

Shari'ah and the State: Reassessing Legal Pluralism in Malaysia through the Kelantan Controversy

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Abstract: This article deliberates over the Malaysian case as an intriguing illustration of robust legal pluralism. It offers an opportunity to reconsider and debate the relationship between state and religious practices, particularly the incorporation of Shari'ah law, in a diverse democratic constitutional state like Malaysia. Malaysia as a state is a significant example of multiculturalism, pluralism, and modern Islamic society. The reforms in Malaysian Shari'ah law since the 1980s indicate that the understanding of Islamic legal practices is highly influenced by the context. The expression of form and substance in Islamic legal practices is a result of politico-legal and judicial struggles, influenced by power configurations that shape Islam into different streams of thought, ranging from democratic-egalitarian to authoritarian-orthodox, which are not mutually exclusive. This article further examines the tension between the primacy of Islam and the supremacy of the Federal Constitution (FC) as they arise in Malaysian courts, with a special focus on a recent case from Kelantan. It discusses the FC's constitutional primacy idea and how Islam and Shari'ah authority fit within it. It also analyses the attitude of civil courts towards the legitimacy of contentious laws passed under the guise of Shari'ah (i.e., claiming divine authority) and highlights the significant divide that emerged between constitutional theory and judicial practice in the 1990s followed by the Kelantan case, in which the Malaysian apex court struck down 16 Shari'ah provisions as unconstitutional. This landmark ruling has significant implications for the country's legal framework. The concluding section discusses the extent of legal pluralism in Malaysia and proposes suggestions to deal with the present legal deadlock.

Keywords: *Legal Pluralism; Malay Muslims; Shari'ah Courts; Federal Constitution; Kelantan Shari'ah Law.*

I. Introduction

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On 9 February, 2024, the Malaysian Federal Court ruled that several Kelantan state *Shari'ah* laws were unconstitutional.¹ This decision received appreciation from various people and organisations, including petitioner Nik Elin Zurina Nik Abdul Rashid and Sisters in Islam (SIS), who regarded it as a validation of the supremacy of the Federal Constitution (FC).² However, this verdict faced backlash from *Kelantan's* ruling party Parti Islam Se Malaysia (PAS)³ and its factions, with PAS secretary-general, Takiyuddin Hassan, labeling the day as a 'Black Friday'.⁴ This ruling has once again sparked the debate about the complex relationship between civil courts and *Shari'ah* courts, the jurisdiction of both courts, and the role of Islam in the FC.

Whether Malaysia is an Islamic theocracy or a secular state has been the subject of heated debate for the past thirty years. A drug law's constitutionality was contested in *Che Omar bin Che Soh v. Public Prosecutor* on the ground that as Islam is official religion of Malaysia, all laws must respect Islam's core principles.⁵ Since subversion is covered under Article 149 of the FC, the Federal Court maintained the legality of the contested provisions. It was further held that the assertion of 'Islam' as the official religion of the Federation under Article 3(1) was essentially ceremonial and did not establish the *Shari'ah* as the yardstick by which legislation is judged to be legitimate.⁶ Malaysia exhibits legal diversity stemming from its colonial heritage, characterised by the coexistence of common law and *Shari'ah* law. The modern Federation of Malaysia, consisting of 13 states and three federal territories, officially

¹ 'Malaysia's top court rules some Islamic laws in Kelantan unconstitutional' *Al Jazeera* (9 February 2024) <<https://www.aljazeera.com/news/2024/2/9/malaysias-top-court-rules-some-islamic-laws-in-kelantan-unconstitutional>> accessed 26 April 2026; In accordance with the Library of Congress (ALA-LC) transliteration method, which keeps the apostrophe to represent the Arabic letter 'ayn ('), the spelling '*Shari'ah*' is used uniformly throughout this paper. Due to the lack of standardised transliteration norms for Arabic script, alternative spellings such as '*Sharia*', '*Shari'ah*', and '*Syariah*' (the latter prominent in Malaysian legal contexts) are frequently seen in English-language sources.

² Kenneth Tee, 'Nik Elin: Federal Court's Ruling in Kelantan Shariah Criminal Provisions a Testament to Federal Constitution's Supremacy' (*Malay Mail*, 9 February 2024). Kenneth Tee, 'Nik Elin: Federal Court's Ruling in Kelantan Shariah Criminal Provisions a Testament to Federal Constitution's Supremacy' (*Malay Mail*, 9 February 2024) <<https://www.malaymail.com/news/malaysia/2024/02/09/nik-elin-federal-courts-ruling-in-kelantan-shariah-criminal-provisions-a-testament-to-federal-constitutions-supremacy/117204>> accessed 28 April 2026.

³ PAS is a political party in Malaysia with an Islamist ideology. PAS has consistently advocated for the interests of the Malay Muslim community in Malaysia over the years. PAS strongly supports the implementation of *Sharia* law and promotes a specific Malay and Islamic Malaysian identity.

⁴ Salma Ben Souissi, 'Malaysia federal court declares Kelantan state Shariah laws unconstitutional' (*JURIST*, 2024) <<https://www.jurist.org/news/2024/02/malaysia-federal-court-declares-kelantan-state-shariah-laws-unconstitutional/>> accessed 26 April 2026.

⁵ *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ 55; Tamir Moustafa, 'The Judicialization of Religion' (2018) 52(3) *Law & Society Review* 685, 708.

⁶ *ibid.*

upholds doctrines of a democratic constitutional state, including democracy, checks and balances, rights and freedoms, and rule of law.⁷ The FC of Malaysia which was enacted in 1957 is based on Western liberal constitutional framework, especially the British Westminster form of parliamentary democracy. However, it also recognises that there are varied groups of people in Malaysia.⁸ It recognises the group-specific rights and implements the affirmative action programmes for Malays.⁹

Malaysia is neither a secular nor an Islamic state, as per Article 3 of the FC, that designates Islam as the official religion of Malaysia.¹⁰ However, the Federal Court has declared that Shari'ah was not a dominant law of nation in the *Che Omar* decision of 1988. According to Article 3(2) of the FC, the Sultan of each Malay state serves as the Head of the Religion of Islam in his state.¹¹ In most secular states, the positions of Head of State and Head of Religion are not combined. Islamic personal laws are recognised, and laws that contradict or run counter to the FC may be enforced by the government. However, if a state law is inconsistent with a federal law, then federal law is preferred, with the extent of the inconsistency.

This article argues that there exists a continual constitutional uncertainty about the demarcation between federal and state power, resulting in frequent intrusions by state legislatures into domains designated for federal authority. The constraints established by the Syariah Courts (Criminal Jurisdiction) Act 1965 impose a lasting limitation on the enforcement of Shari'ah law, complicating the states' aspirations for comprehensive implementation of Shari'ah law and inadvertently fostering legislation that challenges these boundaries.¹² The lack of institutional linkages between the civil and Shari'ah court systems, such as referral

⁷ Dian AH Shah, "'Constitution-Building and Constitutional Culture: The Case of Malaysia'" (*Melbourne Forum on Constitution-Building*) <https://law.unimelb.edu.au/_data/assets/pdf_file/0007/2987953/Malaysia-DianShah.pdf> accessed 12 September 2024.

⁸ Fariza Milaqrshiah Mahmud, 'A Review of the Malaysian Jurisprudence of Constitutional Interpretation' (2023) 31(1) *International Islamic University Malaysia (IIUM) Law Journal* 203, 234.

⁹ *Ibid*; art 153 of the Federal Constitution of Malaysia grants the Yang di-Pertuan Agong the duty to protect the special status of the Malays and the indigenous peoples of Sabah and Sarawak, and empowers the execution of affirmative action initiatives for these demographics.

¹⁰ Mohamed Azam Mohamed Adil, 'The Federal Constitution: Is Malaysia a Secular State?' (2015) *ICR Journal* 121, 123.

¹¹ Tamir Moustafa, 'The Judicialization of Religion' (2018) 52(3) *Law & Society Review* 685, 708.

¹² 'Syariah' is an Arabic loanword in Malay language used to refer to Sharia law in Malaysia. The spelling 'Syariah' appears here as it is the official spelling used in Malaysian legislation and the Malaysian legal system, including the Federal Constitution and the Syariah Courts (Criminal Jurisdiction) Act 1965 itself. This differs from the transliteration 'Shari'ah' used elsewhere in this paper, which follows the Library of Congress (ALA-LC) system for Arabic script.

procedures, pre-enforcement certification, or pathways for addressing potential conflicts, constitutes substantial obstacles to successful legal proceedings.

II. The Three Structural Failures Revealed by the Kelantan Ruling

The Federal Court's long-anticipated decision in *Nik Elin Zurina Nik Abdul Rashid & Anor v. Kerajaan Negeri Kelantan* that addressed a constitutional challenge by two Muslim women against Kelantan Shari'ah state laws has recently been issued, where 16 Shari'ah provisions were held unconstitutional.¹³ The question is not whether Islam is the state religion which is already settled by Article 3(1) of the FC. Nor is the question whether Shari'ah (as divine ideal) is better than the FC. The whole controversy actually revolves around the interpretation of the FC, particularly whether the Shari'ah law, which is the human, positive law codification of certain rules derived from Shari'ah, enacted by the state legislative assemblies is outside their powers. The Court reiterated that there is no controversy regarding Islam being official religion and it is only on the foundation of interpretation of FC.¹⁴ The petition was filed on 25 May, 2022, by Nik Elin Zurina Nik Abdul Rashid and Tengku Yasmin Nastasha Tengku Abdul Rahman in the Federal Court under Article 4(4) of FC. The Kelantan state government was the respondent.¹⁵ The petitioners argued that the state legislative assembly had violated the FC by passing certain sections of the 'Kelantan Syariah Criminal Code (I) Enactment 2019'. They further argued that the separation of powers among the Federal List (List I) and the State List (List II) limits the power of a state to legislate Shari'ah criminal offences, prohibiting encroachment into federally reserved jurisdictions.¹⁶

For the 18 provisions, the petitioners argued that Article 75 of FC required federal legislation to predominate over laws established by Parliament and state legislatures. Article 75 states, 'If any state law is inconsistent with a federal law, the federal law shall prevail and

¹³ *Nik Elin Zurina Nik Abdul Rashid & Anor v Kerajaan Negeri Kelantan* [2024] 3 MLRA; Rozanna Latiff and Danial Azhar, 'Malaysia's top court strikes out some Islamic laws in landmark case' (*Reuters*, 9 February 2024) <<https://www.reuters.com/world/asia-pacific/malaysias-top-court-declares-16-islamic-laws-kelantan-state-unconstitutional-2024-02-09/>> accessed 26 April 2026.

¹⁴ *ibid.*

¹⁵ Tee (n 2).

¹⁶ *Nik Elin* (n 13) [121]; The Federal Constitution of Malaysia, Ninth Schedule, List I and List II.

the state law shall, to the extent of the inconsistency, be void'.¹⁷ They also claimed that the FC specifically requires Parliament to supervise the state legislatures' ability to pass Islamic offences. A 2021 Federal Court ruling with a nine-judge panel universally declared a Selangor state legislation that rendered unnatural sex a Shari'ah offense illegal.¹⁸

For the respondents, the Kelantan state government maintained that Nik Elin and her daughter had no standing to contest the provisions since they were self-interested.¹⁹ They contended that their concerns were premature and mere assumptions. The state administration further claimed that the challenged regulations were established to protect all Muslims in the state and keep them Muslim. As per Syariah Courts (Criminal Jurisdiction) Act 1965, state legislature may enact Shari'ah offences, hence the challenged provisions are legal.²⁰ The main legal issue at hand concerns division of powers among federal and state governments. This case prompts considerations regarding elucidation and execution of Shari'ah in a contemporary legal framework, particularly concerning enforcing punishments under Shari'ah.

The Federal Court applied the Ninth Schedule which delimits the state legislative authority, and Article 75 nullifies conflicting state legislation. Interpreting the ruling merely as a reaffirmation of federal primacy overlooks its profound implications. The decision reveals the inadequacy of the Malaysian constitutional system to effectively control, rather than just rectify, ongoing state legislative overreach. There are three structural failures arise from the case, each indicating issues outside the scope of legal remedy:

A. Recurrence without Deterrence:

The structural constraint stated by the *Kelantan* verdict is more pronounced when considered in the context of the recent constitutional history that preceded it. In *Iki Putra Mubarrak v Kerajaan Negeri Selangor*, a nine-judge Federal Court bench unanimously declared a Selangor Shari'ah provision criminalising 'unnatural sex' invalid, asserting that the matter resided firmly within the purview of federal criminal law as delineated in the Penal

¹⁷ The Federal Constitution, art 75; *Nik Elin* (n 13).

¹⁸ Khairah N Karim, 'Federal Court declares Selangor syariah law criminalising unnatural sex unconstitutional' NST Online (*New Straits Time*, 2021) <<https://www.nst.com.my/news/crime-courts/2021/02/668825/federal-court-declares-selangor-syariah-law-criminalising-unnatural>> accessed 26 April 2026.

¹⁹ Tee (n 2).

²⁰ *Nik Elin* (n 13) [1].

Code, thereby indicating that the state legislature had surpassed its constitutional authority.²¹ The decision was definitive, clear, and obligatory for all state legislatures within the Federation. Subsequent actions exhibited neither acquiescence nor contemplation. The Kelantan state legislature approved the Syariah Criminal Code (I) Enactment 2019, which had mostly similar provisions, while the Selangor challenge remained unresolved before the court that subsequently invalidated it.²² The legislature did not await the Federal Court's conclusion. Instead, it proceeded to enact the legislation under legal ambiguity.

The sequence was not coincidental but indicative of a broader institutional approach. The possibility of future court nullification does not effectively serve as a significant legislative deterrent in practice. A state legislature that enacts a legally flawed provision faces no institutional repercussions beyond the nullification of that provision; there are no penalties or procedural obligations, and no responsibility to address the intentional recurrence of a recognised constitutional error. The Federal Court, as recognised in paragraphs 240 to 241 of the *Nik Elin* verdict, operates as a reactive adjudicative entity.²³ It can rectify unconstitutional laws retroactively. It cannot avert the implementation of an unconstitutional law. Even after receiving a caution, a legislature cannot be restrained or penalised for its continued actions. Every new incursion necessitates new legal actions, new petitions, new arguments, and additional years of litigation, imposing the whole burden on private litigants and the complete expense on the court system and those subjected to provisions that were never constitutionally legitimate.

The Federal Court's rationale in both instances was robust, meticulously articulated, and constitutionally valid. However, it reveals a cycle of constitutional conflict, characterised by the persistent contestation, adjudication, and structural preservation of the same jurisdictional limit for subsequent challenges. This does not constitute a doctrinal failure. This constitutes a failure in institutional design. A legal structure that permits the diagnosis of the same pathology twice within three years, administers the identical cure on both occasions, and lacks a mechanism to avert a third occurrence is failing to uphold its constitutional limits. It is

²¹ *Iki Putra bin Mubarrak v. Kerajaan Negeri Selangor* [2020] 4 MLJ 213 (Federal Court, Malaysia); Zheng Hong See, 'The Federal Court of Malaysia Held State Syariah Law Criminalising "Unnatural Sex" Void and Unconstitutional' (*Oxford Human Rights Hub*, 2021) <<https://ohrh.law.ox.ac.uk/the-federal-court-of-malaysia-held-state-syariah-law-criminalising-unnatural-sex-void-and-unconstitutional/>> accessed 28 April 2024.

²² Kelantan Syariah Criminal Code (I) Enactment 2019.

²³ *Nik Elin* (n 13) [240-241].

addressing its constitutional issues sequentially, incurring increasing costs, with no resolution in view.

B. The 3/5/6 Ceiling as Permanent Frustration

The second failure is in the structural disjunction between the doctrinal ambitions of states pursuing comprehensive application of Islamic criminal law and the jurisdictional limitations established by federal statute. The Syariah Courts (Criminal Jurisdiction) Act 1965 limits punishments in Shari'ah courts to three years of jail, a fine of RM 5,000, and six lashes, known as the 3/5/6 formula.²⁴ This ceiling is applicable irrespective of the severity of the offence in ancient Shari'ah law, thereby rendering the distinction between *hudud* offences, which entail set Quranic punishments, and *ta'zir* offences, which are subject to judicial discretion, constitutionally theoretical.²⁵ No state Shari'ah court may impose a *hudud* punishment without surpassing federal legislative boundaries.

The *hudud* legislation of 1993 and the 2015 parliamentary initiative by PAS to bypass the limitations were both immediate reactions to an anticipated federal obstruction.²⁶ The 2019 Code, albeit articulated in *ta'zir* terminology, was motivated by a similar frustration: a state assembly constitutionally authorised to implement Shari'ah criminal law yet legally restricted from enforcing punishments that its own religious belief considers divinely ordained.²⁷ States seeking to enforce *hudud* sanctions, as prescribed by ancient Islamic jurisprudence for offences like theft, apostasy, and illicit sexual activity, cannot do so legally under the 3/5/6 ceiling. The limitation does not, however, preclude governments from implementing *ta'zir* measures that criminalise identical conduct while imposing penalties within the statutory limit. The outcome

²⁴ Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355) s 2.

²⁵ Karen Meerschaut and Werner de Saeger, 'Contextualising Malaysia's Islamic Law: A Nuanced Perspective' *Legal Pluralism in Muslim Contexts* (Brill 2019) <<https://brill.com/display/book/edcoll/9789004398269/BP000016.xml>>.

²⁶ The Kelantan Syariah Criminal Code (II) Enactment 1993 was enacted by the Kelantan State Legislative Assembly but remains unenforceable owing to constitutional limitations. See Nur Al Farhain Binti Kamaruzaman, 'Reconstructing the Theory of Hudūd and Its Application within the Malaysian Legal Framework: A Case Study of the Syariah Criminal Code (II) 1993, State of Kelantan' (Doctoral Thesis, The University of Leeds 2020).

²⁷ Department of Syariah Judiciary Malaysia (JKSM) confirmed that the impugned provisions of the Kelantan Syariah Criminal Code (I) Enactment 2019 were *ta'zir* offences. See 'Shariah Judiciary Dept: Federal Court's decision solely because provisions exceeded jurisdiction granted to state legislative body' (*Malay Mail, Kuala Lumpur*, 12 February 2024) <<https://www.malaymail.com/news/malaysia/2024/02/11/shariah-judiciary-dept-federal-courts-decision-solely-because-provisions-exceeded-jurisdiction-granted-to-state-legislative-body/117486>> accessed 28 April, 2026.

is a systematic motivation to formulate rules that are officially classified as *ta'zir* (discretionary, limited) yet substantively equivalent to hudud offences, thereby challenging the constitutional limits between federal and state criminal jurisdiction.

The Kelantan Code enacted in 2019 served as a weapon that criminalised behaviors previously addressed by the Penal Code, articulated as Shari'ah offences, with penalties meticulously designed to adhere to the 3/5/6 limit. The 3/5/6 ceiling fails to address the dispute between federal and state interpretations of Islamic criminal law; it only transfers the problem from punishment to legislative formulation. The *Kelantan* ruling illustrates that relocation.

C. Article 121(1A) as a Shadow Problem

The third failure is not explicitly stated in the *Kelantan* verdict. It emerges subtly yet undeniably in the procedural trajectory mandated by the case, as well as in the institutional gap that this trajectory reveals. Article 121(1A) of the FC stipulates that the civil High Courts lack jurisdiction over situations falling within the purview of the Shari'ah courts.²⁸ When Parliament enacted this provision through constitutional amendment in 1988, the objective was unequivocal and legitimate: to terminate a growing jurisdictional dispute between the civil and Shari'ah judiciaries, and to establish a safeguarded domain of authority for the Shari'ah courts that civil courts could not encroach upon.²⁹ The aim was fulfilled. However, an additional element was forfeited along the procedure. The constitutional amendment established a barrier against civil court overreach, so precluding organised discussion between the two legal systems. The two systems were distinctly segregated and lacked any formal method of communication with one other. The institutional silence was inconsequential to the decision in the *Kelantan* litigation. The disputed sections were invalidated due to legislative incompetence, as Article 75 of the FC nullifies state laws that contradict federal legislation, regardless of their subject matter.

Article 121(1A), which establishes the authority of Shari'ah courts from that of civil courts, was not applicable to the facts; its application would constitute a categorical mistake.

²⁸ The Federal Constitution, art 121(1A).

²⁹ Malaysia, Parliamentary Debates, Dewan Rakyat, Vol III, Nos 26 and 27 (17–18 March 1988); Yvonne Tew, 'The Malaysian Legal System: A Tale of Two Courts' (2011) 19 Commonwealth Judicial. Journal., Georgetown Law Library 3.

The Federal Court possessed jurisdiction, used established doctrine, and rendered a sound decision.³⁰ The most pressing issue, however, is not to the resolution of the *Kelantan* case but to the developments preceding the initiation of the subsequent litigation. When a state legislative assembly convenes to formulate a new Shari'ah criminal provision that does not replicate an existing federal offence but relates to subject matter potentially claimed by either the Federal List or the State List, it encounters a constitutional dilemma lacking a definitive institutional resolution. The proposed provision cannot be referred to any entity possessing the ability, skill, and constitutional standing to determine, with binding or persuasive effect, whether it lies within the legislative competence of the state assembly (or the jurisdictional competence of the Shari'ah courts). No statutory, constitutional, or procedural mechanism exists that permits a state legislative assembly, civil court, or Shari'ah court to get future direction on the delineation of federal and state Shari'ah court's jurisdiction in a specific instance.

The ramifications of this disparity are evident. Presently, the tangible costs are borne by the individuals. A Shari'ah criminal law that surpasses the legislative authority of the state does not inherently render itself illegal upon its implementation. It imposes duties and hazards on the Muslim populace of the respective state. It stays effective, often for years, until a plaintiff with the resources, resolve, and proper legal representation opts to contest it in the Federal Court. The petitioners in the *Kelantan* case submitted their petition in May 2022. The Federal Court issued its decision in early 2024. Almost two years passed between the challenge and its conclusion, during which the contested sections remained in the legal code. This is not meant to criticise the Court's efficiency; rather, it illustrates the intrinsic requirements of constitutional litigation at the highest level. However, it is a criticism of a system that lacks a mechanism for addressing these issues more promptly, economically, and without imposing the full responsibility of constitutional enforcement on private plaintiffs.

The pattern is, nevertheless, not novel. The *Kelantan* ruling is the most significant in a series of rulings extending from the 2021 Selangor unnatural sex case to prior challenges against state Shari'ah legislation in the 1990s and 2000s. Each judgement has rectified the immediate issue.³¹ The decisions of the Federal Court are authoritative yet retrospective. They

³⁰ Halsbury's Laws of Malaysia (LexisNexis, 1999) vol 2 discussing reference procedure under art 128 of the Federal Constitution.

³¹ *Nik Elin Zurina bt Nik Abdul Rashid & Anor v Kerajaan Negeri Kelantan* (n 13); *Iki Putra Bin Mubarrak v. Kerajaan Negeri Selangor* (n 21) 323.

inform a legislature of its prohibitions post facto. They do not inform a legislature, before to the event, with any institutional assurance, of its capabilities. This does not constitute a failure of Article 121(1A) when correctly interpreted. The clause fulfills its intended function, and there are valid constitutional justifications for preserving the jurisdictional split it creates. The problem is in the lack of an institutional structure functioning upstream of both legal pathways, which can address border issues prior to their escalation into conflicts.

3. Why Existing Mechanisms are Structurally Inadequate

A. The Dual Track System

Malaysia's dual-track legal system represents a complex and dynamic interplay between Shari'ah and civil law.³² It highlights the diversity of legal traditions and demands of constitutionalism in a plural society. In Malaysia, the relationship between Shari'ah and civil law is particularly complex because of historical, political, and social factors.³³ The roots of the Malay legal system may be traced to its colonial past, when it was operating under a common law framework instituted by British rule. After Malaysia became independent, its legal system evolved to function more effectively for its large Muslim population.³⁴ For example, Shari'ah was integrated into family law. The FC established the idea of legal plurality by recognising Islam as the Federation's religion while also protecting the religious freedom of non-Muslims. In Malaysia, a separate system of Shari'ah courts exists that deals with issues like marriage, divorce, inheritance, and some offences that apply solely to Muslims.³⁵ The federal government has constituted Shari'ah courts in each state, and each of such states has their own set of Shari'ah laws.

³² Michael G. Peletz, 'A Tale of Two Courts: Judicial Transformation and the Rise of a Corporate Islamic Governmentality in Malaysia' (2015) 42 *American Ethnologist* 144 <<https://anthrosource.onlinelibrary.wiley.com/doi/abs/10.1111/amet.12122>>.

³³ David J Banks, 'Islam and Inheritance in Malaya: Culture Conflict or Islamic Revolution?' (1976) 3(4) *American Ethnologist* 573, 586.

³⁴ Wan Norhasniah Wan Husin and Haslina Ibrahim, 'Religious Freedom, The Malaysian Constitution and Islam: A Critical Analysis' (2016) 217 *Procedia - Social and Behavioral Sciences* 1216, 1224.

³⁵ Raihanah Abdullah and Soraya Khairuddin, 'The Malaysian Shari'ah Courts: Polygamy, Divorce and the Administration of Justice' (2009) 25(1) *Asian Women* 21, 54.

The FC stipulates that their authority shall not infringe upon federal civil legislation. Tensions often emerge between Shari'ah and civil law, especially in regions where their domains intersect or when the enforcement of Shari'ah law faces opposition from the secular legal framework.³⁶ Recent events have highlighted the dynamic character of Malaysia's dual-track legal system, as the historic ruling by the nation's top court nullifying certain Kelantan Islamic regulations represents a pivotal point in the continuous interplay amongst Shari'ah and civil law.³⁷ The ambiguity in the Federation of Malaya Constitutional Proposals 1957, commonly referred to as the 'White Paper', is identified to be the main cause behind the lack of clarity surrounding Article 3 of the FC.³⁸ According to Article 3(1), Islam is the religion of the federation.³⁹ Nevertheless, it becomes rather ambiguous when the Federal Court surprisingly invalidates 16 provisions of Shari'ah Criminal law.⁴⁰ However, the FC lacks checks and balances on the legislative power of Malaysian Parliament and the judicial supremacy of the Federal Court. Malaysia identifies itself as a federal country, but the current ruling raises doubts about status of Malaysia as a federal nation. The absence of substantive limits on Parliament's legislative authority under the FC suggests that Islam's status as the official religion is largely symbolic rather than legally determinative. Furthermore, the term 'secular' is not found in the FC. According to Abdul Rashid Moten, the FC does not explicitly state that Shari'ah is the law of the land.⁴¹ However, the FC also does not explicitly state that the country is a secular state.

Article 121(1A) of the FC stipulates that civil courts lack jurisdiction over matters within the purview of the Shari'ah courts. The authority of the Shari'ah court is derived separately from state legislation enacted under Paragraph 1, List II of the Ninth Schedule. Article 121(1A) functions only as an ouster clause: if a subject is appropriately categorised within Shari'ah jurisdiction, the civil courts are constitutionally barred from intervening. The

³⁶ Zaleha Kamaruddin, 'The Islamic Legal System in Malaysia and the Quest for Transformation in the 21st Century' (2012) 6(11) *Australian Journal of Basic and Applied Sciences* 74, 82.

³⁷ Al Jazeera, 'Malaysia's Top Court Rules Some Islamic Laws in Kelantan Unconstitutional' (n 1).

³⁸ Joseph M Fernando, 'The Position of Islam in the Constitution of Malaysia' (2006) 37 (2) *Journal of Southeast Asian Studies* 249, 266.

³⁹ The Federal Constitution, art 3(1). The recognition of Islam as the Federation's religion is a symbolic measure rather than the foundation of a theocratic legal system. The Supreme Court, in *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ 55, elucidated that the phrase 'Islam' in art 3(1) pertains to rites and ceremonies rather than a comprehensive way of life that supersedes other laws. Thus, although Islam holds a privileged position, the Constitution prevails as the ultimate law under art 4(1), allowing for the peaceful and harmonious practice of various religions in the Federation.

⁴⁰ Patricia A Martinez, 'The Islamic State or the State of Islam in Malaysia' (2001) 23 (3) *Contemporary Southeast Asia* 474, 503.

⁴¹ Khairudin Aljunied, *Shapers of Islam in Southeast Asia* (Oxford University Press 2022).

amendment carried out in 1988 was enacted during a time of significant constitutional strain, with Prime Minister Mahathir Mohamad highlighting explicit discontent within the Muslim community regarding the civil courts' perceived ability to supersede Shari'ah court rulings, a concern the amendment aimed, at least in part, to rectify.⁴² The Federal Court in *Nik Elin Zurina bt Nik Abdul Rashid & Anor v. Kerajaan Negeri Kelantan* annulled 16 sections of the Kelantan Syariah Criminal Code (I) Enactment 2019.⁴³ The court did not supersede Article 121(1A) in this regard. The court determined that the Kelantan state legislative assembly had acted *supra vires*, since the invalidated laws pertained to the Federal List (Criminal Code) in the Ninth Schedule, rather than the State List. This argument reveals a core conflict within Malaysian legal pluralism. Article 121(1A) safeguards Shari'ah courts exclusively in areas where state legislative assemblies possess constitutional authority to legislate.⁴⁴ In instances where such competence is lacking, particularly for the majority of criminal offences addressed by the federal penal law, the ouster provision provides no safeguard. The *Nik Elin* ruling thus poses a disconcerting inquiry about legal pluralism in Malaysia: if the bulk of state Shari'ah criminal offences coincide with federal law, what persists of the 'safeguarded realm' that Article 121(1A) aimed to establish in 1988?

The Reid Commission Report stated that original Constitution makers envisioned for Muslim and Malay concerns to be within state jurisdiction.⁴⁵ A Federal Court may use its advisory authority under Articles 128 and 130 of the FC to resolve disputes of jurisdiction without constitutional amendment.⁴⁶ However, these provisions were rarely implemented.⁴⁷ The growth of Shari'ah law in Malaysia is hindered by its restricted applicability to personal laws. Although Islam is considered as the religion of the state, the implementation of Shari'ah law is confined to Muslims. As the High Court stated in *Subashini A/P Rajasingam v. Saravanan A/L Thangathoray*, the Shari'ah courts do not have any jurisdiction over non-

⁴² The Constitution of the Federation of Malaya (1957); National Evangelical Christian Fellowship Malaysia, 'Report on the Parliamentary Roundtable on art 121 (1A) in Parliament (Committee Room 1)' (*NECF Malaysia*, 5 January 2006) <<https://www.necf.org.my/newsmaster.cfm?&menuid=43&action=view&retrieveid=676>> accessed 29 April 2026.

⁴³ *Nik Elin* (n 31) [121].

⁴⁴ *ibid.*

⁴⁵ Fernando, 'The Position of Islam in the Constitution of Malaysia' (n 38) 266.

⁴⁶ Halsbury's Laws of Malaysia (LexisNexis, 1999) vol 2 discussing reference procedure under art 128 of the Federal Constitution.

⁴⁷ Constance Chevallier-Govers, 'The rule of law and legal pluralism in Malaysia' (2010) 2 (1) *Islam and Civilisational Renewal* 90.

Muslims.⁴⁸ The question of whether a matter falls under Shari’ah jurisdiction is a threshold issue for civil courts to determine. This was confirmed by Tun Abu Talib (the Attorney General when Amendment of 1988 came into existence).⁴⁹ He stated that Article 121(A) was never meant to oust the jurisdiction of the High Court to review the decisions of the Shari’ah courts on jurisdictional disputes.

B. Article 75 of the FC and Shari’ah

The constitutional framework delineating power sharing between state and federal legislatures in Malaysia is apparent: Shari’ah law falls within the jurisdiction of the states.⁵⁰ However, differences exist among FC and provincial Shari’ah Laws. Article 74 delineates the allocation of legislative authority among federation and states, according to the lists in the Ninth Schedule.⁵¹ The Ninth Schedule delineates the issues on which ‘Federal (List I)’ and ‘State (List II)’ governments are authorised to legislate. The State List (List II) specifies 13 domains over which state assemblies possess exclusive authority.⁵² The initial paragraph stipulates that, with the exclusion of Kuala Lumpur and Labuan, jurisdiction lies with states: Shari’ah law and family law pertaining to individuals practising Islam fall under state authority, encompassing Shari’ah law related to succession, marriage, adoption, divorce, and the establishment and penalisation of offences committed by adherents of Islam against its tenets, except for issues enumerated in Federal list.⁵³

⁴⁸ *Subashini A/P Rajasingam v. Saravanan A/L Thangathoray* [2007] 2 MLJ; Schedule 9, List II, para 1 of the Federal Constitution states that Syariah courts “shall have jurisdiction only over persons professing the religion of Islam”.

⁴⁹ Lim Kit Siang, ‘Moorthy case - letter to PM and query for AG’ (*DAP Malaysia*, 9 January 2006) <<http://dap-malaysia.com/archive/2006/jan06/lks3765.htm>> accessed 29 April 2026.

⁵⁰ *ibid.*

⁵¹ The Federal Constitution, art 74.

⁵² *ibid.*

⁵³ Federal Constitution of Malaysia, Ninth Schedule, List II, Item 1; See also ‘Press Release | Hudud Is Unconstitutional, Discriminatory and Divisive’ (*Malaysian Bar*, 2015) <<https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-hudud-is-unconstitutional-discriminatory-and-divisive>> accessed 29 April 2026 (Recognizing that criminal law is categorised within the Federal List, so limiting State legislative authority).

Irregularities amongst the FC and state Shari'ah Laws manifest in the absence of consistency in implementation of Shari'ah in Malaysia.⁵⁴ Individual states may establish Shari'ah criminal offences if four requirements are satisfied:

- i. The offence must relate to Shari'ah law and apply solely to Muslims.⁵⁵
- ii. The issue must be fall outside the scope of federal criminal law.
- iii. The provision must not contradict any current federal statute.
- iv. The statute must adhere to the boundaries of state legislative authority.

Article 75 of FC explicitly says that if a state law is inconsistent with a federal law, the federal law shall prevail, rendering provincial law invalid to the extent of discrepancy.⁵⁶ Federal Court in Malaysia has power to examine federal and state laws for unconstitutionality, as articulated in Article 4(1) of FC.⁵⁷ It is also conferred exclusive jurisdiction to resolve disputes between states or between the Federation and any states, specifically regarding legitimacy of a law enacted by Parliament or a state legislature on the basis that it addresses a subject for which Parliament or state legislature lacks legislative authority. The courts are constitutionally obligated to ensure that both state and federal governments adhere to the supremacy of the FC, as empowered by Articles 4(3) and 4(4).⁵⁸ As a mechanism for averting jurisdictional intrusion, it is largely ineffective. Article 75 is only invoked subsequent to the occurrence of inconsistency, the enactment of a state statute, and the initiation of a judicial proceeding to declare it void.⁵⁹ The provision therefore lacks any meaningful preventive or anticipatory function.

In the *Kelantan* case, Article 75 executed its job precisely, the contested clauses were deemed unlawful. The law was passed in 2019, the petition was submitted in 2022, and the verdict was issued in 2024. For five years, clauses that were consistently unlawful persisted in the statute books, creating legal ambiguity and political advantage for their proponents. Article

⁵⁴ Ahmad Fauzi Abdul Hamid, 'Syariahization of Intra-Muslim Religious Freedom and Human Rights Practice in Malaysia: The Case of Darul Arqam' (2016) 38(1) *Contemporary Southeast Asia* 28, 54.

⁵⁵ The Federal Constitution, Ninth Schedule, List II, Item 1; see also Norbani Mohamed Nazeri, 'Criminal Law Codification and Reform in Malaysia: An Overview' [2010] *Singapore Journal of Legal Studies* 375, 399.

⁵⁶ The Federal Constitution, art 75; See also *Iki Putra bin Mubarak v. Kerajaan Negeri Selangor* (n 21) 384, FC (holding that the power of state legislative assembly to legislate Islamic criminal offences is neither exclusive nor comprehensive and that state laws overlapping with federal criminal law are void); *Nik Elin Zurina bt Nik Abdul Rashid & Anor v. Kerajaan Negeri Kelantan* (n 13), FC (invalidating 16 provisions of Kelantan's Syariah Criminal Code on the basis that state legislatures cannot enact laws on matters already covered by the Federal List).

⁵⁷ *ibid*, art 4.

⁵⁸ *ibid*.

⁵⁹ *Nik Elin* (n 13).

75 functions as a post-facto remedy which means it applies after the state law has been enacted and the inconsistency has materialised. A constitution that depends solely on reactive supremacy is not a mechanism for border management; it is an emergency provision.

The FC does not explicitly codify a basic structural concept, which comprises fundamental elements that are immune from legislative alteration due to their paramount constitutional importance. The omission indicates that Parliament even maintains the power to amend elements deemed fundamental to the constitutional framework, constrained solely by the procedural stipulations outlined in Article 159.⁶⁰ Additionally, as discussed above, the 3/5/6 ceiling does not resolve the underlying dispute between federal and state interpretations of Islamic criminal law. However, the *Kelantan* ruling instead exemplifies that relocation.

III. Reassessing Legal Pluralism: What the Kelantan Ruling Clarifies

The dispute in Kelantan has exacerbated the continuing discourse over legal diversity in Malaysia, which functions within a framework of various legal systems: civil law, Shari'ah law, and customary law.⁶¹ The Kelantan Syariah Criminal Code Enactment 1993 enacted under the rule of Pan-Malaysian Islamic Party (PAS), sought to enforce *hudud* rules, including penalties such as amputation for theft and stoning for adultery.⁶² The federal authorities obstructed the implementation, alleging constitutional limitations. In 2015, PAS reintroduced the matter by presenting a private member's bill in Parliament to enable Kelantan to enforce *hudud*.⁶³ The Kelantan dispute has highlighted constitutional problems, examined the role of Shari'ah law, contested secular ideals, strained inter-ethnic and inter-religious relations, generated legal confusion, and impacted political dynamics. The dispute has generated ambiguity over the future trajectory of Malaysian legal system, possibly influencing investor confidence and global impressions of the country. The prevailing interpretation of legal

⁶⁰ Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (First Edition, Bloomsbury 2012). Harry E Groves, 'Equal Protection of the Laws in Malaysia and India' (1963) 12(3) *The American Journal of Comparative Law* 385, 396.

⁶¹ Al Jazeera, 'Malaysia's top court rules some Islamic laws in Kelantan unconstitutional' (n 1).

⁶² Jaclyn L. Neo and Dian A. H. Shah, 'Hudud and the Struggle for Malaysia's Constitutional Soul' (*ConstitutionNet*, 25 June 2015) <<https://constitutionnet.org/news/hudud-and-struggle-malaysias-constitutional-soul>> accessed 12 September 2024. *Hudud* (plural of hadd, meaning 'boundary' or 'limit') refers to fixed punishments prescribed in the Qur'an and Sunnah for specific offences.

⁶³ Mohd Faizal Musa, *Post-Islamism Battles Political Islam in Malaysia* (ISEAS – Yusof Ishak Institute, Singapore 2023) <https://www.iseas.edu.sg/wp-content/uploads/2023/10/TRS17_23.pdf> accessed 28 April 2026.

plurality in Malaysia, as seen in judicial writings, constitutional studies, and political discourse, is structured around a parallel systems concept.⁶⁴ According to this perspective, civil courts and Shari'ah courts function as autonomous, co-equal jurisdictions, each sovereign within its respective domain.⁶⁵ Article 121(1A) is interpreted as the constitutional assurance of non-interference: civil courts lack jurisdiction over issues within the purview of Shari'ah courts, and conversely, Shari'ah courts must not intrude onto civil jurisdiction. The two tracks are parallel and autonomous within its domain.

The *Kelantan* instance illustrates that this approach is descriptively deficient and normatively insufficient.⁶⁶ The concept fails to elucidate why state legislators consistently implement measures that overtly infringe upon federal criminal law, a phenomenon that the parallel systems model presumes is mitigated by distinct jurisdictional borders.⁶⁷ The model provides no normative direction for addressing collisions, except from asserting that they should not occur. It offers no potential tool for border delineation, no referral process for unclear cases, and no institutional platform for collaboration between the two judicial hierarchies. Parallelism devoid of coordination does not constitute pluralism; it represents jurisdictional anarchy characterised by litigation.

An improved understanding of legal plurality within a federal system such as Malaysia is institutionalised boundary management. The coexistence of different legal regimes is facilitated, not jeopardised, by coordinating systems.⁶⁸ Authentic pluralism necessitates institutional connections, platforms where representatives of each legal system may proactively address border conflicts, rather than allowing them to be resolved reactively by a singular court inside one system. The objective of these processes is not to subordinate one legal system to another, but to provide operational significance to the constitutional differentiation between federal and state legislative authority. The FC explicitly delineates the border. It lacks an institution capable of imposing such boundary on proposed law before to enactment, so

⁶⁴ Shad Saleem Faruqi, 'The Power of Different Courts' (*Malaysian Bar*, 2015) <<https://www.malaysianbar.org.my/article/news/legal-and-general-news/legal-news/the-power-of-different-courts>> accessed 29 April 2026.

⁶⁵ 'USCIRF Annual Report 2015 - Tier 2: Malaysia' (*United States Commission on International Religious Freedom*, 1 May 2015) <<https://www.refworld.org/reference/annualreport/uscirf/2015/en/104862>> accessed 29 April 2026.

⁶⁶ *Nik Elin* (n 13); Chief Justice Tun Tengku Maimun Tuan Mat, 'Syariah Court, Islamic Laws Will Not Fade into Oblivion' (*Bernama*, 9 February 2024) <<https://bernama.com/en/news.php?id=2269198>> accessed 29 April 2026.

⁶⁷ Shad Saleem Faruqi (n 64).

⁶⁸ The Federal Constitution, arts 75, 128; *SIS Forum (M) & Anor v. Jawatankuasa Fatwa Negeri Selangor & Ors* [2025] 4 MLJ 625.

protecting litigants, courts, and the polity from the expenses associated with post-hoc nullification.

Further, a strong legal plurality neither necessitates the elimination of the Shari'ah courts (a politically unfeasible proposition) nor subjugates Shari'ah to civil law in all respects (a constitutional misinterpretation of Article 121(1A)).⁶⁹ It necessitates the intentional establishment of bridges, including a permanent jurisdictional entity authorised to certify if a proposed state Shari'ah legislation aligns with the State List and adheres to the 3/5/6 limit. This entity would not supplant the supervisory role of the Federal Court. It would function as a pre-enforcement filter, converting a system of reactive nullification into one of anticipatory coordination. The *Kelantan* verdict has elicited varied reactions from the public and political figures. Advocates argue that it strengthens the constitutional framework and ensures that state laws do not violate federal principles.⁷⁰ Critics assert that the verdict infringes upon the religious freedoms of Muslims and represents a setback in the implementation of Shari'ah principles.

However, all parties recognise the foundational parallel systems paradigm. They dispute the delineation of the border, not the sufficiency of the existing reactive, litigation-dependent method of boundary enforcement. The issue is not that the Federal Court delineated the boundary inaccurately in Kelantan. The issue is that the constitutional framework lacks a means to establish such boundaries in advance. The verdict signifies not a resolution but a symptom, indicating the necessity for institutional transformation. The Kelantan controversy signifies a critical turning point in Malaysia's continuous debate between Shari'ah law and civil law. The verdict reinforces the supremacy of the FC while also underscoring the challenges and complexities of managing a dual-track judicial system in a diverse and multicultural nation.⁷¹

IV. Conclusion

⁶⁹ Tun Pehin Sri Dr Wan Junaidi Tuanku Jaafar, 'Understanding Governance through the Lens of Law and History' (Statesman's Lecture, University of Technology Sarawak, 30 August 2025).

⁷⁰ Shad Saleem Faruqi, 'Legal Pluralism in Malaysia: Navigating the Civil and Shariah Systems' (*FULCRUM*, 2025) <<https://fulcrum.sg/legal-pluralism-in-malaysia-navigating-the-civil-and-shariah-systems/>> accessed 29 April 2026.

⁷¹ *ibid.*

The *Kelantan* case serves as a stress test that the Federal Court successfully navigated. The system consistently fails the stress test as a whole. Repeated judicial corrections, incurring increasing political and financial burdens, on a framework with unaddressed fundamental design faults, do not constitute constitutional government. It constitutes constitutional upkeep and maintenance, regardless of diligence, and differs from repair. What is necessary is not the abrogation of Article 121(1A), but the establishment of a permanent referral body capable of receiving submissions from state legislative assemblies, civil courts, and Shari'ah courts. This body should be staffed by jurists from both legal traditions and endowed with the authority to provide guidance, either binding or advisory, on the constitutional boundaries of state Shari'ah legislative competence prior to the enactment, enforcement, or contestation of a provision. Such an entity would not undermine the Federal Court's supervisory authority under Article 4(4). It would operate upstream as a constitutional filter that mitigates avoidable disputes at their origin instead of allowing them to escalate into litigation. The Syariah Courts (Criminal Jurisdiction) Act 1965 should be amended to require federal certification of any proposed increase, thereby ensuring that the 3/5/6 limit remains the genuine ceiling rather than a floor that invites incremental expansion.

Legal pluralism in Malaysia is not only a qualitative aspect of the constitutional framework; it represents a structural commitment to the coexistence of diverse legal traditions that mirror the nation's historical, theological, and cultural intricacies. Article 3(1), Article 75 and the Ninth Schedule do not only allow for this plurality; they constitutionally enshrine it. A homogenised legal system would not streamline governance; it would obliterate the differences that the FC was intended to safeguard. However, diversity without institutional coordination does not yield freedom; it results in conflict. The Kelantan issue exemplifies this: when jurisdictional borders are disputed and no systematic resolution mechanism is available, the courts must address a structural flaw that the FC did not equip with pre-enforcement mechanisms. The aim, consequently, is not to eliminate legal pluralism but to establish principled delineation and institutional governance of its limits

