BETWEEN TWO SHORES

Courts, the Constitution and the Shariah

This article examines the occasional conflicts that occur in Malaysian courts between constitutional supremacy and the popular notion of the supremacy of Islam. It discusses the doctrine of constitutional primacy and the position of Islam and Shariah authorities under the Federal Constitution. It notes the wide gap between constitutional theory and judicial practice that has developed since the 1990s and surveys the civil courts' attitude towards the validity of many controversial laws enacted in the name of the Shariah. Some recommendations to restore the 1957/1963 scheme of constitutional supremacy are also proposed.

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I. Introduction

1 Malaysia's legal and political system is based on a supreme Constitution,[2] a federal-state division of powers,[3] a parliamentary system of government,[4] a constitutional monarchy,[5] and Islam as "the religion of the Federation".[6]

2 In the last three decades, an engaging debate has raged about whether Malaysia is a secular or a theocratic, Islamic state.[7] Is the

1 Formerly Holder of the Tunku Abdul Rahman Foundation Chair at University of Malaya.
2 Federal Constitution (2010 Reprint) Arts 4(1) and 162(6).
3 Federal Constitution (2010 Reprint) Arts 73–95E.
4 Federal Constitution (2010 Reprint) Art 43.
5 Federal Constitution (2010 Reprint) Art 40.
6 Federal Constitution (2010 Reprint) Art 3 and Ninth Schedule, List II, Item 1.
7 Shad Saleem Faruqi, *Document of Destiny, The Constitution of the Federation of Malaysia* (Star Publications, 2008) at pp 120–137. See generally, G25 Malaysia, "Administration of Matters Pertaining to Islam" (December 2019).

Federal Constitution[8] the foundation of Malaysia's legal edifice or is the Shariah the country's supreme law? In this debate, there is a "problem of semantics"[9] as well as of "hermeneutics"[10] – that is, a disagreement about how words or "spoken utterances" are understood differently by different people in accordance with their own linguistic construction or historical context.

3 To most non-Muslims, the term "secular state" implies that the State is governed by laws derived from human institutions and authorities. From a strictly legal point of view, these laws are supreme and their enactment, amendment or repeal in accordance with the felt necessities of the times is in human hands. Malaysia qualifies as a secular state because Art 4(1) of the Federal Constitution proclaims 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". In furtherance of the "secular state" argument, one can submit that if by an "Islamic state" it is meant that the Shariah is the highest law of the land and the litmus test of the validity of all other laws and actions, then the Malaysian Federation is clearly not an Islamic state. In *Che Omar bin Che Soh v Public Prosecutor*[11] ("*Che Omar*"), the constitutionality of a drug law was challenged on the ground that as Islam is the religion of the Federation, all laws must honour Islamic fundamentals. The impugned law contained a number of un-Islamic features including a presumption of guilt and a mandatory death sentence for an offence not punishable with death in Islamic criminal law. The Supreme Court upheld the validity of the impugned provisions as they were permissible under the Constitution's Art 149 which deals with subversion. The court also held that the provision in Art 3(1) for Islam as the religion of the Federation was mostly ceremonial and did not make the Shariah the litmus test of the validity of laws.

4 However, if the notion of a "secular state" implies that there is a separation between the State and religion and the State does not identify with any particular religion and religion is a private sector affair, and people are not compelled to live by and learn any religious doctrine,[12] then clearly Malaysia is not a secular state – at least not for the 62% or so

8 2010 Reprint.

9 "Semantics" is the historical and psychological study of the meaning of a word, phrase or sentence.

10 "Hermeneutics" has many meanings. One is that it is our cultural traditions, our language and our nature as historical beings that colour our understanding of words and phrases. We only really understand an object, word or fact when it makes sense within our own life context and thus speaks to us meaningfully.

11 [1988] 2 MLJ 55.

12 *Noorliyana Yasira bte Mohd Noor lwn Menteri Pendidikan Malaysia* [2007] 5 MLJ 65.

of the Muslim population that is compulsorily subject to the Shariah in 25 or so areas enumerated in the Ninth Schedule, List II, Item 1.

5 If – as some Malaysian Muslims mistakenly hold –by an Islamic or Muslim state it is meant that Islam is the official religion of the State, or that Muslims constitute the majority of the population, or that Muslims are in control of the Government, then Malaysia may qualify for the description of an Islamic or Muslim state.[13] Much depends on the subjective definition one adopts. Besides the problem of semantics and hermeneutics, the discussion is coloured by the adoption of a dichotomous, "either/or", secular or Islamic approach. In life, as in law, things are often somewhere in between.

6 The purpose of this article is to discuss the implications of "constitutional supremacy" in Malaysia's legal system; examine the constitutional position of Islam and Shariah authorities; note the wide gap between theory and reality that has developed since the 1990s; and survey the civil courts' attitude towards laws enacted in the name of the Shariah.[14] Are some laws enacted to regulate Islamic affairs consistent with or in conflict with the supreme Constitution? Some recommendations to restore the original scheme of things will also be made.

II. Constitutional position of Islam

A. Islam's exalted position

7 Article 3(1) of the Federal Constitution gives Islam an exalted position by making it "the religion of the Federation". The words "Islam", "Shariah" or "Islamic law" are mentioned at least 24 times in the Federal Constitution.[15] No other religion is mentioned by name though under

13 It is noteworthy that on 29 September 2001 the then Prime Minister, Dato' Seri Dr Mahathir Mohamed, publicly declared that Malaysia was already an Islamic state ("negara Islam"). Debate has raged since then on this issue. See Dr Mohamed Azam Mohamed Adil, "Is Malaysia a Secular State?" *New Straits Times* (28 December 2018).

14 What is referred to as "Shariah laws" in Malaysia is actually a fascinating mix of the divine Shariah, the *fiqh* (or juristic interpretation of the jurists of the Shafii sect of Sunni Islam), Malay *adat* (custom), and rules enacted by elected, secular Assemblies in the name of Islam. Each of the 13 States of the Federation has its own version of Shariah Enactment(s). There is a 14th version for the Federal Territories enacted by the Federal Parliament. The fascinating variety of 14 separate though similar laws enacted in the name of a divine law poses multiple challenges and opportunities for the student of Islamic religion and jurisprudence.

15 Federal Constitution (2010 Reprint) Arts 3(1), 3(2), 3(3), 3(5), 5(4), 11(4), 12(2), 34(1), 38(2)(b), 38(6)(d), 42(10), 76(2), 97(3), 121(1A), 145(3), 160(6A),
(cont'd on the next page)

Art 3(1) all other religions are allowed to be practised in peace and harmony.

B. Implications of Art 3(1)

8 As a consequence of Art 3(1), the Government adopts legal, social, administrative, educational and economic policies and programmes to promote the religion of Islam. Islamic institutions are established. There are probably a hundred or so such institutions nationwide like the 14 Shariah Court hierarchies in the 13 states and the federal territories; and institutions like the International Islamic University Malaysia, Institute of Islamic Understanding Malaysia ("IKIM"), Tabung Haji, Islamic Bank, Department of Islamic Development Malaysia ("JAKIM") and Malaysian Islamic Strategic Research Institute. Unlike in secular states like the US, taxpayers' money is used to support Islamic activities including vigorous efforts to convert orang-asli, natives and other non-Muslims to Islam. In Budget 2018, federal Islamic authorities were allocated RM1.03bn as follows:[16]

(a) JAKIM: RM810.890m.[17]

(b) Department of Federal Territory Islamic Affairs ("JAWI"): RM119.6m.

(c) Majlis Islam Wilayah Persekutuan: RM21m.

(d) TV Al-Hijrah: RM15.74m.

(e) Department of Waqaf, Zakat and Hajj: RM15.176m.

(f) Yayasan Dakwa: RM15m.

(g) IKIM: RM14.8m.

(h) Office of the Mufti: RM6.7m.

(i) Muslim Welfare Organisation Malaysia: RM5.49m.

(j) Wasatiyyah Institute Malaysia: RM4.56m.

(k) Others: RM845,300.

160(2), 161C (now repealed), 161D (now repealed), Fourth Schedule Pts I and II, Eighth Schedule (2)(d), Ninth Schedule, List I, Items 4(e) and 4(k), List II, Item 1, and Tenth Schedule Pt III (13).

16 The sums below do not include moneys allocated to the International Islamic University Malaysia (UIAM) or income from *zakat*, *fitrah*, *wakafs* and the multi-million halal certificate industry.

17 According to *The Star Online* (12 October 2019), the allocation went up to RM1.3bn for Budget 2020.

9 Compulsory instruction is given in Islamic religion to Muslims at all educational levels.[18] Consider, for example, the case of the father who unsuccessfully tried to get his daughter exempted from Islamic religious education.[19]

10 From time to time, policies of Islamisation and Islam *hadhari* have been adopted.

C. Head of State and Head of Religion are the same person

11 Under Art 3(5), the Yang di-Pertuan Agong is the head of Islam in seven states. An Islamic Council can be established to advise him.[20] The Sultans are the heads of Islam in their regions. Secular states do not generally combine the office of the Head of State with the Head of Religion.

D. Islamic personal laws are allowed

12 The Federal Constitution permits State Assemblies to create Islamic laws in a limited number of areas and to set up Shariah Courts to administer these laws.[21]

E. Muslims are compulsorily subject to the Shariah

13 All persons who profess the religion of Islam are compulsorily subject to the Shariah in 25 or so areas assigned to the State Assemblies in the Ninth Schedule, List II, Item 1. These "personal and family law" matters are broadly classifiable as follows:

(a) betrothal, marriage, divorce, dower, maintenance and guardianship;

(b) adoption, legitimacy and guardianship;

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18 Federal Constitution (2010 Reprint) Art 12(2).

19 *Noorliyana Yasira bte Mohd Noor lwn Menteri Pendidikan Malaysia* [2007] 5 MLJ 65. See also the recent High Court decision (unreported, 2019) that Jawi is part of Bahasa Malaysia and it is therefore permissible to teach the Jawi script (*khat*) to pupils in Chinese and Tamil schools.

20 Federal Constitution (2010 Reprint) Art 3(5). In actual practice Islamic authorities are established administratively and allocated funds in the annual budget. There is no proof that the very powerful federal religious authorities like Jabatan Kemajuan Islam Malaysia (JAKIM) and Jabatan Agama Islam Wilayah Persekutuan (JAWI) were lawfully established under any law.

21 Federal Constitution (2010 Reprint) Ninth Schedule, List II, Item 1.

(c) property matters including succession, testate and intestate, gifts, partitions and non-charitable trusts, *wakafs*, charitable and religious trusts, and appointment of trustees;

(d) Malay custom;

(e) *zakat*, *fitrah* and *baitulmal*;

(f) mosques;

(g) constitution, organisation and procedure of Shariah Courts;

(h) determination of matters of Islamic law and doctrine; and

(i) creation and punishment of offences against the precepts of Islam, and, under Art 11(4), control or restriction of propagation of any religious doctrine amongst Muslims.

14 No option is allowed to Muslims to opt out of Islamic laws in these designated areas, mostly of personal laws. However, in other areas like contract, tort, banking, sale of goods, hire-purchase, commerce and trusts under the Trustees Act 1949,[22] Muslims are subject to civil laws. In some fields like trusts, bank loans and other banking transactions, they have an option to choose between Shariah laws and civil provisions.

F. Non-Muslims not subject to the Shariah

15 No non-Muslim can be subjected to the jurisdiction of the Shariah Courts.[23]

G. Shariah Courts exist under state laws

16 These courts are mentioned in the Federal Constitution, but their structure, organisation and powers are legislated by state legislation.

H. Civil courts cannot interfere with Shariah Courts

17 The Shariah Courts are courts of limited jurisdiction and are not superior or equal to the civil High Court.[24] Nevertheless, Art 121(1A)

22 Act 208.
23 Federal Constitution (2010 Reprint) Ninth Schedule, List II, Item 1.
24 *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545.

provides that civil courts cannot interfere with Shariah Courts in matters *within Shariah Court jurisdiction*.[25]

I. Preaching to Muslims can be regulated

18 Freedom of religion under Art 11(1) includes the right to profess, practise and preach one's religion. However, as part of the "negotiated settlement" between the Malays and the non-Malays, Art 11(4) permits the states to restrict the preaching of any religious doctrine to Muslims – whether the preaching is done by non-Muslims or unauthorised Muslims.

J. Islam in State Constitutions

19 All states other than Sarawak adopt Islam as the state religion.[26]

K. Some fundamental rights are explicitly subjected to Islamic law exceptions

20 The chapter on "Fundamental Liberties" in Arts 5–13 explicitly provides a number of exceptions in favour of Islamic law. Firstly, equality before the law in Art 8 is subject to an exception on the ground of personal laws.[27] Secondly, Art 11 on freedom of religion is subject to the rule against proselytisation of Muslims in Art 11(4).

L. Chief Ministers in Malay states must be Muslims

21 All nine "Malay State Constitutions" require the Chief Minister to be a Muslim unless the Sultan permits an exception. This discriminatory state provision is possibly saved by Art 8(5)(e).

25 It was held by Mohd Hishamudin J in *Dato' Kadar Shah bin Tun Sulaiman v Datin Fauziah bte Haron* [2008] 7 MLJ 779; [2008] 4 CLJ 504 that "jurisdiction" means "exclusive jurisdiction". Thus, if a matter before the courts covers both Shariah law and civil law, the civil courts are not barred by Art 121(1A) of the Federal Constitution (2010 Reprint). Will Art 75 apply?

26 On the formation of Malaysia in 1963, both Sabah and Sarawak did not have an official state religion. Sabah later amended its Constitution to incorporate an Art 5A to make Islam the religion of the state.

27 Federal Constitution (2010 Reprint) Art 8(5)(a).

M. Concept of a Malay

22 In Art 160(2), the concept of a Malay is not based on ethnicity but is intertwined with the religion of Islam, Malay custom and Malay language.

N. Islamic education

23 Under Art 12(2), it shall be lawful for the Federation or a state to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or assist in providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose.

24 Despite the above religious features, the provision for Islam in Art 3(1) does not convert Malaysia into a theocratic, Islamic state. One notes that in 48 or so states around the world, adoption of an official religion does not necessarily convert the state into a theocracy. Of the 48 nations – 23 Muslim, 16 Christian, seven Buddhist, one Hindu and one Jewish – that adopt an official religion, most do not describe themselves as a theocratic state. For example, in the UK, there is a Church of England of which the Queen is the Head and yet the UK does not describe itself as a theocratic, Christian state. The position in Malaysia is that we have a constitutional state with a hybrid legal system that recognises juridical/legal diversity. The legal system is a rich blend of many sources, among them:

(a) the supreme Federal Constitution;

(b) State Constitutions that must comply with some "essential provisions" outlined in the Eighth Schedule;

(c) enacted federal laws, both primary and secondary;

(d) enacted state laws, both primary and secondary;

(e) judicial precedents of Malaysian courts;

(f) English common law under the Civil Law Act 1956;[28]

(g) Shariah provisions in 25 areas that are enumerated in the Ninth Schedule, List II, Item 1;

(h) Malay custom; and

(i) customs of the natives of Sabah and Sarawak.

28 Act 67.

25 These multiple sources enrich Malaysia's legal landscape. However, in the last few decades, the importance of Islam in the affairs of the State has grown. Islam has become an important factor in law, politics, economics and education, and most institutions of the State. This includes the federal judiciary, Parliament, civil service, police and public universities, which have been co-opted to swim in the tide of Islamisation.

26 Whether this tide has cleansed corruption and other social ills, improved accountability, answerability and responsibility in government, enhanced human dignity, strengthened the social fabric of Malaysia's inter-ethnic, inter-religious and inter-regional relationships or brought a good name to Islam, is another matter. Many say it has polarised society, radicalised some youth, caused a lowering of the standards of education and created a religious basis for unquestioning loyalty to religious and political leaders irrespective of their moral or political misconduct.

III. Constitutional supremacy

27 Unlike the UK, Malaysia has a written and supreme Constitution. There are significant implications of having a written charter as our basic law.

A. The Constitution is the highest law

28 Article 4(1) declares 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. Article 4(1) is strengthened by Art 162(6) which subordinates all pre-Merdeka laws to the supreme Constitution. The implication of Arts 4(1) and 162(6) is that any law, whether federal[29] or state,[30] secular or religious, pre-[31] or post-Merdeka, primary or secondary, in times of emergency[32] or in times of peace, is subordinate to the supreme Constitution.

29 *Mamat bin Daud v Government of Malaysia* [1988] 1 MLJ 119.
30 *Dewan Undangan Negeri Kelantan v Nordin bin Salleh* [1992] 1 MLJ 697.
31 *Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 169.
32 *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50.

B. Parliament is not supreme

29 Parliament's legislative powers are prescribed by the Constitution.[33] It cannot violate the Constitution or trespass on state powers. It cannot transgress fundamental rights.[34] It is bound by procedural requirements in making laws[35] or amending the Constitution.[36]

C. State Assemblies are likewise not supreme

30 State powers are confined to 13 topics in the State List and 14 topics in the Concurrent List.

D. Despite Art 3(1), Malaysia is not an Islamic state

31 Article 3(1) does not say that the Shariah is the basic or the highest law of the land. It does not make the Shariah the litmus test of validity of any law or regulation.[37] Article 3(1) does not say that Malaysia is an Islamic state. In fact, Art 3(1) is accompanied by Art 3(4) which states that nothing in Art 3(1) derogates from any other provision of the Constitution. The implications of Art 3(4) appear to be that the provision about Islam is not superior to or independent of the rest of the Constitution; Art 3(1) does not derogate from any provision in the chapter on fundamental liberties unless expressly so provided;[38] and Art 3(1) is not independent of the federal-state division of powers in the Ninth Schedule, List II, Item 1. Thus, Islamic laws can be enacted only in the 25 permitted areas of the Ninth Schedule, List II, Item 1.

E. Definition of "law"

32 Under Art 160(2), the term "law" is defined and is restricted to written law, common law and custom to the extent recognised. The rich and extensive body of Shariah law is not self-executing. It needs to be enacted by a federal or state legislature or adopted by the courts in a precedent.

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33 Federal Constitution (2010 Reprint) Arts 73–79.
34 Federal Constitution (2010 Reprint) Arts 5–13.
35 Federal Constitution (2010 Reprint) Arts 66–68.
36 Federal Constitution (2010 Reprint) Arts 159 and 161E(2)(b).
37 *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55; *Halimatussaadiah v Public Service Commission, Malaysia* [1992] 1 MLJ 513; *Meor Atiqulrahman lwn Fatimah Sihi* [2000] 5 MLJ 375. See also *Ainan v Syed Abu Bakar* [1939] MLJ 209.
38 Judicial practice is, however, conflicting. To many civil court judges, Art 3 of the Federal Constitution (2010 Reprint) regulates the interpretation and ambit of all other laws.

F. Article 11(5)

33 All religions, including Islam, are subject to regulation by Art 11(5) on the grounds of public order, public health and morality. Federal legislation can be enacted on these grounds to regulate all religious activities including those associated with Islam.[39]

G. Fundamental rights

34 All citizens, including Muslims, are entitled to some fundamental rights which operate as a check on legislative and executive powers. It is submitted that despite a popular perception that Islamic institutions like Shariah authorities and Shariah courts are not bound by the chapter on fundamental liberties, Art 3(4) suggests otherwise. Nothing in Art 3(1) derogates from any other provision of the Constitution. Note can be taken of Art 5(4) whereby arrests for offences under Shariah laws are subject to the same constitutional guarantees as are available in civil courts. In *Minister for Home Affairs v Jamaluddin bin Othman*[40] ("*Jamaluddin*"), a Muslim who had converted out of Islam and was preaching to other Muslims was detained preventively under the Internal Security Act 1960[41] ("ISA"). A writ of *habeas corpus* was issued, as a detention under the ISA should not be resorted to for exercise of freedom of religion.

35 In *Maqsood Ahmad v Ketua Pegawai Penguatkuasa Agama*[42] ("*Maqsood*"), by a Selangor State *fatwa*, the Ahmadiyya Muslim Jama'at (a religious sect) had been declared to be outside the faith of Islam. The Selangor Shariah authorities then issued an order to compel the Ahmadiyyas to appear in the Shariah Court. It was held, and correctly, that as the jurisdiction of the Shariah Court is confined to Muslims, the order to the Ahmadiyyas was illegal under Art 11 and the Ninth Schedule, List II, Item 1.

36 Under Art 12(4), the "parent or guardian" has a right to determine his or her child's religion. A 17-year-old girl cannot convert to Islam without her father's consent: *Teoh Eng Huat v Kadhi, Pasir Mas*[43] ("*Teoh Eng Huat*"). In *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam*

39 The recent controversy about child marriages has not explored the possibility of prohibition of such marriages on the Art 11(5) ground of public health or morality. It is submitted that child marriages, which are permitted in Islamic tradition and under the plethora of native laws in Sabah and Sarawak, can be criminalised under Art 11(5) of the Federal Constitution (2010 Reprint).

40 [1989] 1 MLJ 418.

41 Act 82.

42 [2019] 9 MLJ 596.

43 [1990] 2 MLJ 300.

Perak[44] ("*Indira Gandhi a/p Mutho*"), it was held that the words "parent or guardian" when read in the light of s 2(95) of the Eleventh Schedule mean both parents. Therefore, unilateral conversions of children by one parent are illegal. Consent of both parents is needed. The action of the Registrar of Mu'allafs (converts) was quashed.

37 In *Dato' Seri Syed Hamid Syed Jaafar Albar v SIS Forum (Malaysia)*[45] ("*SIS Forum* (2012)"), the book, "Muslim Women and the Challenge of Islamic Extremism" was banned by the Home Minister because seven pages of the book did not follow JAKIM's guidelines. The Court of Appeal upheld the High Court decision that JAKIM's guidelines are irrelevant to the issue whether the book was a threat to public order. The Minister had acted irrationally by acting under the dictation of JAKIM.

H. Limited applicability of the Shariah

38 There are two major misconceptions about the applicability of Islam in the Malaysian legal system: first, that due to Art 3(1)'s adoption of Islam as the religion of the Federation, the Shariah is applicable in its entirety. The legal position is that the Shariah applies only in those 25 enumerated areas specifically allocated to the State Assemblies in the Ninth Schedule, List II, Item 1.

39 A second major misunderstanding is that all matters of Islam are in state hands. Actually, only 25 areas of Islamic personal and family law like marriage, divorce, custody, *etc*, are allocated to the states. Ordinary crimes, contracts, tort, commercial law, banking (whether conventional or Islamic), the law of evidence and even the sacred *Hajj* are matters of federal law under the Ninth Schedule, List I.

I. Islamic offences

40 Offences against the precepts of Islam can be punished in the Shariah Courts but are subject to the following significant restrictions prescribed in the Ninth Schedule, List II, Item 1.

44 [2018] 1 MLJ 545.
45 [2012] 9 CLJ 297.

(1) The offence must be against the "precepts of Islam"

41 In *Public Prosecutor v Mohd Noor bin Jaafar*[46] ("*Mohd Noor Jaafar*"), there was a violation of s 5(1) of the Islamic Religious Schools (Malacca) Enactment 2002. It was correctly held that the offence did not relate to the precepts of Islam and therefore not within the jurisdiction of the Shariah Court. However, the judicial proceeding fell short in one area: the constitutionality of the Malacca Enactment was not raised or examined despite Item 13 of the Federal List in the Ninth Schedule which allocates education to the federal Parliament. Even if one takes note of Art 12(2) that it is permissible for the states to establish, maintain or assist Islamic institutions or to provide instruction in the religion of Islam and incur expenditure for the purpose, it is nevertheless submitted that the entire field of education is in federal hands and the states and all Islamic religious schools are subject to the jurisdiction of the federal government under the Ninth Schedule, List I, Item 13.

42 In contrast with the narrow view of "precepts of Islam" in *Mohd Noor Jaafar*, the Federal Court in the case of *Sulaiman bin Takrib v Kerajaan Negeri Terengganu*[47] ("*Sulaiman Takrib*") interpreted the term "precepts" very broadly. The court had been invited to confine the words to the essentials of Islam[48] and to distinguish between the divine Shariah and the juristic *fiqh*. The court was advised that following a *fatwa* unquestioningly was not a precept of Islam and no such crime existed in Islamic law. Yet, Tun Hamid, the Chief Justice, defined "precepts" to cover all aspects of Islamic *aqida,*[49] Shariah[50] and *akhlaq*.[51] Most amazingly, the learned Chief Justice also held that in Malaysia the word "Shariah" includes *fiqh* (juristic interpretations) and also provisions from the common law! The significance of including *fiqh* as part of the concept of

46 [2005] 6 MLJ 745.

47 [2009] 6 MLJ 354.

48 Essentials of Islam are generally understood to refer to the Five Pillars of Islam and the Six Pillars of Faith. The Five Pillars of Islam are: (a) *Tawheed* (belief that there is no deity worthy of worship except Allah and that Muhammad is His messenger); (b) prayers; (c) *zakat*; (d) fasting; and (e) *Hajj*. The Six Pillars of Faith are: (a) belief in Allah; (b) belief in angels; (c) belief in all the Revealed Scriptures including the Torah, Gospel, Psalms, the Scriptures of Abraham and the Holy Qur'an; (d) belief in all the Messengers mentioned in the Qur'an including Noah, Abraham, Moses, Jesus and Muhammad; (e) belief in the Last Day; and (f) belief in Divine Determination or *Al-Qadar*.

49 "*Aqida*" refers to articles of faith, tenet, doctrine, dogma, creed, belief and conviction.

50 The learned Chief Justice defined Shariah broadly to include all Islamic law or *Hukum Syarak*, including the *fiqh* (juristic interpretations) of scholars. In most scholarly discourse, Shariah is confined to the Holy Qur'an and the authenticated traditions of Prophet Muhammad.

51 "*Akhlaq*" refers to disposition, nature, temper, ethics, morals, manners and practice of virtue.

"precepts of Islam" is that not only the divine Shariah but also man-made rules and interpretations are given infallibility and disobedience to them can be criminalised.

(2) Only persons who profess *the religion of Islam can be subjected to the jurisdiction of the Shariah Courts*

43 What amounts to "professing" is a matter of interpretation but one can generally state that it refers to affirmation of one's faith in, or avowing allegiance to, or declaring, announcing, proclaiming, asserting or stating one's belief in some principles or precepts. It is noteworthy that the Constitution uses the word "profess" and not "those who were born Muslims" or "registered as Muslims" or "regarded by society as Muslims". Regrettably, in a number of Muslim apostasy cases, civil courts have paid no deference to the word "profess". If a person is born a Muslim or converts to Islam, no exit is allowed except with the permission of the Shariah Courts[52] – a permission many Shariah judges do not wish to grant because that would make them complicit in a most heinous religious offence.

(3) Crimes punishable in Shariah courts cannot relate to any matter in the Federal List[53] *or covered by federal law*[54]

44 This means that any offence within the power of the federal Parliament or already dealt with by federal law is outside the jurisdiction of the State Assembly and the Shariah Courts. Offences like treason, corruption, murder, robbery, theft, rape, homosexuality between males, cheating, betting, blasphemy and lotteries, *etc*, are all outside the powers of the states even if they are part of the jurisprudence of Islam.

(4) Jurisdiction of the Shariah Courts in respect of offences must be conferred by federal law

45 "Jurisdiction" refers to three aspects:

(a) Who may be tried? It is explicitly mandated in the Ninth Schedule, List II, Item 1 that only those professing the religion of Islam may be tried in the Shariah Courts.

(b) What offences may be tried? Federal law is in abdication on this issue as no list of "precept offences" is supplied, giving to the State Assemblies blanket power to create more and more

52 *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan* [2007] 4 MLJ 585.
53 Federal Constitution (2010 Reprint) Ninth Schedule, List II, Item 1; List I, Item 4(h).
54 Federal Constitution (2010 Reprint) Ninth Schedule, List I, Item 4(h).

offences even if they trespass on fundamental rights or the federal-state division of powers.

(c) What penalties may be prescribed? The Syariah Courts (Criminal Jurisdiction) Act 1965[55] provides that the Shariah Courts may try any offences punishable under the "3-6-5" formula – three years jail, six strokes of the cane and RM5,000 fine. In comparative terms, this is the power of Second Class Magistrates. Clearly, the intention in 1965 was to allow the Shariah Courts to try only minor offences.

(5) Power of the Federal Parliament and the State Assemblies to legislate on Shariah matters is subject to the supremacy of the Federal Constitution

46 This means that laws in the name of Islam cannot violate the chapter on fundamental liberties and the federal-state division of powers unless there is express authority to legislate contrary to any provision of the Constitution.

J. Judicial review

47 The superior courts have the power to review the constitutionality of any legislative or executive act on the litmus test of constitutionality. Recently, the Federal Court in *Indira Gandhi a/p Mutho* declared the actions of the Registrar of Mu'allafs as violative of the Federal Constitution as well as the relevant Perak statute.

K. Recognised sources of law

48 In Art 160(2), the Constitution recognises three primary sources of law:

(a) legislation;

(b) common law; and

(c) custom, to the extent recognised.

49 It is notable that the Shariah *per se* is not a source of law in the Federal Constitution. The Shariah has to be adopted in a federal statute or state enactment to have the force of law.

55 Act 355.

L. Shariah and adat

50 In some areas, the Shariah competes with Malay *adat* in the Malay states and with the customs of the natives in the states of Sabah and Sarawak. The law and practice are not uniform from state to state. In Negeri Sembilan, *adat* prevails in property matters. In Sabah and Sarawak, the Shariah is supposed to displace native custom if the parties are Muslims. In practice, many Muslims who are also natives subject themselves to the native courts which accept jurisdiction.

M. Islam not a precondition for holding office

51 Except for the Yang di-Pertuan Agong and the Sultans, Islam is not a prerequisite for citizenship or for the post of Prime Minister. For membership of the Cabinet, Legislature, Judiciary, public services, police, armed forces, universities and constitutional Commissions, the oath of office in the Sixth Schedule is religiously neutral.

IV. Gap between theory and reality

52 A wide gap has developed between the theory of constitutional supremacy and the powers of the Shariah authorities. Malaysian superior courts are extremely reluctant to enforce constitutional supremacy in legislative and executive matters involving the Shariah. Not only the Shariah Courts (which are shielded by Art 121(1A) but also Shariah authorities are allowed to behave as if the Constitution is not applicable to Shariah matters because of the existence of Art 3(1) and the Ninth Schedule, List II, Item 1.

A. Article 3(1)

53 Article 3(1) declares that Islam is the religion of the Federation. However, Art 3(4) cautions that "nothing in this Article derogates from any other provision of this Constitution". In a ground-breaking judgment, Tun Salleh LP held in *Che Omar* that the reference to Islam in Art 3(1) was primarily for ceremonial purposes and therefore the Shariah is not the test of the validity of any law. The supreme Constitution is.

54 Despite this clear ruling, and the explicit provision of Art 3(4), many superior court judges in subsequent years have used Art 3(1) as an interpretative guide to the scope and extent of the powers of Shariah

authorities.[56] In judicial circles, it is politically incorrect to cite *Che Omar* anymore.

B. Article 4(1)

55 Article 4(1) boldly proclaims that any post-Merdeka law that is inconsistent with the Constitution shall, to the extent of the inconsistency, be void. The supremacy of the Constitution in Art 4(1) must be enforced by way of the procedures found in Arts 4(3), 4(4) and 128(1). These procedures are explained in *Ah Thian v Government of Malaysia*[57] ("*Ah Thian*"), where Suffian LP held that under the Constitution, the court has power to declare any federal or state law invalid on any of the following three grounds: (a) because the federal or state law relates to a matter with respect to which Parliament or the state legislature has no power to make law; (b) in the case of both federal and state law, because it is inconsistent with the Constitution; and (c) in the case of state law, because it is inconsistent with federal law under Art 75. The learned Lord President also explained that any challenge on ground (b) that a federal or state law violates the federal-state division of powers is subject to a number of procedural restrictions:

> (i) Such a challenge can only be brought in proceedings for a declaration.
>
> (ii) The proceedings must be between the Federation and the state or states concerned.
>
> (iii) Any private party seeking to invalidate law on this ground must first obtain leave of a Federal Court judge to commence these proceedings, and the Federation as well as any state that would be affected shall be entitled to be a party to such proceedings.
>
> (iv) Only the Federal Court has jurisdiction to decide whether any law made by Parliament or a state legislature is invalid on the ground that it relates to a matter on which the relevant legislature has no power to make law.[58]

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56 *Sulaiman bin Takrib v Kerajaaan Negeri Terengganu* [2009] 6 MLJ 354; [2009] 2 CLJ 54; *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri* [2014] 4 MLJ 765; *ZI Publications Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 153; *Fathul Bari bin Mat Jahya v Majlis Agama Islam Negeri Sembilan* [2012] 4 MLJ 281.

57 [1976] 2 MLJ 112.

58 Wilson Tay Tze Vern, "The Use and Misuse of Articles 4(3) and 4(4) of the Federal Constitution" [2015] 2 MLJ cliv; Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Oxford, Hart Publishing, 2012) at p 138.

56 In *Ah Thian*, as the applicant was seeking to challenge the Firearms (Increased Penalties) Act 1971[59] on the basis that it contravened Art 8(1) of the Federal Constitution guaranteeing the right to equality before the law, it was held that Arts 4(4) and 128(1) did not apply "and the point may be raised in the ordinary way in the course of submission, and determined in the High Court, without reference to the Federal Court, and there is no need for leave of a judge of the Federal Court". This ruling in *Ah Thian* clearly established that a challenge to laws on the ground of violation of fundamental rights need not go through the special procedures of Arts 4(3), 4(4) and 128(1). Cases like *Nordin bin Salleh v Dewan Undangan Negeri Kelantan*,[60] *Muhammad Hilman bin Idham v Kerajaan Malaysia*[61] and *Nik Nazmi bin Nik Ahmad v Public Prosecutor*[62] illustrate this point significantly.[63]

57 Despite the *Ah Thian* ruling that complaints of fundamental rights violation can be heard in any proceedings and in any courts, the apex court in a number of cases has abdicated its responsibility to hear complaints of violation of fundamental rights on the questionable ground that the procedures of Arts 4(4) and 128(1) had not been complied with. In *Muhamad Juzaili bin Mohd Khamis v State Government of Negeri Sembilan*[64] ("*Juzaili*"), a Negeri Sembilan Enactment criminalising cross-dressing was challenged on the grounds that it violated Art 5 (life and personal liberty), Art 8 (equality) and Art 10 (freedom of speech and expression). In a bold, creative and widely applauded judicial decision, the Court of Appeal upheld the challenge and struck down the Negeri Sembilan law on constitutional grounds. Negeri Sembilan appealed to the Federal Court. In a questionable manner, the lawyers for the appellant introduced an argument that had not been raised in the High Court or the Court of Appeal that the aggrieved citizens had not complied with Art 4(4) and therefore the High Court and the Court of Appeal decisions were without jurisdiction. The apex court bent over backwards to accept this unfair submission and ruled that the case should never have been commenced at the High Court level and should have gone straight to the Federal Court under Art 4(4). A string of precedents where fundamental rights issues were successfully raised and adjudicated directly in the High Court were adroitly evaded and avoided. The Federal Court denied the victimised parties the fruits of their Court of Appeal victory. More significantly, the apex court evaded ruling on the Shariah law's validity

59 Act 37.
60 [1992] 1 MLJ 343.
61 [2011] 6 MLJ 507.
62 [2014] 4 MLJ 157.
63 Wilson Tay Tze Vern, "The Use and Misuse of Articles 4(3) and 4(4) of the Federal Constitution" [2015] 2 MLJ cliv at clxiv–clxvi.
64 [2015] 3 MLJ 513 (CA), [2015] 6 MLJ 736; [2015] 8 CLJ 975 (FC).

and avoided the controversial issue of transgender rights. Fortunately, its strained decision to impose the Art 4(4) procedure on all constitutional challenges was disowned soon after by the apex court in *Gin Poh Holdings Sdn Bhd v The Government of the State of Penang*[65] ("*Gin Poh Holdings*") where the validity of one federal and one state law were in question. Raus Sharif CJ (who had sat on the *Juzaili* Bench but was by now the Chief Justice), delivering the judgment of the court, held that the exclusive jurisdiction of the Federal Court relates only to a trespass by the federal or state legislatures on each other's jurisdiction. Issues of fundamental rights violation can be raised in the High Court and even in the lower courts.[66]

C. Fundamental rights

58 Are the fundamental liberties in Pt II of the Constitution guaranteed to Muslims and non-Muslims alike, subject to the provision for Islam in Art 3(1) and the power of the states to legislate about Islam in the Ninth Schedule, List II, Item 1? Or is Art 3(1) and List I in the Ninth Schedule subject to the chapter on fundamental liberties?[67]

59 Some provisions of Pt II are indeed subject to Art 3(1). Among them are:

> (a) Article 8(5)(a) – personal law is exempt from the equality provision in Art 8. Though the words "personal law" are not defined, one can seek some guidance from the Ninth Schedule, List I, Item 4(e)(ii) which describes personal law as referring to "marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession, testate and intestate".
>
> (b) Article 11(4) – the right to propagate any religion to Muslims may be regulated by state law.

65 [2018] 3 MLJ 417; [2018] 4 CLJ 1.

66 *Legally Discerning Selected Judgments of Tun Raus Sharif With Commentaries* (Justice Zainun Ali ed) (Sweet & Maxwell, 2018) at p 86. On Arts 4(3) and 4(4) of the Federal Constitution (2010 Reprint), reference may also be made to *Sulaiman bin Takrib v Kerajaaan Negeri Terengganu* [2009] 6 MLJ 354; [2009] 2 CLJ 54; *Kerajaan Negeri Kelantan v Wong Meng Yit* [2012] 6 MLJ 57; *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri* [2014] 4 MLJ 765; and *ZI Publications Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 153.

67 See *ZI Publications Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 153; *Fathul Bari bin Mat Jahya v Majlis Agama Islam Negeri Sembilan* [2012] 4 MLJ 281; and *State Government of Negeri Sembilan v Muhammad Juzaili Mohd Khamis* [2015] 6 MLJ 736.

60 All other fundamental liberties are left untouched and apply against all laws and all authorities whether religious or civil. For example, in Art 5(4) the safeguard of production of an arrestee before a Magistrate is explicitly applicable to arrests under Shariah laws.

61 However, some civil courts and almost all Shariah authorities behave as if all fundamental rights, whether of Muslims or non-Muslims, are subordinated to Art 3(1) on Islam. The legal provision in Art 3(4) that "nothing in this Article derogates from any other provision of this Constitution" is adroitly ignored.

62 Often, what is permitted by the Constitution is prohibited by Shariah Enactments and the matter is validated by the civil courts. For example, despite Art 11 on freedom of religion and Art 152 on Malay as the national language, Bibles in the national language are seized by state authorities. State Enactments, like those in Selangor, presumably under the authority of Art 11(4), are prohibiting non-Muslims from using many Arabic and Malay words. Among them are the words *Allah*, *Nabi*, *kitab* and *rasul*. A significant case is *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri*[68] ("the *Herald* case"). From a human rights point of view, this decision is a serious violation of free speech, freedom of religion and right to equality. Nobody has a right to tell another how to address the object of his devotion. The word "*Allah*" is not exclusive to Islam. In fact, it is pre-Islamic. It is used by Arabic speaking non-Muslims in the Middle East. It is used by the Sikhs in their Holy Books. In Sabah and Sarawak, the Malay-speaking Christians have used it for decades. The Minister was singling out the Christian church for discrimination as it is well known that other religions like Sikhism use the word "*Allah*" in their scriptures. What is disappointing is that the court used the test of "reasonableness" to justify the Minister's imposition of the restriction on the use of the word "*Allah*". It is submitted that discrimination on ground of religion is prohibited by the Constitution's Art 8(2). A ground prohibited by the Constitution cannot be declared by the court as a rational basis for differentiation. Further, the possible reliance on Art 11(4) is also not convincing. Article 11(4) permits control or restriction of propagation of any religious doctrine or belief among Muslims. Use of a word or two cannot amount to propagation. The "danger" of Muslims being converted or misguided if they hear a non-Muslim using the word "*Allah*" is imaginary and far-fetched. The danger must be "clear and present". The rule of clear and present danger originated in *Schenck v United States*[69] in an attempt by Holmes J

68 [2014] 4 MLJ 765.
69 249 US 47, 39 S Ct 247 (1919).

to formulate a principle for the limitation of liberty with a conscious, intelligent weighing of the opposed societal interests.

63 In some situations, what is prohibited by the Constitution is permitted by Shariah Enactments and the civil courts look the other way. Again, Art 8(2) can be taken as an example. Except as expressly authorised by the Constitution, religious discrimination is forbidden by Art 8(2) in any law, in the appointment to any office or employment under a public authority, or the carrying on of any profession or vocation. Despite this constitutional safeguard, the Federal Court in *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin*[70] ("*Victoria Jayaseele Martin*") permitted a ban on a qualified, non-Muslim lawyer who wished to practise law in the Shariah Courts. The reasoning adopted was that the classification created by a piece of retrospective subsidiary legislation between Muslims and non-Muslims was "reasonable". In so ruling, the apex court overruled a sensible and just Court of Appeal decision. It is humbly submitted that the judicially created intelligible differentia between Muslims and non-Muslims cannot override the constitutional ban on religious discrimination in Art 8(2) except for personal laws.[71] A better reasoning would have been to bring Victoria Martin's case under the explicit permission of Art 8(5)(b) – provision or practice restricting office connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion.

64 Some states ban *ratu cantik* contests for women. There is clear violation of Art 8 because men are not equally restrained. It is also debatable whether taking part in a beauty contest is an "offence against the precepts of Islam". Could the words "offences against the precepts of Islam" also authorise laws to criminalise not wearing *hijab*, forbid women from leaving the house or going abroad without a *muhrim*, ban co-education, and ban girls from driving cars, taking part in sports, or acting as master of ceremonies? Will the fundamental rights in Arts 5–13 permit challenge to the constitutionality of these laws or are the fundamental rights subordinate to Art 3(1) and the Ninth Schedule, List II? Basically, if it comes to any matter with a whiff of Islam, the courts tend to lean in favour of state authorities.

70 [2016] 2 MLJ 309.

71 See Art 8(5)(a) of the Federal Constitution (2010 Reprint).

D. Personal liberty

65 In *Jamaluddin*,[72] *habeas corpus* was awarded to the applicant who was arrested under the ISA because he had converted out of Islam and was propagating Christianity to other Muslims. In *Juzaili*, the aggrieved citizens, who suffered from gender identity disorder ("GID"), sought protection for their livelihood. Constant harassment and arrests by the Shariah authorities were affecting their ability to hold on to permanent jobs. The Court of Appeal held that the constitutional right to "life" in Art 5(1) included the right to livelihood. Section 66 of the Enactment interfered with the personal liberty of the appellants because it prevented them from moving about in public places to reach their respective places of work. Additionally, the impugned s 66 was inconsistent with Art 8 of the Constitution because it unfairly subjected GID sufferers to the same provisions as other normal males. It was further discriminatory because it singled out males who dressed like females and said nothing about females who dressed like males. Section 66 affected the appellants' right to freedom of expression, in that they were prohibited from expressing themselves in the way dictated by their psychological make-up. On this and many other grounds, the state law was invalidated. Regrettably, this remarkable decision was overturned by the Federal Court on the most unconvincing, technical and strained ground that the plaintiffs had violated Art 4(4) by going to the High Court and not commencing proceedings in the apex court.

66 In *Victoria Jayaseele Martin*,[73] a non-Muslim lawyer with Shariah qualification was prevented from being enrolled to practise in a Shariah Court. Her submission that her livelihood was affected found no sympathy in the court.

E. Right to equality and Art 8

67 In the same *Victoria Jayaseele Martin* case, the non-Muslim holder of a Shariah qualification was forbidden by a subsidiary legislation, retrospectively created to bar her entry, from being called to the Shariah Bar. The court held that Art 8 does not bar reasonable or rational classification on the ground of religion. It is submitted that the decision is in disregard of Art 8(2) but could have been justified under Art 8(5)(b).

72 *Minister for Home Affairs v Jamaluddin bin Othman* [1989] 1 MLJ 418.

73 *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin* [2016] 2 MLJ 309.

68 In the famous transgender, cross-dressing case of *Juzaili*, Mohd Hishamudin Yunus J in the Court of Appeal penned the unanimous opinion that s 66 of the Negeri Sembilan Enactment which penalises men who dress like women, but does not impose similar punishment on women who dress like men, was a violation of the equality doctrine. His decision was overturned by the apex court.

69 On another note, if the decisions in *Sulaiman Takrib*[74] and *Fathul Bari bin Mat Jahya v Majlis Agama Islam Negeri Sembilan*[75] ("*Fathul Bari*") are correct that the Ninth Schedule, List I, Item 1 on "offences against the precepts of Islam" includes all issues of *aqida*, Shariah and *akhlaq*, then there is grave danger to Muslim women's rights. If the court-sanctioned power of the states to create crimes against the precept of Islam is virtually unlimited, then in the name of Islam, women who do not wear *tudung*, work night shifts, drive cars, receive higher education in co-educational institutions, or go abroad without a *muhrim*, may be punished if a religious authority rules that these liberal practices are against Islamic *akhlaq*.

F. Freedom of speech and Art 10

70 In *Muhammad Hilman bin Idham v Kerajaan Malaysia*,[76] Mohd Hishamudin and Linton Albert JJ held that s 15(5)(a) of the Universities and University Colleges Act 1971,[77] which forbade students from expressing any sympathy or support for any political party, was contrary to the Constitution's guarantees in Art 10. The decision emphasised that Parliament is not supreme, and the restrictions imposed on free speech must be confined to the restrictions enumerated in Art 10(2). However, in *Fathul Bari*, a law criminalising any discourse about Islam without a *tauliah* was upheld as within the powers of the states to create and punish offences against the precepts of Islam. Judicial decisions of this sort have facilitated a drift towards intellectual intolerance.[78] In 2018, internationally acclaimed Turkish Islamic intellectual, Mustafa Akyol, was detained by JAWI for giving a talk on Islam without prior accreditation from the relevant Religious Teaching Supervisory Committee. His host, Dr Ahmad Farouk Musa of the Islamic Renaissance Front, was investigated for abetting him. One wonders how in a country with

74 *Sulaiman bin Takrib v Kerajaan Negeri Terengganu* [2009] 6 MLJ 354; [2009] 2 CLJ 54; [2009] 1 AMR 644.
75 [2012] 4 MLJ 281.
76 [2011] 6 MLJ 507; [2011] 9 CLJ 50.
77 Act 30.
78 See Shad Saleem Faruqi, "Reflecting on the Law" *The Star* (12 October 2017).

a supreme Constitution, any civil or criminal, federal or state, secular or religious law can be enacted to confer absolute powers on anyone.

71 In *Berjaya Books Sdn Bhd v Jabatan Agama Islam Wilayah Persekutuan*[79] ("*Berjaya Books*"), the Borders Bookstore was raided by Shariah officers from JAWI who seized several copies of the Malay version of the book *Allah, Liberty and Love* by Canadian author Irshad Manji.[80] The book had not been banned by the Home Ministry under the Printing Presses and Publications Act 1984.[81] Both Muslim and non-Muslim employees of the store were questioned. One Muslim employee was arrested who was a mere store manager and not responsible for the selection of books. In a learned judgment that upheld the supremacy of the Constitution, Zaleha Yusof J held that though the impugned Syariah Criminal Offences (Federal Territories) Act 1997[82] was a law for Muslims only, that did not take away the jurisdiction of the High Court because fundamental liberties were involved. The respondent's actions against the non-Muslims were *ultra vires*. The arrest of the Muslim store manager was unreasonable and irrational because she was not responsible for selecting the books. The seizure of the books was illegal because the book had not been banned by the Home Ministry. This also rendered the prosecution in the Shariah Court unconstitutional and in violation of Art 7(1). On the federal-state division of powers, the learned judge held that matters pertaining to publications fell within the Federal List.

72 Regrettably, in a similar case, *ZI Publications Sdn Bhd v Kerajaan Negeri Selangor*[83] ("*ZI Publications*"), the apex court gave a totally different decision. The Jabatan Agama Islam Selangor had raided a publisher's office and seized 180 copies of the Malay version of *Allah, Liberty and Love*. The apex court dismissed the challenge to s 16 of the state Enactment on several grounds. First, there was no violation of the Federal List because the section punished an offence against the precepts of Islam. Second, freedom of expression is limited by the sanctity of Islam in Art 3(1). In so ruling, the court was departing from *Che Omar's* restrictive view of Art 3.[84] According to the judges in *ZI Publications,* Art 3 is not restricted to rituals and ceremonies but assumes an expansive meaning and provides a rationale for curtailing fundamental rights. Third, Art 10 must be read in the light of Arts 3(1), 11, 74(2) and 121. "Taking the Federal Constitution as a whole, it is clear that the intention of the framers was

79 [2014] 1 MLJ 138.
80 Vintage Canada, 2012.
81 Act 301.
82 Act 559.
83 [2016] 1 MLJ 153.
84 *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55.

to allow Muslims in this country to be also governed by Islamic personal law."[85]

73 In *Juzaili*, the appellants were Muslim men who, because of GID, had been expressing themselves as women by wearing female clothes and make-up. Section 66 of the Syariah Criminal Enactment (Negeri Sembilan) 1992 made it an offence for any male Muslim to wear a woman's attire or to pose as a woman. The appellants had been repeatedly detained, arrested and prosecuted by the religious authority. They challenged the constitutionality of s 66. The High Court dismissed the challenge. It was held by the Court of Appeal, with Mohd Hishamudin Yunus J penning the opinion, that s 66 interfered with the personal liberty of the appellants because it prevented them from moving about in public places to reach their respective work places. The right to work was part of their right to life in Art 5(1). Additionally, s 66 was inconsistent with Art 8 of the Constitution because it unfairly subjected GID sufferers to the same provisions as other normal males. It was further discriminatory because it singled out males who dressed like females and said nothing about females who dressed like males. Section 66 affected the appellants' right to freedom of expression, in that they were prohibited from expressing themselves in the way dictated by their psychological make-up.

G. Freedom of religion and Art 11(1)

74 This provision has generated a very large number of cases. In *Jamaluddin*[86] (preventive detention of a person who converted out of Islam and was trying to convert others), *habeas corpus* was issued. In *Hjh Halimatussaadiah bte Hj Kamaruddin v Public Services Commission, Malaysia*[87] ("*Halimatussaadiah*") (civil servant wearing *purdah*), *Ahmad Yani bin Ismail v Inspector General of Police*[88] ("*Ahmad Yani*") and *Zakaria bin Abdul Rahman v Ketua Polis Negara Malaysia*[89] ("*Zakaria*") (polygamous police officers), it was held that reasonable public service regulations could not be defied simply because practices like *purdah* or polygamy were permitted by Islam. Article 11(1) only protected mandatory practices of religion. Similar reasoning applied in *Fatimah bte Sihi v Meor Atiqulrahman bin Ishak*[90] ("*Meor Atiqulrahman*") (where a school pupil was disciplined for insisting on wearing a *serban* to the

85 *ZI Publications Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 153 at [31].
86 *Minister for Home Affairs v Jamaluddin bin Othman* [1989] 1 MLJ 418.
87 [1994] 3 MLJ 61; [1994] 3 AMR 1866.
88 [2005] 4 MLJ 636; [2004] 5 AMR 571.
89 [2001] 3 MLJ 385.
90 [2005] 2 MLJ 25.

school assembly). In all these cases, the judicial decisions were balanced and not swayed by religious considerations.

75 However, in a number of other areas like apostasy, proselytisation of Muslims and offences against the precepts of Islam, the civil courts have generally preferred "political correctness" over the constitutional guarantee of freedom of conscience.[91] In *Kamariah bte Ali v Kerajaan Negeri Kelantan*[92] ("*Kamariah*") and *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan*[93] ("*Lina Joy*"), attempted apostasy by Muslims was not regarded as part of freedom of religion in Art 11.[94]

76 In the matter of freedom of religion, Art 11(1) grants to every person "the right to profess and practise his religion and, subject to clause (4), to propagate it". However, cl 4 provides that "[s]tate law … may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam". This unique restriction in Art 11(4) was part of the "negotiated settlement" between the Malays and non-Malays to shield Muslims from well-organised evangelical groups that had gained a foothold during colonial days. The constitutional problem is that since the 1980s, Art 11(4) has been used by the states to frame catch-all laws against any intellectual discourse on Islam without prior permission of Shariah authorities. Take s 11 of the Syariah Criminal Offences (Federal Territories) Act 1997[95] which provides that "any person who teaches or professes to teach *any matter relating to the religion of Islam* without a *tauliah* [accreditation] … shall be guilty of an offence" [emphasis added]. This was the provision used against Mustafa Akyol. The words "any matter relating to the religion of Islam" cover the whole range of Islamic thought. If s 11 is to be interpreted literally, then any lecturer of Islamic theology, law, economics, banking, commerce, history, good governance and philosophy or any participant in a seminar or workshop on any aspect of Islam must first obtain a *tauliah* or risk a RM5,000 fine or three years' jail! Under their enabling laws, all public and private universities have statutory powers to recruit staff and allocate subjects to be taught. Must the universities and all lecturers in Islam-related subjects seek clearance from the Shariah authorities first? It is understandable if there is a law against "false doctrine" as in s 4, but the s 11 catch-all

91 See Justice Dato Rhodzariah Bujang, "Conversion of Minors – An Uncertainty No More" July [2019] JMJ 33. The article contains a list of many cases of attempted apostasy by Muslims.

92 [2002] 3 MLJ 657

93 [2007] 4 MLJ 585.

94 See also *Public Prosecutor v Krishnan a/l Muthu* Magistrates Court Case No MA-83 146-2002.

95 Act 559.

provision is an overkill and clearly in conflict with Art 11(4), Art 10(1)(a) and all statutes empowering universities and schools.

77 Courts have given blank-cheque powers to Shariah authorities to control "divergent practices" and "differing concepts of Islamic religion". There is judicial sanction for stamping out all diversity of thought within the *ummah* that digresses from the official opinion: *SIS Forum (Malaysia) dan Jawatankuasa Fatwa Negeri Selangor*[96] ("*SIS Forum Malaysia* (2019)"). Freedom of speech and freedom of religion are subordinated to Art 11(4) and the Ninth Schedule, List II. In *SIS Forum Malaysia* (2019), a Selangor *fatwa* declared SIS to be a deviationist group and asked federal departments to suppress publications by SIS. An application to the High Court for a declaration failed on the ground that the impugned *fatwa* was within the powers of the *fatwa* committee under the Ninth Schedule, List II, Item 1 – creation and punishment of offences against the precepts of Islam.

78 In some state Enactments children can be given away in marriage because religious tradition permits children to marry. Actually, Art 11(5) permits all religions and religious practices to be subjected to public order, public health and morality.

H. Parent's rights over religious education

79 In *Noorliyana Yasira bte Mohd Noor lwn Menteri Pendidikan Malaysia*,[97] a father tried unsuccessfully to assert his right under Art 12(4) to determine his daughter's Islamic education. But in *Teoh Eng Huat*[98] the father succeeded in obtaining a declaration that his daughter below 18 could not convert to Islam without his permission.

80 A very large number of unilateral conversion of children cases have gone to the superior courts and the near unanimous view was that issues about the unilateral conversion of a child to Islam were within the powers of the Shariah Courts. This was so even though one of the parents was a non-Muslim![99] These decisions were all overruled by the 2018 landmark case of *Indira Gandhi a/p Mutho*.[100]

96 Kuala Lumpur High Court (27 August 2019).

97 [2007] 5 MLJ 65.

98 *Teoh Eng Huat v Kadhi, Pasir Mas* [1990] 2 MLJ 300.

99 See *Chang Ah Mee v Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah* [2003] 5 MLJ 106; and *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah* [2004] 2 MLJ 648. See also Justice Dato Rhodzariah Bujang, "Conversion of Minors – An Uncertainty No More" July [2019] JMJ 33.

100 *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545; [2018] 2 AMR 313.

I. Federal–state division of legislative powers is in tatters

81 In *Mohd Noor Jaafar*,[101] it was correctly held that the administration of a Muslim religious school is not a Shariah matter and therefore cannot be tried in the Shariah Courts. In *Gin Poh Holdings*,[102] it was held that the entries in the Legislative Lists do not on their own confer legislative power. They are enabling provisions to permit the Legislature concerned to enact legislation. It was also held that the competence of a legislative body to enact law on a particular matter does not exclude the power of the courts to examine the constitutional validity of the law by reference to other provisions of the Constitution.

82 The reality, however, is that on matters that have an Islamic element, State Assemblies often pass laws that violate the federal-state division of power. Courts are reluctant to censure the state authority.

83 In *Mamat bin Daud v Government of Malaysia*[103] ("*Mamat Daud*"), a federal amendment to the Penal Code by adding a new s 298A was struck down because it was not a law on public order but a law on Islam within state jurisdiction. According to the majority, s 298A of the Penal Code was a trespass on the power of the states to enact laws about Islam. A look at the section may reveal otherwise. Section 298A is titled: "Causing, *etc*, disharmony, disunity, or feelings of enmity, hatred or ill-will, or prejudicing, *etc*, the maintenance of harmony or unity, on grounds of religion". The section is broadly drafted to apply to all religions and says nothing specific about Islam, Shariah or Muslims. Subsection (8) of s 298A says:

> If in any proceedings under this section any question arises with regard to the interpretation of any aspect of, or any matter in relation to, *any religion*, the Court shall accept the interpretation given by *any religious authority* referred to in subsection (6), being *a religious authority in respect of that religion*. [emphasis added]

The majority on the Bench, however, felt that on the doctrine of pith and substance, s 298A was about Islamic offences and therefore outside the jurisdiction of the Federal Parliament. It is submitted that the minority was correct. The law was, in its pith and substance, about public order. It applied to all citizens. Even if it was partly about Islamic affairs, that does not *ipso facto* empower the State Assemblies. Under the Federal Constitution not all matters of Islamic crime (*eg*, murder, theft, robbery,

101 *Public Prosecutor v Mohd Noor bin Jaafar* [2005] 6 MLJ 745.

102 *Gin Poh Holdings Sdn Bhd v The Government of the State of Penang* [2018] 3 MLJ 417; [2018] 4 CLJ 1.

103 [1988] 1 MLJ 119.

rape, treason) are in state hands. *Mamat Daud* can be credited or blamed for starting the judicial trend of Islamisation of the Malaysian Constitution; of interpreting state powers on Islam expansively; of promoting the false idea that "if it relates to Islam it is in state hands"; and of interpreting the term "precepts of Islam" too broadly. The devastating decisions in *Sulaiman Takrib*[104] and *Fathul Bari*[105] are inheritors of the *Mamat Daud* tradition.

84 Many states pass laws to regulate Muslim religious schools even though all education is in federal hands. Most states punish homosexuality between males, and betting and lotteries. All three matters are within federal jurisdiction. *Halal-haram* offences are regulated by the states even though they are possibly covered by the Trade Descriptions Act 2011.[106] Muslims wishing to marry are required to take a human immunodeficiency virus test even though medicine and health and infectious diseases are federal matters.

85 In *Kerajaan Negeri Kelantan v Wong Meng Yit*,[107] a non-Muslim bookshop in Kota Bharu was prosecuted for violating local authority rules against selling lottery items. Betting and lotteries are within federal jurisdiction.[108]

86 In *Re bin Abdullah*,[109] the Court of Appeal, chaired by Datuk Tengku Maimun Tuan Mat J (as the Chief Justice was then), in a landmark decision in 2017 unanimously ruled that under the federal Births and Deaths Registration Act 1957,[110] an illegitimate child is entitled to carry his father's name if the father acknowledges paternity and the mother has no objection. Despite the court ruling, the Director-General of the National Registration Department declared that he was instead bound by a *fatwa* (religious edict) issued by the National Fatwa Committee to give the "Abdullah" surname to a child conceived out of wedlock.[111]

87 Blatantly unconstitutional *hudud* laws have been passed by the states of Terengganu and Kelantan in violation of the Ninth Schedule,

104 *Sulaiman bin Takrib v Kerajaan Negeri Terengganu* [2009] 6 MLJ 354; [2009] 1 AMR 644.
105 *Fathul Bari bin Mat Jahya v Majlis Agama Islam Negeri Sembilan* [2012] 4 MLJ 281.
106 Act 730.
107 [2012] 6 MLJ 57.
108 Federal Constitution (2010 Reprint) Ninth Schedule, List I, Item 4(l).
109 See Jabatan Pendaftaran Negara and Seorang Kanak-Kanak, Civil Appeal No 21 (14 November 2019).
110 Act 299.
111 The Court of Appeal's enlightened decision was, regrettably, overruled by the Federal Court. See *Jabatan Pendaftaran Negara v A Child* (Majlis Agama Islam Negeri Johor, intervener) [2020] 2 MLJ 277.

List II and the Syariah Courts (Criminal Jurisdiction) Act 1965. The state laws punish federal crimes and impose sentences far beyond the "3-6-5" formula permitted by the 1965 Act. In 2017, YB Hadi Awang's RUU355 (the *hudud* law) had many unconstitutional provisions but was embraced by the former government.

88 In *ZI Publications*, the Selangor religious authority, Jabatan Agama Islam Selangor, raided the office of ZI Publications and seized 180 copies of *Allah, Kebebasan dan Cinta* by Irshad Manji, even though publications and presses are within federal jurisdiction and the book had not been banned by the Home Ministry. In the recent decision of *SIS Forum Malaysia* (2019), a very expansive view of the powers of the Selangor Fatwa Committee to act under Art 11(4) was affirmed. Sisters in Islam ("SIS"), a Muslim women's organisation, was declared to be "*sesat*". The Selangor Fatwa committee prohibited the publishing of material that had elements of liberalism and pluralism and sought to seize these materials. Such a power of prohibition and seizure actually belongs to a federal Minister under the Printing Presses and Publications Act 1984. The Fatwa Committee also directed the Malaysian Communication and Multi-Media Commission (a federal body) to block the SIS social website. SIS complained of trespass on federal powers, but the High Court rejected the complaints out of hand without much reasoning.

89 "Offences against the precepts of Islam" can be punished by the states. The Federal Court in the cases of *Sulaiman Takrib* and *Fathul Bari* did not confine the term to refer to the essentials of Islam but interpreted the words broadly to mean anything about Islamic *aqida*, Shariah and *akhlaq*.

J. Power of the states to enact Islamic criminal law

90 The Ninth Schedule contains the Federal and State Lists of legislative powers. Item 1 of the State List empowers the states to create and punish "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 when read along with Art 11(4) empowers the states to control the propagation of doctrines and beliefs among persons professing the religion of Islam.

91 In *Sulaiman Takrib*,[112] the petitioner, a Muslim, was charged with offences under ss 10 and 14 of the Syariah Criminal Offences (Takzir) (Terengganu) Enactment 2001 ("SCOT") and s 51 of the Administration

112 *Sulaiman bin Takrib v Kerajaan Negeri Terengganu* [2009] 6 MLJ 354; [2009] 2 CLJ 54; [2009] 1 AMR 644.

of Islamic Religious Affairs (Terengganu) Enactment 2001. He was granted leave to commence proceedings for a declaration pursuant to Art 4(4) of the Federal Constitution that these laws were null and void.

92 The charge under s 10 of the SCOT was for acting in contempt of a religious authority by defying or disobeying the *fatwa* regarding the teaching and belief of Ayah Pin that was published in the *Government Gazette* of the State of Terengganu on 4 December 1997, while the charge under s 14 of the SCOT was for possession of a VCD, the content of which was contrary to the *Hukum Syarak*.

93 Among the petitioner's contentions was that the power to create offences under Item 1 of List II of the Ninth Schedule was limited to the creation of offences against "the precepts of Islam". The court was urged to confine "precepts of Islam" to the "five pillars of Islam" which are: (a) *Tawheed* (belief that there is no deity worthy of worship except Allah and that Muhammad is His messenger); (b) prayers; (c) *zakat*; (d) fasting; and (e) *Hajj*. It was submitted that as the offences were not "offences against the precepts of Islam", the State Assembly was not empowered to enact the said provisions.

94 The court rejected both submissions. Abdul Hamid Mohamad CJ chose a very broad definition of "precepts of Islam" to include *aqida*, Shariah and *akhlaq*. What is remarkable about his exposition is that he included within the Shariah the ideas of *fiqh* (juristic interpretations). By his definition, any *fatwa* or juristic ruling would be a precept of Islam. Further, according to him, in Malaysia the Shariah includes all "Islamic law" and "*Hukum Syarak*".

95 *Sulaiman Takrib* was followed in *Fathul Bari*.[113] The issue in this case was whether the state can impose a *tauliah* requirement before a Muslim speaks about Islam to anyone other than his family members. The *tauliah* requirement was challenged as a violation of freedom of speech in Art 10 and as outside the power of the Assembly to punish offences against the "precepts of Islam". The judges followed *Sulaiman Takrib* and upheld the validity of the *tauliah* requirement.

96 *Fathul Bari* has been criticised on several scores. First, the requirement of a *tauliah* is not a precept of Islam. Several expert witnesses had testified to that, but the judges embraced the expansive view. As opposed to religious absolutism, there is a spirit of *shura* (consultation) and reasoned dissent within the Islamic tradition. Prophet Muhammad

113 *Fathul Bari bin Mat Jahya v Majlis Agama Islam Negeri Sembilan* [2012] 4 MLJ 281; [2012] 4 AMR 297.

once said: "There is mercy in the differences of my community." Second, what is disturbing about this decision is that the actual content of a speech or presentation is irrelevant. Intent to indulge in deviationism is not needed. Any intellectual discourse, no matter how learned and respectful, is a crime unless there is prior permission. The authorities can act against anyone they wish. It is on record that the late Dr Kassim Ahmad, the ex-Mufti of Perlis (as he was then), and MP Khalid Abdul Samad have been charged for speaking without a *tauliah*. Third, the view of the learned judges in *Fathul Bari* that diversity of views may lead to deviationism and that, in turn, may lead to disharmony and disorder is fanciful and not supported by social reality or logic. Fourth, the provisions of the Ninth Schedule are subject to the chapter on fundamental liberties. An unfettered power to impose prior restraint and censorship goes far beyond the permitted restrictions on freedom of religion (Art 11) and freedom of speech (Art 10). The *tauliah* requirement imposes thought-control and cripples free speech and diversity of views. Criminalising any questioning of a *fatwa* is a violation of Arts 10(1)(a) and 10(2)(a).[114] Fifth, there is a sufficient body of opinion that the reasonableness and proportionality of restrictions on human rights are reviewable by the courts: *Sivarasa v Badan Peguam Malaysia*[115] and *Alma Nudo Atenza v Public Prosecutor*.[116] Sixth, the *tauliah* law denigrates all Muslims as servile subjects who must speak about Islam only when allowed to do so and who are so gullible that they are likely to be confused by unlicensed thinkers who must therefore be controlled by prior restraints. Seventh, *fatwas* by State Fatwa Committees are a form of subsidiary legislation under the authority of the state Enactment. For the courts to allow a subsidiary law to override the supreme Constitution's chapter on fundamental liberties is indeed exceptional.

97 The dark shadow of *Sulaiman Takrib* and *Fathul Bari* was evident in the recent decision of *SIS Forum Malaysia* (2019). A 2014 Selangor *fatwa* that had declared SIS as a deviant organisation for subscribing to "religious liberalism and pluralism" was upheld by the High Court. Nordin Hassan J ruled that the High Court did not have the jurisdiction to rule on the case based on Art 121(1A) of the Federal Constitution where such matters should have been referred to the Shariah Court. "The said fatwa is within the limits of the constitution as stipulated under Article 74 and the Second Schedule of the Federal Constitution. This court is not clothed to hear the present application due to jurisdictional issues. The court also finds the decision dated July 14, 2014 is not tainted with

114 See also *Muhamad Juzaili bin Mohd Khamis v State Government of Negeri Sembilan* [2015] 6 MLJ 736; [2015] 8 CLJ 975.
115 [2010] 2 AMR 301.
116 [2019] MLRAU 118.

illegality and proportionality", said Nordin Hassan J.[117] It was held that the Constitution must be read as a whole and that Art 10(1)(a) must be read in the light of Arts 3(1) and 11(4) and the Ninth Schedule, List II.[118] The learned judge is absolutely correct in approving a holistic approach to interpretation and calling for the provisions to be read together. But he contradicts his own recommendations by putting Art 11(4) above all else and giving no importance to Arts 10(1) and 10(2) and the Ninth Schedule, List II. Articles 10(1) and 10(2) provide the permissible grounds of prohibition on free speech. The Ninth Schedule, List II, Item 1 allows creation of offences *only if* they are against the precepts of Islam. Further, the banning of "liberalism" and "pluralism" without defining these terms precisely appears unconstitutional and *ultra vires*. The learned judge's reliance on Art 3(1) without mentioning Art 3(4)'s non-derogation provision indicates a selective reading of Art 3.

98 Because of the reluctance of civil courts to apply constitutional principles to cases involving the Shariah, state Enactments are now extending the concept of "precepts of Islam" to more and more areas: skipping Friday prayers, failing to observe the fast, attempting apostasy *etc*. Some Muslim groups like the Shias are condemned as "deviationists", continuously harassed and vilified. Others like the Ahmadiyyas and Qadiyanis are declared as outside the pale of Islam. Yet their activities are still sought to be regulated by the Shariah authorities.[119]

99 It is submitted that the dangerously expansive interpretation of the words "precepts of Islam" by *Suliaman Takrib* and *Fathul Bari* confers a blank-cheque power on state legislatures and Shariah authorities to legislate on and criminalise virtually any aspect of the personal or public behaviour of a Muslim. One can anticipate that as a result of these unfortunate decisions in *Sulaiman Takrib* and *Fathul Bari* more and more conflicts will emerge in the future between the Federal Constitution and Shariah laws and between federal laws and state laws. Controversial issues of jurisdiction will bedevil the superior courts. In the matter of creating crimes, State Assemblies will become supreme. All fundamental rights of Muslims will be at the mercy of either the State Assembly or delegates of the Assembly like *fatwa* committees.

100 Signs of such assertiveness are already visible. The women's rights group Sisters in Islam has been declared deviant. The entire

117 Hafiz Yatim, "Selangor Fatwa Declaring Sisters in Islam as a Deviant Group Stands – High Court" *The Edge Markets* (27 August 2019).

118 *Sulaiman bin Takrib v Kerajaan Negeri Terengganu* [2009] 6 MLJ 354; [2009] 1 AMR 644; *ZI Publications Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 153.

119 *Maqsood Ahmad v Ketua Pegawai Penguatkuasa Agama* [2019] 9 MLJ 596.

Shia community is demonised. Muslims who support "liberalism", "secularism" and "pluralism" are declared to be deviants. The Muslim retired civil servants group, G25, has been described by the Parti Islam SeMalaysia President as worse than a terrorist group. A Muslim girl caught for drinking beer in a public place was convicted and ordered to be whipped. The practice of yoga was declared to be *haram*. Muslims are forbidden to send Christmas greetings to Christians or to attend any ceremony connected with the Pongal harvest festival. In shopping malls in some states, separate lines must exist at payment counters for males and females. It is conceivable that in the future, if a Muslim girl trims her hair or wears pants or drives a car or travels abroad unaccompanied by a *muhrim*, or attends co-educational facilities, and a Shariah authority decrees by way of a *fatwa* that these "liberal" forms of behaviour or dressing are against Islamic *akhlaq,* and subject to a penalty, there will be questions about whether the protection of the civil courts could be invoked. If a Muslim girl with a degree in mass communication, who is prevented by religious law from becoming an emcee at a public function, wishes to go to the High Court to enforce her fundamental right to life (which includes livelihood), liberty and freedom of expression, will her Pt II rights be subordinated to the power of the state authorities to criminalise any conduct against Islamic *akhlaq* as determined by unelected Shariah authorities? Will Shariah Courts have exclusive jurisdiction under Art 121(1A) or will civil courts have the power to examine the constitutional issues and test the validity of the *fatwas*? Could Arts 4(1) and 5–13 be invoked to examine the validity of religious rulings?

101 It is submitted that in the overall scheme of the Constitution, Shariah legislation and Shariah authorities cannot, unless explicitly permitted[120] by the Federal Constitution, violate the fundamental rights enshrined in Pt II of the Constitution. Unless expressly provided, all Muslims, like their non-Muslim counterparts, are entitled to all facets of personal liberty. See, for example, the explicit applicability of Art 5(4) to the Shariah Courts. It would be unthinkable in 2020 for Shariah legislation, purportedly relying on religious traditions, to go against constitutional provisions relating to abolition of slavery and forced labour (Art 6), protection against retrospective criminal laws (Art 7), protection against double jeopardy (Art 7), right to equality save where explicitly allowed (Art 8), freedom of movement (Art 9), freedom of speech and expression (Art 10), freedom of religion (Art 11), rights in respect of education (Art 12) and right to property (Art 13).

120 For such explicit provisions see Arts 8(5)(a), 8(5)(b), 11(4) and 12(2) of the Federal Constitution (2010 Reprint).

K. Non-Muslims and Shariah Courts

102 Under the Ninth Schedule, List II, Islamic law and Islamic courts cannot apply to non-Muslims. Yet Shariah Courts dissolve non-Muslim marriages and grant custody, guardianship and unilateral conversion orders that devastate non-Muslim lives. What is extremely painful about most of these proceedings is that they are *ex parte*. Yet, when the affected party knocks on the doors of civil courts, jurisdiction is often refused.

L. Articles 121(1) and 121(1A)

103 Article 121(1A) provides that civil courts cannot interfere with Shariah Courts in matters within Shariah Court jurisdiction. Unfortunately, it is not always clear whether a matter falls in civil or Shariah Court jurisdiction. When that happens, our civil courts are deeply divided. Over the last 30 years, painful jurisdictional issues have arisen in such matters as:

(a) dissolution of a non-Muslim marriage when one party converts to Islam;

(b) unilateral conversion of non-Muslim children to Islam;

(c) custody and guardianship of infants in a marriage where one party has converted to Islam.

(d) cases of apostasy. In numerous cases the civil courts have held that whether a person has converted out of Islam is not a matter of the fundamental right in Art 11(1) but a matter within the exclusive jurisdiction of the Shariah Courts;[121] and

(e) *fatwa* to declare individuals and groups as deviationists.

104 Some civil judges transfer any case with the slightest whiff of Islam to the Shariah courts. In *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib*[122] ("*Mohamed Habibullah*") (a request for an injunction in a domestic abuse case), the High Court regarded the crime of domestic violence as outside its jurisdiction and within the jurisdiction of the Shariah Court because the couple were Muslims.

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121 See *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam* [1992] 1 MLJ 1; *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1998] 1 MLJ 681; [1998] 1 AMR 74; *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah* [1999] 1 MLJ 489; *Tey Siew Choo@Nur Aishah Tey v Teo Eng Hua* [1999] 2 AMR 2779; and *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan* [2007] 4 MLJ 585; [2007] 3 AMR 693.

122 [1992] 2 MLJ 793.

105 Other civil judges assert that questions of constitutionality, disputes as to jurisdiction, matters involving fundamental liberties and issues affecting non-Muslims must be tried in the civil courts. Zaleha Yusuf, Mohd Hishamudin Yunus and Zainun Ali JJ are in this distinguished minority. In the case of *Dato' Kadar Shah bin Tun Sulaiman v Datin Fauziah bte Haron*[123] ("*Dato' Kadar Shah*"), Mohd Hishamudin Yunus J ruled that a trust, even between Muslims, was a matter within federal jurisdiction. Even though the defendant was arguing that there was a Muslim gift (a topic in the State List) and not a trust (a topic in the Federal List), there was no ouster of the civil court's jurisdiction. The learned judge laid down a number of guidelines:

> (a) Where there is an issue of competing jurisdiction between the civil court and Shariah Court, the proceedings before the High Court must take precedence over the Shariah Court.
>
> (b) Whether this case involved a Muslim gift (a Shariah court matter) or a civil trust (a civil court matter) is an issue that is not severable and therefore in the civil court's jurisdiction.
>
> (c) Questions of breach of trust came within the jurisdiction of the High Court. Any dispute pertaining to the Law of Trusts is outside the jurisdiction of the Shariah Courts.
>
> (d) The High Courts are superior courts and the Shariah Courts are inferior tribunals existing under state law. As such, the High Court has supervisory jurisdiction over all inferior tribunals including Shariah Courts.
>
> (e) Articles 121(1) and 121(1A) must not be interpreted literally or rigidly but must be interpreted purposively.
>
> (f) Civil courts are ousted only if the Shariah Court has exclusive jurisdiction.

106 In *Siti Hasnah Vangarama Abdullah v Tun Dr Mahathir Mohamad*[124] ("*Siti Hasnah*"), a seven-year-old child born into a Hindu family was converted to Islam by Muslim religious authorities in Penang without the consent of her parents. On reaching maturity she challenged the constitutionality of her conversion. A question arose as to whether the civil court or the Shariah Court had jurisdiction over the matter. Mohd Hishamudin J held that:

123 [2008] 7 MLJ 779; [2008] 4 CLJ 504.
124 [2012] 7 CLJ 845.

(a) A subject matter does not cease to be within the jurisdiction of the civil courts just because it has an Islamic element in it.

(b) There was an allegation that the child was made to renounce her religion in an unconstitutional and illegal manner. As such, the fundamental rights of the parents and the child under Arts 11 and 12 were involved and the civil High Court had exclusive jurisdiction.

(c) A High Court must be extremely cautious and slow in declining jurisdiction and in coming to the conclusion that the subject matter of an action falls within the exclusive jurisdiction of the Shariah Courts especially if fundamental rights are involved.

(d) The civil courts cannot interfere with the Shariah Court only if the matter is within the exclusive jurisdiction of the Shariah Court.

107 Zainun Ali J's classic decision in *Indira Gandhi a/p Mutho*[125] is authority for the proposition that Shariah Courts are not of equal status to the superior civil courts. This was a case of unilateral conversion of children to Islam by a Hindu husband who had embraced Islam. The Court of Appeal had ruled that all matters concerned were in the exclusive jurisdiction of the Shariah Court. Writing for a unanimous Federal Court, Zainun Ali FCJ held that:

(a) The powers of the Shariah Courts must be expressly conferred by state law. Section 50(3)(b)(x) of the Perak Enactment specifically conferred jurisdiction on the Shariah Courts to issue a declaration that "a person is no longer Muslim". This would be applicable in a case where a person renounced his Islamic faith. However, the issue in the present appeals concerned the validity of the certificates of conversion issued by the registrar in respect of the children's conversion to Islam. Nowhere was there any express provision in s 50(3)(b) which conferred jurisdiction on the Shariah Court to determine the validity of a person's conversion to Islam.

(b) The amendment inserting cl (1A) in Art 121 did not oust the jurisdiction of the civil courts nor did it confer judicial power on the Shariah Courts. The jurisdiction to review the actions of public authorities, and the interpretation of the relevant state or

125 *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545; [2018] 2 AMR 313.

federal legislation as well as the Constitution, would lie squarely within the jurisdiction of the civil courts. This jurisdiction could not be excluded from the civil courts and conferred upon the Shariah Courts by virtue of Art 121(1A) of the Federal Constitution.

(c) The wife as a non-Muslim had no *locus* to appear before the Shariah Court and the Shariah Court did not have the power to expand its own jurisdiction to choose to hear the wife's application. In these circumstances, the High Court had jurisdiction, to the exclusion of the Shariah Court, to hear the matter.

(d) The issuance of certificates of conversion by the registrar was an exercise of a statutory power. If an exercise of power under a statute exceeded the four corners of that statute, it would be *ultra vires* and a civil court ought to be able to hold it as such. Though s 101 of the Perak Enactment provided that the decision of the Registrar of Mu'allafs was final, nevertheless, it was settled law that the supervisory jurisdiction of the High Court to determine the legality of administrative action could not be excluded even by an express ouster clause.

(e) Based on the undisputed evidence, the requirement in s 96(1) had not been fulfilled in that the children had not uttered the two clauses of the affirmation of faith and had not been present before the registrar before the certificate of conversion was issued. As such, the issuance of the certificates despite the non-fulfilment of the mandatory statutory requirement was an act which the registrar had no power to do under the Enactment and the registrar had acted beyond the scope of his power.

(f) Under the Guardianship of Infants Act 1961[126] ("GIA"), both parents had equal rights in relation to the custody and upbringing of the infant children and the wishes of both parents were to be taken into consideration. The conversion of the husband to Islam did not alter the antecedent legal position, nor did it bring the children out of the ambit of the GIA.

(g) Based on a purposive interpretation of Art 12(4) read with the Eleventh Schedule to the Federal Constitution, and on an application of ss 5 and 11 of the GIA, the consent of both parents was required before a certificate of conversion to Islam could be issued in respect of the children.

126 Act 351.

(h) *Per* Zulkefli PCA, supporting: In the present case, upholding the rule of law required the court to decide on the issue strictly on the basis of the relevant laws, case authorities and the provisions of both the state and the Federal Constitution governing the particular issue without being swayed by any religious convictions or sentiment.

108 The scintillating *Indira Gandhi a/p Mutho* decision (and the earlier ruling in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat*[127] ("*Semenyih*")) that a non-judicial body cannot bind the superior courts has, however, been diluted by the recent decision in *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd*[128] ("*JRI*"). The case involved a civil lawsuit filed in 2013 by Kuwait Finance House (M) Bhd ("KFH") against JRI Resources Sdn Bhd for recovery of an outstanding amount of RM118,822,066.59 due to the former for four "Ijarah Facilities" agreements and one "Murabahah Tawarruq" agreement negotiated in 2008 and 2009. KFH also instituted a claim against three guarantors. A monumental issue of constitutional and administrative law importance in this case was whether ss 56 and 57 of the Central Bank of Malaysia Act 2009[129] were constitutional for impinging on judicial powers. Under these provisions, the Shariah Advisory Council ("SAC") is the sole authoritative body on Shariah matters pertaining to Islamic banking, *takaful* and Islamic finance. The rulings of the SAC shall prevail over any contradictory ruling given by a Shariah body or committee constituted in Malaysia. All courts and arbitrators are also required to refer to the rulings of the SAC for any proceedings relating to Islamic financial business. The rulings of the SAC are binding on all authorities including the courts. These sections implied that rulings by the SAC on Islamic finance bind the civil High Court even though the Council is not a judicial body. By a five to four majority, the court held that any determination by Bank Negara's SAC is binding on civil courts. *JRI*, while not overruling *Indira Gandhi a/p Mutho* or *Semenyih*, held that in the interest of certainty and uniformity of Islamic doctrine, ss 56–57 of the Central Bank of Malaysia Act 2009 which allow the Bank's SAC to make a final "determination" on Shariah matters, which determination is then binding on the civil courts, is not unconstitutional. The four dissenting judges were, however, of the opinion that s 57 of the Central Bank of Malaysia Act 2009, which gives the SAC its "judicial power", contravenes Art 121 of the Federal Constitution which touches on the exclusive judicial power of the civil courts. In a summary of the minority judgment, Malanjum J said: "The effect of the section (57) is to vest judicial power in the SAC to the

127 [2017] 3 MLJ 561.
128 [2019] 3 MLJ 561; [2019] MLJU 275.
129 Act 701.

exclusion of the High Court on Shariah matters. The section must be struck down as unconstitutional and void."

109 A few observations are in order. First, banking is a federal matter. Second, though the Federal Court in *JRI* did not explicitly overrule the authority of *Semenyih* and *Indira Gandhi a/p Mutho*, these earlier cases have been undermined. The bold assertion in *Semenyih* that a non-judicial body cannot usurp the power of the superior civil courts seems to have been weakened.

110 Third, if Shariah authorities can bind the civil courts with their expert findings, is it not possible to argue that native court authorities in Sabah and Sarawak should be given the same treatment. Their expertise and experience should also bind the civil courts. This will overturn the whole apple cart of judicial review of native court decisions.

111 Not much respect for the *Indira a/p Mutho* decision was shown in the most recent *SIS Forum Malaysia* (2019) case. In this case, the concepts of liberalism and pluralism were declared by Selangor to be against the teachings of Islam. The plaintiffs were declared to be "sesat dan menyeleweng daripada ajaran Islam". They argued that their constitutional rights under Arts 10 and 11 were being violated. Further, the provision in the Selangor Enactment for giving judicial review power to the Shariah High Court was a violation of the civil High Court's inherent powers under Art 121(1) as affirmed by *Semenyih* and *Indira Gandhi a/p Mutho*. Nordin Hassan J rejected both arguments. While conceding that a decision that is *ultra vires* may be reviewed,[130] he ruled that the Fatwa Committee was well within its powers under Art 11(4). Therefore, the decision in *Indira Gandhi a/p Mutho* did not apply and the application for judicial review was refused.

V. Summary and conclusion

112 The courts are clearly split about whether constitutional principles and provisions apply to the growing body of Islamic law. The prominent decisions which subjected Islamic law and Islamic authorities to the Constitution are *Che Omar*, *Jamaluddin*, *Maqsood*, *Teoh Eng Huat*, *Halimatussaadiah*, *Meor Atiqulrahman*, *Ahmad Yani*, *Zakaria*, *Mohd Noor Jaafar*, *SIS Forum* (2012), *Berjaya Books*, *Siti Hasnah*, *Dato' Kadar Shah*, *Re bin Abdullah* and *Indira Gandhi a/p Muthu*.

130 Reliance was placed on *Peguam Negara Malaysia v Chin Chee Kow* [2019] 3 MLJ 443; [2019] MLJU 202.

113 On the other hand, there are many areas where judicial decisions have expanded the horizons of the Shariah Courts and conferred unlimited power on Shariah authorities:

(a) All unilateral conversion cases (till *Indira Gandhi a/p Muthu*).

(b) All Muslim apostasy cases like *Lina Joy* – whether successful or unsuccessful.

(c) Broad interpretation of power to create and punish offences under the Ninth Schedule, List II even though the intention of the drafters was to allow only minor, non-federal offences to be tried by Shariah Courts. The catch-all interpretation of "precepts of Islam" subordinates all fundamental rights to state power: *Mamat Daud*; *Sulaiman Takrib*; *SIS Forum Malaysia* (2019); *Fathul Bari*; *Juzaili*; the *Herald* case; *Victoria Jayaseele Martin*; *Lina Joy*; *Kamariah*; and *Mohamed Habibullah*.

(d) Cases where implied powers are conferred on Shariah Courts.

(e) Jurisdictional conflicts between Shariah and civil courts are mostly resolved in favour of the Shariah Courts (save in rare situations like *Indira Gandhi a/p Mutho*).

(f) Even on matters in the federal list, civil courts are bound by the determination of Shariah authorities like the SAC. This is a clear departure from *Semenyih*[131] *and Indira Gandhi a/p Mutho*.

(g) In many cases where the constitutionality of a state law is challenged, the superior courts cleverly avoid or evade issues by hiding behind questionable procedural matters. In the *Herald* case, leave was refused by the Federal Court even though many monumental issues of constitutional and administrative law were at stake. In *Juzaili,* a learned Court of Appeal decision in favour of the cross-dressers on the basis of Arts 5, 8 and 10 was neutralised by the Federal Court by a not so acceptable argument raised by the defendant state that because of Art 4(4) the case should never have been brought to the High Court and the Court of Appeal and should have gone straight to the apex tribunal. On this point, *Juzaili* was wrongly decided if we take note of *Ah Thian*[132] and the later *Gin Poh Holdings*[133] which demolished the

131 *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat* [2017] 3 MLJ 561.

132 *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112.

133 *Gin Poh Holdings Sdn Bhd v The Government of the State of Penang* [2018] 3 MLJ 417; [2018] 4 CLJ 1.

view that all challenges to a legislation's constitutionality must go straight to the Federal Court.

114 In most of the above cases the tide of Islamic law was too strong for the judges to resist. Malaysia's Constitution is at a crossroads. Only the future will tell whether Malaysia will go the way of Saudi Arabia, Pakistan and Aceh. Or perhaps it will become "one country with two systems" – a Shariah system for all Muslims and a subordinate, constitutional system for non-Muslims.

VI. Recommendations

115 Article 121(1A) states that the civil courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the Shariah courts". This Article should be suitably amended to clarify that "jurisdiction" means "exclusive jurisdiction". In cases where (a) there are constitutional issues; (b) the matter involves conflicting or concurrent jurisdiction of civil and Shariah courts; (c) one of the parties is a non-Muslim; or (d) there is a dispute about the jurisdiction of the Shariah Court, the civil court should have the power to review the proceedings. This recommendation is in line with the recent Federal Court decision in *Indira Gandhi a/p Mutho* and the earlier dissenting opinion of Hamid Sultan JCA in the same case at the Court of Appeal.[134]

116 Item 1 of List II of the Ninth Schedule should be amended to provide an authoritative and precise definition of the term, an "offence against the precepts of Islam".

117 The Syariah Courts Criminal Jurisdiction Act 1965[135] must be amended to provide an authoritative and precise definition of the term "offence against the precepts of Islam".

118 The Syariah Courts Criminal Jurisdiction Act 1965 should be amended to specify the actual crimes over which the Shariah Courts may exercise jurisdiction. This recommendation is based on the Ninth Schedule, List II, Item 1 that the Shariah Courts "shall not have jurisdiction in respect of offences except in so far as conferred by federal law". This amendment will correct some unconstitutional tendencies prevalent in Malaysian Shariah legislation.

134 *Pathmanathan a/l Krishnan v Indira Gandhi a/p Mutho* [2016] 4 MLJ 455.
135 Act 355.

119 All state legislation that violates the federal-state division of power in the Ninth Schedule must be reviewed by the Attorney-General's Office and either amended to conform to the Federal Constitution or be challenged in the Federal Court under Arts 4(3) and 128.

120 When a non-Muslim in a civil marriage converts to Islam and seeks the dissolution of his civil marriage and custody and guardianship of his children, it is a gross violation of the letter and spirit of the Constitution (Ninth Schedule, List II, Item 1) if the Shariah Courts adjudicate on the rights and duties of the non-converting spouse. Item 1 of List II of the Ninth Schedule is crystal clear that the Shariah Courts "shall have jurisdiction only over persons professing the religion of Islam". The relevant civil family laws should be suitably amended to clarify that a marriage solemnised under civil law must be dissolved under civil law by a civil court after all ancillary matters have been resolved.

121 In all countries with legal pluralism, conflict of laws is common. Malaysia needs to acknowledge that these conflicts between civil and Shariah courts and Native and Shariah courts exist and to work out equitable legal solutions that provide a delicate balancing of conflicting interests. Since the 1990s, the prioritising of Islam and application of Islamic principles even in conflict of law situations has not helped justice and has sullied the image of Islam.

122 As long as an Islamic authority like JAKIM exists by way of executive fiat, its law enforcement powers shall remain questionable. At the federal level, Shariah authorities should be created by federal legislation under Art 3(5) and their jurisdiction clearly demarcated and defined.

123 Rehabilitation centres run by state Shariah authorities are unconstitutional and must be handed over to the federal authorities. All prisons, reformatories, remand homes and places of detention are in the Federal List.[136]

124 There are individual officers within federal Shariah institutions who mislead the Muslim public into believing that because Islam is the religion of the Federation, therefore Islamic legislation and the Islamic bureaucracy are not subject to the supremacy of the Constitution. Some of them spread the poison that because of Islam's position as the official religion, the Government has no duty to protect any other religion. This is in conflict with Islam's respect for diversity and the Federal Constitution's

136 Federal Constitution (2010 Reprint) List I, Item 3(b).

protection for all faiths. The Judiciary should not allow itself to be influenced by such opinion.
