

Probate And Administration Of A Muslim's Estate In Malaysia - Legislative Competence And Syariah/Civil Court Jurisdiction

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INTRODUCTION

Generally, but with considerable reservations,¹ it is assumed, backed up by the specific provisions of the Federal Laws, viz. the Probate and Administration Act, 1959 (Act 97)² and the Courts of Judicature Act, 1964 (Act 91) that the Civil Courts (High Court) rather than the Syariah Courts have jurisdiction to decide matters of probate and administration of a Muslim's estate in Malaysia. Ironically this is so notwithstanding the statutory changes that were made to enhance or widen Syariah Courts' jurisdiction by correspondingly curtailing or reducing the jurisdiction of the Civil Courts by adding clause (1A) to Article 121 of the Federal Constitution in 1988, and elaborately and explicitly outlining the jurisdiction of the Syariah Courts in the respective Administration of Islamic Law and/or Syariah Courts Enactments of all the states of the Federation and the Federal Territories. The correctness of such an assumption was challenged in and put to the constitutional and statutory test before the Syariah Appeal Court of the Federal Territory of Kuala Lumpur in the case of *Jumaaton and Anor v. Raja Hizaruddin*. The Court gave judgement on the 8th. July, 1998 per Dato Sheikh Ghazali, CJ. (Syariah High Court) for self and the two panel judges: Prof. Tan Sri Ahmad Ibrahim and Prof. Tan Sri Harun Hashim.

FACTS OF THE CASE

On the death of one Raja Nong Chik b. Raja Ishak, his twelve (12) heirs (2 widows and 10 children) had applied, by mutual agreement, to the civil High Court for the administration of the deceased's estate but without prejudice to the rights of any of them to argue, challenge, add or amend the lists of the properties of the estate. The Registrar of the civil High Court had made an order appointing the Public Trustee as the administrator of the estate for a limited period of four (4) months only. Later, two of the heirs had applied to the Syariah High Court of the Federal Territory of Kuala Lumpur for declarations against the defendant (a son of the deceased) that the shares (and the incomes derived therefrom) in a particular company which the defendant was alleged to have held in his own name but on behalf of his father (the deceased) be included in the assets of the estate for apportionment amongst the twelve (12) heirs of the deceased according to the Islamic law of *hukum faraid*. The defendant denied the application and sought for its dismissal. The Syariah High Court had held as a preliminary issue that it had no jurisdiction to hear this case under section 46(2)(b) of the Administration of Islamic Law (Federal Territories) Act, 1993 (Act 505). In appeal the Syariah Appeal Court took up for

consideration the two issues, namely, (1) whether the Syariah High Court had any jurisdiction to hear this case, and (2) whether the applicants had any *locus standi* to bring this case before the Court, since they did not have any letter of administration to the estate of the deceased granted by the civil High Court under the Probate and Administration Act, 1959. On both these issues, the Court ruled against the applicants.

SYARIAH COURT' JURISDICTION TO DETERMINE CONSTITUTIONAL QUESTION

The central question raised in *Jumaaton* case had involved more an interpretation of the constitution-federal-state legislative competence-rather than statutory interpretation. On the determination of the constitutional question, however, had hinged the jurisdiction of the Syariah Courts in the matter before the Court. The Syariah Appeal Court answered this constitutional question and gave its own reasons therefor. The Court opined that the probate and administration of estate was a matter within federal legislative competence under item 4(e)(i) of the Federal List of the Ninth Schedule to the Federal Constitution and it does not fall within the state legislative competence under item (1) of the State List read with para (ii) of item 4(e) of the Federal List. Therefore, Syariah High Court could have no jurisdiction over probate and administration of a deceased Muslim's estate.

The question of the federal-state legislative competence fall within the exclusive original jurisdiction of the Federal Court by virtue of Article 128(1)(a) of the Federal Constitution.³ Each court undoubtedly has, subject to the appellate or review power and jurisdiction of the superior courts, power to interpret, determine, and define its own jurisdiction. This may be true even where such a determination of the court involves constitutional question of the legislative competence, provided it is attempted incidentally, and not directly,⁴ in the exercise of its obvious jurisdiction. Syariah High Court (and Syariah Appeal Court) being a court of co-ordinate jurisdiction with the civil High Court, their decisions may tend to become final or stand at variance with the decisions of the Civil Courts (High Court, Court of Appeal and Federal Court), in the same way as an Election Tribunal headed by a High Court judge was held to be a court of co-ordinate jurisdiction and, therefore, not amenable to the review power and jurisdiction of the High Court.⁵ That would also raise the question of the bindingness of the Civil Court's decisions, particularly as to the interpretation of the Constitution, on the Syariah Courts. Perhaps for the Syariah Appeal Court referral of this question to the Federal Court for it to exercise its jurisdiction under clause (2) of Article 128 of the Federal Constitution, would have been more appropriate, and avoided the further complications in this area of law.

By deciding the constitutional question the Syariah Appeal Court did not pronounce directly upon the validity of a Federal or State Law on grounds of legislative competence; its decision was that the matter of the probate and administration of a deceased Muslim's estate is governed by the Federal Law of the Probate and Administration Act, 1959, and not the State Law, viz. section 46(2) of

the Administration of Islamic Law (Federal Territories) Act, 1993. Drawing a distinction between the determination of the validity of a law, on the one hand, and the determination of the applicability of a law, federal or state, on the other, the Court of Appeal had adopted an analogous approach in *Ketua Pengarah Jabatan Alam Sekitar & Anor. v. Kajing Tubek & Ors.*,⁶ whereas the High Court below had refrained from deciding the question because in its view Article 128(1)(a) of the Federal Constitution was an impediment for it to do that. The tenability of this distinction drawn by the Court of Appeal is not free from doubt and has yet to receive Federal Court's endorsement. Further, as relate to the Syariah/Civil Courts jurisdiction, just as the civil High Court in Penang, per Edgar Joseph, Jr. J. (as he then was) assumed jurisdiction in *Noor Jahan v. Md. Yusoff*⁷ to interpret the scope of section 40(3)(b)(i, iii & iv) of the Penang State Administration of Muslim Law Enactment, 1959 as to what constitutes *sepencarian* property so as to determine whether its jurisdiction was excluded by virtue of Article 121(1A), and held on the facts of the case that the property in issue was not *sepencarian*, and, therefore, it had jurisdiction to decide the case, a Syariah High Court/Syariah Appeal Court could also have undoubted and competent jurisdiction to determine and define its own jurisdiction by interpreting the applicable law (constitutions, Acts, Enactments, Ordinances, etc.) in question. The resultant question of the resolution of the conflicting decisions of the Civil and Syariah Courts, and the nature of their bindingness upon each other, however, needs to be addressed by the appropriate legislative intervention and/or consistent non-conflicting judicial practice.

LOCUS STANDI OF THE HEIRS/BENEFICIARIES

On the second issue of *locus standi*, the Syariah Appeal Court in *Jumaaton* case held against the applicants for the reason that the heirs of the deceased have no *locus standi* in respect of the estate of the deceased until the administration of the estate has been settled. Upon the agreement of all the parties, the Registrar of the High Court in Kuala Lumpur had made an order under the Probate and Administration Act read with the Courts of Judicature Act for appointing the Public Trustee as the administrator of the estate and before the administration was settled the applicants had moved the Syariah High Court of the Federal Territory of Kuala Lumpur for the declarations sought. The denial of the *locus standi* was supported by the decision of the House of Lords of England in *Lord Sudeley v Attorney General*,⁸ Federal Court decision in *Lee Ah Thaw v. Lee Chun Tek*,⁹ Supreme Court decision in *Tan Heng Poh v. Tan Boon Thong*,¹⁰ and High Court decisions in *Khoo Teng Seong v. Khoo Teng Peng*¹¹ and *Punca Klasik Sdn. Bhd. v. Foh Chong & Sons Sdn. Bhd.*¹²

The Syariah Appeal Court in *Jumaaton* case having held on the first issue that it is the civil High Court, and not the Syariah High Court, that had jurisdiction to hear and decide the matter in question, it was not necessary for it to decide on the *locus standi* of the applicants. *Secondly*, if the Court had held that the Syariah High Court had the jurisdiction to decide the matter in question, then the applicants could be held to have had the *locus standi*. The general proposition of law deduced

from the above five cases relied upon by the Court for denying standing to the applicants would scarcely be applicable to the Syariah High Court which exercise a combined or composite jurisdiction of probate and administration of an estate and determination of the estate on the one hand, and the interests or rights in the estate and the persons (and their respective shares) who are entitled to the shares in the estate according to the rules of *hukum syara* such as contained in, and as approvingly referred to by the Court, *Kitab Matla' al Badrain (Kitab Faraid)*, section 1019 on the other. The law that the Syariah High Court apply makes no distinction between administration of an estate and its distribution and separate them from each other. *Thirdly*, none of these five cases had denied threshold standing to the applicants on the ground of the general proposition as laid down and followed therein; they had only denied them the substantive standing, ie, the reliefs sought from the courts. *Fourthly*, section 50 of the Administration of Islamic Law (Federal Territories) Act, 1993 (Act 505) explicitly gave standing to the beneficiaries to apply for inheritance certificates. It provided for the Syariah High Court to issue inheritance certificates not only on the request of the other court or authority but also on the application of any person claiming to be a beneficiary. *Fifthly*, section 79(1) of the Selangor State Administration of Muslim Law Enactment, 1952 (Ent. 3 of 1952 - a predecessor law of the Act 505), which was relied upon by the Court to deny standing to the applicants had barred any person, other than the administrator or executor, to 'represent or act *on behalf* of the heirs of the estate of a deceased person.' It did not prohibit the heirs from making application in their own right. The proviso to this sub-section had also recognised the right of the beneficiary to claim his/her share on the estate against any unlawful possessor of any *assets* of the deceased. *Sixthly*, and more importantly, the general proposition of law deduced by the Syariah Appeal Court from the above five cases was wider than what they actually decided on the facts of the respective cases. In those cases the rights or interests claimed were not only in the undetermined residue pending completion of the administration of the estate, but they were in the specific (*specie*) properties whose availability to satisfy the interests or rights depended on the chance completion of the administration and the ascertainment of the residue.

In *Lord Sudeley's* case, the Attorney General had sought to impose tax on the one-fourth of the clear part of the estate which could not be done unless the residue was determined; in *Lee Ah Thaw* the beneficiaries under the will of their deceased father had caveated the lands since the administration of the estate was incomplete and the residue was unascertained; in *Tan Heng Poh* a beneficiary (one of the six sons of the deceased) under a will of 1/6th share in the estate caveated eight (8) parcels of land and the court held that the caveator had no caveatable claim or interests in any of the property when at that time the administration of the estate was not completed and the residue for final determination was not ascertained; in *Khoo Teng Seong* two of the nineteen (19) beneficiaries had lodged caveat on the basis that they had shares in the proceeds of the sale of the disputed lands, and the court held that a beneficiary who was entitled to a share of the general residue had no right to enter a caveat against the property of the estate when no part of the estate has been expressly or impliedly devised and bequeathed under a trust created

for his benefit and that a legatee of a share in the residue has no interest in any property of the testator until the residue has been ascertained, and his right is only to have the estate properly administered and applied for his benefit when the administration is complete; and in *Punca Klasik Sdn. Bhd.* the plaintiff had purchased a piece of land from the trustee of the estate, and the third defendant, who were in occupation of a portion of that land, had claimed beneficial ownership in respect of the land they were occupying, and the court held that the third defendant could not be said to be the beneficial owner as there was no instrument of transfer executed in his favour and that a beneficiary has no interest in property in any *specific* investment forming part of the estate or in the income from any such investment when the administration of the estate was incomplete and the residue unascertained, and, consequently, none of the beneficiaries of the estate had any interest in any *specific* property of the said estate.

In the present case before the Syariah Appeal Court the declaration sought were not as to the claim of rights or interest in any *specific* property of the estate but as to the inclusion in the estate which was the subject of administration of certain properties and income (shares in a company and the dividends and other incomes and benefits there- from) which were claimed by the applicants, but denied by the defendant, to have been held by the defendant (a son of the deceased) in his own name but on behalf of their deceased father, and for their distribution and apportionment amongst the twelve (12) heirs of the deceased (including the defendant) who were entitled to their respective portions according to *hukum faraid*. The legatee, beneficiary, and heirs may not have interest or right in any *specific* property of the estate; but that is not to say that they have no right or interest in the overall or the totality of the estate on which very much depend the fortunes of their residue. The rights or interests in the estate do not extinguish with the appointment of the administrator; they merely remain dormant or postponed until administration is complete but all the time they remain substantive rights or interests sufficient enough to have *locus standi* in respect of the estate.

LEGISLATIVE COMPETENCE: FEDERAL CONSTITUTION AND THE LAWS

Federal Parliament has exclusive power to make law in respect of 'succession, testate and intestate; probate and letters of administration' [item 4(e)(i) of the Federal List of the Ninth Schedule to the Federal Constitution] but this does not include 'Islamic personal law relating tosuccession, testate and intestate.' It may be noted that no such exception was made in the Federation of Malaya Constitution, 1948 (see item 42 of the Schedule to the Constitution) and the States' power to make laws in respect of the residuary matters (which included 'Muslim religion or the custom of the Malays) was subject to Federal Legislative Council's power to make laws on matters specified in the Second Schedule. Consequently, federal power in respect of probate and administration in respect of all persons was predominant. The position under the Federal Constitution is, therefore, markedly different and this factor should reflect in the interpretation of the scope of the

federal power in respect of 'succession, testate and intestate; probate and letters of administration' and the federal laws made thereunder, viz Probate and Administration Act, 1959 read with the Courts of Judicature Act, 1964 in so far as they give to the civil High Courts Jurisdiction over this matter.

The State legislatures have exclusive power to make law on 'Islamic law and personal and family law of persons professing the religion of Islam including *the Islamic law relating to succession, testate and intestate.....*' (item 1 of the State List). Here there is no mention of 'probate and letters of administration.' The words 'Islamic law relating to' are significant and it is suggested that they include within them the 'probate and administration' aspects of the rules of *Islamic law relating to 'succession, testate and intestate'*, as the rules of Islamic law make no such distinction between the two. Before the Federation of Malaya Agreement/Constitution, 1948 the entire body of the law of succession fell within the legislative competence of the Malay States and each of the States had made law relating to it.

The Federal Legislative Council enacted the Probate and Administration Ordinance, 1959 (35 of 1959) by replacing the Probate and Administration Ordinance/Enactments of the Straits Settlements and several Malay States [ie. Federated Malay States, (Negeri Sembilan, Pahang, Perak and Selangor) and Johore, Kedah, Trengganu, Kelantan and Perlis].¹³ This Ordinance came to be adopted later as an Act of Federal Parliament (Act 97) and, therefore, a Federal Law within the legislative competence of the Federal Parliament. It applied to all persons, Muslims and non-Muslims. The Federal Legislative Council had also enacted the Courts Ordinance, 1948 (43 of 1948) by replacing the Courts Ordinance/Enactments of the Straits Settlements and several Malay States (ie Federated Malay States, Johore, Kedah, Kelantan, Perlis and Trengganu)¹⁴ which continued in force until it was replaced by the Courts of Judicature Act, 1964 (7 of 1964) enacted by the Federal Parliament. The Courts Enactments/Ordinance and the Courts of Judicature Act expressly granted to the civil High Court the 'jurisdiction to grant probates of wills and testaments and letters of administration of deceased persons leaving property in the Federation.'¹⁵ The Courts Ordinance, however, had subjected the civil High Court's jurisdiction in this respect to the following exception which was not carried into the Courts of Judicature Act upon its repeal. The exception was :

"subject to such modifications to suit the several religions and customs of the indigenous inhabitants as have heretofore been recognised by the courts or have been or shall hereafter be made by law."

This omission is of considerable significance and may be explained as having become unnecessary since under the Federal Constitution the power in respect of it, so far as the Muslims are concerned, is given to the State legislatures and the Syariah Courts. Further, the Courts of Judicature Act, 1964 also made a major departure from its predecessor Ordinance and Enactments in its section 4 which provided that

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

So far as the federal-state legislative relation is concerned if the words 'written law' are taken to mean 'federal written laws', the affectation of section 4 to the state's power and Syariah Courts' jurisdiction may not be very significant. The subsequent constitution amendment, however, has given protection to the Syariah Courts' jurisdiction by adding clause (1A) to Article 121 of the Federal Constitution.

It is also significant to note that the Courts Enactments of the states had provided for the jurisdictions of both the civil courts and the Syariah Courts (then known as *Kathi's* courts), and had defined the jurisdiction of the Syariah Courts as :

*"Every Kathi and Assistant Kathi shall have such powers in all matters concerning Muhammadan religion, marriage, and divorce and all other matters regulated by Muhammadan law as may be defined in his Kuasa."*¹⁶

This part of the Enactment and section 67 which dealt with appeals to the Ruler-in-Council from the decisions of the *Kathi* or an Assistant *Kathi*, were not repealed by the Federal Courts Ordinance, 1948, and continued in force until they were repealed by the corresponding State Enactments of the Administration of Muslim/Islamic Law (such as Selangor Enactment 3 of 1952) which have established and restructured the Syariah Subordinate Courts, Syariah High Courts and Syariah Appeal Courts in each of the States of the Federation, and specified or defined comprehensively their jurisdictions, powers and functions together with the procedure to be followed by them.

So far as the matter of Islamic law relating to 'succession, testate and intestate' is concerned the Syariah High Courts have been given the jurisdiction in civil matters as to:-

'hear and determine all actions and proceedings in which all the parties are Muslims, and which relate to -

- (i)
- (ii)
- (iii)
- (iv) the division of, or claims to *harta sepencarian*
- (v) will 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) division and inheritance of testate or intestate property;
- (ix) the determination of the persons entitled to share in the estate of a deceased Muslim or of the shares to which such persons are respectively entitled.¹⁷

The Syariah High Courts are also given the additional power to issue certificates of inheritance as to 'the persons entitled to share in the estate, or the shares to which such persons are respectively entitled' upon request from a court or authority under duty to make such a determination or on the application of any person claiming to be a beneficiary or his representative.¹⁸

The provisions of sections 4 and 24 of the Courts of Judicature Act, and the application of the Probate and Administration Act to all persons read with item 4(e)(i) of the Federal List¹⁹ of the Ninth Schedule to the Federal Constitution, if widely construed, may have the effect of undermining and severely curtailing the jurisdiction and powers of the Syariah Courts in respect of the administration and the distribution of the estate of a deceased Muslim. The addition of clause (1A) to Article 121²⁰ of the Federal Constitution was intended to impart exclusivity to the jurisdictions and powers of the Syariah Courts. The problem is far from resolved. Having had the opportunity to satisfactorily resolve this vexed legal problem of Malaysian Legal System the decision of the Syarirah Appeal Court of the Federal Territory in the instant case of *Jumaaton* failed to break new ground; its decisional process constricted itself to the traditional mould of assumption based current practices and was marked by safe-play conservatism.

SYARIAH COURT'S JURISDICTION INTERPRETED AND DEFINED

The Syariah Appeal Court has held in *Jumaaton* case that the probate and administration of a deceased Muslim's estate does not fall within the jurisdiction of the Syariah High Court; the civil High Courts have that jurisdiction in accordance with the Federal Law, viz. the Probate and Administration Act, 1959 read with Federal Parliament's Legislative competence relating to it under item 4(e)(i) of the Federal List of the Ninth Schedule to the Federal Constitution. According to the Court, Syariah Court's jurisdiction, even if widely interpreted such as to be co-extensive with the matters specified in item (1) of the State List read with para (ii) of clause (e) of item (4) of the Federal List,²¹ does not extend to the 'probate and administration' of a deceased Muslim's estate because it is not so expressly mentioned in the State List, read with para (ii) of clause (e) of item (4) of the Federal List. In the Court's view this warranted putting a narrow and constricted interpretation on section 46(2)(b)(iv, v, vi, viii and ix) of the Administration of Islamic Law (Federal Territories) Act, 1993 (Act 505) so as to exclude that jurisdiction from such a widely conferred jurisdiction of the Syariah High Court. The Court derived the supporting reasoning mostly from the existing assumed-practice based on the current understanding of the Federal statute law, and some past judicial precedents, without pressing in aid the directly impacting constitutional changes made since then in the Federal-State division of legislative power in the Federation of Malaya Agreements/Constitution of 1948 and the Federal Constitution of 1957, and the far reaching statutory changes made since then at the state level markedly differing from the Probate and Administration Enactments/Ordinance, and the Courts Enactments/Ordinance of the several states (F.M.S., Johore, Kedah, Kelantan, Perlis, and Trengganu and Straits Settlements).²²

Some positive signs may be gleaned in the judgement of the Syariah Appeal Court in the area of the basis of the Syariah Court's jurisdiction *vis-a-vis* Civil Courts, and in its expression of the need for legislative intervention to extend Syariah High Court's jurisdiction to matters of probate and administration of a deceased Muslim's estate. The Court suggested that efforts should be made to give the Syariah Courts the jurisdiction over the matter of probate and administration. Had the Court been disposed to even a moderate purposive activism, rather than sheltering itself behind the safe-play conservatism, it could have made a definitive determination, rather than pleading for a legislative change, that the Syariah High Court has such a jurisdiction within the forecorners of the existing provisions of the Federal Constitution and the state laws relating to the Syariah Court's powers and jurisdiction. Purposive judicial process could have advantageously yielded that result. The Court did not take definitive position on the two contesting propositions as to the basis of the Syariah Court's jurisdiction, viz. whether it is to be expressly conferred by the appropriate statute law or is it to be read constitutionally conferred as co-extensive with all the matters as specified in item (1) of the State List read with para (ii) of clause (e) of item (4) of the Federal List. The Court only proceeded on the footing that even if the latter proposition as laid down by the civil High Court in Kuala Lumpur in *Mohd Hakim Lee v. Majlis Agama Islam, Wilayah Persekutuan*,²³ (and advocated by the present writer earlier on),²⁴ is applied, the Syariah High Court has no jurisdiction in respect of 'probate and administration' because that matter is exclusively within the Federal legislative competence as it is found expressly mentioned in item (4)(e)(i) of the Federal List; and it does not fall within the exclusive legislative competence of the states because it is not to be found in the matters of Islamic law excluded from the federal legislative competence by para (ii) of clause (e) of item (4) of the Federal List, and in item (1) of the State List which mentions only 'succession, testate and intestate.'

With respect, the Court's reading of the text of the relevant items of the Legislative Lists appear to be incomplete. Under item (4)(e)(i) of the Federal List, Parliament has exclusive power to make law on *inter alia* 'succession, testate and intestate; probate and letters of administration.' But this power, in view of item (4)(e)(ii) of the same List does 'not include *Islamic personal law relating to ... succession, testate and intestate*' (italics supplied). What has been excluded is not just 'succession, testate and intestate' of a deceased Muslim but the whole body of 'Islamic law' relating to it and that should obviously include 'probate and administration' process of the Islamic law of succession/inheritance. Islamic law, so far as the jurisdiction of the court is concerned, makes no distinction between 'probate and administration' and does not separate them from each other on the one hand, and 'the determination of persons entitled to shares, the extent of their shares and the distribution and apportionment of the properties of the estate' on the other. It is a one single and composite process of the judicial administration of a deceased Muslim's estate. The words '*Islamic law relating to succession, testate and intestate*' admit of this interpretation. So construed, what is excluded from para (i) of item 4(e) of the Federal List by para (ii) thereof, and what is included in item (1) of the State List is 'the entire body of the Islamic law of succession, testate

and intestate' and that includes Islamic law rules relating to probate and administration, and, therefore, fall within the jurisdiction of the Syariah High Court to the exclusion of the civil High Courts as enjoined by clause (1A) of Article 121 of the Federal Constitution. This result could be maintained under either of the two propositions as to the basis of the Syariah Courts' jurisdiction. The first proposition is satisfied since section 46(2)(b)(v, viii and ix) of Administration of Islamic Law (Federal Territories) Act, 1993 (Act 505) has expressly conferred jurisdiction on the Syariah High Court in respect of wills or death-bed gifts, division and inheritance of testate or intestate property and the determination of the persons entitled to share in the estate of a deceased Muslim or the shares to which such persons are respectively entitled. Implicit in such a wide expressly conferred jurisdiction is the jurisdiction in respect of probate and administration of the estate of a deceased Muslim.²⁵ The second proposition is satisfied because the matter of probate and administration is implicitly included in item (1) of the State List according to the interpretation of it suggested hereinabove.

Probate and administration of estate is a matter incidental to, and, a necessary part of the process of the determination of the assets, persons entitled to their shares, and the distribution of properties amongst the persons entitled to. In respect of the latter the Syariah courts have undoubted jurisdiction. With respect, the Court erred when it said that 'distribution' did not include 'probate and administration.' Proceeding further the Court opined that although section 46(2)(v, vii, viii & ix) of the Administration of Islamic Law (Federal Territories) Act, 1993 did mention about inheritance and distribution of estate, those matters usually involve probate and administration of estate, and, therefore, any argument pertaining to that will be settled in the Civil Courts which have been given the jurisdiction over probate and administration. *Kitab Mata'al Badrain (Kitab Faraid)*, section 1019, which the Court cited to support an opposite proposition, clearly indicates the composite nature of the process of determination and distribution of the inheritance in Islamic law. Here, the Court's reasoning is a logic reversed and a strained effort to unduly cut down the expressly conferred jurisdiction of the Syariah High Court by section 46(2)(v, vi, vii, viii & ix) of the Administration of Islamic Law (Federal Territories) Act, 1993 read with item (1) of the State List. If this view of the Court is to be accepted, it may be asked what would remain of the state legislature's power and Syariah High Court's jurisdiction in respect of 'succession, testate and intestate' of a deceased Muslim's estate? The Court did not pause to reflect on this aspect of the matter.

Probate and Administration Act, 1959 was made under item (4)(e)(i) of the Federal List, and section 46(2) of the Administration of Islamic Law (Federal Territories) Act, 1993 was made under item (1) of the State List read with para (ii) of item 4(e) of the Federal List. Both these laws were within the exclusive legislative power of the respective legislatures. The Syariah Appeal Court's interpretation created a conflict between them. Such a conflict could be resolved by applying the doctrine of 'pith and substance' and not the 'repugnancy' doctrine which the Court seems to have impliedly applied. Applying the 'pith and substance', the state law, i.e. the said section 46(2) should prevail because it is a law in its true nature and

character in respect of 'Islamic law relating to succession, testate and intestate,' notwithstanding its incidental encroachment, if any, on the federal power in respect of 'probate and administration.' This conclusion is further reinforced by the fact that 'probate and administration' as part of 'Islamic law relating to succession, testate and intestate' is expressly excluded from the federal power and included in the State's exclusive power on the interpretation of it suggested hereinabove.

In the face of this constitutional imperative, it is no answer for the Court to refer to and rely upon the previously decided cases of the civil High Courts, such as *In re Timah bt. Abdullah*²⁶ which had determined in its probate and administration jurisdiction, the persons entitled to the share in the estate of a deceased Muslim. As to this case it may be said that under the Courts Enactment of the state then in force, the Syariah Court's jurisdiction was not that wide and explicit as it is now under the Federal Constitution and the state laws. Further, the civil High Courts then exercised that jurisdiction under the state law; but now the state laws have clearly but implicitly conferred that jurisdiction on the Syariah High Courts. In spite of this material changes made in the state laws, the civil High Courts do continue to exercise jurisdiction over the probate and administration as well as the distribution of the estate of deceased Muslims. For instance, as late as on 27th. August, 1998, the civil High Court in Shah Alam, Selangor, held *In re the Estate of Tunku Abdul Rahman (Tunku Khadija and Anor. v. Tunku Noor Hayati)*²⁷ that the Civil Courts have jurisdiction over the probate and administration of estate matters of Muslims, but as the case involved issue relating to Islamic law, ie. validity of Tunku's second marriage and the legitimacy of the children born of that marriage, the High Court thought fit to refer the case to the Syariah High Court.

To buttress its conclusion the Court also relied upon section 50 of the Administration of Islamic Law (Federal Territories) Act, 1993²⁸ which empowered the Syariah High Court to issue inheritance certificate upon a request from the other (civil) courts and authorities 'under the duty to determine the persons entitled to share in the estate, or the shares to which such persons are respectively entitled', stating 'the facts found by it and its opinion as to the persons who are entitled to share in the estate and as to the share to which they are respectively entitled.' Section 50 is only an enabling provision and discretionary in nature. It is to be invoked in proceedings where the determination of such a question by the other court or authority is ancillary or incidental to their substantive jurisdiction. It refers to not only the other 'courts' but also other 'authorities'. Further, this section cannot be so interpreted as to make it a sole governing provision and render nugatory the substantive main provisions of section 46(2). The section provides for the *additional* powers the Syariah High Court may exercise and it cannot be taken to mean that it completely overrides section 46(2). Its purpose is no more than to put on statutory footing the practice in vogue without realising the confusion it would create as to its impact on the substantive and main jurisdiction of the Syariah High Court under section 46(2). The application of section 50 needs to be confined to cases other than those that fall within the exclusive jurisdiction of the Syariah High Court, and not to cut down or denude the expressly conferred jurisdiction of the Syariah High Court by section 46(2).

CONCLUSION

The Syariah Appeal Court of the Federal Territory of Kuala Lumpur did not avail itself of the opportunity, for reasons of its own, in *Jumaaton* case to correct one of the aberrations of the Malaysian Legal System as to the Syariah Court's jurisdiction, to the exclusion of the Civil Courts, to enforce and administer the entire Islamic law of succession. It resigned itself to merely affirm the *status quo* but recorded its plea for presumably, statutory intervention to give such a jurisdiction to the Syariah Courts. It has been submitted herein that *Jumaaton* suffers from various flaws in its determination of the *locus standi* and in the interpretation of item (4)(e)(ii) of the Federal List and item (1) of the State List in respect of the matter of Islamic law of succession. This decision, unless reconsidered by the same Court, will in all probability be followed as a persuasive precedent by the Syariah Courts in the other states. This decision has also the effect of reassuring the correctness of the Civil Courts' practice relating to this area of Islamic law, and leaving a very faint hope of its correction at their hands. For the necessary correction, one can only look to the Federal Court to act under Article 128 in an appropriate case and reverse the *Jumaaton* interpretation of item 4(e)(ii) of the Federal List and item (1) of the State List as to the meaning and scope of the matter: 'Islamic personal law relating to succession, testate and intestate,' ie, whether or not it includes the process of 'probate and administration' of the estate of a deceased Muslim. For the reasons stated hereinabove, the answer to the question should be in the affirmative. Islamic personal law relating to succession does not divorce 'probate and administration' from 'distribution' of the estate of a deceased Muslim. It is a composite one single process of judicial administration of succession and inheritance. If the answer from the Federal Court is in the negative or is not forthcoming for any reason, then recourse to the suitable constitution amendment would become inevitable. Such a separation in Malaysian legal system is only of historical significance, and such an aberration should be corrected sooner the better.

NOTES

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1. For example, while opening a seminar on 'Understanding Syariah Laws Today' in Ipoh on 28th. July 1998, Menteri Besar of the State of Perak called for a review of certain Islamic enactments and laws which in his opinion contradict Article 121(1A) of the Federal Constitution empowering the Syariah Courts to hear cases. 'One such Act is the Syariah Courts Jurisdiction Act, 1984 which spells out the expansion of the Syariah Courts' powers but still encounters a deadlock when trying cases relating to distribution of property, family, heirlooms, wills and Islamic insurance and banking matters. In such instances, the parties concerned will still have to refer the case to the other (civil) courts.' *The New Straits Times*, 29th. July, 1998.
2. The civil High Court in Shah Alam, Selangor, held in *In re the Estate of Tunku Abdul Rahman (Tunku Khadija & Anor v. Tunku Noor Hayati)* that the civil court had jurisdiction over the 'probate and administration of estate' matters of Muslims but as the case involved issues relating to Islamic Law, it must be referred to the Syariah Court. *The New Straits Times*, 28th. August, 1998.
3. Article 128. *Jurisdiction of Federal Court*. (1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction - (a) any question whether a law made by Parliament or by the Legislature of a State is invalid 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; and (2) Without prejudice to any appellate jurisdiction of the Federal court, where in any proceedings before another court a question arises as to the effect of any provision of this constitution, the Federal Court shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with the determination.
4. See for instance the decision of the Court of Appeal in *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors.*, (1997) 3 MLJ 23 at 37 - 39.
5. In *Wee Choon Keong v. Lee Chong Meng & Anor*, (1998)1 MLJ 434 at 439 the Federal court held that the High Court had no jurisdiction to review in certiorari the decision of the Election Tribunal, as it was just like a division of the High Court, presided over by a High Court judge, and, therefore, a court of

co-ordinate jurisdiction. The Court followed its earlier decision in *Tunku Abdullah v. Ali Amberan* (1971) 1 MLJ 25. In *Nor Kursiah bte Baharuddin v. Shahril bin Lamin & Anor*, (1997)1 MLJ 537 the civil High Court in Kuala Lumpur, per Vohra. J. Held that the High Court could not, in a habeas corpus application, review or question the validity of a subsisting order made by a Syariah Court which was a court of competent jurisdiction; that the High Court by virtue of Act. 121(1A) of the Constitution had no jurisdiction to question an order made in respect of a matter where the Syariah High Court, a creature of a written law, had jurisdiction given to it under a written law; and that this court would have to accept the Syariah High Court order as a valid order.

6. *Supra* note 4
7. (1994)1 MLJ 156 at 161-163 This case and the three other cases of *G.Rathinasamy*, (1993) MLJ, 166, *Lim Chan Seng*, (1996) 3 CLJ 231, and *Barkath Ali* (Penang High Court 24-959-95) were followed by the High Court in Penang, per Jeffrey Tan, J. in *Shaik Zolkaffily Shaik Natas & Ors v. Majlis Agama Islam, Pulau Pinang dan Seberang Perai*, (1997) 4 CLJ 70 to deny jurisdiction to the Syariah Court to interpret the document to determine whether or not the land in question remained as *Wakaf* land. In *G. Rethinasamy* the High Court in Penang had denied jurisdiction to the Syariah Court to determine whether or not on the facts of the case there was *Wakaf* estoppel; in *Lim Chan Seng*, Syariah Court was held not to have jurisdiction in an apostasy matter; and in *Barkath Ali*, the Civil Court and not the Syariah Court was held to have jurisdiction to grant declaration that the trust in question was or was not a *Wakaf-au-aulad*.
8. (1896) AC 11
9. (1978)1 MLJ 173
10. (1992)3 CLJ 1340
11. (1990)2 CLJ 233
12. (1998)1 CLJ 60
13. The Probate and Administration Ordinance (SSCap. 51); the Probate and Administration Enactment (FMS cap. 8, Johore Enactment No. 22, Trengganu Enactment 22/1356, Administration of Estates Enactment (Kedah No. 1, Perlis No. 1/1338) and Kelantan Administration Enactment, 1930 (2 of 1930).
14. The Courts Enactment (FMS cap 2, Johore Ent.-54, Kedah Ent. 25, Kelantan Ent. 31 of 1938, Perlis Ent 4 of 1330, Trengganu Ent. 4 of 1340); the Courts Ordinance (SS Cap. 10).
15. See section 49(I) of the FMS Enactment, Para 7 of Part A of the Second Schedule to the Courts Ordinance, and section 24(f) of the Courts of Judicature Act, 1964.
16. Section 63 of the Courts Enactment, 1918 (FMS Cap. 2)
17. Section 46 of the Administration of Islamic Law (Federal Territories) Act, 1993 (Act 505).
18. Section 50 *Ibid*.
19. 4. Civil and Criminal law and procedure and the administration of justice, including - (e) subject to paragraph (ii), the following :

- (i)succession, testate and intestate, probate and letters of administration,
- (ii)the matters mentioned in paragraph (I) do not include Islamic personal law relating tosuccession, testate and intestate;
20. 121. *Judicial power of the Federation*
- (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely -
-
- and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.
21. 1. 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 the Islamic law relating to succession, testate and intestate,
22. *Supra* note 13
23. (1998)1 MLJ 681
24. Mohammed Imam, 'Syariah/Civil Courts Jurisdiction in Matters of *Hukum Syara* : A Persisting Dichotomy', (1995)1 CLJ lxxxix at lxxxvii - xc under the heading 'First Impression' Approach.
25. In this respect reference may be made to a notable decision of the Syariah High Court of the State of Sabah in *S. Osman bin S. Kasim v. AK Othman Shah bin Pg. Mohd. Yusof*, (1998)5 MLJ 597 at 604 which has held that even after the addition of clause (1A) to Article 121 of the Federal Constitution, it had no jurisdiction on grounds of *res judicata* to review and correct the past decisions of the civil High Court and Native Court given in probate and administration jurisdiction which were alleged to be contrary to *hukum syara*. In the absence of any argument or discussion on the point in question, this decision may be taken to have inferentially laid down that by virtue of clause (1A) of Article 121 of the Federal Constitution and section 15 of the Syariah Courts Enactment, 1992 (Ent. 14 of 1992) of the State of Sabah, it has jurisdiction over probate and administration of a deceased Muslim's estate. But for this conclusion, the question of the Syariah High Court reviewing or correcting the past decisions of the civil High Court and Native Court given in probate and administration jurisdiction would not have arisen.
26. (1941) MLJ 44; (1941) SSR 51
27. *Supra* note 2
28. Section 50 of the Administration of Islamic Law (Federal Territories) Act, 1993 (Act 505) :
- "If in the course of any proceedings relating to the administration or distribution of the estate of a deceased Muslim, any court or authority, other than the Syariah High Court, or the Syariah Subordinate Court, is under the duty to determine the persons entitled to share in the estate, or the shares to which such persons are respectively entitled, the Syariah Court may, on the request of such court

or authority, or on the application of any person claiming to be a beneficiary or his representative and on payment by him of the prescribed fee, certify the facts found by it and its opinion as to the persons who are entitled to share in the estate and as to the shares to which they are respectively entitled.'