IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
PETITION NO.: BKA-2-05/2022(D)

BETWEEN

1. NIK ELIN ZURINA BINTI NIK ABDUL RASHID
2. TENGKU YASMIN NASTASHA BINTI TENGKU ABDUL RAHMAN … APPELLANTS

AND

KERAJAAN NEGERI KELANTAN … RESPONDENT

DISSENTING JUDGMENT

[1] There are three applications before the court. Enclosure 26 is the petition filed by the applicants, which is the main application. Enclosure 68 is an application by the respondent, the State Government of Kelantan, to set aside the leave order granted by Vernon Ong FCJ sitting as a single judge of the Federal Court on 30 September 2022 whilst Enclosure 90 is an application by Jabatan Agama Islam Negeri Kelantan to intervene in the action.

[2] Enclosure 90 was dismissed on the first day of hearing itself on 17 August 2023 on the ground that there was no legal basis for the Jabatan Agama Islam Kelantan to intervene. Therefore there are only Enclosure 26 and Enclosure 68 left to be decided.

[3] With regard to Enclosure 68, the grounds for the application, as averred to in the affidavit in support of the Kelantan State Legal Advisor Dato' Idham bin Hj Abdul Ghani affirmed on 2 August 2023 are, *inter alia*, as follows:

(1) the petitioners lack *locus standi* as they fail to show that there is an actual controversy affecting the rights and interests of the parties;

(2) the petitioners are not facing any legal action or being charged in the Kelantan Syariah Court under any of the impugned provisions;

(3) the petitioners' assertion that there is a real risk that they may be subjected to investigation by the 1st respondent is scandalous and frivolous as the 1st respondent is not the authority to enforce the criminal law in the State of Kelantan;

(4) the reasons given by the petitioners at the leave stage were purely speculative, academic and abstract;

[4] In the course of argument shortly after the commencement of hearing on 17 August 2023, learned counsel for the Kelantan Government Dato' Kamaruzaman bin Muhammad Arif asked that Enclosure 68 be heard first before the court proceeded to hear the substantive merits of the application in Enclosure 26. The request had also been made earlier in paragraph 15 of the affidavit in support of the Kelantan State Legal Advisor dated 2 August 2023, i.e. two weeks before the hearing date.

[5] The court's response was to indicate to counsel that Enclosure 68 would be dealt with in the course of hearing the substantive application in Enclosure 26 and that counsel would be heard on the issue of *locus standi* when responding to the applicants' submissions on the merits of Enclosure 26. Learned counsel for the Government of Kelantan raised no objection to this course of action. Parties, including counsel on watching

brief, then proceeded to submit on Enclosure 26 and Enclosure 68, both of which have now been concluded.

[6] If Enclosure 68 is allowed, Enclosure 26 will have to be struck out as a matter of course because with the setting aside of the leave order granted by the single Judge of the Federal Court on 30 September 2022, there will be no petition before the court, and with no petition before the court, the exercise by this court of its exclusive original jurisdiction under Article 128(1)(a) of the Federal Constitution "(the Constitution") will be an exercise in *vacuo*, i.e. in isolation without reference to facts or evidence. It is an untenable situation.

[7] In delivering his decision *ex-tempore* on 30 September 2022, the single Judge of the Federal Court Vernon Ong FCJ gave the following reasons for granting leave under Article 4(4) of the Constitution:

"I thank both the Applicants and Respondent counsel for the written submissions that were filed beforehand and the oral submission before me this morning. I had the benefit of reading and perusing the cause papers. This application relates to certain provisions in the Kelantan Shariah Criminal Code which the Applicants contend the legislature of the state of Kelantan did not have the power to make. It is in essence, a competency challenge. Altogether 20 provisions in the state enactment are said to be impugned on the ground that these are matters falling within List 1 of the Federal List of the Ninth Schedule of the Federal Constitution which are matters which clearly fall within federal law. The learned Assistant State Legal Advisor has abandoned the first PO to the application relating to the omission to name the Majlis Agama Islam Kelantan and the Jabatan Hal Ehwal Agama Islam Negeri Kelantan as parties in this application. The main attack on the Applicants' locus is grounded on the fact that both Applicants are not affected by the impugned provisions and that the First Applicant resided in Kuala Lumpur outside the State of Kelantan. The learned State LA also distinguished the Federal Court decisions in Iki Putra and SIS and cited the case of Gerakan

challenge of the Hudud Laws in support of his contention. However as pointed out by the learned Applicant Counsel, the enactment in question applies here to any Muslims in Kelantan and there is no requirement that the putative Muslim be a resident in the state of Kelantan, it is territorial. Which is to say that any Muslim who happens to be in the state of Kelantan may be liable or subject to prosecution under the impugned provisions of the said enactment. After considering the argument raised and perusing the cause papers, I am of the opinion that the Applicants have made out an arguable case which warrant the granting of leave for the matter to be fully ventilated before the Federal Court. Accordingly, I am granting leave to the Applicants. Order in terms for prayer 1 and 2 of the motion."

[8] Notably the learned judge did not deal with the issue of *locus standi* in depth presumably because His Lordship was more concerned with the merits of the case, which to his mind were to be ventilated at the full hearing once leave had been granted.

[9] The twenty (20) provisions of the Kelantan Syariah Criminal Code (I) [Enactment 14] Enactment 2019 ("the Enactment") that the applicants are contending the State Legislature of Kelantan had no competency to enact are the following sections:

(i) Section 5 – False claim.
(ii) Section 11 – Destroying or defiling places of worship.
(iii) Selling or giving away child to non- Muslim or morally reprehensible Muslim.
(iv) Section 14 – Sodomy.
(v) Section 16 – Sexual intercourse with corpse.
(vi) Section 17 – Sexual intercourse with non-human.
(vii) Section 30 – Words capable of breaking peace.
(viii) Section 31 - Sexual harassment.

(ix) Section 34 – Possessing false documents, giving false evidence, information or statement.

(x) Section 36 – Anything intoxicating.

(xi) Section 37 – Gambling.

(xii) Section 39 – Reducing scale, measurement and weight.

(xiii) Section 40 – Executing transactions contrary to *hukum syarak.*

(xiv) Section 41 – Executing transactions via usury etc.

(xv) Section 42 – Abuse of halal label and connotation.

(xvi) Section 43 – Offering or providing vice services.

(xvii) Section 44 – Preparatory act of offering or providing vice services.

(xviii) Section 45 – Preparatory act of vice.

(xix) Section 47 – Act of incest.

(xx) Section 48 – Muncikari.

[10] It is undoubtedly a constitutional challenge under Article 4 Clause (3) read with Clause (4) of the Constitution. Clauses (3) and (4) are as follows:

"(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or –

(a) if the law is made by Parliament, in proceedings between the Federation and one or more States;

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

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) **shall not be commenced without the leave of a judge of the Federal Court**; and the Federation shall be entitled to be a party to any such proceedings brought for the same purpose under paragraph (a) or (b) of the Clause."

(emphasis added)

[11] Proceedings under paragraphs (a) and (b) of Article 4(3) are proceedings between the Federal and the State Governments and vice versa. No leave to commence proceedings is required. Proceedings under Article 4(4) on the other hand are proceedings commenced by petitioners other than proceedings between the Federal and the State Governments and vice versa. Such proceedings require the leave of a judge of the Federal Court.

[12] The purport of Article 4(4) of the Constitution was explained by Hashim Yeop A Sani SCJ (later CJM) in the then Supreme Court case of *Karim bin Abdul Ghani v Legislative Assembly of the State of Sabah* [1988] 1 MLJ 171 ("*Karim bin Abdul Ghani*") in the following terms:

"The object and purport of Article 4(4) of the Federal Constitution has already been interpreted before in *Stephen Kalong Ningkan v Tun Abang Haji Openg & Tawi Sli* (*No.2)* [1967] 1 MLJ 46, 49 by Pike C.J. (Borneo) with which interpretation I agree. Article 4(3) and (4) of the Federal Constitution is designed to prevent the possibility of the validity of laws made by the legislature being questioned on the ground mentioned in that article incidentally. The article requires that such a law may only be questioned in proceedings for a declaration that the law is invalid. The subject must ask for a specific declaration of invalidity. **In order to secure that frivolous or vexatious proceedings for such declarations are not commenced, Article 4(4) requires that leave of a judge of the Supreme Court must first be obtained**."

(emphasis added)

[13] To paraphrase Hashim Yeop A Sani SCJ, the reason why leave of a Federal Court Judge is required for a constitutional challenge under Article 4(4) of the Constitution is to preclude busybodies or dilettantes from commencing frivolous or vexatious actions to challenge the validity of laws made by Parliament or the State Legislature. The challenge must in all cases be grounded on *bona fide* intention.

[14] Midway through the proceedings and after hearing submissions by learned counsel for the Government of Kelantan, learned counsel for the petitioners informed the court that the petitioners wished to withdraw their challenge to section 5 (False claim) and section 37(1)(a) (Gambling) of the Enactment, which the court took note of.

[15] By withdrawing their challenge to section 5 and section 37(1)(a) of the Enactment, the petitioners are now effectively saying that the offences of false claim (claiming to be a prophet or such other false claims) and gambling are purely religious offences and not "criminal law" for the purposes of the Constitution (Item 1 of the State List) and therefore within the competency of the State Legislature of Kelantan to enact.

[16] It is unfortunate that the Constitution does not define the term "criminal law" in order, if that had been the intention, to exclude from its ambit syariah offences which are purely religious in nature so as to confer on the State Legislatures the power to enact such laws.

[17] The *Britannica Encyclopedia* defines "criminal law" to mean "the body of law that defines criminal offences, regulates the apprehension, charging and trial of suspected persons, and fixes penalties and modes of treatment applicable to convicted offenders". The definition is wide

enough to exclude any and all forms of syariah criminal law from being within the power of the State Legislatures to legislate on. It is therefore hard to understand why the petitioners are now accepting that false claim (section 5) and gambling (section 37(1)(a)) are not "criminal law" for the purposes of the Constitution and therefore within the competency of the Kelantan State Legislature to enact.

[18] In *Iki Putra Mubarrak v Government of Selangor & Anor* [2021] 3 CLJ 465 (*"Iki Putra Mubarrak")*, Azahar Mohamad CJ (Malaya) who delivered the supporting judgment came to the following conclusion at paragraph [118]:

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

[19] The petitioners relied on the following grounds as their legal basis for challenging the validity of the impugned provisions:

(i) The impugned provisions are beyond the legislative competence of the Kelantan Legislature;

(ii) Item 1, List II (State List), Ninth Schedule of the Constitution allows the Kelantan Legislature to make laws on "the creation and punishment of offences by persons professing the religion of

Islam against precepts of that religion, except in regard to matters included in the Federal List" (together with Article 74 of the Constitution);

(iii) The impugned provisions were made pursuant to this legislative field. However, the impugned provisions concern matters in List I (Federal List), Ninth Schedule of the Constitution ("Federal List") and/or dealt with by federal law. Most of them relate to "criminal law" under Item 4 in the Federal List, which includes all matters that could reasonably be viewed as a matter of public concern relating to peace, order, security, morality, health, or some similar purpose, in the public sphere.

[20] In her application for leave earlier, the 1st petitioner in her affidavit in support dated 25 May 2022 affirmed as follows:

"6. I was born in Kota Bharu, Kelantan in 1961;

6.1 I originally resided in Kelantan with my family until 1967.

6.2 I later moved back to Kelantan in 1989 to practice law in Kota Bharu but commuted between Kuala Lumpur and Kota Bharu for work when required. At certain points, I practiced law in Kuala Lumpur but remained a resident in Kelantan.

6.3 I set up my own legal practice in Kelantan in 1997. It was called Messrs. Nik Elin Nik Rashid & Associates.

6.4 I later joined many other law firms as a partner but later quit practice sometime in 2009. I however continued to live in Kota Bharu.

6.5 In 2015, I moved to Kuala Lumpur and returned to legal practice under the style of Messrs. Nik EZ Law Chambers (now known as Messrs. Nik Elin Nik Rashid Law Practice).

6.6 Although I moved to Kuala Lumpur, I frequently travel to Kelantan as I still have family and properties and assets in Kelantan.

6.7 I frequently travel to Kelantan to manage the said properties and assets, including having to pay the necessary taxes and charges.

6.8 With that, there is a real risk that I might be subjected to the investigative powers of the respondent in relation to the impugned Provisions.

6.9 I also intend to retire in Kelantan."

[21] Of the 10 paragraphs, only paragraph 6.8 has anything to do with *locus standi*. The rest have no relation to the issue as they apply to every Muslim, Kelantanese and non-Kelantanese alike and not specific to the petitioners.

[22] Having obtained leave from the single Federal Court Judge on 30 September 2022, the petitioners duly filed their petition (Enclosure 26) which contained their statement made pursuant to Rule 7 of the Rules of the Federal Court 1995 ("the Rules") which reads as follows:

"The petition shall contain a statement in summary form of the material facts on which the petitioner relies and shall conclude by setting out the relief to which the petitioner considers he is entitled. "

[23] Under the heading "Material facts" this is what the petitioners stated:

"4. The 1st Petitioner was born in Kota Bharu, Kelantan in 1961.

4.1 The 1st Petitioner originally resided in Kelantan with her family until1967.

4.2 She later moved back to Kelantan in 1989 to practice law in Kota Bharu but commuted between Kuala Lumpur and Kota Bharu for work when required. At certain points, the 1st Petitioner practiced law in Kuala Lumpur but remained a resident in Kelantan.

4.3 The 1st Petitioner set up her own legal practice in Kelantan in 1997. It was called Messrs. Nik Elin Nik Rashid & Associates.

4.4 The 1st Petitioner later joined many other law firms as a partner but later quit practice sometime in 2009. She however continued to live in Kota Bharu.

4.5 In 2005, the 1st Petitioner moved to Kuala Lumpur and returned to legal practice. The 1st Petitioner practiced under the style of Messrs. Nik EZ Law Chambers (now known as Messrs. Nik Elin Nik Rashid Law Practice).

4.6 Although she moved to Kuala Lumpur, the 1st Petitioner frequently travels to Kelantan as she still has family and properties and assets in Kelantan.

4.7 The 1st Petitioner frequently travels to Kelantan to manage the said properties and assets, including having to pay the necessary taxes and charges.

4.8 The 1st Petitioner intends to retire in Kelantan.

4.9 The 2nd Petitioner is the 1st Petitioner's daughter. She has a residential address in Kelantan and frequently travels to Kelantan to visit her family."

[24] It was the same statement that the 1st petitioner made in her leave application but conspicuously missing from the statutory statement is her averment at paragraph 6.8 of her affidavit in support at the leave stage quoted earlier where she had affirmed:

"6.8 With that, there is a real risk that I might be subjected to the investigative powers of the Respondent in relation to the Impugned Provisions."

[25] There is no explanation for the omission, which leaves the petitioners without any factual basis to support their claim for *locus standi* or standing to sue. Having gone through the cause papers and the submissions of the parties both written and oral, I am constrained to hold that the application in Enclosure 26 is an abuse of the court process and ought to be struck out. Leave should not have been granted in the first

place and must be set aside. It is clear to me that the petitioners have no *locus standi* to maintain the action and consequently this court has no basis in law to exercise its exclusive original jurisdiction under Article 128(1)(a) of the Constitution to hear and to decide on the merits of Enclosure 26. The court cannot assume jurisdiction where there is none.

[26] I take note of the majority view that if leave had been improperly granted by the single Federal Court Judge, the striking out of the petition would be a matter of "technicality". I understand that to mean that if the petition is struck out merely because the petitioners have no *locus standi* to maintain the action, the striking out would be on an issue that is unimportant compared to the larger issue of merits of the case.

[27] I am not prepared to completely disagree with that view, but with the greatest of respect to the majority, technicality or not it is an abuse of the court process for anyone with no *locus standi* to drag the Government, Federal or State, to court to ventilate his or her personal grievances by invoking Article 4(4) read with Article 128(1)(a) of the Constitution. A technical knockout is still a knockout.

[28] An abuse of process occurs when a person or party uses the legal system in a way that does not serve the underlying goal of a legal action but to achieve a collateral purpose. Such abuse of the court process at any level of the court hierarchy is unacceptable and must not be countenanced by this court. Condoning the abuse will render the rule on *locus standi* completely redundant and bereft of all meaning. It will be as good as tossing the rule aside in order to give way to the merits of the case.

[29] *Locus standi* is Latin for “place to stand”. *Black’s Law Dictionary* (Deluxe Ninth Edition) defines it to mean “the right to bring an action or to be heard in a given forum”. It determines whether a party has sufficient interest or stake in the matter to justify his participation in the proceedings. There can be no right to bring an action or to be heard in a given forum where there is no standing to sue. A person with no standing to sue is an incompetent litigant.

[30] The doctrine of *locus standi* signifies that unless a person has been directly injured or is adversely affected by the act he is challenging, his action will not be upheld by the court. He must at least show that he has a real and genuine interest in the subject matter of the suit although it is not necessary to establish infringement of a private right or the suffering of special damage: *See Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 2 CLJ 525 FC (“*MTUC & Ors*”) where it was held by this court that the “adversely affected test” is the preferable test for all the remedies provided for under Order 53 of the ROC.

[31] It is a fundamental requirement for instituting a suit that the person must suffer some kind of injury**.** In *Shanti Kumar R. Canji v Home Insurance Co. of New York* [1974] AIR 1719 the Supreme Court of India observed that the term “aggrieved person” does not mean a person who has suffered an imaginary injury but it means that the rights of the person have been violated adversely in reality, and the injury must be physical, mental, monetary, et cetera and not mere imagination.

[32] It must be highlighted however that the trend in India today is to reject the restrictive application of the *locus standi* rule in favour of

liberalising it through judicial activism for the reason that the strict application of the rule limits the role played by public spirited individuals, non-governmental organisations (NGO) and human rights activists and advocates in litigating socio-economic matters that affect the poor, thereby denying them access to justice. This is reflected in the decision of the Indian Supreme Court in *Janta Dal v HS Chawdhary* (1992) supp 1 SCR 226 at paragraphs 95-96 where the court articulated the rule on *locus standi* as follows:

"If such person or determinate class of persons is by reason of poverty, helplessness or disability or [sic] or socially or economically disadvantaged position, are unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ…seeking judicial redress for the legal wrong or injury."

[33] Taking Nigeria as another random example, the country maintains the strict approach. In *AG Fed v AG Lagos State* (2017) 8 NWLR (PT1566) 20 at 55 para D, the Supreme Court of Nigeria held that the question whether a plaintiff has *locus standi* to bring an action in the first place raises an issue of jurisdiction. In *Liba v Koko* (2017) 11 NWLR (PT1576) 335 at 355-356 paragraphs H-C, the same court held that when the plaintiff has been found to have no standing to sue, the question of whether other issues in the case had been properly decided or not does not arise. This is because the court has no jurisdiction to entertain the claim.

[34] In another case, the Nigerian Supreme Court in *Adesanya v President of the Federal Republic and Others* [1981] 5 SC 112 said at page 174:

"*Locus standi* or standing to sue is an aspect of justiciability and, as such, the problem of *locus standi* is surrounded by the same complexities and vagaries inherent in justiciability. The fundamental aspect of *locus standi* is that it focuses on the party seeking to get his complaint before the court, not on the issues he wishes to have adjudicated."

[35] The four cases are of course cases of foreign origin, namely from India and Nigeria, which may not, I must admit, be of great assistance in interpreting Articles 4(4) and 128(1)(a) of our Constitution. They are cited merely to illustrate the point that there are diverging views among different countries on the question whether the rule on *locus standi* should be applied liberally or restrictively.

[36] As for the procedure to be followed in deciding whether to grant or to refuse leave, the English case of *IRC v Ex parte National Federation of Self Employed and Small Businesses* [1982] AC 617 is instructive. In that case the House of Lords held that standing to sue should be considered in two stages. Firstly, at the leave stage the court should refuse *locus standi* to those who appear to be "busybodies, cranks and other mischief-makers" (*per* Lord Scarman). Secondly, if leave is granted, the court may consider standing to sue again as part of the hearing of the merits of the case, where it may decide that in fact the applicant does not have "sufficient interest".

[37] The first stage necessarily requires the court to determine if the applicant is or is not a busybody, a crank or a mischief-maker. If he or she is such a litigant, then *locus standi* should be refused and the matter ends there without having to proceed to the second stage. This is because, in

the words of Lord Scarman, "*I do not see any purpose served by the requirement for leave*".

[38] There is no reason in my view why this court should not adopt the two-stage process laid down in *IRC* as our law in determining standing to sue in an application for leave under Article 4(4) of the Constitution, although it is not a case on constitutional challenge. The serious nature of the challenge under Article 4(4) read with Article 128(1)(a) of the Constitution is all the more reason why the procedure should be adopted.

[39] *IRC* was a case on administrative law in relation to *locus standi* in an application for judicial review under Order 53 of the English Rules of the Supreme Court, which is equivalent to Order 53 of our Rules of Court 2012 ("the ROC") except that our requirement for the conferment of *locus standi* under the Order is being "adversely affected" instead of having "sufficient interest".

[40] It was on the basis of this authority that this court proceeded to hear Enclosure 26 and Enclosure 68 together instead of hearing Enclosure 68 first to be followed by Enclosure 26 as requested by learned counsel for the Government of Kelantan. The case is also authority for the proposition, at least as the law stood in England at the material time, that although leave had been granted, the case might still be dismissed if the court found that the applicant had no "sufficient interest" in the subject matter of the dispute.

[41] In Malaysia the law on *locus standi* in relation to a constitutional challenge has been explained with admirable clarity by my learned sister Nallini Pathmanathan FCJ delivering the majority judgment of this court in

Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor [2020] 3 CLJ 593 ("*Anwar Ibrahim (1)*"). It was a case that was brought by way of a special case under section 84 of the Courts of Judicature Act 1964 ("the CJA"). On the same page with Her Ladyship in the 5-2 majority were Azahar Mohamad CJ (Malaya), Mohd Zawawi Salleh FCJ, Abang Iskandar Abang Hashim FCJ (now PCA) and Idrus Harun FCJ (later Attorney-General).

[42] In that case, the two constitutional questions referred to this court by the High Court Judge for determination under section 84 of the CJA were: (1) whether section 12 of the Constitution (Amendment) Act 1983, section 2 of the Constitution (Amendment) Act 1984 and section 8 of the Constitution (Amendment) Act 1994 were unconstitutional, null and void and of no effect on the ground that they violated the basic structure of the Constitution; (2) whether the National Security Council Act 2016 was unconstitutional.

[43] The facts of the case are not on all fours with the facts of the present case, but the question of law on *locus standi* that the court was dealing with in that case mirrors the question of law on *locus standi* that this court is dealing with in the present application. The majority in that case refused to answer the constitutional questions posed as the questions were found to be abstract, purely academic and bereft of any actual controversy. It is therefore safe to say that the petitioner in that case failed in his challenge to the validity of the impugned laws not because he failed to establish the merits of his case but because he failed to establish his *locus standi* to maintain the action. The approach taken by the majority is more in line

with the restrictive application of the rule on *locus standi* rather than the liberal approach.

[44] To appreciate the relevance of the majority decision on *locus standi* and to avoid accusation of cherry-picking and misreading of the judgment, I am taking the unusual step of reproducing the whole and entire paragraphs [43] to [59] of the majority judgment. In my view, the 17 paragraphs are worthy of being quoted *in extenso*, given the forensic force of the reasoning. Paragraphs [43] to [59] are as follows:

"[43] **The key question is thus whether there is a real and actual controversy between the parties which will affect their rights and interests. Conceptually, the question is inextricably intertwined with the test of locus standi, which requires a party to have been 'adversely affected' in the sense that they have a 'real and genuine interest in the subject matter'** (*Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145 at para [58]). **A violation of a constitutional right gives rise to both a 'real interest' for a party to bring the action and a 'real controversy' between the parties to the action** (*Tan Eng Hong at para* [106]. As such, in the context of determining whether there is a real controversy in a constitutional challenge, **attempts to sever the requirement of an actual controversy from the notion of standing would be 'conceptually awkward, if not impossible'** (*Croome v State of Tasmania* [1997] HCA 5; (1997) 142 ALR 397 at pp 405-406). For the purposes of this case, we will frame the foregoing discussion in terms of the *Metramac* test of 'actual controversy'.

Whether the mere existence of a law gives rise to an actual controversy affecting the parties

[44] In this case, the plaintiff does not assert that the NSCA has been invoked so as to violate his rights and interests, or that of anyone else. His grievance is purely legal,

directed against the alleged inherent unconstitutionality of the Act. **The constitutional questions referred to us arises from no other fact than the very existence of the Act itself**. **In these peculiar circumstances, the central issue is whether the questions referred are purely abstract or academic**. Can the mere existence of a law, without more, give rise to an actual controversy affecting the parties? Or must the impugned law be used to the detriment of a party before it can constitute an actual controversy?

[45] Useful illumination on this question can be gleaned from three cases in different jurisdictions, all relating to similar subject matters: *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476; [2012] SGCA 45 (Singapore Court of Appeal), *Croome v State of Tasmania* [1997] HCA 5; (1997) 142 ALR 397 (High Court of Australia), and *Leung TC William Roy v Secretary for Justice* [2006] HKCU 1585 (Hong Kong Court of Appeal). In each case, the appellants, homosexual men, challenged the constitutionality of a particular provision in the local criminal legislation which criminalized consensual sexual conduct between males. In all three cases, the apex courts held that the appellants were entitled to bring the constitutional challenge; **they need not wait to be prosecuted under the impugned provisions for a real controversy to arise**.

[46] In *Tan Eng Hong (supra)*, the appellant was arrested and charged under s 377A of the Singapore Penal Code for the commission of an act of gross indecency with another male person. The appellant applied for a declaration the section is unconstitutional. The charge was later substituted with a charge under a different section. The appellant pleaded guilty to the substituted charge and was accordingly convicted and sentence. The attorney general applied to strike out the constitutional challenge.

[47] The Singapore Court of Appeal held that **the crux of the standing requirement as well as the requirement for a real controversy is the violation of a constitutional right; an arguable violation of constitutional rights gives rise to a real controversy for the court to determine** (at paras [84], [179]). ‘Every citizen

has constitutional rights, not every citizen's constitutional rights will be affected by an unconstitutional law in the same way'; pertinently, while a constitutional right may be enjoyed by all citizens, **the mere holding of a constitutional right is insufficient to found a challenge to the law – there must also be a violation of the constitutional right** (at para [93]). It was found that an arguable violation of constitutional rights occurred when the appellant was arrested and detained under an allegedly unconstitutional law, even though the charge was subsequently substituted (at para [151]).

[48] However, the court went further and opined that the mere existence of an allegedly unconstitutional law can, in some cases, constitute a violation of constitutional rights. VK Rajah JA rejected the proposition that a prosecution under an allegedly unconstitutional law must be demonstrated in every case before a violation of constitutional rights can be shown (at para [110]):

> The effects of a law can be felt without a prosecution, and to insist that an applicant needs to face a prosecution under the law in question before he can challenge its constitutionality could have the perverse effect of encouraging criminal behavior to test constitutional issues. Even though a violation of constitutional rights may be most clearly shown where there is a subsisting prosecution under an allegedly unconstitutional law, we find that a violation may be established in the absence of a subsisting prosecution. In certain cases, the very existence of an alleged unconstitutional law in the statute books may suffice to show a violation of an applicant's constitutional rights.

[49] **While the court recognized the possibility of such a case in principle, it declined to lay down a general rule that the existence of an allegedly unconstitutional law constitutes a violation of the applicant's constitutional rights in every case (at para [109]). Whether the very existence of an unconstitutional law in the statute books suffices to show a violation of constitutional rights depends on what exactly that law provides** (at para [94]). The court took pains to emphasise that such a case, though 'conceivable', would be 'rare' and 'extraordinary', and cautioned that 'no such case has ever been brought to the attention of the courts here' (at [94], [106]).

[50] The court considered certain factors pointing towards a violation of constitutional rights by the mere existence of a law**. One of the factors is whether the law specifically targets a particular group: a violation of constitutional rights 'may be more easily demonstrated where the law specifically targets a group and the applicant is a member of that group'** (at para [94]). It was observed, without going into the merits of the challenge, that the impugned section affects the lives of a portion of the community in a very real and intimate way (at para [184]).

[51] Another relevant factor is a **real and credible threat of prosecution** under such a law (at para [179]):

> Although the existence of a lis is clearer when a prosecution has been brought under an allegedly unconstitutional law, the very fact of a real and credible threat of prosecution under such a law is sufficient to amount to an arguable violation of constitutional rights, and this violation gives rise to a real controversy for the court to determine.

[52] **The threat of prosecution must be real and credible and not merely fanciful** (at [111]-[114]). The reason why such a threat may be seen as giving rise to an actual controversy is 'that individuals should not be compelled to act against what is, on the face of it, the law, and thereby risk the actualization of the threat of prosecution' (at para [178]). **In that case, the court found that the threat of prosecution under the impugned section was not merely fanciful, given that the appellant professes to regularly participate in the kind of conduct criminalized** (at para [183]).

[53] In the other two cases, no prosecution had been brought against the appellants pursuant to the impugned provisions. Nevertheless, the courts similarly held that the appellant need not wait to be prosecuted in order for an actual controversy to arise before a challenge can be mounted. In *Croome*, Goudron, McHugh and Gummow JJ in the High Court of Australia rejected the contentions that the appellants' claim for a

declaration of unconstitutionality was premature and that there was no immediate right or liability to be determined, because the state had not yet invoked legal proceedings to enforce the criminal law against the appellants (at pp 409, 411). **The appellants' conduct of their personal lives were found to have been overshadowed by the presence of the impugned provisions in significant respects**. Moreover, since the state has not disabled itself from prosecuting in the future, it was found that the appellants had a real interest and did not raise a question which is abstract or hypothetical (at p 411).

[54] Crucially, the principle that an appellant who has not been prosecuted by an impugned law may challenge its validity is **not without limit. Brennan CJ, Dawson and Toohey JJ stressed that they did not assent to the 'broad proposition' that any person who intends to act in contravention of a law can seek a declaration that the law is invalid, purely by reason of that intention** (at p 402).

[55] The same conclusion was reached by the Hong Kong Court of Appeal in *Leung*. In that case, an argument was raised that the constitutional challenge was based on the 'purely hypothetical situation' that the appellant may be prosecuted in the future (at para [26]). **The court nevertheless held that in view of 'exceptional circumstances', there was sufficient justification to entertain the challenge** (at para [30]). Notwithstanding the fact that 'a prosecution is neither in existence nor in contemplation', Ma CJHC found it clear that **the appellant 'and many others like him have been seriously affected by the existence of the legislation under challenge'** (at para [29]):

> **It is fair to say that the respondent has been living under a considerable cloud**. The effect of the respondent's submissions is really that the constitutionality of the affected provisions can only be tested if the Applicant were to go ahead with those activities criminalized by the provisions in question and be prosecuted for them. In other words, access to justice in this case could only be gained by the Appellant breaking what is according to the statutory provisions in question, the law.

[56] **Again, the requirement of 'exceptional circumstances' was emphasized**. **Such situations cannot be enumerated exhaustively but must be determined on a case by case basis** (at para [28]). Examples include 'situations where it would be undesirable or prejudicial to force interested parties to adopt a wait and see attitude (that is, to force persons to wait until an event occurs) before dealing with a matter' (at para [28]).

[57] These principles are not foreign to the Malaysian courts. The proposition that a real threat to a party's rights can give rise to an actual controversy **that is not abstract or academic** was recognized by the Federal Court in *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101. In that case, in response to an apparent threat to expel him from the state, the appellant sought declarations that he had the right to remain in Sabah. The Federal Court held that the action demonstrated a real dispute and was not academic. Suffian LP held that (at p 108):

> As the distinguished American scholar, EM Borchard on 'Declaratory Judgments', 2nd Ed, p 20, referring to those cases where no traditional wrong has yet been committed or immediately threatened, says ***'a condition of affairs is disclosed which indicates the existence of a cloud upon the plaintiff's rights, a cloud which endangers his peace of mind, his freedom and his pecuniary interests****…'*… The fact that the declaration was sought before the statutory powers were exercised was not a consideration weighing against the grant of that declaration… we consider that a court should make it possible to settle ***real disputes*** immediately they arose, so that the parties may act with certainty and not be under the threat of legal uncertainty and should be able to discount the future. (Emphasis added.)

[58] We consider the situation envisaged – where a constitutional challenge can be brought on the basis of the mere existence of a law – is not technically an exception to the general rule against determining abstract or academic questions without actual controversy. **Rather, such a situation is an exceptional case where, due to certain factors, the existence of the law itself affects the rights of parties and gives rise to an actual controversy**.

[59] We find much merit in the reasoning of the cases above. In our model of concrete review, courts would not ordinarily treat the mere existence of a law as an actual controversy suitable for determination. **However, in the face of an exceptional law specifically targeted against a minority group, the very existence of which amounts to a real and credible threat to their rights – Holocaust-type laws would be an extreme example – the courts are not obliged to stand idly by until the threat materialized**. In the words of Lord Woolf (*Droit Public – English Style*, (1995) Public Law 57 at p 68), 'If Parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which was without precedent'.

(emphasis added)

[45] The words highlighted in bold represent the key points in the judgment**.** For completeness, it will not be out of place in my view to mention briefly the dissenting judgment of David Wong Dak Wah CJ (Sabah and Sarawak) in the same case who held, contrary to the majority view, that the applicant was clothed with the necessary *locus standi*, not that the dissenting judgment has any force of law – it only has persuasive authority (*Yong Tshu Khin & Anor v Dahan Cipta Sdn Bhd & Anor And Other Applications* [2021] 1 CLJ 631; [2021] 1 MLJ 478) or that I am in agreement with it. Essentially the reasons given by the learned CJ (Sabah and Sarawak) were as follows:

"[165] I had the opportunity to deal with this issue of *locus standi* in *Robert Linggi v The Government of Malaysia* [2011] 7 CLJ 373 where I took a view quite similar to that of Abdoolcader SCJ. My views were adopted and applied in *Manoharan Malayalam & Anor v Dato' Seri Mohd Najib Tun Hj Abdul Razak & Ors* [2013] 8 CLJ 1010.

[166] Therefore, in a case where "the complaint of the plaintiff is that the Federal Government or its agent has violated the Federal Constitution by its action or legislation, he has the *locus* to bring an action to declare the action of the Federal

Government or its agent as being unconstitutional, without the necessity of showing that his personal interest or some special interest of his has been adversely affected" (per Hishamudin Yunus JCA in *Manoharan Malayalam*.)

[167] In fact, the proposition is so obvious that it should not need authority. Any contrary proposition would lead to absurdity and I can do no better than to quote the words of Abdoolcader SCJ from *Lim Kit Siang* (at p.101 (CLJ); p.45 (MLJ)):

> The effect of the denial of standing in such circumstances would be, and it has indeed been so suggested, that we will have to fold our arms and do nothing, in which event I would add we might as well have to hang our heads in sorrow and perhaps even in mortification in **not being able to at least entertain for consideration on its merits any legitimate complaint of a public grievance or alleged unconstitutional conduct**. (emphasis added)."

[46] The emphasis clearly was to consider the merits of the complaint rather than on the standing to sue. In *Robert Linggi v The Government of Malaysia* [2011] 7 CLJ 373, David Wong Dak Wah J (as he then was) was concerned with the "erosion of the rights of Sabah in so far as the constitution and jurisdiction of the High Court of Sabah and Sarawak and the appointment, removal and suspension of judges of that court" and that "when there is a challenge concerning any dismantling of the supreme law of the country, litigation should be encouraged".

[47] Pausing here, I must hasten to mention that this court, also through the judgment of my learned sister Nallini Pathmanathan FCJ in the recent case of *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and Other Appeals* [2023] 5 CLJ 167 ("*Taman Rimba*"), approved

of the above passage by Abdoolcader SCJ in coming to the conclusion that the majority decision of the then Supreme Court in *Government of Malaysia* v *Lim Kit Siang* [1988] 2 MLJ 12 ("*Lim Kit Siang"*) no longer represent the law on *locus standi* in Malaysia, particularly in public interest litigation.

[48] At paragraph [438] my learned sister on her part quoted with approval the following passage in the dissenting judgment of Abdoolcader SCJ:

"[438]… To deny *locus standi* in the instant proceedings would in my view be a retrograde step in the present stage of the development of administrative law and a retreat into antiquity. The merits of the complaint are an entirely different matter… *The principle that transcends every other consideration must ex necessitate be that of not closing the door to the ventilation of a genuine public grievance and more particularly so where the disbursement of public funds is in issue, subject always of course to a judicial discretion preclude the phantom busybody or ghostly intermeddler.* (emphasis added)*."*

[49] It was a tacit approval of the minority (Seah and Abdoolcader SCJJ) judgment on the issue of *locus standi* and discarding the majority (Salleh Abas LP, Abdul Hamid CJ (Malaya) and Hashim Yeop A Sani SCJ) judgment which until then had stood as the law on *locus standi* in Malaysia for 35 years after it was handed down in 1988. Abdoolcader SCJ in his dissenting judgment described the majority judgment as "*a retrograde step in the present stage of the development of administrative law and a retreat into antiquity*", true to his pledge at the start of his judgment that he would muster his dissent "without mincing words."

[50] Following its adoption of the minority judgment in *Lim Kit Siang*, this court in *Taman Rimba* laid down a new test for *locus standi*, that it should be a "broad and liberal" test, which means to be more relaxed or less restrictive in granting leave, especially in public interest litigation. It also clarified, among other points of law, the common law duty of administrative bodies to give adequate reasons for their decisions and the issue of conflict of interest involving administrative bodies.

[51] Given the impact that *Taman Rimba* has and will continue to have on the law relating to *locus standi* in Malaysia, it is important in my view to ascertain if the "broad and liberal" test laid down in that case has any application in determining *locus standi* in a constitutional challenge under Article 4(4) read with Article 128(1)(a) of the Constitution. Obviously the answer has to be context driven. As can be seen from the factual make-up of the case, it was a case on *locus standi* in relation to judicial review of administrative action under Order 53 rule 2(4) of the ROC. It was not a case on challenging the competency of a State Legislature to make law under Article 4(4) of the Constitution. The *ratio decidendi* of the case on the issue of *locus standi* is encapsulated in the following paragraphs (7) and (8) of the headnote to the case:

Held (7) The issue of *locus standi* in the instant appeals remained a matter for the court to determine under O.53 r. 2(4) of the ROC by determining whether the respondents were persons under the relevant legislation, here the Federal Territory (Planning) Act 1982 (FTA). As such, the respondents were not required to bring themselves within the category of r. 5(3) of the Planning (Development) Rules 1970 ("the Planning Rules").

The statutory provisions of the FTA prevail over r. 5(3) of the Planning Rules wherein, the FTA provides the public with the opportunity to participate and contribute to the proper planning of the Federal Territories. It was unnecessary for the respondents to fall within the categories of landowners set out in r. 5(3) as O. 5(3) r. 2(4) of the ROC does not stipulate that the respondents need to establish a statutory right in order to meet the requirements of *locus standi*. Under O.53 r.2(4), a person seeking the various reliefs under that provision should meet the threshold test of being “adversely affected”.

Held (8) All the respondents enjoyed standing to sue. This is because the first to fifth respondents represented parcel proprietors in developments close to or neighbouring the subject land which was a public space comprising a park for public use, were adversely affected by the appropriation of half such space for the purpose of a private development. Similarly so with the sixth to tenth respondents, who were placed to enjoy their individual rights to utilize the subject land as a public park. As such the respondents fell within the category of persons who were adversely affected because they were able to show a genuine interest in the subject land and its development otherwise than in conformity with the KLSP which was gazetted in 2004. There was no necessity for these parties to prove that they had suffered special detriment or prejudice which was personal to them.

[52] Clearly, in dealing with the issue of *locus standi*, this court in *Taman Rimba* was concerned with Order 53 rule 2(4) of the ROC *vis-à-vis* Rule 5(3) of the Planning Rules. It was decided that under Order 53 rule 2(4)

of the ROC, the respondents were only required to show that they were "adversely affected" in order for them to be conferred with *locus standi*. They were not required to fall under the category of landowners set out in Rule 5(3) of the Planning Rules in order to be so conferred with standing to sue.

[53] That is the factual context in which the "broad and liberal" test is to be understood. It will be wrong to randomly apply the test to an application for leave under Article 4(4) of the Constitution without regard to other considerations which are not relevant considerations in an application for leave under Order 53 of the ROC. On the facts, the respondents in that case were found to have met the threshold for the conferment of standing to sue as they were "adversely affected" and had a "genuine interest" in the subject land and its development as they either represented parcel proprietors close to the subject land or having the right to enjoy the land as a public park.

[54] Factually therefore, the case has nothing in common with the present case as it involved, in the first place, statutory provisions which are wholly irrelevant for the purposes of the present application. The present case is concerned with the competency of a State Legislature to make law under Article 4(4) of the Constitution, and not with judicial review under Order 53 of the ROC to correct the decisions of administrative bodies like Dewan Bandaraya Kuala Lumpur (DBKL).

[55] The only similarity with the present case, if at all, is the requirement of law as laid down by the majority in *Anwar Ibrahim (1)* that in order to be

conferred with *locus standi*, the petitioners must show “genuine interest” and that they are “adversely affected” by the impugned provisions, although not in the same way that the respondents in *Taman Rimba* were adversely affected by the decision of the local authority.

[56] *Taman Rimba* is therefore not a case that supports the petitioners’ cause on the issue of *locus standi*. It was a case on *locus standi* in relation to judicial review applications to challenge administrative actions, the classic grounds of which are illegality, irrationality and procedural impropriety (See *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 *per* Lord Diplock). These are not factors to consider in determining *locus standi* in a constitutional challenge. The pivotal issue in determining *locus standi* in a constitutional challenge is whether there is an arguable violation of the petitioner’s constitutional rights.

[57] Order 53 rule 2(4) of the ROC on which *Taman Rimba* is based is couched in the following language:

“Any person who is adversely affected by **the decision of any public authority** shall be entitled to make the application.”

(emphasis added)

[58] By the terms of the Order, an application for judicial review is to challenge the decision of any “public authority” by any person “adversely affected” by the decision. There is nothing in the provision that can be

construed as extending its application to acts of Parliament or the State Legislature in enacting laws. This does not mean however that the majority in *Anwar Ibrahim (1)* was wrong to require the applicant in a constitutional challenge to establish being "adversely affected" in order to be conferred with standing to sue, in addition to showing "genuine interest" and an arguable violation of constitutional rights.

[59] While it is true that common law jurisdictions are liberalising the rule on *locus standi*, it must be borne in mind that the authorities on the subject relate more to administrative law than to constitutional law. They deal with complaints of maladministration rather than with constitutional breaches. The idea is to prevent the executive or public authority from acting with impunity. Perhaps the context is best explained by Professor M.P. Jain in his book *Administrative Law in Malaysia and Singapore* Malayan Law Journal, Malaysia 1997 when he said at page 749:

"The present-day tendency all over the common law world is towards liberalisation of *locus standi* to seek judicial redress against complaints of maladministration. It is to be appreciated that if the rule of standing is strict, there may arise a situation when there is no one qualified to bring an action in the court and consequently, the administrative order then go unreviewed. This will amount to a negation of rule of law."

[60] In any case, even if liberalisation or relaxation of the *locus standi rule* is to be extended to a constitutional challenge, it must not be to allow busybodies to participate in proceedings which they have no legal right to participate in. The *locus standi* rule must not be sacrificed on the altar of merits or "public interest". That is unacceptable as a matter of principle. I

do not think the cases that lean towards liberalising the rule on *locus standi* can be construed as endorsing such breach of principle. As held by the House of Lords in *IRC*, at the first stage of determining standing to sue, leave should be refused to those who appear to be "busybodies, cranks and other mischief-makers". Abdoolcader SCJ in *Lim Kit Siang* would describe them as "phantom busybodies or ghostly intermeddlers". Strong words indeed to express his disapproval of abuse of the court process by those who have no legal right to bring an action, even comparing them with ghosts, or *hantu* in Malay.

[61] What is pertinent to note with regard to *Taman Rimba* is that there is nothing in the judgment that can be construed as departing from the views held by the majority in *Anwar Ibrahim (1)*. This is noteworthy because even though *Anwar Ibrahim (1)* is not a case on Article 4(4) of the Constitution (it was not an incompetency challenge), it is highly relevant to the issue before the court in the present application as it is also a case that concerns the issue of *locus standi* in a constitutional challenge.

[62] The minority judgment in *Lim Kit Siang* must also be understood in the same context and the case is not to be taken as authority for saying that *locus standi* may be conferred in every case of constitutional challenge so long as there is a "genuine public grievance" over the constitutionality of any law passed by the State Legislature.

[63] Like *Taman Rimba* it was a case on judicial review under Order 53 of the ROC but under a different rule, which is rule 2(2), to declare the letter of intent issued by the Federal Government to United Engineers (M)

Bhd. (UEM) in respect of the North and South Highway invalid and for a permanent injunction to restrain UEM from signing the contract with the government. Like *Taman Rimba*, it was not a challenge on the constitutional validity of any law passed by the State Legislature.

[64] In dissenting from the majority on the issue of *locus standi* in *Anwar Ibrahim (1)*, David Wong Dak Wah CJ (Sabah and Sarawak) who also applied *Lim Kit Siang* in his minority judgment, appears to have been swayed by the lack of objection by the Attorney-General in "relaxing" the *locus standi* rule. This is how His Lordship dealt with the issue:

"[161] In this case, one must not overlook the fact that the Attorney General did not make any objection and this to me is not without significance bearing in mind that the Attorney General is the Government's main advocate and as most recently reaffirmed by this court in *PCP Construction Sdn Bhd v Leap Modulations Sdn Bhd; Asian Arbitration Centre (Intervener)* [2019] 6 CLJ 1 ('*PCP Construction*'), is also the guardian of public interest. His dual capacity makes the Attorney General's position unique and in a matter of constitutional challenge as we have here, **the lack of objection by the Attorney General or his Chambers should and in my considered view be taken as a reason for the courts to relax the *locus standi* rule**. Though we do not expect the Attorney General to overtly challenge the constitutionality of any legislations which his chambers helped to draft, the Attorney General however bearing in mind that he is also the guardian of public interest should take an open stand when it comes to such constitutional challenge especially so when it affects the basic fundamental rights of the citizens of this country."

(emphasis added)

[65] In the present case, the issue of objection or acquiescence by the Attorney General to the impugned provisions does not arise as the Federal Government, which normally is represented by the Attorney General's Chambers, is not a party to the action. Therefore it is unclear what the Federal Government's stand is on the constitutional challenge mounted by the petitioners in Enclosure 26. By virtue of Article 4(3)(b) of the Constitution, the Federal Government would have been the proper party to challenge the validity of the impugned provisions without having to obtain leave.

[66] The majority in *Anwar Ibrahim (1)* would have been fully aware of the fact that the Attorney General in that case did not object to the applicant's *locus standi* in coming to the conclusion that the applicant Datuk Seri Anwar Ibrahim had no *locus standi* to maintain the action. In all likelihood, the majority had been appraised of the contrary stand taken by the minority and disagreed with it. In short, the majority did not agree with David Wong Dak Wah CJ (Sabah and Sarawak) for the minority that the lack of objection by the Attorney-General should be a reason to "relax" the *locus standi* rule in a constitutional challenge.

[67] I am fully aware that the decision of the majority in *Anwar Ibrahim (1)* had been set aside by a review panel of this court in *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2021] 6 CLJ 1 ("*Anwar Ibrahim (2)*") pursuant to Rule 137 of the Rules and a re-hearing ordered but in my view the setting aside of the decision does not in any way render the majority opinion on *locus standi* irrelevant if otherwise it is a correct

statement of the law. The reasoning, which I must say without being patronising, is flawless and speaks for itself.

[68] Any attempt to undermine the relevance of the majority judgment on the issue of *locus standi* will be futile. There is authority to say that a decision may be reversed on other grounds but still have some precedential authority (See *Durning v Citibank*, *N.A*. 950 F.2d 1419 (1991), a decision of the United States Court of Appeals, Ninth Circuit).

[69] In *Michigan Millers Mutual Ins Co v Bronson Plating Co,* 197 Mich App 482; 496 NW2d 373 (1992), the court was more explicit when it said that "[j]ust as the discovery of one rotten apple in a bushel is no reason to throw out the bushel, one overruled proposition in a case is no reason to ignore all other holdings appearing in that decision."

[70] In *Straman v Lewis* 220 Mich App 448; 559 NW2d 405 (1996), the Court of Appeals cited *Michigan Millers* for the proposition that "holdings of this Court not addressed on the merits by the Supreme Court remain binding despite reversal on other grounds."

[71] I am not aware of any authority within our shores which says that where a decision is set aside on other grounds, the effect is to obliterate the entire decision such that no reference can be made in future cases to other parts of the judgment "not addressed on the merits" by the court which reversed the decision on other grounds. Even textbook authorities and academic journals are used as reference material in court

proceedings unless they have been proven to be wrong or they are of no intrinsic value.

[72] I do not wish to belabour the point but it is crucially important to appreciate that the setting aside of the majority decision in *Anwar Ibrahim (1)* by the review panel in *Anwar Ibrahim (2)* was not because the decision of the majority on *locus standi* was held to be wrong but because it breached the *audi alteram partem* rule by not giving the plaintiff Datuk Seri Anwar Ibrahim the right to be heard on the question of whether the constitutional questions posed for the court's determination were abstract, academic and hypothetical, which had resulted in grave injustice to the applicant as successfully argued by the late Datuk Seri Gopal Sri Ram for the applicant.

[73] There were only two issues of law for the review panel's determination in that case and they were: (i) the circumstances under which the court of final appeal has jurisdiction to review its own decision; and (ii) whether a breach of natural justice falls or should fall within the limited grounds for establishing the jurisdiction for review. The correctness of the majority view on the test to be applied in determining *locus standi* in a constitutional challenge was not in issue.

[74] It was clearly a decision that was centric to the facts of the case, i.e. a denial by the majority of the applicant's right of hearing on the constitutional questions, hence the order for a re-hearing of the matter. What is also clear and which bears repetition is that the review panel did not overrule or disagree with the earlier panel's exposition of the law on

locus standi. Nowhere in the grounds of judgment did the review panel say that the majority in *Anwar Ibrahim (1)* was wrong on the law relating to *locus standi* in a constitutional challenge.

[75] To remove any lingering doubt, if any, as to the actual reason why *Anwar Ibrahim (1)* was set aside by *Anwar Ibrahim (2)*, I think it is necessary for me to set out the more detailed background facts of the case leading to the decision by *Anwar Ibrahim (2)*. For this purpose, suffice it if I refer to the headnote to the case. They are as follows, with the necessary modifications:

[76] The applicant filed an originating summons in the High Court seeking for a declaration that the National Security Council Act 2016 is unconstitutional. At the hearing before the High Court, two preliminary objections were raised against the suit: (i) that the High Court had no jurisdiction to determine the dispute as the subject-matter of the challenge was for the exclusive jurisdiction of the Federal Court; and (ii) that the applicant did not have the *locus standi* to maintain the suit. The High Court Judge sustained the first preliminary objection on the ground that the challenges would have to be initiated directly in the Federal Court. However, no remark or ruling was made by the judge on the second preliminary objection concerning the issue of *locus standi*. On appeal to the Court of Appeal, the same preliminary objection was sustained premised on the principle of *stare decisis*. The appeal was accordingly dismissed. No issue of *locus standi* was raised by the parties. At the hearing of the leave motion at the Federal Court against the decision of the Court of Appeal, the parties agreed that the High Court had the

jurisdiction to determine the dispute. Accordingly, the matter was remitted to the High Court for the determination of the Originating Summons. At the High Court, before another judge, the applicant filed a reference application for the case to be transmitted to the Federal Court pursuant to section 84 of the Courts of Judicature Act 1964 ("the CJA") and Rule 33 of the Rules. There was no objection raised by the respondent, whereas, the *locus standi* point was completely abandoned. The High Court acceded to the application and, with the consent of the parties, by way of a special case pursuant to section 84 of the CJA, referred two constitutional questions for the determination of the Federal Court: (i) pertaining to the jurisdiction of the Federal Court to review its own decisions which had been heard and decided; and (ii) concerning the circumstances in which denial of the right to be heard can constitute a ground for such review warranting a rehearing. On 11 February 2020, the earlier panel, by a majority of five, declined to answer the questions on the ground that they were abstract, academic, and hypothetical and therefore the applicant lacked *locus standi* to pursue the action. Hence the application before the review panel pursuant to Rule 137 of the Rules and the inherent jurisdiction of the court to set aside the decision of the earlier panel on the grounds that: (i) there was a breach of natural justice as the applicant was not given the opportunity to be heard on the issue of whether the constitutional questions were abstract, academic and hypothetical; and (ii) the breach had resulted in a grave injustice to the applicant.

[77] In allowing the application, the review panel in *Anwar Ibrahim (2)* held as follows in relation to the issue of *locus standi:*

Held (4) The specific issue of *locus standi* was never raised either by the court or the parties. The majority, noting that the test of *locus standi* was intertwined with the question of whether there was a real and actual controversy, held that the applicant had not satisfied this test and, in declining to answer the questions posed, held the constitutional questions to be abstract, academic and hypothetical. The applicant was not given notice as well as the opportunity to answer the issues of whether the constitutional questions were academic and his *locus standi* to bring the action. In the circumstances, a case for breach of natural justice had been made out by the applicant in that the *audi alteram partem* rule had not been observed.

[78] There are suggestions by some quarters that in determining *locus standi* in public interest cases, Malaysia should adopt the liberal test expounded by the Supreme Court of Canada in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violent* Society [2012] S.C.R. 524 where the principle was laid down as follows:

"The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.

2. In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justifiable issue, **whether the party bringing the action has a real stake or a genuine interest in its outcome** and

whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court: *Canadian Council of Churches v Canada (Minister of Employment and Immigration),* [1992] 1 S.C.R. 236, at p.253. **The courts exercise this discretion to grant or refuse standing in a "liberal and generous manner**" (p.253)."

(emphasis added)

[79] Three preconditions must therefore be met according to the Canadian position, each one of which must be fulfilled, i.e. cumulatively, before an applicant is entitled to be conferred with *locus standi*: (1) the case raises a serious justifiable issue; (2) the applicant has a real stake or a genuine interest in its outcome; and (3) the suit is a reasonable and effective means to bring the case to the court.

[80] Of interest to note is that the second compulsory requirement fits in squarely with the requirement for the conferment of *locus standi* as laid down by the majority in *Anwar Ibrahim (1)*. Without getting drawn into a debate on the wisdom of applying the "liberal and general manner" test in deciding whether to grant or to refuse *locus standi* in a constitutional challenge, my view is that since there is sufficient adjective law within our jurisdiction to deal with the issue, there is no further need to seek guidance from beyond our shores. The three apex court authorities from Australia, Hong Kong and Singapore cited by the majority in *Anwar Ibrahim (1)* are sufficient for that purpose.

[81] Furthermore, the "broad and liberal" test laid down in *Taman Rimba* in determining *locus standi*, albeit confined to judicial review of

administrative actions, is already in line with the Canadian position as laid down in the *Downtown Eastside Sex Workers* case *(supra).*

[82] Whatever may be the test to determine *locus standi* in a constitutional challenge, be it liberal or restrictive, I am of the view that the test laid down by the majority in *Anwar Ibrahim (1)* is the correct test, which importantly has not been held to be wrong by any subsequent decision of this court, including by *Taman Rimba* itself, not even by way of *obiter* to preserve its persuasive value if the intention was to qualify the majority decision in *Anwar Ibrahim (1)* on the law relating to *locus standi*.

[83] In any case, having regard to the factual context in which the three cases were decided, there is no real conflict between the test laid down in *Anwar Ibrahim (1)* and the "broad and liberal" test applicable in judicial review laid down by this court in *Taman Rimba* or the "liberal and generous manner" test laid down by the Supreme Court of Canada in the *Downtown Eastside Sex Workers case.* Even if there is a conflict, *Anwar Ibrahim (1)* should prevail, being a case on a constitutional challenge under our Constitution as opposed to the other cases which are not.

[84] Therefore, and at the expense of being repetitive, the law on *locus standi* in a constitutional challenge as laid down by the majority in *Anwar Ibrahim (1)* is the law to be applied when it becomes necessary to determine whether a petitioner has the requisite standing to sue in a challenge under Article 4(4) of the Constitution. Paragraph [64] of the judgment is particularly relevant as it reflects the situation in the present application. This is what the majority said:

"[64] **In the absence of actual controversy affecting the rights of parties, the constitutional questions referred to us are abstract and purely academic. The questions have not become academic due to some change in the factual substratum; they were academic for there was no real dispute underlying them to begin with. They exist in a complete factual vacuum in the case before us**. To answer the questions posed would be a significant departure from the deep-rooted and trite rule that the court does not entertain abstract or academic questions, and may even represent a fundamental shift away from the common law concrete review towards the European model of abstract review in constitutional adjudication. **Exceptionally cogent reasons would need to be provided to persuade the Federal Court to undertake such a radical departure from established principles**. In this case the parties have not attempted to do so."

(emphasis added)

[85] Thus, in order to establish *locus standi*, the petitioners in the present case must first of all show that their challenge to the constitutional validity of the impugned provisions does not exist in a factual vacuum by showing that there is an arguable violation of their constitutional rights. Only then can a real and actual controversy between them and the Government of Kelantan arise for this court's determination in the exercise of its exclusive original jurisdiction under Article 128(1)(a) of the Constitution. The petitioners have completely failed to clear this hurdle by failing to point out which of their constitutional rights that are or have been violated by the impugned provisions.

[86] Their contention that the State Legislature of Kelantan had no competency to enact the impugned provisions is irrelevant to the issue of *locus standi*. That is a matter that goes to the substantive merits of the challenge and not to the issue of standing to sue. Reference need to be

made again to the decision of the House of Lords in *IRC* which held that at the first stage of determining standing to sue, leave should be refused to those who appear to be "busybodies, cranks and other mischief-makers". That is a reference to standing to sue and not to merits of the case as the court is not supposed to give a right of hearing to "busybodies, cranks and other mischief-makers" both before and after leave has been granted.

[87] A clear line must be drawn between standing to sue and merits of the challenge. Determination of standing to sue must come before determination of the merits. In colloquial language, the horse must be put before the cart because it is the horse that pulls the cart forward and not the cart pushing the poor horse round and round the mulberry bush.

[88] Surely the petitioners cannot be heard to say, even if they wanted to, that the impugned provisions are in violation of their constitutional right to equality before the law under Article 8 of the Constitution on the ground that the provisions discriminate between them as Muslims and the non-Muslims, or any other form of discrimination under the Article. It would be ludicrous for them to say so.

[89] It needs to be reiterated that the mere fact that the impugned provisions are arguably unconstitutional is no basis for the petitioners to claim that their constitutional rights have thereby been compromised. As decided by the Singapore Court of Appeal in *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476, the mere holding of a constitutional right is

insufficient to found a challenge to the law - there must also be a violation of the constitutional right.

[90] In any case, the petitioners are not asserting that the impugned provisions have been invoked so as to violate their rights and interests or that of anyone else. Their grievance is purely legal, directed at the alleged inherent unconstitutionality of the impugned provisions. The constitutional questions referred to this court arise from no other fact than the very existence of the impugned provisions themselves. In the circumstances, even if this court were to consider the substantive merits of the case, it must decline to answer the constitutional questions posed: See *Anwar Ibrahim (1).* In other words, the petition is doomed to fail in any event.

[91] Further, none of the grounds given by the petitioners in their petition under the heading "Material facts" and in the 1st petitioner's affidavit in support dated 25 May 2022 raise any real controversy between them and the Government of Kelantan, let alone to show that they are "adversely affected" by the impugned provisions.

[92] At the end of the day, what it comes down to is that there is no factual basis for this court to decide on the merits of the constitutional challenge by the petitioners as there is no real dispute underlying them to begin with. It is a petition in a factual vacuum. The challenge is based on a purely hypothetical situation arising from the existence of the impugned provisions, which according to them in their initial averment of fact had struck fear in their minds that the provisions may be enforced against them. Fear factor alone cannot, by a long shot, amount to a "real

controversy" in a challenge so grave as to allege that the highest law making body of the State of Kelantan had no power to enact the impugned provisions.

[93] We all fear something at some point in our lives but in the serious business of challenging the validity of laws made by Parliament or the State Legislature, it must relate, not so much to an infringement of a private right but to an infringement of a constitutional right. Nothing less will suffice. In any event, this court must keep in mind that the petitioners are no longer relying on their fear of enforcement of the impugned provisions as a ground to challenge the validity of the provisions. This ground had been abandoned without any explanation after they had successfully obtained leave on 30 September 2022.

[94] In *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64 Abdul Hamid CJ (Malaya) (as he then was) had this to say on the subject:

"As regards ground (3), I would firmly say that an action may not be brought to Court by a stranger to it. Indeed, generally, a person may not even institute declaratory proceedings in respect of an act which, **although prejudicial to his interests, may not affect him in his private rights**. (See *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536, 532 *per* Pickford L.J. that "it does not extend to enable any stranger to the transaction to go and ask the Court to express its opinion in order to help him on other transactions.")."

(emphasis added)

[95] Earlier when speaking of whether declaration should issue, the learned CJ (Malaya) said:

"The plaintiff has by his Originating Summons sought a declaration. It is fundamental principle that declaration will not be made if the application for it is embarrassing or the declarations can serve no useful purpose: See *Mellstrom & Ors* [1970] 2 All ER 9.

The learned Attorney-General has referred to a textbook on Declaratory Orders, 2nd Edition, by P.W. Young, on the conditions for declaratory orders and has submitted that one of the conditions to be satisfied is that **(a) there must exist a controversy between the parties; (b) the proceedings must involve a 'right'; (c) the proceedings must be brought by a person who has a proper or tangible interest in obtaining the order; (d) it must not be merely of academic interest, hypothetical or one whose resolution would be of no practical utility**.

"The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought." (*The Russian Commercial & Industrial Bank v British Bank for Foreign Trade* [1921] 2 AC 438 at 448 *per* Lord Dunedin)."

(emphasis added)

[96] I have to say with regret and with all due respect to the petitioners that being Muslims themselves, it is rather out of character for them to assert that the impugned provisions, which they would agree conform to the precepts of Islam, are affecting them adversely and posing a threat to their livelihood. It is understandable if non-Muslims were to raise those grounds in challenging the constitutional validity of the impugned

provisions, but for Muslims like the petitioners to do so is quite out of this world.

[97] The phrase “precepts of Islam” has been explained by Azahar Mohamad CJ (Malaya) in his supporting judgment in *Iki Putra Mubarrak*, citing the expert opinion of Professor Emeritus Tan Sri Dr. Mohd Kamal bin Hassan in *Sulaiman Takrib v Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) & Other Cases* [2009] 2 CLJ 54. This is what His Lordship said at paragraph [101]:

“[101] Professor Emeritus Tan Sri Dr. Mohd Kamal bin Hassan who also gave an opinion in *Sulaiman Takrib*, *inter alia*, states as follows:

> 2.2 In the context of the religion of Islam, the expression ‘precepts of Islam’ has a broad meaning to include commandments, rules, principles, injunctions – all derived from the Qur’an, the Sunnah of the Prophet, the consensus of the religious scholars (‘*Ijma*’) and the authoritative rulings (fatwas) of legitimate religious authorities, for the purpose of ensuring, preserving and/or promoting right beliefs, right attitudes, right actions and right conduct amongst the followers of Islam.
>
> 2.3 With regard to the scope of applicability of precepts of Islam, human actions and behavior fall into three major and interrelated domains, namely creed (*aqidah*), law (***shari’ah***) and ethics

(*akhlaq*). The creed is concerned with right beliefs and right attitudes (deemed as actions of the heart), the law with right actions and ethics with right conduct, right behavior and right manners.

2.4 Therefore the precepts of Islam possess the force of enjoining or commanding or prohibiting actions or behavior which Islam considers good (*ma'ruf*) or bad (*mungkar*), permissible (*halal)*, prohibited (*haram*), allowable (*mubah*)."

[98] To repeat what the learned Professor said, the precepts are "*for the purpose of ensuring*, *preserving and/or promoting right beliefs*, *right attitudes*, *right actions and right conduct amongst the followers of Islam*." Absolutely nothing objectionable there, let alone violating any of the petitioners' constitutional rights or affecting them adversely as Muslims. On the contrary they provide a clear guideline for them to be good Muslims.

[99] In *Tan Eng Hong (supra)*, the violation of constitutional right occurred when the appellant was arrested and detained under an allegedly unconstitutional law even though the charge was subsequently substituted with a different offence. Moreover, as noted by the court, the threat of prosecution under the impugned provision was real and not merely fanciful given that the appellant professed to regularly participate in the criminalized conduct.

[100] In the case of the petitioners, the question of a real threat of prosecution under the impugned provisions does not arise as they have not been arrested and detained under the impugned law. Nor have they professed to regularly participate in the conduct criminalized by the provisions. This is not to say that they would be conferred with standing to sue as a matter of course if they had been so threatened with prosecution or regularly participate in the criminalized conduct.

[101] There is nothing in *Anwar Ibrahim (1)* to suggest that those are valid grounds for conferring *locus standi* in a constitutional challenge. The Court of Appeal of Singapore in *Tan Eng Hong* seems to have taken a slightly different view. If I understand the judgment correctly, its view was that a real and credible threat (not merely imaginary or fanciful) of prosecution under an arguably unconstitutional law is a factor to consider when deciding whether to confer *locus standi* on the applicant.

[102] There may be valid reasons for the Singapore apex court to hold such view, but the difficulty with the proposition speaking generally is that if prosecution or threat of prosecution under an arguably unconstitutional law could as a matter of law be a basis for conferring *locus standi* at the leave stage, the implication is profound in that any such criminal law, civil or syariah, which makes it a crime for any person to engage in such conduct, would be open to challenge by those who themselves commit the criminalized conduct or regularly participate in it.

[103] The situation may not arise in real life but in principle and in theory at least, a serial rapist for example will then find it easier to be conferred

with *locus standi* and be granted leave to apply for a declaration that section 376 of the Penal Code is unconstitutional because from his perspective he is at a real risk of being arrested and prosecuted for the offence of rape under that section. After all, as Abdoolcader SCJ said in *Lim Kit Siang*, the merits of the case are an entirely different matter, suggesting that the court should be less strict in granting leave, "*that of not closing the door to the ventilation of a genuine public grievance*".

[104] What constitutes "genuine public grievance" however may give rise to serious difficulty in a challenge under Article 4(4) of the Constitution due to its vague and subjective imperative, in particular due to the need in a constitutional challenge to show a violation of constitutional rights for the conferment of standing to sue, which is not a requirement in an administrative challenge.

[105] In *Iki Putra Mubarrak,* the petitioner was charged in the Selangor Syariah High Court with attempted sexual intercourse against the order of nature (sodomy) with certain other male persons under section 28 of the Syariah Criminal Offences (Selangor) Enactment 1995. He succeeded in the Federal Court to have the syariah penal provision declared unconstitutional on the ground that the State Legislature of Selangor had no power to enact the law as "criminal law" is the exclusive domain of Parliament.

[106] However, what is important to note with regard to the case is that unlike the present case the court in that case was not concerned with the issue of *locus standi*. Leave had earlier been granted under Article 4(4) of

the Constitution by my learned brother Abang Iskandar Abang Hashim FCJ (now PCA) on the following grounds as reported in *Iki Putra Mubarrak v Kerajaan Negeri Selangor* [2020] 6 CLJ 133; [2020] 4 MLJ 213:

(1) That leave was required and necessary as the applicant had shown that his complaint involved the question of the competency of the Selangor State Legislature on a matter that is in the Federal List;

(2) The application was not frivolous or an abuse of the court process as the applicant had shown that he had an arguable case.

[107] As can be seen, *locus standi* was not the basis for the grant of leave. It was granted on the basis that it was an incompetency challenge falling under Article 4(4) of the Constitution and that the applicant had an arguable case and should therefore be allowed to ventilate before the full court the constitutionality and validity of the impugned provision. Obviously these are grounds that basically go to the merits of the challenge and not to standing to sue. It is not clear what the violation of the petitioner's constitutional right was in *Iki Putra Mubarrak* that entitled him to be conferred with standing to sue.

[108] Equally important to note with regard to the case is that the only ground of objection raised by the Selangor Government was that the petitioner had wrongly named the State Government as respondent for the reason that the State Government had no jurisdiction to execute, enforce or prosecute under the Enactment. It was argued that the applicant should have cited the Majlis Agama Islam Selangor (MAIS)

and/or the Jabatan Agama Islam Selangor (JAIS) as respondents as they were the authorities concerned with the actual prosecution of the applicant.

[109] No objection was raised by the Selangor Government that the applicant had no *locus standi* to challenge the validity of the impugned provision under Article 4(4) of the Constitution. That in my view explains why His Lordship Abang Iskandar Abang Hashim FCJ (now PCA) did not touch on the issue of *locus standi* or the right to bring an action in granting leave to the applicant. It was never part of the Selangor Government's case in opposing the application for leave.

[110] At the full hearing, again the issue of *locus standi* was not raised by the Selangor Government. There is nothing in the judgment to indicate that the Selangor Government or any other party to the proceedings objected to the petitioner's standing to sue at the full hearing. Assuming such objection was raised, the court did not deal with the issue. Anyway there can be no waiver of *locus standi* as it goes to the jurisdiction of the court under Article 128(1)(a) of the Constitution to hear a constitutional challenge under Article 4(4) of the Constitution.

[111] It cannot therefore be said with absolute certainty that *Iki Putra Mubarrak* would have gone to the second stage of the proceedings if the issue of *locus standi* had been raised at the leave stage. What appears clear is that at the full hearing, the parties accepted that the petitioner had the requisite *locus standi* to maintain the action against the Selangor

Government, hence the hearing of the case on the merits without the court having to decide on the issue of *locus standi*.

[112] Article 4(4) of the Constitution, which requires leave to be obtained from a judge of the Federal Court before a petitioner can commence action to challenge the constitutionality of a law made by Parliament or the State Legislature, is reproduced again below:

"(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings brought for the same purpose under paragraph (a) or (b) of the Clause."

[113] The point cannot be over emphasised that at the leave stage the court should refuse *locus standi* to those who appear to be "busybodies, cranks, and other mischief-makers". In the context of an application for leave under Article 4(4) of the Constitution this requires, as alluded to earlier, a determination that there is an arguable violation of the petitioner's constitutional rights, that he is genuinely interested, and that he is adversely affected by the impugned provision or provisions. Only then will the court be seized of its exclusive original jurisdiction under Article 128(1)(a) of the Constitution to hear the merits of the case.

[114] That is key to the question whether leave should or should not be granted before the case is allowed to proceed on the merits. Of course, as Lord Scarman also said in *IRC*, if leave had been granted, the court

may decide that in fact the petitioner had no “sufficient interest” in the subject matter of the suit which in the context of the present case is whether the petitioners have been “adversely affected” by the impugned provisions and that there has been a violation of their constitutional rights.

[115] What this means is that *locus standi*, which goes to the Federal Court’s exclusive original jurisdiction under Article 128(1)(a) of the Constitution and which as a matter of law is distinct and separate from the merits of the case, must first be established before leave can be granted, and if leave had improperly been granted, to set it aside at the full hearing.

[116] There is a good reason why it is necessary for the court to decide on *locus standi* before granting leave under Article 4(4) of the Constitution, and that is to avoid the futile exercise of hearing the case on the merits if in the end it has to be struck out because it is found that the petitioner has no standing to sue. The more important reason of course is that only those with legal standing to sue have the legal right to commence legal action in court.

[117] With all due respect to my learned brother who granted leave in the present case, I have to say with regret and in all humility that his grounds of decision do not show that he had adequately applied his mind to the law on *locus standi* and how it works in a constitutional challenge under Article 4(4) of the Constitution. What he did was to gloss over the issue of *locus standi* in four sentences, as follows:

"The main attack on the Applicants' locus is grounded on the fact that both Applicants are not affected by the impugned provisions and that the First Applicant resided in Kuala Lumpur outside the State of Kelantan. The learned State LA also distinguished the Federal Court decisions in Iki Putra and SIS and cited the case of Gerakan challenge of the Hudud Laws in support of his contention. However as pointed out by the learned Applicant counsel, the enactment applies here to any Muslims in Kelantan and there is no requirement that the putative Muslim be a resident in the State of Kelantan, it is territorial. Which is to say that any Muslim who happens to be in the State of Kelantan may be liable and subject to prosecution under the impugned provisions of the said enactment."

[118] As for *Lim Kit Siang*, when Abdoolcader SCJ dealt with the issue of *locus standi* in his dissenting judgment, he was speaking in the context of an application for judicial review by a private person in his capacity as a member of Parliament, leader of the opposition in the House of Representatives, a State Assemblyman, a taxpayer, a motorist and a frequent user of highways and roads in the country to declare invalid the federal government's decision to award a government contract to a private company. He was talking of a "genuine public grievance" as the government contract involved the disbursement of public funds. His concern clearly was with the financial implications of the federal government's action and not with the power of a State Legislature to make law, which is a different kettle of fish altogether.

[119] Obviously therefore, the issue of *locus standi* that the learned judge was dealing with in that case was not germane to the issue of *locus standi* that the court is dealing with in the present application, which concerns the exercise of the Federal Court's exclusive jurisdiction under Article 128(1)(a) of the Constitution to hear a constitutional challenge, which it

cannot exercise if the petitioner does not have a right of audience before the court. Given that *Lim Kit Siang* was a case on judicial review under Order 53 of the ROC, it is not surprising why no reference at all was made to Article 128(1)(a) of the Constitution which relates to a constitutional challenge under Article 4(4) of the Constitution.

[120] That is one factor that separates *Lim Kit Siang* from the present case. The other point to take note of is that both *Lim Kit Siang* and *Taman Rimba* are cases on administrative law and not on constitutional law. This is clear from the dissenting judgment of Abdoolcader SCJ in *Lim Kit Siang.* Therefore, both *Lim Kit Siang* and *Taman Rimba* are not relevant in determining whether leave should or should not be granted in a constitutional challenge under Article 4(4) of the Constitution.

[121] I am compelled to point this out with no pleasure in mind because *Taman Rimba* may be misconstrued as authority for saying that the "broad and liberal" test applies, without exception, to all public interest litigation, including in particular to a constitutional challenge under Article 4(4) of the Constitution, when it is only to be applied in determining *locus standi* in judicial review of administrative action under Order 53 rule 2(4) of the ROC, which does not require the applicant to first of all show an arguable violation of his constitutional rights before *locus standi* can be conferred.

[122] There is no doubt that in laying down the "broad and liberal" test, this court drew inspiration from the minority judgment in *Lim Kit Siang*. This is acknowledged in paragraph [445] of the *Taman Rimba* judgment where the court said:

"[445] For these reasons we reiterate that the dissenting decision of the minority judges, particularly as reflected in the judgment of Abdoolcader SCJ, reflects the correct position in law and ought to be followed. His decision outlines the fundamental requirements that are to be considered by a court **when determining whether or not to grant leave for judicial review**. The cases of *Lim Cho Hock* and *Othman Saat* provide a sound basis for the evolution of the law on standing to sue from that period to the present as it presents a rational and coherent development/progression."

(emphasis added)

[123] I have mentioned Article 128(1)(a) of the Constitution without reproducing it. The Article stipulates as follows:

"128. (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;"

(emphasis added)

[124] The fact that the Federal Court's jurisdiction under the Article is constitutionally expressed to be "*to the exclusion of any other court*" must be given its due significance and weightage. Being mindful of the gravity of a challenge to declare a law made by Parliament or the State Legislature invalid, the framers of the Constitution must have intended to set a high threshold for the grant of leave under Article 4(4), higher than

the threshold for the grant of leave under Order 53 of the ROC, which ordinarily is left to a High Court Judge to deal with.

[125] The majority in *Anwar Ibrahim (1)* was therefore right in requiring the applicant in a constitutional challenge to establish an arguable violation of his constitutional rights in addition to being "adversely affected" and having a "genuine interest" before he can be conferred with standing to sue. I do not think these requirements are in conflict with any principle of law already established by this court on the issue, including the cases of *MTUC & Ors* and *Taman Rimba.*

[126] With due respect, to relax the rule on *locus standi* in a constitutional challenge under Article 4(4) of the Constitution will potentially open the floodgates for busybodies to invoke the Federal Court's exclusive original jurisdiction under Article 128(1)(a) of the Constitution for a collateral purpose. If the exclusivity of the Federal Court's original jurisdiction under the Article is to mean anything, leave under Article 4(4) must be given sparingly and only when standing to sue has been established. In *Anwar Ibrahim (1)*, Nallini Pathmanathan FCJ had also noted at paragraph [16] of the judgment:

"[16] Under the constitutional scheme, therefore, the Federal Court is a court of last resort for all constitutional questions. It is only in a narrow category of **exceptional cases – those expressly stipulated in art. 128(1) FC** – that such questions must be determined by the Federal Court at first instance."

(emphasis added)

[127] The learned judge was of course referring to the exclusive original jurisdiction of the Federal Court to hear challenges on the competency of the Federal or State Legislatures to make law. In *Iki Putra Mubarrak*, the learned Chief Justice made a very pertinent point when Her Ladyship said at paragraph [29]:

"The original jurisdiction of this court is exclusive simply because of the gravity of the allegation that the relevant Legislature has no power to make that law. This is clearly suggested by Suffian LP in *Ah Thian* (*supra*) at p.113 (MLJ), as follows:

The jurisdiction is exclusive to the Federal Court, no other court has it. This is to ensure that a law may be declared invalid on this very serious ground only after full consideration by the highest court in the land."

[128] Being a prerequisite for the exercise of the court's exclusive original jurisdiction under Article 128(1)(a) of the Constitution, *locus standi* must be given its rightful place of importance, not because merits of the case is less important but because the court cannot properly exercise its exclusive original jurisdiction under the Article over those who have no right to commence an action under Article 4(4) of the Constitution.

[129] The guiding principle is that the court should refuse *locus standi* to those who appear to be mere busybodies, more so in cases so serious as to challenge the competency of the highest law making bodies in the country to make law. This court must be cautious in admitting challenges under Article 4(4) of the Constitution to avoid abuse of the *locus standi* rule. If left unchecked, it will shake the very foundation of our democratic

system of government, which is the separation of powers between the legislative, the executive and the judiciary, which is a basic structure of the Constitution.

[130] Coming back to *Iki Putra Mubarrak,* extra care must be taken in dealing with the case, which was referred to during submissions. It needs to be re-emphasised that it was not a case on *locus standi*. In fact the issue of *locus standi*, and therefore the issue of the court's exclusive jurisdiction under Article 128(1)(a) of the Constitution was not even before the court for its consideration.

[131] There was some discussion on jurisdiction by the court but it was on the jurisdiction of the civil court *vis-à-vis* the jurisdiction of the syariah court and not on the exclusive jurisdiction of the Federal Court under Article 128(1)(a) of the Constitution *vis-à-vis* the petitioner's standing to sue. The fact that the petitioner in that case was actually prosecuted for attempting to commit the offence of sodomy under the impugned provision is neither here nor there and is irrelevant to the issue of *locus standi* and jurisdiction of the court.

[132] What is clear is that *Iki Putra Mubarrak* was decided purely on the merits and is not authority for saying that prosecution, threat of prosecution, or regularly participating in the criminalized conduct under the impugned provisions provide valid basis for conferring *locus standi*, either at the leave stage or at the full hearing.

[133] In the present case, the 1st petitioner's fear of a real risk that she might be subjected to the investigative powers of the Kelantan Government in relation to the impugned provisions as averred to in her leave application, is not only unfounded but is also not a ground to confer on her the *locus standi* to maintain the present action. In any case, this assertion had been abandoned in her statutory statement in Enclosure 26 after leave had been granted. The fact of the matter is, there is nothing for her and her daughter to fear unless they regularly participate in the conduct criminalized by the impugned provisions.

[134] In *Croome* and *Leung TC*, the two cases cited in *Anwar Ibrahim (1)*, no prosecution had been brought against the appellants pursuant to the impugned provisions but in both cases, the appellants' conduct of their personal lives were found to have been "overshadowed in significant respects" by the presence of the impugned provisions. That was the reason why the courts in the two cases held that they had *locus standi* even though the State had not yet invoked legal proceedings to enforce the criminal law against them.

[135] The petitioners on the other hand have not shown how their personal lives as Muslims have been "overshadowed in significant respects" by the impugned provisions except for the 1st petitioner's unfounded fear that the provisions may be enforced against her and her daughter.

[136] In *Datuk Syed Kechik*, the applicant was held by the Federal Court to have had *locus standi* because there was a "real dispute" between him

and the State Government of Sabah when the State Government threatened to expel him from the State. In the present case, there is no "real dispute" between the petitioners and the Kelantan Government as there is no threat by the Government to enforce any of the impugned provisions against them. The 1st petitioner's fear that the Government may do so does not constitute "real dispute" between them. Then again, it must be pointed out that *Datuk Syed Kechik* is a case on judicial review of administrative action and not a case on constitutional challenge. A constitutional challenge under Article 4(4) of the Constitution is a different kettle of fish altogether.

[137] It bears repetition that if this court were to accede to the petitioners' initial argument that fear of enforcement could form the basis for conferring *locus standi*, then any Tom Dick and Harry will invariably be conferred with the necessary legal standing to commence action under Article 4(4) of the Constitution to challenge the constitutional validity of the impugned provisions.

[138] It is also worth reiterating that the requirement for leave under Article 4(4) is there to ensure that frivolous or vexatious proceedings for such declarations are not commenced (*Abdul Karim bin Abdul Ghani*). To that I would add that this court, being the apex court, must not condone any abuse of its process by "phantom busybodies", "ghostly intermeddlers", "cranks" and "other mischief-makers", descriptions aptly given to these types of litigant by Lord Scarman in *IRC* and by Abdoolcader SCJ in *Lim Kit Siang*.

[139] In *Anwar Ibrahim (1)*, my learned sister Nallini Pathmanathan FCJ gave "Holocaust-type laws" as extreme examples of "exceptional laws" that would confer *locus standi* (paragraph [59]). The word "holocaust" is defined by the *Merriam-Webster English Dictionary* as "a mass slaughter of people", a genocide. The *Concise Oxford English Dictionary* (11th Edition, Revised) defines it to mean "destruction or slaughter on a mass scale". It refers to a deliberate and systematic extermination of a particular ethnic, racial or religious group.

[140] To put the matter in perspective, the word "holocaust" is associated with the killing of millions of jews by the nazis before and during the second world war, which included herding them into gas chambers in order to kill them. If this sounds graphic, that is what it is. From that perspective, there is absolutely no comparison with the impugned provisions. The provisions are nowhere close to holocaust-type laws by any wild stretch of the imagination.

[141] In the first place the impugned provisions are only applicable to Muslims and not to non-Muslims. Secondly, the question of a "mass slaughter of people" specifically targeted against a minority group does not arise. The petitioners are not even from a minority group. Thirdly, there is nothing exceptional about the impugned provisions. On this score, the petitioners' case on *locus standi* must also fail.

[142] The next question to consider is whether this court has the power to set aside the leave order that has already been granted to the petitioners. The contention by Datuk Malik Imtiaz for the petitioners is that since the

locus standi issue had been dealt with, argued and finally dismissed by Vernon Ong FCJ at the leave stage, this court cannot re-visit the issue as it is *res judicata*.

[143] With due respect to learned counsel, the argument flies in the face of *Wong Shee Kai v Government of Malaysia* [2022] 10 CLJ 1; [2022] 6 MLJ 102, a very recent decision of this court. In that case leave to appeal had been granted to the petitioner. The question before the court was whether the court was bound to hear the petition since leave had been granted, or whether it could set aside the leave order and refuse to hear the petition. As reported in paragraphs (2) and (3) of the headnote to the case, it was held, *inter alia* as follows:

Held (2) Although leave had been granted and the petition had been filed, it was still open to the court, in order to guard its exclusive original jurisdiction from abuse, to re-visit the grant of leave and to set it aside if it found that leave ought not to have been granted in the first place. The grant of leave could not confer jurisdiction where there is none in the first place. Leave could only be granted if there is jurisdiction, and so the grant of leave was not capable of becoming the basis for jurisdiction.

Held (3) If it is found at any stage before, during or after the hearing of the merits of a petition that the initial grant of leave was bad for want of jurisdiction, this court is entitled, after hearing the parties, to set aside the leave order previously granted. And following such setting aside, the petition having no leg to stand on has to be struck out as a matter of course. The power to set aside the previously-granted leave order is within

the ambit of the inherent powers of this court. If at all a statutory provision is required for it, it is rule 137 of the Rules of the Federal Court 1995.

[144] The issue therefore is one of jurisdiction so that leave that has been granted without jurisdiction is liable to be set aside. In *Wong Shee Kai,* the court struck out the petition not because the applicant had no *locus standi* to maintain the action but because the court had no jurisdiction to hear the petition as the challenge was an inconsistency challenge and not an incompetency challenge. As the learned Chief Justice who led the five member panel eruditely surmised in her judgment, the petition "disclosed an inconsistency challenge poorly disguised as an incompetency challenge".

[145] It was held that being an inconsistency challenge, the petition should have been raised in the High Court and not directly in the Federal Court as an inconsistency challenge was beyond the jurisdiction of the Federal Court, whose exclusive jurisdiction under Article 128(1)(a) of the Constitution was to hear an incompetency challenge and not an inconsistency challenge.

[146] As in *Wong Shee Kai*, this court in the present case is dealing with Article 4(3) and (4) of the Constitution which are reproduced again below for ease of reference:

"(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter

with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or –

(a) if the law is made by Parliament, in proceedings between the Federation and one or more States;

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

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings brought for the same purpose under paragraph (a) or (b) of the Clause."

[147] I must highlight in passing that by virtue of Article 4(4) above, the Federal Government shall be entitled to be a party to any such proceedings but for some unexplained reasons it was not made a party to the present proceedings, nor did it apply to intervene in the action. At the hearing, the State Legal Advisor who represented the State Government of Kelantan but who is also an officer of the Federal Government was asked if the Federal Government takes the same stand as the stand taken by the State Government of Kelantan. His reply was that it does not take the same stand.

[148] Obviously the learned State Legal Advisor did not represent the Federal Government in this action although he is an officer of the Federal Government attached to the Attorney-General's Chambers. In his

capacity as the State Legal Advisor of Kelantan, he had made the Kelantan Government's position clear that the impugned provisions are valid and not unconstitutional, which is the flip side of the Federal Government's stand as he himself confirmed in answer to my question at the hearing. This conundrum in the role of the State Legal Advisor in a Federal set up where the State Government is in the opposition needs to be tidied up.

[149] It would have been of great assistance to the court if the Federal Government had been a party to the action so that the court could benefit from the Federal Government's input on such an important constitutional issue as the competency of the Kelantan State Legislature to enact the impugned provisions. With due respect, taking a neutral stand or no stand at all is not a viable option as it involves the power of the State Legislature *vis-à-vis* the legislative power of Parliament to make law. As it is, the court does not have the benefit of the Federal Government's side of the argument.

[150] Be that as it may, the *ratio decidendi* of *Wong Shee Kai* is unwaveringly clear - that a leave order that has already been granted can be set aside if it is found that it should not have been granted in the first place for want of jurisdiction. Put another way, the grant of leave cannot confer jurisdiction where there is none in the first place, and the court has no jurisdiction where there is no standing to sue.

[151] No authority has been provided to this court to say that even where the petitioner has no *locus standi* to maintain the action, this court is

nevertheless seized of its exclusive original jurisdiction under Article 128(1)(a) of the Constitution to hear and to decide on the merits of the petition. As for myself, I do not think that is a tenable proposition of law as *locus standi* is a condition precedent to the exercise of the court's jurisdiction under Article 128(1)(a) of the Constitution. I therefore reject counsel's argument that once leave to appeal has been granted, the issue of *locus standi* is *res judicata* and cannot be re-visited. The argument must fail.

[152] In so far as the issue of jurisdiction is concerned, the position of the petitioners in the present case is no better than the position of the petitioner in *Wong Shee Kai*. While their incompetency challenge is well within the exclusive original jurisdiction of the Federal Court under Article 128(1)(a) of the Constitution, their lack of *locus standi* takes that exclusive original jurisdiction away from the court.

[153] In both *Wong Shee Kai* and in the present case, this court had/has no jurisdiction to hear the applications, in the former because the court had no exclusive jurisdiction to hear an inconsistency challenge and in the present case because the court has no exclusive jurisdiction to hear an application by petitioners who have no right to appear before it.

[154] In a sense the petitioners' position is worse than that of Wong Shee Kai who could at least bring his inconsistency challenge in the High Court although not in the Federal Court. Unlike the petitioners, he was not impeded by lack of *locus standi*. His petition was struck out simply

because he filed his application in the wrong court, and not because he lacked *locus standi*.

[155] The petitioners on the other hand filed their case in the right court but without the necessary *locus standi* or standing to sue, their application has no leg to stand on. Their petition must therefore suffer the same fate as the fate that befell Wong Shee Kai but for a different reason.

[156] In the circumstances and for all the reasons given, Enclosure 68 is allowed. The leave order granted by Vernon Ong FCJ on 30 September 2022 is set aside and Enclosure 26 is struck out with no order as to costs.

Signed

ABDUL RAHMAN SEBLI
Chief Judge of Sabah and Sarawak
Dated: 9 February 2024

Parties

For the Petitioners	:	Malik Imtiaz Sarwar, Lim Yvoone and Surendra Anath of Messrs. Surendra Ananth
For the Respondent:	:	Dato' Idham bin Abd Ghani, Dato' Kamaruzaman bin Muhammad Arif, Dato' Nik Suhaimi bin Nik Sulaiman, Arham Rahimy bin Hariri, Adam bin Mohamed@ Mamat, Mohd Syazwan bin Muhsin Negara, Sofiah binti Omar and Muhammad Izzat bin Dzulkafli of Kelantan State Legal Advisor's Office.

Amicus Curiae

Jabatan Hal Ehwal Agama Islam Kelantan	:	Yusfarizal bin Yusoff and Mohd Faizi bin Che Abu of Messrs. Faizi & Associates
Sister in Islam	:	New Sin Yew, Siti Summaiyah Ahmad Jaafar and Edmund Bon Tai Soon of Messrs. Amerbon
Majlis Agama Islam dan Adat Istiadat Melayu Negeri Kelantan (MAIK):	:	Tabian Tahir and Noor Amalina Mursiedy of Messrs. Hashim Amran Tabian Ahmad
Majlis Agama Islam Wilayah Persekutuan (MAIWP)	:	Datuk Adnan bin Seman@Abdullah and Muhammad Rafique Rashid Ali of Messrs. Adnan Sharida & Associates.

Watching Brief

Badan Peguam Syarie Wilayah Persekutuan	:	Mohd Tajuddin bin Abd Razak and Muhamad Nakhaie bin Ishak of Messrs. Hasshahari & Partners
Malaysian Bar	:	Roshalizawati binti Muhammad and Wan Norfarhan Liyana binti Wan Baharunddin of Messrs. SC Chua, Shaliza & Partners Mohd Faiez bin Md Suhami of Messrs. Faiez & Co Karen Cheah Yee Lynn and Fahri Azzat of Messrs. Fahri, Azzat & Co.

Persatuan Peguam-Peguam Muslim Malaysia (PPMM)	:	Dato' Zainul Rijal bin Abu Bakar, Mohamed Haniff bin Khatri Abdulla and Aidil Khalid of Messrs. Chambers of Zainul Rijal
Persatuan Peguam Syarie Malaysia (PGSM)	:	Dato' Hanif bin Hassan of Messrs. Hanif Hassan & Co. Datin Rosfinah binti Dato' Hj. Rahmat of Messrs. Rosfinah & Co.
Majlis Agama Islam dan Adat Istiadat Melayu Perlis (MAIPs)	:	Fakhrul Azman bin Abu Hasan and Ahmad Edham Abdulwani bin Mohamad of Messrs. Azaine & Fakhrul
Majlis Agama Islam Negeri Islam Negeri Sembilan (MAINS)	:	Dato' Hanif bin Hassan and Sumaiyah binti Jamil of Messrs. Hanif Hassan & Co.
Majlis Ugama Islam Sabah (MUIS)	:	Zakarian bin Ahmad of Messrs. Zakaria Ahmad & Co.
Majlis Agama Islam dan Adat Melayu Perak (MAIPK)	:	Adham Jamalullail bin Haji Ibrahim and Norazali bin Nordin of Messrs. Adham & Associates
Majlis Agama Islam dan Adat Melayu Terengganu (MAIDAM)	:	Sallehudin bin Harun and Yusfarizal bin Yusoff of Messrs. Sallehudin Harun & Partners
Majlis Agama Islam Melaka (MAIM)	:	Datin Hajah Rosfinah binti Dato' Hj Rahmat and Datuk Haji Mohd Adli bin Ithnin of Messrs. Adli & Co.