The Fundamental Impact on the Malaysian Legal Framework by the Federal Court decision of Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors [2018] 1 MLJ 545

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Abstract
The plurality of the Malaysian Legal System has brought both a richer expanse of law, and a cross-jurisdictional conflict in the realm of personal law. This is demonstrated in wavering judicial judgements that have been passed over time. The contention between the Syariah and Civil Courts; the requirement of consent from both parents when converting minors and the protection of judicial independence and the separation of powers are areas of the law which have either been in doubt or conflict before the Federal Court decision in the case of Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak (Indira Gandhi's case).

Firstly, the Article provides for an overview of the case of Indira Gandhi; the facts, issues and the judicial development that led to the Federal Court decision. Secondly, the Article analyses and elucidates the rationality behind the Federal Court decision and explains why the decision of this case has impacted and changed the Malaysian legal framework for the better.

Keywords: Jurisdiction, Syariah Courts, Civil Courts, Basic structure doctrine, constitution, Judicial review, constitutionality of religious conversion

1. Introduction

"The courts are the only defence of the liberty of the subject against departmental aggression …". These were the words stated by the respected Raja Azlan Shah Ag CJ in the Federal Court case of Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd, where he emphasised the importance of the judiciary's role when it comes to protecting the liberty of the people by adjudicating on the lawfulness of state actions.[1] It is therefore an inherent responsibility of the court to bring clarity and stability to the law by interpreting statutes in a manner which protects the very notion of constitutionalism. Such a result may be achieved

* "A tribute to my grandfather, O.L.M. Salahudeen".
[1] [1979] 1 MLJ 135.

by interpreting the law prismatically as suggested by Gopal Sri Ram FCJ in the case of Lee Kwan Woh v Public Prosecutor especially when it comes to protecting the fundamental rights of the individual.[2] Gopal Sri Ram FCJ stated that:

> When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II.[3]

Therefore, the approach he propagated is based on a liberal and generous interpretation of the constitution which promotes and advances the fundamental liberties of the individual.[4] He further stated that any provision that limits the fundamental liberties must be given a restrictive interpretation by the courts.[5]

The Federal Court decision in the case of Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals is an ideal example of the judiciary upholding such principles and protecting the very hallowed foundations of the Malaysian Legal system.[6]

The decision of the Federal Court has impacted the Malaysian legal framework in several ways, bringing clarity and coherence to certain areas of the law which have always been in conflict and doubt. The decision has clarified the jurisdictional clash between the Syariah Courts and the Civil Courts.[7] It has reinstated and reinforced the importance and necessity of obtaining the consent of both the parents when it comes to the religious conversion of children. Lastly, by following the case of Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat,[8] it has reincorporated the fundamental basic structure doctrine into the Malaysian constitution which in turn has implications on the independence of the judiciary and the separation of powers within the Malaysian legal framework.

2. The Pre-Indira Gandhi position

2.1 The clash of jurisdiction between the Syariah and Civil courts

Indira Gandhi's case[9] made a reverberating impact because it conclusively dealt with the inflamed contention that previously existed. This was whether the civil or the Syariah court had

[2] [2009] 5 MLJ 301.
[3] ibid 8 [8].
[4] Shad Saleem Faruqi, 'Law Makers Or Law Finders? - Reflecting On The Law | The Star Online' (Thestar.com.my, 2015) <https://www.thestar.com.my/opinion/columnists/reflecting-on-the-law/2015/02/05/law-makers-or-law-finders-the-three-branches-of-government-have-many-points-of-contact-but-their-ove/> accessed 11 June 2019.
[5] *Lee Kwan Woh* (n 2) 9 [13].
[6] [2018] 1 MLJ 545 (FC).
[7] Srimurugan Alagan, 'Understanding Key Issues in the Federal Constitution' (2018) LR 9, 14.
[8] [2017] 3 MLJ 561 (FC).
[9] *Indira Gandhi* (n 6).

equal status and power. Before 1988 this position was clear, the Shariah Courts were subject to review by the civil courts which rendered the secular court dominant.

However, with the advent of the Constitutional Amendments of 1988[10] the intertwined adjudicatory relationship was severed. Among the changes was the insertion of article 121 1A, which states that the civil courts '*shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts*.' [11] The jurisdiction of the Shariah court is fleshed out in Item 1 of List II in the Ninth Schedule of the Constitution. The crux of this State List is Islamic law as well as personal and family law of Muslim people, including marriage, divorce, maintenance and guardianship etc.

Prior to Indira Gandhi's case the civil courts were reluctant to transcend the borders between secular and Islamic law. The year of 2004 brought forth a case that was the '*spark that ignited a full throttled campaign between*' liberal and conservative legal activists.[12] Shamala v Jeyaganesh's[13] case pronounced the " … contestation of jurisdiction [that] began under Art. 121(1A) …". [14] In this case the parties were initially married under civil law[15]. After four years the husband converted himself and their children to Islam, without his wife's consent or knowledge. The wife applied to the High Court seeking a declaration that the conversion of their two children to Islam was null and void. Faiza Tamby Chik J dismissed the application on the grounds that '*the Syariah Court is the qualified forum to determine the status of the two minors.*'[16]

Moreover, in Hj Raimi bin Abdullah v Siti Hasnah Vangarama bt Abdullah[17] the plaintiff's application to nullify her conversion to Islam was rejected. She applied on the grounds that because she was a minor at the material time, she did not consent to be converted. The Federal Court refused to adjudicate on the matter, with the contemporary Chief Justice Arifin Zakaria stating that '*the Syariah Court shall have the exclusive jurisdiction to determine whether a person is a Muslim or not.*'[18]

Furthermore, the civil and Shariah courts crossed paths again in the '*most well-known Malaysian court case*'[19] of Lina Joy.[20] Here a woman of Malay-Muslim background applied to the National

[10] Law of Malaysia, Act A704, Constitution (Amendment) Act 1988.
[11] Federal Constitution of Malaysia.
[12] Tamir Moustafa, 'Liberal Rights versus Islamic Law? The Construction of a Binary in Malaysian Politics' (2013) 47(4) Law & Society Review, pp. 771-802.
[13] Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor [2004] 2 MLJ 648.
[14] P Rajanthiran R Sivaperegasam, The Impact of Art. 121 (1a) 1988 On Art. 11 - The Freedom of Religion in The Federal Constitution of Malaysia: The Apostasy Case of Lina Joy. Sejarah: Journal of the Department of History, [S.l.], v. 26, n. 1, Nov. 2017. ISSN 1985-0611.
[15] That is according to the Law Reform (Marriage Divorce) Act 1976, Act 164.
[16] *Shamala* (n 13).
[17] [2014] 3 MLJ 757 FC.
[18] Tamir Moustafa, The Politics of Religious Freedom in Malaysia (2014) 29 Md. J. Int'l L. 481.
[19] Lina Joy v Majlis Agama Islam Wilayah Persekutuan [2007] 4 MLJ 585.
[20] ibid.

Registration Department (NRD) to remove the word 'Islam' from her Identity Card. The NRD refused to do so without an apostasy declaration from the Syariah court. She argued that this refusal contravened her constitutional right to freedom of religion.[21] The case marked a glaring conflict between the two legal systems. The question arose whether or not the civil courts could adjudicate on personal matters relating to Muslim people, if they concerned freedoms found in the Constitution. The Federal Court, in a hair-splitting judgement, answered in the negative. It held that it was not within the civil court's jurisdiction to decide whether or not a person was Muslim. Thus, Lina Joy's appeal failed.

These cases illustrated that '*the civil courts were beginning to cede broad legal authority when issues around Islam were involved*'[22]. This was '*even when it meant trampling on individual rights enshrined in the Federal Constitution and even when non-Muslims were involved*.'[23] Theoretically speaking the strict division of the courts' jurisdiction was intended to create clarity. However, practically the opposite occurred, when familial and personal conflicts arose in cases between Muslim and non-Muslim people.

Not only, did the Civil courts concede judicial reviewing of Syariah decisions, it deduced that both courts were on equal standing. Strictly speaking, there is 'nothing' in the Constitution says that the Syariah courts is of equal standing to the civil courts' nor does it stipulate '*that the civil courts cannot maintain their traditional supervisory role over the Syariah courts when they act outside their boundaries.*'[24] However, in cases such as Subashini a/p Rajasingam v Saravanan a/l Thangathoray it was stated that the courts '*they are of equal standing under the Federal Constitution*.' [25] This was purportedly due to Parliament's intention '*to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah Court*'[26]. Thusly rendering both courts' status identical.

2.2 The consent of both parents before the conversion of a child

The main bone of contention in the conversion of minors is not their individual capacity. It is rather that of one parent unilaterally converting them, without the consent of the other parent. Section 5 of the Guardianship of Infants Act 1961 stipulates the equality of both parents in matters concerning their children.[27] Interestingly enough, this provision has been used to both justify and negate a single parent's conversion of a child without the other's consent.

[21] Article 11 of the Federal Constitution of Malaysia.
[22] P Rajanthiran R Sivaperegasam (n 14).
[23] ibid.
[24] P Rajanthiran R Sivaperegasam (n 14).
[25] [2008] 2 MLJ 147.
[26] Mohamed Habibullah bin Mahmood v Faridah bt Dato' Talib [1992] 2 MLJ 793.
[27] Act 351.

In Subashini a/p Rajasingam v Saravanan a/l Thangathoray[28] the court held that the word 'parent' in Article 12(4), which states a minor's religion shall be decided by their parent, 'means a single parent'.[29] Thus, '*either husband or wife has the right to convert a child of the marriage to Islam*'. In this case after years of a civil marriage, the husband converted himself and the couple's eldest child to Islam without his spouse's consent. The court dismissed the wife's claim to nullify the conversion once again.

The facts of this case are very similar to that of Shamala v Jeyaganesh.[30] In both, the converted spouse, being the natural fathers of their respective children, had the right to unilaterally convert them without the mother's consent. The non-Muslim parties did not have an avenue for remedy. This is because they did not have standing in the Syariah court and the civil court refused to charter the realm of Islamic family law. The result of this discrepancy in cross-jurisdictional matters was recognised in Chang Ah Mee's case.[31] Here it was held that allowing '*just the father or mother to choose the religion would invariably mean depriving the other of the constitutional right under art 12(4)*'.[32] However, the aforementioned was overruled by Shamala's case.[33]

Narizan Abdul Rahman in his article recognized this inconsistency in judicial opinion as to whether the consent of both parents is required when converting a minor. He highlighted the judicial incoherence where in some cases the consent of one parent was sufficient to convert a child, where as in other cases the consent of both parents was required. The author called for a reform in this area of the law but failed to propose any amendments.[34]

Zaini Nasohah and others provided an analysis of the religious status of a child where one parent converts to Islam. The authors put forward the view that based on a study on the Islamic School of Laws (*Mazhab)*, where such a conflict arises the child should be given custody to the parent that is a Muslim and should be brought up as a Muslim.[35]

Nuraisyah Chua Abdullah provided for an academic analysis which is based on the religious conversion of a child where one parent converts to Islam and subsequently divorces their spouse. She did not base her suggested reforms on whether or not the consent of one or both parents are required. Instead, she put forward two different approaches the courts may take

[28] [2008] 2 MLJ 147.
[29] ibid.
[30] *Shamala* (n 13).
[31] *Chang Ah Mee v Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah & Ors* [2003] 5 MLJ 106.
[32] Ibid;
[33] *Shamala* (n 13).
[34] Narizan Abdul Rahman, 'Conversion of Minor to Islam in Malaysia: Whither Consent of Parents?' (2008) 16 Jurnal Syariah 585-602.
[35] Zaini Nasohah, Abdel Wadoud Moustafa Mourdi Elseoudi and Mohd Izhar Ariff Mohd Kashim,'Status Agama Anak Bagi Ibubapa yang Memeluk Agama Islam di Malaysia.' (2010) 18(2) Jurnal Syariah 433-452.

depending on whether the child has pre-existing religious beliefs and practices or where the child does not.[36]

Where the child possesses pre-existing religious beliefs, Nuraisyah referred to several English cases and proposed that the courts should grant custody to the parent who can best allow the child to continue their existing religious practices, as this is in the child's best interest and welfare. Similarly, where the child does not possess pre-existing religious beliefs, Nuraisyah proposes that once the court grants guardianship and custody of the child to one of the parents, the chosen parent/guardian should have the right to decide on the child's religion. Although her proposal did not resolve the conflict as to whether the consent of both parents is required before the conversion of a child, it is certainly worth mentioning.

Therefore, there was an evident inconsistency of judicial and academic opinion when it came to this area of the law prior to the Indira Gandhi case.

2.3 The basic structure doctrine

It is of popular academic opinion that the basic structure doctrine found its roots in the Indian Supreme court case of Kesavananda Bharati Sripadagalvaru & Ors v State of Kerala & Anor.[37] However, according to Surendra Ananth, the doctrine gained its recognition in the case of Sajjan Singh v Rajasthan, in Mudholkar J's minority judgement.[38] In essence, His Lordship contended that the features of the Federal Constitution that *'are an amplification or concretisation of the concepts set out in the preamble*' cannot be amended by Parliament.

In Kesavananda, the Indian Supreme Court expressly stated that there are certain features of the Federal Constitution that cannot be amended by Parliament as this would destroy the basic structure of the constitution. Shelat and Grover JJ listed features that were representative of the basic structure of the Indian Constitution, among which was constitutional supremacy, separation of powers and the fundamental rights of the individuals.[39] The courts expanded upon Mudholkar J's minority judgement, and stated that the basic structure is discernible from the whole scheme of the Indian constitution and is not restricted to the preamble.[40]

Therefore, the basic structure doctrine is an important element especially for countries such as Malaysia which are governed by a constitutional monarchy. The doctrine recognizes that there are certain features of the constitution that are the foundational pillars which support it and should not be removed. These features cannot be amended by any statute unless expressly

[36] Nuraisyah Chua Abdullah, 'The Religion of the Child in Cases of One Parent's Conversion to Islam - A Review' [2007] LR 653.
[37] AIR 1973 SC 1461.
[38] AIR 1965 SC 845 at p 865.
[39] *Kesavananda* (n 37) 1603.
[40] ibid.

sanctioned by the Federal constitution itself, and if any such attempt is made, then the courts can strike down such legislation as unconstitutional.[41] This was stated by Gopal Sri Ram FCJ in the case of Sivarasa Rasiah v Badan Peguam Malaysia & Anor.[42] The features which form part of the basic structure of the constitution are to be decided on a *'case by case basis'*,[43] but among them are the independence of the judiciary and the separation of powers.

Unfortunately, after 1988, the judicial independence was in a weakened and injured state.[44] This was primarily due to the aftermath of the 1988 Judicial Crisis, where the Constitution (Amendment) Act 1988[45] was passed. In addition to the insertion of Article 121 (1A), Article 121 of the Federal constitution was also amended and provided that the powers of the judiciary are vested in them by the Federal law. The amended Article 121 states that, " … the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law."

This meant that the parliament could decide the powers of the judiciary and that the parliament can pass laws which restricts or prevents judicial review.[46] This was seen in the case of PP v Kok Wah Kuan,[47] where it was stated by Abdul Hamid Mohamad PCA that, "After the amendment (to Article 121), there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts". Therefore, Abdul Hamid Mohamad PCA verified that the amendment had indeed damaged the independence of the judiciary, thereby affecting the separation of powers and the upholding of the rule of law in the federation.

Thus, prior to the case of Indira Gandhi, there was conflicting and inconsistent judicial opinion as to whether the basic structure doctrine is part of the Malaysian legal framework, especially in light of the 1988 constitutional amendment. In the case of Loh Kooi Choon v Government of Malaysia,[48] the Federal Court appeared to have rejected the basic structure doctrine. Raja Azlan Shah FCJ stated that:

> There have also been strong arguments in support of a doctrine of implied restrictions on the power of constitutional amendment. A short answer to the fallacy of this doctrine is that it concedes to the court a more potent power of constitutional amendment through

[41] Alagan (n 7) 5.
[42] [2010] 3 CLJ 507.
[43] ibid.
[44] Tan Seng Teck, '"Exclusionary Rule, Judicial Integrity and Activism - The Case of Mapp v Ohio": Should Malaysia Adopt a Similar Practice?' [2006] LR 620.
[45] Constitution (Amendment) Act 1988.
[46] Andrew Harding, 'The 1988 Constitutional Crisis in Malaysia' (1990) 39 The International and Comparative Law Quarterly 57-58.
[47] [2008] 1 MLJ 1.
[48] [1977] 2 MLJ 187.

> judicial legislation than the organ formally and clearly chosen by the Constitution for the exercise of the amending power.[49]

In the subsequent case of Phang Chin Hock v Public Prosecutor,[50] Suffian LP impliedly rejected the doctrine by stating that it is not necessary to assess whether the doctrine should be applicable or not. In his reasoning, he had fundamentally agreed with Raja Azlan Shah's judgement in Loh Kooi Choon[51]. This stance was primarily based on the contention that the Indian constitution is different from the Malaysian constitution, as it has an express preamble which the Malaysian constitution does not possess, and therefore the basic structure doctrine has no grounds in Malaysia. However, Surendra Ananth strongly rejects this basis of reasoning. He contends that " … the doctrine was not one that drew its existence purely from the preamble. It owes its existence to scheme of the Constitution as a whole. This was made clear … in Keshavananda Bharati."[52]

Subsequently, in Sivarasa, Gopal Sri Ram FCJ revived the doctrine and expressly cited the case of Keshavananda Bharati with acceptance.[53] The High court in Public Prosecutor v Gan Boon Aun,[54] referred to Sivarasa, and held that the separation of powers formed part of the basic structure doctrine in Malaysia. This decision may have been an attempt to circumvent the amendment to Article 121, but unfortunately the Court of Appeal set aside the judgement on the basis that it contravened the Federal Court decision in the case of Kok Wah Kuan.[55]

Therefore, there has been an evident disparity of judicial opinion as to whether the basic structure doctrine is part of the Malaysian Legal framework. If it is found to be so, this would circumvent the 1988 constitutional amendment to Article 121 since the amendment infringed upon the separation of powers and judicial independence in Malaysia, which are essential elements of the basic structure doctrine. As it will be established, this aspect of the Malaysian legal framework was clarified in the case of Indira Gandhi.

3. The Indira Gandhi case

3.1 Facts of the case

The Appellant, Indira Gandhi (wife) and the Respondent, Patmanathan (husband) got married and their marriage was registered under the Law Reform (Marriage and Divorce) Act 1976[56]. They had three children who were aged, 12 years, 11 years and 11 months when the Appellant

[49] ibid 190.
[50] [1980] 1 MLJ 70.
[51] *Loh Kooi Choon* (n 48).
[52] Surendra Ananth, 'The Basic Structure Doctrine: Its Inception and Application in Malaysia' [2016] 1 MLJ cxlvi, 9.
[53] *Sivarasa* (n 42) 342.
[54] [2012] 9 CLJ 622.
[55] *Kok Wah Kuan* (n 47)
[56] Law Reform (Marriage and Divorce) Act 1976.

had submitted for judicial review on the 9th of June 2009. The husband had converted to Islam on the 11th of March 2009. At the time, the two older children were with the mother, whereas the youngest was with the father.

The Appellant later received documents establishing the conversion of the three children to Islam. These documents included the conversion certificates; granted by the Islamic Religious Affairs Department of Perak. The children were registered as Muslims by the Registrar of Muallaf ("registrar"). The children had no knowledge of nor were they present before the Registrar when the registration and conversion took place.

The Appellant instituted an action for Judicial Review to the High Court to obtain a declaration that the certificates were void, since the legal procedure followed by the registrar in their issuance had breached the provisions of sections 96 and 106(b) of the Administration of the Religion of Islam (Perak) Enactment 2004 ("Perak Enactment 2004")[57], sections 5 and 11 of the Guardianship and Infants Act 1961 (GIA) and Article 12(4) of the Federal Constitution. The husband was named as the 6th Respondent and the others were named as the first to the fifth Respondents.

3.2 Decision of the Courts

The Appellant's claim for judicial review was allowed by the High Court and the certificates were quashed and nullified. The High Court held that they had the jurisdiction to review the matter and to ensure that the procedures under the Perak Enactment 2004 were adhered to by the Registrar. The ouster clause under Section 101(2) was held not to oust their jurisdiction where there is a failure of compliance with statutory procedure.

The Respondents appealed to the Court of Appeal, and the decision was reversed by the majority. They held that the validity of the conversion was an issue that fell within Syariah Court jurisdiction, therefore the High Court had no power to challenge the decision of the registrar. Furthermore, they held that the registration was proof that the conversion was done to the satisfaction of the Registrar and therefore the ouster clause was valid.

The Appellant then appealed to the Federal Court and was granted leave on 19th of May 2016, where three issues were to be addressed:

i) Whether the High Court has the jurisdiction to review the actions of the Registrar of Muallafs who are Syariah authorities exercising statutory powers vested by the Perak Enactment 2004?

[57] Administration of the Religion of Islam (Perak) Enactment 2004.

ii) Whether a child from a marriage under the Law Reform (Marriage and Divorce) Act 1976 (civil marriage) who is below 18 years must comply with both section 96(1) and 106(b) of the Perak Enactment 2004 before their conversion can be registered?
iii) Whether both the parents of a child of a civil marriage must consent before a certificate of conversion to Islam can be issued for the child?

With regards to the first issue, the courts held that the Appellant is challenging legality and administrative procedure that was followed by the Registrar of Muallafs and not the conversion itself, therefore the matter falls within the purview of judicial review. Under Article 121 (1) of the Federal Constitution, the judicial power is vested with the High Courts, and section 25 and para 1 of the Schedule of the Courts of Judicature Act 1964 and Order 53 of the Rules of Court 2012 confers jurisdiction on the High Courts to exercise supervisory powers. Thus, the power of judicial review vests with the High Court and Article 121 (1A) does not oust the jurisdiction of the civil courts. The High Court therefore had the jurisdiction to review the actions of the registrar and to question the legality of the proceedings in issuing the certificates.

In addressing the second issue, the Federal Court highlighted that section 100 of the Perak Enactment makes it obligatory for the Registrar to be satisfied that the requirements are fulfilled under section 96(1) which requires the individual to utter the declaration of faith (shahadha), and 106 (b) which requires the written consent of a parent where the child is less than 18 years. The Federal Court held that both requirements must be fulfilled cumulatively for the certificate of conversion to be valid. Since the children were never present before the Registrar and never uttered the declaration of faith, the procedure was not complied with and the legality of the conversion and registration was declared void.

Lastly, in addressing third issue, the court held that since religion affects the wellbeing and future of the child, Article 12(4) should be given a purposive interpretation and would thereby require the collective consent of both parents (if both are alive). Furthermore, since the children were born out of a civil marriage, the husband remains bound to the provisions of the Guardianship of Infants Act 1961. Therefore, sections 5 and 11 of the GIA which grant equality of parental rights applies to this case, irrespective of the husband's conversion to Islam. Thus, the consent of both the parents was required before a legal certificate of conversion to Islam could be provided for the children.

4. The Post-Indira Gandhi position

4.1 The clash of jurisdiction between the Syariah and Civil courts

The primary reason for the clash of jurisdictions between the Civil and Syariah Courts always leads back to the interpretation of Article 121 (1) and Article 121 (1A) of the Federal Constitution. However, after the Federal court case of Indira Gandhi, it was clarified that the Civil courts and the Syariah courts do not possess equal status and powers. Articles 121(1) and (1A) of the

Federal constitution simply defines the two courts' respective sphere of operation and does not grant the Syariah Courts the same ambit of power as the Civil High Court. By virtue of Article 121(1), which states that '*the judicial power is vested in the High Courts'*, 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, the High Courts are granted judicial supervisory powers. Section 25(2) of the CJA states that:

> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule.
> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.[58]

Paragraph 1 to the Schedule of the CJA reads:

> Prerogative writs
>
> 1. Power to issue to any person or authority directions, orders or writs including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.[59]

The significance of this is that the High Courts, as stated in Indira Gandhi, have the power of judicial review and can review the legality of any public authority even if the public authority is exercising their powers in relation to Syariah matters. Zainun Ali FCJ cited the English case of Anisminic Ltd v The Foreign Compensation Commission and Another [60]in order to prove this point and establish that in circumstances where a Syariah executive body exercises their powers in an ultra vires manner or where they fail to comply with the legal procedure, the Civil Courts can intervene, review and hold such a decision as a nullity even though the subject matter may fall within the domain of the Syariah courts.

The Syariah Courts on the other hand, do not possess the same judicial power of the High court. In Indira Gandhi, the Federal court followed the case of Latifah bt Mat Zin v Rosmawati bt Sharibun & Anor[61] and held that the status of the Syariah courts is similar to that of the Sessions Courts or inferior tribunals,[62] since they are established by the State Legislatures and derive their power from within the ambit of the 9th Schedule of the Federal Constitution.

Furthermore, the Syariah courts do not comply with the with the constitutional safeguards provided under Part IX of the Federal Constitution, which ensures judicial independence and provides for the constitutional protection of the tenure of the superior court judges (High Court,

[58] Courts of Judicature Act 1964.
[59] ibid.
[60] [1969] 2 AC 147 (HL).
[61] [2007] 5 MLJ 101.
[62] Alagan (n 7) 14.

Court of Appeal and Federal Court). Therefore, it is evident that the Syariah courts are below the High Courts in terms of power and scope, and they do not have the necessary constitutional safeguards to adequately exercise supervisory powers such as judicial review.

Generally, the High Courts do not possess the jurisdiction or power to *adjudicate* in matters which fall within the jurisdiction of the Syariah courts. These are usually issues involving personal Islamic principles and laws, such as those within the State list or Concurrent list of the Federal constitution. Apostasy is an example of one of these issues.[63] However, after Indira Gandhi it is clear that the decisions of the Syariah Court may be *reviewed* by the High Court on the basis of their legality through the judicial review process.

There are two schools of thought when it comes to analysing and understanding the scope of the jurisdiction of the Syariah Court. One looks to the state legislation, such as the Perak enactment when jurisdictional clashes with the Civil Court arise, whereas the other looks to the Federal Constitution. It is wrong to look at the state legislation first because different states apply the Syariah law in a different manner.[64] Instead, as was decided by the Federal Court in Indira Gandhi, by simply looking at Item 1 of the Federal Constitution first, which reads that the Syariah Courts, " … shall have jurisdiction only over persons professing the religion of Islam …", it can be concluded that the moment one party to a conflict is *not* a Muslim, the Civil Courts will have jurisdiction regardless of whether or not the other party is a Muslim.

Therefore, as stated by Zainun Ali FCJ, the Civil Courts should not decline to hear a case involving Syariah matters simply based on the fear of possessing no jurisdiction, instead they should scrutinize the nature of the matter first, since Article 121 (1A) does not automatically oust the jurisdiction of the Civil court when it comes to Syariah matters.[65] Where the party before the court is a non-Muslim and the subject matter is within the jurisdiction of the Syariah Courts, the Civil courts will have jurisdiction as the non-Muslim has no locus in a Syariah Court. Where the parties involved are Muslim but the subject matter is outside the purview of the Syariah courts, the Civil Courts will also have jurisdiction.[66] Thus, the distinction between the Syariah and Civil courts jurisdictions was clarified and affirmed by the Federal court in Indira Gandhi.

4.2 The consent of both parents before the conversion of a child

One of the most significant aspects of the decision in Indira Gandhi was the clarification as to whether the word "parent" under Article 12(4) of the Federal Constitution required the consent of a single parent or both parents when it comes to the religious conversion of a child below the age of 18. The Federal Court decided that the consent of both parents is required before such a

[63] Mohd Altaf Hussain Ahangar, 'Freedom of Religion in Malaysia: The Realistic Appraisal' [2008] LR 400.
[64] Segaran M.K., 'Forum Competition in Conversion Cases: A Review of Pathmanathan v Indira Ghandi (Court of Appeal decision)' [2016] LR 32.
[65] Indira Gandhi (n 6) 33.
[66] Alagan (n 7) 14.

decision is made. In the rationalization of this decision, the court referred to the interpretive guide in the Eleventh Schedule of the Federal Constitution which states that singular words in the constitution can be interpreted as plural and plural words can be interpreted as singular. The court acknowledged that such a momentous decision affects the welfare and future of the child, therefore Article 12(4) should be given a purposive interpretation and not a literal one.[67] This is especially so when interpreting the fundamental liberties under the constitution, which article 12(4) falls under, as was stated in the case of Lee Kwan Woh.[68]

The Federal court also clarified the conflict as to whether the Guardianship of Infants Act 1961 could apply to a spouse who has converted to Islam but has children who were born out of a civil marriage. The court drew comparisons between Law Reform (Marriage and Divorce) Act 1976 (LRA) and the GIA, by stating that the LRA requires a converted spouse to be bound to his civil marriage obligations even after conversion to Islam, irrespective of section 3(3) of the act which excludes the act from applying to Muslims.

Likewise, although section 1(3) of the GIA excludes the act from applying to Muslims, this does not apply where the spouse is a convert and was originally in a civil marriage. Therefore, since section 5 and 11 of the GIA gives equal rights to both parents in the upbringing of their children, the husband remained bound by its provisions. Thus, the Federal Court clarified once and for all that Article 12(4) read together with the Eleventh Schedule of the Federal Constitution, along with the application of sections 5 and 11 of the GIA; the consent of both parents will always be required before converting a child below the age of 18, if both the parents are alive.[69]

The primary reason for the conflict of interpretation of Article 12(4) is due to the translation differences between the Bahasa Malaysia and the English version of the constitution. The phrase *'ibu atau bapa'* or *'his father or mother'* under the original Bahasa version of the constitution denotes a parent in the singular, which indicates that a single parent can make the decision.[70] By virtue of 160B of the Federal Constitution, where there is a conflict of interpretation due to translation, the Yang di Pertuan Agong (YDPA) can prescribe the national language as the authoritative text, and the national language would take precedence over the English version.

Interestingly enough, the only reason why the Federal Court declared the English version as the authoritative text in this case was because the respondents had failed to obtain the required prescription from the YDPA under Art 160B in order to declare the national language as authoritative.[71] It is therefore submitted that, had the respondents obtained the required

[67]Maizatul Nazlina, Rahmah Ghazali, 'Federal Court: Unilateral conversion of Indira Gandhi's 3 children is null and void' (The Star Online, 2018) <https://www.thestar.com.my/news/nation/2018/01/29/federal-court-unilateral-conversion-of-indira-gandhis-3-children-is-null-and-void/> accessed 17 November 2018.
[68] Lee Kwan Woh (n 2).
[69] Indira Gandhi (n 6) 48.
[70] Indira Gandhi (n 6) 42.
[71] ibid.

prescription from the Yang di Pertuan Agong, the outcome or judgment of the Federal Court may have possibly been very different since the respondents would have had a stronger case and this ground of appeal may have been defeated.

4.3 The basic structure doctrine

The impact of the case of Indira Gandhi is momentous on this front, as the Federal Court expressly recognized the independence of the judiciary and the application of judicial review as a part of the basic structure of the constitution, which therefore cannot be affected by Article 121(1A) or by the legislature as it is '*intrinsic to, and arises from, the very nature of a constitution*'.[72] The Federal Court made reference to the words of Professor Wade,[73] where he states that:

> … it is always for the courts, in the last resort, to say what is a valid Act of Parliament; and that the decision of this question is not determined by any rule of law which can be laid down or altered by any authority outside the courts. It is simply a political fact.

In establishing their reasoning, the Federal Court in Indira Gandhi followed the Federal Court judgment in Semenyih Jaya, which expressly stated that the courts are not a subordinate of the legislature and the judicial power " … is vested exclusively in the High Courts, and the judicial independence and the separation of powers are recognized as features in the basic structure of the Constitution …".[74] However, since the wider concepts of judicial independence and separation of powers are meaningless without the power to actualize them,[75] the Federal court in Indira Gandhi had expanded on this further by expressly declaring that the power of *judicial review* vests with the High Court and this power cannot be ousted by the legislature. Srimurugan Alagan, in his analysis of the case of Indira Gandhi, cited with approval the decision of the Federal Court and stated that:

> It is well settled that this basic structure cannot be abrogated or removed by any constitutional amendment by the Parliament. The principle that Parliament cannot amend the Federal Constitution to alter the basic structure of the Federal Constitution is now part of our jurisprudence.[76]

[72] Calvin Liang, Sarah Shi, 'The Constitution of Our Constitution, A Vindication of the Basic Structure Doctrine' (2014) Singapore Law Gazette, 12.
[73] H.W.R Wade, 'The Basis of Legal Sovereignty' (1955) 13 CLJ 172.
[74] Indira Gandhi (n 6) 18.
[75] Surendra Ananth, 'The significant implications of the Indira Gandhi decision' (The Malay Mail, 2018) <https://www.malaymail.com/s/1565969/the-significant-implications-of-the-indira-gandhi-decision-surendra-ananth> Accessed 17 November 2018.
[76] Alagan (n 7) 6.

The judgment in Indira Gandhi is therefore one of the most important decisions after the 1988 Judicial crisis, as it reinforces the independence of the judiciary and brings back life to the basic structure doctrine which had once eroded as a result of jurisdictional clashes, breaches of the separation of powers, and other legal challenges which were faced by the Malaysian legal system.

5. Conclusion

The Federal court case of Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals has certainly impacted the Malaysian legal system and has brought clarity to the three issues as demonstrated in this article. However, it must not be forgotten that the rulings of the case can be overruled by another Federal court decision. Although, this is very unlikely since the judgment was based on the progressive notions of gender equality, child welfare, democracy, and the spirit of constitutionalism. Therefore, the Federal court decision will certainly act as a landmark that shall hopefully encourage other judges in the judiciary to interpret legislation in a similar prismatic manner, especially when it comes to the fundamental rights of an individual.

REFERENCES

Legislation

Constitution (Amendment) Act 1988.
Federal Constitution of Malaysia.
Guardianship Of Infants Act 1961.
Law Reform (Marriage Divorce) Act 1976.

Cases

Anisminic Ltd v The Foreign Compensation Commission and Another [1969] 2 AC 147.
Chang Ah Mee v Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah &Ors [2003] 5 MLJ 106.
Hj Raimi bin Abdullah v Siti Hasnah Vangarama bt Abdullah and another appeal [2014] 3 MLJ 757.
Indira Gandhi a/pMutho v Pengarah Jabatan Agama Islam Perak &Ors And Other Appeals [2018] 1 MLJ 545.
Kesavananda Bharati Sripadagalvaru & Ors v State of Kerala & Anor (1973) 4 SCC 225.
Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor [2007] 5 MLJ 101.
Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301.
Lina Joy v Majlis Agama Islam Wilayah Persekutuan [2007] 4 MLJ 585.
LohKooi Choon v Government of Malaysia [1977] 2 MLJ 187.
Mohamed Habibullah bin Mahmood v Faridahbte Dato' Talib [1992] 2 MLJ 793.
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135.
Phang Chin Hock v Public Prosecutor [1980] 1 MLJ 70.
PP v Gan Boon Aun [2012] 9 CLJ 622.
PP v Kok Wah Kuan [2008] 1 MLJ 1.
Sajjan Singh v Rajasthan AIR 1965 SC 845.
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat [2017] 3 MLJ 561.
ShamalaSathiyaseelan v Dr Jeyaganesh C Mogarajah& Anor [2004] 2 MLJ 648.
SivarasaRasiah v Badan Peguam Malaysia & Anor [2010] 3 CLJ 507.
Subashinia/pRajasingam v Saravanan a/l Thangathoray [2008] 2 MLJ 147.
Subashinia/pRajasingam v Saravanan a/l Thangathoray and other [2008] 2 MLJ 147.
Teoh EngHuat v Kadhi Pasir Mas & Anor [1990] 2 MLJ 300.

Book

Faruqi S, Document of Destiny the Constitution of the Federation of Malaysia (Star Publications 2008).

Journal Articles

Alagan S., 'Understanding Key Issues in the Federal Constitution' (2018) LR 9.
Harding A., 'The 1988 Constitutional Crisis in Malaysia' (1990) 39 The International and Comparative Law Quarterly 57.
Liang C., Shi S., 'The Constitution of Our Constitution, A Vindication of the Basic Structure Doctrine' (2014) Singapore Law Gazette.
Masum A., 'The Rule of Law Under the Malaysian Federal Constitution' [2009] 6 MLJ 100.
Mohd Altaf Hussain Ahangar, "'Freedom of Religion in Malaysia: The Realistic Appraisal' [2008] LR 400.

Moustafa T., 'Liberal Rights versus Islamic Law? The Construction of a Binary in Malaysian Politics' (2013) 47(4) Law & Society Review 771.

Moustafa T., 'The Politics of Religious Freedom in Malaysia' (2014) 29 Md. J. Int'l L. 481.

Narizan Abdul Rahman, 'Conversion of Minor to Islam in Malaysia: Whither Consent of Parents?' (2008) 16 Jurnal Syariah 585.

Nuraisyah Chua Abdullah, 'The Religion of the Child in Cases of One Parent's Conversion to Islam - A Review' [2007] LR 653.

Segaran M.K., 'Forum Competition in Conversion Cases: A Review of Pathmanathan v Indira Ghandi (Court of Appeal decision)' [2016] LR 32.

Sivaperegasam P.R.R., 'The Impact Of Art. 121 (1a) 1988 On Art. 11 - The Freedom Of Religion In The Federal Constitution Of Malaysia: The Apostasy Case Of Lina Joy. Sejarah: Journal of the Department of History' (2017) 26(1) Journal of the Department of History 117.

Tan Seng Teck, '"Exclusionary Rule, Judicial Integrity and Activism - The Case of Mapp v Ohio": Should Malaysia Adopt a Similar Practice?' [2006] LR 620.

Wade H., 'The Basis of Legal Sovereignty' (1955) 13 CLJ 172.

Zaini Nasohah, Abdel Wadoud, Moustafa Mourdi Elseoudi and Mohd Izhar Ariff Mohd Kashim, 'Status Agama Anak Bagi Ibubapa yang Memeluk Agama Islam di Malaysia' (2010) 18(2) Jurnal Syariah 433.

Websites

Ananth S., 'The significant implications of the Indira Gandhi decision' (The Malay Mail, 2018) <https://www.malaymail.com/s/1565969/the-significant-implications-of-the-indira-gandhi-decision-surendra-ananth> accessed 17 November 2018.

Nazlina M., Rahmah G., 'Federal Court: Unilateral conversion of Indira Gandhi's 3 children is null and void' (The Star Online, 2018) <https://www.thestar.com.my/news/nation/2018/01/29/federal-court-unilateral-conversion-of-indira-gandhis-3-children-is-null-and-void/> accessed 17 November 2018.