Fathul Bari bin Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Ors

FEDERAL COURT (PUTRAJAYA) — PETITION NO 3 OF 2010
ARIFIN ZAKARIA CHIEF JUSTICE, ZULKEFLI CJ (MALAYA), ABDULL HAMID EMBONG, SURIYADI AND HASAN LAH FCJJ
30 MAY 2012

Constitutional Law — Legislature — State Assembly — State Legislative Assembly made teaching of Islamic religion without 'tauliah' an offence — Whether creation of offence offended Federal Constitution — Whether Shariah Court had jurisdiction to try offence — Whether 'tauliah' necessary to prevent deviant teachings and maintain order and cohesion within community — Whether teaching of Islamic religion without 'tauliah' offended precepts of Islam

The first petitioner was arrested by enforcement officers of the Negeri Sembilan Islamic Affairs Department for conducting a religious talk without a *tauliah*, an offence under s 53(1) of the Syariah Criminal Enactment (Negeri Sembilan) 1992 ('s 53(1)'). He was charged for the offence in the Shariah subordinate court and the second petitioner was charged with aiding and abetting him. The petitioners obtained leave to petition the Federal Court to declare s 53(1) null and void for offending the Federal Constitution ('Constitution') and also to declare that the Shariah Court for Negeri Sembilan had no jurisdiction to try any offence under that section. The petitioners claimed the State Legislature had exceeded its legislative authority in enacting s 53(1) under which any person who engaged in the teaching of the religion without a *tauliah* from the Tauliah Committee, except to members of his family at his place of residence only, was guilty of an offence punishable by a fine or jail or both. The Tauliah Committee, which comprised of the *Mufti* and between three and seven other persons with appropriate experience, knowledge and expertise, had power to grant or withdraw a *tauliah* for the purpose of the teaching of the Islamic religion or any aspect thereof. Section 53(1) was enacted pursuant to art 74(2) read together with Item 1, State List, Ninth Schedule of the Constitution which empowered the state legislature to make laws for the creation and punishment of 'offences against the precepts of Islam' by persons professing the religion. The petitioners argued that neither the al-Quran nor Sunnah prescribed that a *tauliah* must first be had before one could teach the Islamic religion. They said teaching the Islamic religion without a *tauliah* was not an offence in Islam nor was it against the 'precepts of Islam' but that it had been made an offence under the administration of Islamic law so that the teaching of Islam was kept in line with the al-Quran and the Sunnah. On that premise, they said, s 53(1) fell outside the scope of the aforesaid provisions of the

Constitution and was invalid. The respondents submitted that *tauliah* was a pre-requisite before one could teach the Islamic religion. In coming to its decision, the Federal Court accepted that the term 'precepts of Islam' covered the three main domains of creed or belief ('*aqidah*'), law ('*Shariah*') and ethics or morality ('*akhlak*') and that those precepts were derived from the al-Quran and the Sunnah.

Held, dismissing the petition with no order as to costs:

(1) The State Legislative Assembly of Negeri Sembilan had acted within its legislative power in enacting s 53 of the Enactment. The purpose of that provision was clear, that is, to protect the integrity of the *aqidah* (belief), *shariah* (law) and *akhlak* (morality) which constituted the precepts of Islam. The requirement of *tauliah* was necessary to ensure only a person qualified to teach the religion was allowed to do so. This was a measure to stop the spread of deviant teachings among Muslims which was an offence under s 52 of the Enactment (see para 24).

(2) It was commonly accepted that deviant teachings were an offence against the precepts of Islam. Therefore, there was merit in the respondents' contention that, by necessary implication, the teaching of Islam without a *tauliah* could similarly be construed an offence against the precepts of Islam. The term 'precepts of Islam' must be accorded a wide and liberal meaning (see paras 20 & 24).

(3) Section 53 of the Enactment was also an order or direction made by the government and for so long as it was not contrary to the al-Quran or Sunnah and was not an order or direction to engage in *maksiat* (vice), it was obligatory upon Muslims to abide by such order or direction. Obedience to such order or direction constituted a precept of Islam (see para 25).

(4) Such order or direction was made not merely to prevent deviant teachings but also to maintain order and prevent division in the community. No one could suggest the requirement of *tauliah* was a vice. On the contrary, it was necessary in this day and age for the authority to regulate the teachings or preaching of the religion to control, if not eliminate, deviant teachings and safeguard the integrity of the religion (see para 26).

(5) As s 53(1) was enacted pursuant to s 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965 — a federal legislation conferring criminal jurisdiction to the Shariah Courts in respect of offences against the precepts of Islam by persons professing that religion — the Shariah Court of Negeri Sembilan had the necessary jurisdiction to try an offence under that section (see para 28).

[Bahasa Malaysia summary

Pempetisyen pertama ditangkap oleh pegawai-pegawai penguatkuasa Jabatan Hal Ehwal Agama Islam Negeri Sembilan kerana menjalankan ceramah agama tanpa tauliah, kesalahan di bawah s 53(1) Enakmen Jenayah Syariah (Negeri Sembilan) 1992 ('s 53(1)'). Dia dituduh untuk kesalahan tersebut di mahkamah rendah Syariah dan pempetisyen kedua dituduh dengan membantu dan bersubahat dengannya. Pempetisyen-pempetisyen memperolehi keizinan untuk mempetisyen Mahkamah Persekutuan memperisytiharkan s 53(1) terbatal dan tidak sah kerana tidak menghormati Perlembagaan Persekutuan ('Perlembagaan') dan juga untuk mengisytiharkan bahawa Mahkamah Syariah Negeri Sembilan tidak mempunyai bidang kuasa untuk membicarakan apa-apa kesalahan di bawah seksyen tersebut. Pempetisyen-pempetisyen mendakwa bahawa Badan Perundangan Negeri telah melampaui kuasa perundangannya dalam mengubal s 53(1) di mana sesiapa yang melibatkan diri dalam mengajar agama tanpa tauliah daripada Jawatankuasa Tauliah, kecuali kepada ahli-ahli keluarganya di tempat dia tinggal sahaja, melakukan suatu kesalahan yang boleh dihukum dengan denda atau penjara atau kedua-duanya sekali. Jawatankuasa Tauliah, yang termasuk Mufti dan di antara tiga dan tujuh orang lain dengan pengalaman yang mencukupi, pengetahuan dan kepakaran, mempunyai kuasa untuk memberikan dan menarik balik tauliah bagi tujuan mengajar agama Islam atau apa-apa aspeks di dalamnya. Seksyen 53(1) digubal berikutan perkara 74(2) dibaca bersama Item 1, Senarai Negeri, Jadual Kesembilan Perlembagaan yang memberikan kuasa kepada Badan Perundangan Negeri untuk membuat undang-undang bagi pembentukan dan hukuman 'offences against the precepts of Islam' oleh orang-orang yang mengamalkan agama tersebut. Pempetisyen-pempetisyen berhujah bahawa tidak al-Quran ataupun Sunnah menetapkan bahawa tauliah mesti diperolehi sebelum seseorang boleh mengajar agama Islam. Mereka menyatakan bahawa mengajar agama Islam tanpa tauliah bukan kesalahan dalam Islam dan bukan juga bertentangan 'precepts of Islam' tetapi ia dibuat sebagai kesalahan di bawah Pentadbiran undang-undang Islam supaya pengajaran agama Islam selaras dengan al-Quran dan Sunnah. Atas asas ini, mereka menyatakan, s 53(1) terangkum di luar skop peruntukan-peruntukan Perlembagan tersebut dan tidak sah. Responden-responden berhujah bahawa tauliah adalah pra-syarat sebelum seseorang boleh mengajar agama Islam. Dalam mencapai keputusannya, Mahkamah Persekutuan menerima bahawa terma 'precepts of Islam' meliputi tiga domain fahaman utama ('akidah'), undang-undang ('Syariah') dan etika atau moral ('akhlak') dan bahawa ajaran-ajaran tersebut berpunca daripada al-Quran dan Sunnah.

Diputuskan, menolak petisyen tanpa perintah terhadap kos:

(1) Dewan Undangan Negeri Sembilan telah bertindak di dalam kuasa perundangannya dalam mengubal s 53 Enakmen. Tujuan peruntukan

tersebut adalah jelas, iaitu, untuk melindungi integriti aqidah, Syariah dan akhlak yang mana membentuk ajaran-ajaran Islam. Keperluan tauliah adalah perlu untuk memastikan hanya orang yang layak mengajar agama dibenarkan berbuat demikian. Ini adalah langkah untuk menghalang penyebaran ajaran sesat di antara umat Islam yang mana adalah kesalahan di bawah s 52 Enakmen (lihat perenggan 24).

(2) Ia adalah biasa diterima bahawa ajaran sesat adalah kesalahan bertentangan ajaran-ajaran Islam. Oleh itu, terdapat merit dalam hujahan responden-responden bahawa, dengan implikasi perlu, ajaran Islam tanpa tauliah boleh ditafsirkan serupa kesalahan bertentangan ajaran-ajaran Islam. Terma 'precepts of Islam' mesti diberikan maksud luas dan liberal (lihat perenggan 20 & 24).

(3) Seksyen 53 Enakmen juga adalah perintah atau arahan yang dibuat oleh kerjaan dan asalkan ia tidak bertentangan kepada al-Quran atau Sunnah dan bukan perintah atau arahan untuk melibatkan diri dengan maksiat, umat Islam bertanggungjawab untuk mematuhi perintah atau arahan sedemikian. Taat kepada perintah atau arahan sedemikian membentuk ajaran Islam (lihat perenggan 25).

(4) Perintah atau arahan sedemikian bukan sahaja dibuat untuk menghalang ajaran sesat tetapi juga untuk mengekalkan perintah dan menghalang pembahagian di dalam komuniti. Tidak seorangpun boleh mencadangkan bahawa keperluan tauliah adalah maksiat. Sebaliknya, ia adalah perlu pada masa ini untuk pihak berkuasa melaraskan ajaran-ajaran atau berkhutbah agama untuk mengawal, jika tidak menghapuskan, ajaran sesat dan melindungi integriti agama (lihat perenggan 26).

(5) Memandangkan s 53(1) digubal berikutan s 2 Akta Mahkamah Syariah (Bidang kuasa Jenayah) 1965 — perundangan persekutuan memberikan bidang kuasa jenayah kepada Mahkamah Syariah berkaitan kesalahan-kesalahan bertentangan ajaran-ajaran agama Islam oleh orang-orang yang menganut agama tersebut — Mahkamah Syariah Negeri Sembilan mempunyai bidang kuasa yang perlu untuk membicarakan kesalahan di bawah seksyen tersebut (lihat perenggan 28).]

Notes

For cases on State Assembly, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2600–2604.

Cases referred to

Ah Thian v Government of Malaysia [1976] 2 MLJ 112, FC (folld)
CP Motor Spirit Act, Re AIR 1939 FC 1, FC (refd)
Diamond Sugar Mills v State of UP AIR 1961 SC 652, SC (refd)

A *Dorairajan v State of Madras (FB)* AIR 1951 Madras 120, HC (refd)
Harakchand Ratandchand Banthia v Union of India AIR 1970 SC 1453, SC (refd)
Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals [1997] 3 MLJ 23, CA (refd)
B *Mamat bin Daud v Government of Malaysia* [1986] 2 MLJ 192, SC (refd)
Punjab D Industries v IT Commr AIR 1965 SC 1862, CA (refd)
Subramanian v Muthuswamy AIR 1941 FC 47, FC (refd)
Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications [2009] 6 MLJ 354, FC (folld)
C *Union of India v Shri Harbhajan Singh Dhillon* (1971) 2 SCC 779, SC (refd)
United Provinces v Mt Atiqa Begum and other AIR 1941 FC 16, FC (refd)

Legislation referred to

D Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003 s 118
Federal Constitution arts 4(4), 74(2), 128, 128(1)(a), Ninth Schedule, State List, Item 1
Syariah Courts (Criminal Jurisdiction) Act 1965 s 2
E Syariah Criminal Enactment (Negeri Sembilan) 1992 ss 52, 53, 53(1)

Kamarul Hisham Kamaruddin (Hasnal Rezua Merican and Lim Kon Keen with him) (The Chambers of Kamarul Hisham & Hasnal Rezua) for the petitioners.
Hanif bin Hassan (Hanif Hassan & Co) for the first respondent.
Ishak bin Sahari (State Legal Advisor of Negeri Sembilan) for the second
F *respondent.*
Azizah Nawawi (Suzana bt Atan and Arik Sanusi bin Yeop Johari with her) (Attorney General's Chambers) for the third respondent.

Arifin Zakaria Chief Justice (delivering judgment of the court):

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[1] This petition was filed pursuant to art 4(4) of the Federal Constitution for which leave was granted by this court on 5 July 2010. The petitioners herein seek the following reliefs:

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(i) for a declaration that section 53(1) of the Syariah Criminal Enactment (Negeri Sembilan) 1992 (Enactment No. 4 Year 1992) as amended by section 3 of the Syariah Criminal Enactment (Negeri Sembilan) (Amendment) 2004 (Enactment 3 Year 2004) is null and void as being
I contrary to the Federal Constitution;

(ii) for a declaration that the Syariah Court for Negeri Sembilan does not have jurisdiction to try any offence under section 53(1) of the Syariah Criminal Enactment (Negeri Sembilan) 1992 (Enactment No. 4 Year 1992) as

amended by section 3 of Syariah Criminal Enactment (Negeri Sembilan) (Amendment) 2004 (Enactment 3 Year 2004); and

(iii) for any other declarations or consequential orders that this Honourable Court deems fit and just to be given.

[2] The facts giving rise to this petition are briefly as follows. The first petitioner was arrested by the enforcement officers of Jabatan Hal Ehwal Agama Islam Negeri Sembilan on 28 February 2010 for conducting a religious talk without a *tauliah* in the District of Kuala Pilah, Negeri Sembilan. This is an offence under s 53(1) of the Syariah Criminal Enactment (Negeri Sembilan) 1992 ('the Enactment') and he was accordingly charged for the said offence at the Shariah Subordinate Court of Negeri Sembilan. The second petitioner was charged for aiding and abetting the first petitioner. The charges are still pending before the said court.

[3] The petitioners are challenging the constitutionality of s 53(1) of the Enactment on the ground that the State Legislature has exceeded its legislative authority in enacting the said section. They further contend that the Shariah Court lacks jurisdiction to try the offence under the said section. In support, the petitioners cited the case of *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112, where Suffian LP at p 113 observed:

> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.
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> Under our Constitution written law may be invalid on one of these grounds:
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> (1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter which respect to which the State legislature has no power to make law, art 74; or
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> (2) in the case of both Federal and State written law, because it is inconsistent with the Constitution, see art 4(1); or
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> (3) in the case of State written law, because it is inconsistent with Federal law, art 75.
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> The court has power to declare any Federal or State law invalid on any of the above three grounds.
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> The court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any court in the land and in any proceeding whether it be started by Government or by an individual.

A But the power to declare any law invalid on ground (1) is subject to three restrictions prescribed by the Constitution.

[4] We fully agree with the above observation by Suffian LP. Let us now consider what s 53(1) of the Enactment provides. It reads as follows:

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53 Teaching of religion without tauliah

(1) Any person who engages in the teaching of religion without a tauliah from the Tauliah Committee under subsection 118(3) of the Administration Enactment, except to members of his family at his place of residence only, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding three thousand ringgit or imprisonment for a term not exceeding two years or both.

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D **[5]** Section 118 of the Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003 provides as follows:

118 Tauliah Committee

E (1) The Majlis shall appoint a committee to be known as the Tauliah Committee, which shall consist of —

(a) the Mufti as Chairman; and

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(b) not less than three and not more than seven persons with the appropriate experience, knowledge and expertise.

(2) The Majlis shall be responsible for implementing the decisions of the Committee.

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(3) The Tauliah Committee shall have power to grant a tauliah for the purpose of the teaching of the religion of Islam or any aspect of the religion of Islam and to withdraw such tauliah.

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[6] The petitioners contend that s 53(1) of the Enactment is invalid on the ground that it breaches art 74(2) and Item 1, State List, Ninth Schedule of the Federal Constitution wherein the State Legislature is conferred with the power to make laws only with respect to the 'creation and punishment of offences by persons professing the religion of Islam against precepts of that religion'. The petitioners contend that the stipulation for which a *tauliah* is required before any person engages in the teaching of religion is not an offence against the precepts of Islam as provided in Item 1, State List,Ninth Schedule of the Federal Constitution. They maintain that there is no such offence in Islam. On

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that premise, s 53(1) of the Enactment falls outside the scope of the relevant provision. Hence it is invalid. They referred us to *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals* [1997] 3 MLJ 23 where Gopal Sri Ram JCA (as he then was) stated at p 36:

> Generally speaking, if a particular subject in respect of which a law is enacted is not one of those enumerated in the enabling constitutional provision, the enacted law is ultra vires and therefore void: *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119. Proceedings to have a law invalidated on this ground — that is to say, the lack of legislative jurisdiction — must be brought in accordance with the terms of art 4(4) read with art 128 of the Federal Constitution.

[7] Section 53(1) of the Enactment is enacted pursuant to art 74(2) read together with Item 1, State List, Ninth Schedule of the Federal Constitution. This is clear from the Preamble to the Enactment. Article 74(2) of the Federal Constitution reads:

> Subject matter of federal and State laws.
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> 74
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> (1) …
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> (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.

[8] Item 1, State List, Ninth Schedule of the Federal Constitution reads:

> LIST II — State List
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> (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,

A organization and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; 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. (Emphasis added.)

[9] The petition herein is made under art 128(1)(a) of the Federal Constitution which provides:

C Jurisdiction of Federal Court

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

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

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(b) …

[10] The article confers upon this court the exclusive power to determine the F issue or matter in the exercise of its original jurisdiction (see *Mamat bin Daud v Government of Malaysia* [1986] 2 MLJ 192). Perhaps, I need to mention here that the decision of this court on the issue is therefore binding on all courts in the country including the Shariah Courts.

G PRECEPTS OF ISLAM

[11] The critical issue in this petition turns on the question of whether the requirement of a *tauliah* for the teaching of the religion of Islam falls within the precepts of Islam, without which, any person who teaches Islam is committing H an offence against the precepts of Islam. The petitioners submit it is not.

[12] Before we delve into that issue, it is necessary for us to firstly consider what is meant by the term 'precepts'. The word 'precepts' is not defined in the Federal Constitution. It came for consideration of this court in *Sulaiman bin* I *Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354. In that case, the court was asked to consider the issue of whether the non-compliance of a *fatwa* issued by the Fatwa Committee is an offence against the precepts of Islam. Even though the principal issue in that case is not the same as here, the observation of the court as to what is meant

by 'precepts" is relevant to the present case. Having considered the expert opinions tendered in that case, Abdul Hamid Mohamed CJ in delivering the judgment of the court held:

> 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.
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> It can be seen that all the three expert witnesses agree that:
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> (a) precepts of Islam cover three main domains ie creed or belief ('*aqidah*'), law ('*Shariah*')and ethics or morality ('*akhlak*');
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> (b) precepts of Islam are derived from the al-Quran and Sunnah.

[13] We completely agree with the above view. In the present case, both parties have also filed their respective expert opinions by way of affidavits. For the petitioners, we have Tan Sri Dato' Seri Dr Hj Harussani bin Hj Zakaria, (the Mufti of Perak) and Professor Madya Dato' Alim Panglima Hj Mat Jahya bin Haji Hussin, (the former Mufti of Perlis) who is also the father of the first petitioner.

[14] Whereas, for the respondents, we have Tan Sri Sheikh Ghazali bin Hj Abdul Rahman, the Shariah Legal Adviser at the Attorney General's Chambers; Dato' Hj Mohd Yusof bin Hj Ahmad, (the Mufti of Negeri Sembilan) and Ustaz Muhammad Fuad bin Kamaludin, the chairman for *aqidah* (belief), Islamic Religious Council of Negeri Sembilan. We have no doubt that they are all worthy expert witnesses on Islam. Though the former Mufti of Perlis is giving his expert opinion in support of his own son, the first petitioner, this court found that his opinion is purely academic and far from being bias in favour of the first petitioner.

[15] Briefly, this is what they said. The former Mufti of Perlis holds the view that *tauliah* does not fall within the precepts of Islam. Instead, what is important to consider is the level of knowledge of that person and the correctness of the contents of his teachings according to al-Quran and Sunnah.

A He then concluded that the offence of teaching without *tauliah* is merely an administrative offence in nature, rather than an offence against the precepts of Islam.

B **[16]** The Mufti of Perak shares the same sentiment that is, teaching the religion of Islam without a *tauliah* is not an offence against the pillars of Islam but rather an offence under the administration of Islamic law. However, he admitted that *tauliah* is an important mechanism to keep the teaching of Islam in line with al-Quran and Sunnah.

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[17] The Mufti of Negeri Sembilan and Ustaz Muhammad Fuad bin Kamaludin hold the view that *tauliah* is a prerequisite before one could teach the religion of Islam, based on the hadith of the Holy Prophet PBUH. It was narrated in that Hadith that before the Holy Prophet sent his companion Muaz
D bin Jabal to Yemen to be his representative, including to teach the religion of Islam to the Yemenites, the Holy Prophet PBUH had asked several questions to Muaz bin Jabal as to how he would decide on a particular case referred to him. This incident shows that the Holy Prophet PBUH himself had examined his companion before accrediting him with the authority to teach the religion of
E Islam to society. Though the word *tauliah* is not used, but in effect, it is a *tauliah* in every sense of the word.

[18] On the other hand, the Mufti of Perak and the former Mufti of Perlis
F stated that that there is no authority from al-Quran or Sunnah requiring a *tauliah*. Regarding the *hadith* of the Holy Prophet PBUH on the mission sending out Muaz bin Jabal to Yemen, the Mufti of Perak said, the Holy Prophet PBUH did not view it as a *tauliah* when he chose Muaz bin Jabal but instead had considered the level of his knowledge and the accuracy of his
G teachings. That he said cannot be equated with *tauliah*. They maintained that the *tauliah* system that we practise today is different in that a preacher is guilty if he teaches without a *tauliah*, without considering the contents of the preaching.

H **[19]** From the above, we are of the view that there is a clear authority premised on the hadith of the Holy Prophet PBUH concerning the sending of Muaz bin Jabal to Yemen that some sort of verification is necessary before a preacher is allowed to teach the religion to others. In any event, all the experts share the common view that the teaching of Islam needs to be regulated to
I prevent deviant teachings. How else can the authority do this without first verifying whether a preacher is sufficiently qualified to teach or preach the religion? This must be done before the preacher goes around preaching and not after. As we see it, the requirement of *tauliah* is just a mechanism to achieve this purpose.

[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.
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> 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:
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> 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 and bring out harmony between them by recourse to known methods of reconciliation.
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> 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.

[21] In *United Provinces v Mt Atiqa Begum and other* AIR; 1941 FC 16, Gwyer CJ held as follows:

> I think however that none of the items in the lists is to be read in a narrow or restricted sense, and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it.

[22] In *Harakchand Ratandchand Banthia v Union of India* 1970 AIR SC 1453, Ramaswami J stated as follows:

> Before construing these entries it is useful to notice some of the well settled rules of interpretation laid down by the Federal Court and by this court in the matter of construing the entries. The power to legislate is given to the appropriate legislatures by article 246 of the Constitution. The entries in the three lists are only legislative heads or fields of legislation; they demarcate the area over which the appropriate legislatures can operate. It is well established that the widest amplitude should be given to the language of the entries. But some of the entries in the different lists or in the same list may overlap or may appear to be in direct conflict with each other. It is then the duty of this court to reconcile the entries and bring about a harmonious construction.

[23] (See also generally the following cases of *Subramanian v Muthuswamy* AIR 1941 FC 47, *Punjab D Industries v IT Commr* AIR 1965 SC 1862, *Diamond Sugar Mills v State of UP* AIR 1961 SC 652, *In re CP Motor Spirit Act* AIR 1939 FC 1, *Union of India v Shri Harbhajan Singh Dhillon* (1971) 2 SCC 779 and *Dorairajan v State of Madras (FB)* AIR (38) 1951 Madras 120 [CN 14]).

[24] Section 53 of the Enactment is enacted pursuant to Item 1, State List, Ninth Schedule of the Federal Constitution which confers upon the State Legislature the power to enact laws relating to the religion of Islam generally. One of the entries in Item 1 is the creation of offences by persons professing the religion of Islam against the precepts of that religion. Section 53 of the Enactment makes it an offence for any person to engage in the teaching of Islam to any person, other than to members of his family, without first obtaining a *tauliah*. The purpose of this provision is clear, that is to protect the

integrity of the *aqidah* (belief), Shariah (law) and *akhlak* (morality) which constitutes the precepts of Islam. The requirement is necessary to ensure that only a person who is qualified to teach the religion is allowed to do so. This is a measure to stop the spread of deviant teachings among Muslims which is an offence under s 52 of the Enactment. It is commonly accepted that deviant teachings is an offence against the precepts of Islam. Therefore, the respondents contend that, by necessary implication, the teaching of Islam without a *tauliah* could similarly be construed as an offence against the precepts of Islam. In our judgment, there is merit in the respondents' contention. For those reasons, we hold that the State Legislative Assembly of Negeri Sembilan had acted within its legislative power in enacting s 53 of the Enactment.

[25] The respondents further contend that s 53 of the Enactment is an order or direction made by *ulil amri* (arabic term referring to the government) and for so long as the order or direction is not contrary to al-Quran or as-sunnah and is not an order or direction to engage in *maksiat* (vice), it is obligatory upon Muslims to abide by such order or direction. Obedience to such order or direction constitutes a precept of Islam. In this regard, we are in complete agreement with the view of the Mufti of Negeri Sembilan as stated in his affidavit filed herein which reads:

> Di dalam pentadbiran negara setiap keputusan dan tindakan hendaklah sentiasa mengambil kira prinsip yang digariskan oleh kaedah Fiqh iaitu:
>
> Maksudnya: Urusan Pemerintah terhadap rakyat terikat dengan Maslahah.
>
> Kaedah ini memberi garis panduan kepada pemerintah dalam urusan pentadbiran negara membuat peraturan atau polisi yang mengutamakan kemaslahatan masyarakat.
>
> Maslahah merupakah salah satu prinsip Usul Feqh. Maslahah pada asalnya ialah apa yang memberi manfaat dan manjauhkan kemudaratan. Namun yang dimaksudkan dengan maslahah ialah memelihara maqasid syariyyah yang lima, iaitu menjaga agama, jiwa, akal, keturunan dan harta. Setiap perkara yang membawa kepada lima perkara asas ini dianggap maslahah. Manakala setiap perkara yang menggugat lima perkara ini dianggap mafsadah (kerosakan) dan menjauhkannya adalah maslahah. (al-Ghazaliyy 1997: 216-217 al-Mustasfa Min 'llm al-Usul).

[26] In our judgment, the requirement of *tauliah* for the purpose of protecting the public interest (*maslahah*) falls within the concept of *siyasah shari'yyah*. Such order and direction are made not merely to prevent deviant teachings, but also to maintain order and prevent any division in the community. Clearly, no one could suggest that the requirement of a *tauliah* as stipulated in s 53 of the Enactment is a *maksiat*. On the contrary, we are of the view that it is necessary in this day and age for the authority to regulate the teachings or preaching of the religion in order to control, if not eliminate,

deviant teachings. The integrity of the religion needs to be safeguarded at all cost. That is what s 53 of the Enactment purports to do.

[27] The petitioners also seek a declaration that the Shariah Court for Negeri Sembilan does not have jurisdiction to try an offence under s 53 of the Enactment on the ground that the provision does not fall within Item 1, State List, Ninth Schedule of the Federal Constitution. In view of our earlier findings, it necessarily follows that the petitioners' contention herein is devoid of any merit.

[28] For completeness, we wish to add that s 53(1) of the Enactment was enacted pursuant to the provision of s 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965, a federal legislation conferring criminal jurisdiction to the Shariah Courts in respect of offences against the precepts of the religion of Islam by persons professing that religion. Therefore, we hold that the Shariah Court of Negeri Sembilan is conferred with the necessary jurisdiction to try such an offence.

CONCLUSION

[29] For the above reasons, the petition is dismissed. By consent no order is made as to costs.

Petition dismissed with no order as to costs.

Reported by Ashok Kumar