

# JURISDICTION OF FEDERAL AND STATE AUTHORITIES TO PUNISH OFFENCES AGAINST THE PRECEPTS OF ISLAM: A CONSTITUTIONAL PERSPECTIVE

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## I: THE ENFORCEMENT OF MORALITY

Is it as much the business of the law to suppress vice as to suppress treason? How far should the law be used to uphold moral and religious positions?

Discussion of these issues is premised on the belief of the "legal positivists" that law and morality are two distinct spheres which can (and should) be kept apart. In fact, the distinction between legal and moral duties is not always possible.

It is also noteworthy that the debate on the enforcement of morality tends to be confined to matters of sex morality. It is time to broaden our moral horizons and to recognise that there is more to morality than sex. Socio-legal issues such as corruption and crime are also the stuff of morality.

Once morality is understood in a broader context, it becomes obvious that the enforcement of morality is one of the primary functions of the law.

But a line has to be drawn at which state intervention should cease and privacy is respected. Some criterion needs to be devised to justify state intervention in some situations and non-intervention in others.

Islam's requirement to prohibit all that is *munkar* and to promote all that is *ma'aruf* has to be borne in mind. At the same time Islam's respect for privacy must be honoured. John Stuart Mill's "harm to others" test, Lord Devlin's notion of "shared morality", Hart's "critical morality" test and the sociological school's functionalist and pragmatic approach need to be examined critically. Perhaps the question whether or not laws should be used to uphold morality through direct prohibition is better dealt with on the basis of a calculus rather than on a simple formula like 'harm to others'. Prof. Dias suggests a calculus of seven factors: the danger of the activity to others; the danger to the actor himself; economy of factors needed for detection and pursuit; equality of treatment; the nature of the sanction; possible hardship caused by the sanction; and possible side-effects.<sup>1</sup> A combination of such factors can be used as a workable guide to state intervention.

Whatever test one adopts it is clear that in legal ideology it is not possible to set theoretical limits on the power of the state to regulate private conduct. But for

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<sup>1</sup> Dias, *Jurisprudence*, Fifth edition, p. 117

practical reasons the state must stay away from the enforcement of some moral and religious rules.

Even where enforcement is desirable, the “criminalization” of conduct is not always necessary. Alternative approaches to the enforcement of morality can be explored. Prevention and persuasion may be just as effective as the blunt instrument of penal sanctions.

## II: CONSTITUTIONAL DIMENSION

Aside from legal philosophy there is in Malaysia a constitutional dimension to the debate on -

- which authorities (federal or state) have the power to punish transgressions of religious and moral injunctions, and
- to what extent and subject to what limitations may these authorities trespass into matters of private morality and conscience.

The Federal Constitution contains a number of features which are relevant to our discussion.

**Supremacy of the Federal Constitution:** Article 4(1) declares the supremacy of the federal constitution. Supremacy is further strengthened by Article 162(6). The combined effect of these two articles is that Parliament is not supreme. There are procedural as well as substantive limits on Parliament's powers. State Assemblies are, likewise, 'limited' in their legislative competence.

Courts have the power to review federal and state legislation on the ground of 'unconstitutionality': Articles 4(1), 128 and 162(6).

Executive actions can be challenged on the ground of constitutionality: *Surinder Singh Kanda v. Government of Malaya* (1962) 28 MLJ 169.

**Federal system:** The Constitution creates a system of dual government. There is division of legislative, executive, judicial and financial powers between Centre and the States. This division is protected by the Constitution. Judicial review is available if federal or state agencies exceed their constitutional powers. For example s.298A Penal Code and *Mamat Daud v. PP* [1988] 1 MLJ 119.

The Constitution of Malaysia makes a two-fold distribution of legislative powers –

- with respect to territory;
- with respect to subject-matter.

**Territorial jurisdiction:** As regards territory, Article 73(a) provides that subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the Federation and laws having effect outside as well as within the Federation. A law made by Parliament shall not be deemed to be invalid on the

ground that it has extra-territorial operation, i.e., takes effect outside the territory of Malaysia. In the Indian case of *A.H. Wadia v Income-Tax Commissioner, Bombay* AIR 1949 FC 18, the Supreme Court held: "In the case of a sovereign legislature the question of extra-territoriality of any enactment can never be raised in the municipal court as a ground for challenging its validity. The legislation may offend the rules of international law, may not be recognized by foreign courts, or there may be practical difficulties in enforcing them but these are questions of policy with which the domestic tribunals are not concerned." As to state legislatures, Article 73(b) provides that state assemblies may make law for the whole or any part of their states.

**Subject matter:** The legislative powers of Parliament and State Legislatures are subject to the provisions of the Constitution, *viz* :

- the scheme of distribution of powers contained in Schedule 9, Legislative Lists I, II and III;
- fundamental rights; and
- other provisions of the Constitution like Article 75.

**Specially guaranteed fundamental rights:** Articles 5 to 13 provide protection for several political and civil rights, among them personal liberty (Article 5), protection against double jeopardy (Article 7), right to equality (Article 8), freedom of speech and expression (Article 10(1)), freedom of association (Article 10(3)), freedom of religion (Article 11) and rights in respect of education (Article 12).

**Freedom of religion :** In respect of religion, every person has the right to three things:

- to profess
- to practice, and
- subject to Article 11(4), to propagate his religion: Article 11(1)

The first refers to beliefs and doctrines. The second refers to exhibition of these beliefs through acts, practices and rituals. The third is about attempts at propagation.

The right to beliefs and doctrines is generally regarded as absolute. The last two aspects are, everywhere, subject to regulation on grounds of public order, public health and morality (Article 11(5)).

### III: ISLAM AS THE RELIGION OF THE FEDERATION

Islam is the religion of the federation but there is freedom to other communities to practice their own religions in peace and harmony: Articles 3(1) and 11. Does the provision for Islam as “the religion of the federation” make Malaysia into an Islamic state?

**Historical evidence:** Malaysia’s document of destiny does not contain a preamble. The word ‘Islamic’ or ‘secular’ does not appear anywhere in the Constitution. However, there is historical evidence in the Reid Commission papers that the country was meant to be secular. The intention in making Islam the official religion of the Federation was primarily for ceremonial purpose. In the White Paper dealing with the 1957 constitutional proposal it is stated: “There has been included in the proposed Federal Constitution a declaration that Islam is the religion of the Federation. This will in no way affect the present position of the Federation as a secular state...”<sup>2</sup> This view of a secular history is strongly challenged by those who argue that before the coming of the British, Islamic law was the law of the land.<sup>3</sup> With all due respect, such a picture oversimplifies an immensely complex situation. A look at the legal system prior to Merdeka indicates the presence of a myriad of competing and conflicting streams of legal pluralism.

- The Neolithic people who lived in the alluvial flood plains of Malaya between 2500 BC and 1500 BC possessed their own animistic traditions. Likewise the Mesolithic culture (encompassing the Senois of Central Malaya, the Bataks of Sumatra and the Dayaks of Borneo), the Proto-Malays and the Deutero-Malays had their own tribal customs.
- Hinduism from India and Buddhism from India and China held sway in South East Asia between the first to the thirteenth centuries and left an indelible imprint on Malay political and social institutions, court hierarchy, prerogatives and ceremonials, marriage customary rites and Malay criminal law. The incorporation of the patriarchal and monarchical aspects of law are said to have been influenced by Hindu culture. Some of these influences linger till today.<sup>4</sup>
- In Peninsular Malaysia Chinese traders brought with them their own way of life and the close relationship between Malacca and China during the days of the Malacca Sultanate opened the door to Chinese influence on Malay life.
- Before 1963 Sabah and Sarawak were guided by their native customs and by British laws. The influence of Islam was marginal.
- Islam came to Malacca only in the 14<sup>th</sup> century from various regions in Arabia, India and China. But it gained a legal footing in Malaya only in the 15<sup>th</sup> century. Since then the legal system of the Malays shows a fascinating action and reaction between Hindu law, Muslim law and Malay indigenous traditions.

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<sup>2</sup> M. Sufian Hashim, ‘The Relationship between Islam and the State in Malaya’, *Intisari*, Vol. 1. No. 1, p.8.

<sup>3</sup> Ahmad Ibrahim & Ahilemah Joned, *The Malaysian Legal System* (Dewan Bahasa dan Pustaka, Kuala Lumpur, 1987) p.54.

<sup>4</sup> *Ibid*, p.8.

In some Malay states like Malacca, Pahang, Johore and Terengganu, vigorous attempts were made to modify Malay customs and to make them conform to Islamic law. But these attempts were thwarted by the British who relegated Islamic law primarily to personal matters. R.J. Wilkinson says that “there can be no doubt that Muslim law would have ended by becoming the law of Malaya had not British law stepped in to check it”.<sup>5</sup> There is very little doubt that at the time of Merdeka the “Islamic law” that existed in Malaya was “an Islamic law which (had) absorbed portions of the Malay *adat* and therefore not (the) pure Islamic law”.<sup>6</sup>

**Case law:** It was held in *Che Omar Che Soh v. PP* [1988] 2 MLJ 55 that though Islam is the religion of the federation, it is not the basic law of the land and Article 3 (on Islam) imposes no limits on the power of Parliament to legislate. Islamic law is not and never was the general law of the land either at the federal or state level. It applies only to Muslims and only in areas outlined in Item 1 of list II of the Ninth Schedule. In the law of evidence, for example, the Evidence Act applies to the exclusion of Islamic law: *Ainan v. Syed Abubakar* [1939] MLJ 209.

The syariah courts have limited jurisdiction only over persons professing the religion of Islam.<sup>7</sup> It must also be noted, that the Federal Court has now overruled the High Court’s decision in *Meor Atiqulrahman Ishak v. Fatimah bte Sihi* [2005] 5 MLJ 375. The High court had side-stepped the *Che Omar Che Soh* decision and had ruled that Islam is *ad-deen* – a way of life and, therefore, Regulations violating Article 3 can be invalidated.

**Adat:** One must also note the very significant influence of Malay *adat* (custom) on Malay-Muslim personal laws. In some states like Negeri Sembilan, *adat* (custom) overrides *agama* (religion) in some areas of family law.

**Article 4(1):** Under Article 4(1) the Constitution and not the syariah is the supreme law of the federation. Any law passed after Merdeka Day which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void.

**Article 162(6):** Under Article 162(6) and (7) any pre-Merdeka law which is inconsistent with the Constitution, may be amended, adapted or repealed by the courts to make it fall in line with the Constitution.

**Definition of ‘law’:** Article 160(2) of the Constitution, which defines “law”, does not mention the syariah as part of the definition of law.

**Article 3(4):** Though Islam is adopted as the religion of the federation, it is clearly stated in Article 3(4) that nothing in this Article derogates from any other provision of the Constitution. This means that no right or prohibition is extinguished as a result of Article 3.

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<sup>5</sup> R.J. Wilkinson, “Papers on Malay Subjects”, Law (Kuala Lumpur, 1971).

<sup>6</sup> Ahmad Ibrahim ^ Ahilemah Joned, above, note 19, p.3.

<sup>7</sup> Refer to Schedule 9, List II, Item 1.

**Higher status of secular authorities:** If by a theocratic state is meant a state in which the temporal ruler is subjected to the final direction of the theological head and in which the law of God is the supreme law of the land, then clearly Malaysia is nowhere near a theocratic, Islamic state. Syariah authorities are appointed by state governments and can be dismissed by them. Temporal authorities are higher than religious authorities. Except for those areas in which the syariah is allowed to operate, the law of the land is enacted, expounded and administered by secular officials.

**Senior federal posts:** The Yang di-Pertuan Agong must, of course, be a Muslim. But Islam is not a prerequisite for citizenship or for occupying the post of the Prime Minister. Members of the Cabinet, legislature, judiciary, public services (including the police and the armed forces) and the Commissions under the Constitution are not required to be of the Muslim faith. In the Sixth Schedule, the oath of office for cabinet ministers, parliamentary secretaries, Speaker of the Dewan Rakyat, MPs and Senators, Judges and members of Constitutional Commissions is quite non-religious in its wording and does not require allegiance to a divine being or to Islam.

However there is plenty in the Constitution to suggest that Malaysia is, at least partly, an Islamic state.

**Article 3(1):** The implication of adopting Islam as the religion of the federation is that Islamic education and way of life can be promoted by the state for the uplifting of Muslims. Article 12(2) provides that it shall be lawful for the Federation or a State to establish or maintain Islamic institutions, provide instruction in the religion of Islam to Muslims and incur expenditure for the above purposes. Thus, taxpayers' money can be utilized to promote Islamic institutions and to build mosques and other Islamic places of worship and to keep them under the control of state authorities.

**Islamic courts:** Islamic courts can be established and syariah officials can be hired. The jurisdiction of the Syariah courts is protected by Article 121(1A) against interference by ordinary courts.

**Muslims subject to Syariah laws:** All Muslims are subjected to Islamic law in matters of succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, wakafs, zakat, fitrah, baitulmal or similar Islamic religious revenue. A Muslim cannot opt out of Islamic law.<sup>8</sup> He/she can be compelled to pay *zakat* and *fitrah*.

Under Article 11(4) state law and (for federal territories) federal law may control or restrict the propagation of any religious doctrine amongst Muslims. This Article is directed not only at non-Muslim attempts to convert Muslims but also at propagation to Muslims by unauthorized Muslims. Application of such laws, however, poses a

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<sup>8</sup> However in many areas Muslims are allowed to have a choice between syariah provisions and ordinary civil laws. Among these areas are banking, trusts, adoption and a whole range of commercial transactions.

serious constitutional objection. Syariah courts cannot have jurisdiction over non-Muslims and it appears that a federal criminal court will have to try a non-Muslim whose proselytizing zeal violates a state law.

**Islamic morality:** State enactments can seek vigorously to enforce Islamic morality amongst Muslims. For example beauty and body building contests are forbidden to Muslims in many States. In areas permitted by the Ninth Schedule, Islamic civil and criminal laws are applied to all Muslims.

**Islamic offences:** Item 1 of List II of the Ninth Schedule permits State legislation to create and punish offences by persons professing the religion of Islam against the precepts of that religion. However, the power of the state to enforce Islamic criminal law is limited by the words "except in regard to matters included in the Federal list" or "dealt with by federal law".

**State Constitutions:** All State Constitutions in Malay states prescribe that the Ruler of the state must be a person of the Islamic faith. Some State Constitutions require that the Menteri Besar and state officials like the State Secretary shall profess Islam. Except for Sarawak, Islam is the official religion in all states.

**Inter-religious marriages:** As Muslims are not allowed to marry under the civil law of marriages, and must marry under syariah law, non-Muslims seeking to marry Muslims have to convert to Islam if the marriage is to be allowed to be registered. This has caused pain to the parents of many converts. Likewise it has led to several troublesome cases of apostasy by Muslims who, for reasons of the heart, wish to marry their non-Muslim counterparts.

**Atheism:** Does the right to believe include the right to disbelieve and to adopt atheism, agnosticism, rationalism, etc.? In most democratic countries the right not to believe is constitutionally protected. But in the light of the Rukun Negara ("Kepercayaan kepada Tuhan"); the language of Article 11(2) (no tax to support a religion other than one's own); Article 12(3) (no instruction in a religion other than one's own); and the mandatory application of syariah laws to Muslims in many areas, it is possible to argue that atheism is not protected by Article 11 – at least not for Muslims.

**Propagation of religion to Muslims:** Under Article 11(4) of the Federal Constitution non-Muslims may be forbidden by state law from preaching their religion to Muslims.

#### **IV: POWER TO PUNISH VIOLATIONS OF PRECEPTS OF ISLAM**

The power of State Assemblies and the Federal Parliament in Schedule 9, List II, Item 1 to create and punish offences against the precepts of Islam is a residual power and not an unlimited or sovereign power. It is subject to the following constitutional limitations:

**Not applicable to non-Muslims:** Schedule 9, List II, Item 1 is quite clear that non-Muslims cannot be subjected to the syariah. They cannot be compelled to appear before the syariah courts<sup>9</sup>.

**Applicable only to those professing Islam:** The power to punish transgressors of the precepts of Islam applies only to those persons who profess the religion of Islam. In its dictionary sense the word “profess” means to affirm one’s faith or belief in or allegiance to a religion. It also means to feign, allege, assert, aver, openly declare, state, pronounce, announce, annunciate, enunciate, maintain, acknowledge, avow, claim to a quality or feeling, pretend to be or do, or to make a vow on entering an order or calling.

Professing is a matter of inner feeling. It is not something that can be imposed from outside. This means that those who deny the religion or voluntarily renounce it and become *murtads* or apostates are no more in a state of professing the religion of Islam. It could be argued that they should, therefore, be no more subject to the criminal jurisdiction of the syariah courts. The civil and syariah courts have both rejected this line of reasoning, and for understandable reasons. It is not exceptional to hold that status cannot be self determined. Status is almost always other-determined. Also, if during the pendency of syariah court proceedings, a person is allowed to renounce Islam, that would amount to a clever attempt to escape prosecution by depriving the court of its jurisdiction. In any case, the law applicable to a charge is the law at the time of the alleged commission of the offence and not by what happens afterwards.

Some judges have gone so far as to hold that Muslims cannot renounce their religion at all. This point of view is difficult to reconcile with Article 11’s protection of freedom of religion. Article 3 on Islam declares in its clause (4) that “nothing in this Article derogates from any other provision of this Constitution”. Note must also be taken that in most Constitutions and under international law, the right to believe includes the right not to believe. The right to convert from one religion to another is a well-established aspect of freedom of religion.

A majority of judges handling apostasy cases have said that renunciation must be done through the syariah courts. Till the syariah court determines the issue according to Islamic law, the apostate remains a Muslim and can be subjected to the syariah court’s criminal jurisdiction. The problem with this point of view is that

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<sup>9</sup> See also Articles 12(3) and 11(2). However under Article 11(4) of the Federal Constitution, state law and in respect of the federal territories, federal law, may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam. This permits the States to punish attempts by non-Muslims to proselytize Muslims. The prosecution will, however, have to be initiated in ordinary courts. For an illustration of such a law see Control and Restriction of the Propagation of Non-Islamic Religions Enactment 1991, sections 4-9 (Johor).

syariah courts often fail to adjudicate on a renunciation application despite an unconscionable passage of time. No remedy seems to be available if a syariah judge indefinitely postpones the determination of an apostate's status. The administrative law remedy of Mandamus (Order under section 44 Specific Relief Act) is unlikely to lie because of the existence of Article 121(1A) of the Constitution.

**Residual power:** Contrary to what is believed, not everything connected with Islam is in the hands of state assemblies. Some matters of Islamic civil law are assigned by the Constitution to the federal jurisdiction. For example, administration of the Hajj falls under the Federal List, Item 1(h).

Under Schedule 9, List II, Item 1, States have authority relating to "creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, *except in regard to matters included in the Federal List*". Among matters included in the Federal List are "civil and criminal law and procedure" (List I, Item 4). List I, Item 4(h) states that "creation of offences in respect of any of the matters included in the federal List *or dealt with by federal law*" are in the hands of the federal Parliament. Betting and lotteries, murder, theft, robbery, rape, incest and unnatural sex<sup>10</sup> are all offences in Islamic law but they are clearly in federal hands because of Schedule 9, List I, Items 4(l), 4(h) and the federal Penal Code. This means that the criminal law powers of state assemblies are purely residual. Many state laws are, however, in disregard of this constitutional limitation. It is humbly submitted that state criminal laws dealing with matters such as homosexuality, incest, betting and lotteries (which matters are already dealt with by federal laws) are ultra vires the powers of the States.

**Derived and not inherent jurisdiction:** The Constitution in Schedule 9, List II, Item 1 says that syariah courts "shall not have jurisdiction in respect of offences except in so far as conferred by federal law". The relevant federal law is the Syariah Courts (Criminal Jurisdiction) Act 1965. It confines jurisdiction to such offences as are punishable with maximum three years jail, RM5,000 fine and six lashes. Any state law imposing larger penalties would be ultra vires and unconstitutional.

**Fundamental rights:** Federal and State legislative powers in Schedule 9, Lists I, II and III are subject to the gilt-edged provisions of the chapter on fundamental rights. Schedule 9 does not give to Parliament or to the State Assemblies a carte blanche to pass laws on Islam irrespective of the constitutional guarantees in Articles 5 to 13. Schedule 9 does not and cannot override the rest of the Constitution. It does not authorize punishments for acts which are protected by the guarantees of Part 2. For example many state enactments penalize any criticism or challenge to a *fatwa*.<sup>11</sup> This appears to be a violation of Article 10(1)(a) and 10(2)(a) because free speech can be restricted only on the grounds explicitly permitted by Article 10(2)(a). Further, it has been held in *Dewan Undangan Negeri Kelantan v Nordin Salleh*

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<sup>10</sup> Section 53, Enactment 3/1992 (Perak)

<sup>11</sup> Section 21, Crimes (Syariah) Enactment 3/1992 (Perak); Section 12 Enactment 3/1996 (Penang); Section 12, Act 559 (Federal Territories).

(1992) that the power to restrict Article 10 rights belongs to the federal Parliament and not the state Assemblies.

**Precepts of Islam:** The criminal jurisdiction of the Federal Parliament and the State Assemblies in relation to Islam was conferred to enable them to protect the beliefs, tenets, dogmas, principles, articles of faith, canons, maxims, rules, doctrines and teachings of Islam. But if there is over-exuberance in the exercise of this power, and acts are made punishable that are not punishable in Islamic theory, there appears to be some scope for constitutional review. It is arguable, e.g. that Islam does not mandate criminal sanctions against those who miss prayers or who in honest disagreement, question the desirability of a *fatwa*.

**Article 75:** In every federation jurisdictional conflicts between regional governments and the central government are common. There is also the possibility that on topics in the Concurrent List, both tiers of government may have enacted laws. To resolve conflicts where multiplicity of laws exist, Article 75 provides that “if any State law is inconsistent with a federal law, then the Federal law shall prevail and the State law shall, to the extent of the inconsistency, be void”. In actual practice, however, state laws on Islamic matters seem to have administrative ascendancy over conflicting federal laws. For example, social security, workmen’s compensation, insurance, pensions and provident funds are part of item 15 of the Federal List. But if a Muslim dies leaving any of the above funds, federal law seems to give way to the power of the syariah courts over Islamic succession. In recent years, several states are requiring mandatory HIV testing before Muslim marriages can be solemnized. This may well be in clash with the federal power over prevention of diseases in List III, Item 7 and long standing federal laws over disease control.

## V: SPECIAL AREAS

**Deviationist activities:** Under Article 11(5) the religious conduct of non-Muslims can be regulated on the grounds only of public order, public healthy and morality. But Muslims are subjected to many more religious restraints due to the power of the states to punish Muslims for offences against the precepts of Islam in accordance with Schedule 9, List II, and Item 1. The power of the states to punish Muslims for Islamic crimes was recently confirmed by the Court of Appeal in *Kamariah bte Ali Iwn Kerajaan Kelantan* [2002] 3 MLJ 657.

The Court held that:

Article 11 of the Federal Constitution (in relation to Islam) cannot be interpreted so widely as to revoke all legislation requiring a person of the Muslim faith to perform a requirement under Islam or prohibit them from committing an act forbidden by Islam or that prescribes a system of committing an act related to Islam. This was because the standing of Islam in the Federal Constitution was different from that of other religions. First, only Islam, as a religion, is mentioned by name in the Federal Constitution as the religion of the Federation and secondly, the Constitution itself empowers State Legislative Bodies (for States) to codify Islamic law in matters mentioned in List II, State List, Schedule Nine of the Federal Constitution (‘List II’).

Persons of the Islamic faith and Muslim religious groups that are not mainstream are subject to severe restraints in relation to what are deemed to be “deviationist activities”.<sup>12</sup> From a constitutional law point of view laws that punish “deviationist activities” raise difficult legal issues. For example, section 69 of the (Perlis) State Islamic and Malay Customs Enactment criminalizes “deviationist activities”. This section may be constitutionally permissible under Item 1, List II of the 9<sup>th</sup> Schedule. But any one punished under it may put up a vigorous challenge that the law goes far beyond the permissible restrictions of Article 11(5). Article 11(5) of the Constitution gives to every person including a Muslim a right to profess and practise his religion save to the extent that he/she does not endanger public order, public health or morality. The difficulty is that the freedom in Article 11 seems to be, in the case of Muslims, qualified by Item 1 of the State List in the Ninth Schedule. State Enactments are permitted to create and punish offences by persons professing the religion of Islam against precepts of that religion.

It is submitted, however, that despite the undoubted grant of power to the states to punish Muslims for offences against Islamic precepts, some limits need to be drawn on this power so that the guarantee in Article 11 is not extinguished. Further, the proper recourse against deviationist activities is to resort to ex-communication and not to criminalisation. Ex-communication should be resorted to after the parties concerned have been given a full and fair opportunity to defend themselves and to explain their conduct.

**Conversions and apostasy:** The right to convert out of one’s faith is not mentioned explicitly in the Malaysian Constitution though it is alluded to in Article 18 of the International Covenant on Civil and Political Rights 1966 and Article 18 of the Universal Declaration of Human Rights.

For non-Muslims the right to opt out of one’s faith and choose another has been regarded as an implicit part of religious liberty guaranteed by the Constitution. But because of its implications for child-parent relationships, the court in the case of *Teoh Eng Huat* [1986] 2 MLJ 228 held that a child below 18 must conform to the wishes of his/her parents in the matter of religious faith. Thus, a Buddhist girl of seventeen had no constitutional right to abandon her religion and embrace Islam.

In relation to Muslims the issue of conversion or apostasy raises significant religious and political considerations. Many Muslims feel considerable disquiet about Article 18 of the International Covenant on Civil and Political Rights 1966 which was adopted at the behest of a Christian delegate from Lebanon despite strong opposition from the Muslim delegates who were in attendance. Christianity’s link with the merchants, missionaries and military of the colonial era is still fresh in many minds. The disproportionately strong support that Christian missionary activities receive from abroad also arouses fear and resentment. The adoption of Islam as the religion of the federation and the compulsory subjection of Muslims to the *syariah* in a number of matters are other reasons why the conversion of a Muslim out of Islam

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<sup>12</sup> See sections 8-11, Perak Crimes (Syariah) Enactment 3/1992.

arouses deep revulsion and anger among the Malay/Muslim citizens. The situation is exceedingly complex due to the intermingling of politics, law and religion.

Many Muslim scholars argue that repeated references in the Holy Qur'an to the need for tolerance and non-compulsion<sup>13</sup> refer to the freedom of conscience of non-Muslims. Muslims themselves have an absolute duty to uphold their faith.

As Islam is the religion of the federation and Malays are, by constitutional definition, required to be of the Muslim faith, all Muslims are liable to prosecution if their conduct is violative of Islamic precepts. No Muslim can lay a claim to opt out of syariah laws – the constitutional guarantee of freedom of religion notwithstanding. The notion that freedom to believe includes the freedom not to believe is unlikely to be accepted in Malay society and has been rejected in national courts.<sup>14</sup> Despite international norms to the contrary in Article 18 of the Universal Declaration of Human Rights and Article 18 of the International Covenant on Civil and Political Rights (that freedom of religion includes freedom to change one's religious belief), the impact of local culture and beliefs cannot be discounted.

It is submitted, however, that Islam is a religion of persuasion, not force. The proposal to detain apostates may run counter to the spirit of Islam which is one of tolerance for the disbeliever. It is noteworthy that the Holy Qur'an nowhere prescribes a worldly punishment for apostates even though it is stated repeatedly that their conduct shall incur the wrath of Allah (SWT) in the hereafter.<sup>15</sup> In fact Surah Ali 'Imran 3:86-89 recognises the possibility of repentance and reminds us that Allah is all-forgiving. Only if the apostate turns against the Muslim community is he to be seized and killed (Surah Nisa 4:89), The Grand Imam of Al-Azhar, Sheikh Muhammad Sayyed Tantawi is of the view that as long as the apostates do not insult or attack Islam or the Muslims, they should be left alone. "Action should not be taken against them on the basis that they renounced Islam. Only when they insult Islam or try to destroy the religion, one should act (against them).<sup>16</sup> Tantawi bases his opinion on Surah An-Nisa (4:137): "Those who believe, then disbelieve, again believe and again disbelieve, then increase in disbelief, Allah will not forgive them nor guide them in the right path".

The difficulty is that there is a known Hadith ordering that apostates should be advised, imprisoned, and if they still persist, then beheaded. Some Muslim scholars like Prof. Hashim Kamali are of the view that the Hadith must be read in the context in which it was made – in times of war, emergency and grave threat to the Islamic community. They also point out that the Prophet never ordered the execution of an apostate.<sup>17</sup>

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<sup>13</sup> Holy Qur'an Surah 2 Ayat 256; Surah 109 Ayats 1-6; Surah 10 Ayat 99

<sup>14</sup> Daud Mamat v Majlis Agama Islam [2002] 2 MLJ 390

<sup>15</sup> Surahs Muhammad 47:25, 27-28; Ali 'Imran 3:86-89; Baqarah 2:217; Nahl 16:106

<sup>16</sup> The Star, 29.8.98, p.22.

<sup>17</sup> For a view of the jurists see Mohammad Hashim Kamali, *Punishment in Islamic Law – an Enquiry into the Hudud Bill of Kelantan* (Institut Kajian Dasar, Kuala Lumpur, 1995) pp. 33-37

In response to the Muslim *volksgeist*, a number of states have, in the last few years, enacted “rehabilitation laws” that permit detention and re-education of converts out of Islam. Various referred to as Restoration of Aqidah or apostasy or *murtad* laws, these enactments shake constitutional theory to its roots.<sup>18</sup> They pit state law on apostasy against the Federal Constitution’s guarantee of religious freedom. From a constitutional law point of view, apostasy laws raise difficult constitutional issues under Articles 11, 5, 3, 10 and 12.

*Article 11*: The freedom of religion in Article 11(1) is broad enough to permit change of faith. Though Article 11(4) restricts propagation of any religion to Muslims, the law nowhere forbids voluntary conversion of a Muslim to another faith. In the case of *Minister v. Jamaluddin Othman* [1989] 1 MLJ 369 the Supreme Court implicitly acknowledged the right of a Muslim to convert to another religion. A similar sentiment was expressed in *Kamariah bte Ali* [2002] 3 MLJ 657.

*Article 5*: Forced rehabilitation will be an interference with personal liberty guaranteed by Article 5(1). Habeas corpus may be applied for. But a difficult jurisdictional issue will arise whether due to the existence of Article 121(1A) a High Court can interfere with a detention order arising out of the judgment of a syariah court. Article 121(1A) states that the ordinary courts “shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts”. This leaves open the possibility of habeas corpus if the state law is unconstitutional or if the syariah court is acting outside its jurisdiction.

*Article 3*: The aqidah (basic faith) laws cannot be saved by Article 3’s declaration that Islam is the religion of the federation because Article 3(4) clearly states that “nothing in this article derogates from any other provision of this Constitution”. This means that Article 3 cannot override Article 11.

*Article 10(1) (a)*: Article 10(1)(a) guarantees speech and expression. A *murtad* (convert out of Islam) may claim that the rehabilitation law violates his rights under Article 10 unless aspects of public order can be used to defend the *murtad* law.

*Article 10(1) (c)* : Article 10(1)(c) guarantees the right to associate. Inherent in this right is the right to disassociate. See *Dewan Undangan Negeri Kelantan v Nordin b. Salleh* [1992] 1 MLJ 343 about the right to leave a political party and join another.

*Article 12*: Article 12(3) says that no person shall be forced to receive instruction or take part in any ceremony or act of worship of a religion other than his own. The forced rehabilitation laws will fall foul of this guarantee.

The *aqidah* laws are triggering a massive constitutional debate that pits religion against the Constitution and disturbs the delicate social fabric that has held all Malaysians together for 47 years. At the moment the following judicial attitudes and conflicts have emerged.

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<sup>18</sup> Perak Crimes Syariah Enactment 3/1992, sections 12-13.

1. According to one High Court the act of exiting from a religion is not part of freedom of religion – at least not in the case of Muslims : *Daud Mamat v Majlis Agama* [2002] 2 MLJ 390. A contrary view was recently expressed by the Court of Appeal in an appeal from a Kelantan High Court decision. It was held that a Muslim is not forbidden from renouncing Islam : *Kamariah bte Ali Iwn Kerajaan Negeri Kelantan* [2002] 3 MLJ 657.
2. But this renunciation cannot be done unilaterally. A Muslim who wishes to declare apostasy must first get the syariah court to confirm that he/she has left the religion. A statutory declaration of apostasy is not enough. The matter has to be determined by the syariah court using Islamic law : *Daud Mamat* [2002] 2 MLJ 390 and *Mad Yaacob Ismail* [2002] 6 MLJ 179. Until the act of renunciation is validated by the syariah court, a Muslim is deemed to be a person of the Muslim faith: *Kamariah bte Ali* [2002] 3 MLJ 657.
3. A Muslim cannot escape the jurisdiction of the syariah court by a unilateral act of renunciation. The syariah court continues to have jurisdiction till the issue of status is determined at law.
4. In the absence of an inquiry by the syariah court, the civil court must accept a Muslim to be still a Muslim till the syariah court has made a pronouncement.
5. Civil courts should not interfere with decisions of the syariah courts because of Article 121(1A).
6. The issue of whether an individual is an apostate or not was one of Islamic law and not civil law.

**Hudud laws and jurisdictional issues:** In the last few years a number of State Assemblies, as part of their quest for an Islamic state, are enacting “hudud laws” – i.e. laws relating to crimes, punishments, rights and duties that are mentioned in the Holy Qur’an.<sup>19</sup> The States are claiming to exercise this jurisdiction on the ground that under the Federal Constitution Islamic penal law is in State hands. Such a view amounts to an overstatement of the powers of the States for a number of legal reasons.

First, under Schedule 9, List II, Item 1, States have authority relating to “creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, *except in regard to matters included in the Federal List*” (emphasis added). This means that any matter assigned to the federal Parliament is outside the legislative competence of the States. In Schedule 9, List I, Item 4, criminal law and procedure, administration of justice, jurisdiction and powers of all courts, creation of offences in respect of any of the matters included in the Federal List or *dealt with by federal law* are in federal hands. It is well known that theft,

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<sup>19</sup> Mohammad Hashim Kamali, *Punishment in Islamic Law – an Enquiry into the Hudud Bill of Kelantan* (Institut Kajian Dasar, Kuala Lumpur, 1995). See also Enakmen Kanun Jenayah Syariah II, 1993 (Kelantan).

robbery, rape, murder, incest, unnatural sex and gambling are all dealt with by the federal Penal Code. Therefore, the States are not permitted to enact *hudud* laws on these criminal matters even though these crimes are also crimes against Islam.

Second, Schedule 9, List II, Item 1 clearly provides that syariah courts “shall have jurisdiction only over persons professing the religion of Islam”. This means that State Assemblies and syariah courts have no power to apply the *hudud* laws to non-Muslims.

Third, the jurisdiction of the syariah courts is not inherent but must be derived from federal law. The Constitution, in Schedule 9, List II, Item 1 says that Syariah courts “shall not have jurisdiction in respect of offences except in so far as conferred by federal law”. The relevant federal law is section 2 of the the Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355). It states that the jurisdiction of the syariah courts shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof. Any penalty like cutting of hands or stoning to death that is not mentioned in Act 355 is *ultra vires* the powers of the states and also unconstitutional.

The implication of the above is that the States and the State syariah courts have jurisdiction over only such Islamic criminal offences as are *not* dealt with by federal law viz, offences like consuming alcohol, not fasting during *bulan puasa*, *zina*, *khalwat* and missing Friday prayers.

**Enforcement of hudud laws:** In addition to the question as to who has the jurisdiction to enact *hudud* laws, there is the further constitutional problem of enforcement of *hudud* laws and the arrest and detention of syariah offenders. The State authorities are entitled to set-up their own enforcement units. But if they wish to seek the help of the federal police, there are legal dilemmas.

Under the Constitution’s Ninth Schedule, List 1, Item 3(a) the police force is a federal force. Its powers and functions are derived from the Federal Constitution and from federal laws like the Police Act 1967 (Act 344). Under section 3(3) of Act 344, the Force shall be employed for “the prevention and detection of crime and the apprehension and prosecution of offenders”. The control of the Force in any area or State is in the hands of the Commissioner, Chief Police Officer or such police officer as the IGP may specify: section 6.

However, section 19 states that every police officer shall perform the duties and exercise the powers granted to him under Act 344 *or any other law at any place in Malaysia where he may be doing duty* (emphasis added). It is arguable that the words in italics could cover state syariah laws. This could mean that police officers are obliged under section 19 to enforce State laws.

It must be remembered, however, that section 20(1) and (2) clarify that in the performance of his duties, a police officer is subject to the orders and directions of his superiors in the Force and not the order of the State executive. Further, any

state law that confers rights or imposes duties on the police is beyond the powers of the State Assembly because the police force is under federal jurisdiction. A State Assembly cannot order the police to undertake responsibilities in much the same way it cannot order the immigration, customs or EPF authorities to perform any acts.

**Prisons:** As with the police, prisons, reformatories, remand homes and places of detention are in the Federal List: Ninth Schedule List 1, Item 3(b). It is, therefore, submitted that state-run rehabilitation centers for *aqidah* offenders or *murtads* will be outside the powers of the state authorities.

## VI: CONCLUSION

In Article 4(1), the Federal Constitution declares itself to be the supreme law of the federation. However, a wide gap has developed between theory and practice. In relation to Islamic matters, a silent, informal re-writing of the Constitution seems to have taken place. A great deal of legislation on Islamic matters appears to disregard constitutional provisions. The superior courts appear reluctant to intervene. The executive appears to lack the political will to restore the original constitutional scheme of things.

The chapter on fundamental rights appears to have been subordinated to federal and state jurisdiction to legislate on Islamic matters. Item 1, List II, Schedule 9 has triumphed over the gilt-edged provisions relating to fundamental liberties.

The federal-state division of legislative power has broken down in relation to matters of Islamic law. The residual criminal law powers of state assemblies are being used expansively in disregard of the supreme constitution and (in the case of hudud laws) with total indifference to the relevant federal law on jurisdictional limitations of state assemblies.