

**A STUDY ON THE CONFLICT OF JURISDICTION BETWEEN  
CIVIL AND SYARIAH COURTS IN MALAYSIA**

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The students/authors confirm that the work submitted is their own and that appropriate credit has been given where references have been made to the works of others.

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## 1.1 INTRODUCTION

There are two systems of courts in Malaysia namely the civil courts and the Syariah courts. The civil courts were established under Article 121 of the Federal Constitution and the jurisdiction of these courts is also provided therein. On the other hand, the Syariah courts were established through Administration of Islamic Laws Enactments of all the respective states, and through federal law in the Federal Territories. Generally, the jurisdiction of Syariah courts is as laid out in Item 1, List II of the 9<sup>th</sup> Schedule of the Constitution.<sup>1</sup>

Before the introduction of Article 121(1A) into the Constitution, the civil Courts may review decisions of the Syariah courts where in some instances the former had set aside the decisions of the latter such as in *Myriam v Mohamed Ariff*,<sup>2</sup> *Commissioner for Religious Affairs, Terengganu & Ors. v Tengku Mariam*,<sup>3</sup> *Ainan Mahmud v Syed Abu Bakar*,<sup>4</sup> and *Nafsiah v Abd. Majid*.<sup>5</sup> However, in *Mohamed Saad bin Mohd Nor v Hasnah bte Ahmad*,<sup>6</sup> the civil High Court set aside the decision of the Magistrate Court concerning the custody of a child as decided by the Mahkamah Kadi (as it then was). The learned trial judge was of the opinion that the custody of child for Muslims fall under the jurisdiction of the Mahkamah Kadi and not the civil court.<sup>7</sup>

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<sup>1</sup> Wan Arfah Hamzah and Ramy Bulan. *An Introduction to Malaysian Legal System*, (Penerbit Fajar Bakti, 2003) at 201-202 and 183

<sup>2</sup> [1971] 1 MLJ 275

<sup>3</sup> [1969] 1 MLJ 110

<sup>4</sup> [1939] MLJ 209

<sup>5</sup> [1969] 2 MLJ 174

<sup>6</sup> [1949] MLJ Supp 31

<sup>7</sup> Mohamed Azam Mohamed Adil, Dr., "Perebutan Bidang Kuasa antara Mahkamah Sivil dan Mahkamah Syariah: Kemelut Belum Berakhir", *Mingguan Ahad*, 27 August 2006, at 8.

Amendment to Article 121<sup>8</sup> of the Constitution has added clause (1A) which states that civil High Courts and inferior courts established by federal law “shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts”.<sup>9</sup> The amendment appears to separate the jurisdiction of civil and Syariah courts, however it is argued that the effect thereof is still a matter of some doubt.<sup>10</sup> This view is proven by some of the decisions of the civil courts where the judges are still of the opinion that the jurisdiction of the courts is not fettered by the Article. For an instance, in *Shahamin Faizal Kung bin Abdullah v Asme bte Haji Junus*,<sup>11</sup> Edgar Joseph J opined that the provision in the Courts of Judicature Act 1964 remains despite the 1988 Amendment. The reason was that the state enactment does not confer exclusive jurisdiction upon the Syariah court on the matter in question. The same reason can be found in *Ng Wan Chan v Majlis Agama Islam*.<sup>12</sup>

Later, in *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib*,<sup>13</sup> the then Supreme Court overruled the two decisions above. In this case, Harun SCJ was of the opinion that when there is a challenge to jurisdiction, the correct approach was to firstly see whether the Syariah court has jurisdiction and not whether the state legislature has power to enact law conferring on the Syariah court.<sup>14</sup> Unfortunately, the interference of

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<sup>8</sup> The Constitution (Amendment) Act 1988 (Act 704)

<sup>9</sup> Wu Min Aun, *The Malaysian Legal System* (Longman Selangor 2<sup>nd</sup> edn 1999) at 161

<sup>10</sup> Andrew Harding, *Law Government and the Constitution in Malaysia* (Malayan Law Journal Kuala Lumpur 1996) at 134

<sup>11</sup> [1991] 3 MLJ 327

<sup>12</sup> [1991] 3 MLJ 174 and 487

<sup>13</sup> [1992] 2 MLJ 793

<sup>14</sup> KC Vohrah, Philip TN Koh and Peter SW Ling, *The Constitution of Malaysia* (Malayan Law Journal 5<sup>th</sup> edn 2004) at 475