carries any element of 'criminal law' in Item 4 of the Federal List by reference to any of the other Items in the Federal List. In this regard, we observe that Item 14 of the Federal List, in particular paras (c) and (d), provide thus:

"14. Medicine and health including sanitation in the federal capital, and including:

...

(c) poisons and dangerous drugs; and

(d) intoxicating drugs and liquors; manufacture and sale of drugs.".

[192] Reading the entry 'intoxicating drugs and liquors' in Item 14(d) with the rest of the phrases quoted above, it is apparent that in general, it is within Parliament's purview to enact laws that deal with such matters including the passing of laws that create and punish offences in relation to them.

[193] Having considered the pith and substance of s 36, and the fact that it is too broad to be read down, we find that s 36 deals, in pith and substance with matters included in Item 14 of the Federal List read with Item 4 of the Federal List. Hence, we find that s 36 is caught by the preclusion clause.

[194] It follows that the respondent had no power to make s 36 and it is unconstitutional on that ground.

Section 37

[195] Section 37 stipulates thus:

"Gambling

37. (1) Any person who:

(a) gambles or found to be in a gambling place, whether he gambles or not; or

(b) organizes, provides place or permits any gambling activity in any premises under his possession or control,

commits an offence and upon conviction shall be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(2) In this section, "gamble" includes any game or competition in which a bet is placed.

(3) In this section, "gambling place" means any premise, including room, office or stall, or any opened or closed place, which is used or kept for the purpose of any game which its decision is based on luck or a combination of skill and luck whether permitted by any other law or otherwise for obtaining money or value of money.

(4) The court may order any device, item or thing used in the commission of or related to the offence mentioned in subsection (1) to be forfeited and destroyed, albeit no one is convicted of the offence.

(5) If the court has convicted any person of the offence, the court, if it is satisfied, in addition to any punishment prescribed for the offence, may order any appropriate order.".

[196] Section 37 deals with two different offences that relate to gambling as can be gleaned from paras (a) and (b) of subsection (1). Paragraph 37(1)(a) deals with the act of engaging in gambling and the petitioners have withdrawn their challenge against this paragraph. We therefore make no comment on the validity of this paragraph. That only leaves us with the question on para 37(1)(b).

[197] While we make no comment on para 37(1)(a), we do nonetheless refer to it to understand para 37(1)(b). In our view para 37(1)(b) deals, in contrast to para 37(1)(a), with the situation of organising gambling activity within a place in the person's possession or control, or providing a place or permitting such activity in such premises. It is distinct from para 37(1)(a) in that this paragraph deals distinctly with the act of engaging in gambling irrespective of whether the place of gambling is a lawful gaming house and also irrespective of whether the game itself is lawful.

[198] We take notice that in most jurisdictions, including Malaysia, gambling is a regulated leisure activity. It is considered a vice and can certainly fall within the banner of something against the precepts of Islam within its second broad category as there is no clear referable entry in Item 1 of the State List. This necessitates asking the question whether the preclusion clause applies.

[199] What we must ask is if there is any Item or entry in the Federal List against which Parliament can enact laws for the purposes of criminalising or punishing offences in relation to those Items or entries.

[200] As submitted by the petitioners, betting and lotteries is a subject-matter under the Federal List which is clearly spelt out by Item 4(l) of the Federal List which states:

> "4. Civil and criminal law and procedure and the administration of justice, including:
>
> ...
>
> (l) betting and lotteries.".

[201] We take the view that 'betting and lotteries' can clearly and reasonably be taken to include gambling. The organisation of gaming houses and the regulation of betting and lotteries, as well as the creation of offences and their punishments are within the jurisdiction of Parliament. We find that s 37(1)(b) purports to deal with a matter that is included in Item 4(l) of the Federal List which should be read together with the general header of Item 4 on 'criminal law'. The subject matter of s 37(1)(b) is thus caught by the preclusion clause.

[202] We accordingly hold that s 37(1)(b) is unconstitutional on the ground that the respondent did not have the power to make it.

Section 39

[203] Section 39 stipulates:

> "Reducing scale, measurement and weight
>
> 39. (1) Any person who scales, measures or weighs in any matter related to property transaction and fraudulently makes a reduction in scale, measurement or weight commits an offence and upon conviction shall be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding one year or to any combination thereof.
>
> (2) If the court has convicted any person of the offence, the court, if it is satisfied, in addition to any punishment prescribed for the offence, may order any appropriate order.".

[204] The petitioners submit that the subject-matter of s 39 in pith and substance relates to Item (f) of the Federal List which enumerates the following field:

> "8. Trade, commerce and industry, including:
>
> ...
>
> (f) establishment of standards of weights and measures;...".

[205] We agree the above would also attract Item 4 of the Federal List in relation to 'criminal law' because federally promulgated criminal legislation includes offences in relation to any of the other matters enumerated in the Federal List. It is our view that s 39, even upon a simple reading, quite clearly, in pith and substance, deals with matters that fall within the ambit of Item 8(f) of the Federal List.

[206] Given this line of reasoning, s 39 is therefore caught by the preclusion clause. For that reason, we find that s 39 is unconstitutional on the ground that the respondent had no power to make it.

Sections 40 And 41

[207] We take the view that ss 40 and 41 can be dealt with concurrently. They generally relate to financing matters.

[208] Section 40 reads:

> "Executing transactions contrary to hukum syarak
>
> 40. Any person who executes any transaction of:
>
> (a) buying and selling;
>
> (b) ijarah;

(c) rahn;

(d) syarikah or musyarakah;

(e) mudharabah;

(f) qardh;

(g) ju'alah;

(h) hiwalah;

(i) 'ariyah or i'arah;

(j) wakalah;

(k) dhaman;

(l) hibah;

(m) will;

(n) istisna'';

(o) wadi'ah;

(p) luqatah;

(q) syufah;

contrary to hukum syarak or any fatwa or any official decision of the Syariah Advisory Council of the Bank Negara Malaysia or the Syariah Advisory Council of the Securities Commission of Malaysia or recognized by written laws in force commits an offence and upon conviction shall be liable to a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding one year or to both and in the case of a continuing offence, a further fine not exceeding one thousand ringgit or imprisonment for period not exceeding six months or any appropriate order or any combination thereof.''.

[209] Section 41 in turn reads:

''Executing transactions via usury, etc

41. Any person who executes any transaction of:

(a) usury;

(b) ghisy;

(c) gharar;

(d) ghasb;

(e) illegal disposal of property;

(f) ihtikar;

contrary to hukum syarak or any fatwa or any official decision of the Syariah Advisory Council of the Bank Negara Malaysia or the Syariah Advisory Council of the Securities Commission of Malaysia or recognized by written

laws in force commits an offence and upon conviction shall be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both and in the case of a continuing offence, a further fine not exceeding one thousand ringgit for each day the offence continues or imprisonment for a term not exceeding one year and any appropriate order.".

[210] The petitioners submit that both ss 40 and 41 pertain specifically to Item 4(k) of the Federal List or generally to Item 7 of the Federal List. Item 4(k) states:

"4. Civil and criminal law and procedure and the administration of justice, including:

...

(k) ascertainment of Islamic law and other personal laws for purposes of federal law;...".

[211] Item 7 provides quite extensively as follows:

"7. Finance, including:

(a) currency, legal tender and coinage;

(b) national savings and savings banks;

(c) borrowing on the security of the Federal Consolidated Fund;

(d) loans to or borrowing by the States, public authorities and private enterprise;

(e) public debt of the Federation;

(f) financial and accounting procedure, including procedure for the collection, custody and payment of the public moneys of the Federation and of the States, and the purchase, custody and disposal of public property other than land of the Federation and of the States;

(g) audit and accounts of the Federation and the States and other public authorities;

(h) taxes; rates in the federal capital;

(i) fees in respect of any of the matters in the Federal List or dealt with by federal law;

(j) banking; money-lending; pawnbrokers; control of credit;

(k) bills of exchange, cheques, promissory notes and other similar instruments;

(l) foreign exchange; and

(m) capital issues; stock and commodity exchanges.".

[212] The petitioners' submission is that because banking and financing matters appear to be governed solely by federal law, the States cannot enact laws on the

same matter. More specifically on the subject of Islamic banking and Islamic law, Item 4(k) specifically empowers Parliament, via federal law, to ascertain Islamic and other personal law for the purposes of federal law. We agree with this submission.

[213] Islamic banking is a matter which relates strictly to finance and is caught by Item 7 of the Federal List. For purposes of ascertaining principles of Islamic banking and for ensuring uniformity and congruity in this field, Item 4(k) specifically empowers Parliament to ascertain Islamic law and other personal laws for use in federal laws. The federal law in this regard and with respect to Item 4(k) would be Islamic finance laws and regulations.

[214] The scope of Item 4(k) of the Federal List differs from Item 1 of the State List. The former allows for the ascertainment of Islamic law principles for the creation of federally legislated matters such as Islamic banking and finance. The latter relates to the enactment of laws that actually concern personal law and are matters which only the States can enact.

[215] We find that ss 40 and 41 quite patently deal with matters that fall within Items 4(k) and 7 of the Federal List. It must also be read with Item 4 of the Federal List generally specifically the words 'criminal law' because the making of 'criminal law' can be referenced to other entries in the Federal List which in this case would be Items 4(k) and 7 read together.

[216] Even if ss 40 and 41 deal with offences which relate to the precepts of Islam in any of its two broad categories, the States are nevertheless precluded from legislating such laws by virtue of the preclusion clause to Item 1 of the State List.

[217] For the above reasons, we accept that both in outward form as well as in pith and substance, ss 40 and 41 are laws the subject-matter of which deal with matters with respect of which only Parliament can make. We accordingly find that ss 40 and 41 are unconstitutional because the respondent had no power to make them.

Section 42

[218] Section 42 reads as follows:

> Abuse of halal label and connotation
>
> 42. (1) Any person who displays any form of halal label on non-halal food, drink, goods or service for the purpose of deceiving or misleading Muslims that such food, drink, goods or service is halal commits an offence and upon conviction shall be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.
>
> (2) For the purposes of this section, "any person" includes any Muslim who at the time the offence is committed is the director, manager or

secretary of the company or otherwise responsible for the management of the company also commits the offence unless he proves that:

(a) the offence is committed by the company without his consent or connivance; or

(b) he has taken all reasonable effort to prevent the occurrence of the offence as he ought to have exercised having regard to the nature of his office or of his duties in the company and all the circumstances.".

[219] The petitioners submit that s 42 is unconstitutional because in pith and substance it pertains to matters which fall within Item 8 of the Federal List read with Item 4 of the Federal Law on 'criminal law'. Item 8 provides, in relevant part:

"8. Trade, commerce and industry, including:

(a) production, supply and distribution of goods; price control and food control; adulteration of foodstuffs and other goods;

...

(e) patents; designs, inventions; trade marks and mercantile marks; copyrights;".

[220] Item 8 of the Federal List makes it clear, especially from the above entry that food control, which when interpreted broadly and including the phrase that appears after it in 'adulteration of foodstuffs and other goods', would include food standards and safety. Accordingly, reading Item 8 of the Federal List with Item 4 of the same, any offence that can capture the essence of Item 8 would also include Parliament's power to legislate on 'criminal law'. These entries must also be read in light of Item 4(k) of the Federal List which, as explained above, allows Parliament to ascertain Islamic law for federal law purposes. In this regard, as food safety and adulteration of food safety is a matter for Parliament, the use and abuse of the halal logo would also constitute a matter included in the Federal List.

[221] We find that the pith and substance of s 42 deals with matters that fall within the Federal List specifically Items 8 and 4.

[222] Section 42 is thus caught by the preclusion clause to Item 1 of the State List which means that the respondent had no power to make it. We therefore hold that s 42 is unconstitutional on that ground.

Sections 43, 44, 45 And 48

[223] In our analysis, ss 43, 44, 45, and 48 can be dealt with together as they principally deal with similar subject-matter.

[224] Section 43 reads:

"Offering or providing vice services

43. (1) Any person who offers or provides vice services commits an offence and upon conviction shall be liable to a fine of 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.

(2) Any person who does any act preparatory to:

(a) prostitute his wife or child or any person in his custody or care; or

(b) cause or permit the husband, wife or child or any person in the custody or care to prostitute ownself, commits an offence and upon conviction shall be liable 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.

(3) If the court has convicted any person of the offence, the court, if it is satisfied, in addition to any punishment prescribed for the offence, may order any appropriate order.".

[225] Section 44 provides:

"Preparatory act of offering or providing vice services

44. (1) Any person who performs any act in any way in preparation for prostituting ownself or in preparation for offering vice services or providing vice services for ownself commits an offence and upon conviction shall be liable 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.

(2) If the court has convicted any person of the offence, the court, if it is satisfied, in addition to any punishment prescribed for the offence, may order any appropriate order.".

[226] Section 45 reads:

"Preparatory act of vice

45. (1) Any person who performs any act for preparation of committing vice commits an offence and upon conviction shall be liable 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.

(2) If the court has convicted any person of the offence, the court, if it is satisfied, in addition to any punishment prescribed for the offence, may order any appropriate order.".

[227] What the above sections have in common is the penalising of 'vice' in one form or another. Section 2(1) defines vice as follows:

> "(1) In this Act, unless the context otherwise requires:
>
> "vice" for the purposes of Part VI, means vice matters containing sexual element;".

[228] Given the strict definition above, we find that the offences stated above are strictly limited to vice relating to anything containing a sexual element.

[229] Finally, s 48 reads as follows:

> "Muncikari
>
> 48. (1) Any person who acts as a muncikari commits an offence and upon conviction shall be liable 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.
>
> (2) If the court has convicted any person of the offence, the court, if it is satisfied, in addition to any punishment prescribed for the offence, may order any appropriate order.".

[230] Section 2(1) defines "muncikari" as follows:

> "(1) In this Act, unless the context otherwise requires:
>
> "Muncikari" means a person who acts as an intermediary between a woman and a man or between the same gender for any purpose infringing Part VI of this Enactment;".

[231] Section 43 deals with a situation where a person offers or provides vice services. Subsection (2) deals specifically with a situation where a husband provides or offers his child, wife or a person in his custody for vice services. It also deals with a situation where anyone caused the aforementioned persons to offer or provide such services.

[232] Section 44 effectively makes it an offence to attempt to offer vice services. Section 45 on the other hand, from our interpretation of it, is targeted at a person engaging in vice activities. In other words, while ss 43 and 44 deal with the offer and provision of vice services, s 45 deals with persons who take up such vice services.

[233] Section 48, which deals with muncikari, relates to a situation where a person acts as a middleman to enable another man or woman to engage in vice activities with other men or women. This would include a situation where one acts either as a procurer or procuress.

[234] The petitioners submit that ss 43, 44, 45 and 48 deal with matters of general criminal law which falls within 'criminal law' in Item 4 of the Federal List. We can accept that each of these four provisions relate to criminal

offences that fall within the precepts of the religion of Islam not in the first broad category (as we cannot ascertain a specific applicable entry in Item 1) but in the second broad category of it.

[235] We move to determine if there is any specific Federal List entry that can reasonably be interpreted to deal with vice services. In our assessment, there is none.

[236] Hence, these conditions warrant considering whether ss 43, 44, 45 and 48 can, in pith and substance, be deemed as 'purely religious offences' that cannot be included within the ambit of 'general criminal law' in the second broad category of 'criminal law' in Item 4 of the Federal List.

[237] It is our view that ss 43, 44, 45 and 48 does in pith and substance, collectively deal with the offence of solicitation of prostitution in one form, shape or another. We take the view that prostitution is a general offence that falls within Parliament's purview to legislate upon under Item 4 of the Federal List. The solicitation of vice services and prostitution is a crime that affects not just persons professing the religion of Islam but any person in this country. In that sense, it is not a 'purely religious offence' as it is a matter of 'general criminal law' relating to public order, safety, health, morality, etc, in a manner similar to the reasoning concerning ss 14, 16, 17 and 47 above.

[238] We therefore find that ss 43, 44, 45 and 48 are caught by the preclusion clause. Sections 43, 44, 45 and 48 are thus unconstitutional on the ground that the respondent had no power to make them.

Conclusion

[239] We thank all the parties, *amici curiae*, and watching briefs that have made submissions on the legal issues that have arisen in this case. We have read all these submissions and considered them in arriving at our conclusions. In large part, the law in this area is very much settled upon in the judgments of this Court in *Iki Putra* and *SIS Forum*. We did not therefore consider that there was much dispute in the interpretation and applicability of the law in this area. Because it concerned more the application of law to the facts of this case, we paid greater attention to the submissions of the parties, namely the petitioners and the respondent.

[240] For the avoidance of doubt, we have not expressed any view on the validity of ss 5 and 37(1)(a) as the petitioners, in the course of oral argument withdrew their challenge against these provisions. Sections 5 and 37(1)(a) should therefore continue to be presumed constitutional. Further, for reasons stated in this judgment, we have found that the respondent did have the power to make ss 13 and 30. Sections 13 and 30 are therefore not unconstitutional.

[241] As for the rest of the Impugned Sections, and in terms of the sole remedy that can be granted in this case, for the reasons contained in this judgment, we hereby grant the following declaration:

"Sections 11, 14, 16, 17, 31,34, 36, 37(1)(b), 39, 40, 41, 42, 43, 44, 45, 47 and 48 of the Kelantan Syariah Criminal Code (I) Enactment 2019 [Enactment 14] are invalid on the ground that they make provision with respect to matters with respect to which the Legislature of the State of Kelantan has no power to make laws and the said provisions are accordingly null and void by virtue of cls (1) and (3) of art 4 of the Federal Constitution."

[242] There shall be no order as to costs in light of s 83 of the Courts of Judicature Act 1964.

Abdul Rahman Sebli CJSS (dissenting):

[243] There are three applications before the court. Enclosure 26 is the petition filed by the applicants, which is the main application. Enclosure 68 is an application by the respondent, the State Government of Kelantan, to set aside the leave order granted by Vernon Ong FCJ sitting as a single judge of the Federal Court on 30 September 2022 whilst encl 90 is an application by Jabatan Agama Islam Negeri Kelantan to intervene in the action.

[244] Enclosure 90 was dismissed on the first day of hearing itself on 17 August 2023 on the ground that there was no legal basis for the Jabatan Agama Islam Kelantan to intervene. Therefore there are only encl 26 and encl 68 left to be decided.

[245] With regard to encl 68, the grounds for the application, as averred to in the affidavit in support of the Kelantan State Legal Advisor Dato' Idham bin Hj Abdul Ghani affirmed on 2 August 2023 are, *inter alia*, as follows:

(1) the petitioners lack *locus standi* as they fail to show that there is an actual controversy affecting the rights and interests of the parties;

(2) the petitioners are not facing any legal action or being charged in the Kelantan Syariah Court under any of the impugned provisions;

(3) the petitioners' assertion that there is a real risk that they may be subjected to investigation by the respondent is scandalous and frivolous as the respondent is not the authority to enforce the criminal law in the State of Kelantan;

(4) the reasons given by the petitioners at the leave stage were purely speculative, academic and abstract;

[246] In the course of argument shortly after the commencement of hearing on 17 August 2023, learned counsel for the Kelantan Government Dato' Kamaruzaman bin Muhammad Arif asked that encl 68 be heard first before the court proceeded to hear the substantive merits of the application in encl 26. The request had also been made earlier in para 15 of the affidavit in support of the Kelantan State Legal Advisor dated 2 August 2023, ie two weeks before the hearing date.

[247] The court's response was to indicate to counsel that encl 68 would be dealt with in the course of hearing the substantive application in encl 26 and that counsel would be heard on the issue of *locus standi* when responding to the applicants' submissions on the merits of encl 26. Learned counsel for the Government of Kelantan raised no objection to this course of action. Parties, including counsel on watching brief, then proceeded to submit on encl 26 and encl 68, both of which have now been concluded.

[248] If encl 68 is allowed, encl 26 will have to be struck out as a matter of course because with the setting aside of the leave order granted by the single Judge of the Federal Court on 30 September 2022, there will be no petition before the court, and with no petition before the court, the exercise by this court of its exclusive original jurisdiction under art 128(1)(a) of the Federal Constitution ("the Constitution") will be an exercise *in vacuo* ie in isolation without reference to facts or evidence. It is an untenable situation.

[249] In delivering his decision *ex tempore* on 30 September 2022, the single Judge of the Federal Court Vernon Ong FCJ gave the following reasons for granting leave under art 4(4) of the Constitution:

> "I thank both the Applicants and Respondent counsel for the written submissions that were filed beforehand and the oral submission before me this morning. I had the benefit of reading and perusing the cause papers. This application relates to certain provisions in the Kelantan Shariah Criminal Code which the Applicants contend the legislature of the state of Kelantan did not have the power to make. It is in essence, a competency challenge. Altogether 20 provisions in the state enactment are said to be impugned on the ground that these are matters falling within List 1 of the Federal List of the Ninth Schedule of the Federal Constitution which are matters which clearly fall within federal law. The learned Assistant State Legal Advisor has abandoned the first PO to the application relating to the omission to name the Majlis Agama Islam Kelantan and the Jabatan Hal Ehwal Agama Islam Negeri Kelantan as parties in this application. The main attack on the Applicants' *locus* is grounded on the fact that both Applicants are not affected by the impugned provisions and that the First Applicant resided in Kuala Lumpur outside the State of Kelantan. The learned State LA also distinguished the Federal Court decisions in *Iki Putra* and *SIS* and cited the case of *Gerakan* challenge of the Hudud Laws in support of his contention. However as pointed out by the learned Applicant's Counsel, the enactment in question applies here to any Muslims in Kelantan and there is no requirement that the putative Muslim be a resident in the state of Kelantan, it is territorial. Which is to say that any Muslim who happens to be in the state of Kelantan may be liable or subject to prosecution under the impugned provisions of the said enactment. After considering the argument raised and perusing the cause papers, I am of the opinion that the Applicants have made out an arguable case which warrant the granting of leave for the matter to be fully ventilated before the Federal Court. Accordingly, I am granting leave to the Applicants. Order in terms for prayer 1 and 2 of the motion."

[250] Notably the learned judge did not deal with the issue of *locus standi* in depth presumably because His Lordship was more concerned with the merits

of the case, which to his mind were to be ventilated at the full hearing once leave had been granted.

[251] The twenty (20) provisions of the Kelantan Syariah Criminal Code (I) Enactment 2019 [Enactment 14] ("the Enactment") that the applicants are contending the State Legislature of Kelantan had no competency to enact are the following sections:

(i) Section 5 - False claim.

(ii) Section 11 - Destroying or defiling places of worship.

(iii) Selling or giving away child to non-Muslim or morally reprehensible Muslim.

(iv) Section 14 - Sodomy.

(v) Section 16 - Sexual intercourse with corpse.

(vi) Section 17 - Sexual intercourse with non-human.

(vii) Section 30 - Words capable of breaking peace.

(viii) Section 31 - Sexual harassment.

(ix) Section 34 - Possessing false documents, giving false evidence, information or statement.

(x) Section 36 - Anything intoxicating.

(xi) Section 37 - Gambling.

(xii) Section 39 - Reducing scale, measurement and weight.

(xiii) Section 40 - Executing transactions contrary to hukum syarak.

(xiv) Section 41 - Executing transactions via usury etc.

(xv) Section 42 - Abuse of halal label and connotation.

(xvi) Section 43 - Offering or providing vice services.

(xvii) Section 44 - Preparatory act of offering or providing vice services.

(xviii) Section 45 - Preparatory act of vice.

(xix) Section 47 - Act of incest.

(xx) Section 48 - Muncikari.

[252] It is undoubtedly a constitutional challenge under art 4 cl (3) read with cl (4) of the Constitution. Clauses (3) and (4) are as follows:

"(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or:

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

(b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in cl (3) (not being proceedings falling within para (a) or (b) of the Clause) **shall not be commenced without the leave of a judge of the Federal Court;** and the Federation shall be entitled to be a party to any such proceedings brought for the same purpose under para (a) or (b) of the Clause."

[Emphasis Added]

[253] Proceedings under paras (a) and (b) of art 4(3) are proceedings between the Federal and the State Governments and *vice versa*. No leave to commence proceedings is required. Proceedings under art 4(4) on the other hand are proceedings commenced by petitioners other than proceedings between the Federal and the State Governments and *vice versa*. Such proceedings require the leave of a judge of the Federal Court.

[254] The purport of art 4(4) of the Constitution was explained by Hashim Yeop A Sani SCJ (later CJM) in the then Supreme Court case of *Karim Abdul Ghani v. The Legislative Assembly of the State of Sabah* [1987] 1 MLRA 242 ("*Karim Abdul Ghani*") in the following terms:

"The object and purport of art 4(4) of the Federal Constitution has already been interpreted before in *Stephen Kalong Ningkan v. Tun Abang Haji Openg & Tawi Sli (No 2)* [1966] 1 MLRH 280 by Pike CJ (Borneo) with which interpretation I agree. Article 4(3) and (4) of the Federal Constitution is designed to prevent the possibility of the validity of laws made by the legislature being questioned on the ground mentioned in that article incidentally. The article requires that such a law may only be questioned in proceedings for a declaration that the law is invalid. The subject must ask for a specific declaration of invalidity. **In order to secure that frivolous or vexatious proceedings for such declarations are not commenced, art 4(4) requires that leave of a judge of the Supreme Court must first be obtained.**"

[Emphasis Added]

[255] To paraphrase Hashim Yeop A Sani SCJ, the reason why leave of a Federal Court Judge is required for a constitutional challenge under art 4(4) of the Constitution is to preclude busybodies or dilettantes from commencing frivolous or vexatious actions to challenge the validity of laws made by Parliament or the State Legislature. The challenge must in all cases be grounded on *bona fide* intention.

[256] Midway through the proceedings and after hearing submissions by learned counsel for the Government of Kelantan, learned counsel for the petitioners informed the court that the petitioners wished to withdraw their challenge to s 5 (False claim) and s 37(1)(a) (Gambling) of the Enactment, which the court took note of.

[257] By withdrawing their challenge to s 5 and s 37(1)(a) of the Enactment, the petitioners are now effectively saying that the offences of false claim (claiming to be a prophet or such other false claims) and gambling are purely religious offences and not "criminal law" for the purposes of the Constitution (Item 1 of the State List) and therefore within the competency of the State Legislature of Kelantan to enact.

[258] It is unfortunate that the Constitution does not define the term "criminal law" in order, if that had been the intention, to exclude from its ambit syariah offences which are purely religious in nature so as to confer on the State Legislatures the power to enact such laws.

[259] The *Britannica Encyclopedia* defines "criminal law" to mean "the body of law that defines criminal offences, regulates the apprehension, charging and trial of suspected persons, and fixes penalties and modes of treatment applicable to convicted offenders". The definition is wide enough to exclude any and all forms of syariah criminal law from being within the power of the State Legislatures to legislate on. It is therefore hard to understand why the petitioners are now accepting that false claim (s 5) and gambling (s 37(1)(a)) are not "criminal law" for the purposes of the Constitution and therefore within the competency of the Kelantan State Legislature to enact.

[260] In *Iki Putra Mubarrak v. Kerajaan Negeri Selangor & Anor* [2021] 3 MLRA 384 ("*Iki Putra Mubarrak*"), Azahar Mohamed CJ (Malaya) who delivered the supporting judgment came to the following conclusion at para [118]:

> "[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's legislative field, the preclusion clause catches it. The true character and substance of the impugned provision in reality belongs to the subject matter of "criminal law". The term "criminal law" in the 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."

[261] The petitioners relied on the following grounds as their legal basis for challenging the validity of the impugned provisions:

(i) The impugned provisions are beyond the legislative competence of the Kelantan Legislature;

(ii) Item 1, List II (State List), Ninth Schedule of the Constitution allows the Kelantan Legislature to make laws on "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" (together with art 74 of the Constitution);

(iii) The impugned provisions were made pursuant to this legislative field. However, the impugned provisions concern matters in List I (Federal List), Ninth Schedule of the Constitution ("Federal List") and/or dealt with by federal law. Most of them relate to "criminal law" under Item 4 in the Federal List, which includes all matters that could reasonably be viewed as a matter of public concern relating to peace, order, security, morality, health, or some similar purpose, in the public sphere.

[262] In her application for leave earlier, the 1st petitioner in her affidavit in support dated 25 May 2022 affirmed as follows:

"6. I was born in Kota Bharu, Kelantan in 1961;

6.1 I originally resided in Kelantan with my family until 1967.

6.2 I later moved back to Kelantan in 1989 to practice law in Kota Bharu but commuted between Kuala Lumpur and Kota Bharu for work when required. At certain points, I practiced law in Kuala Lumpur but remained a resident in Kelantan.

6.3 I set up my own legal practice in Kelantan in 1997. It was called Messrs Nik Elin Nik Rashid & Associates.

6.4 I later joined many other law firms as a partner but later quit practice sometime in 2009. I however continued to live in Kota Bharu.

6.5 In 2015, I moved to Kuala Lumpur and returned to legal practice under the style of Messrs Nik EZ Law Chambers (now known as Messrs Nik Elin Nik Rashid Law Practice).

6.6 Although I moved to Kuala Lumpur, I frequently travel to Kelantan as I still have family and properties and assets in Kelantan.

6.7 I frequently travel to Kelantan to manage the said properties and assets, including having to pay the necessary taxes and charges.

6.8 With that, there is a real risk that I might be subjected to the investigative powers of the respondent in relation to the impugned Provisions.

6.9 I also intend to retire in Kelantan."

[263] Of the 10 paragraphs, only para 6.8 has anything to do with *locus standi*. The rest have no relation to the issue as they apply to every Muslim, Kelantanese and non-Kelantanese alike and not specific to the petitioners.

[264] Having obtained leave from the single Federal Court Judge on 30 September 2022, the petitioners duly filed their petition (encl 26) which contained their statement made pursuant to r 7 of the Rules of the Federal Court 1995 ("the Rules") which reads as follows:

> "The petition shall contain a statement in summary form of the material facts on which the petitioner relies and shall conclude by setting out the relief to which the petitioner considers he is entitled."

[265] Under the heading "Material facts" this is what the petitioners stated:

> "4. The 1st Petitioner was born in Kota Bharu, Kelantan in 1961.
>
> 4.1 The 1st Petitioner originally resided in Kelantan with her family until 1967.
>
> 4.2 She later moved back to Kelantan in 1989 to practice law in Kota Bharu but commuted between Kuala Lumpur and Kota Bharu for work when required. At certain points, the 1st Petitioner practiced law in Kuala Lumpur but remained a resident in Kelantan.
>
> 4.3 The 1st Petitioner set up her own legal practice in Kelantan in 1997. It was called Messrs Nik Elin Nik Rashid & Associates.
>
> 4.4 The 1st Petitioner later joined many other law firms as a partner but later quit practice sometime in 2009. She however continued to live in Kota Bharu.
>
> 4.5 In 2005, the 1st Petitioner moved to Kuala Lumpur and returned to legal practice. The 1st Petitioner practiced under the style of Messrs Nik EZ Law Chambers (now known as Messrs Nik Elin Nik Rashid Law Practice).
>
> 4.6 Although she moved to Kuala Lumpur, the 1st Petitioner frequently travels to Kelantan as she still has family and properties and assets in Kelantan.
>
> 4.7 The 1st Petitioner frequently travels to Kelantan to manage the said properties and assets, including having to pay the necessary taxes and charges.
>
> 4.8 The 1st Petitioner intends to retire in Kelantan.
>
> 4.9 The 2nd Petitioner is the 1st Petitioner's daughter. She has a residential address in Kelantan and frequently travels to Kelantan to visit her family."

[266] It was the same statement that the 1st petitioner made in her leave application but conspicuously missing from the statutory statement is her averment at para 6.8 of her affidavit in support at the leave stage quoted earlier where she had affirmed:

> "6.8 With that, there is a real risk that I might be subjected to the investigative powers of the Respondent in relation to the Impugned Provisions."

[267] There is no explanation for the omission, which leaves the petitioners without any factual basis to support their claim for *locus standi* or standing to sue. Having gone through the cause papers and the submissions of the parties both written and oral, I am constrained to hold that the application in encl 26 is an abuse of the court process and ought to be struck out. Leave should not have been granted in the first place and must be set aside. It is clear to me that the petitioners have no *locus standi* to maintain the action and consequently this court has no basis in law to exercise its exclusive original jurisdiction under art 128(1)(a) of the Constitution to hear and to decide on the merits of encl 26. The court cannot assume jurisdiction where there is none.

[268] I take note of the majority view that if leave had been improperly granted by the single Federal Court Judge, the striking out of the petition would be a matter of "technicality". I understand that to mean that if the petition is struck out merely because the petitioners have no *locus standi* to maintain the action, the striking out would be on an issue that is unimportant compared to the larger issue of the merits of the case.

[269] I am not prepared to completely disagree with that view, but with the greatest of respect to the majority, technicality or not it is an abuse of the court process for anyone with no *locus standi* to drag the Government, Federal or State, to court to ventilate his or her personal grievances by invoking art 4(4) read with art 128(1)(a) of the Constitution. A technical knockout is still a knockout.

[270] An abuse of process occurs when a person or party uses the legal system in a way that does not serve the underlying goal of a legal action but to achieve a collateral purpose. Such abuse of the court process at any level of the court hierarchy is unacceptable and must not be countenanced by this court. Condoning the abuse will render the rule on *locus standi* completely redundant and bereft of all meaning. It will be as good as tossing the rule aside in order to give way to the merits of the case.

[271] *Locus standi* is Latin for "place to stand". *Black's Law Dictionary* (Deluxe Ninth Edition) defines it to mean "the right to bring an action or to be heard in a given forum". It determines whether a party has sufficient interest or stake in the matter to justify his participation in the proceedings. There can be no right to bring an action or to be heard in a given forum where there is no standing to sue. A person with no standing to sue is an incompetent litigant.

[272] The doctrine of *locus standi* signifies that unless a person has been directly injured or is adversely affected by the act he is challenging, his action will not be upheld by the court. He must at least show that he has a real and genuine interest in the subject matter of the suit although it is not necessary to establish infringement of a private right or the suffering of special damage: See *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air & Komunikasi & Anor* [2014] 2 MLRA 1 ("*MTUC & Ors*") where it was held by this court that the "adversely

affected test" is the preferable test for all the remedies provided for under O 53 of the ROC.

[273] It is a fundamental requirement for instituting a suit that the person must suffer some kind of injury. In *Shanti Kumar R Canji v. Home Insurance Co of New York* [1974] AIR 1719 the Supreme Court of India observed that the term "aggrieved person" does not mean a person who has suffered an imaginary injury but it means that the rights of the person have been violated adversely in reality, and the injury must be physical, mental, monetary, et cetera and not mere imagination.

[274] It must be highlighted however that the trend in India today is to reject the restrictive application of the *locus standi* rule in favour of liberalising it through judicial activism for the reason that the strict application of the rule limits the role played by public spirited individuals, non-governmental organisations (NGO) and human rights activists and advocates in litigating socio-economic matters that affect the poor, thereby denying them access to justice. This is reflected in the decision of the Indian Supreme Court in *Janata Dal v. HS Chowdhary And Ors* [1992] SUPP 1 SCR 226 at paras 95-96 where the court articulated the rule on *locus standi* as follows:

> "If such person or determinate class of persons is by reason of poverty, helplessness or disability or [*sic*] or socially or economically disadvantaged position, are unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ... seeking judicial redress for the legal wrong or injury."

[275] Taking Nigeria as another random example, the country maintains the strict approach. In *AG Fed v. AG Lagos State* [2017] 8 NWLR (PT1566) 20 at 55 para D, the Supreme Court of Nigeria held that the question whether a plaintiff has *locus standi* to bring an action in the first place raises an issue of jurisdiction. In *Liba v. Koko* [2017] 11 NWLR (PT1576) 335 at 355-356 paras H-C, the same court held that when the plaintiff has been found to have no standing to sue, the question of whether other issues in the case had been properly decided or not does not arise. This is because the court has no jurisdiction to entertain the claim.

[276] In another case, the Nigerian Supreme Court in *Adesanya v. President Of The Federal Republic And Others* [1981] 5 SC 112 said at p 174:

> "*Locus standi* or standing to sue is an aspect of justiciability and, as such, the problem of *locus standi* is surrounded by the same complexities and vagaries inherent in justiciability. The fundamental aspect of *locus standi* is that it focuses on the party seeking to get his complaint before the court, not on the issues he wishes to have adjudicated."

[277] The four cases are of course cases of foreign origin, namely from India and Nigeria, which may not, I must admit, be of great assistance in

interpreting arts 4(4) and 128(1)(a) of our Constitution. They are cited merely to illustrate the point that there are diverging views among different countries on the question whether the rule on *locus standi* should be applied liberally or restrictively.

[278] As for the procedure to be followed in deciding whether to grant or to refuse leave, the English case of *IRC v. Ex Parte National Federation Of Self-Employed And Small Businesses* [1982] AC 617 is instructive. In that case the House of Lords held that standing to sue should be considered in two stages. Firstly, at the leave stage the court should refuse *locus standi* to those who appear to be "busybodies, cranks and other mischief-makers" (per Lord Scarman). Secondly, if leave is granted, the court may consider standing to sue again as part of the hearing of the merits of the case, where it may decide that in fact the applicant does not have "sufficient interest".

[279] The first stage necessarily requires the court to determine if the applicant is or is not a busybody, a crank or a mischief-maker. If he or she is such a litigant, then *locus standi* should be refused and the matter ends there without having to proceed to the second stage. This is because, in the words of Lord Scarman, "I do not see any purpose served by the requirement for leave".

[280] There is no reason in my view why this court should not adopt the two-stage process laid down in *IRC* as our law in determining standing to sue in an application for leave under art 4(4) of the Constitution, although it is not a case on constitutional challenge. The serious nature of the challenge under art 4(4) read with art 128(1)(a) of the Constitution is all the more reason why the procedure should be adopted.

[281] *IRC* was a case on administrative law in relation to *locus standi* in an application for judicial review under O 53 of the English Rules of the Supreme Court, which is equivalent to O 53 of our Rules of Court 2012 ("the ROC") except that our requirement for the conferment of *locus standi* under the Order is being "adversely affected" instead of having "sufficient interest".

[282] It was on the basis of this authority that this court proceeded to hear encl 26 and encl 68 together instead of hearing encl 68 first to be followed by encl 26 as requested by learned counsel for the Government of Kelantan. The case is also authority for the proposition, at least as the law stood in England at the material time, that although leave had been granted, the case might still be dismissed if the court found that the applicant had no "sufficient interest" in the subject matter of the dispute.

[283] In Malaysia, the law on *locus standi* in relation to a constitutional challenge has been explained with admirable clarity by my learned sister Nallini Pathmanathan FCJ in delivering the majority judgment of this court in *Datuk Seri Anwar Ibrahim v. Government of Malaysia & Anor* [2020] 2 MLRA 1 ("*Anwar Ibrahim (1)*"). It was a case that was brought by way of a special case under s 84 of the Courts of Judicature Act 1964 ("the CJA"). On the same page

with Her Ladyship in the 5-2 majority were Azahar Mohamed CJ (Malaya), Mohd Zawawi Salleh FCJ, Abang Iskandar Abang Hashim FCJ (now PCA) and Idrus Harun FCJ (later Attorney-General).

[284] In that case, the two constitutional questions referred to this court by the High Court Judge for determination under s 84 of the CJA were: (1) whether s 12 of the Constitution (Amendment) Act 1983, s 2 of the Constitution (Amendment) Act 1984 and s 8 of the Constitution (Amendment) Act 1994 were unconstitutional, null and void and of no effect on the ground that they violated the basic structure of the Constitution; (2) whether the National Security Council Act 2016 was unconstitutional.

[285] The facts of the case are not on all fours with the facts of the present case, but the question of law on *locus standi* that the court was dealing with in that case mirrors the question of law on *locus standi* that this court is dealing with in the present application. The majority in that case refused to answer the constitutional questions posed as the questions were found to be abstract, purely academic and bereft of any actual controversy. It is therefore safe to say that the petitioner in that case failed in his challenge to the validity of the impugned laws not because he failed to establish the merits of his case but because he failed to establish his *locus standi* to maintain the action. The approach taken by the majority is more in line with the restrictive application of the rule on *locus standi* rather than the liberal approach.

[286] To appreciate the relevance of the majority decision on *locus standi* and to avoid accusation of cherry-picking and misreading of the judgment, I am taking the unusual step of reproducing the whole and entire paras [43] to [59] of the majority judgment. In my view, the 17 paragraphs are worthy of being quoted *in extenso*, given the forensic force of the reasoning. Paragraphs [43] to [59] are as follows:

> "[43] **The key question is thus whether there is a real and actual controversy between the parties which will affect their rights and interests. Conceptually, the question is inextricably intertwined with the test of *locus standi,* which requires a party to have been 'adversely affected' in the sense that they have a 'real and genuine interest in the subject matter'** (*Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air & Komunikasi & Anor* [2014] 2 MLRA 1 at para [58]). **A violation of a constitutional right gives rise to both a 'real interest' for a party to bring the action and a 'real controversy' between the parties to the action** (*Tan Eng Hong* at para [106]. As such, in the context of determining whether there is a real controversy in a constitutional challenge, **attempts to sever the requirement of an actual controversy from the notion of standing would be 'conceptually awkward, if not impossible'** (*Croome v. State of Tasmania* [1997] HCA 5; [1997] 142 ALR 397 at pp 405-406). For the purposes of this case, we will frame the foregoing discussion in terms of the Metramac test of 'actual controversy'.
>
> Whether The Mere Existence Of A Law Gives Rise To An Actual Controversy Affecting The Parties

[44] In this case, the plaintiff does not assert that the NSCA has been invoked so as to violate his rights and interests, or that of anyone else. His grievance is purely legal, directed against the alleged inherent unconstitutionality of the Act. **The constitutional questions referred to us arises from no other fact than the very existence of the Act itself. In these peculiar circumstances, the central issue is whether the questions referred are purely abstract or academic.** Can the mere existence of a law, without more, give rise to an actual controversy affecting the parties? Or must the impugned law be used to the detriment of a party before it can constitute an actual controversy?

[45] Useful illumination on this question can be gleaned from three cases in different jurisdictions, all relating to similar subject matters: *Tan Eng Hong v. Attorney-General* [2012] 4 SLR 476; [2012] SGCA 45 (Singapore Court of Appeal), *Croome v. State of Tasmania* [1997] HCA 5; [1997] 142 ALR 397 (High Court of Australia), and *Leung TC William Roy v. Secretary for Justice* [2006] HKCU 1585 (Hong Kong Court of Appeal). In each case, the appellants, homosexual men, challenged the constitutionality of a particular provision in the local criminal legislation which criminalized consensual sexual conduct between males. In all three cases, the apex courts held that the appellants were entitled to bring the constitutional challenge; **they need not wait to be prosecuted under the impugned provisions for a real controversy to arise.**

[46] In *Tan Eng Hong (supra)*, the appellant was arrested and charged under s 377A of the Singapore Penal Code for the commission of an act of gross indecency with another male person. The appellant applied for a declaration the section is unconstitutional. The charge was later substituted with a charge under a different section. The appellant pleaded guilty to the substituted charge and was accordingly convicted and sentence. The attorney general applied to strike out the constitutional challenge.

[47] The Singapore Court of Appeal held that **the crux of the standing requirement as well as the requirement for a real controversy is the violation of a constitutional right; an arguable violation of constitutional rights gives rise to a real controversy for the court to determine** (at paras [84], [179]). 'Every citizen has constitutional rights, not every citizen's constitutional rights will be affected by an unconstitutional law in the same way'; pertinently, while a constitutional right may be enjoyed by all citizens, **the mere holding of a constitutional right is insufficient to found a challenge to the law - there must also be a violation of the constitutional right** (at para [93]). It was found that an arguable violation of constitutional rights occurred when the appellant was arrested and detained under an allegedly unconstitutional law, even though the charge was subsequently substituted (at para [151]).

[48] However, the court went further and opined that the mere existence of an allegedly unconstitutional law can, in some cases, constitute a violation of constitutional rights. VK Rajah JA rejected the proposition that a prosecution under an allegedly unconstitutional law must be demonstrated in every case before a violation of constitutional rights can be shown (at para [110]):

> The effects of a law can be felt without a prosecution, and to insist that an applicant needs to face a prosecution under the law in question before he can challenge its constitutionality could have the perverse effect of

> encouraging criminal behavior to test constitutional issues. Even though a violation of constitutional rights may be most clearly shown where there is a subsisting prosecution under an allegedly unconstitutional law, we find that a violation may be established in the absence of a subsisting prosecution. In certain cases, the very existence of an alleged unconstitutional law in the statute books may suffice to show a violation of an applicant's constitutional rights.

[49] **While the court recognized the possibility of such a case in principle, it declined to lay down a general rule that the existence of an allegedly unconstitutional law constitutes a violation of the applicant's constitutional rights in every case (at para [109]). Whether the very existence of an unconstitutional law in the statute books suffices to show a violation of constitutional rights depends on what exactly that law provides** (at para [94]). The court took pains to emphasise that such a case, though 'conceivable', would be 'rare' and 'extraordinary', and cautioned that 'no such case has ever been brought to the attention of the courts here' (at [94], [106]).

[50] The court considered certain factors pointing towards a violation of constitutional rights by the mere existence of a law. **One of the factors is whether the law specifically targets a particular group: a violation of constitutional rights 'may be more easily demonstrated where the law specifically targets a group and the applicant is a member of that group'** (at para [94]). It was observed, without going into the merits of the challenge, that the impugned section affects the lives of a portion of the community in a very real and intimate way (at para [184]).

[51] Another relevant factor is a **real and credible threat of prosecution** under such a law (at para [179]):

> Although the existence of a lis is clearer when a prosecution has been brought under an allegedly unconstitutional law, the very fact of a real and credible threat of prosecution under such a law is sufficient to amount to an arguable violation of constitutional rights, and this violation gives rise to a real controversy for the court to determine.

[52] **The threat of prosecution must be real and credible and not merely fanciful** (at [111]-[114]). The reason why such a threat may be seen as giving rise to an actual controversy is 'that individuals should not be compelled to act against what is, on the face of it, the law, and thereby risk the actualization of the threat of prosecution' (at para [178]). **In that case, the court found that the threat of prosecution under the impugned section was not merely fanciful, given that the appellant professes to regularly participate in the kind of conduct criminalized** (at para [183]).

[53] In the other two cases, no prosecution had been brought against the appellants pursuant to the impugned provisions. Nevertheless, the courts similarly held that the appellant need not wait to be prosecuted in order for an actual controversy to arise before a challenge can be mounted. In *Croome*, Goudron, McHugh and Gummow JJ in the High Court of Australia rejected the contentions that the appellants' claim for a declaration of unconstitutionality was premature and that there was no immediate right or liability to be determined, because the state had not yet invoked legal

proceedings to enforce the criminal law against the appellants (at pp 409, 411). **The appellants' conduct of their personal lives were found to have been overshadowed by the presence of the impugned provisions in significant respects.** Moreover, since the state has not disabled itself from prosecuting in the future, it was found that the appellants had a real interest and did not raise a question which is abstract or hypothetical (at p 411).

[54] Crucially, the principle that an appellant who has not been prosecuted by an impugned law may challenge its validity is **not without limit. Brennan CJ, Dawson and Toohey JJ stressed that they did not assent to the 'broad proposition' that any person who intends to act in contravention of a law can seek a declaration that the law is invalid, purely by reason of that intention** (at p 402).

[55] The same conclusion was reached by the Hong Kong Court of Appeal in *Leung*. In that case, an argument was raised that the constitutional challenge was based on the 'purely hypothetical situation' that the appellant may be prosecuted in the future (at para [26]). **The court nevertheless held that in view of 'exceptional circumstances', there was sufficient justification to entertain the challenge** (at para [30]). Notwithstanding the fact that 'a prosecution is neither in existence nor in contemplation', Ma CJHC found it clear that **the appellant 'and many others like him have been seriously affected by the existence of the legislation under challenge'** (at para [29]):

> **It is fair to say that the respondent has been living under a considerable cloud.** The effect of the respondent's submissions is really that the constitutionality of the affected provisions can only be tested if the Applicant were to go ahead with those activities criminalized by the provisions in question and be prosecuted for them. In other words, access to justice in this case could only be gained by the Appellant breaking what is according to the statutory provisions in question, the law.

[56] **Again, the requirement of 'exceptional circumstances' was emphasized. Such situations cannot be enumerated exhaustively but must be determined on a case by case basis** (at para [28]). Examples include 'situations where it would be undesirable or prejudicial to force interested parties to adopt a wait and see attitude (that is, to force persons to wait until an event occurs) before dealing with a matter' (at para [28]).

[57] These principles are not foreign to the Malaysian courts. The proposition that a real threat to a party's rights can give rise to an actual controversy **that is not abstract or academic** was recognized by the Federal Court in *Datuk Syed Kechik Syed Mohamed v. Government of Malaysia & Anor* [1978] 1 MLRA 504. In that case, in response to an apparent threat to expel him from the state, the appellant sought declarations that he had the right to remain in Sabah. The Federal Court held that the action demonstrated a real dispute and was not academic. Suffian LP held that (at p 518):

> As the distinguished American scholar, EM Borchard on '*Declaratory Judgments*', 2nd Ed, p 20, referring to those cases where no traditional wrong has yet been committed or immediately threatened, says **'a condition of affairs is disclosed which indicates the existence of a cloud upon the plaintiff's rights, a cloud which endangers his peace**

> **of mind, his freedom and his pecuniary interests…'**... The fact that the declaration was sought before the statutory powers were exercised was not a consideration weighing against the grant of that declaration... we consider that a court should make it possible to settle **real disputes** immediately they arose, so that the parties may act with certainty and not be under the threat of legal uncertainty and should be able to discount the future.
>
> [Emphasis Added]
>
> [58] We consider the situation envisaged - where a constitutional challenge can be brought on the basis of the mere existence of a law - is not technically an exception to the general rule against determining abstract or academic questions without actual controversy. **Rather, such a situation is an exceptional case where, due to certain factors, the existence of the law itself affects the rights of parties and gives rise to an actual controversy.**
>
> [59] We find much merit in the reasoning of the cases above. In our model of concrete review, courts would not ordinarily treat the mere existence of a law as an actual controversy suitable for determination. **However, in the face of an exceptional law specifically targeted against a minority group, the very existence of which amounts to a real and credible threat to their rights - Holocaust-type laws would be an extreme example - the courts are not obliged to stand idly by until the threat materialized.** In the words of Lord Woolf (*Droit Public - English Style*, (1995) Public Law 57 at p 68), 'If Parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which was without precedent'.
>
> [Emphasis Added]

[287] The words highlighted in bold represent the key points in the judgment. For completeness, it will not be out of place in my view to mention briefly the dissenting judgment of David Wong Dak Wah CJ (Sabah and Sarawak) in the same case who held, contrary to the majority view, that the applicant was clothed with the necessary *locus standi*, not that the dissenting judgment has any force of law - it only has persuasive authority (*Yong Tshu Khin & Anor v. Dahan Cipta Sdn Bhd & Anor And Other Appeals* [2021] 1 MLRA 1) or that I am in agreement with it. Essentially the reasons given by the learned CJ (Sabah and Sarawak) were as follows:

> "[165] I had the opportunity to deal with this issue of *locus standi* in *Robert Linggi v. The Government of Malaysia* [2011] 1 MLRH 389 where I took a view quite similar to that of Abdoolcader SCJ. My views were adopted and applied in *Manoharan Malayalam & Anor v. Dato' Seri Mohd Najib Tun Hj Abdul Razak & Ors* [2013] 5 MLRA 243.
>
> [166] Therefore, in a case where "the complaint of the plaintiff is that the Federal Government or its agent has violated the Federal Constitution by its action or legislation, he has the locus to bring an action to declare the action of the Federal Government or its agent as being unconstitutional, without the necessity of showing that his personal interest or some special interest of his has been adversely affected" (per Hishamudin Yunus JCA in *Manoharan Malayalam*.)

> [167] In fact, the proposition is so obvious that it should not need authority. Any contrary proposition would lead to absurdity and I can do no better than to quote the words of Abdoolcader SCJ from *Lim Kit Siang* (at p 222):
>
> > The effect of the denial of standing in such circumstances would be, and it has indeed been so suggested, that we will have to fold our arms and do nothing, in which event I would add we might as well have to hang our heads in sorrow and perhaps even in mortification in **not being able to at least entertain for consideration on its merits any legitimate complaint of a public grievance or alleged unconstitutional conduct**."
>
> [Emphasis Added]

[288] The emphasis clearly was to consider the merits of the complaint rather than on the standing to sue. In *Robert Linggi v. The Government of Malaysia* [2011] 1 MLRH 389, David Wong Dak Wah J (as he then was) was concerned with the "erosion of the rights of Sabah in so far as the constitution and jurisdiction of the High Court of Sabah and Sarawak and the appointment, removal and suspension of judges of that court" and that "when there is a challenge concerning any dismantling of the supreme law of the country, litigation should be encouraged".

[289] Pausing here, I must hasten to mention that this court, also through the judgment of my learned sister Nallini Pathmanathan FCJ in the recent case of *Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals* [2023] 4 MLRA 114 ("*Taman Rimba*"), approved of the above passage by Abdoolcader SCJ in coming to the conclusion that the majority decision of the then Supreme Court in *Government of Malaysia v. Lim Kit Siang* [1988] 1 MLRA 178 ("*Lim Kit Siang*") no longer represent the law on *locus standi* in Malaysia, particularly in public interest litigation.

[290] At para [438] my learned sister on her part quoted with approval the following passage in the dissenting judgment of Abdoolcader SCJ:

> "[438]... To deny *locus standi* in the instant proceedings would in my view be a retrograde step in the present stage of the development of administrative law and a retreat into antiquity. The merits of the complaint are an entirely different matter... **The principle that transcends every other consideration must** ***ex necessitate*** **be that of not closing the door to the ventilation of a genuine public grievance and more particularly so where the disbursement of public funds is in issue, subject always of course to a judicial discretion preclude the phantom busybody or ghostly intermeddler.**"
>
> [Emphasis Added]

[291] It was a tacit approval of the minority (Seah and Abdoolcader SCJJ) judgment on the issue of *locus standi* and discarding the majority (Salleh Abas LP, Abdul Hamid CJ (Malaya) and Hashim Yeop A Sani SCJ) judgment which until then had stood as the law on *locus standi* in Malaysia for 35 years

after it was handed down in 1988. Abdoolcader SCJ in his dissenting judgment described the majority judgment as "a retrograde step in the present stage of the development of administrative law and a retreat into antiquity", true to his pledge at the start of his judgment that he would muster his dissent "without mincing words".

[292] Following its adoption of the minority judgment in *Lim Kit Siang*, this court in *Taman Rimba* laid down a new test for *locus standi*, that it should be a "broad and liberal" test, which means to be more relaxed or less restrictive in granting leave, especially in public interest litigation. It also clarified, among other points of law, the common law duty of administrative bodies to give adequate reasons for their decisions and the issue of conflict of interest involving administrative bodies.

[293] Given the impact that *Taman Rimba* has and will continue to have on the law relating to *locus standi* in Malaysia, it is important in my view to ascertain if the "broad and liberal" test laid down in that case has any application in determining *locus standi* in a constitutional challenge under art 4(4) read with art 128(1)(a) of the Constitution. Obviously the answer has to be context driven. As can be seen from the factual makeup of the case, it was a case on *locus standi* in relation to judicial review of administrative action under O 53 r 2(4) of the ROC. It was not a case on challenging the competency of a State Legislature to make law under art 4(4) of the Constitution. The *ratio decidendi* of the case on the issue of *locus standi* is encapsulated in the following paras (7) and (8) of the headnote to the case:

> Held (7) The issue of *locus standi* in the instant appeals remained a matter for the court to determine under O 53 r 2(4) of the ROC by determining whether the respondents were persons under the relevant legislation, here the Federal Territory (Planning) Act 1982 (FTA). As such, the respondents were not required to bring themselves within the category of r 5(3) of the Planning (Development) Rules 1970 ("the Planning Rules"). The statutory provisions of the FTA prevail over r 5(3) of the Planning Rules wherein, the FTA provides the public with the opportunity to participate and contribute to the proper planning of the Federal Territories. It was unnecessary for the respondents to fall within the categories of landowners set out in r 5(3) as O 5(3) r 2(4) of the ROC does not stipulate that the respondents need to establish a statutory right in order to meet the requirements of *locus standi*. Under O 53 r 2(4), a person seeking the various reliefs under that provision should meet the threshold test of being "adversely affected".
>
> Held (8) All the respondents enjoyed standing to sue. This is because the first to fifth respondents represented parcel proprietors in developments close to or neighbouring the subject land which was a public space comprising a park for public use, were adversely affected by the appropriation of half such space for the purpose of a private development. Similarly so with the sixth to tenth respondents, who were placed to enjoy their individual rights to utilize the subject land as a public park. As such the respondents fell within the category of persons who were adversely affected because they were able to show a genuine interest in the subject land and its development otherwise

than in conformity with the KLSP which was gazetted in 2004. There was no necessity for these parties to prove that they had suffered special detriment or prejudice which was personal to them.

[294] Clearly, in dealing with the issue of *locus standi*, this court in *Taman Rimba* was concerned with O 53 r 2(4) of the ROC *vis-à-vis* r 5(3) of the Planning Rules. It was decided that under O 53 r 2(4) of the ROC, the respondents were only required to show that they were "adversely affected" in order for them to be conferred with *locus standi*. They were not required to fall under the category of landowners set out in r 5(3) of the Planning Rules in order to be so conferred with standing to sue.

[295] That is the factual context in which the "broad and liberal" test is to be understood. It will be wrong to randomly apply the test to an application for leave under art 4(4) of the Constitution without regard to other considerations which are not relevant considerations in an application for leave under O 53 of the ROC. On the facts, the respondents in that case were found to have met the threshold for the conferment of standing to sue as they were "adversely affected" and had a "genuine interest" in the subject land and its development as they either represented parcel proprietors close to the subject land or having the right to enjoy the land as a public park.

[296] Factually therefore, the case has nothing in common with the present case as it involved, in the first place, statutory provisions which are wholly irrelevant for the purposes of the present application. The present case is concerned with the competency of a State Legislature to make law under art 4(4) of the Constitution, and not with judicial review under O 53 of the ROC to correct the decisions of administrative bodies like Dewan Bandaraya Kuala Lumpur (DBKL).

[297] The only similarity with the present case, if at all, is the requirement of law as laid down by the majority in *Anwar Ibrahim (1)* that in order to be conferred with *locus standi*, the petitioners must show "genuine interest" and that they are "adversely affected" by the impugned provisions, although not in the same way that the respondents in *Taman Rimba* were adversely affected by the decision of the local authority.

[298] *Taman Rimba* is therefore not a case that supports the petitioners' cause on the issue of *locus standi*. It was a case on *locus standi* in relation to judicial review applications to challenge administrative actions, the classic grounds of which are illegality, irrationality and procedural impropriety (See *Council of Civil Service Unions v. Minister for the Civil Service* [1985] 1 AC 374 per Lord Diplock). These are not factors to consider in determining *locus standi* in a constitutional challenge. The pivotal issue in determining *locus standi* in a constitutional challenge is whether there is an arguable violation of the petitioner's constitutional rights.

[299] Order 53 r 2(4) of the ROC on which *Taman Rimba* is based is couched in the following language:

> "Any person who is adversely affected by **the decision of any public authority** shall be entitled to make the application."
>
> [Emphasis Added]

[300] By the terms of the Order, an application for judicial review is to challenge the decision of any "public authority" by any person "adversely affected" by the decision. There is nothing in the provision that can be construed as extending its application to acts of Parliament or the State Legislature in enacting laws. This does not mean however that the majority in *Anwar Ibrahim (1)* was wrong to require the applicant in a constitutional challenge to establish being "adversely affected" in order to be conferred with standing to sue, in addition to showing "genuine interest" and an arguable violation of constitutional rights.

[301] While it is true that common law jurisdictions are liberalising the rule on *locus standi*, it must be borne in mind that the authorities on the subject relate more to administrative law than to constitutional law. They deal with complaints of maladministration rather than with constitutional breaches. The idea is to prevent the executive or public authority from acting with impunity. Perhaps the context is best explained by Professor MP Jain in his book *Administrative Law of Malaysia and Singapore*, Malayan Law Journal, Malaysia 1997 when he said at p 749:

> "The present-day tendency all over the common law world is towards liberalisation of *locus standi* to seek judicial redress against complaints of maladministration. It is to be appreciated that if the rule of standing is strict, there may arise a situation when there is no one qualified to bring an action in the court and consequently, the administrative order then go unreviewed. This will amount to a negation of rule of law."

[302] In any case, even if liberalisation or relaxation of the *locus standi* rule is to be extended to a constitutional challenge, it must not be to allow busybodies to participate in proceedings which they have no legal right to participate in. The *locus standi* rule must not be sacrificed on the altar of merits or "public interest". That is unacceptable as a matter of principle. I do not think the cases that lean towards liberalising the rule on *locus standi* can be construed as endorsing such breach of principle. As held by the House of Lords in *IRC*, at the first stage of determining standing to sue, leave should be refused to those who appear to be "busybodies, cranks and other mischief-makers". Abdoolcader SCJ in *Lim Kit Siang* would describe them as "phantom busybodies or ghostly intermeddlers". Strong words indeed to express his disapproval of abuse of the court process by those who have no legal right to bring an action, even comparing them with ghosts, or hantu in Malay.

[303] What is pertinent to note with regard to *Taman Rimba* is that there is nothing in the judgment that can be construed as departing from the views held by the majority in *Anwar Ibrahim (1)*. This is noteworthy because even though *Anwar Ibrahim (1)* is not a case on art 4(4) of the Constitution (it was not an incompetency challenge), it is highly relevant to the issue before the court in

the present application as it is also a case that concerns the issue of *locus standi* in a constitutional challenge.

[304] The minority judgment in *Lim Kit Siang* must also be understood in the same context and the case is not to be taken as authority for saying that *locus standi* may be conferred in every case of constitutional challenge so long as there is a "genuine public grievance" over the constitutionality of any law passed by the State Legislature.

[305] Like *Taman Rimba* it was a case on judicial review under O 53 of the ROC but under a different rule, which is r 2(2), to declare the letter of intent issued by the Federal Government to United Engineers (M) Bhd (UEM) in respect of the North and South Highway invalid and for a permanent injunction to restrain UEM from signing the contract with the government. Like *Taman Rimba*, it was not a challenge on the constitutional validity of any law passed by the State Legislature.

[306] In dissenting from the majority on the issue of *locus standi* in *Anwar Ibrahim (1)*, David Wong Dak Wah CJ (Sabah and Sarawak) who also applied *Lim Kit Siang* in his minority judgment, appears to have been swayed by the lack of objection by the Attorney-General in "relaxing" the *locus standi* rule. This is how His Lordship dealt with the issue:

> "[161] In this case, one must not overlook the fact that the Attorney General did not make any objection and this to me is not without significance bearing in mind that the Attorney General is the Government's main advocate and as most recently reaffirmed by this court in *PCP Construction Sdn Bhd v. Leap Modulations Sdn Bhd; Asian Arbitration Centre (Intervener)* [2019] 3 MLRA 429 ('*PCP Construction*'), is also the guardian of public interest. His dual capacity makes the Attorney General's position unique and in a matter of constitutional challenge as we have here, **the lack of objection by the Attorney General or his Chambers should and in my considered view be taken as a reason for the courts to relax the *locus standi* rule.** Though we do not expect the Attorney General to overtly challenge the constitutionality of any legislations which his chambers helped to draft, the Attorney General however bearing in mind that he is also the guardian of public interest should take an open stand when it comes to such constitutional challenge especially so when it affects the basic fundamental rights of the citizens of this country."
>
> [Emphasis Added]

[307] In the present case, the issue of objection or acquiescence by the Attorney General to the impugned provisions does not arise as the Federal Government, which normally is represented by the Attorney General's Chambers, is not a party to the action. Therefore it is unclear what the Federal Government's stand is on the constitutional challenge mounted by the petitioners in encl 26. By virtue of art 4(3)(b) of the Constitution, the Federal Government would have been the proper party to challenge the validity of the impugned provisions without having to obtain leave.

[308] The majority in *Anwar Ibrahim (1)* would have been fully aware of the fact that the Attorney General in that case did not object to the applicant's *locus standi* in coming to the conclusion that the applicant Datuk Seri Anwar Ibrahim had no *locus standi* to maintain the action. In all likelihood, the majority had been appraised of the contrary stand taken by the minority and disagreed with it. In short, the majority did not agree with David Wong Dak Wah CJ (Sabah and Sarawak) for the minority that the lack of objection by the Attorney-General should be a reason to "relax" the *locus standi* rule in a constitutional challenge.

[309] I am fully aware that the decision of the majority in *Anwar Ibrahim (1)* had been set aside by a review panel of this court in *Datuk Seri Anwar Ibrahim v. Government of Malaysia & Anor* [2021] 2 MLRA 190 ("*Anwar Ibrahim (2)*") pursuant to r 137 of the Rules and a re-hearing ordered but in my view the setting aside of the decision does not in any way render the majority opinion on *locus standi* irrelevant if otherwise it is a correct statement of the law. The reasoning, which I must say without being patronising, is flawless and speaks for itself.

[310] Any attempt to undermine the relevance of the majority judgment on the issue of *locus standi* will be futile. There is authority to say that a decision may be reversed on other grounds but still have some precedential authority (See *Durning v. Citibank*, NA 950 F2d 1419 [1991], a decision of the United States Court of Appeals, Ninth Circuit).

[311] In *Michigan Millers Mutual Ins Co v. Bronson Plating Co*, 197 Mich App 482; 496 NW2d 373 [1992], the court was more explicit when it said that "[j]ust as the discovery of one rotten apple in a bushel is no reason to throw out the bushel, one overruled proposition in a case is no reason to ignore all other holdings appearing in that decision."

[312] In *Straman v. Lewis* 220 Mich App 448; 559 NW2d 405 [1996], the Court of Appeals cited *Michigan Millers* for the proposition that "holdings of this Court not addressed on the merits by the Supreme Court remain binding despite reversal on other grounds."

[313] I am not aware of any authority within our shores which says that where a decision is set aside on other grounds, the effect is to obliterate the entire decision such that no reference can be made in future cases to other parts of the judgment "not addressed on the merits" by the court which reversed the decision on other grounds. Even textbook authorities and academic journals are used as reference material in court proceedings unless they have been proven to be wrong or they are of no intrinsic value.

[314] I do not wish to belabour the point but it is crucially important to appreciate that the setting aside of the majority decision in *Anwar Ibrahim (1)* by the review panel in *Anwar Ibrahim (2)* was not because the decision of the majority on *locus standi* was held to be wrong but because it breached the *audi alteram partem* rule by not giving the plaintiff Datuk Seri Anwar Ibrahim the

right to be heard on the question of whether the constitutional questions posed for the court's determination were abstract, academic and hypothetical, which had resulted in grave injustice to the applicant as successfully argued by the late Datuk Seri Gopal Sri Ram for the applicant.

[315] There were only two issues of law for the review panel's determination in that case and they were: (i) the circumstances under which the court of final appeal has jurisdiction to review its own decision; and (ii) whether a breach of natural justice falls or should fall within the limited grounds for establishing the jurisdiction for review. The correctness of the majority view on the test to be applied in determining *locus standi* in a constitutional challenge was not in issue.

[316] It was clearly a decision that was centric to the facts of the case, ie a denial by the majority of the applicant's right of hearing on the constitutional questions, hence the order for a re-hearing of the matter. What is also clear and which bears repetition is that the review panel did not overrule or disagree with the earlier panel's exposition of the law on *locus standi*. Nowhere in the grounds of judgment did the review panel say that the majority in *Anwar Ibrahim (1)* was wrong on the law relating to *locus standi* in a constitutional challenge.

[317] To remove any lingering doubt, if any, as to the actual reason why *Anwar Ibrahim (1)* was set aside by *Anwar Ibrahim (2)*, I think it is necessary for me to set out the more detailed background facts of the case leading to the decision by *Anwar Ibrahim (2)*. For this purpose, suffice it if I refer to the headnote to the case. They are as follows, with the necessary modifications.

[318] The applicant filed an originating summons in the High Court seeking for a declaration that the National Security Council Act 2016 is unconstitutional. At the hearing before the High Court, two preliminary objections were raised against the suit: (i) that the High Court had no jurisdiction to determine the dispute as the subject-matter of the challenge was for the exclusive jurisdiction of the Federal Court; and (ii) that the applicant did not have the *locus standi* to maintain the suit. The High Court Judge sustained the first preliminary objection on the ground that the challenges would have to be initiated directly in the Federal Court. However, no remark or ruling was made by the judge on the second preliminary objection concerning the issue of *locus standi*. On appeal to the Court of Appeal, the same preliminary objection was sustained premised on the principle of *stare decisis*. The appeal was accordingly dismissed. No issue of *locus standi* was raised by the parties. At the hearing of the leave motion at the Federal Court against the decision of the Court of Appeal, the parties agreed that the High Court had the jurisdiction to determine the dispute. Accordingly, the matter was remitted to the High Court for the determination of the Originating Summons. At the High Court, before another judge, the applicant filed a reference application for the case to be transmitted to the Federal Court pursuant to s 84 of the Courts of Judicature Act 1964 ("the CJA") and r 33 of the Rules. There was no objection raised by the respondent,

whereas, the *locus standi* point was completely abandoned. The High Court acceded to the application and, with the consent of the parties, by way of a special case pursuant to s 84 of the CJA, referred two constitutional questions for the determination of the Federal Court: (i) pertaining to the jurisdiction of the Federal Court to review its own decisions which had been heard and decided; and (ii) concerning the circumstances in which denial of the right to be heard can constitute a ground for such review warranting a rehearing. On 11 February 2020, the earlier panel, by a majority of five, declined to answer the questions on the ground that they were abstract, academic, and hypothetical and therefore the applicant lacked *locus standi* to pursue the action. Hence the application before the review panel pursuant to r 137 of the Rules and the inherent jurisdiction of the court to set aside the decision of the earlier panel on the grounds that: (i) there was a breach of natural justice as the applicant was not given the opportunity to be heard on the issue of whether the constitutional questions were abstract, academic and hypothetical; and (ii) the breach had resulted in a grave injustice to the applicant.

[319] In allowing the application, the review panel in *Anwar Ibrahim (2)* held as follows in relation to the issue of *locus standi*:

> Held (4) The specific issue of *locus standi* was never raised either by the court or the parties. The majority, noting that the test of *locus standi* was intertwined with the question of whether there was a real and actual controversy, held that the applicant had not satisfied this test and, in declining to answer the questions posed, held the constitutional questions to be abstract, academic and hypothetical. The applicant was not given notice as well as the opportunity to answer the issues of whether the constitutional questions were academic and his *locus standi* to bring the action. In the circumstances, a case for breach of natural justice had been made out by the applicant in that the *audi alteram partem* rule had not been observed.

[320] There are suggestions by some quarters that in determining *locus standi* in public interest cases, Malaysia should adopt the liberal test expounded by the Supreme Court of Canada in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society* [2012] SCR 524 where the principle was laid down as follows:

> "The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.
>
> 2. In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justifiable issue, **whether the party bringing the action has a real stake or a genuine interest in its outcome** and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means

> to bring the case to court: *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236, at p 253. **The courts exercise this discretion to grant or refuse standing in a "liberal and generous manner"** (p 253)."
>
> [Emphasis Added]

[321] Three preconditions must therefore be met according to the Canadian position, each one of which must be fulfilled, ie cumulatively, before an applicant is entitled to be conferred with *locus standi*: (1) the case raises a serious justifiable issue; (2) the applicant has a real stake or a genuine interest in its outcome; and (3) the suit is a reasonable and effective means to bring the case to the court.

[322] Of interest to note is that the second compulsory requirement fits in squarely with the requirement for the conferment of *locus standi* as laid down by the majority in *Anwar Ibrahim (1)*. Without getting drawn into a debate on the wisdom of applying the "liberal and general manner" test in deciding whether to grant or to refuse *locus standi* in a constitutional challenge, my view is that since there is sufficient adjective law within our jurisdiction to deal with the issue, there is no further need to seek guidance from beyond our shores. The three apex court authorities from Australia, Hong Kong and Singapore cited by the majority in *Anwar Ibrahim (1)* are sufficient for that purpose.

[323] Furthermore, the "broad and liberal" test laid down in *Taman Rimba* in determining *locus standi*, albeit confined to judicial review of administrative actions, is already in line with the Canadian position as laid down in the *Downtown Eastside Sex Workers case (supra)*.

[324] Whatever may be the test to determine *locus standi* in a constitutional challenge, be it liberal or restrictive, I am of the view that the test laid down by the majority in *Anwar Ibrahim (1)* is the correct test, which importantly has not been held to be wrong by any subsequent decision of this court, including by *Taman Rimba* itself, not even by way of obiter to preserve its persuasive value if the intention was to qualify the majority decision in *Anwar Ibrahim (1)* on the law relating to *locus standi*.

[325] In any case, having regard to the factual context in which the three cases were decided, there is no real conflict between the test laid down in *Anwar Ibrahim (1)* and the "broad and liberal" test applicable in judicial review laid down by this court in *Taman Rimba* or the "liberal and generous manner" test laid down by the Supreme Court of Canada in the *Downtown Eastside Sex Workers* case. Even if there is a conflict, *Anwar Ibrahim (1)* should prevail, being a case on a constitutional challenge under our Constitution as opposed to the other cases which are not.

[326] Therefore, and at the expense of being repetitive, the law on *locus standi* in a constitutional challenge as laid down by the majority in *Anwar Ibrahim (1)* is the law to be applied when it becomes necessary to determine whether

a petitioner has the requisite standing to sue in a challenge under art 4(4) of the Constitution. Paragraph [64] of the judgment is particularly relevant as it reflects the situation in the present application. This is what the majority said:

> "[64] **In the absence of actual controversy affecting the rights of parties, the constitutional questions referred to us are abstract and purely academic. The questions have not become academic due to some change in the factual substratum; they were academic for there was no real dispute underlying them to begin with. They exist in a complete factual vacuum in the case before us.** To answer the questions posed would be a significant departure from the deep-rooted and trite rule that the court does not entertain abstract or academic questions, and may even represent a fundamental shift away from the common law concrete review towards the European model of abstract review in constitutional adjudication. Exceptionally cogent reasons would need to be provided to persuade the Federal Court to undertake such a radical departure from established principles. In this case the parties have not attempted to do so."
>
> [Emphasis Added]

[327] Thus, in order to establish *locus standi*, the petitioners in the present case must first of all show that their challenge to the constitutional validity of the impugned provisions does not exist in a factual vacuum by showing that there is an arguable violation of their constitutional rights. Only then can a real and actual controversy between them and the Government of Kelantan arise for this court's determination in the exercise of its exclusive original jurisdiction under art 128(1)(a) of the Constitution. The petitioners have completely failed to clear this hurdle by failing to point out which of their constitutional rights that are or have been violated by the impugned provisions.

[328] Their contention that the State Legislature of Kelantan had no competency to enact the impugned provisions is irrelevant to the issue of *locus standi*. That is a matter that goes to the substantive merits of the challenge and not to the issue of standing to sue. Reference needs to be made again to the decision of the House of Lords in *IRC* which held that at the first stage of determining standing to sue, leave should be refused to those who appear to be "busybodies, cranks and other mischief-makers". That is a reference to standing to sue and not to merits of the case as the court is not supposed to give a right of hearing to "busybodies, cranks and other mischief-makers" both before and after leave has been granted.

[329] A clear line must be drawn between standing to sue and merits of the challenge. Determination of standing to sue must come before determination of the merits. In colloquial language, the horse must be put before the cart because it is the horse that pulls the cart forward and not the cart pushing the poor horse round and round the mulberry bush.

[330] Surely the petitioners cannot be heard to say, even if they wanted to, that the impugned provisions are in violation of their constitutional right to

equality before the law under art 8 of the Constitution on the ground that the provisions discriminate between them as Muslims and the non-Muslims, or any other form of discrimination under the Article. It would be ludicrous for them to say so.

[331] It needs to be reiterated that the mere fact that the impugned provisions are arguably unconstitutional is no basis for the petitioners to claim that their constitutional rights have thereby been compromised. As decided by the Singapore Court of Appeal in *Tan Eng Hong v. Attorney-General* [2012] 4 SLR 476, the mere holding of a constitutional right is insufficient to found a challenge to the law - there must also be a violation of the constitutional right.

[332] In any case, the petitioners are not asserting that the impugned provisions have been invoked so as to violate their rights and interests or that of anyone else. Their grievance is purely legal, directed at the alleged inherent unconstitutionality of the impugned provisions. The constitutional questions referred to this court arise from no other fact than the very existence of the impugned provisions themselves. In the circumstances, even if this court were to consider the substantive merits of the case, it must decline to answer the constitutional questions posed: See *Anwar Ibrahim (1)*. In other words, the petition is doomed to fail in any event.

[333] Further, none of the grounds given by the petitioners in their petition under the heading "Material facts" and in the 1st petitioner's affidavit in support dated 25 May 2022 raise any real controversy between them and the Government of Kelantan, let alone to show that they are "adversely affected" by the impugned provisions.

[334] At the end of the day, what it comes down to is that there is no factual basis for this court to decide on the merits of the constitutional challenge by the petitioners as there is no real dispute underlying them to begin with. It is a petition in a factual vacuum. The challenge is based on a purely hypothetical situation arising from the existence of the impugned provisions, which according to them in their initial averment of fact had struck fear in their minds that the provisions may be enforced against them. Fear factor alone cannot, by a long shot, amount to a "real controversy" in a challenge so grave as to allege that the highest law making body of the State of Kelantan had no power to enact the impugned provisions.

[335] We all fear something at some point in our lives but in the serious business of challenging the validity of laws made by Parliament or the State Legislature, it must relate, not so much to an infringement of a private right but to an infringement of a constitutional right. Nothing less will suffice. In any event, this court must keep in mind that the petitioners are no longer relying on their fear of enforcement of the impugned provisions as a ground to challenge the validity of the provisions. This ground had been abandoned without any explanation after they had successfully obtained leave on 30 September 2022.

[336] In *Karpal Singh v. Sultan of Selangor* [1987] 1 MLRH 215 Abdul Hamid CJ (Malaya) (as he then was) had this to say on the subject:

> "As regards ground (3), I would firmly say that an action may not be brought to Court by a stranger to it. Indeed, generally, a person may not even institute declaratory proceedings in respect of an act which, **although prejudicial to his interests, may not affect him in his private rights.** (See *Guaranty Trust Co of New York v. Hannay & Co* [1915] 2 KB 536, 562 per Pickford LJ that "it does not extend to enable any stranger to the transaction to go and ask the Court to express its opinion in order to help him on other transactions)".
>
> [Emphasis Added]

[337] Earlier when speaking of whether declaration should issue, the learned CJ (Malaya) said:

> "The plaintiff has by his Originating Summons sought a declaration. It is fundamental principle that declaration will not be made if the application for it is embarrassing or the declarations can serve no useful purpose: See *Mellstrom & Ors* [1970] 2 All ER 9.
>
> The learned Attorney-General has referred to a textbook on *Declaratory Orders*, 2nd Edition, by PW Young, on the conditions for declaratory orders and has submitted that one of the conditions to be satisfied is that **(a) there must exist a controversy between the parties; (b) the proceedings must involve a 'right'; (c) the proceedings must be brought by a person who has a proper or tangible interest in obtaining the order; (d) it must not be merely of academic interest, hypothetical or one whose resolution would be of no practical utility.**
>
> "The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought." (*The Russian Commercial & Industrial Bank v. British Bank for Foreign Trade* [1921] 2 AC 438 at 448 per Lord Dunedin)."
>
> [Emphasis Added]

[338] I have to say with regret and with all due respect to the petitioners that being Muslims themselves, it is rather out of character for them to assert that the impugned provisions, which they would agree conform to the precepts of Islam, are affecting them adversely and posing a threat to their livelihood. It is understandable if non-Muslims were to raise those grounds in challenging the constitutional validity of the impugned provisions, but for Muslims like the petitioners to do so is quite out of this world.

[339] The phrase "precepts of Islam" has been explained by Azahar Mohamed CJ (Malaya) in his supporting judgment in *Iki Putra Mubarrak*, citing the expert opinion of Professor Emeritus Tan Sri Dr Mohd Kamal bin Hassan in *Sulaiman Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) & Other Cases* [2008] 3 MLRA 257. This is what His Lordship said at para [101]:

"[101] Professor Emeritus Tan Sri Dr Mohd Kamal bin Hassan who also gave 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 ('Ijma') 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 With regard to the scope of applicability of 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 (mungkar), permissible (halal), prohibited (haram), allowable (mubah)."

[340] To repeat what the learned Professor said, the precepts are "for the purpose of ensuring, preserving and/or promoting right beliefs, right attitudes, right actions and right conduct amongst the followers of Islam". Absolutely nothing objectionable there, let alone violating any of the petitioners' constitutional rights or affecting them adversely as Muslims. On the contrary they provide a clear guideline for them to be good Muslims.

[341] In *Tan Eng Hong (supra)*, the violation of constitutional right occurred when the appellant was arrested and detained under an allegedly unconstitutional law even though the charge was subsequently substituted with a different offence. Moreover, as noted by the court, the threat of prosecution under the impugned provision was real and not merely fanciful given that the appellant professed to regularly participate in the criminalized conduct.

[342] In the case of the petitioners, the question of a real threat of prosecution under the impugned provisions does not arise as they have not been arrested and detained under the impugned law. Nor have they professed to regularly participate in the conduct criminalized by the provisions. This is not to say that they would be conferred with standing to sue as a matter of course if they had been so threatened with prosecution or regularly participate in the criminalized conduct.

[343] There is nothing in *Anwar Ibrahim (1)* to suggest that those are valid grounds for conferring *locus standi* in a constitutional challenge. The Court of Appeal of Singapore in *Tan Eng Hong* seems to have taken a slightly different view. If I understand the judgment correctly, its view was that a real and credible threat (not merely imaginary or fanciful) of prosecution under an

arguably unconstitutional law is a factor to consider when deciding whether to confer *locus standi* on the applicant.

[344] There may be valid reasons for the Singapore apex court to hold such view, but the difficulty with the proposition speaking generally is that if prosecution or threat of prosecution under an arguably unconstitutional law could as a matter of law be a basis for conferring *locus standi* at the leave stage, the implication is profound in that any such criminal law, civil or syariah, which makes it a crime for any person to engage in such conduct, would be open to challenge by those who themselves commit the criminalized conduct or regularly participate in it.

[345] The situation may not arise in real life but in principle and in theory at least, a serial rapist for example will then find it easier to be conferred with *locus standi* and be granted leave to apply for a declaration that s 376 of the Penal Code is unconstitutional because from his perspective he is at a real risk of being arrested and prosecuted for the offence of rape under that section. After all, as Abdoolcader SCJ said in *Lim Kit Siang*, the merits of the case are an entirely different matter, suggesting that the court should be less strict in granting leave, "that of not closing the door to the ventilation of a genuine public grievance".

[346] What constitutes "genuine public grievance" however may give rise to serious difficulty in a challenge under art 4(4) of the Constitution due to its vague and subjective imperative, in particular due to the need in a constitutional challenge to show a violation of constitutional rights for the conferment of standing to sue, which is not a requirement in an administrative challenge.

[347] In *Iki Putra Mubarrak*, the petitioner was charged in the Selangor Syariah High Court with attempted sexual intercourse against the order of nature (sodomy) with certain other male persons under s 28 of the Syariah Criminal Offences (Selangor) Enactment 1995. He succeeded in the Federal Court to have the syariah penal provision declared unconstitutional on the ground that the State Legislature of Selangor had no power to enact the law as "criminal law" is the exclusive domain of Parliament.

[348] However, what is important to note with regard to the case is that unlike the present case the court in that case was not concerned with the issue of *locus standi*. Leave had earlier been granted under art 4(4) of the Constitution by my learned brother Abang Iskandar Abang Hashim FCJ (now PCA) on the following grounds as reported in *Iki Putra Mubarrak v. Kerajaan Selangor* [2020] 4 MLRA 1:

(1) That leave was required and necessary as the applicant had shown that his complaint involved the question of the competency of the Selangor State Legislature on a matter that is in the Federal List;

(2) The application was not frivolous or an abuse of the court process as the applicant had shown that he had an arguable case.

[349] As can be seen, *locus standi* was not the basis for the grant of leave. It was granted on the basis that it was an incompetency challenge falling under art 4(4) of the Constitution and that the applicant had an arguable case and should therefore be allowed to ventilate before the full court the constitutionality and validity of the impugned provision. Obviously these are grounds that basically go to the merits of the challenge and not to standing to sue. It is not clear what the violation of the petitioner's constitutional right was in *Iki Putra Mubarrak* that entitled him to be conferred with standing to sue.

[350] Equally important to note with regard to the case is that the only ground of objection raised by the Selangor Government was that the petitioner had wrongly named the State Government as respondent for the reason that the State Government had no jurisdiction to execute, enforce or prosecute under the Enactment. It was argued that the applicant should have cited the Majlis Agama Islam Selangor (MAIS) and/or the Jabatan Agama Islam Selangor (JAIS) as respondents as they were the authorities concerned with the actual prosecution of the applicant.

[351] No objection was raised by the Selangor Government that the applicant had no *locus standi* to challenge the validity of the impugned provision under art 4(4) of the Constitution. That in my view explains why His Lordship Abang Iskandar Abang Hashim FCJ (now PCA) did not touch on the issue of *locus standi* or the right to bring an action in granting leave to the applicant. It was never part of the Selangor Government's case in opposing the application for leave.

[352] At the full hearing, again the issue of *locus standi* was not raised by the Selangor Government. There is nothing in the judgment to indicate that the Selangor Government or any other party to the proceedings objected to the petitioner's standing to sue at the full hearing. Assuming such objection was raised, the court did not deal with the issue. Anyway there can be no waiver of *locus standi* as it goes to the jurisdiction of the court under art 128(1)(a) of the Constitution to hear a constitutional challenge under art 4(4) of the Constitution.

[353] It cannot therefore be said with absolute certainty that *Iki Putra Mubarrak* would have gone to the second stage of the proceedings if the issue of *locus standi* had been raised at the leave stage. What appears clear is that at the full hearing, the parties accepted that the petitioner had the requisite *locus standi* to maintain the action against the Selangor Government, hence the hearing of the case on the merits without the court having to decide on the issue of *locus standi*.

[354] Article 4(4) of the Constitution, which requires leave to be obtained from a judge of the Federal Court before a petitioner can commence action to challenge the constitutionality of a law made by Parliament or the State Legislature, is reproduced again below:

> "(4) Proceedings for a declaration that a law is invalid on the ground mentioned in cl (3) (not being proceedings falling within para (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings brought for the same purpose under para (a) or (b) of the Clause."

[355] The point cannot be over-emphasised that at the leave stage the court should refuse *locus standi* to those who appear to be "busybodies, cranks, and other mischief-makers". In the context of an application for leave under art 4(4) of the Constitution this requires, as alluded to earlier, a determination that there is an arguable violation of the petitioner's constitutional rights, that he is genuinely interested, and that he is adversely affected by the impugned provision or provisions. Only then will the court be seized of its exclusive original jurisdiction under art 128(1)(a) of the Constitution to hear the merits of the case.

[356] That is key to the question whether leave should or should not be granted before the case is allowed to proceed on the merits. Of course, as Lord Scarman also said in *IRC*, if leave had been granted, the court may decide that in fact the petitioner had no "sufficient interest" in the subject matter of the suit which in the context of the present case is whether the petitioners have been "adversely affected" by the impugned provisions and that there has been a violation of their constitutional rights.

[357] What this means is that *locus standi*, which goes to the Federal Court's exclusive original jurisdiction under art 128(1)(a) of the Constitution and which as a matter of law is distinct and separate from the merits of the case, must first be established before leave can be granted, and if leave had improperly been granted, to set it aside at the full hearing.

[358] There is a good reason why it is necessary for the court to decide on *locus standi* before granting leave under art 4(4) of the Constitution, and that is to avoid the futile exercise of hearing the case on the merits, if in the end it has to be struck out because it is found that the petitioner has no standing to sue. The more important reason of course is that only those with legal standing to sue have the legal right to commence legal action in court.

[359] With all due respect to my learned brother who granted leave in the present case, I have to say with regret and in all humility that his grounds of decision do not show that he had adequately applied his mind to the law on *locus standi* and how it works in a constitutional challenge under art 4(4) of the Constitution. What he did was to gloss over the issue of *locus standi* in four sentences, as follows:

> "The main attack on the Applicants' *locus* is grounded on the fact that both Applicants are not affected by the impugned provisions and that the First Applicant resided in Kuala Lumpur outside the State of Kelantan. The

> learned State LA also distinguished the Federal Court decisions in *Iki Putra* and *SIS* and cited the case of *Gerakan* challenge of the Hudud Laws in support of his contention. However as pointed out by the learned Applicant counsel, the enactment applies here to any Muslims in Kelantan and there is no requirement that the putative Muslim be a resident in the State of Kelantan, it is territorial. Which is to say that any Muslim who happens to be in the State of Kelantan may be liable and subject to prosecution under the impugned provisions of the said enactment."

[360] As for *Lim Kit Siang*, when Abdoolcader SCJ dealt with the issue of *locus standi* in his dissenting judgment, he was speaking in the context of an application for judicial review by a private person in his capacity as a member of Parliament, leader of the opposition in the House of Representatives, a State Assemblyman, a taxpayer, a motorist and a frequent user of highways and roads in the country to declare invalid the federal government's decision to award a government contract to a private company. He was talking of a "genuine public grievance" as the government contract involved the disbursement of public funds. His concern clearly was with the financial implications of the federal government's action and not with the power of a State Legislature to make law, which is a different kettle of fish altogether.

[361] Obviously therefore, the issue of *locus standi* that the learned judge was dealing with in that case was not germane to the issue of *locus standi* that the court is dealing with in the present application, which concerns the exercise of the Federal Court's exclusive jurisdiction under art 128(1)(a) of the Constitution to hear a constitutional challenge, which it cannot exercise if the petitioner does not have a right of audience before the court. Given that *Lim Kit Siang* was a case on judicial review under O 53 of the ROC, it is not surprising why no reference at all was made to art 128(1)(a) of the Constitution which relates to a constitutional challenge under art 4(4) of the Constitution.

[362] That is one factor that separates *Lim Kit Siang* from the present case. The other point to take note of is that both *Lim Kit Siang* and *Taman Rimba* are cases on administrative law and not on constitutional law. This is clear from the dissenting judgment of Abdoolcader SCJ in *Lim Kit Siang*. Therefore, both *Lim Kit Siang* and *Taman Rimba* are not relevant in determining whether leave should or should not be granted in a constitutional challenge under art 4(4) of the Constitution.

[363] I am compelled to point this out with no pleasure in mind because *Taman Rimba* may be misconstrued as authority for saying that the "broad and liberal" test applies, without exception, to all public interest litigation, including in particular to a constitutional challenge under art 4(4) of the Constitution, when it is only to be applied in determining *locus standi* in judicial review of administrative action under O 53 r 2(4) of the ROC, which does not require the applicant to first of all show an arguable violation of his constitutional rights before *locus standi* can be conferred.

[364] There is no doubt that in laying down the "broad and liberal" test, this court drew inspiration from the minority judgment in *Lim Kit Siang*. This is acknowledged in para [445] of the *Taman Rimba* judgment where the court said:

> "[445] For these reasons we reiterate that the dissenting decision of the minority judges, particularly as reflected in the judgment of Abdoolcader SCJ, reflects the correct position in law and ought to be followed. His decision outlines the fundamental requirements that are to be considered by a court **when determining whether or not to grant leave for judicial review.** The cases of *Lim Cho Hock* and *Othman Saat* provide a sound basis for the evolution of the law on standing to sue from that period to the present as it presents a rational and coherent development/progression."
>
> [Emphasis Added]

[365] I have mentioned art 128(1)(a) of the Constitution without reproducing it. The Article stipulates as follows:

> "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]

[366] The fact that the Federal Court's jurisdiction under the Article is constitutionally expressed to be "to the exclusion of any other court" must be given its due significance and weightage. Being mindful of the gravity of a challenge to declare a law made by Parliament or the State Legislature invalid, the framers of the Constitution must have intended to set a high threshold for the grant of leave under art 4(4), higher than the threshold for the grant of leave under O 53 of the ROC, which ordinarily is left to a High Court Judge to deal with.

[367] The majority in *Anwar Ibrahim (1)* was therefore right in requiring the applicant in a constitutional challenge to establish an arguable violation of his constitutional rights in addition to being "adversely affected" and having a "genuine interest" before he can be conferred with standing to sue. I do not think these requirements are in conflict with any principle of law already established by this court on the issue, including the cases of *MTUC & Ors* and *Taman Rimba*.

[368] With due respect, to relax the rule on *locus standi* in a constitutional challenge under art 4(4) of the Constitution will potentially open the floodgates for busybodies to invoke the Federal Court's exclusive original

jurisdiction under art 128(1)(a) of the Constitution for a collateral purpose. If the exclusivity of the Federal Court's original jurisdiction under the Article is to mean anything, leave under art 4(4) must be given sparingly and only when standing to sue has been established. In *Anwar Ibrahim (1)*, Nallini Pathmanathan FCJ had also noted at para [16] of the judgment:

> "[16] Under the constitutional scheme, therefore, the Federal Court is a court of last resort for all constitutional questions. It is only in a narrow category of **exceptional cases - those expressly stipulated in art 128(1) FC** - that such questions must be determined by the Federal Court at first instance."
>
> [Emphasis Added]

[369] The learned judge was of course referring to the exclusive original jurisdiction of the Federal Court to hear challenges on the competency of the Federal or State Legislatures to make law. In *Iki Putra Mubarrak*, the learned Chief Justice made a very pertinent point when Her Ladyship said at para [29]:

> "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)* at p 412, as follows:
>
> > The 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."

[370] Being a prerequisite for the exercise of the court's exclusive original jurisdiction under art 128(1)(a) of the Constitution, *locus standi* must be given its rightful place of importance, not because merits of the case is less important but because the court cannot properly exercise its exclusive original jurisdiction under the Article over those who have no right to commence an action under art 4(4) of the Constitution.

[371] The guiding principle is that the court should refuse *locus standi* to those who appear to be mere busybodies, more so in cases so serious as to challenge the competency of the highest law-making bodies in the country to make law. This court must be cautious in admitting challenges under art 4(4) of the Constitution to avoid abuse of the *locus standi* rule. If left unchecked, it will shake the very foundation of our democratic system of government, which is the separation of powers between the legislative, the executive and the judiciary, which is a basic structure of the Constitution.

[372] Coming back to *Iki Putra Mubarrak*, extra care must be taken in dealing with the case, which was referred to during submissions. It needs to be re-emphasised that it was not a case on *locus standi*. In fact the issue of *locus standi*, and therefore the issue of the court's exclusive jurisdiction under art 128(1)(a) of the Constitution was not even before the court for its consideration.

[373] There was some discussion on jurisdiction by the court but it was on the jurisdiction of the civil court *vis-à-vis* the jurisdiction of the syariah court

and not on the exclusive jurisdiction of the Federal Court under art 128(1)(a) of the Constitution *vis-à-vis* the petitioner's standing to sue. The fact that the petitioner in that case was actually prosecuted for attempting to commit the offence of sodomy under the impugned provision is neither here nor there and is irrelevant to the issue of *locus standi* and jurisdiction of the court.

[374] What is clear is that *Iki Putra Mubarrak* was decided purely on the merits and is not authority for saying that prosecution, threat of prosecution, or regularly participating in the criminalized conduct under the impugned provisions provide valid basis for conferring *locus standi*, either at the leave stage or at the full hearing.

[375] In the present case, the 1st petitioner's fear of a real risk that she might be subjected to the investigative powers of the Kelantan Government in relation to the impugned provisions as averred to in her leave application, is not only unfounded but is also not a ground to confer on her the *locus standi* to maintain the present action. In any case, this assertion had been abandoned in her statutory statement in encl 26 after leave had been granted. The fact of the matter is, there is nothing for her and her daughter to fear unless they regularly participate in the conduct criminalized by the impugned provisions.

[376] In *Croome* and *Leung TC*, the two cases cited in *Anwar Ibrahim (1)*, no prosecution had been brought against the appellants pursuant to the impugned provisions but in both cases, the appellants' conduct of their personal lives were found to have been "overshadowed in significant respects" by the presence of the impugned provisions. That was the reason why the courts in the two cases held that they had *locus standi* even though the State had not yet invoked legal proceedings to enforce the criminal law against them.

[377] The petitioners on the other hand have not shown how their personal lives as Muslims have been "overshadowed in significant respects" by the impugned provisions except for the 1st petitioner's unfounded fear that the provisions may be enforced against her and her daughter.

[378] In *Datuk Syed Kechik*, the applicant was held by the Federal Court to have had *locus standi* because there was a "real dispute" between him and the State Government of Sabah when the State Government threatened to expel him from the State. In the present case, there is no "real dispute" between the petitioners and the Kelantan Government as there is no threat by the Government to enforce any of the impugned provisions against them. The 1st petitioner's fear that the Government may do so does not constitute "real dispute" between them. Then again, it must be pointed out that *Datuk Syed Kechik* is a case on judicial review of administrative action and not a case on constitutional challenge. A constitutional challenge under art 4(4) of the Constitution is a different kettle of fish altogether.

[379] It bears repetition that if this court were to accede to the petitioners' initial argument that fear of enforcement could form the basis for conferring

locus standi, then any Tom Dick and Harry will invariably be conferred with the necessary legal standing to commence action under art 4(4) of the Constitution to challenge the constitutional validity of the impugned provisions.

[380] It is also worth reiterating that the requirement for leave under art 4(4) is there to ensure that frivolous or vexatious proceedings for such declarations are not commenced (*Karim Abdul Ghani*). To that I would add that this court, being the apex court, must not condone any abuse of its process by "phantom busybodies", "ghostly intermeddlers", "cranks" and "other mischief-makers", descriptions aptly given to these types of litigant by Lord Scarman in IRC and by Abdoolcader SCJ in *Lim Kit Siang*.

[381] In *Anwar Ibrahim (1)*, my learned sister Nallini Pathmanathan FCJ gave "Holocaust-type laws" as extreme examples of "exceptional laws" that would confer *locus standi* (paragraph [59]). The word "holocaust" is defined by the *Merriam-Webster English Dictionary* as "a mass slaughter of people", a genocide. The *Concise Oxford English Dictionary* (11th Edition, Revised) defines it to mean "destruction or slaughter on a mass scale". It refers to a deliberate and systematic extermination of a particular ethnic, racial or religious group.

[382] To put the matter in perspective, the word "holocaust" is associated with the killing of millions of Jews by the Nazis before and during the second world war, which included herding them into gas chambers in order to kill them. If this sounds graphic, that is what it is. From that perspective, there is absolutely no comparison with the impugned provisions. The provisions are nowhere close to holocaust-type laws by any wild stretch of the imagination.

[383] In the first place the impugned provisions are only applicable to Muslims and not to non-Muslims. Secondly, the question of a "mass slaughter of people" specifically targeted against a minority group does not arise. The petitioners are not even from a minority group. Thirdly, there is nothing exceptional about the impugned provisions. On this score, the petitioners' case on *locus standi* must also fail.

[384] The next question to consider is whether this court has the power to set aside the leave order that has already been granted to the petitioners. The contention by Datuk Malik Imtiaz for the petitioners is that since the *locus standi* issue had been dealt with, argued and finally dismissed by Vernon Ong FCJ at the leave stage, this court cannot re-visit the issue as it is *res judicata*.

[385] With due respect to learned counsel, the argument flies in the face of *Wong Shee Kai v. Government of Malaysia* [2022] 6 MLRA 797, a very recent decision of this court. In that case leave to appeal had been granted to the petitioner. The question before the court was whether the court was bound to hear the petition since leave had been granted, or whether it could set aside the leave order and refuse to hear the petition. As reported in paras (2) and (3) of the headnote to the case, it was held, *inter alia* as follows:

Held (2) Although leave had been granted and the petition had been filed, it was still open to the court, in order to guard its exclusive original jurisdiction from abuse, to re-visit the grant of leave and to set it aside if it found that leave ought not to have been granted in the first place. The grant of leave could not confer jurisdiction where there is none in the first place. Leave could only be granted if there is jurisdiction, and so the grant of leave was not capable of becoming the basis for jurisdiction.

Held (3) If it is found at any stage before, during or after the hearing of the merits of a petition that the initial grant of leave was bad for want of jurisdiction, this court is entitled, after hearing the parties, to set aside the leave order previously granted. And following such setting aside, the petition having no leg to stand on has to be struck out as a matter of course. The power to set aside the previously-granted leave order is within the ambit of the inherent powers of this court. If at all a statutory provision is required for it, it is r 137 of the Rules of the Federal Court 1995.

[386] The issue therefore is one of jurisdiction so that leave that has been granted without jurisdiction is liable to be set aside. In *Wong Shee Kai*, the court struck out the petition not because the applicant had no *locus standi* to maintain the action but because the court had no jurisdiction to hear the petition as the challenge was an inconsistency challenge and not an incompetency challenge. As the learned Chief Justice who led the five-member panel eruditely surmised in her judgment, the petition "disclosed an inconsistency challenge poorly disguised as an incompetency challenge".

[387] It was held that being an inconsistency challenge, the petition should have been raised in the High Court and not directly in the Federal Court as an inconsistency challenge was beyond the jurisdiction of the Federal Court, whose exclusive jurisdiction under art 128(1)(a) of the Constitution was to hear an incompetency challenge and not an inconsistency challenge.

[388] As in *Wong Shee Kai*, this court in the present case is dealing with art 4(3) and (4) of the Constitution which are reproduced again below for ease of reference:

"(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or:

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

(b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in cl (3) (not being proceedings falling within para (a) or (b) of

> the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings brought for the same purpose under para (a) or (b) of the Clause."

[389] I must highlight in passing that by virtue of art 4(4) above, the Federal Government shall be entitled to be a party to any such proceedings but for some unexplained reasons it was not made a party to the present proceedings, nor did it apply to intervene in the action. At the hearing, the State Legal Advisor who represented the State Government of Kelantan but who is also an officer of the Federal Government was asked if the Federal Government takes the same stand as the stand taken by the State Government of Kelantan. His reply was that it does not take the same stand.

[390] Obviously the learned State Legal Advisor did not represent the Federal Government in this action although he is an officer of the Federal Government attached to the Attorney-General's Chambers. In his capacity as the State Legal Advisor of Kelantan, he had made the Kelantan Government's position clear that the impugned provisions are valid and not unconstitutional, which is the flip side of the Federal Government's stand as he himself confirmed in answer to my question at the hearing. This conundrum in the role of the State Legal Advisor in a Federal set up where the State Government is in the opposition needs to be tidied up.

[391] It would have been of great assistance to the court if the Federal Government had been a party to the action so that the court could benefit from the Federal Government's input on such an important constitutional issue as the competency of the Kelantan State Legislature to enact the impugned provisions. With due respect, taking a neutral stand or no stand at all is not a viable option as it involves the power of the State Legislature *vis-à-vis* the legislative power of Parliament to make law. As it is, the court does not have the benefit of the Federal Government's side of the argument.

[392] Be that as it may, the *ratio decidendi* of *Wong Shee Kai* is unwaveringly clear - that a leave order that has already been granted can be set aside if it is found that it should not have been granted in the first place for want of jurisdiction. Put another way, the grant of leave cannot confer jurisdiction where there is none in the first place, and the court has no jurisdiction where there is no standing to sue.

[393] No authority has been provided to this court to say that even where the petitioner has no *locus standi* to maintain the action, this court is nevertheless seized of its exclusive original jurisdiction under art 128(1)(a) of the Constitution to hear and to decide on the merits of the petition. As for myself, I do not think that is a tenable proposition of law as *locus standi* is a condition precedent to the exercise of the court's jurisdiction under art 128(1)(a) of the Constitution. I therefore reject counsel's argument that

once leave to appeal has been granted, the issue of *locus standi* is *res judicata* and cannot be revisited. The argument must fail.

[394] In so far as the issue of jurisdiction is concerned, the position of the petitioners in the present case is no better than the position of the petitioner in *Wong Shee Kai*. While their incompetency challenge is well within the exclusive original jurisdiction of the Federal Court under art 128(1)(a) of the Constitution, their lack of *locus standi* takes that exclusive original jurisdiction away from the court.

[395] In both *Wong Shee Kai* and in the present case, this court had/has no jurisdiction to hear the applications, in the former because the court had no exclusive jurisdiction to hear an inconsistency challenge and in the present case, because the court has no exclusive jurisdiction to hear an application by petitioners who have no right to appear before it.

[396] In a sense, the petitioners' position is worse than that of *Wong Shee Kai* who could at least bring his inconsistency challenge in the High Court although not in the Federal Court. Unlike the petitioners, he was not impeded by lack of *locus standi*. His petition was struck out simply because he filed his application in the wrong court, and not because he lacked *locus standi*.

[397] The petitioners on the other hand filed their case in the right court but without the necessary *locus standi* or standing to sue, their application has no leg to stand on. Their petition must therefore suffer the same fate as the fate that befell *Wong Shee Kai* but for a different reason.

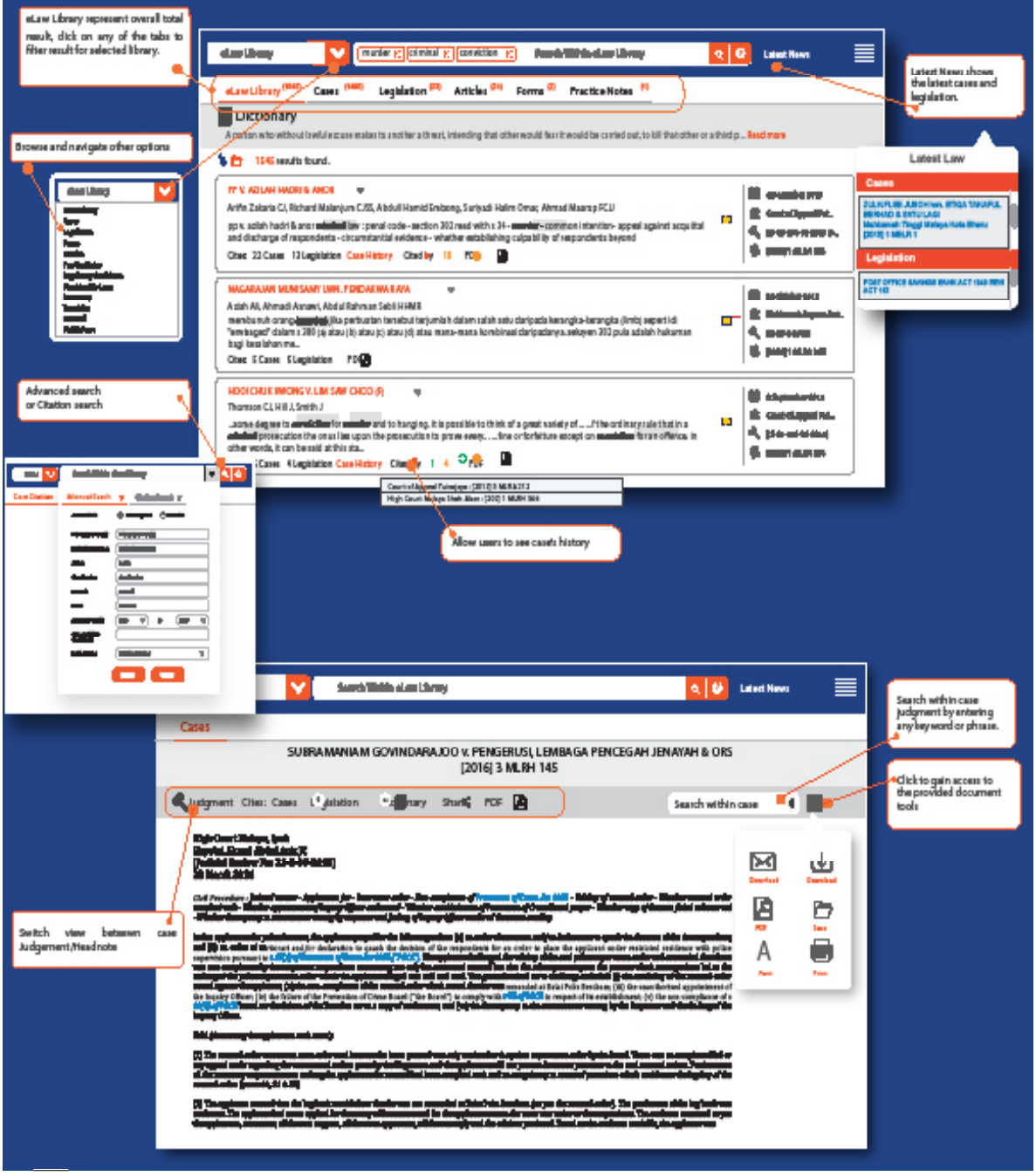
[398] In the circumstances and for all the reasons given, encl 68 is allowed. The leave order granted by Vernon Ong FCJ on 30 September 2022 is set aside and encl 26 is struck out with no order as to costs.

eLaw.my
The Digital Library

Introducing eLaw
Experience the difference today

eLaw.my is Malaysia's largest database of court judgments and legislation, that can be cross-searched and mined by a feature-rich and user-friendly search engine—clearly the most efficient search tool for busy legal professionals like you.

A Snapshot of Highlights

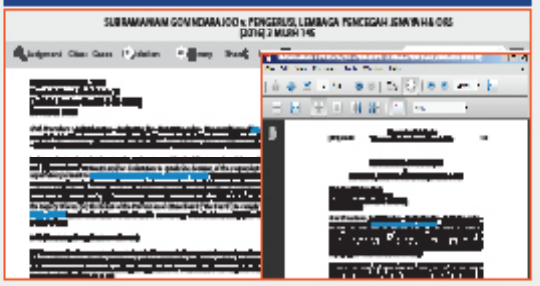


Our Features

Search Engine

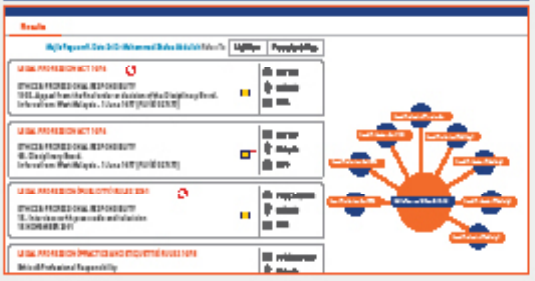
- Easier
- Smarter
- Faster Results.

Judgments Library



eLaw has more than 80,000 judgments from Federal/ Supreme Court, Court of Appeal, High Court, Industrial Court and Syariah Court, dating back to the 1900s.

Find Overruled Cases

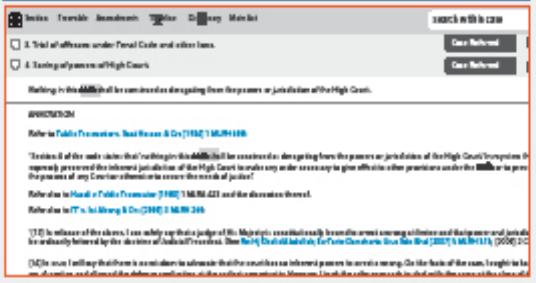


The relationships between referred cases can be viewed via precedent map diagram or a list — e.g. Followed, referred, distinguished or overruled.

Multi-Journal Case Citator

You can extract judgments based on the citations of the various local legal journals.*

Legislation Library



You can cross-reference & print updated Federal and State Legislation including municipal by-laws and view amendments in a timeline format.

Main legislation are also annotated with explanations, cross-references, and cases.

Dictionary/Translator

eLaw has tools such as a law dictionary and a English - Malay translator to assist your research.

Clarification: Please note that eLaw's multi-journal case citator will retrieve the corresponding judgment for you, in the version and format of The Legal Review's publications, with an affixed MLR citation. No other publisher's version of the judgment will be retrieved & exhibited. The printed judgment in pdf from The Legal Review may then be submitted in Court, should you so require.

Please note that The Legal Review Sdn Bhd (is the content provider) and has no other business association with any other publisher.

Start searching today!

www.elaw.my