A RESOUNDING ENDORSEMENT OF SECULARISM -
The Historic case of Indira Gandhi Mutho vs. Director of the Department for Islam, Perak

> *"Constitutionalism facilitates – indeed, makes possible – a democratic political system by creating an orderly framework within which people may make political decisions. Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it."* Canadian Supreme Court in Re Secession of Quebec [1998] 2 SCR 217[i]

Malaysia's Federal Constitution guarantees fundamental liberties such as religious freedom whilst stating that "Islam is the religion of the Federation". The latter provision slipped in during the independence negotiations has been troublesome at times and often given cause to the religious right to push for the application of Syariah in government and legislation.

Malaysia's 2 High Courts also have inherent supervisory powers and as Malaysia is a common law nation, they bound by *stare decisis* to apply binding precedents and to take into consideration decisions of other common law courts. In 1988 the Federal Government then under the rule of Barisan Nasional, enacted sub-clause (1A) to Article 121 of the Constitution. Many viewed this as an erosion of the supervisory powers of the civil courts and a backdoor introduction of Syariah into Malaysia's, otherwise secular constitution. This scepticism was not entirely misplaced given the wide spread perception that the government of the day was under pressure to accommodate the sentiments of conservative religious constituencies.

The controversial section seemed to place Syariah courts on an equal footing with the civil courts and suggested that Parliament had carved out part of the supervisory powers of High Courts. The amendment reads:

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

Given a wide or biased construction, these words could mean that any subject, no matter how remote, given an Islamic label would fall outside the supervisory oversight of the civil courts. They were indeed given this effect by the Court of Appeal in the case of *Pengarah Jabatan Agama Islam Perak vs. Indira Gandhi Mutho*.

However, an appeal against that decision brought the matter before the Federal Court and the effect and significance of Article 121(1A) was finally clarified in a bold unanimous judgment that categorically affirmed Malaysia's secular foundations and aligned her constitutional jurisprudence with those

of other common law countries such as Canada, Australia and the United Kingdom.

Indira Gandhi and her children

Some brief facts about the case. The decision arose from a custody battle that could be rich pickings for a Hollywood blockbuster, and involved the voluntary conversion of a Hindu to Islam and his subsequent unilateral "conversion" of his 3 children to his newfound faith without the consent of the children's mother. Following the children's conversion, the father sought and obtained recognition of the conversion by a Syariah court. The injustice of this was heightened by the fact that the state religious authority that recognised the conversion seemed oblivious to the plight of a mother who was never consulted about the conversion.

The mother filed an application for judicial review in the High Court of Malaya for an order of *certiorari* to quash her children's conversion contending that the issuance of the certificates of conversion was *ultra vires* and illegal.

In the High Court

In response to the mother's application, the defendants in the suit contended that the High Court had no jurisdiction to hear the matter as the case came within Article 121(1A) and so it was argued, could only be tried before a Syariah court. More outrageous was the suggestion that a Syariah court, a puisne court established under state legislation, could adjudicate and conduct judicial review over an administrative exercise of authority to the exclusion of the High Court.

The High Court had no trouble allowing the mother's application for judicial review and set aside the certificates of conversion and held that Article 121(1A) of the Federal Constitution did not confer jurisdiction or authority on the Syariah courts to the exclusion of the civil courts.

The High Court's decision was reversed on appeal by the Court of Appeal (supra) whereupon the matter was brought before the Federal Court.

Findings of the Federal Court

In restoring the judgment of the High Court and allowing the appeal by the mother, the Federal Court recognised Malaysia's Westminster traditions and considered at length the structure of the Federal Constitution, the separation of powers and the role of the judiciary in civil courts. Many commonwealth precedents were cited and affirmed, most notably those from Canada.

In synopsis, the Federal Court stood firm on the following immutable principles:

1. The Federal Constitution is premised on certain underlying principles (based on the Westminster model) and include the separation of powers, the rule of law, and the protection of minorities.

2. These principles are part of the basic structure of the Constitution. Hence, they cannot be abrogated or removed.

3. The role of the civil courts as established by virtue of Article 121 is fundamental to these principles. The judicial power of the civil courts is inherent in the basic structure of the Constitution.

4. Article 121(1A) must be interpreted against the background of the foundational principles and other provisions in the Constitution.

5. In deciding the jurisdiction of the Shariah courts, the Canadian two-stage test applied in the case of MacMillan Bloedel Ltd v. Simpson [1995] 4 SCR 725, applies equally in Malaysia, with the following results:-

(a) Stage 1: judicial power cannot be vested in the Syariah Courts, because such courts are not constituted as a "superior court" in accordance with the constitutional provisions safeguarding the independence of judges.

(b) Stage 2: judicial power cannot be removed from the civil courts, because such powers are part of the core or inherent jurisdiction of the civil courts.

6. *Regardless of the label that may be applied to the subject matter*[iii], the power to review the lawfulness of executive action under Article 121(1A) rests solely with the civil courts.

The judgement is historic in that Malaysia's highest court was prepared to take a clear, independent stand to remove any doubt over the authority of civil courts to interpret all legislation including legislation dealing with religious matters. This augurs well for secularism in Malaysia.

Contributed by RLSE

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[i] Cited with approval by the Malaysian Federal Court in Indira Gandhi Mutho vs. Pengarah Jabatan Agama Islam Perak

[ii] The High Courts of Malaya and Borneo

[iii] Emphasis by RLSE