IN THE HIGH COURT OF MALAYA AT IPOH

IN THE STATE OF PERAK DARUL RIDZUAN

ORIGINATING SUMMONS NO.: 24-513-2009

In the matter of TEVI DARSINY, KARAN DINISH and PRASANA DIKSA, infants

And

In the matter of Sections 2, 3, 5, 12 Guardianship of Infants Act 1961 (Act No. 13 of 1961)

And

In the matter of the Law Reform (Marriage and Divorce) Act 1976 (Act 164)

And

In the matter of the Rules of the High Court 1980

BETWEEN

INDIRA GANDHI A/P MUTHO ... APPLICANT/PLAINTIFF

AND

PATMANATHAN A/L KRISHNAN ... RESPONDENT/DEFENDANT

AND/OR

ANYONE HAVING CUSTODY AND CONTROL

OVER PRASANA DIKSA (BIRTH CERTIFICATE NO. K 885353)

THE JUDGMENT OF

YA TUAN LEE SWEE SENG

This is a sequel to the continuing saga in the **Indira Gandhi's** case (**Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors** [2013] 5 MLJ 552). The plaintiff applicant Indira Gandhi had in the earlier action applied for a declaration that the conversion of the 3 children by her husband to Islam is unconstitutional, null and void and of no effect. The

Court had granted her the application and quashed the 3 certificates of conversion.

In this Originating Summons (“OS”) she had applied for and was granted a custody order for the 3 children by her Ladyship Wan Afrah J. on 11 March 2010 under section 88 of the Law Reform (Marriage and Divorce) Act 1967 ("Law Reform Act"). The custody order also directed the husband to deliver the youngest child, Prasana Diksa, to her immediately. She subsequently filed a Petition for divorce on ground of her husband's conversion to Islam as allowed by law and provided for under section 51 of the Law Reform Act. The divorce was granted on 8 August 2012.

Problem

Whilst she had applied for in this Originating Summons and obtained a custody order for her 3 children with reasonable access to her husband, her husband having converted to Islam, had earlier without her knowledge, obtained a custody order from the Syariah High Court over the 3 children on 8 April 2009 (an interim custody order) and on 29 September 2009 (a permanent custody order). She was never served with the cause papers from the Syariah High Court. She only knew about the Syariah High Court

custody order when the husband, who is the respondent defendant here, filed his affidavit to oppose her application in this OS action for custody.

Whilst she was unaware of the Syariah High Court custody proceeding, her application to this Court for custody was duly served on the husband defendant and he was heard before custody of the 3 children was given to the wife with reasonable access to him. The husband's appeal against the custody order to the Court of Appeal had been struck out.

The matter has now come to the crunch. Though granted the custody order, the husband has not delivered the youngest child, Prasana Diksa, to the wife. The husband had, on 31 March 2009, forcefully taken the child from her. The child was still nursing at her mother's breast, being hardly 11 months old then. The last time she saw the child was in October 2009, when both parents were present in Court during a hearing of the custody application in this OS.

Indira Gandhi's problem is not hers alone; it is a problem not uncommon in many a family where one spouse has converted to Islam and the Muslim spouse has gone to the Syariah Court for a custody order of the children and the non-Muslim spouse has gone to the Civil Court and also obtained a custody order for the children as well. It remains a paradox of life that love

at marriage can overcome all odds and obstacles, but love in the face of a divorce or perhaps the lack of it coupled with a new-found faith, can bring in its wake so much attrition and aggravation.

Prayer

She had commenced this contempt action in Enclosure 3 on 23 September 2013 against her husband for willfully refusing to comply with the Civil High Court custody order and indeed in flagrant violation of it. She had prayed for an order of committal of the husband to prison until the contempt is purged. Leave was obtained on 18 October 2013 and this Notice of Application for an order of committal was filed on the same day.

His defence was that he is armed with and abiding by a valid Syariah High Court custody order. He further admitted that he has not obeyed the Civil High Court custody order. He evinced no intention of obeying it as the Syariah High Court custody order is clear in that custody of the youngest child had been given to him. He also said that his solicitors had advised him that it is no contempt for him not to deliver up the youngest child to the wife. There was no apology forthcoming for disobeying the Civil High Court custody order as he was convinced that he was avowedly abiding by the Syariah High Court custody order. His own counsel admitted in Court that

the Syariah High Court order did not deny her access to the youngest child; but even access could not be exercised as the respondent husband could not be contacted nor located.

Principles

The battle for custody now boils down to this: Whether a convert to Islam, who has obtained a custody order from the Syariah High Court with respect to a child from a Civil Marriage under the Law Reform (Marriage and Divorce) Act 1976, is absolved from obeying a Civil High Court custody order granted to the non-Muslim spouse?

Is this a case of conflict of laws and jurisdictions or is this more a case of accepting or refusing to accept the order from the Court of proper jurisdiction, which problem has come to plague not just the parties to the marriage and now the divorce but the powers that be, the legal pundits and the people who look to the law to bring some order to the basic indispensable unit of human society, that of the family.

We must once again turn to the law to guide us through the tension and trauma of life where love between the couple is no more and in its place, the mistrust of each other and even of the law. The Court is most grateful to all learned counsel who have come forward as amicus curiae and also

representing the various stakeholders, in assisting the Court by combing the various journals and bringing to the Court's attention any case that might have a bearing in its decision. Hopefully with the light shed we shall find our way through this legal labyrinth of seemingly conflicting laws and competing jurisdictions.

It must be stated at the outset that the respondent husband had never been present for the various hearings of the application for contempt though his solicitors confirmed that they had informed him of the dates of the various hearings and the need to attend. It seems his reason as relayed by his counsel was that he feared for his safety.

Whether the jurisdiction of the Syariah Court is only over matters where all parties before the Court are Muslims

The judicial power of the Federation is reposed in the two High Courts, the Court of Appeal and the Federal Court as provided for under Article 121 of the Federal Constitution. These are the superior courts in contradistinction from the inferior courts as may be provided by federal law. The High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

With respect to the High Courts, Article 121(1) reads as follows:

"Article 121. Judicial power of the Federation.

(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely—

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed).

and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law."

The relevant federal law conferring jurisdiction in the two High Courts would be the Courts of Judicature Act 1964. Section 23 deals with the local civil jurisdiction of the High Courts and section 24 provides for the specific civil

jurisdiction of the High Courts. The relevant parts of section 24(a) and (d) read as follows:

"Section 24

Without prejudice to the generality of section 23, the civil jurisdiction of the High Court shall include -

(a) jurisdiction under any written law relating to divorce and matrimonial causes;

.....

(d) jurisdiction to appoint and control guardians of infants and generally over the person and property of infants;"

With respect to the specific powers of the High Courts in divorce and matrimonial causes, that is further expanded and elaborated in the Law Reform Act.

Whilst the High Courts, the Court of Appeal and the Federal Court are established under the Federal Consitution, the Syariah Courts are established under the various State Enactments with respect to the Administration of the Religion of Islam and in Perak, the relevant State Enactment is the Administration of the Religion of Islam (Perak) Enactment

2004 ("the Perak Administration Enactment"). It was passed by the State Legislative Assembly of Perak on 21 June 2004 and came into force on 1 June 2005.

The power of Parliament to make federal laws is conferred by Article 74(1) of the Federal Constitution, being confined to matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

The Federal Constitution itself circumscribed the matters that a state may legislate on with respect to the **subject persons** and the **subject matters** over which the Syariah Court established under the respective State Enactments may be conferred with jurisdiction over. In other words a state cannot have more powers than what has been given it by the Federal Constitution with respect to both subject-persons and subject-matters over which it wants its Syariah Courts to have jurisdiction.

Item 1 of List II State List in the Ninth Schedule to the Federal Constitution provides the matters within the legislative powers of the states as follows:

> "List II—State List
>
> 1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, **Islamic law and personal and family law of**

persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, **marriage**, **divorce**, dower, maintenance, adoption, legitimacy, **guardianship**, gifts, partitions and non-charitable trusts;

Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State;

Malay customs;

Zakat, Fitrah and Baitulmal or similar Islamic religious revenue;

mosques or any Islamic public places of worship, creation and punishment of offences by **persons professing the religion of Islam** against precepts of that religion, except in regard to matters included in the Federal List;

the constitution, organization and procedure of **Syariah courts**, which shall have **jurisdiction only over persons professing the religion of Islam** and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of

propagating doctrines and beliefs among persons professing the religion of Islam;

the determination of matters of Islamic law and doctrine and Malay custom." (emphasis added)

The matters within each semi-colon have been placed in separate paragraphs above for ease of reading and reference.

Under Article 74(2) of the Federal Constitution, 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.

With respect to the subject-persons over which a Syariah Court may have jurisdiction, the framers clearly and consciously confined the application of Islamic law to only Muslims and that non-Muslims are exempt from its application as can be seen in the repeated refrain "**persons professing the religion of Islam".** Hence when it comes to the Syariah Court exercising its jurisdiction over subject-persons, it shall have "**jurisdiction only over persons professing the religion of Islam".** The positioning of the word "only" after "jurisdiction" is so carefully placed to emphasize that only Muslims come under its jurisdiction and that non-Muslims are excluded. In other words non-Muslims do not and cannot come ever under

the jurisdiction of the Syariah Courts and its orders cannot bind a non-Muslim, be he or she a parent, spouse, child or person.

The various State Legislatures understood this perfectly well for the various State Enactments have provisions similar to the Perak Administration Enactment where the subject persons jurisdiction is concerned in the establishment and conferment of jurisdiction in the Syariah Court. In section 50(3)(b) on its civil jurisdiction, the Syariah High Court shall hear and determine all actions and proceedings **if all the parties to the actions or proceedings are Muslims (subject-person jurisdiction)** and if it relates to the specific **subject matters** set out from (i) to (xii) as follows **(subject-matter jurisdiction)**:

> "50 (1) A Syariah High Court shall have jurisdiction throughout the State of Perak Darul Ridzuan and shall be presided over by a Syariah High Court Judge.
>
> (2)Notwithstanding subsection (1), the Chief Syariah Judge may sit as a Syariah High Court Judge and preside over such Court.
>
> (3)The **Syariah High Court** shall –
>
> (a)in its criminal jurisdiction, try any offence committed by a Muslim and punishable under the Islamic Family Law (Perak) Enactment 2004 [Enactment No. 6 Of 2004] or under any other written law

prescribing offences against precepts of the religion of Islam for the time being in force, and may impose any punishment provided therefor; and

(b)in its **civil jurisdiction**, hear and determine all actions and proceedings **if all the parties to the actions or proceedings are Muslims** and the actions or proceedings relate to –

(i) betrothal, **marriage**, ruju', **divoce**, annulment of marriage (fasakh), nusyuz, or judicial separation (faraq) or any other matter relating to the relationship between husband and wife;

(ii) any disposition of or claim to property arising out of any of the matters set out in subparagraph (i);

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

(iv) **the division of, or claims to, harta sepencarian;**

(v) wills or gifts made while in a state of marad-al-maut;

(vi) gifts inter vivos, or settlements made without adequate consideration in money or money's worth by a Muslim;

(vii) wakaf or nazr;

(viii) division and inheritance of testate or intestate property;

(ix) the determination of the persons entitled to share in the estate of a deceased Muslim or the shares to which such persons are respectively entitled;

(x) a declaration that a person is no longer a Muslim;

(xi) a declaration that a deceased person was a Muslim or otherwise at the time of his death; and

(xii) **other matters in respect of which jurisdiction is conferred by any written law**." (emphasis added)

The fact that jurisdiction cannot be inferred or implied is further spelt out in (xii) other matters in respect of which jurisdiction is **"conferred by any written law".**

Where the words of a constitutional provision are clear, no one can alter the words therein, to yield a meaning according to one's personal or political preference. When Item 1 List II of the State List in the Ninth Schedule uses the words "shall have **jurisdiction only over persons professing the religion of Islam**", it means just that. All the parties appearing before it must be Muslims.

In **Lau Keen Fai v Lim Ban Kay @ Lim Chiam Boon & Anor** [2012] 2 MLJ 8 the Federal Court had reminded us of what is obvious but often overlooked that the basic task of the court is to ascertain and give effect to

the true meaning of what Parliament had intended on the provisions of the Act it had enacted. Where the words are clear and unambiguous, a court should give effect to the plain words. There is no question of construction.

When the Perak State Enactment says "if **all the parties** to the actions or proceedings **are Muslims** " (section 50(3)(b) thereof) it means just that. It cannot be read as "if some of the parties.....are Muslims" or "if most of the parties.....are Muslims." If those words are still not clear enough, then section 63 of the Perak Administration Enactment removes all traces of doubt when it declares as follows:

> "Section 63. Jurisdiction does not extend to non-Muslims.
>
> No decision of the Syariah Appeal Court, Syariah High Court or Syariah Subordinate Court shall involve the right or the property of a non-Muslim."

This point was clearly in the fore-front of the Federal Court in **Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor** [2007] 5 MLJ 101, when it observed as follows at pages 117-118:

> "[49] .....if in a case in the civil court, an Islamic law issue arises, which is within the jurisdiction of the syariah court, the party raising the issue should file a case in the syariah court solely for the

determination of that issue and the decision of the syariah court on that issue should then be applied by the civil court in the determination of the case. But, **this is only possible if both parties are Muslims. If one of the parties is not a Muslim such an application to the syariah court cannot be made. If the non-Muslim party is the would-be Plaintiff, he is unable even to commence proceedings in the syariah court. If the non-Muslim party is the would-be defendant, he would not be able to appear to put up his defence.** The problem persists. Similarly, if in a case in the syariah court, a civil law issue e.g. land law or companies law arises, the party raising the issue should file a case in the civil court for the determination of that issue which decision should be applied by the syariah court in deciding the case.....

.....

[52] Actually if laws are made by Parliament and the Legislatures of the States in strict compliance with the Federal List and the State List and unless the real issues are misunderstood, **there should not be any situation where both courts have jurisdiction over the same matter or issue.** It may be that, as in the instant appeal, the granting of the letters of administration and the order of distribution is a matter

within the jurisdiction of the civil court but the determination of the Islamic law issue arising in the petition is within the jurisdiction of the syariah court. But, these are two distinct issues, one falls within the jurisdiction of the civil court and the other falls within the jurisdiction of the syariah court. Still, there is a clear division of the issues that either court will have to decide. **So, there is no question of both courts having jurisdiction over the same matter or issue."** (emphasis added)

The Federal Court in **Subashini a/p Rajasingam v Saravanan a/l Thangathoray & Other Appeals** [2008] 2 MLJ 147 was of the same wavelength when it comes to the issue of the Syariah Court having no jurisdiction over the non-Muslim spouse where the spouse has converted to Islam. His Lordship Nik Hashim FCJ explained at pages 169-170 as follows:

"[21] ..... To my mind, **the dissolution order of the civil marriage by the Syariah High Court by virtue of conversion would have no legal effect in the High Court other than as evidence of the fact of the dissolution of the marriage under the Islamic law in accordance with Hukum Syarak. Thus, the non-Muslim marriage between the husband and wife remains intact and continues to**

subsist until the High Court dissolves it pursuant to a petition for divorce by the unconverted spouse under s 51(1) of the 1976 Act.

[22] In the present case, there is no impediment for the converted spouse, ie the husband, to appear in the divorce proceeding in the High Court albeit as a respondent, as the jurisdiction of the High Court extends to him **unlike the Syariah High Court which restricts its jurisdiction to persons professing the religion of Islam only,** for example under s 46(2)(b) of the Administration of Islamic Law (Federal Territories) Act 1993 (the 1993 Act) where in its civil jurisdiction relating to (i) marriage and (iii) custody, **the Syariah High Court shall have the jurisdiction to hear and determine the action in which all the parties are Muslims.** Thus, **the contentions that the wife could submit to the jurisdiction of the Syariah Court and have recourse to s 53 of the 1993 Act are not quite correct as the 1993 Act limits its jurisdiction to Muslims only. The wife, being a non-Muslim, has no locus in the Syariah Court."** (emphasis added)

To grant a custody order when the non-Muslim parent could not be heard and was not heard would clearly involve the right of a non-Muslim under

the law and especially under the Law Reform Act under which the marriage was contracted and the youngest child was born. Such an order is in excess of its jurisdiction which as section 63 says, does not extend to non-Muslims.

Nothing must be added or altered to cloud the issue and to create a conflict of jurisdiction when there was none to begin with. It does not matter if a Syariah Court has been issuing custody order umpteen times in favour of a converted parent to Islam granting custody to that converted parent either without hearing or after hearing the unconverted parent. If it is wrong, it is wrong. Repeated wrongs do not make the wrongs, right! There is no estoppel against a statute. A civil High Court being a superior court has supervisory powers over a Syariah Court if the Syariah Court exceeds its jurisdiction and encroaches onto the province and power of the civil courts jurisdiction. The Syariah Courts are creatures of a State enactment and are inferior courts with limited jurisdiction. Its jurisdiction is both conferred and circumscribed by the various State Enactments that conceived and created it, consistent with the Federal Constitution that spells out the scope of its jurisdiction.

Jurisdiction cannot be conferred by consent of parties, even if the non-Muslim spouse or parent has consented. No amount of coercive or even

condescending consent can create jurisdiction. The constrains of convenience cannot create jurisdiction when there was completely none to begin with. It cannot be assumed even if the non-Muslim party has appeared before it. It cannot be acquiesced to by any abrogation or abandonment of the non-Muslim's right under the civil law. It cannot be acquired by accretion in the active application of Syariah law to non-Muslim parent or spouse because one parent or spouse has converted to Islam. Least still can it be arrogated by necessary implication or inference by virtue of Article 3(1) of the Federal Constitution that Islam is the religion of the Federation.

In the Privy Council case of **Meenakshi Naidoo v Subramaniya Sastri** LR 14 IA 160, the High Court at Madras purported to entertain an appeal against the decision of a District Judge which was not appealable. At the hearing before the High Court, neither the parties nor the court raised the question of jurisdiction. The High Court proceeded to reverse the decision of the District Judge. On appeal to the Privy Council, it was held that consent or waiver could not cure the absence of jurisdiction. Sir Richard Baggallay, in delivering the advice of the Board said at page166:

> "It has been suggested, it is not right altogether to pass that suggestion over, that, by reason of the course pursued by the present

appellants in the High Court, they have waived the right which they might otherwise have had to raise the question of want of jurisdiction. But this view appears to their Lordships to be untenable. **No amount of consent under such circumstances could confer jurisdiction where no jurisdiction exists.** Upon this point, it may be convenient to refer to the judgment of their Lordships delivered by Lord Watson in the comparatively recent case of *Ledgard v Bull* LR 13 IA 144, as it in very concise terms deals with the circumstances under which there can be a waiver of a right to complain of a want of jurisdiction. Their Lordships say: 'The defendant pleads that there was no jurisdiction in respect that the suit was instituted before a court incompetent to entertain it; and that the order of transference was also incompetently made. The District Judge was perfectly competent to entertain and try the suit if it were competently brought; and their Lordships do not doubt that in such a case a defendant may be barred by his own conduct from objecting to irregularities in the institution of the suit. **When the judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process**, although they may constitute the judge their arbitrator, and be bound by his decision on

the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the judge is competent to try, the parties without objection join issue, and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit.' In the present case, **there was an inherent incompetency in the High Court to deal with the question brought before it, and no consent could have conferred upon the High Court that jurisdiction which it never possessed**." (emphasis added)

In **Federal Hotel Sdn Bhd v National Union of Hotel, Bar and Restaurant Workers** [1963] 1 MLJ 175, the Federal Court said at page 178G (left): "It is a fundamental principle that no consent or acquiescence can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction ... ".

With the greatest of respect, the Syariah Courts are courts of limited jurisdiction having jurisdiction only over Muslims and with respect to subject-matters within the personal laws of a Muslim especially in Islamic Family law matters. The **Black's Law Dictionary**, Eighth Edition, Thomson

West, USA, 1999 by Bryan A. Garner (Editor in Chief) at page 380 defines a "court of limited jurisdiction" as "A court with jurisdiction over only certain types of cases, or cases in which the amount in controversy is limited." It defines at page 381 an "inferior court" as "2. A court of special, limited or statutory jurisdiction, whose record must show the existence of jurisdiction in any given case to give its ruling presumptive validity."

In that sense it is, very respectfully, an inferior court in legal parlance as its jurisdiction in terms of its power and province is limited under the various States Administration of the Religion of Islam Enactments. Territorially, it has jurisdiction only throughout its State. Subject-persons wise only over Muslims whether it be a criminal or civil matter. Subject-matters wise mainly matters within the personal laws of a Muslim especially in Islamic Family law matters. This is unlike the High Courts and above which are often referred to as superior courts as in courts having unlimited jurisdiction and generally having supervisory powers over inferior courts. The expression of 'unlimited jurisdiction', was used by Lord Diplocl in **Isaacs v Robertson** [1985] AC 97 at page 103 when in passing, he also referred to such a superior court as 'a court of unlimited jurisdiction in the course of contentious litigation'. Even such a superior court must still act within

jurisdiction and no law can sanction a court acting in excess of its jurisdiction, wide and varied as it may be.

The Syariah High Court had no jurisdiction to grant the custody order to the respondent husband, though he is a Muslim, as the other party named in the proceeding before the Syariah High Court is not a Muslim; she is a Hindu. The Syariah High Court was inherently incompetent to deal with the issue of custody when a party to the proceeding, the wife, is a Hindu.

I am not unaware of the Court of Appeal case of **Kaliammal a/p Sinnasamy v Majlis Agama Islam Wilayah Persekutuan (JAWI) & Ors** [2012] 3 MLJ 694 which is often cited as authority for saying that a non-Muslim may appear in the Syariah Courts. The Court of Appeal did not refer to **Tang Sung Mooi (f) v Too Miew Kim** [1994] 3. MLJ 117, **Latifah Mat Zin** (supra) and **Federal Hotel Sdn Bhd v National Union of Hotel Bar & Restaurant Workers**[1983] 1 MLJ 175. The above decision did not seem to be in sync with the other prior cases referred to. Where there is a case in the Federal Court deciding one thing and one in the Court of Appeal deciding another in which the decision of the Federal Court was not cited, this Court would be more constrained to follow the decision of the Federal Court. See the principle enunciated in **R v Northumberland**

Compensation Appeal Tribunal: Ex parte Shaw [1951] 1 All ER 268 at 276A-B.

My attention was also drawn to the case of **Soon Singh a/l Bikar Singh v Pertubohan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor** [1999] 1 MLJ 489 and **Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkifly Shaik Natar & Ors** [2003] 3 CLJ 289 in support of the proposition that the Syariah Court's jurisdiction may be derived by implication in that if a Muslim party is allowed to name and commence proceedings in the Syariah Court against a non-Muslim party, by implication the non-Muslim party must be allowed to appear in the Syariah Court to defend.

The subsequent Federal Court's decision of **Latifah Mat Zin** (supra) and **Abdul Kahar bin Ahmad v Kerajaan Negeri Selangor (Kerajaan Malaysia, Intervener) & Anor** [2008] 3 MLJ 617 have clearly and categorically stated that the jurisdiction of the Syariah Court must be expressly provided for by law enacted by the legislature. When 2 decisions of the Federal Court conflict, on a point of law, the later decision prevails over the earlier decision. The later decision shall represent the current state of the law. See the Federal Court's decision of **Dalip Bhagwan Singh v Public Prosecutor** [1998] 1 MLJ 1 at 14.

Where both the Federal Constitution and the enabling Perak Administration Enactment are clear as bright and broad daylight where subject-persons jurisdiction is concerned, the Court has no business to introduce words not in the provision of Item 1 of List II State List in the Ninth Schedule of the Federal Constitution and the corresponding section 50(3)(b) of the Perak Administration Enactment to blur the issue. Neither can it do so to bolster or buttress the claim of some quarters just because it is provided that Islam is the religion of the Federation.

Whether the Syariah Court has jurisdiction over the subject-matter in this case which is a custody matter in a civil marriage where one party has converted to Islam

Having established that the Syariah Court has no jurisdiction to grant the custody order as the subject-persons are not all Muslims, in that the wife Indira Gandhi is not, there is then strictly speaking, no necessity to consider whether the subject-matter is one where the Syariah Court has jurisdiction. Both the requirements of subject-persons and subject-matter must be present. It is a both/and and not either/or requirement. However, for the sake of argument, let us now consider whether the subject-matter is one where the Syariah Court has jurisdiction.

The relevant State Enactment is the Islamic Family Law (Perak) Enactment 2004. Its application under section 4 is to all Muslims living or resident in the State of Perak Darul Ridzuan. It is an Enactment to amend and consolidate provisions of the Islamic Family Law in respect of marriage, divorce, maintenance, guardianship, and other matters connected with family life as stated in its Preamble.

The Islamic Family (Perak) Enactment provides under section 45 that nothing in the Enactment shall authorize the Syariah Court to make an order of divorce or an order pertaining to a divorce or to permit a husband to pronounce a *talaq* except-

(a) where the marriage has been registered or is deemed to be registered under the Enactment; or

(b) where the marriage was solemnized in accordance with Hukum Syarak; and

(c) where the residence of either of the parties to the marriage at the time when the application is presented is in the State of Perak Darul Ridzuan.

Clearly the divorce granted and the ancillary reliefs that follow under the Islamic Family Law (Perak) Enactment are for those married under the

Enactment or under Islamic law. It is not meant for those whose marriage was under the civil law under the Law Reform Act. It flows from a correct understanding of the reference to marriage and divorce in section 50(3)(b)(i) of the Perak Enactment as referring to a marriage where the parties are Muslims and a dissolution of such a Muslim marriage. Likewise a reference to custody of infants under section 50(3)(b)(iii) is understood to refer to infants born to the Muslim parents in a Muslim marriage or at least infants whose parents are both now Muslims.

For the avoidance of doubt on jurisdiction, the Islamic Family Law (Perak) Enactment further provides in section 47(1)(a) and (b) the following to be expressly stated in the prescribed form for an application for divorce so that the Syariah High Court is left in no doubt as to its jurisdiction:

> "Divorce by *talaq* or by order
>
> 47. (1) A husband or a wife who desires divorce shall present an application for divorce to the Court in the prescribed form, accompanied by a declaration containing-
>
> (a) **particulars of the marriage** and the names, ages and sex of the **children, if any, of the marriage,**

(b) particular of the **facts** giving the Courts **jurisdiction under section 45**," (emphasis added)

Properly read, the marriage is one under section 45(a) where the marriage has been registered or is deemed to be registered under the Islamic Family Law Enactment or under section 45(b) where the marriage was solemnized in accordance with *Hukum Syarak*. The meaning of "children of the marriage" must mean children of a Muslim marriage as above referred to. It cannot refer to children of a civil marriage under the Law Reform Act.

The Federal Court in **Subashini's** case [2008] 2 MLJ 147 had dealt with the same questions under the equivalent provision in the Administration of Islamic Law (Federal Territories) Act 1993 and the questions at [6] at page 164 and the answers at [31] at page 174 as given by his Lordship Nik Hashim FCJ are matched for each of reading as follows:

"[6].....(2.2.1) are provisions such as s 46(2)(b)(i) of the Administration of Islamic Law (Federal Territories) Act 1993 (the '1993 Act') intended only to address marriages solemnized under the relevant State Islamic legislation ('Islamic marriages');(2.2.2) as such, is the jurisdiction and/or power vested by such provisions in the Syariah Courts limited to the granting of decrees of divorce and

orders consequential to such decrees pertaining to inter alia maintenance, custody, and child support in respect of Islamic marriages?

.....

[31] Accordingly, my answers to the main questions posed are as follows:

.....

(2.2.1) Yes.

(2.2.2) Yes."

In **Majlis Agama Islam dan Adat Melayu Perak Darul Ridzuan v Mohamed Suffian bin Ahmad Syazali & Anor** [2014] 3 MLJ 74 the Court of Appeal held that when a question of whether the Syariah Court has jurisdiction over a matter, one must proceed first to consider whether the State has legislative competency before considering whether the courts have jurisdiction. Here, the State has no legislative competency to enact any State laws where the Syariah Courts may adjudicate a dispute involving a non-Muslim. The State List in the Ninth Schedule in Item 1 List

II does not allow that to begin with. In other words, under the Federal Constitution conceived by our forefathers during the birth of our beloved nation, it was expressly provided that Islamic laws shall not apply to non-Muslims.

The subject-matter competency, also referred to as jurisdictional competency, must flow from the subject-persons competency or legislative competency. As the legislative competency is that of Muslim marriages and divorces where both the husband and wife are Muslim, the jurisdictional competency in terms of the subject-matter cannot be otherwise than a divorce order or custody order where both the husband and wife are Muslims.

The fact that a parent converts to Islam does not make the child of the marriage a Muslim. The meaning of who is a Muslim has been defined as follows under section 2 of the Perak Administration Enactment as follows:

> "(a) a person who professes the religion of Islam;
>
> (b) **a person either or both of whose parents were at the time of the person's birth, a Muslim;**
>
> (c) a person whose upbringing was conducted on the basis that he was a Muslim;

(d) a person who is commonly reputed to be a Muslim;

(e) **a person who has converted to the religion of Islam in accordance with section 96**; or

(f) a person who is shown to have stated, in circumstances in which he was bound by law to state the truth, that he was a Muslim, whether the statement be oral or written;" (emphasis added)

Section 96 of the Perak Enactment provides as follows:

"Requirements for conversion to the religion of Islam.

96. (1) The following requirements shall be complied with for a valid conversion of a person to Islam:

(a) the person must **utter in reasonably intelligible Arabic** the two clauses of the Affirmation of Faith;

(b) at the time of uttering the **two clauses of the Affirmation of Faith** the person must be aware that they mean "I bear witness that there is no god but Allah and I bear witness that the Prophet Muhammad S.A.W. is the Messenger of Allah"; and

(c) **the utterance must be made of the person's own free will.**

(2) A person who is incapable of speech may, for the purpose of fulfilling the requirement of paragraph (1)(a), utter the 2 clauses of the Affirmation of Faith by means of signs that convey the meaning specified in paragraph (b) of that subsection." (emphasis added)

In the **Indira Gandhi's** case (supra) it was held as follows at pages 582-583:

"[72] It is not in dispute that the children were not present, and in any case, did not utter the 2 clauses of the Affirmation of Faith. It was submitted by the Applicant that this failure to comply with a basic requirement for a valid conversion under the Perak Enactment must surely render the conversion void.

[73] Learned counsel for the 6th Respondent Encik Hatim Musa informed the Court that this is the section that has always been used by the 1st and 2nd Respondents for the conversion of minor children to Islam even without their presence to utter the 2 clauses in the Affirmations of Faith and even as babies still unable to utter the said Affirmation, let alone doing it on one's own free will.

[74] If a section of an Act or Enactment has been wrongly invoked and applied, then its repeated use does not make a non-compliance

into a proper compliance. The fact that the utterance must be made voluntarily of one's free will underscores the fact that in Islam as in other religions, there should be no compulsion for as is often said, it is with the heart that one believes and with the mouth one confesses.

[75] In fact section 106 of the Perak Enactment should be read together with section 96(1). Section 106 reads as follows:

> "For the purpose of the Part, **a person who is not a Muslim may convert to the religion of Islam** if he is of sound mind and -
>
> (a) has attained the age of eighteen years; and
>
> (b) if he has not attained the age of eighteen years, his parent or guardian consents in writing to his conversion." (emphasis added)

[76] As can be seen from the opening words of section 106, it starts of with the desire of the person to convert to Islam. If he has attained 18 years old then he does not need the consent of his parent and may proceed to comply with section 96. If he has not attained 18 years old then he must nevertheless come within the meaning of "a person who is not a Muslim may convert to the religion of Islam"; in other words there must be a desire from within his heart. In such a

case the consent of his parent must be given in writing and more than that the requirements of section 96 must be complied with for it says "The following requirements shall be complied with for a valid conversion of a person to Islam." "

Here, the defendant father converted to Islam after the youngest child was born. He then attempted to convert the baby, hardly a year old, under section 96 of the Perak Administration Enactment. As this Court has held for the reasons given above that the conversion is null and void and of no effect for non-compliance with the section 96 and 106 of the Perak Administration Enactment, it is not open to the respondent husband to argue that nevertheless in custody matters, since he had converted to Islam and with that, he had also converted the child, the Syariah Court would have jurisdiction over a Muslim child where custody is concerned. The child is the product of the union between the husband and the wife. No custody order can be made by a court of law when the wife could not be heard and was not heard. Indeed the certificates of conversion of all the children had been quashed by this Court.

Even if the certificates of conversion had not been quashed, the Syariah Court would still not have jurisdiction on the issue of custody in as much as its jurisdiction in divorce is with respect to marriages of Muslims under the

Islamic Family Law Enactment. Its custody is over infants born to Muslim parents married under the Islamic Family Law Enactment.

Whether only the Civil High Court has exclusive civil jurisdiction with respect to a custody and divorce order arising from a civil marriage under the Law Reform Act inspite of the conversion to Islam of a party to the marriage

One must look to the governing statute with respect to whether the Civil High Court has jurisdiction over a divorce and custody matters where the marriage had been contracted under the Law Reform Act. Section 3(3) of the Law Reform Act would be crucial. It reads:

> "This Act **shall not apply to a Muslim** or **to any person who is married under Islamic law** and **no marriage of one of the parties which professes the religion of Islam shall be solemnized or registered under this Act**; 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,** and such decree shall, notwithstanding any other written law

to the contrary, **be valid against the party to the marriage who has so converted to Islam."** (emphasis added)

The words before the semi-colon refer to marriage and the words after the semi-colon refer to divorce. No one would argue that the Law Reform Act does not apply to a Muslim in that a Muslim cannot choose to be married under the Law Reform Act. It applies only to non-Muslims. The fact that the first clause before the semi-colon refers to the application of the Law Reform Act to marriages is underscored by the successive reference to "**any person who is married under Islamic law"** and "**no marriage of one of the parties which professes the religion of Islam shall be solemnized or registered under this Act**;"

It would be appropriate to apply the maxim, *noscitur a sociis*, which means "it is known from its associates". The **Black's Law Dictionary**, Eighth Edition, Thomson West, USA, 1999 by Bryan A. Garner (Editor in Chief) at page 1087 explains this Latin expression as follows:

"A canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it."

This maxim allows the word to take colour and precision from the context in which it appears. Hence the reference to Muslim in section 3(3) means in the context a reference to marriage where a Muslim is concerned. The Law Reform Act does not apply to a Muslim in that he cannot be married under the Act. It does not mean and cannot be made to mean that the Law Reform Act does not apply to a divorce where one of the parties to a marriage under the Act has converted to be a Muslim. The fact that it applies to such a divorce where one spouse has converted to Islam is clearly spelt out in the second clause with reference to the High Court having jurisdiction over such a divorce under section 51.

A statute has to be interpreted in such a manner as to preserve internal consistency and harmony. To insist that the Civil High Court has no jurisdiction over a divorce where a party has become a Muslim merely because section 3(3) in its opening words say "This Act does not apply to a Muslim....", would be to introduce inconsistency when none was intended.

Section 51 of the Law Reform Act provides as follows:

> "51. Dissolution on ground of conversion to Islam
>
> (1) **Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce:**

Provided that no petition under this section shall be presented before the expiration of the period of three months from the date of the conversion.

(2) 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**, if any, and may attach any conditions to the decree of the dissolution as it thinks fit.

(3) Section 50 shall not apply to any petition for divorce under this section." (emphasis added)

The fact that the Civil High Court has jurisdiction to make a custody order affecting the children of the civil marriage even though one party has converted to Islam is clear from section 51(2). What is equally clear is that by section 51, the Law Reform Act is intended for application to all matters of divorce and its ancillary reliefs like custody arising from a marriage registered or deemed to be registered under the Act irrespective of the conversion, after the marriage, of one party to Islam. Stated succinctly the Law Reform Act applies to all parties who are married or deemed to have been married under the Law Reform Act when it comes to dissolution of the

marriage and ancillary reliefs irrespective of the conversion of a party to Islam.

Even for the sake of argument, assuming for a moment that there is a conflict between a State Enactment and a Federal law on the issue of which is the Court having proper jurisdiction to grant a divorce and custody order in a case of a spouse in a civil marriage who has converted to Islam, the Federal law shall prevail. Article 75 of the Federal Constitution under the heading of Inconsistencies between federal and State laws provides as follows:

> "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." (emphasis added)

Whilst the Syariah Courts have jurisdiction only over Muslims where divorce and custody are concerned, the Civil High Court has jurisdiction over all parties who had married under the Law Reform Act irrespective of their conversion to Islam or otherwise.

Moreover the expression "Child of the marriage" under the Law Reform Act has been defined in section 2 as follows:

"child of the marriage" means **a child of both parties to the marriage in question** or a child of one party to the marriage accepted as one of the family by the other party; and "child" in this context includes an illegitimate child of, and a child adopted by, either of the parties to the marriage in pursuance of an adoption order made under any written law relating to adoption;" (emphasis added)

The plaintiff Indira Gandhi had applied for custody of the "child of the marriage" under section 88 of the Law Reform Act which comes under Part VIII under "Protection of Children". Section 87 which also comes under Part VIII of the Law Reform Act states that "child" has the meaning of "Child of the marriage" as defined in section 2 who is under the age of eighteen years.

She was perfectly entitled to apply for the custody of the 3 children even before the filing of the divorce petition as section 88(1) of the Law Reform Act provides as follows:

"88. (1) The court **may at any time** by order **place a child in the custody of his or her father or his or her mother or**, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any

association the objects of which include child welfare or to any other suitable person." (emphasis added)

The case of the High Court in **Ling King Mee v Moh Chu Teck** [1993] 3 MLJ 140 at 144H-145C supports the above proposition.

Assuming for a moment that there are 2 possible jurisdictions, the defendant husband had submitted to the jurisdiction of the Civil High Court by filing his affidavit to oppose the application in this OS, by engaging his solicitors to argue on his behalf and by appealing to the Court of Appeal after the custody order was given to the wife. His appeal to the Court of Appeal had been struck out. It is not for him now to say that the Civil High Court has no jurisdiction after having submitted to it. The wife on the other hand had taken the consistent stand that the Syariah High Court has no jurisdiction over her and she had not submitted to the jurisdiction of the Syariah High Court.

In **Tang Sung Mooi v Too Miew Kim** [1994] 3 MLJ 117 at page 124 his Lordship Mohamed Dzaiddin SCJ (as he then was) expounded section 51 in the Supreme Court as follows:

"Under s 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 decree of dissolution. The legislature, by enacting s 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 for divorce and such 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 for a divorce and ancillary reliefs. Further, it would appear to us that **parliament, in enacting sub-s 51(2), must have had in mind to give protection to non-Muslim spouses and children of the marriage against a Muslim convert.**

... **From the wording of s 51(2), the legislature clearly intended to provide ancillary reliefs for non-Muslim spouses and the children of the marriage as a result of one party's conversion to Islam.** In our opinion, by implication from s 51(2) above, the High Court, in the present reference, has jurisdiction to hear and determine the ancillary issues. The implication may arise from the language used, from the context or from the application of some external rule.

They are of equal force, whatever their derivation. (Bennion's Statutory Interpretation (2nd Ed) 1992 p 362). **It would result in grave injustice to non-Muslim spouses and children whose only remedy would be in the civil courts if the High Court no longer has jurisdiction, since the Syariah Courts do not have jurisdiction over non-Muslims. In this context of the legislative intent of s 3 and the overall purpose of the Act, the respondent's legal obligation under non-Muslim marriages cannot surely be extinguished or avoided by his conversion to Islam."** (emphasis added)

It was argued that the ratio of **Tang Sung Mooi** case is that the Law Reform Act applies in a case where the conversion to Islam of a party to the civil marriage took place after the divorce and before the hearing of the division of matrimonial assets. However clearly from the above dicta of the Supreme Court, his Lordship had not intended the ratio to be that narrowly confined as can be seen from the expansive language used in the above dicta. The time of conversion does not make a jot of difference for so long as the conversion to Islam is after the civil marriage.

The Federal Court in **Subashini a/p Rajasingam v Saravanan a/l Thangathoray & Other Appeals** [2008] 2 MLJ 147, speaking through Nik

Hashim FCJ, was very clear on the continuing jurisdiction over the party to the civil marriage who had converted to Islam at pages 168-169 as follows:

> "[19] ..... **The husband could not shield himself behind the freedom of religion clause under art 11(1) of the FC to avoid his antecedent obligations under the 1976 Act on the ground that the civil court has no jurisdiction over him.** It must be noted that both the husband and wife were Hindus at the time of their marriage. Therefore, **the status of the husband and wife at the time of registering their marriage was of material importance, otherwise the husband's conversion would cause injustice to the unconverted wife including the children. A non-Muslim marriage does not automatically dissolve upon one of the parties converted to Islam.** Thus, by contracting the civil marriage, the husband and wife were bound by the 1976 Act in respect to divorce and custody of the children of the marriage, and thus, **the civil court continues to have jurisdiction over him, notwithstanding his conversion to Islam."** (emphasis added)

Further at pages 169-170 as stated earlier, his Lordship Nik Hashim FCJ explained as follows with respect to the effect of section 46(2) of the Islamic

Family Law (Federal Territories) Act 1984 which is the same as section 46(2) of the Perak Islamic Family Enactment:

"[21] Section 46(2) of the Islamic Family Law (Federal Territories) Act 1984 ('the 1984 Act') states:

> The conversion to Islam by either party to a non-Muslim marriage shall not by itself operate to dissolve the marriage unless and until so confirmed by the court.

The act of confirmation of the dissolution of the marriage under the section is not a mere administrative act as understood by the Court of Appeal, but a full judicial proceeding before the Syariah High Court as it happened in Dalam Perkara Permohonan Perisytiharan Pembubaran Perkahwinan Disebabkan Pertukaran Agama -- Permohonan Siti Aisyah Janthip Aisam, JHXXI/11 (1427H) 262, where the Syariah High Court Kuala Terengganu after evaluating the evidence and applying the Hukum Syarak, allowed the wife's application to dissolve her Buddhist civil marriage to the husband pursuant to s 43(2) Enakmen Undang-Undang Pentadbiran Keluarga Islam (Negeri Terengganu) 1985, which is equivalent to s 46(2) of the 1984 Act. It appears from the case that the husband did not contest

the application and neither a decree of divorce granted under s 51 of the 1976 Act by the High Court was ever produced in the Syariah Court. To my mind, the dissolution order of the civil marriage by the Syariah High Court by virtue of conversion would have no legal effect in the High Court other than as evidence of the fact of the dissolution of the marriage under the Islamic law in accordance with Hukum Syarak. Thus, **the non-Muslim marriage between the husband and wife remains intact and continues to subsist until the High Court dissolves it pursuant to a petition for divorce by the unconverted spouse under s 51(1) of the 1976 Act.**

[22] **In the present case, there is no impediment for the converted spouse, ie the husband, to appear in the divorce proceeding in the High Court albeit as a respondent, as the jurisdiction of the High Court extends to him unlike the Syariah High Court which restricts its jurisdiction to persons professing the religion of Islam only,** ....." (emphasis added)

In **Tey Siew Choo v Teo Eng Hua** [1996] 6 CLJ 308, a woman who had converted to Islam petitioned for divorce in the Civil High Court. The brief facts are found at page 310 as follows:

"On 14 April 1982 the petitioner's customary marriage to Teo Eng Hua was registered at the Registry of Civil Marriages, Melaka Utara, Melaka. Both were Buddhists. The marriage was blessed with four children, with the eldest being twenty one years of age whilst the youngest, eight. On 7 July 1995 the petitioner, embraced Islam and took the name of Tey Siew Choo @ Nur Aishah Tey Binti Abdullah. Her husband Teo Eng Hua did not follow suit. Due to that conversion both parties lived apart for a continuous period of no less than three years. On 10 August 1998 three years one month and three days to the day, the petitioner filed the current petition. In it she prayed that the marriage be dissolved."

At page 311, his Lordship Suriyadi Halim Omar J (now FCJ) observed as follows:

"The general provision of s. 3(3) also clearly provides that the decree of divorce successfully obtained by the unconverted spouse, shall be valid against the converted partner. As against this legal backdrop, Parliament has seen it fit to insert s. 4 which in a gist provides that any marriage solemnised under any law, religion, custom or usage is deemed to be registered. Unless avoided, that marriage shall subsist until dissolved by the death of one of the parties, ordered so

dissolved by a court of competent jurisdiction or by a decree of nullity also made by a court of competent jurisdiction. To wind up on this point, unless the customary marriage of the petitioner with the respondent is dissolved by me, that marriage still subsists in the eyes of the Act."

His Lordship Suriyadi J (now FCJ) held that even a converted spouse to Islam has the locus to file a petition for divorce under section 53 if the unconverted spouse does not present a petition for divorce on ground of conversion to Islam under section 51. At page 313 and 314 his Lordship observed:

"Indisputably, ss. 3(3), 4 and 51(1) as supported by the above cases, settle once and for all that the unconverted spouse may file a petition (see also *Ng Siew Pian lwn. Abd Wahid bin Abu Hassan, Kadi Daerah Bukit Mertajam & Satu Yang Lain* [1992] 2 MLJ 425). But do those provisions also provide the *locus* for the converted person to petition for a divorce under the Act? Having scrutinised the provisions, I am convinced that Parliament never intended that the convert should be denied of the same right. Section 53 of the Act reads that "either party to a marriage may petition for a divorce ...". This provision is self-explanatory in that no discrimination exists

against any contracting party to a marriage. The prohibition of the invocation of this Act is only against a Muslim or to any person who is married under Muslim law. The petitioner, when she married the respondent was yet to be a Muslim and similarly was never married under Muslim law. On that premise, there is absolutely no legal impediment to suggest that this Act should not be applicable to her. In fact Mohamed Dzaiddin SCJ in *Tan Sung Mooi v. Too Miew Kim (supra)* at p. 123 had occasion to say:

> Section 3(3) provides that the Act shall not apply to Muslims or Muslim marriages and that only non-Muslim marriages may be solemnized or registered. This clearly means that the Act only applies to non-Muslims and non-Muslim marriages.

In the unlikely event that the converted spouse were not to be allowed to move the petition for divorce under the Act, and the partner for some reason or other refuses to petition for divorce, a foreseeable awkward scenario may be anticipated in the near future for the actors. Undivorced by judicial pronouncement, both therefore will be subject to the sanctions of civil law. On that score, if she were to re-marry, the probability of her being prosecuted for bigamy cannot be discounted. The husband is in no better position. Under s. 494 of

the Penal Code, whoever having a husband or wife marries, in which case the marriage is void by reason of its taking place during the life of such spouse, if found guilty shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to a fine. Pursuant to the facts of this case, which falls squarely within the Exception of the abovementioned section, unless the marriage with the first husband has been declared void by a court of competent jurisdiction, the petitioner may face the wrath of the prosecutor (*Public Prosecutor v. Rajappan* [1986] l MLJ 152). Taking a bolder step forward, since they are still legally married under civil law, the respective properties of the parties will be potentially exposed to the claims of the other. I can only imagine the horrifying mess that may materialise when one party dies and the surviving spouse pops up and stake a claim on the estate of the deceased."

In **Kung Lim Siew Wan v Choong Chee Kuan** [2003] 6 MLJ 260, the parties were married under the Law Reform Act. The wife petitioned for a divorce and the husband argued that he was a Muslim even before their marriage was registered under the Law Reform Act and so the Civil High Court has no jurisdiction. He applied to strike out the petition. In dismissing

his application, his Lordship Raus Sharif J (now PCA) reiterated at pages 267-268 as follows:

"Memanglah benar, fakta kes ini adalah sedikit berbeza. Di dalam kes *Tang Sung Mooi,* ia membincangkan keadaan di mana salah seorang dalam perkahwinan di bawah Akta tersebut, memeluk agama Islam, walhal dalam kes antara plaintif dan defendan di sini, mendedahkan fakta bahawa defendan semasa perkahwinannya didaftarkan di bawah Akta tersebut, mengaku kemudiannya sebagai seorang Islam. Tetapi pada saya, prinsip yang sama adalah terpakai. Pada saya atas fakta kes ini, **defendan tidak boleh menggunakan s 3(3), untuk menyekat plaintif daripada menuntut haknya di mahkamah sivil. Akta tersebut sememangnya memperuntukkan perlindungan kepada hak-hak plaintif dan juga anak-anak yang terlibat. Jika tidak di manakah plaintif hendak membuat tuntutan yang berbangkit dari Akta tersebut. Sudah tentunya tidak di Mahkamah Syariah kerana plaintif sebagai bukan Islam tidak boleh membuat tuntutan seperti di saman pemula di Mahkamah Syariah.** Oleh itu, saya tidak dapat bersetuju dengan hujahan peguam bijaksana defendan bahawa mahkamah ini tidak mempunyai bidangkuasa untuk mendengar permohonan plaintif dan atas saranan

bahawa mahkamah yang sepatutnya memutuskan perkara ini ialah Mahkamah Syariah. Pada saya, **defendan dengan mengisytiharkan diri sebagai penganut Buddha, semasa mendaftarkan perkahwinannya dengan plaintif di bawah Akta tersebut adalah dikuasai oleh Akta tersebut, dan mahkamah yang mempunyai bidang kuasa untuk memutuskan perkara-perkara yang berkaitan dengan Akta tersebut adalah mahkamah sivil."** (emphasis added)

In **Subashini Rajasingam v Saravanan Thangathoray & Other Appeals** [2008] 2 MLJ 147 at page 220, it was clearly declared by his Lordship Abdul Aziz Mohamad FCJ that the Civil High Court has exclusive jurisdiction over the dissolution of a non-Muslim marriage and matters ancillary thereto inspite of a party's conversion to Islam:

"[147] The wife therefore succeeds on the question of jurisdiction. The dissolution of the marriage in this case, which is a non-Muslim marriage, and matters consequential or ancillary thereto, including maintenance, custody of children and other ancillary reliefs, **are not matters within the jurisdiction of the Syariah Courts**. Therefore clause (1A) of Article 121 does not apply to deprive the High Court of

its jurisdiction under s. 51 of the Law Reform Act. **The High Court has the exclusive jurisdiction.**"

The marriage of the converted spouse, contracted as it was under the Law Reform Act, is not automatically dissolved upon his or her conversion to Islam. The marriage remains until it is dissolved by an order of dissolution of the marriage under section 51 or 53 of the Law Reform Act. Should the converted spouse go ahead and enter into a marriage under Muslim law before the dissolution of his or her prior civil marriage, he or she runs the risk of being prosecuted for bigamy. It is also highly undesirable when the unconverted spouse is still married to the converted spouse under the civil marriage but the converted spouse is no longer married to the unconverted spouse under Islamic law! It would create a curious confusion where you can be still married to a person who is no longer married to you.

The case of **Public Prosecutor v David John White alias Abdul Rahman** (1940) 9 MLJ (F.M.R.S.) 214 highlighted the danger of having committed bigamy if a divorce has not been first obtained with respect to one's prior marriage before a subsequent marriage under a personal law that allows for polygamy. The accused married a Christian lady at Taiping, Federated Malay States, in 1918 according to the rites and ceremonies of the Church of England. In 1936, while his wife was still alive, the accused married

another Christian lady according to Islamic law after they had converted to Islam. Prosecution was instituted for bigamy. Horne, J held as follows at pages 214-215:

"The accused David John White is charged for bigamy and has claimed trial. He was married to Birdie Rose Moreira in the Church of All Saints, Taiping Federated Malay States, on the 28th December 1918 according to the rites and ceremonies of the Church of England. On the 10th January, 1936, his wife being alive, the accused and Miss Webb were converted to Mohammedanism by Haji Mohamed, the Kathi of Seremban, and thereupon the accused and Miss Webb, having been named Abdul Rahman and Aisha respectively, were married according to Mohammedan law by the Kathi in the presence of witnesses. The accused in his statement from the dock admits the facts."

.....

"I am therefore bound to hold and so to direct myself that as monogamous and polygamous marriages are recognized by the civil law, a man who enters into a marriage relationship with a woman

according to monogamous marriage takes upon himself all the obligations springing from a monogamous relationship and acquires by law the status of "husband" in a monogamous marriage. He cannot therefore whatever his religion may be, during the subsistence of that monogamous marriage marry or go through legally recognised form of marriage with another woman.

A conversion to another faith of either spouse of such a marriage has no legal effect on the status of that spouse.....”

Perhaps as a matter of concession there is now a provision in section 46(2) of the Perak Islamic Family Enactment that reads:

"The conversion to Islam by either party to a non-Muslim marriage shall not by itself operate to dissolve the marriage unless and until so confirmed by the Court."

The "Court" would in the context under section 2 of the Perak Islamic Family Law Enactment be the Syariah High Court. Whatever may be the nature of this confirmation hearing, whether it be a full trial or a purely administrative ex-parte hearing, it cannot be the section that confers jurisdiction. Otherwise it would be inconsistent with other provisions of the Islamic Family Law (Perak) Enactment in sections 45 and 47. In fact

section 47(1)(b) refers to "particulars of the facts giving the Courts jurisdiction under **section 45**". It specifically omits section 46 as it does not see section 46 as a conferring jurisdiction section but a confirmation procedure. The confirmation proceeding is separate and distinct from an application for divorce under section 45 with respect to an order of divorce or an order pertaining to a divorce or to permit a husband to pronounce a talaq as the requirements of jurisdiction under section 45(a) or (b) and (c) have not all been fulfilled.

Whether the Syariah Court Order on custody is null and void and of no effect for want of jurisdiction

If a Court order is given by a court that has no jurisdiction to grant it, that purported Court order is of no effect. It cannot be otherwise. For a civil High Court to say so whether by way of a declaration or by way of saying so in arriving at its conclusion that the civil High Court custody order is binding on the converted spouse to a civil marriage, does not run foul of Article 121(1A) of the Federal Constitution. Where a Syariah Court seeks to encroach on to the exclusive jurisdiction of the civil High Court, the civil High Court must resist such an excursion and in so doing, would be declaring what the Constitution and the federal law allow it to do, which is to declare the Syariah Court order as being null and void and of no effect,

and by so doing, keeping both streams pure. Article 121(1A) would only apply when the Syariah Court acts within jurisdiction and where it has not ventured beyond its jurisdiction and has not encroached onto the jurisdiction of the Civil Courts.

A reminder of the legislative history behind Article 121(1A) would put the amendment in its proper context. This exercise was undertaken in **Latifah's** case (supra) by the Federal Court at page 117:

> "[50] Something should be said about cl (1A) of art 121. This clause was added by Act A 704 and came into force from 10 June 1988. As explained by Professor Ahmad Ibrahim, who I would say was the prime mover behind this amendment in his article *The Amendment of Article 121 of the Federal Constitution: Its effect on the Administration of Islamic Law* [1989] 2 MLJ xvii:
>
> > One important effect of the amendment is to avoid for the future any conflict between the decisions of the Syariah Courts and the Civil Courts which had occurred in a number of cases before. For example, in *Myriam v Ariff …*
>
> [51] Prior to the establishment of the syariah courts, custody of children, Muslim and non-Muslim, was within the jurisdiction of the

civil courts. Then the syariah courts were established with jurisdiction regarding custody of Muslim children, pursuant to the provision of the State List. However, in Myriam v Mohamed Arif, the High Court held that it still had jurisdiction regarding custody of Muslim children. Hence the amendment.

[52] Actually if laws are made by Parliament and the Legislatures of the States in strict compliance with the Federal List and the State List and unless the real issues are misunderstood, there should not be any situation where both courts have jurisdiction over the same matter or issue. It may be that, as in the instant appeal, the granting of the letters of administration and the order of distribution is a matter within the jurisdiction of the civil court but the determination of the Islamic law issue arising in the petition is within the jurisdiction of the syariah court. But, these are two distinct issues, one falls within the jurisdiction of the civil court and the other falls within the jurisdiction of the syariah court. Still, there is a clear division of the issues that either court will have to decide. So, there is no question of both courts having jurisdiction over the same matter or issue.

[53] Of course, such a situation can arise where the Legislature of a State makes law that infringes on matters within the Federal List. I am

quite sure that there are such laws made by the Legislatures of the States after the introduction of cl (1A) of art 121 even though I shall refrain from mentioning them in this judgment. In such a situation **the civil court will be asked to apply the provision of cl (1A) of art 121 to exclude the jurisdiction of the civil court. The civil court should not be influenced by such an argument. Clause (1A) of art 121 was not introduced for the purpose of ousting the jurisdiction of the civil courts.** The question to be asked is: Are such laws constitutional in the first place? And the constitutionality of such laws are a matter for the Federal Court to decide - Article 128." (emphasis added)

What then is the effect of an order of a Court given in excess of its jurisdiction? The Federal Court declared in no uncertain term the consequences in **Eu Finance Berhad v. Lim Yoke Foo** [1982] 2 MLJ 37 at page 39 to 40, where Abdoolcader, J. (as he then was) held as follows:

"The general rule is that **where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other**

words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729, 736, Lord Diplock L.J. (now a Law Lord) said (at page 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.

Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision.The party affected by the decision may appeal 'but he is not bound to (do so), because he is at liberty to treat the act as void' [*Birmingham (Churchwardens and Overseers) v Shaw* (1849) 10 QB 868 880; 116 ER 329 at page 880 (per Denman C.J.)]. In *Barnard v National Dock Labour Board* [1953] 2 QB 18, 34 it was said that, as a notice of suspension made by the local board was a nullity, 'the fact that there was an unsuccessful appeal on it cannot turn that which was a nullity into an effective suspension' (at page 34 per Singleton L.J.). *Ridge v Baldwin* [1984] AC 40 is to the same effect.

Lord Denning said in *Director of Public Prosecutions v Head* [1959] AC 83 (at page 111) that if an order was void, it would in law be a nullity and there would be no need for an order to quash it as it would be automatically null and void without more ado. Lord Denning as Master of the Rolls so held too in *Regina v Paddington Valuation Officer & Anor, Ex parte Peachey Property Corporation Ltd* (No 2) [1966] 1 QB 380 (at page 402. The judgment of this court in *Pow Hing & Anor v Registrar of Titles, Malacca* [1981] 1 MLJ 155. 157 refers (at page 157) to the decision of the House of Lords in *London & Clydeside Estates Ltd v Aberdeen District Council & Anor* [1980] 1 WLR 182, 189 and a passage in the judgment of the Lord Chancellor, Lord Hailsham of St. Marylebone (at page 189) where he refers to a spectrum of possibilities as the legal consequence of non-compliance with statutory requirements and speaks of one extreme where there has been such an outrageous and flagrant violation of a fundamental obligation that what has been done may be safely ignored and treated as having no legal consequence and in the event of any reliance sought thereon the party affected is entitled to use the defect simply as a shield or defence without having taken any positive action of his own.

The decision of this court in *Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Berhad [1981] 1 MLJ 234* to the effect that section 418 which provides for an appeal is the exclusive remedy of an aggrieved person or body against a decision inter alia of a Collector of Land Revenue and precludes any claim for declaratory relief, on which the respondent seeks to rely, has no application to the present proceedings as the decision sought to be impugned in that case was made within jurisdiction and was not a nullity. We reiterate the second order in the matter before us is invalid and wholly dehors the provisions of the Code and no appeal is therefore essential or necessary to impugn its validity and **it can be subject to collateral attack** in the instant proceedings." (emphasis added)

The effect of an order of court, even that of a superior court made without jurisdiction was further explored by the Federal Court in **Badiaddin Bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd** [1998] 1 MLJ 393 at page 409:

"It is of course settled law as laid down by the Federal Court in *Hock Hua Bank's* case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction.

But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is **where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction** so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '... which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make'. (emphasis added)

In the same judgment of the Federal Court, his Lordship Gopal Sri Ram JCA (as he then was) observed at pages 425-426 as follows:

"It is true, as a general rule, that orders of a court of unlimited jurisdiction may not be impugned on the ground that they are void in the sense that they may be ignored or disobeyed. The decision of the

Judicial Committee of the Privy Council in *Isaacs v Robertson* [1985] AC 97 affirms the existence of the rule. There, Lord Diplock when delivering the advice of the Board said (at pp 102-103):

> Their Lordships would, however, take this opportunity to point out that in relation to orders of a court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are 'void' in the sense that they can be ignored with impunity by those persons to whom they are addressed, orders that are 'voidable' and may be enforced unless and until they are set aside. Dicta that refer to the possibility of there being such a distinction between orders to which the descriptions 'void' and 'voidable' respectively have been applied can be found in the opinions given by the Judicial Committee of the Privy Council in the appeals *Marsh v Marsh* [1945] AC 271 at p 284 and *MacFoy v United Africa Co Ltd* [1962] AC 152 at p 160; but in neither of those appeals nor in any other case to which counsel has been able to refer their Lordships has any order of a court of unlimited jurisdiction been held to fall into a category of court orders that can simply be ignored because they are void ipso facto without there being any need for proceedings to have

them set aside. The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind; what they do support is the quite different proposition that there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts ex debito justitiae the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice.

The contrasting legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or

regular. If it is irregular, it can be set aside by the court that made it upon application to that court; if it is regular, it can only be set aside by an appellate court upon appeal if there is one to which an appeal lies.

It is one thing to say that an order of a court of unlimited jurisdiction must be obeyed until it is set aside. It is quite a different thing to say that a court of unlimited jurisdiction may make orders in breach of written law. *Isaacs v Robertson* is certainly not authority for the latter proposition. I take it to be well settled that **even courts of unlimited jurisdiction have no authority to act in contravention of written law.** Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. **But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal."** (emphasis added)

Practical realities and ramifications also constrain the civil High Court to so act. If it is wrong, the appellate superior Courts in the Court of Appeal and the Federal Court can correct it. Whereas, with respect to the Syariah High Court custody order, there will be practically no appeal to the Syariah Appellate Court as the non-Muslim party or parent does not have the locus to appear in the Syariah High Court, much less to appeal to the Syariah Appellate Court. Reluctance of the Civil High Court to explicitly declare that the custody order of the Syariah Court is null and void and of no effect would perpetuate the popular perception in some quarters that the Syariah Court custody and divorce order is a valid order of a Court of proper jurisdiction and that the Civil High Court order can be conveniently and correctly ignored! It will only be conducive in creating confusion and conflict when there was none to begin with if only each side would remain in and retain its proper constitutional and jurisdictional role. To venture beyond what has been vouchsafed for the respective Syariah and Civil Courts would perpetuate a perception of one Court being victorious over another and vanquishing the other in a battle for supremacy when at the end of the day, it is as basic as taking one's dispute to the proper Court to have it adjudicated.

The fact that the Civil High Court has supervisory jurisdiction over the Syariah Courts has been decided in a number of cases. In **Dato' Kadar Shah bin Tun Sulaiman v Datin Fauziah bin Harun** [2008] 7 MLJ 779 at page 785 Mohd Hishamudin, J (now JCA) observed as folows:

> [14] In my judgment, where there is an issue of competing jurisdiction between the civil court and the Syariah Court, the proceedings before the High Court of Malaya or the High Court of Sabah and Sarawak must take precedence over the Syariah Courts as the High Court of Malaya and the High Court of Sabah and Sarawak are superior civil courts, being High Courts duly constituted under the Federal Constitution. **Syariah Courts are mere state courts established by state law, and under the Federal Constitution these state courts do not enjoy the same status and powers as the High Courts established under the Courts of Judicature Act 1964. Indeed, the High Courts have supervisory powers over Syariah Courts just as the High Courts have supervisory powers over other inferior tribunals like, for instance, the Industrial Court.**
>
> [15] Of course, I am constantly conscious of (and, perhaps, troubled by) cll (1) and (1A) of art 121 of the Federal Constitution. But these provisions cannot be interpreted literally or rigidly. At times common

sense must prevail. In interpreting them the purposive approach must be adopted." (emphasis added)

In **Potensi Bernas Sdn Bhd v. Datu Badaruddin Datu Mustapha** [2009] 8 CLJ 573, his Lordship Abdul Rahman Sebli JC (as he then was) had no compunction when called upon to declare some ex-parte orders of the Syariah High Court of Sabah to be null and void and of no effect as having no jurisdiction to make orders affecting the lands of a company, a non-Muslim owner and also as being outside the territorial jurisdiction of the Syariah High Court, as the injunction obtained was sought to be enforced in the Federal Territory of Labuan. At page 580-581 his Lordship argued with courage and conviction as follows:

> **"[12]** The Syariah High Courts in Sabah are established pursuant to s. 4(2) of the Sabah Syariah Court Enactment 2004 ("the Sabah Syariah Enactment") which provides:
>
> > The Yang di-Pertua Negeri may, on the recommendation of the State Chief Syar'ie Judge, by notification in the Gazette, constitute a Syariah High Court for the State of Sabah which have jurisdiction throughout the State of Sabah and may prescribe the divisions limit of jurisdiction in the State of Sabah.

[13] Section 11(1) of the Sabah Syariah Enactment further provides as follows:

> A Syariah High Court shall have jurisdiction throughout the State of Sabah and shall be presided by a Syariah High Court Judge.

[14] On a plain reading of the above provisions it is clear that the jurisdiction of the Syariah High Courts of Sabah is confined to the State of Sabah. The Federal Territory of Labuan, not being part of Sabah is therefore beyond the jurisdictional reach of the Syariah High Court which issued the injunction order. Counsel for the defendant however argued that the injunction order can be enforced in the Federal Territory of Labuan as the dispute involving the family of the late Tun Datu Mustapha is before the Syariah High Court. **It was submitted that the Civil Court has no jurisdiction to hear the application as it involves a matter within the jurisdiction of the Syariah Court, citing art. 121(1A) of the Federal Constitution ("the Constitution"). I find no merit in this argument. In my view the Civil Court is only precluded from interfering if the Syariah Court had acted within its jurisdiction. It is not a blanket prohibition. In the present case it is clear that the Syariah High**

Court had no jurisdiction to grant the injunction order as the property is located outside the State of Sabah and involving a non Muslim owner.

[15] It has been decided by the Federal Court in *Latifah bte Mat Zin, supra* that the jurisdiction of the Syariah Courts is limited only to muslims. This is also enacted in s. 11(3)(b) of the Sabah Syariah Enactment.

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

[17] For reasons stated above the plaintiff's application must be allowed in terms of the originating summons dated 18 June 2008." (emphasis added)

Clearly, when the Syariah Court had ventured beyond the jurisdiction vested in it and encroached onto the rights and properties of non-Muslim, the Civil High Court did not fold its arms and allow the excursion and encroachment to pass by idly and lightly. On application of an aggrieved party the Civil High Court has not failed to act decisively to point out the error of jurisdiction and to declare null and void the orders made in excess of jurisdiction of the Syariah Courts. The latest decision of the High Court in **Karambunai Corp Bhd & Ors v Ag Damit Bin Ag Tengah** [2014] 8 MLJ 16 highlighted this. His Lordship Ravinthran J. observed as follows at pages 28-31:

"[16] It is clear from the above provisions that the Shariah Courts have jurisdiction over persons professing the religion of Islam only and their jurisdiction is limited to the matters stated in the State List and in the Shariah Court Enactment 2004 (No 6 of 2004). Disputes involving non-Muslims and disputes over land between a registered owner and a purported beneficial owner do not fall within the jurisdiction of the Shariah Courts. In fact, s 26 of the Syariah Courts

Enactment 2004 of Sabah (No 6 of 2004) clearly provides that the Shariah Courts have no jurisdiction over the rights or properly of non-Muslims. Section 26 reads as follows:

> Jurisdiction does not extend to non-Muslims
>
> 26. No decision of the Shariah Appeal Court, Shariah High Court or any of the Shariah Subordinate Court shall involve the right or the property of a non-Muslim. (emphasis supplied)

[17] The civil High Court on the other hand has the sole jurisdiction to adjudicate on all land disputes between any party, whether Muslim or non-Muslim. Section 23 of the Courts of Judicature Act 1964 provides as follows:

> (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:
>
> (a)-(c) (d) any land the ownership of which is disputed is situated, within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

[18] The schedule to the Courts of Judicature Act 1964 also provides that any dispute in respect of partition of land or sale of land falls within the jurisdiction of the civil High Court. In the premises, it is clear that land disputes are within the jurisdiction of the civil High Court alone and do not fall within the jurisdiction of the Shariah Courts. The Shariah Courts only have jurisdiction in respect of the succession of estates of deceased persons. There is no doubt that property of a deceased person may include land and this property could properly be listed as forming part of the estate of a deceased person. However, in the instant case, at the time the defendant applied to administer the estate of the Pg Siti Hapsah and Pg Siti Alimah, the Karambunai land had already been vested in the Pengiran brothers and a large portion of it had been sold to the second plaintiff. Thus it did not form part of the estate of the said deceased persons. However, the Shariah court had ordered the share of the second plaintiff in the Karambunai land to be transferred to the defendant. By virtue of the State List in the Federal Constitution and the Shariah Court Enactment 2004 (No 6 of 2004), the jurisdiction of the Shariah Courts only extends to the appointment of administrator and division of property in respect of the estate of a

deceased Muslim. Beyond that, **nothing in the law confers jurisdiction on the Shariah Courts to nullify the registered interests of a bona fide non-Muslim purchaser of property. There is undisputed evidence that the second plaintiff is a bona fide purchaser of the property.** The agreements through which the second plaintiff acquired part of the Karambunai land were exhibited in court. At the material time, the Pengiran brothers were the registered owners of the Karambunai land. The defendant himself admitted during cross-examination that the second plaintiff was a bona fide purchaser. Article 121(1A) of the Federal Constitution which counsel for defendant relied on to argue that the civil High Court cannot grant any relief pertaining to the Shariah Court action of the defendant reads as follows:

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

[19] 'The court' in the above clause refers to the civil High Courts established under art 121. However, **before this clause can be invoked to bar the civil High Court from exercising jurisdiction in any matter, it must be demonstrated that the said matter falls**

within the jurisdiction of the Shariah courts. It is clear from the List II and the Shariah Court Enactment 2004 (No 6 of 2004) of Sabah that adjudication of disputes in respect of title to land do not fall within the jurisdiction of the Shariah Courts. Furthermore, as submitted by counsel for the plaintiffs, **'jurisdiction of the Shariah Courts' should be read as 'exclusive' jurisdiction.** The authority that she cited is the Court of Appeal case of *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 MLJ 266. The appellant was charged in the sessions court for an act of gross indecency which is an offence under s 377D of the Penal Code. The facts supporting the Penal Code offence also disclosed an offence under the Syariah Courts Enactment (Federal Territories) Act 1997. It was argued by the appellant that only the Shariah Courts had jurisdiction over the appellant and the offence which the appellant is alleged to have committed. The Court of Appeal came to the conclusion that the expression 'jurisdiction of the Shariah courts' refers to 'the exclusive jurisdiction' of those courts. Gopal Sri Ram JCA (as His Lordship then was) speaking for the Court of Appeal gave an example of exclusivity of jurisdiction which is as follows:

In other words, if a person professing the religion of Islam does a proscribed act which is an offence both under the Penal Code (FMS Cap 45) and the Act, then the courts referred to in Article 121(1) will have jurisdiction to try such an offence. It is only in respect of offences under the Act that a Shariah court may have exclusive jurisdiction. For example, the offence of adultery which is prescribed as an offence under the Act has no equivalent in the Penal Code (FMS Cap 45) or other federal criminal statutes. So if a person professing the religion of Islam commits adultery, then he or she may be tried only in a Shariah court.

[20] The appeal to the Federal Court from the Court of Appeal was dismissed and the above passage was cited with approval. ....." (emphasis added)

Whilst the dispute was over lands registered in the name of a non-Muslim and so clearly outside the jurisdiction of the Syariah Courts, yet the principle is the same. It is that if a matter is outside the jurisdiction of the Syariah Court and the Syariah Court proceeded to make orders affecting the rights or property of a non-Muslim, then the only avenue is for the non-Muslim to come to the Civil High Court to right the wrong, to correct the

error and to get the necessary declaration. Even assuming for a moment that both courts have jurisdiction, then as the matter of divorce and custody does not fall within the exclusive jurisdiction of the Syariah Court, the Syariah Court shall have no jurisdiction. With respect to the reliefs in the light of the Syariah High Court venturing beyond its jurisdiction, his Lordship Ravinthran J. pronounced as follows at pages 32-33:

"Whether civil High Court can grant remedy?

[24] The plaintiff has applied for a number of reliefs. The plaintiffs have applied for declarations that the impugned Shariah Court orders have no effect on the registered interest of the second plaintiff in the Karambunai land. As I stated earlier, counsel for defendant submitted that the civil High Court cannot give declaratory orders to the effect that the Shariah Court orders are not binding on the plaintiff as that would contravene art 121(1A) of the Federal Constitution. In my opinion, **art 121(1A) would prevent the civil courts from granting any relief declaring Shariah Court decisions as non-binding only if the Shariah court had acted within their jurisdiction. In the instant case, the Shariah Courts which granted the impugned orders had even contravened their own incorporating Ordinance, ie the Shariah Court Enactment 2004**

(No 6 of 2004). Section 26 clearly states that they are not empowered to grant orders that affect the property of a non-Muslim. Thus, the Shariah Courts had clearly acted in excess of jurisdiction. The purpose of art 121(1A) is to separate the jurisdiction of the civil and shariah courts. Neither is allowed to interfere with each other's jurisdiction. The following passage from the judgment of the Federal Court in the case of *Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals* [2008] 2 MLJ 147; [2008] 2 CLJ 1 which is a matrimonial matter involving conversion to the Religion of Islam bear out this view:

> Article 121(1A) of the FC makes a clear distinction between the jurisdiction of the Shariah and civil courts and, hence, with the separation of the jurisdiction, the respective courts cannot interfere with each other's jurisdiction. Thus, the civil court cannot be moved to injunct a validly obtained order of a Shariah court of competent jurisdiction. (Emphasis added.)

[25] In the instant case, the defendant had applied for relief from the Shariah Courts that interfered with the registered property rights of a non-Muslim company under the guise of obtaining consequential orders in relation to the administration of the estate of a deceased

Muslim. However, for reasons given earlier, **it is indisputable that a Shariah Court is not a court of competent jurisdiction for the purpose of adjudicating a matter involving a land dispute, let alone a dispute over registered land that belongs to a non-Muslim. In my view, civil courts should not decline jurisdiction merely on the ground that the Shariah Court had made a decision on a matter which has an Islamic law element in it such as administration of an estate of a deceased Muslim and accept the argument that art 121(1A) applies.** There is no magic in the mere invocation of art 121(1A). It is still the bounden duty of the court to inquire whether there is merit in the counter argument that art 121(1A) does not apply. Otherwise, the act of declining jurisdiction mechanically would be tantamount to abdication of duty to protect the fundamental rights of a citizen....." (emphasis added)

Besides granting the necessary declaratory reliefs, his Lordship at page 37 also granted a "declaration that having regard to Shariah Court Ordinance 2004 (No 6 of 2004) particularly ss 11 and 26, the defendant is not entitled to pursue any remedies from the Shariah Court that interferes with the proprietary right of the plaintiffs in Karambunai land and that he is also barred and injuncted from so doing."

Though those proceedings referred to above in **Potensi Bernas** and **Karambunai** cases (supra) are direct applications for the necessary reliefs of declarations that the Syariah High Court orders were null and void, it does not prevent this Court, in a case where the alleged contemnor is relying on a Syariah High Court custody order given in excess of jurisdiction, to hold that such an order is null and void and of no effect. As was highlighted in **Eu Finance's** case (supra), such an order may be challenged in a collateral proceeding.

It is also not for the affected non-Muslim parent to wait patiently for the Syariah Appeal Court to correct any excess of jurisdiction of the Syariah High Court. In the first place, the husband is not appealing as it is a custody order in his favour. More importantly, the wife being a non-Muslim cannot appear in the Syariah High Court, much less appeal to the Syariah Appeal Court. Neither must she wait for the Syariah Appeal Court under section 57 of the Perak Administration Enactment to exercise its supervisory and revisionary jurisdiction over the Syariah High Court as justice may require. In **Karambunai's** case, though the Syariah Appeal Court did set aside some of the orders of the Syariah High Court given in excess of jurisdiction, the aggrieved non-Muslim party was not barred from proceeding to the Civil High Court to get the relevant declarations.

Indira Gandhi is thus perfectly entitled to turn to the Civil High Court that has exclusive jurisdiction to hear the matter of her divorce and the ancillary custody order. The husband cannot depend on his reliance on the Syariah High Court custody order as an excuse for not complying with the Civil High Court custody order which has jurisdiction over him and is binding on him. The Syariah High Court custody order being given in excess of jurisdiction is null and void and of no effect and cannot be relied on as a shield against the contempt action brought by the applicant wife.

Whether the Syariah Court nevertheless has jurisdiction as the party applying for custody is a Muslim on ground that Islam is the religion of the Federation

The most important freedom in all the fundamental liberties provisions in our Constitution must surely be the freedom to profess and practise one's religion. A convert to Islam is at liberty to order his life according to Hukum Syarak and this comes into sharp focus in the area of marriage and divorce and that of inheritance rights and estate distribution. However there are times when the exercise of such a right may impinge upon the rights already acquired by the other party to a civil marriage. That right of equal guardianship rights under section 5 of the Guardianship of Infants Act 1961

is one. There is also the rebuttable presumption under section 88(3) of the Law Reform Act as follows:

> "There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody."

Is it then open for the father who has converted to Islam to now say that under the Islamic Family Law (Perak) Enactment, by virtue of section 83 thereof, that the non-Muslim mother is not entitled to exercise her right of custody over the child? Section 83(a) reads as follows:

> "A person to whom belongs the upbringing of a child, shall be entitled to exercise the right of *hadhanah* if -
>
> (a) she is a Muslim;"

In the first place, as already argued and established by this Court, the Islamic Family Law (Perak) Enactment has no application to a non-Muslim party to a civil marriage. No Syariah Court may make an order of divorce dissolving the civil marriage and with that, no custody order may be made affecting the child of the civil marriage. Parliament did not countenance a

situation where Islamic laws may be applied to a non-Muslim against his or her will. The acquired rights of the parties under the Guardianship of Infants Act 1961 (especially section 5 on equality of parental rights) and under the Law Reform Act hold good for the parties.

It does not lie for the converted husband to Islam to say that as the Guardianship of Infants Act does not apply to him by virtue of section 1(3), he now has more rights under his personal law and under the Islamic Family Law (Perak) Enactment over his unconverted Non-Muslim wife where custody over their children are concerned. Whether that argument is hinged on Islam being the religion of the Federation or that Islamic law is the grundnorm or basic structure of the Constitution, it has no foundation and place in the interpretation of the relevant provisions of the Federal Constitutiton and the federal laws and State enactments as has been held in a number of cases and supported by legislative and constitutional history. Such an argument would run counter to the equality provision of Article 8 of the Constitution which provides as follows:

"Article 8. Equality.

(1) All persons are **equal before the law** and entitled to **the equal protection of the law**.

(2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of **religion, race**, descent, place of birth or **gender in any law**....." (emphasis added)

Reliance on Article 3(1) of the Constitution to bolster and buttress the position that Islamic law is the grundnorm of the Federation and that all federal laws must be consistent with it, had been raised and rejected in **Che Omar bin Che Soh v. Public Prosecutor** [1988] 2 MLJ 55 at page 56 to 57 where his Lordship Saleh Abas, LP. traced the constitutional history of Malaya then and put in perspective the proper meaning of "Islam" referred to in Article 3(1) as follows:

"Thus all laws including administration of Islamic laws had to receive this validity through a secular fiat. Although theoretically because the sovereignty of the ruler was absolute in the sense that he could do what he likes, and govern according to what he thought fit, the Anglo/Malay Treaties restricted this power. The effect of the restriction made it possible for the colonial regime under the guise of "advice" to rule the country as it saw fit and rendered the position of the ruler one of continuous process of diminution. For example, the establishment of the Federated Malay States in 1895, with the

subsequent establishment of the Council of States and other constitutional developments, further resulted in the weakening of the ruler's plenary power to such an extent that Islam in its public aspect had become nothing more than a mere appendix to the ruler's sovereignty. Because of this, only laws relating to family and inheritance were left to be administered and even this was not considered by the court to have territorial application binding all persons irrespective of religion and race living in the state. The law was only applicable to Muslims as their personal law. Thus, it can be seen that during the British colonial period, through their system of indirect rule and establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only. (See M.B. Hooker, Islamic Law in South-east Asia, 1984.)

In our view, it is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word "Islam" in the context of Article 3. If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void. Far from making such provision, Article 162, on the

other hand, purposely preserves the continuity of secular law prior to the Constitution, unless such law is contrary to the latter.

It would thus appear that not much reliance can be placed on the wording of Article 3 to sustain the submission that punishment of death for the offence of drug trafficking, or any other offence, will be void as being unconstitutional.

We, therefore, do not consider important to discuss cases cited by counsel on the question of death penalty being contrary to Islamic perception.

It is the contention of Mr. Ramdas Tikamdas **that because Islam is the religion of the Federation, the law passed by Parliament must be imbued with Islamic and religious principles** and Mr. Mura Raju, in addition, submitted that, because Syariah law is the existing law at the time of Merdeka, any law of general application in this country must conform to Syariah law. **Needless to say that this submission, in our view, will be contrary to the constitutional and legal history of the Federation and also to the Civil Law Act which provides for the reception of English common law in this country.**

A great deal of argument was spent to say that the law must be just, and the Proclamation of Independence was cited as an authority. There is of course no need for us to go further than to say that the standard of justice naturally varies from individual to individual; but the only yardstick that the court will have to accept, apart from our personal feelings, is the law that was legislated by Parliament.

We thank counsel for the efforts in making researches into the subject, which enabled them to put the submissions before us. We are particularly impressed in view of the fact they were not Muslims. However, we have to set aside our personal feelings because **the law in this country is still what it is today, secular law, where morality not accepted by the law is not enjoying the status of law."** (emphasis added)

Another challenge was rehashed again in the Federal Court, this time in **Subashini's** case [2008] 2 CLJ 1. His Lordship Abdul Aziz Mohamad FCJ had no hesitation in dismissing it as follows at pages 91-92:

"[151] I can now deal with the husband's fourth head of submission which is one that relies on the fact that Islam is the religion of the Federation by virtue of Art. 3(1) of the Constitution for giving victory to the Syariah Court side in a conflict of jurisdiction between the Syariah

Courts and the secular courts. Of the four heads of submission, this occupies the most number of pages. The thinking behind this argument is akin to one that inclines towards making Islamic law, by virtue of Islam being the religion of the Federation, something like the supreme or prevailing law of this country. That kind of thinking was rejected by the Supreme Court in *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ 55, where Salleh Abas LP, who spoke for the court, in considering the word "Islam" in Art. 3(1), spoke of the religion in this way at p. 56 C-D (left):

> There can be no doubt that Islam is not just a mere collection of dogmas and rituals but it is a complete way of life covering all fields of human activities, may they be private or public, legal, political, economic, social, cultural, moral or judicial. This way of ordering the life with all the precepts and moral standards is based on divine guidance through his prophets and the last of such guidance is the Quran and the last messenger is Mohammad S.A.W. whose conduct and utterances are revered.

He then asked the question whether that was the meaning of "Islam" intended by the framers of the Constitution in Art 3(1) and answered to the effect that it was not. The husband submits that the case is no

longer good law because the Supreme Court made two grave errors. I disagree about the two errors, but I will not labour to explain why or to say more about this head of submission because the husband's counsel explained orally that this head would be relevant only if this court should find that both the Syariah High Court and the secular High Court have jurisdiction in this case and, as has been said, I find that only the secular High Court has jurisdiction.

[152] The Art. 3(1) argument is also used to contend that Parliament had no power to enact s. 51 of the Law Reform Act because it compels the application by the civil courts to a Muslim of the civil law in matrimonial cases. I am unable to see how the fact that Islam is the religion of the Federation prohibits Parliament from passing a law to ensure that where a spouse in a non-Muslim marriage converts to Islam and the marriage is consequently dissolved, he or she remains bound to the obligations under the legal regime governing a non-Muslim marriage, that he or she undertook to the other spouse, as regards himself or herself and the children of the marriage, when he or she entered into the non-Muslim marriage. I am unable to see how the fact that Islam is the religion of the Federation can operate to

prevent a measure to ensure that the non-converting spouse is not frustrated in his or her expectations flowing from those obligations."

It is said that those who forget their history are liable to repeat its mistakes. In interpreting a provision of the Constitution, one is permitted to refer to its legislative history to shed some light into the meaning of the words used or introduced in the provision. In **Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor** [1999] 1 MLJ 266 , his Lordship Gopal Sri Ram JCA (later FCJ) referred to the legislative history behind Article 121(1A) to help determine the ambit and scope of its operation.

The Reid Commission in its **Report of the Federation of Malaya Constitutional Commission 1957**, London, Her Majesty's Stationery Office at page 73 noted the proposal submitted by the Alliance in this wise at paragraph 169 as follows:

"We have considered the question whether there should be any statement in the Constitution to the effect that Islam shall be the State religion. There was universal agreement that if any such provision were inserted it must be made clear that **it would not in any way affect the civil rights of non-Muslim**. In the memorandum submitted by the Alliance it was stated-"the religion of Malaysia shall

be Islam. The observance of this principle **shall not impose any disability on non-Muslim nationals professing and practising their own religions and shall not imply that the State is not a secular State**....." (emphasis added)

In proposing that the Alliance's recommendation to the Reid Commission be accepted, Justice Halim bin Abdul Hamid, a member of the Commission from Pakistan, took pains to explain as follows at page 99 paragraph 11 to the **Report of the Federation of Malaya Constitutional Commission 1957** (supra):

"**A provision like one suggested above is innocuous.** Not less than 15 countries of the world have a provision of this type entrenched in their Constitutions. Among the Christian countries, which have such a provision in their Constitutions, are Ireland (Art. 6), Norway (Art. 1), Denmark (Art. 3), Spain (Art. 6), Argentina (Art. 2), Bolivia (Art.3), Panama (Art. 36) and Paraguay (Art.3). Among the Muslim countries are Afghanistan (Art.1), Iran (Art.1), Iraq (Art. 13), Jordan (Art. 2), Saudi Arabia (Art. 7), and Syria (Art. 3). Thailand is an instance in which Buddhism has been enjoined to be the religion of the King who is required by the Constitution to uphold that religion (Constitution of Thailand (Art. 7)). **If in these countries a religion**

has been declared to be the religion of the State and that declaration has not been found to have caused hardships to anybody no harm will ensue if such a declaration is included in the Constitution of Malaya. In fact, in all the Constitution of Malayan States a provision of this type already exists. All that is required to be done is to transplant it from the State Constitutions and to embed it in the Federal". (emphasis added)

It is interesting how that which initially was innocuous has now become inimical. The final product in Article 3(1) of the Constitution reads as follows:

"Islam is the religion of the Federation; **but** other religions may be practised in peace and harmony in any part of the Federation"

The interposition of the conjunction "but" instead of "and" following the phrase "Islam is the religion of the Federation" is properly placed to express the legislative intent to scrupulously limit the purport of Article 3 with regard to Islam being made the religion of the Federation. "But" is the language of contrast and constrain; it arrests attention and adds assurance that though Islam is so expressed as the religion of the Federation, the religious and legal rights of the other minorities shall not be impaired in any way.

Hashim Yeop A. Sani, a former Chief Justice of Malaya, pens for posterity the purport and intent of Article 3(1) at page 151 in his book **Our Constitution**, The Law Publishers (M) Sdn Bhd at page 151, as follows:

> "When the Merdeka Constitution was being drafted in 1957 the Reid Commission considered the question as to whether there should be any statement in the Constitution to the effect that Islam should be the State religion. There was general agreement that if such a provision [Article 3] was to be inserted, it must be made very clear that it must not affect the civil rights of non-Muslims. It would appear that a compromise resolution resulted in the present Article 3 of the Constitution. **The words "Islam is the religion of the Federation" appearing in clause (1) of that Article has no legal effect and that the intention was probably to impose conditions on federal ceremonies to be conducted according to Muslim rites**". (emphasis added)

Joseph M Fernando in his article **The Position of Islam in the Constitution of Malaysia** published in the Journal of Southeast Asian Studies, 37(2), UK, 2006 The National University of Singapore at pp249-266, referred at p 266 to the clarification given by our first Prime Minister Tunku Abdul Rahman barely a year after independence during a debate in

the Legislative Council. The Tunku clarified and confirmed as follows as recorded in the Federal Legislative Council Debates, 1 May 1958, pages 4671-4672:

> "I would like to make it clear that this country is not an Islamic State as it is generally understood, we merely provide that Islam shall be the official religion of the State."

To put the position beyond any pale of doubt and to put the proper perspective on the pre-eminence given to Islam as the religion of the Federation, there was introduced the non-derogatory provision in Article 3(4) which reads:

> "Nothing in this Article derogates from any other provision of this Constitution."

The Bahasa Malaysia rendering of this Article 3(4) is even more plain and punchy. It conveys the meaning that Article 3 will not in any way undermine any of the other provisions of the Federal Constitution. It reads:

> "Perkara 3(4) Tiada apa-apa jua dalam Perkara ini **mengurangkan mana-mana peruntukan** lain dalam Perlembagaan ini." (emphasis added)

In the context of the issue at hand, the prominence and preeminence given to the religion of Islam shall not undermine the rights given to non-Muslims

under the federal laws be it under the Guardianship of Infants Act 1961 or the Law Reform Act as constitutionally guaranteed under Article 8 and 11 of the Federal Constitution.

Whether the Respondent is in contempt of the Civil High Court custody order in the circumstances of the case

This Court is in no doubt whatsoever that the alleged contemnor has knowledge of contempt proceeding against him. Indeed he did instruct his solicitors to act for him and to file an affidavit on his behalf. Whilst admitting that he had not complied with the Civil High Court custody order, his explanation and excuse was that he is duty bound to follow the Syariah High Court custody order. He evinced no intention of complying with the Civil High Court custody order. He took the position that he is not bound by it as he comes under the Syariah High Court's jurisdiction. His counsel argued that both the interim and permanent Syariah High Court custody order has not been set aside by the wife.

The Court is also in no doubt that the respondent was clearly and consciously aware of the Civil High Court custody order made against him dated 11 March 2010. He was represented by his then solicitors. He even

appealed to the Court of Appeal and then sought leave from the Federal Court to appeal further but failed. Even though the said order had been served on the 2 previous solicitors for the defendant/respondent with the repeated requests through the years for an appointment to be fixed for effecting personal service on him and also for handing over the youngest child to the wife, the previous solicitors had not co-operated with the said requests. The fact that the respondent is well aware of the Civil High Court custody order is amply attested by his own reference to it in his affidavit dated 21 April 2011 to oppose the Judicial Review Application No. 25-10-2009 in the Ipoh High Court in Exhibit MR 2 as referred to in the applicant's further affidavit in Enclosure 4 Exhibit IG 6 in support of her application for leave to commence this committal action and also for personal service of the said custody order to be dispensed with. He had also referred to and exhibited the grounds of judgment of her Ladyship Wan Afrah J, dated 3 November 2010 in his affidavit in support of his leave application to the Federal Court against the decision of the Court of Appeal in striking out his appeal against the decision of his Ladyship. See Exhibit IG 7 in the applicant's further affidavit in Enclosure 4. This Court had thus, when granting leave for this contempt action on 18 October 2013, also granted an order for the personal service of the Civil High Court custody order to be

dispensed with under O 45 r 7(7) of the Rules of Court 2012 (“ROC”) as the Court was satisfied that the defendant/respondent was evading service.

The fact that the Court has a discretion to dispense with personal service of even a mandatory order if it thinks just to do so finds support in a number of decisions: **OCM Opportunities Gund II, LP and Others v Burhan Uray (alias Wong Ming Kiong) and Others (No 2)** [2005] 3 SLR 60, **Davy International Ltd and Others v Tazzyman** [1997] 1 WLR 1256 and **In Re Tuck. March v Loosemore** [1906] 1 Ch 692.

Her solicitors had also applied for an order to exempt from personal service of the cause papers for contempt on the alleged contemnor personally under O 52 r 4(4) and under O 62 r 14 ("ROC") as it was clear that he had made himself uncontactable to the applicant wife and his whereabouts, undiscoverable and undetectable. Despite various letters of appointments to the respondent's previous and current solicitors on record, for an appointment to serve the contempt papers on the appointed time and place at his solicitors office, the respondent had not turned up. The applicant's process server had gone to the house which address had been used by the respondent in affirming his affidavit, i.e. No. 1753-A, Jalan Sultan Yahya Petra, 15150, Kota Bahru, Kelantan but the occupant of the house had

informed him that no one by the name of Patmanathan a/l Krishnan or his new name Muhammad Riduan Bin Abdullah had stayed there.

The application in Enclosure 11 was made on an abundance of caution to avoid the procedural objections raised and considered in the Supreme Court case of **Arthur Lee Meng Kwang v Faber Merlin Malaysia Berhad & Ors** [1986] 2 MLJ 193. This was so even though the respondent's counsel had informed the Court on the first day of hearing on 6 January 2014 that his client, the alleged contemnor, was aware of the contempt proceeding and agreed to service of the relevant contempt papers to be effected on his firm Awi & Co and that such service shall be deemed to be effective service on the respondent.

This Court had allowed the application as there was no prejudice caused and that under the circumstance it would be just to do so. Indeed the respondent had filed his affidavit on 5 December 2013, even before the application for exemption of personal service was filed on 20 December 2013. Moreover learned counsel for the respondent had no objection to the application.

The act of contempt is clearly stated in the Statement filed under O 52 r 3(2) ROC and the Amended Statement filed herein. The relief sought was

to commit the respondent to prison for contempt of court for failure to comply with the Civil High Court Order of 11 March 2010 in that he had failed or refused to hand over the youngest child, Prasana Diksa, to the applicant wife forthwith. The failure and refusal to hand over the youngest child is not in dispute.

The stand taken by the respondent through his learned counsel was that he need not comply with the Civil High Court custody order as he is bound by the Syariah High Court custody order granted earlier and which jurisdiction he comes under.

Having held that the Civil High Court custody order is binding on him and that the Syariah High Court custody order is null and void as having been given in excess of jurisdiction of the Syariah High Court, the respondent is clearly in violation of the Civil High Court custody order. In other words, the respondent cannot rely on the Syariah High Court custody order to excuse, exempt, exonerate or exculpate himself from complying with the Civil High Court custody order. The respondent cannot take upon himself to decide that the Civil High Court custody order is not binding on him. If he does so, as in this case, consciously and deliberately, he runs the risk of being in contempt of court.

In **Hadkinson v Hadkinson** [1952] P.285, the mother of the child had taken the child out of the jurisdiction of the English court to Australia in breach of the custody order granted in her favour. The husband applied to have the child brought back to the jurisdiction of the court. In the Court of Appeal, Romer L.J. emphasized as follows at pages 288-289:

> **"It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void**. "A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it. ... **It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null and void - whether it was regular or irregular.** That they should come to the court and not take upon themselves to determine such a question: that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. **He should apply to the**

court that it might be discharged. As long as it existed it must not be disobeyed." (Per Lord Cottenham L.C. in Chuck v. Cremer.)

Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that **anyone who disobeys an order of the court (and I am not now considering disobedience of orders relating merely to matters of procedure) is in contempt and may be punished by committal or attachment or otherwise.** The second is that no application to the court by *289 such a person will be entertained until he has purged himself of his contempt. It is the second of these consequences which is of immediate relevance to this appeal....."

Here the respondent had appealed against the Civil High Court custody order to the Court of Appeal but failed. Then he sought leave from the Federal Court to appeal further but again, failed. It is too late in the day for him now to say that the Civil High Court custody order is not binding on him. His refusal to comply with the Civil High Court custody order is nothing less than deliberate and willfull, no matter how justified it may be in his own eyes.

Again in **Gordon v Gordon** [1946] P. 99 at page 109, also in the context of a custody order, the English Court of Appeal reiterated as follows:

> "There is, of course, another matter of great importance, and that is that the orders of the court should be observed and that no litigant should be permitted to say that he feels strongly that the order is a wrong order and, therefore, will not obey it."

Our own Supreme Court has stated by way of reminder in **Puah Bee Hong v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur** [1994] 2 MLJ 601 at pages 610-611, through his Lordship Peh Sweee Chin SCJ as follows:

> "We are of the considered view that **an order of a superior court such as the High Court, even if it is eg, an order obtained ex parte or a default judgment; until it is set aside, must be obeyed by everyone whether its validity is challenged or not,** and 'it is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until the order is discharged', per Romer LJ in *Hadkinson v Hadkinson*.3 This passage was quoted with approval and adopted by this court in *Pembinaan KSY Sdn Bhd v Lian Seng*

Properties Sdn Bhd.4 It was stated in *Isaacs v Robertso* n 5 that it was misleading to describe such an order of competent jurisdiction as void or voidable, for every order must be obeyed until it was set aside and 'these are not orders which are void ipso facto without the need for proceedings to set them aside'. One of the reasons is that such **a superior court must be presumed to have the jurisdiction to make an order which it has made. Every order made by a superior court must be regarded as an order of competent jurisdiction.**

Further, **a superior court, like the High Court, is considered to be a court of unlimited jurisdiction in contentious civil matters and is therefore to be distinguished from those inferior tribunals which are established outside the hierarchy of ordinary courts. Such public authorities and bodies are conferred with limited jurisdiction by various statutes.** This condition of such limited jurisdiction has always been one of the primary bases for the judicial review by a superior court of their decisions on the ground of lack or excess of jurisdiction. A Land Administrator, like the Land Administrator in the instant appeal, the Special Commissioners of

Income Tax and various other similar bodies are such inferior tribunals....." (emphasis added)

The respondent here cannot say that he relied on his solicitors advice that he was not obliged to comply with the Civil High Court custody order as he was duty bound to obey the Syariah High Court custody order. In the Privy Council decision in **Datuk Hing Kim Sui v Tiu Shi Kian & Anor** [1987] 1 MLJ 345 at page 347 it was held that reliance on legal advice, while it may be relevant as mitigation, is not a defence where the conduct complained of is in breach of the order. Reference was made by the Pricy Council to the case of **Re Agreement of the Mileage Conference Group of the Tyre Manufacturers' Conference Ltd** [1996] 2 All E.R. 849.

Likewise, *mens rea* is not an ingredient to be proved in contempt proceedings as was held by the Court of Appeal in **Jasa Keramat Sdn. Bhd v Monatech (M) Sdn Bhd** [2001] 4 MLJ 577 at page 596. The alleged contemnor cannot be heard to say that he had no intention to breach the Civil High Court custody order as he was sincere in thinking that it has no effect on him, being bound by the Syariah High Court custody order, which he sincerely thought he was. One can be sincere and yet be sincerely wrong and so suffer the consequences of it. At any rate, the husband's sincerity is doubted as though the Syariah High Court order did not prevent

the wife from having access to the youngest child as admitted by his counsel, no arrangements whatsoever was made by the husband for the wife to at least have reasonable access to the child all these years since 2010. I am satisfied beyond a reasonable doubt that the respondent has wilfully disobeyed and deliberately disregarded the Civil High Court custody order.

On the first date of hearing on 6 January 2014, learned counsel for the respondent informed the Court that his client could not come because his car road tax had expired. On subsequent hearings on 14 February, 9 April and 16 April 2014 his learned counsel informed the Court that his client was aware of the various dates fixed but chose to stay away as he feared for his safety. His learned counsel informed the Court that he had instructions to proceed to fully argue the matter in his client's absence. It was only after the close of submission and before the date of 30 May 2014 fixed for decision of this contempt application, that learned counsel applied to discharge himself and his firm from acting for the respondent. It was only on 26 April 2014 that learned counsel filed his application for discharge in Enclosure 25. In his affidavit in Enclosure 26 Encik Asmuni bin Awi deposed by paragraph 4 that in his meeting with his client on 22 April 2014 he had asked his client to attend court as directed by the Court for its

decision on 30 May 2014. However his client had refused to fully co-operate. Further by paragraph 5 he deposed to the fact that at that meeting which was also attended by representatives from the Majlis Agama Islam Perak, the client refused to give his fullest co-operation to his instruction and advice and more than that, his client had even barred in from speaking or intervening in the said discussion. Learned counsel went on to lament the fact that his client had not given him the respect due to him as his counsel, for his client had told him that even if he should discharge himself, there are many lawyers out there ever ready to assist and represent him. Little wonder that under such a circumstance, he had found it difficult to discharge his duties effectively and professionally. Under such a circumstance, I was constrained to grant a discharge application on 14 May 2014 after satisfying myself that he had conveyed to his client the need to attend the proceeding on 30 May 2014 when decision would be delivered.

I remind myself that committal proceedings are quasi-criminal in nature. Thus, the Court should avoid making a committal order without giving the defendant a chance to answer the charges against him. In effect, the alleged contemnor *must* be present in court during the committal hearing to face the charges. This is illustrated in **Phonographic Performance Ltd v**

Inch [2002] All ER (D) 253 where despite service of the relevant court papers on the alleged contemnor, he chose not to put any evidence in defence or appear on the return date. A bench warrant was issued for him to be arrested and brought to court.

However, and by analogy, the House of Lords confirms that in criminal cases, where a defendant is absent, the court has the discretion to continue with the trial. But it is a discretion exercised with great caution and with close regard to the overall fairness of the proceedings. The judge's overriding concern will be to ensure that the trial, if conducted in the absence of the defendant, will be as fair as circumstances permit and lead to a just outcome: **R v Jones (Anthony)** [2003] 1 AC 1 at [6] in the dicta of Lord Bingham in the house of Lords as follows at page 10:

> "6 For very many years the law of England and Wales has recognised the right of a defendant to attend his trial and, in trials on indictment, has imposed an obligation on him to do so. The presence of the defendant has been treated as a very important feature of an effective jury trial. But for many years problems have arisen in cases where, although the defendant is present at the beginning of the trial, it cannot (or cannot conveniently or respectably) be continued to the end in his presence. This may be because of genuine but intermittent

illness of the defendant (as in R v Abrahams (1895) 21 VLR 343 and R v Howson (1981) 74 Cr App R 172); or misbehaviour (as in R v Berry (1897) 104 LT Jo 110 and R v Browne (1906) 70 JP 472); or because the defendant has voluntarily absconded (as in R v Jones (Robert) (No 2) [1972] 1 WLR 887 and R v Shaw (Elvis) [1980] 1 WLR 1526). **In all these cases the court has been recognised as having a discretion, to be exercised in all the particular circumstances of the case, whether to continue the trial or to order that the jury be discharged with a view to a further trial being held at a later date. The existence of such a discretion is well established**, and is not challenged on behalf of the appellant in this appeal. But it is of course a discretion to be exercised with great caution and with close regard to the overall fairness of the proceedings; a defendant afflicted by involuntary illness or incapacity will have much stronger grounds for resisting the continuance of the trial than one who has voluntarily chosen to abscond." (emphasis added)

I agree that, by analogy, the same can and should apply for committal proceedings. It is even more necessary as the alleged contemnor has made himself uncontactable and his hiding place, undetectable and

undiscoverable. What is at stake is the welfare and safety of the child. There is no certainty that the police will be able to execute the warrant of arrest against him even if the same is issued to compel his attendance at the committal hearing. The court can exercise its discretion to proceed with a committal hearing in the absence of the alleged contemnor especially when his own counsel had informed the Court that he had full instruction to proceed in his client's absence. The discretion is however only exercised after **great caution** and with careful consideration of relevant factors e.g. the nature of the contempt, whether the alleged contemnor is legally represented, the evidence in defence, the guarantee of a fair hearing, etc. Upon finding the alleged contemnor in contempt, a bench warrant may be issued, reciting the finding of contempt, and directing that he be taken to prison for the period of the committal. The decision of the English High Court in **Lexi Holdings plc v Luqman and others** [2009] All ER (D) 217 at [46]-[47] is instructive on this:

> *"*46…the purpose of a committal hearing is to penalise the respondent for any contempts which are established, in appropriate cases by committal to prison. Committal to prison can be achieved only by the presence of the respondent. **Of course, in his absence, a bench warrant can be issued, reciting the finding of contempt, and**

directing that he be taken to prison for the period of the committal. But that step is taken only because his absence necessitates it. The purpose of a committal hearing is to commit the respondent found guilty of contempt, not to issue a warrant for his arrest. His absence may frustrate the purpose of the proceedings. It is also, in my view, damaging to the public perception of the administration of justice that it becomes a matter of choice whether a respondent attends the hearing of an application to commit him. **The court may decide that in particular cases it is not appropriate to issue a warrant to secure his attendance but I would regard it as essential that it has the power to do so.** The similarities with criminal proceedings in their penal purposes and consequences would suggest that this is so.

47. This issue is closely related to the question as to whether and, if so, when the court should proceed with a hearing in the respondent's absence. Mr Gibbons for Mohammed submitted, by analogy with the leading criminal cases…that the court should do so only with great caution…I do not have to decide the question in this case, but I agree that caution is required." (emphasis added)

Also in support of this submission is the decision of **JSC BTA Bank v Solodchenko and others (No 2)** [2011] 1 WLR 906 where the English High Court had proceeded to hear the application *in absentia* on the basis that "has instructed solicitors and leading counsel to represent him" at [9] and [13] as follows:

> "9 Mr Kythreotis failed (I understand in common with other defendants) to provide answers or supporting documents within the time ordered. Indeed, he did nothing about Henderson J's order until the committal application was issued and served on him. The day before the first hearing he produced a short statement apologising to the court, giving an explanation for his conduct and expressing his eagerness belatedly to comply with the order.
>
> .....
>
> 13 Mr Kythreotis has at all relevant times remained in Cyprus. I am aware of the fact that the court should avoid sentencing for contempt in the absence of the defendant: see Phonographic Performance Ltd v Inch (unreported) 16 May 2002 . **However the purpose is to give the defendant a chance to answer the charges against him. In this case Mr Kythreotis has instructed solicitors and leading**

counsel to represent him. I did not order him to attend court but on the last occasion I did say that he would be well-advised to attend on the basis that if he did not submit to cross-examination on relevant issues that could affect the weight to be given to his evidence in accordance with the principles enunciated by Lord Denning MR and Megaw LJ in *Comet Products UK Ltd v Hawkex Plastics Ltd* [1971] 2 QB 67 ." (emphasis added)

In the present case, despite his absence, the defendant has filed an affidavit in reply (Encl. 6) admitting to non-compliance and has instructed Messrs Awi & Co. and a leading and junior counsel to represent him on the said date. Further, this proceeding is covered widely in the mass media. I have no doubt that the defendant must certainly have full knowledge of this proceeding.

On the basis of the grossness of the contempt, that the Defendant has tendered no evidence in defence, is legally represented and has even admitted to not complying with the Court custody order, it was submitted that this Court should proceed with the committal hearing in the defendant’s absence. Should it find the respondant to be in contempt of

court, it should proceed to sentence him and issue a Warrant for Committal (Rules of Court 2012: Form 107 and 108).

I agree with learned counsel's above submission on behalf of the applicant. Our courts have no compunction in proceeding to hear the applicant in a contempt application where the alleged contemnor chose to absent himself. In **Chung Onn v Chan Ah Kaw & Anor** [1996] MLJU 206, his Lordship Low Hop Bing J (as he then was) proceeded with the contempt hearing as the alleged contemnor had persistently failed to attend court on the hearing dates fixed though duly served with the contempt papers. His Lordship held that the persistent absence of the alleged contemnor did not preclude the applicant from proceeding with the contempt application. The Court further held that the alleged contemnor had shown an absolutely lackadaisical attitude towards his contemptuous conduct. The Court there found him guilty of contempt in his absence.

In fact judging by the police inaction and inertia in assisting the wife to find the child inspite of the many police reports lodged by her, it is most unlikely that the alleged contemnor will attend Court on the day of decision and sentencing. Indeed, he is not in the Court today. Perhaps the police were labouring under the misconception that there was nothing they could do as

the husband has a Syariah High Court custody order in his favour. This is a case where taking into account the practical and urgent realities of the situation, this Court is entitled to proceed with the relevant sentence on a finding of guilt. Otherwise all that a recalcitrant contemnor needs to do is to abscond or absent himself and nothing could be done to him and the High Court custody order would be brought into disrepute. There would be no respect for the dignity of the Court as its order can be easily ignored with impunity and disregarded with disdain. Let it be said once again that no Court of competent jurisdiction acts in vain.

The applicant had also applied for a recovery order in Enclosure 14 under section 47 and 88 of the Law Reform Act read together with section 53 of the Child Act 2001. No affidavit has been filed by the respondent to oppose the said application. Learned counsel for the respondent tried to sever himself between acting for the respondent for the contempt for which he had authority and acting for him in the recovery order action for which he has no authority. This he cannot do as either he has authority to act for his client with respect to all applications filed in the same matter or he has no authority at all. There cannot be 2 different sets of solicitors acting for a

litigant in the same matter though the litigant may have as many counsel to represent him as he may engage.

She had prayed for the following recovery order set out below:

"A. Pursuant to section 47 of the Law Reform (Marriage and Divorce) Act 1976 (*"**the Act**"*)(read together with *Practice Direction; (Family Division: disclosure of addresses by government departments)* [1989] 1 All ER 765 and section 88 of the Act):

1. That the following authorities shall disclose the address(es) of the Defendant, Patmanathan A/L Krishnan @ Muhammad Riduan bin Abdullah (No. K/P: 690526-08-5987), or Prasana Diksa (Birth Certificate No. BZ14511) (*"**Prasana Diksa**"*), as stated within their records to the Plaintiff's solicitors, Kula & Associates of No. 11A, Jalan Dato Seri Ahmad Said, Greentown, 30450 Ipoh, Perak (*"**the Plaintiff's solicitors**"*), within two (2) weeks upon service of a certified true copy of this order:

a. the State of Kelantan Department of Health of Aras 5, Wisma Persekutuan, Jalan Bayam, 15590 Kota Bharu, Kelantan;

b. the State of Perak Department of Health of Jalan Panglima Bukit Gantang Wahab, 30590 Ipoh, Perak; and

c. the Ministry of Health of Blok E1, E3, E6, E7 & E10, Kompleks E, Pusat Pentadbiran Kerajaan Persekutuan, 62590 Putrajaya.

B. Pursuant to section 53 of the Child Act 2001:

1. That the Defendant, Patmanathan A/L Krishnan @ Muhammad Riduan bin Abdullah (No. K/P: 690526-08-5987), produce Prasana Diksa and hand Prasana Diksa to the Plaintiff or any police officer forthwith upon service of this order.

2. That any person, who is in a position to produce Prasana Diksa on request, do so to the Plaintiff or any police officer forthwith upon service of a certified true copy of this order.

3 That the Plaintiff and all police officers be authorized to remove Prasana Diksa from the Defendant, Patmanathan A/L Krishnan @ Muhammad Riduan bin Abdullah (No. K/P: 690526-08-5987), or from any person having custody or control of Prasana Diksa.

4. That the Defendant, Patmanathan A/L Krishnan @ Muhammad Riduan bin Abdullah (No. K/P: 690526-08-5987), or any person who has information as to Prasana Diksa's whereabouts shall disclose that information to the Plaintiff or any police officer.

5. That any police officer be authorized to enter into the residence of the Defendant, Patmanathan A/L Krishnan @ Muhammad Riduan bin Abdullah (No. K/P: 690526-08-5987), and search for Prasana Diksa, using reasonable force if necessary.

6. If necessary, that the Inspector-General of the Royal Malaysia Police or the relevant Commissioner of Police or Chief Police Officer shall control and direct the relevant and appropriate police officer(s):

a. To investigate police report PUSAT/001175/14 dated 25-2-2014 ("**the Report**") with a view to determining the Defendant, Patmanathan A/L Krishnan @ Muhammad Riduan bin Abdullah (No. K/P: 690526-08-5987), or Prasana Diksa's whereabouts.

b. To obtain custody of Prasana Diksa from any place where Prasana Diksa may be found, and to assist the Plaintiff to achieve the same when necessary.

c. To search for Prasana Diksa in any place to which entry has been obtained.

d. To apprehend the Defendant, Patmanathan A/L Krishnan @ Muhammad Riduan bin Abdullah (No. K/P: 690526-08-5987), for the purpose of obtaining information as to Prasana Diksa's whereabouts.

e. To file an affidavit in the cause herein and to serve a copy of the same on the Plaintiff's solicitors, exhibiting copies of the entries in the Diary of Proceedings in Investigation (under section 119 of the Criminal Procedure Code) with respect to the Report, within the first week of every month beginning from the month after service of a certified true copy of this order on the Royal Malaysia Police Headquarters at Bukit Aman, 50560 Kuala Lumpur.

7. That notice of this order be given to the following police headquarters by being provided with a certified true copy of this order:

a.Royal Malaysia Police Headquarters at Bukit Aman, 50560 Kuala Lumpur.

b. The State of Kelantan Police Contingent Headquarters at Jalan Bayam, 15990 Kota Bharu, Kelantan.

c. The following 10 District Police Headquarters in the State of Kelantan:

.....

d. The State of Perak Police Contingent Headquarters at Jalan Sultan Iskandar, 30000, Ipoh, Perak.

e. The following 17 District Police Headquarters in the State of Perak:

.....

C. Costs of this application and all other costs incurred in the execution of this order, either by the Plaintiff or by any other party named herein, be borne by the Defendant."

The applicant has more than cogent reasons to apply for the said recovery order. The reasons as summarised by her learned counsel in his submission are as follows:

1. The defendant had admitted in his affidavit in Enclosure 6 paragraph 4(vii) to still willfully retaining custody of the child despite knowledge of the Civil High Court custody order. The last time the applicant saw the defendant and the daughter was in October 2009 when she was still a baby. It was when both were present in the High Court during a hearing of this Originating Summons for custody. She does not know the whereabouts or the residence of the defendant or the daughter. She has not been able to trace the whereabouts of her daughter. She has not seen a recent photograph of her daughter. She has not been able to speak to her since October 2009. She does not know anything, as her mother, her daughter's health and well-being and is deeply concerned about her safety and welfare. She has never been allowed access by the defendant to her dsighted since he abducted her in March 2009.

2. She had made a police report dated 25 February 2014 detailing the daughter's abduction by the defendant in the hope that the police would investigate the matter under section 52 of the Child Act 2001.

Despite 2 requests by her on 8 April 2014 and 6 May 2014 for a report under section 107A(1) of the Criminal Procedure Code ("CPC"), none has been provided. She believes the defendant ought to be residing either in the State of Perak or the State of Kelantan as his affidavits were sworn before Commissioners for Oaths in both states.

3. The defendant has admitted in a news report by Harakah Daily published on 31 July 2013 that he is in the State of Kelantan and requires contributions from the public for his legal fees which amount to a staggering RM60,000.00. The said news report also suggests that the daughter is still with the defendant: Encl 19, exh. A-8

4.The defendant has never stated his occupation in his recent affidavits. The plaintiff thus believes that the defendant could be unemployed and has no means or insufficient means of taking care of the daughter. Given that, and with the fact that the defendant has admitted to having debts of RM60,000.00, the plaintiff believes that the daughter could be neglected and her welfare severely affected by her continued retention by the defendant.

5. The defendant has been absent on all committal hearing dates without any cogent reasons and his solicitors' affidavit in support of their application to discharge themselves shows that the defendant is willfully refusing or neglecting to attend the decision of the committal application on 30 May 2014: Encl 26, para 4

Her fears are valid as any reasonable mother of a child separated from her for so long would fear. Her fears are not unfounded.

Section 47 of the Law Reform Act reads:

"Subject to the provisions contained in this Part, the court shall in all suits and proceedings hereunder act and give relief on principles which in the opinion of the court are, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings."

The English **Practice Direction; (Family Division: disclosure of addresses by government departments)** [1989] 1 All ER 765 ("the Practice Direction") provides the arrangements whereby the court may request the disclosure of addresses by government departments for, *inter alia*, tracing the whereabouts of a child, or the person with whom the child is said to be, in proceedings in which a custody order is being enforced.

The request will be made officially through the registrar. It must be shown that the child is the subject of the custody proceedings and cannot be traced and is believed to be with the person whose address is sought. The Practice Direction lists the **UK National Health Service Central Register for the Department of Health** as a department which would be of assistance to anyone seeking a disclosure of address.

In the instant case, for the reasons given above and with the evidence before the Court, the Court is being moved to make an order that the State of Kelantan Department of Health, State of Perak Department of Health and the Ministry of Health (collectively referred to as the "the Departments") shall disclose the address(es) of the defendant or the daughter as stated within their records to the plaintiff's solicitors within two (2) weeks upon service of a certified true copy of the order.

I agree that this Court, on principles which are nearly as conformable to the Practice Direction, can and ought to give the relief sought for in Part A of Encl 17 in order to assist in the enforcement of the Court Order. This is also supported by the fact that the the High Court in hearing a custody case regarding infants within jurisdiction is invested with an inherent jurisdiction which is derived from the Crown's prerogative powers as *parens patriae*

(parent of the nation): **Mahabir Prasad v Mahabir Prasad** [1981] 2 MLJ 326 at 326H – 327C, FC.

Section 52(1) of the Child Act 2001 makes it a criminal offence for any parent or guardian who does not have the lawful custody of a child to take or send out a child, whether within or outside Malaysia, without the consent of the person who has the lawful custody of the child. The offence is punishable with a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both. Section 53(1) of the Child Act 2001 empowers the Court to make a "recovery order" where there is reason to believe that a child had been taken or sent away without the consent of the person who has lawful custody of the child.

Section 53(3) stipulates that a "recovery order" may:

> (a) direct any person who is in a position to do so to produce the child on request to any authorized person;
>
> (b) authorize the removal of the child by any authorized person;
>
> (c) require any person who has information as to the child's whereabouts to disclose that information to the authorized person;

(d) authorize any police officer to enter into any premises specified in the order and search for the child, using reasonable force if necessary.

I agree with learned counsel for the plaintiff that reading both sections 52 and 53 of the Child Act 2001 together illuminates the intent of Parliament in enacting these provisions i.e. to prevent instances of child abduction by spouses who do not have lawful custody of a child. The reliefs in the application largely mirror that in **Legasri Purana Chandran v Sreepathy Ganapathy Krishan Iyer** [2010] 8 CLJ 208 at 211F – 212D, 221D and 225E, HC where the said orders were granted.

I have no doubt that by granting the orders prayer for in Enclosure 17, the police with the resources of the State behind them, might well be able to find the husband and with that the child as well. A specific order of this nature would clarify for the police that it is not for them to fold their arms in quiet desperation, powerless to spring into action, on ground that there is a Syariah High Court custody order that allows the husband to have custody of the youngest child. I have no hesitation to grant an order in terms of Enclosure 17 and I so order with costs of RM5,000.00 to be paid by the defendant to the applicant.

Pronouncement

There is no other way to see the action of the husband in refusing to hand over the youngest child to the wife to whom custody has been given by this Court other than this: it is clear Contempt of Court and I find the respondent Patmanathan a/l Krishnan (NRIC No. 690526-08-5987) so guilty! No Court of proper and competent jurisdiction acts in vain and no one should ever entertain the thought that such a court order can be flouted with impunity. The custody order, emanating from a court of proper jurisdiction, would compel and command compliance on pain of contempt. I also order costs of RM15,000.00 to be paid by the respondent to the applicant.

The contemnor is aware of today's date for decision and sentencing as his counsel had informed this Court of this fact before obtaining an order to discharge himself and his firm from acting for him. I have no good reason to disbelieve his counsel. Judging from his previous conduct in refusing to attend all previous hearings of this contempt action, this Court is well entitled to proceed to pass the necessary sentence to compel him to comply with the Civil High Court custody order.

However he has now a solicitor on record, one Encik Anas Fauzi, who had earlier at the beginning of today's proceeding, informed the Court that his

client is fully aware of the decision today but decided not to come for fear of his safety. I asked him to address me on mitigation before sentence is passed.

Encik Anas instead asked for a stay of the committal order and whatever sentence that may be passed as well as stay of the recovery order. He said if his appeal is successful than it would be nugatory. I cannot see how it could be as the child would then be returned to the husband. He referred to change of circumstance since 2010 and now is 2014 but he agreed that it was the husband who was the cause of it. The husband then cannot take advantage of his own wrong to now continue to deny the wife further of the custody of the child. He also alluded to a possible public tension being created arising from this decision of committal for contempt. That fear is unfounded and we can trust the police to take care of law and order. I dismissed the oral application for stay of the order of committal and the recovery order as there are no special circumstance and with every passing day, the child is a day older.

The only sentence reserved by the law in the light of such a gross violation of a court order would be a committal to prison until the contempt is purged by the delivery up of the youngest child Prasana Diksa to the wife and I so order and issue a warrant for committal. In **Shamala a/p Sathiyaseelan v**

Dr Jeyaganesh a/l C Mogarajah [2004] 2 MLJ 241 at page 256, the High Court granted an order for committal to prison against the husband for contempt for not complying with a custody order granted by the Civil High Court to the wife inspite of the husband's defence that he had obtained a Syariah Court custody order in his favour.

However this Court of judgement is also the seat of mercy. The Court would allow the contemnor until next Friday 6 June 2014 by 12 noon to deliver up Prasana Diksa to her mother at the office of her solicitors Messrs Kula & Associates. Perhaps he would have some time by then, to ponder and reflect, to weigh and consider, that to deliberately defy the Civil High Court custody order is so serious a matter that would be visited with imprisonment until the contempt is purged. Only the contemnor alone knows when that will be. The order and warrant for committal is temporarily suspended until 12 noon Friday 6 June 2014. In the event of compliance, the order and warrant of committal shall be suspended indefinitely.

Postscript

This is not a case of one Court striving for superiority or supremacy over another. Much less is it a case of pitting one Court's jurisdiction over another and see which would prevail. It is at the end of the day as basic as

bringing to the proper Court for the adjudication a custody dispute arising out of a civil marriage even though one party to the marriage has converted to Islam. It is no more than resolving one's outstanding obligations with respect to divorce, whether it be custody or maintenance or matrimonial assets issues, under the law where one's marriage was contracted and consummated and now stands dissolved.

In as much as a Civil High Court would restrain from and refuse to entertain a custody application of a parent in a marriage under Muslim law, so also would a Syariah Court refrain from and refuse to entertain a custody application in a civil marriage. Both legal systems in the Civil Courts and the Syariah Courts and the streams flowing from it must be kept pure and that involves respecting each other's jurisdiction as conferred by the Federal Constitution, the federal laws and the State Enactments. Both must restrain and refrain from any excursion and encroachment onto the exclusive jurisdiction of the other. When there is such an encroachment, then a superior court in the Civil High Courts would be constrained to do what is necessary though unpleasant, so that both streams remain pure, yea even placid and peaceful.

One is free to embrace whichever religion one is convicted of in one's journey through life; seeking to find meaning and purpose in all of one's

endeavours and perchance one's calling in life. However, that cannot change one's existing obligations under the law of one's marriage. That law was good to confer validity and legitimacy to one's marriage and offspring; the same law holds good at one's divorce. Any perceived advantage of wanting one's new personal law to apply to the disadvantage of the unconverted parent is illusory and more importantly, inimical to the fostering of healthy race relations in the social context of a multicultural and multi-religious state where unity in diversity should be our strength and not our shame. One may recall to mind the need for courage to change the things we cannot accept, the grace to accept the things we cannot change and hopefully the wisdom to distinguish one from the other.

The end of all our seeking and searching must be that we should approximate to that which is fair, just and reasonable in the conflicts that would invariably arise even in the closest of human and filial relationships within a family. However one looks at the problem of custody whether with or without the change of one's religion, the common ground must surely always be the welfare of the child. The maternal bond between a mother and child is irreplaceable.

No legal system should deprive an infant child of a mother's love or visit upon a mother the anguish and agony of such deep void, bereft of the

warmth and wonder of the child of her womb. There was not the slightest hint of any blemish in her character or blush with respect to her morality that would disqualify her from custody of the child at her breast. Surely it cannot be on account of her remaining in the faith she was in, when he first married her. Both human decency and dignity would demand that the child be returned to the mother.

There is no way to measure the misery of the lost years between a mother and her infant child, taken away from her when the suckling babe was hardly 11 months old and now with the passage of time, she would be 6 years old. Hope springs eternal in the darkest of nights and with the police being directed to execute the recovery order coupled with a warrant of committal, she may yet be able to see and hold her child in her embrace once again.

Dated 30 May 2014.

Sgd

Y.A. TUAN LEE SWEE SENG

Judge

High Court Ipoh

Perak Darul Ridzuan

For the Applicant: Aston Paiva, Fahri Azzat, K Shanmuga, M Kulasegaran, N Selvam and Rafeeza Handan.

. (Messrs Kula & Associates)

For the Respondant: Haji Asmuni Ali, Hatim Musa and Mohd Fitri Asmuni

(Messrs Asmuni & Co.) until discharged on 14 May 2014.

Anas bin Fauzi (Messrs Anas Sazira & Partners) effective 29 May 2014.

Honey Tan Lay Ean, Edmund Bon Tai Soon and New Sin Yew amicus curiae and holding watching brief for Malaysian Bar.

Hanif Khatri, Abdul Rahim Sinwan, Adham Jamallulai Bin Haji Ibrahim and Mohd Fasha Musthafa as amicus curiae and holding a watching brief for Persatuan Peguam Muslim Malaysia.

Koo Chin Nam, Gan Peng Sin and Kevin Khoo as amicus curiae and holding a watching brief for MCA.

Lim Heng Seng and Philip TN Koh as amicus curiae and holding a watching brief for Malaysian Consultative Council for Buddhism, Christianity, Hinduism, Sikhism and Taoism (MCBCHST)

Sumathi Sivamany holding watching brief for AWAM, PWW (Perak Woman for Woman Society, EMPOWER (Persatuan Kesedaran Komuniti Selangor) and SIS (Sister in Islam), WAO (Women's Aid Organisation), WCC (Women's Centre for Change, Penang).

Dahlia Lee and Goh Siu Lin holding a watching brief for Association of Women Lawyers (AWAL)

Date of Decision: 30 May 2014.