

# Chapter 3

## The Status of Islam and Islamic Law in the Malaysian Federal Constitution



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### Introduction

The Malaysian Federal Constitution was drafted by ‘The Reid Commission’ headed by *Lord William Reid*, a distinguished *Lord* of Appeal in ordinary in the House of Lords, with other constitutional law experts, namely, Sir. Ivor Jennings (the United Kingdom), Sir. William McKell (Australia), Mr. Justice B. Malik (India), and Mr. Justice Abdul Hamid (Pakistan). The Federal Constitution is the supreme law of the federation (The Malaysian Federal Constitution (MFC), art. 4(1)). It is a lengthy document extending to 183 articles and 13 schedules, covering various matters, such as the federal and state governments’ structure and powers, individual fundamental rights, citizenship, emergency powers, and religion of the federation. Malaysia is a federation that consists of the following thirteen states, namely, Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Sabah, Sarawak, Selangor and Terengganu; and three Federal Territories, namely, Kuala Lumpur, Putrajaya and Labuan (MFC, art. 1). Each of the thirteen states mentioned earlier has its constitution, which also has to be in line with the auspice of the Federal Constitution (Ahmad and Ali Mohamed 2020). And, the Federal Constitution itself serves as the constitution for all the three Federal Territories (MFC, Item 27, Federal List, Ninth Schedule).

Federal laws are promulgated by the Federal Parliament, which consists of the House of Representatives (‘Dewan Rakyat’) and the Senate (‘Dewan Negara’). The Federal Parliament has the power to make laws for the whole or any part of the federation and laws having effect outside as well as within the federation (MFC, art.

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73(a)). It may enact laws relating to any of the matters enumerated in the Federal List (MFC, The First List, Ninth Schedule) or the Concurrent List (MFC, The Third List, Ninth Schedule). Accordingly, laws passed at the federal level are also known as the Acts of Parliament. State laws are enacted by the assemblymen sitting in the State Legislative Assemblies ('Dewan Undangan Negeri') of each state and only applicable to the respective state (MFC, art. 74(1)). A Legislative Assembly has the power to make laws for the whole or any part of that particular state (MFC, art. 73(b)). It may make laws in relation to any of the matters enumerated in the State List (the Second List, Ninth Schedule, MFC) or the Concurrent List. Besides, the State Legislative Assemblies also have the power to pass laws with respect to any matter which is not enumerated in any of the Lists set out in the Ninth Schedule to be applicable to the respective state (MFC, art. 77).

In relation to the status and position of Islam and Islamic law in the Federal Constitution, which forms the main focus of this chapter, the constitution places Islam in a special position (*Mohamed Habibullah bin Mahmood v. Faridah bte Dato Talib* [1993] 1 CLJ 264, SC). Each Ruler of the state is the Head of the religion of Islam in their respective states, and the Yang di-Pertuan Agong (the King)<sup>1</sup> is the Head of the religion of Islam in his own state; the Federal Territories of Kuala Lumpur, Putrajaya, and Labuan; and the States of Malacca, Penang, Sabah as well as Sarawak.<sup>2</sup> It is an offence to act in contempt of religious authority or defy, disobey or dispute the orders or directions of the Ruler of the States or Yang di-Pertuan Agong as the Head of the religion of Islam. Anyone who commits any of the above offences is liable to a fine not exceeding RM3000 or to imprisonment for a term not exceeding two years or to both upon conviction (Shari'ah Criminal Offences (Federal Territories) Act 1997 (Act 559), s. 9).

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<sup>1</sup>The Yang di-Pertuan Agong is elected by the Conference of Rulers for a term of five years: see art 32 of the Federal Constitution, but he may, at any time, resign his office by writing under his hand addressed to the Conference of Rulers or be removed from office by the Conference of Rulers. The Federal Constitution, art 41, provides that the Yang di-Pertuan Agong is the Supreme Head of the Federation and the Supreme Commander of the Armed Forces of the Federation and pursuant to art 40, he must act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except as otherwise provided for by the Federal Constitution. The Cabinet is headed by the Prime Minister and is collectively responsible to Parliament.

<sup>2</sup>Malaysia is a federation and is divided into thirteen states—Perlis, Kedah, Penang, Kelantan, Terengganu, Perak, Selangor, Negeri Sembilan, Malacca, Johor, Pahang, Sarawak and Sabah—and three Federal Territories—Kuala Lumpur, Labuan and Putrajaya. The Federal Territory of Kuala Lumpur was excluded from the boundaries of the State of Selangor vide the Constitution (Amendment) (No 2) Act 1973 (Act A206); the Federal Territory of Labuan was excluded from the boundaries of the State of Sabah vide the Constitution (Amendment) (No 2) Act 1984 (Act A585) and the Federal Territory of Putrajaya was excluded from the boundaries of the State of Selangor vide the Constitution (Amendment) Act 2001 (Act A1095).

## Islam in the Federal Constitution

Article 3 of the Federal Constitution provides that “Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.” The status of Islam in the context of this article is related only to rituals and ceremonies as held by the Supreme Court (now known as the Federal Court) in *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55 and *Meor Atiqulrahman Ishak and Ors v Fatimah Sihi & Ors* [2006] 4 MLJ 605. It was further reiterated by the previous leadership of Malaysia, including Malaysia’s first Prime Minister, Tunku Abdul Rahman. In the Federal Legislative Council Debates, 1 May 1958, he stated: “I would like to make it clear that this country is not an Islamic State as it is generally understood, we merely provide that Islam shall be the official religion of the State” (Wan Teh 2001).<sup>3</sup> In *Fatimah Sihi’s* case, the High Court decided in favour of the pupil who had been unlawfully expelled from school for disregarding the school directive of not to wear a turban, an Islamic dress, to school. The court held, *inter alia*, that article 3 of the constitution should be interpreted to mean that the religion of Islam exceeds rituals and ceremonies and that the government is given the responsibility to protect and promote Islam as best as it could. On appeal, the Court of Appeal reversed the said decision. It was held that whether or not wearing a turban formed an integral part of the religion of Islam involved a question of evidence for the respondents to adduce, which they had failed in this case. On a further appeal, this decision was affirmed by the Federal Court.

Be that as it may, it is noteworthy that the term ‘Malay’, the largest ethnic group of Malaysia,<sup>4</sup> is defined in article 160 of the Federal Constitution as “a person who professes the religion of Islam.” The phrase “a person who professes the religion of Islam” was defined in *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Anor* [2004] 6 CLJ 242 as a person who is brought up as a Muslim or his/her upbringing was conducted on the basis that he/she was a Muslim, he/she lived as a Muslim with his/her family and is commonly reputed to be a Muslim. Further, the term ‘Muslim’ is defined in section 2 of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) as: “(i) a person who professes the religion of Islam; (ii) a person either or both of whose parents were, at the time of the person’s birth, Muslims; (iii) a person whose upbringing was conducted on the basis that he was a Muslim; (iv) a person who has converted to Islam in accordance with the requirements of s. 85 of Act 505; (v) a person who is commonly reputed to be a Muslim; or (vi) a person

<sup>3</sup> See Booklet entitled *Malaysia adalah Sebuah Negara Islam* (Malaysia Is an Islamic State/Nation) published by the Ministry of Information explaining why Malaysia is already an Islamic nation.

<sup>4</sup> Malaysia is highly multi-ethnic with Malays, Chinese and Indians constituting the three biggest groups. The great bulk of Chinese and Indians are descendants of people who arrived in Malaysia during the British colonial rule. The Malays on the other hand are, together with some smaller minority groups, defined as native to the region and have been given the special status of “bumiputra”. This category, which constitutes slightly more than half the population, is assigned certain economic and other privileges in order to redress the economic imbalance between the ethnic groups of the country.

who is shown to have stated, in circumstances in which he was bound by law to state the truth, that he was a Muslim, whether the statement be verbal or written.”

Aside from article 3, article 11 of the constitution deals with the right of individuals to profess and practise his or her religion freely in the federation but with certain restrictions as mentioned in article 11(4) namely, that the state law, or in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, the federal law, may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam. In other words, the propagation of any other religious doctrine or belief among persons professing the religion of Islam may be controlled or restricted by a law enacted by the State Legislative Assembly, and in respect of the Federal Territories, the Parliament. The purpose of this restriction is to protect the religion of Islam from being exposed to the influences of the tenets, precepts, and practices of other religions or even of certain schools of thoughts and opinion within the Islamic religion itself (*Mamat Daud & Ors v. The Government of Malaysia* [1988] 1 CLJ 11). The phrase “religion of Islam” was succinctly explained by Suriyadi Halim Omar J in *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2006] 8 CLJ 9:

“It does not speak of a Malaysian oriented religion of Islam, Islam practised by a particular branch in the Muslim world or *mazhab* or words to that effect, but simply religion of Islam. That being so it must be in the original format as revealed through Prophet Muhammad ordained by Allah, before the birth of the sectarian groups. The Quran has clearly enjoined that the only source of guidance is what has been laid down in it, as revealed by Allah through Prophet Muhammad, and the authentic *ahadith* (traditions and actions of the prophet; Quran vol (5):49; vol (7):3; vol (59):7).

The Quran as a source is not a problem, as it has remained unchanged since its revelation, and no Muslim of whatever sect will suggest otherwise. The problem is the *al-sunnah*. This collection of traditions, sayings and actions has had its fair share of controversy, in the like of their acceptance by branches of followers (sects), generally termed as *mazhabs*. The major ones are the Hanafi, Maliki, Shafie, and Hambali.

To some, hereinafter referred to as purists or fundamentalists, a word made respectable by the former Malaysian Prime Minister, to even accede to the *mazhab's* concept is *per se* blasphemous, as in the eyes of Islam they would have committed sin, for having divided the religion of Islam into different sects (Quran (6): 159). Without wanting to stir any hornet's nest, during the life time of Prophet Muhammad, these *mazhabs* never existed and Islam as propagated by him was the solitary sect. As far as any purist is concerned only the *mazhab* of Muhammad existed then. The sects that came after him were never revealed through him by the Almighty, and surely if He had wanted it sanctioned He would have revealed it through the prophet. His prophecy of his followers splitting up into seventy-three sects, with only one acceptable group religiously adhering to his sublime teachings, has given further ammunition to these purists.

With the procreation of these sects, came the predictable different interpretations of the abovementioned two sources. Certain sects, apart from giving different interpretations have created further discord, by challenging even the very existence and authenticity of some of the *ahadiths*. Surely all these differences do not augur well for the ordinary Muslim on the road, especially the non-Arabic speaking Muslim populace. These are only a few of the headaches faced by the legislators and propagators of the Islamic banking system.

With Allah at vol (5):3 having said that He had perfected the Islamic religion as chosen by him (see also Bukhari and Muslim), and all Muslims must only refer to the Quran and the *hadith*, it takes a brave and perhaps suicidal government to codify and create another competitive source of reference for consideration. Perhaps that is the main reason why an Act in the like of the Contracts Act 1950, but catering to Islamic prerequisites has yet to see the daylight of a successful legislation” (pp. 17–18).

In *Jamaluddin Othman v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1989] 1 CLJ 448, it was stated that if the Home Ministry acts to restrict the freedom of a person from professing and practising his religion, this act will be inconsistent with the provision of article 11 and therefore any order of detention in this respect would not be valid. A non-Muslims cannot be compelled to convert to Islam as this article guarantees freedom of religion. In other words, they are free to profess and practise their religion, which is constitutionally guaranteed in article 11(1). In the case of a minor, the Supreme Court had in *Teoh Eng Huat v The Kadhi of Pasir Mas, Kelantan & Anor* [1990] 2 CLJ 11, stated, *inter alia*, that their parent or guardian possesses the right to determine their religion until he or she attained the age of majority. And, in *Sulaiman Takrib v Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) & other cases* [2009] 2 CLJ 54, Abdul Hamid Mohamad CJ (as he then was), stated that “any argument that any law that seeks to control the propagation of doctrines and beliefs among persons professing the religion of Islam is unconstitutional because it is inconsistent with art. 11 (freedom of religion) or any other provision is doomed to fail from the start” (p. 59).

## Islamic Law in the Federal Constitution

In article 160 of the constitution, the word ‘law’ is defined to mean “written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.” However, Islamic law, which is a system of law based on the divine will of Allah (*s.w.t.*) that was revealed to the Prophet Muhammad (*s.a.w.*) over a period of twenty-three years beginning in 610 A.D, had been omitted from the said definition.

Be that as it may, article 74(2) the Federal Constitution grants the respective State Legislative Assembly to “make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.” The State List includes the following: “Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; *Wakafs* and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; *Zakat*, *Fitrah* and *Baitulmal* or similar Islamic religious revenue; mosques or any Islamic public

place of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Shari'ah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom." Islamic laws governing similar matters relating to Muslims in the Federal Territories are passed by the Federal Parliament. In *Yong Fuat Meng v Chin Yoon Kew* [2008] 5 CLJ 705, Hamid Sultan Abu Backer JC stated: "Schedule 9, is very limited in scope and condoning its breach will be unconstitutional and will create much imbalance to the rights of the public as well as administration of justice as a whole, as has been evidenced by case laws" (p. 731).

In relation to the Shari'ah courts, it is noteworthy that these courts are an integral part of the Malaysian judicial system and are distinct from the civil courts as to their function and jurisdiction. The Shari'ah courts are designated as a specialist court with a three-tier court system, namely, the Shari'ah Subordinate Court, the Shari'ah High Court, and the Shari'ah Appeal Court. The judges of the Shari'ah courts are persons who are familiar with the knowledge of Islamic principles and law. The recognition of the Shari'ah courts was largely due to Article 121(1A) of the Federal Constitution, which excludes the jurisdiction of the civil courts in respect of any matter that comes within the jurisdiction of the Shari'ah courts.

The historical origin of these courts can be traced way before the Straits Settlements. The Malay States came under the British administration where the law applicable in those states was Islamic law, which had absorbed to some extent the rules of the Malay custom. Justice was administered in Kathi's court with an appeal to the Sultan. However, during the British administration of these states, English law became the general law of the land. Thus, the courts modeled on Britain's were set up in the Straits Settlements by introducing the Charters of Justice in 1807 and 1826, and in the Malay States through the advice of the British resident and advisor. However, Kathi's court was relegated to a subordinate position. For example, the Court Enactment of 1905 of the Federated Malay States included the Court of Kathi and Assistant Kathi within the British court system. Their jurisdiction was, however, limited to hear matters pertaining to marriage, divorce, and other matters stipulated in the '*surat kuasa*' (letter of authority). An appeal against the decision of the Court of Kathi and Assistant Kathi lies with the Court of Magistrate and the Supreme Court. Further, the Courts Ordinance of 1948 made the civil court's jurisdiction general, wherein Kathi's Court was omitted from being part of the Federal court system. The Ordinance continued to apply throughout the federation until it was repealed and replaced by the Courts of Judicature Act 1964 and the Subordinate Courts Act 1948. When Malaya achieved independence in 1957, Kathi's Court's status was reduced to that of the state court.

As noted earlier, the Federal Constitution divides legislative power between the federation and states, giving the federation the legislative power over civil and crim-



inal law, including the jurisdiction of the courts other than Shari'ah courts. The states are given the legislative power over a wide range of personal matters affecting the Muslims, and the Shari'ah courts were mandated to have jurisdiction over these matters and only over persons professing the religion of Islam. In relation to its criminal jurisdiction, it is noteworthy that in 1965, the Parliament enacted the Muslim Courts (Criminal Jurisdiction) Act 1965, which provided that the jurisdiction of the Muslim courts shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding six months or with any fine exceeding one thousand dollars [dollar was initially used before RM was introduced in the 1990s] or with both. The act applied only to the 'States of Malaya'. In 1984, the Muslim Courts (Criminal Jurisdiction) Act 1965 was amended where the courts' criminal jurisdiction was increased to three years imprisonment, fine not exceeding five thousand ringgit or with whipping not exceeding six strokes or with any combination thereof. The 1965 Act was revised in 1988 and renamed the Shari'ah Courts (Criminal Jurisdiction) Act 1965 (Act 355), which was initially applied to the 'States of West Malaysia'. However, *vide* the Shari'ah Courts (Criminal Jurisdiction) (Amendment and Extension) Act 1989, Act 355 was extended to 'all the States of Malaysia'. In fact, the Shari'ah courts cannot exceed the power vested on it by the Shari'ah Courts (Criminal Jurisdiction) Act 1965, a federal law. Undoubtedly, the Shari'ah court's criminal jurisdiction is a far cry compared to the court at the lowest tier of the civil jurisdiction, i.e., the First Class Magistrate. Pursuant to section 85 of the Subordinate Courts Act 1948, a First Class Magistrate is empowered to impose imprisonment up to five years, a fine up to ten thousand ringgit (RM10,000) and whipping up to twelve strokes.

The jurisdiction and powers of the Shari'ah Courts are founded in the following acts which are implemented in the Federal Territories of Kuala Lumpur, Putrajaya, and Labuan: (i) Administration of Islamic law (Federal Territories) Act 1993 (Act 505); (ii) Islamic Family Law (Federal Territories) Act 1984 (Act 303); (iii) Shari'ah Criminal Offences (Federal Territories) Act 1997 (Act 559); (iv) Shari'ah Criminal Procedure (Federal Territories) Act 1997 (Act 560); (v) Shari'ah Court Evidence (Federal Territories) Act 1997 (Act 561); and Shari'ah Court Civil Procedure (Federal Territories) Act 1998 (Act 585). Similar statutes have been adopted and implemented in the various states in Malaysia. Muslims in Malaysia are subjected to the above special laws to the exclusion of other non-Muslim communities (*Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah* [2004] 2 MLJ 241).

It is interesting to note that clause (1A) was inserted into article 121 *vide* the Constitution (Amendment) Act 1988 (Act 704 of 1988), which came into force on 10 June 1988. The said insertion was primarily intended to confer exclusive jurisdiction on the Shari'ah Court to adjudicate on any matter which has been lawfully vested by law within the jurisdiction of the Shari'ah Court. It has thus, taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the Shari'ah Courts. In *Ismail Mohamad v. Wan Khairani Wan Mahmood & Another Appeal* [2009] 4 CLJ 653, a case dealing with a Muslim couple's right to the distribution of the assets on divorce, Zaki Tun Azmi CJ (as he then was), delivering the judgment of the Federal Court, stated: "It is not denied that any jurisdiction that is

lawfully vested in the Shari'ah Court is exclusively within the jurisdiction of the Shari'ah Court. It is also admitted that the civil court cannot overstep its jurisdiction to decide on matters which strictly fall within the Shari'ah Court jurisdiction" (p. 659).

In *Dato' Kadar Shah bin Tun Sulaiman v Datin Fauziah binti Haron* [2008] 7 MLJ 779, it was stated that "where there is an issue of competing jurisdiction between the civil court and the Shari'ah court, the proceedings before the High Court of Malaya or the High Court of Sabah and Sarawak must take precedence over the Shari'ah courts as the High Court of Malaya and the High Court of Sabah and Sarawak are superior civil courts, being High Courts duly constituted under the Federal Constitution. Shari'ah courts are mere State courts established by State law, and under the Federal Constitution these State courts do not enjoy the same status and powers as the High Courts established under the Courts of Judicature Act 1964 (Act 91). Indeed, the High Courts have supervisory powers over Shari'ah Courts just as the High Courts have supervisory powers over other inferior tribunals like, for instance, the Industrial Court" (p. 788).

Again, in *Mohd Hanif bin Farikullah v Bushra Chaudri* [2001] 5 MLJ 533, it was stated: "Article 121(1A) of the Federal Constitution does not overrule the general jurisdiction of the civil courts. Civil Courts are courts of general jurisdiction and can hear cases commenced by Muslims as well as by Non-Muslims, and can try offences against Muslims and Non-Muslims that are created by the laws of the land. Moreover, the Civil High Courts are courts of inherent jurisdiction while the jurisdiction of the Shari'ah Courts are determined by the respective state laws and if the legislature does not confer on the Shari'ah Courts any jurisdiction to deal with any matter in the State List then the Shari'ah Court is precluded from dealing with that matter" (p. 541).

The above authorities are a mere reiteration of the application of the basic structure doctrine, which has now been affirmed by the apex court in the following cases: *Sivarasa Rasiiah v Badan Peguam Malaysia* [2010] 3 CLJ 507, *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 5 CLJ 526, *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545, and *Alma Nudo Atenza v PP & Another Appeal* [2019] 5 CLJ 780. In *Semenyih Jaya's* case, Zainun Ali FCJ, delivering the unanimous decision of the Federal Court, stated: "the Judiciary is thus entrusted with keeping every organ and institution of the State within its legal boundary. Concomitantly the concept of the independence of the Judiciary is the foundation of the principles of the separation of powers" (p. 533). The *Semenyih Jaya's* case was followed in *Indira Gandhi's* case, where Zainun Ali FCJ who also penned the written judgment of the Federal Court, stated *inter alia*, that the vesting of the judicial power of the federation in the civil courts formed part of the basic structure of the constitution and could not be removed, even by constitutional amendment. In particular, her ladyship stated: "It would be instructive to now distill the principles as have been illustrated above: (a) under art. 121(1) [Constitution], judicial power is vested exclusively in the civil High Courts. The jurisdiction and powers of the courts cannot be confined to federal law. The courts will continually and inevitably be engaged in the



interpretation and enforcement of all laws that operate in this country and any other source of law recognised by our legal system; (b) judicial power in particular the power of judicial review, is an essential feature of the basic structure of the Constitution; (c) features in the basic structure of the Constitution cannot be abrogated by Parliament by way of constitutional amendment; (d) judicial power may not be removed from the High Courts; and (e) judicial power may not be conferred upon bodies other than the High Courts, unless such bodies comply with the safeguards provided in Part IX of the Constitution to ensure their independence” (p. 536).

In *Indira Gandhi’s* case, the Federal Court noted that it is inaccurate to state that Article 121(1A) of the Federal Constitution excludes or oust the civil court’s jurisdiction on matters within the jurisdiction of Shari’ah court. The court noted that the civil courts and Shari’ah courts operated on a different footing altogether, and “the perception that both courts should exercise a mutually reciprocal policy of non-interference may be somewhat misconceived and premised on an erroneous understanding of the constitutional framework in Malaysia” (p. 549). In particular, Zainun Ali FCJ stated:

“The amendment inserting cl. (1A) in art. 121 does not oust the jurisdiction of the civil courts nor does it confer judicial power on the Shari’ah courts. More importantly, Parliament does not have the power to make any constitutional amendment to give such an effect; it would be invalid, if not downright repugnant, to the notion of judicial power inherent in the basic structure of the Constitution... Article 121(1A) does not constitute a blanket exclusion of the jurisdiction of civil courts whenever a matter relating to Islamic law arises. The inherent judicial power of civil courts in relation to judicial review and questions of constitutional or statutory interpretation is not and cannot be removed by the insertion of cl. (1A)” (p. 551).

In *Indira Gandhi’s* case, the Federal Court decreed that the civil courts had jurisdiction to hear cases when aggrieved parties questioned any conversion to Islam.<sup>5</sup> Nevertheless, it is not disputed that, by virtue of article 121(1A), the Shari’ah courts across the nation have exclusive jurisdiction to try and hear cases involving the persons professing the religion of Islam in all matters that fall under its jurisdiction.

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<sup>5</sup>It is noteworthy that majority of conflict of jurisdiction cases revolved around family law matters and, in particular, divorce application and claim for custody in the event one of the spouses to civil marriage converts to Islam. This matter has not been resolved vide section 4 of the Law Reform (Marriage and Divorce) Amendment Act 2017 which came into effect on 15 December 2018. It provides that any application for divorce for marriage solemnised in a civil registry must be resolved in the civil court even if one of the spouses has converted to Islam. The newly inserted subsection (1) of section 51 the Law Reform (Marriage and Divorce) Act 1976 allow either party, or both parties, to a marriage to petition for a divorce where one of them has converted to Islam. Prior to this amendment, only the non-converting spouse could petition for a divorce. Further, a new section 51A to the Principal Act provides that where the converted spouse dies before the non-Muslim marriage is dissolved, the surviving spouse, the surviving children of a marriage and the parents of the deceased converted spouse will be entitled to participate in the distribution of the matrimonial assets of the deceased.

## Conclusion

In a nutshell, the Malaysian Federal Constitution promulgates the religion of Islam as “the Religion of the Federation”, yet it allows all other religions to be practised in peace and harmony. As “the Religion of the Federation”, it is obvious that Islam has the highest status among all other religions, and Islamic religious matters are given priority in Malaysia. The Federal Constitution allows the State Legislative Assemblies for the respective state and the Federal Parliament for the federal territories to make Islamic laws relating to personal and family matters; charitable and religious trusts; Islamic religious revenue; Islamic public place of worship; creation and punishment of offences against precepts of Islam; the constitution, organisation and procedure of Shari’ah courts; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law. It should also be noted that these duly enacted Islamic laws are only applicable to the persons professing the religion of Islam and are not applicable to non-Muslims. In order to enforce some of these Islamic laws, a three-tier Shari’ah court system was established in all states and the federal territories. The respective Shari’ah court generally has the civil jurisdiction to hear and determine all actions and proceedings – especially in personal and family matters – in which all the parties are Muslims, and the criminal jurisdiction to try any offence committed by a Muslim and punishable under any relevant Islamic law.

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