Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications

FEDERAL COURT (PUTRAJAYA) — PETITION NOS 1 OF 2006, 1 OF 2007 AND 2 OF 2007
ABDUL HAMID MOHAMAD CHIEF JUSTICE, ZAKI AZMI PCA AND ZULKEFLI FCJ
26 SEPTEMBER 2008

Constitutional Law — Legislation — Validity of impugned legislation — Declaration that impugned provisions were null and void, application for — Whether Fatwa Committee empowered to create offences — Whether offences created against 'the precepts of Islam' — Syariah Criminal Offences (Takzir) (Terengganu) Enactment 2001 ss 10 & 14 — Administration of Islamic Religious Affairs (Terengganu) Enactment 2001 ss 50 & 51 — Syariah Criminal Offences (State of Selangor) Enactment 1995 ss 7, 8(a), 10(b), 12(c), 13 & 16(1)(a)

Islamic Law — Legislation — Validity of impugned legislation — Declaration that impugned provisions were null and void, application for — Whether Fatwa Committee empowered to create offences — Whether offences created against 'the precepts of Islam' — Syariah Criminal Offences (Takzir) (Terengganu) Enactment 2001 ss 10 & 14 — Administration of Islamic Religious Affairs (Terengganu) Enactment 2001 ss 50 & 51 — Syariah Criminal Offences (State of Selangor) Enactment 1995 ss 7, 8(a), 10(b), 12(c), 13 & 16(1)(a)

Words and Phrases — 'The precepts of Islam' — Whether term 'the precepts of Islam' was to be confined to five pillars of Islam — Federal Constitution Ninth Schedule, List II, item 1

This judgment was in respect of three separate petitions, namely, Petition No 1 of 2006 ('the first petition'), Petition No 1 of 2007 ('the second petition') and Petition No 2 of 2007 ('the third petition'), which were heard together because they involved similar issues. The petitioner in the first petition, a Muslim, was arrested and charged with having committed an offence under s 10 of the Syariah Criminal Offences (Takzir) (Terengganu) Enactment 2001 ('SCOT') by having defied or disobeyed the *fatwa*, which was published in the Government *Gazette* of the state of Terengganu on 4 December 1997, and an offence under s 14 of the SCOT for having in his possession a VCD

that contained material that was contrary to Hukum Syarak or 'the precepts of Islam'. Pending his trial, the petitioner applied for and obtained leave to file the present petition. In his petition, commenced pursuant to art 4(4) of the Federal Constitution ('Constitution'), the petitioner sought a declaration that s 51 of the Administration of Islamic Religious Affairs (Terengganu) Enactment 2001 ('AIRA') and ss 10 and 14 of the SCOT, which were enacted by the State Legislative Assembly of Terengganu ('SLAT'), were null and void because the SLAT had no power to make such provisions. In fact, although the Fatwa Committee has the power to issue *fatwa*s after going through the procedures as laid down in s 50 of the AIRA, every *fatwa* has to be assented to by the DYMM Sultan and then the State Government will have to be informed of such *fatwa* before it is published in the *Gazette* and becomes binding on every Muslim in a state. It was the petitioner's contention that the Fatwa Committee had been empowered to create offences when that power was vested in the SLAT. In this respect, the petitioner submitted that by allowing the Fatwa Committee to issue binding *fatwa*s and/or creating the offence of acting contrary to the *fatwa* the SLAT had in effect abdicated its legislative power and/or created an independent legislative body in the Fatwa Committee. The petitioner further submitted that the power to create offences under item 1 of List II of the Ninth Schedule of the Federal Constitution is limited to the creation of offences against 'the precepts of Islam' and that the offences under ss 10 and 14 of the SCOT were not offences against 'the precepts of Islam'. According to the petitioner's expert witness, the term 'the precepts of Islam' was to be confined to the fiver pillars of Islam and nothing else. In the second petition, the petitioner, a Muslim by his own admission, was charged for five offences under ss 7, 8(a), 10(b), 12(c) and 13 of the Syariah Criminal Offences (State of Selangor) Enactment 1995 ('SCOS'). The charges included, inter alia, the offence of expounding of a doctrine relating to the religion of Islam which was contrary to the *Hukum Syarak*, or the precepts of Islam. In his petition, commenced pursuant to art 4(4) of the Constitution, the petitioner sought a declaration that s 49 of the Administration of the Religion of Islam (Selangor) Enactment 2003 and ss 7, 8(a), 10(b), 12(c) and 13 of the SCOS were invalid and void. In the third petition the petitioner was charged under ss 8(a) and 16(1)(a) of the SCOS and also sought a declaration that the said provisions of law were null and void. The main issues before the court in all three petitions were whether the Fatwa Committee was empowered to create offences and whether the term 'the precepts of Islam' was to be confined to the five pillars of Islam.

Held, dismissing all the three petitions with costs:

(1) (per **Abdul Hamid Mohamad Chief Justice**) While the Fatwa Committee may give its *fatwa* on any question relating to Islamic law, except for the ascertainment of Islamic law for purposes of federal law,

not all its view may be made offences for disobedience thereof. Only *fatwa*s that have gone through the process provided by s 50 of the AIRA become binding. Thus, at the end of the day it is the SLAT and not the Fatwa Committee that declares a *fatwa* to be binding and to have the force of law (see paras 35 & 36).

(2) (per **Abdul Hamid Mohamad Chief Justice and Zaki Azmi PCA**) Although there was no provision for the *fatwa* to be laid before the SLAT, the *fatwa* itself was not an offence. The offences were the acts prohibited by ss 10 and 14 of the SCOT, and the SCOT was an enactment passed by the SLAT which had the powers to create offences against Muslims, as provided in item 1 of List II (State List) of the Ninth Schedule. It is therefore not correct to say that the SLAT had empowered the Fatwa Committee to create offences. Further, the SLAT may at any time repeal s 10 of the SCOT or even s 51 of the AIRA or for that matter both enactments. This showed that the SLAT was not powerless (see paras 44 & 103).

(3) (per **Abdul Hamid Mohamad Chief Justice**) All the three expert witnesses agreed that the term 'the precepts of Islam' covered the three main domains ie creed or belief (aqidah), law (shariah) and ethics or morality (akhlak) and included the teachings in the Qur'an and Sunnah. For present purposes it was most important that all of them agreed that *aqidah* forms one of the precepts as this falls squarely within the meaning of the word 'precept' as it is used in the Constitution. Further, after due consideration of the evidence of the three expert witnesses it would not be correct to conclude that only the five pillars of Islam form the precepts of Islam. As such the offences created by ss 10 and 14 of the SCOT are offences regarding 'the precepts of Islam' (see paras 61–63 & 65).

(4) (per **Abdul Hamid Mohamad Chief Justice**) If an offence is an offence against 'the precepts of Islam' then it should not be treated as criminal law. In the instant case as the offences were offences against 'the precepts of Islam' and the impugned offences specifically covered Muslims only and were pertaining to Islam only, it could not be envisaged that they were criminal laws as envisaged by the Constitution. As such, the impugned sections were valid (see paras 69, 73–74).

(5) (per **Abdul Hamid Mohamad Chief Justice**) All the views expressed in the first petition were equally applicable to the second petition. The offences under ss 7, 8(a), 10(b), 12(c) and 13 of the SCOS are clearly offences concerning the aqidah and meant to protect and preserve the true teachings of Islam. As such they were offences against 'the precepts of Islam' (see para 85).

(6) per **Abdul Hamid Mohamad Chief Justice**) The same views applied to the third petition. As s 8 of the SCOS had already been discussed in the second petition there was no need to repeat it again in respect of the third petition, and the views expressed in respect of s 14 of the SCOT in the first petition applied to s 16 of the SCOS in the third petition (see paras 87–88).

(7) (per **Zaki Azmi PCA**) The *fatwa* in question in the first petition was in fact published in the Government *Gazette* of the State of Terengganu on 4 December 1997, and it was clear that the publication was done on the direction of the DYMM Sultan. In effect therefore, it was made by DYMM Sultan, who is the head of the religion of Islam in the state of Terengganu, on the advice of the Fatwa Committee. Thus it is not the Fatwa Committee which created the criminal offences (see para 102).

[Bahasa Malaysia summary

Penghakiman ini adalah berkaitan tiga petisyen berasingan, iaitu, Petisyen No 1 Tahun 2006 ('petisyen pertama'), Petisyen No 1 Tahun 2007 ('petisyen kedua') dan Petisyen No 2 Tahun 2007 ('petisyen ketiga'), yang telah didengar bersama kerana melibatkan isu-isu yang sama. Pempetisyen dalam petisyen pertama, seorang muslim, yang telah ditangkap dan dituduh melakukan kesalahan di bawah s 10 Enakmen Kesalahan Jenayah Syariah (Takzir) (Terengganu) 2001 ('SCOT') kerana telah mengingkari atau tidak mematuhi fatwa, yang telah diterbitkan dalam *Warta* Kerajaan bagi negeri Terengganu pada 4 Disember 1997, dan kesalahan di bawah s 14 SCOT kerana memiliki VCD yang mengandungi bahan bertentangan dengan hukum syarak atau 'the precepts of Islam'. Sementara menunggu perbicaraannya pempetisyen memohon untuk dan memperoleh kebenaran memfailkan petisyen ini. Dalam petisyennya, yang dimulakan menurut perkara 4(4) Perlembagaan Persekutuan ('Perlembagaan'), pempetisyen telah memohon deklarasi bahawa s 51 Enakmen Pentadbiran Hal Ehwal Agama Islam (Terengganu) 2001 ('AIRA') dan ss 10 dan 14 SCOT, yang telah digubal oleh Dewan Perundangan Negeri Terengganu ('DPNT'), adalah terbatal dan tidak sah kerana DPNT tiada kuasa untuk membuat peruntukan-peruntukan sedemikian. Bahkan, meskipun Jawatankuasa Fatwa mempunyai kuasa untuk mengeluarkan fatwa-fatwa selepas melalui prosedur-prosedur yang ditetapkan dalam s 50 AIRA, setiap fatwa perlu diperkenankan oleh DYMM Sultan dan kemudian kerajaan negeri akan dimaklumkan tentang fatwa tersebut sebelum ia diterbitkan dalam *Warta* dan mengikat setiap Muslim dalam negeri itu. Adalah hujah pempetisyen bahawa Jawatankuasa Fatwa telah diberikan kuasa untuk membentuk kesalahan apabila kuasa tersebut diberikan kepada DPNT. Dalam hal ini pempetisyen menghujahkan bahawa dengan membenarkan Jawatankuasa Fatwa mengeluarkan fatwa-fatwa yang mengikat dan/atau membentuk kesalahan yang bertindak bertentangan dengan fatwa DPNT

sememangnya melepaskan kuasa perundangannya dan/atau membentuk badan perundangan berasingan dalam Jawatankuasa Fatwa. Pempetisyen seterusnya menghujahkan bahawa kuasa untuk membentuk kesalahan di bawah item 1 Senarai II kepada Jadual ke-9 Perlembagaan Persekutuan adalah terbatas kepada pembentukan kesalahan terhadap 'the precepts of Islam' dan kesalahan-kesalahan di bawah ss 10 dan 14 SCOT bukan kesalahan-kesalahan terhadap 'the precepts of Islam'. Menurut saksi pakar pempetisyen, terma 'the precepts of Islam' hendaklah terbatas kepada lima rukun Islam dan tiada yang lain. Dalam petisyen kedua, pempetisyen, seorang muslim dengan pengakuannya sendiri, telah dituduh atas lima kesalahan di bawah ss 7, 8(a), 10(b), 12(c) dan 13 Enakmen Kesalahan-Kesalahan Jenayah Syariah (Negeri Selangor) 1995 ('SCOS'). Pertuduhan-pertuduhan itu termasuklah, antara lain, kesalahan menjelaskan secara terperinci doktrin berkaitan agama Islam yang bertentangan dengan hukum syarak, atau ajaran Islam. Dalam petisyennya, yang dimulakan menurut perkara 4(4) Perlembagaan, pempetisyen memohon deklarasi bahawa s 49 Enakmen Pentadbiran Agama Islam (Selangor) 2003 dan ss 7, 8, 10(b), 12(c) dan 13 SCOS adalah tidak sah dan terbatal. Dalam petisyen ketiga, pempetisyen dituduh di bawah ss 8(a) dan 16(1)(a) SCOS dan juga memohon deklarasi bahawa peruntukan-peruntukan perundangan tersebut adalah terbatal dan tidak sah. Isu-isu utama di hadapan mahkamah dalam ketiga-tiga petisyen adalah sama ada Jawatankuasa Fatwa diberi kuasa untuk membentuk kesalahan-kesalahan dan sama ada terma 'the precepts of Islam' terbatas kepada lima perkara dalam rukun Islam.

Diputuskan, menolak kesemua petisyen dengan kos:

(1) (oleh **Abdul Hamid Mohamad Ketua Hakim Negara**) Walaupun Jawatankuasa Fatwa boleh memberikan fatwanya tentang apa-apa persoalan berkaitan undang-undang Islam, kecuali penentuan undang-undang Islam bagi tujuan undang-undang persekutuan, bukan semua pendapatnya boleh dijadikan kesalahan-kesalahan kerana pengingkaran yang berikut. Hanya fatwa-fatwa yang telah melalui proses yang diperuntukkan oleh s 50 AIRA adalah mengikat. Oleh itu, akhirnya ianya adalah untuk DPNT dan bukan Jawatankuasa Fatwa yang mengisytiharkan fatwa itu mengikat dan mempunyai kuasa undang-undang (lihat perenggan 35 & 36).

(2) (oleh **Abdul Hamid Mohamad Ketua Hakim Negara dan Zaki Azmi PMR**) Meskipun tiada peruntukan untuk fatwa dibentangkan di hadapan DPNT, fatwa itu sendiri bukan satu kesalahan. Kesalahan-kesalahan tersebut adalah tindakan-tindakan yang dilarang oleh ss 10 dan 14 SCOT, dan SCOT adalah enakmen yang diluluskan oleh DPNT yang mempunyai kuasa untuk membentuk

kesalahan-kesalahan terhadap Muslim, seperti yang diperuntukkan dalam item 1 Senarai II (Senarai Negeri) kepada Jadual ke-9. Oleh itu adalah tidak wajar untuk mengatakan bahawa DPNT telah memberikan kuasa kepada Jawatankuasa Fatwa untuk membentuk kesalahan-kesalahan. Tambahan, DPNT boleh dari masa ke semasa memansuhkan s 10 SCOT atau juga s 51 AIRA atau kedua-dua enakmen tersebut. Ini menunjukkan bahawa DPNT bukanlah tidak berkuasa (lihat perenggan 44 & 103).

(3) (oleh **Abdul Hamid Mohamad Ketua Hakim Negara**) Kesemua tiga saksi pakar tersebut telah bersetuju bahawa terma 'the precepts of Islam' merangkumi tiga aspek iaitu aqidah, syariah dan akhlak dan termasuklah ajaran Quran dan Sunnah. Bagi tujuan ini adalah penting untuk mereka semua bersetuju bahawa aqidah membentuk salah satu daripada penjelasan terperinci kerana ia termasuk dalam maksud perkataan 'precept' di mana ia digunakan dalam Perlembagaan. Bahkan, setelah mengambilkira keterangan tiga saksi pakar tersebut adalah tidak wajar untuk memutuskan bahawa hanya lima rukun Islam sahaja yang membentuk penjelasan terperinci tentang Islam. Oleh itu kesalahan-kesalahan yang dibentuk oleh ss 10 dan 14 SCOT adalah kesalahan-kesalahan yang berhubung 'the precepts of Islam' (lihat perenggan 61–63 & 65).

(4) (oleh **Abdul Hamid Mohamad Ketua Hakim Negara**) Jika kesalahan itu kesalahan terhadap 'the precepts of Islam' maka ia tidak sepatutnya dianggap sebagai undang-undang jenayah. Dalam kes ini memandangkan kesalahan-kesalahan tersebut adalah kesalahan-kesalahan terhadap 'the precepts of Islam' dan kesalahan-kesalahan yang dipersoalkan khususnya hanya berkaitan Muslim sahaja dan berkaitan Islam sahaja, ia tidak boleh dibayangkan bahawa ianya undang-undang jenayah seperti yang dibayangkan oleh Perlembagaan. Oleh itu, seksyen-seksyen yang dipersoalkan adalah sah (lihat perenggan 69, 73–74).

(5) (oleh **Abdul Hamid Mohamad Ketua Hakim Negara**) Kesemua pendapat yang dinyatakan dalam petisyen pertama adalah sama terpakai untuk petisyen kedua. Kesalahan-kesalahan di bawah ss 7, 8(a), 10(b), 12(c) dan 13 SCOS adalah jelas kesalahan-kesalahan berkaitan aqidah dan bermaksud untuk melindungi dan mengekalkan ajaran sebenar Islam. Oleh demikian ianya kesalahan-kesalahan terhadap 'the precepts of Islam' (lihat perenggan 85).

(6) (oleh **Abdul Hamid Mohamad Ketua Hakim Negara**) Pendapat yang sama terpakai untuk petisyen ketiga. Memandangkan s 8 SCOS telahpun dibincangkan dalam petisyen kedua tidak perlu diulangi lagi berkaitan petisyen ketiga, dan pendapat yang dinyatakan berhubung

s 14 SCOT dalam petisyen pertama terpakai kepada s 16 SCOS dalam petisyen ketiga (lihat perenggan 87–88).

(7) (oleh **Zaki Azmi PMR**) Fatwa yang dipersoalkan dalam petisyen pertama sememangnya telah diterbitkan dalam Warta Kerajaan negeri Terengganu pada 4 Disember 1997, dan adalah jelas bahawa penerbitan itu telah dilakukan atas arahan DYMM Sultan. Oleh demikian, ia telah dibuat oleh DYMM Sultan, yang merupakan ketua agama Islam dalam negeri Terengganu, atas nasihat Jawatankuasa Fatwa. Oleh itu bukan Jawatankuasa Fatwa yang membentuk kesalahan-kesalahan jenayah tersebut (lihat perenggan 102).]

Notes

For a case on validity of impunged legislation, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2207.

For cases on Islamic law in general, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 478–719.

Cases referred to

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

Legislation referred to

Administration of Islamic Religions Affairs (Terengganu) Enactment 1986 (repealed) ss 24, 25, 26(3)
Administration of Islamic Religions Affairs (Terengganu) Enactment 2001 ss 3, 10, 48, 49, 50, 50(6), 51, 51(1), 107
Administration of the Religion of Islam (Selangor) Enactment 2003 s 49
Commissioners for Oaths Rules 1993
Constitution of the State of Terengganu arts IV, XII
Courts of Judicature Act 1964 s 11
Criminal Procedure Code
Dangerous Drugs Act 1952 ss 7, 16, 47, 47(3), (4)
Dangerous Drugs Regulations 1952 regs 22, 23
Evidence Act 1950
Federal Constitution arts 3, 4, 4(1), (3), (4), 11, 11(4), (5), 71(1), 74, 75, Eighth Schedule, item 1(2), (d), Ninth Schedule, List I, items (3), (4), List II, items 1, 4, 4(k)
Interpretation Acts 1948 and 1967 s 87(b)
Penal Code ss 186, 188, 292, 293, 294, 298A
Subordinate Courts Rules 1980
Syariah Courts (Criminal Jurisdiction) Act 1965 s 2
Syariah Criminal Offences (Statute of Selangor) Enactment 1995 ss 7, 8, 8(a), 10(b), 12(c), 13, 16, 16(1)(a)
Syariah Criminal Offences (Takzir) (Terengganu) Enactment 2001 ss 10, 14,

Malik Imtiaz Sarwar (Edmund Bon Tai Soon, Syamsuriatina Ishak and Haris Ibrahim with him) (Haris & Co) (Petition No 1 of 2006) for the applicant.
Noorbahri bin Baharuddin (Legal Advisor, Terengganu) (Petition No 1 of 2006) for the respondent.
Kamaludin bin Mohd Said (Mahamad Naser bin Disa, Nizam bt Zakaria and Arik Sanusi bin Yeop Johari) (Petition No 1 of 2006) for the intervener.
Malik Imtiaz Sarwar (Edmund Bon Tai Soon, Syamsuriatina Ishak and Haris Ibrahim with him) (Haris & Co) (Petition No 1 of 2007) for the applicant.
Zauyah Be bt Loth Khan (Azhari bin Abu Hanit with her) (Legal Advisor, Selangor) (Petition No 1 of 2007) for the respondent.
Mubashir Mansor (Abdul Rahim Sinwam and Abdul Halim Bahari with him) (Azra & Associates) (Petition No 1 of 2007) for Majlis Agama Islam Selangor, intervener.
Malik Imtiaz Sarwar (Edmund Bon Tai Soon, Syamsuriatina Ishak and Haris Ibrahim with him) (Haris & Co) (Petition No 2 of 2007) for the applicant.
Zauyah Be bt Loth Khan (Azhari bin Abu Hanit with her) (Legal Advisor, Selangor) (Petition No 2 of 2007) for the respondent.
Kamaludin bin Mohd Said (Mahamad Naser bin Disa, Nizam bt Zakaria and Arik Sanusi Bin Yeop Johari with him) (Senior Federal Counsel, Attorney General's Chambers) (Petition No 2 of 2007) for the Government of Malaysia, intervener.

Abdul Hamid Mohamad Chief Justice:

[1] As this is my last judgment of this court in my judicial career, perhaps I should call it my 'farewell judgment'.

[2] There are three separate petitions before this court. As the facts and the issues are similar, they were heard together. In this judgment, to avoid confusion, I shall first deal with Petition No 1 of 2006, followed by the other two.

PETITION NO 1 OF 2006

[3] On 2 July 2005, the petitioner was arrested together with 20 others. On 23 August 2005 he was charged at the Syariah Subordinate Court at Besut, Terengganu with an offence under ss 10 and 14 of the Syariah Criminal Offences (Takzir) (Terengganu) Enactment 2001 ('SCOT').

[4] On 20 July 2005 the petitioner was again arrested with 57 others. On 21 July 2005 he was charged at the Syariah Subordinate Court at Besut, Terengganu. On 4 August 2005, the case was transferred to the Syariah High Court at Kuala Terengganu where they were charged with an offence under s 10 of the SCOT.

[5] The charge under s 10 is, in substance, for acting in contempt of a religious authority by defying or disobeying the *fatwa* regarding the teaching and belief of Ayah Pin which was published in the Government *Gazette* of the State of Terengganu on 4 December 1997. That *gazette* notification reads:

> Bahawasanya menurut Seksyen 26(3) Enakmen Pentadbiran Hal Ehwal Agama Islam 1986 Duli Yang Maha Mulia Tuanku Al-Sultan telah perkenan supaya fatwa yang terkandung di dalam ini disiarkan dalam *Warta*.
>
> Oleh yang demikian, pada menjalankan kuasa-kuasa yang diberi di bawah Seksyen 25 Enakmen Pentadbiran Hal Ehwal Agama Islam 1986, Jawatankuasa Fatwa Majlis Agama Islam dan Adat Melayu Terengganu dengan ini membuat dan mengeluarkan Fatwa berikut:
>
> 1. Bahawasanya ajaran dan pegangan Ayah Pin adalah palsu, sesat, menyeleweng dan boleh membawa ancaman kepada ketenteraman orang awam serta merosakkan akidah.
> 2. Oleh yang demikian orang ramai di negeri ini hendaklah menghindar diri daripada terlibat dengan pegangan dan ajaran Ayah Pin tersebut.

[6] The charge under s 14 is for possession of a vcd the content of which is contrary to Hukum Syarak. The trials are still pending in the respective Syariah courts.

[7] Pursuant to a Notice of Motion No 08–175 of 2005(T) filed by the petitioner, this court on 22 February 2006 granted leave to the petitioner to commence proceedings for a declaration, pursuant to art 4(4) of the Federal Constitution that s 51 of the Administration of Islamic Religions Affairs (Terengganu) Enactment 2001 ('AIRA') and ss 10 and 14 of the SCOT mentioned earlier are null and void.

[8] In his affidavit in support of the petition, the petitioner affirms that he is a muslim.

[9] The 'Principal Contentions' of the petitioner has been summarised by learned counsel as follows:

> 4 The principal contentions are (as elaborated below):
>
> 4.1 that by enacting the said provisions and consequently allowing the Fatwa Committee to, through the process prescribed in that part of the AIRA in which s 51 appears, issue binding *fatwa* and/or creating the offence of acting contrary to *fatwa* the State Assembly had, in effect abdicated legislative power and/or created an independent legislative body in the Fatwa Committee.

(a) The enumerated powers in Lists II and III of the 9th Schedule of the FC do not provide the power to do so.

(b) Additionally, the creation or establishment of an independent legislative power other than, or in addition to, Parliament and the State Assemblies is not contemplated under the FC.

4.2 that even if (which is refuted) the State Assembly was empowered to delegate its legislative power to the Fatwa Committee, in allowing the Fatwa Committee to issue binding *fatwa*s, as aforesaid, and/or creating the offence of acting contrary to *fatwa*, the delegation of power amounted to excessive delegation outside the competence of the State Assembly; and/or

4.3 that the power to create offences under Item 1 of List II of the 9th Schedule, FC, is limited to the creation of offences against 'the precepts of Islam' and that as the offences of inter alia:

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

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

provided for under ss 10 and 14 of the SCOT respectively are not 'offences against the precepts of Islam', the State Assembly was and is not empowered to enact the said provisions.

[10] Section 51 of the AIRA provides:

51(1)Upon its publication in the Gazette, a *fatwa* shall be binding on every Muslim in the State of Terengganu 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 f*atwa*, in matters of personal observance.

(2) A *fatwa* shall be recognized by all courts in the State of Terengganu as authoritative of all matters laid down therein.

[11] 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.

[12] Section 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.

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.

[13] Article 3 of the Federal Constitution provides:

3(1) Islam is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation.

(2) In every State other that States not having a Ruler the position of the Ruler as the Head of the religion of Islam in his State in the manner and to the extent acknowledged and declared by the Constitution of the State, and, subject to that Constitution, all rights, privileges, prerogatives and power enjoyed by him as Head of that religion, are unaffected and unimpaired; but in any acts, observances of ceremonies with respect to which the Conference of Rulers has agreed that they should extend to the Federation as a whole each of the other Rulers shall in his capacity as Head of the religion of Islam authorize the Yang di-Pertuan Agong to represent him.

[14] Article 4(1) of the Federal Constitution provides:

4(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

[15] Article 11 of the Federal Constitution provides:

(1) Every person has the right to profess and practice his religion and, subject to clause (4), to propagate it.

(2) ...

A (3) ...

(4) State law and, in respect of the Federal Territory, federal law may control or resist the propagation of any religions doctrine or belief among peoples professing the religion of Islam.

B

[16] Article 71(1) of the Federal Constitution provides:

(1) The Federation shall guarantee the right of a Ruler of a State to … exercise the constitutional rights and privileges of Ruler of that State in accordance with the Constitution of that State …

C

[17] Item 1(2)(d) of Eighth Schedule of the Federal Constitution provides:

D

1(2) The Ruler may act in his discretion in the performance of the following functions (in addition to those in the performance of which he may act in his discretion under the Federal Constitution) that is to say:

E (d) any function as Head of the religion of Islam or relating to the custom of the Malays;

[18] Article 74 of the Federal Constitution provides:

F

74(1)...

(2) Without prejudice to any power to make laws conferred on 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.

G

(3) 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.

H

[19] Article 75 of the Federal Constitution provides:

75 If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void.

I

[20] We now come to the Ninth Schedule, made with reference to arts 74 and 77, entitled 'Legislative Lists'. List I is the Federal List. The list enumerates matters that are within the powers of the Federal Parliament to

make laws, which, includes, 'civil and criminal law and procedure and the administration of justice …' (item 4) and 'Ascertainment of Islamic law and other personal laws for purposes of federal law …' (item 4(k)).

[21] List II enumerates matters that the State Legislature may make laws. Item 1 is the relevant one. It is very lengthy. To avoid confusion I shall only reproduce the material parts for the determination of this appeal:

> ... Islamic law …, 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.

[22] At this juncture, I would only like to emphasise four points arising from this item. First, the State Legislature may create offences and punishment of offences:

(a) by persons professing the religion of Islam;

(b) against the precepts of Islam,

provided it is not in regard to matters included in the Federal List.

[23] Secondly, the jurisdiction of the Syariah Court in respect of offences is limited to in so far as conferred by federal law. Hence, the Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355) ('SC (CJ) Act 1965') was enacted. It contains three sections only. Section 2 provides:

> 2 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 or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof.

[24] Thirdly, the State Legislature may make law for the control of propagating doctrines and beliefs among persons professing the religion of Islam. So, any argument that any law that seeks to control the propagation of doctrines and beliefs among persons professing the religion of Islam is unconstitutional because it is inconsistent with art 11 (freedom of religion) or any other provision is doomed to fail from the start.

[25] Fourthly, the State Legislature may also make law for the determination of matters of Islamic law and doctrine and Malay custom.

[26] We now come to the Constitution of the State of Terengganu. Article IV, inter alia, provides:

> IV.1 The Head of the Religion of the State shall be His Royal Highness and the Majlis Ugama Islam and Adat Melayu, in English the Council of Religion and Malay Customs, constituted under the existing State law shall continue to aid and advise His Royal Highness in accordance with such law.

[27] Article XII of the Constitution of Terengganu, repeats the provision of item 1(2) of the Eight Schedule of the Federal Constitution reproduced earlier.

SECTION 51 OF THE AIRA

[28] To appreciate the discussion regarding s 51 of the AIRA, we would have to begin from s 48.

[29] Section 48 establishes the Fatwa Committee.

[30] Section 49 provides:

> 49 The Fatwa Committee shall, on the direction of the Duli Yang Maha Mulia Sultan (The Ruler — added), and may on its own initiative or on the request of any person by letter addressed to the Mufti, prepare a fatwa on any unsettled or controversial question of or relating to Hukum Syarak.

[31] Section 50 of the AIRA provides for the procedure in making a *fatwa*. After the proposed *fatwa* is discussed by the committee, the Mufti, on behalf of the committee, submits the prepared *fatwa* to the Majlis (Council). After deliberation, the Majlis may make a recommendation to the Ruler for his assent for publication of the *fatwa* in the *Gazette*. When the *fatwa* has been assented to by the Ruler, the Majlis shall inform the State Government of the *fatwa* and thereafter shall cause it to be published in the *Gazette*. Then comes the impugned s 51 which, in brief, provides that the *fatwa*, upon its

publication in the *Gazette*, becomes binding on every muslim in a state and it shall be his religious duty to abide by and uphold it, unless he is permitted by Hukum Syarak to depart from it in matters of personal observance.

[32] The legality of the establishment of the Fatwa Committee and that it has power to issue *fatwa*s are not disputed. There is no dispute that the Terengganu State Legislative Assembly ('TSLA') has power to create offences provided that it is within the limits provided by the Federal Constitution. However, it was argued that what had been done was to empower the Fatwa Committee to create offences when that power vests in the TSLA.

[33] With respect, I am unable to agree with that argument. The power given to the Fatwa Committee is to 'prepare a fatwa on any unsettled of controversial question of or relating the Hukum Syarak'. The term 'Hukum Syarak' used in the section has the same meaning as 'Islamic law' used in item 1 of List II, State List. In other words, the Fatwa Committee may prepare a *fatwa* on any question of or relating to Islamic law. The only exception is if it is an ascertainment of Islamic law for purposes of federal law.

[34] However, this should not be confused with creation and punishment of offences. Creation and punishment of offence have further limits:

(a) it is confined to persons professing the religion of Islam;

(b) it is against the precept of Islam;

(c) it is not with regard to matters included in the Federal List; and

(d) it is within the limit provided by s 2 of the SC (CJ) Act 1965.

[35] So, while the Fatwa Committee may give its *fatwa* on any question of or relating to Islamic law, except for the ascertainment of Islamic law for purposes of federal law, not all its views may be made offences for disobedience thereof. Only *fatwa*s that have gone through the process provided by s 50 of the AIRA become binding and the disobedience thereof, by virtue of s 10 of the AIRA becomes an offence under the law. Here, the four restrictions or conditions mentioned as (a), (b), (c) and (d) in the preceding paragraph come into play.

[36] Regarding the binding effect of the *fatwa*s, it is the TSLA that makes the *fatwa*s binding. It is not the Fatwa Committee that declares its *fatwa*s to be binding and to have the force of law. In any event, it has not been shown that by making the *fatwa* binding on muslims (even then with exception — see s 51(1) of the AIRA) and the Syariah Courts in the state, the provision contravenes any provision of the Constitution.

[37] It was argued that the power to create the offence was not exercised by the TSLA, but by the Fatwa Committee. With respect, I am also unable to agree with this submission. The offence is created by TSLA in s 10 of the SCOT. Without s 10 of the SCOT, disobedience, etc, of a *fatwa* is not a punishable offence.

SECTION 10 OF THE SCOT

[38] It is s 10 of the SCOT that makes it an offence for a person to, inter alia, defy, disobey or dispute the *fatwa*. The offence is created by the TLSA, not by the Fatwa Committee. It is true that the substance of the offence is determined by the Fatwa Committee. But, that power is specifically given by the TSLA to the committee. It is not peculiar to this committee alone. As an example, under s 11 of the Courts of Judicature Act 1964 ('CJA'), the Chief Justice is given the power to make rules for the appointment, conduct, etc pertaining to Commissioners for Oaths. The Commissioners for Oaths Rules 1993 made thereunder, inter alia, make it an offence for a Commissioner for Oaths who 'fails to comply' with the rules made by the committee. Here, not only the ingredients of the offence but the offence itself is created by the Chief Justice. While I pass no judgment on it, I am referring to it to show that such a provision is quite common.

[39] In any event, s 87(b) of the Interpretation Acts 1948 and 1967 does provide that a subsidiary legislation may make provision annexing to the breach of any subsidiary legislation a penalty of fine or imprisonment 'as the authority making the subsidiary Legislature may think fit'.

[40] As I have said, this goes even further than s 10 of the SCOT. In s 10 of the SCOT it is TSLA that creates the offence and fixes the punishment thereof.

[41] Further example is also found in the Dangerous Drugs Act 1952 ('DDA'). Section 7 empowers the Minister to regulate the production of and dealing in raw opium, coca-leaves, poppy-straw and cannabis. Section 16 empowers the Minister to made regulations to provide for controlling the manufacture, sale, possession and distribution of drugs. Section 47 empowers to Minister to 'make regulations for the further, better and more convenient carrying out of the provisions or purposes of' the Act. However, sub-s (3) requires that such regulations 'shall be published in the gazette and shall be laid as soon as practicable before the Dewan Rakyat'.

[42] Pursuant to those three sections, the Dangerous Drugs Regulations 1952 ('DDR') were made. Regulation 22 creates an offence and provides the

penalty for supplying false information. Regulation 23 creates the offence and provide the punishment for making false documents.

[43] Again, unlike s 10 of the SCOT, it is the regulation made by the Minister that creates the offence and provides the punishment. This is another example where the 'delegation' goes even further than in s 10 of the SCOT. It is true that the regulation is required to be tabled before the Dewan Rakyat. But, that requirement is not for the purpose of validating the regulation before its comes into force. It is to enable the Dewan Rakyat to pass a resolution to annul it but, even then, without prejudice to the validity of anything previously done thereunder — s 47(4).

[44] It is true that there is no provision for the *fatwa* to be laid before the TSLA. But, in the case of a *fatwa*, the offence is created by s 10 of the SCOT itself. TSLA, may at any time repeal s 10 of the SCOT or even s 51 of the AIRA, or, for that matter both the Enactments. It is not that the TSLA is powerless. Besides, if the gazetted *fatwa* covers a matter falling outside the limit provided by the Constitution, it is clearly open to challenge in the court of law, as in this case. For a *fatwa* to have the force of law and for s 10 of the SCOT to operate, it must be one that falls within the limits set by the Constitution. That is the limit.

[45] I shall give only two more examples, both from the Penal Code. Section 186 makes it an offence for anybody to voluntarily obstruct a public servant in the discharge of his public functions. What is a 'public function' is not defined. First, it is up to the officer to decide whether, in his view, what he was doing was a public function or not. In the final analysis, it is for the court to decide. The same analogy applies here.

[46] Similarly s 188 makes it an offence for a person who, 'knowing that by an order promulgated by a public servant lawfully empowered to promulgate such an order he is directed to abstain from a certain act … disobeys such directions, shall ... be punished …'. What the specific orders are that may be promulgated are not stated. Of course a general guideline is provided in the section. That again is analogous to the issue in question. Indeed, in both situations, it is impossible to list down the kind of orders or *fatwa*s that may be made except that they must fall within the guidelines, in the instant case as provided by the Constitution and SCOT. Take the very *fatwa* in this case as an example. How would TSLA know that there would be an 'Ayah Pin' and what he would preach contrary to Hukum Syarak?

SECTION 14 OF THE SCOT

[47] Section 14 of the SCOT makes it an offence for a person to print,

publish, produce, record, distribute etc or has in his possession any book, pamphlet, document etc containing anything which is contrary to Hukum Syarak.

[48] Besides the arguments dealt with in the discussion of s 51 of the AIRA and s 10 of the SCOT it was argued that the offence is ambiguous as, inter alia, the enforcement of the offence is only 'executable on the opinion of the enforcement authorities as to what amounts to being contrary to Hukum Syarak, and incidentally therefore what amounts to Hukum Syarak'.

[49] With respect I am unable to agree with this contention too. The offence is triable by the Syariah Court. It is the Syariah Court that will determine whether the materials contain anything which is contrary to Hukum Syarak. Of course an enforcement officer will have to form his own opinion first as to whether an offence has been committed before making an arrest. The Syariah Prosecuting Officer too will have to form his own opinion before preferring a charge against a person. Eventually, it is the Syariah Court that decides whether all the ingredients of the offence have been proved.

[50] For comparison, take the offences of sale, etc, of obscene books etc, — ss 292, 293 and 294 of the Penal Code. Both the police officer and the public prosecutor, at their respective levels would have to determine whether in their respective opinions, the matter or act is obscene. Finally it is the court that decides whether the matter or act is obscene or not. In any event, I do not find any law or provision of the Constitution that s 14 contravenes.

PRECEPTS OF ISLAM

[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.

[53] Opinions of three 'experts' were also produced. They are Tan Sri Sheikh Ghazali bin Hj Abdul Rahman who was the Director General of the Syariah Judicial Department, Malaysia and had served as Chief Syariah Judge for the Federal Territory and still sits on in the Syariah Court of Appeal in eight states. The second is Professor Dr Mohd Kamal bin Hassan who was the Rector of the International Islamic University, Malaysia. Their opinions were produced by the intervener, the Government of Malaysia. The third is Professor Muhammad Hashim Kamali who was the Dean of the International Institute of Islamic Thought and Civilisation. Reading their curriculum vitae and knowing them personally, I have no hesitation to say that they are worthy expert witnesses on Islam. One point I wish to make even though it is not the basis for the preference of their opinion is that while Tan Sri Sheikh Ghazali and Professor Dr Mohd Kamal Hassan are Malaysian Malays, Professor Dr Muhammad Hashim Kamali is an Afghan and may not belong to the Shafie school, as in the case of the first mentioned two experts. The other point to be noted is that Tan Sri Sheikh Ghazali had his first degree in Syariah from al-Azhar University in Cairo followed by a Diploma in Education at 'Ain Sham University, Cairo and another diploma from the International Islamic University, Malaysia.

[54] Professor Dr Mohd Kamal Hassan obtained his first degree in Islamic Studies from the University of Malaya, MA, MPhil and PhD from the Columbia University, New York majoring in Islamic contemporary thought with reference to Indonesia.

[55] Professor Dr Muhammad Hashim Kamali had his first degree in Law and Political Science at Kabul University, Afghanistan, LLM and PhD in Comparative Law at the University of London.

[56] We see, therefore, that of the three experts, Tan Sri Sheikh Ghazali is the product of al-Azhar University in Syariah, taught in Arabic while the other two are the products of western universities with English as the medium of instruction.

[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 (*fatwa*s) 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).

[59] Professor Dr Muhammad Hashim Kamali, inter alia, opines as follows:

> A precept of Islam is an indisputable fundamental principle, or a fundamental principle in connection with which there is no serious dispute or debate amongst jurists. The 'precepts of Islam' essentially refer to the cardinal principles of belief, law and morality that constitute the core of the Islamic identity of a muslim individual and society which are enunciated in the clear text of the Qur'an and

authentic hadith. Yet not all that is established in the clear text, such as certain commercial contracts and punishments, on which the Qur'an is clear, yet one would hesitate to classify these under 'the percepts of Islam'.

Precepts must be founded in the 'syariah', that is derived from the Holy Qur'an and the authentic and undisputed hadith of the Holy Prophet, peace be upon him (pbuh). 'Syariah' must be distinguished from 'fiqh', the latter being a derivative of the former in which juristic reasoning has been employed. Precepts cannot be founded on 'fiqh' alone;

The most commonly accepted precepts are the recital of the 'syahadah', the five daily prayers at designated times, the fast in the month of Ramadhan, the payment of alms and the pilgrimage of the Haj to the holy city of Mecca.

[60] The learned professor goes on to give his opinion that acting against a *fatwa* does not amount to acting against the precepts of Islam. For that reason the offence created by s 10 is not an offence against the precept of Islam. Similarly s 14 of the SCOT is not an offence against the precept of Islam. With respect, these are matters for this court to decide and not for him.

[61] It can be seen that all the three expert witnesses agree that:

(a) precepts of Islam cover three main domains ie creed or belief ('aqidah'), law ('shari'ah') and ethics or morality ('akhlak');

(b) precepts of Islam are derived from the Qur'an and Sunnah.

[62] Learned counsel for the petitioner urged this court to accept the opinion of Professor Dr Hashim Kamali which, according to him, confines precepts of Islam to the 'five pillars' of Islam only and nothing else. With respect, it is not correct to say that Professor Dr Hashim Kamali said that only the five pillars of Islam form the precepts of Islam. In fact, he started off para 7.3 with the words 'The most commonly accepted precepts are …'. They are not exhaustive.

[63] In any event, what is most important for our present purpose is that all of them agree that 'aqidah' forms one of the precepts. Indeed, I would say that the word 'aqidah' falls squarely within the meaning of the word 'precept' used in the Constitution.

[64] However, if I have to choose between the opinions of Tan Sri Sheikh Ghazali and Professor Dr Kamal Hassan and the apparently more restrictive view of Professor Dr Hashim Kamali, in Malaysian context and bearing in mind the English word 'precepts' used in the Constitution, I would prefer to broader views of Tan Sri Sheikh Ghazali and Professor Dr Kamal Hassan.

[65] In my judgment offences created by s 10 of the SCOT are offences regarding the 'precepts of Islam'.

[66] Coming now to s 14 of the SCOT. The offence is for printing, publishing, producing, recording, distributing, having in possession, etc, of any book, pamphlet, document, etc, containing anything which is contrary to 'Hukum Syarak'.

[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' interchangeably. 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'.

CRIMINAL LAW

[69] It was also argued that the offences are 'criminal law' and therefore within the federal jurisdiction to legislate. I admit that it is not easy to draw the dividing line between 'criminal law' and the offences that may be created by the State Legislature. Every offence has a punishment attached to it. In that sense, it is 'criminal law'. However, if every offence is 'criminal law' then, no offence may be created by the State Legislatures pursuant to item 1, List II of the Ninth Schedule. To give effect to the provision of the Constitution a distinction has to be made between the two categories of offences and a line has to be drawn somewhere. The dividing line seems to be that if the offence is an offence against the precept of Islam, then it should not be treated as

'criminal law'. That too seems to be the approach taken by the Supreme Court judgment in *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119. In that case the issue was whether s 298A of the Penal Code was invalid on the ground that it made provisions with respect to a matter with respect to which Parliament had no power to make. It was argued that the section was ultra vires the Constitution because, having regard to the pith and substance of the section, it was a law which ought to be passed NOT by Parliament but by the State Legislative Assemblies, it being a legislation on Islamic religion, according to art 11(4) and item 1 of List II, Ninth Schedule of the Federal Constitution. On the other hand, it was contended by the respondent that the section was valid because it was a law passed by Parliament on the basis of public order, internal security and also criminal law according to art 11(5) and items (3) and (4) of List I of the Ninth Schedule of the Federal Constitution.

[70] By a majority of 3:2 the court held, quoting the headnote in the Malayan Law Journal:

> Held by a majority (Hashim Yeop A Sani and Abdoolcader SCJJ dissenting:) (1) having considered and examined the provisions of s 298A of the Penal Code as a whole, it is a colourable legislation in that it pretends to be a legislation on public order, when in pith and substance it is a law on the subject of religion with respect to which only the states have power to legislate under arts 74 and 77 of the Federal Constitutions.

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

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

[72] Considering the difficulty to draw the line between the two categories of offences and the fact that the Supreme Court in *Mamat bin Daud* too did not attempt to lay down the principles for the distinctions to be made, I too shall refrain from attempting to do it as I fear that it might do more harm than good. I would prefer that the issue be decided on a case to case basis. However, if, for example, a similar offence has been created and is found, in the federal law, since even prior to the Merdeka Day, that must be accepted

A as 'criminal law'. But, where no similar 'criminal law' offence has been created, then, as in the case of *Mamat bin Daud*, the court would have decide on it.

B **[73]** In the instant case, as the offences are offences against the precept of Islam, as there are no similar offences in the federal law and the impugned offences specifically cover muslims only and pertaining to Islam only, clearly it cannot be argued that they are 'criminal law' as envisage by the Constitution.

C **[74]** In my judgment the impugned sections are valid.

PETITION NO 1 OF 2007

D **[75]** In this case, the petitioner, a muslim by his own admission, was charged before the Syariah Court at Shah Alam, Selangor for fives offences under ss 7, 8(a), 10(b), 12(c) and 13 of the Syariah Criminal Offences (State of Selangor) Enactment 1995 ('SCOS').

E **[76]** Briefly, the charge under s 7 of the SCOS is for expounding a doctrine relating to the religion of Islam which is contrary to 'Hukum Syarak'. The charge under s 8(a) is for declaring himself as a Malay prophet of this era which is contrary to 'Hukum Syarak'. The charge under s 10(b) is for insulting or bringing into contempt the religion of Islam by, inter alia, saying
F that the performance of the haj is an invention of the Saudi Arabian Government for the purpose of making a profit and that praying is similar to being drunk or gambling. The charge under s 12(c) is for disobeying the lawful orders of the Mufti given by way of a *fatwa* which had been gazetted on 29 August 1991 vide PU Sel2/1991. Lastly, the charge under s 13 is for
G propagating the teaching of and practice of Ajaran Kahar bin Ahmad which is contrary to 'Hukum Syarak' and the *fatwa* referred earlier.

[77] On 3 January 2007, this court granted leave pursuant to art 4(3) of the Federal Constitution to commence proceedings under art 4(4) of the
H Constitution. The petition seeks to have this court declare that s 49 of the Administration of the Religion of Islam (Selangor) Enactment 2003 ('ARIS') besides ss 7, 8(a), 10(b), 12(c) and 13 of the SCOS mentioned earlier invalid and void.

I **[78]** The relevant provisions of the Constitution of the State of Selangor are similar to those of the State of Terengganu and need not be reproduced. Similarly s 49 of the ARIS need not be reproduced as it is similar to s 51 of the AIRA. However, it is necessary to reproduce the provisions of ss 7, 8, 10, 12 and 13 of the SCOS.

[79] Section 7 of the SCOS provides:

7(1) Any person who teaches or expounds in any place, whether private or public, any doctrine or performs any ceremony or act relating to the religion of Islam shall, if such doctrine or ceremony or act is contrary to Islamic Law or any *fatwa* for the time being in force in this State, be guilty of an offence and shall be liable on conviction to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.

(2) The Court may order any document or thing used in the commission of or related to the offence referred to in subsection (1) to be forfeited and destroyed, notwithstanding that no person may have been convicted of such offence.

[80] Section 8 of the SCOS provides:

8 Any person who —

(a) declares himself or any other person to be a prophet, Imam Mahadi or wali; or

(b) states or claims that he or some other person knows of events or matters which are beyond the comprehension or knowledge of human beings,

such declaration, statement or claim being false and contrary to the teachings of Islam, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.

[81] Section 10 of the SCOS provides:

10 Any person who by words which are capable of being heard or read or by drawings, marks or other forms of representation which are visible or capable of being visible or in any other manner —

(a) insults or brings into contempt the religion of Islam;

(b) derides, apes or ridicules the practices or ceremonies relating to the religion of Islam; or

(c) degrades or brings into contempt any law relating to the religion of Islam for the time being in force in this State,

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

[82] Section 12 of the SCOS provides:

> 12 Any person who acts in contempt of the lawful authority, or defies, disobeys or disputes the lawful orders or directions, of —
>
> (a) His Royal Highness the Sultan in His capacity as the Head of the religion of Islam;
>
> (b) The Majlis;
>
> (c) The Mufti, expressed or given by way of a 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.

[83] Section 13 of the SCOS provides:

> 13(1)Any person who gives, propagates or disseminates any opinion concerning any issue, Islamic teachings or Islamic Law contrary to any fatwa for the time being in force in this State shall be guilty of an offence and shall be liable on conviction 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 any document or other medium containing the opinion referred to in subsection (1) to be forfeited and destroyed, not withstanding that no person may have been convicted of an offence in connection with such opinion.

[84] The *fatwa* which was gazetted on 29 August 1991 (No 607) in six pages, in substance, says:

> Pada menjalankan kuasa-kuasa yang diberi oleh seksyen 41(2) Enakmen Pentadbiran Agama Islam 1952 (Selangor No. 3/52) Jawatankuasa Perudangan Majlis Agama Islam Selangor bagi pihak MAIS menfatwakan Bahawasanya Hj. Khahar B. Hj. Ahmad Jalal No. K.P. 3297747 yang beralamat di No. 44 Kg. Kemensah Hulu Klang telah membawa ajaran ilmu salah kerana telah menyeleweng daripada akidah dan hukum syariat islamiah yang sebenar dan telah membuat penghinaan kepada para Ulama' yang muktabar. Butir-butir mengenai ajaran yang dimaksudkan adalah seperti di dalam jadual.
>
> 2. Jawatankuasa Perundangan Agama Hukum Syara' juga bersetuju mengharamkan buku yang dikarang oleh beliau yang bertajuk 'AL-FURQAAN-PEMBEDA' daripada dicetak, diedar, dijual, dibaca, disimpan dan digunakan oleh orang ramai.

[85] Actually, all the submissions in respect of Petition No 1 of 2007 are

applicable here and my views expressed therein are also applicable here. All that need be said is that the offences created are clearly offences concerning the 'aqidah' meant to protect and preserve the true teaching of Islam. They are clearly offence against the precepts of Islam.

PETITION NO 2 OF 2007

[86] As the first petitioner has passed away, only the second petitioner is proceeding with this petition. The second petitioner, a muslim by his own admission, was charged in the Syariah Court at Shah Alam, Selangor under ss 8(a) and 16(1)(a) of the SCOS. The charge under s 8(a) is for declaring that Hj Abd Kahar bin Ahmad as a prophet which is false and contrary to Hukum Syarak. The charge under s 16(1)(a) for distributing documents the contents of which are contrary to Hukum Syarak. On 3 January 2007 he obtained leave of this court to challenge the validity of the two sections.

[87] Section 8 of the SCOS has been reproduced in the discussion of Petition No 1 of 2007. Section 16 is exactly the same as s 14 of the SCOT that has been reproduced in the discussion of Petition No 1 of 2006.

[88] So, whatever I have said regarding s 8 of the SCOS in Petition No 1 of 2007 applies here. Similarly whatever I have said about s 14 of the SCOT applies to s 16 of the SCOS.

CONCLUSIONS

[89] For the reasons given above in my judgments, all the impugned provisions are valid laws, I would therefore dismiss all the three petitions.

[90] My brother Zulkefli bin Ahmad Makinudin FCJ has read this judgment and agrees with it.

Zaki Azmi PCA:

[91] I have had the privilege of reading the grounds of judgment of my learned Chief Justice, in draft. Permit me however to express my views on certain aspects of Petition No 1 of 2006 (*Sulaiman bin Takrib v Kerajaan Negeri Terengganu (the Government of Malaysia, intervener)*).

[92] I do not need to restate the facts or the issues as well as the relevant provisions of the laws in detail since these are already laid out in extenso in the grounds of judgment of the learned Chief Justice.

[93] These proceedings before us are commenced pursuant to art 4(4) of the Federal Constitution for a declaration that the provisions of laws referred hereafter which were enacted by the State Legislative Assembly of Terengganu ('SLAT') are invalid on the ground that SLAT has no powers to make such provisions.

[94] The question is whether the SLAT is empowered to enact s 51 of the Administration of Islamic Religious Affairs (Terengganu) Enactment 2001 ('AIRA 2001') and as well as ss 10 and 14 of the Syariah Criminal Offences (Takzir) (Terengganu) Enactment 2001 ('SCOT').

[95] The petitioner in this case was on 4 August 2005 charged under s 10 of the SCOT. Subsequently on 23 August 2005 he was charged under s 14 of the SCOT for the possession of a VCD containing materials contrary to *Hukum Syarak*, which is the teaching of Ayah Pin. This is the *fatwa* that is under discussion in this case. In any case, for the purpose of this petition, the facts are not in dispute and it is also not relevant as to which limb of the section he is charged under.

[96] Before we proceed, let us understand what a *fatwa* is. *Fatwa* is an Arabic word which is not defined in either the AIRA 1986 or AIRA 2001. The petitioner quoted the definition of *fatwa* from one of the experts, Mohamad Hashim Kamali in his book *Islamic Law in Malaysia: Issues and Developments* (Kuala Lumpur, 2000):

> As a juristic concept, 'fatwa' signifies an opinion, verdict, or response, of a learned scholar of Shar[@2248]'a over an issue in which a response has been solicited. …

Another reference made by the petitioner is to Farid Sufian Shuaib in his book *Powers and Jurisdiction of Syariah Courts in Malaysia* (Malayan Law Journal 2003) where he defined a *fatwa* as:

> … a formal legal opinion given by an Islamic Jurist or a body of Islamic Jurists in an answer to a question submitted to the Islamic Jurist or the body of Islamic Jurists.

[97] In my opinion, since the *fatwa* under discussion was made pursuant to the Administration of Islamic Religious Affairs Enactment 1986 ('AIRA 1986'), and by the time the petitioner was charged, the AIRA 1986 has been replaced by the AIRA 2001, both legislations become relevant in my discussion. If the *fatwa* made under the AIRA 1986 is not valid for some reasons, then it cannot continue to be valid under the AIRA 2001. By virtue of s 107 of the AIRA 2001, the *fatwa* under AIRA 1986 only remains in force so far as it is not inconsistent with AIRA 2001.

[98] The *fatwa* which is in question was prescribed pursuant to s 25 of the AIRA 1986 and published pursuant to s 26 of the same. Under the AIRA 2001, powers to make *fatwa* are governed by s 50 and to publish it under s 51. The AIRA 1986 contained simpler provisions for making of *fatwa* than that found in the AIRA 2001. The AIRA 1986 conferred discretion on the DYMM Sultan whether to publish a *fatwa* or not. On the other hand, under the AIRA 2001 publication is compulsory to make it binding on every Muslim in Terengganu and shall be recognised by all courts in Terengganu (see ss 26(3) of the AIRA 1986 and 50(6) of the AIRA 2001). By its publication in the *Gazette* the law presumes that it is made known to every member of the public. In substance, I find that the provisions relating to the making of *fatwa* under the AIRA 1986 and AIRA 2001 are the same. The *fatwa* made vide government *Gazette* of the state of Terengganu on 4 December 1997 is therefore saved by s 107 of the AIRA 2001.

[99] Section 51 of the AIRA 2001 provides that a *fatwa* shall be binding on every muslim in the state of Terengganu and unless he is permitted by *Hukum Syarak* shall not depart from such *fatwa* in matters of personal observations. It is also provided that a *fatwa* shall be recognised by all courts in the state of Terengganu as authoritative of all matters laid down in that *fatwa*. Sections 24 and 25 of the AIRA 1986 and their corresponding provisions in ss 48, 49 and 50 of the AIRA 2001 lay down the procedure for the making of a *fatwa*. The procedure again is well spelt out in the judgment of my learned Chief Justice and I do not need to repeat it. It can be clearly seen from these provisions that they merely provide for the making of a *fatwa*.

[100] Once a *fatwa* is made then anybody who fails to comply with that *fatwa* commits the offence which is provided under s 10 of the SCOT. Section 10 of the SCOT makes it an offence for a muslim to defy, disobey or dispute the orders or directions of the DYMM Sultan as head of religion of Islam, the Majlis or Mufti which is given by way of *fatwa*. Section 14 of the SCOT in turn makes it an offence to, inter alia, have in one's possession any form of recording containing anything which is contrary to *Hukum Syarak* (Islamic law).

[101] It is clear that the Fatwa Committee (after going through the procedures laid out in the relevant sections mentioned earlier) prepares the *fatwa* whether under the AIRA 1986 or AIRA 2001. What the Fatwa Committee does is to merely state whether certain acts are within the *Hukum Syarak* or not. Under the AIRA 1986, the Majlis is empowered to make a *fatwa* but under the AIRA 2001 every *fatwa* has to be assented to by the DYMM Sultan and then the state government will have to be informed of such *fatwa* before it is published in the *Gazette*. In my opinion, in respect of the *fatwa* under discussion, whether the government has been informed of

such *fatwa* or not, does not go into its substantive validity. After all it is just a notification to the government. No consultation or approval is required from the government.

[102] The *fatwa* under discussion was in fact published in the *Gazette* although under the AIRA 1986 a *fatwa* need not be published in the *Gazette*. Reading from the government *Gazette* of the state of Terengganu of 4 December 1997 which is, again, already reproduced in the judgment of my learned Chief Justice, and pursuant to ss 25 and 26(3) of the AIRA 1986, it is clear that the publication of the *fatwa* was done on the direction of the DYMM Sultan. In effect therefore, it is made by DYMM Sultan on the advice of the Fatwa Committee. I read the Fatwa Committee in this respect as only an advisor to the Sultan. We must not forget that the DYMM Sultan is the head of the religion of Islam in the state of Terengganu as declared and set forth in the laws of the constitution of the state of Terengganu (see s 3 of the AIRA 2001). This is another reason why it cannot be said that it is the Fatwa Committee which creates the criminal offences. Of course under AIRA 1986, there may be a *fatwa* which is not published in the *Gazette*. I would not like to make comments on the validity of such an unpublished *fatwa*.

[103] The petitioner on the other hand, is charged under a different legislation altogether for the offences. As can be seen from the provisions relating to the making of the *fatwa*, by itself, a *fatwa* is not an offence. The offences are the acts prohibited by ss 10 and 14 of the SCOT. The SCOT is an Enactment passed by the SLAT which clearly has the powers to create offences against muslims. This is clearly provided for in item 1 of List II (State List) of the Ninth Schedule ie ' … *creation and punishment of offences* by persons professing the religion of Islam against precepts of that religion …'. And it is pursuant to this that the offending sections are created to ensure compliance of the *fatwa*. It is therefore not correct to say that the SLAT has empowered the Fatwa Committee to create offences. It does not.

[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.

[106] In regard to Petitions Nos 1 of 2007 and 2 of 2007, I have no comments and fully concur with the judgment of my learned Chief Justice.

[107] I therefore hold that all the provisions of the respective laws which validity have been challenged by the petitioner are all valid laws. I concur with my learned Chief Justice to dismiss the three petitions with costs and that deposits be paid towards taxed costs.

Petitions dismissed with costs.

Reported by Kohila Nesan