CONFRONTING THE CONSTITUTIONALITY OF HUDUD

by

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INTRODUCTION

On 25 November 1993, the Kelantan State Legislature had unanimously passed the Syariah Criminal Code II 1993 ('1993 Enactment').[1] The aim of the 1993 Enactment was to introduce a broader scheme of Islamic criminal law than had been hitherto established in Kelantan or any other state in the Federation and which overlapped with the federal criminal law framework.

Unsurprisingly, the 1993 Enactment engendered controversy on several fronts. It was contended that the said enactment was unconstitutional for, amongst other things, attempting to create a parallel criminal law system that went beyond the limited scope of the Islamic personal law framework permitted by the Federal Constitution ('the Constitution'), this exercise involving a usurpation of Parliament's exclusive legislative authority over matters of criminal law in the public sphere.[2] It was also contended that the offences that the Kelantan State Legislature had created were offences that were not reflective of the offences under Syariah Law that were meant to be the basis of the enacted offences.[3]

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1 See the statement by Sisters in Islam dated 25 December 1993 at http://www.sistersinislam.org.my/news.php?item.32.121.

2 See Amanda J Whiting (2010), *Secularism, the Islamic State and the Malaysian Legal Profession*, Asian Journal of Comparative Law 5(1), pp 23–24 ('Amanda').

3 See criticism by Sisters in Islam in its statement dated 25 December 1993 at http://www.sistersinislam.org.my/news.php?item.32.121; see also Amanda, footnote 2, at pp 15 and 24.

As enforcement of the 1993 Enactment required Federal involvement, the sentences that Syariah Courts are permitted to impose are dictated by federal law and implementation involves federal agencies including the Royal Malaysian Police and the prisons authorities, the said enactment was never enforced.[4]

Controversy erupted once more when in 2014 the Government of Kelantan announced that it would be seeking to implement its broader vision of Islamic criminal law in Kelantan, originally characterised by the 1993 Enactment.[5] The Government of Kelantan conceded the need for a refinement of the said enactment and for that purpose move a bill to amend the said enactment. Notwithstanding the controversy, that bill was unanimously passed by the Kelantan State Legislature on 19 March 2015 (the 'Amended 1993 Enactment').[6]

The Amended 1993 Enactment contains provisions on *hudud, qisas* and *ta'zir* offences. The term 'hudud' (literally 'limits') refers to offences (and their corresponding punishment or sentence) that are considered by jurists to have been prescribed by the Quran and the Sunnah of the Prophet Muhammad.[7] *Qisas* involves physical assault and murder which are punishable through retaliation.[8] *Ta'zir* refers to punishments that are not prescribed in the Quran or Sunnah, but are executed under the discretionary powers of a judge.[9]

The following offences and punishments are prescribed by the Amended 1993 Enactment:

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4 The Royal Malaysian Police refused to assist with the implementation of such laws. See http://www.cnsnews.com/news.

5 The Malaysian Medical Association opposed the idea that surgeons should be made to perform the amputation of hands, see http://news.asiaone.com/news/malaysia/malaysia-doctors-we-will-not-perform-amputation-hudud; the former Prime Minister, Tun Dr Mahathir Mohamad was reported as having criticized theAmended Enactment 1993 as it imposed 'taliban-style' punishments, see http://www.themalaymailonline.com/malaysia/article/taliban-style-hudud-coming-soon-to-malaysia-dr-m-warns-in-aussie-paper.

6 See http://www.thestar.com.my/news/nation/2015/03/20/kelantan-unanimously-adopts-hudud-amendments/.

7 Dr Etim E Okon, *Hudud Punishments in Islamic Criminal Law* (2014) 10(14) European Scientific Journal 227, at p 228.

8 *Ibid.*

9 *Ibid.*

Offence	Punishment
Section 6 — Sariqah (theft)	Section 7 — Amputation of the right hand (first time)
Section 9 — Hirabah (robbery)	Section 10 — Execution or crucifixion or cutting of hands and feet from opposite sides or imprisonment (depending on the nature of the crime)
Section 12 — Adultery	Section 13 — Stoning until death with medium sized stones
Section 14 — Sodomy	Section 15 — Stoning until death with medium sized stones. If with wife, ta'zir punishment applies
Section 17 — Qazaf (false accusation of adultery)	Section 18 — Whipping of 80 lashes
Section 19 — Al-li'an (false accusation of adultery by husband, on oath, against his wife) and li'an (wife's rejection of accusation)	Section 20 — Whipping of 80 lashes for husband Stoning until death for wife if she does not reject the accusation
Section 22 — Syurb (consumption of liquor or intoxicating drinks)	Section 22 — Whipping of not more than eighty lashes and not less than 40 lashes
Section 23 — Irtidad or riddah (Voluntarily acting or uttering words that are against the aqidah[10] of Islam)	Section 23 — Imprisonment (to be determined by the Syariah Court) for the purposes of repentance. If he/she does not repent, the sentence is death
Sections 26, 30 and 32 — Homicide (includes intentional and unintentional)	Sections 27, 31 and 33 — Death, imprisonment or payment of diyat (depending on the nature of the crime)
Section 34 — Causing bodily injury	Section 35 — Similar bodily injury to be inflicted

This time around, the federal agencies have expressed a greater openness to the implementation of the said enactment.[11] This however does not address the limits Parliament had placed on the Syariah Courts in so far their power to impose sentences were concerned. Those limits are currently defined by the Syariah Court Criminal Jurisdiciton Act 1965 ('the Syariah Court Act'). As things stand, the Syariah Court Act limits the sentencing powers of the Syariah

10 Aqidah means 'belief with certainty and conviction in one's heart and soul in Allah and His divine Law'. See *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal* [2016] 2 MLJ 309 ('Victoria Martin') (FC), at p 339.

11 See https://sg.news.yahoo.com/kelantan-hudud-police-fear-clash-between-shariah-civil-112536568.html.

Courts to imprisonment of three years, with any fine exceeding five thousand ringgit or with whipping exceeding six strokes, or with any combination thereof.

To address those limits, the Member of Parliament for Marang, Dato' Seri Haji Abdul bin Awang, the President of the Pan-Malaysian Islamic Party, tabled a private members bill to amend the Syariah Court Act ('the Hudud Bill').[12] The proposed amendment to s 2 of the Syariah Court Act, reproduced below, aims at vesting Syariah Courts with the power to impose all sentences prescribed under Islamic law save for death sentences:[13]

> 2. ... mahkamah syariah akan mempunyai kuasa ke atas seseorang penganut agama Islam dan di dalam hal-hal kesalahan di bawah perkara-perkara yang disenaraikan di dalam Butiran 1 Senarai Negeri di bawah Jadual Kesembilan Undang-undang Persekutuan.
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> 2A. ... dengan menjalankan undang-undang jenayah di bawah Seksyen 2, Mahkamah Syariah berhak menjatuhkan hukuman yang dibenarkan oleh undang-undang Syariah berkaitan hal-hal kesalahan yang disenaraikan di bawah seksyen yang disebutkan di atas selain dari hukuman mati.

The Hudud Bill has yet to be moved in Parliament, though the Honourable Member had informed the Dewan Rakyat on 26 May 2016 that he would explain the said bill at the next sitting of Parliament scheduled to commence on 17 October 2016.[14]

It is not apparent which constitutional provision the Hudud Bill is being moved under.[15] However, it is safe to say that the Government of Kelantan recognises that some of the offences in the Amended 1993 Enactment concern matters that Parliament has legislative competence over. The Kelantan Menteri Besar had reportedly said in a press statement:[16]

> He said, most of the hudud and qisas offences such as theft, robbery, rape, causing injury and murder are within the jurisdiction of the federal government as provided in the Penal Code ...

The Hudud Bill has deepened the controversy surrounding the attempt by the Government of Kelantan to introduce a broader framework of Islamic criminal

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12 *Hansard* of the Dewan Rakyat dated 26 May 2016, at p 65 ('Hansard').
13 The bill is reproduced from the Hansard above.
14 *Hansard*, *ibid* footnote 12, p 66.
15 *Ibid*, at pp 65–66
16 Tun Abdul Hamid Mohamad, *Seminar On Implementation Of Hudud In Malaysia — History And The Future* [2015] 2 MLJ cv

law. Media reports on the subject suggest a willingness on the part of United Malays National Organisation ('UMNO') to support the move, fuelling concerns that the private member's bill may be passed.[17]

This article attempts to address the central question of whether Parliament or the Legislatures of the State ('State Legislatures') are empowered to create such a parallel system of criminal law, albeit an Islamic law system. The question is considered by reference to the three issues which appear to be fundamental: firstly, whether the State Legislatures are empowered to enact any law equivalent to the Amended 1993 Enactment; secondly, whether Parliament is empowered to allow for the sanctioning of the Amended 1993 Enactment; and thirdly, even if Parliament is empowered, would such a law be unconstitutional.

This article does not seek to determine if the said offences and the prescribed punishments are in accordance with the Quran and *Hadith*.

POWER OF THE STATE LEGISLATIVE ASSEMBLIES TO ENACT ANY LAW EQUIVALENT TO THE 1993 ENACTMENT

Division of legislative power

General

Legislative power is divided between Parliament and the respective State Legislatures. The delineation of legislative powers is prescribed by the art 74 of the Constitution itself. Article 74(1) of the Constitution empowers Parliament to enact laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (the Ninth Schedule sets out the Federal, State and Concurrent Lists). Article 74(2) of the Constitution empowers the State Legislatures to enact laws with respect to any of the matters enumerated in the State List or the Concurrent List.

The enumerated matters are referred to as fields of legislative competence. It is a cardinal rule of interpretation that these legislative fields are not to be read

17 It was reported that the Prime Minister, Dato' Seri Najib Razak and the Deputy Prime Minister, Dato' Seri Zahid Hamidi had asked for the 8Hudud Bill (to sanction the Amended 1993 Enactment) to be moved up to the top of the Dewan Rakyat's agenda. See http://www.freemalaysiatoday.com. The Tourism and Culture Minister, Datuk Seri Nazri Aziz, had reportedly said that UMNO had decided to support the Hudud Bill due to a rise in religious offences in Kelantan. See http://www.themalaymailonline.com/malaysia.

in a narrow or restricted sense, and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it.[18] The widest possible construction, according to the ordinary meaning of the words in the entry, must be put upon them.[19] Gopal Sri Ram JCA in *Ketua Pengarah Jabatan Alam Sekitar and Anor v Kajing Tubek and Ors and other appeals* [1997] 3 MLJ 23 ('Kajing Tubek') said at p 37:[20]

> It is a well settled principle of constitutional interpretation that every entry in each Legislative List must be given its widest significance and that its scope cannot be curtailed save to the extent necessary to give effect to other legislative entries: *State of Bombay v Narottamdas Jethabhai* AIR 1951 SC 69.

However, the legislative fields must be interpreted harmoniously with the Constitution as a whole to ensure that any meaning given will 'meet the machinery of the government settled by the Constitution'.[21] As will be demonstrated, the constitutional framework is a highly pertinent aspect of the discussion at hand.

Federalism

In considering the constitutional framework, it cannot be ignored that the nation was established as a federation. One can go so far as to say that federalism is an intrinsic and essential feature of the Constitution. As was stated by Gopal Sri Ram JCA (as he then was) in *Kajing Tubek,* the doctrine of federalism is 'woven into the very fabric of the Federal Constitution'.[22]

This necessarily injects a level of complexity into the analysis. As MP Jain has observed, '(f)ederalism constitutes a complex governmental mechanism for governance of a country'.[23] He further notes that '(t)he distribution of legislative powers between the centre and the states is the most important characteristic, rather the core, of any federal system'.[24]

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18 *The Elel Hotels and Investment Ltd v Union of India,* AIR 1990 SC 1664 (SC) at p 1669.
19 *Ibid.*
20 Cited with approval by the Federal Court in *Fathul Bari bin Mat Jahya and Anor v Majlis Agama Islam Negeri Sembilan and Ors* [2012] 4 MLJ 281 ('Fathul Bari') at p 292.
21 *Jilubhai Nanbhai Khachar v State of Gujarat,* AIR 1995 SC 142(SC) at p 148.
22 *Ketua Pengarah Jabatan Alam Sekitar and Anor v Kajing Tubek and Ors and other appeals* [1997] 3 MLJ 23 at p 40.
23 MP Jain, *Indian Constitutional Law* (6th Ed, Lexis Nexis, 2010), at p 691.
24 *Ibid.*

The terms of reference of the Federation of Malaya Constitutional Commission ('Reid Commission') required it to make recommendations for a federal form of constitution for the whole country. The language of the relevant terms of reference offer great insight into what the intended constitution was intended to embody in this regard. In its report, entitled 'Report of the Federation of Malaya Constitutional Commission 1957', the Reid Commission stated, at p 5:

> To make recommendations for a *federal form of constitution for the whole country as a single, self-governing unit within the Commonwealth* based on Parliamentary democracy with a bicameral legislature, which would include provision for:
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> (i) the establishment of a *strong central government* with the States and Settlements enjoying a measure of autonomy (the question of the residual legislative power to be examined by, and to be the subject of recommendations by the Commission and with machinery for consultation between the central Government and the States and Settlements on certain financial matters to be specified in the Constitution

This aspect of the intended constitution was underscored by the Alliance (comprising UMNO, the Malaysian Chinese Association and the Malaysian Indian Association) in its memorandum to the Reid Commission. The clear aim was to have greater powers vested in central government than in the state governments. In *The Making of the Malayan Constitution*, Joseph M Fernando notes (about the said memorandum):[25]

> The Alliance memorandum dealt at some length on their conception of federalism in respect of the Federal-State distribution of legislative powers and financial resources. The Alliance recognised that it could be a source of political conflict, and sought to provide the Commission with their main ideas on the subject. *They proposed greater powers for the central government than those emumerated under the 1948 Federation of Malaya Agreement in line with their principal intention of creating a strong central government.*
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> *The Alliance, as the party in power, was naturally inclined to ensure that the central government's power to rule and legislate was not obstructed by a dilution of power to the States. Hence, for example, the proposal by the Alliance for residuary legislative powers that were vested in the States and Settlements under the Federation of Malaya Agreement to be transferred to the Federal government. In comparison with the wider*

25 Joseph M Fernando, *The Making of the Malayan Constitution* (The Malaysian Branch of the Royal Asiatic Society, 2002) at pp 70–71 ('Fernando').

> *powers conferred on the State governments in the American, Australian and Indian constitutions, the Alliance proposals tended to considerably reduce the sphere of influence of State governments.*
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> The Alliance urged the commission to define clearly the legislative and executive powers of the Federal and State governments in place of the existing consultation machinery to avoid difficulties they believed could arise if the party in control at the centre was different from that in the States. The Alliance were not unduly concerned with the structure and functioning of government as they felt the existing colonial framework of administration provided a solid foundation for modern constitutional government, with some adjustments. The Rule of Law, the make-up and the modus operandi of the legislative system, with the exceptions of the compositions of its members, the Federal system of government and the independence of the judiciary, were much admired constitutional traits and the Alliance felt they contained the basic essentials necessary for the effective functioning of a modern constitutional government based on parliamentary democracy.

The framers of the Constitution recognised this dynamic. Inconsistencies between laws passed by Parliament and the State Legislatures were to be resolved in favour of federal law. To that end, art 75 of the Constitution provides:

> If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void.

Exclusive domain of Parliament over criminal law

Criminal law is enumerated in Item 4 of the Federal List in broad terms, the said item vesting Parliament with the legislative competence to enact all laws necessary for the administration of justice. For ease of reference, the said item provides:

> 4 Civil and criminal law and procedure and the administration of justice, including —
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> (a) Constitution and organization of all courts other than Syariah Courts;
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> (b) Jurisdiction and powers of all such courts;
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> (c) Remuneration and other privileges of the judges and officers presiding over such courts;
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> (d) Persons entitled to practise before such courts;
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> (e) Subject to paragraph (ii), the following:
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> (i) Contract; partnership, agency and other special contracts; master and servant; inns and inn-keepers; actionable wrongs; property and its transfer and hypothecation, except land; bona vacantia; equity and

trusts; marriage, divorce and legitimacy; married women's property and status; interpretation of federal law; negotiable instruments; statutory declarations; arbitration; mercantile law; registration of businesses and business names; age of majority; infants and minors; adoption; succession, testate and intestate; probate and letters of administration; bankruptcy and insolvency; oaths and affirmations; limitation; reciprocal enforcement of judgments and orders; the law of evidence;

(ii) the matters mentioned in paragraph (i) do not include Islamic personal law relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession, testate and intestate;

(f) Official secrets; corrupt practices;

(g) Use or exhibition of coats of arms, armorial bearings, flags, emblems, uniforms, orders and decorations other than those of a State;

(h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;

(i) Indemnity in respect of any of the matters in the Federal List or dealt with by federal law;

(j) Admiralty Jurisdiction;

(k) Ascertainment of Islamic law and other personal laws for purposes of federal law; and

(l) Betting and lotteries.

As is apparent, Parliament was given wide powers to enact laws to create the criminal justice system that it thought the nation required. If at all it was limited in this regard, Parliament was not permitted to create offences in respect of matters in the State List. Hashim Yeop A Sani SCJ in *Mamat bin Daud and Ors v Government of Malaysia* [1988] 1 MLJ 119('Mamat Daud') said at p 127:

> When viewed in the light of criminal law, the nature of s 298A, as creating a criminal offence, can easily be grounded on item 3(a) of the Federal List (public order) and Item 4(h) of the Federal List (creation of offences). *Those items confer ample powers on Parliament to enact legislation on public order and civil and criminal law and procedure and to create offences. The words used in Item 4 of the Federal List are 'civil and criminal law and procedure'*. The power conferred by item 4 of the Federal List is wide and is subject only to creation of offences in respect of matters included in the State List as stated in Item 9 of the State List in the Ninth Schedule to the Federal Constitution. Article 74(4) of the Constitution provides that where general as well as specific expressions are used in the List, the generality of the former shall not be taken to be limited by the

> latter. The words 'civil and criminal law and procedure' when read with art 74(4) of the Constitution would thus clearly vest Parliament with the power to enact the law.

This interpretation has found favour with the Canadian courts, a useful jurisdiction to consider in light of it similarly being a federation with a division of legislative power between its Federal Parliament and the provincial legislatures. As in Malaysia, if there is a conflict between a federal law and provincial law, the former prevails and the latter is displaced.[26] Furthermore, criminal law is a matter within the domain of the Federal Parliament. Section 92 of the Canadian Constitution Acts 1867 to 1982 provides:

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
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> ...
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> 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

On the interpretation of the said legislative field, Estey J in *Scowby v Glendinning* [1986] 2 SCR 226 ('Scowby') said, at para 11:

> *The terms of s 91(27) of the Constitution must be read as assigning to Parliament exclusive jurisdiction over criminal law in the widest sense of the term. Provincial legislation which in pith and substance falls inside the perimeter of that term broadly defined is ultra vires. Parliament's legislative jurisdiction properly founded on s. 91(27) may have a destructive force on encroaching legislation from provincial legislatures, but such is the nature of the allocation procedure in ss. 91 and 92 of the Constitution*. Here we are not concerned with the result in law of the exercise by Parliament of one of its exclusive heads of jurisdiction. Indeed, the converse is the question: what, if anything, is the result in law of legislation by a province where it may be classified as essentially criminal in nature. Basic principles require the conclusion that such legislation is invalid, regardless of any perceived need for its substantive provisions, and regardless of perceived defects or gaps in the federal legislative plan (*Westendorp v The Queen,* [1983] 1 SCR 43, and see

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26 *Royal Bank of Canada v Larue and others* [1928] AC 187 (PC), at p 198.

the discussion in Hogg, supra at pp 313–15).

The question posed by Estey J, 'what, if anything, is the result in law of legislation by a province where it may be classified as essentially criminal in nature', resonates. It foreshadows an essential issue in the discussion at hand; what does 'criminal law' mean.

Traditionally, 'criminal law' has been defined simplistically by reference to acts and omissions that are prohibited by penal provisions.[27] This definition is however problematic as it merely requires there to be a penal provision for a matter to be classified as a matter of 'criminal law'. It is for this reason that the Federal Court in *Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354 ('Sulaiman Takrib') rejected this method of definition.[28] The Canadian Supreme Court in *Scowby* departed from this method of definition, preferring instead an approach that called for an examination of whether there was a legitimate public purpose underlying the prohibition. Estey J said at para 10:

> Such a definition is necessarily too broad, as it would permit Parliament, simply by legislating in the proper form, to colourably invade areas of exclusively provincial legislative competence. Therefore, in the Margarine Reference [Reference re Validity of Section 5(a) of the Dairy Industry Act] [1949] S.C.R. 1, it was accepted that some legitimate public purpose must underlie the prohibition.
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> *A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.*

The more recent decision of the Canadian Supreme Court in *Reference re Assisted Human Reproduction Act* [2010] 3 SCR 457 further developed the jurisprudence on the subject, distilling the three criteria by which it is determined whether a law is a 'criminal law'. McLachlin CJ said at para 35:

> Having characterized the matter to which the Act relates, the next question is whether it comes within the scope of the federal criminal law power under s 91(27) of the Constitution Act, 1867. In order to answer this question, we must consider whether the matter satisfies the three requirements of valid criminal

27 See for instance, *Proprietary Articles Trade Association and others v Attorney-General for Canada and others* [1931] AC 310 (PC) , at p 314.

28 See para 69 of the judgment.

> law: (1) a prohibition; (2) backed by a penalty; (3) with a criminal law purpose: Reference re Firearms Act (Can.), 2000 SCC 31, [2000] 1 S.C.R. 783 ('Firearms Reference'), at para. 27.

The court further explained the third requirement. McLachlin CJ said at paras 43 and 46:

> There is merit in both positions. On the one hand, the jurisprudence properly recognizes that confining the criminal law power to precise categories is impossible. *The criminal law must be able to respond to new and emerging matters of public concern that go to the health and security of Canadians and the fundamental values that underpin Canadian society*. A crabbed, categorical approach to valid criminal law purposes is thus inappropriate. On the other hand, a limitless definition, combined with the doctrine of paramountcy, has the potential to upset the constitutional balance of federal-provincial powers. Both extremes must be rejected. *To constitute a valid criminal law purpose, a law's purpose must address a public concern relating to peace, order, security, morality, health, or some similar purpose*. At the same time, extensions that have the potential to undermine the constitutional division of powers should be rejected.
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> ...
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> *Criminal law objectives, such as peace, order, security, morality, and health do not occupy separate watertight compartments.* The question in each case is whether the matter of the legislation at issue relates to one or more of the recognized criminal law purposes, or a similar objective. Criminal laws will often engage more than one objective, and the objectives may overlap with each other.

It is of critical significance that the definition of 'criminal law' propounded by the Canadian Supreme Court envisages Parliament being left to determine whether a matter should be made the subject of an offence or not. It is for this reason that the court emphasised the need to leave Parliament free to deal with new and emerging matters. Laskin CJ had previously considered this in *R v Zelensky* [1978] 2 SCR 940, where he said at p 951:

> Indeed, Duff C.J.C. said in Provincial Secretary of*Prince Edward Island v. Egan* [[1941] S.C.R. 396], at p. 401, that '*the subject of criminal law entrusted to the Parliament of Canada is necessarily an expanding field by reason of the authority of the Parliament to create crimes, impose punishment for such crimes and to deal with criminal procedure.' We cannot, therefore approach the validity of s. 653 as if the fields of criminal law and criminal procedure and the modes of sentencing have been frozen as of some particular time. New appreciations thrown up by new social conditions, or re-assessments of old appreciations which new or altered social conditions induce make it appropriate for this Court to re-examine courses of decision on the scope of legislative power when fresh issues are presented to it*, always remembering, of course, that it is entrusted with a very delicate role in

> maintaining the integrity of the constitutional limits imposed by the British North America Act.

This necessarily means that where Parliament has chosen not to enact an offence, this is not be understood as meaning that Parliament does not consider that matter as not being capable of forming the subject of a criminal offence at some later point in time. There is no reason why this approach should not be adopted in Malaysia. It is implicitly recognised by the Constitution, which envisages the creation of a criminal justice system in which offences are committed against the interests of the Federation.[29] It is for this reason that art 145(3) of the Constitution vests the attorney general with the power to institute, conduct or discontinue any proceedings for an offence, such offence being one against the Federation of Malaysia. His power is limited only to the extent of proceedings before a Syariah Court, a native court or a court-martial. It is manifestly the case that Parliament has been given domain over the creation of offences in the public sphere.

The existence of the Islamic criminal law system in its current form does not detract from this conclusion. The Constitution enables the creation of such a system purely for personal law purposes. This was judicial recognised by the Supreme Court in *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55 in which Salleh Abas LP said at p 56:

> For example, the establishment of the Federated Malay States in 1895, with the subsequent establishment of the Council of States and other constitutional developments, further resulted in the weakening of the ruler's plenary power to such an extent that *Islam in its public aspect had become nothing more than a mere appendix to the ruler's sovereignty. Because of this, only laws relating to family and inheritance were left to be administered and even this was not considered by the court to have territorial application binding all persons irrespective of religion and race living in the state. The law was only applicable to Muslims as their personal law. Thus, it can be seen that during the British colonial period, through their system of indirect rule and establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only* (see MB Hooker, Islamic Law in South-east Asia, 1984).
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> In our view, it is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word 'Islam' in the context of Article 3.

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29 See *Knox Contracting Limited v Canada* [1990] 2 SCR 338 (SC), where Cory J, in determining if an offence was criminal law, had considered that the said offence was 'clearly harmful to the State'. See para 15 of the decision.

Creation of offences against Islamic precepts

The empowerment of the State Legislatures to enact laws creating offences against Islamic precepts cannot be understood as amounting to those legislative bodies having been vested with the authority to enact such laws to the extent of encroaching into the domain of Parliament where criminal law is concerned.

Examining the Islamic precepts field

The creation of offences against Islamic precepts is provided for in Item 1 of the State List. That item provides, inter alia:

> ... 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 ...

It is immediately apparent that the State Legislatures are not vested with unfettered competence to create any and all offences against the precepts of Islam. As has been emphasised above, the entitlement to do so is precluded where they concern matters included in the Federal List. This preclusion must be adhered to strictly having regard to the constitutional framework. That this must be the case is demonstrated by the framers of the Constitution having vested the Federal Court with the power to strike down laws made without legislative power under arts 4(3) and 128(1)(a) of the Constitution.

As to what amounts to a matter included in the Federal List, in particular 'criminal law', the discussion above as to the definition of 'criminal law' refers. In this analysis, there is no need to deal with the question of what 'precepts of Islam' means. No matter how widely the term is defined, the legislative power to create offences against precepts is circumscribed in the manner described above. When the offence sought to be created by the State Legislatures pursuant to Item 1 of the State List pertains to what could reasonably be viewed as a matter of public concern relating to peace, order, security, morality, health, or some similar purpose, in the public sphere, State Legislatures cease having the power to do so. It is in this way that power to create personal law offences under Item 1 of the State List is balanced against the power to create (or not create) offences in the public sphere under Item 4 of the Federal List.

Put another way, where in pith and substance an offence created under Item 1 of the State List is a matter of criminal law (in the sense explained above), notwithstanding that it might pertain to an Islamic precept, the State Legislature concerned ceases having the power to create the offence. This conclusion is reinforced by art 4(1) of the Constitution, which declares the

Constitution, and not Islamic law, supreme, and art 75, which declares that federal law is to prevail over state law. At the risk of repetition, as Estey J said in *Scowby*, at para 11:

> Indeed, the converse is the question: what, *if anything, is the result in law of legislation by a province where it may be classified as essentially criminal in nature. Basic principles require the conclusion that such legislation is invalid, regardless of any perceived need for its substantive provisions, and regardless of perceived defects or gaps in the federal legislative plan* (*Westendorp v The Queen,* [1983] 1 SCR 43, and see the discussion in *Hogg*, at pp 313–315).

Guarantee of equality and non-discrimination

The analysis above is further reinforced by the guarantee of equality and non-discrimination enshrined in art 8 of the Constitution. That article provides:

(1) All persons are equal before the law and entitled to the equal protection of the law.

(2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

The article was very usefully explained by Abdoolcader J (as he then was) in *Public Prosecutor v Datuk Harun bin Haji Idris and Ors* [1976] 2 MLJ 116, at p 119:

> Article 8(2) contains a specific and particular application of the principle of equality before the law and equal protection of the law embodied in art 8(1). *Therefore, discrimination against any citizen only on the grounds of religion, race, descent or place of birth or any of them in any law is prohibited under art 8(2) and such discrimination cannot be validated by having recourse to the principle of reasonable classification which is permitted by* art 8(1) (*Srinivasa Aiyar v Saraswathi Ammal* AIR 1952 Mad 193 195 at p. 195; *Kathi Raning Rawat v State of Saurashtra* AIR 1952 SC 123 at p 125).
>
> In cases not covered by art 8(2), the general principle of equality embodied in art 8(1) is attracted whenever discrimination is alleged, and if accordingly discrimination is alleged on a ground other than those specified in Article 8(2), the case must be decided under the general provisions of art 8(1). Article 8(1) and (2) must be read together, their combined effect is not that the State cannot discriminate or pass unequal laws, but that if it does so, the discrimination or the inequality must be based on some reasonable ground (art 8(1)), and that, due to

> art 8(2), religion, race, descent or place of birth alone is not and cannot be a reasonable ground of discrimination against citizens. The word 'discrimination' in art 8(2) involves an element of unfavourable bias.

As has already been explained above, criminal law is a matter of Federal law. In its report, the Reid Commission stated, at paras 122 and 128:

> All matters of civil and criminal law and procedure are within the legislative authority of the Federation, subject to the qualifications as to Muslim law and Malay custom mentioned in Chapter V. We do not propose any considerable changes in these arrangements, though we have tried to draw a clear distinction between Federal and State powers, which are now covered in the Sixth Schedule by Head 4 of the Federal List and Head 1 of the State List. In effect we agree that the constitution and powers of Qadis' Courts and other matters relating to Muslim law and Malay custom should be within State jurisdiction, while all other matters relating to civil and criminal law and procedure, including marriage, divorce, legitimacy, etc, should be within Federal jurisdiction.
>
> ...
>
> In any case, the administration of criminal justice being wholly in Federal hands, it is necessary that the appointment of magistrates be vested in a Federal body.

Several conclusions as regards the subject of this article necessarily flow from the foregoing. Any criminal justice system put in place under the Constitution would not be constitutional if it discriminated between Malaysians (or other persons) on grounds of religion. Every person, regardless of their religion, is entitled to be treated as being equal before the law. This would require that offences in the public sphere be investigated, prosecuted and adjudged in the same way for all persons. Thus the existence of two parallel systems of criminal law is inescapably precluded, the question of reasonable classification not arising at all.[30] Any other reading would result in the Constitution being inconsistent with itself. As Raja Azlan Shah FJ (as he then was) observed in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, at p 190:

> I concede that Parliament can alter the entrenched provisions of cl (4) of art 5, to wit, removing the provision relating to production before the magistrate of any arrested person under the Restricted Residence Enactment as long as the process of constitutional amendment as laid down in cl (3) of art 159 is complied with. When that is done it becomes an integral part of the *Constitution, it is the supreme law, and accordingly it cannot be said to be at variance with itself*. A passage from the Privy Council judgment in *Hinds v The Queen*, is of some assistance (p 392):

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30 For an analysis on reasonable classification, see *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257(FC), at pp 274–275.

> That the Parliament of Jamaica has power to create a court ... is not open to doubt, but if any of the provisions doing so conflict with the Constitution in its present form, then it could only do so effectively if the Constitution was first amended so as to secure that there ceased to be any inconsistency between the provisions and the Constitution ...
>
> *This reasoning, in my view, is based on the premise that the Constitution as the supreme law, unchangeable by ordinary means, is distinct from ordinary law and as such cannot be inconsistent with itself.* It is the supreme law because it settles the norms of corporate behaviour and the principle of good government. This is so because the Federation of Malaya, and later, Malaysia, began with the acceptance of the Constitution by the nine Malay States and the former Settlements of Penang and Melaka, by the acceptance of it by Sabah and Sarawak that entered the Federation in 1963, as 'the supreme law of the Federation ... '(clause 1 of Article 4). It is thus the most vital working document which we created and possess.

The nature of the Amended 1993 Enactment

Having considered the limits of the power to create offences against the precepts of Islam under Item 1 of the State List, it now becomes necessary to consider whether the offences under the Amended 1993 Enactment, are in pith and substance, criminal law within the meaning of Item 4 of the Federal List.

Penal Code offences

The following table shows how seven out of the ten offences under the Amended 1993 Enactment are offences that can be dealt with under the Penal Code. That makes it plain that these offences concern matters falling within the federal list, and therefore not within the competence of the Kelantan State Legislature.

1993 Amended Enactment	Penal Code
Section 6 — Sariqah (theft)	Section 378 — Theft
Section 9 — Hirabah (robbery)	Section 390 — Robbery
Section 12 — Adultery	
Sections 14 — Sodomy	Section 377A — Carnal intercourse against the order of nature
Section 17 — Qazaf (false accusation of adultery)	Section 499 — Defamation
Section 19 — Al-li'an (false accusation of adultery by husband, on oath, against his wife) and li'an (wife's rejection of accusation)	Section 499 — Defamation

Section 22 — Syurb (consumption of liquor or intoxicating drinks)	
Section 23 — Irtidad or riddah (Voluntarily acting or uttering words that are against the aqidah of Islam)	
Sections 26, 30 and 32 — Homicide (includes intentional and unintentional)	Sections 299, 300 and 304A — Culpable homicide, murder and causing death by negligence
Section 34 — Causing bodily injury	Sections 319 and 320 — Hurt and grievous hurt

As for the other offences, it remains to be considered whether these concern matters that Parliament could create offences against.

Adultery

In the event, Parliament formed the view that adultery was a matter of public concern, if could, if it so chose to do, enact laws against. The three conditions identified above as to what constitute a matter of criminal law would be fulfilled.

Adultery, in both the sense of fornication (extra-marital sexual relations) and, more classically, sexual relations by one spouse of a marriage with a third party, was recognised as a criminal offence in England and was considered to be a 'breach of social order'.[31] In the United States,[32] adultery remains a criminal offence in 21 states.[33] In India, adultery is an offence under s 497 of the Indian Penal Code.[34]

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31 Lawrence M Friedman and William E Havemann (2013), The Rise and Fall of the Unwritten Law: Sex, Patriarchy, and Vigilante Justice in the American Courts 61 Buffalo L Rev 997 at p 1043, see footnote 299.

32 For a historical discussion, see Robert M Ireland, *The Libertine Must Die: Sexual Dishonor and the Unwritten Law in the Nineteenth-Century United States Journal of Social History* Vol 23 No 1 (Autumn 1989, pp 27–44. This article also considered the position in England.

33 See http://www.usatoday.com/story/news/nation-now/2014/04/17/anti-adultery-laws-new-hampshire/7780563/. It should be noted that most states define adultery as sexual intercourse between a person who is married with a person other than their spouse. In other states, like North Carolina for example, adultery occurs when two people who are not married to each other 'lewdly and lasciviously associate'. Colorado was the last state to repeal anti-adultery laws, see http://www.freep.com/story/life/family/2014/04/17/in-which-states-is-cheating-on-your-spouse-illegal/28936155/.

34 Adultery is defined as 'sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape'

In the Malaysian context, it appears that Parliament has recognized its legislative competence to enact laws against adultery. Chapter XX of the Penal Code deals with offences relating to marriage. In particular, s 498 provides for an offence similar to that under s 497 of the Indian Penal Code. Section 498 of the Malaysian Penal Code provides:

> Whoever takes or entices away any woman who is and whom he knows, or has reason to believe, to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals, or detains with that intent any such woman, shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

The High Court has recognised adultery as matter that 'smear(s) the sanctity of the institution of monogamous marriages'.[35]

Alcohol consumption

Similarly, were Parliament be of the view that the consumption of alcohol was a matter of public concern, if could, criminalise such an act. Item 14(d) of the Federal List empowers Parliament to, inter alia, enact laws on matters of health, particularly with regard to intoxicating liquors.

These powers have been exercised by Parliament. The Food (Amendment) Regulations 2016 bans the selling of certain types of alcohol. The said regulations prohibit the sale of alcohol to those aged below 21. The said regulations also imposes the need to include a health warning that reads, 'Consuming alcohol can be hazardous to health', in the labels of alcohol products.[36] The said regulations were made by the Minister of Health pursuant to s 34 of the Food Act 1983, the power to do so having been delegated by Parliament.

Offences against aqidah[37]

Offences against *aqidah* is a more complex subject.

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35 *Yew Yin Lai v Teo Meng Hai and Anor* [2013] 8 MLJ 787, at p 807.

36 See http://www.themalaymailonline.com/malaysia/article/its-official-legal-drinking-age-now-21.

37 *Aqidah* means 'belief with certainty and conviction in one's heart and soul in Allah and His divine Law'. See *Victoria Martin*, footnote 10, at p 339

The offence created by the Amended 1993 Enactment is vague and ambiguous, and appears to have been included as a catch-all provision. Section 23(1) of the 1993 Amended Enactment provides:

> Whoever voluntarily, deliberately and aware of making an act or uttered a word affects or against the aqidah (belief) in Islamic religion is committing irtidad.

Aqidah is defined by s 23(2) of the 1993 Amended Enactment as:

> For the purpose of sub-section (1), the acts or the words which affect the 'aqidah (belief) are those which concern or deal with the fundamental aspects of Islamic religion which are deemed to have been known and believed by every Muslim as part of his general knowledge for being a Muslim, such as matter pertaining to Rukun Islam, Rukun Imam and matters of halal (the allowable or the lawful) or haram (the prohibited or the unlawful).

It is apparent that the offending words and conduct that amount to an offence have not been identified with any degree of particularity, s 23(2) cross-referring to the fundamentals of the Islamic religion expected to be known by a Muslim. This is a highly subjective basis for any offence, more so where the term 'Islamic precepts' has been defined[38] to include matters that are *fiqh* as opposed to matters that are based wholly on the syariah.[39]

Such offences offend the principle of *nullum crimen sine lege, nulla poena sine lege*, that is, there must be no crime or punishment except in accordance with law which is fixed and certain that criminal law must be fixed and certain. This principle was re-stated in the decision of the Canadian Supreme Court in *R v Kelly* [1992] 2 SCR 170 ('Kelly'), where at p 203, McLachlin CJ said:

> It is a fundamental proposition of the criminal law that the law be certain and definitive. This is essential, given the fact that what is at stake is the potential deprivation of a person of his or her liberty and his or her subjection to the sanction and opprobrium of criminal conviction. This principle has been enshrined in the common law for centuries, encapsulated in the *maxim nullum crimen sine lege, nulla poena sine lege* — there must be no crime or punishment except in accordance with law which is fixed and certain. A crime which offends this fundamental principle may for that reason be unconstitutional

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38 *Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354 (FC), at p 375.

39 *Fiqh* is a derivative of syariah (derived only from the Quran and authentic and undisputed hadith of the Holy Prophet) in which juristic reasoning has been employed. See *Sulaiman Takrib*, footnote 39, at pp 373–374.

Kelly was accepted by the Malaysian High Court.[40] An offence which was not certain and definitive would clearly offend arts 5 and 8 of the Constitution for denying the accused of the right to a fair trial and due process as the accused would not have any certainty as to what is that had been criminalised, and would therefore not be in a position to defend himself.

Further, s 23(1) is so wide as to encompass the nine offences identified above that fall within the ambit of the Federal List. This would necessarily mean that in enacting this offence, the Kelantan State Legislature had encroached into the Federal List.

Even if the said subsection was understood as being directed at protecting the personal beliefs of persons professing the religion of Islam ('Muslims') from being the target of efforts aimed at disaffection and, separately, the protection of the religion of Islam itself, these are matters that have been provided for.

As for the former, offences pertaining to disaffection are within 'criminal law' in the Federal List. By way of illustration, s 298 of the Penal Code provides:[41]

> Whoever, with deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, shall be punished with imprisonment for a term which may extend to one year or with fine or with both.

As to the latter, it comes within the scope of art 11(4) of the Constitution which provides:

> (4) State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.

Article 11(4) allows for the State Legislatures to enact laws aimed at controlling or restricting the propagation of any religious doctrine or belief among persons professing the religion of Islam. The sub-article does not limit the application

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40 This principle has been accepted by the Malaysian High Court in *Public Prosecutor v Hairul Din Bin Zainal Abidin* [2001] 6 MLJ 146, at p 156; *Public Prosecutor v Ayyavoo a/l Subramaniam* [2004] 6 MLJ 511, at p 563; *Public Prosecutor v Syed Muhamad Faysal bin Syed Ibrahim* [2004] 6 MLJ 303, at p 363; *Zuki bin Mohd lwn Pendakwa Raya* [2010] 3 MLJ 102, at p 122.

41 See also s 3(1)(d) of the Sedition Act 1948, which defines a seditious tendency to include, 'to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State'.

of such laws to non-Muslims and, as such, laws enacted pursuant to the said sub-article would equally apply to Muslims. In this way, the sub-article can be understood as being directed at the protection of the religion of Islam. This was recognised in the majority decision in *Mamat Daud. Salleh Abas*, LP said, at p 121:

> Clause (4) is a power which enables states to pass a law to protect the religion of Islam from being exposed to the influences of the tenets, precepts and practices of other religions or even of certain schools of thoughts and opinions within the Islamic religion itself.

Where art 11(4) is invoked as being the basis of a law enacted by the State Legislatures, then the question of Item 1 of the State List does not arise.

Apostasy

Without derogating from the matters stated above as to s 23(1) offending the principle *of nullum crimen sine lege, nulla poena sine lege*, the said subsection arguably encompasses acts amounting to apostasy by Muslims (by declaration or conduct) as such acts could amount to being acts or words contrary to 'aqidah'.

In addition to what has already been stated above, it must be borne in mind that Item 1 of the State List does not expressly vest the State Legislatures with the power to enact laws over apostasy. Further the said item cannot be understood as impliedly providing such competence to the legislative body. This is clearly borne out by the manner in which the said item limits the jurisdiction of the Syariah Courts to 'persons professing the religion of Islam'. The act of professing means 'to *affirm, or declare one's faith in or allegiance to (a religion, principle, God or Saint etc*)'.[42] An apostate, by definition, is someone who does not affirm or declare faith in Islam. Consequently, such a person would not fall within the jurisdiction of the Syariah Courts. This jurisdictional threshold was recognised by the Court of Appeal In *Kamariah bte Ali dan lain-lain v Kerajaan Negeri Kelantan, Malaysia dan satu lagi* [2002] 3 MLJ 657, where, at p 669, Abdul Hamid Mohamad JCA (as he then was), said:

> Kesimpulannya, jika mahkamah ini perlu memutuskan persoalan sama ada Mahkamah Syariah mempunyai bidang kuasa memutuskan persoalan murtad, pada pandangan saya, Mahkamah Syariah mempunyai bidangkuasa berbuat demikian. Jika tidak bagaimana mahkamah itu hendak membicarakan kes-kesnya? Bidangkuasanya terhad kepada orang Islam. Adakah setiap kali

42 *Re Mohamed Said Nabi, Decd* [1965] 1 MLJ 121, at p 122.

> persoalan itu berbangkit di Mahkamah Syariah, ia perlu diputuskan oleh Mahkamah Sivil terlebih dahulu sebelum Mahkamah Syariah boleh meneruskan perbicaraannya? Ini amat tidak munasabah.

Interpreting Item 1 of the State List to allow for the State Legislature to enact laws against apostasy on the part of Muslims would also be inconsistent with art 11(1) of the Constitution which guarantees the freedom of religion of all 'persons' without exception. That this freedom applies equally to Muslims has been accepted by the Malaysian courts. In the decision of the majority in *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585 ('Lina Joy'), Ahmad Fairuz CJ said, at p 612:

> Di dalam rayuan di hadapan mahkamah sekarang, tiada ketentuan muktamad bahawa perayu tidak lagi menganuti agama Islam. Maka, kenyataan bahawa perayu tidak boleh lagi berada di bawah bidangkuasa Mahkamah Syariah kerana Mahkamah Syariah hanya ada bidang kuasa terhadap seseorang yang menganuti agama Islam (*profess*) tidak boleh/wajar ditekankan. Cara seseorang keluar dari sesuatu agama adalah semestinya mengikut kaedah atau undang-undang atau amalan (*practice*) yang ditentukan atau ditetapkan oleh agama itu sendiri. Perayu tidak dihalang dari berkahwin. Kebebasan beragama di bawah Perkara 11 PP memerlukan perayu mematuhi amalan-amalan atau undang-undang agama Islam khususnya mengenai keluar dari agama itu. Apabila ketentuan-ketentuan agama Islam dipatuhi dan pihak berkuasa agama Islam memperakukan kemurtadannya barulah perayu dapat menganuti agama Kristian. Dengan lain perkataan seseorang tidak boleh sesuka hatinya keluar dan masuk agama. Apabila ia menganuti sesuatu agama, akal budi (*common sense*) sendiri memerlukan dia mematuhi amalan-amalan dan undang-undang dalam agama itu.

The forgoing decisions, and those that have applied them,[43] make it plain that it is not the case that Muslims do not have the freedom of religion under art 11(1) of the Constitution. These cases, in particular the majority decision in *Lina Joy*, have laid down the narrower principle that Muslims who wish to renounce their faith must do so in accordance with the principles of Islamic law, and that this is a matter that only the Syariah Courts can determine. These decisions are premised on an interpretation of art 11(1) of the Constitution in which the freedom to renounce Islam on the part of Muslims is subject to Muslims doing so in accordance with the principles of Islamic law.

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43 See *Hj Raimi bin Abdullah v Siti Hasnah Vangarama bt Abdullah and another appeal* [2014] 3 MLJ 757 (FC).

Leaving aside the question of whether these decisions are correct as a matter of principle,[44] it is apparent that criminalising apostasy would be inconsistent with art 11(1), even as interpreted by the majority in *Lina Joy*.

Conclusion

In view of the foregoing, it is reiterated that the Kelantan Legislature did not have the power to enact the various sub-sections of the Amended 1993 Enactment identified above.

The analysis would have a bearing on many of the offences within the various Islamic enactments currently in force. An analysis of the provisions concerned is however beyond the scope of this article. It is clear however that to the extent that these offences are offences against the precepts of Islam and do not fall within the ambit of 'criminal law' for the purposes of the Federal List, those offences are valid.

As a matter of logic, only those offences which were purely an offence against the precepts of Islam and which could not fulfil the third requirement of the definition of 'criminal law' discussed above, would have been validly enacted. Without intending to limit the ambit of this separate discussion, the offence of consuming food in public during the month of Ramadhan could reasonably be argued as an instance of such a valid offence.[45]

POWER OF PARLIAMENT TO SANCTION THE ENACTING OF SUCH LAWS

The next issue that requires consideration is whether Parliament has the power to pass the Hudud Bill. At face value, it would appear to be the case as a revision of the sentencing powers of the Syariah Courts clearly falls within Item 1 of the State List ('so far as conferred by federal law'). However, a closer consideration of the said bill and its implications, reveals that that this is not necessarily the

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44 In *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585, the Bar Council argued that this interpretation must be rejected as it would require the Federal Court implying a condition into art 11(1) of the Constitution in circumstances where this was not warranted. See pp 610–611 of the decision.

45 The issue as to what amounts to a precept of Islam was dealt with by the Federal Court in *Sulaiman Takrib*, footnote 39, at p 375 and Fathul Bari, footnote 20, at pp 289–290. The authors are of the view that the interpretation adopted by the Federal Court in those decisions is problematic. The court concluded that precepts were to be distilled from *fiqh* (derived law) as opposed to the immutable syariah. That discussion must regrettably be made the subject of a further article.

case.

Impermissible delegation of power

As noted in the introduction above, the aim of the Hudud Bill is to vest the Kelantan Syariah Court with the power to impose sentences prescribed under Islamic law, with the exception of the death sentence. The said bill effectively validates the Amended 1993 Enactment. In so doing, Parliament would effectively authorised the delegation of its essential legislative function with respect to criminal law. This has been explained above.

There is a further dimension to this. To reiterate, the proposed amendments seek to empower the Syariah Courts as follows:

> 2. ... mahkamah syariah akan mempunyai kuasa ke atas seseorang penganut agama Islam dan di dalam hal-hal kesalahan di bawah perkara-perkara yang disenaraikan di dalam Butiran 1 Senarai Negeri di bawah Jadual Kesembilan Undang-undang Persekutuan
>
> 2A. ... dengan menjalankan undang-undang jenayah di bawah Seksyen 2, Mahkamah Syariah berhak menjatuhkan hukuman yang dibenarkan oleh undang-undang Syariah berkaitan hal-hal kesalahan yang disearaikan di bawah seksyen yang disebutkan di atas selain dari hukuman mati.

It is apparent that, the reference to Item 1 of the State List offers no guidance or direction as to what sentences are to be imposed for specific offences were the said amendment to take effect. The implication is that Parliament would have left it to the Syariah Courts to determine what sentences to impose. The Syariah Courts would then impose the sentences prescribed under the Amended 1993 Enactment.

The Federal List and the State List are exclusive of each other. Save for the Concurrent List, Parliament is restricted to matters within the Federal List. In effectively ratifying the Amended 1993 Enactment, Parliament would in effect have delegated its law making powers with respect to criminal law to the Kelantan State Legislature. Parliament is not permitted to do this as this would be tantamount to Parliament rewriting art 74 of the Constitution.

Basic structure of the Constitution

The enacting of the Hudud Bill would result in the dilution of Parliament's exclusive control over criminal law in the public sphere. This undermines the Federal character of the Constitution. As observed by Gopal Sri Ram JCA (as he then was) in *Kajing Tubek*, federalism is 'woven into the very fabric of the

Constitution'. It is reasonably argued that it is a basic feature of the Constitution. As Joseph M Fernando puts it:[46]

> The final form of the Constitution largely reflected the Alliance's ideas, ideals and compromises. As the leading nationalist movement and the heir-apparent, the Alliance was able to turn the constitutional deliberations in its favour. The other principal parties in the negotiations, the Rulers and the British government, had to be content with a subsidiary but not insignificant role. From the preceding examinations it would not be unreasonable to suggest that if a Malaysian commission had been delegated the task of drafting the Constitution, the basic structure and elements of the new constitution would not have been very different from the document prepared by the Reid Commission.

It would be unconstitutional to amend the Constitution, directly or otherwise, to undermine this feature. In *Sivarasa Rasiah v Badan Peguam Malaysia and Anor* [2010] 2 MLJ 333, Gopal Sri Ram FCJ said at p 342:

> *Further, it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part of the basic structure must be worked out on a case by case basis.* Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution. See *Keshavananda Bharati v State of Kerala* AIR 1973 SC 1461.

Fraud on the Constitution

Following on from the foregoing, as noted above, endorsing the Amended 1993 Enactment would have the effect of creating a parallel system of criminal law applicable only to Muslims. For the reasons already set out, in particular allowing for the State Legislatures to transgress into the criminal law field in a covert manner, this is not permitted. An exercise of legislative power notwithstanding would amount to a fraud on the Constitution. The result of such a colourable exercise of power would be repugnant to the constitutional scheme. In *Dr DC Wadhwa and Ors v State of Bihar and Ors* AIR 1987 SC 579, Bhagwati J said, at pp 589–560:

> But otherwise, it would be a colourable exercise of power on the part of the Executive to continue an Ordinance with substantially the same provisions beyond the period limited by the Constitution, by adopting the methodology of repromulgation. *It is settled law that a constitutional authority cannot do indirectly*

46 Fernando, footnote 25, at p 212.

> *what it is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an Act, such provision cannot be allowed to be defeated by adoption of any subterfuge. That would be clearly a fraud on the constitutional provision*. This is precisely what was pointed out by Mukharji, J speaking for the Court in *KC Gajapati Narayan Deo and Ors v State of Orissa,* [1954] 1 SCR 1:
>
> In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject matter in substance is something which is beyond the powers of that legislature to legislate upon, the form in which the law is. clothed would not save it from condemnation. The legislature cannot violate the constitutional prohibitions by employing an indirect method.
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> So also in *P Vajravelu Mudaliar v Special Deputy Collector, Madras and Anr,* [1965] 1 SCR 614 a *Constitution Bench of this Court observed that when it is said that Legislation is a colourable one, what it means is that the Legislature has transgressed its legislative power in a covert or indirect manner, if it adopts a device to outstep the limits of its power*.
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> ...
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> *Such a strategem would be repugnant to the constitutional scheme as it would enable the Executive to transgress its constitutional limitation in the matter of law making in an emergent situation and to covertly and indirectly arrogate to itself the law making function of the Legislature*.

That colourable exercise of power by Parliament could be struck down by our courts was recognised by the majority in *Mamat Daud*, citing with approval the decision of the Supreme Court of India in *KCG Narayan Deo v State of Orissa* AIR 1953 SC 375.[47]

SUCH A LAW WOULD BE IN ANY EVENT UNCONSTITUTIONAL

The analysis thus far has focused on the power to legislate. Much of this discussion has centered on how the germane provisions of the Constitution are to be applied. It stands to reason that leaving aside the question of legislative competency, the Amended 1993 Enactment and the Hudud Bill (should it come into force) would be unconstitutional for contravening the Constitution. These laws, should they come into force, would create a parallel criminal law system that overlaps with the existing system at the federal level. As explained above, this would violate the basic structure of the Constitution. It would also give rise to a system of discrimination on the grounds of religion. A person

47 The Supreme Court cited p 379 of the said decision.

Muslim who resides in Kelantan would be subjected to both systems. The disparate sentences that would be imposed by the different systems would result in either lighter or harsher for Muslims, therefore discriminating against the Muslims and the non-Muslims as the case may be. This state of affairs would have been the result of an arbitrary exercise of legislative power in contravention of art 8(1) and (2) of the Constitution. This is impermissible. As was stated by Gopal Sri Ram JCA (as he then was) in *Tan Tek Seng v Suruhunjaya Perkhidmatan Pendidikan and Anor* [1996] 1 MLJ 261, at pp 284–285:[48]

> The effect of all these decisions was summed up by Thommen J in *Shri Sitaram Sugar Co Ltd v Union of India and Ors* (1990) 3 SCC 223 at p 251 as follows:
>
> *Any arbitrary action, whether I nature of a legislative or administrative or quasi-judicial exercise of power, is liable to attract the prohibition of art 14 of the Constitution. As stated in EP Royappa v State of Tamil Nadu* (1974) 4 SCC3 'equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch'. Unguided and unrestricted power is affected by the vice of discrimination: *Maneka Gandhi v Union of India. The principle of equality enshrined in art 14 must guide every State action, whether it be legislative, executive, or quasi-judicial: Ramana Dayaram Shettyv International Airport Authority of India (1979) 3 SCC 489, 511-12*, *Ajay Hasia v Khalid Mujib Sehravardi* [1981] 1 SCC 722 and *DS Nakara v Union of India* (1983) 1 SCC 305.
>
> By reason of the decision of our Supreme Court in *Nordin*'s case I do not think it is open to me to ignore the new approach to the construction of art 8(1). Indeed, it would be wrong, both on principle and authority, for me to stubbornly cling on to an archaic and arcane approach to the construction of art 8(1). I would therefore adopt the test suggested by the Supreme Court of India in *Maneka Gandhi* and apply it to the present case.
>
> (See also the decision of the Federal Court in *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, where Gopal Sri Ram, FCJ said at p 313, '(t)he effect of art 8(1) *is to ensure that legislative, administrative and judicial action is objectively fair*').

There is also the question of whether the sentences meted out under the Amended 1993 Enactment, such as amputation and crucifixion, are in

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48 Though the decision of the Court of Appeal was overturned by the Federal Court, the analysis of the Court of Appeal on art 8 of the Constitution was referred to by the same court in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213, at p 219. The said decision was cited with approval by the Federal Court in *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285, at p 318.

themselves constitutional. On the face of it, they are clearly cruel, unusual and tortuous punishments that offend international human rights norms. This discussion is however regrettably beyond the scope of this article.

CONCLUSION

It must be stressed that the discussion at hand is not about Islam, or being anti-Islam. Rather, it is about standing by a shared commitment that we undertook in 1957 when we declared ourselves citizens of an independent nation. The aim of the extensive consultation between the Reid Commission and the stakeholders in Malaya, and the subsequent discussions that led to the establishment of the Constitution were aimed at essential objective of inter-communal cooperation and national unity.[49] The vision of Malayan society that came to be that espoused by the Constitution became the basis of life in the independent Malaya. This vision was subsequently re-examined by the Cobbold Commission and found by the peoples of Sabah and Sarawak to be one that they too identified with, paving their entry into Malaysia.

It is essential that the Constitution be appreciated for what it has always represented. Though expediency may dictate that it be interpreted at convenience for political purposes, commitment to the original vision of the framers of the Constitution must be adhered to. The danger of compromising on this matter of fundamental significance cannot be understated. As Tunku Abdul Rahman said in the early 1990s:[50]

> After all these years of trying to build a genuine multiracial and multireligious Malaysia, we are now confronted with a new danger — Islamic fundamentalism ... they are now raising all kinds of ideas to Islamise the country, and this is not good. Malaysia cannot practise Islam fully because half of the population is not Muslim. They have a different culture and different ways of life, and they don't want Islam ... In the past, and I know this since I have been through all this since Independence, Malays, Chinese and Indians had no problems because we stuck to our constitutional bargain and we don't want to impose our values on other people. Today, even the party that I led for so long has done a lot of new things about Islam and want to Islamise the party.

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49 Fernando, footnote 25, at p 216.

50 Hussin Mutalib, *Islam in Malaysia: From Revivalism to Islamic State* (National University of Singapore Press, 1993) at p 94.