

Islam and *Shariah* Offences in Malaysian Constitutional Framework: Issues and Challenges

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ABSTRACT

This paper discusses the position of Islam in the Malaysian constitution and the enforcement of laws relating to shariah offences in Malaysia. It looks at the basic governing legal provisions relating to Islam and shariah offences both at Federal and State levels. The authorities and powers provided for the syariah courts officers and judges are also analysed. This paper focuses on the legal issues surrounding the investigation, prosecuting and courts' power in dealing with the offences. With the current state of legal provisions and infrastructures, the paper finds that there are many rooms for the improvement for the Islamic Legal system in Malaysia particularly with regard to the upgrading the status, image and jurisdiction of the syariah courts.

Keywords: Islam, syariah court, shariah offence, jurisdiction, legal system

1. INTRODUCTION

Malaysia is a unique country, known for having a dual system of laws and courts system. As Malaysia, historically, was under the British colonisation, she applies the English Common Law that is applicable in civil courts. The Islamic law, as the personal law of the majority of the citizens, on the hand is applied in the syariah courts. The syariah courts have the absolute jurisdiction to hear and decide cases on *shariah* offences in Malaysia.¹

This paper seeks to discuss the position of Islam in the Federal Constitution, *shariah* offences in Malaysia and how these offences are dealt with by the relevant authorities. The issues and challenges surrounding the enforcement of *shariah* criminal law will be addressed.

This paper begins with the basic concepts of Malaysia legal system relating to Islam, Islamic law and jurisdiction of the syariah courts. As there are too many issues that may involve and with the space/time constraints of this paper, it focuses on several selected main issues that have become frequently debated

issues. Improvement of the related issues shall also be discussed.

2. BRIEF OVERVIEW OF MALAYSIAN LEGAL SYSTEM

Since independence in 1957, federalism is applied in Malaysia whereby the government operates simultaneously at Federal and State levels respecting the Constitutional Monarchy that has become the back-bone principle in the Malaysian legal system. The Constitutional Monarchy system provides that the Rulers of the nine Malay States² are the Heads of their respective States while the Head of State of the Federation is the Yang di-Pertuan Agong (the King) who is elected by the Malay Rulers amongst themselves through the Conference of Rulers for a five year term.

At Federal level, the three organs of the Federation are the executive, the legislature and the judiciary. The Yang di-Pertuan Agong is the Head of the Executive and The Prime Minister leads the cabinet. Parliament³ is the federal legislative body which has three components, namely, Yang di-Pertuan Agong,

¹Throughout this article, spelling '*shariah*' is used instead of '*syariah*'. Nevertheless, the spelling of '*syariah*' will be used in reference to the court eg '*syariah* court' and the law eg Syariah Court (Criminal Jurisdiction) Act 1965 as this spelling is officially used in the written laws in Malaysia. As it is used together with 'court', it will not be italicized.

² The States are Perlis, Kedah, Perak, Selangor, Negeri Sembilan, Johor, Pahang, Terengganu and Kelantan. There are States that do not sultans and the Yang di-Pertuan Agong becomes the Head of Islam in these States. They are Melaka, Pulau Pinang, Sabah and Sarawak.

³Its jurisdiction is provided in the Federal and Concurrent Lists of the Federal Constitution.

the House of Representatives and the Senate. The civil court system is the judiciary for the whole Federation. At State level, the Sultan⁴ is the Head of the Executive and the Menteri Besar (Chief Minister) leads the State administration. The legislative is called State Legislative Assembly.⁵ The civil courts and syariah courts operate at State level having their respective jurisdictions.⁶

The supreme law of the Federation is the Federal Constitution. Each State of the Federation has its own constitution too. Not only does the Federal Constitution expressly provide that Islam is the religion of the Federation, the constitution of each State except Sarawak also expressly provides that Islam is the religion of the State. Thus, Malaysia is not a secular State. The Federal Constitution enumerates legislative matters for Parliament and for the State Legislative Assemblies. The jurisdiction of the civil court and the syariah courts also spelt out in the Federal Constitution. The two courts are independent of one another and they are parallel systems. Islam and Islamic law are State matters. States have the legislative power to enact on Islamic law applicable to Muslims. With respect to the Federal Territories, it is Parliament that has the legislative power to enact on Islamic law. The syariah courts have jurisdiction in such Islamic law matters. Legislations on Islamic law include Administration of Islamic Law Enactments, Islamic Family Law Enactments, Syariah Criminal Offences Enactments, Syariah Court Evidence Enactments, Syariah Court Civil Procedure Enactments and Syariah Criminal Procedure Enactments.⁷

⁴ Sultan is the official name used in most of the States except Perlis and Negeri Sembilan where the post is known as Raja and Yang di-Pertuan Besar respectively.

⁵ Its jurisdiction is provided in the State and Concurrent Lists of the Federal Constitution as well as respective State's Constitution.

⁶ See the Federal, State, Concurrent Lists and Article 121(1A) of the Federal Constitution.

⁷ For further reading see Farid Sufian Shuaib, Tajul Aris Ahmad Bustami & Mohd Hisham Mohd Kamal, *Administration of Islamic Law in Malaysia: Text and Material*, Kuala Lumpur: LexisNexis, 2010.

3. ISLAM IN THE FEDERAL CONSTITUTION

The Federal Constitution provides that Islam is the religion of the Federation with the allowance of other religions to be practised in Malaysia.⁸ The constitution also guarantee the freedom of religions and the freedom to practice it in Malaysia.⁹ The Federal Constitution, however, remains as the highest law of the land.¹⁰

The case of *Che Omar Che Soh v Public Prosecutor*,¹¹ perhaps is the first ever case in the Malaysian legal history that dealt with the interpretation of Article 3(1) of the Federal Constitution. The Supreme Court, being the highest court, had given a controversial decision by taking a historical approach in construing articles 3(1) and 4(1) of the Federal Constitution. The court decided that, *inter alia*, 'Islam is the religion of the Federation' means 'Islam' in this Article is confined to the 'ritual and ceremony' only – an interpretation that provides that Article 3 possibly carries no legal effect at all. Much has been criticised on this interpretation particularly in a country where majority of its citizen are Muslims.

From time to time through courts' decisions, we could see the interpretation has been given a new more sensible meaning. It seems that the later cases inclined to adopt wider interpretation of Article 3 to mean 'Islam as a complete way of life'. This can be seen in the decisions in *Meor Atiqulrahman bin Ishak dan lain-lain lwn Fatimah bte Sihi dan lain-*

⁸ See Article 3(1) of the Federal Constitution that provides 'Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation'.

⁹ See Article 11(1) of the Federal Constitution that provides 'every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it'.

¹⁰ See Article 4(1) of the Federal Constitution that provides 'this Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void'.

¹¹ [1988] 2 MLJ 55, Supreme Court led by Tun Salleh Abas LP.

*lain*¹² and *Lina Joy v Majlis Agama Islam Wilayah & Anor*.¹³ It can be said that the new interpretation represent the true concept of Islam and more accurate as compared to the one in *Che Omar Che Soh*.¹⁴

4. SYARIAH COURT

By virtue of item 1, State List of the Federal Constitution, the constitution, organization and procedure of syariah courts are established by the State legislatures. In case of the Federal Territories, its syariah courts are established by Act of Parliament by virtue of item 6(e) of the Federal List.

The Federal Constitution empowers the syariah courts civil and criminal jurisdictions. In civil jurisdiction, syariah courts can adjudicate cases arising under “Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, inheritance, gift and waqf.”¹⁵ For family matters, the syariah courts refer to Islamic family laws enacted by the states.¹⁶

Apart from matters of religious observance and personal status law, the States also have some power to enact and enforce Islamic criminal law. Although criminal law is generally under the jurisdiction of the federal government,¹⁷ state governments can create their own laws to cover “offences by persons professing the religion of Islam against precepts of that religion – except in regard to matters in

the Federal List.”¹⁸ For few decades, the meaning of “offences against the precepts of Islam” was uncertain until it was finally addressed in the case *Sulaiman bin Takrib v Kerajaan Negeri Terengganu and Ors*.¹⁹ Abdul Hamid Mohamad CJ decided that the phrase should cover all offences that are against the injunctions of Al-Qur’an, al-Sunnah, ijma’, *fatwa* and religious authorities. It does not confine to the offences relating to 5 pillars of Islam²⁰ only.

In monitoring the State governments to effectively enact and enforce the Islamic criminal law, the Parliament in 1965 has passed Syariah Courts (Criminal Jurisdiction) Act of 1965 (as amended in 1984). The Act confers sentencing powers to the syariah courts to the limit of 3 years imprisonment, RM5,000 fines, six strokes or any combination thereof.²¹ Such jurisdictions might be appropriate in 1984 but they are relatively low in our present day. It is interesting to note that, since 1984, there is no increase in the jurisdiction even though, from time to time, many parties have seriously proposed for it. The increase would definitely upgrade the status of the syariah courts to be at par with their civil counterparts.

5. APPLICABLE ISLAMIC CRIMINAL LAWS

Malaysia achieved her independence on 31st August 1957 and since then she upholds the federalism concept in the country administration. Malaysia consists of a Federal administration centred at Putrajaya where the legislative body is known as Parliament; and 14 States governments whose laws are passed by the State legislative assembly. The Federal Constitution is the supreme law of the land and all other laws should be consistent with its provision.²²

By virtue of the Federal Constitution, the Islamic law is under the States’ administration and the law is legislated and passed by the

¹²[2000] 5 MLJ375, High Court, Mohd Nor Abdullah J.

¹³[2004] 2 MLJ 119, High Court, Faiza Tamby Chik J.

¹⁴ Unfortunately both cases were decided by the High Court which is inferior than the Supreme Court or its equivalent – Federal Court. The decision in *Che Omar Che Soh* stands until being overruled by the Federal Court. There is no case afterwards that dealt specifically with this issue.

¹⁵ See Federal Constitution, article 74, 9th Schedule (State List, item 1).

¹⁶ See for eg Islamic Family Law (Federal Territories) Act 1984 (Act 303 of 1984); Islamic Family Law (State of Selangor) Enactment 2003 (Enactment 2 of 2003).

¹⁷ See Federal Constitution, 9th Schedule (Federal List, item 1).

¹⁸ See Federal Constitution, article 74, 9th Schedule (State List, item 1).

¹⁹ [2009] 6 MLJ 354, FC.

²⁰ Offences relating to *shahadah*, prayer, fasting, *zakat* and pilgrimage.

²¹ See section 2 of the Act.

²² Article 4 of the Federal Constitution.

individual State Legislative Assembly.²³ For the purpose of this article, the reference will be made to the Federal Territories' laws. The followings are among the relevant legal provisions that relate to the enforcement of syariah offences in Malaysia:

- 1) Federal Constitution, 9th Schedule, State List, List II;
- 2) Syariah Court (Criminal Jurisdiction) Act 1965 (ACT 355);
- 3) Syariah Criminal Offences (Federal Territories) Act 1997 (ACT 559); and
- 4) Syariah Criminal Prosedure (Federal Territories) Act 1997 (ACT 560)

6. TYPES OF SHARIAH OFFENCES

The *shariah* offences are triable by the States' syariah courts. The Syariah Criminal Offences (Federal Territories) Act 1997 categorises the types of the *shariah* offences as follows:

- (a) Offences relating to 'Aqidah;
- (b) Offences relating to the sanctity of the religion of Islam and its institution;
- (c) Offences relating to decency;
- (d) Miscellaneous offences; and
- (e) Offences relating family law.

Offences relating to 'aqidah consist of wrongful worship that is contrary to Islamic law;²⁴ false doctrine that is contrary to Islamic law;²⁵ propagation of other religious doctrines to Muslims²⁶ and false claim to be prophet or Imam Mahdi.²⁷

Offences that relate to the sanctity of the Islam and its institution comprise of insulting

the religion of Islam;²⁸ deriding Quranic verses and sunnah;²⁹ contempt or defiance of religious authorities;³⁰ defiance of court order;³¹ religious teaching without *tauliah*;³² opinion contrary to *fatwa*;³³ religious publication that is contrary to Islamic law;³⁴ failure to perform Friday prayer;³⁵ disrespect for *Ramadhan*;³⁶ non-payment of *zakat*;³⁷ instigating someone to neglect any religious duty;³⁸ gambling³⁹ and offences related to intoxicating drinks.⁴⁰

Offences on decency involve incest,⁴¹ prostitution;⁴² *muncikari* (pimp);⁴³ sexual intercourse outside marriage;⁴⁴ *muqaddimahzina*;⁴⁵ homosexuality;

²⁸See section 7 of Syariah Criminal Offences (Federal Territories) Act 1997.

²⁹See section 8 of Syariah Criminal Offences (Federal Territories) Act 1997.

³⁰ See section 9 of Syariah Criminal Offences (Federal Territories) Act 1997.

³¹ See section 10 of Syariah Criminal Offences (Federal Territories) Act 1997.

³² See section 11 of Syariah Criminal Offences (Federal Territories) Act 1997.

³³ See section 12 of Syariah Criminal Offences (Federal Territories) Act 1997.

³⁴ See section 13 of Syariah Criminal Offences (Federal Territories) Act 1997.

³⁵ See section 14 of Syariah Criminal Offences (Federal Territories) Act 1997.

³⁶ See section 15 of Syariah Criminal Offences (Federal Territories) Act 1997.

³⁷See section 16 of Syariah Criminal Offences (Federal Territories) Act 1997.

³⁸See section 17 of Syariah Criminal Offences (Federal Territories) Act 1997.

³⁹See section 18 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁴⁰See section 19 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁴¹See section 20 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁴²See section 21 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁴³See section 22 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁴⁴See section 23 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁴⁵See section 24 of Syariah Criminal Offences (Federal Territories) Act 1997.

²³ Except in case of Federal Territories where its laws are also passed by the Parliament due to special setup made by the federal government when Federal Territory of Kuala Lumpur was established in 1974. This set up was maintained when Labuan and Putrajaya joined the Federal Territories respectively in 1984 and 2001.

²⁴See section 3 of Syariah Criminal Offences (Federal Territories) Act 1997.

²⁵See section 4 of Syariah Criminal Offences (Federal Territories) Act 1997.

²⁶See section 5 of Syariah Criminal Offences (Federal Territories) Act 1997.

²⁷See section 6 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁴⁶lesbian, ⁴⁷*khalwat*, ⁴⁸male poses as women ⁴⁹and indecent act in public.⁵⁰

Miscellaneous offences refer to giving false statement;⁵¹ *takfir*;⁵² destroying *masjid*;⁵³ collecting *zakat* without authority;⁵⁴ illegal payment of *zakat*;⁵⁵ encouraging vice;⁵⁶ enticing a married woman;⁵⁷ preventing married couple from cohabiting;⁵⁸ instigating married couple to divorce or to neglect their duties;⁵⁹ enticing female person;⁶⁰ selling or giving away child to non-Muslim;⁶¹ *qazaf*;⁶² abuse of *halalsign*⁶³ and abetment.⁶⁴

Offences relating to family law refer to list of offences provided by Islamic Family Law (Federal Territories) Act 1984 (ACT 303).The

⁴⁶See section 25 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁴⁷See section 26 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁴⁸See section 27 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁴⁹See section 28 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁵⁰See section 29 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁵¹See section 30 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁵²See section 31 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁵³See section 32 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁵⁴See section 33 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁵⁵See section 34 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁵⁶See section 35 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁵⁷See section 36 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁵⁸See section 37 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁵⁹See section 38 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁶⁰See section 39 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁶¹See section 40 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁶²See section 41 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁶³See section 42 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁶⁴See section 43 of Syariah Criminal Offences (Federal Territories) Act 1997.

offences are, among others, offences of marriage without permission;⁶⁵ divorce outside court⁶⁶ and polygamy without court's permission.⁶⁷

7. JURISDICTION OF SYARIAH COURTS ON CRIMINAL OFFENCES

The discussion on the jurisdiction of syariah courts with regard to the investigation and prosecution of the *shariah* offences will be looked from the following aspects:

- (a) Islamic criminal offences in the Federal Constitution;
- (b) Sentencing power of the syariah court;
- (c) Territorial jurisdiction of the syariah court.

7.1 Islamic Criminal Offences in the Federal Constitution

Syariah courts are conferred with jurisdiction in respect of offences against the precept of the religion of Islam committed by persons professing that religion.⁶⁸ As for the prosecution of *shariah* offences by the syariah courts, the 9th Schedule, State List, List II, Item 1 of the Federal Constitution outlines three issues that must be satisfied, namely the offences:

- (a) must be against the precept of religion of Islam;
- (b) committed by a Muslim/Muslims; and
- (c) must be prescribed under any written law.

Firstly, the offence must be contrary to the precept of the religion of Islam. The meaning of 'offences against the precept of the religion of Islam' was addressed in the case of *Sulaiman Takrib v Kerajaan Negeri Terengganu*⁶⁹ where the petitioner and several others were arrested for disobeying the 1997 fatwa regarding the

⁶⁵See section 40(1) of Islamic Family Law (Federal Territories) Act 1984, read together with section 19 of the same Act.

⁶⁶See section 124 of Islamic Family Law (Federal Territories) Act 1984.

⁶⁷See section 123 of Islamic Family Law (Federal Territories) Act 1984.

⁶⁸See 9th Schedule, State List, List II, Item 1 of the Federal Constitution.

⁶⁹[2009] 4 MLJ 354, FC.

prohibition of teaching and practicing of Ayah Pin's doctrine. The word 'precept' is not defined in the Federal Constitution. After hearing the views of three experts in Islamic law, the Federal Court decided that 'offences against the precept of the religion of Islam' referred to 'offences which are contrary to *Hukum Syarak*'.⁷⁰ This interpretation gives wider power to the legislative to legislate and to the court to prosecute any offences that are not in line with *Hukum Syarak*. Meaning to say, the offences are not confined to those against the pillars of Islam (*rukun Islam*) only.

Secondly, the offences must be committed by Muslim/Muslims only.⁷¹ Since the offences are related to the religion of Islam, the syariah court has no jurisdiction should the offence be committed by a non-Muslim. It is interesting to note that for the offence of *khalwat* (the offence that must be committed by two individuals) between a Muslim and a non-Muslim, only the Muslim could be brought to the syariah court while the non-Muslim suspect is to be released. This is simply because the syariah court has no jurisdiction over non-Muslims and in fact *khalwat* is not an offence to them under any laws.

Thirdly, the offence must be prescribed under any written law. It is a tricky issue when it involves an offence that is prescribed by the Federal Constitution but is not prescribed by any State written law.⁷² Even though the old trend of the Federal Court required the express conferment of such jurisdiction to the syariah court,⁷³ the later trend proposes that the Federal

Court is satisfied with the implied conferment of the jurisdiction.⁷⁴ However for a convenient implementation of law and to avoid any untoward claim, the syariah court prosecutor will only prosecute offences that are only provided by written laws.⁷⁵

7.2 Sentencing Power of the Syariah Courts

The establishment and general jurisdiction of the syariah courts in Malaysia are provided by the Federal Constitution, which were later provided again in the forms of State laws. The extent of the sentencing power of the syariah court is governed by the federal law, Syariah Court (Criminal Jurisdiction) Act 1965 (ACT 355).⁷⁶ This Act limits the sentencing power of the syariah to imprisonment of not more than 5 years, fines of not more than RM5000 and whipping of not more than 6 strokes or any combination thereof.⁷⁷ The States later on legislated their laws according to this confined jurisdiction and could not go beyond. Article 75 of the Federal Constitution provides that in the event of inconsistencies between State law and the federal law, the State law will become null and void to the extent of the inconsistencies.

Likewise, the implication of this Act is that the syariah court could not sentence beyond of this confined jurisdiction, otherwise it becomes

[1991] 3 MLJ 487 and *Lim Chan Seng lwn Pengarah Jabatan Agama Islam & Satu yang Lain* [1996] 3 CLJ 231.

⁷⁴ See for example *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1998] 1 MLJ 681, *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1991] 1 MLJ 489, FC and *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan Lain-lain* [2007] 1 MLJ 585, FC.

⁷⁵ Written laws in this context include gazette *fatwa* issued and endorsed by relevant authorized bodies. In Malaysia, a *fatwa* will be prepared by Fatwa Committee, brought to the State Legislative Assembly for deliberation and then gazetted as a law. Any *fatwa* that is not properly gazette remains as an advice and has no legal effect. See for example section 34(1) and 34 (2) of the Administration of Islamic Law (Federal Territories Act) 1993. See also *Pendakwa Syarie lwn. Fahyu Hanim Ahmad dll*, [2000] Jurnal Syariah 8 (1) at 137.

⁷⁶ As amended in 1984 and revised in 1988.

⁷⁷ See section 2 of the Act.

⁷⁰ See the arguments by the government's experts, Tan Sri Sheikh Ghazali bin Haji Abdul Rahman (the Director General of the Syariah Judicial Department of Malaysia) and Professor Tan Sri Dr Mohd Kamal Hassan (the former Rector of the International Islamic University Malaysia); and the petitioner's expert, Professor Dr Muhammad Hashim Kamali (an academician and a book writer).

⁷¹ See 9th Schedule, State List, List II, Item 1 of the Federal Constitution and section 1 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁷² For example the offence of renunciation of religion of Islam (*riddah*) where no State has made it an offence even though it is impliedly provided in the Federal Constitution.

⁷³ See for example, *Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor*

unconstitutional. In the modern era, these confined jurisdictions could not serve justice well as the people are not afraid of the jurisdiction. The time has come for the increase of such jurisdiction to make syariah court as competitive as civil court that enjoy wider jurisdiction. A bill to increase these jurisdiction has been tabled in Parliament this year and it has been debated and voted yet. This issue will not be deliberated here as this is not the objective of this paper.

7.3 Territorial Jurisdiction of the Syariah Court

As the initial establishment of the syariah courts is provided by the 9th Schedule, State List of the Federal Constitution, they are considered as State's courts. Laws relating to the court shall only be enforceable within the State's boundaries only.⁷⁸ For the enforcement outside jurisdiction, the court shall rely on the reciprocal provision in the act for such purpose. Reciprocal provision is an enabling provision for inter-State syariah courts' decisions enforcement through a legal endorsement of the receiving State. For example, if a syariah court in the Federal territories wants to execute its warrant of arrest on a suspect who resides in the State of Selangor, the warrant shall be endorsed first by the Selangor syariah court before it could be executed.⁷⁹ It is just a formality that has been well respected and adhered to so far.

8. SELECTED ISSUES ON THE ENFORCEMENT OF SHARIAH OFFENCES

It is undeniable that when it comes to the enforcement of law, particularly in federal-State legal set-up, there will be many issues arising either economically, legally, and technically. Economic issue is on the inability of the State government, in some cases, to provide adequate and competitive infrastructures and salary-scale to the courts' officials. This may somehow slow down the process of the court either directly or indirectly.

⁷⁸For example section 1 of Syariah Criminal Offences (Federal Territories Act) 1997 and section 1 of Syariah Criminal Procedure (Federal Territories) Act 1997 provide that such law shall only be enforceable in the Federal Territories only.

⁷⁹See section 39 of Syariah Criminal Procedure (Federal Territories) Act 1997.

The followings are the legal and technical that may arise on the implementation of the law.

8.1 Offences that are Practically Hard to be Prosecuted at the Syariah Courts

The Syariah Criminal Offences (Federal Territories) Act 1997 outlines more than 40 *shariah* offences triable by the syariah courts. Out of these offences, offences relating to '*aqidah*' and decency have been the main and frequently tried offences in courts. However, some of the offences remain as offences in law but are not brought to the courts for trial due to its impracticality and difficulty to enforce.

Based on current man-power, some of the offences are hard to enforce due to impracticality. For example, a non-seizable offence of failure to perform Jumaat prayer.⁸⁰ Public might question that if the officers want to enforce this by arresting people who did not pray, what about the fact that the officers who make the arrest did not themselves pray? In Malaysia, the number of female officers is very limited and no non-Muslim officers at all. This makes the offence remain as an offence in the Act but not in reality. The government must have a serious thought about this matter and find a practical solution for its implementation.

8.2 Investigation and Prosecution of Seizable Offences

The Syariah Criminal Procedure (Federal Territories) Act 1997 enlists some acts that are categorised as non-seizable offences.⁸¹ The examples of non-seizable offences in the Act are disrespect of Ramadhan,⁸² failure to pay *zakat*⁸³ and indecent act in public.⁸⁴ For seizable offences, the Religious Enforcement Officer generally could not make an arrest except with warrant of arrest where time is needed for the issuance. In case where the authorities make an operation on seizable offences, persons caught for the offence will only be detained for a short

⁸⁰See section 14 of the Act.

⁸¹Section 2 of Syariah Criminal Offences (Federal Territories) Act 1997 defines 'non-seizable offences' as offences that are punishable with imprisonment for not more than one year or with fines only where the Religious Enforcement Officer or Police Officer shall not make an arrest without warrant.

⁸²See section 15 of the Act.

⁸³See section 16 of the Act.

⁸⁴See section 29 of the Act.

while for the purpose of recording their background. They then be released with an instruction to come to the authorities' office for investigation. In many cases, they failed to come to the office and it is not easy for the authority to re-locate them and the cases hardly come to the prosecution. It is timely for the government to re-look at this classification and categorised all relevant offences as 'seizable' so that the investigation process could be more effectively take place.

8.3 Limited Sentencing Power

The Syariah Court (Criminal Jurisdiction) Act 1965 has confined the syariah court jurisdiction to three years imprisonment, fines of RM5000, whipping of 6 strokes or any combination thereof. It is an established practice that the first offender, upon conviction, will only be fined not more than a half of the maximum penalty. For repeated offenders, they always cite health, sole bread winner of the family and responsibility to look after aged-parents as mitigating factors in their appeals. At the end, they will end up with light punishments.

The low punishment prompts the accused to plead guilty during the trial and they will have no problem in paying the light fines. Most of the criminal cases ended up with 'plead guilty' process as the lawyer's fee, should they claim for trial, will be much higher than the fines that they will receive.

It is not wrong for the 'plead guilty process' to take place as this is allowed by the law. However, too many plead guilty case may deprive the courts of the legal arguments and submissions that may enrich the jurisprudence of the Islamic law. The submission of the lawyers, for example, may contribute to the development of the law and indirectly develop analytical thinking on the part of the judges and lawyers.

8.4 Non-awareness of Public on the *Fatwa* as a Law

Most people are aware of the offences in the Syariah Criminal Offences (Federal Territories) Act 1997 and matrimonial offences in Islamic Family Law (Federal Territories) Act 1984. However, not many are aware of failure

to follow a gazetted *fatwa* is also an offence.⁸⁵ In the case of *Pendakwa Syarie Iwn. Fahyu Hanim Ahmad dll*,⁸⁶ the accused claimed ignorant on the existence of a *fatwa* of Selangor prohibiting Muslim women from participating in the beauty contest. In *Sulaiman Takrib v Kerajaan Negeri Terengganu*,⁸⁷ the party even questioned the validity of a gazetted *fatwa* on prohibition of a deviant teaching as a binding law.

8.5 Non Muslim in Syariah Courts

Syariah Criminal Offences (Federal Territories) Act 1997⁸⁸ and Syariah Criminal Procedure (Federal Territories) Act 1997⁸⁹ provide that the laws are only be applicable to Muslim only. The fact that the syariah courts are put under the 9th Schedule, State List of the Federal Constitution is a proof that non-Muslims are not subject to the syariah court jurisdiction.

Khalwat is an offence that is committed by two unrelated individuals.⁹⁰ It is quite strange for an offence of *khalwat* between a Muslim and a non-Muslim, only the Muslim partner will be subject to the syariah prosecution and be sentenced upon conviction while the non-Muslim partner is free from the prosecution. *Khalwat*, on the hand, is not an offence in any civil law.

Another interesting example is the offence 'misuse of *halal* signage'.⁹¹ This is a syariah-related offence issue but is committed mostly by non-Muslims where syariah courts have no jurisdiction on them.

Section 44 of Syariah Criminal Procedure (Federal Territories) Act 1997 gives the power to the syariah courts to issue a search warrant to whomever person related to the case, even to non-Muslims. Section 11 of the Act gives power to the Religious Enforcement Officers a search even on the premises belong to the non-

⁸⁵See section 34 of Administration of Islamic Law (Federal Territories) Act 1993.

⁸⁶[2000] Jurnal Syariah 8 (1) at 137.

⁸⁷[2009] 6 MLJ 354, FC.

⁸⁸See section 1 of the Act.

⁸⁹See section 1 of the Act.

⁹⁰See section 27 of Syariah Criminal Offences (Federal Territories) Act 1997.

⁹¹See section 42 of Syariah Criminal Offences (Federal Territories) Act 1997.

Muslims. However, the Act does not specify the implication should the non-Muslims do not adhere to the law. As the law is presently understood, the syariah court will not have jurisdiction over non-Muslims and section 210 of the Act on contempt of court will not be applicable to them. The non-Muslims may only be subject to the civil court for Penal Code offences such as obstruction of justice or obstruction of the government servants from discharging their official duties.

8.6 Role of Police

The Act empowers the Police Officers to make an arrest,⁹² search⁹³ and to execute a search warrant⁹⁴ and a warrant of arrest.⁹⁵ In reality, these officers are not syariah court officers and not trained in the Islamic law and Islamic procedural law. This makes them reluctant to pro-actively lead the investigation. Currently, they only join operations as a support team for the Religious Enforcement Officers.

8.7 Remand Order⁹⁶

Article 5 of the Federal Constitution empowers the syariah court judges to issue a remand order. Unlike Criminal Procedure Code that is applicable to civil courts, there is no specific section about remand order in the Syariah Criminal Procedure (Federal Territories) Act 1997. Even though section 107 of the Act is arguably related to remand order but it is not used by the court because of its ambiguity. Hence, remand order is not in practice in the syariah courts.

8.8 Enforcement of Summon and Warrant of Arrest

By virtue of 9th Schedule, State List of the Federal Constitution, syariah courts are considered as State courts and shall have the power within the confined of that particular

State.⁹⁷ For an execution of a summon and a warrant of arrest outside jurisdiction of the issuing court, it relies on the reciprocal enforcement between the States. There is no legal issue but because of technicality, it always delay on the part of the execution.

9. CONCLUSION

It is regret to state that after 61 years of Malaysia's independence, the position of the syariah courts in Malaysia is not as adequate and competitive as their civil courts. There are many efforts from many agencies that have to concentrate on, among other things, the followings:

- a) increasing the proper criminal jurisdiction of the syariah courts;
- b) (b) providing adequate and exhaustive syariah legal provisions;
- c) (c) addressing the issues of shortage of man-power and infrastructures;
- d) (d) addressing the issues of adequate financial allocation to syariah courts; and
- e) (e) upgrading the cooperation of the enforcement agencies.

Concentration of these issues may contribute to the effectiveness of the syariah courts and will directly instill the confidence of the society in the Islamic legal system in Malaysia.

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⁹²See section 10 of Syariah Criminal Procedure (Federal Territories) Act 1997.

⁹³See section 11 of Syariah Criminal Procedure (Federal Territories) Act 1997.

⁹⁴See section 44 of Syariah Criminal Procedure (Federal Territories) Act 1997.

⁹⁵See section 34 of Syariah Criminal Procedure (Federal Territories) Act 1997.

⁹⁶Remand is an order of the court for a further detention of suspects after 24-hour of arrest.

⁹⁷See section 1 of Syariah Criminal Procedure (Federal Territories) Act 1997.

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