RESOLVING JURISDICTIONAL DILEMMA IN RECENT RELIGIOUS DISPUTES BY LEGAL MECHANISMS

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ABSTRACT

The duality of the Malaysian legal system has resulted in an ongoing jurisdictional conflict between the Civil Court and Syariah Court throughout the years. Jurisdictional dilemma will usually occur when one of the parties initiates legal action in a Civil Court instead of a Syariah Court, which has jurisdictional power pertaining to Islamic law and religious matter. The objective of this paper is to study how to resolve jurisdictional friction between the two courts by discussing the development of juristic approaches when clashes of jurisdiction are involved. Specifically, the jurisdictional dilemma will be critically analysed based on selected court cases. Thus, the authors have adopted descriptive, analytical and doctrinal legal methods for the purpose of discussing the issue. The paper, suggests practical solutions to avoid further conflict in the future by using legal mechanisms available will also be appraised.

Keywords: conflict of jurisdiction, Syariah Court, Civil Court, precepts of Islam

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INTRODUCTION

Conflict of laws is not a new topic in the context of Malaysian legal parlance. Over the years, conflict of laws has become a debatable topic among scholars, legal practitioners and theologians. Clashes will occur when there is a predicament with volition to choose which law to apply if there are two or more antithetical legal disciplines having jurisdiction over the case; and usually the outcome to the issue will depend on the selection of law to be applied in deciding the matter.

It is significant to posit a preliminary question when discussing the issue of jurisdiction: under which law should the case at hand be decided in order to resolve the legal dispute?

The Malaysian legal system has been instituted with a unique juridical foundation[1] given the history of British colonisation of its Muslim majority community; and as such has resulted in the establishment of two legal systems, namely the English common law and Islamic law. Major problems arise when a subject matter that falls under Islamic law jurisdiction is brought before the Civil Courts, especially on religion-related conflict. As a result, discord between these courts will become more evident and it will certainly give impact to jurisdictional equilibration as promulgated in Article 121 of the Federal Constitution where, specifically in clause (1A) of the provision , which avers that the Civil Courts have no jurisdiction on matters falling under the jurisdiction of Syariah Courts. In this regard, this article will further examine how a dual legal system has developed the juristic approaches to determine jurisdictional conflict as well as analyse the appropriate

[1] Gerhard Hoffstaedter, "Asia-Pacific: From One Law to Many: Legal Pluralism and Islam in Malaysia", *Alternative Law Journal, Vol. 40, No. 2* (2015): 134.

principles applicable in decided cases concerning some recent religious conflicts, *viz*. *Iki Putra bin Mubarak v Government of Selangor*[2]*; Rosliza bt Ibrahim v Government of Selangor & Anor*[3]*; Jill Ireland Lawrence Bill v Minister of Home Affairs of Malaysia & Anor*[4]; and legal mechanisms to resolve jurisdictional friction practically.

Dual Legal System and Jurisdictional Conflict

Malaysia has a dual legal and judicial system, with two mainstream courts, namely the Civil Court and the Syariah Court. This is to ensure that both courts can exercise their own jurisdiction without interfering with one another. In order to avoid jurisdictional conflict, a constitutional amendment in 1988 was made by inserting clause (1A) into Article 121. This amendment is to prevent the High Court from exercising any jurisdiction on matters that fall within the ambit of the Syariah Court. In this section, the authors will lay down the court's position before and after the amendment, the jurisdictional approaches, and jurisdictional issues.

Before The Amendment

Prior to the introduction of clause (1A) into Article 121, several cases involving shariah issues and principles have been decided to be in the realm of the High Court, and not the Syariah Court, which subsequently brought about the idea on the need for amendment. In *Ainan bin Mahmud v Syed Abu Bakar bin Habib Yusoff & Ors*,[5] the court held that under Section 112 of the Evidence Enactment, presumption of legitimacy where a child is born during the

2 [2021] 2 MLJ 323
3 [2021] 2 MLJ 181
4 [2021] CLJ LT (7)
5 [1939] MLJ 209

continuance of a valid marriage overrides the Islamic law principle that a child born within six months of marriage is illegitimate., In *Nafsiah v Abdul Majid*,[6] the High Court held that they have jurisdiction over matters of Muslim marriage. In *Myriam v Mohamed Ariff*,[7] the court held that the High Court had jurisdiction in a Muslim custody case.

The approach taken by the High Court in pre-1971 cases caused discontent among Muslims, quietly or openly in public discourses. Hence, to overcome jurisdictional conflict, the introduction of a new clause (1A) into Article 121 of the Federal Constitution was proposed. The clause mentions that Civil Courts shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts. Some would argue that it gives exclusive jurisdiction to the Syariah Courts. Professor Ahmad Ibrahim mentioned in his article[8] about the inclusion of this amendment as follows:

> *"The important effect of the amendment is to avoid for the future any conflict between the decisions of the Syariah Courts and the Civil Courts which had occurred in a number of cases. For example, in Myriam v Ariff...."*

It is evident that before the amendment, Civil Courts have declared itself to have jurisdiction in hearing disputes relating to Islamic affairs. The amendment is therefore necessary in ensuring that cases relating to Muslims can be adjudicated according to the Islamic law, and to simmer down dissatisfaction in the Muslim community.

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6 [1969] 2 MLJ 175

7 [1971] 1 MLJ 265

8 Ahmad Ibrahim, "The Amendment of Article 121 of the Federal Constitution: Its Effect on the Administration of Islamic Law" [1989] 2 MLJ xvii.

Recent Attitude of the Court in Applying Jurisdictional Approaches

After the amendment of the Constitution, most of the cases that involved clashes of jurisdiction are interpreted in light of jurisdictional approaches. These approaches are meant to assist the Court in determining which Court has the power to hear the contended matter. The jurisdictional approaches consist of express, implied, 'remedy prayed for', subject-matter and 'pith and substance' approaches.

i) Express Jurisdiction Approach

The phrase "within the jurisdiction of Syariah Courts" in clause (1A) has raised problems of interpretation. The problem is on how the word "jurisdiction" should be interpreted. Under the express jurisdiction approach, Civil Courts are of the view that the word "jurisdiction" is limited to jurisdiction that is expressly conferred upon the Syariah Courts by the relevant state enactments, pursuant to power(s) given under Article 74(2) of the Federal Constitution.[9] This approach was tested in *Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor*,[10] whereby the High Court decided that Syariah Courts only have jurisdiction to consider issues that were expressly conferred by State law in accordance with the Federal Constitution. Since there is no provision on the jurisdiction of the Syariah Court to determine the issue of whether a person is Muslim or not, hence, the High Court has jurisdiction to hear the matter.

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9 Wan Arfah Hamzah, *A First Look At The Malaysian Legal System* (Selangor: Oxford Fajar Sdn. Bhd, 2009), 237.

10 [1991] 3 MLJ 487

Later, in *Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib*,[11] the issue before the High Court was whether the High Court had jurisdiction to adjudicate the dispute as the appellant's action against her husband involved a matter which fell within the jurisdiction of the Syariah Court. Harun Hashim SCJ (as he then was) concluded that "there cannot be any doubt that the Syariah Court has been conferred with jurisdiction" as this was a matter of Islamic family law that was within the jurisdiction of the Syariah Court. The three Supreme Court judges allowed the appeal and held that the Civil Courts could be denied jurisdiction in shariah matters within the states' legislative competence only when, and in so far as, the Syariah Courts are by law expressly conferred with such a jurisdiction.

ii) Implied Jurisdiction Approach

Jurisdiction over all matters enumerated in Item 1, State List, Ninth Schedule of the Federal Constitution, regardless of whether or not the State Legislature has enacted legislation under Article 74 (2) to confer jurisdiction over the matters upon Syariah Courts, is called as the 'implied jurisdiction' approach. For instance, apostasy is not mentioned in the list to be categorised under Syariah Court jurisdiction. On top of that, many State laws provide for conversion to Islam, not out of Islam.[12] When there is no express provision in State law regarding this, will Syariah Courts have implied jurisdiction? This question was answered in *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur*.[13] The Court stated that they

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11 [1992] 2 MLJ 793

12 Yvonne Tew, "The Malaysian Legal System: A Tale of Two Courts", *Commonwealth Judicial Journal 19, no. 1* (2011): 3-7, https://search.informit.org/doi/10.3316/agispt.20113488.

13 [1998]1 MLJ 681

should look at the State List (List II, Ninth Schedule of the Federal Constitution) to see whether or not the Syariah Court has jurisdiction over a matter.. Later, in *Abdul Shaik bin Md Ibrahim v Hussein bin Ibrahim*,[14] the Court disagreed with *Md Hakim Lee* and said it was contrary to the case of *Habibullah*.

A clearer view regarding the implied jurisdiction approach can be found in *Soon Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah*.[15] The Federal Court in this case ruled that the jurisdiction of the Syariah Courts to deal with conversion out of Islam, although not expressly provided in the state enactments, can be read into them by implication derived from the provisions concerning conversion into Islam. A wider view was taken in *Majlis Ugama Islam Pulau Pinang dan Seberang Prai v Shaik Zolkaffily bin Shaik Natar & Ors*.[16] This was an application made to the High Court by Muslim plaintiffs applying for a declaration concerning a piece of land which was the subject-matter of a will. The High Court and the Court of Appeal decided that the Civil Court had jurisdiction on the basis of the express jurisdiction approach and 'remedy prayed for' approach, and thus the declaration sought could not be granted by the Syariah Court. On appeal, the Federal Court ruled that the Syariah Court had jurisdiction if the subject-matter is in Item 1 of the State List, Ninth Schedule, even if the Syariah Court cannot grant the relief sought by the parties. The court also recognised that Article 121 (1A) discusses about jurisdiction and not the power of granting remedies. The decision approved the implied jurisdiction approach propounded in *Md Hakim Lee*.

[14] [1999] 5 MLJ 618
[15] [1999] 1 MLJ 489
[16] [2003] 3 MLJ 705

The approach slowly developed, and it was further reconfirmed in *Lina Joy v Majlis Agama Islam Wilayah Persekutuan dan lain-lain*.[17]The Federal Court affirmed the decision of *Soon Sing*h. Since apostasy relates to Islamic law and it falls under matters in Item 1 of the State List under Ninth Schedule, it was held that apostasy clearly falls within the jurisdiction of the Syariah Court. Thus, by virtue of Article 121 (1A), Civil Courts have no jurisdiction over this matter. The court also highlighted that forcing one to go to a Syariah Court does not infringe on constitutional rights because if a person professes Islam, he must follow the Islamic law which had laid down the way to embrace and convert out of Islam. A majority were of the view that the implied approach is the correct approach whereby the Syariah Court may derive powers directly from the State List without the need for any Enactment to confer power upon it.[18] This approach was further strengthened in *Hj. Raimi Abdullah v Siti Hasnah Vangarama Abdullah and Anor. Appeal*.[19] The Court stated that Article 121 of the Federal Constitution clearly provided that the Civil Court shall have no jurisdiction on any matter falling within the jurisdiction of the Syariah Court. Whether a person was a Muslim or not was a matter falling under the exclusive jurisdiction of the Syariah Court — it would be inappropriate for the Civil Court, which lacks jurisdiction pursuant to Article 121, to determine the validity of the conversion of any person to Islam as this is strictly a religious issue. In another recent case of *Syarifah Nooraffyzza bt Wan Hosen v Director of Jabatan Agama*

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17 [2007] 4 MLJ 585

18 Lim Wei Jiet and Abraham Au Tian Hui, "*Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545- From Conflict of Jurisdictions to Reaffirmation of Constitutional Supremacy", *Journal of Malaysian and Comparative Law Vol. 45 No. 1* (2019): 85.

19 [2014] 3 MLJ 757

Islam Sarawak & Ors,[20] the Court of Appeal decided that the apex court had consistently and repeatedly held that the jurisdiction of the Syariah Court regarding apostasy need not be expressly laid down in the state laws. The Court was satisfied that the learned trial judge did not err in law in holding that the High Court had no jurisdiction to hear apostasy matters.

iii) 'Remedy Prayed For' Approach

Remedy prayed for is basically what the parties pleaded at the end of the claim. If the remedy prayed for does not exist in one jurisdiction regardless the subject matter listed under it, the claim would not subsist. Thus, by using this approach, the Court would determine whether the remedy can be obtained in the Civil or Syariah Court. This approach was highlighted in *Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman & Satu Yang Lain*.[21] The Supreme Court decided that High Court has jurisdiction over the case although the issue was *wakaf* The rationale was that the Administration of Muslim Law Enactment 1959 (Penang) did not provide for the remedy of injunction and the Syariah Court did not have jurisdiction to issue an order of injunction prayed for in the suit. The remedy of injunction is provided by the Specific Relief Act 1950 and the rules were to be found in the Rules of the High Court 1980, in which power was given to the High Court to issue. Therefore, the claim for a perpetual injunction in that case could only be heard by the High Court, even though *wakaf* is within the jurisdiction of Syariah Court.

[20] [2018] 2 MLJ 354
[21] [1992] 2 MLJ 244

iv) Subject Matter Approach

This approach is straightforward as it looks into the matter enumerated in Item 1 in the State List of the Federal Constitution. In determining whether the matter before the Court falls under the jurisdiction of the Syariah Court or the Civil Court, the Court should look at the subject matter of the action and not the remedies prayed for. This was highlighted in the case of *Abdul Shaik Md Ibrahim & Anor v Hussein Ibrahim & Ors*[22]. The fact that the remedy prayed for in two of the prayers is a "declaration" does not remove the case from the jurisdiction of the Syariah Court. It cannot be said that the Syariah Court has no jurisdiction over the matter merely because the plaintiffs had prayed for the remedy of declarations. The Court was no longer bound by the decision of *Isa Abdul Rahman.*

It is also important to note that in *Soon Singh's* case the remedy sought was for a declaration. Yet, the Federal Court considered the question of jurisdiction purely on the subject matter approach. This case highlighted that the remedy prayed for approach is no longer the law.[23] Nevertheless, the correct approach is the subject matter approach where the only question to exclude Civil Court jurisdiction is to look at whether or not the subject matter falls under the jurisdiction of a Syariah Court. This approach was used in *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor*.[24] The appellant applied for a declaration that his son was not a Muslim at the time of his death and that he had renounced Islam and resumed the practice of the Sikh faith. The Court, in dismissing the

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22 [1999] 3 CLJ 539

23 Farid Suffian Shuaib, "Constitutional Restatement of Parallel Jurisdiction between Civil Courts and Syariah Courts in Malaysia: Twenty Years On (1998-2008)", [2008] *Malayan Law Journal*, 5, xxxiii at xxxix.

24 [1992] 1 MLJ 1

appeal, stated that the question of whether or not the deceased had renounced Islam during his lifetime can be answered by the only forum qualified to do so, which is the Syariah Court. On this view, it is imperative that the determination of the question in issue requires substantial consideration of the Islamic law by relevant jurists qualified to do so. The judge also in his judgment mentioned that Islamic law involves a high level of interpretation in which judges of the secular courts do not have the requisite expertise.[25]

However, a different view was observed in *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang*.[26] This is the case where the plaintiffs applied for a declaration that they had lawfully renounced their Islamic faith. The defendant challenged it by saying that the High Court, being a Civil Court, does not have jurisdiction to hear the matter as it fell within jurisdiction of Syariah Court. Justice Abdul Hamid Mohamed held that "Art 121(1A) does not automatically confer jurisdiction to the Syariah Court, even in respect of matters that fall under the State List of the Ninth Schedule. To confer the jurisdiction the State must first act upon the power given it by Article 74 and 77 of the State List, and accordingly enact laws conferring the jurisdiction. Only then will the matter come under the jurisdiction of the Syariah Court to the exclusion of the Civil Court." The learned judge added that to enable the Syariah Court to have jurisdiction over the matters raised by the plaintiffs in *Lim Chan Seng*, the State Legislature of Penang must first amend the Penang Administration of Muslim Law Enactment 1993, and "incorporate thereto, appropriate provisions to that effect."[27] The Court further decided that

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25 Pawancheek Merican, "Murtad (Apostasy) and Article 121(1A) of the Federal Constitution", [1998] *Malayan Law Journal*, 2, lxxvii at lxxxiii.

26 [1996] 3 CLJ 231

27 Ibid, lxxxi.

there is no impediment for the Civil Court to hear the matter because there is no provision found in the Penang Enactment that empowered the Syariah Court to decide on the issue of apostasy.

A similar position was taken in *Mohd Hanif Farikullah v Bushra Chaudri & Another Appeal*'[28] where it was stated that Article 121(1A) does not overrule the general jurisdiction of the Civil Courts. Civil High Courts are also courts of inherent jurisdiction, while jurisdiction of the Syariah Court is determined by state laws; and if the legislature did not confer Syariah Court jurisdiction to deal with any matter in the State List, then the Syariah Court is precluded from dealing with that matter. This is called the "subject matter approach", which refers to provisions in state enactments in order to determine jurisdiction.[29] The subject matter approach was applied in the case of *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor*[30] where the subject matter is in relation to *hibah* and therefore the Syariah Court was held to be the proper court to hear the matter. However, the case of *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals*[31] rejected the subject matter approach. At the Court of Appeal, the majority decided based on the subject matter approach, whereby whether a person was a Muslim or not needed only to be decided by the Syariah Court. On appeal, the Federal Court decided that the Syariah Court are creatures of State legislation and possess no judicial power. Therefore, the jurisdiction of Syariah Courts must be expressly provided for by the State Legislature within the subject matter listed in Item 1 of the State List.

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28 [2001] 2 CLJ 397

29 Ashgar Ali Ali Mohamed, *Malaysian Legal System* (Selangor: Malaysian Current Law Journal Sdn. Bhd., 2014), 343.

30 [2007] 5 MLJ 101

31 [2018] 1 MLJ 545

v) 'Pith and Substance' Approach

This approach looks at the disputed issue. The Court will look at the pith and substance in determining whether the Syariah or the Civil Court has jurisdiction to hear the case. Even while the subject matter is still within the jurisdiction of a Syariah Court, Ninth Schedule, List II, it does not automatically qualify a Syariah Court to hear the case.

This approach was introduced in *Mamat bin Daud v Government of Malaysia*[32] where the Supreme Court held that section 298A of the Penal Code was in "pith and substance" a law on the subject matter of the religion of Islam, veiled under the pretence of it being a law on public order. As such, it is a law on a subject matter that Parliament had no competency to legislate, as the power to make laws on religion is bequeathed only to the State Legislative Assemblies under Articles 74 and 75 of the Federal Constitution. The impugned section was therefore found to be a colourable legislation and was declared to be constitutionally invalid. This case requires us to look at the pith and substance in overcoming the overlapping legislative powers between the federation and states.[33]

The approach was developed in *Jabatan Agama Islam Wilayah Persekutuan & Ors v Berjaya Books Sdn Bhd & Ors*[34]. The pith and substance approach to the case according to counsel was that any alleged offence against the precepts of Islamic law is not a criminal offence as was upheld in the case of *Sulaiman Takrib*. It was argued by the counsel that as Shariah law is personal law, it should apply to Muslims only and not to non-Muslims such as the second

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32 [1988] 1 MLJ 119

33 Farid Suffian Shuaib, "Administration of Shariah Criminal Justice under the Malaysian Constitutional Framework: Issues and Suggestions", [2011] *Malayan Law Journal*, 6, i at vi.

34 [2015] 3 MLJ 65

respondent in this instance, when he was examined by officers of the first appellant under the provisions of the Shariah Criminal Offences (Federal Territories) Act 1997. The pith and substance approach would not be confined to Shariah issues and to sections of the law but importantly would consider the breach of constitutional rights of the respondents occasioned by the search and seizure of the books and its examination. The Court was of the view that the proper approach to be taken in adjudicating the matter would be the pith and substance approach as contended by the respondents. The authors are of the view that the pith and substance approach is the correct approach as it will be wide enough to include the consideration of both the subject matter of the case and the reliefs sought.

Based on the aforementioned approaches, the Court has been consistent in adopting two approaches, namely the subject matter approach and pith and substance approach. In arriving to that point, the Court decides based on the facts of the case, parties involved, and whether such subject matters are provided in the Lists either, Federal or State. However, this did not solve the whole dilemma of the conflict at hand. Jurisdictional issues have continued to emerge in several matters below that are still unsettled until today.

Jurisdictional Issues

Religious Status Concerning Non-Muslims

This issue is regarding the situation of a non-Muslim party who seeks for a declaration that at the time of death, the deceased was not a Muslim, thus the Civil Court has jurisdiction. This can be illustrated in the case of *Kaliammal a/p Sinnasamy v Pengarah Jabatan Agama Islam Wilayah Persekutuan (Jawi) & 2 Yg Lain*[35] where M Moorthy's

[35] [2006] 1 AMR 498

widow was informed of her spouse's conversion to Islam only after his death. She then applied to the High Court for a declaration that the deceased died as a Hindu . The Court held that Syariah Court had jurisdiction to determine the validity of the deceased's conversion to Islam because the legislation had expressly conferred upon such court jurisdiction over the matter.

Unilateral Conversion of One Spouse

This issue concerns parties who were married under civil law and one of the spouses subsequently converts to Islam, who then seeks f for dissolution of the marriage in a Syariah Court. Additionally, the converted spouse converts their children to Islam without the consent of their non-converted spouse.

The case of *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah*[36] will shed some light about this issue. The wife being the non-converted spouse went to the Civil Courts and asked for a declaration that the Civil Court has jurisdiction in regard to the dissolution of marriage and custody of the children. On the other hand, the husband objected to the application by claiming that the Syariah Court has the locus to hear the dispute. The High Court decided that the custody order of the two children given by the Syariah High Court does not bind the plaintiff, a non-Muslim; and the Syariah Court has no jurisdiction to enforce the order on non-Muslims.[37] However, the High Court held that the unilateral conversion of the two children to Islam without the consent of the other spouse was valid.

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[36] [2004] 2 MLJ 648

[37] Kerstin Steiner, "The Case Continues? The High Courts in Malaysia and Unilateral Conversion of a Child to Islam By One Parent", *Australian Journal of Asian Law Vol. 14 No. 2* (2013): 384.

A similar approach was taken in *Subashini Rajasingham v Saravanan Thangathoray & Ors*[38] The Court of Appeal decided that the Civil Court could not prevent a Muslim convert from seeking the dissolution of his marriage to a non-Muslim wife from the Syariah Court. Later, the Federal Court remarked on the term "parent" in the Federal Constitution which can be construed as either one of the parents, to convert a child to Islam without the consent of another spouse. A distinctive approach can be seen in the Federal Court case of *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors and Other Appeal*,[39] where the Court decided that the conversion of an underage child to Islam must obtained both of the parents' consent. Hence, conversion without another spouse's consent is rendered unconstitutional.

The question is which Court has the jurisdiction to determine the validity of the conversion of the children? Zainun Ali FCJ in *Indira Gandhi* set a clear view on this matter. The learned judge was of the view that section 50 (3) of the Administration of the Religion of Islam (Perak) Enactment 2004 did not confer jurisdiction to the Syariah Court as it does not deal with the validity of the conversion of children to Islam. On top of that, the non-Muslim parent does not have any locus to present before the Syariah Court. Hence, this renders the Civil Court to have exclusive jurisdiction to hear this matter.

Apostasy

The matter relating to conversion to Islam or out of Islam would lie squarely within the jurisdiction of the Syariah Court. A plethora of cases as mentioned above have decided

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38 [2007] 2 MLJ 705

39 [2018] 3 CLJ 145

by way of implication of the conversion to Islam; thus, conversion out of Islam is also within the jurisdictional spectrum of the Syariah Court. With respect to that, it is incorrect and not suitable to apply the express jurisdiction approach as decided in *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor*[40]; instead, the implied jurisdiction approach has been consistently used by the courts in determining cases concerning apostasy.

Judicial Review on Fatwa

A *fatwa* is a scholastic opinion, edict or ruling on a point of Islamic law which is to be issued by a recognised community. A scholar who has authority to issue a *fatwa* is called a *mufti*. In light of section 34 (1) of the Administration of Islamic Law (Federal Territories) Act 1993, the role of a mufti has been stated as follows:

> *"The Mufi shall, on the direction of the Yang di-Pertuan Agong, and may, on his own initiative, or on the request of any person made by letter addressed to the Mufti, make and publish in the Gazette, a fatwa or ruling on any unsettled or controversial question of or relating to Islamic law."*

A *fatwa* is binding upon the Muslim community and it must be issued systematically and appropriately.[41] But to what extent is a *fatwa* legally binding? In general, a *fatwa* is accepted by the Syariah Court in making a decision by way of referring to a *fatwa* issued by its own State.[42] It was found that *fatwa* has become an authority of the Syariah Court and it is recognised as a reliable source by all states Islamic religious administration enactments except for

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40 [2007] 5 MLJ 101

41 Othman Ishak, "The Making of Fatwa in Malaysia", *Islamic Studies vol. 28, no. 4* (1989) 415.

42 Mohammad Hashim Kamali, *Islamic Law in Malaysia: Issues and Developments* (Kuala Lumpur: Ilmiah Publishers, 2000): 157.

Kelantan.[43] Be that as it may, the binding power of *fatwa* in the Civil Court is not discussed.

Judicial review is the power vested upon a court of law to examine the conduct of a body in order to establish whether or not the body has acted lawfully by acting within the scope of its lawful powers.[44] It examines the manner of a public body in exercising law-making and adjudicatory powers as conferred in statute or by common law.[45] In relation to this issue, it raises a question as to whether judicial review on *fatwas* should be done in the Syariah Court or Civil Court. An answer to the question can be seen in *SIS Forum (M) & Ors v Jawatankuasa Fatwa Negeri Selangor & Ors*[46] where the applicant had filed an application for judicial review on the *fatwa* issued by the Fatwa Committee. It was claimed by the applicant that the *fatwa* labelling the ideology of liberalism and pluralism adopted by the first appellant as deviant from the teachings of Islam had contravened the Federal Constitution. The High Court dismissed the application of judicial review as it is not the jurisdiction of the Civil Court to review on the matter of *fatwa*. Even so, the contrary was decided in the case of *Muhamad Juzaili bin Mohd Khamis & Ors v State Government of Negeri Sembilan & Ors,*[47] whereby the application of judicial review on the constitutionality of section 66 of the Syariah Criminal Enactment 1992 (Negeri

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43 Nur Sarah Tajul Urus and Alias Azhar, "The Application of Fatwa in Court Decision Making", *International Journal of Law, Government and Communication, Vol.3, No.9* (2018), 88.

44 Irving Stevens, *Constitutional and Administrative Law, (3rd Ed)*, (London: M & E Pitman Publishing, 1996), 221.

45 Ahmad Masum, "The Doctrine of Judicial Review: A Cornerstone of Good Governance in Malaysia" [2010] *Malayan Law Journal*, 6, cxiv at cxv.

46 [2018] 3 MLJ 706

47 [2015] 3 MLJ 513

Sembilan), which specifically prescribed the offence of a male person posing as a woman, was granted by the Court.

SIS Forum later in 2020 submitted leave to commence legal action to challenge the constitutionality of the provision in section 66A of the Administration of the Religion of Islam (State of Selangor) Enactment 2003, which stated that Syariah High Courts in Selangor have the jurisdiction to hear applications for judicial review, in order to challenge the *fatwa* labelling the group as deviant. As stipulated in section 66A, judicial review to challenge a *fatwa* ought to be under the jurisdiction of the Syariah Court, and thus another important question to be raised is whether the Syariah Court has power to hear a judicial review against a *fatwa* issued by a religious council and committee. In the case of Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal,[48] the court stated that "the power of judicial review is essential to the constitutional role of the courts, and inherent in the basic structure of the constitution."[49] Conversely, judicial review is also available under the Islamic legal system. A Syariah Court judge, when making any decision, must refer to the Quran and Sunnah. When the rulings cannot be found in the Quran or Sunnah, it must be deduced from *ijtihad*[50] to derive the Syariah ruling from the two sources.[51]

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48 [2019] 3 MLJ 443

49 Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal [2019] 3 MLJ 44, para 81.

50 *Ijtihad* is an effort made by qualified Islamic jurists to infer the rules *(hukm)* of Syariah through the interpretation of the Quran and Sunnah of the Prophet.

51 Nayel Musa Shaker Al-Omran, "Historical and Political Background of Judicial Review in Islamic Legal System", [2015] *Malayan Law Journal*, 2, xliv at lx.

Although it is clear from the discussion above that *fatwa* is the *corpus juris* of the Islamic legal system in Malaysia, as it is a subset of *ijtihad* and Islamic jurisprudence, to date this issue is still pending final adjudication before the apex court.

Analysis of Jurisdictional Dilemma in Recent Court Cases

Before the amendment, Syariah Courts have limited power and jurisdiction as it was subordinate to the Civil Court. Previously also, judges who presided on the bench to decide cases concerning Islamic law were non-Muslim judges.[52] Although the proviso on the separation of jurisdiction was inserted in the Constitution years ago, the issue still persists when a party subject to Islamic law brings the case before the Civil Court. In this section, the authors will discuss the jurisdictional dilemma in recent cases on religious disputes and critically appraise the principles which have been discussed and relevant to be applied when jurisdictional conflict happens.

i) *Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 323

The petitioner was charged in the Selangor Syariah High Court under section 28 of the Syariah Criminal Offences (Selangor) Enactment 1995 ('the 1995 Enactment') for an attempt to commit sexual intercourse against the order of nature, read together with section 52 of the Enactment.

The petitioner was granted leave to file a petition to challenge the competency of the Selangor State Legislature

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[52] Farid Suffian Shuaib, *Powers and Jurisdiction of Syariah Courts in Malaysia (2nd Edition)*, (Malaysia: LexisNexis Malaysia Sdn. Bhd., 2008): 155.

(SSL) to enact section 28 of the Enactment. The petitioner contended that section 377 of the Penal Code on buggery and section 377A of the Penal Code on carnal intercourse against the order of nature comprised in Federal law already govern the very subject matter of Section 28 of the Enactment. Hence, it was argued that SSL was incompetent to pass section 28 by virtue of the words "except in regard to matters included in the Federal List" in item 1 of the State List.

The issue for determination of the Court was the interpretation of the words "except in regard to matters included in the Federal List" contained in Item 1, List II, Ninth Schedule of the Federal Constitution (State List); vis-à-vis the power of State Legislatures to make laws under the said item. A few considerations were made by the Court before decision; firstly, the precepts of Islam and the Federal criminal jurisdiction. The Court referred to the case of *Sulaiman Takrib* where Chief Justice Abdul Hamid had detailed out the limitations of the State Legislatures powers to enact laws in respect of offences against the precepts of Islam. One of these was the creation and punishment of offences not in regard to matters included in the Federal List. *Liwat* under section 28 is clearly against the precepts of Islam. But the question is whether the SSL is competent to enact on it in light of the preclusion clause. Secondly, construing the preclusion clause in Item 1 of the State List. The words employed by Item 1 are "except in regard to matters included in the Federal List". The words are not: "except in regard to matters included in the Federal law." Analysing the constitutional validity of state-legislated law on the basis of whether the same subject matter has already been included in the Federal law would render the words "Federal List" in the preclusion clause to item 1 nugatory. In absence of any party challenging the Parliamentary power to enact the Penal Code provisions, the said provisions were competently enacted by Parliament within the meaning of

Items 3 and 4 of the Federal List. Thirdly, the co-existence of Federal and State laws. The Court disagreed with the authority of *Sukma Darmawan*, where Federal and State provisions may co-exist. The *Sukma Darmawan* case was not in relation to a petition filed in the original jurisdiction of the Court where the competency of a State Legislature to make such law was challenged. *Sukma Darmawan* was in relation to which court has jurisdiction to hear the case. The general power of Parliament to enact criminal law is provided for in items 3 and 4 of the Federal List. Articles 74(3), 75 and 77 of the Constitution indicate that the primary power of legislation in criminal law resides in Parliament. This is further borne out by the State List in terms of the powers of the State Legislatures to enact criminal laws, namely the powers are subjected to the preclusion clause in Item 1 of the State List and Item 9 of the State List. In pith and substance, Section 28 of the 1995 Enactment relates to a matter that falls under the Federal List. It can be postulated that in regards to the preclusion clause in item 1 of the State List, when the two Legislatures (Federal and State) legislate a law concerning the subject matter of criminal law, and the two laws touch on the same matter, the said laws cannot co-exist even if it is said to be against the precepts of Islam. Fourthly, the constitutional validity of section 28 of the 1995 Enactment. Since the subject matter of section 28 of the 1995 Enactment falls within the preclusion clause of Item 1 of the State List, it contravenes the very Item 1 of the State List which provides that the State Legislature has no power to make law in regard to matters included in the Federal List. Thus, section 28 is inconsistent with Federal Constitution and is therefore void.

An important point to infer from this case is that the ourt was of the view that even though there was no law at the Federal level, the State Legislature cannot legislate any law pertaining to criminal law. This can be distinguished with

the case of *Sulaiman Takrib* where the Court has stated that if there is law enacted by the Parliament, the State Legislature cannot enact the same law. Nevertheless, in *Iki Putra*, even if there is no law enacted by Parliament at the Federal level, the State cannot enact the law if it involves criminal law.[53] This will result in too many Syariah laws to be challenged in the future. For instance, gambling under the Betting Act 1953 and Syariah Criminal Offences Act. This would render Islamic criminal law otiose. Apart from that, the Court should not adopt the pith and substance approach in dealing with section 28. Though both provisions share the same subject matter, the Court should look at the objective behind the inclusion of the provisions. The punishments, evidence and burden of proof is distinctive in nature between the provision in the Penal Code and Syariah criminal offence. Hence, with due respect, a more harmonised approach should be weighed by the Court so as to ensure both Civil and Syariah Courts can co-exist. Such an approach is illustrated in the case of *Sukma Darmawan* where the court applied section 59 of the Interpretation Acts 1948 and 1967, as follows:

> *[56]"So that where an act or omission is an offence under two or more written laws the offender may be prosecuted and punished under any of those laws, so long as he is not prosecuted and punished twice for the same offence. It follows that where an offender commits an offence triable by either the Civil Court or a Syariah Court, he may be prosecuted in either of those courts."*

Additionally, the Court agreed that *liwat* is one of the offences that are against the precepts of Islam. The only issue is whether SSL is competent to enact such law.[54] The Court also referred to the case of *Sulaiman Takrib*, where

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53 Sulaiman Bin Takrib v Kerajaan Negeri Terengganu [2008] MLJU 815, para 52.

54 Ibid., para 42

the phrase "precepts of Islam" can be accorded with widest possible construction, but to disregard the preclusion clause will render the preclusion clause otiose.[55] The case of *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor*. [2007] 5 MLJ 101 was used to support the petitioner's case, as judge Abdul Hamid Mohamad FCJ held that:

> *[47] "So, where an offence is already in existence in, say, the Penal Code, is it open to a State Legislature to create a similar offence applicable only to Muslims? Does it not fall within the exception 'except in regard to matters included in the Federal List' ie criminal law? To me, the answer to the last-mentioned question is obviously in the affirmative."*

In contrast, the judgement of Abdul Hamid Mohamad FCJ in *Sulaiman Takrib* on the definition of criminal law should be taken into consideration:

> *[49] "I admit that it is not easy to draw the dividing line between 'criminal law' and the offences that may be created by the State Legislature. Every offence has a punishment attached to it. In that sense, it is 'criminal law'. However, if every offence is 'criminal law' then, no offence may be created by the State Legislatures pursuant to item 1, List II of the Ninth Schedule. To give effect to the provision of the Constitution a distinction has to be made between the two categories of offences and a line has to be drawn somewhere. The dividing line seems to be that if the offence is an offence against the precept of Islam, then it should not be treated as 'criminal law'.*
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> *[50] In the instant case, as the offences are offences against the precept of Islam, as there are no similar offences in the federal law and the impugned offences specifically cover Muslims only and pertaining to Islam only, clearly it cannot be argued that they are 'criminal law' as envisage by the Constitution."*

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55 Ibid., para 46

In this case, a Shariah criminal offence did not fall within the ambit of criminal law because it is only applicable to Muslims as envisaged through Article 121 (1A) of the Federal Constitution. Instead of using the pith and substance approach, the Court should have applied a subject matter approach as *liwat* falls under the State List and it is an offence against the precepts of Islam. The pith and substance approach should not only be limited to the area of law *per se*, which is criminal law, but must also include the nature of the punishments, evidence and burden of proof.

ii) *Jill Ireland Lawrence Bill v Minister of Home Affairs of Malaysia & Anor* [2021] [CLJ LT (7)

The conflict was on the matter of using the word "Allah" in the Malay Bible, the Al-Kitab, whereby an application of judicial review was made to the High Court.. The applicant in this case, a Bumiputera from the Melanau community in Sarawak, had been using the Malay language as a medium to practise her religion such as praying, worshipping and receiving religious instruction. In practising her faith, the applicant and her family have been relying on religious instruction in the Indonesian language. In connection with this fact, on the day when the applicant had landed at the Low-Cost Carrier Terminal (LLCT) at Sepang, custom officers confiscated 8 CDs carrying the word "Allah" in her possession. Consequently, the items were also confiscated by the Ministry of Home Affairs pursuant to section 9 of the Printing Presses and Publications Act 1984 [Act 301]. The grounds of confiscation were based on "Istilah Larangan, Ketenteraman Awam dan Melanggar Garis Panduan JAKIM".

The main issue raised in this case was on the validity of the impugned directive issued in 1986 from the Ministry of Home Affairs, where the name of Allah was

prohibited from being used in the Al-Kitab. It had then inevitably led to legal questions on the constitutional rights of the applicant's fundamental liberty to obtain education and to practise the religion of Christianity in pursuant to Articles 3, 8, 11 and 12 of the Federal Constitution.

Before the case was brought to the High Court for judicial review, it was held by the Court of Appeal on the applicant's cross appeal for her prayer to use the name of Allah for the purpose of practising her religion. The judgment of the Court of Appeal is as follows:

> *[39] "With respect, we agree with her, partially. We agree with her that any prayer that had sought to challenge the prohibition of the use of the word 'Allah', following the decision of the majority in the Federal Court in the Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 6 CLJ 541, must not be done in a collateral manner. The Enactment which had contained those prohibition on the use of the word 'Allah' has to be challenged specifically for want of jurisdiction. The impugned provisions in the Enactment cannot be challenged in isolation, as was done in this case. To that extent we would agree with the learned judge's decision on the applicant's prayers that were not granted.*
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> *[40] However, we noted that there were prayers that were not inextricably tied down specifically with the use of the word 'Allah' especially those which were predicated upon the deprivation of freedom of religion [art. 11] and the right to equality or freedom from discrimination [art. 8] which we believe, could and ought to have been dealt with by the learned judge, but were not. That would relate to the declarations that were sought for as contained in prayer in prayers (c) and (d) of the application. …."*

In comparison with *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri &*

Ors,[56] the constitutionality of section 9 of the Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactment 1988 in the subsequent case was challenged. The applicant had challenged the constitutionality of the aforesaid provision, that the State Legislature had no power to enact the impugned provision. The applicant additionally sought *certiorari* to quash the decision by the respondent that the applicant was prohibited to use "Allah" in its "Herald – The Catholic Weekly". The Court of Appeal had set aside the decision of the High Court in *Titular Roman Catholic's* case and decided that the decision of the respondent in prohibiting the applicant from using the word "Allah" in the publication was *intra vires* of the Federal Constitution and Act 301, as it was within the prerogative of the Minister in accordance with his function and statutory power. The majority of judges on the Bench in the Federal Court held that the High Court judge ought not to have entertained the issue of the validity and constitutionality of the impugned provision on the grounds of procedural non-compliance and want of jurisdiction. In the recent case of *Jill Ireland*, it has been expressed by YA Datuk Nor Bee Ariffin that:

> *[33] "….It is not for this Court to decide on issues that had sought to challenge the prohibition on the use of the word "Allah" as the same could not be done in a collateral manner. That was the reason for not remitting prayers (e) and (f) because the Enactments which contained those prohibition on the use of the word "Allah" had to be challenged specifically for want of jurisdiction and the impugned provision in the Enactment could not be challenged in isolation. This Court would not descend into the controversy.*
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> *[34] This in my view will necessarily exclude this Court from canvassing the theological issues. I am guided by the*

[56] [2014] 6 CLJ 541

majority decision in the Federal Court in the Titular Roman Catholic Archbishop of Kuala Lumpur, supra, which did not proceed with the question in Part C that relate to theology issues as the facts show that the Minister's decision was never premised on theological consideration and found that the views expressed by the learned judges of the Court of Appeal on those issues were mere obiter…"

Given the instant discussion on the jurisdictional dilemma, it is safe to say that the conflict of jurisdiction was naught to occur although this case was *apropos* of religious disputes. It was not stated in the Enactment that such a case shall be under the jurisdiction of the Syariah Court since the party in the application scope of the Enactment involved persons of non-Islamic religion. This is pursuant to Item 1 in List II of the Federal Constitution which explicitly asserts that the jurisdiction of the Syariah Court shall confer only upon persons professing the religion of Islam. Hence, not all religious disputes will deal with the challenges of jurisdictional rivalry.

iii) *Rosliza bt Ibrahim v Government of Selangor & Anor* [2021] 2 MLJ 181

The case concerns the dispute between the appellant, Rosliza bt Ibrahim and the respondent, the Government of Selangor. The religious status of the appellant was the highlight of this case. According to the facts, the appellant was born illegitimate and raised by her Buddhist mother. The appellant in this case filed an originating summons seeking the Federal Court to declare her as (a) an illegitimate child and her biological mother a Buddhist; (b) that the word "parents" as stated in section 2 of the Administration of Religion of Islam (Selangor Enactment) 2003 does not include the putative father of an illegitimate child; and (c) that she is not a person professing the religion of Islam, and not be subjected to the state legislation under the Ninth Schedule, List II, Item 1 of the Federal

Constitution and the jurisdiction of the Syariah Courts in Selangor.

There were two issues in this case. The first was whether the High Court, being a Civil Court, has exclusive jurisdiction to hear and determine whether a person is or is not a Muslim, and the second was whether the contents or the information in the identity card can be considered as conclusive proof for the declaration of religion status under section 41 of the Specific Relief Act 1950. However, in deciding the case, the opinion from Islamic law experts was absent. Since the first issue has nexus with the topic of this article, the authors will focus specifically on it only. In this respect, the Federal Court held that it has jurisdiction to hear the claim from the appellant since it is not a renouncement case but an *ab initio* case where the appellant from the very beginning was never a Muslim.

The Court, in answering the question of whether the High Court has exclusive jurisdiction to hear the matter, required determination of whether a person is or not a Muslim rather than whether a person is no longer a Muslim. The decision of the High Court and the Court of Appeal was erroneous as it was made on the premise that the appellant was originally a Muslim who was seeking for renouncement from Islam. The court below in their respective judgments dismissed the prayers sought by the appellant on the ground that it was bound by the previous Federal Court decision in *Lina Joy's* case. It was critically examined by the Court in this case that there is a fundamental distinction between "no longer a Muslim" and "never was a Muslim". The Court distinguished the case of *Director General of the Registration Department v Azmi bin Muhammad Azam @ Rooney*[57], where it was decided by the Chief Syarie Judge that the matter is not under the jurisdiction of the Syariah

[57] [Court of Appeal Civil Appeal No. Q-01-159-05/2016]

Court since he is a non-Muslim *ab initio*. The former signifies that the case of renouncement clearly falls within the jurisdiction of the Syariah Court. The latter is an *ab initio* case and it cannot fall within Syariah jurisdiction.

Additionally, the conflict of jurisdiction between the two tribunals emerged when the appellant in her prayer sought a declaration that she is not a person professing the religion of Islam and shall not be the subject of Syariah law and jurisdiction. The Court, in deciding the matter, discussed the meaning of "professing religion" in the Federal Constitution. The term "profess and practice" in Article 11 (1) of the Federal Constitution extends to how one may be identified with a religion and the level of devotion to their beliefs, while Item 1 of the State List excluded the word "practice". In settling the clash between the two tribunals, the relevant principles to be applied is based on the two approaches laid down by the Civil Court as mentioned earlier in *Majlis Ugama Islam Pulau Pinang and Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors*,[58] namely the remedy prayed for and subject matter approaches. One of the reliefs sought was to declare the appellant not to be the subject of Syariah law and jurisdiction as she is not a person professing the religion of Islam. Since she has never been a Muslim, the relief she prayed for was rightfully brought before the jurisdiction of the Civil Court based on the former approach.

Nonetheless, although Item 1 of the State List did not expressly mention that persons who were never Muslim are to be under Syariah court jurisdiction following the implied approach, it is not an enabler as per the assumption that the Syariah Court would be a suitable forum to decide the matter. The authors are in accord with the conditions set in the present case — to determine whether or

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58 [2003] 3 MLJ 305

not the matter falls under the purview of Syariah court jurisdiction, there must be jurisdiction of *ratione personae* (by reason of the person) and *ratione materia* (subject matter) and it must be conjunctive. The absence of both conditions will render the inability to exercise the power and if so, it will be *ultra vires* the Federal Constitution.

Legal Mechanisms in Settling Religious Disputes

Despite acknowledging the fact that religious disputes have been ignited and are ongoing in Malaysia for decades, we must come to realise that this issue should be resolved effectively. The resolution of religious conflict is significant to ensure that an individual's fundamental right to freedom of religion is not deprived. As religious matters are within the realm of constitutional law, there are several legal mechanisms available as a practical tool in assisting to settle the continuing religious conflict and to avoid any conflict to be raised in the future. The legal mechanisms are to amend the wordings in the constitution; harmonisation of legal bifurcation by the alteration of terms in the scripture; and allowing the issue on Islamic law to be under its own jurisdiction without interference from the Civil Court. The discussion will be dealt respectively below.

Amendment to the Constitution

When there is an issue on the interpretation of wordings in the Constitution which might further lead to a never-ending legal tug-of-war, a substantial constitutional amendment in resolving the dispute in fact should be taken into consideration. The process of the amendment to change a specific part of the existing Constitution is done without having to entirely substitute the Constitution. Due to the overlap and clash of jurisdictional power between Syariah and Civil Courts, it has resulted in recent controversial legal

issues on the subject of constitutional interpretation, where the constitutionality of provisions in the Syariah State Legislature was contested. This can be seen in the newer case of *Iki Putra bin Mubarak v Government of Selangor*, where the constitutionality of section 28 of the Syariah Criminal Offences (Selangor) Enactment 1995 was upheaved.

The inconsistency seems to materialise when the petitioner posited that the State Legislature was incompetent to enact such provisions. It was avouched in Item 1 of State List in the Ninth Schedule of the Federal Constitution that the State Legislature had no power to enact any matter which came under the Federal List. Such clause is called a "preclusion clause". Even when there are two Legislatures, be it Federal or State, enacting laws pertaining to similar subject matters of criminal law, the two laws on the same subject matter cannot co-exist although one of the laws concerns the offence against the precepts of Islam. So as to avoid future conflict or more so of challenges raised consequently, constitutional amendments on the "preclusion clause" should be initiated to ensure that the two Legislatures will not strife against one another.

The formula of the amendment as embodied in the Federal Constitution are that there are four modes to make constitutional amendments effective.[59] These modes are by requiring a simple majority; by an Act which has been passed by a two-thirds majority in each House of Parliament on second and third readings; by an Act which has commanded the support of a two-thirds majority in each House of Parliament on second and third readings, together with the consent of the Conference of Rulers; and by an Act supported by two-thirds majority in each House of

[59] Lionel Aster Sheridan and Harry E. Groves, *The Constitution of Malaysia* (New York: Oceana Publications, 1967), 14-15.

Parliament on second and third readings, together with the concurrence of the Governor of Borneo states concerned.[60] With respect to the modes mentioned, the alteration of the preclusion clause in Item 1 in the State List of the Ninth Schedule can be done by the requirement of two-thirds majority from members of Parliament before presenting the bill of amendment to the Yang Di-Pertuan Agong for his assent, by which such mode of amendment is generally executed. Since the amendment of the preclusion clause is linked to state legislation specifically section 28 of the Syariah Criminal Offences (Selangor) Enactment 1995, amendments shall be made in presence of support by two-thirds majority from the House of Parliament.

Alteration of Term in the Malay Bible

While the directive from the Ministry of Home Affairs issued in 1986 was held illegal and unlawful, it was also claimed that the minister did not take theological consideration pertaining to the usage of the word Allah in the Bible, as it was only based on public consideration. It was first proclaimed in the Internal Security (Prohibition Documents) No.3 Order 1982 that absolute prohibition of publication and circulation of the Al-Kitab was imposed..[61] Be that as it may, the Internal Security (Prohibition Publication) No.4 Order 1982 still retained the prohibition but with exclusion that the Al-Kitab is confined to the usage of churches only.[62] There seemed to be a discrepancy in the Cabinet's policy decision in 1986. Initially, the name of

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60 Hoong Phun Lee, "The Amendment Process Under the Malaysian Constitution", *Journal of Malaysian and Comparative Law Vol.1, No.2* (1974): 186.

61 Kementerian Hal Ehwal Dalam Negeri : 0 59/3/9/Jld 4; PN (PU2) 24 Pt. 11

62 Kementerian Hal Ehwal Dalam Negeri: 0 59/3/9/A; PN (PU2) 24 Pt. 11

Allah was allowed to be used in Christian publications. Not long after the countenance, the Publication Control Department of the Ministry of Home Affairs sent out letters to Christian publishers obtruding the usage of four words, namely "Allah", "Kaabah", "Baitullah" and "solat" from being used in any biblical publications, in order to prevent misapprehension and confusion among Christians and Muslims.[63] Imputable to the juxtaposition of these regulations and policy, such prohibition was imposed to prevent detriment to security and public interest.

There are ample evidences to suggest that Bumiputera Christians in Sabah and Sarawak have been using the word "Allah" to refer to the God whom they worshipped as professed in their evangelical scripture for centuries. In fact, the term had been used even before Malaysia existed as the version of the bible that they use was originally from Indonesia.[64] Being that the justification given by the government that the usage of *"*Allah" in Christian publications will cause confusion to Muslims; we must find solutions to the conundrum of the restriction concerning the usage of the term "Allah" as God, to ensure that freedom of religion is practiced without any discrimination. Given the long history of usage and uncontroverted evidences of established practice, the authors concur with the proposition that the four words which is claimed to be associated with Islam can be considered to be permitted to be used in the Al-Kitab (for Bumiputera Christians in Sabah and Sarawak only) so long as the words are defined in its proper religious context (for example, "Allah" in Islam is a term of endearment and

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63 Letter KDN : S.59/3/9/A Klt. 2 – (17) and dated 5 December 1986

64 Abd Hakim Mohad, et al., "Understanding the Christian's Community Stance towards the Muslim Community in Sabah: After the Ban on the Usage of the term Allah", *International Journal of Academic Research in Business and Social Science, Vol. 7, No. 8* (2017): 453.

signifies the concept of oneness (*tawheed*) of God, while in Christianity, the concept of God revolves around the belief in trinity). For example, the usage of those words must also be in a controlled environment and comply with strict restrictions; it must carry a disclaimer on the cover page of the publication, along with the Christian cross symbol, that the Al-Kitab is exclusively confined to the usage of Christians (in Sabah and Sarawak). Another practical solution that can be taken into account in allowing the term "Allah" in the Al-Kitab for Christians in West Malaysia is by amending the term by changing the spelling of "Allah". For instance, instead of using "Allah", the term may be replaced and spelled with similar etymology locution such as "Eloh" or "Alah" or "Elah". The reason to put in such terms in a different spelling is purely to avoid turmoil among both Muslim and Christian communities which may affect peace and tranquillity in a multi-religious society. This proposition must be carefully studied and endorsed by the relevant authority such as Dewan Bahasa dan Pustaka.

Generally in Islam, the act of using the name of Allah by non-Muslims is not inherently unlawful. Besides, it is also constitutionally guaranteed under the Federal Constitution that any religion may be practiced in peace and harmony.[65] However, if there is a tendency that such acts may jeopardise the sanctity of Islam causing discomfort and confusion in the Muslim community, it is necessary to find solutions to prevent it from happening, without causing prejudice to the right of non-Muslims to practice their religion fairly.

[65] See Article 3 (1) of the Malaysian Federal Constitution

Islamic Law under Its Own Jurisdiction

The dispute in determining a religious status of a person will be convoluted if the party seeking the declaration brings a claim before the Civil Court instead of the Syariah Court. Even though Rosliza bt Ibrahim v Government of Selangor & Anor.,[66] was decided by the Federal Court as a non-renouncement case, the Court did not consider the Islamic jurisprudence perspective in the matter of determining the lineage of the appellant. As regards this matter, there are three practical solutions the authors would suggest, scilicet, the establishment of a special tribunal; direct reference to the Syariah Court to decide on Islamic law issues; and admitting the opinion of experts in Islamic jurisprudence.

i) Establishment of Special Tribunal

The authors sincerely believe that any case involving religious status must be adjudicated by judges on the Bench who possess excellent knowledge in Islamic law, and not merely to decide the controversial question based on the interpretation of statutory provisions and civil cases. This idea tallies with the opinion expressed by Farid Suffian Shuaib, Tajul Aris Bustami & Mohd Hisham Mohd Kamal, that:

> *"Application of Islamic Law in Civil Court may also create problem of proper interpretation of Islamic Law. In the absence of any expert on Islamic Law on the Bench, there appears to be the problem of identifying relevant principles of Islamic Law and applying such principle…Civil Court judges would unavoidably expand hukum syarak based on civil cases and statutory provisions.*

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66 [2021] 2 MLJ 181

> *No reference would be made to the authoritative sources of Islamic Law".*[67]

From the above findings, conventionally Civil Courts have no jurisdiction in respect of matters that fall under the jurisdiction of the Syariah Court.[68] The authors are of the view that the issue will be easily resolved if it comes under the jurisdiction of the same forum. Hence, there must be some kind of unification in the polarity of legal systems between Civil and Syariah to decide on religious disputes. This can be done by way of recognising the position of a special tribunal. This is in line with the judgment from Tun Abdul Hamid in the case of *Abdul Shaik Md. Ibrahim & Anor v Hussein Ibrahim & Ors*[69], quoted verbatim as follows:

> *"…my suggestion in Lim Chan Seng on unification (or merger) of the Syariah and Civil Courts is worth considering. It is heartening to note that former Supreme Court judge, Harun Hashim, has expressed a similar view in his article "Merge legal system to avoid injustice".*

Thus, instead of striving for jurisdictional power, the authors are of the opinion that the two disciplines of the Courts must be made to harmonise and complement each other.

ii) Direct Reference to the Syariah Court

Apart from that, former Chief Justice, Tun Abdul Hamid Mohammad was of the view that in civil matters, a case will become enormously intricate when the question in dispute

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67 Farid Suffian Shuaib, Tajul Aris Bustami and Mohd Hisham Mohd Kamal, *Administration of Islamic Law in Malaysia: Texts and Material* (Kuala Lumpur: Malayan Law Journal Sdn. Bhd, 2001): 81.

68 See Article 121 (1A) of the Malaysian Federal Constitution

69 [1999] 3 CLJ 539

involves the jurisdiction of the Syariah Court and comprises a non-Muslim party who is not subject to Islamic law. It has also been expounded by Mohamed Yusof S.C.J in *Dalip Kaur v Ketua Pegawai Polis Daerah, Bukit Mertajam & Anor*[70] that:

> *"It is apparent from the observation made by the learned judicial commissioner that the determination of the question whether a person was a Muslim or had renounced the faith of Islam before death, transgressed into the realm of syariah law which needs serious considerations and proper interpretation of such law…The present question in my view cannot be determined by a simple application of facts as has been found by the learned judicial commissioner on the basis of veracity and the relevancy of the civil law. Such a serious issue would, to my mind, need consideration by eminent jurists who are properly qualified in the field of Islamic Jurisprudence."*

In such an instance, it was suggested by the learned Tun Abdul Hamid that in resolving the jurisdictional dilemma, the Bench must incorporate judges from each discipline of both Civil and Syariah Courts. Regardless of whether the party is bound or not to Islamic law, when there is an issue falling under the subject matter of Islamic law it must be adjudged by judges from the Syariah Court. The judges from the Civil Court will decide all other issues and cases. The final judgment subsequently will be given collectively by the Bench.[71]

The position of Syarie judges are only open to those who have obtained LL.B in Syariah or professional qualification in Islamic studies from recognised universities

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70 [1992] 1 MLJ 1

71 Datuk Abdul Hamid bin Haji Mohamad, "Civil and Syariah Courts in Malaysia: Conflict of Jurisdictions" [2002] *Malayan Law Journal*, 1, cxxx at cxxxix.

either in Malaysia or abroad.[72] It may be said that academic qualification in the field of Islamic law and jurisprudence is *sine qua non* to be a judge in the Syariah Court. Hence, the authors are in accord with the suggestion that any question in issue in the sphere of Islamic law should be directly referred to the Syariah Court to decide.

iii) Admission of Expert Opinion

The issue within the quintessence of Islamic law must also be considered by a qualified person in the field of Islamic jurisprudence. In light of section 45 of the Evidence Act 1950, the opinion of an expert in a particular area is required when the Court has to form an opinion on a point of foreign law or of science or art. To quote Tun Abdul Hamid in Syed Abu Bakar v Public Prosecutor,[73] he expressed that:

> *"There are however cases in which the court is not in a position to form a correct judgment without the help of persons who have acquire special skill or experience on a particular subject, when the question involved is beyond the range of common experience or common knowledge or when special study of a subject or special training or special experience therein is necessary. In such cases the help of the experts is required"*

In determining the legitimacy status which falls within the context of Islamic science of law, the court must be furnished with such expertise and not neglect the opinion of an expert in the subject of Islamic jurisprudence, such as the States' Fatwa Committee members with the faculty to

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[72] Najibah Mohd Zin., "The Training, Appointment, and Supervision of Islamic Judges in Malaysia*", Pacific Rim Law & Policy Journal 21, No. 1* (2012): 118

[73] [1984] 2 MLJ 19

unravel complexities concerning the establishment of *nasab* (lineage). A testimony of one who possesses expertise in analysing and determining the legitimacy status of a child born in accordance with the Syariah principles must be anticipated by the Court. In *Sulaiman Takrib*, the question of interpretation of the term "precepts of Islam" according to the Federal Constitution emerged. Zaki Tun Azmi PCA (as he then was) in his judgment clearly said:

> *"If the precepts of Islam, as contended by the petitioner, are only the five pillars of Islam, then all the other previous arguments by the respondent will all crumble. This court is not an expert in Islamic Law. It therefore has to rely on opinions given by experts in this field".*

When there is any question in relation to Islamic law; for instance, the religious status of one at the time of birth, it requires critical observation, serious deliberation and proper interpretation of the law. Verily, the Court without appreciation and apprehension specifically on Islamic jurisprudence should not merely decide on the terminology of the provision and should acquire the opinion from experts in the subject matter instead.

CONCLUSION

The reason behind the inclusion of Article 121 (1A) is to prevent jurisdictional conflict and to oust the jurisdiction of Civil Court in matters that fall within the exclusive jurisdiction of the Syariah Court. In fact, the Courts have been consistent in dealing with matters relating to religious status and apostasy where the jurisdiction belongs to the Syariah Court. The Courts should be guided by the approaches and decide accordingly. The duality of the legal system in Malaysia must co-exist and complement each other. The integration of both Syariah law and

Civil law can be observed in *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd*[74] where the Court held that the Syariah Advisory Council (SAC) is the sole authoritative body on Syariah matters pertaining to Islamic banking and finance; and the ruling made by the SAC bind the Civil High Court although the SAC is not a judicial body. The majority allowed Bank Negara SAC to make a final determination on Syariah matters that bind the Civil Court and is constitutional.[75] This case indicates that Civil Courts must refer to expert opinions such as the SAC to determine Syariah matters, and banking which falls under Federal List. It is not persuasive, but the opinion binds the Civil Court. It reflects the unity of both legal systems in Malaysia which must be celebrated.

[74] [2019] 3 MLJ 561

[75] Shad Saleem Faruqi, "Between Two Shores, Courts, the Constitution and the Shariah" [2020] *Singapore Academy of Law Journal*, 32, 414 at 452