

**CIVIL 'JURISDICTION' OF SYARIAH COURT IN MALAYSIA - SHOULD IT BE EXPRESSED OR IMPLIED?: A REFLECTION**

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**ABSTRACT**

*The jurisdiction of Syariah Courts to hear matters its own matters is generally provided and fallen under List II (State List) of the 9<sup>th</sup> Schedule to the Federal Constitution ('FC') and specifically provided in the respective states' enactments on the administration of Islamic Law enactments and for the Federal Territories, an act passed by Parliament. However, there are certain matters that have been left by the legislatures to have them being specifically provided in the said provisions even though it involves the determination of Islamic Law as enshrined in List II (State List) under the Ninth Schedule to the FC. In such situation, what is the position of Syariah Court? Could it determine the matters even though it had not been provided by the legislature?. This paper will highlight these issues through cases decided in courts in Malaysia.*

**INTRODUCTION**

Under the Malaysian Federal Constitution, legislative powers are distributed between the Federal Legislature and the State Legislature. In List II (State List) under the Ninth Schedule of the Federal Constitution, the subject matter of Islam is vested in the State Legislature. This list enumerates the power and rights of the states to administer Islamic matter. Item 1 of List II states as follows:

*'Except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic law and personal and family law of persons professing the religion of Islam, including 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 or worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List, the constitution, organization and procedure of 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 item, 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'.*

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In respect of the Federal Territories, only the Parliament can pass law relating to Islam pursuant to item 6(e) of List 1 (Federal List) under the Ninth Schedule to the FC. This item reads as follows:

*'The government and administration of the Federal Territories of Kuala Lumpur and Labuan including Islamic Law therein to the same extent as provided in item 1 in the State List and in respect of the Federal Territory of Labuan, native law and custom to the same extent as provided in item 13 of the Supplement to State List for States of Sabah and Sarawak'*

On the other hand, matters that specifically falls within the Federal Government, concerning the administration of justice and law that is provided in item 4 of List I (Federal List) under the Ninth Schedule to the FC. Matters fall within this list, are only for the concern of Federal Government. Only the Federal Government can pass law and to govern these matters, not the State. The matters that fall within item 4 and Item 6 (e) of List 1 (Federal List) under the Ninth Schedule to the FC, read as follows:

*the constitution, organization, jurisdiction, remuneration, privileges of the officers of the court (other than Syariah Courts);  
Jurisdiction and power of all such courts;  
Remuneration and other privileges of the judges and officers presiding over such courts;  
Persons entitled to practise before such courts;  
Subject to para (ii), the following:*

*(i) contract, partnership, agency, other special contract, ... actionable wrongs, property and its transfer and hypothecation, except land, bona vacantia, equity and trusts, ...negotiable instruments, statutory declarations, arbitration, mercantile law, registration of businesses...probate and letter of administration, bankruptcy and insolvency, oaths and affirmations, limitation, reciprocal enforcement of judgments and orders, the law of evidence;*

*ii) the matters mentioned in para (i) do not include Islamic personal law relating to marriage, divorce, guardianship, maintenance, adoption, family law, gifts or succession, testate and intestate;*

*iii) Official secrets; corrupt practices;*

*iv) Use or exhibition of coats of arms, armorial bearings, flags, emblems, uniforms, orders and decorations other than those of a State;*

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

*vi) Indemnity in respect of any of the matters in the Federal List or dealt with by federal law;*

*vii) Admiralty Jurisdiction;*

*viii) Ascertainment of Islamic law and other personal laws for purposes of federal law; and,*

*ix) Betting and lotteries.*

### THE SYARIAH COURT

Pursuant to List II (State List), except in regard to Federal Territories, only the states (States' Legislative Assemblies) are responsible to make, pass and establish

the court which will be responsible to determine Islamic matters. For example in Kedah, the State Legislative Assemblies had passed laws and regulations concerning Islamic matters. These laws and regulations are as follows:

The Kedah Islamic Criminal Law Code Enactment 1988;  
The Kedah Islamic Family Law Enactment 1979;  
The Kedah Syariah Courts Enactment 1993;  
The Kedah Administration of Islamic Law Enactment 1978;  
The Kedah Islamic Evidence Enactment of the Syariah Court 1989; and,  
The Kedah Islamic Civil Procedure Enactment 1979

The respective states are responsible to make laws relating to matters that fall within List II of the 9<sup>th</sup> Schedule to the FC. This power or grant is stated in article 74 (2) of the FC which reads:

*'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'*

However article 74(3) qualifies the operation of section 74(2) in that the power to make laws is subject to conditions or restrictions imposed by the FC. Article 77 of the FC states that the legislature of a state shall have power to make laws with respect to any matter not enumerated in any of the Lists set out in the Ninth Schedule, viz matters that are not fallen within the Parliament's purview.

#### **THE ESTABLISHMENT OF SYARIAH COURT**

As mentioned above the responsibility to establish Syariah Courts falls to the states. For example in Kedah pursuant to the section 3(1)(2)(3) of the Syariah Court Enactment 1993, His Royal Highness the Sultan of Kedah on the advices of the Majlis Agama Islam Kedah, may by notification in the Gazette constitute Syariah Subordinate Courts, Syariah High Courts and Syariah Appeal Courts for the state of Kedah. The Sultan of Kedah also is empowered by section 4, 5, 6, 7 and 8 of the Kedah Syariah Court Enactment 1993, to appoints, on the advices either given by the Majlis Agama Islam Kedah or on the recommendation of the Chief Syariah Judge, the Chief Syariah Judge, Syariah High Court Judges, Syariah Subordinate Court Judges and Syariah Courts Registrars.

#### **THE APPLICABLE LAW TO SYARIAH COURTS**

Based on the Administration of Islamic law Enactments of each states in Malaysia it is provided that Islamic Law (hukum syara') is the governing law of the Syariah Courts and if there is no provision in the Enactments on a particular issue, the Syariah Court is duty bound to follow the Islamic Law by reference to, *inter alia* the Quran, Assunnah and opinions of the mazhabs to settle that dispute. These provisions contained in section 245(1)(2) of the Penang Syariah Court Civil Procedure Enactment 1999, section 130(1)(2) of the Penang Syariah Evidence Enactment 1996, section 25(1)(2) of the Kedah Syariah Court Enactment 1993, section 122(1)(2) of the Kedah Islamic Family Law Enactment 1984, section 273(1)(2) of the Kedah Civil Procedure Enactment 1984, section 100 of the Kedah Islamic Evidence Enactment 1990 and section 253 of the Selangor Syariah Civil Procedure Code 1991.

## THE CIVIL JURISDICTION OF SYARIAH COURTS

List II of the 9<sup>th</sup> Schedule to the FC, specifically provide to the state (including the Syariah Court) the power over certain matters and in regard to the Syariah Court, its jurisdiction and power are only applicable and enforced to Muslims. This provision is repeated and further clarified in the respective states' enactments on the administration of Islamic Law, for example, in the State of Kedah, pursuant to section 9(2)(b) of the Syariah Courts Enactment 1993 ('Kedah Enactment'), the Syariah High Court can only hear and determine all actions in which all parties are Muslims. The relevant provisions relating to civil and criminal jurisdiction of the Syariah Court in Kedah are stated below.

*Section 9 (2) A Syariah High Court shall -*

*(b) in its civil jurisdiction, hear and determine all actions and proceedings in which all parties are Muslim and which relate to -*

*betrothal, marriage, ... or other matters relating to the relationship between husband and wife;*

*a disposition of, or claim to, ... the matters set out item I above;*

*the maintenance of dependants, legitimacy, or guardianship or custody (hadhanah) of infants;*

*the division of, or claims to, harta sepencarian;*

*Wills or death-bed gifts (marad-al-maut) of a deceased Muslim;*

*Gifts inter-vivos, or settlements made without adequate consideration in money or money's worth, by a Muslim;*

*Wakaf or nazar;*

*Division and inheritance of testate or intestate property;*

*The determination of persons entitled to share in the estate of a deceased Muslim or the shares to which such persons are respectively entitled; or*

*Other matters in respect of which jurisdiction is conferred by any written law;*

Similarly for the Syariah Subordinate Court, pursuant to section 10(2)(b) of the Kedah Enactment, possesses the jurisdictions as that of the Syariah High Court.

For Penang and the Federal Territories (Kuala Lumpur), the aforesaid jurisdiction is respectively spelt out in section 48(2)(b)(i)-(x) of the Administration of Islamic Religious Affairs Enactment of the State of Penang, 1993 ('Penang Enactment') in respect of the Penang Syariah High Court's, and section 46(2)(b)(i)-(x) of the Administration of Islamic Law (Federal Territories) Act 1993 ('FT Act') for the Federal Territories'. In respect of their respective Syariah Subordinate Courts' jurisdictions, these are stated in section 49(2)(b) and section 47(2)(b) of their respective Enactment and Act.

Meanwhile their respective provisions on the Syariah Subordinate Courts are provided in section 49(2)(b) of the Penang Enactment, section 47(2)(b) of the FT Act and section 43(2)(b) of the Selangor Enactment.

### **Article 121 (1A) of the FC**

Since the inclusion of clause 1A of article 121 to the Federal Constitution ('FC'), the Ordinary Civil Courts - courts other than the Syariah courts, shall have no jurisdiction to try and decide matters which fall within the jurisdiction of the Syariah Courts. The Ordinary Civil Courts shall have no jurisdiction if the parties involved are Muslims and the disputed matters are within the jurisdiction of the Syariah Courts. This new amendment to the FC was made into effect from 10 June, 1988. The rationale of having such an amendment is to allow the Syariah Court to carry out its functions within the jurisdiction conferred by law without

any interference from the Ordinary Civil Courts. Previously there were cases found to be within the Syariah Court's jurisdiction, yet they were dealt with by the Ordinary Civil Court. The effect of this amendment is to avoid in future any conflict between the decisions of the Syariah Court and the Ordinary Civil Court which had occurred previously in a number of cases for example *Myriam v Ariff*,<sup>3</sup> *Commissioners for Religious Affairs Trengganu & Ors v Tengku Mariam*<sup>4</sup>, *Ainan bin Mahmud v Syed Abu Bakar*<sup>5</sup> *Nafsiah v Abdul Majid*<sup>6</sup>, *Roberts v Ummi Kalthom*<sup>7</sup>, *Boto' binti Taha v Jaafar bin Muhammad*<sup>8</sup>, *Re Syed Shaik Alkaff*<sup>9</sup> and in *Re Alsagoff's Trust*<sup>10</sup>.

By this constitutional amendment it is to be understood that matters that fall within the jurisdiction of the Syariah Court as enumerated in the above statutory provisions should exclusively be dealt with by the Syariah Court. However, upon scrutiny of some cases, it is found that not all cases that may relate to the above provisions could be determined by the Syariah Court. In that case, these cases fall back on the Ordinary Civil Courts.

### THE PROBLEM

One of the underlying problems that occur to Syariah Court in respect of its right to freely and fully exercising its civil 'jurisdiction', though guaranteed by Article

<sup>3</sup> (1971) 1 MLJ 265. The issue on this case was whether the widow who had married to another man could be given custody of her child from her previous marriage. The court set the decision of the Kathi aside on the ground of section 45(6) of the Selangor Administration of Muslim Law Act 1952 and the jurisdiction granted to the High Court (Ordinary Civil Court) pursuant to the Guardianship of Infants Act 1961.

<sup>4</sup> (1969) 1 MLJ 110, where there was issue of wakaf. In the preliminary, the parties had consulted the Mufti to have decision on whether wakaf made by Tengku Chik for the benefit of his family was legal or not. The Mufti had approved such wakaf. However, the learned judge in that case refused to accept such fatwa but follow decision of the Privy Council in *Abdul Fata Mohamed Isbak v Rasamaya Dbur Chowdhury* (1894) L.R. 221A 76 and *Fatimah binti Mohamad v Salim bahshuwen* (1952) A.C. 1.

<sup>5</sup> (1939) MLJ 209. Where it involved a child which was birthed four months after marriage. The court held that according to section 112 of the Evidence Enactment, such a child was a legitimate child for the couple, even though it is illegitimate according to Islamic Law.

<sup>6</sup> (1969) 2 MLJ 174. Where the plaintiff in this case claimed damages against the defendant for having breached the contract to marry and further alleged that damages must be added as she had been persuaded to have sexual intercourse with the defendant. Consequently, she gave birth. The learned judge in this case held that the High Court (Ordinary Civil Court) had power and jurisdiction to hear and determine the case. This was clearly disregarded the provision of section 119 of the Islamic Law Administration Enactment of Melaka 1959 which provided special statutory provisions for betrothal among Muslims.

<sup>7</sup> (1966) 1 MLJ 163. This case involved issue of Harta Sepencarian, which clearly within the jurisdiction of the Syariah Court.

<sup>8</sup> (1985) 2 MLJ 98. This case involved issue of Harta Sepencarian.

<sup>9</sup> (1923) 2 MC 38. This case involved issue of wakaf. In this case it was held that provision for estate assumed by a sound Muslim man as good and valid according to Islamic law does not necessarily be accepted as charitable in the eye of the English Law. Similarly, the usages of 'wakaf' or 'amal al khaira' does not necessarily show the general charitable intention. Thus provisions made to spend the balance of estates for amal al khaira (good deeds) in Tahrim, Mekah and Madinah according to the discretion of the donor (wasi) was held not valid.

<sup>10</sup> (1956) MLJ 244. Where it was held that monetary provision as gift to the poor people reciting Al-Quran on the graves of the deceased was not valid. This is because the court are bound to follow section 101 of the Evidence Act 1950 which provides that will and trust deeds shall be interpreted in accordance with the English law.

121 (1A) of the FC, is the issue of lacking of jurisdiction<sup>11</sup> over certain matters. This is due to the failure of the States' Administration of Islamic Law Enactments to incorporate fully and comprehensively the matters enumerated under List II (State List) of the Ninth Schedule to the FC. Because of this problem, Syariah Court could not determine that matter, even though it involves issues of Islamic Law. For example is the issue of apostasy/murtad (conversion out of Islam). In some states in Malaysia, there is no provision which specifically grants Syariah Court the jurisdiction to determine the status and issue of apostasy. In this situation, the matter and dispute over the issue of aspostasy would fall back on the realm of the High Court (Ordinary Civil Court).

### Case Law

To illustrate the above difficulty, the authors would like to highlight and discuss cases that raised this problem. The position of these cases on the above problem and its solution seem to be precarious and uncertain, which warrant deeper thought and scrutiny over them. These cases are:

Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor (No. 2)<sup>12</sup>;  
Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang & Satu Tindakan Yang Lain<sup>13</sup>;  
Barkath Ali bin Abu Backer v Anwar Kabir bin Abu Backer & Ors<sup>14</sup>;  
In The Estate of Tunku Abdul Rahman Putra ibni Almarhum Sultan Abdul Hamid<sup>15</sup>;  
Tan Sung Mooi v Too Miew Kim<sup>16</sup>;  
Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur<sup>17</sup>; and,  
Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor.<sup>18</sup>  
Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor (No. 2)<sup>19</sup>

In this case, the plaintiff was the widow of the deceased (Lee Siew Kee), seeking from the High Court (Ordinary Civil Court) the following orders:  
a declaration that the deceased, was a Buddhist during his lifetime and at the time of his death on 2 May, 1991;

<sup>11</sup> The word 'jurisdiction' and 'power' is different. One may fall into it's perplexing terminology if he does not give sufficient care to their difference of meaning. The term 'The distinction between jurisdiction and power was considered in Lee Lee Cheng v Seow Peng Kwang (1960) 1 MLJ1. The court found that the meaning of the words 'jurisdiction' and 'powers' as used in the Courts Ordinance 1948 were different. This was because there were different provisions relating to 'jurisdiction' and 'powers' in that Ordinance. The court explained that 'jurisdiction' was the authority of the courts to hear and decide disputes brought before it. 'Powers' on the other hand were the courts' capacity to give effect to its judgment by making or giving the order or the relief prayed. The court stated that although a court was given certain 'powers', this did not mean that the court could use the 'powers' if it had no 'jurisdiction'. If a court has 'jurisdiction' over a matter, it could not exceed its 'power' in that matter because the terms 'jurisdiction' and 'powers' were distinct.

<sup>12</sup> (1991) 3 MLJ 487.

<sup>13</sup> (1996) 3 CLJ 231.

<sup>14</sup> (1997) 4 MLJ 389.

<sup>15</sup> (1998) 4 MLJ 623.

<sup>16</sup> (1994) 3 MLJ 117.

<sup>17</sup> (1998) 1 MLJ 681.

<sup>18</sup> (1999) 1 MLJ 489.

<sup>19</sup> (1991) 3 MLJ 487.

an injunction ordering the second defendant and/or his agents and servants to deliver the remains (body) of the deceased to the plaintiff and/or the next of kin of the deceased and/or to her/their agents or servants;

*an injunction restraining the first defendant (Majlis Ugama Islam Wilayah Persekutuan) from taking or claiming possession of the remains of the deceased or in anyway whatsoever interfering with the delivery of the plaintiff of her possession of the said remains...*

The first defendant raised a preliminary objection that, the High Court (Ordinary Civil Court) has no jurisdiction to hear the case, being that the matter under trial is one that falls within the jurisdiction of the Syariah Court. And that as it is within the jurisdiction of the Syariah Court, pursuant to Article 121 (1A) of the FC, the High Court (Ordinary Civil Court) is debarred from hearing the case. The first defendant contended that the matter - the determination whether a person who had converted to the religion of Islam is presently, or if he had died, at the time of his death was, Muslim or not - falls within the jurisdiction of the Syariah Court, even though there is no express provision, conferring such jurisdiction to Syariah Court, contained in the Selangor Administration of Muslim Law Enactment 1952. The judge - Eusoff Chin J rejected the argument of the first defendant on the ground that, the jurisdiction of the Syariah Court could not be derived by implication. His Lordship said that, in order for the Syariah Court to have the right and jurisdiction over the matter, there must be specific statute which could confer that jurisdiction to it. Otherwise, the matter is seized to the High Court (Ordinary Civil Court) for determination. The High Court (Ordinary Civil Court) can do this by invoking in particular section 23 of the Court of Judicature Act 1964, which confers the High Court (Ordinary Civil Court) the jurisdiction to try all civil proceedings.

**Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang & Satu Tindakan Yang Lain<sup>20</sup>**

The issue that appeared in this case was, whether Syariah Court in Penang could have the jurisdiction to try apostasy (murtad) cases. This is because there is no provision in the Penang Administration of Islamic Affairs Enactment 1993, which confers that jurisdiction to the Syariah Court. Thus because of this problem, the Syariah Court could not try that apostasy case and instead, that case should fall back on the High Court (Ordinary Civil Court) for determination. The learned judge (Abdul Hamid J) said that, by right the matter should be dealt with by the Syariah Court, as that court consist of members learned in Islamic law. And that they are the right people to decide issue of apostasy according to Islamic Law. However, as there is no provisions in the Penang Enactment conferring the Syariah Court such jurisdiction, the Syariah Court is debarred from trying that case.

**Barkath Ali bin Abu Backer v Anwar Kabir bin Abu Backer & Ors<sup>21</sup>**

*The facts of this case are that, the plaintiff's mother (settlor of a trust who had passed away in 1989) was an Indian national domiciled in India. She had created a trust deed and appointed the plaintiff as the lawful attorney with powers to take possession of all assets in Malaysia, Singapore and other countries. The plaintiff filed an application to the High Court (Ordinary Civil Court) in order to determine whether the assets in Malaysia and Singapore had formed the subject matter of a*

<sup>20</sup> (1996) 3 CLJ 231.

<sup>21</sup> (1997) 4 MLJ 389.

valid and subsisting trust/wakaf or whether those assets were never validly transferred to the trust/wakaf and therefore only had formed part of the settlor's residuary estate and it should be distributed amongst her beneficiaries in accordance with Islamic law (faraid). In the trust/wakaf deed, the settlor declared that the trust was a 'wakaf-ul-aulad'<sup>22</sup> and stipulated that the trust/wakaf shall not fall within the jurisdiction of the 'wakaf board' for supervision. Counsel for the third defendant, relying on Article 121(1A) of the FC, raised a preliminary objection that only the Syariah Court has the jurisdiction to determine the questions raised by the plaintiff, not the High Court (Ordinary Civil Court) as the subject matter (wakaf) is specifically stated to be under the jurisdiction of the Syariah Court pursuant to List II under the Ninth Schedule to the FC and pursuant to the provision in the Penang Administration of Religion of Islam Enactment 1993. However, the plaintiff and his siblings (the first and second defendants), contended otherwise, in that only the High Court (Ordinary Civil Court) has, not the Syariah Court. The Issue: Whether the High Court (Ordinary Civil Court) has one?

The court held that the High Court (Ordinary Civil Court) has the jurisdiction to entertain the case. According to the court, the action of the plaintiffs involved an application for a declaratory decree and such 'decree'/'matter' is undoubtedly is that of the High Court (Ordinary Civil Court)'s pursuant to Specific Relief Act 1960 and Order 15 rule 16 of the Rules of the High Court 1980. It follows that, such an application falls under the province of the High Court (Ordinary Civil Court) to construe and interpret the 'deeds' of the settlor to determine if there was a valid trust/wakaf. Therefore, the Syariah Court has no jurisdiction, even though it involved the question of Muslim's will and wakaf. Clearly, in this case, the court had applied the 'remedy approach' in construing the jurisdiction of the Syariah Court and to legitimize the policy of the court allowing the High Court (Ordinary Civil Court) to determine the case.

#### **In The Estate of Tunku Abdul Rahman Putra ibni Almarhum Sultan Abdul Hamid<sup>23</sup>**

The action before the High Court (Ordinary Civil Court) flows from a petition for letters of administration and is an application for an order to revoke the grant, amend the petition and re-issue a fresh grant of Letters of Administration. One of the issues involved is, whether the High Court (Ordinary Civil Court) has the jurisdiction to hear and determine a dispute arising out of the administration of the estate of a Muslim (Tunku Abdul Rahman Putra).

The High Court (Ordinary Civil Court) highlighted that, its jurisdiction is derived from Article 121 of the FC and in respect of the jurisdiction to hear the application for probate and administration, it is specifically provided by section 24(f) of the Court of Judicature Act 1964. 'Probate and administration' is one of the Federal List (List 1) under the Ninth Schedule to the FC. And being a Federal matter, Parliament had enacted law, and in this respect - the Court of Judicature Act 1964 ('CJA'), conferring the High Court (Ordinary Civil Court) the jurisdiction over 'probate and administration'. Further more, in regard to the predominant position of the CJA, the learned judge alluded that, this CJA shall prevail, except over the FC, over any other written law, in the event there is inconsistency and conflict between this CJA and other written law, pursuant to section 4 of the CJA. In regard to the rules and regulation of the 'probate and administration', Parliament has also, enacted the Probate and Administration Act 1959 ('PAA') to

<sup>22</sup> Wakaf made to the benefit of the children and descendants.

<sup>23</sup> (1998) 4 MLJ 625.



deal with matters relating to probate and administration. The PAA is an Act of general application to both Muslims and Non-Muslims, as opposed to other statutes which have a clause limiting its application to Non-Muslims only. Examples of these limiting clauses restricting its application only over Non-Muslims, are section 2(2) Wills Act 1959, section 2 Distribution Act 1958 and section 31 Adoption Act 1962.

Following the above grounds, the learned judge rejected the argument that the issue/matter - 'probate and administration' falls within the jurisdiction of the Syariah Court. There is no specific expressed provision in section 42(2)(b) of the Selangor Administration of Islamic Law Enactment 1989 and section 48(2)(b) of the Penang Administration of Islamic Religious Affairs Enactment 1993, conferring the Syariah Court the jurisdiction to hear 'probate and administration'. On this approach, the learned judge relied on and followed Shaik Zolkaffly bin Shaik Natar & Ors v. Religious Council of Penang<sup>24</sup>, and Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor (No. 2)<sup>25</sup>. Even though Syariah Court has the jurisdiction to hear matters involving Muslims (as in this case) on and over matters enumerated in List II (State List) under the Ninth Schedule to the FC, this does not mean that Syariah Court has the jurisdiction to hear that matter (probate and administration involving Muslim parties), as the jurisdiction of the Syariah Court should not be adopted by way of implication and by construing List II with broader possible interpretation as propounded by Abdul Kadir Sulaiman J in Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan<sup>26</sup>. Further, the judge adumbrated that in order for the Syariah Court to have the said jurisdiction, the State Legislative Assembly should provide and pass laws granting such matter and if there is none, then the present High Court (Ordinary Civil Court), could not take the function of the legislature by conferring the former that jurisdiction - Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang & Satu Tindakan Yang Lain<sup>27</sup> and Barkath Ali bin Abu Backer v Anwar Kabir bin Abu Backer & Ors<sup>28</sup>.

#### **Tan Sung Mooi v Too Miew Kim**<sup>29</sup>

This case involved the issue whether the respondent, on he being converted to Islam after the dissolution of the marriage with the petitioner, who was a non Muslim, by the High Court (Ordinary Civil Court), the High Court(Ordinary Civil Court) could not have the jurisdiction to hear the application of the petitioner, for an order of division of matrimonial assets and for maintenance. The facts of the case were these: Both the petitioner and the respondent, were married according to the Chinese customary rites on 20 February 1967 and cohabitated in Malaysia until April 1982, when they decided to live apart. Some time in March 1988, the petitioner filed a divorce petition under section 53 of the Law Reform (Marriage and Divorce) Act 1976 ('the said Act') on the ground that her marriage with the respondent had irretievably broken down. On 17 December, 1991, the Kuala Lumpur High Court (Ordinary Civil Court) dissolved the marriage and granted a decree nisi being made absolute, to be made absolute after three months. In the meanwhile, pending the decree nisi being made absolute, the petitioner, on 24 December 1991, filed an application against the respondent under section 76 and 77 of the Act for an order of division of matrimonial property and for maintenance. The respondent objected this application, as the application had been made after

<sup>24</sup> (2003) 3 CLJ 289.

<sup>25</sup> (1991) 3 MLJ 487.

<sup>26</sup> (1998) 1 MLJ 681.

<sup>27</sup> (1996) 3 CLJ 231.

<sup>28</sup> (1997) 4 MLJ 389.

<sup>29</sup> (1994) 3 MLJ 117.

he become a Muslim and that the High Court (Ordinary Civil Court) is ousted from hearing the case. On the other hand, the petitioner contended that, the High Court (Ordinary Civil Court) should have the jurisdiction to hear the application, not the Syariah Court, as she was not a Muslim. Otherwise, she could not get the remedies in law as afforded by the said Act. In this regard, the respondent raised section 3(3) of the said Act which reads: *'This Act shall not apply to a Muslim...'*. In reply the petitioner said that section 3(3) of the said Act is unconstitutional as it ousts the High Court (Ordinary Civil Court) and this means that she would have no avenue to claim her rights as espoused by law.

The High Court (Ordinary Civil Court) rejected the contention of the respondent on the grounds that:

The High Court (Ordinary Civil Court) has the right to exercise the jurisdiction pursuant to section 24 (a) of the Courts of Judicature Act 1964 which states that the jurisdiction of the High Court (Ordinary Civil Court) shall include: *'...jurisdiction under any written law relating to divorce and matrimonial matters...'*

The second part of section 3(3) of the Law Reform (Marriage and Divorce) Act 1976 make reference to section 51 of the Act. It states:

*...but nothing herein shall be construed to prevent a court before which a petition for divorce has been made under section 51 from granting a decree of divorce on the petition of one party to a marriage where the other party has converted to Islam...*

Under section 51, where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce and the court upon dissolving the marriage, may make provision for the wife or husband and for the support, care and custody of the children of the marriage and may attach any condition to the decree of dissolution. The legislature, by enacting section 51, clearly envisaged a situation that where one party to a non-Muslim marriage converted to Islam, the other party who has not converted may petition to the High Court (Ordinary Civil Court) for divorce and seek ancillary reliefs. In another word, the conversion to Islam of one party to a non-Muslim marriage is made a ground for the other party to apply to the High Court (Ordinary Civil Court) for divorce and ancillary reliefs.

Further the court opined that, the Parliament in enacting sub-section 51(2), must have had in mind to give protection to non-Muslim spouses and children of the marriage against a Muslim convert. However, the court thought that it is pity that albeit there was a desire, on part of the Parliament, to accord such protection to the non-Muslim spouse, yet they had failed to foresee a situation such as in the present case, where the parties remained non-Muslims until after the marriage was dissolved, and then one party converted to Islam. It would be absurd and would be unjust to the non-Muslims parties, such as in the present action, would not get any recourse and remedy, in respect of her application for ancillary relief arising from such divorce made absolute, from the High Court (Ordinary Civil Court) simply because, the other party had converted to Islam.

In the result, the High Court (Ordinary Civil Court) held that, they have the jurisdiction by way of implication based on the above grounds.

**Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur<sup>30</sup>**

The plaintiff had vide a deed poll and a statutory declaration made on 12 October, 1995, averred that he was born a Buddhist. He embraced the religion of Islam on

<sup>30</sup> (1998) 1 MLJ 681.

30 March, 1978 and used the name of Md. Hakim Lee. But by the deed poll and the statutory declaration, he had renounced the religion of Islam and showed an intention to use the name of Lee Leong Kim in place of Md. Hakim Lee. He deposed that his action is guaranteed by article 11 of the FC and as such, no authority or body could limit or hinder his freedom. So by an application which the plaintiff filed in the High Court (Ordinary Civil Court) at Kuala Lumpur, the plaintiff applied for the following relief:

*a declaration that his renunciation of the Islamic religion by a deed poll dated 12 October, 1995 is in accordance with the law and valid;*  
*a declaration that he is not required to obtain the consent of the defendant to renounce the religion of Islam;*  
*costs; and,*  
*any further or other relief the court deems fit and just*

On the hearing of the application, the defendant raised a preliminary issue that, the High Court (Ordinary Civil Court) is debarred from hearing the application, as the application involved the issue of the religious status of the plaintiff and that the only forum capable of determining this issue is the Syariah Court, which will base their ruling on the teachings of Islam as contained in the Quran and Sunnah and hukum syarak. It follows then that, as this falls within the jurisdiction of the Syariah Court, the High Court (Ordinary Civil Court) is ousted from hearing the case, pursuant to Article 121 (1A) of the FC.

In determining the issue, the judge - Abdul Kadir Sulaiman J, referred to several provisions in the FC namely article 121 (1A), item 1 of List II (State List) under the Ninth Schedule to the FC, article 74 and section 46 of the Administration of Islamic Law (Federal Territories) Act 1993 relating to the civil jurisdiction of the Syariah Court if the Federal Territories. Several were also cited, referred and compared with the case at present under trial - Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib<sup>31</sup>, Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang & Satu Tindakan Yang Lain<sup>32</sup>, Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor<sup>33</sup>, Soon Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor<sup>34</sup> and Hajjah Mahani bt Sulaiman & Ors v. Majlis Agama Islam & Adat Melayu Terengganu<sup>35</sup>. In conclusion, the judge found that, there is nothing in section 46 of the Administration of Islamic Law (Federal Territories) Act 1993 that expressly conferred the jurisdiction to the Syariah Court to determine the religion status of any Muslims. However, the lacking of express provision in the said provision, does not hinder the Syariah Court from invoking the general or wider or the 'inherent' jurisdiction as conferred by item 1 of List II (State List) under the Ninth Schedule to the FC. The sentence '*...the determination of matters of Islamic Law...*' contained in that item, is enough to confer the Syariah Court jurisdiction to hear the issue. In this position, the judge did not agree with the policy of the court, in Mohamed Habibullah, Lim Chan Seng and Dalip Kaur, towards emphasising the need to have an express provision granting the Syariah Court such a jurisdiction, before it could hear and determine the case. Instead, he agreed with the findings and policy in Soon Singh and Hajah Mahani.

<sup>31</sup> (1992) 2 MLJ 793.

<sup>32</sup> (1996) 3 CLJ 231.

<sup>33</sup> (1992) 1 MLJ 1.

<sup>34</sup> (1994) 1 MLJ 690.

<sup>35</sup> (1996) 3 AMR 2898.

**Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor<sup>36</sup>**

This case concerns the issue of conversion out of Islam. The appellant had applied for a declaration that he was no longer a Muslim from the High Court (Ordinary Civil Court) at Kuala Lumpur. At the hearing of the case, the respondent/defendant raised a preliminary objection that, the High Court (Ordinary Civil Court) had no jurisdiction to hear the case. This was upheld by the learned judge. The judge relied on Dalip Kaur v. Pegawai Polis Daerah, Bukit Mertajam & Anor,<sup>37</sup> where the court found the matters involving renouncement of Islam is only for the Syariah Court to consider, following the rules under Islamic Law. Thus, the only forum capable and have the jurisdiction on the issue of apostasy should be the Syariah Court, not the High Court (Ordinary Civil Court). By this case also, the judge stated that the jurisdiction to hear apostasy lies with the Syariah Court of the Federal Territories, even though this matter has yet been expressly conferred to it. The ground which the court opined that the Syariah Court must have such a jurisdiction is by way of implication. Dissatisfied with the result, the appellant then appealed to the Court of Appeal (Ordinary Civil Court) and then to the Supreme Court (Ordinary Civil Court). The Court of Appeal (Ordinary Civil Court) and the Supreme Court (Ordinary Civil Court) too rejected the appeal. Both courts opined that, the jurisdiction of the Syariah Court to hear and determine apostasy case is by way of implication, as there is no express provision conferring the Syariah Court over that matter. The Supreme Court (Ordinary Civil Court) only considered the existence of jurisdiction on the subject matter of apostasy, expressly or impliedly.

**CONCLUSION AND SUGGESTIONS**

Except in two cases, *viz* Soon Singh and Md Hakim Lee, that the High Courts (Ordinary Civil Courts) decided that, the matters under dispute fall within the ambit of the Syariah Court. In Soon Singh, the issue involved apostasy or conversion out of Islam, though this matter has not been provided in the state's enactment of the Administration of Islamic Law, yet, the jurisdiction of the Syariah Court is derived from its 'inherent' jurisdiction as spelt out in the List II (State List). Similarly what is transpired in Md Hakim Lee. The court had adopted the 'subject matter approach' or by way of implication over List II (State List), in construing the jurisdiction of the Syariah Court. However, this in conflict with the findings in the other above cases - Ng Wan Chan (issue of renunciation from Islam), Lim Chan Seng (issue of renunciation from Islam), Barkath Ali (issue of specific relief but emanating from disputes involving the status of trust/wakaf), In The Estate of Tunku Abdul Rahman Putra (issue of probate and administration) and Tan Sung Mooi (issue of application ancillary relief resulting from a decree of divorce over a Muslim party). However, it is opined that these cases might have been decided otherwise, following the recent Supreme Court's case - Shaik Zolkaffly bin Shaik Natar & Ors v. Religious Council of Penang,<sup>38</sup> where the Supreme Court decided in construing the jurisdiction of the Syariah Court, the court should interpret the matters as enumerated in List II (State List) in the best possible interpretation, even though this might have not been provided in the States' Administration of Islamic Law. The approach also should be the 'subject matter approach', not the 'remedy approach'. The matters as contained in the List

<sup>36</sup> (1999) 1 MLJ 489.

<sup>37</sup> (1992) 1 MLJ 1.

<sup>38</sup> (2003) 3 CLJ 289.

II (State List) are all the 'inherent' jurisdictions of the Syariah Court. Following this landmark decision, what the author would like to ask is whether, to what extent could this finding apply in future cases involving other type of disputes pertaining to matters that fall within List II(State List) for example on the jurisdiction to hear and determine the disputes involving Islamic Banking and Takaful(Islamic Insurance)? Should these disputes be determined by the Syariah Court?. It is advisable that, the finding by the Supreme Court in Shaik Zolkaffly be enacted as written law, and certain provision be made on the States' Administration of Islamic Law Enactments, the Court of Judicature Act 1964, Civil Law Act 1953, High Court Rules 1980, Subordinate Court Rules 1980 and the like, to accommodate this law, in order to resolve the jurisdictional tussle in Malaysia.