Jurisdiction of State Authorities to punish offences against the precepts of Islam: A Constitutional Perspective

Wednesday, 28 September 2005 09:21pm

By: Prof. Dr. Shad Saleem Faruqi
Professor of Law and Legal Adviser to Universiti Teknologi MARA

I: THE ENFORCEMENT OF MORALITY

Is it the business of the law to suppress vice and to enforce morality? 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 whether the law should enforce morality tends to concentrate on matters of sexual 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 for reasons of human rights as well as for practical and economic considerations 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.[1] Harming fellow Muslims, trying to uncover their nakedness, committing espionage or reporting on the private affairs of others is forbidden in Islam. According to a *Hadith,* exposing the faults of others through suspicion and espionage, spying upon one another, trying to bare each others hidden failings and exposing or exploring the privacy and personal weaknesses of the people is regarded as reprehensible.[2] According to another *Hadith* "if anyone tries to uncover the nakedness of his Muslim brother, God will uncover his own nakedness.[3]

On the enforcement of morality through the law, legal philosophy offers many approaches.[4] John Stuart Mill proposes a "harm to others" test. It is not the business of the law to promote virtue and to punish vice. Enforcement of morality is not the function of the state. A distinction must be made between sin (which should remain a matter of private conscience) and crime (which consists of conduct that causes harm to others).

Lord Devlin proposes a "public morality" test. What constitutes society is the existence of shared values. The law must make it its business to protect these shared values and standards. But as far as possible privacy must be respected. Not every breach of public morality needs to be punished. Only such conduct as arouses widespread disapprobation, a mixture of intolerance, indignation and disgust, needs to be suppressed by the instrument of law.

H.L.A. Hart rejects the "public morality" test. He believes that except on the most simple issues of morality, there is no community of beliefs in modern society and no unanimity on what constitutes immoral conduct. Instead, value pluralism is widespread. Hart, therefore, recommends a "critical morality" test. The law's decision to intervene in matters of private conscience must be based on a thorough, empirical collection and investigation of all facts and a critical analysis of the consequences. A similar, functionalist and pragmatic approach is recommended by the sociological school.

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.[5] 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 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: Articles 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-State division of powers: 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 in *Mamat Daud v PP* [1988] 1 MLJ 119 section 298A of the federal Penal Code was declared to be an unconstitutional trespass on state legislative power by the Federal Parliament.

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 FC18, 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. List I contains 27 paragraphs. In relation to topics in these paragraphs the federal Parliament has exclusive legislative competence. List II outlines 13 areas for which State Assemblies have exclusive power. List III includes 12 topics in relation to which both the federal and state legislatures have concurrent power.[6]
- fundamental rights; and
- other provisions of the Constitution like Article 75.

Federal List: A look at List I indicates that the 27 paragraphs in this List cover 110 or more items. The Constitution has allocated the most important legislative matters like defence, finance and internal security to the federal Parliament. Two controversial areas within federal jurisdiction deserve special mention.

(i) *Islamic Law:* Included in the federal list are many topics on which classical Islamic law provides a wealth of principles and precepts. It must be remembered that like secular law, Islamic law addresses all fields of human endeavour, be they public or private, civil or criminal, national or international. Legal areas like pilgrimages, civil law, criminal law, contracts, employment, equity and trusts, mercantile law, banking, trade, commerce, treaties, defence, war and peace, betting, lotteries, taxes, education, labour and social security are all in the federal list. But any one familiar with Islamic legal systems will know that in relation to these fields there is a wealth of Islamic laws and principles.[7] However in the context of Malaysia these areas are exclusively in the hands of the federal Parliament. Thus, contracts, sale and purchase, banking, hire-purchase and employment agreements, whether by Muslims or non-Muslims, are governed by federal laws.[8] In *Bank Islam v. Adnan Omar* [1994] 3 CLJ 735[9] it was argued that syariah courts and not the civil courts have jurisdiction over Islamic banking. The contention was rejected. Banking, whether Islamic or conventional, is a matter of federal jurisdiction and the civil courts are the proper forum to adjudicate disputes.

(ii) *Criminal Law:* Almost the entire field of criminal law is allocated to the central government. Extradition, fugitive offenders, alien enemies and enemy aliens, police, criminal investigation, registration of criminals, public order, prisons, reformatories, places of detention, probation of offenders, juvenile offenders, criminal law and procedure, corrupt practices, "creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law", betting and lotteries are all matters of federal jurisdiction even though there are Islamic laws on many of these points. In *Che Omar Che Soh v. PP* [1998] 2 MLJ 55, a federal law against drug trafficking was unsuccessfully challenged as unIslamic. It was held that the declaration in Article 3 that "Islam is the religion of the federation" does not impose fetters on the power of Parliament to legislate on matters assigned to it by the Constitution.

From the above it follows that the assertion that all Islamic civil and criminal law is within State jurisdiction has no

constitutional basis. On many areas of Islamic law, the federal Parliament is the authorised legislative authority.

State List: The Constitution's Schedule 9, List II has 13 paragraphs covering 31 or so items. For our purpose the most important paragraph is Paragraph I which stretches to 210 words and could be broken down into the following nine areas:

- Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts;
- Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutional trusts, charities and charitable institutions operating wholly within the State;
- Malay customs;
- Zakat, Fitrah and Baitulmal or similar Islamic religious revenue;
- Mosques or any Islamic public places of worship;
- Creation and punishment of offences by persons professing the religion of Islamic against precepts of that religion, except in regard to matters included in the Federal List;
- The constitution, organization and procedure of syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law;
- The control of propagating doctrines and beliefs among persons professing the religion Islam;
- The determination of matters of Islamic law and doctrine and Malay custom.

The use of such generic words as "matters of Islamic law" has given rise to an engaging debate about the extent of the powers of the states to legislate on Islamic matters. One view is that State Assemblies have legislative monopoly whenever a measure, in its pith and substance, deals with an Islamic civil or criminal matter. The decision in *Mamat Daud v. Government* [1988] 1 MLJ 119 lends credence to this view. The other view is that states have only a limited power confined to the explicitly mentioned areas of Islamic law in Schedule 9, List II, Paragraph I. The rest of the field of Islamic law is open to federal jurisdiction.[10]

It is submitted that the second view represents the constitutional scheme of things. The term "Islam" or "Islamic law" in Schedule 9 List II, Paragraph 1 does not refer to Islamic law in its entirety but only to such areas of Islamic law as are explicitly enumerated in that paragraph. This contention can be supported by the following submissions:

(i) By specifying with precision those areas of Islamic law that are assigned to the States, it is obvious that the intention of the Constitution was to confine state power to enumerated fields. If the intention was to allocate the entire field of Islamic law to the States there would be no need to use 210 words in Paragraph I to enumerate specific areas of Islamic law. The contention that the words "Islamic law" must be interpreted broadly because "Islam is not just a mere collection of dogmas and rituals but … is a complete way of life covering all fields of human activities, may they be private or public, legal, political, economic, social, cultural, moral or judicial"[11] is plausible. But it is submitted that this majestic and broad view of Islam is not incorporated into the Constitution.

In List II, Paragraph I the words "Islamic law" occur at two places. On the first occasion the item of "Islamic law is not a separate and independent head. It is not followed by a full stop, comma or semi-colon but is part of a long sentence running to 210 words. The sentence runs as follows: "Islamic law and personal and family law of persons professing the religion of Islam including the Islamic law relating to" (12 items of Islamic personal law). The implication is that "Islamic law and personal and family law" were meant to refer to only to these 12 enumerated matters.

The second reference to "Islamic law" at the end of Paragraph I of List II – "the determination of matters of Islamic law and doctrine" – is indeed very broad. It is submitted, however, that these words must be interpreted narrowly and in the context of the specific areas of Islam explicitly mentioned in the paragraph.

(ii) List I, Paragraph e (ii) expressly excludes from federal jurisdiction the specific items of Islamic personal law relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession, testate and intestate". This implies that other areas of Islamic law like banking, contracts, insurance are not outside the powers of the federal Parliament.

(iii) List II, Paragraph 4(k) gives to the federal Parliament power in relation to the "ascertainment of Islamic law and other personal laws for purposes of federal law". This means that the Constitution envisages that some federal laws will have an Islamic component. The states have no monopoly over these laws.

(iv) It is judicially accepted that topics in the Federal List are in federal hands even though they may involve an Islamic component. Thus, banking and insurance – whether Islamic or conventional – are federal matters.[12] Likewise contracts and partnerships are regulated by federal laws. The Practice Direction of 6 February 2003 by the Chief Judge established a Muamalat Division within the civil court system to handle federal laws with an Islamic content.[13]

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). These rights operate as constitutional limits on the powers of federal and state legislatures and as restraints on legislative exuberance. Legislative power in Schedule 9, Lists I, II and III is subordinate to the gilt-edged provisions of the chapter on fundamental rights.

In the light of this, sections 12(3) and 41(1) of the (Kelantan) Syariah Criminal Code II Enactment 1993 appear to be unconstitutional and violative of Article 8(2) of the Constitution because they discriminate against women in the matter of giving evidence in a court of law. Section 23(4) of the same Enactment appears to violate the right to property in Article 13 in that orders the forfeiture of property without any compensation.

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)).

Article 3(4) : The Constitution in Article 3(1) declares that Islam shall be the religion of the Federation. But it is provided in Article 3(4) that nothing in Article 3 derogates from any other provision of the Constitution. This means that Article 3 does not override any constitutional provision or extinguish any right guaranteed by the Constitution.

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…[14] 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.[15] 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.[16]

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 14th century from various regions in Arabia, India and China. But it gained a legal footing in Malaya only in the 15th century. Since then the legal system of the Malays shows a fascinating action and reaction between Hindu law, Muslim law and Malay indigenous traditions. 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".[17] 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".[18]

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.[19] 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.

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.[20] 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 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[21]. "Syariah courts … shall have jurisdiction only over persons professing the religion of Islam". Kelantan's clever device of permitting non-Muslims "to elect" to be governed by Kelantan's Syariah Criminal Code II Enactment of 1993 will not remove the unconstitutionality. Jurisdiction is conferred by law. The act of election by non-Muslims cannot confer jurisdiction when none existed under the Constitution. See section 56(2) of the 1993 Enactment.

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.

A majority of judges handling apostasy cases[22] 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. There are three serious problems with this point of view. First, the syariah courts often fail to adjudicate on a renunciation application despite an unconscionable passage of time. Statutory time limits must, therefore, be imposed to require the syariah courts to adjudicate on an application within a prescribed time frame. Second, 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. Third, syariah authorities denounce and effectively defeat an application to renounce Islam by prosecuting the applicant for insulting Islam.

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. Further, 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 both in international law and in most municipal systems.

Schedule 9, List II, Item 1: Contrary to what is believed, not everything connected with Islam is in the hands of state assemblies. State Assemblies have a power only over the matters explicitly included in paragraph 1 of the State List.[23] These matters relate to Islamic personal law, wakafs, Malay customs, zakat, mosques, offences against precepts of Islam (except those offences covered by federal law), syariah courts, propagation of religion to Muslim and determination of matters of Islamic law and Malay custom. All other matters of Islamic criminal and civil law are assigned by the Constitution to federal jurisdiction. For example, administration of the *Hajj* falls under the Federal List, Item 1(h). Likewise, much of the field of Islamic criminal law is assigned to the federal parliament. Thus, theft, murder and rape fall under Federal List, Items 4 and 4(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"*. This means that List II acknowledges that certain areas of Islamic law are part of the federal jurisdiction. State powers over Islam are neither exclusive nor comprehensive. Among matters included in the Federal List are "civil and criminal law and

procedure" (List I, Item 4) and "Betting and lotteries" (List I Item 4(l). The words "except in regard to matters included in the Federal List" and the assignment of criminal law and procedure and betting and lottery to the federal jurisdiction clearly imply that State power over Islamic law offences is subordinate to the federal power and is residual and not inherent. Crime is, mostly a matter for federal supervision.

Schedule 9, List I, Item 4(h): The assignment of Islamic criminal law offences to the States is further qualified and limited by List I, Item 4(h) which assigns "creation of offences in respect of any of the matters included in the Federal List *or dealt with by federal law* to the federal Parliament. Like Item I in List II, Item 4(h) in List I reiterates that the criminal law powers of state assemblies are purely residual.

Murder, theft, robbery, rape, incest and homosexuality are all offences in Islamic law but are clearly in federal hands due to Schedule 9, List I, Item 4(h) and the Federal Penal Code. Murder is covered by sections 300, 302 and 307 of the Penal Code. Theft is dealt with by sections 378 – 382A; robbery by sections 390 to 402; and rape in section 375 – 376. Incest and homosexuality can be covered by sections 377A to 377C of the Penal Code. State Enactments on these federal matters would, therefore, be ultra vires the powers of the States.

Betting and lotteries are Islamic law offences but are clearly in federal jurisdiction under Schedule 9, List I, Item 4(l) and the Lotteries Act 1952 (Act 288) and the Betting Act 1953 (Act 495). Many states laws are in disregard of this constitutional position.

A Selective survey indicates that the Syariah Criminal Offences (State of Penang) Enactment 1996 (No.3 of 1996) contains many provisions that overlap with federal criminal offences. Among them are:

- Section 7 on insulting or bringing into contempt the religion of Islam. This overlaps with section 298 of the federal Penal Code.
- Section 8 on deriding Qur'anic verses or *Hadith*. This too may be covered by section 298 of the Penal Code.
- Section 18 on gambling. This overlaps with the federal Gaming Tax Act 1972 (Act 65).
- Section 25 and 26 relating to *liwat* and *musahaqah*. These are covered by sections 377A to 377C Penal Code.
- Section 30 about giving false evidence which is also covered by section 191 of the Penal Code.
- Section 32 relating to the defiling of a mosque. This is similar to section 295 of the Penal Code.
- Sections 43 to 46 on Abetment. These sections overlap with sections 107 to 114 of the Penal Code.

The (Penang) Crimes (Syariah) Enactment 1992 contains many penal provisions which overlap with or trespass into federal jurisdiction. Among the provisions are: Section 14 (insulting or bringing into contempt the religion of Islam); section 15 (deriding Qur'anic verses or *Hadith*); section 26 (gambling); section 27 (giving false evidence); section 35 (disturbing a religious assembly or ceremony); section 36 (destroying or defiling a place of worship); section 37 (words that may cause breach of peace); section 39 (secrecy); and section 61 – 64 (abetment).

The state of Terengganu Syariah Criminal Offences (Takzir) Enactment No. 7 of 2001 in section 50 imposes a punishment for disturbing a religious assembly or ceremony. In section 52 prosecution maybe instituted for words that may cause breach of peace. Section 54 punishes any violation of the duty to observe secrecy. All the above matters are the subject of federal laws.

Another State law that encroaches on the federal power is the Syariah Criminal Code II Enactment 1993 of the State of Kelantan. It seeks to punish:

- Theft (sections 4(a), 6)
- Robbery (sections 4(b), 8)
- Carnal intercourse against the order of nature (sections 16, 19, 20, 21)
- Homicide (section 25)
- Causing death, injury, pain, harm, disease, infirmity or injury (sections 30, 34).

All the above are federal offences and, therefore, outside the powers of the state.

Whether in some future case, the superior courts will restore the constitutional scheme of things and declare that State Assemblies do not have an equal or concurrent power over crimes committed by Muslims remains to be seen. The picture today is mixed.

1. It has been stated admirably that Article 121(1A) does *not* say that all disputes in which all the parties are Muslims should only be heard in the Syariah Court" : *Sarwari a/p Ainuddin v. Abdul Aziz* [2006] 6 MLJ 737.

2. The High Court has held that civil courts cannot interfere with syariah courts when the issue is within the *exclusive* jurisdiction of the syariah courts. But if an act is an offence both under the Penal Code and the Syariah Criminal Offences (FederalTerritories) Act 1997, as in *Sukma Darmawan v. KP Penjara* [1988] 4 MLJ 742, then both sets of laws and both sets of courts may operate. If the charge is *liwat*, then the Sessions Court has no jurisdiction. But as the charge in

the case was of gross indecency under the Penal Code, therefore Article 121(1A) did not apply.

It is submitted that the *Sukma* decision should be regarded as authority only for federal territories. In the territories of the states, it would be constitutionally wrong to concede that both sets of laws and both sets of courts may operate. If a crime like unnatural sex is covered by both a federal and a state law, then the state law's validity is highly in doubt because of Schedule 9, List I, Item 4(h).

3. In *Soon Singh v. PERKIM* [1999] 1 MLJ 489 the court gave an expansive interpretation of the Syariah Courts' power to deal with apostasy. The court held that the jurisdiction of the syariah courts to deal with apostasy, although not expressly provided in the State Enactment, can be read into them by implication derived from the provisions concerning conversion into Islam. With all due respect, apostasy raises critical constitutional issues about freedom of religion and the Federal Courts' decision in this case, overruling *Lim Chuan Seng v. Pengarah Jabatan Agama* [1976] 3 CLJ 231 amounts to a refusal to recognise the constitutional issues involved and an indefensible delegation of its duty to the syariah courts. Despite their erudition in the *hukum syarak*, the judges of the Islamic courts have no experience in the canons of constitutional interpretation.

Syariah Courts Criminal Jurisdiction Act 1965 : The powers of State Assemblies to legislate for crimes is a limited and derived power. It is not inherent. 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 like the hudud laws of Terrengganu and Kelantan imposing larger penalties would be ultra vires and unconstitutional.

Under the Syariah Criminal Code II Enactment 1993 of the State of Kelantan the following penalties are clearly ultra vires the power of the assembly:

- Amputation of right hand (s.6(a), 6(b), 9(a))
- Imprisonment for such term as in the opinion of the court may likely to lead the convict to repentance (s.6(c), 9(d)
- Death (s.9(a), 9(b), 23(4), 27)
- Crucification (s.9 (a))
- Stoning to death (s.11(1))
- Whipping (s.11(2), 13)
- Repentance (s.23(3))
- Forfeiture of property (s.23(4))
- Imprisonment for life (s.29)
- Imprisonment not exceeding 14 years (s.31)
- Imprisonment not exceeding 10 years (s.33)
- Imprisonment not exceeding five years (s.20, 21, 23 (4))

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 is noteworthy that Article 74 on the subject matter of federal and state laws states clearly that "the power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution." It is submitted that Schedule 9 cannot 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*.[24] 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).

The Syariah Criminal Offences (State of Penang) Enactment 1996 punishes "wrongful worship" in section 3; "false doctrine" in section 4; "defying or disputing a *fatwa*" in sections 9 and 12; and "printing a religious publication contrary to Islamic law" in section 12. All these sections raise constitutional issues relating to fundamental rights as guaranteed by Article 10 (free speech) and Article 11 (freedom of religion).

Laws against apostasy pose a severe challenge to freedom of conscience. This right was indirectly recognized in *Minister v. Jamaluddin Othman* [1989] 1 MLJ 418 but is facing extinction now. Many State Enactments criminalize a conversion or attempted conversion out of Islam. Refer, for example, to section 12 and 13 of the Crimes (Syariah) Enactment 1992 of Perak.

The Enactment in sections 8 and 9 punishes deviationist teachings and practices. It is submitted that deviationism per se cannot be punished under the Constitution . It is only when the deviationist practice has adverse implications for public

order, public health and morality that Article 11(5) authorises penalties.

Sections 16, 21 and 22 of the Perak Enactment also punish any disobedience to or disputing of a *fatwa* and any religious publication contrary to the *Hukum Syara'*. These sections transgress Article 10(1) on freedom of speech and expression.

In section 56 the Enactment punishes any Muslim "woman who in any public place exposes any part of her body which arouses passion." This is a gender-biased provision conflicting with the Constitution's Article 8(2) because it singles out females for exposing their body in public. Males are quite capable of similar acts arousing similar passions in women.

The State of Terengganu Syariah Criminal Offences (Takzir) Enactment No. 7 of 2001 in many provisions seems to violate fundamental guarantees of equality (Article 8), freedom of speech and expression (Article 10) and freedom of religion (Article 11). Section 7 seeks to punish apostasy. Section 15 on "manipulating the teaching of Islam or the Islamic Law" seems to clash with a citizen's right to express his views peacefully, respectfully and without inciting public disorder. Section 35 (woman who exposes her body in public) and section 68 (committing female offenders to approved homes) are distinctly gender biased and violate Article 8(2) of the Constitution.

Similar problems exist with the Syariah Criminal Offences (FederalTerritories) Act 1997 (Act 559). Sections 4, 9, 11, 12 and 13 of the Act seem to violate freedom of speech and expression. Sections 3, 4, 6 and 11 show disregard for the Constitution's promise of freedom of religion. Sections 21, 36, 39 and 56 reflect an unconstitutional gender bias.

Nordin Salleh decision: It has been held in *Dewan Undangan Negeri Kelantan v Nordin Salleh* [1992] 1 MLJ 343 that the power to restrict Article 10 rights belongs to the federal Parliament and not to the state Assemblies. This flows from the wording of Article 10(2): "*Parliament* may by law impose on the rights conferred … such restrictions as it deems necessary…"

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 "precepts of Islam" i.e. 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, show disrespect of Ramadhan or who, in honest disagreement, question the desirability of a *fatwa*. Section 14 of the Syariah Criminal Offences (State of Penang) Enactment 1996 provides punishment for failure to perform Friday prayers. Section 15(a) criminalizes the act of selling food, drink or tobacco to Muslims for immediate consumption during hours of fasting. Section 15(b) penalizes eating drinking or smoking openly during the hours of fasting. Perak has simlar provisions in section 23 and 24. The Syariah Criminal Offence (FederalTerritories) Act 1997 in sections 14 – 15 contains similar laws.

It is questionable that a religion that admirably proclaims "let there be no compulsion in religion" will mandate the imposition of jail terms of six months and fines up to 1,000 ringgit for such minor failures of religious duties. However, there is no easy answer to the question as to who has jurisdiction to determine whether a law is in accord with the "precepts of Islam". Constitutional issues must be determined by constitutional courts. But, admittedly, whether an enacted law is or is not in consonance with the precepts of Islam requires an intimate knowledge and appreciation of Islamic jurisprudence. That will best be found in the syariah courts.

Article 75: In everyfederation 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 like Prevention and Control of Infectious Disease Act 1988 (Act 342).

Any other provision of the Federal or State Constitution : In Malaysia there is constitutional supremacy as opposed to parliamentary supremacy. Federal legislation must conform to the Federal Constitution. State legislation should honour both the federal and the state Constitution.

Section 48 of the (Kelantan) Syariah Criminal Code II Enactment 1993 appears to be unconstitutional because it seeks to curtail the Sultan's constitutional power to pardon a convicted person.

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 being 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 lwn 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".[25] 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 9th 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 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[26] 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.[27] Despite international norms to the contrary in Article 18 of the Universal Declaration of Human Rights and Article 18 of the International Convenant 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 wordly punishment for apostates even though it is stated repeatedly that their conduct shall incur the wrath of Allah (SWT) in the hereafter.[28] 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).[29] 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.[30]

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. Variously referred to as Restoration of Aqidah or apostasy or *murtad* laws, these enactments shake constitutional theory to its roots.[31] They pit state law on apostasy against the

Federal Constitution's guarantee of religious freedom.[32] 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 haveas 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.

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.

2. 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 lwn Kerajaan Negeri Kelantan* [2002] 3 MLJ 657. 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; *Zubeydah bte Shaik Mohd v Kalaichelvan a/l Alagapan* [2003] 2 MLJ 471; *Lina Joy v. Majlis Agama Islam Wilayah* [2004] 2 MLJ 119; *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1; *Majlis Agama Islam Negeri Sembilan lwn. Hun Mun Meng* [1992] 2 MLJ 67; *Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1998] 1 MLJ 681; *Mohamed Habibullah bin Mahmood v. Faridah bte Dato Talib* [1992] 2 MLJ 793; *Soon Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah* [1994] 1 MLJ 690; *Tang Sung Mooi v. Too Miew Kim* [1994] 3 MLJ 117; *Priyathaseny v. Pegawai Penguatkuasa Agama Jabatan Hal Ehwal Agama Islam Perak* [2003] 2 MLJ 302. 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.

3. 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. Civil courts should not interfere with decisions of the syariah courts because of Article 121(1A).

4. 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.[33] 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, 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 addtion 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 limitations.

In creating and punishing offences against the precepts of Islam, fundamental liberties are being ignored. 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 trumped and triumphed over the gilt-edged provisions of fundamental libertiesas in *Lina Joy v. Majlis Agama Islam Wilayah* [2004] 2 MLJ 119. This is amazing. Legislative powers in Schedule 9 must conform to fundamental rights. It is not fundamental rights that must be whittled down to permit an unrestrained usage of law-making powers in Schedule 9.

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. State Assemblies are trespassing into areas the Constitution assigned in List I to the federal Parliament. State authorities are behaving as if the entire field of Islamic civil and criminal law is within their jurisdiction. Residual powers have blossomed into inherent and unlimited powers. The significant limitation in Schedule 9 that states may create and punish offences against the precepts of Islam *except in regard to matters included in the Federal List*[34] *or dealt with by federal law*[35] is being sidestepped with no official protest from any other organ of state.

The jurisdictional limitations imposed by the Syariah Courts (Criminal Jurisdiction) Act 1965 are being flouted as in the case of *hudud* legislation.

The superior courts appear reluctant to intervene or to adjudicate whenever an "Islamic" law's constitutionality is challenged. Because of the passage of Article 121(1A) the civil courts are extremely reluctant to examine the constitutionality of syariah based legislation even when human rights violations are involved. It is submitted that Article 121(1A) was never meant to oust constitutional or jurisdictional issues.

Judicial reluctance or abdication is best illustrated by the 1992 case of the four disciples of Ayah Pin. In that case,

sections 102(1), (2) and (3) of the Councils of the Religion of Islam and Malay Custom, Kelantan Enactment 1994 were challenged as violating Articles 9, 11(1), 11(5) and 74 of the Federal Constitution. The Federal Court refused to answer the questions of constitutionality and failed to clarify the fundamental question of the right of Muslims to their personal faith.

Just as with the judiciary, the executive appears to lack the political will to restore the original constitutional scheme of things.

In some respects the country is undergoing increasing amount of "talibanisation". More and more conduct is being criminalized even though Islam does not mandate criminal sanctions for all transgressions of Islamic duties. It defies understanding that a religion with a universalist perspective and scripture that celebrates pluralism can be interpreted to show such aggression and intolerance towards "deviationists" and apostates. It is a matter of dismay that the Malay-Muslim tradition of tolerance and moderation is being replaced by a Wahhabist tradition of religious police forces, exclusivist interpretation and intolerance of both inter-religious and intra-religious plurality.

The denial of the authority of the Constitution, implicit in many of the above laws, is a matter of great concern.

At the social level, conversions into Islam and conversions out of Islam are having serious implications for inter-religious and inter-racial harmony. Those affected and their families are complaining of cruelty, injustice and lack of compassion.

There appears to be lack of political will to work out satisfactory solutions of the type that inspired the drafting of the Merdeka Constitution. The spirit of accommodation, moderation and tolerance that animated the body politic in 1957 seems to have dissipated. The Constitution stands at a crossroads.

---

[1] Refer generally to Mohammad Hashim Kamali, *Freedom of Expression in Islam,* Berita Publishing, 1994, 119-122.

[2] Tirmidhi, *Sunan*, III, 255, *Kitab al-Birr*, Hadith no. 84.

[3] Sahih Muslim, K. *al-Birr wa al-sillah*. Al-Ghazali, *Kitab Adab al-suhbah*, pp. 242-43.

[4] Freeman, *Lloyds Introduction to Jurisprudence*, 7th edn., London, 2001, pp. 362-7

[5] Dias, *Jurisprudence*, Fifth edition, p. 117

[6] The Supplementary State List (List IIA) and the Supplementary Concurrent List (List IIIA) for Sabah and Sarawak are not relevant for our discussion.

[7] Tyser, Demetriades & Ismail Haqqi Effendi (Translators), *The Mejelle, An English Translation of Majallahel-Ahkam-I-Adliya and A complete Code on Islamic Civil Law,* Law Publishing Company, Lahore, 1962; Hamilton, Charles, *The Hedaya or Guide - A Commentary on the Mussulman Laws,* Premier Book House, Lahore, 1982; Ibn Taymiya, *Public Duties in Islam - The Institution of the Hisba,* The Islamic Foundation, 1983; Sayyid Qutb, *Social Justice in Islam,* The Open Press, Kuala Lumpur, 1983.

[8] Refer to the Contracts Act 1950, Islamic Banking Act 1983, Takaful Act 1984, Partnership Act 1961, Companies Act 1965.

[9] See also *Dato Nik Mahmud Daud v. Bank Islam* [1998] 3 MLJ 393; *Bank Kerjasama Rakyat v. Emcee Corporation* [2003] 1 CLJ 625.

[10] Mohamed Ismail Mohamed Shariff, "The Legislative Jurisdiction of the Federal Parliament in Matters Involving Islamic Law' [2005] 3 MLJ CV.

[11] Salleh Abbas, LP in *Che Omar Che Soh v. PP* [1988] 2 MLJ 55 at 55-56.

[12] Refer to the Islamic Banking Act 1983 (Act 276); Takaful Act 1984 (Act 312).

[13] Arahan Amalan No.1/2003, Pendaftaran kes-kes Muamalat di Mahkamah (Kod Pengklasan).

[14] M. Sufian Hashim, 'The Relationship between Islam and the State in Malaya', *Intisari*, Vol. 1. No. 1, p.8.

[15] Ahmad Ibrahim & Ahilemah Joned, *The Malaysian Legal System* (Dewan Bahasa dan Pustaka, Kuala Lumpur, 1987) p.54.

[16] Ibid, p.8.

[17] R.J. Wilkinson, "Papers on Malay Subjects", (Kuala Lumpur, 1971).

[18] Ahmad Ibrahim and Ahilemah Joned, supra, note 7, p.3.

[19] Refer to Schedule 9, List II, Item 1.

[20] 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.

[21] 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).

[22] See Section V, Special Areas, Conversion and Apostasy, *infra*.

[23] See Section II, *supra*, paragraph on the State List.

[24] Section 21, Crimes (Syariah) Enactment 3/1992 (Perak); Section 12 Enactment 3/1996 (Penang); Section 12, Act 559 (Federal Territories).

[25] See sections 8-11, Perak Crimes (Syariah) Enactment 3/1992; section 23, Kelantan Syariah Criminal Code II Enactment 1993.

[26] Holy Qur'an Surah 2 Ayat 256; Surah 109 Ayats 1-6; Surah 10 Ayat 99

[27] *Daud Mamat v Majlis Agama Islam* [2002] 2 MLJ 390

[28] Surahs Muhammad 47:25, 27-28; Ali 'Imran 3:86-89; Baqarah 2:217; Nahl 16:106

[29] The Star, 29.8.98, p.22.

[30] 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

[31] Perak Crimes Syariah Enactment 3/1992, sections 12-13; Syariah Criminal Code II Enactment 1993 (Kelantan), sections 4(f).

[32] *Zubedyah Shaik Mohd v Kalaichelvan a/l Algapan* [2003] 2 MLJ 471.

[33] 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).

[34] Schedule 9, List II, Item 1.

[35] Schedule 9, List I, Item 4(h).