Maqsood Ahmad & Ors v Ketua Pegawai Penguatkuasa Agama & Ors

HIGH COURT (SHAH ALAM) — APPLICATION FOR JUDICIAL REVIEW NO 25–56–10 OF 2015
VAZEER ALAM J
14 DECEMBER 2018

Civil Procedure — Judicial review — Application for — Decision to issue letters of agreement and bond compelling appearance before Shariah Court — Freedom of religion — Whether Shariah Courts in Selangor had jurisdiction over offence under s 97(2) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ('ARIE') — Whether Shariah Courts in Selangor had jurisdiction over groups of people declared to be non-Muslims by virtue of a fatwa — Legal position of fatwa — Powers of Chief Syarie Prosecutor — Powers of Chief Religious Enforcement Officer — Administration of the Religion of Islam (State of Selangor) Enactment 2003 ss 61, 62, 74, 78, 79 & 97 — Federal Constitution arts 11, 74 & Ninth Schedule

Islamic Law — Jurisdiction — Shariah Court — Whether Shariah Courts in Selangor had jurisdiction over offence under s 97(2) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 — Whether Shariah Courts in Selangor had jurisdiction over groups of people declared to be non-Muslims by virtue of fatwa

This was a judicial review application of the applicants against the decision of the second respondent who issued letters of agreement and bond compelling them to appear before the Shariah Court on pain of monetary penalty in respect of an offence under s 97(2) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ('the ARIE') which was instituted by the fifth respondent. Pursuant to s 84 of the Courts of Judicature Act 1964, two constitutional questions were transmitted to the Federal Court being: (a) whether the Shariah Courts in the state of Selangor did not have jurisdiction in respect of the offence in s 97(2) of the ARIE; and (b) if the above question was answered in the negative, whether the Shariah courts in the State of Selangor did not have jurisdiction over members of the Ahmadiyya Muslim Jama'at religious group including the applicants. The Federal Court had, without answering the two constitutional questions, remitted the reference back to the High Court on the basis that the High Court had jurisdiction to hear and dispose of the aforementioned issues. The parties were in agreement that the two constitutional questions would dispose of the judicial review. The applicants submitted: (i) s 97(2) of the ARIE was an exercise of legislative

power under Item 9 of the State List was not a precept offence but was in pith and substance an offence in respect of mosques or any Islamic places of worship, therefore it was an offence which could only be tried by the magistrate's court and instituted by the Attorney General. The respondents submitted: (1) s 97(2) of the ARIE came under the category of offences against the 'precepts of Religion of Islam'. The term 'precepts of Religion of Islam' was not merely confined to the basic tenets, but had a much wider meaning that included the teachings in the Al-Quran, the Sunnah of the Prophet of Islam, the consensus of the religious scholars and the authoritative rulings of legitimate religious authorities, for the purpose of ensuring, preserving and/or promoting rights beliefs, right attitudes, right actions and right conduct amongst the follower of Islam; and (2) the Shariah High Court in Selangor had the jurisdiction to declare that a person was no longer a Muslim, hence the applicants must first apply to the Shariah High Court for such a declaration, before any challenge to the jurisdiction over the Shariah Court over the applicants was brought.

Held, allowing the application, with RM25,000 as costs:

(1) Pursuant to art 74(2) read together with the provisions of Item 1 of the State List, the Selangor State Legislative Assembly had powers to make laws with respect to mosques or any Islamic public places of worship, as well as creation and punishment of offences by persons professing the religion of Islam against the precepts of that religion. Further, by virtue of the provisions of Item 9, the State Legislative Assembly had the power to make laws in respect of any of the matters included in the State List or dealt with by state law (see para 13).

(2) In pith and substance, s 97(2) of the ARIE was related to the regulation of mosques. The offence created by s 97(2) was in substance an offence that was against the 'precepts of Islam' for worship or prayers was a fundamental tenet of the religion and the regulating of places of worship was necessary for the purpose of ensuring, preserving and/or promoting rights beliefs, right attitudes, right actions and right conduct amongst the followers of Islam (see para 30).

(3) The doctrinal stand of the state religious authorities so far as the Ahmadis were concerned was that the Ahmadis were non-Muslims. However, in determining the constitutional issue, the court was not concerned to 'adjudicate on the truth of religious beliefs or on the validity of particular rites' of the Ahmadiyya Muslim Jama'at as 'disputes about doctrine or liturgy are non-justiciable if they do not as a consequence engage civil rights or interests or reviewable questions of public law' (see para 52).

(4) Both the *fatwas* issued by the Mufti for Selangor pursuant to s 31(1) of the Administration of Islamic Law Enactment 1989 on 22 June 1998 and on 29 August 1999 were binding on all Muslims in the State of Selangor

and shall be recognised and upheld by the Shariah Courts in the State of Selangor. The result of which an Ahmadi was considered a non-Muslim by the state even though an Ahmadi may consider himself to be a Muslim or a member of an Islamic sect. The effect of the fatwa was that the Ahmadis were considered followers of a separate and distinct religion removed from Islam. The court therefore accepted the contention that a distinctive religious sect like the Ahmadiyya Muslim Jama'at which has had religious rulings with the force of law against its members declaring that they were not Muslims, was to be treated as a distinct religious group equally entitled to rights under art 11 of the Federal Constitution (see paras 54–55).

(5) Article 11 of the Federal Constitution guaranteed the right to every person, including permanent residents, migrant workers, tourists, international students, asylum seekers and refugees, to religion. The right to freedom of belief was absolute, but the right of freedom to manifest belief was qualified (see paras 56–57).

(6) Pursuant to s 2 of the Shariah Courts (Criminal Jurisdiction) Act and s 74(1) of the ARIE, the Shariah Court did not have any jurisdiction over non-Muslims. The powers of the Chief Syarie Prosecutor was exercisable only in respect of any offence that the Shariah Court was competent to try, and that would necessarily mean only offences committed by a Muslim. Further, investigative powers conferred under ARIE to the Chief Enforcement Officer and Religious Enforcement Officers were statutorily circumscribed and were exercisable only on Muslims (see paras 62 & 64–66).

(7) Having declared the Ahmadis as non-Muslims, the state Islamic religious authorities could not continue to dictate the manner in which the Ahmadis carry out their religious practices or restrict the places in which they perform their prayers or religious rites (see para 66).

[Bahasa Malaysia summary

Ini merupakan permohonan semakan kehakiman pemohon-pemohon terhadap keputusan responden kedua yang mengeluarkan surat persetujuan dan bon mendorong mereka untuk hadir dihadapan Mahkamah Shariah, dan sekiranya gagal akan dikenakan penalti kewangan berkenaan dengan satu kesalahan di bawah s 97(2) Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 ('EPAI') yang dimulakan oleh responden kelima. Selaras dengan s 84 Akta Mahkamah Kehakiman 1964, dua soalan perlembagaan telah dihantar ke Mahkamah Persekutuan iaitu: (a) sama ada Mahkamah Shariah dalam Negeri Selangor tidak mempunyai bidang kuasa berkenaan dengan kesalahan di bawah s 97(2) EPAI; dan (b) sekiranya jawapan kepada soalan diatas adalah negatif, sama ada Mahkamah Shariah dalam Negeri Selangor tidak mempunyai bidang kuasa terhadap ahli kumpulan agama

Ahmadiyya Muslim Jama'at termasuklah pemohon-pemohon. Mahkamah Persekutuan telah, tanpa menjawab dua persoalan perlembagaan tersebut, menghantar kembali rujukan tersebut ke Mahkamah Tinggi atas alasan bahawa Mahkamah Tinggi mempunyai budi bicara untuk mendengar dan menyelesaikan isu-isu tersebut. Pihak-pihak bersetuju bahwa sekiranya kedua-dua soalan perlembagaan tersebut dijawab, ianya akan menyelesaikan semakan kehakiman ini. Pemohon-pemohon menghujahkan: (i) s 97(2) EPAI adalah penggunaan kuasa legislatif dibawah Item 9 Senarai Negeri bukanlah satu kesalahan ajaran tetapi inti patinya adalah kesalahan berkenaan dengan masjid atau apa-apa tempat sembahyang Islam, oleh yang demikian, ianya merupakan satu kesalahan yang hanya boleh dibicarakan oleh mahkamah majistret dan dimulakan oleh Peguam Negara. Responden menghujahkan: (1) s 97(2) EPAI merupakan sebahagian daripada kategori kesalahan terhadap 'ajaran agama Islam'. Terma 'ajaran agama Islam' bukan sahaja rukun-rukun asas, tetapi mempunyai makna yang lebih luas termasuklah ajaran Al-Quran, Sunnah Nabi Islam, persetujuan cendekiawan agama dan keputusan autoritatif pihak berkuasa agama yang sah, untuk tujuan memastikan, memelihara, dan menyebar hak beragama, sikap betul, tindakan betul dan perlakuan betul sesama pengikut Islam; dan (2) Mahkamah Tinggi Shariah di Selangor mempunyai budi bicara untuk mengisytiharkan bahawa seorang individu bukan seorang beragama islam, oleh yang demikian, pemohon hendaklah pertama sekali memohon kepada Mahkamah Tinggi Shariah untuk deklarasi sedemikian rupa, sebelum apa-apa mebawa cabaran terhadap bidangkuasa Mahkamah Shariah.

Diputuskan, membenarkan permohonan dengan kos RM25,000:

(1) Selaras dengan perkara 74(2) dibaca bersama peruntukan Item 1 Senarai Negeri, Majlis Undangan Negeri Selangor mempunyai kuasa untuk membuat undang-undang berkenaan dengan masjid atau apa-apa tempat beribadah Islam, dan juga membuat dan menghukum kesalahan oleh orang yang menganut agama Islam terhadap ajaran agama tersebut. Lanjutan itu, selaras dengan peruntukan Item 9, Majlis Undangan Negeri mempunyai kuasa untuk membuat undang-undang berkenaan dengan apa-apa perkara yang termasuk didalam Senarai Negeri atau diuruskan oleh undang-undang negeri (lihat perenggan 13).

(2) Secara inti patinya, s 97(2) EPAI berkenaan dengan pengawalan masjid, kesalahan yang dibuat oleh s 97(2) adalah kesalahan terhadap ajaran agama islam kerana ibadah atau sembahyang adalah perlu untuk tujuan memastikan, memelihara dan menyebar hak beragama, sikap betul, tindakan betul dan perlakuan betul sesama pengikut Islam (lihat perenggan 30).

(3) Pendapat doktrin pihak berkuasa agama negeri setakat mana pengikut Ahmadi adalah berkaitan adalah bahawa pengikut Ahmadi adalah

bukan-Islam. Namun dalam memutuskan isu perlembagaan, mahkamah tidak perlu untuk 'memutuskan kebenaran kepercayaan agama atau kesahihan upacara tertentu Ahmadiyya Muslim Jama'at kerana 'perbalahan berkenaan dengan doktrin atau liturgi merupakan pertikaian yang tidak boleh diadili sekiranya mereka tidak memberi kesan kepada hak sivil atau kepentingan atau persoalan hukum awam yang boleh disemak' (lihat perenggan 52).

(4) Kedua-dua fatwa yang dikeluarkan oleh Mufti Selangor selaras dengan s 31(1) Enakmen Pentadbiaran Agama Islam 1989 pada 22 Jun 1998 dan 29 Ogos 1999 adalah mengikat kepada semua penganut agama Islam dalam negeri Selangor. Akibatnya adalah seorang pengikut Ahmadi dikira sebagai bukan-Islam oleh negeri walaupun seorang pengikut Ahmadi mengira dirinya sebagai seorang beragama Islam atau sebahagian daripada anggota taifah Islam. Kesan fatwa tersebut adalah bahawa pengikut Ahmadi dikira sebagai pengikut agama yang lain dan berbeza daripada Islam. Mahkamah oleh itu, menerima hujahan bahawa taifah asing seperti Ahmadiyya Muslim Jama'at yang mempunyai keputusan agama yang mempunyai kuasa undang-undang terhadap ahli-ahlinya mengisytiharkan bahawa mereka adalah bukan-Islam, hendaklah dilayan sebagai kumpulan agama yang berbeza dan mempunyai hak di bawah perkara 11 Perlembagaan Persekutuan (lihat perenggan 54–55).

(5) Perkara 11 Perlembagaan Persekutuan menjamin hak setiap orang, termasuk pemastautin tetap, pekerja asing, pelancong, pelajar antarabangsa, peminta perlindungan dan pelarian, kepada agama. Hak beragama adalah mutlak, tetapi hak untuk menunjukan kepercayaan adalah berkecuali (lihat perenggan 56–57).

(6) Selaras dengan s 2 Akta Mahkamah Shariah (Bidangkuasa Jenayah) dan s 74(1) EPAI, Mahkamah Shariah tidak mempunyai bidang kuasa terhadap orang bukan Islam. Kuasa Ketua Pendakwa Syarie hanya boleh digunakan terhadap kesalahan yang Mahkamah Shariah boleh bicarakan, dan ianya bermakna hanya kesalahan yang dilakukan oleh seorang Islam. Lanjutan itu, kuasa menyiasat yang diberikan di bawah EPAI kepada Ketua Pegawai Penguatkuasa dan Pegawai Penguatkuasa Agama adalah diberikan secara statutori dan hanya boleh digunakan kepada orang Islam (lihat perenggan 62 & 64–65).

(7) Setelah mengisytiharkan pengikut Ahmadi sebagai bukan Islam, pihak berkuasa agama negeri tidak boleh menentukan cara pengikut Ahmadi menjalankan acara agama mereka atau menghadkan tempat yang mana mereka bersembahyang atau menjalankan upacara agama (lihat perenggan 66).]

Notes

For cases on application for judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5937–5949.

For cases on Shariah Court, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 761–804.

Cases referred to

Abdul Rahim bin Haji Bahaudin v Chief Kadi, Kedah [1983] 2 MLJ 370 (refd)

Acharya Jagadishwaranada Avadhuta and Another v Commissioner of Police, Calcutta and Others [1990] AIR Cal 336, HC (refd)

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680; [1948] 1 KB 223, CA (refd)

Booi Kim Lee v Menteri Sumber Manusia & Anor [1999] 3 MLJ 515, HC (refd)

Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935; [1985] AC 374, HL (refd)

Fathul Bari bin Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Ors [2012] 4 MLJ 281; [2012] 4 CLJ 717, FC (refd)

Halimatussaadiah v Public Service Commission, Malaysia & Anor [1992] 1 MLJ 513, HC (refd)

Harianto Effendy bin Zakaria & Ors v Mahkamah Perusahaan Malaysia & Anor [2014] 6 MLJ 305; [2014] 8 CLJ 821, FC (refd)

Jenny bt Peter @ Nur Muzdhalifah Abdullah v Director of Jabatan Agama Islam Sarawak & Ors and other appeals [2017] 1 MLJ 340; [2016] 1 LNS 1132, CA (refd)

Kamariah bte Ali dan Lain-lain lwn Kerajaan Negeri Kelantan dan Satu Lagi [2005] 1 MLJ 197; [2004] 3 CLJ 409, FC (refd)

Lam Eng Rubber Factory (M) Sdn Bhd v Pengarah Alam Sekitar, Negeri Kedah dan Perlis & Anor [2005] 2 MLJ 493; [2005] 2 AMR 471; [2005] 2 CLJ 159, CA (refd)

Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain [2007] 4 MLJ 585; [2007] 5 CLJ 557, FC (refd)

M Sentivelu a/l R Marimuthu v Public Services Commission Malaysia & Anor [2005] 5 MLJ 393, CA (refd)

Mamat bin Daud & Ors v Government of Malaysia [1988] 1 MLJ 119, SC (refd)

Mamat bin Daud & Ors v Government of Malaysia [1986] 2 MLJ 192; [1988] 1 CLJ Rep 197, SC (refd)

Meeran Lebbaik Maullim & Anor v J Mohamed Ismail Marican and The Straits Printing Works [1926] 2 MC 85 (refd)

Michael Lee Fook Wah v Minister Of Human Resources Malaysia & Anor [1998] 1 MLJ 305, CA (refd)

Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9, SC (refd)

Narantakath Avullah v Parakkal Mammu and Ors AIR 1923 Madras 171 (refd)

PP v Mohd Noor bin Jaafar [2005] 6 MLJ 745, HC (refd)

R (on the application of Williamson) v Secretary of State for Education and Employment [2005] 2 WLR 590, HL (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
R v Big M Drug Mart Ltd (1985) 18 DLR (4th) 321 (refd)
SMC No 1 of 2014 [2015] 2 LRC 583 (refd)
Shergill and others v Khaira and others [2014] 3 All ER 243, SC (refd)
Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications [2009] 6 MLJ 354; [2009] 2 CLJ 54, FC (refd)
Susie Teoh; Teoh Eng Huat v Kadhi of Pasir Mas Kelantan & Majlis Ugama Islam dan Adat Istiadat Melayu, Kelantan, In Re [1986] 2 MLJ 228 (refd)
Syed Mubarak bin Syed Ahmad v Majlis Peguam Negara [2000] 4 MLJ 167; [2000] 3 AMR 3048, CA (refd)
United States v Ballard (1944) 322 US 78 (refd)

Legislation referred to

Administration of Islamic Law Enactment 1989 s 31(1)
Administration of Muslim Law Enactment 1962 of Kedah ss 38(2), 41, 163(1)
Administration of the Religion of Islam (State of Selangor) Enactment 2003 ss 2, 4, 49, 61, 61(3), (3)(b)(x), 62(2), 74, 74(2), 78(2), 79, 97, 97(2)
Constitution of Pakistan art 20
Control of Islamic Religious Schools (Malacca) Enactment 2002 s 5(3)
Courts of Judicature Act 1964 s 84
Federal Constitution arts 11, 11(1), (3), (4), (5), 74, 74(2), 145(3), Ninth Schedule, Federal List, State List, Items 1, 9
Penal Code [IND] s 494
Penal Code s 298A
Rules of Court 2012 O 53 r 2(3)
Subordinate Courts Act 1948 ss 76, 82, 85, 87
Syariah Courts (Criminal Jurisdiction) Act 1965 s 2
Syariah Criminal Offences (Takzir) (Terengganu) Enactment 2001 ss 10, 14
Syariah Criminal Offences Enactment (Selangor) 1995

Aston Paiva (Quratulain Atiqah bt Norzahirulanuar and Michael Cheah Ern Tien with him) (AmerBON & Advocates) for the applicant.
Mohd Syahrizal Syah bin Zakaria (Selangor State Legal Advisor, Selangor State Legal Advisor's Office) for the third, fourth and sixth respondents.
Hasnan bin Hamzah (Hasnan Hamzah) for the second and fifth respondents.

Vazeer Alam J:

[1] This is an application for judicial review by the applicants against the decision of the Ketua Pegawai Penguatkuasa Agama, ie the Chief Religious Enforcement Officer of Selangor ('the second respondent') to issue letters of agreement and bond against each of them; compelling them to appear before the Shariah Court on pain of monetary penalty for proceedings in respect of an offence under s 97(2) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ('the ARIE'); instituted by the Ketua Pendakwa Syarie, ie the Chief Syarie Prosecutor of Selangor ('the fifth respondent').

[2] By way of background, the following facts are relevant. On Friday the 11 April 2014 at around 2pm, officers of the Jabatan Agama Islam Selangor ('JAIS'), ie the fourth respondents, raided premises at No 16-2, Dolomite Park Avenue, Jalan Batu Caves, 68100 Selangor ('the premises') which was being privately used by the applicants to perform their prayers. The raiding officers were informed that all those present at the premises were members of the Ahmadiyya Muslim Jama'at religious group (translated in English as the Ahmadiyya Muslim Community) ('the Jama'at').

[3] Following the raid on the premises:

(a) the applicants were informed that they had not obtained written permission to use the premises for purposes which may only be carried on, in or by a mosque, contrary to s 97 of the ARIE;

(b) all 39 applicants, comprising 36 adult members of the Jama'at and three of their children, who were present at the premises, were arrested, detained and threatened with prosecution in the Shariah Court; and

(c) the applicants were then all issued with letters of agreement and bond ('the bond') by the second respondent, the Chief Religious Enforcement Officer, which compels them to appear before the Shariah Court on pain of monetary penalty.

[4] On 10 July 2014, the applicants filed an application for leave to commence judicial review in respect of issuance of the letters of agreement and bond ('bond') to each of them. On 14 August 2014, leave to apply for judicial review was granted by the High Court in Malaya at Kuala Lumpur. On 15 September 2015, the judicial review proceedings were transferred to the High Court in Malaya at Shah Alam. On 5 February 2016, a stay of proceedings was granted in relation to the bond till the determination of the judicial review.

[5] On 29 September 2017 pursuant to s 84 of the Courts of Judicature Act

1964, the High Court at Shah Alam stayed the applicants' judicial review proceedings, and stated a special case with two constitutional questions and transmitted the same to the Federal Court for its decision.

[6] These two constitutional questions were:

1. In light of Item 9 (read together with the sub-matter 'mosques or any Islamic public places of worship' in Item 1) of the State List in the Federal Constitution and section 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965, whether the Syariah courts in the State of Selangor do not have jurisdiction in respect of the offence in section 97(2) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003.

2. If the above is answered in the negative: In light of 'Fatwa Tentang Ajaran Ahmadiah/Qadiani' gazetted as Jil 51, No 20, Sel PU 15 on 24-9-1998, 'Pindaan Fatwa Tentang Ajaran Ahmadiah/Qadiani' gazetted as Jil 53, No 17, Sel PU 36 on 17-8-2000 and article 11 (read together with Item 1 of the State List) of the Federal Constitution, whether the Syariah courts in the State of Selangor do not have jurisdiction over members of the Ahmadiyya Muslim Jama'at religious group (translated in English as the 'Ahmadiyya Muslim Community') including the Applicants.

The said questions in effect concern the jurisdiction of the Shariah Courts in respect of 'offences' as regards to 'mosques or any Islamic public places of worship', and the Shariah Court's jurisdiction over members of the Ahmadiyya Muslim Jama'at religious group, ie the Jama'at.

[7] However, on 26 March 2018, the Federal Court remitted the said constitutional reference to the High Court without answering the questions on the basis that the High Court has jurisdiction to hear and dispose of these constitutional issues.

[8] Learned counsel on both sides of the divide were of the common view that the answers to these two constitutional questions would in effect dispose off this judicial review application wherein the applicant's were seeking the following substantive remedy:

(a) Declarasi bahawa menurut seksyen 49 Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 dibaca dengan 'Penetapan di bawah seksyen 41 Enakmen Pentadbiran Hukum Syarak bagi Negeri Selangor' bertarikh 11.4.1977 [JPM (U) WP 0172/6/1; PN (PU) 197] yang diwartakan sebagai PU (B) 279 dan 'Fatwa tentang ajaran Ahmadiah/Qadiani di bawah Enakmen Pentadbiran Perundangan Islam 1989' bertarikh 22.6.1998 [JAI Sel 8069/2: PU Sel AGM/0007 Jld 2] yang diwartakan sebagai Sel PU 15 pada 24.9.1998 (Jil 51 No 20. Tambahan No 6),

A Responden-Responden tidak mempunyai bidangkuasa untuk menyiasat dan/atau mendakwa Pemohon-Pemohon atau setiap satu daripada mereka.

(b) Deklarasi bahawa tindakan dan/atau keputusan Responden-Responden dan kakitangan-kakitangannya, pegawai-pegawainya dan/atau agen-agennya untuk menyiasat dan/atau mencadangkan pendakwaan dan/atau mendakwa Pemohon-Pemohon atau setiap satu daripada mereka adalah bercanggah dengan hak-hak Pemohon-Pemohon di bawah Fasal-Fasal 5 dan/atau 8 dan/atau 11 dan/atau Item 1, Senarai II, Jadual Ke-9 Perlembagaan Persekutuan dan/atau seksyen 49 Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003.

(c) Perintah bersifat pembatalan (certiorari) keputusan Responden-Responden dan kakitangan-kakitangannya, pegawai-pegawainya dan/atau agen-agennya untuk menjalankan penyiasatan atau meneruskan penyiasatan dan/atau meneruskan pendakwaan yang dicadangkan terhadap dan/atau mendakwa Pemohon-Pemohon atau setiap satu daripada mereka.

(d) Perintah bersifat pembatalan (certiorari) keputusan Responden-Responden Ke-2, Ke-3 dan Ke-4 untuk mengeluarkan 'Surat Perjanjian dan Jaminan kepada Ketua Pegawai Pengkuatkuasaan Agama' masing-masing bertarikh 11.4.2014 kepada Pemohon-Pemohon Ke-11; 14.4.2014 kepada Pemohon-Pemohon Ke-33; 15.4.2014 kepada Pemohon-Pemohon Ke-2, 3, 4, 7, 9, 14, 19, 20, 35 dan 39; 16.4.2014 kepada Pemohon-Pemohon Ke-10, 15, 18, 21, 22, 23, 25, 26, 27, 29, 34, 36 dan 38; dan 17.4.2014 kepada Pemohon-Pemohon Ke-5, 6, 8, 12, 13, 16, 17, 24, 28, 30, 31, 32, dan 37.

(e) Perintah bersifat mandamus terhadap Responden-Responden untuk melaksanakan penetapan di bawah seksyen 41 Enakmen Pentadbiran Hukum Syarak bagi Negeri Selangor' bertarikh 11.4.1977 [JPM (U) WP 0172/6/1; PN (PU) 197] yang diwartakan sebagai PU (B) 279 dan 'Fatwa tentang ajaran Ahmadiah/Qadiani di bawah Enakmen Pentadbiran Perundangan Islam 1989' bertarikh 22.6.1998 [JAI. Sel 8069/2: PU Sel AGM/0007 Jld 2] yang diwartakan sebagai Sel PU 15 pada 24.9.1998 (Jil 51 No 20. Tambahan No 6), terhadap penyiasatan dan/atau pendakwaan atau pendakwaan yang dicadangkan ke atas kes-kes Pemohon-Pemohon dan selanjutnya untuk membatalkan dan/atau mengugurkan penyiasatan dan/atau pendakwaan atau pendakwaan yang dicadangkan tersebut.

(f) Perintah bersifat larangan (*prohibition*) terhadap Responden-Responden Ke-2, Ke-3 dan Ke-4 dan kakitangan-kakitangannya, pegawai-pegawainya dan/atau agen-agennya daripada menjalankan penyiasatan atau meneruskan penyiasatan terhadap Pemohon-Pemohon atau setiap satu daripada mereka.

(g) Secara alternative perintah bersifat larangan (*prohibition*) terhadap Responden-Responden Ke-2, Ke-3 dan Ke-4 dan kakitangan-kakitangannya, pegawai-pegawainya dan/atau agen-agennya daripada

menjalankan penyiasatan atau meneruskan penyiasatan dan/atau meneruskan terhadap Pemohon-Pemohon atau setiap satu daripada mereka sekiranya Pemohon-Pemohon atau setiap satu daripada mereka mengemukakan bukti atau keterangan kepada Responden-Responden Ke-2, Ke-3 dan Ke-4 bahawa mereka adalah pengikut-pengikut ajaran Ahmadiah/Qadiani.

(h) Perintah bersifat larangan (*prohibition*) terhadap Responden-Responden Ke-2, Ke-3 dan Ke-4 dan kakitangan-kakitangannya, pegawai-pegawainya dan/atau agen-agennya daripada mengambil langkah-langkah untuk mendakwa dan/atau meneruskan pendakwaan yang dicadangkan terhadap Pemohon-Pemohon atau setiap satu daripada mereka.

(i) Deklarasi bahawa kesemua orang (samada warganegara atau bukan warganegara Malaysia) yang mengakui (*professing*) kepercayaan-kepercayaan dan doktrin-doktrin Jemaat Ahmadiyah Muslim atau Ahmadiyya Muslim Community adalah berhak untuk mengakui dan mengamalkan (*profess and practise*) agama mereka di negeri Selangor, dan kesemua undang-undang yang dibuat menurut Jadual Ke-9 Senarai II Item 1 Perlembagaan Persekutuan di negeri Selangor tidak terpakai dan tidak mempunyai kesan ke atas orang-orang yang seumpama.

THE FIRST QUESTION/ISSUE

[9] Issue 1: In light of Item 9 (read together with the sub-matter 'mosques or any Islamic public places of worship' in Item 1) of the State List in the Federal Constitution and s 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965, whether the Shariah Courts in the State of Selangor do not have jurisdiction in respect of the offence in s 97(2) of the ARIE.

The crux of the issue in question 1 is this: whether the Shariah Courts have jurisdiction in respect of offences under s 97(2) of the ARIE or are such offences triable before the magistrate's court.

[10] My answer to question 1 is in the negative, in that, I am of the view that Shariah Courts have jurisdiction in respect of offences under s 97(2) of the ARIE provided that the alleged offender/accused person is a Muslim. And my reasons for that are as follows.

[11] There are several statutory provisions that needs to be looked into for the determination of question 1. The first is the Federal Constitution. Article 74 of the Federal Constitution deals with the legislative powers of Parliament and State Legislative Assemblies, and provides that:

74 Subject matter of federal and state laws

(1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

(2) *Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.*

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

(4) Where general as well as specific expressions are used in describing any of the matter enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.

[12] The Ninth Schedule to the Federal Constitution deals with the Federal and State Legislative List, and in List II — ie the State List, the following is provided:

LIST II — STATE LIST

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

...

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

[13] Hence, pursuant to art 74(2) read together with the provisions of Item 1 of the State List, the Selangor State Legislative Assembly has powers to make

laws with respect to mosques or any Islamic public places of worship, as well as creation and punishment of offences by persons professing the religion of Islam against precepts of that religion. Further, by virtue of the provisions of Item 9, the State Legislative Assembly has the power to make laws in respect of any of the matters included in the State List or dealt with by state law.

[14] Thus, the State List prescribes both a general legislative matter and specific legislative matter with respect to 'offences':

(a) the former is found in Item 9 and phrased 'Creation of offences in respect of any of the matter included in the State List'; and

(b) the latter is found in Item 1 and phrased 'creation and punishment of offences by persons professing the Muslim religion against precepts of that religion, except in regard to matters included in the Federal List'.

[15] Additionally, Parliament has enacted the Syariah Courts (Criminal Jurisdiction) Act 1965 (Revised 1988) ('Act 355') to confer jurisdiction upon courts constituted under any state law for the purpose of dealing with offences under Islamic law. And in s 2 of Act 355 it is provided as follows:

> 2 Criminal Jurisdiction of Syariah Courts
>
> The Syariah Courts duly constituted under any law in a State and invested with jurisdiction over persons professing the religion of Islam and in respect of any of the matters enumerated in List II of the State List of the Ninth Schedule to the Federal Constitution are hereby conferred jurisdiction in respect of offences against precepts of the religion of Islam by persons professing that religion which may be prescribed under any written law:
>
> Provided that such jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years of with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof.

[16] The Selangor State Assembly had pursuant to its legislative powers conferred by the Federal Constitution and Act 355 enacted the ARIE, and particularly s 97 thereof, which provides:

> 97 Restriction on establishment of mosques and penalty
>
> (1) No person shall, without the permission in writing of the Majlis, erect any building to be used or use or cause to be used any building for purposes which may only be carried on in or by a mosque.
>
> (2) Any person who contravene the provisions of subsection (1) shall be guilty of an offence and shall on conviction be liable to fine not exceeding three thousand ringgit or to imprisonment for term not exceeding one year or to both.

And for the purposes of the interpretation of the ARIE, s 2 therein provides that:

2(1) In this Enactment, unless the context otherwise requires —

'Majlis' means the Majlis Agama Islam Selangor;

'mosque' means 'a building' —

(a) used for Friday prayers and other prayers and activities which are enjoined, required, recommended, or approved by religion of Islam; and

(b) the use of which as such is permitted by the Majlis under section 98.

[17] Hence, the effect of s 97 read with s 2 of the ARIE is that:

(a) there is restriction on establishment of Islamic places of worship, ie mosques, in Selangor without the prior written permission of the Majlis Agama Islam Selangor; and

(b) any person who contravenes this restriction shall on conviction be liable to fine not exceeding three thousand ringgit or to imprisonment for term not exceeding one year or to both.

And in this regard, it is worth emphasising that 'mosque' by its definition in the ARIE means a place that is used for Friday prayers and other prayers and activities which are enjoined, required, recommended, or approved by religion of Islam.

[18] Learned counsel for the applicants submits that based on a textual interpretation, the creation of the 'offence' in s 97(2) is an exercise of legislative power pursuant to Item 9 (read together with the sub-matter 'mosques or any Islamic public places of worship' in Item 1) of the State List, and not under the 'precept offences' sub-matter in Item 1. And thus counsel argues that s 97(2) is not a 'precept offence' ie an offence in respect of conduct or behavior by Muslims which are against rules of conduct prescribed by the Muslim religion, but is, in 'pith and substance', an 'offence' in respect of 'mosques or any Islamic public places of worship'.

[19] Therefore, given that s 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355) only confers jurisdiction on the Shariah Courts 'in respect of offences against precepts of the religion of Islam' and not 'in respect of offences with respect to any of the matters enumerated in paragraph 1 of the State List of the Ninth Schedule to the Federal Constitution', learned counsel for the applicants contends that the 'offence' in s 97(2) can only be tried in the magistrates' court, and that prosecution for such offence can only be instituted by the Attorney General and not the Chief Syarie Prosecutor of the State of Selangor. See Subordinate Courts Act 1948, ss 76, 82, 85 and 87, and Federal Constitution, art 145(3) respectively.

[20] In this regard, learned counsel for the applicants has referred to the

High Court case of *Public Prosecutor v Mohd Noor bin Jaafar* [2005] 6 MLJ 745. In that case, the accused person was charged in the magistrates' court for an offence under a state law ie s 5(3) of the Control of Islamic Religious Schools (Malacca) Enactment 2002, with prosecution being conducted by a Syarie prosecutor that was authorised by the deputy public prosecutor. The magistrates' court referred two constitutional questions to the High Court for its transmission to the Federal Court. Low Hop Bing J (later JCA), when considering the reference, held:

> [36] Under s 2 (of the Shariah Courts (Criminal Jurisdiction) Act 1965), the criminal jurisdiction which Parliament has conferred upon the Shariah courts is clearly circumscribed in the sense that it is confined to offences against the precepts of the religion of Islam by persons professing that religion which may be prescribed by any written law.
>
> [37] That brings me to the consideration of the charge in question under s 5(1) of the Enactment, in which no person or body of persons may establish or maintain a religious school (in this case, Tadika Pasti Al Khauthar) unless it is registered in accordance with the provisions of the Enactment.
>
> [38] In my judgment, the nature of the offence under s 5(1) does not belong to the category of offences against the precepts of the religion of Islam and so it is clearly not within the exclusive jurisdiction of the Shariah courts.

[21] Hence, learned counsel for the applicants argues that Act 355 only confers the Shariah Courts with jurisdiction in respect of offences against 'precepts of the religion of Islam', and not in respect of 'mosques or any Islamic public places of worship'; and thus contends that question 1 should be answered in the affirmative: ie that the Shariah Courts in the State of Selangor do not have jurisdiction in respect of the 'offence' in s 97(2) of the ARIE.

[22] However, learned counsel for the second, third and fifth respondents as well as learned counsel for the first and fourth respondents argue otherwise and contend that the offence under s 97(2) of the ARIE is one that comes under the category of offences against 'precepts of the religion of Islam' and in this regard has referred to the pronouncement of the Federal Court in the case of *Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354; [2009] 2 CLJ 54 where the term 'precepts of the religion of Islam' was explained. In *Sulaiman bin Takrib* several appeals were heard together and in one of the appeals the appellant was charged under ss 10 and 14 of the Syariah Criminal Offences (Takzir) (Terengganu) Enactment 2001 ('the SCOT').

[23] Section 10 of the SCOT provides:

> 10 Any person who acts in contempt of religious authority or defies, disobeys or disputes the orders or directions of the Duli Yang Maha Mulia Sultan as the Head of the religion of Islam, the Majlis or the Mufti, expressed or given by way of fatwa,

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.

[24] Whilst, s 14 of the SCOT provides:

14(1) Any person who:

(a) prints, publishes, produces, records, distributes or in any other manner disseminates any book, pamphlet, document or any form of recording containing anything which is contrary to Hukum Syarak; or

(b) has in his possession any such book, pamphlet, document or recording, 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.

(2) The Court may order that any book, pamphlet, document or recording referred to in subsection (1) be forfeited and destroyed, notwithstanding that no person may have been convicted of an offence connected therewith.

[25] The main substance or elements of the offences in ss 10 and 14 of the SCOT, were:

(a) 'acting contrary to fatwa'; and/or

(b) 'having possession of material contrary to Hukum Syarak'.

One of the issues in contention raised by the appellants in *Sulaiman bin Takrib* was that the power to create offences under Item 1 of List II of the Ninth Schedule to the Federal Constitution was limited to the creation of offences against 'the precepts of Islam' and that as the offences under ss 10 and 14 of the SCOT were not 'offences against the precepts of Islam', the State Assembly was not empowered to enact these provisions.

[26] The Federal Court having considered extensive arguments as well as having had the benefit of the opinion of three eminent scholars of Islam on the matter, held as follows:

(a) through Abdul Hamid Mohamad CJ:

> [51] It was argued that the offences created by the impugned sections are not offences against the precepts of Islam. As has been said earlier, one of the limits imposed by the Constitution on the State Legislative Assembly in creating offences under the Item 1, List II is that the offences must be offences against the precepts of Islam. So, the question is what is the meaning of the words 'precepts of Islam' as used in the Constitution. It is important to remember that this Court is interpreting the Constitution, not writing a thesis on the 'precepts of Islam'.
>
> [52] There is no definition of the word 'precepts' in the Federal Constitution.

The Malay translation of the Constitution uses the word 'perintah'. The *Istilah Undang-Undang* (3rd Ed, Sweet & Maxwell Asia) uses the word 'arahan' for 'precepts'. The *Kamus Inggeris Melayu Dewan* uses the word 'ajaran'. According to *Siri Glosari Undang-Undang* of the Dewan Bahasa dan Pustaka 'precepts' means 'perintah', ie, 'Suruhan dan Larangan melakukan sesuatu, contohnya dalam agama'. According to the *Oxford English Dictionary* the word 'precept' means 'a general command or injunction; an instruction, direction or rule for action and conduct; esp an injunction as to moral conduct; a maxim. Most commonly applied to divine commands ...'. In my view, the meanings of the word 'precept' quoted above point to the same thing as described in greater detail in the *Oxford English Dictionary*. I accept them all.

...

[57] Whatever their backgrounds are, let us look at their opinions. Tan Sri Sheikh Ghazali starts of by saying:

> *'Precepts of Islam' bermaksud ajaran-ajaran atau perintah-perintah agama Islam sebagaimana yang terkandung di dalam Al-Quran dan As-Sunah. Ia bukan hanya terhad kepada rukun Islam yang lima*. Ajaran Islam meliputi 'Aqidah, Syariah dan Akhlak'.

[58] Professor Dr Mohd Kamal Hassan opines, inter alia, as follows:

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

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

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

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

(b) through Zaki Tun Azmi PCA (as he then was):

[104] The other issue which I think is the crux of this case is the interpretation of the word 'precepts' in Item 1 of List II (the State List) of the Federal Constitution. The State Enactments, AIRA 1986, AIRA 2001 and SCOT as well as SLAT derive their validity and powers originally from the Federal Constitution. In particular, the legislative power of the State Assemblies is provided for under art 74 of the Federal Constitution. Again, the relevant paragraph of the Second List in the Ninth Schedule is para 1 relating to Islamic law and personal and family law of persons professing the religion of Islam. In particular, the meaning of the word 'precepts' from the text quoted earlier ie, '... creation and punishment of offences by persons professing the religion of Islam against the precepts of that religion except in regard to matters included in the Federal List ...' is relevant to the issue before us.

[105] *If the precepts of Islam, as contended by the petitioner, are only the five pillars of Islam, then all the other previous arguments by the respondent will all crumble*. This court is not an expert in Islamic law. It therefore has to rely on opinions given by experts in this field. In our present case, three experts have given their opinions. They are Tan Sri Sheikh Ghazali bin Hj Abdul Rahman, Professor Dr Mohd Kamal bin Hassan and Professor Muhammad Hashim Kamali. Their curriculum vitae are spelt out in detail in the judgment of my learned Chief Justice. *All the three, in principle, unanimously agree that the term 'precepts of Islam' includes the teachings in the Al Quran and As Sunnah*. The Chief Justice has also gone at great length in his judgment to discuss and come to a conclusion why he holds that the *precepts of Islam go beyond the mere five pillars of Islam*. I agree with their opinions and the conclusion arrived at by the learned Chief Justice and I have nothing to add on this issue.

The long and short of the Federal Court's judgment was that the 'term percepts of Islam' was not merely confined to the basic tenets, ie the five pillars of Islam,

but had a much more wider meaning that includes the teachings in the Al Quran, the Sunnah of the Prophet of Islam (ie his teachings and traditions), the consensus of the religious scholars (*ijma*) and the authoritative rulings (*fatwas*) of legitimate religious authorities, for the purpose of ensuring, preserving and/or promoting right beliefs, right attitudes, right actions and right conduct amongst the followers of Islam.

[27] The decision in *Sulaiman bin Takrib* was subsequently reaffirmed by the Federal Court in the case of *Fathul Bari bin Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Ors* [2012] 4 MLJ 281; [2012] 4 CLJ 717 where Arifin Zakaria, CJ held that the term 'precepts of Islam' must be given a wide and liberal interpretation and stated as follows:

> [20] Further, we are of the view that the term precepts of Islam must be accorded a wide and liberal meaning. This is in line with the authorities on the interpretation of the heads or fields of the legislation as appearing in the legislative lists of the Federal Constitution. As was observed by Gopal Sri Ram JCA (as he then was) in the case of *Ketua Pengarah Jabatan Alam Sekitar & Anor* as follows:
>
> > It is a well settled principle of constitutional interpretation that every entry in each Legislative List must be given its widest significance and that its scope cannot be curtailed save to the extent necessary to give effect to other legislative entries: *State of Bombay v Narottamdas Jethabhai* AIR 1951 SC 69.
> >
> > In *JC Waghmare & Ors v State of Maharashtra* AIR 1978 Bom 119 at p 137, Tulzapurkar Ag CJ, when delivering the judgment of a strongly constituted Full Bench of the Bombay High Court, after a review of the leading authorities upon the subject, summarised the applicable principles as follows:
> >
> > > From the above discussion, the following general principles would be clearly deducible: (a) entries in the three Lists are merely legislative heads or fields of legislation; they demarcate the area over which the appropriate legislatures can operate; (b) allocation of subjects in the Lists is not by way of scientific or logical definition but is a mere enumeration of broad and comprehensive categories; dictionary meaning of the words used, though helpful, is not decisive; (c) entries should be interpreted broadly and liberally, widest amplitude being given to the words employed, because few words of an entry are intended to confer vast and plenary powers; (d) entries being heads of legislation, none of the items in the Lists is to be read in a narrow and restricted sense but should be read broadly so as to cover or extend to all cognate, subsidiary, ancillary or incidental matters, which can fairly and reasonably be said to be comprehended in it; (e) since the specific entries in the three Lists between them exhaust all conceivable subjects of legislation, every matter dealt with by an enactment should as far as possible be allocated to one or the other of the Entries in the Lists and the residuary Entry 97 in List I should be resorted to as the last refuge; and (f) if entries either from different Lists or from the same List overlap or appear to conflict with each other, every effort is to be made to reconcile

A and bring out harmony between them by recourse to known methods of reconciliation.

It is also well settled that the phrase 'with respect to' appearing in art 74(1) and (2) of the Federal Constitution — the provision conferring legislative power upon the Federal and State Governments respectively — is an expression of wide import. As observed by Latham CJ in *Bank of New South Wales v The Commonwealth* [1948] 76 CLR 1 at p 186, in relation to the identical phrase appearing in s 51 of the Australian Constitution which confers Federal legislative authority:

> A power to make laws 'with respect to' a specific subject is as wide a legislative power as can be created. No form of words has been suggested which would give a wider power. The power conferred upon a Parliament by such words in an Imperial statute is plenary — as wide as that of the Imperial Parliament itself: *R v Burah* (1878) 3 App Cas 889; *Hodge v R* (1883) 9 App Cas 117. But the power is plenary only with respect to the specified subject.
>
> Although Latham CJ was dissenting on that occasion, we are unable to see any criticism in the majority judgments in relation to what was said in the foregoing passage. Indeed, a reading of all the judgments in that case reveals that there was no disagreement between their Honours upon the applicable interpretative principles. Where the majority parted company with the learned Chief Justice was only with regard to the consequence that resulted on an application of those principles to the particular statute that was the subject of challenge.

[28] The principle of constitutional interpretation that every entry in each Legislative List must be given its widest significance, which was applied by the Federal Court in *Fathul Bari Mat Jahya,* is explained in *NS Bindra Interpretation of Statute* (10th Ed) at pp 1297, 1298 and 1302 as follows:

> The function of lists is not to confer power, they merely demarcate the legislative fields, and so must, as far as possible, be given a broad and comprehensive interpretation. The doctrine of 'liberal interpretation' has a special application in interpreting the ambit of the various entries in the legislative lists included in Sch VII of our Constitution. None of the items in the lists is to be read in a narrow or restricted sense. Each general word should be held to extend to all ancillary or subsidiary matters, which can be fairly and reasonably be said to be comprehended in it. It is, therefore, clear that in construing an entry in a list conferring legislative powers, the widest possible construction according to their ordinary meaning must be put upon the words used therein.
>
> ... Entries to the legislative lists are not sources of legislative power but are merely topics or fields of legislation and must receive a liberal construction, inspired by a broad and generous spirit and not in narrow and pedantic sense. The expression 'with respect to' in art 246 brings in *the doctrine of 'pith and substance' in the understanding of the exertion of the legislature power, and wherever the question of legislative competence is raised, the test is whether the legislation looked as a whole is substantially 'with respect to' the particular topic of the legislation. If the legislation has a substantial and not merely a remote connection with the entry, the matter may well be taken to be a legislation on the topic*.

[29] The afore stated 'pith and substance' rule was first applied by the Supreme Court in *Mamat bin Daud & Ors v Government of Malaysia* [1986] 2 MLJ 192; [1988] 1 CLJ Rep 197 in interpreting the Federal Constitution. In that case, it was contended by the petitioners that s 298A of the Penal Code was ultra vires the Constitution in that it 'is null and void because in pith and substance it is a law on the subject of religion on which Parliament is not competent to legislate'. On the other hand, it was contended by the government that 'Parliament has the necessary constitutional competence to enact the law since the subject matter is not in fact 'religion', but 'Public Order' under Item 3(a) (of the Federal List)'. By a majority consisting of Mohd Azmi SCJ, George Seah SCJ and Salleh Abas LP (concurring), the Supreme Court agreed with the contention of the petitioners. What is of relevance in *Mamat Daud*'s case is its exposition of the 'pith and substance' rule. Both Mohd Azmi SCJ (in the majority) and Eusoffe Abdoolcader SCJ (dissenting) provide an elegant illustration of the nature and application of the rule:

> In determining whether s 298A in pith and substance falls within the class of subject matter of 'religion' or 'public order', it is the substance and not the form or outward appearance of the impugned legislation which must be considered. The impugned statute may even declare itself as dealing with religion, but if on investigation of the legislation as a whole, it is in fact not so, the Court must so declare. Conversely, it is not sufficient for the impugned legislation to declare itself as dealing with public order, if in substance, it seeks to deal directly or indirectly with religion or religious law, doctrine or precept, for no amount of cosmetics used in the legislative make-up can save it from being struck down for pretending to be what it is not. The object, purpose and design of the impugned section must therefore be investigated for the purpose of ascertaining the true character and substance of the legislation and the class of subject matter of legislation to which it really belongs. But the court should not be concerned with the motives which induced the legislature to exercise its power, nor should the court be concerned with the draconian nature of the legislation ... (per Mohd Azmi SCJ, at p 200b–d)
>
> This rule envisages the examination of the legislation in question as a whole to ascertain its true nature and character in order to determine into what List it falls.
>
> ...
>
> The doctrine of pith and substance introduces a degree of flexibility into the otherwise rigid scheme of distribution of powers, the *raison d'etre* underlying the rule being that if every legislation were to be invalid, however slight or incidental the encroachment on to the other field, then the power of each legislature would be drastically circumscribed to deal effectively with the subjects entrusted to it.
>
> ...
>
> The categories of legislative power specified in the Federal and State Lists must in some circumstances inevitably overlap, and therefore a challenged law with features of meaning relevant to both Federal and State categories of laws has to be classified by that feature of it deemed most important for purposes of the division of legislative powers designated in the Constitution (per Eusoffe Abdoolcader SCJ, at pp 209i–210a, 210b–c and 210h).

[30] Applying the above principles of constitutional interpretation, I find that in pith and substance, s 97(2) of the ARIE is related to the regulation of mosques, ie places used by Muslims for Friday prayers and other prayers and activities which are enjoined, required, recommended, or approved by religion of Islam. And of course the obligatory prayers are one of the five pillars of Islam. Hence, I find that the offence created by s 97(2), ie the contravention of the restriction on establishment of mosques in Selangor without the prior written permission of the Majlis Agama Islam Selangor, is in substance an offence that is against the 'precepts of Islam', for worship or prayers is a fundamental tenet of the religion, and the regulating of places of worship is necessary for the purpose of ensuring, preserving and/or promoting right beliefs, right attitudes, right actions and right conduct amongst the followers of Islam.

[31] In this respect, further regard may be had to Salleh Abas LP's majority pronouncement in *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119 (SC) to the effect that under art 11(4) of the Federal Constitution, the States are empowered to make laws to regulate the practice of Islam, which would in my opinion include the control and regulation of mosques. And in this regard, Salleh Abas LP said:

> I accept that to allow any Muslim or groups of Muslims to adopt divergent practices and entertain differing concepts of Islamic religion may well be dangerous and could lead to disunity among Muslims and, therefore, could affect public order in the states. But the power to legislate in order to control or stop such practices is given to states as could be seen from art 11 cl (4):
>
> > (4) State law and, in respect of the Federal Territory, federal law may control or restrict the propagation of any religious doctrine or belief among peoples professing the religion of Islam
>
> It is they alone which can say what should be the proper belief, rule and concept of Islamic religion or what should not be its interpretation and what should be the rule in a particular given situation or case. *Clause (4) is a power which enables states to pass a law to protect the religion of Islam from being exposed to the influences of the tenets, precepts and practices of other religions or even of certain schools of thoughts and opinions within the Islamic religion itself.*

[32] And further by virtue of the interpretation of the word 'precepts of Islam' by the Federal Court in *Sulaiman bin Takrib* and *Fathul Bari*, and Item 9 (read together with the sub-matter 'mosques or any Islamic public places of worship' in Item 1) of the State List in the Federal Constitution and s 2 of Act 355, I find that the Shariah Courts in the State of Selangor do have jurisdiction in respect of the offence in sub-s 97(2) of the ARIE, if such an offence is committed by a Muslim. Hence, I find that sub-s 97(2) is consistent with Item I of the State List, Ninth Schedule, Federal Constitution, and therefore constitutional. Thus, my answer to question 1 is in the negative.

THE SECOND QUESTION/ISSUE

[33] Issue 2: If the above is answered in the negative: In light of 'Fatwa Tentang Ajaran Ahmadiah/Qadiani' *gazetted* as Jil 51, No 20, Sel PU 15 on 24 September 1998, 'Pindaan Fatwa Tentang Ajaran Ahmadiah/Qadiani' *gazetted* as Jil 53, No 17, Sel PU 36 on 17 August 2000 and art 11 (read together with Item 1 of the State List) of the Federal Constitution, whether the Shariah Courts in the State of Selangor do not have jurisdiction over members of the Ahmadiyya Muslim Jama'at religious group (translated in English as the 'Ahmadiyya Muslim Community') including the applicants.

[34] The crux of question 2 is: in light of the excommunication of Ahmadis from the fold of the state sanctioned Muslim religion in Malaysia by the relevant Islamic religious authorities, whether the Shariah Courts have jurisdiction over such persons. I have answered question 2 in the affirmative, ie that the Shariah Courts do not have jurisdiction over the Ahmadis. My reasons for doing so are as follows.

[35] In order to answer question 2, it would be imperative to take a look at the Ahmadiyya Muslim Jama'at and their historical presence in Malaysia, particularly in light of the right to freedom of religion enshrined in art 11 of the Federal Constitution.

[36] In 1889, the Ahmadiyya Muslim Jama'at religious group ('the Jama'at') was founded by Mirza Ghulam Ahmad of Qadian, Punjab, India. Members of the Jama'at refer to themselves as Ahmadis or Ahmadi Muslims. Ahmadis are sometimes referred to as 'Qadiani' (in reference to the birthplace of Mirza Ghulam Ahmad). It has become a worldwide religious movement, and the official headquarters of the Jama'at today is in London, England.

[37] Due to crucial theological doctrinal differences, some Islamic religious authorities consider Ahmadis apostates, whilst some consider them 'kafir' or unbelievers, and have by decree or fatwa excommunicated them from main stream or orthodox Islam.

[38] Historical records show that Ahmadis have lived in British Malaya and Singapore since the turn of the last century. This is confirmed by Farish A Noor in his book *Islam on the Move* (Amsterdam University Press, 2012):

> The Ahmadis first came to British Malaya in 1906, and almost all of them were members of the Indian diaspora who had migrated to British Malaya to seek out new career opportunities as functionaries in the colonial civil service and security forces, or to establish their own commercial enterprises in the Straits Settlements of Penang, Malacca and Singapore ... In British Malaya, most were of the Qadiani branch ... Efforts by the Qadianis to spread their teachings and gain followers were

> fruitless, and up to Malaya's independence in 1957, the Qadianis were largely regarded as outsiders who were alien both in terms of their origins as well as their beliefs.
>
> ...
>
> Despite the difficulties faced by 1949, the first Jama'at of the Qadianis in British Malaya was set up in Jeram, Selangor ... Soon after, the Qadianis built their first mosque in the area and in 1954 they were given their own burial ground. ... Shortly after Malaya gained independence *in 1957, the small Qadiani settlement in Kampung Baru, Kuala Lumpur found themselves surrounded by Malay-Muslim settlers who demanded that they be evicted onthe grounds that they were not Muslims. In 1959 the newly independent Malayan government under the first prime minister Tunku Abdul Rahman tried to settle the dispute by awarding the Qadianis eight new lots of land in hitherto unused and undeveloped area around Kampung Nakhoda. It was in 1963 that the Qadianis were re-located there and their first mosque set up.* (Emphasis added.)

[39] Following the resettlement of the Ahmadiyya community in 1963 to Kampung Nakhoda, Batu Caves, they have carried out their religious activities on the several plots of land that was given to them by the Malaysian government of the day. Presently, the Jama'at is based in the same locality, ie in a three storey building at No 11A, Jalan Nakhoda Kanan, Kampung Nakhoda, 68100 Batu Caves, Selangor. The Ahmadis refer to this building as 'Bait-us-Salam', which before 24 April 2009 was used by them as a temporary place of worship. Since 24 April 2009, the Majlis Agama Islam Selangor ('MAIS') had prohibited the Ahmadis from using the 'Bait-us-Salam' as their place of worship, as Friday and daily obligatory prayers were conducted at the premises, and was thus considered a mosque by MAIS.

[40] The doctrinal beliefs of the Ahmadis came for consideration by the Singapore High Court in *Meeran Lebbaik Maullim & Anor v J Mohamed Ismail Marican and The Straits Printing Works* [1926] 2 MC 85 (HC). In that case, the plaintiffs, who say they are Mohamedan Tamils, claimed for damages for libel which the defendants published concerning them as Ahmadis in the Tamil language, which was distributed in Singapore in May 1925. It was alleged that the words of the libel represent the plaintiffs to be 'disseminators of false doctrines, deceivers, misguided illiterate fools, hypocrites, liars and unbelievers behind whom it is unlawful in Mohamedan law for any Muslim to pray, to whom no Muslim woman should be joined in marriage, from whom any Muslim married to them is de facto divorced and whose bodies should not be interred in any Muslim burial ground' (at p 86H–I). Deane J, in finding for the plaintiffs, stated:

> In view therefore of these circumstances and bearing in mind that Mirza was born and lived his life in India remote from Singapore can the plaintiffs fairly be saddled with the heresies imputed to him? Whether as a matter of fact the Ahmediyas are Kafirs or not does not really seem to me to be material in this case, if necessary, to decide the question I should have no hesitation in deciding it as it was decided and

on the same grounds as it was decided in the case of *Narantakatt Avallah v Purakkal Mamu*. The overwhelming evidence in this case is that the fundamentals of Mohammedanism are believed in by the Ahmediyas who are therefore entitled to be called Mohammedans and not Kafirs and that the points on which they differ from the orthodox are on the traditions which have never been considered fundamental. (at pp 102–103)

[41] The case of *Narantakath Avullah v Parakkal Mammu and Ors* AIR 1923 Madras 171, referred to by the Singapore High Court in *Meeran Lebbaik Maullim*, concerned s 494 of the Indian Penal Code which makes bigamy an offence. In that case, a petition for criminal revision was filed to determine if the petitioner's acceptance of the Jama'at's doctrines made him an apostate from Mahomedanism (the proper term is Islam), resulting in a dissolution of his Muslim marriage and thus becoming a defence to the petitioner's wife who had remarried thereafter (at p 171). In determining that a Muslim does not become an apostate by merely accepting the doctrines of the Jama'at, and that Ahmadis are merely a sect of Muslims (p 176), the High Court held:

Turning now to the question of apostasy raised, it is undoubtedly a question of Mahomedan theology to say what deviation from the recognized doctrines of Mahomedanism would amount to apostasy; but as civil rights and legal statuses of parties are based on its decisions, we must decide it ourselves. The accused has called 3 witnesses of the orthodox party who assert themselves to be men learned in Mahomedan theology and who say that the adoption by a Mahomedan of the tenets of Gulam Ahamed Mirza, the founder of the sect of Ahamadiyans amounts to apostasy under that law; but we cannot accept their opinion as settling the question as argued for the accused, particularly as they are interested as orthodox Mahomedans in denouncing the members of the new sect as unbelievers and as they have not given satisfactory reasons for their opinions. ... [W]e must therefore consider the doctrines of Ahamadiyans and see whether their adoption by Mahomedans would amount to heresy and make them apostates or murtads and put them outside the pale of Mahomedanism. ... [I]in doing this we must take the doctrines as propounded by Ahamad himself and accepted by his followers and not the distorted version of them as given by their opponent. ... It begins by saying:

> We are Muslims by the Grace of God, Mustapha (the Holy Prophet of Arabia) is our leader and guide ... The wine of our spiritual knowledge is from the cup of the book of God which is called the Quran.

A perusal of what is stated in the pamphlet shows clearly that the Ahamadiyans subscribe to the Kalma that there is no God but one God and Mahomed is His Prophet and unreservedly accept the prophethood of Mahomed and the supreme authority of the Quran. In fact it would seem that they differ from the orthodox Mahomedans only in some six points which are set out in the pamphlet and also by the learned Judge in his judgment.

I agree with my learned brother in thinking that these differences are not sufficient to justify us in holding that that the Ahamadees are not Mahomedans but apostates. As already stated, they accept the Kalma, the prophethood of Mahomed and the authority of the Koran. These undoubtedly are the essential conditions for a person

A to be a Mahomedan, and they are complied with by the Ahamadees. That would seem to make them Moslems governed by the Mahomedan Law. Mr Ameer Ali says in his book on Mahomedan Law, 4th Edition, Vol II, page 36 that:

> As any person who professes the religion of Islam, in other words, accepts the unity of God and the prophetic character of Mahomed is, a Moslem subject and is subject to the Musalman Law. So long as the individual pronounces the Kalma of Tauhid. the creed of Islam, it is not necessary for him or her to observe any of the rights and ceremonies or to believe in particular doctrines which imply Imam or belief,

B

C and again on page 112:

> Every person who acknowledges the Divine Unity and the messengership of the Arabian prophet is regarded as within the pale of Islam; nothing more is required.

D To the same effect is the opinion of Sir Abdur Rahim in his Mahomedan Jurisprudence, page 249 where he says the Islamic faith consists in acknowledging the authority of one God and Law-giver and the truth of Mahomed's mission as his prophet. ...[T]he learned Counsel for the petitioner has brought to our notice one recent decision in which the very question raised before us as to the status of Ahamadees seems to have been raised, viz., the case of *Khalil Ahmed v Malik Istafi* E (1917) 2 Pat LJ 108. It was expressly ruled there that the sect known as Ahamadees are Mahomedans notwithstanding their pronounced dissent on several important matters of doctrine from the orthodox Mahomedan faith. In view of these authorities which I accept it follows that a Mahomadan does not become an apostate by merely accepting the doctrine of Ahamadees. The Ahamadiyans are in my view only a reformed sect of Mahomedans. (at pp 175–176)

F

[42] Thus, in both *Meeran Lebbaik Maullim* and *Narantakath Avullah* the the Singapore and Madras High Courts had both opined that the Ahmadis are Muslims notwithstanding their pronounced dissent on several important G matters of doctrine from the orthodox Islamic faith.

[43] However, this position did not find favour or acceptance by the dominant followers of orthodox Islam in British Malaya, and on 15 December 1953, after a hearing conducted before His Royal Highness the Sultan of H Selangor in the Palace at Kuala Lumpur, it was determined by the Islamic Religious Affairs Department of Selangor (Jabatan Agama Islam Selangor) that Ahmadis were 'kafir' ('disbelievers') and thus were not Muslims.

[44] Flowing therefrom, post independence and the formation of the I Federation of Malaya, the Chief Minister of Selangor had on two separate occasions, ie on 14 March 1959 and 19 November 1970, respectively caused for two plots of state land to be reserved as a burial ground for the interment of Ahmadis to the exclusion of Muslims within the State of Selangor. The Selangor Government *Gazette* dated 2 April 1959 containing the proclamation

in that regard dated 14 March 1959 reads:

> In the exercise of the powers conferred upon the Ruler in Council by section 24(i) of the Land Code and delegated to him, the Menteri Besar, Selangor, hereby proclaims that parcel land situate in the mukim of Jeram, described in the Schedule hereto, and delineated upon revenue survey plan No. 21,491, deposited in the office of the Chief Surveyor, Selangor, to be *a reserve for the purpose of a site for a Qadiani Burial Ground to be maintained by the following members of the Ahmadiyyah Sect*:
>
> Syed Abdul Rahman bin Syed Alwi Moon bin Haron
>
> Talib bin Sulong
>
> Lebai Ahmad bin Muhamed Atan bin Hitam

And the subsequent Selangor Government *Gazette* dated 17 December 1970 containing the proclamation dated 19 November 1970 reads:

> In the exercise of the powers conferred upon him by section 62 of the National Land Code and delegated to him by His Highness the Ruler in Council vide Sl PU 14 dated 24th March, 1966, the Menteri Besar, Selangor, hereby proclaims that parcel of land situate in the Mukim of Kuala Lumpur described in the Schedule hereto and delineated upon Revenue Survey Plan No 25,055, deposited in the office of the Chief Surveyor, Selangor, to *be a reserve for the purpose of a site for the burial ground to be under the control of the Trustees of Juma'ah Ahmadiyah, Kuala Lumpur*. (Emphasis added.)

Hence, whilst having declared the Ahmadis as non-Muslims, the State of Selangor recognised them as a religious denomination removed from Islam and had allowed them live on the land. And the continued existence of the Ahmadiyya community in Selangor was recognised by the reservation of state land for the interment of their dead separate and distinct from the Muslim burial grounds in which the Ahmadis were not allowed to bury their dead. This evidences the excommunication of the Ahmadis from the dominant orthodox Muslim community in the State of Selangor. They were allowed to live apart from the main stream followers of Islam in the State.

[45] Subsequently, on 18 June 1975, the Conference of Rulers in its 101st Meeting discussed a paper presented by the Majlis Kebangsaan bagi Hal Ehwal Ugama Islam ('MHEAI') titled 'Fatwa mengenai Ajaran Kadiyani/Ahmadiah'. And at that meeting it was resolved that the MHEAI shall take the necessary action to convey the decision of the Conference of Rulers concerning the Jama'at be adopted and declared by the respective state governments. The federal and state religious authorities acted on that recommendation.

[46] Two years later, on 11 April 1997, the Yang di-Pertuan Agong made the following determination for the Federal Territories pursuant to s 41 of the Administration of Muslim Law Enactment 1952, which was published in His Majesty's Government *Gazette* on 28 April 1997:

A The following determination by the Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong of a question referred to him under section 41 of the Administration of Muslim Law Enactment of the State of Selangor, as modified by the Federal Territory (Modification of the Administration of Muslim Law Enactment) Order 1974, is published as directed by him pursuant to section 42 (3) B of the Enactment:

> Bahawa ajaran Ahmadiah/Qadyani yang direka oleh Mirza Ghulam Ahmad itu bukan daripada ajaran Islam. *Dengan ini orang yang mengikut ajaran ini bukanlah orang Islam*. (Emphasis added.)

C **[47]** On 29 April 1981, His Royal Highness the Sultan of Kedah directed the publication of the following notification in the Kedah *Gazette* pursuant to s 38(2) of the Administration of Muslim Law Enactment 1952, which was *gazetted* in the Government of Kedah *Gazette* on 4 June 1981:

D In exercise of the powers conferred by section 38(2) of the Administration of Muslim Law Enactment, His Royal Highness the Sultan hereby directs that the following fatwa given by the Majlis on 26th Safar 1392 equivalent to 10th April 1972 be notified to all as a fatwa that is binding on all Muslims resident in the State of Kedah with effect from 4th June 1978.

E Majlis Ugama Islam setelah menimbang pandangan-pandangan dan perakuan-perakuan Jawatankuasa Fatwa dan setelah mengkaji dengan teliti berhubung dengan ajaran-ajaran Qadyani, terbitan-terbitan dan amalan-amalan yang berkaitan dengannya mengambil ketetapan mengharamkan ajaran-ajaran Qadyani, terbitan-terbitan dan amalan-amalan yang berkaitan dengannya dari F diajar, disebar, dimiliki dan dipelajari serta beramal dengan pengajaran tersebut. (No 286/1981)

[48] Two years later, on 20 May 1983, Mustapha Hussain J, sitting at the High Court in Malaya at Alor Setar had in the case of *Abdul Rahim bin Haji* G *Bahaudin v Chief Kadi, Kedah* [1983] 2 MLJ 370 issued a writ of prohibition against the Chief Kadi of Kedah; prohibiting him from hearing a series of Muslim offences in the Shariah court involving Abdul Rahim, a follower of the Ahmadi sect on grounds essentially that by virtue of the *gazette* notification H dated 4 June 1981, the applicant was not a Muslim and therefore not subject to the jurisdiction of the Shariah Courts.

[49] 15 years later, on 22 June 1998, the Mufti for Selangor made a *fatwa* for the state pursuant to s 31(1) of the Administration of Islamic Law Enactment I 1989 ('the *fatwa*') (published in the Selangor State Government *Gazette* dated 24 September 1998 *Jil* 51, No 20, Sel PU 15). The *fatwa* reads as follows:

Fatwa On Ajaran Ahmadiah/Qadiani

> In exercise of the powers conferred by section 31(1) and section 32 of the Administration of Islamic Law Enactment 1989 the Mufti for the State of Selangor,

after discussions with the Islamic Legal Consultative Committee, confirmed and adopts the result of the 1975 Law Committee as specified in the Schedule.

Jadual/Schedule

(1) *Ajaran Qadiani adalah satu ajaran yang menyalahi dari ajaran Islam yang sebenarnya. Pengikut-pengikut ajaran Qadiani ini telah dihukumkan kafir oleh Ulamak-Ulamak Islam serata dunia.*

(2) *Jabatan Agama Islam Selangor telah menghukumkan kafir kepada pengikut-pengikut Qadiani yang berpusat di Batu 20 Jeram, Kuala Selangor pada 15-12-1953* setelah mereka dibicarakan di Istana Kuala Lumpur di hadapan D.Y.M.M. Sultan Selangor serta beberapa orang Alim Ulamak di Negeri Selangor ini. *Setiap orang yang telah menjadi penganut ajaran Qadiani adalah telah murtad-(keluar dari Agama Islam). Maka wajiblah dituntut mereka bertaubat kembali kepada Islam dengan mengikrar dua kalimah syahadat.*

(3) Antara ciri-ciri ajaran itu ialah:

(a) Mirza Ghulan Ahmad mendakwa

(i) Sebagai Nabi yang menerima wahyu.

(ii) Imam Mahadi.

(iii) Isa Al Masih.

(iv) Mempunyai mukjizat.

(v) Para Nabi menyaksikan dirinya.

(vi) Malaikat sebagai pancaindera tuhan.

(vii) Nabi Isa AS telah mati dan kuburnya di Srinagar.

(b) Ibadah haji di Qadian, India.

(c) Menafikan jihad.

(d) Mengubah ayat-ayat Quran.

(4) Orang-orang Islam adalah dilarang menjual, mengedar, membeli, memiliki atau memberi ceramah tentang isi kandungan buku-buku berikut:

(a) 'Invitation To Ahmadiyah' yang dikarang oleh Hazrat Hj Mirza Bashir-ud-din Ahmad (Khalifatul Masih II).

(b) Penawar Racun Fitnah Terhadap Ahmadiyyah yang ditulis oleh Pengurus Besar Jema'at Ahmadiah.

(c) Alam Sebagai Saksi yang dikarang oleh Mohamad Zain bin Hasan.

(d) 'The Holy Quran With English Translation And Commentary' (Vol II, Part I) yang dikarang oleh M Mas'ud Ahmad.

[50] On 29 August 1999, the Mufti for Selangor amended the *fatwa* of 22 June 1998 and caused for its publication in the Government of Selangor *Gazette* on 17 August 2000. The amendment reads as follows:

AMENDMENT OF FATWA ON AJARAN AHMADIAH/QADIANI

In exercise of the powers conferred by subsection 31(1) and section 32 of the Administration of Islamic Law Enactment 1989, the Mufti for the State of Selangor, after discussions with the Islamic Legal Consultative Committee, amends the fatwa published on 24th September 1988 by inserting after paragraph 2 in the Schedule the following paragraph:

Jadual/Schedule

2A. Memandangkan mana-mana orang yang telah menganuti ajaran Qadiani telah menjadi murtad (keluar dari Agama Islam), akibatnya dari segi Hukum syara' dan Undang-Undang Sivil ialah —

(a) Perkahwinan orang tersebut boleh dibubarkan dengan pengesahan Mahkamah Syariah mengikut seksyen 46 Enakmen Undang-Undang Keluarga Islam Selangor 1984;

(b) Orang tersebut tidak boleh menjadi wali dalam akad nikah anak perempuannya;

(c) Orang tersebut tidak boleh mewarisi harta peninggalan kerabat-kerabat Muslimnya; dan

(d) Orang tersebut tidak berhak untuk mendapatkan apa-apa keistimewaan yang diperuntukkan kepada orang Melayu di bawah Perlembangaan Persekutuan dan Undang-Undang Negeri dan sekiranya hak-hak tersebut telah diberi, dinikmati atau diperolehi oleh orang tersebut, ia hendaklah terhenti dari berkuatkuasa dan bolehlah dilucut, ditarik balik dan dibatalkan, mengikut, mana berkenaan, oleh pihak berkuasa yang berkaitan. (Sel PU 36/2000)

[51] This general trend amongst the state and federal religious authorities prevailed in Malaysia, and from 2001–2013, the following state religious authorities issued rulings reflecting the pith and substance of the above determinations, vis a vis the Ahmadis:

(a) Melaka (MPU 36/2001), Federal Territories (PU (B) 1/2004), Sabah (No 450/2007), Perlis (No 84/2011) and Negeri Sembilan (NS PU 14/2013): *Gazetted*; and

(b) Johor (2001) and Sarawak (2005): Not *Gazetted*.

[52] Now, that is the doctrinal stand of the state religious authorities in so far as the Ahmadis are concerned, ie that the Ahmadis are non-Muslims. However, in determining the constitutional issue in question 2, this court is not concerned to 'adjudicate on the truth of religious beliefs or on the validity of particular rites' of the Ahmadiyya Muslim Jama'at as 'disputes about doctrine or liturgy are non-justiciable if they do not as a consequence engage civil rights or interests or reviewable questions of public law' (see: *Shergill and others v Khaira and others* [2014] 3 All ER 243 at paras [45]–[46] (SC) (UK). As such

I will not delve into religious doctrine and would confine the determination of the issue to matters of law and constitutional rights. A

[53] The determination of question 2 deals with the legal implication arising from the two *fatwas*, referred to earlier, issued by the Mufti for Selangor and the applicants' civil and constitutional rights as enshrined in the Federal Constitution and relevant statutes. The legal effect and consequence of a *fatwa* is contained in s 49 of the ARIE which states: B

> 49 A fatwa published in the Gazette is binding
>
> (1) Upon its publication in the *Gazette*, a *fatwa* shall be binding on every Muslim in the State of Selangor as a dictate of his religion and it shall be his religious duty to abide by and uphold the *fatwa*, unless he is permitted by *Hukum Syarak* to depart from the *fatwa* in matters of personal observance. C
>
> (2) A *fatwa* shall be recognised by all courts in the State of Selangor of all matters laid down therein. D

[54] Hence, both the *fatwas* issued by the Mufti for Selangor pursuant to s 31(1) of the Administration of Islamic Law Enactment 1989 on 22 June 1998 (*gazetted* on 24 September 1998) and on 29 August 1999 (*gazetted* on 17 August 2000) are binding on all Muslims in the State of Selangor and shall be recognised and upheld by the Shariah Courts in the State of Selangor. The upshot of both these *gazetted fatwas* is that an Ahmadi is considered a non-Muslim by the state. This can be seen from the wordings of both the *fatwas*, ie an Ahmadi is a 'kafir' ('disbeliever') and 'murtad' (apostate), and that he cannot inherit from his Muslim kin and the Islamic laws of succession does not apply; an Ahmadi cannot be the 'wali' or guardian to give away his daughter in an Islamic marriage; an Ahmadi is not a Malay as defined in the Federal Constitution as it requires a Malay to profess the religion of Islam. The *fatwas* also state that in order for an Ahmadi to return to the fold as a Muslim, he would have to repent and pronounce the declaration of faith ie to utter the *khalimah shahadah*. So even though an Ahmadi may consider himself to be a Muslim or a member of an Islamic sect, the State does not regard him so, and has stripped him of all rights and privileges accorded to a Muslim in the State. The legal effect of both these *fatwas* is that the Ahmadi community has been excommunicated from the main stream Muslim community. This fact is further manifested by the State not allowing the interment of the body of an Ahmadi within a Muslim cemetery and making available two plots of state land as reserve for burial of Ahmadis to the exclusion of Muslims. Therefore, in life and in death, the Ahmadis are separate and distinct from the main stream Muslim community. E F G H I

[55] Hence, the effect of the *fatwas* and the actions of the state vis a vis the Ahmadiyya community is that they are considered followers of a separate and

distinct religion removed from Islam. In that regard, I accept the applicants' contention that a distinctive religious sect like the Ahmadiyya Muslim Jama'at, which has had religious rulings with force of law made against its members declaring them 'bukanlah orang Islam' (not Muslims) or 'kafir' in the States in Malaysia, is to be treated as a distinct religious group equally entitled to the rights under art 11 of the Federal Constitution, as all other religious groups in Malaysia eg those related to Buddhism, Christianity, Hinduism, Sikhism or Taoism. Article 11 of the Federal Constitution on freedom of religion reads:

> 11 Freedom of religion
>
> (1) Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.
>
> (2) No person shall be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own.
>
> (3) Every religious group has the right —
>
> (a) to manage its own religious affairs;
>
> (b) to establish and maintain institutions for religious or charitable purposes; and
>
> (c) to acquire and own property and hold and administer it in accordance with law.
>
> (4) State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.
>
> (5) This Article does not authorise any act contrary to any general law relating to public order, public health or morality.

[56] Article 11 guarantees to 'every person' in Malaysia, and not merely Malaysian citizens, the right to profess, practise and propagate his religion. A 'person', as opposed to 'citizen', would include permanent residents, migrant workers, tourists, international students, asylum seekers and refugees. Such 'persons' are entitled to 'freedom of religion' under the Federal Constitution while within Malaysia. In this regard, it would be pertinent to note that some of the applicants are non-citizens and/or foreigners, and they too would be afforded the right enshrined in art 11 to freedom of religion.

[57] There are no constitutionally permitted grounds to restrict or prohibit the mere profession of one's religion, except in so far as the restriction to propagate any religious doctrine or belief among persons professing the religion of Islam, as stipulated in art 11(4) of the Federal Constitution. Thus, the profession of one's chosen religion is guaranteed absolutely (see:

Halimatussaadiah v Public Service Commission, Malaysia & Anor [1992] 1 MLJ 513 at p 526 (HC) (per Eusoff Chin J (later CJ)); *In re Susie Teoh; Teoh Eng Huat v Kadhi of Pasir Mas Kelantan & Majlis Ugama Islam dan Adat Istiadat Melayu, Kelantan* [1986] 2 MLJ 228 at p 231 (HC) (per Abdul Malek J (later PCA)). This would also be consistent with the constitutional position in the United States of America, India, Pakistan, Canada and the United Kingdom. In effect, no person can be punished for merely believing or professing their religious doctrines and beliefs while in Malaysia. The right of freedom to belief is absolute, but the right of freedom to manifest belief is qualified. This qualification is necessary because the way a belief is expressed in practice may impact on others (see: *United States v Ballard* (1944) 322 US 78 at pp 86–87 (SC); *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 at pp 353–354 (SC); *Acharya Jagadishwaranada Avadhuta and Another v Commissioner of Police, Calcutta and Others* [1990] AIR Cal 336 at p 349 (HC); *R (on the application of Williamson) v Secretary of State for Education and Employment* [2005] 2 WLR 590 at paras [16]–[17] (HL)).

[58] Flowing from the qualification to the freedom to manifest belief, the ractise of one's religion is subject to general laws relating to public order, public health or morality, and the Constitution permits the States to control or restrict, by law, the propagation of 'any religious doctrine or belief' among Muslims, see: art 11(3), (4) and (5) of the Federal Constitution.

[59] Article 11(3) guarantees to 'every religious group' the right to manage its own religious affairs, to establish and maintain institutions for religious or charitable purposes, and to acquire and own property and hold and administer it in accordance with law.

[60] The Pakistan Supreme Court in *SMC No 1 of 2014* [2015] 2 LRC 583, had occasion to consider the meaning of 'freedom of religion' when interpreting art 20 of the Constitution of Pakistan (equipollent to art 11(1) and (3) of our Constitution), and held as follows:

> [13] ... By freedom of religion and belief is meant the right of a person to follow a doctrine or belief system which, in the view of those who profess it, provides spiritual satisfaction. However, it is impossible to define the term 'religion' in rigid terms. The freedom of religion must then be construed liberally to include freedom of conscience, thought, expression, belief and faith. Freedom, individual autonomy and rationality characterise liberal democracies and the individual freedoms thus flowing from the freedom of religion must not be curtailed by attributing an interpretation of the right to religious belief and practice exclusively as a community-based freedom.
>
> ...
>
> [15] ... (c) ... *The right to profess and practise is conferred not only on religious communities but also on every citizen. What this means is that every citizen can exercise*

A *this right to profess, practise and propagate his religious views, even against the prevailing or dominant views of its own religious denomination or sect.* In other words, neither the majority religious denominations or sect nor the minority religious denomination or sect can impose its religious will on the citizen. Therefore, not only does it protect religious denominations and sects against each other but protect every citizen against the imposition of religious views by its own fellow co-believers.

B

...

(d) As far as every religious denomination is concerned, even sects within these religious denominations have been conferred the additional right to establish, maintain and manage their religious institutions. Therefore, even sects within these religious denominations have been protected against their own co-religious denominations.

C

The principles enunciated by the Pakistan Supreme Court in *SMC No 1 of 2014* are highly persuasive in interpreting art 11(1) and (3) of the Federal Constitution, as their art 20 is equipollent to our art 11(1) and (3).

D

JURISDICTION OF THE SHARIAH COURTS

[61] Now, the State Mufti for Selangor has by his two *fatwas* declared the Ahmadis as non-Muslims, and as such, in law, they are a religious denomination of their own, who based on the constitutional right to freedom of religion have their right to profess and practice their religion in accordance to the law without hindrance.

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F **[62]** The issue that arises then is this: do the Shariah Courts or the Chief Syarie Prosecutor have jurisdiction over members of the Ahmadiyya Jama'at. In order to answer that question, it would be pertinent to look at several statutory provisions.

The first is s 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965 which provides:

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2 criminal jurisdiction of Shariah Courts

The Syariah Courts duly constituted under any law in a State and invested with *jurisdiction over persons professing the religion of Islam* and in respect of any of the matters enumerated in List II of the State List of the Ninth Schedule to the Federal Constitution are *hereby conferred jurisdiction in respect ofoffences against precepts of the religion of Islam by persons professing that religion* which may be prescribed under any written law:

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Provided that such jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years of with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof.

I

The next is s 74 of the ARIE which provides:

74 Jurisdiction does not extend to non-Muslims

(1) No decision of the Syariah Appeal Court, Syariah High Court or Syariah Subordinate Court shall involve the right or the property of a non-Muslim.

(2) For the avoidance of doubt, it is hereby declared that a Muslim shall at all times be acknowledged and treated as a Muslim unless a declaration has been made by a Syariah Court that he is no longer a Muslim.

Hence, pursuant to s 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965 and s 74(1) of the ARIE the Shariah Courts do not have any jurisdiction over non-Muslims.

[63] This is jurisdictional limitation is further fortified by the provisions of ss 61(3) and 62(2) of the ARIE that deals with the criminal jurisdiction of the Shariah Courts, where it is clearly provided that the Shariah Courts have criminal jurisdiction to try only offences committed by a Muslim and punishable under the Syariah Criminal Offences Enactment (Selangor) 1995.

Section 61(3) of the AIRE provides:

(3) The Syariah High Court shall —

(a) in its criminal jurisdiction, *try any offence committed by a Muslim* and punishable under the Syariah Criminal Offences Enactment (Selangor) 1995 [En No 9/1995] or under any other written law for the time being in force which prescribes offences against the precepts of the religions of Islam and may impose any punishment provided for the offence;

And s 62(2) of the AIRE provides:

(2) The Syariah Subordinate Court shall —

(a) in its criminal jurisdiction, *try any offence committed by a Muslim* under the Syariah Criminal Offences Enactment (Selangor) 1995 or any other written law which prescribes offences against the precepts of the religion of Islam for which the punishment provided by such Enactment or other written law does not exceed three thousand ringgit, or imprisonment for a term of two years or both, and may impose any punishment provided for such offences;

[64] And finally, s 78(2) of the ARIE that deals with the powers of the Chief Syarie Prosecutor provides:

78 Chief Syarie Prosecutor and Syariah Prosecutors

(2) The Chief Syarie Prosecutor shall have power exercisable at his discretion to institute, conduct or discontinue any proceeding for an offence before any Syariah Court.

Thus, according to s 78(2) of the ARIE the powers of the Chief Syarie Prosecutor is exercisable only in respect of any offence that the Shariah Court is competent to try, and that would necessarily mean only offences committed

by a Muslim. Hence, the Chief Syarie Prosecutor would only have powers to prefer charges against Muslims and would have no power or jurisdiction to prosecute non-Muslims for offences contained in the Syariah Criminal Offences Enactment (Selangor) 1995 or for that matter the ARIE.

[65] Additionally, the investigative powers conferred under s 79 of the ARIE to the Chief Religious Enforcement Officer and Religious Enforcement Officers is limited to carrying out investigation of offences under that Enactment or under any other written law which prescribes offences against the precepts of the religion of Islam. Hence, the investigative powers of the Chief Religious Enforcement Officer and Religious Enforcement Officers are statutorily circumscribed and are exercisable only on Muslims. For ease of reference s 79 of the ARIE reads:

> 79 Religious Enforcement Officers
>
> The Majlis may appoint from amongst the members of the State public service or joint service a Chief Religious Enforcement Officer and Religious Enforcement Officers to carry out the investigation of offences under this Enactment or under any other written law which prescribes offences against the precepts of the religion of Islam.

[66] Hence, it follows that by virtue of Item 1 of the State List and the various statutory provisions discussed above on the jurisdiction of the Shariah courts; the Ahmadis, who have been declared by the State Mufti for Selangor to be non-Muslims, are not subject to the jurisdiction of the Shariah Courts in Selangor. Having declared the Ahmadis as non-Muslims the state Islamic religious authorities cannot continue to dictate the manner in which the Ahmadis carry out their religious practices or restrict the places in which they perform their prayers or religious rites.

[67] In this regard, and of high persuasive authority, is the High Court case of *Abdul Rahim bin Haji Bahaudin v Chief Kadi, Kedah* [1983] 2 MLJ 370 which also involved the issue of jurisdiction of the Shariah Court over a member of the Ahmadiyyah Jama'at. In that case, Abdul Rahim applied for judicial review to prohibit the Chief Kadi of Kedah from hearing four Muslim offence cases against him in the Shariah Court. The offences concerned Abdul Rahim's distribution of religious pamphlets and documents relating to the Jama'at; purportedly an offence under the now repealed s 163(1) of the Administration of Muslim Law Enactment 1962 of Kedah. Abdul Rahim had publicly declared and embraced the Ahmadiyya sect in 1970. In 1981, the *fatwa* issued by the Majlis Ugama Islam of Kedah was *gazetted* (see para 48 above). The said *fatwa*, in effect, says that whosoever believes in the teachings of the Ahmadiyya sect is an apostate. Abdul Rahim's only ground for the judicial review was that as he is a follower of the Ahmadiyya sect and the Majlis Ugama Islam Kedah says that he is not a Muslim, hence the Majlis Ugama

Islam of Kedah and the Shariah Courts have no jurisdiction to try him. In allowing the judicial review, Mustapha Hussain J held:

> This application is made to the High Court under s 25(2) of the Courts of Judicature Act 1964 where the High Court in its exercise of the powers of issuing prerogative writs can, in suitable cases and in particular for the protection of fundamental liberties enshrined in Part II of the Federal Constitution, issue orders against any person or authority.
>
> *The Kedah State Administration of Muslim Law Enactment 9 of 1962, section 41(3)(a) and (b) conferred a jurisdiction to the Kadi's or the Syariah Court only to Muslims. This means that non-Muslims, (and the Applicant is a non-Muslim as declared by the Majlis itself), are outside the jurisdiction of the Majlis and its Syariah Courts.*
>
> This being so, the Application is therefore allowed. *In fact in the written submission the learned Legal Adviser using his own words says 'the Respondent (ie the Majlis Ugama Islam and the Chief Kadi) concede that the Applicant is not a Musilim and therefore is not subject to the jurisdiction of Mahkamah Syariah'*.
>
> The Motion is allowed, a Writ of Prohibition is hereby issued prohibiting the Chief Kadi of Kedah, his agents, and/or servants from hearing cases Jenayah 1/83, 2/83, 3/83 and 4/83 Syariah Court, Alor Setar. (Emphasis added.)

[68] However, learned counsels for the respondents argue that the case of *Abdul Rahim bin Haji Bahaudin* is of no relevance to the present case as, unlike the present case, in that case there was evidence confirming the applicant to be an Ahmadi and thus a non-Muslim. Learned counsel refers to the following passage in that judgment:

> ... both parties agreed that the court write to the Muslim Religious Council of Kedah for their ruling whether the followers of the Ahmadhi sect is a Muslim or a non-Muslim.
>
> The Muslim Religious Council replied and this was confirmed by the President of the Council and the Chairman of the Fatwa Committee who gave evidence in Court that a follower of the Ahmadhi sect is not a Muslim.

[69] Learned counsels for the respondents further contend that the case of *Abdul Rahim bin Haji Bahaudin* is not applicable to the present case by virtue of the subsequent insertion of ss 61 and 74 of the ARIE in the year 2003, which provides the Shariah High Court in Selangor with jurisdiction to declare that a person is no longer a Muslim. Hence, counsel argues that all the applicants must first apply to the Shariah High Court for a declaration that they are not Muslims, before any challenge to jurisdiction of the Shariah Court over the applicants is brought.

[70] In this regard, learned counsels for the respondents have placed reliance on the pronouncement of the Federal Court in *Kamariah bte Ali dan Lain-lain lwn Kerajaan Negeri Kelantan dan Satu Lagi* [2005] 1 MLJ 197; [2004] 3 CLJ 409 to the effect that self-declaration by a person that he is non-Muslim is

insufficient in the eyes of law, and that until and unless the Shariah Court makes a declaration that he is a non-Muslim, a Muslim remains a Muslim in the eyes of the law, and thus s 4 as well as sub-s 97(2) of the ARIE would continue to apply to that person. The relevant passage from that judgment relied on by learned counsels for the respondents reads:

> Mahkamah ini bersetuju dengan ungkapan-ungkapan penghakiman yang telah dibentangkan di atas. Membuat akuan berkanun dan mengisytiharkan mereka bukan lagi menganut agama Islam tidak dengan sendirinya melepaskan perayu-perayu daripada pertuduhan yang ada di Mahkamah Syariah. Dengan mengambil pendekatan maksud, Mahkamah berpendapat bahawa masa yang material untuk menentukan sama ada perayu-perayu adalah orang yang menganut agama Islam ialah masa ketika mana perayu- perayu melakukan kesalahan di bawah Undang-Undang Majlis Agama Islam dan Adat Istiadat Melayu Kelantan. Oleh itu walau pun perayu-perayu telah mengisytiharkan mereka murtad pada tahun 1998, mereka selayaknya dibawa ke hadapan Mahkamah Syariah pada tahun 2000 kerana ia berkaitan suatu kesalahan yang telah dilakukan ketika perayu-perayu masih beragama Islam. Jika pendekatan maksud tidak diambil, orang-orang Islam yang menghadapi pertuduhan di Mahkamah Syariah boleh sewenang-wenangnya menimbulkan pembelaan yang mereka bukan lagi seorang yang menganut agama Islam dan dengan demikian tidak tertakluk kepada bidangkuasa Mahkamah Syariah. Keadaan sebegini akan menjejaskan pentadbiran Undang-Undang Islam di Malaysia dan mungkin juga undang-undang agama lain.

[71] I am not fully convinced by that argument. The pronouncement of the Federal Court in *Kamariah bte Ali* deals with a Muslim's renunciation of faith by unilateral declaration by way of a statutory declaration, which the court held to be ineffective until and unless the same is confirmed by the Shariah Court. It must, however, be noted that in the present case the issue is not one of unilateral renunciation of faith, but rather the legal effect of religious 'excommunication', and not religious 'apostasy'. 'Apostasy' is 'renunciation of a belief or faith', while 'excommunication' is to 'officially exclude from participation ..., or from formal communion ...' (*Oxford Encyclopaedic English Dictionary* (1991)). The issue for determination in *Abdul Rahim bin Haji Bahaudin* also arose from a *fatwa* issued by the Majlis Agama Islam Kedah that Ahmadis are non-Muslims and that decree was further confirmed by affidavit evidence. Hence, it that case it was also an issue of excommunication by the Islamic religious authority as is the case here and not one of unilateral renunciation of faith.

[72] This difference is borne out by the facts in this case which is very much different from the facts in *Kamariah bte Ali*. In this regard, it would be worth revisiting the facts of the case as deposed in the affidavits filed in support of the application. As stated earlier, after the Jama'at moved from Kampung Baru to Kampung Nakhoda, Batu Caves, they have been carrying out their religious practices, including prayers, within the compound of their base in

'Bait-us-Salam'. On 24 April 2009, the Jama'at received a letter from Majlis Agama Islam Selangor ('MAIS') prohibiting the Jama'at from using the 'Bait-us-Salam' as a place of worship, on grounds that the Jama'at had not obtained the written permission of MAIS to use the 'Bait-us-Salam' 'for purposes which may be carried on in or by a mosque' ('the prohibitory notice'). This was ostensibly done pursuant to s 97 of ARIE. The prohibitory notice was sent to the Jama'at despite there being erected by the Majlis Perbandaran Selayang sometime in 2005, with the endorsement of the Selangor State Government (the sixth respondent), three signboards in front and to the side of 'Bait-us-Salam' and a further three signboards around Kampung Nakhoda, Batu Caves, with the words 'Qadiani Bukan Agama Islam' (Qadiani is not Islam). Obviously, the respondents knew that the 'Bait-us-Salam' was being used as a place of worship by the Ahmadis and wanted to warn the larger mainstream Muslim population that the state does not consider the Ahmadis as followers of Islam.

[73] The Jama'at, in abundance of caution and not wanting any untoward incidents then stopped using the 'Bait-us-Salam' as a place of worship and instead rented premises at No 16-2, Dolomite Park Avenue, Jalan Batu Caves, 68100 Selangor, ('the premises') solely for the Jama'at's members to pray. On 11 April 2014, a Friday, at around 2pm, officers of the Jabatan Agama Islam Selangor ('JAIS') (the fourth respondent') raided the premises, and:

(a) arrested all 39 applicants who were at the premises (comprising 36 adults members of the Jama'at and three of their children), who were detained and threatened with prosecution in the Shariah Court; and

(b) religious materials and audio equipment belonging to the Jama'at were seized.

[74] The JAIS officers informed the applicants that they had not obtained the written permission of MAIS to use the premises for purposes of a mosque, contrary to s 97 of the ARIE. The JAIS officers were informed by some of the applicants that all those present at the premises were members of the Jama'at, however, the JAIS officers did not heed the protestation of the applicants and proceeded to arrest and detain them, and subsequently issue them the bond. Now, it belies logic to require the Jama'at to get permission from MAIS to use the premises as a place of worship, ie a mosque, when the Ahmadis have been declared as non-Muslims by virtue of the two *fatwas* issued by the State Mufti for Selangor. If the Ahmadis are not Muslims, the premises cannot by definition under s 2 of the ARIE, be termed a mosque, for by that statutory definition a mosque is a place where Islamic prayers are conducted.

[75] The existence of the Ahmadiyya community in Selangor, since at least from the 1950s, is a fact that was well known to the Selangor State Religious

Authorities. The Ahmadis were declared as non-Muslims after a hearing before HRH The Sultan of Selangor in 1953. Thereafter, separate burial grounds for Ahmadis were reserved on state land by the Selangor State Government. Then, sometime in 1963, the Ahmadiyya community were moved from Kampung Baru in Kuala Lumpur and resettled in Kampung Nakhoda, Batu Caves, on several plots of land given to the community by the Malaysian government, by the good office of the then Prime Minister Tunku Abdul Rahman. Thereafter, the two *fatwas*, namely, 'Fatwa Tentang Ajaran Ahmadiah/Qadiani' *gazetted* as *Jil* 51, No 20, Sel PU 15 on 24 September 1998, and the 'Pindaan Fatwa Tentang Ajaran Ahmadiah/Qadiani' *gazetted* as *Jil* 53, No 17, Sel PU 36 on 17 August 2000 were published declaring the members of the Jama'at as non-Muslims. The Selangor State religious authorities knew well of the Jama'at's religious activities at their base in Kampung Nakhoda and this is evidenced by the signboards erected around the 'Bait-us-Salam' notifying the public that 'Qadiani is not Islam' and also by the notice of prohibition issued by the MAIS in 2009 to the Jama'at to cease all prayer activities on the premises. The applicants were then forced to conduct their prayers at the rented premises. There is no evidence of the applicants being a nuisance or being a cause of concern in respect of public order and security. They were peacefully conducting their religious affairs.

[76] In light of this, it is rather disingenious of the respondents to now argue that the applicants would have to apply to the Shariah Court to be declared a non-Muslim. Now, if the members of the Jama'at have been declared as non-Muslims by virtue of the two *fatwas*, why is there a necessity for any member of the Jama'at to further apply to the Shariah Court for a declaration that they are not Muslims. The applicants state that there are approximately 5,000 members of the Jama'at in Malaysia. It would be ridiculous to require all 5,000 members to apply to the Shariah Court to be declared as members of the Jama'at or as non-Muslims and also for their progenies, when they are born, to also make such an application. The absurd nature of this suggestion becomes even more apparent when considering that some of the applicants are foreigners. Should every foreigner who professes to be an Ahmadi be also required to make an application to the Shariah Court after he enters the country if he intends to participate in the religious rituals and prayers of the Jama'at. Surely not. When the religious authorities have by law excommunicated a sect from the state recognised mainstream or dominant orthodox Islam, then by implication all members of that sect would not be members of the state sanctioned mainstream orthodox Islam, ie Ahlul Sunnah Wa Jamaah.

[77] The applicants have stated that they are all members of the Jama'at and this is not challenged or controverted by the respondents. A fortiori, in law and by the binding nature of the *fatwas* on the respondents, the applicants are

non-Muslims and that is sufficient for them to be beyond the reach or jurisdiction of the Shariah Courts and the Syarie Chief Prosecutor. In any event, in respect of an offence under s 97 of the ARIE, the Shariah Courts would only have jurisdiction when the person who commits that offence is a Muslim. Since the applicants, by virtue of the two *fatwas*, have been declared as non-Muslims, they are, for reasons that have been discussed earlier, incapable of committing an offence under s 97 of the ARIE. Thus, I agree with learned counsel for the applicants that the respondents' reliance on the following authorities and statutory provisions on 'apostasy' to require the applicants to apply to be declared as non-Muslims is misconceived, if not misleading:

(a) *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585; [2007] 5 CLJ 557;

(b) *Jenny bt Peter @ Nur Muzdhalifah Abdullah v Director of Jabatan Agama Islam Sarawak & Ors and other appeals* [2017] 1 MLJ 340; [2016] 1 LNS 1132;

(c) *Kamariah bte Ali dan Lain-lain lwn Kerajaan Negeri Kelantan dan Satu Lagi* [2005] 1 MLJ 197; [2004] 3 CLJ 409; and

(d) ss 61(3)(b)(x) and 74(2) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003.

[78] As members of a distinct religious denomination, the applicants' constitutional right to freedom of religion is protected. And that right to freedom of religion includes the right to establish, maintain and manage their religious institutions and affairs without hindrance by the respondents. This would include the right to use premises for the conduct of their religious rites and prayers.

[79] It is well settled that the High Court when hearing an application for judicial does not sit in its appellate jurisdiction but merely performs its supervisory jurisdiction. See *Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998] 1 MLJ 305 (CA); *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9 (SC). Judicial review is not to interfere but to intervene where there is illegality, procedural impropriety or irrationality and possibly proportionality.

[80] Further, in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 (FC); and *Booi Kim Lee v Menteri Sumber Manusia & Anor* [1999] 3 MLJ 515 (HC), the courts adopted the dicta of Lord Diplock in *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935; [1985] AC 374 and stated that the courts can, by way of judicial review, interfere with an act of an executive authority in generally three different circumstances, namely:

A (a) illegality — that is when the authority concerned has been guilty of an error of law in its action, ie purporting to exercise a power it does not have and/or acting ultra vires its powers. This allows the courts to scrutinise such decisions not only for process, but also for substance. See *Syed Mubarak bin Syed Ahmad v Majlis Peguam Negara* [2000] 4 MLJ
B 167; [2000] 3 AMR 3048; *Lam Eng Rubber Factory (M) Sdn Bhd v Pengarah Alam Sekitar, Negeri Kedah dan Perlis & Anor* [2005] 2 MLJ 493; [2005] 2 AMR 471; [2005] 2 CLJ 159;

(b) irrationality — that is the when the authority exercises its power in such
C an unreasonable manner that the decision is so outrageous that it defies logic and that a person having put his mind to the question could not have arrived at such a decision, ie the *Wednesbury* unreasonableness principle — see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680; [1948] 1 KB 223; and

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(c) procedural impropriety — that is the authority's failure to observe procedural rules expressly laid down in the legislative instrument by which its jurisdiction is conferred, the breach of which may or may not involve denial of natural justice. See *M Sentivelu a/l R Marimuthu v*
E *Public Services Commission Malaysia & Anor* [2005] 5 MLJ 393.

[81] Lord Diplock mentioned 'proportionality' as a possible fourth ground of review and the Federal Court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 (FC) said that such a principle is
F recognized as a general principle of English law, and when applied, it enables the court to review an impugned decision for substance as well as process. Indeed, in industrial and employment law the principle of proportionality is well recognised and has been a ground for judicial review. See *Harianto Effendy bin Zakaria & Ors v Mahkamah Perusahaan Malaysia & Anor* [2014] 6 MLJ
G 305; [2014] 8 CLJ 821 (FC).

[82] I find that in the present application, for reasons discussed earlier, the second, third, and/or fourth respondents had acted in excess of jurisdiction in issuing the 'Surat Perjanjian dan Jaminan kepada Ketua Pegawai
H Penguatkuasaan Agama' to all the applicants. And as such, the respondents are guilty of an error of law in their action, ie purporting to exercise a power that they do not have and/or acting ultra vires their powers. Thus, the action and/or decision of the respondents in investigating the applicants for a purported offence under s 97(2) of the ARIE and the issuance of the 'Surat Perjanjian dan
I Jaminan kepada Ketua Pegawai Penguatkuasaan Agama' and the threatened prosecution of the applicants before the Shariah Court amounts to an illegality that is susceptible to curial intervention by this court.

[83] Thus, the applicants' judicial review application is allowed, and

pursuant to O 53 r 2(3), the following reliefs are granted:

(a) declarasi bahawa menurut s 49 Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 dibaca dengan 'Penetapan di bawah seksyen 41 Enakmen Pentadbiran Hukum Syarak bagi Negeri Selangor' bertarikh 11 April 1977 [JPM (U) WP 0172/6/1; PN (PU) 197] yang diwartakan sebagai PU (B) 279 dan 'Fatwa tentang ajaran Ahmadiah/Qadiani di bawah Enakmen Pentadbiran Perundangan Islam 1989' bertarikh 22 Jun 1998 [JAI Sel 8069/2: PU Sel AGM/0007 Jld 2] yang diwartakan sebagai Sel PU 15 pada 24 September 1998 (Jil 51 No 20 Tambahan No 6), responden-responden tidak mempunyai bidangkuasa untuk menyiasat dan/atau mendakwa pemohon-pemohon atau setiap satu daripada mereka;

(b) deklarasi bahawa tindakan dan/atau keputusan responden-responden dan kakitangan-kakitangannya, pegawai-pegawainya dan/atau agen-agennya untuk menyiasat dan/atau mencadangkan pendakwaan dan/atau mendakwa pemohon-pemohon atau setiap satu daripada mereka adalah bercanggah dengan hak-hak pemohon-pemohon di bawah Fasal-Fasal 5 dan/atau 8 dan/atau 11 dan/atau Item 1, Senarai II, Jadual Ke-9 Perlembagaan Persekutuan dan/atau s 49 Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003;

(c) perintah bersifat pembatalan (*certiorari*) keputusan responden-responden dan kakitangan-kakitangannya, pegawai-pegawainya dan/atau agen-agennya untuk menjalankan penyiasatan atau meneruskan penyiasatan dan/atau meneruskan pendakwaan yang dicadangkan terhadap dan/atau mendakwa pemohon-pemohon atau setiap satu daripada mereka;

(d) perintah bersifat pembatalan (*certiorari*) keputusan responden-responden ke-2, ke-3 dan ke-4 untuk mengeluarkan 'Surat Perjanjian dan Jaminan kepada Ketua Pegawai Pengkuatkuasaan Agama' masing-masing bertarikh 11 April 2014 kepada pemohon-pemohon ke-11; 14 April 2014 kepada pemohon-pemohon Ke-33; 15 April 2014 kepada pemohon-pemohon ke-2, 3, 4, 7, 9, 14, 19, 20, 35 dan 39; 16 April 2014 kepada pemohon-pemohon ke-10, 15, 18, 21, 22, 23, 25, 26, 27, 29, 34, 36 dan 38; dan 17 April 2014 kepada pemohon-pemohon ke-5, 6, 8, 12, 13, 16, 17, 24, 28, 30, 31, 32, dan 37;

(e) perintah bersifat mandamus terhadap Responden-Responden untuk melaksanakan penetapan di bawah s 41 Enakmen Pentadbiran Hukum Syarak bagi Negeri Selangor bertarikh 11 April 1977 [JPM (U) WP 0172/6/1; PN (PU) 197] yang diwartakan sebagai PU (B) 279 dan 'Fatwa tentang ajaran Ahmadiah/Qadiani di bawah Enakmen Pentadbiran Perundangan Islam 1989' bertarikh 22 Jun 1998 [JAI Sel 8069/2: PU Sel AGM/0007 Jld 2] yang diwartakan sebagai Sel PU 15 pada 24 September 1998 (Jil 51 No 20 Tambahan No 6), terhadap penyiasatan dan/atau pendakwaan atau pendakwaan yang dicadangkan ke atas kes-kes

A pemohon-pemohon dan selanjutnya untuk membatalkan dan/atau mengugurkan penyiasatan dan/atau pendakwaan atau pendakwaan yang dicadangkan tersebut;

(f) perintah bersifat larangan (*prohibition*) terhadap responden-responden ke-2, ke-3 dan ke-4 dan kakitangan-kakitangannya, pegawai-pegawainya B dan/atau agen-agennya daripada menjalankan penyiasatan atau meneruskan penyiasatan terhadap pemohon-pemohon atau setiap satu daripada mereka;

(g) perintah bersifat larangan (*prohibition*) terhadap responden-responden ke-2, ke-3 dan ke-4 dan kakitangan-kakitangannya, pegawai-pegawainya C dan/atau agen-agennya daripada mengambil langkah-langkah untuk mendakwa dan/atau meneruskan pendakwaan yang dicadangkan terhadap pemohon-pemohon atau setiap satu daripada mereka; dan

(h) the respondents shall pay the sum of RM25,000 as cost to the applicants.

D *Application allowed with costs of RM25,000.*

Reported by Izzat Fauzan

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