IN THE FEDERAL COURT OF MALAYSIA

(ORIGINAL JURISDICTION)

CASE NO: BKA-3-11/2019(W)

Between

… Petitioner

And

1. Kerajaan Negeri Selangor

2. Majlis Agama Islam Selangor … Respondents

Coram:

Tengku Maimun binti Tuan Mat, CJ
Rohana binti Yusuf, PCA
Azahar bin Mohamed, CJM
Abang Iskandar bin Abang Hashim, CJSS
Mohd. Zawawi bin Salleh, FCJ
Nallini Pathmanathan, FCJ
Vernon Ong Lam Kiat, FCJ
Zabariah binti Mohd. Yusof, FCJ
Hasnah binti Mohammed Hashim, FCJ

JUDGMENT OF THE COURT

Introduction

[1] The issue for our determination is rather narrow. It concerns the interpretation or effect of the words ‘except in regard to matters included

in the Federal List' contained in item 1, List II, Ninth Schedule of the Federal Constitution ('State List'), vis-à-vis the power of the State legislatures to make laws under the said item.

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

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

> "(1) A declaration that Section 28 of the Syariah Criminal Offences (Selangor) Enactment 1995 is invalid on the ground that it makes provision with respect to a matter to which the Legislature of the State of Selangor has no power to make laws and is therefore null and void;
>
> (2) Costs; and/or
>
> (3) Such further and/or other reliefs as deemed fit by this Honourable Court.".

Background Facts

[4] On 21.8.2019, the Syarie Prosecutor preferred a charge against the petitioner in Selangor Syariah High Court. The charge essentially alleged that the petitioner had, on 9.11.2018, sometime between 9pm and 10.30pm in a house at Bandar Baru Bangi, attempted to commit sexual

intercourse against the order of nature with certain other male persons. The governing provision of the charge is section 28 of the 1995 Enactment read together with section 52 (attempted offences).

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

The Main Arguments

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

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

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

> "Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to… creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, **except in regard to matters included in the Federal List**; the… Syariah courts… shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law…". [Emphasis added]

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

> "**Buggery**
>
> **377.** Whoever voluntarily has carnal intercourse with an animal shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine or to whipping.
>
> **Carnal intercourse against the order of nature**
>
> **377A.** Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature.".

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

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

[11] He argued that the starting point for this discussion is the judgment of this Court in *Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354 ('*Sulaiman Takrib*') although the Court in that case was not ultimately

required to interpret the phrase ‘except in regard to matters included in the Federal List’ in item 1 of the State List which is described as the ‘preclusion clause’.

[12] It was argued that while *Sulaiman Takrib* undertook to define the words ‘precepts of Islam’ in item 1 of the State List, the Court was not called upon to interpret the preclusion clause on the facts of that case. This petition, it was submitted, breaks new ground. Learned counsel further argued that in *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara, Malaysia & Anor* [1999] 2 MLJ 241 (‘*Sukma Darmawan*’), this Court did not consider the preclusion clause. Hence, it was contended that *Sukma Darmawan* is not authority for the proposition that section 28 of the Enactment can co-exist with its Federal counterparts.

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

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

Preliminary Issues

[15] Before proceeding to consider this petition on its merits, we will first deal with certain preliminary issues. The first issue concerns two affidavits affirmed respectively by Dato' Setia Haji Mohd Tamyes bin Abd. Wahid, the Mufti of Selangor ('Encl. 129') and by Professor Dr. Shamrahayu binti A. Aziz ('Encl. 130') filed by the 1st respondent in support of their case.

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

Encls. 129 and Encl. 130

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

[18] It is trite that experts only assist the Court to determine issues of fact. They do not otherwise have any locus to provide opinions on issues of law. As far back as 1963, Winslow J said this in *Ong Chan Tow v R* [1963] 29 MLJ 160, at page 162:

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

[19] If the above passage applies to ordinary law and how experts are in no position to provide their opinion as to the interpretation and application of it, then the same must equally be true and apply with greater force to the interpretation and application of the FC. In fact, this Court has already held in *Abdul Kahar bin Ahmad v Kerajaan Negeri Selangor (Kerajaan Malaysia, intervener) & Anor* [2008] 3 MLJ 617 ('*Abdul Kahar*'), that it is singularly the civil Superior Courts that have the jurisdiction and power to interpret the FC.

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

Original Jurisdiction of the Federal Court

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

[22] The seminal case on the narrow breadth of the original jurisdiction of this Court is the judgment of Suffian LP in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 ('*Ah Thian*'). In that case, his Lordship held that where a matter is not strictly for the original jurisdiction of this Court, the point can be raised in the course of submission in the ordinary way before the High Court. In short, unless this Court is called upon to determine constitutional questions arising from the High Court through a reference under section 84 of the Courts of Judicature Act 1964 ('CJA 1964'), this Court's original jurisdiction is restricted to competency challenges.

[23] In *Rethana v Government of Malaysia* [1984] 2 MLJ 52 at page 54, Azmi FJ explained not only the rationale for how an incompetency challenge ought to be differentiated from an inconsistency challenge, but also the reason for this Court's very narrow original jurisdiction. His Lordship said:

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

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

[25] The Legislative Lists are prescriptive in that the Legislature (Federal or State) has no power to enact laws on a matter unless it is permitted to do so by the FC. However, once a general permissive provision is found to exist to permit legislation to that effect, then the cannons of construction require that the said entries are not to be read narrowly or pedantically. They must instead be interpreted liberally with the widest possible amplitude, extending to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended therein (see generally: *Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors* [2018] 3 MLJ 417 ('*Gin Poh*').

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

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

[27] Anyone reading the above constitutional provision would at once appreciate the potential confusion that may arise between the use of the phrases 'inconsistency challenge' and 'incompetency challenge' when Article 4(1) only refers generally to the word 'inconsistent'. To appreciate the context, we find it necessary to reproduce Articles 4(3) and 128(1) of

the FC which substantively cater for the original jurisdiction of the Federal Court. These provisions provide as follows:

> "Article 4
>
> (3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State **has no power** to make laws, except in proceedings for a declaration that the law is invalid on that ground…
>
> Article 128
>
> (1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction —
>
> (a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State **has no power** to make laws;".
>
> [Emphasis added]

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

[29] In this regard, the phrases 'inconsistency challenge' and 'incompetency challenge' are purely convenient nomenclature serving as

a means to identify the procedure to mount the different challenges given their nature. As identified earlier, the High Courts have jurisdiction to hear inconsistency challenges while incompetency challenges are reserved for the original jurisdiction of the Federal Court. The original jurisdiction of this Court is exclusive simply because of the gravity of the allegation that the relevant legislature has no power to make that law. This is clearly suggested by Suffian LP in *Ah Thian* (supra) at page 113, as follows:

> "This jurisdiction is exclusive to the Federal Court, no other court has it. This is to ensure that a law may be declared invalid on this very serious ground only after full consideration by the highest court in the land.".

[30] As mentioned at the outset, this is a petition filed in the original jurisdiction of the Federal Court. The arguments articulated by learned counsel Dato Malik in respect of the constitutional validity of the Syariah Courts (Criminal Jurisdiction) Act 1965, that Syariah Courts do not exercise judicial power, that Syariah Courts are not constitutionally empowered to pass sentences of whipping and imprisonment, and that they must equally observe Part II of the FC (more specifically Articles 5(1) and 8(1)), are in part, of the nature that they relate to matters which may be raised before the High Courts in the ordinary way. Thus, we do not think these arguments merit discussion in this petition.

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

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

Our Analysis/Decision

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

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

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

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

Precepts of Islam and Federal Criminal Jurisdiction

[37] In *Sulaiman Takrib*, the petitioner argued that certain provisions of State Enactments of the State of Terengganu were unconstitutional on the basis that the Legislature of the State had no power to make it. Several provisions were canvassed before the Courts but in substance the said provisions generally made it an offence for Muslims to print, publish, produce, record, distribute, possess, etc, of any book, pamphlet, document, etc, containing anything which is contrary to '*Hukum Syarak*' as determined by *fatwa*. The trials before the Syariah Courts in that case were regarding a VCD which contained teachings of 'Ayah Pin'. There were also other charges for acting in contravention of a fatwa which declared that 'Ayah Pin' is a belief contrary to *Hukum Syarak*.

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

> "[67] We have seen that the three experts agree that 'precepts of Islam' include 'law' or 'Shariah'. We should also note that the Federal Constitution uses the term 'Islamic law' which, in the Malay translation, is translated as 'Hukum Syarak'. Indeed, all the laws in Malaysia, whether Federal or state, use

the term 'Islamic Law' and 'Hukum Syarak' interchangeably. It is true that, jurisprudentially, there is a distinction between 'syariah' and 'fiqh', as pointed out by Professor Dr Hashim Kamali. However, in Malaysia, in the drafting of laws and in daily usage, the word 'syariah' is used to cover 'fiqh' as well. A clear example is the name of the 'Syariah Court' itself. In fact, 'Syariah' laws in Malaysia do not only include 'fiqh' but also provisions from common law source — see, for example the respective Syariah Criminal Procedure Act/Enactments, Syariah Civil Procedure Act/Enactment; the Syariah Evidence Act/Enactments, and others. We will find that provisions of the Criminal Procedure Code, the Subordinate Courts Rules 1980 and the Evidence Act 1950, used in the 'civil courts' are incorporated into those laws, respectively.

[68] Coming back to the offences created by s 14 of the SCOT, the key words are contrary to Hukum Syarak, which necessarily means the same thing as precepts of Islam. Even if it is not so, by virtue of the provision of the Federal Constitution, the words 'Hukum Syarak' as used in s 14 of the SCOT and elsewhere where offences are created must necessarily be within the ambit of 'precepts of Islam'.".

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

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

> mere five pillars of Islam. I agree with their opinions and the conclusion arrived at by the learned Chief Justice and I have nothing to add on this issue.".

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

> "[34] However, this should not be confused with creation and punishment of offences. Creation and punishment of offence have further limits:
>
> (a) it is confined to persons professing the religion of Islam;
>
> (b) it is against the precept of Islam;
>
> (c) it is not with regard to matters included in the Federal List; and
>
> (d) it is within the limit provided by s 2 of the SC (CJ) Act 1965.".

[41] The approach taken in *Sulaiman Takrib* in respect of its interpretation of the phrase 'precepts of Islam' was adopted by this Court in *ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor* [2016] 1 MLJ 153 ('*ZI Publications*').

[42] It is not in dispute in this case that *liwat* which is one of the offences contemplated by section 28 of the 1995 Enactment and with which the petitioner is charged, is against the precepts of Islam. Having articulated the law on the interpretation of the phrase 'precepts of Islam', it is clear at this stage that it is insufficient for learned counsel for the respondents to simply maintain that section 28 of the 1995 Enactment is valid in view of

it being an offence against the precepts of Islam. The larger question posited for our consideration is whether notwithstanding its nature as being against the precepts of Islam, the SSL is competent to enact it in light of the preclusion clause.

Construing the Preclusion Clause in Item 1 of the State List

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

[44] Counsel for the petitioner referred us to case law from other jurisdictions such as Canada. The unique feature of the dichotomy in our civil and Syariah laws is peculiar to our country and exists in our FC on account of our historical circumstances. In this regard, we recall the words of Thomson in *The Government of the State of Kelantan v The Government of The Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* [1963] 29 MLJ 355 at page 358, that 'the Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries'. We accordingly consider reference to our own case law sufficient.

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

provisions, the Court ought to be minded to apply the rule of harmonious construction.

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

[47] The preclusion clause was considered in passing by this Court in *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101 ('*Latifah*'). Most critically, Abdul Hamid Mohamad FCJ (as he then was) observed as follows:

> "[26] 'Criminal law' is a federal matter — item 4. However, State Legislatures are given power to make law for the 'creation and punishment of offences by persons professing the religion of Islam *against precepts of that religion, except in regard to matters included in the Federal List*' – item 1 of State List. The two qualifications at the end of that sentence (i.e. 'against precepts of that religion' and 'except in regard to matters included in the Federal List') limit the offences that can be created by a State Legislature. So, where an offence is already in existence in, say, the Penal Code, is it open to a State Legislature to create a similar offence applicable only to Muslims? Does it not fall within the exception 'except in regard to matters included in the Federal List' ie criminal law? To me, the answer to the last-mentioned question is obviously in the affirmative. Furthermore, Article 75 provides:

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

[27] Item 4(k) provides: 'Ascertainment of Islamic Law and other personal laws for purposes of federal law' is a federal matter. A good example is in the area of Islamic banking, Islamic finance and takaful. Banking, finance and insurance are matters enumerated in the Federal List, items 7 and 8 respectively. The ascertainment whether a particular product of banking, finance and insurance (or takaful) is Shariah-compliance or not falls within item 4(k) and is a federal matter. For this purpose Parliament has established the Syariah Advisory Council — see s 16B of the Central Bank of Malaysia Act 1958 (Act 519).".

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

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

"CRIMINAL LAW

[69] It was also argued that the offences are 'criminal law' and therefore within the federal jurisdiction to legislate. I admit that it is not easy to draw the dividing line between 'criminal law' and the offences that may be created by the

State Legislature. Every offence has a punishment attached to it. In that sense, it is 'criminal law'. However, if every offence is 'criminal law' then, no offence may be created by the State Legislatures pursuant to item 1, List II of the Ninth Schedule. To give effect to the provision of the Constitution a distinction has to be made between the two categories of offences and a line has to be drawn somewhere. The dividing line seems to be that if the offence is an offence against the precept of Islam, then it should not be treated as 'criminal law'. That too seems to be the approach taken by the Supreme Court judgment in *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119. In that case the issue was whether s 298A of the Penal Code was invalid on the ground that it made provisions with respect to a matter with respect to which Parliament had no power to make. It was argued that the section was ultra vires the Constitution because, having regard to the pith and substance of the section, it was a law which ought to be passed NOT by Parliament but by the State Legislative Assemblies, it being a legislation on Islamic religion, according to art 11(4) and item 1 of List II, Ninth Schedule of the Federal Constitution. On the other hand, it was contended by the respondent that the section was valid because it was a law passed by Parliament on the basis of public order, internal security and also criminal law according to art 11(5) and items (3) and (4) of List I of the Ninth Schedule of the Federal Constitution.".

[50] His Lordship further observed that:

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

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

[51] With respect, we are unable to agree with his Lordship's observations as regards his categorisation of which legislature (Federal or State) is empowered to make law within the context of item 1 of the State List. The words employed by item 1 since Merdeka Day 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.

[53] In this regard, we note that none of the parties before us have challenged the competency of Parliament to enact the federal counterparts of section 28 of the 1995 Enactment as contained in the Penal Code. Absent any challenge by any party as to Parliament's power to enact them, we must assume that the relevant Penal Code provisions were competently enacted by Parliament within the meaning of items 3 and 4 of the Federal List and any other related legislative entries (see generally *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116).

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

Co-Existence of Federal and State Laws

[55] In *Sukma Darmawan* (supra), briefly, the issue before this Court concerned the charge preferred against one Sukma Darmawan bin Sasmitaat Madja principally under section 377D of the Penal Code. The argument before the Court was that the civil courts did not have jurisdiction to try the offence and that the proper forum ought to have been the Syariah Courts. Eusoff Chin CJ observed as follows as regards the validity of the Penal Code provision vis-à-vis its Syariah counterpart, at page 247:

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

[56] His Lordship made a technical distinction between the civil and Syariah versions of the offence. It is this very distinction that the respondents seek to make in their argument that the Syariah provision is constitutionally valid in spite of the Penal Code provisions. The respondents' arguments appear to resonate with the following passage of the learned Chief Justice's judgment in *Sukma Darmawan*, at page 247:

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

> triable by either the civil court or a syariah court, he may be prosecuted in either of those courts.".

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

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

[58] Another general illustration that Muslims are subject to two types of laws is the judgment of the Court of Appeal in *Ketua Pegawai Penguatkuasa Agama & Ors v Maqsood Ahmad & Ors and another appeal* [2021] 1 MLJ 120 ('*Maqsood Ahmad*'). The Court of Appeal in that case took pains to examine the history of Islamic law in Malaysia and its co-existence with the civil laws in the country. We find that we are in complete agreement with it and have nothing further to add as such exposition also appears to be concomitant with that of Salleh Abas LP's in *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55.

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

power of the State Legislatures to enact such laws by subjecting it to the Federal List.

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

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

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

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

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

> "[45] The point to note here is that both courts, civil and syariah, are creatures of statutes. Both owe their existence to statutes, the Federal Constitution, the Acts of Parliament and the State Enactments. Both get their jurisdictions from statutes i.e. Constitution, federal law or State law, as the case may be. So, it is to the relevant statutes that they should look to determine whether they have jurisdiction or not. Even if the syariah court does not exist, the civil court will still have to look at the statutes to see whether it has jurisdiction over a matter or

not. Similarly, even if the civil court does not exist, the syariah court will still have to look at the statute to see whether it has jurisdiction over a matter or not. Each court must determine for itself first whether it has jurisdiction over a particular matter in the first place, in the case of the syariah courts in the States, by referring to the relevant State laws and in the case of the syariah court in the Federal Territory, the relevant Federal laws. Just because the other court does not have jurisdiction over a matter does not mean that it has jurisdiction over it. So, to take the example given earlier, if one of the parties is a non-Muslim, the syariah court does not have jurisdiction over the case, even if the subject matter falls within its jurisdiction. On the other hand, just because one of the parties is a non-Muslim does not mean that the civil court has jurisdiction over the case if the subject matter is not within its jurisdiction.

…

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

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

[64] We agree with his Lordship generally on the approach to be taken by the Courts in determining jurisdiction. However, in light of the judgments of this Court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah*

Daerah Hulu Langat and another case [2017] 3 MLJ 561 and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545, in all cases, the civil Superior Courts retain supervisory jurisdiction which is inherent in their function under Articles 4(1) and 121(1) of the FC. Thus, unless their jurisdiction is very clearly excluded by virtue of subject-matter under Article 121(1A), the question that the civil Superior Courts have no jurisdiction to determine any form of dispute does not arise.

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

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

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

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

[68] The conditions and restrictions referred to in Article 74(3) must surely include the preclusion clause in item 1 of the State List. Unlike countries such as the United States where the primary power of legislation lies with the individual States with residual powers in the Federation, the terms of our FC and the history of its founding make it abundantly clear that the primary legislative powers of the Federation shall lie ultimately with Parliament save and except for specific matters over which the States shall have legislative powers. This is borne out by the Reid Commission Report 1957, as follows:

> "82. We have already explained the way in which powers are now divided between the Federation and the States and we have noted some of the difficulties which have arisen from this division. We think that it would be impracticable to continue the present system in so far as, with regard to many matters, it confers legislative power on the Federation and executive power on the States. If Malaya is to be a democratic country the Government of each State must be controlled by its elected Legislative Assembly, and we must envisage the possibility that from time to time the party in power in one or more of the States may differ in outlook, and policy from the party in power in the Federation. It appears to us that in such circumstances the present division of powers would probably lead to friction and might well have graver consequences. We therefore recommend that in future legislative power and executive responsibility should always go together. We have specified those subjects which we think ought to be Federal and those which we think ought to be State subjects, and where necessary we shall give our reasons later for our allocation. We shall also explain why we propose that there should be concurrent powers. But, before proceeding to deal with specific subjects, we wish to emphasise that with regard to any which are in the Federal List not only should the Federal Parliament have the sole power to legislate but the Federal Government should also have the ultimate responsibility for determining policy and controlling administration. And similarly, with regard to any subject in the State List, in general the State Legislature should have the exclusive power to

legislate and the State Government should have the exclusive responsibility for determining policy and controlling administration. **We say that 'in general' the State Legislative Assembly and the State Government should have these powers and responsibilities because we think it necessary to recommend that in certain particular circumstances which we shall explain later the Federation should have overriding powers.**". [Emphasis added]

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

"Article 75

Inconsistencies between federal and State laws

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

Article 77

Residual power of legislation

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

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

[71] With that, we now turn our attention to the specific question of power of legislation on 'criminal law'. The petitioner referred us to numerous authorities on the definition of 'criminal law'. We do not think those cases

(local and international) need to be relied upon given that there is no dispute that we are dealing with criminal law on the facts of this petition.

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

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

[73] Item 4 in turn provides as follows:

> "4. Civil and criminal law and procedure and the administration of justice, including—
>
> (a) Constitution and organization of all courts other than Syariah Courts;
>
> (b) Jurisdiction and powers of all such courts;
>
> (c) Remuneration and other privileges of the judges and officers presiding over such courts;
>
> (d) persons entitled to practise before such courts;

(e) …

(f) Official secrets; corrupt practices;

(g) …

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

(i) …

(j) …

(k) …; and

(l) Betting and lotteries.”.

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

“Item 1

1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam… creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List…

Item 9

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

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

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

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

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

…

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

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

[78] The authority on the limitation on Parliament to do this whether directly or in pith and substance is the judgment of the Supreme Court in *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119 ('*Mamat bin Daud*'). And, while *Mamat bin Daud* was a split decision, all Justices agreed on the existence of the Federal and State dichotomy but disagreed on the extent of its application on pith and substance on the facts of that case. In fact, in a passage upon which the petitioner in this case also relied and which supports our reasoning above, Abdoolcader SCJ in his Lordship's dissenting judgment observed, at pages 130-131, as follows:

"It is now necessary to examine and consider the Federal and State Lists in the Ninth Schedule to the Constitution to ascertain the items relevant for the purpose of determining the validity of section 298A. In the Federal List, item 3 deals with internal security generally and includes in paragraph (a) thereof public order. I would pause to observe that I have given an exegesis on public

order and what it involves in my judgment in *Re Application of Tan Boon Liat & Allen* [1976] 2 MLJ 83 which was affirmed by the Federal Court ([1977] 2 MLJ 18). Item 4 in the Federal List refers, *inter alia*, to criminal law and procedure and includes in paragraph (h) thereof the creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law.

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

Item 1 in the State List, however, excludes its application to the Federal Territories of Kuala Lumpur and Labuan as the subject matter of that item in respect of the Federal Territories comes within the federal legislative power under item 6(e) in the Federal List. When it comes to different aspects of personal law affecting persons other than those professing the religion of Islam, in the field of such areas as family law, marriage, divorce, adoption and succession, federal law provides for these matters under item 4(e)(i) in the Federal List even though it might perhaps be arguable, predicated on the premise that the matter of religion other than Islam (which is specifically provided for in item 1 in the State List) comes within the residual power of legislation of the Legislature of a State under Article 77 of the Constitution, that in doing so Parliament may appear to trench into the sphere of religious precepts and practice, but paragraph (k) of item 4 in the Federal List which provides for the ascertainment of Islamic law and other personal laws for the purposes of federal law would militate against any such argument, quite apart from the likely eventuation of the double aspect doctrine in the circumstances.”.

[Emphasis added]

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

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

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

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

Constitutional Validity of Section 28 of the 1995 Enactment

[83] As stated earlier, there is no issue as regards the constitutionality of the provisions contained under the header '*Unnatural Offences*' of the Penal Code. And we have no reason to doubt that the said Penal Code

provisions which are substantively mirrored in section 28 of the 1995 Enactment, are within the purview of items 3 and 4 of the Federal List.

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

[85] Given the above, the natural consequence is that the subject-matter upon which section 28 of the 1995 Enactment was made falls within the preclusion clause of item 1 of the State List. As such, it is our view that the said section was enacted in contravention of item 1 of the State List which stipulates that the State Legislatures have no power to make law 'in regard to matters included in the Federal List'. To that extent, section 28 of the 1995 Enactment is inconsistent with the FC and is therefore void.

Conclusion

[86] For the avoidance of doubt, the State Legislatures throughout Malaysia have the power to enact offences against the precepts of Islam. As decided by this Court in *Sulaiman Takrib* (supra) and other related judgments, the definition of 'precepts of Islam' is wide and is not merely limited to the five pillars of Islam. Thus, the range of offences that may be enacted are wide. Having said that, the power to enact such range of offences is subject to a constitutional limit.

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

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

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

Dated: 25th February 2021 signed

(TENGKU MAIMUN BINTI TUAN MAT)
Chief Justice,
Federal Court of Malaysia.

List of Counsel:

For the Petitioner

Dato Malik Imtiaz Sarwar
(with him Honey Tan, Surendra Ananth and Tay Kit Hoo)
(Messrs. Tan Law Practice)

For the 1st Respondent

Dato' Salim bin Soib @ Hamid SFC
(with him Nur Irmawatie binti Daud SFC and Husna binti Abdul Halim, SFC)
(Office of the State Legal Advisor of the State of Selangor)

For the 2nd Respondent

Halimatunsa'adiah binti Abu Hamad
(with her Azlan bin Sulaiman and Yap Chen Hong)
(Messrs. Adi & Co.)

For Majlis Agama Islam Wilayah Persekutuan (MAIWP) (*Amicus Curiae*)

Tuan Haji Rahim bin Sinwan
(with him Muhamad Hisham Marzuki)
(Messrs. Nailah Ramli & Partners)

For Suruhanjaya Hak Asasi Manusia Malaysia (Suhakam) (Watching Brief)

Andrew Chew Chin Hock
[Messrs. Andrew Khoo & Daniel Lo]