

## **Towards an Apex *Sharia* Court in Malaysia**

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### **ABSTRACT**

Malaysia has 14 *Sharia* court systems. The main reason for this state of affairs is the distribution of legislative powers under the Federal Constitution between the Federation and the states where Islam and Islamic law are state matters. This paper looks at the consequences of having several distinct *Sharia* court systems. The *Sharia* courts and the laws differ from one state to another. This paper looks at the legal possibility of having one apex court for all the 14 *Sharia* court systems to streamline the administration and decisions of the *Sharia* courts.

*Keywords:* Federalism, Islamic law, legal system, *Sharia* courts

### **INTRODUCTION**

Malaysia is a multiracial and multi-religious country in the region of Southeast Asia. For centuries, this country was the centre of amalgamation of many cultures, with people of different races and religions living together.<sup>1</sup> Malaysia has a unique blend of three distinctive legal systems, namely,

English common law, Islamic law and customary law. The judiciary in Malaysia is largely influenced by the common law of England and Islamic law. There are three court systems in operation, namely, the civil court system, the *Sharia* court system and the Native Court system. Unlike the civil court system in Malaysia, which is a federalised court system, the *Sharia* court system is primarily established by state law (Shuaib, 2012). Therefore, Islamic law in one state might differ from that of another state.

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### **Civil Court System**

Before we consider the *Sharia* court system, let us look at one of the major court systems in Malaysia, namely, the civil court system. In this system, there are superior courts and inferior courts. The superior courts consist of the High Courts, the Court of Appeal and the Federal Court, which are at the apex of our legal system, whereas the Sessions Court and the Magistrates' Court collectively form the inferior courts or subordinate courts. The establishment of these courts is spelt out under Part IX of the Federal Constitution. The jurisdiction of the courts in civil or criminal matters is contained in the Subordinate Courts Act 1948 (Revised 1972) and the Courts of Judicature Act 1964 (Revised 1972).

There are two High Courts in Malaysia, one in West Malaysia, known as the High Court in Malaya, and the other in East Malaysia, known as the High Court in Sabah and Sarawak. The two High Courts in Malaysia have general supervisory and revisionary jurisdiction over all the subordinate courts<sup>2</sup> and jurisdiction to hear appeals from the subordinate courts in civil and criminal matters.<sup>3</sup> The High Courts have unlimited civil jurisdiction.

The other appellate courts are the Federal Court and the Court of Appeal. The Court of Appeal hears appeals from

the High Court relating to both civil and criminal matters<sup>4</sup> while the Federal Court hears appeals from the Court of Appeal.<sup>5</sup> The Federal Court is the ultimate 'appellate court' in all civil and criminal matters<sup>6</sup> and is a final interpreter of the law of the land and the Federal Constitution.<sup>7</sup>

### **The Native Court System**

The Native Courts in Sabah and Sarawak are established to hear and determine disputes among natives in relation to native customary laws (Phelan, 2003). Thus, in Sabah and Sarawak, in addition to the civil courts and the *Sharia* courts, there are the Natives Courts established under the Sabah Natives Courts Enactment 1992 and the Sarawak Native Court Ordinance 1992. Both the Natives Courts in Sabah and Sarawak hear cases arising from a breach of native law or custom, where all the parties are natives and the case involves native customary law.

### **The *Sharia* Court System**

The *Sharia* court system is one of the three separate court systems that exist in the Malaysian legal system (Shuaib, 2008a). Under Article 121(1A) of the Federal Constitution, exclusive jurisdiction in matters with respect to Islamic laws is

<sup>2</sup>See sections 31 to 37 of the Court of Judicature Act 1964 (Revised 1972).

<sup>3</sup>See section 27 of the Court of Judicature Act 1964 (Revised 1972).

<sup>4</sup>See Article 121(1B) of the Federal Constitution.

<sup>5</sup>See Article 121(2) of the Federal Constitution.

<sup>6</sup>See sections 96, 97 and 87(1) of the Court of Judicature Act 1964 (Revised 1972).

<sup>7</sup>See Article 128 of the Federal Constitution.

conferred to the *Sharia* courts.<sup>8</sup> There is a parallel system of state *Sharia* courts that have limited jurisdiction over matters of state Islamic law (*Sharia*). The *Sharia* courts of the states and the Federal Territories were established by virtue of item 1 of the State List of the Federal Constitution and item 6(e) of the Federal List for the Federal Territories.<sup>9</sup> All states and the Federal Territories have their separate sets of the *Sharia* Court system (Shuaib, 2015). These are spelt out in the state enactments such as the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) and the Administration of the Religion of Islam (Selangor) Enactment 2003.

The *Sharia* courts have jurisdiction over Islamic matters, and can generally pass sentences of not more than three years imprisonment, RM5,000 in fines and six strokes of the cane.<sup>10</sup> As established by the states, they have jurisdiction within the respective state boundaries only.<sup>11</sup> The hierarchy of the *Sharia* Courts in Malaysia

consists of the *Sharia* Court of Appeal, the *Sharia* High Courts and the *Sharia* Subordinate Courts. Administratively, the *Sharia* Subordinate Courts in every state are bound by orders from the *Sharia* High Courts. At present, there are 14 *Sharia* Courts of Appeal in Malaysia, including one *Sharia* Court of Appeal in the Federal Territories, functioning as the apex court in each state in dealing with appeals from the lower court.

### CONSEQUENCES OF HAVING MULTIPLE *SHARIA* COURT SYSTEMS

Looking at the above description of the *Sharia* court systems, it should be clear that in Malaysia there are 14 *Sharia* court systems established under different laws.<sup>12</sup> The main reason for this situation is the distribution of legislative powers under the Federal Constitution between the Federation and the states (Aziz, 2007). Islam and Islamic law are state matters. Item 1 of the State List of the Ninth Schedule, Federal Constitution confers sole jurisdiction to the state to enact Islamic law as applicable to Muslims. With respect to the Federal Territories, Parliament has the legislative power to enact Islamic law.<sup>13</sup> Since *Sharia* courts are established under the State List,

<sup>8</sup>*Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 *Malayan Law Journal* 793. <sup>9</sup>Ninth Schedule of the Federal Constitution

<sup>10</sup>See section 2 of the *Sharia* Courts (Criminal Jurisdiction) Act 1965 (Revised 1988). Consider a Bill to amend the Act to increase the power of the *Sharia* courts brought by a Member of Parliament, Abdul Hadi Awang, on 25 May, 2016; see *Sharia* Court (Criminal Jurisdiction) (Amendment) Bill 2016.

<sup>11</sup>*Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 *Malayan Law Journal* 354.

<sup>12</sup>See, for instance, the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505); the Administration of the Religion of Islam (Johore) Enactment 2003 (Enactment No 16 of 2003); the *Sharia* Court Enactment 2008 (Kedah) (Enactment No 08 of 2008/En.12).

<sup>13</sup>See item 6(e) of the Federal List.

states have powers to enact their own laws and procedural matters. The outcomes of these legislative powers are the varied legislations, albeit slight, as well as the varied decisions of *Sharia* courts in the states of Malaysia.

### **Non-Uniformity of Laws**

The different administration of the *Sharia* court systems in each state and the Federal Territories produce several consequences. The first is non-uniformity of laws. The state has the power to impose its own laws in its *Sharia* Court in dealing with the subject matters that fall within its jurisdiction. Thus, one may find that the law of the *Sharia* Court in one state might be different from that of the other states.

### **Territorial Limit of Jurisdiction**

The second consequence, territorial jurisdiction, refers to the geographical limitation imposed on a particular court. For instance, in the civil court system, a Magistrates' court in Perak has no jurisdiction to hear and determine a cause of action which arose in the states of Sabah and Sarawak. In similar vein, the Native Courts of Sabah and Sarawak have no jurisdiction to hear and determine a cause of action outside their respective territorial limits. This is stated in the Native Courts Ordinance 1992 (Sarawak) and the Native Courts Enactment 1992 (Sabah).

Similarly, the *Sharia* Court in one state has no jurisdiction to hear and determine a cause of action which has accrued in other

states. For instance, a *Sharia* Court in the Federal Territories has no jurisdiction to hear an application for jointly acquired matrimonial property if an order for divorce was granted by a *Sharia* court in Selangor. This is because it is the *Sharia* court in Selangor that has jurisdiction to grant a related relief, such as an order for jointly acquired property<sup>14</sup>, when granting an order for divorce. In short, if the court proceeds to hear the dispute and makes a decision when it lacks the necessary territorial jurisdiction to do so, the entire proceeding is illegal or void and any judgement made is liable to be set aside irrespective of whether the defendant objects to the jurisdiction or not.

### **Territorial Limit of Orders**

Another consequence is that the orders of a *Sharia* court in one particular state are enforceable generally within the territorial limit of that state only.<sup>15</sup> This is due to the fact that the *Sharia* courts are established by the states, not the Federation. Thus, there may be a problem in enforcing a judgement of a *Sharia* court if one of the parties is residing in another state. Similarly, the *Sharia* courts of one state are not bound by the decision of *Sharia* courts from other states. There are also difficulties in serving summonses

<sup>14</sup>See section 122 of the Islamic Family Law (State of Selangor) Enactment 2003.

<sup>15</sup>*Kassim @ Osman bin Ahmad v Dato' Seri Jamil Khir bin Baharom Menteri di Jabatan Perdana Menteri (Hal Ehwal Agama Islam) & Ors [2016] 7 Malayan Law Journal 669.*

and warrants outside a state in which they are issued and in enforcing a *Sharia* Court decision outside of the state. For instance, maintenance orders made by a *Sharia* Court is unenforceable outside the state. Although most of these problems have been resolved through reciprocal enforcement of orders between the states, some states have still not adopted the mechanism.

### **Jurisdiction of the Court Depends on Residence of the Parties**

The next consequence is related to jurisdiction. In relation to the different state administration of *Sharia* courts and their territorial jurisdiction, the jurisdiction of *Sharia* courts depends on the residence of the parties. For instance, section 4 of the Islamic Family Law (Federal Territory) Act 1984 provides: "Save as is otherwise expressly provided, this Act shall apply to all Muslims living in the Federal Territory and to all Muslims resident in the Federal Territory who are living outside the Federal Territory." It can be seen from this provision that apart from being a Muslim, being a resident of one state is a requirement for a person to initiate a case in the *Sharia* Courts.

Under section 2 of the Islamic Family Law (Federal Territories) Act 1984, "resident" means a person permanently or ordinarily living in a particular area. The 14 states of Malaysia, including the Federal Territories, provide a similar interpretation of residence. In Perlis, the interpretation of residence is slightly different, where section 2 of the Islamic Family Law (Perlis) Enactment 2006 provides that "resident"

means a person permanently living or ordinarily residing in a particular area or certified by the Syarie Judge as such.

In contrast, the Islamic Family Law (Kedah Darul Aman) Enactment 2008 uses the term "*bermastautin*" for residence without translating it and provides that it means "permanently living or ordinarily *bermukim* in a particular area." It also has a provision on "*bermukim*," which means "residing or living in a particular place temporarily". In addition, section 4 of the said Enactment provides that the Enactment shall apply to "all Muslims who are *bermukim* in the State of Kedah Darul Aman, or *bermastautin* in the State of Kedah Darul Aman but who are living outside the state."<sup>16</sup> In this respect, the application of Islamic Law in this state is wider than in other states in Malaysia as it has jurisdiction not only on a resident but also a person living temporarily in the state of Kedah. Although on the face of it the Kedah Enactment may seem to be wider, the Federal Territories' Act also provides that it is applicable to Muslims "living" in the Federal Territories.

### **Forum Shopping**

Another consequence is forum shopping. When multiple courts seemingly have concurrent jurisdiction over a plaintiff's cause, the plaintiff may choose a *Sharia* court from a state that will treat his or her cause most favourably. Some litigants prefer

<sup>16</sup>Emphasis is the author's.

their legal case to be heard in the court which will apply the law more favourably to their case.

In the case of *Aishah bt Abd Rauf v Wan Mohd. Yusof bin Wan Othman*,<sup>17</sup> after the application for polygamous marriage was dismissed by the *Sharia* Appeal Court in Selangor, the husband filed another application in Terengganu, where he eventually succeeded in his application. This is the impact of the difference of requirements in both states in dealing with polygamous marriage.

#### ***Sharia* Courts of One State Do Not Have to Follow the Decision of *Sharia* Courts of another State for the Same Parties in the Same Case**

An example of a case where a *Sharia* court did not have to follow a decision of another *Sharia* court from another state is the case of *Aishah bt Abd Rauf v Wan Mohd. Yusof bin Wan Othman*,<sup>18</sup> where the appellant succeeded in setting aside the application to contract a polygamous marriage by the respondent in the *Sharia* Appeal Court in Selangor. Dissatisfied with the order, the respondent filed another application in Terengganu, where he eventually succeeded in his claim. In this respect, what is crucial is that the order issued by a *Sharia* court in one state did not bind another *Sharia* court in other states.

<sup>17</sup>(1412) 7 *Jurnal Hukum* 152.

<sup>18</sup>(1412) 7 *Jurnal Hukum* 152.

#### **Legal Possibility of Establishing an Apex *Sharia* Court at the National Level**

The discussion so far has shown that the existence of 14 *Sharia* court systems, while faithful to the concept of federalism as agreed in the formation of the Federation of Malaya and later Malaysia, causes problems in the administration of *Sharia* justice. The creation of an apex *Sharia* court for the federation may not solve all the problems, but may in the long run reduce them.

The setting up of an apex *Sharia* Court at the national level in Malaysia has to take into account the position of Islam under the Federal Constitution (Aziz, 2006). Before we delve further into the issue, let us briefly look at the relevant provisions of the Federal Constitution, particularly on the division of power between Parliament and state Legislatures, to fully understand the constitutional limitations and ultimately, to find ways to overcome such constraints.

#### **Federalism**

One of the main problems in the setting up of an apex *Sharia* Court of Appeal is the distribution of legislative and executive powers under the Federal Constitution (Aziz & Shuaib, 2009). There is no one entity that has monopoly of legislative and executive powers in Malaysia because Malaysia is a new entity formed by the agreement of the states (Fong, 2008). This system of a central power, while at the same time maintaining the existence of the partnering entities is known as federalism. Federalism is a

political organisation that brings together separate political units under an umbrella of one political system but retains the integrity and uniqueness of each political unit (Beri, 2003). Federal systems allow this by distributing powers between the central and the constituent authorities in a way that preserves their existence and authority.

The distribution of powers between the central authority and state authority is found in Article 74 of the Constitution, which it provides for the division of powers of these two authorities as found in the Ninth Schedule of the Federal Constitution. Due to the nature of federalism, the determination of legislative powers depends on the subject matter concerned, whether it falls under the Federal List, the State List or the Concurrent List.

#### **Distribution of the Legislative Power between the Federation and the States**

Being a federation, legislative power is distributed between the Federation and the states. The Constitution does this by establishing three main Legislative Lists in the Ninth Schedule, providing, respectively, the schedule of matters with respect to which the Federal Parliament (Parliament), the state legislature and both of these bodies can enact laws. Part VI of the Federal Constitution is the segment that specifically deals with the distribution of legislative powers. It starts with Article 73, which provides for Parliament to hold exclusive power to make laws for the whole or any part of the Federation while the state

legislature has the power to make laws for the whole or any part of the state.

Under Article 74, Parliament has the exclusive power to make laws over matters falling under the Federal List, whereas each state, through its Legislative Assembly, has legislative power over matters under the State List.<sup>19</sup> In addition, both Parliament and state legislatures share the power to make laws over matters under the Concurrent List, but Article 75 provides that in the event of conflict, federal law will prevail over state law.

Another important article is Article 76, which identifies the legislative power of Parliament to legislate laws for states in certain cases. This is the exception to Article 74 and it is in fact, a provision that plays a crucial role in paving the way towards establishing an apex *Sharia* Court. We shall deal with this provision later.

Under the Ninth Schedule, the Federal List has 26 paragraphs that set out the matters in respects of which Parliament has exclusive power to make laws. It

<sup>19</sup>There are supplements to the State List (List IIA) and the Concurrent List (List IIIA) that apply only to Sabah and Sarawak. These give the two states legislative powers over matters such as native law and customs, ports and harbours (other than those declared to be federal), hydro electricity and personal law relating to marriage, divorce, family law, gifts and intestacy. See for instance *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and Other Appeals* [1997] 3 *Malayan Law Journal* 23.

covers external affairs, defence, internal security to civil and criminal law and procedure and others. For the purpose of this study, the following may be noted: Item 4 of the Federal List contains enlisted civil and criminal law and procedure and the administration of justice, including: “(a) constitution and organisation of all courts other than *Sharia* Courts.” In this respect, the Federal Government has the authority to enact laws on the constitution and organisation of civil courts,<sup>20</sup> but not to constitute *Sharia* courts.

The State List under the Ninth Schedule consists of 13 paragraphs which set out the matters in respect of which state legislature has exclusive power to make laws. This includes Islamic Personal Law, local government, state works and water, state holidays and others. It also has a special list supplemented for the states of Sabah and Sarawak known as List IIA.<sup>21</sup> One thing that needs to be highlighted is that the constitution, organisation and procedure of *Sharia* courts fall under the authority of the state legislature.

### ***Sharia* Court Being under the State List**

Item 1 of the State List of the Ninth Schedule confers the power to the state legislature to enact laws on the constitution, organisation

and procedure of *Sharia* courts (Aziz, 2007). Is the state then the authority to establish the apex *Sharia* Court since such a question relates to matters in Item 1, namely, *Sharia* courts? A straight answer cannot be given because generally, as stated under Article 73 of the Federal Constitution, state law is enforceable within the state territory. Thus, a state cannot enact a law applicable to the whole of the federation, as seems to be the case in establishing an apex *Sharia* court at the national level.<sup>22</sup> We will consider some options in the following sections.

### **LEGAL OPTIONS IN ESTABLISHING A FEDERAL *SHARIA* COURT OF APPEAL**

Several possible methods may be examined to establish an apex *Sharia* court.

#### **Parliament Enacting Uniform Laws**

Firstly, although states have the legislative power to legislate on *Sharia* courts, the Federal Constitution allows Parliament to enact state matters under certain circumstances. In this respect, paragraph (b) Clause (1) of Article 76 of the Federal Constitution provides that Parliament may legislate for “the purpose of promoting uniformity of the laws of two or more states.” Article 76 further provides that “a law made ... shall not come into operation

<sup>20</sup>See the Courts of Judicature Act 1964 (Revised-1972) and the Subordinate Courts Act 1948 (Revised 1972).

<sup>21</sup>*Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and Other Appeals* [1997] 3 *Malayan Law Journal* 23.

<sup>22</sup>See for instance *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and Other Appeals* [1997] 3 *Malayan Law Journal* 23.



in any state until it has been adopted by a law made by the Legislature of that state, and shall then be deemed to be a state law and not a federal law, and may accordingly be amended or repealed by a law made by that Legislature.”

According to the Reid Commission, the power of Parliament to legislate over states’ subjects is not meant to undermine states’ wishes but to help states in drafting complicated legislation. The process of the required adoption by the state of the relevant Acts would ensure the sovereignty of the states over the subject matters.<sup>23</sup>

Despite the fact that religion falls under the State List, Parliament is authorised to enact laws on any matter provided in the State List as embodied in paragraph (b) Clause 1 of Article 76. This is a relevant provision that can be invoked to promote uniformity of laws of all states in an attempt to set up an apex *Sharia* court at the national level (Ibrahim, 2013). However, it needs to be borne in mind that laws on Islamic matters require consultation with state governments as stipulated under Article 76(2) of the Federal Constitution. Additionally, a particular law may not be enforced until and unless the State Legislative Assembly adopts the law by

enacting a specific enactment on the said law. Furthermore, the said law must be regarded as a state law and not a Federal law, and can be amended or repealed by a State Legislative Assembly.<sup>24</sup>

### **Conference of Rulers to Decree Uniform Laws**

The Conference of Rulers as an institution that brings together the Head of States in Malaysia should be fully utilised. Article 3(2) of the Federal Constitution confers power to the Ruler of every state to be the Head of the Religion of Islam while the Yang Di-Pertuan Agong (YDPA) is the Head of the Religion of Islam for states not having a Ruler such as Malacca, Penang, Sabah and Sarawak and also for the Federal Territories of Kuala Lumpur, Labuan and Putrajaya.

A glance at Article 3(5) of the Federal Constitution suggests that Parliament may by law make provisions for regulating Islamic religious affairs as well as setting up a Council to advise the YDPA on matters relating to the religion of Islam. In this regard, the Conference of Rulers may advise the YDPA on matters relating to the religion of Islam and on legislation related to Islam. The Conference of Rulers could be used as a unifying and legitimising mechanism for states to arrive at an agreement in establishing an apex *Sharia* court.

The National Council for Administration of Islamic Religious Affairs (Majlis

<sup>23</sup>Para. 84. See also *East Union (Malaya) Sdn Bhd v Government of the State of Johore & Government of Malaysia* [1981] 1 *Malayan Law Journal* 151. See also *Lim Chee Cheng & Ors v Pentadbir Tanah Daerah Seberang Perai Tengah, Bukit Mertajam* [1999] 4 *Malayan Law Journal* 213.

<sup>24</sup>Article 76(3) of the Federal Constitution.

Kebangsaan bagi Hal Ehwal Agama Islam ‘MKI’) could be used to channel this proposal to the Conference of Rulers.<sup>25</sup> Thus, the Conference of Rulers could be used to fulfil the requirements of Article 76(1)(b) and 76(2), namely, on the purpose of having a uniform law on the apex *Sharia* court and on consultation with the state government.

### **Constitutional Amendment**

Another route that one may take in enabling Parliament to establish an apex court at the national level is by amending the Federal Constitution to give such powers to Parliament. The Constitution may be amended by Parliament under Article 159 of the Federal Constitution, which generally requires the support of two thirds of the total number of the House of Representatives and the Senate.<sup>26</sup> However, if the amendment directly affects the privileges, position, honours or dignity of the Rulers, the consent of the Conference of Rulers is required.<sup>27</sup> Since the Rulers

are the Heads of the Religion of Islam, it is arguable that an amendment that extends their power to establish *Sharia* courts for the whole Federation is invalidated by this requirement. Additionally, such an amendment requires the concurrence of the Yang di-Pertua Negeri of the states of Sabah and Sarawak as it would affect matters that Parliament may not make into law, in this case legislation on Islamic matters for the states.<sup>28</sup> We will list out the proposed amendment before any observation is made.

**An amendment to clause (4) of Article 76 of the constitution.** Ahmad Ibrahim suggests that this can be done by conferring power to Parliament to enact laws on the constitution, organisation and procedure of *Sharia* courts by inserting the words “membership, organisation, and jurisdiction and powers of *Sharia* Court” after the words “local government” in Clause (4) of Article 76 (Ibrahim, 2013).

**A new part IX(A) on *Sharia* judiciary.** The Federal Constitution is amended by inserting a new part, namely, “Part IX(A) *Sharia* Judiciary,” after “Part IX The Judiciary,” which will specifically deal with the constitution and organisation of *Sharia* Courts in Malaysia.

**An amendment to Article 132 to include judicial and *Sharia* law service.** Article 132 of the Federal Constitution is amended

<sup>25</sup>On MKI and uniformity of laws, see for instance Johari, A. S. (2014). Ke arah merealisasikan penyeragaman penggubalan undang-undang syariah di Malaysia: Pengalaman, pelaksanaan dan kerjasama antara persekutuan dengan negeri. In *Seminar bidang kuasa perundangan syariah: Penyeragaman oleh persekutuan vs pelaksanaan oleh negeri: “Lesson learnt and the way forward”*, Putrajaya: Attorney General’s Chambers.

<sup>26</sup>Article 159(3) of the Federal Constitution.

<sup>27</sup>Article 38(4) of the Federal Constitution.

<sup>28</sup>Article 161E(1)(c) of the Federal Constitution.

by adding a paragraph (a) on “the judicial and *Sharia* law service” after paragraph “(b) the judicial and legal service”.

**A new Article 138A to establish a *Sharia* judicial and legal service commission.**

Article 138 is amended by inserting Article 138A after Article 138 to provide for a *Sharia* Judicial and Legal Service Commission.

**Amendment to the Ninth Schedule to provide legislative power to Parliament.**

The Ninth Schedule of the Federal Constitution is amended by replacing the phrase “other than the *Sharia* Court” in Item 4(a) list I under the Federal List with the phrase “constitution and organisation of all courts including *Sharia* Courts”.

One might wonder how an appeal from *Sharia* courts can be brought to such a court. Generally, an appeal can be made to the Sultan of a particular state, who will then refer the matter to the Federal *Sharia* Appeal Court for the court to give its advisory opinion. Here, the decision of the Court would be the decision of the Sultan. In the context of *Sharia* courts, the courts can “advise” the state religious authority, namely, the Sultan, concerning the decision of the appeal. In order to maintain the relationship between the appeal and the state from where it originates, a judge from that state should be one of the members of the panel sitting to decide the appeal (Shuaib, 2008b).

**CONCLUSION**

There are several legal obstacles in establishing an apex *Sharia* Court at the national level. The very nature of the Federation of Malaysia, which provides limited autonomous powers to states on matters of Islam, makes interference and diminishes such powers as being delicate and sensitive. The distribution of executive and legislative powers under the Federal Constitution provides for Islamic matters, which include the *Sharia* courts, to be under the powers of the states.

However, the Federal Constitution itself envisages a situation where Parliament may be allowed to legislate on state matters. Nevertheless, in order to protect the limited autonomous powers that states have, such legislation may require concurrence and adoption by state governments and their legislature. Be that as it may, it is still a viable option coupled with the use of the Conference of Rulers and the MKI as unifying and legitimising vehicles for national-level decisions on Islam.

A more drastic enabling method to establish an apex *Sharia* court at the national level is by amending the Constitution to give the required powers to Parliament. However, it is our view that this would be contrary to the concept of federalism agreed to by the states at the formation of the Federation of Malaya and then Malaysia, and, realistically, it would be very difficult to obtain the required consent of the Conference of Rulers.

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