DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO. 01(f)-8-02/2015(N)

ANTARA

1. KERAJAAN NEGERI SEMBILAN
2. JABATAN HAL EHWAL AGAMA ISLAM
   NEGERI SEMBILAN
3. PENGARAH JABATAN HAL EHWAL AGAMA ISLAM
   NEGERI SEMBILAN
4. KETUA PEGAWAI PENGUATKUASA AGAMA
   NEGERI SEMBILAN
5. KETUA PENDAKWA SYARIE
   NEGERI SEMBILAN
6. MAJLIS AGAMA ISLAM NEGERI SEMBILAN

...PERAYU-PERAYU

DAN

1. MUHAMAD JUZAILI BIN MOHD KHAMIS
   (NO. K/P: 870722-03-5133)
2. SHUKUR BIN JANI
   (NO. K/P: 860128-59-5243)
3. WAN FAIROL BIN WAN ISMAIL
   (NO. K/P: 840319-06-5415)

...RESPONDEN-RESPONDEN

APPELLANTS' WRITTEN SUBMISSION

Appellants' Outline of Submissions

May it please this Honourable Court,

A. Preliminaries

1. This is the Appellants' submission in support of the appeal against the decision of the Court of Appeal on 07.11.2014.

2. For ease of reference, the following cause papers are of relevance:

   a) The **Court of Appeal Order** dated 07.11.2014;
   b) The **Leave to Appeal Order** dated 27.01.2015;
   c) The **Notice of Appeal** dated 25.02.2015; and
   d) The **Memorandum of Appeal** dated 06.04.2015.

B. Factual Matrix Of The Appeal

3. For the consideration of this Honourable Court, the 1st Appellant is the State Government of Negeri Sembilan.

4. The 2nd Appellant is the Islamic Affairs Department of Negeri Sembilan, which is a department of the 1st Appellant

responsible for Islamic affairs within the state of Negeri Sembilan.

5. The 3rd Appellant is the Director and/or highest ranked officer of the 2nd Appellant.

6. The 4th Appellant is the Chief Syariah Enforcement Officer of Negeri Sembilan who is appointed pursuant to section 79 of the Administration of Religion of Islam (Negeri Sembilan) Enactment 2003. The 4th Appellant has the duty to carry out investigations under any written law prescribing offences against the precepts of the religion of Islam in Negeri Sembilan.

7. The 5th Appellant is the Chief Syariah Prosecutor of Negeri Sembilan who is appointed pursuant to section 78 (1) of the Administration of Religion of Islam (Negeri Sembilan) Enactment 2003. The 5th Appellant has the power exercisable at his discretion to institute, conduct or discontinue any proceedings for an offence before a Syariah Court in Negeri Sembilan.

8. The 6th Appellant is the Islamic Religious Council of Negeri Sembilan established under section 4 of the Administration of Religion of Islam (Negeri Sembilan) Enactment 2003 to aid

and advise the Yang di-Pertuan Besar in matters relating to the religion of Islam.

9. All three Respondents are male bridal make-up artists professing the religion of Islam. The Respondents are also male-to-female transsexuals or '*Mak Nyah*'.

10. On 02.02.2011, the Respondents filed an application for Judicial Review in the High Court of Malaya in Seremban.

11. On 04.11.2011, the Respondents obtained leave for Judicial Review under Order 53 Rule 3(2) of the Rules of High Court 1980. The reliefs sought under that application *inter alia* are as follow:

11.1 *A declaration that section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 ("**section 66**") is inconsistent with the following provisions of the Federal Constitution or each of them and consequently null and void:-*

11.1.1 *Article 8(2);*

11.1.2 *Article 10(1)(a) [read together with Article 5(1) and Article 8(1)];*

11.1.3 *Article 9(2) [read together with Article 8(1)]; and/or*

11.1.4 *Article 5(1) [read together with Article 8(1)].*

12. On 11.10.2012, the Learned Judge of the High Court, **Yang Arif Datuk Siti Mariah binti Haji Ahmad** dismissed the Judicial Review application.

13. Unsatisfied with the decision of the High Court, the Respondents appealed to the Court of Appeal. On 07.11.2014, the Learned Judges of the Court of Appeal, **Yang Arif Dato' Mohd Hishamudin Yunus, Yang Arif Dato' Aziah binti Ali** and **Yang Arif Datuk Lim Yee Lan** allowed the appeal and declared section 66 to be invalid as being unconstitutional due to inconsistency with Articles 5(1), 8(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution.

14. Therefore, we are here before this Honourable Court to appeal against the decision of the Court of Appeal.

15. Question of law allowed by the Federal Court on 27.01.2015 when granting leave to Appeal:-

"Whether Section 66 of the Syariah Criminal Enactment (Negeri Sembilan) 1992 [Enactment No. 4/1992]

contravenes Articles 5(1), 8(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution."

C. **Ground 1 – Memorandum of Appeal**

The Learned Judges of the Court of Appeal (and the High Court) were in error in entertaining the application for Judicial Review when the Courts were not seized with jurisdiction to entertain such a challenge through the said mechanism on the legislative powers of the State to enact matters pertaining to Islamic laws, and particularly without resort to the procedures specifically provided under Article 4(4) of the Federal Constitution.

16. The Respondents filed an application for Judicial Review on 2.2.2011 to the High Court of Malaya at Seremban for a declaration that Section 66 of the Syariah Criminal Enactment (Negeri Sembilan) 1992 ("**the Enactment**") **is void as it is inconsistent with Articles 5(1), 8(1) and (2), 9(2) and 10(1)(a) of the Federal Constitution as well as alternative declaratory reliefs and order of prohibition.**

17. The Judicial Review application was dismissed by the High Court and aggrieved with such decision, the Respondents appealed to the Court of Appeal.

18. In allowing the appeal, the Court of Appeal held that Section 66 of the Enactment is inconsistent with Articles 5(1), 8(1) and (2), 9(2) and 10(1)(a) of the Federal Constitution and is therefore void.

19. In sum, the findings of the learned Court of Appeal judges is that Section 66 of the Enactment is invalid and unconstitutional as it offends the fundamental liberties enshrined in Articles 5(1), 8(1) and (2), and 9(2) of the Federal Constitution. **It is discussed in Paragraphs 40 to 68 of the judgment.**

20. Further, Section 66 of the Enactment is also held to be invalid and unconstitutional as pitted against Article 10(1)(a) and Article 10(2)(a) on the ground that it is a law purporting to restrict freedom of speech and expression which **only the Parliament has power to enact such law** and **the State Legislature of Negeri Sembilan has no power whatsoever to enact the same.** Additionally, the restriction to freedom of expression imposed by section 66 of the Enactment is unreasonable which renders it unconstitutional, too. The relevant judgment of **His Lordships Mohd Hishamudin JCA** is reproduced below:

"[73] Section 66 directly affects the appellants' right to freedom of expression, in that they are prohibited from wearing the attire and articles of clothing of their choice.

[74] ***Article 10(2)(a) states that only Parliament may restrict freedom of expression in limited situations; and so long as such restrictions are reasonable.***

[75] ***The State Legislative Assemblies in Malaysia (and this includes the State Legislature of Negeri Sembilan) have no power to restrict freedom of speech and expression. Only Parliament has such power.*** *This is confirmed by the Supreme Court in Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697 at p 717; [1992] 1 CLJ (Rep) 72 at p 82:*

> *Next it must be observed that art 10(2) of the Federal Constitution provides that only Parliament may by law impose those restrictions referred to in arts 10(2), (3) and (4) of the Federal Constitution. Therefore even if any such restriction purported to have been imposed by the Constitution of the State*

of Kelantan was valid, and it is not, it is clear that the restriction could not be imposed by a law passed by any State Legislature. That would be another ground why Article XXXIA of the Constitution of Kelantan should be invalidated.

[76] Section 66 is a state law that criminalises any male Muslim who wears a woman's attire or who poses as a woman in a public place. ***Hence, s 66 is unconstitutional since it is a law purporting to restrict freedom of speech and expression but it is a law not made by Parliament.***

[77] ***Moreover, any restriction on freedom of expression must be reasonable****. In* ***Sivarasa Rasiah*** *the Federal Court held:*

[5] The other principle of constitutional interpretation that is relevant to the present appeal is this. Provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively. Take art 10(2)(c). It says that 'Parliament may by law impose — (c) on the right conferred by para (c) of cl (1), such restrictions as it deems necessary or expedient in the interest of

the security of the Federation or any part thereof, public order or morality.' Now although the article says 'restrictions', the word 'reasonable' should be read into the provision to qualify the width of the proviso. The reasons for reading the derogation as 'such reasonable restrictions' appear in the judgment of the Court of Appeal in Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia [2007] 1 CLJ 19 which reasons are now adopted as part of this judgment.

(see also Dr Mohd Nasir Hashim and Muhammad Hilman.)

[78] Clearly, the restriction imposed on the appellants and other GID sufferers by s 66 is unreasonable. Thus, also from the aspect of reasonableness, s 66 is unconstitutional.

21. Based on the preceding paragraphs, we humbly submit that the **net effect** on the "pith and substance" of the finding of the learned Court of Appeal judges is that **the Negeri Sembilan's Legislature has no power to enact Section 66 of the Enactment**.

22. In the event that the validity or constitutionality of the law is challenged on the ground that the State Legislature has no power to enact the law, we further submit that the **specific procedure laid down in Articles 4(3) and 4(4) of the Federal Constitution must be strictly complied with. Articles 4(3) and 4(4) of the Federal Constitution [Tab 1, Volume 1 ABOA] provide**:

"4(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or —

(a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

(b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being

proceedings falling within paragraph (a) or (b) of the Clause) ***shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.***"

23. **Articles 4(3) and 4(4) of the Federal Constitution** are extensively deliberated by the **Federal Court** in **Ah Thian v Government of Malaysia [1976] 2 MLJ 112 [Tab 2, Volume 1 ABOA]**, where **Suffian LP** held as follows:

"Under our Constitution written law may be invalid on one of these grounds:

(1) ***in the case of federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of state written law, because it relates to a matter with (sic) respect to which the State Legislature has no power to make law, art 74****; or*

(2) in the case of both federal and state written law, because it is inconsistent with the Constitution, see art 4(1); or

(3) in the case of state written law, because it is inconsistent with federal law, art 75.

The court has power to declare any federal or state law invalid on any of the above three grounds.

The court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any court in the land and in any proceeding whether it be started by government or by an individual.

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

First, ***cl (3) of art 4*** *provides that the validity of any law made by Parliament or by a State Legislature may not be questioned on the ground that it makes provision with respect to any matter with respect to which the*

relevant Legislature has no power to make law, except in three types of proceedings as follows:

(a) <u>in proceedings for a declaration that the law is invalid on that ground; or</u>

(b) if the law was made by Parliament, in proceedings between the Federation and one or more states; or

(c) if the law was made by a State Legislature, in proceedings between the federation and that state.

It will be noted that proceedings of types (b) and (c) are brought by government, and there is no need for any one to ask specifically for a declaration that the law is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. The point can be raised in the course of submission in the ordinary way. ***<u>Proceedings of type (a) may however be brought by an individual against another individual or against government or by government against an individual, but whoever brings the proceedings must specifically ask for a declaration that the law impugned is invalid on that ground.</u>***

Secondly, clause (4) of art 4 provides that proceedings of the type mentioned in (a) above may not be commenced by an individual without leave of a judge of the Federal Court and the Federation is entitled to be a party to such proceedings, and so is any State that would or might be a party to proceedings brought for the same purpose under type (b) or (c) above. This is to ensure that no adverse ruling is made without giving the relevant government an opportunity to argue to the contrary.

Thirdly, cl (1) of art 128 provides that only the Federal Court has jurisdiction to determine whether a law made by Parliament or by a State Legislature is invalid on the ground that it relates to a matter with respect to which the relevant Legislature has no power to make law. This jurisdiction is exclusive to the Federal Court, no other court has it. This is to ensure that a law may be declared invalid on this very serious ground only after full consideration by the highest court in land."

24. In light of the above paragraphs, it is respectfully submitted that the present case whereby the Respondents sought to declare **section 66 of the Enactment** unconstitutional on the ground that the State Legislature does not have power to enact law purporting to restrict freedom of speech and expression falls squarely within the proceedings of type (a) as explained by **Suffian LP** in **Ah Thian's case**.

25. It necessarily follows that when the Respondents sought to challenge the validity or constitutionality of **section 66 of the Enactment,** they must specifically ask for a declaration that the law is invalid, and such a proceeding may only be commenced with leave of a judge of the Federal Court. Further, **Article 128 of the Federal Constitution** provides that the Federal Court shall have the exclusive jurisdiction in hearing and determining such matter.

26. In **Abdul Karim bin Abdul Ghani v State Legislative Assembly of Sabah [1988] 1 MLJ 171 [Tab 3, Volume 1]**, the **Supreme Court** explained the underlying purposes of Article 4(3) and 4(4) of the Federal Constitution where **His Lordships Hashim Yeop Sani SCJ** had this to say:

> *"The object and purport of Article 4(4) of the Federal Constitution has already been interpreted before*

in Stephen Kalong Ningkan v Tun Abang Haji Openg & Tawi Sli (No 2) [1967] 1 MLJ 46 49 by Pike C.J. (Borneo) with which interpretation I agree. ***Article 4(3) and (4) of the Federal Constitution is designed to prevent the possibility of the validity of laws made by the legislature being questioned on the ground mentioned in that article incidentally.*** *The article requires that such a law may only be questioned in proceedings for a declaration that the law is invalid. The subject must ask for a specific declaration of invalidity. In order to secure that frivolous or vexatious proceedings for such declarations are not commenced, Article 4(4) requires that the leave of a judge of the Supreme Court must first be obtained." (emphasis by underlining added)*

27. The specific procedure specified in Article 4(3) and 4(4) of the Federal Constitution is followed in a number of cases, see **Fathul Bari bin Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Ors [2012] 4 MLJ 281 [Tab 4, Volume 1 ABOA]**; **Sulaiman bin Takrib v Kerajaan Negeri Terenggan (Kerajaan Malaysia, intervener) and other applications [2009] 6 MLJ 354 [Tab 5, Volume 1 ABOA]**; and **Mamat bin Daud & Ors v Government of Malaysia [1988] 1 MLJ 119 [Tab 6 ABOA].**

(Counsel to deal orally with the three cases above)

28. In the recent **Federal Court** decision of **Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 MLJ 765 [Tab 7 ABOA]**, the Applicant filed an application for judicial review under O 53 r 3(1) of the Rules of the High Court 1980, challenging the decision of the Minister which imposed condition that the applicant is prohibited from using the word 'ALLAH' in 'Herald — The Catholic Weekly'. The decision of the High Court in allowing the application is quoted at paragraph 38 of the judgment:

> *"[38] In the High Court, the applicant challenged the validity or constitutionality of the impugned provision. The learned High Court judge upheld the challenge and she considered the issue at some length. In her judgment, she stated:*
>
> > *[52] Mr Royan drew to the court's attention (i) that art 11(4) which is the restriction does not state that state law can forbid or prohibit but 'may control or restrict'; does not provide for state law or any other law to control or restrict the propagation of any religious doctrine or belief*

among persons professing a religion other than Islam; the word 'propagate' means 'to spread from person to person, ... to disseminate ... (... belief or practise, etc)' citing Rev Stainislaus v State of Madhya Pradesh & Ors AIR 1977 SC 908 at p 911 left column. Mr Royan submits ex facie, s 9 of the State Enactments make it an offence for a person who is not a Muslim to use the word 'Allah' except by way of quotation or reference; so it appears that a Christian would be committing an offence if he uses the word Allah' to a group of non-Muslims or to a non-Muslim individual. Mr Royan then argues that that cannot be the case because art 11(4) states one may 'control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam'. I am persuaded such an interpretation would be ludicrous as the interpretation does not accord with the object and ambit of art 11(4) of the Federal Constitution.

[53] ***I find there is merit in Mr Royan's submission that unless we want to say that s.9 is invalid or unconstitutional to that extent (which I will revert to later), the***

correct way of approaching s 9 is it ought to be read with art 11(4). If s 9 is so read in conjunction with art 11(4), the result will be that a non-Muslim could be committing an offence if he uses the word 'ALLAH' to a Muslim but there would be no offence if it was used to a non-Muslim. Indeed art 11(1) reinforces this position as it states 'Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it'. Clause 4 restricts a person's right only to propagate his religious doctrine or belief to persons professing the religion of Islam. So long as he does not propagate his religion to persons not professing the religion of Islam, he commits no offence. It is significant to note that art 11(1) gives freedom for a person to profess and practise his religion and the restriction is on the right to propagate.

[57] ... On the other hand the object of art 11(4) and the State Enactments is to protect or restrict propagation to persons of the Islamic faith. Seen in this context by no stretch of imagination can

one say that s 9 of the State Enactments may well be proportionate to the object it seeks to achieve and the measure is therefore arbitrary and unconstitutional. Following this it shows the first respondent has therefore taken an irrelevant consideration.

She further held:

[80] With regard to the contention that the publication permit is governed by the existence of the State Enactments pertaining to the control and restriction of the propagation of non-Islamic religions among Muslims, ***it is open to the applicant in these proceedings to challenge by way of collateral attack the constitutionality of the said Enactments on the ground that s 9 infringe the applicant's fundamental liberties under arts 3, 10, 11 and 12 of the Federal Constitution****."*

29. However, the decision of the High Court was overturned by the **Court of Appeal**. In the Applicants' application to obtain leave to appeal in **Federal Court**, **His Lordships**

Arifin Zakaria CJ (delivering the judgment of the majority of the Court) significantly held in **Paragraph 39** that:

> *"**The net effect of the finding of the learned High Court judge is that the impugned provision is invalid, null and void, and unconstitutional as it exceeds the object of art 11(4) of the Federal Constitution. The respective States' Legislature thus have no power to enact the impugned provision**."*

30. The **Federal Court** further held in **paragraphs 42 and 43** as follows:

> *"[42] The effect of cl (3) and (4) of art 4 as explained by the Supreme Court in Abdul Karim bin Abdul Ghani is that **the validity or constitutionality of the laws could not be questioned by way of collateral attack, as was done in the present case**. This is to prevent any frivolous or vexatious challenge being made on the relevant legislation. **Clause (3) of art 4 provides that the validity or constitutionality of the relevant legislation may only be questioned in proceedings for a declaration that the legislation is invalid. And cl (4) of art 4 stipulates that such***

proceedings shall not be commenced without the leave of a judge of the Federal Court. This procedure was followed in a number of cases *(see* ***Fathul Bari bin Mat Jahya; Sulaiman bin Takrib v Kerajaan Negeri Terengganu*** *(Kerajaan Malaysia, intervener) and other applications [2009] 6 MLJ 354; [2009] 2 CLJ 54 (FC);* ***Mamat bin Daud & Ors v Government of Malaysia*** *[1986] 2 MLJ 192; [1986] CLJ Rep 190 (SC)).*

[43] ***Premised on the above, I hold that the High Court judge ought not to have entertained the challenge on the validity or constitutionality of the impugned provision for two reasons, namely procedural non-compliance and for want of jurisdiction. The findings of the High Court judge that the impugned provision is unconstitutional was rightly set aside by the Court of Appeal****."*

31. Similarly, in our present case, the application for judicial review filed by the Respondents to seek for a declaration that Section 66 of the Enactment is void as it is inconsistent with Articles 5(1), 8(1) and (2), 9(2) and 10(1)(a) of the Federal Constitution is definitely a challenge in pith and substance against the validity and

constitutionality of **Section 66** of the Enactment by way of collateral attack – which is clearly not a proper way in mounting a challenge to invalidate a state law pitted against the Federal Constitution.

32. As specified in **Article 4(3) and 4(4) of the Federal Constitution,** a challenge against the validity and constitutionality of **Section 66** of the Enactment on the ground that State Legislature has no power to enact such provision shall only be made in proceedings for a declaration and such proceedings shall not be commenced without the leave of a judge of the Federal Court.

33. When the Respondents failed to follow the specific procedure laid down in **Article 4(3) and 4(4) of the Federal Constitution**, it is humbly submitted that the **the Learned Judges of the Court of Appeal (and the High Court) were in error in entertaining the application for Judicial Review when the Courts were not seized with jurisdiction to entertain such a challenge through the said mechanism on the legislative powers of the State to enact matters pertaining to Islamic laws allegedly contrary to various fundamental liberty provisions of the Federal Constitution, and particularly without resort to**

the procedures specifically provided under Article 4(3) and 4(4) of the Federal Constitution.

33A. The effect of such substantive procedural non-compliance is for this Honourable Court to allow this appeal, setting aside the judgment of the Court of Appeal and the High Court and declaring that this judicial review action by the Respondent is incomplete for substantive procedural non-compliance of Article 4(3) and Article 4(4) of the Federal Constitution.

33B. Having said that, by virtue of Article 121(1A) of the Federal Constitution, it establishes Syariah Court which has jurisdiction in the matters of item 1 List II of the Ninth Schedule of the Federal Constitution. Further, Civil Courts shall have no jurisdiction in respect of any matter within the jurisdiction of Syariah Court.

33C. However, by virtue of a Malaysian landmark case of **Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain [2007] 4 MLJ 585**, it was held that when there is a constitutional issue involved especially on the question of fundamental rights as enshrined in the Constitution it is of critical importance that the civil superior courts should not decline jurisdiction by merely citing article 121(1A). The clause only protects the Syariah court in matters within their

exclusive jurisdiction, which does not include the interpretation of the provisions of the Constitution. (Further discussion can be found in Ground 3 of the Memorandum of Appeal below)

33D. In light of the recent case of **Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 MLJ 765**, the specific procedure in challenging the validity of Section 66 of the Syariah Criminal Enactment (Negeri Sembilan) 1992 is as provided in Article 4(3) and 4(4) of the Federal Constitution, and not by way of judicial review as filed by the Respondent.

D. Ground 3 - Memorandum of Appeal

The Learned Judges of Court of Appeal were erroneous in law in not appreciating that Section 66 of the Syariah Criminal Enactment (Negeri Sembilan) 1992 (Enactment No. 4/1992), being a law enacted by the State Legislature under Item I, List II - State List, Schedule 9 of the Federal Constitution, clearly falling within the rubric of "creation and punishment of offences by persons professing the religion of Islam against the precepts of that religion..." also forms the personal law of Muslims in the State and therefore by virtue of Article 121 (1A) of

the Federal Constitution a matter within the exclusive jurisdiction of the State Syariah Court system.

I. The Purview of Article 121 (1A) of Federal Constitution under Judicial power of the Federation

34. The courts referred to in **Clause (1)** shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

35. **Article 121 (1A),** which came into effect on 10 June 1988, takes away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah court, but this clause does not, however, take away the jurisdiction of the civil court to interpret any written laws of the states enacted for the administration of Muslim law especially when challenge against the Federal Constitution. The Civil Courts have powers to decide on this. The following cases illustrate the dynamics of the jurisdiction of the Civil Courts when required to interpret provisions of State legislation.

36. In a case of **Dalip Kaur v Pegawai Polis Daerah [1992] 1 MLJ 1 [Tab 1 VOL 3(a) ABOA]** the Supreme Court dismissed

the appeal of the appellant who applied for a declaration that her deceased son at the time of his death on 3 October 1990 was not a Muslim and/or had renounced the Islamic faith and for the consequential declaration that she was entitled to the body of the deceased. The deceased was born a Sikh and brought up in the Sikh faith. However, he converted to Islam on 1 June 1991 before the District Kadi of Kulim and the conversion was duly registered with the Majlis Agama Islam Kedah in accordance with s 139 of the Administration of Muslim Law Enactment 1962 of Kedah.

37. The appellant had contended that subsequent to the conversion the deceased had by a deed poll on 9 September 1991 renounced the Islamic faith and resumed the practice of the Sikh faith. It was also alleged that the deceased had been rebaptized by a Sikh priest at a Sikh temple and that the deceased had regularly attended the congregation at the Sikh temple.

38. At the trial before the High Court, the learned judicial commissioner found that the signature on the deed poll was not that of the deceased and he also rejected the evidence of the Sikh priest and that of the deceased's brother with regard to the rebaptism and the congregation at the Sikh

temple. He held that the deceased was a Muslim at the time of his death. The appellant appealed.

39. At the hearing of the appeal, the Supreme Court remitted the case to the High Court for the learned judicial commissioner to refer certain questions of Islamic law that arose to the Fatwa Committee of Kedah. This was done and after receiving the fatwa the learned judicial commissioner confirmed his earlier findings and decision. The appellant appealed.

40. The Supreme Court Judge, Hashim Yeop A Sani CJ dismissed the appeal and decided that the learned judicial commissioner was entitled to accept the answers of the fatwa committee to the questions which were referred to it and which were agreed by all parties. The fatwa committee was of the opinion that the deceased was a Muslim as he had been duly converted to Islam and there was no decision of a Syariah court which decided that he had renounced or left the Islamic faith.

41. The judge in this case was of the view that clear provisions should be incorporated in all the state Enactments to avoid difficulties of interpretation by the civil courts.

"***This is particularly important in view of the amendment to art 121 of the Federal Constitution made by Act A704 of 1988. The new cl 1A of article 121 of the Constitution effective from 10 June 1988 has taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the syariah courts. But that clause does not take away the jurisdiction of the civil court to interpret any written laws of the states enacted for the administration of Muslim law.*** *One of the opinions given in the fatwa of the fatwa committee in this case was that a convert who executes a deed poll renouncing Islam is a murtad (apostate). Of course this opinion is valid only for the state of Kedah.*

If there are clear provisions in the state Enactment the task of the civil court is made easier when it is asked to make a declaration relating to the status of a person whether such person is or is not a Muslim under the Enactment."

42. In a subsequent case of **Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah &**

Anor [1999] 1 MLJ 489 [Tab 2 VOL 3(a) ABOA], the appellant who was brought up as a Sikh converted to Islam without the knowledge and consent of his widowed mother while he was still a minor. Upon reaching 21 years of age, he went through a baptism ceremony into the Sikh faith, thereby renouncing Islam. He then executed a deed poll in which he declared unequivocally that he was a Sikh.

43. Subsequently, he filed an originating summons in the Kuala Lumpur High Court seeking a declaration that he was no longer a Muslim. Counsel for the Jabatan Agama Islam Kedah raised a preliminary objection against the application contending that the High Court had no jurisdiction as the matter came under the jurisdiction of the syariah courts. The learned High Court judge upheld the objection and dismissed the application. The appellant appealed.

44. At the **Federal Court**, counsel submitted that since there was no express provision in the Kedah Administration of Muslim Law Enactment 1962 conferring jurisdiction on the syariah court, the High Court had jurisdiction to hear the appellant's application. Secondly, the grounds that the appellant's conversion to Islam while a minor and without the knowledge of his mother was invalid; and thirdly by

virtue of article 11(1) of the Federal Constitution, the appellant had an unfettered constitutional right to choose his religion and to practise it and such right could not be disputed or infringed.

45. The learned Judge, **Mohamed Dzaiddin FCJ** delivered his judgment that the jurisdiction of the syariah courts to deal with conversions out of Islam, although not expressly provided for in some State Enactments, can be read into those enactments by implication derived from the provisions concerning conversion into Islam.

> ***"It is inevitable that since matters on conversion to Islam come under the jurisdiction of the syariah courts, by implication, conversion out of Islam should also fall under the jurisdiction of the same courts. Thus, the appellant's application for a declaration that he was no longer a Muslim came within the jurisdiction of the syariah court and not that of the High Court"***

46. Thus, it is submitted that Article 121(1A) provides that the civil court has no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts. The Federal

Constitution therefore recognizes the coexistence of the two systems of courts in the administration of justice in this country and each court has its own role to play. Accordingly, the two courts must be regarded as having the same standing in this country.

47. In applying to our situation at hand, the question of constitutionality of Section 66 of the Syariah Criminal Enactment (Negeri Sembilan) 1992 (Enactment No. 4/1992) has been challenged by the Respondents to declare Section 66 as an invalid state shariah law by criminalizing cross-dressing in Malaysia.

48. The Court of Appeal delivered a favourable decision to the Respondents by upholding the basic rights enshrined under the Federal Constitution in declaring Section 66 of the Negeri Sembilan Shariah Criminal Enactment 1992 as invalid and unconstitutional.

49. The challenge of the said Section 66 of the Negeri Sembilan Shariah Criminal Enactments 1992 as infringement of Article 5 on the right to live with dignity, Article 8 on gender equality, Article 9 on freedom of movement and

Article 10 on freedom of speech and expression in the Federal Constitution.

50. Although, article 121(1A) effective from 10 June 1988 had taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the Syariah Courts, it does not take away the jurisdiction of the civil courts to interpret written laws of the state enacted for administration of Muslim law.

51. In a landmark case of **Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals [2008] 2 MLJ 147 [Tab 3 VOL 3(a) ABOA]**, as per **Nik Hashim FCJ** the **Federal Court** concluded that the civil court cannot be moved to injunct a validly obtained order of a Syariah court of competent jurisdiction. The injunction obtained by the wife in that case, although addressed to the husband, was in effect a stay of proceedings of the husband's applications in the Syariah High Court and that amounted to an interference by the High Court with the husband's exercise of his right as a Muslim to pursue his remedies in the Syariah High Court, which the law does not permit.

52. Any rivalry between the two jurisdictions must now be solved in terms of article 121(1A) is found in a case of **Mohamad Habibullah bin Mahmood v Faridah bte Dato Talib [1992] 2 MLJ 793 [Tab 4 VOL 3(a) ABOA]**, the plaintiff and defendant are Muslims and the wife petitioned for divorce in the Syariah Court of Kuala Lumpur. The wife alleges that during the course of her marriage, she was battered by her husband on numerous occasions and subsequently, she filed a suit in the High Court at Kuala Lumpur against her husband claiming for damages and an injunction to restrain the defendant from assaulting, harassing or molesting her and members of her family. The defendant filed a notice of motion to set aside the temporary injunction.

53. **In Zaina Abidin bin Hamid @ S Maniam & Ors v Kerajaan Malaysia & Ors [2009] 6 MLJ 863 [Tab 5 VOL 3(a) ABOA],** the Plaintiff sought declarations on interpretations concerning constitutionality of federal and state legislations on whether article 121(1A) of the Federal Constitution taken away jurisdiction of civil courts to interpret written laws of state enacted for administration of Muslim Law. The plaintiffs are actually seeking recourse by requesting the civil courts to interpret the constitutionality of written laws enacted in Parliament and the State Legislative Assembly.

54. The plaintiffs who were seeking recourse by requesting the civil courts to interpret the constitutionality of written laws enacted in Parliament and the State Legislative Assembly certainly could not constitute an abuse of process. Hence, the OS was not unsustainable. It must be heard and determined on merits.

55. In **Sarwari a/p Ainuddin v Abdul Aziz a/l Ainuddin (No 2) [2001] 6 MLJ 737 [Tab 6 VOL 3(a) ABOA],** Shankar J held that this article does not say and should not be understood to mean that all disputes in which all the parties are Muslim should only be heard in the Syariah court. Provisions within the relevant Administration of Islamic Law Enactments recognize that the jurisdiction of the Syariah court and the civil courts, far from being mutually exclusive, are in fact symbiotic since they provide the machinery whereby the opinion of the Mufti or the Syariah court can be effectively implemented by the civil court acting within its jurisdiction.

56. The question of jurisdiction has to be decided in the first instance in and by the court where the action has been filed. Any suggestion that the court does not have

jurisdiction must be raised at the earliest possible opportunity. Unless it is manifestly obvious that the civil court never had any jurisdiction at all by virtue of article 121(1A) of the Constitution, in a civil case a party should not be permitted to argue at the appellate stage that the court of first instance did not have jurisdiction.

57. In **Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors [2003] 3 MLJ 705 [Tab 7 VOL 3(a) ABOA]**, the Federal Court held that the Court of Appeal in Majlis Ugama Islam Pulau Pinang dan Seberang Perai lwn Shaik Zolkaffily bin Shaik Natar dan lain-lain (supra) too fell into the same error as the learned High Court judge in taking 'the remedy prayed for' approach instead of the 'subject matter' approach.

58. It was unfortunate that the Court of Appeal did not have the benefit of considering Soon Singh(supra) and had Soon Singh been brought for the consideration of the Court of Appeal, it could well have come to a different conclusion or finding. Accordingly, the decisions of the Court of Appeal that the Syariah court had no jurisdiction to issue the injunction applied for by the respondents and no power to

adjudicate on the will and the deed of settlement cannot be supported.

59. When there is a challenge to the jurisdiction of the High Court, the key is not whether the High Court has jurisdiction but whether jurisdiction of the matter at hand is with the Syariah court. Article 121(1A) is not the written law giving jurisdiction to the Syariah court.

60. It merely settles the issue of the concurrent jurisdiction of the High Court, in that there is none, when jurisdiction of a subject matter is given to the Syariah court: see **Shaik Zolkaffily bin Shaik Natar & Ors (sued as trustees of the estate of Sheik Eusoff bin Sheik Latiff, deceased) v Majlis Agama Islam Pulau Pinang dan Seberang Perai [1997] 3 MLJ 281 [Tab 8 VOL 3(a) ABOA]**. The (Marriage and Divorce) Act 1976 (Act 164) section 3 is not unconstitutional in the light of articles 11(1) ante and 121(1A).

61. The expression 'jurisdiction of the Syariah courts' refers to the exclusive jurisdiction of the Syariah courts. Thus, under cl (1A), the courts will have jurisdiction where the offender may be tried under statutory as well as under Syariah law:

see **Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor [1999] 1 MLJ 266 at 280, CA [Tab 10 VOL 3(a) ABOA].**

62. The necessity of clause (1A) was to stop the practice of aggrieved parties coming to the High Court to get the High Court to review decisions made by Syariah courts. Decisions of Syariah court should rightly be reviewed by their own appellate courts. They have their own court procedure where decisions of a court of a kathi or kathi besar are appealable to their Court of Appeal. Since the Syariah courts have their own system, their own rules of evidence and procedure which in some respects are different from those applicable to the civil courts, it is only appropriate that the civil court should refrain from interfering with what goes on in the Syariah courts. This policy on non-interference is reciprocated by the Syariah courts as laid down in a case of **Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara, Malaysia & Anor [1999] 2 MLJ 241, FC [Tab 11 VOL 3(b) ABOA]**

63. The Constitution, while using the term 'power' with regard to making laws in article 74, avoided using the word in

article 121(1A). Instead the phrase used is 'the jurisdiction of the Syariah courts'. There is a very clear distinction between the 'power to make law', and the 'jurisdiction of the Syariah courts'.

64. The State List gave power to the state in matters set out therein, to make law. One of the powers given to the state is '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'.

65. Although the state may create such laws, the Syariah court has 'jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph', that jurisdiction itself is limited to jurisdiction in respect of offences 'in so far as conferred by federal law': **Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor [1998] 4 MLJ 742 [Tab 9 VOL 3(a) ABOA].**

66. Jurisdiction to the Syariah court (and it is only within the State) is given by State laws, or for the Federal Territories, by an Act of Parliament, over any matter in the State List

under Sch 9 to the Federal Constitution, but if State law does not confer on the Syariah court any jurisdiction to deal with any matter in the State List, the Syariah court is precluded from dealing with the matter, and jurisdiction cannot be derived by implication as laid down in a case of **Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor (No 2) [1991] 3 MLJ 487 [Tab 12 VOL 3(b) ABOA] per Eusoff Chin J.**

67. In a case of **Kaliammal a/p Sinnasamy lwn Pengarah Jabatan Agama Islam Wilayah Persekutuan (JAWI) dan lain-lain [2006] 1 MLJ 685 [Tab 13 VOL 3(a) ABOA]** was contrasted to **Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor (supra) [Tab 12 VOL 3(b) ABOA],** because in Kaliammal there was an order by the Syariah court which clearly decided that on 22 December 2005 the deceased was a Muslim and his name was Mohamad bin Abdullah.

68. The Syariah court has the jurisdiction and competency to determine the affirmation of the deceased's conversion to Islam. With that, the civil court does not have the jurisdiction and cannot act to review again the decision of that Syariah court.

69. Where the offence alleged has been expressly conferred upon a magistrate, it means that it is not a matter in which a Syariah court enjoys exclusive jurisdiction; so there can be no contravention of article 121(1A) under which a civil court ceases to have jurisdiction if and only if a particular matter comes within the jurisdiction of the Syariah court.

70. Thus on the registration of an Islamic religious school and not the precepts of the religion of Islam, there can be no doubt that the Malacca State Legislature clearly intended to exclude the subject matter from the jurisdiction of the Syariah courts and instead conferred the jurisdiction on a magistrate. In other words, it is not a matter within the jurisdiction of the Syariah courts

71. The Court of Appeal in **Saravanan a/l Thangathoray v Subashini a/p Rajasingam [2007] 2 MLJ 705 [Tab 14 VOL 3(b) ABOA]** CA, whilst preferring **Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang & Anor [1996] MLJU 500 [Tab 15 VOL 3(b) ABOA]**, disagreed with the decision in **Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur [1998] 1 MLJ 681 [Tab 16 VOL 3(b) ABOA]** because the latter case appears to

have considered article 121(1A) in isolation and given it a literal interpretation. Instead, article 121(1A) must be read with article 121(1), regard being had to the legislative purpose for introducing the former clause into the Federal Constitution.

72. The court was also of the view that these two clauses of article 121 should be interpreted purposively so as to avoid unfairness or injustice and so as to produce a smooth working of the system which the Article creates and regulates. The court felt that this was the proper approach to the interpretation of article 121(1A) as authoritatively decided by the Federal Court in **Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor [1999] 2 MLJ 241, FC**.

73. In **Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain [2007] 4 MLJ 585 [Tab 17 VOL 3(b) ABOA]** FC, his lordship Richard Malanjum CJ (Sabah and Sarawak) was of the view that apostasy involves complex questions of constitutional importance especially when some States in Malaysia have enacted legislation to criminalize it which in

turn raises questions involving federal-state division of legislative powers.

74. It therefore entails consideration of article 5(1), 3(4), 11(1), 8(2), 10(1)(a), 10(1)(e), 12(3) ante and Schedule 9 post. Since constitutional issues are involved especially on the question of fundamental rights as enshrined in the Constitution it is of critical importance that the civil superior courts should not decline jurisdiction by merely citing article 121(1A). In his lordship's view that clause only protects the Syariah court in matters within their jurisdiction, which does not include the interpretation of the provisions of the Constitution.

75. Hence when jurisdictional issues arise, civil courts are not required to abdicate their constitutional function. Legislation criminalizing apostasy or limiting the scope of the provisions of the fundamental liberties as enshrined in the Constitution is a constitutional issue in nature which only the civil courts have jurisdiction to determine.

76. This refers to courts constituted under any State law for the purpose of handling any matters enumerated in Sch 9 List II

(the State List) post. For the criminal jurisdiction of Syariah courts, see the Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355) (2 Islamic law & Islamic Matters). For provisions relating to the enforcement and administration of Islamic Law, and the constitution and organisation of the Syariah courts in the Federal Territories, see the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) (6 Islamic Law & Islamic Matters).

77. A Syariah court is thus not a court of inherent jurisdiction. It is created by the power in item 1, and it relies on federal law for its jurisdiction over offences as decided in a case of **Nor Kursiah bte Baharuddin v Shahril bin Lamin & Anor [1997] 1 MLJ 537 [Tab 18 VOL 3(b) ABOA]**.

78. In **Genga Devi a/p Chelliah lwn Santanam a/l Damodaram [2001] 1 MLJ 526 [Tab 19 VOL 3(b) ABOA]**, it was held that looking at article 121(1A), the civil court cannot interfere with matters related and subjected to the jurisdiction of the Syariah court. This is because these two courts have different jurisdictions.

79. In **Kamariah bte Ali & Ors v Kerajaan Negeri Kelantan, Malaysia & Anor and other appeals [2002] 3 MLJ 657 [Tab 20 VOL 3(b) ABOA]**, CA, the Court of Appeal held that the Syariah High Court is clearly a court of competent jurisdiction. A High Court cannot, in a habeas corpus application, review or question the validity of a subsisting order made by a court of competent jurisdiction.

80. In any event, a High Court, by virtue of article 121, has no jurisdiction to question an order made in respect of a matter where the Syariah High Court, a creature of a written law, has jurisdiction given to it under a written law. The High Court has to accept the Syariah High Court order as a valid orderwhere the order was made by the Syariah High Court in the Federal Territory in respect of a matter which was well within its jurisdiction and is an order that affects Muslim parties.

81. This High Court, under article 121(1A) of the Constitution, has no jurisdiction to question the validity of the order which was made in respect of a matter which is obviously within the jurisdiction of the Syariah High Court.

82. Article 121(1A) does not overrule the general jurisdiction of the civil courts. The main point to note is that the civil courts are courts of general jurisdiction and can hear cases brought by Muslims as well as non-Muslims and can try offences against Muslims and non-Muslims that are created by the law of the land.

83. Moreover, the Civil High Courts are also courts of inherent jurisdiction while the jurisdiction of the Syariah courts is determined by the state law and if the legislature does not confer on the Syariah court any jurisdiction to deal with any matter in the state list, the Syariah court is precluded from dealing with that matter.

84. Consequently, once a decision is made that the civil court has jurisdiction to hear a matter, the court can decide the matter or issue which arises. As to whether the civil judge is competent to hear and decide the matter has nothing to do with the jurisdiction of the court

85. Article 121(1A) does not overrule the general jurisdiction of the civil courts. Civil courts are courts of general jurisdiction and can hear cases commenced by Muslims and

non-Muslims, and can try offences against Muslims and non-Muslims that are created by the laws of the land. Further, the civil High Courts are courts of inherent jurisdiction whilst the jurisdiction of the Syariah courts is determined by the respective State laws. If the legislature does not confer on the Syariah courts any jurisdiction to deal with any matter in the State List then the Syariah court is precluded from dealing with that matter.

86. In **Daud bin Mamat & Ors v Majlis Agama Islam & Anor [2001] 2 MLJ 390 [Tab 21 VOL 3(b) ABOA]**, the court held that the issues before it did not involve matters of interpretation of the Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1944 or any written law of the State of Kelantan, enacted for the administration of Muslim law.

87. Therefore, the powers of the court, by virtue of article 121(1A), are curtailed. The plaintiffs, being legally Muslims, will remain within the jurisdiction of the Syariah court, and outside the jurisdictional purview of the civil court.

88. Under article 121(1A), the High Courts in Malaya and Sabah and Sarawak were ousted over matters which fell within the

jurisdiction of the Syariah court. 'Pursuant to article 121(1A) of the Federal Constitution, the High Court has no jurisdiction in respect of any matter that is within the jurisdiction of the Syariah court.

89. It is now beyond question that, in determining the jurisdiction of the Syariah court, the "subject matter" approach is preferred' as laid down in a case of **Abdul Shaik bin Md Ibrahim & Anor v Hussein bin Ibrahim & Ors [1999] 5 MLJ 618 [Tab 22 VOL 3(b) ABOA]**.

90. See also **Azizah bte Shaik Ismail & Anor v Fatimah bte Shaik Ismail & Anor [2002] 6 MLJ 589 [Tab 23 VOL 3(b) ABOA]**, where the court held that the fact that the remedy sought by the applicants (a writ of habeas corpus) was not expressly conferred by the Enactment on the Syariah court did not automatically grant the civil court jurisdiction. This is because custody of a Muslim child is a subject matter which is clearly within the jurisdiction of the Syariah court.

91. Thus, the court could not go into the merits of the order of the Syariah subordinate court because the court had no jurisdiction to review it. It must accept the order as a valid

and subsisting. It cannot be challenged in a civil court by virtue of article 121(1A).

92. The main issue here is whether or not Section 66 of the Syariah Criminal Enactment (Negeri Sembilan) 1992 (Enactment No. 4/1992) violates the Federal Constitution and hence made it invalid. There is only one avenue available in challenging the validity of Section 66 of as enshrined in Article 4 of the Federal Constitution as has been elaborated in above paragraph of this submission.

93. The Respondents in this case could rightly resort and challenge the validity of Section 66 since constitutional issues are involved especially on the question of fundamental rights as enshrined in the Constitution it is of critical importance that the civil superior courts should not decline jurisdiction by merely citing article 121(1A). The clause only protects the Syariah court in matters within their exclusive jurisdiction, which does not include the interpretation of the provisions of the Constitution.

94. Hence when jurisdictional issues arise, civil courts are not required to abandon their constitutional function or limiting the scope of the provisions of the fundamental liberties as

enshrined in the Constitution. It is a constitutional issue in nature which only the civil courts have jurisdiction to determine.

E. Ground 4 – Memorandum of Appeal

The learned Judges of the Court of Appeal were erroneous in law and in fact in not considering that any investigation and/or prosecution under Section 66 of the Syariah Criminal Enactment (Negeri Sembilan) 1992 [Enactment No. 4/1992] in the State Syariah court would entail, inter alia, the following issues:-

a. **The definition of 'male' within the section and if the term includes a male Muslim with Gender Identity Disorder ('GID');**
b. **Islamic philosophy on gender identity;**
c. **Gender at birth and registration as such;**
d. **Medical manipulation of the gender;**
e. **Relevant historical and current psychological factor;**
f. **Whether GID persons are able to raise the specific defence provided in Section 11 of the Enactment, viz, the defence of unsoundness of mind,**

And therefore in the context of the above, we humbly submit that the examination of the constitutionality or validity of Section 66 by the High Court and/or the Court of Appeal was premature when the factual matrix, inter alia, of the above elements were nit enquired by the Syariah Court.

I. The Law on Prematurity

95. In **Lee Kok Wai & Anor V. Securities Commission Malaysia [2015] 4 CLJ 260 [Tab 1, Volume 4 ABOA]**, the applicants' application for leave under **O. 53 r. 3 of the Rules of Court 2012 was to quash the decision of the Audit Oversight Board (AOB) of the Securities Commission Malaysia in issuing a notice to show cause pursuant to s. 31Z of the Securities Commission Act 1993.** The inquiry was to investigate a suspected non-compliance of certain recognised auditing and ethical standards pertaining to an audit on a company. **Justice Asmabi Mohamad**, in dismissing the leave for Judicial Review application held that:

"Application Was Premature

[24] There is no decision to review:

(i) It was obvious in the case before me and for the reasons that I had highlighted above, the issuance of the notice to show cause by the AOB on 5 September 2014 was the exercise of the powers of the AOB pursuant to s. 31Z(5) of Act 498 which stipulates that the AOB shall not proceed to take any action under s. 31Z(2) without first affording the person concerned the opportunity to be heard. As I had discussed above the AOB was merely conducting an inquiry and the issuance of the notice to show cause was part and parcel of its investigative process and ***no decision had been made*** *under s. 31Z(2) of Act 498.* ***The whole process under the relevant section had not been completed****. As there was, no decision made by the AOB the applicants' action to move this court for leave for judicial review to be issued was premature. In order to invoke the court's judicial review powers, there must be a subject matter for the court to review; a decision made by the decision maker or refusal by him to make a decision (see Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor [2008] 6 CLJ 805; [2008] 6 MLJ 704 (CA) p. 718).*

[25] Further, the applicants' attempt to restrain the AOB from exercising its statutory duties and regulatory