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## THE AFTERMATH OF *NIK ELIN*: DOES IT AFFECT THE POSITION OF THE MALAYSIAN SYARIAH COURT?

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### Abstract:

This article examines the ramifications of the recent Federal Court judgment in the case of *Nik Elin Zurina Nik Abdul Rashid & Anor v. Kerajaan Negeri Kelantan* to the position of the Syariah Court in Malaysia. The judgment of the case witnessed 16 out of 18 provisions of the Kelantan Syariah Criminal Code Enactment 2019 which have been challenged on the ground of unconstitutional be declared null and void by the Federal Court. This has given rise to the state of anxiety and dissatisfaction particularly among Muslims community who feels that the position of the Syariah Court has been degraded. The study employs qualitative study in analysing relevant materials that comprised of statutory laws, journal articles and cases law relating to the issue of constitution and conflict of laws. The finding shows that the verdict made by the Federal Court in *Nik Elin*'s case does not affect the position of Syariah Court in Malaysia since it has nothing to do with the issue of Islamic doctrine. Thus, this article concludes that in the process of making laws, legislative bodies must always have the power and competency to do so in the spirit of preserving the supremacy of the Federal Constitution as the highest law in Malaysia.

### Keywords:

Legislation, Jurisdiction, Constitution, State Law, Syariah Court.

## Introduction

In 2019, the Kelantan State Legislative Assembly has passed a law known as Kelantan Syariah Criminal Code Enactment (1) [Enactment 14] (hereinafter referred to as the Enactment 2019) and came into force on the 1<sup>st</sup> of November 2021. The Enactment 2019 replaced the law governing Islamic criminal matters as provided in the Kelantan Syariah Criminal Code 1985

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[Enactment 2 of 1985]. The Enactment 2019 consists of 35 sections of the 1985 Enactment and 33 new sections which expand certain acts to be considered as crime under the Syariah law. The 68 sections of the Enactment 2019 are arranged and listed under 9 different parts and the offences are found under Part II till Part VII. The offences are categorized accordingly as follows:

- i) *Ta'zir* offences in relation to sanctity of the religion.
- ii) *Ta'zir* offences in relation to life and dignity.
- iii) *Ta'zir* offences in relation to mind and consumption.
- iv) *Ta'zir* offences in relation to property.
- v) *Ta'zir* offence in relation to human descendant.
- vi) Offences in relation to complicity and attempt.

However, on 9<sup>th</sup> February 2024, the Federal Court allowed the application made by Nik Elin Zurina, a native of Kelantan, who filed a petition directly with the Federal Court under Article 4(4) of the Federal Constitution to challenge the constitutionality and validity of 18 provisions under the Kelantan Syariah Criminal Code Enactment 2019, claiming that the Kelantan State Legislature lacks the legislative power to enact such law on the ground that there are federal laws covering the same offences. By allowing the application, the Federal Court further made a judgment that 16 provisions under the said Enactment are null and void for violating the Federal Constitution.

It is undisputedly that this case has been highlighted and caught the attention of the public from the very beginning the petition was filed with the court since it involves the issue of conflict between civil and *Shariah* law. Following the judgment of the Federal Court, it sparked a lot of debates among the public particularly the Muslims community who did not satisfy with the decision of the court as they felt that Islamic law has been threatened and the position of the Syariah court has been downgraded. Moreover, there are also various sentiments and accusations played by certain parties concerning the position of Islam and Syariah court and this has created a state of anxiety and discontentment among Muslims in Malaysia.

The objective of this article is therefore to examine the consequence of the apex court judgment in particular to the position of the Syariah Court in Malaysia. A thorough analysis of the Federal Court's judgment in *Nik Elin*'s case is made for the purpose of clarifying the current position of law since the case does not only involve constitutional issues but have become a matter of public interest.

Although the study discusses the conflict between civil and *Shariah* law, the scope of discussion is mainly based on constitutional law particularly on the issue of legislation. Other areas of conflict of law between the two are generally excluded. In addition, it should be noted that the study focuses on the effect of the court's judgment to the position of the Syariah court in Malaysia and not to the position of Islamic law in general.

### Methods of Study

The study is mainly based on library research and content analysis. For the purpose of identifying the conflict between the civil and *Shariah* law, descriptive research method is utilized. Content analysis of statutory provisions of several related laws namely the Federal Constitution, the Syariah Courts (Criminal Jurisdiction) Act 1965 and the Kelantan Syariah Criminal Code Enactment (1) [Enactment 14] 2019 is adopted to examine the position of law under the said legislation regarding the issue of legislation and legislative power.

Content analysis approach is also adopted when dealing with examination of decided cases in order to determine the legal reasoning for each judgment and judicial interpretation of the courts. This approach serves as a useful method particularly to study the manner the law being interpreted and applied.

## **An Analysis of The Nik Elin's Case**

### ***Facts of the Case***

A petition was filed in the Federal Court by Nik Elin Zurina binti Nik Abdul Rashid and Tengku Yasmin Nastasha binti Tengku Abdul Rahman (hereinafter referred to as Petitioners) to seek declaration that certain provisions of the Enactment 2019 were invalid. The petitioners claimed that sections 5,11,13,14,16,17,30, 31, 34, 36, 37, 39, 40, 42, 43, 44, 45, 47 and 48 of the Enactment 2019 (hereinafter referred to as Disputed Sections) were enacted beyond the jurisdiction of the State Legislature of Kelantan (hereinafter referred to as Respondent), thus render the Disputed Sections to be null and void. The heading of the Disputed Sections tried by the Court are as follows:

- a) Section 5: Fake Claims
- b) Section 11: Destroying of defiling place of worship
- c) Section 13: Selling or give away child to non-Muslims or morality reprehensible Muslim
- d) Section 14,16, 17 and 47: Offences related to sexual offences – Sodomy, sexual intercourse with corpse/with non-human and incest
- e) Section 30: Words capable of breaking peace
- f) Section 31: Sexual harassment
- g) Section 34: Possessing false document, giving false evidence, information or statement
- h) Section 36: Anything intoxicating
- i) Section 37: Gambling
- j) Section 39: Reducing scale, measure and weight
- k) Section 40 and 41: Executing transactions contrary to Hukum Syara'/via usury etc.
- l) Section 42: Abuse of halal labels and connotation
- m) Section 43,44,48 and 48: Offering or providing or preparatory of vice offences /preparatory act of vice and muncikari

However, at the beginning of oral argument in the Court, the Petitioners withdrew their challenge against two sections namely 5 and 37(1)(a), thus rendering the Court to not consider these provisions as Disputed Sections.

The Petitioners argued that the Respondent has no power to enact those provisions as criminal matters fall under the jurisdiction of federal government, thus only the Parliament can make laws on those matters. The Petitioners contended that the enactment of the Disputed Sections by the Respondent contravened Articles 73 and 74 of the Federal Constitution thus, by virtue of Article 4 of the Constitution, the laws shall be null and void. The Respondent on the other hand, using the same Articles argued that the matters fall within the state jurisdiction as mentioned in the State List (List II) of the Ninth Schedule i.e. to legislate offences against the precepts of Islam. The Respondent contended that the provisions governing criminal matters in the Enactment 2019 fall within Item I of the State List under which relates to the matters concerning persons professing the religion of Islam, thus empowering the state legislature to enact laws governing Muslim and act against the precepts of Islam.

### ***The Issue of the Case***

The main issues of the case are as follows:

- i) Whether the Disputed Sections of the Enactment 2019 are constitutionally valid?
- ii) Whether the Disputed Sections of the Enactment 2019 fall within Item 1 of the State List, thus empowering the State Legislature of Kelantan to enact those laws?
- iii) Whether there is any preclusion clause in Item 1 of the State List of the Federal Constitution?

### ***The Discussion and Judgment of the Federal Court***

In coming to its decision, the Federal Court has referred to the Federal Constitution for analysis and discussion particularly provisions on the supremacy of Constitution and legislative power. The proceedings brought by the Petitioners is about challenging the competency of the State Legislature of Kelantan to enact the Disputed Sections. Article 73 provides the extent of power of Parliament as well as State Legislatures in exercising their legislative power. Under the said article, the Parliament may make laws for the whole or any part of the Federation and make the law effective either outside or within the Federation. The State Legislatures on the other hand, may make law for the whole or any part of that States.

To avoid dispute and redundancy, the Constitution under Article 74 has clearly divided the power of the two legislative bodies i.e. Parliament and State Legislatures to make laws within the matters enumerated in the Ninth Schedule of the Constitution. Given that, Parliament is empowered to make laws for the subject matter enumerated in the Federal List and Concurrent List (i.e. List I and List III respectively as set out in the Ninth Schedule). For the State Legislatures, they are allowed to make laws with respect to matter enumerated in the State List and Concurrent List (List II and List III as set out in the Ninth Schedule). As such, any law passed by legislative bodies either Parliament or State Legislatures which is beyond the subject matter provided in the Ninth Schedule shall be by virtue of Article 4 to be considered constitutionally invalid.

The Federal Court also made reference to the case of *Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 323 (hereinafter referred to *Iki Putra*). In that case, the Lordship explained that the Federal Constitution has accorded primary powers of legislation to Parliament with certain limited powers to the State Legislatures. This can be seen in the Legislative Lists i.e. Federal List (consists of 28 items) and State List (consists of 16 items) which provide the fields or areas upon which the legislative bodies are empowered to make laws. Given that, the Parliament and State Legislatures are confined to their respective Legislative Lists in making laws and are not allowed to make laws beyond what has been established in the Lists. As such, there is no overlapping powers of legislation between Parliament and State Legislatures whereby primary powers of legislation is given to Parliament as the legislative body to enact laws on any matters for the whole nation as provided in the Federal List and matter dealt with by the Federal Law.

Based upon the above discussion, the Federal Court made declaration that 16 out of 18 provisions of the Kelantan Syariah Criminal Code Enactment 2019 were null and void on the ground that the State Legislature has no power to enact laws on such matters as they fall under the Federal List upon which only Parliament can legislate.

### **The Supremacy of the Constitution**

The *Nik Elin* case provided a significant test of constitutional supremacy in Malaysia, which highlighted the Federal Constitution's pivotal role in the nation's legal framework. In Malaysia, Federal Constitution provides a comprehensive framework that outlines the structure of government, distribution of powers, safeguards for fundamental rights, citizenship, parliamentary democracy and constitutional monarchy (Sufian Shuaib, 2010). It consists of a preamble, main provisions, and schedules, all of which uphold the principles of constitutional supremacy, separation of powers, and the rule of law.

The Federal Constitution of Malaysia upholds the principle of constitutional supremacy, which is stated in Article 4(1) of the Federal Constitution. This article declares that:

*"This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."*

This principle has significant implications for Malaysia's legal framework, as it affects the relationship between the Constitution and other laws. Shad Saleem Faruqi (2020) argues that constitutional supremacy has two crucial consequences. Firstly, all laws must conform to the provisions of the Federal Constitution, which is the supreme law of the land. Secondly, Parliament's legislative powers are restricted, and it is not supreme. All laws passed before and after Malaysia's independence are subject to the supremacy of the Federal Constitution. Article 4(1) specifically addresses laws passed after independence, while Article 162 pertains to laws passed before independence. According to Article 162(6), courts and tribunals can apply the provisions of any existing laws and pre-independence laws with necessary modifications to ensure their alignment with the Constitution.

Furthermore, Constitutional supremacy in Malaysia differs from the principle of parliamentary supremacy that prevails in the United Kingdom. In the UK, parliamentary supremacy (or parliamentary sovereignty) means that Parliament holds the highest legal authority and can enact or repeal any law. This means that no other entity, including the courts, can override or annul legislation passed by Parliament. In Malaysia, however, the Federal Constitution holds supremacy over parliamentary authority. This means that Parliament's authority to pass laws is subject to limitations and controls imposed by the Constitution. This ensures that legislative actions by Parliament must conform to the constitutional framework. This was confirmed in the case of *Ah Thian v. Government of Malaysia* (1976), where the Federal Court held that: "The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written Constitution. The power of Parliament and the State Legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please" (p. 113).

### **The Supremacy of Constitution and Federalism**

The *Nik Elin* case, which challenged the Kelantan Syariah Criminal Code (I) Enactment 2019, provides a clear illustration of how Malaysia's federal system and the principle of constitutional supremacy work together. Malaysia's federal structure, akin to dual federalism, embodies a clear division of powers between the federal and state government (Md. Khalid, 2018). This reinforces the superiority of the Federal Constitution by establishing clear boundaries and defining the respective jurisdictions of federal and state laws (Muslim, 2015). This framework ensures that neither level of government encroaches upon the powers reserved for the other,



thereby maintaining the constitutional order and upholding the supremacy of the Federal Constitution within a structured and balanced federal system.

The distribution of legislative powers between the federal and state governments is outlined in Article 74 of the Federal Constitution, with further elaboration provided in the Ninth Schedule. This schedule divides the powers between the federal government and the state governments into three lists: the Federal List, the State List, and the Concurrent List. The Federal List encompasses important matters such as external affairs, defence and internal security, finance, and commerce, which fall under the jurisdiction of the federal government. On the other hand, the state government deals with matters relating to the Islamic religion and laws, land, agriculture and forestry, local government, local services, and the machinery of the State Government. The Concurrent List includes areas where the federal government shares its executive and legislative powers with the state governments. These areas include social welfare, scholarships, national parks and wildlife, and irrigation, and other related matters specified in the Concurrent List. Moreover, Article 75 establishes that federal law prevails over state law in the event of inconsistency, ensuring uniformity and consistency in the legal system. Meanwhile, Article 76 confers upon Parliament the authority to enact laws concerning matters delineated in the State List under specified circumstances, such as national security or economic interests. This provision allows for federal intervention in state affairs when deemed necessary, allowing for federal intervention in state matters under specific conditions.

### ***Procedural Safeguards in Challenging Legislative Validity under Malaysia's Federal Constitution***

The Federal Constitution of Malaysia establishes clear criteria for assessing the validity of written laws. This is based on the delineation of legislative powers between federal and state governments. The criteria for invalidating laws are clearly articulated in the case of *Ah Thian v. Government of Malaysia* (1976) 2 MLJ 113, the Federal Constitution outlines specific grounds upon which laws can be deemed invalid. The grounds are:

- 1) written law made by Parliament or the State Legislature may be invalid on the ground that the respective legislative body has no power to make law (Article 74); or
- 2) written law made by Parliament or the State Legislature is inconsistent with the Constitution, (Article 4(1)); or
- 3) state written law made by the State Legislature is inconsistent with Federal Law (Article 75).

According to Hairudin (2019), the authority to invalidate laws on the basis of grounds (2) and (3) is unrestricted, which means that any of the Superior Courts can do so in proceedings initiated by either the Government or individuals. However, when it comes to declaring a law invalid based on ground (1), three restrictions outlined in Articles 4(3), 4(4), along with Article 128(1), apply. Therefore, it's crucial to understand the procedural aspects that govern the process of challenging the validity of the law on ground (1) which has been referred to as "incompetency challenges" by the court in the case of *Wong Shee Kai v Government of Malaysia* [2022] 6 MLJ 102.

First, Article 4(3) states that the validity of any law enacted by Parliament or a State legislature may not be challenged on the basis that it addresses a matter beyond the jurisdiction of the relevant legislature, except in three specific types of proceedings. These proceedings are: -

- (a) in proceedings seeking a declaration of the law's invalidity on that ground; or
- (b) if the law was made by Parliament, in proceedings between the Federation and one or more states; or
- (c) if the law was made by a State legislature, in proceedings between the Federation and that State.

Secondly, Article 4(4) dictates that proceedings of the type mentioned in (a) above may not be commenced by an individual without the leave of a judge from the Federal Court, and the Federation is entitled to be a party to such proceedings, as is any State that would or might be a party to proceedings initiated for the same purpose under types (b) or (c) mentioned above. This provision ensures that no adverse ruling is made without allowing the relevant government to argue otherwise. Thirdly, clause (1) of Article 128 specifies that only the Federal Court has jurisdiction to determine the validity of a law made by Parliament or a State legislature on the grounds that it pertains to a matter beyond the legislature's authority to legislate. This provision ensures that a law can only be declared invalid after a thorough examination by the highest court in the nation. It serves as an essential mechanism for maintaining the separation of powers by assigning the judiciary the authority to scrutinize the actions of the legislative branch.

It is worth noting that the *Nik Elin* case is not the only one where legal challenges based on incompetency have been brought before the court. There are other notable cases that serve as examples and shed light on the implications of such challenges. One such case is *Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 323, which was decided before the *Nik Elin* case. The *Iki Putra* case dealt with a challenge to the constitutionality and validity of Section 28 of the Syariah Criminal Offences (Selangor) Enactment 1995. This section criminalizes engaging in sexual activity against the laws of nature. The challenge was brought on the grounds that the section is inconsistent with the Federal Constitution and the Penal Code, which already contain a similar offence (Section 377A). The Federal Court held that the Impugned Provision was invalid, null, and of no effect. It could not be regarded as having been constitutionally legislated by the Selangor State Legislature (LSS) because of the existence of Section 377A of the Penal Code.

On the other hand, the case of *Mamat Daud v. Government of Malaysia* (1988) 1 MLJ 119 illustrate the situation where the competency of parliament in legislated law had been challenged. The case involved a constitutional challenge to section 298A of the Penal Code, which concerned behaviours leading to disharmony, ill-will, hatred, or enmity on the grounds of religion. The petitioners were accused of acting as an Imam, Khatib, and Bilal during a Friday prayer on May 13, 1985, at Kampung Kenaga, Wakaf Tapai, in the district of Kuala Terengganu, without obtaining authorization from the Terengganu Administration of Muslims Law. Pursuant to Article 4, clause (4) of the Federal Constitution, which grants individuals the right to challenge the constitutionality of specific legislation, the petitioners were granted permission to file a motion seeking a declaration that section 298A of the Penal Code contravenes Article 74, clause (1) of the Federal Constitution, which outlines the legislative boundaries of the Parliament. The majority ruling of the court determined that the challenged section was valid and applicable solely to non-Muslims. The court acknowledged that the section might be invalid when applied to the Muslim community but maintained its applicability to non-Muslims.

### **The Position of Islam and Islamic Law under the Federal Constitution**

It is undoubtedly that in relation to the status and position of Islam under the Federal Constitution, Islam has been placed in a special position. This can be seen in Article 3 of the Constitution which provides that, "Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation." Besides Article 3, Article 11(1) provides for freedom of religion whereby each citizens have the right to profess and practice his or her religion but subject always to Article 11(4) namely, the state or federal law may control or restrict the propagation of any religious doctrine or belief among Muslims. According to Ashgar Ali and Muhamad Hassan (2021), the purpose of this restriction or limitation is actually to protect the religion of Islam "from being exposed to the influences of the tenets, precepts and practices of other religions." In the case of *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1MLJ 119, the Federal Court ruled that Article 11(4) of the Federal Constitution gives the states the power to pass laws that protect Islam from the influence of other religions, specific schools, and opinions within the Islamic religion itself.

In relation to Islamic law, Article 74 of the Federal Constitution confers powers on the State Legislature to make laws with respect to any of the matters enumerated in the State List or the Concurrent List of the Ninth Schedule of the Constitution. Besides laying down the legislative power of the State Legislature to legislate law on Islamic matters and Malay customs, the State List also prescribes for the administration of Islamic law as well as the establishment and organization of the Syariah court. Item 1 of the State List reads as follows:

"Except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs. Zakat, Fitrah and Baitulmal or similar Islamic religious revenue, mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organisation and procedure of Syariah courts, which shall have jurisdiction only over person professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom."

Based on the item 1 of the State List, it is clear that as far as the operation of Islamic law is concerned, the jurisdiction of the Syariah court is confined to the personal or private matter rather than the public or constitutional law. Furthermore, it is important for such jurisdiction to be expressly conferred by state legislations as the Syariah court does not have automatic jurisdiction over all the above-mentioned matters.

### **Position of the Syariah Court in Malaysia**

It is noteworthy that Syariah courts are an integral part of our judicial system although they are distinct from the civil courts as to their powers and jurisdictions. By virtue of Article 121 of



the Federal Constitution, judicial power is vested exclusively in the civil courts. Unlike the status of the Syariah court which is dependent on the State Legislature, the judicial power of the civil courts is inherent in the basic structure of the Constitution (*Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors* [2018] 3 CLJ 145). Syariah court, on the other hand, is established under the state law in pursuant to the powers given to it under item 1 of the List II (State List) in the Ninth Schedule of the Constitution. In other words, until and unless the state legislature provides for its establishment, the Syariah court as yet non-existent.

With regards to the position of the Syariah court, the Federal Court in *Latifah Mat Zin v. Rosmawati bt. Shariban & Anor* [2007] 5 MLJ 101 expressed that the State Legislature may make law to set up the Syariah court in the State and such court do not exist until such law is made. This is in contrast to the position of the civil courts in which they are established by the Constitution itself and in fact there is a whole Part in the Constitution i.e., Part IX to deal with the civil courts under the title “The Judiciary”. In this respect, the position of the Syariah court is similar to the Sessions Courts and the Magistrates’ Courts which are known as ‘inferior courts’ under the Federal Constitution.

Notwithstanding the creation of Syariah court to deal with the matters in Item 1 under the State List in the Ninth Schedule, there are cases where civil courts exercise jurisdiction over Muslim parties, for instance on matters of *wakaf* and custody (as can be seen in the case of *Commissioner of Religious Affairs v. Tengku Mariam* (1970) 1 MLJ 220; *Haji Embong b. Ibrahim & Others v. Tengku Nik Maimunah* [1980] 1 MLJ 286) without made a reference to Islamic law or in ignorance of opinion of Muslim jurists. In addition, the decision of the Syariah court is also subject to judicial review by the civil court and if there is conflict between decisions of the two courts, decision of the civil court shall prevail. The case of *Myriam v. Mohamed Ariff* [1971] 1 MLJ 265 illustrated the situation where problem arose when both civil and Syariah courts have jurisdiction in custody cases involving Muslim parties. In this case, despite the Syariah Court Order relating to custody had been recorded earlier in the Syariah court, the High Court in *Myriam’s* case concluded that it had jurisdiction to hear the mother’s application on the ground that section 45(6) of the Selangor Administration of Muslim Law Enactment 1952 did not exclude the jurisdiction of the civil court and in fact acknowledged the superiority of the civil court to the extent that if there is any conflict or inconsistency in the decision of the Syariah court with the decision of the civil court, the civil court’s decision shall prevail. Abdul Hamid (2002) pointed out that the issue of jurisdictional conflict between the civil court and the Syariah court is more complex in civil matters compared to criminal matters.

The recognition of the Syariah court in Malaysia was largely due to the amendment of Article 121 of the Federal Constitution which was made in 1988 by inserting a new clause 121(1A) effective from 10<sup>th</sup> June 1988. A new clause (1A) reads:

“(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the *Syariah* courts.”

The courts referred to in Clause (1) here are the High Courts and subordinate courts established under the Federal Constitution. Generally, the amendment is made for the purpose of excluding the civil court from hearing *Shariah* matters which obviously under the jurisdiction of the Syariah court. Professor Ahmad Ibrahim (1990) explained that the important effect of the amendment is to avoid for any conflict in the future between the decisions of the civil and the

*Syariah* court which had previously occurred in a number of cases like *Myriam v. Mohamed Ariff*. According to Harding (1966), the purpose of Article 121(1A) is merely to ensure that decisions made by the *Syariah* court within its jurisdiction are not reversed by the civil court. The amendment also neither have an effect of ousting the jurisdiction of the civil courts to review the *Syariah* court's decision, nor enhancing the *Syariah* court's jurisdiction.

Regarding the effect of amendment of Article 121(1A), the approach to be taken in applying the article was settled in the leading case of *Mohamed Habibullah b. Mahmood v. Faridah bte Dato Talib* [1992] 2 MLJ 793. The Supreme Court in this case affirmed that the effect of the amendment is to take away the jurisdiction of the civil court in respect of any matters within the jurisdiction of the *Syariah* court.

The recent judgment of the court regarding the issue of jurisdiction of the *Syariah* court and the effect of amendment of Article 121(1A) can be found in the judgment of the Federal Court in the case of *Indira Gandhi* in 2018. In *Indira's* case, the Federal Court had made some important remarks. The court was of the view that clause (1A) does not prevent civil courts from exercising jurisdiction in determining matters under federal law, despite the unilateral conversion of the party to Islam. The court referred to the case of *Viran a/l Nagappan v. Deepa a/p Subramaniam and other appeals* [2016] 1 MLJ 585, in which case the Federal Court confirmed the jurisdiction of civil courts to determine divorce and custody matters under the Law Reform (Marriage and Divorce) Act 1976 involving parties to a civil marriage but one of whom has converted to Islam. The pronouncement made by Raus Sharif PCA in *Viran* has ended the confusion as to the purport of Article 121(1A) and his Lordship made it clear that Article 121(1A) was introduced for the purpose of avoiding any conflict between the decision of the *Syariah* court and the civil court, and not to oust the civil court's jurisdiction.

The Federal court in *Indira* also declared that the approach that Article 121(1A) excludes the civil court's jurisdiction is now flawed as the inherent judicial power of civil court in relation to judicial review and questions of statutory or constitutional interpretation cannot be removed even if it involves matter pertaining to Islamic law. This remark is actually affirmed the previous judgment of the Supreme Court made by Hashim Yeop Sani CJ (Malaya) and Harun M. Hashim SCJ in *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor* [1991] 1 CLJ (Rep) 77 in which the court held that, in view of the amendment to Article 121 of the Constitution which excluded the jurisdiction of the civil courts in respect of any matter that comes within the *Syariah* court's jurisdiction, clear provisions should be incorporated in all the State legislations in order to avoid difficulties of interpretation by the civil courts. Nevertheless, the amendment did not take away the jurisdiction of the civil courts to interpret any provisions of the State Enactments enacted for the administration of Islamic law.

In *Nik Elin's* case, there is no issue of conflict of jurisdiction as the petition concerned with the issues of constitutionality and competency of the state law and thus, the only court which has the jurisdiction to determine the matter is the Federal Court as has been provided by the Federal Constitution.

### ***Judicial Power of the Syariah Court***

As noted earlier, the legislative power under the Federal Constitution are divided between the federation and states. The legislative power of states covers a wide range of personal matters

affecting the Muslims and the powers to adjudicate these matters were given to the Syariah courts which shall have jurisdiction only over persons professing the religion of Islam. The Syariah court in Malaysia consists of a three-tier court system, namely, the Syariah Subordinate Court, the Syariah High Court and the Syariah Appeal court.

As regards to its criminal jurisdiction, Syariah court cannot exceed the power vested on it by the Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355). Section 2 of the Act provides that the Syariah court jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof. It can be witnessed that under the Act 355, the Syariah court's criminal jurisdiction is a far cry compared to the jurisdiction of the civil courts. Moreover, Syariah court can only hear cases on matters pertaining to Islamic laws that are listed under List II (State List) in the Ninth Schedule of the Federal Constitution and the provisions embodied in the state's enactment. The prescribed criminal jurisdiction of the Syariah court clearly portrays that Syariah court cannot hear cases related to *hudud* and *qisas* since the punishment provided by the Act 355 is too minimal.

Although the State List stated that State Legislatures may make laws for offences committed by Muslims that against the precepts of Islam, this does not include the power to make criminal laws in general. Since the Syariah court is established under the state law in pursuant to the powers given to it under item 1 of the List II (State List), the jurisdiction of the Syariah court is also dependent on the power conferred to it by the state law. In the Federal Constitution, criminal law is mentioned in Item 4 of the Federal List which means the power to legislate that matter is conferred primarily to Parliament and leaving certain limited powers of legislation to the States as mentioned in Item 1 of the State List including to make laws against the precepts of Islam. With regards to the extent to which the State Legislatures may enact Syariah criminal law, the Federal Court in *Nik Elin*'s case was of the view that even though the state may enact laws that punish offences for Muslim, the phrase "against the precepts of Islam" as provided in Item 1 of the State List is intended to be applied only to offences that are purely religious in nature and nothing else. In *Iki Putra*'s case, the Lordship said characteristics of purely religious offence are something related to namely 1) Aqidah; 2) sanctity to the Islamic religion and its institution and 3) one purely related to morality in Islam. In other words, if the offences are not purely to the precepts of Islam, the powers to legislate on that matter is conferred to Parliament as stipulated in the Federal List. This shows that the states are empowered to enact law on Syariah matter is confined to private and personal law only.

The Federal Court in *Nik Elin* also explained the reason of not making the Syariah Law as the main law of the land is because Malaysia is multi-racial and multi-religious society. Given that, the criminal law needs to be developed such that it could be applied equally to all persons regardless of race and religion. If not citizen either Muslim or Non-Muslim would be subject to different laws and legal systems for the same offences for example on general law like rape, corruption, theft etc. Therefore, the power to enact general criminal law is conferred to Parliament by virtue of Item 4 of the Federal List and for the State Legislatures, the power to do so is limited to matters that is purely religious in nature.

**Table 1: List of Disputed Sections and the Legislative Power under the Federal Constitution**

<b>Disputed Sections in Kelantan Syariah Criminal Code (I) Enactment 2019</b>	<b>Legislative Power</b>	<b>Constitutional validity</b>
Section 11: Destroying/defiling Muslim or non-Muslim place of worship	Parliament	Null and void
Section 13: Selling/giving away child to non-Muslim / morally reprehensible Muslim	State Legislature	Valid
Sections 14, 16, 17: Sodomy, sexual intercourse with corpse/non-human	Parliament	Null and void
Section 30: Words capable of breaking peace	State Legislature	Valid
Section 31: Sexual harassment	Parliament	Null and void
Section 34: Possessing false document, giving false evidence, information or statement	Parliament	Null and void
Section 36 : Anything intoxicating	Parliament	Null and void
Section 37: Gambling	Parliament	Null and void
Section 39: Reducing scale, measure and weight	Parliament	Null and void
Sections 40 & 41: Executing transactions contrary to Hukum Syara'/via usury etc.	Parliament	Null and void
Section 42: Abuse of halal labels and connotation	Parliament	Null and void
Section 43,44,45 and 48: Offering or providing or preparatory of vice offences /preparatory act of offering vice services and muncikari	Parliament	Null and void
Section 47: Incest	Parliament	Null and void

Source: *Nik Elin Zurina Nik Abdul Rashid & Anor v. Kerajaan Negeri Kelantan* [2024] 3 MLRA 1

## Conclusion

It is worthy to take note that the rationale behind the separation of legislative jurisdiction between the Federal and State legislature is to avoid the issue of overlapping or redundancy of legislative jurisdiction between the Parliament and the State Legislative Assemblies. Therefore, the judgment of the apex court in the case of *Nik Elin* should be taken in the right spirit by all the parties concerned particularly the State legislatures to do all the needful in order to ensure that the state laws are in conformity with the Federal Constitution. The petition brought by Nik Elin has nothing to do with the issue of challenging the position of Islam or the Syariah court in this country. In answering the main objective of the study, the answer seems to be negative. The position of the Syariah court remain intact as guaranteed in the Federal Constitution and thus, it can be concluded that the Federal Court's ruling in the case of Nik Elin does not affect or undermine the position of the Syariah court in Malaysia. This article can be considered as an answer to all the questions raised by the public relating to the issue of position of the Malaysian Syariah court following the judgment of *Nik Elin*.

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