THE JURISDICTIONS AND POWERS OF SHARIAH COURT IN MALAYSIA: AN ANALYSIS

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Abstract

The jurisdictions of Shariah Court, except with regard to Shariah Court in the Federal Territories which only the Parliament has the power to pass law relating to it, are specifically provided in the respective States' Enactments of the Administration of Islamic Law. The power of the States to pass and make laws relating to Administration of Islamic Law, is originally conferred by Article 74 (2) of the Federal Constitution (FC) and further this position has been entrenched in List II under the Ninth Schedule to the Federal Constitution (FC). However, based on the decisions of several case-law in Malaysia it is found that though the jurisdiction of the Shariah Court is clear on and over the said matters as conferred by the statutory provisions, yet there are certain enumerated matters which are still could not be decided freely and independently by the Shariah Court. These matters instead, have fallen into the realm of the Ordinary Civil Courts. It is contended that, this uncertainty would result in 'chaos' on the Shariah Court's jurisdiction and power to freely determine over its own matters. This phenomenon could shroud in uncertainty over and fetter the exclusiveness and entrenched jurisdictions and powers of the Shariah Court itself, which could even, arguably, reach the pinnacle of neglecting the significant of Article 121(1A) of the FC, in which, this provision has specifically ousted the Ordinary Civil Courts from interfering with the jurisdictions of the Shariah Court over certain exclusive matters.

This paper will highlight the issues and will suggest certain measures in order to promote and upgrade the status and due functions of the Shariah Court in Malaysia

Introduction

Islam is the religion of the Federation of Malaysia pursuant to Article 3(1) of the FC. However, based on the constitutional interpretation and case law, Islam only becomes the concern of the respective states, except for Federal Territories, in Malaysia. Only the states, through their state legislative assemblies are responsible to make Islamic laws. This is provided in item I of List II (State List) provides as follows:

Except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic law and personal and family law of persons professing the religion of Islam, including Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions

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(b) in its civil jurisdiction, hear and determine all actions and proceedings in which all parties are Muslim and which relate to-

i) betrothal, marriage, or other matters relating to the relationship between husband and wife;

ii) a disposition of, or claim to, ... the matters set out paragraph I above;

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

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

v) Wills or death-bed gifts (marad-al-maut) of a deceased Muslim;

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

vii) Wakaf or nazr;

viii) Division and inheritance of testate or intestate property;

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

x) Other matters in respect of which jurisdiction is conferred by any written law;

Similarly, the Kedah Syariah Subordinate Court, pursuant to section 10(2)(b) of the Kedah Enactment, possesses the jurisdictions as that of the Syariah High Court. The difference between the Syariah Subordinate Court and the Syariah High Court is that the Syariah Subordinate Court can only hear claims arising from the aforesaid matters involving amount or value which does not exceed RM 50,000.00.

For Penang and the Federal Territories (Kuala Lumpur), the aforesaid jurisdiction is respectively spelt out in section 48(2)(b)(i)-(x) of the Administration of Islamic Religious Affairs Enactment of the State of Penang, 1993 ('Penang Enactment') in respect of the Penang Syariah High Court, and section 46(2)(b)(i)-(x) of the Administration of Islamic Law (Federal Territories) Act 1993 ('FT Act') for the Federal Territories. In respect of their respective Syariah Subordinate Courts' jurisdictions, these are stated in section 49(2)(b) and section 47(2)(b) of their respective Enactment and Act.

Meanwhile their respective provisions on the Syariah Subordinate Courts are provided in section 49(2)(b) of the Penang Enactment, section 47(2)(b) of the FT Act and section 43(2)(b) of the Selangor Enactment.

The Applicable Law to the Syariah Courts

Based on the Administration of Islamic law Enactments of each states in Malaysia it is provided that Islamic Law (hukum syara') is the governing law of the Syariah Courts and if there is no provision in the Enactments on a particular issue, the Syariah Court is duty bound to follow the Islamic Law by reference to, inter alia the Quran, Assunnah and opinions of the mazhabs to settle that dispute. These provisions contained in section 245(1)(2) of the Penang Syariah

Article 121 (1A) of the FC

Since the inclusion of clause 1A of article 121 to the Federal Constitution (‘FC’), the Ordinary Civil Courts - courts other than the Syariah courts, shall have no jurisdiction to try and decide matters which fall within the jurisdiction of the Syariah Courts. The Ordinary Civil Courts shall have no jurisdiction if the parties involved are Muslims and the disputed matters are within the jurisdiction of the Syariah Courts. This new amendment to the FC was made into effect from 10 June, 1988. The rationale of having such an amendment is to allow the Syariah Court to carry out its functions within the jurisdiction conferred by law without any interference from the Ordinary Civil Courts. Previously there were cases found to be within the Syariah Court’s jurisdiction, yet they were dealt with by the Ordinary Civil Court. The effect of this amendment is to avoid in future any conflict between the decisions of the Syariah Court and the Ordinary Civil Court which had occurred previously in a number of cases for example Myriam v Ariff, Commissioners for Religious Affairs Trengganu & Ors v Tengku Mariam, Ainan bin Mahmud v Syed Abu Bakar, Nafisah v Abdul Majid, Roberts v Ummi Kalthom, Boto’ binti Taha v Jaafar bin Muhammad, Re Syed Shaik Alkafe and in Re Alsagoff’s Trust.

1 (1971) 1 MLJ 265. The issue on this case was whether the widow who had married to another man could be given custody of her child from her previous marriage. The court set the decision of the Kathi aside on the ground of section 45(6) of the Selangor Administration of Muslim Law Act 1952 and the jurisdiction granted to the High Court (Ordinary Civil Court) pursuant to the Guardianship of Infants Act 1961.

2 (1969) 1 MLJ 110, where there was issue of wakaf. In the preliminary, the parties had consulted the Mufti to have decision on whether wakaf made by Tengku Chik for the benefit of his family was legal or not. The Mufti had approved such wakaf. However, the learned judge in that case refused to accept such fatwa but follow decision of the Privy Council in Abdul Foto Mohamed Ishak v Rosomoya Dhur Chowdhury (1894)L.R. 221A 76 and Fotirnoh binti Mohamed said审视, sulaiman bohsuwen (1952) A.C. 1.

3 (1939) MLJ 209. Where it involved a child which was birthed four months after marriage. The court held that according to section 112 of the Evidence Enactment, such a child was a legitimate child for the couple, even though it is illegitimate according to Islamic Law.

4 (1969) 2 MLJ 174. Where the plaintiff in this case claimed damages against the defendant for having breached the contract to marry and further alleged that damages must be added as she had been persuaded to have sexual intercourse with the defendant. Consequently, she gave birth. The learned judge in this case held that the High Court (Ordinary Civil Court) had power and jurisdiction to hear and determine the case. This was clearly disregarded the provision of section 119 of the Islamic Law Administration Enactment of Melaka 1959 which provided special statutory provisions for betrothal among Muslims.

5 (1966) 1 MLJ 163. This case involved issue of Harta Sepencarian, which clearly within the jurisdiction of the Syariah Court.

6 (1969) 2 MLJ 98. This case involved issue of Harta Sepencarian.

7 (1923) 2 MC 38. This case involved issue of wakaf. In this case it was held that provision for estate assumed by a sound Muslim man as good and valid according to Islamic law does not necessarily be accepted as charitable in the eye of the English Law. Similarly, the usages of ‘wakaf’ or ‘amal al khaira’ does not necessarily show the general charitable intention. Thus
operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulrnal or similar Islamic religious revenue; mosques or any Islamic public places or worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah Courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of ANY of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom'.

As far as the Federal Government is concerned, its duty towards Islam, in accord with article 3(4) of the FC is limited to prevent other religion from being propagated to people professing the religion of Islam. Secondly, the Yang Dipertuan Agong, vide oath of office, pursuant to the Fourth Schedule, solemnly and truly declares that he shall at all time protect the religion of Islam and to hold the rule of law and order of the country. Only through these provisions that, the FC confers upon the Federal Government, some responsibility, towards defending and protecting the religion of Islam.² The actual authority to pass and make laws pertaining to Islam is the states pursuant, except for Federal Territories, to Article 74 (2) of the FC, which reads:

'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'

However, Article 74(3) qualifies the operation of section 74(2) in that the power to make laws is subject to conditions or restriction imposed by the FC. Further, Article 77 of the FC states that the legislature of a state shall have power to make laws with respect to any matter not enumerated in any of the List set out in the Ninth Schedule, provided that it is not being a matter of which Parliament has power to pass laws. Syariah Court is only entitled to decide matters which are specifically mentioned in item I of List II (State List) of the Ninth Schedule to the FC above. Matters which fall within the Federal List - List 1 in particular item 4 are excluded. The matters that fall within item 4 of List 1 (Federal List) under the Ninth Schedule to the FC are as follows:

(a) the constitution, organization, jurisdiction, remuneration, privileges of the officers of the court (other than Syariah Courts);

(b) Jurisdiction and power of all such courts;
(c) Remuneration and other privileges of the judges and officers presiding over such courts;
(d) Persons entitled to practise before such courts;
(e) Subject to para (ii), the following:
   (i) contract, partnership, agency, other special contract, ... actionable wrongs, property and its transfer and hypothecation, except land, bona vacantia, equity and trusts, ... negotiable instruments, statutory declarations, arbitration, mercantile law, registration of businesses...probate and letter of administration, bankruptcy and insolvency, oaths and affirmations, limitation, reciprocal enforcement of judgments and orders, the law of evidence;
   ii) the matters mentioned in para (i) do not include Islamic personal law relating to marriage, divorce, guardianship, maintenance, adoption, family law, gifts or succession, testate and intestate;
(f) Official secrets; corrupt practices;
(g) Use or exhibition of coats of arms, armorial bearings, flags, emblems, uniforms, orders and decorations other than those of a State;
(h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;
(i) Indemnity in respect of any of the matters in the Federal List or dealt with by federal law;
(j) Admiralty Jurisdiction;
(k) Ascertainment of Islamic law and other personal laws for purposes of federal law; and,
(l) Betting and lotteries.

Thus based on List 1 and List II above, the jurisdiction and power of the Syariah Court are limited, unlike the Ordinary Civil Court.

States' Enactments on the Administration of Islamic Law

List II of the 9th Schedule to the FC, specifically provide to the state (including the Syariah Court) the power over certain matters and in regard to the Syariah Court, its jurisdiction and power are only applicable and enforced over/on Muslims. This provision is repeated and further clarified in the respective states' enactments on the administration of Islamic Law, for example, for the State of Kedah, pursuant to section 9(2)(b) of the Syariah Courts Enactment 1993 ('Kedah Enactment'), the Syariah High Court can only hear and determine all actions in which all parties are Muslims. The relevant provisions relating to civil jurisdiction of the Syariah Court in Kedah are stated below.

Section 9(1) A Syariah High Court shall have jurisdiction throughout the State and shall be presided over by a Syariah Judge.

(2) A Syariah High Court shall -
By this constitutional amendment it is to be understood that matters that fall within the jurisdiction of the Syariah Court as enumerated in the above statutory provisions should exclusively dealt with by the Syariah Court. However, upon scrutiny of some cases, it is found that not all cases that may relate to the above provisions could be determined by the Syariah Court. If this event were to occur, they would then, fall back on the Ordinary Civil Courts.

The Problem

The underlying problem that occur, to the Syariah Court in respect of its right to freely and fully exercising its jurisdiction, though guaranteed by Article 121 (1A) of the FC, is the issue of lacking of certain ‘power’. This ‘power’ is very essential to the judicial machinery, for otherwise, they would not able to enforce any order and decision. This can be illustrated as follows - for example, in case of wakaf, where there is dispute in regard to the existence of wakaf, the party who claims that there was actually a ‘wakaf’, would normally prayed to the court for order of declaration. Further, that would also request for an injunction order in order to restrain the trespassing party from further occupying on the said wakaf land. However, the ‘power’ to grant declaratory order and injunction is only exclusively given to the High Court (ordinary civil court) pursuant to Specific Relief Act 1950 and Rules of High Court 1980. Although, wakaf is expressly within the jurisdiction of the Syariah Court, yet as the prayers requested by the parties are not that within the competence of the Syariah Court, Syariah Court is debarred from determining the case.

The question is, is there any difference between jurisdiction and power? If one were to look back at Article 121 (1A) of the FC, that provision only uses the term ‘jurisdiction’, not ‘power’. Further question would then follow, does the term ‘jurisdiction’ also include ‘power’?. The distinction between ‘jurisdiction’ and ‘power’ was considered in Lee Lee Chenq v Seow Peng Kwang11. The court found that the meaning of the words ‘jurisdiction’ and ‘powers’ as used in the Courts Ordinance 1948 were different. This was because there were different provisions relating to ‘jurisdiction’ and ‘powers’ in that Ordinance. The court explained that ‘jurisdiction’ was the authority of the courts to hear and decide disputes brought before it. ‘Powers’ on the other hand were the courts’ capacity to give effect to its judgment by making or giving the order or the relief prayed. The court stated that although a court was given certain ‘powers’, this did not mean that the court could use the ‘powers’ if it had no ‘jurisdiction’. If a court has ‘jurisdiction’ over a matter, it could not exceed its ‘power’ in that matter because the terms ‘jurisdiction’ and ‘powers’ were distinct.

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provisions made to spend the balance of estates for amal al khaira (good deeds) in Tahrim, Mekah and Madinah according to the discretion of the donor (wasi) was held not valid.10 (1956) MLJ 244. Where it was held that monetary provision as gift to the poor people reciting Al-Quran on the graves of the deceased was not valid. This is because the court are bound to follow section 101 of the Evidence Act 1950 which provides that will and trust deeds shall be interpreted in accordance with the English law.

10 (1956) MLJ 244. 11 (1960) 1 MLJ 1.
To illustrate the above difficulty, the authors would like to highlight cases that raised this problem. The cases are:

1) Majlis Agama Islam Pulau Pinang v Isa Abdul Rahman & Satu Yang Lain;\footnote{12} 
2) G Rethinasamy lwn Mailis Ugama Islam, Pulau Pinang dan Satu Yang Lain;\footnote{13} 
3) Shaik Zolkaffily bin Shaik Natar & Ors v. Religious Council of Penang (Court of Appeal (Ordinary Civil Court));\footnote{14} 
4) Barkath Ali bin Abu Backer v. Anwar Kabir bin Abu Backer & Ors;\footnote{15} 
5) Abdul Shaik bin Md Ibrahim v Hussein bin Ibrahim;\footnote{16} and, 
6) Shaik Zolkaffily bin Shaik Natar & Ors v. Religious Council of Penang (Supreme Court (Ordinary Civil Court));\footnote{17}

1) Majlis Agama Islam Pulau Pinang v Isa Abdul Rahman & Satu Yang Lain;\footnote{18}

This case came to the Supreme Court (Ordinary Civil Court) for determination of an appeal. In this case, the first respondent inherited from the original landowner a piece of land on which a mosque had been built in 1889. The original landowner had donated the land and the mosque as 'wakaf am'. The appellant proposed to demolish the mosque and on its place, they intended to erect a building for commercial purposes. The respondents claimed in the High Court (Ordinary Civil Court) of Penang, inter alia: a declaration that the proposal of the appellant to demolish the mosque was contrary to law and ‘hukum syara’; a declaration that under ‘wakaf am’ the appellant had no right to demolish the said mosque; and an injunction to prevent the appellant or their agents or servants from demolishing the mosque. The appellant had made an application to set aside the respondents’ claim. The Senior Assistant Registrar of the High Court dismissed the appellant’s application. So too was the appeal to the judge. The appellant further appealed to the Supreme Court (Ordinary Civil Court).

The Supreme Court (Ordinary Civil Court) decided that the real order applied for by the respondent was a perpetual injunction. This order, according to the Specific Relief Act 1950, could only be granted by the High Court (ordinary civil court) not the Syariah Court.\footnote{19} Although the relevant Syariah Court has

\footnote{12} (1992) 2 MLJ 244.  
\footnote{13} (1993) 2 MLJ 166.  
\footnote{14} (1997) 3 MLJ 281.  
\footnote{15} (1997) 4 MLJ 389.  
\footnote{16} (1999) 5 MLJ 618.  
\footnote{17} (2003) 3 CLJ 289.  
\footnote{18} (1992) 2 MLJ 244.  
\footnote{19} Section 51(2) of the Specific Relief Act 1950 states: A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

According to the judge (Eusoff Chin SCJ).

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jurisdiction over the subject matter, namely the jurisdiction to construe, interpret and determine will of a Muslim and wakaf, the Syariah Court has no power to grant the order prayed for. Since the Syariah Court does not have the required power, the High Court (Ordinary Civil Court) is the proper forum to hear the application and to finally decide the case.

2) G Rethinasamy Iwn Majlis Ugama Islam, Pulau Pinang dan Satu Yang Lain;

This is a High Court (Ordinary Civil Court)’s case. In this case, the plaintiff (G Rethinasamy) claimed that he was the registered owner of a piece of land, situated at the North East District, Penang (‘the said land’). Based on his claim, the first defendant (Majlis Ugama Islam Pulau Pinang) and the second defendant (the chairman and committee members of the Kelawai Mosque, Penang), through their agents and servants had verbally agreed with the plaintiff that they would transfer the cemetary covering an area of 6,200 square foot and to demolish two temporary buildings, both were situated at and erected on the said land. According to the plaintiff, both defendants had failed to do these. Hence, the plaintiff applied for a declaration that he is still the registered owner of the said land and/or he is entitled to have full possession on and over the land, without any interference by the defendants, damages, interest and vacant possession.

The defendants in defence replied that, they agreed that the plaintiff is the registered owner of the said land. However, his ownership is limited to the portion marked in blue as highlighted in the attaching map. The defendants denied that they have ever agreed to transfer the cemetary and to demolish the buildings. Further the defendants said that, originally the said land, now owned by the plaintiff, was actually, for about 90 years had been owned by the Muslims and that the portion marked green in the attaching map (‘portion A’) has been used for religious purposes together with the mosque situated thereon. That mosque had been built in 1866. Portion A is an area that has been used for prayers, storages and as cemetary. The defendants further said that portion is a wakaf land and that it has been vested in the first defendant (Majlis Ugama Islam Pulau Pinang) under section 105 of the Penang Administration of Religion of Islam Enactment 1993. Further, the defendants made a counter-claim that the plaintiff had been estopped from claiming that portion (portion A) as the usage of that portion has been so since the last 100 years and this is well known to the plaintiff and the previous owners without any objections from them. The defendants too, claimed for a declaration that portion A is a wakaf land and that, that portion be divided and severed from the whole land under dispute/ the said land, for the purpose of issuance of separate title and that the Penang Registrar of Land Title do take necessary actions to give effect to the order made by the court.

‘matters involving injunction is specifically provided in Part III of the Specific Relief Act 1950 and the power to issue injunction order is only given to the High Court (Ordinary Civil Court). Even the session and magistrate courts are prohibited by section 69 and 93 of the Subordinate Court Act 1948 from issuing injunction order irrespective whether it is perpetual injunction or interim.’

20 (1993) 2 MLJ 166.
The judge - Abdul Hamid J rejected the contention that, this case could be determined by the Syariah Court, although portion A is a wakaf land. Matters concerning ‘wakaf’ if we were to look at the provision in List II (State List) under the Ninth Schedule to the FC and the Penang Administration of Religion of Islam Enactment manifestly falls within the Syariah Court’s jurisdiction. However, this provision is still insufficient to grant the Syariah Court exclusive jurisdiction and power to determine it in this case. The grounds of his Lordship refusal are:

1) The plaintiff is not a Muslim. Thus, this debars the Syariah Court from hearing the case pursuant to the limitation placed on it by the legislature namely, List II (State List) under the Ninth Schedule to the FC and section 40(3)(a) of the Penang Administration of Religion of Islam Enactment 1993;

2) The issues involved in this case are namely - the effect of registration of title under land law, issue of estoppel and order for declaration. These matters are not conferred to the Syariah Court for determination by any legislation. In fact, these are the provinces of the High Court (Ordinary Civil Courts) pursuant to the National Land Code 1965, Rules of High Court 1980 and Specific Relief Act 1953; and,

3) Cases previous to the one under determination, support the above grounds. For example Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor21, the Supreme Court (Ordinary Civil Court) finally decided that the High Court (Ordinary Civil Court) and not the Syariah Court, had the right to hear issue relating to vesting order although that case involved matter which required special examination according to Islamic Law and in Majlis Aqama Islam Pulau Pinang v Isa Abdul Rahman22, the Supreme Court (Ordinary Civil Court) too decided that only the same court(Civil Court) could hear the claim for injunction order, albeit the subject matter was ‘wakaf’.

3) Shaik Zolkaffily bin Shaik Natar & Ors v. Religious Council of Penang (Court of Appeal (Ordinary Civil Court));23

This is a High Court (Ordinary Civil Court)’s case. The facts of this case are as follows; The plaintiff claimed that they were the trustees and the beneficiaries of the estate of the deceased (Sheik Eusoff bin Sheik Latiff). They sought, inter alia, for a declaration that some lots of land be reverted to the estate of the deceased, further order that vesting order be made to the plaintiffs as the trustees of the deceased or in the alternative damages and an injunction to restrain the defendants and their agents or servants from disposing, interfering or otherwise dealing with the lands until final disposal of the action (‘the said relief’). The grounds of the plaintiff’s claims were that the deceased had left a will dated 30th December, 1892 and grant of probate of the estate of the deceased was extracted and granted on 22nd October, 1894 to the widow of the deceased, who also had died. According to the plaintiffs, the will contained the wish of the deceased that upon his death, his estates would be held in trust for

21 (1992) 1 MLJ 7.
22 (1992) 2 MLJ 244.
the benefits of his widow and his son and daughters (all were eight). Further, according to the will, the estate should reserve as a 'wakoff' (wakaf) during the 21 years period from the demise of the last survivor of his children. According to the plaintiffs, the deceased's children all had died and the said 21 years had lapsed. Thus, accordingly, the plaintiffs wanted back the estates (land) and to hold the land as trusts. Unfortunately, the defendants (Majlis Ugama Islam Pulau Pinang - being the trustee of the wakaf land in Penang, pursuant to the provision in the Penang Administration of Religion of Islam Enactment 1993) failed to comply with their request. Thus, the plaintiffs commenced the present action against the defendants seeking the said relief. The defendants in their defence contended that, *inter alia*, the High Court (Ordinary Civil Court) has no jurisdiction to try the claim and according to the Penang Administration of Religion of Islam Enactment 1993 (Enactment No. 7 of 1993) ('Penang Enactment') all wakaf and trusts in Penang and all mosques together with immovable properties erected thereon are vested in the Council (Majlis Ugama Islam Pulau Pinang). Secondly, by a deed of settlement No. 841/1980 dated 26th June, 1980 the deceased had made a confession that the said land shall be ‘wakafkan’ as a cemetery for the deceased, his family and for persons professing Islamic faith in Penang. On this, the defendants negated that the deceased had ever made a will. The defendants filed a summons to strike out the plaintiffs' statement of claim pursuant to Order 18 rule 19(1)(a) of the Rules of High Court 1980 and under the inherent jurisdiction of the court. The issue raised by the defendants was whether the High Court (Ordinary Civil Court) has the jurisdiction to try and hear issues relating to wakaf? The judge (Jeffry Tan, J) interposed that once the defendant had filed a conditional appearance, the defendants had waived any irregularities and that means they had submitted themselves to the jurisdiction of the court. The judge referred to *Tengku Ali ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman* and 10 Halsbury laws of England (4th Ed) paragraph 718. On this premise, the same question resurfaced again, viz, whether the High Court (Ordinary Civil Court) has the jurisdiction to try and hear issues relating to wakaf? The judge rejected the argument that the High Court (Ordinary Civil Court) has no jurisdiction to determine that case, simply because the subject matter is wakaf which falls within the Syariah Court's jurisdiction. The judge gave his decision based on two grounds:

a) There are several cases before this case which had adjudicated matters which in the preliminary of the trial were thought to have fallen within the jurisdiction of the Syariah Court, yet the High Court (Ordinary Civil Court) could still adjudicate the same. The supporting cases are G. Rethinasamy v. Majlis Ugama Islam, Pulau Pinang dan Satu Yang Lain, Lim Chan Seng v. Pengarah Jabatan Agama Islam Pulau Pinang, Barkath Ali bin Abu Backer

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24 (1994) 2 MLJ 83  
25 (1993) 2 MLJ 166  
26 (1996) 3 CLJ 231
v. Anwar Kabir bin Abu Backer & Ors;\textsuperscript{27} and Majlis Agama Islam Pulau Pinang v. Isa Abdul Rahman & Satu Yang Lain;\textsuperscript{28}

b) The Syariah Court has no jurisdiction to adjudicate this case by reason that there is no statutory provision granting Syariah Court the power to issue declaratory order, vesting order or the jurisdiction to adjudicate and interpret wills and deeds of settlement. These matters are only exclusively given to the High Court (Ordinary Civil Court).

4) Barkath Ali bin Abu Backer v. Anwar Kabir bin Abu Backer & Ors;\textsuperscript{29}
The facts of this case are that, the plaintiff’s mother(settlor of a trust who had passed away in 1989) was an Indian national domiciled in India. She had created a trust deed and appointed the plaintiff as the lawful attorney with powers to take possession of all assets in Malaysia, Singapore and other countries. The plaintiff filed an application to the High Court (Ordinary Civil Court) in order to determine whether the assets in Malaysia and Singapore had formed the subject matter of a valid and subsisting trust/wakaf or whether those assets were never validly transferred to the trust/wakaf and therefore only had formed part of the settlor’s residuary estate and it should be distributed amongst her beneficiaries in accordance with Islamic law (faraid). In the trust/wakaf deed, the settlor declared that the trust was a ‘wakaf-ul-a~lad’\textsuperscript{30} and stipulated that the trust/wakaf shall not fall within the jurisdiction of the ‘wakaf board’ for supervision. Counsel for the third defendant, relying on Article 121(1A) of the FC, raised a preliminary objection that only the Syariah Court has the jurisdiction to determine the questions raised by the plaintiff, not the High Court (Ordinary Civil Court) as the subject matter (wakaf) is specifically stated to be under the jurisdiction of the ‘wakaf board’ for supervision. Counsel for the third defendant, relying on Article 121(1A) of the FC, raised a preliminary objection that only the Syariah Court has the jurisdiction to determine the questions raised by the plaintiff, not the High Court (Ordinary Civil Court) as the subject matter (wakaf) is specifically stated to be under the jurisdiction of the ‘wakaf board’ for supervision. 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The court held that the High Court (Ordinary Civil Court) has the jurisdiction to entertain the case. According to the court, the action of the plaintiffs involved an application for a declaratory decree and such ‘decree’/’matter’ is undoubtedly is that of the High Court (Ordinary Civil Court)’s pursuant to Specific Relief Act 1960 and Order 15 rule 16 of the Rules of the High Court 1980. It follows that, such an application falls under the province of the High Court (Ordinary Civil Court) to construe and interpret the ‘deeds’ of the settlor to determine if there was a valid trust/wakaf. Therefore, the Syariah Court has no jurisdiction, even though it involved the question of Muslim’s will and wakaf. Clearly, in this case, the court had applied the ‘remedy approach’ in construing

\textsuperscript{27} (1997) 4 MLJ 389.
\textsuperscript{28} (1992) 2 MLJ 244.
\textsuperscript{29} (1997) 4 MLJ 389.
\textsuperscript{30} Wakaf made to the benefit of the children and descendants.
the jurisdiction of the Syariah Court and to legitimize the policy of the court allowing the High Court (Ordinary Civil Court) to determine the case.

5) **Abdul Shaik bin Md Ibrahim v Hussein bin Ibrahim:**
This is a High Court (Ordinary Civil Court)’s case. In this case, the issue raised - Whether Syariah Court could determine the subject matter even though that subject matter is expressly being provided by the States’ Administration of Islamic Law Enactments as fallen within Syariah Court’s exclusive ambit but it involved the application for declaratory order which relief Syariah Court has no power to issue?.

In this respect the learned judge, Abdul Hamid J expressly preferred the ‘subject matter’ approach rather than ‘remedy approach’. ‘Subject matter’ approach means that, as long as the matter that is being dealt with by the Syariah Court is clearly within its jurisdiction as conferred by the Administration of Islamic Law Enactment, even though the Syariah Court has no power, to issue any ‘remedial’ order (such as declaratory order, vesting order, injunction order and specific relief) the Syariah Court still have the right and jurisdiction to determine that case. On the other hand, the ‘remedy approach’ means that, in order that Syariah Court to have ‘full’ jurisdiction over certain subject matter, but if in case, that subject matter involved application for relief or specific remedy, which no legislation has ever been passed to grant Syariah Court such powers, Syariah Court is not allowed to determine that case.

6) **Shaik Zolkaffily bin Shaik Natar & Ors v. Religious Council of Penang (Supreme Court (Ordinary Civil Court));**
This is an appeal case from the High Court (Ordinary Civil Court) and Court of Appeal (Ordinary Civil Court) - please see from the previous pages. The defendants, who dissastified with the decisions in the High Court (Ordinary Civil Court), appealed to the Court of Appeal (Ordinary Civil Court). However, their appeal was again rejected by the Court of Appeal (Ordinary Civil Court). However, when the case was brought for further appeal to the Supreme Court (Ordinary Civil Court), the Supreme Court (Ordinary Civil Court) overruled the decisions made by the High Court (Ordinary Civil Court) and the Court of Appeal (Ordinary Civil Court) to the effect that the Syariah Court does have the jurisdiction to hear the matter (wakaf and Islamic wills) notwithstanding that there is no express provision in the Penang Administration of Religion of Islam Enactment 1993 nor is there any specific legislations that grant the Syariah Court the power to issue specific relief such as declaratory order, vesting order or to adjudicate and interpret wills and deeds of settlement, following the ratio of Abdul Kadir Sulaiman, J in Md. Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur. This case emphasized the ‘wider/liberal approach or subject matter approach’ in looking into the jurisdiction of the Syariah Court in light of List II (State List) under the Ninth Schedule to the FC, which gives ‘inherent power and jurisdiction’ to the states, which would

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31 (1999) 5 MLJ 618.
33 This had been reported in 4 MLJ (2002) 130.
34 (1998) 1 MLJ 691.
eventually include the Syariah Court, to invoke Islamic Law. Further his Lordships also agreed with the opinion of Abdul Kadir Sulaiman J, that the ‘fact that the plaintiffs may not have his remedy in the Syariah Court would not make the jurisdiction exercisable by the Ordinary Civil Court’. The Supreme Court (Ordinary Civil Court) rejected the ‘remedy approach’ as propounded by Harun Hashim SCJ in Mohamed Habibullah v Faridah bte Dato’ Talib\(^{13}\). Whereby, according to Harun SCJ in this case, if there is no statutory provision granting the Syariah Court with powers to exercise specific relief remedies, notwithstanding that matter falls exclusively within the Syariah Court’s purview such as wakaf or wills, the matter would still be under the Ordinary Civil Court’s jurisdiction.

Conclusion and Suggestions

The apex court in Malaysia finally decided that, in Shaik Zolkaffily case, the correct approach to be taken in interpreting the jurisdiction should be made by way of ‘subject matter approach’ not the ‘remedy approach’. However, according to one learned legal expert\(^{16}\), Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah\(^{37}\), a case before Shaik Zolkaffily, has indirectly settled the issue. This case concerns the issue of conversion out of Islam. The appellant had applied for a declaration that he was no longer a Muslim from the High Court(Ordinary Civil Court) at Kuala Lumpur. At the hearing of the case, the respondent/defendant raised a preliminary objection that, the High Court (Ordinary Civil Court) had no jurisdiction to hear the case. This was upheld by the learned judge. The judge relied on Dalip Kaur v. Pegawai Polis Daerah, Bukit Mertajam & Anor,\(^ {38}\). In this case where the court found that the jurisdiction to hear matter involving renouncement of Islam falls exclusively on the shoulder of Syariah Court. This matter needs special examination according to Islamic Law. Thus, the only special forum capable and have the jurisdiction to determine apostasy according to Islamic Law is the Syariah Court, not the High Court (Ordinary Civil Court). By this case also, the judge stated that the jurisdiction to hear apostasy falls on the Syariah Court of the Federal Territories, even though that jurisdiction has yet been expressly conferred by the legislature, yet, by way of implication, the Syariah Court should and must have one.

Dissatisfied with the finding, the appellant then appealed to the Court of Appeal(Ordinary Civil Court) and then to the Supreme Court (Ordinary Civil Court). The Court of Appeal(Ordinary Civil Court) rejected the appeal. So too the Supreme Court (Ordinary Civil Court). Both courts opined that, the jurisdiction of the Syariah Court to hear and determine apostasy case is by way

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\(^{13}\)(1993) 1 CLJ 264.


\(^{37}\)(1999) 1 MLJ 489.

\(^{38}\)(1992) 1 MLJ 1.
of implication, as there is no express provision conferring the Syariah Court over that matter. However, unfortunately the Supreme Court (Ordinary Civil Court) did not consider the ‘power’ of Syariah Court to grant the declaration in the course of it determination over the ‘jurisdiction’ of Syariah Court. It can be inferred from the judgment that the Supreme Court (Ordinary Civil Court) regarded the question of ‘power’ of Syariah Courts as a non-issue. The question that could be posed, whether when the Supreme Court (Ordinary Civil Court) had ascertained the ‘jurisdiction’, the Supreme Court too impliedly assumed that ‘jurisdiction’ would carry ‘necessary’ or ‘inherent’ power (such as the power to issue declaratory order and injunction order) for its due and effectual execution?

Finally to avoid any absurd result and difficulty following the above problem, in that the Syariah Court has no power to issue certain order such as - injunctive relief, declaratory order and other specific relief, it is advisable that the legislatures (Parliament for the Federal Territories or States Legislative Assemblies) to pass laws conferring the Syariah Court such necessary power.