Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-441-89
HARUN HASHIM, MOHAMED AZMI AND GUNN CHIT TUAN SCJJ
15 DECEMBER 1992

Civil Procedure *— Jurisdiction — Domestic violence — Application by wife for injunction to restrain husband from assaulting, harassing and molesting her — Parties are Muslims — Whether High Court or Syariah Court has jurisdiction to deal with the matter — Selangor Administration of Islamic Law Enactment 1952 s 45 (3) — Islamic Family Law (Federal Territory) Act 1984 ss 5, 107, 127 & 128 — Courts of Judicature Act 1964 ss 4 & 23 — Federal Constitution art 121(1A)*

Islamic Law *— Jurisdiction of Syariah Court — Application by wife for injunction to restrain husband from assaulting and harassing her — Matter within jurisdiction of Syariah Court — Whether High Court has jurisdiction to grant injunction.*

Tort *— Locus standi — Whether wife has capacity to sue husband for assault and battery — Married Women Ordinance 1957 s 9(2)*

The plaintiff and defendant are Muslims. They were married on 5 August 1965 and on 3 March 1989, the plaintiff (wife) petitioned for divorce in the Syariah Court of Kuala Lumpur. The plaintiff 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.

The issues before the High Court were:

(a) whether the court has jurisdiction to adjudicate on the plaintiff's action since it involves a matter which falls exclusively within the jurisdiction of the Syariah Court; and
(b) whether the plaintiff could institute the present action against the defendant when s 9(2) of the Married Women Ordinance 1957 prohibited a wife from suing her husband in tort.

The learned judge held that he had jurisdiction to hear the case and that s 9(2) of the Married Women Ordinance 1957 did not apply. (See [1990] 1 MLJ 174.) The defendant appealed.

Held, allowing the appeal:

(1) The intention of Parliament by art 121(1A) of the Federal Constitution is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah Court.
(2) The parties in this case are Muslims and they are husband and wife. The allegations of assault and battery by the plaintiff fall within s 127 of the Islamic Family Act 1984 and the Syariah

Court has power to grant an injunction under s 107 of the Act. There cannot be any doubt that the Syariah Court has been conferred with jurisdiction in respect of matters before the High Court in this case.

(3) The Courts of Judicature Act 1964, including s 4, does not qualify as an Act or statutory provision affecting the Constitution because it is ordinary law enacted not under art 159 of the Constitution but enacted in the ordinary way. It therefore cannot override the provisions of the Constitution as amended from time to time.

(4) As the defendant and plaintiff are husband and wife and the allegations of assault and battery constituting a tort are not related to the protection or security of property, the plaintiff is barred by s 9(2) of the Married Women Ordinance 1957 from suing the defendant.

(5) (**Per Harun Hashim SCJ**) On the facts of this case, the High Court has no jurisdiction to adjudicate the plaintiff's claim for damages for assault and battery against her husband and to the grant of an injunction arising therefrom. The order of interim injunction is dissolved and the application to strike out the writ and statement of claim is allowed.

Cases referred to

Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1992] 1 MLJ 7 (folld)

Ali Mat bin Khamis v Jamaliah bte Kassim [1974] 1 MLJ 18 (not folld)

Shahamin Faizul Kung bin Abdullah v Asma bte Haji Junus [1991] 3 MLJ 327 (refd)

Phang Chin Hock v PP [1980] 1 MLJ 70 (refd)

(6) (**Per Mohamed Azmi SCJ**) The root of the plaintiff's complaint relates to the conduct of the defendant during the course of a Muslim marriage. It is not really a civil or criminal matter as suggested by the trial judge. In fact and in law, the alleged assault and battery constitute a matrimonial offence or misconduct and the matter should be dealt with by the court in its matrimonial and not in its general civil jurisdiction.

(7) (**Per Mohamed Azmi SCJ**) Once the parties have submitted themselves to the jurisdiction of the Syariah Court and once the Syariah Court had taken cognizance of the matrimonial cause on the ground of the defendant's misconduct, it is an abuse of process for the plaintiff to go to the High Court and complain over the same misconduct.

Cases referred to

Beard v Beard [1964] P 8 (refd)

Hunter v Chief Constable of the West Midlands Police & Ors (1982) AC 529; [1981] 3 All ER 727 (folld)

Ramah bte Ta'at v Laton bte Malim Sutan (1927) 6 FMSLR 128 (refd)
Ali Mat bin Khamis v Jamaliah bte Kassim [1974] 1 MLJ 18 (distd)
Shahamin Faizul Kung bin Abdullah v Asma bte Haji Junus [1991] 3 MLJ 327 (refd)
Phang Chin Hock v PP [1980] 1 MLJ 70 (refd)
Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1992] 1 MLJ 7 (refd)

(8) (**Per Gunn Chit Tuan SCJ**) Acts made by Parliament complying with art 159, which provides for amendment of the Constitution, are valid even if inconsistent with the Constitution. On the other hand, Acts which do not amend the Constitution must be consistent with it.

(9) (**Per Gunn Chit Tuan SCJ**) Sections 4, 23 and 24, which prevail over the provisions of any other written law, cannot prevail over art 121(1A).

Cases referred to
Rediffusion (Hong Kong) v Attorney General of Hong Kong [1970] AC 1136 (refd)
Ali Mat bin Khamis v Jamaliah bte Kassim [1974] 1 MLJ 18 (refd)
Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1992] 1 MLJ 7 (refd)
Assa Singh v Mentri Besar, Johor [1969] 2 MLJ 30 (folld)
Shahamin Faizul Kung bin Abdullah v Asma bte Haji Junus [1991] 3 MLJ 327 (refd)
Phang Chin Hock v PP [1980] 1 MLJ 70 (folld)
Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29 (folld)

Per curiam:

(1) (**Per Harun Hashim SCJ**) When there is a challenge to jurisdiction, the correct approach is to see whether the Syariah Court has jurisdiction and not whether the state legislature has power to enact the law conferring jurisdiction on the Syariah Court.

(2) (**Per Gunn Chit Tuan SCJ**) In determining whether a Muslim has renounced Islam, the only forum qualified to answer the question is the Syariah Court.

[Bahasa Malaysia summary

Plaintif dan defendan beragama Islam. Mereka telah berkahwin pada 5 Ogos 1965 dan pada 3 Mac 1989, plaintif (si isteri) telah mengemukakan petisyen perceraian di Mahkamah Syariah di Kuala Lumpur. Plaintif mengata bahawa semasa perkahwinannya, beliau telah diserangsentuh oleh suaminya beberapa kali dan seterusnya, beliau telah memfailkan guaman di Mahkamah Tinggi di Kuala Lumpur terhadap suaminya menuntut ganti rugi dan injunksi menahan defendan dari

menyerang, mengganggu berkali-kali atau memperkosa plaintif dan ahli keluarganya. Defendan telah memfail notis usul untuk mengetepikan injunksi sementara itu. A

Isu-isu di hadapan Mahkamah Tinggi adalah:

(a) sama ada Mahkamah mempunyai bidang kuasa untuk menghakimi tindakan plaintif kerana ia melibatkan perkara yang terletak secara eksklusif di dalam bidang kuasa Mahkamah Syariah; dan B
(b) sama ada plaintif boleh memulakan tindakan ini terhadap defendan apabila s 9(2) Ordinan Perempuan Bersuami 1957 melarang seorang isteri daripada mendakwa suaminya dalam tort.

Hakim yang arif telah memutuskan bahawa beliau mempunyai bidang kuasa mendengar kes itu dan s 9(2) Ordinan Perempuan Bersuami 1957 tidak terpakai. (Lihat [1990] 1 MLJ 174.) Defendan telah membuat rayuan. C

Diputuskan, membenarkan rayuan itu: D

(1) Tujuan Parlimen dengan perkara 121(1A) Perlembagaan Persekutuan adalah untuk menyingkir bidang kuasa Mahkamah Tinggi mengenai apa-apa perkara di dalam bidang kuasa Mahkamah Syariah.
(2) Pihak-pihak dalam kes ini beragama Islam dan mereka adalah suami isteri. Tuduhan serangan dan serang-sentuh oleh plaintif jatuh di bawah s 127 Akta Undang-Undang Keluarga Islam 1984 dan Mahkamah Syariah mempunyai kuasa memberi injunksi di bawah s 107 Akta itu. Sudah pasti bahawa Mahkamah Syariah telah diberi bidang kuasa mengenai perkara di hadapan Mahkamah Tinggi di dalam kes ini. E
(3) Akta Mahkamah Kehakiman 1964, termasuk s 4, bukanlah suatu Akta atau peruntukan statutori yang membawa kesan ke atas Perlembagaan kerana ianya adalah undang-undang biasa yang bukan diperbuat di bawah perkara 159 Perlembagaan tetapi diperbuat dengan cara biasa. Oleh itu, ianya tidak boleh mengatasi peruntukan-peruntukan Perlembagaan seperti yang dipinda dari masa ke semasa. F G
(4) Oleh kerana defendan dan plaintif adalah suami isteri dan tuduhan serangan dan serang-sentuh yang merupakan tort tidak berhubungan dengan perlindungan atau keselamatan harta, plaintif dilarang oleh s 9(2) Ordinan Perempuan Bersuami 1957 daripada mendakwa defendan. H
(5) (Oleh **Harun Hashim HMA**) Berdasarkan fakta-fakta kes ini, Mahkamah Tinggi tidak mempunyai bidang kuasa untuk menghakimi tuntutan plaintif untuk mendapat ganti rugi bagi serangan dan serang-sentuh terhadap suaminya dan untuk mendapat injunksi yang timbul akibatnya. Perintah injunksi interim itu dibubarkan dan permohonan membatalkan writ dan pernyataan tuntutan itu dibenarkan. I
(6) (Oleh **Mohamed Azmi HMA**) Punca aduan plaintif berkaitan dengan kelakuan defendan semasa suatu perkahwinan Islam. Ia

bukannya perkara sivil atau jenayah sepertimana yang dikatakan oleh hakim perbicaraan. Dari segi fakta dan dari segi undang-undang, serangan dan serang-sentuh yang dituduh itu merupakan kesalahan hal-ehwal perkahwinan atau salah laku dan perkara itu sepatutnya diuruskan oleh mahkamah dalam bidang kuasa hal-ehwal perkahwinan dan bukan dalam bidang kuasa sivil am.

(7) (Oleh **Mohamed Azmi HMA**) Sebaik sahaja kedua pihak itu telah menunduk kepada bidang kuasa Mahkamah Syariah dan sebaik sahaja Mahkamah Syariah telah mengambil perhatian tentang kausa hal-ehwal perkahwinan atas alasan salah laku defendan, adalah suatu penyalahgunaan proses mahkamah bagi plaintif untuk pergi ke Mahkamah Tinggi dan mengadu tentang salah laku yang sama.

(8) (Oleh **Gunn Chit Tuan HMA**) Akta yang dibuat oleh Parlimen yang mematuhi perkara 159, yang membenarkan pindaan Perlembagaan, adalah sah walaupun tidak konsisten dengan Perlembagaan. Sebaliknya, Akta yang tidak meminda Perlembagaan mestilah konsisten dengannya.

(9) (Oleh **Gunn Chit Tuan HMA**) Seksyen 4, 23 dan 24, yang mengatasi peruntukan sebarang undang-undang bertulis yang lain, tidak boleh mengatasi perkara 121(1A).

Per curiam:

(1) (Oleh **Harun Hashim HMA**) Apabila bidang kuasa dicabar, pendekatan yang betul adalah untuk melihat sama ada Mahkamah Syariah mempunyai bidang kuasa dan bukan sama ada badan perundangan negeri mempunyai kuasa memperbuat undang-undang memberi bidang kuasa kepada Mahkamah Syariah.

(2) (Oleh **Gunn Chit Tuan HMA**) Dalam memutuskan sama ada seseorang yang beragama Islam telah menolak agama Islam, forum yang layak menjawab soalan itu adalah Mahkamah Syariah.]

Notes

For a case on the court's jurisdiction in relation to Muslim Law see 2 *Mallal's Digest* (4th Ed) para 1473.

Complete list of cases referred to

1 *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 7 (refd)
2 *Ali Mat bin Khamis v Jamaliah bte Kassim* [1974] 1 MLJ 18 (not folld)
3 *Shahamin Faizul Kung bin Abdullah v Asma bte Haji Junus* [1991] 3 MLJ 327 (refd)
4 *Phang Chin Hock v PP* [1980] 1 MLJ 70 (refd)
5 *Beard v Beard* [1946] P 8 (refd)
6 *Hunter v Chief Constable of the West Midlands Police & Ors* [1982] AC 529; [1981] 3 All ER 727 (folld)
7 *Ramah bte Ta'at v Laton bte Malim Sutan* (1927) 6 FMSLR 128 (refd)

8 *Reddiffusion (Hong Kong) v Attorney General of Hong Kong* [1970] AC 1136 (refd)
9 *Assa Singh v Mentri Besar, Johor* [1969] 2 MLJ 30 (folld)
10 *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 (folld)

Legislation referred to

Civil Law Act 1956 s 10
Courts of Judicature Act 1964 ss 4, 23(1)
Federal Constitution arts 3(1), 4(3), 74(2), 121, 159, State List Item I
Islamic Family Law (Federal Territory) Act 1984 ss 5, 107, 127, 128
Penang Administration of Muslim Law Enactment 1959 s 40(3)
Selangor Administration of Muslim Law Enactment 1952 s 45
Syariah Courts (Criminal Jurisdiction) Act 1965 s 2
Married Women Ordinance 1957 ss 3, 9(2)
Rules of the High Court 1980 O 18 r 19(1)

Appeal from: Civil Suit No S7–22–126–89 (High Court, Kuala Lumpur)

Mohd Raziff bin Mohd Zahir (*Kamariah Ainiah Kamaruzaman* and *Pawancheek bin Marican* with him) (*Kamar Ainiah & Co*) for the appellant.
Balwant Singh Sidhu (*Balwant Singh Sidhu & Co*) for the respondent.

Harun Hashim SCJ: This was an application in the High Court to set aside an ex parte interim injunction and another application to strike out the plaintiff's writ and statement of claim. Both applications were heard together when the court's jurisdiction was challenged. The learned judge determined that the following questions were before the court:

(a) whether the court has jurisdiction to adjudicate on the plaintiff's action since it involves a matter which falls exclusively within the jurisdiction of the Syariah Court; and
(b) whether the plaintiff could institute the present action against the defendant when s 9(2) of the Married Women Ordinance 1957 prohibited a wife from suing her husband in tort.

In the event, the learned judge held that he had jurisdiction and that s 9(2) of the Married Women Ordinance did not apply. The defendant appeals against these rulings. The applications proper have yet to be heard on the merits.

The plaintiff and defendant are Muslims. They were married on 5 August 1965 at Batu Pahat in the State of Johor and the marriage was registered by the Jabatan Agama Johor on 9 August 1965. On 3 March 1989, the plaintiff (wife) petitioned for divorce in the Syariah Court of Kuala Lumpur. The hearing of the divorce petition was pending at the material time.

The plaintiff alleges that during the course of her marriage, she was battered by her husband on numerous occasions. On 14 February 1989,

she filed a writ of summons in the High Court at Kuala Lumpur and claimed the following reliefs:

(1) damages and/or aggravated damages for acts of assault and battery committed by the defendant against the plaintiff and the members of their family:

(ii) an injunction to restrain the defendant by himself, his servant, agent or otherwise howsoever from assaulting, harrassing, molesting or intefering, calling and harrassing by telephone calls, coming to the plaintiff's compound at any time of the day with the intention of seeing the plaintiff, approaching the plaintiff or trying to see the plaintiff or talk to the plaintiff, abusing or insulting the plaintiff by word or action in any manner, way-laying the plaintiff at any place and using physical force on the plaintiff, interfering or harrassing or in any manner disturb any person or persons, relatives and friends safeguarding the plaintiff's safety; and until further order;

(iii) costs of this action; and

(iv) further and/or any other relief as this honourable court deems fit to award.

At the same time, she filed an ex parte summons-in-chambers praying for a temporary injunction to restrain the defendant from, inter alia, assaulting, harrassing or molesting her and members of her family. On 15 February 1989, when the ex parte summons came up for hearing, the defendant appeared and gave an oral undertaking that he would not assault, harrass or molest the plaintiff. The learned judge therefore made no other and adjourned the matter sine die. However, on 12 April 1989, the solicitor for the plaintiff filed an affidavit complaining that the defendant continued to harrass the plaintiff and requested the court to restore the plaintiff's application for an interim injunction which application the learned judge granted ex parte on 14 April 1989 with liberty to the defendant to set it aside.

On 21 April 1989, the plaintiff filed her statement of claim. On 28 April 1989, the defendant filed a notice of motion to set aside the temporary injunction. On 12 May 1989, the defendant took out a summons-in-chambers to strike out the plaintiff's writ and statement of claim under O 18 r 19(1) of the Rules of the High Court 1980. Both applications eventually came up for hearing on 30 August 1989.

Article 121 of the Federal Constitution states:

(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 in Kuala Lumpur; and

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

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.

But art 121(1A) which came into effect on 10 June 1988 provides:

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

Section 23(1) of the Courts of Judicature Act 1964 confers general jurisdiction on the High Court to try *all civil proceedings*. It follows that the High Court has jurisdiction to try an action in tort claiming damages for assault and battery, and consequently to grant an injunction to restrain the defendant from assaulting, harrassing and molesting the plaintiff.

The first question then is whether, on the facts of this case, the Syariah Court has jurisdiction so as to oust the jurisdiction of the High Court under art 121(1A).

In deciding that he had jurisdiction, the learned judge said:

> Since the plaintiff here is seeking for redress against an actionable wrong committed against her person, it cannot therefore be said that the actionable wrong complained of falls exclusively within the jurisdiction of the Syariah Court when the legislature of a State has no power to enact law relating to such matter. Furthermore, a cursory glance at the Selangor Administration of Muslim Law Enactment 1952 is sufficient to convince me that such an actionable wrong as pleaded by the plaintiff is not within the jurisdiction of the Syariah Court — see s 45(3) of the Enactment. Likewise such an actionable wrong is also excluded from the Selangor Islamic Family Law Enactment 1984.
>
> For the above reasons I have no hesitation, on the authority of *Ali Mat v Jamaliah* (1974) 1 MLJ 18, in holding that this court has jurisdiction to entertain the action of the plaintiff.

[See [1990] 1 MLJ 174.]

It is obvious that the intention of Parliament by art 121(1A) is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah Court: *Dalip Kaur v Pegawai Polis Daerah, Balai Polls Daerah, Bukit Mertajam & Anor.*[1] I am therefore of the opinion that when there is a challenge to jurisdiction, as here, the correct approach is to firstly see whether the Syariah Court has jurisdiction and not whether the state legislature has power to enact the law conferring jurisdiction on the Syariah Court. The validity of a state law can only be questioned in a separate proceeding under art 4(3) of the Federal Constitution (which in so far as it is relevant) provides:

> The validity of any law made by ... the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter to which ... 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* ... (Emphasis added.)

And by art 4(4) read with art 128, only the Supreme Court may declare any such law invalid in the proceedings referred to in art 4(3).

In the present case, 45(3) of the Selangor Administration of Muslim Law Enactment 1952 ('the 1952 Enactment') referred to by the learned judges states:

> The Court of the Kathi Besar shall —
>
> (a) in its criminal jurisdiction, try any offence committed by a Muslim and punishable under this enactment, and may impose any punishment therefor provided;
> (b) in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties profess the Muslim religion and which relate to —

(i) betrothal, marriage, divorce, nullity of marriage, or judicial separation,
(ii) any disposition of, or claim to, property arising out of any of the matters set out in sub-paragraph (i) of this paragraph,
(iii) maintenance of dependants, legitimacy, guardianship or custody of infants,
(iv) division of, or claims to, sapencharian property.

The 1952 Enactment (which applied to Kuala Lumpur before it became a Federal Territory) has since been replaced by the Selangor Administration of Islamic Law Enactment 1989 with effect from 14 September 1989 but parts of it continue to apply to Kuala Lumpur whilst other parts of the 1952 Enactment have been superseded by the Islamic Family Law (Federal Territory) Act 1984. The jurisdiction of the Kuala Lumpur Syariah Court in this appeal is conferred by s 45(3) of the 1952 Enactment.

Section 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965 provides:

> The Syariah Courts duly constituted under any law in a State and invested with jurisdiction over persons professing the religion of Islam and in respect of any of the matters enumerated in List II of the State List of the Ninth Schedule to the Federal Constitution are hereby conferred jurisdiction in respect of offences against precepts of the religion of Islam by persons professing that religion which may be prescribed under any written law.
>
> Provided that such jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof.

Sections 107, 127 and 128 of the Islamic Family Law (Federal Territory) Act 1984 provides:

> Injunction against molestation
>
> 107 (1) The Court shall have power during the pendency of any matrimonial proceedings or on or after the grant of an order of divorce, fasakh, or annulment, to order any person to refrain from forcing his or her society on his or her spouse or former spouse and from other acts of molestation.
>
> (2) Failure to comply with an order made under this section shall be punishable as a contempt of Court.
>
> Ill-treatment of wife
>
> 127 Any person who ill-treats his wife or cheats his wife of her property commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or with both such fine and imprisonment.
>
> Failure to give proper justice to wife
>
> 128 Any person who fails to give proper justice to his wife according to Hukum Syara' commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or with both such fine and imprisonment.

It is true that the Syariah Court has not been conferred with jurisdiction, exclusive or otherwise, to try an actionable wrong committed against the

person as set out by the learned judged but the parties in the instant case are Muslims, they are husband and wife and the allegations of assault and battery occurred during marriage. A divorce petition is pending. The acts complained of by the plaintiff fall within s 127 of the Islamic Family Law Act and the Syariah Court has power to grant an injunction as claimed by the plaintiff under s 107 of that Act. There cannot be any doubt that the Syariah Court has been conferred with jurisdiction in respect of matters before the High Court in the present case.

With respect, I think that the learned judge in arriving at his decision fell into the error of isolating and treating the allegations of assault and battery as an actionable wrong simpliciter (which is clearly within the jurisdiction of the High Court) without regard to the fact that this is a matter for Islamic Family Law within the jurisdiction of the Syariah Court. It seems to me that the learned judge was under the impression that if the High Court did not give a remedy, the wife would not have any remedy.

In *Ali Mat bin Khamis v Jamaliah bte Kassim*,[2] the question was whether a matter involving 'harta sapencharian' should be heard in the Court of the Kathi Besar or the High Court. There, the Negeri Sembilan Administration of Muslim Law Enactment 1960 provides in s 41(3)(b)(iv) that the Court of the Kathi Besar shall in its civil jurisdiction, hear and determine all actions and proceedings in which all parties profess the Muslim religion and which relate to division inter vivos of sapencharian property. The learned judge in that case held:

> ... short of specific words to that effect, the above provision of the Negeri Sembilan Enactment was not intended to take away the jurisdiction in civil matters given to a High Court by s 23 of the Courts of Judicature Act 1964 (Act 91).

That case was decided in 1973. I am of the view that if such a question is to be decided today, the answer would be that the jurisdiction of the High Court has indeed been taken away by art 121(1A) of the Constitution.

During the course of argument, we were referred to the Penang case of *Shahamin Faizul Kung bin Abdullah v Asma bte Haji Junus*[3] which concerns the custody of a male child six years of age. The father of the child, whose mother had died, claimed custody of the child who was in the care of the child's maternal grandmother. The parties are Muslims and a preliminary objection was taken that the High Court had no jurisdiction by virtue of art 121(1A) of the Constitution as the jurisdiction had been conferred on the Court of the Kathi Besar by the Penang Administration of Muslim Law Enactment 1959 which by s 40(3)(b) provided:

> (3) the Court of the Kathi Besar shall —
>
> (b) in its civil jurisdiction, hear and determine actions and proceedings in which all the parties profess the Muslim Religion and which relate to:
>
> (iii) maintenance of dependants, legitimacy, guardianship or custody of infants.

At p 331 the learned judge in that case said:

> The Courts of Judicature Act 1964, except for s 5, came into force on 16 March 1964. Section 5 came into force on 16 September 1964. But, art 121(1A), as I

A have already noted, came into force only as recently as 10 June 1988 by virtue of Act A704. In other words, it was not in force at the date of the commencement of the Courts of Judicature Act 1964. Therefore by virtue of s 4 of the Courts of Judicature Act, ss 23 and 24 thereof would, in my opinion, still prevail to confer jurisdiction on this court to hear the present application. It would have been otherwise if art 121(1A) had been enacted with retrospective effect so as to have
B been in force at the date of commencement of the Courts of Judicature Act 1964.

It will be observed that although the 1948 Ordinance was revised in 1972 and retitled the Subordinate Courts Act 1948, no change was made to s 109 even though s 4 of the Courts of Judicature Act had been in existence since 1964. I do not, however, think that this distinction makes any diffe-
C rence to the effect of s 4 of the Courts of Judicature Act. The intention of Parliament in adding the words 'other than the Constitution' in that section is to exclude the Constitution since the Constitution is the Supreme Law of the land under art 4(1). I do not, therefore, see how s 4 of the Courts of Judicature Act can render the constitutional amendment ineffective. For that matter, no Act of Parliament however precisely worded can nullify a
D provision of the Constitution. I accordingly hold that the words 'in force at the commencement of this Act' do not refer to the Constitution but to laws made before 1 January 1949.

In stating that s 4 is a provision affecting the Constitution, the learned judge referred to a passage in *Phang Chin Hock v PP*[4] at p 72 which said:

E In our judgement, in construing art 4(1) and art 159, the rule of harmonious construction requires us to give effect to both provisions and to hold and we accordingly hold that Acts made by Parliament, complying with the conditions set out in art 159, are valid even if inconsistent with the Constitution, and that a distinction should be drawn between on the one hand Acts affecting the Constitution and on the other hand ordinary laws enacted in the ordinary way.
F It is federal law of the latter category that is meant by law in art 4(1); only such law must be consistent with the Constitution.

With respect to the learned judge, I hold that the Courts of Judicature Act is a federal law of the latter category. Acts of Parliament which are inconsistent with the Constitution and therefore *Acts affecting the Constitution*
G referred to in that passage are Acts enacted under the special provisions of art 159. The Courts of Judicature Act is enacted under art 121(1). It follows that the Courts of Judicature Act is not an act affecting the Constitution and in my opinion there is no necessity to make art 121(1A) retrospective in effect in order to nullify the effect of s 4 of the Courts of Judicature Act as construed by the learned judge.

H Taking an objective view of the Constitution, it is obvious from the very beginning that the makers of the Constitution clearly intended that the Muslims of this country shall be governed by Islamic Family Law as evident from the Ninth Schedule to the Constitution. Item 1 of the State List provides:

I Muslim Law and personal and family law of persons professing the Muslim religion ... the constitution, organisation and procedure of Muslim courts ... the determination of matters of Muslim Law and doctrine and Malay custom.

Indeed, Muslims in this country are governed by Islamic personal and family laws which have been in existence since the coming of Islam to this

country in the 15th century. Such laws have been administered not only by the Syariah Courts but also by the civil courts. What art 121(1A) has done is to grant exclusive jurisdiction to the Syariah Courts in the administration of such Islamic Laws. In other words, art 121(1A) is a provision to prevent conflicting jurisdictions between the civil courts and the Syariah Courts. A

Mr Sidhu also raised the point that the plaintiff had by a statutory declaration, affirmed on 12 April 1989, renounced Islam and therefore the Syariah Court ceased to exercise jurisdiction over her. This aspect of the matter was brought to the attention of the Kathi of Petaling Jaya who reported on 20 May 1989 to the Director of the Jabatan Agama Islam Selangor that the plaintiff had retracted her renunciation of Islam before him. As such she is still a Muslim and Mr Sidhu's argument fails. B C

The second question here which was pleaded as an alternative to the first question, is the effect of s 9(2) of the Married Women Ordinance 1957 which provides:

> Remedies of married women for protection and security of separate property. Except for the protection or security of his or her property no husband or wife shall be entitled to sue the other for a tort. D

The learned judge held that this section did not apply 'as the plaintiff's action is grounded on criminal offences committed or threatened to be committed against her.'

The rule that a married couple cannot sue each other in tort is derived from the common law of England where it was held that marital status made the husband and wife one person in the eyes of the law and therefore a suit by one against the other is like suing oneself. This common law rule has since been removed by the (UK) Law Reform (Husband and Wife) Act 1962 and each of the parties to a marriage has the same right of action in tort against the other as if they were not married. But our law still stands. E F

'Tort' is an injury or wrong committed with or without force to the person or property of another.

Section 10 of the Civil Law Act 1956 provides:

> (1) Where damage is suffered by any person as a result of a tort (whether a crime or not). G
>
> (4) Nothing in this section shall —
>
> (a) affect any criminal proceedings against any person in respect of any wrongful act.

The cause of action in the present case is clearly a *tort*. If the allegations of assault and battery can be proved, this may be the subject of criminal proceedings against the defendant but this fact stands independently from an action in tort. As the plaintiff and defendant are husband and wife and the allegations of assault and battery constituting the tort are not related to the protection or security of property, the plaintiff is barred by s 9(2) of the Married Women Ordinance from suing the defendant. Section 9(2) therefore applies and the High Court is in error in deciding that it did not. H I

For the reasons stated, I hold that on the facts of this case, the High Court has no jurisdiction to adjudicate on the plaintiff's claim for damages for assault and battery against her husband and to the grant of an injunction

arising therefrom. I would allow the appeal with costs here and below. The rulings of the learned judge are reversed. The order of interim injunction is dissolved and the application to strike out the writ and statement of claim be allowed.

Deposit to be refunded to the appellant.

Mohamed Azmi SCJ: The crucial issue of jurisdiction in this appeal arises on an application by the appellant to set aside an ex parte interlocutory injunction granted to his wife ('the respondent') on 13 February 1989 and on another application by him to strike out her statement of claim under O 18 r 19 Rules of the High Court 1980 ('RHC'). It is not in dispute that after applying for dissolution of her marriage in the Kuala Lumpur Syariah Court under the Islamic Family Law (Federal Territory) Act 1984, and whilst waiting for a date of hearing to be fixed, the respondent ('Faridah') has taken another course of action by filing a writ action in the Kuala Lumpur High Court against the appellant ('Habibullah') in which she is claiming for damages and injunction for acts of assault and battery allegedly committed by Habibullah against her. It is the argument of counsel for Habibullah, both here and in the court below that the High Court has no jurisdiction to hear Faridah's claim, nor issue the interlocutory injunction because both parties to the proceedings are Muslims, and the proceedings relate to Islamic family law, and as such only the Syariah Court has jurisdiction to hear the claim by virtue of the new cl (1A) of art 121 of the Federal Constitution. Alternatively, it is also contended that Faridah's claim against her husband in tort is prohibited by s 9(2) of the Married Women Ordinance 1957.

In both applications to strike out and to set aside the ex parte injunction, the legal argument was heard jointly by the learned judge as preliminary points of law by way of objection to the jurisdiction of the High Court. The two issues are as follows:

(1) whether the High Court has jurisdiction to adjudicate on Faridah's action since it involves a matter which falls exclusively within the jurisdiction of the Syariah Court; and

(2) whether Faridah can institute the present action against Habibullah when s 9(2) of the Married Women Ordinance 1957 prohibits a wife from suing her husband in tort.

The learned judge dismissed the objection and ordered the senior assistant registrar to fix a date for the hearing of both applications on the merits. [See [1990] 1 MLJ 174.] The sealed order of the High Court dated 14 October 1989 reads:

> It is hereby ordered that this honourable court has jurisdiction to deal with the plaintiff's action, and it is further ordered that s 9(2) of the Married Women Ordinance 1957 is not applicable and it is lastly ordered that leave to appeal is granted.

Dealing with the constitutional argument first, the amended cl (1) of art 121 provides that there shall be two High Courts of co-ordinate jurisdiction and status, namely the High Court in Malaya and the High Court in

Borneo. This is followed by a new cl (1A) which was inserted by s 8(c) of the Constitution (Amendment) Act 1988 with effect from 10 June 1988 in the following terms: 'The courts referred to in Clause (1) *shall have no jurisdiction* in respect of any matter within the jurisdiction of the Syariah Courts'. (Emphasis added.)

The learned judge construed art 121 cl (1A) as a provision which excludes the jurisdiction of the High Court of any matter falling within the jurisdiction of the Syariah Court. At p 4 of his judgment he states:

> In considering the constitutional issue, it is necessary to examine whether the action of the plaintiff falls within the jurisdiction of the Syariah Court. If it does then by virtue of s 8(c) of the Constitution (Amendment) Act 1988, this court 'shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Court'. In this connection it is important to identify the cause of action of the plaintiff from the statement of claim.

Thus, the learned judge construed cl (1A) correctly and he certainly appreciated the importance of identifying Faridah's cause of action in the statement of claim. If it falls within the jurisdiction of the Syariah Court, then that court has exclusive jurisdiction.

It should be noted that in civil matters, apart from general jurisdiction under s 23 of the Courts of Judicature Act 1964, a judge sitting in the High Court, can exercise a variety of specific jurisdiction under s 24. Depending on the nature of the case before him, the judge may for instance be sitting as a bankruptcy judge, a probate judge, or a family court judge exercising jurisdiction in divorce and matrimonial cases, guardianship of infants and so on.

In *Beard v Beard*,[5] although the English Court of Appeal was dealing with the doctrine of condonation — in relation to fresh matrimonial wrong or misconduct, Scott LJ at p 11 discussed the meaning of the term 'matrimonial offence', thus:

> It is said by the one side that 'matrimonial offence' means only such a breach of matrimonial duty as will entitle and, perhaps, require the divorce court to grant a decree to the aggrieved spouse, and that no degree of matrimonial breach of duty, short of what calls for such a decree, can constitute a 'matrimonial offence' within the meaning of the decisions. Their argument is based on the contention that the word 'offence' correctly construed carries their meaning. The other side reply that the word 'offence' has no statutory force, and is merely a word used compendiously in the cases to cover any matrimonial wrongdoing, whether any decree could or could not be based on the particular wrongdoing in fact established. The dispute has thus seemed to turn on a problem of interpreting a judicial phrase. I think the broader viewpoint is the sounder and that it would be fallacious to limit the argument of principle by any such verbal and restrictive interpretation of a convenient judicial phrase.

From the statement of claim and ex parte summons for interlocutory injunction, the present dispute is clearly between a Muslim married couple where the wife's petition for dissolution of marriage is still pending in the Syariah Court. The subsequent claim in the High Court for damages and injunction are based on alleged acts of assault and battery by the husband arising from or connected with the petition for dissolution of marriage in

A the Syariah Court. It is pertinent to refer to the basis of Faridah's claim for damages and injunction under para 4 which alleges: '*During the course of marriage* between the plaintiff and the defendant, the defendant had battered the plaintiff on numerous occasions.' (Emphasis added.)

Thus, the root of her complaint relates to the conduct of Habibullah as a husband during the course of a Muslim marriage. It is not really a civil or criminal matter simpliciter as suggested by the trial judge. In fact and in law, the alleged assault and battery constitute matrimonial offence or misconduct by Habibullah which may entitled Faridah to a dissolution of her marriage under Muslim law as enacted in the Islamic Family Law (Federal Territory) Act 1984. Under s 52(1)(h)(i) of the Act, a woman married in accordance with Hukum Syara' shall be entitled to obtain an order for the dissolution of marriage or fasakh if the husband treats her with cruelty, that is to say, inter alia, habitually assaults her or makes her life miserable by cruelty of conduct. Since the complaint relates to marriage, the matter should, if at all, be dealt with by the court in its matrimonial and not in its general civil jurisdiction.

In support of her application in the High Court for interlocutory injunction, Faridah admitted in para 8 of her affidavit dated 11 February 1989, that her application was made after she had filed divorce papers in the Syariah Court and was then waiting for a hearing date. Once the parties have submitted themselves to the jurisdiction of the Syariah Court, and once the Syariah Court has taken cognizance of the matrimonial cause on the ground of the husband's misconduct, it would in my view be an abuse of process under para (d) of O 18 r 19 of the RHC for Faridah to go to the High Court and complain over the same misconduct. Lord Diplock in *Hunter v Chief Constable of the West Midlands Police & Ors*[6] at p 536 had this to say:

> My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.

Applying the above principle, it is difficult to imagine how the administration of justice can be served if the parties are allowed to abuse the process of the court by hopping from one jurisdiction to another over the same subject matter. There is no suggestion by anyone both here and in the court below that the High Court has the jurisdiction to alter the matrimonial status of Faridah either by divorce or dissolution of her Muslim marriage under s 24 of the Courts of Judicature Act 1964. If not for anything else, the application under O 18 r 19 ought to have been allowed forthwith on the ground of prejudice and unfairness to Habibullah in the proceedings pending against him in the Syariah Court.

In England, the jurisdiction of and the law applied by the Probate, Divorce and Admiralty Division, sitting in divorce is purely statutory, but by the combined effect of s 6 of the Matrimonial Causes Act 1857, the Judicature Acts and s 21 of the Supreme Court of Judicature (Consolidation) Act 1925, the whole of the matrimonial jurisdiction of the ecclesiastical courts is now vested in it (see judgment of Scott LJ in *Beard v Beard*[5] at p 12). In this country, as far as Islamic family law is concerned, the reverse appears to be taking place though not of similar historical events.

In *Ramah bte Ta'at v Laton bte Malim Sutan*[7], the main issue before the Supreme Court was whether the principle of Islamic Law on what is now known as 'harta sepencarian' had application in the case. Thorne J delivering the majority judgment held that Islamic Law is not a foreign law but a local law, and in the course of his judgment, he addressed his opinion to the then colonial government in these words:

> It is perhaps not out of place for me to remark that the time has now arrived when the attention of the executive might well be drawn to the existing state of the law as affecting Mohamedans in the Federated Malay States. Mohemedan Law is varied in the different states in the Federation, and in some instances in different districts of the same state, by local customs having the force of law, and it would not be practicable therefore to pass a Federal Enactment dealing with all the States of the Federation.
>
> It seems to me, however, that State Enactments might well be passed dealing with the questions of the rights of parties upon divorce, and upon succession to the estate of deceased intestates, which more commonly arise, and giving power to the courts to take evidence in more involved cases not covered by the provisions of the enactment as to the law of the matter in debate. Although I have held that the Supreme Court has jurisdiction to deal with such cases as the present, the further question emerges as to whether or not the Supreme Court is the proper tribunal for dealing with these cases, and whether it would not be more consonant with the views of those professing the Mohamedan religion that His Highness the Sultan in Council in each State should establish special courts for dealing with these cases with an appeal to His Highness the Sultan in Council in each case; of course the jurisdiction of the Supreme Court and of the Court of Appeal would properly be excluded by such enactment.

The proposed exclusion of the jurisdiction of the civil courts in Islamic family law as envisaged by the Supreme Court in 1927, is now a reality with the coming into force of cl (1A) of art 121 of the Federal Constitution with effect from 10 June 1988. It would have been a source of satisfaction to Thorne J and Acton J, to know that in 1952 the first modern Enactment on Administration of Muslim Law was enacted by the Selangor State Legislature. Other states in the former FMS and Unfederated Malay States followed suit.

On Merdeka Day, the Federal Constitution in art 3(1) declared that 'Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.' The very fact that people professing religion other than Islam are constitutionally guaranteed the right to practise their faith in peace and harmony, must necessarily mean that Muslims are also similarly guaranteed the right to practise Islam in the like manner. Being the religion of the Federation, Islam has a special position in Malaysia. The Ruler of a State of the Federation is the head of

A the religion of Islam in his state and the Yang di-Pertuan Agong is head of the religion of Islam in the Federal Territories of Kuala Lumpur and Labuan in addition of being so in his own state and in the states of Malacca, Penang, Sabah and Sarawak. Article 74(2) read with the Second List of the Ninth Sch, confers the power to make law on the state legislatures, and on Parliament in respect of the Federal Territories of Kuala Lumpur and B Labuan on the subject of 'Islamic Law and personal and family law of persons professing the religion of Islam ...'. This includes, inter alia, the Islamic Law relating to betrothal, marriage, divorce, dowry and maintenance, the constitution, organization and procedure of Syariah Courts which shall have jurisdiction only over persons performing the religion of C Islam. Thus, under para 4(e), ie the Federal Legislature List of the Ninth Sch, the power of Parliament to make law on civil and criminal law and procedure and the administration of justice including, inter alia, actionable wrongs, marriage and divorce; married women's property and status, do not include Islamic personal law relating to marriage, divorce, family law, etc.

D With effect from 10 June 1988, the new exclusion cl (1A) was introduced by the Constitution (Amendment) Act 1988 which expressly excludes the jurisdiction of the High Court in Malaya and the High Court in Borneo in respect of any matter within the jurisdiction of the Syariah Court. By such exclusion, the intention of the new cl (1A) is clearly to confer exclusive E jurisdiction to the Syariah Courts to adjudicate on any matter which has been lawfully vested by law within the jurisdiction of the Syariah Court. In short, any jurisdiction lawfully vested in the Syariah Court is now exclusively within the jurisdiction of that court. Whether the vesting of such jurisdiction is valid is of course another matter which can be challenged under art 4(3). As far as this appeal is concerned, the validity of the F Administration of Islamic Law Enactment 1952 and the Islamic Family Law (Federal Territory) Act 1984 has not been challenged. Section 4 of the 1984 Act applies to all Muslims living in the Federal Territory and as well to all Muslims residing in the Federal Territory who are living outside the Federal Territory. The Act makes provisions on Islamic Law in respect of G marriage, divorce, maintenance, guardianship and other matters connected with family life. The jurisdiction of the Syariah Court in Kuala Lumpur to deal with these matters is conferred by s 45(3)(b) of the Administration of Muslim Law Enactment 1952 (State of Selangor Enactment No 3 of 1952) which has been in force in Kuala Lumpur even before the creation of the Federal Territory. Although the 1952 Enactment has ceased to apply in the H State of Selangor by the Administration of Islamic Law Enactment 1989 (which came into effect on 1 September 1991), the 1952 Selangor Enactment continues to be in force in Kuala Lumpur as modified by the Federal Territory (Modification of Administration of Muslim Law Enactment) Orders 1974 and 1981, vide PU(A) 44/1974 and PU(A) 390/1981.

I Since s 45(3)(b) Administration of Muslim Law Enactment 1952 confers jurisdiction on the Kuala Lumpur Syariah Court to hear and determine all actions and proceedings which relate to marriage or divorce in which all the parties profess the Muslim religion, the High Court's specific jurisdiction under s 24 Courts of Judicature Act 1964 on the subject matter of

divorce and matrimonial causes and matters relating thereto are excluded by virtue of art 121(1A). The principle of interpretation of statutes demands that a general provision cannot override a specific one, and as such the High Court cannot invoke its general civil jurisdiction under s 23 to revive a specific jurisdiction under s 24 which has been excluded by the Constitution. The cause of action pleaded in Faridah's statement of claim is so intertwined with and ancillary to the main petition for a dissolution of the Muslim marriage in the Syariah Court that the High Court must clearly be held to have no jurisdiction in the matter. Any rivalry between the two jurisdictions must now be solved in terms of art 121(1A).

At p 8 of his judgment, the learned judge stated that he had no hesitation, on the authority of *Ali Mat v Jamaliah*,[2] in holding that the High Court had jurisdiction to entertain the action of Faridah. But that authority was decided before the new cl (1A) was enacted and it should have been distinguished on that ground. The learned judge also erred in law and in fact in his conclusion that the Administration of Muslim Law Enactment 1952 as in force in the Federal Territory of Kuala Lumpur, and the Islamic Family Law (Federal Territory) Act 1984, do not confer adequate power to the Syariah Court for the protection of battered wives, and as such Faridah's predicament seems to have generated so much sympathy that the injunctive remedy would appear to have been granted as if on the basis of the doctrine of necessity, notwithstanding the provision of art 121(1A). Whilst there is room for concern for the long delay in fixing the date of hearing, due apparently to uncertainty on the part of the Syariah judges whether the petition should be filed in Selangor or in the Federal Territory, the fear of the learned judge that the Syariah Court is powerless to protect battered wives is unfounded. The alleged ill-treatment or act of cruelty by Habibullah, is amply covered by s 127 of both the Selangor Islamic Family Law Enactment 1984 and the Islamic Family Law (Federal Territory) Act 1984 which provides:

> Any person who ill-treats his wife or cheats his wife of her property commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or with both such fine and imprisonment.

As regards injunctive remedy against molestation of a wife pending divorce proceedings, the 1984 Act provides the necessary power to the Syariah Court to make restraining orders. Section 107(1) provides:

> The court shall have power during the pendency of any matrimonial proceedings or on or after the grant of an order of divorce, fasakh or annulment, to order any person to refrain from forcing his or her society on his or her spouse or from spouse, and from other acts of molestation.

On the facts of this case, it is reasonable to conclude that Faridah's application for dissolution of marriage in the Syariah Court must necessarily fall squarely under s 52(1)(h)(i) of the 1984 Act, viz, dissolution of her marriage on the ground that her husband, Habibullah treats her with cruelty, that is to say, habitually assaults her or makes her life miserable by cruelty of conduct.

On the constitutional issue, Mr Balwant Singh Sidhu for Faridah has raised before us an interesting argument that art 121(1A) is ineffective because the Constitution (Amendment) Act 1988 has failed to make the new provision retrospective from a date prior to 16 March 1964, ie prior to the effective date of the Courts of Judicature Act 1964. Section 4 provides:

> In the event of inconsistency or conflict between this Act and any other written law *other than the Constitution* in force at the commencement of this Act, the provision of this Act shall prevail. (Emphasis added.)

It is contended that since the new art 121(1A) is inconsistent or in conflict with the provisions of the Courts of Judicature Act by taking away the jurisdiction of the High Court conferred by ss 23 and 24 in respect of any matter within the jurisdiction of the Syariah Courts, the provision of the Act would prevail over the constitutional amendment unless the Constitution Amendment Act is made retrospective. Clause (1A) came into force only on 10 June 1988 and as such it is argued that the jurisdiction of the High Court under ss 23 and 24 shall continue to prevail over or at least to be concurrent with the jurisdiction of the Syariah Court.

The learned judge did not expressly state any particular opinion on how s 4 of the 1964 Act should be construed. But Mr Balwant Singh Sindhu contends that the conclusion of the learned judge on jurisdiction is correct in law on the authority of *Shahamin Faizul Kung Abdullah v Asma Hj Junus*.[3] There, the High Court held that s 4 of the Courts of Judicature Act 1964 is a provision 'affecting the Constitution' as envisaged by the Federal Court in *Phang Chin Hock v PP*[4] at p 72. After recognizing that the intention of art 121(1A) is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah Courts, the judge in the *Shahamin* case[3] concluded that the new cl (1A) had however failed in its objective for failure to make it retrospective and thereby was caught by s 4 of the 1964 Act. The relevant part of the judgment in the *Shahamin* case[3] is as follows:

> I have not overlooked art 4(1) of the Federal Constitution which provides:
>
> > This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.
>
> It is true that the Constitution is the supreme law of the land. But 'law' in art 4(1), with reference to Acts of Parliament, means federal law consisting of ordinary laws enacted in the ordinary way and not Acts affecting the Constitution. Only the former must be consistent with the Constitution. As Suffian LP said in *Phang Chin Hock v PP* [1980] 1 MLJ 70 at p 72:
>
> > In our judgment, in construing art 4(1) and art 159, the rule of harmonious construction requires us to give effect to both provisions and to hold and we accordingly hold that Acts made by Parliament, complying with the conditions set out in art 159, are valid even if inconsistent with the Constitution, and that a distinction should be drawn between on the one hand Acts affecting the Constitution and on the other hand ordinary laws enacted in the ordinary way. It is federal law of the latter category that is meant by law in art 4(1); only such law must be consistent with the Constitution.

> Section 4 of the Courts of Judicature Act 1964, in my view, is a provision affecting the Constitution because its effect is to render ineffective amendments to the Constitution pertaining to the jurisdiction of the High Courts made after the date of its commencement unless made with retrospective effect.

Similarly, in the instant appeal, the learned judge seemed to hold that because of s 4 of the Courts of Judicature Act 1964, the new cl (1A) is ineffective and therefore s 23 of the Act prevails over the amendment to the Constitution. In the event, the learned judge required expressed provisions in the Administration of Muslim Law Enactment or the Islamic Family Law Enactment to exclude the jurisdiction of the High Court. Thus at p 12 of his judgment he said:

> The jurisdiction of this court to entertain the plaintiff's action is provided under s 23 of the Courts of Judicature Act 1964. Furthermore s 4 of that Act states:
>
> > in the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail.
>
> It follows therefore unless there are specific words in the Selangor Administration of Islamic Law Enactment 1952 or the Selangor Islamic Family Law Enactment of 1984 (these two enactments were relied on by the learned counsel for the defendant to support her contention about the jurisdiction of the Syariah Court) empowering the Syariah Court to deal exclusively with the dispute raised before this court and to grant the reliefs sought by the plaintiff in this action, I am not prepared to accede to the contention of the defendant's counsel.

Before this court, it is never suggested that the Federal Constitution cannot be amended. Nor is it put in argument that art 121(1A) has destroyed the basic structure of the Constitution, or that it has failed to comply with all the conditions precedent and subsequent, regarding manner and form prescribed by the Constitution itself. The general proposition (not raised in this appeal) that an amendment is not valid unless it is consistent with the existing Constitution, has been rejected by the Federal Court in *Phang Chin Hock v PP*.[4] Suffian LP delivering the judgment of the court said at p 72:

> If it is correct that amendments made to the Constitution are valid only if consistent with its existing provisions, then clearly no change whatsoever may be made to the Constitution; in other words, art 159 is superfluous, for the Constitution cannot be changed or altered in any way, as if it has been carved in granite. If our Constitution makers had intended that their successors should not in any way alter their handiwork, it would have been perfectly easy for them to do so provide; but nowhere in the Constitution does it appear that that was their intention, even if they had been so unrealistic as to harbour such intention. On the contrary, apart from art 159, there are many provisions showing that they realized that the Constitution should be a living document intended to be workable between the partners that constitute the Malayan (later Malaysian) polity, a living document that is reviewable from time to time in the light of experience, and, if need be, amended.

Thus, it is not the case for Faridah that the new cl (1A) introduced by s 8(c) Constitution (Amendment) Act 1988 is invalid because of inconsistency with the existing Constitution by virtue of art 4(1). The interplay between art 4(1) and art 159 has been resolved in the *Phang Chin Hock* case[4] by the

application of the rule of harmonious construction. The Federal Court speaking through Suffian LP gave effect to both provisions by holding that:

> ... Acts made by Parliament, complying with the conditions set out in art 159, are valid even if inconsistent with the Constitution, and that a distinction should be drawn between on the one hand Acts affecting the Constitution and on the other hand ordinary laws enacted in the ordinary way. It is federal law of the latter category that is meant by law in art 4(1); only such law must be consistent with the Constitution.

Now, arising from the judgment just quoted, what are 'Acts affecting the Constitution' which the Federal Court was distinguishing from 'ordinary laws enacted in the ordinary way'? In the context of the judgment, on the construction of art 4(1) and art 159, 'Acts affecting the Constitution' mean no more than Acts of Parliament which amend the Constitution through the legislative process under art 159, such as the one under consideration, namely the Constitution (Amendment) Act 1988 which introduces the new art 121(1A). Accordingly, the Courts of Judicature Act 1964 including s 4, does not qualify as an Act or a statutory provision 'affecting the Constitution' because it is an ordinary law or an ordinary statutory provision enacted not under art 159 but enacted in the ordinary way.'

In the circumstances, this court must depart from the judgment of the High Court in the *Shahamin* case[3] relied upon by Mr Balwant Singh Sidhu, as an authority for the proposition that s 4 of the Courts of Judicature Act is a provision 'affecting the Constitution' in the context understood in *Phang Chin Hock v PP*.[4] If indeed, s 4 is intended to affect the Constitution by rendering ineffective amendment to the Constitution properly enacted under art 159, unless made with retrospective effect to a date prior to the date of coming into force of the Courts of Judicature Act 1964, then to that extent, it is clearly ineffective under art 4(1) because federal law enacted in the ordinary way, cannot override the provision of the Constitution as amended from time to time.

Furthermore the provision of s 4 of the Courts of Judicature Act itself, does not support the proposition that it is capable of rendering ineffective for whatever reason the provisions of any Constitution Amendment Act enacted under art 159. The words, 'other than the Constitution' in s 4 are not mere surplusage. Under art 160, the term 'written law' includes the Constitution and the word 'law' and 'federal law' includes 'any Act of Parliament' which amends the Constitution under art 159. The intention of Parliament in s 4 is expressly to exclude the Constitution or any Act of Parliament enacted under art 159 which amends the Constitution. In any event, therefore, s 4 of the 1964 Act is not applicable to the Constitution (Amendment) Act 1988, and it cannot prevail over art 121(1A) of the Constitution. As a result, the learned judge erred in law in holding that the High Court has jurisdiction in Faridah's claim on the ground that cl (1A) is lame and ineffective.

As regards the alternative argument on jurisdiction under the Married Women Ordinance 1957, s 9(2) provides: 'Except for the protection or security of his or her property, no husband or wife shall be entitled to sue the other for a tort.'

In view of the court's conclusion on the constitutional issue under art 121(1A), there is no real necessity to deal with it. But for the sake of completeness, even if the court were to treat the statement of claim as a claim unconnected with marriage and divorce, Faridah's cause of action against Habibullah would still remain in tort for actionable wrong arising from the alleged criminal acts under ss 323 and 324 of the Penal Code. In rejecting the s 9(2) argument, the learned judge in the final paragraph of his judgment had this to say:

> For the above reasons, I hold that s 9(2) of the Married Women Ordinance 1957 does not apply as the plaintiff's action is grounded on criminal offences committed or threatened to be committed against her.

The above reasoning does not appear to be correct. Merely because a cause of action is grounded on criminal offences does not alter a civil claim in tort to a criminal matter. When dealing with Faridah's claim and application for ex parte interlocutory injunction, the learned judge is obviously exercising the civil jurisdiction of the High Court. It is trite law that an offender against the Penal Code may be sued in tort for the wrongful act. In this case, the alleged liability of Habibullah, as pleaded in the statement of claim, is in tort arising from the commission of a matrimonial offence or misconduct and as such, the learned judge also erred in the alternative in holding that Faridah's claim is not in tort and in rejecting the argument under s 9(2). On this issue, the argument put forward by Mr Balwant Singh Sidhu is extremely weak. Learned counsel is forced to admit that Faridah's claim before the learned judge is in tort and that damages and injunction are civil remedies, notwithstanding that the cause of action has arisen from the commission of criminal offences, committed in the course of a subsisting marriage.

The final argument canvassed by Mr Balwant Singh Sidhu, is that Faridah is no longer a Muslim and as such, the Syariah Court has no jurisdiction in the matter at all.

It is true that in para 12 of her statement of claim, Faridah alleges that on 12 April 1989, she had revoked her Muslim faith by means of a statutory declaration before a Commissioner of Oath owing to her belief that 'Islam could not provide enough protection for battered wife'. But it is equally true that there is an uncontradicted documentary evidence in the form of a letter dated 20 May 1989 (exh MH-1) from the Kadi of Petaling Jaya, Selangor to the effect that on 16 May 1989, at his office, Faridah had retracted her renunciation of Islam and renewed her faith in the religion. The particulars of this matter are contained in paras 3 and 6 of Habibullah's supplementary affidavit dated 28 August 1989. For the determination of this question, it is relevant to refer to s 5 of the Islamic Family Law (Federal Territory) Act 1984 which provides:

> If for the purposes of this Act any question arises as to whether a person is a Muslim, that question shall be decided according to the criterion of general reputation, without making any attempt to question the faith, beliefs, conduct, behaviour, character, acts, or omissions of that person.

In *Dalip Kaur v Pegawai Polis Daerah Bukit Mertajam*[1] at p 9, Mohamed Yusoff SCJ, has also expressed the following views:

It is apparent from the observation made by the learned Judicial Commissioner that the determination of the question whether a person was a Muslim or had renounced the faith of Islam before death, transgressed into the realm of syariah law which needs serious considerations and proper interpretation of such law. Without proper authority to support his contention, it is not sufficient to say whether there is or there is not a condition precedent for a person to become a Muslim; or that if the deceased were proved to have had said his prayers at a Sikh temple he was definitely an apostate.

The present question, in my view, cannot be determined by a simple application of facts as has been found by the learned judicial commissioner on the basis of veracity and relevancy of evidence according to civil law. Such a serious issue would, to my mind, need consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence.

On this view it is imperative that the determination of the question in issue requires substantial consideration of the Islamic law by relevant jurists qualified to do so. The only forum qualified to do so is the syariah court.

On the test of general reputation, there is no evidence before the court, apart the statutory declaration sworn before Madam Navamoni (exh RJ-1) to suggest that Faridah has effectively renounced her Islamic faith and thereby committed apostasy. She was lawfully married to Habibullah in 1965 under Islamic law as evidenced by the Marriage Certificate (see p 76 of Appeal Record). There are four children to the marriage, all of whom, like their parents, have Muslim names.

The writ in this case was filed on 14 February 1989 and it is interesting to note that the statutory declaration was made by Faridah on 12 April 1989, ie the very date that her solicitor, Rubiah bte Jaafar affirmed an affidavit exhibiting the statutory declaration. The identical date is startling and gives rise to a strong probability that the declaration was hastily made on inadequate legal advice to forestall any application to set aside the interlocutory injunction. Be that as it may, s 46 of the Islamic Family Law (Federal Territory) Act 1984 provides that the renunciation of Islam by either party to a marriage or his or her conversion to a faith other than Islam shall not by itself operate to dissolve the marriage, unless and until so confirmed by the Syariah Court. Further, under s 130, a spouse who by deception makes himself or herself an apostate in order to annul his or her marriage commits an offence.

This court, as indeed it seems the trial judge, can only conclude that both Faridah and Habibullah are Muslims at all material times. The argument that Mr Balwant Singh Sidhu tried to introduce in this court on apostasy, or that Faridah was not a Muslim at any material time must therefore be rejected.

The appeal is accordingly allowed with costs both here and in the court below. The ruling of the High Court on jurisdiction is reversed, and both the application under O 18 and O 19 of the RHC and the application to set aside the ex parte interlocutory injunction must necessarily succeed, and they are hereby allowed. The deposit in this appeal is refunded.

Gunn Chit Tuan SCJ: One Faridah bte Dato Talib ('the plaintiff') had on 14 February 1989, filed a suit in the High Court at Kuala Lumpur against her husband, one Mohd Habibullah bin Mahmood ('the defendant'). In a statement of claim, the plaintiff averred that she is the wife of the defendant

by way of marriage solemnised on 5 August 1965. She alleged that during the course of marriage, the defendant had battered her on numerous occasions. It was also averred that the plaintiff, through her lawyers Messrs Sheikh Shatar Cheah & Tan, had petitioned for an irrevocable divorce at the Mahkamah Syariah, Kuala Lumpur, but the Syariah Court Judge had on 24 March 1989, dismissed the petition for want of jurisdiction until and unless consent is obtained from the Jabatan Agama Islam, Petaling Jaya. And on 29 March 1989, the plaintiff's solicitors duly applied for the said consent which is still pending. On 12 April 1989, the plaintiff by way of a statutory declaration affirmed that she had renounced her Muslim faith. She therefore claimed damages for acts of assault and battery committed by the defendant against her and also an injunction to restrain the defendant by himself, his servant, agent or otherwise howsoever from assaulting, harassing, molesting or interfering, calling and harassing by telephone calls, etc or in any manner disturb her. The plaintiff had also applied for by summons-in-chambers and on 14 April 1989, obtained a temporary injunction restraining the defendant from assaulting, harassing, molesting or interfering with her, with liberty to the defendant to apply to set it aside.

A notice of motion was filed by the defendant on 28 April 1989, to set aside the order of 14 April 1989, granting the temporary injunction. When the parties appeared before Lim Beng Choon J on 30 August 1989, the High Court was asked to decide two issues, namely:

(i) whether the High Court had jurisdiction to adjudicate on the plaintiff's action since it involved a matter which fell exclusively within the jurisdiction of the Syariah Court; and
(ii) whether the plaintiff could institute the action against the defendant when s 9(2) of the Married Women Ordinance 1957, prohibited the wife from suing her husband in tort.

Lim Beng Choon J held on 14 October 1989, that a perusal of the statement of claim had convinced him that the plaintiff's action is based on an actionable wrong of assault and battery which is both a civil and criminal wrong. Although his Lordship had not overlooked the fact that the plaintiff had instituted divorce proceedings in the Syariah Court, he was however of the view that a divorce action before the Syariah Court could not render her cause of action in the High Court less defective, nor can the said divorce action prevent her from seeking an injunction from the High Court to prevent her personal safety from being violated. His Lordship stated further, relying on *Reddiffusion (Hong Kong) v Attorney General of Hong Kong*,[8] that for purposes of answering the jurisdictional question, the High Court must assume that if the action were allowed to proceed, the plaintiff would be able to establish that the act and conduct of the defendant, as alleged in the statement of claim, would be unlawful and would adversely affect her personal safety.

Lim Beng Choon J also held that the jurisdiction of the High Court to entertain the plaintiff's action is provided under s 23 of the Courts of Judicature Act 1964, as well as s 4 of that Act which states that:

> In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail.

A He concluded that he had no hesitation, on the authority of *Ali Mat v Jamaliah*[2], in holding that the High Court had jurisdiction to entertain the action of the plaintiff.

As regards the second issue, the learned judge held that s 9(2) of the Married Women Ordinance 1957, did not apply as the plaintiff's action was grounded on criminal offences committed or threatened to be committed against her. [See [1990] 1 MLJ 174.]

B

The defendant appealed to the Supreme Court and before us, Encik Mohd Raziff bin Mohd Zahir, the first counsel for the defendant, referred to art 121 (1A) of the Constitution which reads as follows:

C

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

He contended that the learned judge had erred in relying on ss 23 and 24 of the Courts of Judicature Act 1964. Counsel stated that with the amendment of the Constitution, *Ali Mat v Jamaliah*[2] was no longer good law and he then referred to the views of Hashim A Yeop Sani CJ and Mohd Yusoff SCJ (as they then were) in *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor*,[1] both of whom had stated that the new cl (1A) of art 121 of the Constitution, which came into effect on 10 June 1988, had taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the syariah courts.

D

E Counsel then referred to the Islamic Family Law (Federal Territory) Act 1984, and stated that the learned judge had also erred when he relied on *Reddiffusion (Hong Kong) v Attorney General of Hong Kong*,[8] which he contended was irrelevant to the present case. He referred to the following s 107 of the Islamic Family Law (Federal Territory) Act 1984:

F

> (1) The Court shall have power during the pendency of any matrimonial proceedings or on or after the grant of an order of divorce, fasakh, or annulment, to order any person to refrain from forcing his or her society on his or her spouse or former spouse and from other acts of molestation.
> (2) Failure to comply with an order made under this section shall be punishable as a contempt of Court.

G

He pointed out that a court of a Kathi or Kathi Besar in the Federal Territory constituted under the Administration of Muslim Law Enactment 1952, of the State of Selangor has power to grant an injunction against acts of molestation. Reference was also made to the following s 127 of the Islamic Family Law (Federal Territory) Act 1984:

H

> Any person who ill-treats his wife or cheats his wife of her property commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or with both such fine and imprisonment.

I Which, counsel pointed out, punished any person for ill-treatment of his wife. Counsel stated that the Syariah Courts also have criminal jurisdiction and referred to the following s 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965 (Rev 1988):

> The Syariah Courts duly constituted under any law in a State and invested with jurisdiction over persons professing the religion of Islam and in respect of any of

the matters enumerated in List II of the State List of the Ninth Schedule to the Federal Constitution are hereby conferred jurisdiction in respect of offences against precepts of the religion of Islam by persons professing that religion which may be prescribed under any written law:

Provided that such jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof.

Encik Pawancheek bin Marican, the second counsel for the appellant, contended that the intention of Parliament in enacting art 121(1A) was to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah Courts. He also contended that s 4 of the Courts of Judicature Act 1964, cannot affect the application of art 121(1A) of the Constitution as the former is inconsistent with art 121(1A) and is therefore null and void by virtue of art 4(1) of the Constitution, which declares that the Federal Constitution is the supreme law of the Federation. He then referred us to the following passage in the judgment of Suffian FJ (as he then was) in *Assa Singh v Mentri Besar, Johore*[9] [at pp 39–40]:

The first part of cl (1) of art 4 provides that the Constitution shall be the supreme law of the land and one would therefore expect it to follow that any law which is inconsistent with the Constitution is void, at least to the extent of the inconsistency, but the Constitution, as the learned Solicitor-General points out, draws a distinction between:

(a) pre-Merdeka law and
(b) post-Merdeka law

which is inconsistent with the Constitution.

The constitutional treatment of the two categories of inconsistent laws is quite different. Article 4(1) provides that any post-Merdeka law which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void.

Article 162 on the other hand provides that any pre-Merdeka law such as the Enactment shall continue in force on and after Merdeka Day. That is so even if it is inconsistent with the Constitution. It may, however, be repealed by the appropriate legislature. Until so repealed it may be modified without going to Parliament, simply by order of His Majesty within a period of two years beginning with Merdeka Day for the purpose of bringing its provisions into accord with the Constitution. If it has not been modified by His Majesty under art 162 or if it has not been modified otherwise, then under cl (6) any court applying its provision must apply it with the necessary modifications to bring it into accord with the Constitution.

Counsel stated that as the Courts of Judicature Act 1964 is a post-Merdeka law, s 4 therefore is void by virtue of art 4(1) of the Constitution as it is inconsistent with art 121(1A). He contended that the learned judge had no power to hear the proceedings filed by the plaintiff in the High Court which had no jurisdiction to entertain her claim by virtue of the fact that the subject matter of the claim falls within the jurisdiction of the Syariah Courts.

Encik Pawancheek bin Marican then referred to *Shahamin Faizul Kung bin Abdullah v Asma bt Haji Junus*,[3] in which Edgar Joseph Jr J (as he then was) had an opportunity to construe s 4 of the Courts of Judicature Act

1964, in the light of a conflict arising between the jurisdiction of the Penang Syariah Court and that of the Penang High Court in respect of the guardianship of a Muslim infant. His Lordship in that case stated [at p 331] that:

> It is obvious that the draftsman had intended by art 121(1A) to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah Courts. The only question which now arises is whether he had succeeded in that objective. If he has not then the court will not come to his aid ...
>
> In view of its pivotal importance regarding this part of the case, I must now, once again reproduce s 4 of the Courts of Judicature Act 1964 which reads:
>
> > 'In the event of inconsistency or conflict between this Act and any other written law *other than the Constitution in force at the commencement of this Act*, the provisions of this Act shall prevail.' (Emphasis supplied.)
>
> The Courts of Judicature Act 1964, except for s 5, came into force on 16 March 1964. Section 5 came into force on 16 September 1964. But, art 121(1A), as I have already noted, came into force only as recently as 10 June 1988 by virtue of Act A704. In other words,it was not in force at the date of the commencement of the Courts of Judicature Act 1964. Therefore, by virtue of s 4 of the Courts of Judicature Act 1964, ss 23 and 24 thereof would, in my opinion, still prevail to confer jurisdiction on this court to hear the present application. It would have been otherwise if art 121(1A) had been enacted with retrospective effect so as to have been in force at the date of commencement of the Courts of Judicature Act.

For support of the above view, the learned judge cited the following passage in the judgment of Suffian LP (as he then was) in the Federal Court case of *Phang Chin Hock v PP*:[4]

> In our judgment, in construing art 4(1) and art 159, the rule of harmonious construction requires us to give effect to both provisions and to hold and we accordingly hold that Acts made by Parliament, complying with the conditions set out in art 159, are valid even if inconsistent with the Constitution, and that a distinction should be drawn between on the one hand Acts affecting the Constitution and on the other hand ordinary laws enacted in the ordinary way. It is federal law of the latter category that is meant by law in art 4(1); only such law must be consistent with the Constitution.

After referring to the above passage, the learned judge then concluded as follows:

> Section 4 of the Courts of Judicature Act, in my view, is a provision affecting the Constitution because its effect is to render ineffective amendments to the Constitution pertaining to the jurisdiction of the High Courts made after the date of its commencement unless made with retrospective effect.

It was the appellant's contention that his Lordship had erred in coming to the decision that he did in the *Shahamin* case.[3] Counsel submitted that the learned judge had misconstrued the meaning of the words 'Acts affecting the Constitution' used by Suffian LP (as he then was) in *Phang Chin Hock*'s case.[4] He contended that in *Phang Chin Hock*'s case,[4] Suffian LP (as he then was) had used those words to mean Acts of Parliament enacted for the purpose of amending the Constitution. Counsel submitted that that meaning could be easily gauged from the following paragraph preceding the passage quoted by the learned judge:

> If it is correct that amendments made to the Constitution are valid only if consistent with its existing provisions, then clearly no change whatsoever may be made to the Constitution; in other words, art 159 is superflous, for the Constitution cannot be changed or altered in any way, as if it has been carved in granite. If our Constitution makers had intended that their successors should not in any way alter their handiwork, it would have been perfectly easy for them to so provide; but nowhere in the Constitution does it appear that that was their intention, even if they had been so unrealistic as to harbour such intention. On the contrary apart from art 159, there are many provisions showing that they realized that the Constitution should be a living document intended to be workable between the partners that constitute the Malayan (later Malaysian) polity, a living document that is reviewable from time to time in the light of experience and, if need be, amended.

Counsel reiterated that from the above-quoted passage in the judgment of Suffian LP (as he then was), it is obvious that the words 'Acts affecting the Constitution' mean Acts of Parliament enacted for the purpose of amending the Constitution following the procedure laid down in art 159 of the Constitution. He submitted that in essence, there are two kinds of Acts of Parliament, namely:

(i) ordinary Acts of Parliament; and
(ii) Acts of Parliament enacted for the purpose of amending any provision of the Constitution.

Encik Pawancheek further submitted, with respect to Datuk Edgar Joseph Jr J (as he then was), that there is no such thing as 'Acts affecting the Constitution' as the unhappy choice of words by Suffian LP (as he then was) in *Phang Chin Hock*'s case[4] had led the learned judge in *Shahamin*'s case[3] to reach a wrong conclusion as to the import of the words. Counsel added that it is pertinent to note that Suffian LP (as he then was) in *Phang Chin Hock*'s case[4] had drawn a distinction between the Indian Constitution and the Malaysian Constitution with regard to the power of Parliament to enact Acts of Parliament which are inconsistent with the provisions of the Constitution. His Lordship had traced the history of the two Constitutions in order to show that the Malaysian Parliament has power to enact Acts of Parliament for the purpose of amending the Constitution even if such Acts are inconsistent with the subsisting provisions of the Constitution. Counsel said that in *Shahamin*'s case,[3] the learned judge had construed art 121(1A) of the Constitution in the way that ordinary statutes are interpreted by suggesting that art 121(1A) should have been made retrospective in order not to fall foul of s 4 of the Courts of Judicature Act 1964.

It was the final submission of Encik Pawancheek bin Marican that based on his contention above, art 121(1A) should override s 4 of the Courts of Judicature Act 1964, so as to enforce the legislature's intention to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah Courts.

The defendant's third counsel, Cik Kamar Ainiah bte Kamaruzaman, referred to the following s 3 of the Married Women Ordinance 1957, and stated that the application of that Ordinance to Muslims is subject to Islamic law:

A This Act shall have effect in the States of Johore, Kedah, Kelantan, Negeri Sembilan, Pahang, Perak, Perlis, Selangor, Trengganu and the Federal Territory of Kuala Lumpur in relation to Muslim married women and their property, rights and obligations subject to the Islamic law and the customs of the Malays governing the relations between husband and wife so far as the same may be applicable, and in the States of Malacca and Penang subject to the Islamic law
B of the States in all cases to which such last-mentioned Islamic law extends.

Counsel then referred to s 9(2) of that Ordinance, which reads as follows: 'Except for the protection or security of his or her property no husband or wife shall be entitled to sue the other for a tort.'

He stated that the remedies of a married woman for protection and
C security of her separate property do not include the right to sue her husband for a tort.

Mr Balwant Singh Sidhu, counsel for the plaintiff, submitted, without stating any reasons, that the decision of Datuk Edgar Joseph Jr J (as he then was) in the *Shahamin*'s case[3] should apply. He then stated that in considering whether the plaintiff is an apostate, the relevant date is the date when
D the order was made by the High Court because jurisdiction was not exercised before that date. Counsel pointed out that the plaintiff had made the following 'surat akuan' on 12 April 1989:

SURAT AKUAN

E Saya, Hajjah Faridah bte Dato' Talib (No K/P 4608422) yang beralamat di No 73, Lorong Titiwangsa 9, Taman Tasik Titiwangsa, Kuala Lumpur dengan sesungguhnya dan sebenarnya mengaku bahawa:

1 Saya adalah seorang Melayu berugama Islam.
2 Saya telah berkahwin dengan seorang Islam bernama Mohd Habibullah bin Mahmud, keturunan India, sejak 5 Ogos 1965.
F 3 Saya degan fikiran yang waras tanpa sebarang dorongan dan tekanan daripada mana-mana pihak istihar diri saya terkeluar daripada ugama Islam.
4 Saya masih dan ingin mengekalkan nama saya seperti tercatit didalam surat beranak dan kad pengenalan saya.
5 Dan saya membuat surat akuan ini dengan kepercayaan bahawa butir-butir yang diberi adalah benar serta mengikut Undang-Undang Surat Akuan
G 1960.

Diperakukan dan ditandatangani)
oleh Faridah bt Dato Talib)
di Kuala Lumpur, Wilayah) tt
Persekutuan pada 12 April) .....
H 1989 pada pukul 10 pagi)

Dihadapan saya,
tt
.....
Navamoni
Pesuruhjaya Sumpah
I Mahkamah Tinggi
Kuala Lumpur

Mr Balwant Singh Sidhu also referred us to the following letter written on 20 May 1989, by the Pejabat Agama Islam, Petaling Jaya, to the Dato' Pengarah, Jabatan Agama Islam Selangor:

PEJABAT AGAMA ISLAM,
46000 PETALING JAYA
Assalamualaikum wr wb
Ruj Kami : (18) dlm PAI PJ 020/04/89
Tarikh : 14 Syawal 1409
20 Mei 1989

Dato' Pengarah,
Jabatan Agama Islam Selangor,
40676 Shah Alam,
Selangor Darul Ehsan.

Ybh Dato',

Puan Hajjah Faridah binti Dato' Talib

Dengan segala hormatnya dimaklumkan, sehubungan dengan pengakuan penama ini di Mahkamah Tinggi Kuala Lumpur telah keluar dari Islam telah dimaklumkan ke pejabat ini.

2 Dan sehubungan dengan itu lagi pejabat ini telah membuat panggilan hadir pada tarikh 16 Mei 1989 jam 10 pagi. Dengan rasa syukur Puan Hajjah Faridah telah pun hadir mengikut yang diberikan:

(a) Puan Hajah Faridah memperakui yang ia ada membuat pengumuman keluar Islam di Mahkamah Tinggi Kuala Lumpur;
(b) tetapi ia telah memberi pengakuan selepas itu ia telah taubat dan rujuk kepada Islam semula dan ada menunaikan ibadah sembahyang.

Sekian permakluman mengenai perkara ini.

Wassalam.

'Berkhidmat kerana Allah untuk negara.'

Saya yang jujur,
tt
.....

Counsel then referred to the following s 5 of the Islamic Family Law (Federal Territory) Act 1984:

> If for the purposes of this Act any question arises as to whether a person is a Muslim, that question shall be decided according to the criterion of general reputation, without making any attempt to question the faith, beliefs, conduct, behaviour, character, acts, or omissions of that person.

He contended that the criterion for deciding whether a person is a Muslim is provided in that section.

With respect to the submission of Mr Balwant Singh Sidhu regarding whether the plaintiff could be considered an apostate, reference ought to be made to the dictum of Mohamed Yusoff SCJ (as he then was) in the recent decision of this court in *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor*,[1] when it was pointed out that in determining whether a Muslim has renounced Islam, the only forum qualified to answer the question is the Syariah Court. But in deciding the first issue raised in this case, it is not necessary for a civil court to consider that point. And in any event it would appear from the evidence adduced that both parties were Muslims when this case was adjudicated by the High Court.

A As regards the first issue concerning jurisdiction for the determination of the High Court, we could start by looking at art 4(1) of the Constitution, which is as follows:

> The Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of
B the inconsistency, be void.

It will be noticed that the word 'law' is followed by the word 'passed'. The word 'law' must therefore mean Acts passed by Parliament and I would, with respect, agree with the judgment of Suffian LP (as he then was) in *Phang Chin Hock v PP*[4] that Acts made by Parliament complying with
C art 159, which provides for amendment of the Constitution, are valid even if inconsistent with the Constitution. On the other hand, Acts which do not amend the Constitution must be consistent with it.

For an explanation on how the Constitution should be interpreted, I cannot do better than to refer to the following passage in the judgment of Raja Azlan Shah Ag LP (as he then was) in *Dato Menteri Othman bin*
D *Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus*:[7]

> In interpreting a Constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a Constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way — 'with less
E rigidity and more generosity than other Acts' (see *Minister of Home Affairs v Fisher* [1979] 3 All ER 21. A Constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of
F enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those funda-
G mental rights and freedoms.' The principle of interpreting Constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in *Attorney-General of St Christopher, Nevis and Anguilla v Reynolds* [1979] 3 All ER 129 at p 136.
>
> It is in the light of this kind of ambulatory approach that we must construe our Constitution.

H Turning to s 4(1) of the Courts of Judicature Act 1964, I note that the marginal note indicates that it is a '[P]rovision to prevent conflict of laws'. That, in my view, cannot mean a conflict between any written law and the Constitution which is the supreme law as provided in art 4 and which was in force when the Courts of Judicature Act 1964, was enacted. By the use
I of the words 'other than the Constitution', the legislature had in mind art 4 which declared the Constitution as the supreme law. It follows, in my view, that the legislature intended the words 'in force at the commencement of this Act' to refer to the provisions of any other written law which, in the event of inconsistency or conflict between the Courts of Judicature Act and that other written law (other than the Constitution), shall not

prevail over the provisions of the Courts of Judicature Act 1964. Sections 4, 23 and 24 of the Courts of Judicature Act 1964, which prevail over the provisions of any other written law, cannot prevail over art 121(1A) of the Constitution. And it is clear from the provisions of art 121(1A) of the Constitution that Parliament had declared and intended that as from 10 June 1988, the civil courts should have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.

What then are matters within the jurisdiction of the Syariah Courts? Both the learned trial judge and counsel for the parties were aware of and have referred to the following s 45 of the Administration of Muslim Law Enactment 1952 ('the Enactment'), as modified by the Federal Territory (Modification of Administration of Muslim Law Enactment) Order 1974, regarding the local limits and extent of jurisdiction of religious courts:

(1) The Court of the Kathi Besar shall have jurisdiction throughout the Federal Territory and shall be presided over by the Kathi Besar.

(2) Subject as in this Enactment otherwise provided a Court of a Kathi shall have jurisdiction in respect of any civil or criminal matter of the nature hereinafter specified arising within the local limits of jurisdiction prescribed for it under the preceding section, or, if no local limits are so prescribed, within the Federal Territory, and shall be presided over by the Kathi appointed hereto.

(3) The Court of the Kathi Besar shall —

(a) in its criminal jurisdiction, try any offence committed by a Muslim and punishable under this Enactment, and may impose any punishment therefor provided;

(b) in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties profess the Muslim religion and which relate to —

(i) betrothal, marriage, divorce, nullity of marriage, or judicial separation,

(ii) any disposition of, or claim to, property arising out of any of the matters set out in sub-paragraph (i) of this paragraph,

(iii) maintenance of dependants, legitimacy, guardianship or custody of infants,

(iv) division of, or claims to, sapencharian property,

(v) determination of the persons entitled to share in the estate of a deceased person who professed the Muslim religion, or of the shares to which such persons are respectively entitled,

(vi) wills or death-bed gifts of a deceased person who professed the Muslim religion,

(vii) gifts inter vivos, or settlements made without consideration in money or money's worth by a person professing the Muslim religion,

(viii) wakaf or nazr, or

(ix) other matters in respect of which jurisdiction is conferred by any written law:

Provided that it shall not ordinarily try any offence or hear or determine any action or proceeding in respect of which any Court of a Kathi has jurisdiction.

(4) The Court of a Kathi shall —

(a) in its criminal jurisdiction, try any offence committed by a Muslim and punishable under this Enactment for which the maximum punishment

provided by law does not exceed imprisonment for three months or a fine of five hundred dollars or both, and may impose any punishment therefor provided;

(b) in its civil jurisdiction, hear and determine all such actions and proceedings as the Court of the Kathi Besar is authorized to hear and determine, in which the amount or value of the subject-matter does not exceed ten thousand dollars, or is not capable of estimation in terms of money.

(5) No decision of the Court of the Kathi Besar or a Kathi shall affect any right of property of any non-Muslim.

(6) Nothing in this Enactment contained shall affect the jurisdiction of any Civil Court and, in the event of any difference or conflict arising between the decision of a Court of the Kathi Besar or a Kathi and the decision of a Civil Court acting within its jurisdiction, the decision of the Civil Court shall prevail.

It would appear from the above-quoted section that the Court of the Kathi Besar in the Federal Territory has civil jurisdiction to hear and determine all actions and proceedings in which all the parties profess the Muslim religion and in only matters specified in the above s 45(3)(b) of the Enactment but does not at present have civil jurisdiction to hear an action for a tort albeit by a wife against her husband and that therefore such an action could be heard by a civil court in the exercise of its jurisdiction. But that was not the end of the matter in this case because of the second issue.

As regards the second issue, there were no arguments from counsel for both parties as to how the Married Women Ordinance 1957, should be applied to the plaintiff in accordance with s 3 of the Married Women Ordinance 1957. In the absence of any assistance on the Islamic law and the customs of the Malays governing the relations between husband and wife so far as may be applicable to the parties, I can only state for the purposes of this case that the remedies of a Muslim married woman for the protection and security of her separate property are also to be found in s 9(2) of the Married Women Ordinance 1957, as a married woman has been defined in that Ordinance to include 'any woman married in accordance with the rites and ceremonies required by her religion, manners or customs.' If that is correct, then, in my view, the plaintiff could not have instituted the action for a tort against the defendant by virtue of the present s 9(2) of that Ordinance because s 9 of that Ordinance only enables a wife to sue her husband for the protection and security of her property but otherwise forbids actions of tort between them. It follows that the plaintiff could not have instituted this action for damages for acts of assault and battery against the defendant because of that section. On that ground, the learned judge should have struck out the plaintiff's suit and also set aside his order of 14 April 1989, granting the temporary injunction.

For the reasons stated, I would therefore allow this appeal with half costs here and below, dissolve the temporary injunction and also order that the deposit be refunded to the appellant.

Appeal allowed.

Reported by Prof Ahmad Ibrahim