

**Berjaya Books Sdn Bhd & Ors v Jabatan Agama Islam Wilayah  
Persekutuan & Ors**

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL  
REVIEW NO 25–137–06 OF 2012

ZALEHA YUSOF J  
23 MARCH 2013

*Administrative Law — Judicial review — Jurisdiction of High Court — Whether High Court could hear application to quash decisions made and actions taken by Islamic body against Muslims and non-Muslims — Whether High Court had power to interpret Islamic statute especially if it adversely affected fundamental liberties — Whether actions taken by Islamic body unlawful, irrational, mala fide and void — Whether law under which Islamic body acted ultra vires Federal Constitution and other superior federal laws*

The first applicant owned the Borders Bookstore ('Borders'). The second applicant was its general manager of operations and merchandising responsible for the selection of books and magazines displayed and sold at Borders. The third applicant was a store manager at a branch of Borders which was raided by officers from the first respondent ('JAWI') who seized several copies of books entitled 'Allah, Kebebasan dan Cinta' and 'Allah, Liberty and Love' (the publications) authored by a foreign writer. The officers questioned both the Muslim and non-Muslim staff at the branch and ordered some of them to attend at JAWI's office for further questioning and to provide written statements. At the time of the raid and seizure, the publications had not been banned by the Home Ministry which only issued and *gazetted* a prohibition order on the books three weeks after the raid had taken place. A week after the raid, the third applicant was arrested by the first respondent for prosecution under s 13 of the Shariah Criminal Offences (Federal Territories) Act 1997 ('Act 559') for disseminating/distributing/selling publications deemed contrary to *hukum syarak* ('Islamic law'). In their instant judicial review application, the applicants sought to quash the various decisions made and actions taken by JAWI on the grounds, inter alia, that Act 559 and other laws pertaining to the administration of Islamic law applied only to Muslims; that Act 559 itself had no provision banning the publications and that all actions that were taken by JAWI against the applicants before the Home Ministry had formally banned the publications were unlawful and void. The applicants contended that the High Court, and not the Shariah Court, had jurisdiction to hear and determine the instant matter and they sought damages and an order that JAWI discontinue all further action in the matter, including the prosecution of the third applicant, until the judicial review application had been finally disposed of. The respondents contended that as the case concerned

A Act 559, only the Shariah Court had jurisdiction to hear the matter. They also said the judicial review application was misplaced as the action that was taken against the applicants was criminal in nature.

**Held**, allowing the application:

- B (1) The High Court had jurisdiction to hear the instant application which involved the interpretation of laws concerning fundamental liberties. The question of the High Court encroaching into the jurisdiction of the Shariah Court did not arise. Although Act 559 was a law for Muslims, that did not take away the High Court's jurisdiction to interpret it. Item C 4(k) of List 1 of the Ninth Schedule of the Federal Constitution provided that ascertainment of Islamic law and other personal laws for purpose of federal law was a federal matter (see paras 14–16 & 25).
- D (2) Act 559 clearly applied only to persons professing the religion of Islam. The first respondent's actions against the first and second applicants were therefore unlawful, in excess of its powers and irrational. As for the third applicant, she was merely the store manager and not responsible for the selection of books and publications displayed and sold at Borders. Even after knowing these facts, the first respondent continued to prosecute the E third applicant, again showing its actions to be unreasonable and irrational (see paras 30 & 33).
- F (3) The first respondent acted mala fide in carrying out the raid and seizure and in arresting and prosecuting the third applicant despite there being no prohibition order issued by the Home Ministry. The prosecution of the third applicant in the Shariah High Court infringed art 7 of the Federal Constitution as she was being punished for an act which was not punishable by law at the time it was allegedly committed. The second and G third respondents acted mala fide in acting without due care, caution and responsibility by failing to use their dominant position to guide the first respondent on law enforcement measures and in omitting to co-ordinate law enforcement measures in a rational manner to ensure peace, harmony and security between Muslim and non-Muslim communities (see paras 39 & 45).
- H (4) The second respondent had also acted mala fide in rushing to issue the prohibition order on the books in a casual and cavalier fashion almost as an afterthought after the enforcement actions had been taken by the first respondent. It could not be said that the second respondent had properly 'satisfied' himself or considered the full circumstances of the case in a I rational and thoughtful manner as was required of him under s 7 of the Printing Presses and Publications Act 1984 ('Act 301'). He abdicated his duties when he stated in his affidavit that the first respondent could perform the seizures without any prohibition order from the Home Ministry (see para 44).

- (5) The validity of s 13 of Act 559 was questionable as it seemed to be ultra vires Act 301 and the Federal Constitution. Matters pertaining to publications, printing and printing presses fell within the Federal List under Item 21 of List 1 of the Ninth Schedule of the Federal Constitution read together with art 74 of the Constitution. Although Item 1 of List II of that Schedule gave the State Legislature power to create offences against the precepts of Islam by persons professing the religion of Islam and to provide punishment for such offences, the state could not enact laws with regard to matters included in the Federal List. Even if s 13 was a valid law, what amounted to 'contrary to Islamic law' under that section was questionable and too wide. It was necessary for members of the public to be first informed as to what publication was contrary to Islamic law or the precepts of Islam (see paras 34–36). **A**
- (6) The offence under s 13 of Act 559 was the legislation of an offence against the precepts of Islam and therefore legislation upon religious doctrine. Hence, it was not criminal in nature unlike an offence under Act 301. The argument that the action that was taken against the applicants was criminal in nature and therefore could not be judicially reviewed was untenable (see para 24). **B**
- (7) The applicants had succeeded in showing the respondents to be guilty of illegality, abuse of discretionary powers, irrationality, unreasonable exercise of power, unconstitutionality and procedural impropriety (see para 41). **C**

#### **[Bahasa Malaysia summary**

Pemohon pertama memiliki Borders Bookstore ('Borders'). Perayu kedua adalah pengurus besar operasi dan barangan yang bertanggungjawab untuk pemilihan buku-buku dan majalah-majalah yang dipamerkan dan dijual di Borders. Pemohon ketiga adalah pengurus stor di cawangan Borders yang telah diserbu oleh pegawai-pegawai dari responden pertama ('JAWI') yang telah merampas beberapa salinan buku bertajuk 'Allah, Kebebasan dan Cinta' dan 'Allah, Liberty and Love' ('penerbitan tersebut') yang ditulis oleh penulis asing. Pegawai-pegawai yang menyoal kedua-dua staf beragama Islam dan staf bukan beragama Islam di cawangan itu dan mengarahkan beberapa daripada mereka hadir di pejabat JAWI untuk soalan lanjut dan untuk memberikan kenyataan bertulis. Pada masa serbuan dan rampasan itu, penerbitan tersebut tidak diharamkan oleh Kementerian Dalam Negeri yang hanya mengeluarkan dan *mewartakan* perintah larangan untuk buku-buku itu tiga minggu selepas serbuan itu berlaku. Seminggu selepas serbuan itu, pemohon ketiga telah ditangkap oleh responden pertama untuk pendakwaan di bawah s 13 Akta Kesalahan Jenayah Syariah (Wilayah Persekutuan) 1997 ('Akta 559') kerana menyebarkan/mengedar/menjual penerbitan yang dianggap bertentangan dengan hukum syarak ('undang-undang Islam'). Dalam permohonan semakan kehakiman mereka ini, pemohon memohon untuk membatalkan pelbagai **D**

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- A keputusan yang dibuat dan tindakan yang diambil oleh JAWI atas alasan, antara lain, bahawa Akta 559 dan undang-undang lain yang berkaitan dengan pentadbiran undang-undang Islam terpakai hanya kepada umat Islam; bahawa Akta 559 itu sendiri tidak mempunyai peruntukan mengharamkan penerbitan dan bahawa segala tindakan yang telah diambil oleh JAWI terhadap pemohon
- B sebelum Kementerian Dalam Negeri telah secara rasmi mengharamkan penerbitan adalah menyalahi undang-undang dan tidak sah. Pemohon berhujah bahawa Mahkamah Tinggi, dan bukan Mahkamah Syariah, mempunyai bidang kuasa untuk mendengar dan menentukan perkara ini dan mereka memohon ganti rugi dan perintah bahawa JAWI tidak meneruskan
- C semua tindakan selanjutnya dalam perkara itu, termasuk pendakwaan pemohon ketiga, sehingga permohonan semakan kehakiman telah akhirnya dilupuskan. Responden-responden menegaskan bahawa memandangkan kes adalah berkenaan Akta 559, hanya Mahkamah Syariah mempunyai bidang
- D kuasa untuk mendengar perkara itu. Mereka juga berkata permohonan semakan kehakiman tidak sesuai kerana tindakan yang telah diambil terhadap pemohon adalah bersifat jenayah.

**Diputuskan**, membenarkan permohonan:

- E (1) Mahkamah Tinggi mempunyai bidang kuasa untuk mendengar permohonan ini yang melibatkan tafsiran undang-undang berkaitan kebebasan asas. Persoalan Mahkamah Tinggi menceroboh ke dalam
- F bidang kuasa Mahkamah Syariah tidak timbul. Walaupun Akta 559 merupakan undang-undang untuk orang Islam, ia tidak mengambil bidang kuasa Mahkamah Tinggi untuk mentafsirkannya. Perkara 4(k) Senarai 1 Jadual Kesembilan kepada Perlembagaan Persekutuan memperuntukkan penentuan undang-undang Islam dan undang-undang peribadi yang lain bagi maksud undang-undang persekutuan adalah perkara persekutuan (lihat perenggan 14–16 & 25).
- G (2) Akta 559 jelas terpakai hanya untuk orang beragama Islam. Tindakan responden pertama terhadap pemohon-pemohon pertama dan kedua dengan itu menyalahi undang-undang, yang melebihi kuasanya dan tidak rasional. Bagi pemohon ketiga, dia hanyalah pengurus kedai dan
- H tidak bertanggungjawab dalam pemilihan buku-buku dan penerbitan dipamerkan dan dijual di Borders. Walaupun selepas mengetahui fakta-fakta tersebut, responden pertama terus mendakwa pemohon ketiga, sekali lagi menunjukkan tindakannya yang tidak munasabah dan tidak rasional (lihat perenggan 30 & 33).
- I (3) Responden pertama telah bertindak mala fide dalam menjalankan serbuan dan rampasan dan dalam menangkap dan mendakwa pemohon ketiga walaupun tiada perintah larangan yang dikeluarkan oleh Kementerian Dalam Negeri. Pendakwaan pemohon ketiga di Mahkamah Tinggi Syariah melanggar perkara 7 Perlembagaan

- Persekutuan kerana dia telah dihukum kerana sesuatu perbuatan yang tidak boleh dihukum oleh undang-undang pada masa ia didakwa telah dilakukan. Responden-responden kedua dan ketiga telah bertindak secara mala fide dengan bertindak tanpa teliti, berhati-hati dan bertanggungjawab kerana gagal untuk menggunakan kedudukan dominan mereka untuk membimbing responden pertama tentang langkah-langkah penguatkuasaan undang-undang dan dalam meninggalkan untuk menyalurkan langkah-langkah penguatkuasaan dengan cara yang rasional untuk memastikan keamanan, keharmonian dan keselamatan antara masyarakat Islam dan bukan Islam (lihat perenggan 39 & 45).
- (4) Responden kedua juga telah bertindak secara mala fide kerana tergesa-gesa untuk mengeluarkan perintah larangan ke atas buku-buku dengan cara kasual dan angkuh hampir seperti suatu yang difikirkan kemudian selepas tindakan penguatkuasaan telah diambil oleh responden pertama. Ia tidak boleh dikatakan bahawa responden kedua telah dengan betul 'berpuas hati' dengan dirinya atau mengambil kira sepenuhnya kes itu secara rasional dan bijaksana seperti yang dikehendaki olehnya di bawah s 7 Akta Mesin Cetak dan Penerbitan 1984 (Akta 301'). Dia telah melepaskan tugasnya dengan menyatakan dalam afidavitnya bahawa responden pertama boleh melakukan rampasan itu tanpa apa-apa perintah larangan daripada Kementerian Dalam Negeri (lihat perenggan 44).
- (5) Kesahan s 13 Akta 559 adalah dipersoalkan kerana ia seolah-olah menjadi ultra vires Akta 301 dan Perlembagaan Persekutuan. Perkara yang berkaitan dengan penerbitan, percetakan dan percetakan akhbar termasuk di dalam Senarai Persekutuan di bawah Butir 21 Senarai 1 Jadual Kesembilan Perlembagaan Persekutuan yang dibaca bersama-sama dengan perkara 74 Perlembagaan. Walaupun Butir 1 Senarai II Jadual itu memberikan kuasa perundangan negeri untuk mewujudkan kesalahan-kesalahan terhadap ajaran Islam oleh orang yang menganut agama Islam dan memberi hukuman bagi kesalahan itu, kerajaan tidak boleh menggubal undang-undang berkenaan dengan perkara-perkara yang termasuk dalam Senarai Persekutuan. Walaupun s 13 adalah undang-undang yang sah, apa yang membentuk 'bertentangan dengan undang-undang Islam' di bawah seksyen adalah dipersoalkan dan terlalu luas. Adalah perlu bagi orang ramai untuk dimaklumkan terlebih dahulu tentang penerbitan apa yang adalah bertentangan dengan undang-undang Islam atau ajaran Islam (lihat perenggan 34–36).
- (6) Kesalahan-kesalahan di bawah s 13 Akta 559 adalah perundangan untuk kesalahan terhadap ajaran Islam dan oleh itu perundangan berasaskan doktrin keagamaan. Justeru, ia bukan bersifat jenayah tidak seperti

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- A** kesalahan di bawah Akta 301. Hujah bahawa tindakan itu telah diambil terhadap pemohon-pemohon adalah bersifat jenayah dan oleh itu tidak boleh disemak semula secara kehakiman tidak dapat dipertahankan (lihat perenggan 24).
- B** (7) Pemohon-pemohon telah berjaya menunjukkan yang responden-responden adalah bersalah kerana menyalahi undang-undang, menyalah guna kuasa budi bicara, tidak rasional, pelaksanaan kuasa yang tidak munasabah, tidak berperlembagaan dan ketidakwajaran prosedur (lihat perenggan 41).]

**C** **Notes**

For cases on jurisdiction of High Court, see 1(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 349–351.

**D** **Cases referred to**

*Abdul Kahar bin Ahmad v Kerajaan Negeri Selangor (Kerajaan Malaysia, intervener) & Anor* [2008] 3 MLJ 617; [2008] 4 CLJ 309, FC (refd)  
*Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145, FC (refd)

**E** *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374, HL (refd)

*Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1, SC (refd)

**F** *Karam Singh v Menteri Hal Ehwal Dalam Negeri [Minister of Home Affairs], Malaysia* [1969] 2 MLJ 129, FC (consd)

*Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101; [2007] 5 CLJ 253, FC (folld)

*Multi-Purpose Holdings Berhad v Ketua Pengarah Hasil Dalam Negeri* [2006] 2 MLJ 498; [2006] 1 CLJ 1121, CA (folld)

**G** *Potensi Bernas Sdn Bhd v Datu Badaruddin Datu Mustapha* [2009] 8 CLJ 573, HC (refd)

*Siti Hasnah Vangarama binti Abdullah v Tun Dr Mahathir bin Mohamad & Ors* (Civil Appeal No P-01(1M)-606 of 2010), CA (refd)

**H** *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 MLJ 266; [1999] 1 CLJ 481, CA (folld)

*Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354, FC (refd)

**I** *Tan Sri Eric Chia Eng Hock v PP (No 1)* [2007] 2 MLJ 101; [2007] 1 CLJ 565, FC (folld)

**Legislation referred to**

Administration of Islamic Law (Federal Territory) Act 1993 ss 2, 46  
Companies Act 1965

Federal Constitution arts 7, 74, 74(1), (2), 121, 121(1A), 128(1), Ninth Schedule, Federal List, List I, Items 4(k), 21, List II, Item 21  
 Printing Presses and Publications Act 1984 s 7, 7(1)  
 Rules of Court 2012 O 53  
 Syariah Criminal Offences (Federal Territories) Act 1997 ss 1(2), 13

*Rosli bin Dahlan (Bahari Yeow Tien Hong and Muhammad Faizal Faiz bin Mohd Hasani with him) (Lee Hishamuddin Allen Gledhill) for the applicants.*  
*Effandi Nazila bin Hj Abdullah (Senior Federal Counsel, Attorney General) for the respondents.*

**Zaleha Yusof J:**

[1] The first applicant owns the Borders Bookstore ('Borders'), an internationally renowned chain of bookstores. The second applicant is Borders' general manager of operations and merchandising, who is responsible for the selection of titles range of stock of books and publications displayed and sold in Borders. The third applicant is a Borders' employee, who is assigned as the store manager for the Borders branch in The Gardens, Midvalley.

[2] The application for judicial review by the applicants in this instance is against the decisions by the first respondent, Jabatan Agama Islam Wilayah Persekutuan, in raiding and searching the premises of the first applicant and seizing publications therein and examining the first applicant's Muslim and non-Muslim employees on 23 May 2012 and in arresting the third applicant on 30 May 2012 and prosecuting the third applicant on 19 June 2012.

#### BACKGROUND FACTS

[3] On 23 May 2012, the first respondent's officers accompanied by a group of reporters and photographers raided the Borders Bookstore at The Gardens, Midvalley. During the raid, the first respondent's officers seized several books by an international writer, Irshad Manji, titled 'Allah, Kebebasan dan Cinta' and 'Allah, Liberty and Love' ('publications'). At the material time, the publications were not subject to any prohibition order by the Ministry of Home Affairs ('KDN'). The first respondent's officers proceeded to examine the Muslim and non-Muslim employees of Borders, and issued orders compelling them to be further subjected to investigation and examination.

[4] On 29 May 2012, KDN made a prohibition order vide *Gazette Notification* PU(A) 162 known as Printing Presses and Publications (Control of Undesirable Publication) (No 3) Order 2012 ('the said prohibition order') and issued on 14 June 2012, three weeks after the raid. As ordered by the first respondent, the second applicant, the third applicant and another Borders'



A employee, Farihna Mohamed Fadhlullah, attended the first respondent's office on 30 May 2012 to assist with their investigations and to be examined. Though the second applicant is a non-Muslim, in the spirit of co-operation Borders still directed him to be examined.

B [5] However, the third applicant was arrested on that day, 30 May 2012. The applicants made various representations to first respondent, the Minister of KDN, the second respondent and Minister Hal Ehwal Islam, the third respondent, but the first respondent still insisted that it would prosecute the  
C third applicant under s 13 of the Syariah Criminal Offences (Federal Territories) Act 1997 for the offence of disseminating/distributing by way of selling publications deemed contrary to *hukum syarak* ('Islamic Law'). Hence, this application.

D RELIEFS SOUGHT

[6] The following are the reliefs sought by the applicants:

E (a) suatu Perintah Certiorari membatalkan tindakan keputusan oleh pegawai-pegawai Jabatan Agama Islam Wilayah Persekutuan ('JAWI') dalam menyerbu, menggeledah, merampas dan menyita bahan terbitan di premis Pemohon Pertama dan memeriksa pekerja-pekerja Pemohon Pertama pada 23.5.2012 dan juga Perintah Hadir Memberi Keterangan Mengikut seksyen 58(1) Akta Prosedur Jenayah Syariah (Wilayah-Wilayah Persekutuan) 1997 ('Akta Prosedur 1997') bertarikh  
F 23.5.2012 terhadap pekerja-pekerja Pemohon Pertama iaitu Stephen Fung Wye Keong dan Nik Raina binti Nik Abdul Aziz yang merupakan Pemohon Kedua dan Pemohon Ketiga ('Tindakan JAWI') dan suatu Perintah Mandamus supaya JAWI mengemukakan semua rekod dan dokumen berkenaan Tindakan JAWI kepada Mahkamah Yang Mulia ini  
G untuk disemak supaya JAWI diarahkan menarik balik dan membatalkan Tindakan JAWI tersebut;

H (b) suatu Perintah Certiorari membatalkan keputusan tangkapan, Bon Diri bertarikh 30.5.2012 dan tindakan pendakwaan oleh JAWI terhadap Pemohon Ketiga dan selanjutnya suatu Perintah Mandamus supaya JAWI mengemukakan semua rekod dan dokumen berkenaan tangkapan, Bon Diri dan suratcara pendakwaan terhadap Pemohon Ketiga kepada Mahkamah Yang Mulia ini untuk disemak supaya JAWI diarahkan menarik balik dan membatalkan tangkapan, Bon Diri dan pendakwaan terhadap Pemohon Ketiga;

I (c) suatu deklarasi bahawa Akta Kesalahan Jenayah Syariah (Wilayah-Wilayah Persekutuan) 1997 ('AKJS 1997') dan Akta Pentadbiran Undang-Undang Islam (Wilayah-Wilayah Persekutuan) 1993 ('Akta Pentadbiran 1993') adalah akta-akta yang hanya terpakai kepada orang Islam sahaja dan selanjutnya peruntukan tatacara dan



- prosedur untuk pelaksanaan akta-akta tersebut yang terkandung dalam Akta Prosedur 1997 juga terpakai ke atas orang Islam sahaja; **A**
- (d) suatu deklarasi bahawa oleh kerana AKJS 1997 tidak mempunyai peruntukan melarang bahan terbitan yang melanggar hukum Syarak, maka sebarang tindakan penguatkuasaan di bawah seksyen 13 AKJS 1997 hanya boleh dibuat setelah Kementerian Dalam Negeri ('KDN') membuat perintah larangan di bawah Akta Mesin Cetak dan Penerbitan 1984 ('Akta Cetak 1984'), dengan mengeluarkan suatu Perintah Kawalan Hasil Penerbitan Tidak Diingini; **B**
- (e) suatu deklarasi bahawa oleh kerana penguatkuasaan dalam bentuk Tindakan JAWI dibuat pada 23.5.2012 sebelum KDN membuat sebarang perintah larangan di bawah Akta Cetak 1984, maka tindakan JAWI tersebut adalah tidak sah dan terbatal; **C**
- (f) suatu deklarasi bahawa oleh kerana Perintah Mesin Cetak dan Penerbitan (Kawalan Hasil Penerbitan Tidak Diingini) (No.3) 2012 hanya dibuat oleh KDN dalam Warta Kerajaan P.U.(A) 162 pada 29.5.2012, maka Tindakan JAWI terhadap Pemohon Pertama dan Pemohon Kedua dan semua tindakan susulan dalam tangkapan dan pendakwaan terhadap Pemohon Ketiga adalah tidak sah dan terbatal; **D**
- (g) suatu deklarasi bahawa menurut Fasal 121(1) Perlembagaan Persekutuan, Mahkamah yang mempunyai bidangkuasa dan merupakan forum yang layak dan sesuai bagi memberikan tafsiran berkenaan pemakaian Akta Cetak 1984 ke atas AJKS 1997, Akta Pentadbiran 1993, Akta Prosedur 1997 adalah Mahkamah Tinggi Malaya dan bukan Mahkamah Syariah; **E**
- (h) suatu deklarasi bahawa oleh sebab perkara yang dinyatakan di perenggan (g) di atas, JAWI tidak boleh membuat atau meneruskan sebarang pendakwaan terhadap Pemohon Ketiga sehinggalah pelupusan Semakan Kehakiman ini; **F**
- (i) suatu Perintah bahawa segala prosiding lanjut dalam Tindakan JAWI, tindakan tangkapan dan semua tindakan susulan termasuk pendakwaan ke atas Pemohon Ketiga digantung, sehingga pelupusan akhir dan muktamad permohonan untuk semakan kehakiman ini; **G**
- (j) pampasan ditaksirkan di atas aib, trauma, ketakutan, kehilangan, kerugian, kesusahan, kerosakan reputasi dan nama baik yang dialami dan ditanggung oleh Pemohon-Pemohon akibat Tindakan JAWI yang salah ke atas Pemohon Pertama dan Kedua dan tindakan tangkapan dan pendakwaan ke atas Pemohon Ketiga; **H**
- (k) bahawa segala arahan dan perintah yang perlu dan berikutan diberi; **I**
- (l) bahawa kos-kos dalam permohonan ditanggung oleh responden-responden; dan
- (m) relif-relif selanjutnya atau yang lain sebagaimana yang difikirkan sesuai dan berpatutan oleh Mahkamah Yang Mulia ini.

**A** THE PARTIES' ARGUMENTS

[7] Both parties have put forth very lengthy and persuasive arguments which I summarise as follows:

**B****(a) The respondent's opposition****C**

The respondents basically rely on s 13 of the Syariah Criminal Offences (Federal Territories) Act 1997 ('Act 559') and Item 1 of List II of the Ninth Schedule of the Federal Constitution, read together with cl 2 of art 74 of the Federal Constitution; to oppose this application and to support their argument that the action taken by them was valid.

**D**

It is also the argument of the respondents that the pith and substance of s 13 of Act 559 is in respect of religious publications contrary to Islamic Law and it is covered by Item 1, List II of the Ninth Schedule of the Federal Constitution and therefore this court has no jurisdiction to deal with this case which touches on the said s 13.

**E**

Further the respondents also argue that the action of the respondents against the applicants is an action under criminal law and not civil law and therefore is not subject to judicial review by this court.

**F****(b) The applicant's argument****G**

Briefly, the applicants argue that the respondents cannot imply that the Shariah Court has jurisdiction merely because there is s 13 of Act 559 which allows them to take enforcement actions when similar offence has been legislated in s 7 of the Printing, Presses and Publications Act 1984 ('Act 301'). The applicants argue that Act 301 was legislated pursuant to Item 21 of List 1 of the Ninth Schedule read together with cl 1 of art 74 of the Federal Constitution and therefore it has superior legislative capacity as compared to Act 559 which is only applicable to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya.

**H**

Further the applicants contend that what amount to contrary to Islamic Law under s 13 of Act 559 itself is ambiguous and wide. They argue that the offence specified under the said s 13 of Act 559 which is a legislation of an offence against the precepts of Islam is a legislation upon religious doctrine, and is not criminal law per se.

**I**

The applicants argue that this court has jurisdiction to review the decision and action of the respondents which are tainted with illegality, abuse of discretionary powers or process, irrationally, unreasonableness exercise of power, procedural impropriety and unconstitutionally and therefore are unlawful.

## THE RELEVANT LAW INVOLVED

A

[8] Section 13 of Act 559 which read as follows:

(1) Any person who —

- (a) Prints, publishes, produces, records, distributes, or in any other manner disseminates any book, pamphlet, document or any form or recording containing anything which is contrary to Islamic Law; or
- (b) Has in his possession any such book, pamphlet, document or recording.

B

Shall be guilty of an offence and shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

C

[9] Section 7(1) of Act 301 which read as follows:

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If the Minister is satisfied that any publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in any manner prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest, he may in his absolute discretion by order published in the Gazette prohibit, either absolutely or subject to such conditions as may be prescribed, the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of that publication and future publications of the publisher concerned.

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## ISSUE

- (a) Whether this court has jurisdiction to hear this application; and
- (b) whether the respondents' action against the applicants are lawful.

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## DECISION

H

*Whether this court has jurisdiction to hear this application*

[10] Without doubt, this case involves the review of the respondents' action in raiding and searching the premise of the first applicant and seizing publications therein and examining the applicants and subsequently arresting and prosecuting the third applicant. The respondents here are also without doubt, are public authorities and the applicants are aggrieved and have been adversely affected by the respondents' actions.

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A [11] MP Jain in his book, *Administrative Law of Malaysia and Singapore*, (3rd Ed) at p 665 had said the following:

B Today, certiorari goes not only to a body discharging a quasi-judicial functions, but any body determining the rights of the people. The modern trend is that wherever there is power to determine question affecting the rights of persons, there is a duty to act judicially and such a determination is subject to certiorari ... In Malaysia, certiorari has been frequently involved to quash the discretionary decision of Minister and other administrative authorities. Certiorari has thus emerged into a trend remedy for the central of decisions by the administration affecting rights of persons ...

C [12] In a recent case of *Ahmad Jefri bin Mohd Jabri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145, the Federal Court had held, inter alia, as follows:

D ... The High Court has a supervisory jurisdiction over proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties. This process exercise by the High Court is commonly referred to as 'judicial review'. In brief, judicial review provides a means by which judicial control of administrative actions is exercised.

E [13] There are many other authorities on this issue; but I feel the above suffice to support the argument that this court has indeed a supervisory power over the decision and act of those bodies like the respondents in this case. The applicants have come to court and pleaded that they have been legally wronged. Therefore it is not correct for this court to just close its eyes and ignore this as it is this court's duty to uphold, protect and ensure that justice is administer in a regular and effective manner according to law.

F [14] It must also be highlighted that this application involves the interpretation of laws that relate to fundamental liberties. In *Siti Hasnah Vangarama binti Abdullah v Tun Dr Mahathir bin Mohamad & Ors* (Civil Appeal No P-01(1M)-606 of 2010), the Court of Appeal held:

G At the outset we wish to stress here that we do not think that it is the law that a subject-matter of a claim or complaint automatically ceases to be within the jurisdiction of the civil courts just because it has an Islamic law element in it. This is not the intention of art 121(1A) of the Federal Constitution says. Clause (1A) of art 121 states —

H (1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Shariah courts.

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In our view, the correct position in law is that only if the subject-matter of the action is exclusively within the jurisdiction of the Shariah Courts would the subject-matter, by virtue of art 121(1A) of the Federal Constitution, fall outside the jurisdiction of the civil courts.

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...

In conclusion, we wish to say that a civil High Court must be extremely cautious and slow in declining jurisdiction and in coming to the conclusion that the subject-matter of an action before it falls within the exclusive jurisdiction of the Shariah Courts; particularly, in cases involving the fundamental rights of the subjects. In *Abdul Ghani Haroon v Ketua Polis Negara* [2001] 2 MLJ 689 it has been said (at p 697):

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Judges are the protectors of fundamental liberties of the subjects as enshrined in the Constitution. It is a sacred trust that they must vigilantly uphold.

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The same sentiment was repeated by the High Court in *Abd Malek bin Hussin v Borhan bin Hj Daud & Ors* [2008] 1 MLJ 368. Perhaps the following dicta could serve as a useful guide to High Court judges. In *Dato' Kadar Shah Tun Sulaiman v Datin Fauziah Haron* [2008] 4 CLJ 504 the High Court said:

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In my judgment, where there is an issue of competing jurisdiction between the civil court and the Shariah court, the proceedings before the High Court of Malaya or the High Court of Sabah and Sarawak must take precedence over the Shariah Courts as the High Court of Malaya and High Court of Sabah and Sarawak are superior civil courts, being High Courts duly constituted under the Federal Constitution. Shariah Courts are mere state courts established by state law, and under the Federal Constitution these state courts do not enjoy the same status and powers as the High Courts established under the Courts of Judicature Act 1964.

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[15] No doubt that Act 559 is the law for Muslim, but that does not take away the jurisdiction of this court to interpret it; as held by the Supreme Court in *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1, as follows:

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We are of the view that clear provisions should be incorporated in all the state Enactments to avoid difficulties of interpretation by the civil courts. This is particularly important in view of the amendment to art 121 of the Federal Constitution made by Act A704 of 1988. The new cl 1A of art 121 of the Constitution effective from 10 June 1988 has taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the Shariah Courts. But that clause does not take away the jurisdiction of the civil court to interpret any written laws of the states enacted for the administration of Muslim law.

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[16] I also feel the question of whether Act 559 is subject to Act 301 is a

**A** matter under the Federal List and for this court to have the jurisdiction over as provided by Item 4(k) of List 1 of the Ninth Schedule of the Federal Constitution as follows:

(k) Ascertainment of Islamic Law and other personal laws for purpose of federal law.

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[17] In *Abdul Kahar bin Ahmad v Kerajaan Negeri Selangor (Kerajaan Malaysia intervener) & Anor* [2008] 3 MLJ 617; [2008] 4 CLJ 309, the Federal Court held:

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Nowhere in the Constitution is there a provision that the determination of Islamic Law for the purpose of interpreting the Federal Constitution is a matter for the State Legislature to make law to grant such jurisdiction to the Shariah Court. Hence, there is no such provision in the State Enactments to grant such jurisdiction to Shariah Court. In fact, it cannot be done. On the other hand, Item 4(k) of List 1, Federal List of the Ninth Schedule goes further to provide that:

**D**

(k) Ascertainment of Islamic Law and other personal laws for purpose of federal law.

is a federal matter.

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[18] Reliance was made on the provision of art 121(1A) of the Constitution. With respect, this article does not confer jurisdiction on Shariah Courts to interpret the Constitution to the exclusion of this court.

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[19] As I have said a number of times, ending with *Latifah*, that provision was inserted to avoid a situation as in *Myriam v Ariff* [1971] 1 MLJ 265; [1971] 3 LNS 1, not to oust the jurisdiction of this court in matters that rightly belong to it. Before the jurisdiction of this court is excluded, it must be shown that the Shariah Court has jurisdiction over the matter first. That is not the case here. In fact, the Constitution provides to the contrary. Article 128(1) of the Federal Constitution provides:

**G**

128(1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction.

**H**

(a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and

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[20] That, in effect, is what the Majlis Agama Islam is saying that Shariah High Court should determine. That is a matter for this court to decide, not the Shariah High Court. Whether the impugned provisions are within the scope that the State Legislature has jurisdiction to make or not and whether they are valid or not, will be decided when we hear the petition.

[18] Further I would also like to refer to the Court of Appeal in *Sukma*

*Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 MLJ 266; [1999] 1 CLJ 481 wherein the effect of art 121(1A) of the Federal Constitution and Act 559 was discussed. Gopal Sri Ram JCA (as he then was) at p 496 had this to say:

In our view, this part of the appeal turns upon the true interpretation that art 121(1A) is to receive. Does cl (1A) to art 121 mean that the ordinary courts are to have no jurisdiction over all matters, including offences under the Penal Code committed by persons professing the religion of Islam, which are also within the jurisdiction of the Shariah Court? Or, does it mean that the former are not to have jurisdiction over only those matters which are within the exclusive jurisdiction of the latter?

[19] After examining the legislative history of art 121(1A) and various authorities, the learned judge concluded at p 497 as follows:

Accordingly, in the light of the authorities we have referred to earlier in this judgment, we have come to the conclusion that the expression ‘jurisdiction of the Shariah courts’ refers to ‘the exclusive jurisdiction’ of those courts. In other words, if a person professing the religion of Islam does a proscribed act which is an offence both under the Penal Code and the Act, then the courts referred to in art 121(1) will have jurisdiction to try such an offence. It is only in respect of offences under the Act that a Shariah Court may have exclusive jurisdiction. For example, the offence of adultery which is proscribed as an offence under the Act has no equivalent in the Penal Code or other Federal criminal statute. So, if a person professing the religion of Islam commits adultery, then, he or she may be tried only in a Shariah Court.

[20] The offence proscribed by s 13 of the Act 559 is not exclusively within the jurisdiction of the Shariah Court but can also be found in s 7 of the Act 301. Therefore applying the above principle, this court has jurisdiction to also deal with it, even though that is not an issue here. As submitted by the learned counsel for the applicants, while Act 559 applies only to the Federal Territories of Kuala Lumpur and Labuan, and to people professing the religion of Islam, the Act 301 applies throughout and beyond Malaysia. It applies to every person irrespective of race, sex or religion.

[21] In submitting that s 13 of the Act 559 is constitutional, learned SFC refers to Item 1 List II of the Ninth Schedule (see paras 5.2, 5.3 and 5.4) which provides as follows:

Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the DEFINITION and regulation of charitable and religious trusts, the appointment of



A trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution. Organization and procedure of Shariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.

D [22] With due respect to the learned SFC, I agree with learned counsel for the applicants that upon a clear and full reading of Item 1 List II, Ninth Schedule of the FC, it would reveal an important exception that the state cannot enact laws in regard to matters included in the Federal List, which I shall again discuss later.

E [23] On the arguments that the action of the respondents against the applicants is an action under criminal law and not civil law and therefore it is not open to be judicially reviewed by this court, I would like to refer to the Federal Court decision in *Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354, as follows:

F ... it is not easy to draw the dividing line between 'criminal law' and the offences that may be created by the State Legislature. Every offence has a punishment attached to it. In that sense, it is 'criminal law'. However, if every offence is 'criminal law' then, no offence may be created by the State Legislatures pursuant to Item 1, List II of the Ninth Schedule. To give effect to the provision of the Constitution a distinction has to be made between the two categories of offences and a line has to be drawn somewhere. The dividing line seems to be that if the offence is an offence against the precept of Islam, then it should not be treated as 'criminal law'. That too seems to be the approach taken by the Supreme Court judgment in *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119. In that case the issue was whether s 298A of the Penal Code was invalid on the ground that it made provisions with respect to a matter with respect to which Parliament had no power to make ...

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Salleh Abas LP who delivered one of the majority judgments said:

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Surely, a legislation to deny a muslim from holding a certain view or to prevent him from adopting a practice consistent with that view is legislation upon religious doctrine. In its applicability to the religion of Islam, the impugned section must, in my view, be within the competence of State Legislative Assemblies only. See Item 1 (of) List II of the Ninth Schedule to the Constitution.

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...

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

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[24] The offence specified under s 13 of Act 559 — which is a legislation of an offence against the precepts of Islam is a legislation upon religious doctrine and is therefore not a criminal law unlike Printing Act etc. Hence, the argument that the action taken by the respondents against the applicants is criminal in nature and cannot be judicially reviewed by the court, with due respect, cannot hold water.

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[25] To conclude, based on the above, I am satisfied that this court has clear jurisdiction to hear this application under O 53 of the Rules of Court 2012. To me, the question of this court encroaching into the jurisdiction of Shariah Court does not arise at all.

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*Whether the respondents' action against the applicants are lawful.*

[26] The three applicants are a company, a non-Muslim and a Muslim respectively. Section 1(2) of Act 559 clearly provides that the Act shall apply to 'persons professing the religion of Islam'. Although the word 'persons' is not defined, the word 'Muslim' is defined in the Administration of Islamic Law (Federal Territory) Act 1993 (Act 505) under s 2 as follows:

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- (a) a person who professes the religion of Islam;
- (b) a person either or both of whose parents were, at the time of the person's birth, Muslims;
- (c) a person whose upbringing was conducted on the basis that he was a Muslim;
- (d) a person who has converted to Islam in accordance with the requirements of section 85;
- (e) a person who is commonly reputed to be a Muslim; or

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A (f) a person who is shown to have stated, in circumstances in which he was bound by law to state the truth, that he was a Muslim, whether the statement be verbal or written.

B [27] Upon reading s 46 of Act 505 it is clear that it confers criminal and civil jurisdiction to the Shariah High Court over Muslim only.

C [28] In *Potensi Bernas Sdn Bhd v Datu Badaruddin Datu Mustapha* [2009] 8 CLJ 573, the High Court was required to determine whether to declare, among others, that the plaintiff, a company incorporated under the Companies Act 1965, and an island property bought under the plaintiff's name could fall under the jurisdiction of the Shariah Court. The court answered in the negative, holding that a company could not be a Muslim, or have a religion:

D ... In my view the Civil Court is only precluded from interfering if the Shariah Court had acted within its jurisdiction. It is not a blanket prohibition. In the present case it is clear that the Shariah High Court had no jurisdiction to grant the injunction order as the property is located outside the State of Sabah and involving a non Muslim owner.

E ...  
There is no dispute that the plaintiff company consists of both Muslim and non Muslim shareholders. In fact the majority shareholder is a non Muslim. The defendant's contention that the Shariah High Court has jurisdiction over the plaintiff is based solely on the fact that Datu Amir Kahar, a shareholder in the company is a Muslim. This argument is untenable. Clearly the property is not the personal property of Datu Amir Kahar. It is not even registered in his name. It belongs to the company which, being a creature of statute does not profess any religion. Only natural persons can profess a religion. Therefore the injunction order (by the Shariah Court) restraining the plaintiff from dealing with the property is not only manifestly unjust to the non Muslim shareholders of the plaintiff but is also null and void for want of jurisdiction.

G [29] In *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101; [2007] 5 CLJ 253 the Federal Court held at para [49]:

H [49] Until the problem is solved by the legislature, it appears that the only way out now is, if in a case in the civil court, an Islamic law issue arises, which is within the jurisdiction of the Shariah Court, the party raising the issue should file a case in the Shariah Court solely for the determination of that issue and the decision of the Shariah court on that issue should then be applied by the civil court in the determination of the case. But, this is only possible if both parties are Muslims. If I one of the parties is not a Muslim such an application to the Shariah Court cannot be made. If the non-Muslim party is the would-be plaintiff, he is unable even to commence proceedings in the Syariah court. If the non-Muslim party is the would-be defendant, he would not be able to appear to put up his defence. The problem persists. Similarly, if in a case in the Shariah court, a civil law issue eg, land

law or companies law arises, the party raising the issue should file a case in the civil court for the determination of that issue which decision should be applied by the Shariah Court in deciding the case.

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[30] Applying the above principles to the instant case, I am of the view that since Shariah laws are not applicable to non-Muslim, the action taken by the first respondent's against the first and second applicants were clearly unlawful and in excess of their powers. The action is also irrational as how could they investigate the second applicant in relation to an offence pertaining to publications contrary to Islamic law, despite being aware that:

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- (a) the second applicant is a non-Muslim; and
- (b) therefore could not be assumed to have sufficient knowledge of Islamic law or of what is contrary to Islamic law?

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[31] Refer to *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

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[32] Now, on action against the third applicant; it cannot be disputed that the third applicant is a Muslim. However, does that alone justify the first respondent's action against her?

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[33] She is merely a store manager, and the actual person who is responsible for the selection of titles and range of stock of books and publications displayed and sold in the first applicant's bookstore is the second respondent and not her. This fact has not been disputed by the respondents. Being subordinate to the second applicant, she has no authority whatsoever to decide on the selection or distribution of any books or publication in the first applicant bookstore; and yet the first respondent continued to prosecute even when the above facts had been made known to them during the investigation at the first respondent's office on 30 May 2012; as deposed in the applicant's first affidavit. This clearly shows that the respondents' decisions and exercise were so unreasonable and again, irrational.

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[34] Matters pertaining to publications, printing and printing presses fall within Item 21 of List I of the Ninth Schedule read together with art 74 of the Federal Constitution. If we look at Item 1 of List II of the Ninth Schedule, the state is given power to create and punish offences by persons professing the religion of Islam against precept of Islam, except in regard to matters included in the Federal List. No doubt the creation and punishment of offences against the precepts of Islam can be enacted by the State Legislature. However, I must again emphasise, clear reading of Item 1 of List II of the Ninth Schedule as I mention just now, shows that the state cannot enact laws in regard to matters included in the Federal List. Since matters pertaining to publications, printing

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A and printing presses fall within List I ie the Federal List, validity of s 13 of the Act 559 is questionable as it seems to be ultra vires the Act 301 and the Federal Constitution.

B [35] Even if it is a valid law, what amounts to ‘contrary to Islamic Law’ as provided by that provision is also questionable as it is too wide. Members of public must be made known what publication is contrary to Islam law or precept of Islam. Otherwise, as learned counsel for the applicants has submitted, a Muslim employee who works in a bookstore that also sells Christianity Bibles, books on Buddhism or Hinduism or any other religion  
C besides other books, we do have many such bookstores now, would be committing an offence.

D [36] Hence there need to be notification by the respondents as to what books and publications are contrary to Islamic law. It must be noted that at the material time, the publication or book in question was not subject to any publications order by KDN. The publication order was issued only three weeks after the raid. This court must bear in mind the provision of art 7 of the Federal Constitution which provides that no person shall be punishable for an act or omission which was not punishable by law when it was done or made. Section  
E 13 of the Act 559 must be in conformity with the Federal Constitution especially the said art 7. The Court of Appeal in *Multi-Purpose Holdings Berhad v Ketua Pengarah Hasil Dalam Negeri* [2006] 2 MLJ 498; [2006] 1 CLJ 1121 had observed that Parliament does not intend its Act to violate the  
F constitution. Hence, a statute must be read harmoniously with the constitution to avoid any conflict between them which will result in the statute becoming void. Therefore, the Act must be read prospectively to prevent the appellant in that case and those similarly circumstanced from being retrospectively criminally liable.

G [37] Further there is nothing in the said Act 559 which provides for any state religious bodies to prohibit any publication. It only creates an offence of publication. In order to follow and adopt a harmonious interpretation of the laws, the only logical approach is for s 7 of the Act 301 to support s 13 of the  
H Act 559 ie notification to the public first than only the enforcement action. We live in a multi religious and multi racial society. Such approach in my opinion, would be harmonious and avoids any tension, controversy and conflict in our society and law. Refer to *Sukma Darmawan’s* case; the Court of Appeal in *Multi-Purpose Holdings Berhad v Ketua Pengarah Hasil Dalam Negeri* [2006] 2  
I MLJ 498; [2006] 1 CLJ 1121 and also the Federal Court decision in *Tan Sri Eric Chia Eng Hock v Public Prosecutor (No 1)* [2007] 2 MLJ 101; [2007] 1 CLJ 565.

[38] Applying that principle, as it stands now, I am of the opinion that the criminal charge against the third applicant in the Shariah High Court is an infringement of art 7 which is a provision concerning fundamental liberties, guaranteed by our Federal Constitution. A

[39] I also must state here that I agree with learned counsel for the applicant when he submits that the second respondent, by the averments in his affidavit, has abdicated his duties when he stated that the first respondent can perform seizures without any prohibition order from the KDN, as s 7 of Act 301 clearly states that the powers of prohibition with respect to publication lies with the honourable Minister of Home Ministry. Hence, there is a procedural impropriety here which warrant a judicial review. B  
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[40] To conclude, on this second issue, for the reasons that I have stated, I view the respondents' action against the applicants as unlawful. D

#### CONCLUSION

[41] I have perused the cause papers and scrutinised submissions made by the parties. I am satisfied that the applicants have shown existence of illegality, abuse of discretionary powers, irrationality, unreasonable exercise of power, unconstitutionally and that there exists procedural impropriety on the part of the respondents. Looking at the whole scenario of the case, it is hard not to agree with the applicants that there are elements of mala fide in the handling and carrying out of the actions of the respondents. In law, mala fide can be inferred when there was absence of care, caution and a proper sense of responsibility. In *Karam Singh v Menteri Hal Ehwal Dalam Negeri [Minister of Home Affairs], Malaysia* [1969] 2 MLJ 129, the Federal Court held: E  
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... Mala fides does not mean at all a malicious intention. It normally means that a power is exercised for a collateral or ulterior purpose, ie for a purpose other than the purpose for which it is professed to have been exercised ... G

... the words appear to have an extended meaning 'in the serious matter of depriving a citizen of his liberty without trial ...'

... In this connection want of good faith, of course, means no more than that, in the serious matter of depriving a citizen of his liberty without trial, there was absence of care, caution and a proper sense of responsibility. On this interpretation of mala fides there is no difference of opinion ... H  
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- A** ... If it was true that the order came to be made in a casual or cavalier fashion, it cannot properly be said that the Cabinet or the Minister concerned had been 'satisfied'. On the other hand, if the decision was made upon a proper evaluation of the facts and surrounding circumstances and after due deliberation, that was all which could be required for the issue of an order based on subjective satisfaction. In
- B** the final analysis, the issue is one of fact ....

[42] The existence of mala fide on the part of the respondents can be seen from their following action:

- C** (a) on the part of the first respondent when they exercised their dominant position and enforcement powers for a collateral purpose by:
- D** (i) prosecuting the third applicant, who is a Muslim, when they could not do so against the first applicant (as the corporate owner of Borders Bookstore) or the second applicant (as the person responsible over the display and sale of the Publications, and who as a non-Muslim could not be prosecuted under the Act 559; and
- E** (ii) conducting enforcement actions, despite there being no prior prohibition order issued by KDN, and arresting and prosecuting the third applicant for what was a non-offence at the time of the raid.

- F** [43] It can also be inferred when the third applicant was deprived of her liberty without due care, caution and responsibility, when the first respondent arresting and prosecuting her despite knowing that she was neither the owner of the bookstore; nor had control over the selection of publications therein.

- G** [44] On the part of the second respondent, mala fide is inferred when he made an order in a casual or cavalier fashion, in rushing the prohibition order to prohibit the publications, almost as an afterthought, ie only after the enforcement actions by the first respondent on 23 May 2012 and 24 May 2012, and thus it cannot be said that the Minister concerned had been properly 'satisfied' or had considered the full circumstances of the case in a rational and thoughtful manner as would be required of him under s 7 of the Printing Act.

- H** [45] The second respondent and the third respondent can also be said to have acted mala fide by acting without due care, caution and responsibility in failing to use their dominant position over the first respondent or omission to coordinate law enforcement measures in a rational manner to ensure harmony, peace and security between Muslim and non-Muslim communities and in failing to provide guidance to the first respondent on law enforcement measures.
- I**

[46] I have taken into consideration all those reasons and on those grounds



I allow this application in prayer (a)–(i) of encl 6. The applicants agree that the court makes no order as to cost and I therefore make no order as to cost. **A**

*Application allowed.*

Reported by Ashok Kumar **B**

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