IN THE FEDERAL COURT OF MALAYSIA AT PUTRAJAYA
ORIGINAL JURISDICTION NO.: BKA-2-11/2021(W)

BETWEEN

RAMLI BIN GHANI ... APPLICANT

AND

1. KEMENTERIAN KESIHATAN MALAYSIA
2. KERAJAAN MALAYSIA ... RESPONDENTS

CORAM:

MOHD ZAWAWI BIN SALLEH, FCJ

GROUNDS OF JUDGMENT

The Application

[1] The applicant, a practitioner of Islamic Medicine, by way of Notice of Motion dated 4 November 2021 (enclosure 1), supported by Affidavit In Support (enclosure 2), seeks leave to commence proceedings against the respondents, the Health Ministry and the Federal Government, in the Federal Court in the exercise of its original jurisdiction for the following declaratory reliefs:

"1. Satu kebenaran Mahkamah ini bagi memohon ***deklarasi bahawa Parliamen tiada kuasa untuk membuat Akta Perubatan Tradisional dan Komplimentari 2016 (Akta 775) setakat mana Akta 775 tersebut menyentuh dan mengawal selia hal-hal yang berkaitan:***

a) Pengubatan Islam; dan

b) Perubatan Tradisional Melayu,

oleh kerana ***kedua-duanya adalah di bawah bidang kuasa eksklusif negeri-negeri di bawah Jadual 9, Item 1 (Senarai Negeri) Perlembagaan Persekutuan dan oleh yang demikian, Akta 775 tersebut adalah terbatal dan tidak sah setakat mana Akta 775 itu menyentuh dan mengawal selia hal-hal yang berkaitan dengan pengubatan Islam dan perubatan Tradisional Melayu.***

2. Apa-apa perintah interlokutori atau arahan (direction) yang adil dan suai manfaat termasuk perintah berkaitan apa-apa pindaan atau pembetulan atau tambahan yang perlu kepada apa-apa terma permohonan ini termasuk pindaan atau pembetulan atau tambahan yang perlu kepada ayat, format atau bentuk dalam tindakan ini atau apa-apa perintah atau arahan yang membenarkan sesuatu permohonan dibuat secara lisan bagi memastikan merit kes ini dapat diputuskan secara lancar untuk memenuhi kehendak keadilan.

3. Tiada perintah untuk kos.". (emphasis added).

[2] In essence, the applicant seeks a declaration that Parliament has no power and/or is not competent to enact any provisions that regulates matters relating to Islamic Medicine and Malay Traditional Medicine in the Act 775 ("the Act"). The applicant asserts that both of these matters are within the purview of the exclusive jurisdiction of the State Legislative Assembly under Item 1 of the State List, Ninth Schedule to the Federal Constitution ("FC") and therefore any provisions under the Act on Islamic Medicine and Malay Traditional Medicine are null and void.

[3] At the outset, it must be clarified that "Islamic Medicine" in this application refers to the healing method based on the Quran and Hadith through the recitation of the Quran, seeking of refuge, remembrance and supplication that is used as a means of treating sickness and other problems, by reciting verses of the Quran or by using the prayers in Arabic or in the language the meaning is understood (Ruqyah). It does not refer to the body of medical knowledge and practice which began in the early Islamic period and which is being currently practiced by Muslim physicians in Muslim and non-Muslim countries.

Parties' Competing Submissions
The Applicant's Submission

[4] Strip to the bare bones, the applicant's contentions are as follows:

(i) Islamic Medicine is part of religious worship and Parliament has no power and/or is not competent to enact any provisions

involving Islamic laws as per Act 775. The State Islamic Religious Council and the Sultan as the head of the religion of Islam are the parties that have exclusive power concerning matters on Islamic Medicine;

(ii) the Act has restrained the right of the applicant in practicing his Islamic Medicine which contains the recitations of certain Quranic verses as well as other incantation and invocations according to the Prophetic tradition of the Prophet Muhammad (PBUH), Syariah laws, and common practice of Malay Traditional Medicine;

(iii) the matters relating to Islamic laws and Malay custom are exclusively under the authority, prerogative, and privilege of the Malay Sultans as guaranteed by Article 38(4) of the FC;

(iv) the Act is invalid as it is not within the power of Parliament to enact any provisions that regulate any guidelines for the Islamic Medicine and Malay Traditional practitioner and to regulate the aspects of treatment for Islamic Medicine as they involve Islamic laws;

(v) Islamic Medicine treatment cannot be separated from the usage of verses of the Al-Quran and Al-Hadith;

(vi) the matters relating to Islamic Medicine and Malay Traditional Medicine cannot be regulated by the first respondent, (Kementerian Kesihatan Malaysia ("**KKM**")) as the KKM has no expertise or knowledge in Shariah laws;

(vii) the determination of the correct method of treatment given by Islamic healers is within the exclusive authority of the State Islamic Religious Council and within the competence of the State Assembly; and

(viii) the Act was passed without the consent of the Conference of Rulers under Article 38(4) of the FC; and

(ix) references are made to the cases of **Ah Thian v Government of Malaysia** [1976] 2 MLJ 112 ("Ah Thian"), **Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of The State of Penang & Ors** [2018] 3 MLJ 417 ("Gin Poh Holdings"), and **Mohd Khairul Azam Abdul Aziz v Menteri Pendidikan Malaysia & Anor** [2020] 9 CLJ 309 ("Mohd Khairul Azam") in support of the application to commence proceedings under Articles 4(3) and 4(4) of the FC.

[5] In the course of the argument of this application, learned counsel for the applicant mainly assailed Act 775 based on sections 25 and 26 of the Act on the grounds that these provisions go beyond the legislative competency of Parliament. Section 25 of the Act stipulates that a person who is not a registered practitioner shall not directly or indirectly practise traditional and complementary medicine services and if a person is convicted for the offence, he shall be liable to a fine not exceeding RM30,000 or imprisonment not exceeding two years or both. Meanwhile, section 26 of the Act states that a registered practitioner shall not practise

in a recognised practice area unless he holds a valid and subsisting practising certificate. The content and effect of these two impugned sections will be considered in greater detail in the later part of this judgment.

The Respondents' Submission

[6] In reply, the respondents submitted briefly as follows:

(i) the applicant's application is frivolous and vexatious and that there is no arguable case as it is clear that Parliament has the power and/or is competent to enact matters contained in the Act. Reference is made to **Mamat Bin Daud v Government of Malaysia** [1986] 2 MLJ 192 ("Mamat Bin Daud") and **Abdul Karim B. Abdul Ghani v Legislative Assembly of Sabah** [1988] 1 MLJ 171;

(ii) the argument advanced by the applicant that Parliament has no power and/or is not competent to enact any provisions that relate to Islamic Medicine and Malay Traditional Medicine is misconceived and devoid of merit based on the provisions under Articles 73 and 74 of the FC;

(iii) matters relating to health, medicine, and the medical profession are listed under the Federal List in Item 14, List 1, Ninth Schedule of the FC ("**Item 14 of the Federal List**");

(iv) in pith and substance, the Act falls within the class of subject matter of 'health', 'medicine services', and 'medical

profession'; hence Parliament has the power and/or is competent to enact the Act which falls within Item 14 of the Federal List;

(v) the functions and powers of the Traditional and Complementary Medicine Council ("**Council**") stipulated under section 5 of the Act are to regulate the traditional and complementary medicine services in Malaysia as a whole and they have nothing to do with the Islamic religion and Malay custom; and

(vi) the scope of functions and powers of the Council does not amount to any prohibition and/or control of the propagation of doctrines and beliefs among persons professing the religion of Islam or the determination of matters of Islamic law and Malay custom.

[7] Before I dwell on the matter and in order to put this application in perspective, it is important to note that Malaysia is a federation of states. One of the important features of federalism is a division or distribution of legislative power between Parliament and State Assemblies. Parliament or State Assemblies cannot validly enacted laws with respect to any matters which is not within its competence. Articles 74, 77 and the Ninth Schedule of the Federal Constitution ("FC") contain five legislative lists – Federal List, State List, Concurrent List, Supplementary State List for Sabah and Sarawak and Supplementary Concurrent List for Sabah and Sarawak. Parliament has exclusive law – making power in relation to 28

topics in the Federal List and Concurrent List. State Assemblies have exclusive powers in relation to 13 items in the State List. Sabah and Sarawak have special jurisdiction in relation to 6 items in the Supplementary State List and 9 items in the Supplementary Concurrent List.

[8] The State Assemblies are not subordinate to the Parliament, as they are fully independent in the areas of jurisdiction that are assigned exclusively to them. "The one is not subordinate to the other in its own field; the authority of one is co-ordinates with of other". (See: Dicey, A.V., The Law of the Constitution, 151, 155 (1994)).

Legislative History Of The Act

[9] Initially, the Traditional and Complementary Medicine Act 2013 [*Act 756*] was tabled and passed in both Houses of Parliament in 2012. Act 756 has been gazetted on 8 February 2013 but has never been enforced. Later, a gazette notification was released through G.N. 5450/2016 dated 10 March 2016 titled "Notification in the relation to the Traditional and Complementary Medicine Act [*Act 756*]" which is reproduced as follows:

"TRADITIONAL AND COMPLEMENTARY MEDICINE ACT 2016 [THE ACT]

Note: G.N. 5450/2016 dated 10 March 2016 NOTIFICATION IN RELATION TO THE TRADITIONAL AND COMPLEMENTARY MEDICINE ACT 2013 [ACT 756]

> *This is to notify that the* ***Traditional and Complementary Medicine Act 2013 [Act 756] has no force of law for not fulfilling the requirement of Clause (3) Article 66 of the Federal Constitution. See the Traditional and Complementary Medicine Act 2016 [The Act].****". (emphasis added).*

[10] G.N. 5460/2016 declares that Act 756 has no force of law as not satisfying the requirement of Article 66(3) of the FC and the Act was changed to Act 775. Later, Act 775 comes into force and received the Royal Assent on 2 March 2016. Act 775 was gazetted on 10 March 2016.

[11] The object of the Act as stated in its long title is as follows:

> *"An Act to* ***provide for the establishment of the Traditional and Complementary Medicine Council to regulate the traditional and complementary medicine services in Malaysia*** *and to provide for matters connected therewith.". (emphasis added).*

[12] The Parliament's intention in enacting Act 756 (later changed to Act 775) can be gleaned from the Health Minister's speech during the second and third readings of the Bill in Dewan Rakyat on 24 September 2012 and the Deputy Health Minister's speech during the second and third readings of the Bill at Dewan Negara on 3 December 2012.

[13] The relevant excerpts of the Health Minister's speech at the Dewan Rakyat are as follows:

> *"[24 September 2012]*
>
> *Tuan Yang di-Pertua, saya mohon mencadangkan iaitu bahawa Rang undang-undang Perubatan Tradisional dan Komplementari 2012 diwujudkan* ***bertujuan untuk mengawal selia amalan perubatan tradisional dan komplementari, mendaftar pengamal perubatan tradisional dan komplementari dan mengadakan peruntukan bagi penubuhan Majlis Perubatan Tradisional dan Komplementari****.*
>
> *...*
>
> *Di Malaysia permintaan terhadap perubatan tradisional dan komplementari semakin meningkat dan berkembang dengan pesat. Pada masa yang sama* ***pihak kementerian telah menerima banyak aduan dari semasa ke semasa berhubung dengan perubatan tradisional dan komplementari ini****. Selain daripada itu, negara juga sering digemparkan dengan pelbagai berita dan peristiwa di dalam akhbar berhubung dengan kes-kes yang melibatkan para pengamal perubatan tradisional dan komplementari ini.*
>
> *Pada tahun 2001, kementerian telah mengambil langkah* ***melancarkan dasar kebangsaan dalam bidang perubatan tradisional dan komplementari*** *yang menyatakan bahawa* ***perubatan tradisional dan***

komplementari ini akan wujud bersama dengan perubatan moden *dan akan* ***disepadukan ke dalam sistem penjagaan kesihatan kebangsaan*** *bagi* ***meningkatkan kesejahteraan dan tahap kesihatan rakyat****. Justeru itu, satu akta amat perlu dikuatkuasakan untuk* ***memastikan bahawa perubatan tradisional dan komplementari di Malaysia adalah selamat dan berkualiti untuk memastikan kesejahteraan rakyat.*** *(emphasis added).*

[14] During the debate session on the Amendment in Committee on 25 September 2012, it was further discussed on the inclusion of Islamic Medicine/Practice in the Bill. The Health Minister in his speech addressed the concerns related to Islamic Medicine/Practice as follows:

"Tuan Yang di-Pertua, saya juga hendak menjelaskan di sini bahawa berhubung dengan pengubatan Islam yang banyak di bincang dalam Dewan ini. ***Saya hendak jelaskan di sini bahawa memang kita sudah ada badan pengamalnya. Kita juga akan pastikan bahawa garis panduan perubatan Islam yang telah pun digariskan dapat dikemaskinikan dari semasa ke semasa*** *dan dapat kita* ***memantau dari segi pelaksanaannya****. Memang tadi dua hari ini saya sudah dengar banyak bagaimana ada penyelewengan, bagaimana kita hendak mengelak dari segi salah gunanya dan kita harap melalui pemantauan ini kita dapat memastikan kesejahteraan dan keselamatan pesakit-pesakit dijaga dengan baik.*

...

Tuan Yang di-Pertua, berhubung dengan pentauliahan dan piawaian pengubatan Islam yang ditanya oleh Yang Berhormat Kota Raja, ***syarat pendaftaran bergantung kepada jenis amalan yang dijalankan dan pentauliahan daripada guru yang diiktiraf. Amalan pengubatan Islam telah dibukukan melalui garis panduan yang telah disebutkan tadi dan kita adakan kerjasama yang rapat dengan JAKIM dan Jabatan Agama Islam Negeri di peringkat negeri dan pengamal pengubatan Islam****. Garis panduan ini merangkumi amalan yang boleh dijalankan oleh pengamal perubatan Islam di mana apa yang disebutkan oleh Yang Berhormat Pasir Mas tadi ada yang bedah batin itu, ia bukan di bawah amalan pengubatan Islam. I think itu adalah tidak boleh dilaksanakan.*

Tapisan unsur-unsur syirik dalam pengubatan Melayu dan Islam, ***Kementerian kesihatan maklum akan perkara ini dan Kementerian Kesihatan akan merujukkan perkara ini kepada pihak JAKIM dan badan pengamal Islam yang diiktiraf oleh pihak berkuasa****.". (emphasis added).*

[15] In the Explanatory Statement to the Act 756 Bill 2012 (D.R. 30/12) (later changed to Act 755), it is stated as follows:

"Rang Undang-Undang Perubatan Tradisional dan Komplimentari 2012 ("Akta yang dicadangkan) ***bertujuan*** *untuk* ***mengadakan peruntukan*** *bagi perkara-perkara*

berkaitan dengan ***penubuhan Majlis Perubatan Tradisional dan Komplimentari****, untuk* ***mengawal selia perkhidmatan perubatan tradisional dan komplementari*** *dan untuk mengadakan peruntukan bagi perkara-perkara yang berkaitan dengannya.". (emphasis added).*

[16] From the foregoing, it can be discerned that the intention of the Parliament in enacting the Act, among others, are as follows:

(i) to establish the Council to facilitate the regulation of the traditional and complementary medicine services in Malaysia. The provisions under the Act relate to the administrative purposes in regulating the traditional and complementary medicine practitioners and services, such as the formal registration of the practitioner, disciplinary proceedings and punishments;

(ii) the objective of the Act was to enforce regulatory measures in ensuring the quality, safety and effectiveness of the traditional and complementary medicine practices in Malaysia. The provisions under the Act broadly cover diverse matters ranging from medical malpractice and patient rights to the supervision and punishment of professional misconduct;

(iii) the Act was intended to give recognition to the profession of the registered practitioner in order to accomplish a genuine, full-scare health care profession, and practitioners to become fully qualified professionals in maximising potential in

healthcare delivery, along with other health services provided in the country;

(iv) a "phased approach" is adopted in promoting the integration and institutionalisation of traditional and complementary medicine in the country. The approach also emphasises the appropriateness of developing regulations and health care models for traditional and complementary medicine; and

(v) **the inclusion of Islamic Medicine Practice is merely to regulate, register and enhance the practitioner of the practice area involving Islamic Medicine Practice and not controlling the Islamic law itself.**

Legislative Competence To Enact The Act

[17] The starting point in discussing whether Parliament is competent to enact the Act is Article 74 of the FC. The law-making powers of Parliament and the State Legislatures are provided for respectively in Articles 74(1) and (2). They are as follows:

> *"**Subject matter of federal and State laws***
>
> *74. (1) Without prejudice to any power to make laws conferred on it by any other Article, **Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List** (that is to say, the First or Third List set out in the Ninth Schedule).*

(2) Without prejudice to any power to make laws conferred on it by any other Article, ***the Legislature of a State may make laws with respect to any of the matters enumerated in the State List*** *(that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.*

(3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.

(4) ***Where general as well as specific expressions are used in describing any of the matters enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter****.". (emphasis added).*

[18] There are three important observations that can be made from Article 74(1) of the FC. Firstly, Article 74(1) of the FC highlights the fundamental principle relating to the power of Parliament to make law in respect of particular matters enumerated in the Federal List or the Concurrent List. Secondly, the words "with respect to" in Article 74(1) must be interpreted with extensive amplitude. And thirdly, the function of the entries in the Legislative Lists in the Ninth Schedule as stated in Article 74(1) is not to confer powers of legislation, but merely to demarcate the fields in which legislative bodies operate.

[19] In this regard, Azahar Mohamed CJ (Malaya) in the majority judgment of the Federal Court in **Letitia Bosman v Public Prosecutor and other appeals** (No 1) [2020] 5 MLJ 277 ("Letitia Bosman") explained the scheme of the legislative power in the following words:

> *"[49] Evidently, Parliament derives its legislative power from the FC. The power to legislate is a plenary power vested in Parliament. The issue of legislative competency is to be decided by reference to matters falling within Parliament's power to legislate. What is important in the setting of the present appeals is that the* ***constitutional scheme of the FC empowers Parliament, the Legislative branch of the government to make laws with respect to any of the matters enumerated in cl (1) art 74 of the FC and the Federal List as set out in the Ninth Schedule. The constitutional provisions highlight the fundamental principle relating to the power of Parliament to make law in respect of a particular matter pursuant to the FC****. In this regard, Item 4 of the Federal List provides for 'civil and criminal law', including in para (h) 'creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law'.*
>
> *[50] An important point to note is that the* ***words 'with respect to' in art 74 must be interpreted with extensive amplitude. The cardinal rule of interpretation is that the entries in the legislative lists are not to be read in a narrow or restricted sense and that each general word***

***should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. The widest possible construction, according to the ordinary meaning of the words in the entry, must be put upon them**. In construing the words in a constitutional document conferring legislative power **the most liberal construction should be put upon the words so that the same may have effect in widest amplitude**. ...*

*[51] Another equally important point to note is that **the function of the entries in the Legislative Lists in the Ninth Schedule is not to confer powers of legislation, but merely to demarcate the fields in which legislative bodies operate**. ...". (emphasis added).*

[20] Further, the Court of Appeal in **Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals [1997] 3 MLJ 23** at page 37 (cited with approval by the Federal Court in **Gin Poh Holdings** and **Khairul Azam**) made the following pertinent observation in respect of the words "with respect to" in Articles 74(1) and (2) of the FC:

*"It is also well settled that the phrase **'with respect to' appearing in art 74(1) and (2) of the Federal Constitution** — the provision conferring legislative power upon the Federal and State Governments respectively — **is an expression of wide import**. As observed by Latham CJ in Bank of New South Wales v The Commonwealth (1948) 76 CLR 1 at p 186, in relation to the identical phrase appearing*

in s 51 of the Australian Constitution which confers Federal legislative authority:

> ***A power to make laws 'with respect to' a specific subject is as wide a legislative power as can be created**. No form of words has been suggested which would give a wider power. **The power conferred upon a Parliament by such words in an Imperial statute is plenary as wide as that of the Imperial Parliament itself**: R v Burah (1878) 3 App Cas 889; Hodge v R (1883) 9 App Cas 117. But the power is plenary only with respect to the specified subject.". (emphasis added).*

[21] In **Gin Poh Holdings** (supra), the Federal Court summarised the principles applicable to the interpretation of entries in the legislative lists as follows:

> *"[61] In brief, the principles applicable to the interpretation of entries in the legislative lists as established in the cases above may be condensed thus:*
>
> (a) *the entries in the legislative lists do not confer legislative power. Rather, they are broad heads or fields of legislation to demarcate the respective areas in which Parliament and the State Legislature may operate;*
>
> (b) *the entries must be interpreted liberally with the widest amplitude, and not narrowly or restrictively. Each entry*

extends to all ancillary and subsidiary matters which can fairly and reasonably be said to be comprehended in it;

(c) *the rule of widest construction does not permit an entry to be interpreted so as to include matters with no rational connection to it, or to override or render meaningless another entry;*

(d) *in the event of apparent conflict or overlap between entries, the court should attempt to reconcile the entries by adopting a harmonious construction; and*

(e) *in interpreting a particular entry, the court should confine its decision to the concrete question arising from the case, without pronouncing a more exhaustive definition than is necessary.".*

[22] Therefore, it can be concluded that Parliament and the State Legislatures derive their legislative power from Article 74 of the FC. This Article explains and limits the powers and areas in which each legislative body is empowered to make laws. On the other hand, the Legislative Lists in the Ninth Schedule of the FC merely to demarcate the fields in which legislative bodies operate and it is not to confer powers of legislation.

[23] In the present application, Parliament is empowered by the FC to make laws in respect of the "medicine and health" in Item 14 of the Federal List, which in my opinion is a broad head or field of legislation over which

Parliament can operate. The words "medicine" and "health" are not defined in the FC and in the Interpretation and General Clauses Ordinance 1948.

[24] However, the words "medicine and health" are general words of wide amplitude. Applying the principles applicable to the interpretation of the legislative lists that have been discussed earlier, the widest possible construction must be given the words "medicine and health".

[25] In my opinion, Parliament's legislative power to make laws with respect to "medicine and health" includes the power to legislate on ancillary matters that can be fairly and reasonably be included in the entry of "medicine and health". So construed, there could be no doubt that the words "medicine and health" include Islamic Medicine and Malay Traditional Medicine. Islamic Medicine and Malay Traditional Medicine have a rational connection to the subject of "medicine and health". Traditional medicine is also an integral part of medicine and the health system of our nation. It comprises medical aspects of traditional knowledge that developed over generations before the era of modern medicine.

[26] Besides, Article 74(4) of the FC expressly provides that where general, as well as specific expressions, are used in describing any of the matters enumerated in the Lists set out in the Ninth Schedule the

generality of the former shall not be taken to be limited by the latter. MP Jain in Indian Constitutional law (6th Edition, India: LexisNexis Butterworths Wadhwa Nagpur, 2010) at page 574 (cited with approval by the Federal Court in **Gin Poh Holdings** and **Khairul Azam**) explained this point as follows:

> *"The framers of the Constitution wished to take a number of comprehensive categories and describe each of them by a word of broad and general import. For example, in matters like 'Local Government', 'Education', 'Water', 'Agriculture', and 'Land', the respective entry opens with a word of general import, followed by a number of examples or illustrations or words having reference to specific sub-heads or aspects of the subject matter.* ***The effect of the general word, however, is not curtailed, but rather amplified and explained, by what follows thereafter****.". (emphasis added).*

[27] Hence, it is well within the realm of the Legislature's power of Parliament to enact the Act in respect of Islamic Medicine and Malay Traditional Medicine.

The Doctrine Of Pith And Substance

[28] Apart from the legislative power of Parliament that has been discussed above, reference also should be made to the doctrine of pith and substance. This doctrine, in essence, requires the court to ascertain

the true nature and character of the laws and scrutinise it in its entirety, to decide whether it is a lawful exercise of the legislative body in relation to the legislative list entry. This doctrine was accepted and applied by both the majority and dissenting views in the then Supreme Court in **Mamat Bin Daud** in interpreting the FC.

[29] In describing the doctrine, Mohamed Azmi SCJ had these to say at page 123:

> *"In determining whether s 298A, in pith and substance, falls within the class of subject matter of 'religion' or 'public order',* ***it is the substance and not the form or outward appearance of the impugned legislation which must be considered****. The impugned statute may even declare itself as dealing with religion, but if on investigation of the legislation as a whole, it is in fact not so, the court must so declare. Conversely, it is not sufficient for the impugned legislation to declare itself as dealing with public order if, in substance, it seeks to deal directly or indirectly with religion or religious law, doctrine or precept, for no amount of cosmetics used in the legislative make-up can save it from being struck down for pretending to be what it is not.* ***The object, purpose and design of the impugned section must therefore be investigated for the purpose of ascertaining the true character and substance of the legislation and the class of subject matter of legislation to which it really belongs****.". (emphasis added).*

[30] Conceptually, the principle of constitutional interpretation that every entry in each Legislative List must be given its widest significance is inextricably intertwined with the doctrine of pith and substance. This is explained in NS Bindra Interpretation of Statute (10th Ed) at page 1297, 1298 and 1302 as follows:

> *"The function of lists is not to confer power, they merely demarcate the legislative fields, and so must, as far as possible, be given a broad and comprehensive interpretation.*
>
> *...*
>
> *Entries to the legislative lists are not sources of legislative power but are merely topics or fields of legislation and must receive a liberal construction, inspired by a broad and generous spirit and not in narrow and pedantic sense.*
>
> ***The expression 'with respect to' in art 246 brings in the doctrine of 'pith and substance' in the understanding of the exertion of the legislature power, and wherever the question of legislative competence is raised, the test is whether the legislation looked as a whole is substantially 'with respect to' the particular topic of the legislation**. If the legislation has a substantial and not merely a remote connection with the entry, the matter may well be taken to be a legislation on the topic.". (emphasis added).*

[31] The above explanation is further made clear in the judgment of Raus Sharif CJ in **Gin Poh Holdings**. His Lordship observed as follows:

> *"[70]* ***The 'pith and substance' test requires the court to ascertain 'the true nature and character of the legislation and scrutinise it in its entirety, to decide whether it is a lawful exercise of the legislative authority of Parliament in relation to the entry'****. ...*
>
> *[71]* ***The connection between the substance of the legislation and the matter must not be too indirect or remote to fall within the entry in the Legislative List*** *(In re A Reference As To The Validity of Section 5(a) of the Dairy Industry Act; Canadian Federation of Agriculture v A-G for Quebec [1951] AC 179 (PC) at pp 200-201).* ***Incidental effects on matters outside the authorised field do not invalidate the legislation****. Per Lord Atkin in Gallagher v Lynn [1937] 3 All ER 598; [1937] AC 863 at p 870:*
>
> ***If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field****. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field.* ***Nor are you to look only at the object of the legislator****. An Act may have a perfectly lawful object, eg, to promote the health of the inhabitants, but may seek to achieve that object by invalid methods, eg, a direct prohibition of any trade with a*

foreign country. In other words, ***you may certainly consider the clauses of an Act to see whether they are passed 'in respect of' the forbidden subject****. (Emphasis added.)*

[72] However, ***if the encroachment is ostensibly ancillary but in truth beyond the competence of the legislative body, the legislation will be colourable and constitutionally invalid*** *(Gujarat Ambuja Cements Ltd & Anr v Union of India & Anr (2005) 4 SCC 214). The doctrine of colourable legislation was explained by the Indian Supreme Court in KC Gajapati Narayana Deo v The State of Orissa AIR 1953 Ori 185; (1954) SCR 1, quoted by the majority in Mamat bin Daud:*

It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of 'bona fides' or 'mala fides' on the part of the legislature. ***The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law****. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power …*

If the constitution of a state distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative

entries, or if there are limitations on the legislative authority in the shape of fundamental rights, ***questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers.*** *Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression 'colourable legislation' has been applied in certain judicial pronouncements.* ***The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears on proper examination to be a mere pretence or disguise****.". (emphasis added).*

[32] More recently, Azahar Mohamed CJ (Malaya) in the Federal Court's decision of **Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor** [2021] 2 MLJ 323 ("Iki Putra") held as follows:

"[117]In determining whether the impugned provision, in pith and substance, falls within the subject matter of 'Criminal law', ***it is the substance and not the form or outward appearance of the provision that must be considered.*** *On the principle of pith and substance, I consider the analysis by Mohamed Azmi SCJ in Mamat bin Daud (at p 123) to be pertinent and directly to the point. It cannot be*

disputed that in pith and substance, the impugned provision falls within the entry 'Criminal Law' under the Federal List.

[118] Based on all the foregoing reasons, on this constitutional issue, I conclude by saying that even though the impugned provision falls within the precepts of Islam legislative field, the preclusion clause catches it. ***The true character and substance*** *of the impugned provision in reality belongs to the subject matter 'Criminal law'. The term 'criminal law' in Federal List would include within it 'offences against precepts of religion of Islam' as assigned to the State Legislature. Put another way, only Parliament has power to make such laws with respect to the offence of sexual intercourse against the order of nature.". (emphasis added).*

[33] Therefore, the main principle behind the doctrine of pith and substance is this: when a controversy arises about whether a particular legislature is not exceeding its own and encroaching on the other's constitutional power, the doctrine of pith and substance has to be applied to find out the true nature of a legislation and the entry within which it would fall. In this process, it is necessary for the courts to go into and examine the true character of the legislation, its substance, its object, its scope, and effect to find out whether the legislation in question is genuinely referable to the field of legislation allotted to it under the constitutional scheme.

[34] Bearing in mind the above mentioned principles, I now turn to apply the principles in order to determine whether the Act insofar it concerns Islamic Medicine and Malay Traditional Medicine, in pith and substance, fall within the meaning of "medicine and health" in Item 14 of the Federal List.

[35] As has been alluded to earlier in the legislative history of the Act, the intention of the Parliament to enact the Act is mainly for establishing the Council to regulate the traditional and complementary medicine services in Malaysia but not in respect of matters pertaining to the Islamic law and Malay customs. There is no provision in the Act relating to Islamic law and Malay customs. The inclusion of Islamic Medicine Practice is merely to regulate, register, and enhance the practitioner of the practice area involving Islamic medicine and not to control the Islamic law itself.

[36] The Act does not prohibit Islamic medicine or Malay traditional medicine but is merely regulatory in nature. All the provisions in the Act merely regulate the way traditional and complementary medicine services are to be conducted so as not to endanger the health system and essentially for the public good.

[37] Sections 25 and 26 of the Act do not prohibit traditional and complementary medicine services but merely regulate such services. These provisions do not in any way restrained the right of the applicant in

practicing his Islamic Medicine based on the Quran and Hadith, Syariah laws, and common practice of Malay Traditional Medicine.

[38] There is a difference between 'prohibiting' and 'regulating' and this has been explained by the Federal Court in the case of **Weng Lee Granite Quarry Sdn Bhd v Majlis Perbandaran Seberang Perai [2020] 1 MLJ 211** in the following words:

> *"[35]* ***There is a difference between the word 'prohibiting' which interferes with proprietary rights and 'regulating', which does not interfere with proprietary rights but merely ensures that the proprietary rights are exercised in a proper and responsible manner.*** *The right to carry out quarry activities is clearly different from the regulation and supervision of quarry activities.". (emphasis added)*

[39] Based on all the foregoing reasons, it is my opinion that in pith and substance, the true character and nature of the Act is not concerned with the jurisprudence of Islamic law and Malay customs. The Act was introduced primarily to regulate the traditional and complementary medicine services in Malaysia including Islamic Medicine and Malay Traditional Medicine being part of the traditional medicine in Malaysia but not in respect of matters pertaining to the Islamic law and Malay customs. The Act does not touch on precepts of Islam, any rule, conduct, principle, commandment and teaching of Islam prescribed in the Syariah.

Challenge Based On Article 38(4) Of The FC

[40] That, however, it is not the end of the matter learned counsel for the applicant also submitted that Parliament has no competency to enact any provision on Islamic Medicine and Malay Traditional mounted an attack on the validity of the Act based on Article 38(4) of the FC. The Applicant contended that the matters on Islamic law and Malay Custom are under the authority, prerogative, and privilege of the Malay Sultans under Article 38(4) of the FC. Therefore, the Act is null and void as this Act was passed without the consent of the Conference of Rulers under Article 38(4) of the FC.

[41] Article 38(4) of the FC provides as follows:

> *"**Conference of Rulers***
>
> *(1) – (3) ...*
> *(4) No law directly affecting the privileges, position, honours or dignities of the Rulers shall be passed without the consent of the Conference of Rulers.".*

[42] In my opinion, this submission is outside the scope of the application, in which the only declaration sought was that the Parliament has no competency to enact any provision on Islamic Medicine and Malay Traditional Medicine in the Act on the ground that these both matters are

under exclusive jurisdiction of the State Legislative Assembly under Item 1 of the State List.

[43] It must be borne in mind that the application is filed pursuant to Articles 4(3), 4(4), and 128(1)(a) of the FC to invoke the exclusive original jurisdiction of the Federal Court. The scope of the original jurisdiction of the Federal Court does not extend to all constitutional challenges to legislation. It is confined to cases where the validity of a law is challenged on the ground that it deals with a matter with respect to which the relevant legislative body has no power to make law. An impugned law deals with a matter with respect to which the relevant legislative body has no power to make law if:

(i) Parliament made law on a matter not within the Federal List;

(ii) the State Legislature made law on a matter not within the State List;

(iii) Parliament made law on a matter within the State List pursuant to Article 76, but failed to comply with the requirements in the said Article; or

(iv) the State Legislature made law on a matter within the Federal List pursuant to Article 76A (1) but failed to comply with the requirements in the said Article.

[44] Where Parliament or the State Legislature has the legislative competence to enact a law, the constitutional validity of the law still depends on compliance with other provisions of the FC. All other grounds of challenge, including alleged inconsistency with other provisions of the FC, are within the jurisdiction of the High Court and do not fall within the exclusive original jurisdiction of the Federal Court.

[45] This position is well-established (see **Ah Thian** at 113; **Gin Poh Holdings** at [32]; **Petroliam Nasional Bhd (Petronas) v Kerajaan Negeri Sarawak** [2018] 12 MLJ 43 (FC) at [3]-[4]; **Alma Nudo Atenza v Public Prosecutor and another appeal** [2019] 4 MLJ 1 at [55]-[61]; **Mohd Khairul Azam bin Abdul Aziz v Menteri Pendidikan Malaysia & Anor [2020]** 1 MLJ 398 (FC) at [11]-[14], [22], [29]; and more recently in **Iki Putra** at [31] and **SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener)** [2022] 2 MLJ 356 at [11]).

[46] The learned Chief Justice, Tengku Maimun Tuan Mat in delivering the unanimous decision of the Federal Court's nine-member bench in **SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener)** [2022] 2 MLJ 356 at [11] held as follows:

> *"[11] It has been held and explained recently, following a long line of settled case law, that* ***the original jurisdiction of this court is a very narrowly confined one and is limited only to the 'competency' of a legislature to pass***

an impugned law. 'Inconsistency' challenges (as opposed to 'incompetency' challenges) cannot be addressed to the original jurisdiction of the Federal Court. *See specifically: Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor [2021] 2 MLJ 323 ('Iki Putra'), at [29]; and generally: Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors [2018] 3 MLJ 417 ('Gin Poh'); and Ah Thian v Government of Malaysia [1976] 2 MLJ 112.". (emphasis added).*

[47] In **Gin Poh Holdings**, the Federal Court held as follows at [32]:

"[32] To summarise, the following principles can be distilled from the line of authorities above in relation to the scope and operation of arts 4(3), 4(4) and 128(1)(a) of the Federal Constitution:

(i) ***arts 4(3), 4(4) and 128(1)(a) apply only to proceedings where the validity of a legislation is specifically challenged on the ground that it deals with a matter with respect to which the relevant legislative body has no power to make law****;*

(ii) ***an impugned law deals with a matter with respect to which the relevant legislative body has no power to make law if****:*

(a) ***Parliament made law on a matter not within the Federal List****;*

(b) the State Legislature made law on a matter not within the State List;

(c) Parliament made law on a matter within the State List pursuant to art 76, but failed to comply with the requirements in the said Article; or

(d) the State Legislature made law on a matter within the Federal List pursuant to art 76A(1), but failed to comply with the requirements in the said Article;

(iii) ***a challenge to the validity of a legislation on that ground is subject to the following restrictions****:*

(a) it may only be commenced in three types of proceedings (art 4(3)):

(aa) ***proceedings for a declaration that a law is invalid on that ground****;*

(ab) if the law was made by Parliament, proceedings between the Federation and one or more States; and
(ac) if the law was made by a State Legislature, proceedings between the Federation and that State;

(b) ***proceedings of type (iii)(a)(aa) above may only be commenced with the leave of the Federal Court (art 4(4)).*** *Leave is not required for the other two types of proceedings in (iii)(a)(ab) and (ac); and*

(c) ***the Federal Court has exclusive original jurisdiction to determine the matter (art 128(1)(a))****.". (emphasis added).*

[48] In **Petroliam Nasional Bhd (Petronas) v Kerajaan Negeri Sarawak [2018] 10 MLJ 433** at [3]-[4], the Federal Court made the following important observation:

"[3] ***Articles 4(3), 4(4) and 128(1)(a) apply only where the validity of a law is challenged on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws****...*

[4] Clause (3) of art 4 provides that the validity of any law made by Parliament or by a State Legislature may not be questioned on the ground that it makes provision with respect to any matter with respect to which the relevant Legislature has no power to make law, except in three types of proceedings as follows:

(a) **in proceedings for a declaration that the law is invalid on that ground**; or

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

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

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

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

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

[49] The learned Chief Justice, Tengku Maimun Tuan Mat in delivering majority judgment of the Federal Court in **Iki Putra** at paragraph [29] held as follows:

"[29] In this regard, the phrases 'inconsistency challenge' and 'incompetency challenge' are purely convenient nomenclature serving as a means to identify the procedure to mount the different challenges given their nature. As identified earlier, the High Courts have jurisdiction to hear inconsistency challenges while incompetency challenges are reserved for the original jurisdiction of the Federal Court. ***The original jurisdiction of this court is exclusive simply because of the gravity of the allegation that the relevant legislature has no power to make that law****. This is clearly suggested by Suffian LP in Ah Thian at p 113, as follows:*

This jurisdiction is exclusive to the Federal Court, no other court has it. This is to ensure that ***a law may be***

declared invalid on this very serious ground only after full consideration by the highest court in the land.". *(emphasis added)*

[50] A similar situation where some, but not all, grounds of invalidity raised fall within the scope of Articles 4(4) and 128(1)(a) was dealt with by the then Supreme Court in **Nordin bin Salleh v Kerajaan Negeri Kelantan & Anor** [1993] 3 MLJ 344. There, the applicant applied for leave to commence proceedings under Article 4(4) for declarations that section 73 of the Kelantan Council of Religion and Malay Custom Enactment 1966 was invalid on various grounds. The Supreme Court granted leave in respect of the declaration sought that the Kelantan State Legislature had no power to enact the impugned section, which relates to a matter not in the State List but in the Federal List. The Supreme Court refused leave in respect of the declaration sought that the section was inconsistent with Article 10 of the FC. The Supreme Court held as follow (at page 351):

*"**As para (c) of the notice of motion was to seek a declaration that s 73 of the Enactment was void on the grounds that it was inconsistent with the provisions of art 10(1)(a) of the Constitution and not on the grounds that it dealt with a matter with respect to which the Kelantan Legislature had no power to deal with, the High Court has jurisdiction in the matter and the leave of a judge of the Supreme Court was not required.** As for the prayers in paras (a) and (b) of the notice of motion, **I was***

satisfied that the applicant had an arguable case in that the application is not frivolous. *I am of the view that the Enactment is a post-Merdeka legislation, and the intended challenge is on the competency of the Kelantan State Legislature to enact the legislation.* ***The two prayers are not merely grounded on the impugned law being inconsistent with the Constitution, also the validity of the legislation is to be challenged on the grounds that it deals with a matter with respect to which the State Legislature has no power to make law. As such, leave of a judge of the Supreme Court is required under art 4(4) and the applicant should be allowed to canvass his case before the full court on the constitutionality and validity of that section in the said Enactment.*** *I therefore made an order granting leave to the applicant to file proceedings in the Supreme Court for declarations in terms of prayers (a) and (b) of the said notice of motion.", (emphasis added)*

[51] It is clear, therefore, the alleged inconsistency with Article 38(4) of the FC does not directly relate to the question of legislative competence, and hence strictly lies beyond the scope of this application. To put it the other way around, if the Federal Court determines that Parliament has no power to enact the Act in relation to Islamic Medicine and Malay Traditional Medicine, all the provisions in respect of Islamic Medicine and Malay Traditional Medicine will be rendered invalid without the necessity to consider the issue of Article 38(4) of the FC. It is noted that this point was not considered in the parties' submissions.

[52] It is a well-settled principle that, at the leave stage, which is the threshold stage, the Court will not go into substantial issues on merits. All the applicant has to do is to follow the threshold requirement by showing a *prima facie* case and that the application is not vexatious or frivolous. There must be some substance in the grounds supporting the application. It is also important to note that the application for leave is procedural and not substantive and is merely to obtain permission to bring proceedings for a substantive hearing (see: **Iki Putra bin Mubarrak v Kerajaan Negeri Selangor** [2020] 4 MLJ 213 at [32]; **Association of Bank Officers Peninsular Malaysia v Malayan Commercial Banks Association** [1990] 3 MLJ 228 at 229; **Kamaruzaman Khalid v YB Menteri Sumber Manusia** [1997] MLJU 96 at [2]; **Clear Water Sanctuary Golf Management Bhd v Ketua Pengarah Perhubungan Perusahaan & Anor** [2007] 6 MLJ 446 at 457).

[53] I can confidently say that this application fails to satisfy the required threshold. As discussed above, Parliament's legislative power to make laws with respect to "medicine and health" includes the power to legislate on Islamic Medicine and Malay Traditional Medicine. Moreover, based on the doctrine of pith and substance, the Act falls squarely within the class of subject matter of "medicine and health", and thence Parliament has the power to enact all the provisions in the Act as stipulated in Item 14 of the Federal List. Apart from that, the alleged inconsistency with Article 38(4) of the FC does not directly relate to the question of legislative

competence. These circumstances are sufficient to show that the applicant does not have an arguable case.

Conclusion

[54] The above discussion may be briefly summarised as follows:

(a) the primary objective in enacting the Act is to regulate the management and supervision of the traditional and complementary medicine services and practitioners in Malaysia. The Act is not intended to regulate matters pertaining to the law of Islamic religion and Malay customs that touch on precepts of Islam substantively. The Act is enacted as the administrative and regulatory measures for the traditional and complementary medicine services and practitioners in Malaysia which including Islamic Medicine and Malay Custom practitioners;

(b) Parliament's legislative power to make laws with respect to "medicine and health" includes the power to legislate on Islamic Medicine and Malay Traditional Medicine. Islamic Medicine and Malay Traditional Medicine have a rational connection to the subject of "medicine and health". Hence, it is well within the realm of the Legislature's power of Parliament to enact the Act in respect of Islamic Medicine and Malay Traditional Medicine;

(c) based on the doctrine of pith and substance, the Act falls within the class of subject matter of "medicine and health", and

Parliament has the power to enact all the provisions in the Act as stipulated in Item 14 of the Federal List;

(d) the alleged inconsistency with Article 38(4) of the FC does not directly relate to the question of legislative competence, and hence strictly lies beyond the scope of this application; and

(e) the Applicant's application failed to meet the requirements under Article 4(4) of the FC.

[55] For the foregoing reasons, I dismissed the applicant's application with no order as to costs.

SALINAN DIAKUI SAH

Dated: 22 April 2022

Norsaliha

NORSALIHA BINTI MOHD SALLEH
Setiausaha Kepada
YA Datuk Seri Haji Mohd Zawawi Bin Salleh
Hakim Mahkamah Persekutuan Malaysia

Signed
(MOHD ZAWAWI SALLEH)
Federal Court Judge
Malaysia

Case No.: BKA-2-11/2021(W)

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[This judgment is subject to final editorial approved by the Court].