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

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I. INTRODUCTION

Religion is an important, and at certain levels, the overriding component of the dictates of society. Religious precepts influence political structures, ways of life, economic approaches, and in labyrinthine fashion, diffused into legal systems. In Malaysia, the influence of religion in its legal systems was present even before the coming of Islam during the reign of the Malacca Sultanates – where records showed that judicial control during the early Malay States vested in a ruler who was regarded as the *devaraja* or semi-divine king under the Hindu-Buddhist concept. He possessed absolute legal authority in resolving judicial disputes and was assisted by sages known as Brahmans.[1]

Upon the acceptance of Islam by the Sultanate, *Syariah* Laws were introduced and assimilated rather naturally, to the extent of replacing customary laws such as the *Adat Temenggung* and *Adat Pepatih*. The application of *Syariah* Laws in Malaya continued through the colonial era, unfazed by the development of philosophical and jurisprudential concepts in the West on the desirability of secularism, e.g. Thomas Jefferson's infamous notion of 'separation of state and church' in the United States, Islamic Law gained validation in Malaya during the British colonisation with the introduction of the Courts Enactment 1919 (later the Courts Ordinance 1948) where a dual court system was established which assigned non-Islamic matters under the jurisdiction of the Civil Courts and Islamic private law matters such as marriage, divorce, custody of children etc to be vested in the *Kadhi*'s court.[2] When the Independence of Malaya came in 1957, the powers of the *Syariah* Courts were expressly provided for as a matter within the State List.[3] Whilst it would appear obvious that the constitution, organisation and procedure of *Syariah* Courts is placed exclusively under the powers of the States with no general jurisdiction over any matter enumerated under the Federal List, no boundaries were drawn between that of the Civil Courts and the *Syariah* Courts. This led to the numerous instances where the Civil Courts claimed dominance over its *Syariah* counterparts.[4]

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1 Wan Arfah Hamzah, *A First Look at the Malaysian Legal System*, Oxford Fajar Sdn Bhd, Selangor, 2009, p.19.

2 Shamrahayu A. Aziz, "The Malaysian Legal System: The Roots, the Influence and the Future", [2009] 3 *Malayan Law Journal* xcii.

3 Item 1, State List, Ninth Schedule, Federal Constitution.

4 *Nafsiah v Abdul Majid* [1969] 2 MLJ 174, *Commissioner for Religious Affairs, Terengganu & Ors v Tengku Mariam binti Tengku Sri Wa Raja & Anor* [1970] 1 MLJ 222, *Myriam v Mohamed Ariff* [1971] 1 MLJ 265.

The purported encroachment of the Civil Courts towards the *Syariah* courts had sparked the dissatisfaction of various Muslim religious organisations.[5] In the hope of resolving the conundrum,[6] Parliament had in 1988 amended the Federal Constitution with the insertion of Article 121(1A) where the plain and direct interpretation of the following words appeared to demarcate and settle the jurisdictional imbroglio:

> The courts referred to in Clause (1) [the two High Courts] shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

The amendment, though with the intention of resolving once and for all the jurisdictional conflicts between the two courts, had in effect, regrettably, the opening of a can of worms with the courts treading along fine lines when they decide on preliminary issues of jurisdiction. Legal discourses of the courts seem to have formulated two distinct approaches in the determination of a conflict in jurisdiction: (i) The Subject Matter Approach, and (ii) The Remedy Sought for Approach. However, these approaches have time and again shown to be only stop-gap measures which are fact-sensitive, at times contradictory in itself and failed to address the fundamental question as to when the Civil Courts should intervene or to restrain itself from treading the sensitive province of Islamic matters.

Perhaps what the courts have inadvertently neglected is to forensically examine both Articles 121(1) and Article 121(1A) in the context of the Federal Constitution as a whole. After all, both the Civil and *Syariah* Courts have their scope of powers defined in the Constitution and do not assume more powers than what is prescribed. Thus was the holistic or constitutional approach adopted by the Federal Court in the landmark decision of *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals*[7] *(Indira Gandhi)* where based on the very fundamental concepts of constitutionalism, the predicament of the family of Indira Gandhi a/p Mutho that arose from the unilateral conversion of her three children by her ex-husband, was finally put to rest after a long decade of legal battles.

II. THE FACTS

The Appellant in this case is a Hindu woman who contracted a civil marriage under the Law Reform (Marriage and Divorce) Act 1976 (LRA) with one Pathmanathan a/l Kirshnan. They had three children. Whilst the marriage was still subsisting, the husband converted to Islam and obtained a custody order from the *Syariah* High Court (The *Syariah* Custody Order). The *Syariah* Custody Order was made in the absence of the Appellant. The wife later received certificates of conversion showing that the Registrar

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5 Abdul Hamid bin Haji Mohamad, "Civil and Syariah Courts in Malaysia: Conflict of Jurisdiction", [2002] 1 *Malayan Law Journal* cxxx, at cxxxiv.

6 Dr Mahathir bin Mohamad, Parliamentary Debates, Dewan Rakyat, 7th Parliament, 2nd Session, 17th March 1988, p.1364.

7 *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545

of *Muallaf* had registered all three children as Muslims. The following year, the wife's divorce petition was allowed by the Ipoh High Court on the ground that the husband had converted to Islam. The Civil Court granted to the wife custody orders over all three children. This resulted in two contradictory custody orders granted by both the *Syariah* Court and the Civil Court.

A. Proceedings at the High Court

At the same time, by way of Judicial Review, the wife applied to the High Court in Ipoh for relief in the form of a *certiorari* to quash the certificate of conversion and alternatively a declaration that the certificates were null and void as the prerequisites set out in sections 96[8] and 106[9] of the Administration of the Religion of Islam (Perak) Enactment 2004 (ARIPE 2004) were not complied with before the children were accordingly converted. Further, the Appellant's right as a parent over her children's religion by virtue of Article 12(4) of the Federal Constitution and sections 5 and 11 of the Guardianship of Infants Act 1961 was side-lined when the conversion was done unilaterally without her consent of the same.

The Respondents, comprising of, *inter alia*, the Director of the Islamic Religious Affairs Department of Perak, the Registrar of *Muallafs*, the Perak Government, and the Government of Malaysia took no issue with the fact that the requirements in section 96 of the ARIPE 2004 were not complied with – no evidence was produced before the High Court that any of the three children had recited the Affirmation of the Muslim Faith and were not present before the Registrar of *Muallafs* before the certificate of conversion was issued.[10] The Respondents' position/objections were based on the following: (i) the Civil Courts have no jurisdiction to hear matters within the jurisdiction of the *Syariah* Courts by virtue of Article 121(1A) of the Federal Constitution as conversion to Islam is characterised as a strictly religious matter;[11] (ii) section 101(2) provides for the finality of the certificate of conversion and it is not open for the Civil Court to question the facts stated therein.[12] With regard to the need for the Appellant's consent prior to the conversion of the three children, the Respondents asserted that one single parent was sufficient to covert a child. In addition, the Respondents collectively contended that the national language translation of Art 12(4) refers to '*ibu atau bapa*' (mother or father) in the singular and contended that the national language version is the authoritative text pursuant to Article 160B of the Federal Constitution.[13]

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8 Section 96(1)(a) and (c) of ARIPE 2004 provides for the requirement that the person converting to Islam must utter in reasonably intelligible Arabic the two clauses of the Affirmation of the Muslim Faith and such utterances must be made of the person's own free will.

9 Section 106(b) of ARIPE 2004 provides for the additional condition that for the conversion of persons under the age of 18, his parent or guardian must consent in writing to his conversion.

10 *Supra* n.7 at para 131.

11 *Ibid.* at para 25-26.

12 *Ibid.* at para 137.

13 Article 160B of the Federal Constitution provides that where the Constitution has been translated into the national language the Yang di-Pertuan Agong may prescribe such national language text to be authoritative and in any conflict with the English language text of the Constitution, the national language text shall prevail.

Despite the preliminary objections, the High Court found that that as there was patent non-compliance with the provisions of the ARIPE 2004, the very conclusiveness of the certificates of conversion was open to challenge.[14] Having addressed the jurisdictional issue, the learned High Court Judge went on to hold that the decision of the Registrar of *Muallafs* in issuing the certificates of conversion was invalid and illegal. Firstly, Article 11 of the Federal Constitution guarantees freedom to profess and practise one's own religion. If the decision by the Registrar of *Muallafs* is permitted to stand, it is in effect a restriction of the wife's freedom as a non-Muslim parent to be able to teach her children (to whom custody was granted to her) the tenets of her faith and this amounted to a deprivation of her constitutional rights not just under Article 11 but also Articles 5(1) and 3(1) of the Federal Constitution. Even if she proceeded to do so, there could be serious complications as her actions could tantamount to proselytisation to the converted children – which again is subject to control and prohibition under the relevant state laws. Following the Supreme Court decision in *Dewan Undangan Negeri Kelantan v Nordin bin Salleh*,[15] the High Court found the decision directly affects the wife's fundamental right to practise her religion so much so that "its inevitable effect or consequence on the fundamental right is such that it makes her exercise ineffective or illusory". The decision is therefore unconstitutional. Secondly, on the issue of unilateral conversion, despite having conceded that he was bound by way of *stare decisis* – as in the case of *Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals*[16] *(Subashini)* where the Federal Court held that Article 8 is not violated in a conversion by the converted parent of a minor child to Islam – the High Court judge nevertheless relied on administrative grounds in judicial review to hold that the decision of the Registrar of Muallafs was procedurally flawed as the wife was not given a right to be heard. This is because the wife possesses the corresponding right to life as guaranteed under Article 5 read with Article 11 of the Federal Constitution. In this regard the learned High Court judge also interpreted 'life' in Article 5 of the Federal Constitution "to be more than just mere existence".

> It is not just physical life sustained by food but emotional, intellectual and spiritual as well for man does not live by bread alone. The human person is not just mere body, but soul and spirit as well. It includes the right to choose one's religious beliefs and to teach one's religious beliefs to one's children. It encompasses life in all its fullness where the spiritual and religious aspects of one's life are concerned. After all the first tenet of the *Rukunegara* declares 'Belief in God'.

In this way the High Court judge rather cleverly side-stepped the Subashini case, where even if the question of consent is neglected, the decision would still be administratively improper as the wife was denied of her constitutional rights in breach of the principles of natural justice.[17]

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[14] *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors* [2013] 5 MLJ 552 at para 75.

[15] [1992] 1 MLJ 697.

[16] [2008] 2 MLJ 147.

[17] Citing in approval, the Federal Court decision in *Datuk Hj Mohammad Tufail bin Mahmud & Ors v Dato Ting Check Sii* [2009] 4 MLJ 165.

B. Proceedings at the Court of Appeal

The decision of the learned High Court Judge was however, overturned two years later by the Court of Appeal[18] by a 2-1 majority. The majority decision is essentially two-fold. On the jurisdictional conflict, the Court of Appeal favoured the interpretation advanced by the Respondents (The Registrar of *Muallafs*, the State Government and the husband) that the power to declare the status of a Muslim person was within the exclusive jurisdiction of the *Syariah* Court, the decision of the High Court was therefore a transgression of section 50(3)(b)(x) of the ARIPE 2004 and "the lack of remedy for the wife could not *ipso facto* confer jurisdiction on the High Court".

The majority was also of the opinion that the High Court judge had overlooked and failed to consider the provision of section 101 of the ARIPE 2004 which essentially is a finality clause. Section 101(2) of the ARIPE 2004 declared the certificate of conversion to be conclusive proof of the facts stated in the certificate. Since the three impugned certificates stated that the persons named therein '*adalah disahkan telah memasuk Islam*' and '*surat ini membuktikan bahawa beliau adalah seorang Islam mengikut rekod pendaftaran jabatan ini*' (translation below) the High Court had to accept the facts stated therein and it was beyond the powers of the High Court judge to question the same. Despite the pronouncement on the jurisdictional conflict, the majority in the Court of Appeal also went on to hold that the High Court judge's interpretation of violation of Article 11 of the Federal Constitution had run foul of the Federal Court's pronouncement in *Subashini* that Article 12(4) of the Constitution did not confer the right of choice of religion of children under the age of 18 in both parents. The exercise of the right of one parent under Article 12(4) could not and should not be taken to mean as a deprivation of another parent's right to profess and practice his or her religion and to propagate it under Article 11(1) of the Constitution.

C. The Leave Questions to the Federal Court

Dissatisfied, the wife applied for leave to appeal to the Federal Court. Leave to appeal was granted to the wife on three questions of law:

(i) Whether the High Court has the exclusive jurisdiction pursuant to ss. 23, 24 and 25 and the Schedule of the Courts of Judicature Act 1964 (read together with O 53 of the Rules of Court 2012) and/or its inherent jurisdiction to review the actions of the Registrar of *Muallafs* or his delegate acting as public authorities in exercising statutory powers vested by the ARIPE 2004;

(ii) Whether a child of a marriage under the LRA (a civil marriage) who has not attained the age of 18 years must comply with both ss. 96(1) and 106(b) of the ARIPE 2004 (or similar provisions in state laws throughout the country) before the Registrar of Muallafs or his delegate may register the conversion to Islam of that child; and

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[18] *Pathmanathan a/l Krishnan (also known as Muhammad Riduan bin Abdullah) v Indira Gandhi a/p Mutho and other appeals* [2016] 4 MLJ 455

* ' confirmed to have embraced Islam' and 'this letter is proof that he/she is a Muslim in accordance with the Department's Record of Registration'.

(iii) Whether the mother *and* the father (if both are still surviving) of a child of a civil marriage must consent before a certificate of conversion to Islam can be issued in respect of that child.

III. REASONING OF THE COURT

A. The Basic Structure Doctrine In Light of Article 121

The Federal Court was once again faced with the difficult question of whether the matter before the bench was one which fell within the exclusive jurisdiction of the *Syariah* Courts. This effectively puts to test the inevitable question as to whether Article 121(1A), having been worded in an exclusionary nature, would on a fundamental level preclude the High Court from entertaining her application at all.

Instead of taking on the traditional approach in forensically examining whether the issues fell within the exclusive jurisdiction of the *Syariah* Courts, the Federal Court took a step backwards to first interpret the Article which precedes Article 121(1A) – Article 121(1) itself. In other words, what was important to the Federal Court was rather whether or not the matter before it was one which fell within the judicial powers of the High Courts (which includes the civil High Court, Court of Appeal and Federal Court). This '*know thyself*' approach was all the more fashionable as the judiciary had just recently delivered the landmark judgement of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & another case*[19] *(Semenyih Jaya)* where similar members of the bench[20] decided that judicial power stemming from Article 121(1) of the Federal Constitution is vested in the courts – and no one else:

> [67] The legal consequence is that art 121(1) of the Federal Constitution states that judicial power or the power to adjudicate in civil and criminal matters brought to the court is vested only in the court. The same position was adopted in an earlier decision of the Federal Court in the dissenting view of Richard Malanjum CJ (Sabah and Sarawak) in Kok Wah Kuan (FC) and curiously, as did the majority of the Court of Appeal in the same case; *Kok Wah Kuan v Public Prosecutor* (CA).[21]

Riding on the strong waves of judicial awakening in *Semenyih Jaya*, the Federal Court went on to reaffirm the Basic Structure Doctrine, following the spate of authorities in the cases of *Sivarasa Rasiah v Badan Peguam Malaysia*,[22] *Liyanage v The Queen*[23] and *Keshavananda Bharati v State of Kerala*.[24] Following *Semenyih Jaya*, the Federal Court marked the starting point by re-establishing that judicial power forms part of the Basic

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19 [2017] 3 MLJ 561.

20 Zulkefli Makinudin PCA, Zainun Ali FCJ and Abu Samah Nordin FCJ constituted both the benches in *Semenyih Jaya* and *Indira Gandhi.*

21 *Supra* n.17 at para 67.

22 [2010] 2 MLJ 333.

23 [1967] 1 AC 259.

24 AIR 1973 SC 146.

Structure of the Federal Constitution which cannot be curtailed or limited even by a Constitutional Amendment.

In order to identify provisions of the Federal Constitution which form the Basic Structure, the same must be interpreted in light of its "historical and philosophical context" as well as "its fundamental underlying principles". In the process, Justice Zainun Ali made attempts to classify certain "foundational principles of a constitution" which include the rule of law, constitutionalism, protection of minority rights, and separation of powers between the branches of government.[25] In the context of the present case, Justice Zainun Ali held that the sacrosanct role of the judiciary as the ultimate arbiter of the lawfulness of state action is "inherent in these foundational principles" and hence form part of the Basic Structure of the Federal Constitution.[26]

Following that, as the power of Judicial Review is vested only in the Civil Courts and not the *Syariah* Court by virtue of section 25 and paragraph 1 to the Schedule of the Courts of Judicature Act 1964 (CJA) and Order 53 of the Rules of Court 2012 (ROC 2012), the present case being a challenge against the decision of a public authority – despite the fact that the Registrar of *Muallafs* was also exercising a religious function – the Civil Courts assume judicial power to the exclusion of the *Syariah* Courts under Article 121(1) and the general jurisdictional powers under federal law such as the CJA and the ROC 2012.[27] Question 1 is thus answered in the affirmative.

In the obverse, unlike the Civil Courts which are conferred judicial power independently and directly from the Federal Constitution, the *Syariah* Courts do not enjoy judicial power. As such, the jurisdiction of the *Syariah* Courts must be provided for by the State Legislature within the items of the State List. The impact of this judgement on the status of the *Syariah* Court will be further explained in the next chapter.

B. The Powers of the Registrar of Muallafs as Limited by ARIPE 2004

Having held that the Civil Courts is seized with jurisdiction to hear the matter, the Federal Court proceeded to examine the decision making process of the Registrar of *Muallafs*. As elaborated in the facts above, the relevant provisions governing the conversion to the religion of Islam in the State of Perak is governed by sections 96 and 106 of the ARIPE 2004. Express administrative and procedural requirements for a valid conversion were provided for in these sections which read as follows:

> 96. REQUIREMENT FOR CONVERSION TO THE RELIGION OF ISLAM
> (1) The following requirements shall be complied with for a valid conversion of a person to Islam:
> (a) The person must utter in reasonably intelligible Arabic the two clauses of the Affirmation of Faith;

[25] *Supra* n.7 at paras 29-32.

[26] *Ibid.* at para 33.

[27] *Ibid.* at para 45-48.

(b) At time of uttering the two clauses of the Affirmation of Faith the person must be aware that they mean 'I bear witness that there is no god but Allah and I bear witness that the Prophet Muhammad SAW is the Messenger of Allah'; and
(c) The utterance must be made of the person's own free will.

(2) A person who is incapable of speech may, for the purpose of fulfilling the requirement of paragraph (1)(a), utter the 2 clauses of the Affirmation of Faith by means of signs that convey the meaning specified in paragraph (b) of the subsection.

106. CAPACITY TO CONVERT TO THE RELIGION OF ISLAM
For the purpose of the Part, a person who is not a Muslim may convert to the religion of Islam if he is of sound mind and —
(a) has attained the age of eighteen years; and
(b) if he has not attained the age of eighteen years, his parent or guardian consents in writing to his conversion.

The Respondents did not dispute that sections 96(1) and 106(b) were not in fact complied with in the issuance of the certificates of conversion. Instead, they sought to rely on the finality clause in section 101(2) of the ARIPE 2004 which purports to immunise the decision of the Registrar from any form of hindsight review:

101. CERTIFICATE OF CONVERSION TO THE RELIGION OF ISLAM
…(2) A Certificate of Conversion to Religion of Islam shall be conclusive proof of the facts stated in the Certificate.

The Respondents' and the Court of Appeal's interpretation of the above section were wholly rejected by the Federal Court. Reference was made to the oft-repeated and celebrated judgement of Raja Azlan Shah CJ (as His Royal Highness then was) in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd*[28] where His Royal Highness in no ambiguous terms held that no legal power can be left unchecked. As such, the Registrar of Muallafs must act within the parameters of his powers as his discretion to register the Appellant's children as Muslims is limited by statute.

Justice Zainun Ali further ventured into the development of the law on ouster clauses where the lineage of judicial approaches since the House of Lords in *Anisminic Ltd v The Foreign Compensation Commission and Another*[29] which abolished the fine distinction between a "jurisdictional error" and "error of law" in the context of an ouster clause was considered and adopted in full. The House of Lords essentially held that it is for the courts to decide the true construction of an ouster clause which defines the area of the jurisdiction of a public authority.

Hence, as the Registrar of *Muallafs* had failed to comply with the express provisions circumscribed by the State Legislature prior to the exercise of his powers, i.e. that the

[28] [1979] 1 MLJ 135.
[29] [1969] 2 AC 147.

Appellant's children were not present before the Registrar to utter the two clauses of affirmation of faith, and neither was there a consent in writing since the children were below the age of 18, the Registrar of *Muallafs* had clearly exceeded his statutory powers and the finality clause in section 101(2) cannot be used to save his error. Question 2 is hence answered in the affirmative.

C. The Requirement of Consent of Both Parents and the Implied Overruling of Subashini's Case

The third question of law relates to the very issue of legality in a unilateral conversion. The three children in this case were products of a Hindu marriage. Hence, as the Malaysian law and national policy require a citizen to possess a particular religious belief, they would ordinarily and by virtue of Article 12(4) be Hindus until they reach the age of majority where they can then decide what religion they want to embrace or by default follow in their parents' religion. The problem in this case arose when the husband upon conversion dictated unilaterally the religious belief of the children without the wife's consent. The conundrum which consequentially arose is a question of interpretation of section 106(b) of the ARIPE 2004 in the light of Article 12(4) of the Federal Constitution – whether the word 'parent' in Article 12(4) should be read to mean a single parent or both parents.

The Respondents argued that since Article 12(4) uses the word 'parent' in the singular sense instead of parents and as interpreted by the Federal Court in Subashini, the word 'parent' ought to mean a single parent. The Respondents further contend that their position is reinforced by the fact that the national language translation of Article 12(4) refers to '*ibu atau bapa*' (mother or father) in the singular and the national language version is the authoritative text by virtue of Article 160B of the Federal Constitution.

The Federal Court rejected the Respondents' literal interpretation of Article 12(4) and reminded that the interpretation of the Federal Constitution ought not to be done pedantically but must be construed broadly, generously and liberally.[30] Justice Zainun Ali referred to the interpretation provisions in Article 160 which provides for the construction of words in the singular to include also the plural. However, it is noted that Justice Zainun Ali did not refer to another provision which also states the same – section 2(95) of the Eleventh Schedule to the Federal Constitution. Further, as requisite prescription of the national language version under Article 160B has not been effected by the Yang di-Pertuan Agong, the authoritative text ought to be the English version.

In coming to a decision in favour of the Appellant, the Federal Court was also mindful of the overarching consideration in matters of Family Law. In this regard, section 5 of the Guardianship of Infants Act 1961 provides the underlying policy that a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal. The Respondents' argument that the GIA

[30] *Supra* n.7 at paras 154-155, citing in approval the decisions of *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 and *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301.

does not apply to the Muslim Respondent husband was held to be baseless in law.[31] The Federal Court further held that where the child's religion or religious upbringing is an issue, the paramount consideration for the court is to safeguard the welfare of the child, having regard to all circumstances of the case.[32] It is therefore undesirable for a significant decision such as the conversion of a child to be made without the consent of both parents. To do so would give rise to practical conundrums, as was described by the High Court judge:

> If by 'parent' is meant either parent then we would have a situation where one day the converted parent converts the child to his religion and the next day the other parent realising this would convert the child back to her religion. The same can then be repeated ad nauseam.[33]

In the facts of this case, as the custody of all three children was granted to the Appellant wife – as opposed to the Respondent husband who was nowhere to be found – it is the Appellant wife who exercises the dominant influence in their lives. The Federal Court considered this important factor and was of the opinion that it would certainly be in the welfare of the children that the status quo in regard to their religion be maintained, until they reach the age of majority.

To complete the picture, the Federal Court went on to overrule by way of implication the dicta in *Subashini* – a decision which both the High Court and the Court of Appeal felt bound to follow. Whilst the Federal Court found the dicta in *Subashini* to be of mere obiter and therefore not binding, it went on to hold that the Federal Court in *Subashini* has misinterpreted the decision of *Teoh Eng Huat v Kadhi, Pasir Mas & Anor*[34] when it held that "Article 12(4) must not be read as entrenching the right to the choice of religion in both parents":

> [170] In our view, *Teoh Eng Huat* does not stand for the proposition that the word 'parent' in art 12(4) means a single parent. The issue in that case was whether the right to determine an infant's religion lies with the infant herself or her parent.
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> [171] There was no issue as to whether the right may be exercised by one parent without the consent of the other, or both parents jointly. We thus consider that the interpretation of art 12(4) propounded in *Subashini* is unsupported and erroneous.

Question 3 was thus answered in the affirmative.

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31 The Federal Court followed the well-established decision in *Kamariah bte Ali dan lain-lain lwn Kerajaan Negeri Kelantan dan satu lagi* [2005] 1 MLJ 197 and *Tang Sung Mooi v Too Miew Kim* [1994] 3 MLJ 117 which established that conversion does not absolve a person from hisd antecedent legal obligations.

32 *Supra* n.7 at paras 159-163.

33 *Ibid.* at para 163.

34 [1990] 2 MLJ 300.

VI. LEGAL ANALYSIS

A. Resolution Of The Practical Problems In Interfaith Conflicts

To understand the full impact of the decision, it would be useful to first backtrack into the various past treatises adopted by the courts in relation to the interpretation of Article 121(1A) and why the amendment had failed to resolve the incessant tug-of-war of jurisdiction between that of Civil Courts and the *Syariah* Court, despite the express intention of the legislators to do so.

(i) Prelude: The 'Remedy Prayed For' Approach and the 'Subject Matter' Approach

Over the years, the courts have attempted to develop a particular formula in situations where it is put to decide on issues of conflict of jurisdictions.

The first approach is the 'Remedy Prayed for' Approach. A clear example for the application of this approach can be derived from the Supreme Court decision in *Majlis Agama Islam Pulau Pinang v Isa Abdul Rahman & Satu Yang Lain*.[35] In that case, the first respondent inherited from the original landowner a piece of land on which a mosque had been built in 1889. The original landowner had given the land and the mosque as *wakaf am*. The appellant proposed to demolish the mosque and in its place erect a building for commercial purposes. The respondents claimed in the High Court of Penang inter alia the following remedies: a declaration that the proposal of the appellant to demolish the mosque was contrary to law and the *hukum syarak*; a declaration that under the *wakaf am* the appellant had no right to demolish the said mosque; and an injunction to prevent the appellant or its agents from demolishing the mosque. The appellant applied to set aside the writ on the ground that the High Court had no jurisdiction to hear the matter as it involved the resolution of the issue of whether or not the purpose of the *wakaf* would be defeated if the mosque was demolished and the said land was used for commercial purposes. Eusoff Chin SCJ held that the claim made by the respondents was clearly for an injunction which neither the court of the chief *kadhi* or the court of *kadhi* had jurisdiction to issue. Furthermore, the power to grant an injunction is vested only with the High Court under the Specific Relief Act 1950. Hence, the 'remedy prayed for' in the case would necessitate the Civil Court to hear the case in lieu of the *Syariah* Courts.

In contrast, the 'Subject Matter Approach' requires the court to undertake a rather onerous task of making a preliminary determination on whether or not the issues before it fall within matters enumerated under the State List. In turn, the 'Subject Matter Approach' has been dealt with by the Courts via two methods.

The first method is to assume that the powers of the *Syariah* Courts are co-terminus with the powers of the respective State Legislative Assemblies. It is implied that as long as the subject is within paragraph 1 of the State List in the Ninth Schedule to the Federal Constitution, the *Syariah* Courts have jurisdiction to decide on it. In other words, whatever the State Legislative Assemblies are empowered to enact, that subject automatically falls within the purview of the *Syariah* Courts - irrespective of whether there is explicit

[35] [1992] 2 MLJ 244.

enactment passed on the subject. This method was applied in numerous decisions such as *Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor (No.2),*[36] *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib*[37] *(Habibullah)*, *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang & Satu Tindakan Lain.*[38]

The second method to the 'Subject Matter Approach' is that the *Syariah* Courts can decide on the matter only when the State Legislative Assembly has explicitly passed an enactment to that effect. The competence of the State Legislative Assembly and the *Syariah* Courts are, in this sense, not one and the same. The Supreme Court in *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor*[39] adopted this slightly stricter manner in respect of the 'Subject Matter Approach', where it held that jurisdiction to hear and decide matters is not automatically conferred on the *Syariah* Court as the State Legislature would still have to legislate and expressly vest the *Syariah* Court with such jurisdiction. Only then the jurisdiction of the Civil Courts would be ousted.[40]

The 'Subject Matter Approach', however, was made complicated in the case of *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor*[41] *(Soon Singh)*. In that case, the appellant — who was brought up as a Sikh — converted to Islam without the knowledge and consent of his widowed mother while he was still a minor. Upon reaching 21 years of age, he went through a baptism ceremony into the Sikh faith, thereby renouncing Islam. He then executed a deed poll in which he declared unequivocally that he was a Sikh. Subsequently, he filed an originating summons in the Kuala Lumpur High Court seeking a declaration that he was no longer a Muslim. Counsel for the Jabatan Agama Islam Kedah raised a preliminary objection against the application contending that the High Court had no jurisdiction as the matter came under the jurisdiction of the *Syariah* Courts. The High Court judge upheld the objection and dismissed the application. On appeal, the Federal Court in dismissing his appeal held that jurisdiction of the *Syariah* Courts could be conferred by way of implication.

Even though the Penang Administration of Muslim Law Enactment 1993 did not expressly provide for conversion out of Islam, there were express provisions administering conversion into Islam. The Federal Court's rationale was somewhat based on the idea of convenience – that it would be inevitable that the *Syariah* Court would be the better forum to decide on this matter. Speaking for the Federal Court, Dzaiddin FCJ held:

> It is quite clear to us that the legislative purpose of the State Enactments and the Act is to provide a law concerning the enforcement and administration of Islamic law, the constitution and organization of the *syariah* courts and related matters. Therefore, when jurisdiction is expressly conferred on the *syariah* courts to adjudicate on matters relating to conversion to Islam, in our opinion, it is logical that matters concerning conversion out of Islam (apostasy) could be read as necessarily

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36 [1991] 3 MLJ 487.

37 [1992] 2 MLJ 793.

38 [1996] MLJU 500.

39 [1992] 1 MLJ 1.

40 *Ibid* at 22.

41 [1999] 1 MLJ 489.

> implied in and falling within the jurisdiction of the *syariah* courts. One reason we can think of is that the determination of a Muslim convert's conversion out of Islam involves inquiring into the validity of his purported renunciation of Islam under Islamic law in accordance with *hukum syarak* (Dalip Kaur). As in the case of conversion to Islam, certain requirements must be complied with under *hukum syarak* for a conversion out of Islam to be valid, which only the syariah courts are the experts and appropriate to adjudicate. In short, it does seem inevitable that since matters on conversion to Islam come under the jurisdiction of the *syariah* courts, by implication conversion out of Islam should also fall under the jurisdiction of the same courts.

The decision in *Soon Singh* is highly problematic as it seems to strip the Civil Courts of jurisdiction in all matters in relation to Islamic precepts regardless of whether or not there is in existence an enabling provision for the *Syariah* Courts to adjudicate upon that matter. Such an interpretation also neglected the fact that the appellant in that case was converted into Islam without his mother's knowledge while he was still a minor, which clearly is a contravention of Article 12(4) and at variance with the ratio in the previous Supreme Court decision in *Teoh Eng Huat v Kadhi, Pasir Mas & Anor*[42] *(Teoh Eng Huat)* where it was held that the right of religious practice of an infant should be exercised by his guardian on his behalf until he reached the age of majority. The court in *Soon Singh,* in complete disregard of *Teoh Eng Huat*, took a complete hands-off approach as follows:

> In our view, the question whether the appellant's conversion to Islam, while a minor was valid or not is not a relevant issue in this appeal. We are here to decide on the jurisdictional question of which court a Muslim convert can apply for a declaration that he had converted out of Islam.

The wider approach in *Soon Singh* is similarly adopted by the subsequent decisions in *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur*[43]and the Federal Court in *Majlis Ugama Islam Pulau Pinang dan Seberang Prai v Shaik Zolkaffily bin Shaik Natar & Ors.*[44] Such complication reached its peak in the Federal Court decision of *Lina Joy v Majlis Agama Islam Wilayah Persekutuan dan lain-lain*[45] *(Lina Joy)* where Ahmad Fairuz CJ for the majority view held that the 'implication approach' ought to be the correct approach and the *Syariah* Courts may derive powers directly from the State List without the need for the enactment of state legislation to confer power on the same.[46]

It is submitted that the above judicial trend has created a slippery slope where the *Syariah* Courts are allowed to freely assume jurisdiction in any matter even though not authorised under any state law. The complication is especially more intense in hybrid religious issues such as matters involving conversions.

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42 [1990] 2 MLJ 300.

43 [1998] 1 MLJ 681.

44 [2003] 3 MLJ 705.

45 [2007] 4 MLJ 585.

46 [2007] 4 MLJ 585 at p. 616.

The 'Subject Matter Approach' therefore allows the S*yariah* Courts to expand their jurisdiction in an unbridled manner – notwithstanding the clear provisions in the State List that the *Syariah* Courts are in effect creatures under State Laws – and this to some extent suggests that *Syariah* Courts possess inherent jurisdiction. At this stage, the law, as it stood, seem to denote that the *Syariah* Courts are in equal standing with the Civil Courts and exercising judicial powers in different spheres. This is evident in the Federal Court in Subashini where it was suggested that a husband in a civil marriage, having converted to Islam, is at liberty to collaterally file custody proceedings in the *Syariah* Court[47] even though there was a corresponding process in the Civil Court where a divorce petition was filed by the non-converting wife, also seeking for ancillary reliefs over the same subject matter. The confusion, time, costs and anxiety caused to families are endless, to say the least, as the powers of the *Syariah* Courts continue to expand. Similar facts took place also in the case of *Shamala a/p Sathiyaseelan v Dr Jeyaganesh & Anor.*[48]

(ii) Judicial Review as Part of the Basic Structure Doctrine – A Dilution of the Effect of Article 121(1A)

It was the incessant confusion in judicial precedence that led to the sad story of Indira Gandhi and her legal battles since 2009 – first for custody over her children, followed by this judicial review[49], and then committal proceedings[50] when the Respondent husband, refused to return their youngest child to the wife. Indira's sufferings were aggravated when the Inspector General of Police (IGP) had publicly taken the position that the police will not take any action due to two conflicting orders as to the custody of the children which were respectively issued by the Civil Court and the *Syariah* Court. Aggrieved, Indira applied to the High Court for a mandamus order to direct the IGP to carry out the High Court's orders. On appeal, the Court of Appeal ruled in favour of the IGP on the ground that it was within the discretion of the IGP to decide on the execution of the order as the subject matter involved was purely personal as opposed to public duty. It was only in 2016 that the Federal Court overturned the decision of the Court of Appeal[51] and restored the mandamus compelling the IGP to arrest the Respondent husband for contempt of court. Sadly, todate, Indira's youngest child is still yet to be found.

However, this ground-breaking judgement, we submit, puts to rest not only a decade-long of anxieties for Indira but also the confusions plaguing the question of what is the true effect Article 121(1A). The effect of *Indira Gandhi* completely dilutes the effect of any tests adopted by the courts in the past which had contributed to the inconsistent and regressive development of the law. The upshot of Justice Zainun Ali's step-by-step approach cuts precisely at the root cause of the problem – Article 121 – and the way the provision interplays with the fundamental concepts of the Federal Constitution. In

47 [2008] 2 MLJ 147 at p. 167.

48 [2004] 2 MLJ 648.

49 *Supra* n. 14.

50 *Indira Gandhi a/p Mutho v Patmanathan a/l Krishnan (anyone having and control over Prasana Diksa)* [2015] 7 MLJ 153.

51 *Indira Ghandi a/p Mutho v Ketua Polis Negara* [2016] 3 MLJ 141.

holding that the Federal Constitution embodies a Basic Structure where judicial power is sacrosanct, Justice Zainun casted a safety net around Article 121(1) where the origin of judicial power is stationed. The reverberating words in *Semenyih Jaya* – overruling the decades-proof decisions of *Loh Kooi Choon v Government of Malaysia,*[52] *Phang Chin Hock v Public Prosecutor*[53] and *Kok Wah Kuan v PP*[54] - now firmly establishes that the Basic Structure cannot be altered even by way of a constitutional amendment under Article 159. The net effect of this pronouncement dilutes the effect of Article 121(1A) which came in only in 1988 and was clearly a populist move by the Government intended to curtail the jurisdiction of the Civil Courts. The Federal Court, however, took the firm position that the Federal Constitution is not a system of a simple, majority rule and is certainly not subservient to populist ideologies:

> An understanding of the scope and importance of the principles of the rule of law and constitutionalism is aided by acknowledging explicitly why a constitution is entrenched beyond the reach of simple majority rule. There are three overlapping reasons.
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> First, a constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to government interference. Although democratic government is generally solicitous of those rights, there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection. Second a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority. And third, a constitution may provide for a division of political power that allocates political power amongst different levels of government. That purpose would be defeated if one of those democratically elected levels of government could usurp the powers of the other simply by exercising its legislative power to allocate additional political power to itself unilaterally.[55]

In other words, Article 121(1) must take pre-eminent precedence over Article 121(1A), instead of the other way around. The answer to the conflict in jurisdiction is now relatively clear and simple: if a matter comes within the judicial power of the Civil Courts under Article 121, nothing – not even Article 121(1A) or the State List – can prohibit the Civil Courts from exercising its general jurisdiction, as their judicial powers cannot be

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52 [1977] 2 MLJ 187.

53 [1980] 1 MLJ 70.

54 [2007] 4 CLJ 454.

55 *Supra* n.7 at para 30, citing with approval the decision of the Canadian Supreme Court in *Reference re Secession of Quebec* [1998] 2 SCR 217.

abrogated or reduced in any way, any manner, or anytime. The effect of Article 121(1A), as outlined by Justice Zainun Ali herself, is as follows[56] -

> [90] Thus based on the principles distilled from the above discussion, the effect of art 121(1A) in the Malaysian context can be outlined as follows:
> (a) the Federal Constitution is premised on certain underlying principles. In a Westminster model Constitution, these principles include the separation of powers, the rule of law, and the protection of minorities;
> (b) these principles are part of the basic structure of the Constitution. Hence, they cannot be abrogated or removed;
> (c) the role of the civil courts as established by virtue of art 121 is fundamental to these principles. The judicial power of the civil courts is inherent in the basic structure of the Constitution;
> (d) cl (1A) of art 121 of the Federal Constitution recognises the power of the *Syariah* Courts when it exercises its power within jurisdiction;
> (e) art 121(1A) must be interpreted against the background of the foundational principles and other provisions in the Constitution;
> (f) the Canadian two-stage test may be applied to determine whether art 121(1A) can have the effect of granting jurisdiction to the *Syariah* Courts in judicial review applications to the exclusion of the civil courts:
> (g) applying stage 1 of the test, judicial power cannot be vested in the *Syariah* Courts, because such courts are not constituted as a 'superior court' in accordance with the constitutional provisions safeguarding the independence of judges in Part IX; and
> (h) applying stage 2 of the test, judicial power cannot be removed from the civil courts, because such powers are part of the core or inherent jurisdiction of the civil courts;
> (i) the present appeals arose from an application for judicial review of the administrative actions of an executive body (the Registrar of *Muallafs*) in exercise of its statutory powers (under the Perak Enactment). Regardless of the label that may be applied to the subject matter, the power to review the lawfulness of executive action rests solely with the civil courts.

(iii) A Classification of Scenarios Where the Civil Courts are Clothed with Jurisdiction

En route, Justice Zainun Ali had also classified a list of non-exhaustive scenarios where the Civil Courts enjoy jurisdiction to the exclusion of the *Syariah* Courts:

(a) Where it involves the interpretation of the Federal Constitution, even in situations where the determination of Islamic Law is required for the purpose of such interpretation;[57]

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[56] *Supra* n.7 at para 90.

[57] *Ibid.* at para 93, citing with approval the decision of the Federal Court in *Abdul Kahar bin Ahmad v Kerajaan Negeri Selangor (Kerajaan Malaysia, intervener) & Anor* [2008] 3 MLJ 617 and the strong dissent of Richard Malanjum CJSS in *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585.

(b) Where it involves the interpretation of legislation, even in relation to legislation enacted for the administration of Muslim Law;[58]
(c) Where it involves the determination of the constitutionality of state legislation for the establishment of *Syariah* Courts, where state laws infringe on matters within the Federal List in the Constitution;[59]
(d) Where it involves the determination of matters under federal law, notwithstanding the conversion of a party to Islam;[60] and
(e) Where one of the parties to the matter is a non-Muslim, whereby the *Syariah* Courts would have no jurisdiction over.

B. Relegation of Syariah Courts as Inferior Tribunals in Comparison to Civil Courts

Before *Indira Gandhi*, judicial decisions of the past decade such as *Lina Joy* and *Subashini* have placed *Syariah* Courts on the same pedestal (some say even higher) than the Civil Courts. This has resulted in much controversy and debates on the secular nature of our constitutional scheme.

The Federal Court in *Indira Gandhi* has now made it clear that *Syariah* Courts are inferior tribunals in relation to the Civil Courts. In this regard, the several key pronouncements made by the Federal Court have a momentous impact on the status and nature of the *Syariah* Courts.

Firstly, the *Syariah* Courts are creatures of state legislation and possess no judicial power. As such, the jurisdiction of *Syariah* Courts must be expressly provided for by the State legislature within the limits of Item 1 of the State List.[61] The Federal Court accepted the view in *Latifah bte Mat Zin*[62] – the conservative position under the 'Subject Matter Approach' – rather than the wider approaches in *Soon Singh, Subashini* and *Lina Joy*. This was put into practical terms when the Federal Court rejected the rationale of the Court of Appeal which held that the powers of the *Syariah* Court in the case are derived from the provisions of section 50(3)(b)(x) and (xi) of the ARIPE 2004 which state as follows -

> (3) The *Syariah* High Courts shall —
> (b) in its civil jurisdiction hear and determine all actions and proceedings if all the parties to the actions or proceedings are Muslims and the actions and proceedings relate to —
> (x) a declaration that a person is no longer a Muslim

[58] *Ibid.* at para 95, citing with approval the decision of the Federal Court in *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1.

[59] *Ibid.* at para 96, citing with approval the decision of the Federal Court in *Latifah bte Mat Zin* [2007] 5 MLJ 101.

[60] *Ibid.* at para 97, citing with approval the decision of the Federal Court in *Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals* [2016] 1 MLJ 585.

[61] *Ibid.* at paras 62-63.

[62] [2007] 5 MLJ 101.

> (xi) a declaration that a deceased person was a Muslim or otherwise at the time of his death; and…

The Court of Appeal's approach of 'jurisdiction by implication' is similar to that of the approaches taken in *Soon Singh* and *Lina Joy* where no express provisions were provided for the jurisdiction of the *Syariah* Courts in relation to the validity of a person's conversion to Islam (as opposed to out of Islam under section 50(3)(b)(x)). However, the Federal Court's decision as elaborated above finally and firmly puts this judicial trend to an end[63]. It is submitted that with the revised interpretation of the scope of Article 121(1A), the approaches adopted in *Soon Singh*, *Mohamed Habibullah*, *Subashini*, and *Lina Joy* have been effectively unravelled and overruled.[64]

The Federal Court's rationale that *Syariah* Courts enjoy no judicial power also gained traction from the fact that *Syariah* Courts are not constituted in accordance with the provisions of Part IX of the Federal Constitution entitled 'The Judiciary'. Hence, the constitutional safeguards for judicial independence, security of tenure and remuneration of judges do not apply at all to *Syariah* Court judges. It is submitted that *Syariah* Court judges are therefore not really judges in the strict sense but are akin to chairpersons of inferior tribunals,[65] such as the Industrial Court and Strata Management Tribunals.

C. Judicial Power Triumphing Over Ouster Clauses

The legal position on ouster clauses before the Federal Court's back-to-back decisions in *Semenyih Jaya* and *Indira Gandhi* was very uncertain, with many courts deferring completely to the Executive & Legislature by refusing to entertain cases merely because ouster clauses have been invoked.[66]

If the *Semenyih Jaya* judgment had not made it clear that ouster clauses in our statutes cannot strip the Court of its supervisory jurisdiction, it is hoped that *Indira Gandhi* would bury all doubts whatsoever. The Federal Court held that once there is an excess of jurisdiction in the Anisminic sense, then no ouster clause can exclude the jurisdiction of the courts:

> In our view therefore, based on the principles in Anisminic (supra), the lack of jurisdiction by the Registrar renders the Certificates issued a nullity. Section 101(2) cannot have the effect of excluding the court's power of judicial review over the Registrar's issuance of the Certificate. It is settled law that the supervisory jurisdiction of courts to determine the legality of administrative action cannot be excluded even by an express ouster clause. It would be repugnant to the rule of law and the judicial power of the courts if the Registrar's decision is immune from

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63 *Supra* n.7 at paras 64-68.

64 *Ibid.* at paras 94, 98 & 102.

65 *Ibid.* at paras 69-72.

66 For a detailed discussion on the judicial trends before *Semenyih Jaya*, please refer to "*Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & another case [2017] 3 MLJ 561 – A Landmark in Constitutional and Land Acquisition Law*" by Lim Wei Jiet at Journal of Malaysian and Comparative Law, Vol: 44(2), 2017.

> review, even in light of uncontroverted facts that the Registrar had no jurisdiction to make such a decision.[67]

In fact, *Indira Gandhi* goes one step further – it has effectively held that even an ouster clause in the Federal Constitution i.e. Article 121(1A) cannot be interpreted to remove the jurisdiction of the Civil Courts. This will bring into question the applicability of other ouster clauses peppered throughout the Federal Constitution, such as -

(i) Article 63, which prevents the courts from enquiring on any proceedings in either House of Parliament or committee thereof;
(ii) Article 72, which prevents the courts from enquiring on any proceedings in the State Legislative Assemblies;[68]
(iii) Article 150(8)(b) which excludes the jurisdiction of courts from determining a proclamation of emergency, the continued operation of such proclamation, any ordinance promulgated therein and the continuation of such ordinances; and
(iv) Section 2 of Part III of the Second Schedule, whereby decisions of the Federal Government relating to citizenship cannot be reviewed by a court of law.[69]

D. Registrar of Muallafs and Syariah Courts – One and the Same?

Surprisingly, the Federal Court in Indira Gandhi did not discuss the central tenet of Hamid Sultan JCA's strong dissent at the Court of Appeal below – which is that the Registrar of *Muallafs* as the administrative body being challenged in this case is different from the *Syariah* Courts.

Hamid Sultan JCA emphasised the trite legal position that the Civil Courts have judicial review powers to check on administrative bodies and agencies. The Civil Courts do not have powers to intervene only in lawful decisions of the *Syariah* Courts made within its jurisdiction. In other words, not all sections under the ARIPE 2004 – including the issuance of certificates of conversion – fall within the jurisdiction of *Syariah* Courts and are thereby protected by Article 121(1A).

Hamid Sultan JCA therefore concluded as such:

> [144] If the certificate relating to conversion had to be challenged, it has to be done by way of judicial review. It has to be set aside if the order of the *Pendaftar Mualaf* is a *nullity ab initio* based on Badiaddin principle. It can be done by way of judicial review and/or writ or originating summons seeking a declaration to

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67 *Supra* n.7 at para 126.

68 See, however, *Teng Chang Khim (appealing as speaker of the Selangor State Legislative Assembly) v Badrul Hisham bin Abdullah & Anor* [2017] 5 MLJ 567.

69 But note the recent case of *Madhuvita Janjara Augustin (suing through next friend Margaret Louisa Tan) v Augustin a/l Lourdsamy & Ors* [2018] 1 MLJ 307, where the Court of Appeal held that the ouster clause in section 2 of Part III of the Second Schedule is "not the same as saying that the matter is non-justiciable" and ordered the Registrar of Births and Deaths Malaysia to re-register the appellant's status as a Malaysian citizen. The scope of this ouster clause is also a question of law posed by various applicants to the Federal Court at the time of publication, one of which is *Pang Wee See & Yee Oii Pah & Yee Ooi Wah v Pendaftar Besar Kelahiran dan Kematian, Malaysia* (Federal Court Civil Appeal No.: 01(f)-45-09/2017(B)).

nullify the order. In essence, the primary issues involved here has nothing to do with *Syariah* Courts or its jurisdiction or constitutional principles as advocated by the parties as well as the learned trial judge. The discussion of *Syariah* Court and its jurisdiction in this judgment is only to demonstrate the conduct of the appellant who had abused the *Syariah* process.

V. CONCLUSION: A REAFFIRMATION OF MALAYSIA AS A SECULAR STATE

It is hoped that the decision of *Indira Gandhi*, decided in the most fashionable manner that constitutional enthusiasts could expect, would finally put an end to the impasse in relation to the conflict in jurisdictions between the Civil and *Syariah* Courts. It is now for the executive and legislative branches of government to act on the judiciary's clarion call and finally table the proposed amendments to section 88 of the LRA to be passed in Parliament[70] as follows:

(1) Where a party to a marriage has converted to Islam, the religion of any child of the marriage shall remain as the religion of the parties to the marriage prior to the conversion, except where both parties to the marriage agree to a conversion of the child to Islam, subject always to the wishes of the child where he or she has attained the age of eighteen years.
(2) Where the parties to the marriage professed different religions prior to the conversion of one spouse to Islam, a child of the marriage shall be at liberty to remain in the religion of either one of the prior religions of the parties before the conversion to Islam.

The decision would inevitably be uncomfortable to some quarters who in the words of supporting judgement in this case of Zulkefli Makinuddin PCA, could be right if the issues were argued "purely from the view point of the *Syariah* law and its precepts".[71]

There already seems to be a pull-back to the seemingly strong sails of *Indira Gandhi*. On 27 February 2018, it was reported that the Federal Court had dismissed the appeals of three Muslim converts and a Muslim by birth from Sarawak to have their applications on apostasy to be heard in the civil high court. There are no grounds of judgment todate, and one can only hope that the principles embedded in *Indira Gandhi* have not been fundamentally altered.[72]

However, this was followed by a watershed event that will have a fundamental impact on the nation's socio-political and legal fabric i.e. the victory of the Pakatan Harapan coalition in the 14th General Elections. Their leaders have previously expressed visions

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[70] The then Barisan Nasional Government had promised in 2009 that this matter would be resolved and there were sighs of relief when Section 88A appeared in the Bill that was presented in the Dewan Rakyat in November 2017. However, it was subsequently withdrawn.

[71] *Supra* n7 in the supporting judgment of Zulkefli Makinudin at para 6.

[72] 2 of the 5 judges in this case were part of the panel of judges in Indira Gandhi i.e. Zulkefli Makinudin PCA and Ramly Ali FCJ.

of a pluralistic Malaysia and the need to conclusively solve conversion cases. One hopes that legislations which reflect the same such as the previously proposed section 88 of the LRA will be revisited and tabled soon so that no other non-Muslim parent would have to experience what *Indira Gandhi* herself did.

One must not forget that at the end of the day, Malaysia, as founded by our forefathers, is a diversified and multi-racial society. The foundational principles of the Federal Constitution were built to protect the various diverse communities. In the supporting judgment of Zulkefli Makinudin PCA, His Lordship found it worthy to mention the inspiring words of the late Tun Suffian at the Braddel Memorial Lecture in 1982:

> In a multi-racial and multi religious society like yours and mine, while we judges cannot help being Malay or Chinese or Indian; or being Muslim or Buddhist or Hindu or whatever, we strive not to be too identified with any particular race or religion - so that nobody reading our judgement with our name deleted could with confidence identify our race or religion, and so that the various communities, especially minority communities, are assured that we will not allow their rights to be trampled underfoot. [73]

One can only hope to match such prose by repeating the reverberating words of the founding father and first prime minister of our nation, the late Tunku Abdul Rahman Putra, where he had unshakeably declared:

> …. I mentioned that this country is a secular state. It means that it is not a Muslim state. Islam is the official religion of the country, but other religions have a right to play their part as far as religion is concerned. This is about it – but it is not absolutely a secular state because if it were so, there would be officially no religion. So it is the state which gives freedom to all religions to carry out their worship. The Constitution has more or less set out the point.[74]

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[73] *Ibid.* at para 5.

[74] Tunku Abdul Rahman Putra, The Role of Religion in Nation Building, in Contemporary 'Issues on Malaysian Religions, 1984 at p. 25.