The Court of Appeal's Decision in *Muhamad Juzaili bin Mohd Khamis & Ors v State Government of Negeri Sembilan & Ors* – A Real Breakthrough in the Law

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I. INTRODUCTION

Islamic enforcement officers were conducting their routine 'patrols' and caught two women attempting to engage in sexual activity in a car. These women, respectively aged 32 and 22, pleaded guilty to attempted *musahaqah* before the Terengganu Syariah High Court. They were convicted and sentenced to six lashes each and fined RM3300 (approximately USD792) or four months' imprisonment in default. The caning was carried out on 3 September 2018 by the authorities in the presence of the public comprising various sectors of society. It is said that at least 100 people witnessed it.[1]

Musahaqah is an offence under Section 30 of the Syariah Criminal Offences Enactment (Takzir) (Terengganu) Enactment 2001 (the Terengganu Enactment) and is punishable with fine not exceeding RM5000 or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof. The punishment for attempted *musahaqah* is the same as the offence itself (Section 59 of the Terengganu Enactment). Section 2 of the Terengganu Enactment defines *musahaqah* as "sexual relations between female persons".

Putrajaya's initial response to the whipping was that it was powerless to stop the caning.[2] Fortunately, Datuk Dr Mujahid Yusof Rawa (now Datuk Seri), the Minister in the Prime Minister's Department in charge of Islamic Religious Affairs, later said that his ministry is now taking effort to halt 'moral policing'. He reportedly said that:[3]

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1 FMT Reporters, 100 attend public caning of couple in Terengganu lesbian sex case, *Free Malaysia Today*, 3 September 2018 https://www.freemalaysiatoday.com/category/nation/2018/09/03/100-attend-public-caning-of-couple-in-terengganu-lesbian-sex-case./ last accessed on 4 November 2018.

2 Boo Su-Lyn, Putrajaya powerless to stop Shariah caning, law minister says after lesbians whipped, *Malay Mail*, 4 September 2018 https://www.malaymail.com/s/1669328/putrajaya-powerless-to-stop-shariah-caning-law-minister-says-after-lesbians. last accessed on 22 October 2018.

3 Zakiah Koya, 'No more night khalwat raids or intrusion into Muslims' private lives says Mujahid, *The Star Online* 6 October 2018 https://www.thestar.com.my/news/nation/2018/10/06/putting-compassion-into-practice-mujahid-aims-to-change-mindset-of-conservative-religious-civil-serv/#IR0HtePT6mQTqoRH.99 last accessed on 22 October 2018.

> This issue of enforcement on *khalwat*[4] has been misused and exploited in some cases. It is important that they (enforcement officers) do not interfere with the individual sphere… The reality is that in Malaysia, even though it is an Islamic affair, there will be a point where you will have to confront problems relating to non-Muslims…

The Minister's statement received support from Tun Dr Mahathir Mohamad, the Honourable Prime Minister of Malaysia. It was reported that:[5]

> Mahathir said Islam does not dictate its followers to "go and hunt for people" and "needlessly find trouble". "This is to the point that you want to climb into their house and all that … that is not Islam," he told reporters on the sidelines of a forum at Suria KLCC here. He was responding to Minister in the Prime Minister's Department Mujahid Yusof Rawa's comments in The Star earlier today that what Muslims do behind closed doors is none of the government's business.

The Prime Minister went on to say:[6]

> "My concern is what goes on in public that encroaches on sensitivity, legality or criminality. Only then does the government come in, not because we want to be the moral police but because we want to secure the public sphere," he said.

On 6 September 2018, the Supreme Court of India delivered its judgment in *Navtej Singh Johar & Ors v The Union of India* (unreported) (*Navtej*) wherein it declared that much of Section 377 of the Indian Penal Code which criminalised carnal intercourse between humans as being unconstitutional. Four days later, on 10 September 2018 a similar

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4 On the point of '*khalwat*', section 31 of the Terengganu Enactment stipulates as follows:
Any – (a) man who is found together with one or more women, not being his wife or *mahram**; or (b) woman who is found together with one or more man, not being her husband or *mahram**, in any secluded place or in a house or room under circumstances which may give rise to suspicion that they were engaged in immoral acts shall be guilty of an offence and shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.
*'*Mahram'*, is not defined in the Terengganu Enactment. But according to the Quran, it is a group of persons which are prohibited from marrying each other. Chapter 4, verse 23 of the Quran reads: "Prohibited to you [for marriage] are your mothers, your daughters, your sisters, your father's sisters, your mother's sisters, your brother's daughters, your sister's daughters, your [milk] mothers who nursed you, your sisters through nursing, your wives' mothers, and your step-daughters under your guardianship [born] of your wives unto whom you have gone in. But if you have not gone in unto them, there is no sin upon you. And [also prohibited are] the wives of your sons who are from your [own] loins, and that you take [in marriage] two sisters simultaneously, except for what has already occurred. Indeed, Allah is ever Forgiving and Merciful."
See also: Siti Zubaidah Ismail, 'The Legal Perspective of Khalwat (Close Proximity) as a Shariah Criminal Offence in Malaysia' Pertanika J. Soc. Sci. & Hum. 24 (3): 923-935 (2016), at page 929. Available at <https://umexpert.um.edu.my/file/publication/00002828_79981.pdf>.

5 Vinodh Pillai, Mahathir: 'Climbing' into houses for khalwat raids 'not Islamic', *Free Malaysia Today*, 6 October 2018 https://www.freemalaysiatoday.com/category/nation/2018/10/06/mahathir-climbing-into-houses-for-khalwat-raids-not-islamic/ last accessed on 22 October 2018.

6 *Ibid*.

challenge was launched in Singapore based on the judgment in *Navtej*.[7] Needless to say, the Indian Court's decision has caused shockwaves throughout similar legal systems in the world.

The judgment of the Malaysian Court of Appeal in *Muhamad Juzaili bin Mohd Khamis & Ors v State Government of Negeri Sembilan & Ors* (*Juzaili*)[8] was one of the key inspirations for our article. It is therefore imperative that we re-visit this breakthrough by revered Justice Hishamudin Yunus in light of these international developments.

In some sense, this paper is intended to expand on the arguments made in our online article. This paper first analyses the facts and legal reasoning of the Court of Appeal. It then argues why the Federal Court's reversal of the Court of Appeal's ruling was plainly flawed. What then follows are comments on how Justice Hishamudin's illustrious judgment still remains relevant, if not necessary, in light of current developments. In this vein, the paper also discusses the general effect of the Court of Appeal's judgment in *Juzaili* (Court of Appeal) in respect of the right to privacy in Malaysia.

At the outset, the authors will like to emphasise that this paper does not aim to promote homosexuality or any other acts considered immoral.

II. THE FACTS

The three appellants had filed an application for judicial review at the High Court of Negeri Sembilan substantively seeking a declaration that Section 66 of the Syariah Criminal Enactment 1992 of Negeri Sembilan (Enactment) was unconstitutional. Section 66 reads:

> Any male person who, in any public place wears a woman's attire or poses as a woman shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.

The High Court granted leave for judicial review but the substantive application was heard before another judge who dismissed it. The appellants accordingly appealed to the Court of Appeal.

The appellate court noted at the outset that the appellants were Muslim men who were diagnosed with Gender Identity Disorder (GID). This diagnosis was confirmed by one psychiatrist after medically examining them. The Court of Appeal also had the benefit of affidavits filed on behalf of other medical experts who set out their opinion on what constitutes GID.

In short, the expert evidence established that GID is an incurable medical condition which affects the mind. It causes the subject to think and believe that they are mentally the gender opposite to the one they were ascribed at birth. Plainly put, the appellants

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7 See https://www.reuters.com/article/us-singapore-lgbt/singapore-dj-files-court-challenge-against-gay-sex-ban-after-india-ruling-idUSKCN1LS0ZA last accessed on 22 October 2018.

8 [2015] 3 MLJ 513.

were medically considered respectively as being men with 'a female spirit trapped in a male body'.

As a result, they exhibited characteristics which were typical of women such as dressing in women's clothes and wearing makeup. The Court of Appeal aptly noted that this evidence remained *uncontradicted.*

The judicial review was premised on the appellants' claim that they were subjected to persecution (repeated arrests and prosecution) under the said Section 66 of the Enactment for 'cross-dressing'. The Court of Appeal agreed and granted them their declaration.

III. THE LAW

The Court of Appeal allowed the appeal and struck down Section 66 of the Enactment on five fronts namely that it was inconsistent with the following provisions of the Federal Constitution:

i) Article 5(1);
ii) Articles 8(1) and 8(2);
iii) Article 9(2);
iv) Article 10(1)(a), respectively of the Federal Constitution; and
v) The principles laid down by the Supreme Court of India in *National Legal Services Authority v Union of India and others*[9] (*NALSA* case).

Article 5

On Article 5(1), the Court of Appeal gave it a liberal interpretation in holding that the appellants have the right to live with dignity. The deprivation occurred when they were repeatedly subjected to arrests and prosecution which acts caused their lives perpetual insecurity and vulnerability. The Court of Appeal also opined that the net result of the arrests and detentions meant that the appellants were denied a right to their livelihood. They could not access their place of work while cross-dressed without fear of being arrested.

Articles 8(1) and 8(2)

The subsequent ground was on Articles 8(1) and 8(2). The judgment addressed Article 8 in two ways based on two limbs. First, the appellants were afforded unequal treatment as citizens of this country. This is because the law made no exception for men suffering from GID. 'Normal' male Muslims are not subject to this kind of treatment as they do not suffer the condition. This was the inequality.

The second ground which relates to Article 8(2) pertains to discrimination based on gender. The Enactment only applies to Muslim men; not women. Hence, the Court of Appeal agreed with the argument that the Enactment was unfavourably biased against men and thus violates Article 8(2).

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[9] [2014] 3 MLJ 595; (2014) 5 SCC 438.

Article 9(2)

On Article 9(2), after considering and applying settled law, the Court of Appeal formed the view that restrictions on the freedom of movement must be reasonable. The Court was convinced that the Enactment imposed unreasonable restrictions in violation of Article 9(2). This is because the appellants were constantly in fear of being arrested or prosecuted whenever moving around Negeri Sembilan.

Article 10(1)(a)

The subsequent reason for striking down Section 66 was premised on Article 10(1)(a).

Firstly, in making inroads to the interpretation of the Federal Constitution, the Court, after referring to *Tinker v Des Moines Independent Community School District* (a decision of the Supreme Court of the United States),[10] held that a person's dress, attire or articles of clothing are a form of expression guaranteed under Article 10(1)(a). Section 66 of the Enactment in effect prohibited the appellants' right to wear the attire and articles of clothing of their choice and thus a violation of their right to freedom of expression.

Secondly, the Court of Appeal held that pursuant to Article 10(2)(a) only *Parliament* may restrict freedom of expression and such restriction must be reasonable. Here, the restriction on the freedom of expression was imposed by the State Legislature vide Section 66 of the Enactment. Such restriction not having been made by Parliament, was therefore unreasonable and *ultra vires* Article 10(1)(a). This was another reason why the Court of Appeal struck down Section 66 of the Enactment.

The NALSA case

Next, the Court of Appeal in interpreting Articles 5(1), 8(1) and (2), and 10(1)(a) of the Federal Constitution, adopted the principles expounded by the Indian Supreme Court in the *NALSA* case.

Firstly, in interpreting the word 'gender' in Article 8(2) of the Federal Constitution, the Court of Appeal adopted the Indian Supreme Court's interpretation of the word 'sex' in Article 15 of the Indian Constitution *i.e.* that the word 'sex' includes 'gender identity'.

Secondly, the Court of Appeal adopted the Indian Supreme Court's interpretation of Article 19(1)(a) of the Indian Constitution, that is to say, the right of expressing one's gender through articles of clothing and dressing is a form of expression protected under our Article 10(1)(a).

Thirdly, the Court of Appeal adopted and applied the Indian Supreme Court's interpretation of Article 21 of the Indian Constitution (principally our Article 5) that the said Article protects the dignity of human life and one's right to privacy under our Article 5(1) of the Federal Constitution. The Court of Appeal adopted and recognised that the recognition of one's identity lies at the heart of the fundamental right to dignity.

Thus, it appears that the overall effect of the *NALSA* case is this. The Court of Appeal adopted the *ratio* in the *NALSA* case to support its ruling in respect of the violations of

[10] 393 US 503 (1969).

Articles 5, 8, and 10 of our Federal Constitution. By doing this, the Court of Appeal reaffirmed a prismatic and liberal interpretation of fundamental liberties.

Premised on the above, the Court of Appeal was firmly of the view that Section 66 of the Enactment was *ultra vires* Part II of the Federal Constitution. It therefore allowed the appellants' appeal and struck down the said Section 66 as being unconstitutional.

IV. COMMENTARY

Articles 4(3) and 4(4) of the Federal Constitution and the Judgment of the Federal Court in Juzaili

For the better understanding of this part of the discussion, we think it is imperative to first discuss the general operation of Articles 4(3) and 4(4) of the Federal Constitution. We will then narrow the discussion to highlight the error of the Federal Court in *Juzaili*. Next, we will explore the decision of the Federal Court in *Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors* (Gin Poh)[11] and how it confirms that the Court of Appeal in *Juzaili* was correct.

(i) The General Operation of Articles 4(3) and 4(4) of the Federal Constitution Generally

Arguments on the unconstitutionality of Section 66 of the Enactment were premised on the ground that the impugned provision was inconsistent with Part II of the Federal Constitution, namely, the provisions adumbrated above.

There is no doubt that our Federal Constitution is the supreme law of the land.[12] Under our Federal Constitution written law may be invalid on three grounds. These grounds were succinctly outlined by Suffian LP in the landmark case of *Ah Thian v Government of Malaysia*.[13] They are as follows:

1. written law made by Parliament or the State Legislature may be invalid on the ground that the respective legislative body has no power to make law;
2. written law made by Parliament or the State Legislature is inconsistent with the Constitution; and
3. state written law made by the State Legislature is inconsistent with Federal Law.

The power to declare any law invalid on grounds (2) and (3) can be exercised by any of the Superior Courts in any proceeding brought by the Government or persons without any restrictions. However, the power to declare any law invalid on ground (1) is subject to three restrictions provided by Articles 4(3), 4(4) read with Article 128(1). In declaring a law invalid on ground (1), the Federal Court must exercise its original jurisdiction. The 3 conditions are as follows:

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[11] [2018] 3 MLJ 417.

[12] Article 4(1) of the Federal Constitution.

[13] [1976] 2 MLJ 112, at page 113.

Firstly, a challenge based on ground (1) the person must initiate proceedings for a declaration framed as such that the law is invalid.[14]

Secondly, pursuant to Article 4(4) any person who seeks to invalidate a law on ground (1) must first obtain leave of a single Federal Court judge to commence these proceedings. The Federal Government and any other State Government that would be affected is entitled to be a party to the said proceedings. However, this requirement is dispensed with in proceedings brought between the Federal Government and any State Government pursuant to Articles 4(3)(a) and 4(3)(b).

Thirdly, pursuant to Article 128(1) the Federal Court has exclusive jurisdiction to decide the proceedings on ground (1) as stated earlier.

The above 'restrictions' are mandatory procedures that must be complied with for any person seeking to declare a law invalid on ground (1). The ramification of procedural non-compliance as earlier discussed is that any challenge by a person on ground (1) would be dismissed.

Back to *Juzaili*, the declaration sought in there was premised on ground (2) *i.e.* that the impugned Section 66 of the Enactment was inconsistent with the Constitution and *not* on ground (1). Therefore, any Superior Court (in this case the Court of Appeal) is empowered to declare the impugned provision unconstitutional. Therefore, with respect, the aforementioned 'restrictions' applicable to ground (1) challenges ought not to apply at all in the case of *Juzaili.*

(ii) The Error of the Federal Court in *Juzaili*[15]

The Federal Court reversed the decision of the Court of Appeal on a preliminary issue raised by the parties defending the constitutionality of Section 66 of the Enactment.

It was argued that the net effect of the Court of Appeal's decision was that the Negeri Sembilan State Legislature has no power to enact the impugned section and it was claimed that the procedure pursuant to Articles 4(3) and 4(4) was not complied with.

Ah Thian was cited to emphasise that only the Federal Court has the exclusive jurisdiction to declare the impugned provision unconstitutional. Thus, the declaration sought that the impugned section is inconsistent with Articles 5(1), 8(2), 9(2) and 10(1)(a) should not have been entertained by the High Court. This was supposedly because, the leave of a judge of the Federal Court as required pursuant to Article 4(4), was not first obtained.

In deciding the case, the Federal Court was of the view that the challenge against the said Section 66 amounted to a collateral attack by way of judicial review proceedings. In coming to the said conclusion, the Federal Court followed the case of *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors*[16] and found that the declaration sought "*was an attempt to limit the legislative power of the State Legislature*".[17]

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14 See also generally: *Petroliam Nasional Berhad (Petronas) v Kerajaan Negeri Sarawak* [2018] MYFC 25.

15 [2015] 6 MLJ 736.

16 [2014] 4 MLJ 765.

17 [2015] 6 MLJ 736, at paragraph 26.

As a result, the Federal Court held that the declarations sought should have been dismissed by the High Court for lack of jurisdiction. It ultimately allowed the appeal and reversed the Court of Appeal. The merits of the case did not see the light of day.

The outcome of the Federal Court's decision complicated the clear principle expounded by Suffian LP in *Ah Thian*. In this respect we submit that the interpretation of Articles 4(3) and 4(4) was *per incuriam*. This error was made evident by the Federal Court itself in the case of *Gin Poh*.

(iii) The Decision of the Federal Court in *Gin Poh Holdings Sdn Bhd*

Gin Poh concerned the challenge by a private company against the acquisition by the State Government of Penang of its ten parcels of lands. The matter was brought directly before the Federal Court under Articles 4(3) and 4(4) of the Federal Constitution. Leave by a single judge of the Federal Court was granted.

Brief Facts

The petitioner, *Gin Poh*, was the registered proprietor of its ten parcels of land ('the lands'). The lands were acquired by the fourth respondent, the Land Administrator. The petitioner received compensation but accepted it under protest by reason of it being inadequate. The petitioner subsequently referred the inadequacy point to the High Court after which a higher compensation sum was awarded. Subsequently, the fourth respondent proceeded to alienate the lands to the fifth respondent, a body corporate established under the Chief Minister of Penang (Incorporation) Enactment 2009 (Enactment 9). The said alienation prompted the petitioner to petition for a declaration that the initial acquisition was made mala fide and for non-public purposes. The petitioner contended that the fourth respondent's acquisition of the lands was invalid and accordingly prayed that they be returned. The challenge was basically mounted on three fronts summarised as follows.

Firstly, the fifth respondent was established via Enactment 9 which is a law that falls within the purview of the Federal Parliament. The State Legislature therefore had no power to legislate Enactment 9.

Secondly, and in any event, Parliament had no power to permit the State Legislature to make law allowing for incorporation as was done via the Incorporation (State Legislatures Competency) Act 1962 (Act 380).

Thirdly, even if Act 380 was validly made, the said power to allow for incorporation only applied to corporations aggregate under the Companies Act 1965 and not otherwise. Thus, the incorporation of the fifth respondent, a corporation sole, was made in excess of Federal legislative power.

The petitioner also raised an alternative argument. It claimed that the relevant sections of the Enactment 9 were unconstitutional as they effectively allowed the State to legislate beyond the power conferred to it by the State Constitution. This portion of the *Gin Poh* judgment is not relevant to the present discussion.

The Federal Court dismissed the petition and held that both Parliament and the Penang State Legislature were competent to pass Act 380 and Enactment 9 respectively. The said laws were therefore validly made.

Significance of the Decision

The Federal Court in coming to the above decision distilled the law on Articles 4(3), 4(4) and 128(1)(a). The Federal Court referred to the *locus classicus* i.e. *Ah Thian* and opined that it had no reason to depart from it. The Federal Court noted that Suffian LP's decision is the correct interpretation of these provisions because of the late Lord President's involvement in helping draft the Malayan Constitution in 1956-1957 and its predecessor, the Federation of Malaya Agreement 1948.

The Federal Court judgment on this point can be summed up as follows. The starting point in these kinds of cases is Article 128(1). This is the substantive constitutional provision which positively confers the Federal Court with original jurisdiction in two distinct circumstances. Paragraph (a) of that Article is invoked on the question whether a law made by Parliament or the State Legislature (as the case may be) is invalid on the grounds that the said legislative bodies had no power to make them. The second situation arises when the Federal Court's original jurisdiction is invoked through paragraph (b), to wit, in Federal against State, or State against State disputes.

The Federal Court also described situations where a legislative body makes law in respect of something it has no power to make. It happens when:

(a) Parliament makes law on a matter not within the Federal List or makes law within the State List (unless Article 76 is met which would thereby allow Parliament to make certain laws within the States' purview); or
(b) the State makes law not within the State List (unless Parliament has otherwise made law under Article 76A allowing the State to legislate on the matter exclusive to Parliament).

Reverting to our comment on *Juzaili*, the Federal Court's return to the normative view in *Gin Poh* is welcomed. It serves to prove the point that the Federal Court's judgment in *Juzaili* was flawed. We humbly submit that the Federal Court itself pertinently recognised this error as follows:

> [33] A different construction of the scope of Articles 4(4) and 128(1)(a) appears to have been adopted in a handful of cases. The ground of challenge that a law relates to 'matters with respect to which the legislative body has no power to make laws' was given a wider interpretation, extending to challenges that an Act contravenes the fundamental liberties provisions in the Federal Constitution and that a State Enactment is inconsistent with Federal law. *We observe that the cases in favour of the wider interpretation do not offer a clear juridical foundation for the alternative construction, and are not altogether reconcilable with the dominant position settled by the line of authorities discussed earlier*."
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> [Emphasis added]

The Rationale for the Distinction between Articles 4(3) and 4(4) of the Federal Constitution

The Federal Court in *Gin Poh* rightly noted that it possesses four kinds of jurisdiction, namely: original jurisdiction, appellate jurisdiction, referral jurisdiction and advisory

jurisdiction. The Federal Court, as the final court of appeal is most reluctant to engage its original and referral jurisdictions. This is because, if a matter could so easily be brought and disposed of by the Federal Court, then parties would be denied their right of appeal against that decision. This was elucidated by the former[18] Federal Court in *Mark Koding v Public Prosecutor*[19] which observed:

> Secondly, we would observe that it would have been better if the learned Judge had not referred this matter to us but instead had himself decided the constitutional questions which arose (he had jurisdiction to do so: *Fernandez v Attorney-General* [1970] 1 MLJ 262, 264) and decided the case one way or the other. If he had done that and there were an appeal to us, the whole matter would have been disposed of in two steps.
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> By referring this matter to us without deciding it one way or another, should there be an appeal from his decision on the charge, this matter would come back to us a second time, and thus will have to be disposed of in four steps: causing delay and additional expense, instead of helping in the words of Section 48(2) of the Courts of Judicature Act, towards the speedy and economical final determination of these proceedings.

The former Federal Court also held in *Rethana v Government of Malaysia*[20] per Mohamed Azmi FJ as follows:

> Under our Constitution, the Federal Court is an appellate Court and its exclusive original jurisdiction is limited. In my opinion, this particular original jurisdiction of the Federal Court conferred by Article 128(1)(a) read with Section 45 of the Courts of Judicature Act 1964 should be strictly construed and confined to cases where the validity of any law passed by Parliament or any State Legislature is being challenged on the ground that Parliament has legislated on a matter outside the Federal List or Concurrent List; or a State Legislature has enacted a law concerning a matter outside the State List or the Concurrent List as contained in the ninth Schedule to the Federal Constitution. To extend the exclusive original jurisdiction of the Federal Court to matters which are not expressly provided by the Constitution would apart from anything else, deprive aggrieved litigants of their right of appeal to the highest Court in the land.

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18 The word 'former' is used here because pre-1985, the Federal Court was the intermediary appellate Court, the Privy Council being the apex court. Between 1985 and 1995, appeals to the Privy Council were abolished and the Supreme Court became the final appellate court for all appeals arising from the High Court (two-tier appellate system). In 1994, Parliament re-introduced the three-tier appellate system. The Court of Appeal was established as the intermediary appellate court for all appeals arising from the High Court. All appeals from the Court of Appeal now end at the Federal Court (in cases where the High Court was the court of first instance).

19 [1982] 2 MLJ 120 at pp 123 -124.

20 [1984] 2 MLJ 52 at p 54.

It is for these reasons that when the matter can be raised by way of submission in the ordinary course at the High Court, parties should then abide by such course. That is the rationale for the difference in procedure, and we submit, further strengthens our argument that the Court of Appeal rightly possessed the jurisdiction to decide *Juzaili*.

The Inevitable Road Back to the Court of Appeal's Judgment in *Juzaili*

As a prelude, the *Government of Malaysia v Loh Wai Kong*[21] concerned a case whereby the Government of Malaysia succeeded in the High Court. However, despite succeeding, it appealed against orders made by the High Court. The former Federal Court allowed the appeal. Subsequently, in *Lee Kwan Woh v Public Prosecutor*[22] the Federal Court per Gopal Sri Ram FCJ held that the former Federal Court had no jurisdiction to even entertain and allow the appeal. This was because the Government was unhappy with the grounds of judgment and not the orders made per se. It is trite that a party may only appeal against the order of the Court and not the grounds of judgment. It was on this ground that Gopal Sri Ram FCJ observed that "the views expressed in *Loh Wai Kong* (Federal Court) are worthless as precedent."[23]

We recognise that the facts in *Loh Wai Kong* differ with those of *Juzaili*'s. Nevertheless, what was held by Gopal Sri Ram FCJ in *Lee Kwan Woh* we believe, should apply analogously. This is because, as previously mentioned, the principles expounded by the Federal Court in interpreting Articles 4(3) and 4(4) were made *per incuriam*. Hence, the Federal Court's judgment is similarly 'worthless as precedent'. Therefore, the judgment of the Court of Appeal in *Juzaili* should still remain instructive as the Federal Court never decided on the merits.

(iv) *Juzaili*, *Navtej* and the Burgeoning Right to Privacy in Malaysia of 'Unnatural Offences' and the Decision of the Indian Supreme Court in *Navtej*

The Indian Supreme Court's five-man constitutional bench handed down its unanimous decision on 6 September 2018. Four judgments were delivered. The majority judgment was delivered by: Dipak Misra, Chief Justice of India (CJI) with Khanwilkar J Nariman, Chandrachud, Malhotra JJ also delivered separate concurring judgments. The collective judgment of the Indian Supreme Court spans nearly 500 pages.

We hope to keep this article concise and in so much as it relates to the decision in *Juzaili*. So regrettably, we cannot explore the decision in *Navtej* at great length. That feat is worthy of its own article. The relevant part that we wish to focus on is the ruling in respect of the right to privacy.

In respect of privacy, the following portions of the majority judgment of the Supreme Court are instructive:

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21 [1979] 2 MLJ 33.

22 [2009] 5 MLJ 301.

23 *Ibid*., at paragraph 7.

160. At home, the view as to the right to privacy underwent a sea-change when a nine-Judge Bench of this Court in Puttaswamy (supra) elevated the right to privacy to the stature of fundamental right under Article 21 of the Constitution. One of us, Chandrachud, J., speaking for the majority, regarded the judgment in *Suresh Koushal* as a discordant note and opined that the reasons stated therein cannot be regarded as a valid constitutional basis for disregarding a claim based on privacy under Article 21 of the Constitution. Further, he observed that the reasoning in *Suresh Koushal*'s decision to the effect that — "a minuscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders" is not a sustainable basis to deny the right to privacy.

161. It was further observed that the purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular, and the guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion.

162. The test of popular acceptance, in view of the majority opinion, was not at all a valid basis to disregard rights which have been conferred with the sanctity of constitutional protection. The Court noted that the discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream', but in a democratic Constitution founded on the Rule of Law, it does not mean that their rights are any less sacred than those conferred on other citizens.

163. *As far as the aspect of sexual orientation is concerned, the Court opined that it is an essential attribute of privacy and discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. The Court was of the view that equality demands that the sexual orientation of each individual in the society must be protected on an even platform, for the right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution…*

228. In *Puttaswamy* (*supra*), the right to privacy has been declared to be a fundamental right by this Court as being a facet of life and personal liberty protected under Article 21 of the Constitution. In view of the above authorities, we have no hesitation to say that Section 377 IPC, in its present form, abridges both human dignity as well as the fundamental right to privacy and choice of the citizenry, howsoever small. *As sexual orientation is an essential and innate facet of privacy, the right to privacy takes within its sweep the right of every individual including that of the LGBT to express their choices in terms of sexual inclination without the fear of persecution or criminal prosecution*.

230. The sexual autonomy of an individual to choose his/her sexual partner is an important pillar and an insegregable facet of individual liberty. When the liberty of even a single person of the society is smothered under some vague and archival

> stipulation that it is against the order of nature or under the perception that the majority population is peeved when such an individual exercises his/her liberty despite the fact that the exercise of such liberty is within the confines of his/her private space, then the signature of life melts and living becomes a bare subsistence and resultantly, the fundamental right of liberty of such an individual is abridged.
>
> [Emphasis added]

The provision challenged in *Navtej* was section 377 of the Indian Penal Code. It stipulates as follows:

> Section 377 Unnatural offences —
>
> Whoever voluntarily has *carnal intercourse against the order of nature with any man, woman* or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
>
> ***Explanation*** — Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.
>
> [Emphasis added]

In Malaysia, unnatural sexual acts have been criminalised by virtue of Sections 377 to 377E of the Malaysian Penal Code.

Section 377 criminalises buggery with animals *i.e.* sexual intercourse with animals (bestiality). The Indian equivalent was upheld as constitutional in *Navtej*.

Section 377A, defines the phrase 'carnal intercourse against the order of nature' as 'sexual connection with another person by the introduction of the penis into the anus or mouth of the other person'.

A plain reading of Section 377A suggests that it applies against males only be it heterosexual or homosexual. Be that as it may, we argue that the said section is biased against homosexual males. This is because it operates without the element of consent. To put it another way, consensual sex between adults is not a crime. Non-consensual sexual activity however is an offence classified as rape. What it leaves then is a class of persons *i.e.* homosexuals who are prosecuted regardless of whether the intercourse was consensual or not.

This was the rationale of the Human Rights Committee in recommending Australia to repeal Tasmania's equivalent of the law when its conformity with Australia's international human rights law obligations was called into question.[24] It was also the opinion of majority in *Navtej*.[25]

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[24] *Toonen v Australia* (1994) UN Doc CCPR/C/50/D/488/1992, HRC Communication No 488/1992.

[25] See the majority judgment of Dipak Misra CJI (Khanwilkar J concurring) at paragraphs 237-241.

To quote the Human Rights Committee in *Toonen* in respect of the Tasmanian example, it opined as follows: [26]

> 7.6 As to the discriminatory effect of Sections 122 and 123 of the Tasmanian Criminal Code, the author reaffirms that the combined effect of the provisions is discriminatory because together they outlaw all forms of intimacy between men. Despite its apparent neutrality, Section 122 is said to be by itself discriminatory. In spite of the gender neutrality of Tasmanian laws against "unnatural sexual intercourse", this provision, like similar and now repealed laws in different Australian states, has been enforced far more often against men engaged in homosexual activity than against men or women who are heterosexually active. At the same time, the provision criminalizes an activity practised more often by men sexually active with other men than by men or women who are heterosexually active. The author contends that in its General Comment on Article 26 and in some of its views, the Human Rights Committee itself has accepted the notion of "indirect discrimination".

Section 377C criminalises non-consensual carnal intercourse. We believe it is necessary in that it appropriately punishes people who non-consensually violate others – comparable to the rationale behind the criminalisation of rape.

It must be noted however that there is no section that directly criminalises female homosexual acts. The closest to this is Section 377D which criminalises private and public acts of indecency.

That leaves us with Sections 377CA and 377E. Section 377CA criminalises non-consensual sexual acts which involve the insertion of an object (other than the penis) into the vagina or anus. Section 377E criminalises the incitement of children to engage in acts of gross indecency.

Should consensual homosexual activity be criminalised? This was explored by the Supreme Court of India in *Navtej*. It was also recently explored by one Professor Tommy Koh in an article published online arguing that the Singaporean equivalent of the provision is unconstitutional.[27]

Shorn of tautology, these provisions relating to carnal intercourse were designed by the colonials at a time where sexual intercourse was considered an act solely for procreation. Homosexual activity was in this sense considered 'unnatural'. Further, it was also considered sinful and hence criminalised on ecclesiastical or religious grounds.

The above view is no longer tenable. Our courts are not judges of morality. If at all morality is a factor, it must be (according to the majority in *Navtej*) grounded on 'constitutional morality'. The phrase 'constitutional morality' is best explained in the words of the Indian Supreme Court itself as follows:[28]

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[26] *Toonen v Australia* (1994) UN Doc CCPR/C/50/D/488/1992, HRC Communication No 488/1992, at paragraph 7.6.

[27] Tommy Koh, 'Section 377A: Science, religion and the law' *The Straits Times*, 25 September 2018 < https://www.straitstimes.com/opinion/section-377a-science-religion-and-the-law> (last accessed on 22 October 2018).

[28] See the majority judgment of Dipak Misra CJI (Khanwilkar J concurring) at paragraphs 111237-241.

> 111. The concept of constitutional morality is not limited to the mere observance of the core principles of constitutionalism as the magnitude and sweep of constitutional morality is not confined to the provisions and literal text which a Constitution contains, rather it embraces within itself virtues of a wide magnitude such as that of ushering a pluralistic and inclusive society, while at the same time adhering to the other principles of constitutionalism. It is further the result of embodying constitutional morality that the values of constitutionalism trickle down and percolate through the apparatus of the State for the betterment of each and every individual citizen of the State…
>
> 119. The duty of the constitutional courts is to adjudge the validity of law on well-established principles, namely, legislative competence or violations of fundamental rights or of any other constitutional provisions. At the same time, it is expected from the courts as the final arbiter of the Constitution to uphold the cherished principles of the Constitution and not to be remotely guided by majoritarian view or popular perception. The Court has to be guided by the conception of constitutional morality and not by the societal morality.
>
> 120. We may hasten to add here that in the context of the issue at hand, when a penal provision is challenged as being violative of the fundamental rights of a section of the society, notwithstanding the fact whether the said section of the society is a minority or a majority, the magna cum laude and creditable principle of constitutional morality, in a constitutional democracy like ours where the rule of law prevails, must not be allowed to be trampled by obscure notions of social morality which have no legal tenability. The concept of constitutional morality would serve as an aid for the Court to arrive at a just decision which would be in consonance with the constitutional rights of the citizens, howsoever small that fragment of the populace may be. The idea of number, in this context, is meaningless; like zero on the left side of any number.

In short, the courts are not concerned with social morality. An act may be a sin, but if the said act is criminalised against the grain of constitutionality, then it is the duty of the Courts to intervene and set the law straight. Therefore, following the Indian example, our Penal Code provision in Section 377B is arguably unconstitutional.

One might argue that the position in Malaysia is radically different from that of India or even Singapore. Indeed, it is. The individual States are empowered under the Federal Constitution to create offences against the precepts of Islam.[29] But we argue that any laws made which criminalise consensual homosexual activity are unconstitutional because they violate, amongst others, the fundamental liberty of privacy. Even if, or especially so if they are enacted on grounds of religion.

This is where *Juzaili* becomes relevant. The Court of Appeal itself noted that in deciding the constitutionality of Section 66 of the Enactment, the Court was not concerned with the power of the State to enact the law. In the words of Hishamudin Yunus JCA:

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[29] See the Constitution of Malaysia, List II (State List), item 1.

> [38] We wish to make it clear here that whether or not section 66 is consistent with the precepts of Islam is not in issue in the present case. Indeed, this is conceded by Mr Aston Paiva, learned counsel for the appellants.

Based on the above, the secular nature of the Federal Constitution overrides the allowance for laws premised on religion. This is explicit in Articles 3(1) and 3(4) of the Constitution. This was aptly summarised by Hishamudin JCA as follows:

> [26] Islam is declared by Art 3(1) of the Federal Constitution to be the religion of the Federation.

Religion of the Federation

> 3(1) Islam is the religion of the Federation; but other religions may be practised in peace and harmony in Any part of the Federation.

> [30] But what is more important for the purpose of our judgment is the fact that Art 3(4) qualifies the status of Islam in following terms:

> … (4) Nothing in this Article derogates from any other provision of this Constitution.

> [31] What Art 3(4) means is that *Art 3(1) is subject to, among others, the fundamental liberties provisions as enshrined in Part II of the Federal Constitution.* [Emphasis added]

The above approach was in fact embossed into our jurisprudence in the timeless words of Salleh Abas LP in *Che Omar Che Soh v Public Prosecutor*:[30]

> [W]e have to set aside our personal feelings because the law in this country is still what it is today, secular law, where morality not accepted by the law is not enjoying the status of law. Perhaps that argument should be addressed at other forums or at seminars and, perhaps, to politicians and Parliament. Until the law and the system is changed, we have no choice but to proceed as we are doing today.

(v) The Right to Privacy in Malaysia – Briefly

So how then does *Navtej* augur for Malaysia? The recognition of the right to privacy is slowly gaining traction here. It is trite that Indian authorities, though not binding, are highly persuasive.[31] In this vein, we believe the grounds to adopt the rationale in *Navtej* are compelling.

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30 [1988] 2 MLJ 55, at page 57.

31 See: *Leonard v Nachaippa Chetty* (1923) 4 FMSLR 267; *Jumatsah bin Daud v Voon Kin Kuet* [1981] 1 MLJ 254.

As it stands, the invasion of privacy is actionable on two planes. Firstly, it is a constitutional right housed in Article 5 of the Constitution. Secondly, it exists as a cause of action in common law *i.e.* tort.

The two planes are interconnected. The common law of the United Kingdom (UK) was at first reluctant to recognise a general cause of action in tort. But, once the UK incorporated the Convention for the Protection of Human Rights and Fundamental Freedoms ('European Convention') through the Human Rights Act 1998, the Courts of the UK began to expand the tort of invasion of privacy.[32] This is because Article 8 of the European Convention mandates that States respect the right to privacy.

We argue that the same rationale is applicable in Malaysia. As we argue below, our Courts have held that the right to privacy is implicit in Article 5 of the Constitution. And, like in the UK, our Courts are at liberty to develop the common law right to privacy. It is trite that Malaysian Courts are free to develop our own Malaysian Common law.[33]

This has actually been done before. Our Courts have translated statutes and generic Government policy into an actionable tort. The relevant passages of the Federal Court per Suriyadi Halim Omar FCJ in the *Asmah* case are instructive. His Lordship held as follows:[34]

> [36] We need also to highlight a few concessions made by parties, namely that in Malaysia the tort of sexual harassment at the time of filing of the action did not exist, nor any legislation had been promulgated on the law of sexual harassment prior to the Employment (Amendment) Act 2012 (Act A1419), which came into force on 1 April 2012. This Act included an amendment to include Part XVA into the Employment Act 1955 (Act 265). This amendment provided for the manner in which employers should deal with complaints of sexual harassment at the place of work ie it puts the employer to task. This amendment unfortunately did not address the rights and liabilities of the harasser and the victim.
>
> [37] Prior to the abovementioned amendment, the 1999 Practice Code was already in place. Its shortcoming was that it did not give rise to a cause of action for the victim against the harasser.

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[32] For a deeper analysis on the subject, see: Usharani Balasingam and Saifullah Bhatti, 'Between Lex Lata and Lex Ferenda – An Evaluation of the Extent of the Right to Privacy in Malaysia' [2017] 4 MLJ xxix. There, the authors survey the definitions of 'privacy' and explore, amongst others, how a constitutional right to privacy was at first rejected in India and then later recognised as being part of Article 21 of the Constitution of India. Since Article 5 of the Malaysian Constitution is almost *in pari materia* with the said Article 21, the authors argue how the right should be recognised here as well. The authors also explore and argue how privacy as a tort should be developed.

[33] *Nepline Sdn Bhd v Jones Lang Wootton* [1995] 1 CLJ 865, at page 872.

[34] See generally the judgment of the Federal Court in *Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor* [2016] 4 MLJ 282. The Federal Court recognised the tort of harassment and in formulating it, placed emphasis, *inter alia*, on the amendments to the Employment Act 1955 and the soft-law guidelines in the Malaysian Code of Practice on the Prevention and Education of Sexual Harassment in the Workplace 1999. The appellant was awarded damages against the respondent who was found to have sexually harassed her at her workplace.

> [38] The appellant also conceded that the court is not prevented from developing the law and introducing a law of tort where and when appropriate.

If statutes and government policy can form the basis of a new tort (harassment), then we submit that it is imperative that a tort based on privacy be introduced as a corollary to its constitutional law counterpart. This will be in line with the spirit of the Constitution to protect fundamental liberties.

An action in tort is sometimes necessary depending on the nature of the claim or the remedy sought. This is because some claims carry more of a private element than they do a public one. In cases which carry more of a private element, seeking judicial review would therefore not be advisable.[35]

A suitable example would be the decision in *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors*.[36] Police officers took photos of a female detainee's private parts when she attempted to relieve herself. She sued the government in tort claiming that such egregious conduct constituted an invasion of her privacy. While the High Court granted her damages, it did not hold the Government of Malaysia vicariously liable. She appealed to the Court of Appeal who held that the Government ought to be vicariously liable. She was accordingly allowed damages to the tune of RM100,000.00 for the blatant invasion of her privacy.[37]

Back to our discussion on the constitutional right to privacy, it was first recognised as a constitutional right in Malaysia in passing by the Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor.*[38] However, the recognition was to illustrate the breadth and scope of Article 5 of our Constitution. The facts of the case itself had nothing to do with privacy. The recognition was therefore merely *obiter*.

This recognition in *obiter* was subsequently adopted as *ratio* by the Court of Appeal in *Juzaili*. As already elaborated above, it did this by adopting the portion of the Indian Supreme Court's judgment in the *NALSA* case which re-emphasises privacy rights under India's Constitution. And, as also argued above, the decision of the Court of Appeal still remains law despite its subsequent reversal by the Federal Court. This is because the judgment of the Federal Court, as already argued, was impliedly recognised in *Gin Poh* as being made *per incuriam*.

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35 See for example: *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145, per James Foong FCJ at paragraph 61 – "We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O 53 of the RHC [now Order 53 of the Rules of Court 2012]. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. *If it has substantial public law element then the procedure under O 53 of the RHC must be adopted. Otherwise it may be set aside on ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O 53 of the RHC is not suitable…"*[Emphasis added]

36 [2009] 6 MLJ 826.

37 *Ibid*.

38 [2010] 2 MLJ 333, at paragraph 15.

It is in this sense that *Juzaili* is a breakthrough in the law. The fact that it has adopted and cemented a constitutional right to privacy is a step in the right direction. Premised on our arguments above, the judgment of the Court of Appeal remains law and is instructive precedent for further development of the constitutional right to privacy in future litigation.

V. CONCLUSION

Based on the foregoing, we argue that the Court of Appeal's judgment in *Juzaili* is all the more relevant today. It was the *Navtej* before *Navtej*. Its reversal by the Federal Court on appeal was erroneous. The judgment of the Court of Appeal ought to therefore remain law till today.

We hope that judges in the future will be inspired to follow the precedent set by the Court of Appeal especially in developing jurisprudence in the field of privacy law. With respect, our judges have to be forward looking and consider the rights of individuals as a whole. They ought not to decide cases relating to fundamental liberties premised on what the society might think of them. The time to act is now. In the words of the majority in *Navtej*:[39]

> [T]he constitutional courts have to embody in their approach a telescopic vision wherein they inculcate the ability to be futuristic and do not procrastinate till the day when the number of citizens whose fundamental rights are affected and violated grow in figures.

Ultimately, whatever our moral convictions may be, the Federal Constitution remains supreme. It cannot be displaced by persons claiming to hold the moral torch.

[39] See the majority judgment of Dipak Misra CJI (Khanwilkar J concurring) at paragraph 117.