

OFFENCES BY PERSONS PROFESSING THE RELIGION OF ISLAM AGAINST PRECEPTS OF THAT RELIGION

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ABSTRACT

This article analyses laws for Muslims under the Malaysian legal system by outlining its historical and legal developments in British Malaya and Malaysia. It is primarily concerned with the matter of offences by persons professing the religion of Islam against precepts of that religion. It has the dual objective of providing readers with a solid account of the historical context in which these offences were developed, and analyses the approach taken by the Judiciary of today with respect to these offences since their re-enacting after Merdeka. It argues that the Judiciary has failed to preserve the Constitution as envisaged in 1957. Recent decisions of the Federal Court have disregarded the reasoning of the Supreme Court in *Mamat Daud*, misinterpreted the common noun ‘precepts’ for the proper noun ‘Precepts of Islam’ while favouring the opinions of contemporary experts on religion when interpreting the Constitution. This article finds that Parliament must remedy this continued failure by the Judiciary by engaging with interested persons, and in doing so, preserve the protections of the Constitution of 1957, and allow the subject matter – laws for Muslims in Malaysia – to be subject to 21st century democratic deliberation.

Keywords: precepts, Islam, offences, State List, Muslim courts

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THE HISTORY OF ANGLO-MUHAMMADAN LAWS IN MALAYA

British Administration was established in Perak with the Pangkor Treaty of 1874. Subsequent agreements with respective Rulers saw the Peninsula brought under British dominion by 1919. A reiteration in these agreements was Clause VI of the Pangkor Treaty; stipulating that “the *Sultan* receive and provide a suitable residence for a British Officer to be called Resident who shall be accredited to his Court and whose advice must be asked and acted upon in all questions other than those touching Malay religion and custom”. This marked the introduction of indirect rule, through the Residential System, into the Malay States.

Fundamentally, these treaties reflected British awareness that religion and custom were two expressions of Malay life in which interference would likely arouse resentment and even unrest. Colonial religious policy avoided meddling in such matters and sought to assure the Malays that their traditional way of life was not threatened. But while that was official British policy, in effect - interference was inescapable - all laws, even those dealing with matters of religion, were drafted by British personnel, and its passage in the State Councils a formality. In fact, British intervention in religious matters often had Malay consent, and, at times, responded to the wish of the Malay Rulers.

British tolerance of Islam indirectly assisted in the expansion of laws, by conferring doctrinal and administrative authority on officials dependent on the *Sultans* for their power. The Rulers and their State Councils began to assume a wider responsibility for religious affairs. The enacting of written systems of civil and criminal law generated pressure to establish a more formal system of Islamic law; courts were set up and procedures laid down.

Muslim courts established in each State to enforce Muslim law and *adat* saw a *kathi* appointed for every district. These courts had jurisdiction over Muslims only, and their

primary responsibility was to distribute property after death or divorce. In most States, the British intervened directly in tasks such as nominating *kathis* and religious teachers, considering points of Islamic law and practice, considering appeals from lower religious courts, supervising religious publications, and dealing with religious legislation.

Through institutionalisation and bureaucratisation using statutory enactments, administrative reforms and rules, there was now organized religious officialdom in British Malaya. But this was not the outcome of any preconceived process or deliberate planning, but emerged of itself out of British colonial policy and the general philosophy of it. Therein lies the paradox; that Islam and Islamic institutions in Malaya had the benefit of far-reaching development because of British rule.

In 1885, Perak enacted Order in Council 1885 “Muhammadans to Pray in Mosques on Friday”; a law which made Friday prayer in the mosque compulsory. Muslims who disobeyed were liable to a small fine and the proceeds were applied to the upkeep of mosques.

In 1887 and 1893, Sungei Ujong and Negri Sembilan (old) enacted similar laws; State Council Order of August 9, 1887 “Mosque Attendance” and State Council Order of May 25 1893 “Mosque Attendance” respectively.

In 1894, Perak enacted Order in Council No. 1 of 1894 “Adultery by Muhammadans”; a law which made adultery an offence. Where a Muslim man had consensual sexual intercourse with the wife of another man, they were guilty of adultery and liable to punishment.

Within a few days, Selangor enacted a similar law – Regulation XI of 1894 “Prevention of Adultery Regulation” - adding that the court could act only when the complaint was made by the husband of the woman or her guardian.

Between 1895 and 1899, the State Councils of Perak and Negri Sembilan discussed the need to establish a comprehensive ‘Muhammadan Code’ of behavior and studied drafts of codification of ‘Muhammadan Law’.

In July 1897, the *Durbar* had its first meeting in Kuala Lumpur where the major issue was the compilation of a Code of Muhammadan Laws and Customs to penalize moral offences which did not come within the scope of English criminal law.

In 1898, the Sultan of Pahang, in the State Council, complained that all crimes committed in Pahang against Islamic law went unpunished and as a Ruler of a Muslim State he felt himself personally responsible for all such misdeeds, and steps should be taken for the British Governor to assume the burden of punishing offenders.

By 1900, the State Council of Selangor had resolved for the drafting of an enactment with proposed amendments by the State Council of Negri Sembilan and the Sultan of Perak to be communicated to the Resident-General.

In January and July 1902, discussions took place at the conference of Residents in Selangor, and thereafter the legal adviser T.H. Kershaw drafted a Muhammadan Laws Enactment, which would only cover cases in which both parties were Muslims. Consultations were held between the sultanates, State Councils and British Residents on the draft's details.

The draft enactment aroused some opposition in the press, especially on the clause on compulsory mosque attendance on Fridays and the clauses dealing with the morals of women. The two noted concerns were: How would this obligatory worship affect all Government servants of whom the majority were Muslims? And why doesn't the legislation exclude Indians and other Muslims because religious liberties were not interfered with in their native countries?

In 1904, and despite valid concerns, the enactment was enacted in all the Federated Malay States; titled The Muhammadan Laws Enactment¹. Subsequent amendments introduced the offence of Prohibition of Sale of Cooked Food in

¹ Enactment No. 6 of 1904 (Negri Sembilan), Enactment No. 3 of 1904 (Selangor), Enactment No. 2 of 1904 (Pahang) and Enactment No. 20 of 1904 (Perak)

the month of Ramadan, Prohibition of Cohabitation between Divorced Persons and Incest² respectively. There were 9 offences.

Table 1. Overview of offences in the Muhammadan Laws Enactment 1904

Section	Offence	Punishment
3	Failure to attend prayers at Mosque every Friday.	Fine not exceeding 50 cents before a Court of Penghulu (or a Court of a Kathi in Negri Sembilan and Pahang).
4	Enticing any unmarried girl out of the keeping of her parents or guardians.	Imprisonment not exceeding 6 months and fine up to twice the amount of "mas kahwin" payable for a marriage of a girl of her class.
5	Absconding to lead an immoral life (unmarried girls).	Imprisonment not exceeding 1 month (3 months for subsequent offences).
6	Adultery with a wife of another man.	Imprisonment not exceeding 1 year and fine not exceeding \$250 for the man, and imprisonment not exceeding 6 months for the woman.
7	Incest.	Incest by reason of consanguinity or fosterage: imprisonment not exceeding 5 years for men. Incest by reason of affinity: imprisonment not exceeding 6 months for men, or fine not exceeding \$250.

² Enactment No. 1 of 1917 (Negri Sembilan), Enactment No. 1 of 1917 (Selangor) and Enactment No. 1 of 1917 (Perak); Enactment No. 1 of 1918 (Negri Sembilan), Enactment No. 1 of 1918 (Selangor) and Enactment No. 1 of 1918 (Perak); Enactment No. 2 of 1915 (Negri Sembilan), Enactment No. 1 of 1915 (Selangor) and Enactment No. 1 of 1915 (Perak)

7A	Prohibition to cohabit as a man and wife (after three pronouncements of divorces) unless the woman has lawfully married another man and divorced subsequently.	Fine not exceeding \$250 and for subsequent offences, fine not exceeding \$500 or imprisonment not exceeding 6 months.
8	Betrothal (breach of promise to marry).	Pay the value of the “mas kahwin” which would have been paid if marriage took place.
9	Teaching religious doctrine in public place without written permission of Sultan or teaching false doctrines.	Fine not exceeding \$25.
9A	Prohibition on shopkeepers or retail traders from selling during Ramadhan between 6 a.m. and 6 p.m. to Muslim persons cooked food for immediate consumption.	Fine not exceeding \$2 and fine not exceeding \$10 for subsequent offences before Court of Kathi, Court of Penghulu or Court of Magistrate.

Source: Muhammadan Laws Enactment 1904

Only persons professing the Muhammadan religion were subject to the enactment (s. 2). These offences were triable before a Magistrate’s Court. However, when trying such offences, the courts had to cause two (2) Muhammadans of standing to be summoned from a list of persons nominated in that behalf by the Ruler to sit with the court as assessors (s. 10). The courts were however not bound by the opinion of the assessors (s. 11). All fines recovered from the offenders must be paid to a fund called the “Muhammadan Religious Fund” (s. 12).

In 1933, the Federated Malay States began to prepare a new Muhammadan Laws Enactment.

When the draft of the Bill was made public in October 1935, its critics argued that prohibitions touching on personal morality interfered with individual discretion to a high degree. The editor of the Singapore monthly Voice of Islam thought that the Bill was contrary to the principles of Islam; it was obligatory on Muslims to pray five times daily and to attend mosque on Friday, but they should attend of their own accord; and not be compelled as that engendered hypocrisy. Similar objections were raised by Malays, who regarded the Bill as archaic i.e. it was impossible to obey the Qur'an to the letter, and hundreds of Malays would be fined or imprisoned every day for not going to the mosque. The Warta Malaya, a Singaporean Malay daily, declared the Bill dangerous as complete criminal, civil and social laws were presented in the Qur'an and the provisions of the Bill conflicted with Islamic law. The Straits Budget added that no such legislation existed in Islamic Egypt, Turkey or Persia, the Muslim States of India or in the Netherlands East Indies with their vast Muslim populations.

On the other hand, the Bill was defended by many who believed that this compulsion was accepted as right and natural by the Malays themselves. Religion and State were inextricably joined together in the eyes of the Malays that the duty of the *Sultans* to regulate the religious lives of their subjects was not questioned. Muslim rulers in the Malay States were always entitled to use their laws, courts and police to ensure orthodoxy. It was argued that state control of sermons, religious matters and publication of religious books provided many benefits including the prevention of unqualified persons from teaching and propagating.

The Bill, drafted by a committee of legal officials in consultation with Muslim dignitaries of all four Federated Malay States, was passed in Pahang in 1937 titled Muslim (Offences) Enactment 1938, in Negri Sembilan and Selangor in 1938 titled Muhammadan (Offences) Order in Council 1938 and Muhammadan (Offences) Enactment 1938 respectively and

in Perak in 1939 titled Mohamedan (Offences) Enactment 1939; overruling the resistance and controversy that it had aroused.

Taking Negri Sembilan's Muhammadan (Offences) Order in Council 1938 as an example, there were 13 offences.

Table 2. Overview of offences in Negri Sembilan's Muhammadan (Offences) Order in Council 1938

Section	Offence	Punishment
3	Failure to attend Prayers at Mosque every Friday.	Fine not exceeding \$5 before a Court of Penghulu.
6	Non-attendance of children at Koran School.	Fine not exceeding \$5 before a Court of Magistrate or a Court of Penghulu.
7	Enticing any unmarried girl out of the keeping of her parents or guardians.	Imprisonment not exceeding 6 months and fine up twice the amount of "mas kahwin" payable for a marriage of a girl of her class.
8	Absconding to lead an immoral life (unmarried girls).	Imprisonment not exceeding 1 month (3 months for subsequent offences).
9(i)	Adultery with a wife of another man.	Imprisonment not exceeding 1 year and fine not exceeding \$500 for the man, and imprisonment not exceeding 6 months or and fine not exceeding \$250 for the woman.
9(ii)	Khalwat for men: in retirement alone with and in suspicious proximity to any Muhammadan woman whom he is not forbidden to marry.	Imprisonment not exceeding 1 year and fine not exceeding \$500 for the man, and imprisonment not exceeding 6 months or and fine not exceeding \$250 for the woman as participator.
9(iii)	Khalwat for women: in retirement alone with and in suspicious proximity to any male not being a Muhammadan.	Imprisonment not exceeding 6 months or fine not exceeding \$250.

10	Incest.	Incest by reason of consanguinity or fosterage: imprisonment not exceeding 5 years for men. Incest by reason of affinity: imprisonment not exceeding 6 months for men, or fine not exceeding \$250.
11	Prohibition to cohabit as a man and wife (after three pronouncements of divorces) unless the woman has lawfully married another man and divorced subsequently.	Fine not exceeding \$250 and for subsequent offences, fine not exceeding \$500 or imprisonment not exceeding 6 months.
12	Teaching religious doctrine in public place without written permission of Sultan or teaching false doctrines.	Fine not exceeding \$100.
13	Prohibition on shopkeepers or retail traders from supplying cooked food, drink, tobacco or cigarettes for immediate consumption during Ramadhan between half an hour before sunrise and the hour of sunset to Muslim persons.	Fine not exceeding \$2 and fine not exceeding \$10 for subsequent offences before Court of Kathi, Court of Penghulu or Court of Magistrate.
14	Printing or publishing publications concerning the Muhammadan religion containing precepts of the said religion which are contrary to the opinion of the Religious Committee appointed by the Ruler.	Fine not exceeding \$200 or imprisonment not more than 1 year, and such book or document shall be liable to forfeiture.

15	Breaches of fasting rules in the month of Ramadhan.	Fine not exceeding \$2 and fine not exceeding \$10 for subsequent offences before Court of Kathi, Court of Penghulu or Court of Magistrate.
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Source: Muhammadan (Offences) Order in Council 1938

Only persons professing the Muhammadan religion were subject to the enactment (s. 2). These offences were triable before a Magistrate's Court and the Supreme Court. However, when trying such offences, the courts had to cause two (2) Muhammadans of standing to be summoned from a list of persons nominated in that behalf by the *Majlis Meshuarat Ka'adil dan Undang* to sit with the court as assessors (s. 16). The courts were however not bound by the opinion of the assessors (s. 17). All fines recovered from the offenders must be paid to a fund called the "Muhammadan Religious Fund" (s. 18).

In the Unfederated Malay States, the situation followed the development in the Federated Malay States.

In 1919, Johor enacted the Offences by Mohammedans Enactment (Enactment No. 25 of 1919); a replica of the Muhammadan Laws Enactment 1904, but more rigorous in its treatment of prostitution.

In 1911, Kedah enacted a Religious Observance Enactment; it closely followed the Muhammadan Laws Enactment 1904, and dealt with marriage and divorce, mosque attendance, observance of *Ramadhan*, enticing, leading an immoral life, adultery, betrothal, incest, inspection by the *shaikh-al-Islam* of books and documents to do with Islam and unauthorized teaching of religion.

Circa 1923, Terengganu enacted the Punishment for non-observance of Friday Prayers Enactment (Ishtihar 29/1341) and Prohibition of Improper Intercourse Enactment (No. 3/1342) to make non-observance of Friday prayers an offence and to prohibit adultery respectively.

In 1938, Kelantan enacted the Muhammadan Offences Enactment 1938 which consolidated existing Muslim offences and followed the formula of the Federated Malay States with some modifications; there were penalties for inciting others against attending mosque or taking religious instructions, slandering any *pegawai masjid*, teaching religion without permission of the *Majlis Ugama Islam* and making *fatwas* on Islamic law. The Majlis also controlled the printing, publishing or importing of any book or document on religious topics, the Qur'an may not be used in a theatrical performance, and the purchase, sale or consumption (in a shop or other public place) of intoxicating liquors was forbidden.³

Besides offences, Anglo-Muhammadan Laws in British Malaya included matters with respect to *Wakaf*⁴, mosques⁵, *Zakat*⁶, *Baitulmal*⁷, *Haj*⁸, religious education for Malay children⁹ and the creation of religious authorities i.e. the

³ Moshe Yegar, *Islam and Islamic Institutions in British Malaya: Policies and Implementation* (The Magnes Press, The Hebrew University, 1979), 5 – 270

⁴ *Wakaf* Prohibition Enactment 1911 (Johor), Sultan Idris Estate Enactment 1917 (Perak), Sultan Idris Religious and Charitable Trust Enactment 1917 (Perak) and *Wakaf* Enactment 1951 (No. 8 of 1951) (Perak)

⁵ Mosques and Suraus Enactment 1916 (No. 10 of 1916) (Kelantan) and Mosques Enactment (No. 24 of 1938) (Kelantan)

⁶ *Zakat* and *Fitrah* Enactment 1949 (No. 2 of 1949) (Perlis), *Bait-ul-mal*, *Zakat* and *Fitrah* Enactment 1951 (No. 7 of 1951) (Perak) and *Zakat* Enactment 1955 (No. 4 of 1955) (Kedah)

⁷ *Baitulmal* Enactment (No. 18 of 1934) (Johor) and *Baitulmal* Enactment (No. 37 of 1937) (Terengganu)

⁸ Ordinance to Make Better Provisions for the Regulation of Pilgrim Ships (No. XVI of 1897) (Straits Settlements), Ordinance to provide for the Regulation and Control of Pilgrim Brokers (No. XVII of 1906) (Straits Settlements) and Enactment to provide for the Regulation and Control of Pilgrim Ships and Pilgrims (Enactment No. 7 of 1930) (Federated Malay States)

⁹ School Attendance Regulation 1891, Regulation V of 1891 (Sungei Ujong), School Attendance Enactment 1900 (III of 1900) (Negeri Sembilan), School Attendance Enactment 1908 (No. 7 of 1908)

Registrar of Marriages and Divorces¹⁰, the *Majlis Ugama Islam*¹¹ and the *Mufti*¹². Muslim courts or *Kathi* courts were often constituted together with other non-religious courts.¹³

(Pahang), Enactment No. 10 of 1914 (Kedah), Enactment No. 8 of 1915 (Johor), School Attendance Enactment 1916 (No. 2 of 1916) (Perak), Enactment No. 2 of 1923 (Terengganu) and Enactment No. 14 of 1931 (Kedah)

¹⁰ Ordinance No. 26 (Mahomedans) 1880 (Straits Settlements), Muhammadans Marriage and Divorce Registration Enactment 1900; No. 2/1900 (Perak), No. 8/1900 (Selangor), No. 5/1900 (Negeri Sembilan) and No. 13/1900 (Pahang), Muslim Marriage and Divorce Enactment 1911 (Kelantan), Mohammadan Marriages (Separations) Enactment 1913 (Kedah), Muhammadan Marriage and Divorce (Registration) Enactment 1913 (Perlis), Muhammadan Marriage (Separation) Enactment 1913 (Perlis), Muhammadan Marriage and Divorce Registration Enactment 1914 (Johor) and Registration of Muhammadan Marriage and Divorce Enactment 1922 (Terengganu). In Kelantan, amendments were made in 1917, 1919 and 1926 before a new law was passed i.e. Moslem Marriages and Divorces Enactment (No. 22/1938). In Johor, amendments were made through Enactments Nos. 11/1935, 17/1935 and 2/1950. In Terengganu, a new law was passed i.e. Muhammadan Marriage and Divorce Registration Enactment 1938

¹¹ *Undang-Undang Anggota Majlis Agama Islam dan Istiadat Melayu Kelantan* No. 14/1916 (Kelantan), *Majlis Ugama Islam dan Istiadat Melayu* Enactment (No. 23 of 1938) (Kelantan), Council of Religion Enactment 1949 (Johor), Council of Religion and Malay Custom Enactment 1948 (Kedah), Council of Religion and Malay Custom and Kadzis Courts Enactment 1953 (Kelantan), Council of Religion Enactment 1949 (reconstituted by the Council of Muslim Religion Enactment 1957) (Negeri Sembilan), Council of Religion and Malay Custom Enactment 1949 (Pahang), Council of Religion and Malay Custom Enactment 1949 (reconstituted by the *Majlis Ugama Islam dan Adat Melayu* Enactment 1951) (Perak), Council of Religion and Malay Custom Enactment 1949 (Perlis), Council of Religion and Malay Custom Enactment 1949 (Selangor) and Council of Religion and Malay Customs Enactment 1949 (Terengganu)

¹² Muhammadan Law Determination Enactment No.27/1919; ‘to provide for the determination of questions of Muhammadan Law’ (Johor) and Council of Religion and Malay Custom Enactment 1949 (Perlis), ss. 5 and 10. See also: Muhammadan Law and Malay Custom (Determination) Enactment 1930 (Federated Malay States)

From 1952, Anglo-Muhammadan Laws including offences were consolidated into a single enactment in all States.¹⁴ Taking the first of these, Selangor's Administration of Muslim Law Enactment 1952, as an example, there were 27 offences.

Table 3. Overview of offences in Selangor's Administration of Muslim Law Enactment 1952

Section	Offence	Punishment
150	Compulsory attendance for Friday prayers at mosque	Fine up to \$25
151	Purchase, sale or consumption of intoxicating liquor	Fine up to \$25, for subsequent offences, up to \$50
152	Purchase or sale, for immediate consumption, or consumption of food, drink or tobacco during daylight in Ramadhan	Fine up to \$25, for subsequent offences, up to \$50

¹³ Order in Council No. 11 of 1890 (Perak), Order in Council No. 1 of 1893 (Negeri Sembilan), Enactment No. 5 of 1900 (Perak), Enactment No. III of 1900 (Selangor), Enactment No. VIII of 1900 (Pahang), Enactment No. 14 of 1901 (Negeri Sembilan), Court Enactment of 1911 (Perlis), Courts Enactment II of 1911 (Johor), Enactment No. 16 of 1914 (Johor), Courts Enactment No. 4 of 1921 (Terengganu), Courts Enactment No. 7 of 1934 (Kedah) and Courts Enactment No. 31 of 1938 (Kelantan)

¹⁴ Council of Religion and Malay Custom and Kadzis Courts Enactment 1953 (Kelantan), Administration of Muslim Law Enactment 1955 (Terengganu), Administration of the Law of the Religion of Islam Enactment 1956 (Pahang), Administration of Muslim Law Enactment 1959 (Penang), Administration of Muslim Law Enactment 1959 (Malacca), Administration of Muslim Law Enactment 1960 (Negeri Sembilan), Administration of Muslim Law Enactment 1962 (Kedah), Administration of Muslim Law Enactment 1963 (Perlis), Administration of Muslim Law Enactment 1965 (Perak) and Administration of Islamic Law Enactment 1978 (Johor)

153	Disobeying Sultan's lawful orders during Ramadhan, Hari Raya Haji or Hari Raya Fitrah	Fine up to \$25
155(1)	Desertion of wife pursuant to court order	Imprisonment up to 14 days or fine up to \$50 or both
155(2)	Ill-treatment of wife	Imprisonment up to 14 days or fine up to \$50 or both
156	Willfully disobeying husband's lawful order	Fine up to \$10, for subsequent offences, imprisonment up to 7 days or fine up to \$50
157(1)	Khalwat for men	Imprisonment up to 14 days or fine up to \$50, for subsequent offences, imprisonment up to 1 month or fine up to \$100
157(2)	Khalwat for women (including with non-Muslim men)	Imprisonment up to 14 days or fine up to \$50, for subsequent offences, imprisonment up to 1 month or fine up to \$100
158	Illicit intercourse between divorced persons	For man, imprisonment up to 1 month or fine up to \$100 For women, imprisonment up to 7 days and fine up to \$25
159	Unlawful solemnization of marriage	Imprisonment up to 1 month or fine up to \$100
160	Failure to report marriage or divorce	Fine up to \$25
161	Failure to report conversions	Fine up to \$25
162	Improper retention of funds by pegawai masjid	Imprisonment up to 3 months or fine up to \$250
163	Willful neglect of statutory duty	Imprisonment up to 3 months or fine up to \$250
164	Breach of secrecy	Imprisonment up to 3 months or fine

		up to \$250
165	Erecting mosques without written permission of the Majlis Ugama	Fine up to \$1000
166	Religious teaching, save in own residence, without written permission of Kathi	Imprisonment up to 1 month or fine up to \$100
167	Teaching of false religious doctrine publicly	Imprisonment up to 3 months or fine up to \$250
168	Issuance of fatwa on any question of Muslim law, doctrine and Malay customary law by persons not authorized under the enactment	Imprisonment up to 3 months or fine up to \$250
169	Printing or publishing of books contrary to Muslim law, doctrine or a fetua	Imprisonment up to 6 months or fine up to \$500
170	Misuse of Qur'an for entertainment or derision	Imprisonment up to 1 month or fine up to \$100
171	Contempt of any religious authority	Imprisonment up to 1 month or fine up to \$100
172	Contempt of the Muslim religion	Imprisonment up to 6 months or fine up to \$500
173	Non-payment of zakat or fitrah	Imprisonment up to 7 days or fine up to \$100
174	Inciting Muslims to refrain from attending mosque or religious instructions	Imprisonment up to 14 days or fine up to \$50
175	Abetment	Same punishment as if he had

		committed offence
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Source: Administration of Muslim Law Enactment 1952

These offences only applied to persons professing the Muslim religion, and can only be prosecuted in the Court of the *Kathi Besar* or a Court of a *Kathi* (s. 149).

On 31st August 1957 i.e. Merdeka Day, the Federal Constitution (“the Constitution”) came into effect. Article 162(1) of the Constitution preserves the continuity of Anglo-Muhammadian Laws made *before* Merdeka Day while Article 74(2) (read together with Item 1 of the State List in the Ninth Schedule) confirms the State Legislatures’ powers to make such laws *after* Merdeka Day. The said Item 1 then read:

“List II – State List

Muslim Law and personal and family law of persons professing the Muslim religion, including the Muslim Law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts;

Muslim Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Muslim religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State;

Malay custom;

Zakat, Fitrah and Baitulmal or similar Muslim revenue;

mosques or any Muslim public places of worship, creation and punishment of

offences by persons professing the Muslim religion against precepts of that religion, except in regard to matters included in the Federal List;

the constitution, organization and procedure of Muslim courts, which shall have jurisdiction only over persons professing the Muslim religion and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law;

the control of propagating doctrines and beliefs among persons professing the Muslim religion;

the determination of matters of Muslim Law and doctrine and Malay custom.”
[Space after semicolons added]¹⁵

In 1965, the Muslim Courts (Criminal Jurisdiction) Act 1965 (Act 23 of 1965) was enacted by Parliament to confer the Muslim courts with jurisdiction in respect of “offences”, specifically, “in respect of offences against precepts of the Muslim religion by persons professing that religion” (s. 2), and to validate “offences” tried by the said courts between 1957 to 1965 (s. 3).

In 1976, a constitutional amendment was passed by Parliament substituting the expressions “Muslim”, “Muslim religion” and “Muslim court” wherever it appears in the Constitution with the word “Islamic”, “religion of Islam” and “Syariah court” respectively.¹⁶ This is the first time the

¹⁵ *Constitutional Proposals for the Federation of Malaya 1957* (London: Her Majesty’s Stationery Office), 134

¹⁶ Sections 44 and 45, Constitution (Amendment) Act 1976 (Act A354) (w.e.f. 27-8-1976)

undefined non-English word “Syariah” appears in our Constitution. For that reason alone, the author submits that this amendment is cosmetic if not purely political. As explicated by Professor Tamir Moustafa:

“In addition to codification and increased specificity in the law, there was an important shift in the way that Anglo-Muslim law was presented to the Malaysian public beginning in the 1970s. Until that time, Anglo-Muslim family law was understood as being grounded in some substantive aspects of custom and fiqh (Islamic jurisprudence), but there was no formal pretence that the laws themselves constituted ‘shariah’ [(God’s law)]. The 1957 Federal Constitution, for example, outlined a role for the states in administering ‘Muslim law’ as did the state level statutes that regulated family law. However, a constitutional amendment in 1976 replaced each iteration of ‘Muslim law’ with ‘Islamic law’. Likewise, every mention of ‘Muslim courts’ was amended to read ‘Syariah courts’. The same semantic shift soon appeared in statutory law: the Muslim Family Law Act became the Islamic Family Law Act; the Administration of Muslim Law Act became the Administration of Islamic Law Act; the Muslim Criminal Law Offenses Act became the Syariah Criminal Offenses Act; the Muslim Criminal Procedure Act became the Syariah Criminal Procedure Act and so on.

Why is this important? In all of these amendments, the shift in terminology

exchanged the object of the law (Muslims) for the purported essence of the law (as 'Islamic'). This semantic shift, I argue, is a prime example of what Erik Hobsbawm calls 'the invention of tradition'. The authenticity of the Malaysian 'shariah' courts is premised on fidelity to the Islamic legal tradition. Yet, ironically, the Malaysian government reconstituted Islamic law in ways that are better understood as a subversion of the Islamic legal tradition. That distinct form of Anglo-Muslim law, it must be remembered, is little more than a century old. But every reference to state 'fatwas' or the 'shariah courts' serves to strengthen the state's claim to embrace the Islamic legal tradition. Indeed, the power of this semantic construction is underlined by the fact that even in a critique such as this, the author finds it difficult, if not impossible, to avoid using these symbolically laden terms. It is with the aid of such semantic shifts that the government presents the syariah courts as a faithful rendering of the Islamic legal tradition, rather than as a subversion of that tradition. In this regard, a parallel may be drawn to nationalism. Just as nationalism requires a collective forgetting of the historical record in order to embrace a sense of nation, so too does syariah court authority require a collective amnesia vis-à-vis the Islamic legal tradition.

This semantic shift was likely an effort to endow Muslim family law and Muslim

courts with a religious personality in order to brandish the government's religious credentials. The shift in terminology came during a period when the dakwah (religious revival) movement was picking up considerable steam in Malaysian political life. The ruling UMNO faced constant criticism from PAS President Asri Muda to defend Malay economic, political, and cultural interests through the early 1970s. The Malaysian Islamic Youth Movement (Angkatan Belia Islam Malaysia—more popularly known by its acronym, ABIM) also formed in August 1971, heralding a new era of grassroots opposition. UMNO's central political challenge was to defend itself against the constant charge that the government was not doing enough to advance Islam.”¹⁷

In the 1982 State Election of Kelantan and the 1982 General Election, the National Front (*Barisan Nasional*) retained a majority in the Kelantan Legislative Assembly and Parliament respectively.

In 1984, Parliament amended Act 23 of 1965; extending its jurisdiction in respect of “offences” punishable with “imprisonment for a term exceeding six months or with any fine exceeding one thousand dollars or with both” to “imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof”.¹⁸

¹⁷ Professor Tamir Moustafa, “Judging in God’s Name: State Power, Secularism, and the Politics of Islamic law in Malaysia”, *Oxford Journal of Law and Religion*, Vol. 3, No. 1 (2014): 159

¹⁸ Muslim Courts (Criminal Jurisdiction) (Amendment) Act 1984 (Act A612)

A year later, in 1985, Kelantan enacted the Syariah Criminal Code 1985 (Enactment No. 2 of 1985) solely for Muslim offences. There were now 28 offences.

Table 4. Overview of offences in Kelantan's Syariah Criminal Code 1985

Section	Offence	Punishment
5	Indecent act or behavior contrary to Hukum Syarak in any public place or any person found making love with a person other than one's spouse	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 6 months or to both.
6	Utterance of any word which is contrary to Hukum Syarak in any place	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 6 months or to both.
7	<i>Pondan</i> : male person wearing a woman's attire and posing as a woman in any public place	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 4 months or to both.
8	Instigating married woman or man to be divorced or neglect duties and responsibilities	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 6 months or to both.
9	<i>Khalwat</i> : any person living with or cohabiting with or in retirement with or hiding with any person of the opposite sex who is not his mahram other than his spouse	Fine not exceeding RM2000 or to imprisonment for a term not exceeding 1 year or to both.
10	Incest: an act or a series of act, which is presumed to be contrary to Hukum Syarak between a man and a woman who are prohibited from marrying	Fine not exceeding RM3000 or to imprisonment for a term not exceeding 2 years or to both.

	each other	
11	Adultery/ <i>Zina</i> : sexual intercourse between a man and a woman who are not husband and wife other than rape and <i>persetubuhan syubhat</i>	Imprisonment for a term not exceeding 3 years or to a fine not exceeding RM5000 or to both and to 6 strokes of whipping.
12	An act preparatory to the commission of <i>Zina</i>	Fine not exceeding RM3000 or to imprisonment for a term not exceeding 2 years or to both and to whipping not exceeding 3 strokes.
13	Abetment of the commission of the offence of <i>zina</i>	Fine not exceeding RM3000 or to imprisonment for a term not exceeding 2 years or to both.
14	<i>Liwat</i> : sexual relations between male persons	Fine not exceeding RM5000 or to imprisonment for a term not exceeding 3 years or to both and to 6 strokes of whipping.
15	<i>Musahakah</i> : sexual relations between female persons	Fine not exceeding RM5000 or to imprisonment for a term not exceeding 4 months or to both.
16	Pregnancy outside marriage	Fine not exceeding RM3000 or to imprisonment for a term not exceeding 2 years or to both.
17	Enticing other person's wife	Fine not exceeding RM2000 or to imprisonment for a term not exceeding 1 year or to both.
18	Prostituting wife or child	Fine not exceeding RM3000 or to imprisonment for a term not exceeding 2 years or to both.
19	Prostituting (woman)	Fine not exceeding RM4000 or to imprisonment for a term not exceeding 2 years or to both.
20	Enticing a woman to run away from the custody of	Fine not exceeding RM2000 or to imprisonment for a term not

	her parents or guardian	exceeding 1 year or to both.
21	Selling or giving away child to a non-Muslim	Fine not exceeding RM2000 or to imprisonment for a term not exceeding 1 year or to both.
22	Becoming a <i>muncikari</i> /pimp (a person who acts as a procurer between a female and a male for a purpose which is contrary to <i>Hukum Syarak</i>)	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 6 months or to both.
23	Encouraging <i>maksiat</i>	Fine not exceeding RM500 or to imprisonment for a term not exceeding 6 months or to both.
24	<i>Takfir</i> : uttering or implying that a person is not a Muslim	Imprisonment for a term not exceeding 3 years or to a fine not exceeding RM5000 or to both.
25	Intoxicating drinks: (i) Drinking liquor or any intoxicating drinks. (ii) Making, selling, exhibiting or buying any intoxicating drinks.	(i) Fine not exceeding RM5000 or to imprisonment for a term not exceeding 3 years or to both and to whipping not more than six strokes. (ii) Fine not exceeding RM3000 or to imprisonment for a term not exceeding 2 years or to both.
26	Consuming food or drink or smokes any tobacco in the hours of daylight in the month of Ramadan	Fine not exceeding RM500 or imprisonment for a term not exceeding 3 months and for a second and subsequent offence to a fine not exceeding RM1000 or to imprisonment for a term not exceeding 6 months or to both.
27	Failing to comply with, contravening, objecting to or deriding any <i>Qadhi</i> or	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 6 months or to both.

	<i>Pegawai Ugama Islam Negeri</i> or <i>Penyelia Ugama</i> in the discharge of his duties	
28	Deriding or despising any law in force in the Syariah courts	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 6 months or to both.
29	Abetment	Same punishment as if he had committed offence.
30	Attempts	Punishment not exceeding one-half of the punishment provided for the offence.
31	Failing to comply with, contravening, objecting to, deriding or refusing to obey any order of the Syariah courts	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 1 year or to both.
32	Failing to comply with an order of His Royal Highness the Sultan on any specific matter which is contrary to Hukum Syarak	Fine not exceeding RM2000 or to imprisonment for a term not exceeding 1 year or to both.

Source: Syariah Criminal Code 1985 of Kelantan

These offences only applied to persons professing the religion of Islam (who have attained puberty (*akil baligh*) and are in the state of Kelantan), and can only be prosecuted in the Court of *Qadhi Besar*, Court of *Qadhi Khas* or Court of *Qadhi Jajahan* (ss. 3, 9(1), 10(1) and 11(1)) i.e. the Muslim or “Syariah” courts in Kelantan.

In 1988, Act 23 of 1965 was revised, and was renamed the *Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355)*.

All States then began adopting Kelantan's template of offences with minor differences between the offences, and many additional offences.¹⁹

Judiciary: A Failure to Preserve the Constitution

The relevant matter in Item 1 of the State List reads:

“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”

From 1985 to 1987, the Supreme Court in *Mamat Daud v. Government of Malaysia*²⁰ was moved to determine whether a Federal law was invalid on the ground that it makes provision with respect to a matter to which Parliament has no power to make, pursuant to article 4(3) of the Constitution. The petitioners contended that the said law was on ‘religion’ which Parliament is not competent to legislate except with regard to the Federal Territories, and the sole right to legislate on the Islamic religion is given to the State Legislatures under Item 1 of the State List. The petitioners succeeded by a majority.

¹⁹ Syariah Criminal Offences Enactment 1997 (Johore), Syariah Criminal Offences (Kedah Darul Aman) Enactment 2014, Enakmen Kesalahan Syariah (Negeri Melaka) 1991, Syariah Criminal (Negeri Sembilan) Enactment 1992, Syariah Criminal Offences Enactment 2013 (Pahang), Syariah Criminal Offences (State of Penang) Enactment 1996, Crimes (Syariah) Enactment 1992 (Perak), Criminal Offences in the Syarak Enactment 1991 (Perlis), Syariah Criminal Offences Enactment 1995 (Sabah), Syariah Criminal Offences Ordinance 2001 (Sarawak), Syariah Criminal Offences (Selangor) Enactment 1995, Syariah Criminal Offences (Takzir) (Terengganu) Enactment 2001 and Syariah Criminal Offences (Federal Territories) Act 1997.

²⁰ *Mamat Daud & Ors. v. Government of Malaysia* [1986] 2 MLJ 192; *Mamat Daud & Ors. v. The Government of Malaysia* [1988] 1 CLJ (Rep) 197.

There were two critical matters in the Supreme Court's decision; first, on interpreting Item 1 of the State List, and second, on the applicable legal rule in such determinations i.e. 'the pith and substance rule.'

On the first matter, Mohd. Azmi SCJ elucidates:

“As far as Islamic religion is concerned, they come under the classification of either the general subject of Islamic law, or the specific subjects of creation and punishments of offences by persons professing the religion of Islam against precepts of that religion, or the control of propagating doctrines and beliefs amongst persons professing the religion of Islam, or the determination of matters of Islamic law and doctrines, all of which are reserved expressly for legislation by the State Legislatures.

...

Article 74 confers legislative power only to the State Legislatures to deal with Islamic law and the determination of Islamic law and doctrine amongst Muslims. State law on such subjects can for example, be found in s. 21(1) of the Terengganu Administration of Islamic Law Enactment (State Enactment No. 4 of 1955) (State Enactment No. 4 of 1955) which provides:

In making and issuing any ruling upon any point of Islamic Law or a doctrine in the manner hereinbefore provided the Mufti,

shall ordinarily follow the orthodox tenets of the Shafeite Sect.”²¹ [Emphasis added]

Thus, Item 1 of the State List must be read as disjunctive classes of matters with respect to the Islamic religion. The author submits that this interpretation also reveals a consistency in the text of Item 1 of the State List and the Anglo-Muhammadian Laws of British Malaya.

On the second matter, Mohd. Azmi SCJ and Eusoffe Abdoolcader SCJ (dissenting) explained:-

“Mohd. Azmi SCJ: ...In determining whether s. 298A in pith and substance falls within the class of subject matter of “religion” or “public order”, it is the substance and not the form or outward appearance of the impugned legislation which must be considered. ...The object, purpose and design of the impugned section must therefore be investigated for the purpose of ascertaining the true character and substance of the legislation and the class of subject matter of legislation to which it really belongs.

...

Eusoffe Abdoolcader SCJ: ...This rule envisages the examination of the legislation in question as a whole to ascertain its true nature and character in order to determine into what List it falls.”²² [Emphasis added]

Thus, the pith and substance rule requires the court to first, examine the impugned law as a whole i.e. investigate its

²¹ [1988] 1 CLJ (Rep) 197 at 202h and 203f – f.

²² [1988] 1 CLJ (Rep) 197 at 200b – d and 209i – 210a.

object, purpose and design, second, to ascertain the impugned law's true nature, character and substance, and third, to determine the class of subject matter of legislation the impugned law really belongs to.

In 2008, the Federal Court decided *Sulaiman Takrib v. Kerajaan Negeri Terengganu*, pursuant to article 4(3) of the Constitution, where it held that State law offences which penalised defiance or disobedience of a *fatwa* are “offences regarding the ‘precepts of Islam’”, and that the State Legislatures have the power to make such laws.²³

To the author, *Sulaiman Takrib*, while correct in outcome, suffers from an infirmity in reasoning. The State Legislatures do have the power to make such offences, only that these offences are not “precepts”. Defiance or disobedience of a *fatwa* is not a precept of the religion of Islam because under Islamic legal tradition a *fatwa* is a *non-binding* opinion.²⁴

This infirmity was the result of the court's failure to apply the pith and substance rule, and to interpret the English word “precept” according to an English dictionary (on the meaning of *text*) and in light of the history of Anglo-Muhammadan Laws in British Malaya (on the *context* of the classes in Item 1 of the State List).

Instead, the court merely adopted the opinions of *contemporary* expert witnesses on the religion of Islam on what the phrase “Precepts of Islam” meant,²⁵ and affixed that meaning to the word “precepts” in Item 1 of the State List in the Constitution.

In doing so, the court failed to *preserve* the Constitution; to give the relevant matter in Item 1 of the State List its plain and ordinary meaning as envisaged by its drafters; who specifically used the common noun “precepts”, and not the proper noun “Precepts of Islam”.

²³ [2009] 2 CLJ 54 at [65].

²⁴ Moustafa, “*Judging*,” 152 (*n.* 3).

²⁵ [2009] 2 CLJ 54 at [53] – [64].

Curiously, just 15 years prior, the Supreme Court in *Nordin Salleh v. Kerajaan Negeri Kelantan* saw another expert witness ascribe a different meaning to that same phrase.²⁶

To emphasise, a written constitution falls to be construed in the light of its subject matter and of the surrounding circumstances with reference to which it was made.²⁷ Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language.²⁸ In this regard, it bears recollection that the Constitution was drafted in February 1957 by a commission of jurists²⁹ and subsequently revised and amended by June 1957 by a Working Party and legal draftsmen.³⁰ Their fundamental aids to drafting would have necessarily been English dictionaries (in ascertaining the meaning of *text*) and existing laws in Malaya (in ascertaining the *context* of matters in the legislative lists).

Thus, in interpreting the relevant *text* of the Constitution, it is to these aids that the Judiciary must have regard to, not the opinions of *contemporary* expert witnesses on religion. Contemporary expert witnesses on religion are no authority for the interpretation of a secular legal document drafted in 1957.

A *textual* analysis of the relevant matter in Item 1 of the State List demonstrates:

²⁶ [1993] 4 CLJ 215 at 218f (right) – 291c (left).

²⁷ *Hinds v The Queen* [1976] 2 WLR 366 at 371G, PC.

²⁸ *Minister of Home Affairs v Fisher* [1979] 2 WLR 889 at 895E – F, PC.

²⁹ *Report of the Federation of Malaya Constitutional Commission 1957* (London: Her Majesty's Stationery Office), 5, para 2. The Commission consisted of Lord William Reid (a Lord of Appeal), Sir Ivor Jennings (a Cambridge jurist), Sir William McKell (a former Governor-General of Australia), B. Malik (a former Chief Justice in India) and Abdul Hamid (a Judge in Pakistan).

³⁰ *Constitutional Proposals for the Federation of Malaya 1957* (London: Her Majesty's Stationery Office), 3 – 4, paras 1 – 4. The Working Party consisted of the High Commissioner for the Federation of Malaya, four representatives of the Rulers, four representatives of the Government of the Federation, the Chief Secretary and the Attorney General.

Table 5. Textual analysis of ‘Offences by persons professing the religion of Islam against precepts of that religion’

Text	Meaning
“offences”	<p>“a violation of the law”</p> <p><i>(Black’s Law Dictionary (Thomson West, 8th Ed., 2004), 1110: “offense”)</i></p>
“by persons professing the religion of Islam against”	“by Muslims against”
“precepts”	<p>“1. An order to do a particular act; a command. 2. A general instruction or rule for action, a maxim; esp. an injunction (freq. a divine command) regarding moral conduct.”</p> <p><i>(The New Shorter Oxford English Dictionary on Historical Principles (Clarendon Press Oxford, 1993), 2324: “precept”)</i></p> <p>“a standard or rule of conduct; a command or principle”</p> <p><i>(Black’s Law Dictionary (Thomson West, 8th Ed., 2004), 1215: “precept”)</i></p>
“of that religion”	“of the religion professed by Muslims”

Source: Federal Constitution

Thus, *textually*, what the relevant matter in Item 1 of the State List envisages is that State Legislatures may create, and stipulate the punishments for, “offences” in respect of conduct

by Muslims which are against rules of conduct, commands or injunctions ordained by the religion of Islam.

Indeed, the word “precepts” is being interpreted *widely*. And in the context of the religion of Islam, will include matters beyond the Five Pillars, but the width of the said matter must necessarily be limited given the preclusion clause that follows i.e. “except in regard to matters included in the Federal List”; the effect of which is to preclude State Legislatures from creating “precepts” offences in regard to matters in the Federal List or dealt with by federal law (e.g. public order, commerce and health).³¹

The preclusion clause – “except in regard to matters included in the Federal List” – would be necessary, if not expected, given that Islam is not just a mere collection of dogmas and rituals but covers human activities relating to the legal, political, economic, social, cultural, moral and judicial.³²

Thus, the preclusion clause conditions the extent of the States’ legislative powers with respect to creating “precepts” offences.

A *contextual* comparison between the impugned laws in successive Federal Court decisions and the relevant Anglo-Muhammadian Laws of British Malaya only reinforces the textual conclusion above.

In *Fathul Bari v Majlis Agama Islam Negeri Sembilan*, the court held that the State law offence which penalised teaching religious matters without a *tauliah* (accreditation) was “an offence against the precepts of Islam”, following a religious anecdote.³³ But this secular offence can be traced to section 9 of the Muhammadan Enactment 1904 [TABLE 1] which read:

*“No person shall, except in his own house
and in the presence of members of his own*

³¹ [1988] 1 CLJ (Rep) 197 at 212e

³² *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55 at 56C – D (left), SC.

³³ [2012] 4 CLJ 717 at [17], [24] – [26].

family only, teach any religious doctrine, unless he shall previously have obtained written permission to do so from His Highness the Sultan; and any person who shall teach any religious doctrine without having obtained such permission, or who, having obtained such permission, shall teach any false doctrine, shall be liable, on conviction before a competent Court, to a fine not exceeding twenty-five dollars.”

In *ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor*, the court held that the State law offence which penalised publishing a publication contrary to Islamic law is also an “offence against the precepts of Islam”.³⁴ But this secular offence can be traced to section 14 of the Muhammadan (Offences) Order in Council 1938 of Negri Sembilan for instance [TABLE 2] which read:

“Any person who prints or publishes any book or document concerning the Muhammadan religion, whether such book or document is an original composition or a compilation from existing documents or both, without the written permission of the Majlis Meshuarat Ka’adilán dan Undang, or any person who sells, offers for sale, distributes or circulates any book, which, in the opinion of the Religious Committee appointed by His Highness the Yang-di-pertuan Besar in that behalf, contains precepts of the Muhammadan religion which are contrary to the recognized principles thereof shall be guilty of an offence and shall be liable on conviction to

³⁴ [2016] 1 MLJ 153 at [27].

a fine not exceeding two hundred dollars or to imprisonment of either description for not more than one year, and such book or document shall be liable to forfeiture.”

In reality, the impugned laws in *Fathul Bari and ZI Publications* are not offences derived from precepts of the religion of Islam, but are offences with respect to ‘religious teaching’ and ‘publications concerning the religion of Islam’ respectively. On Merdeka Day, these matters came to be reflected in that class of Item 1 of the State List titled “the control of propagating doctrines and beliefs among persons professing the religion of Islam”, and the State Legislatures do have the power to create “offences” in respect of this class of matter because *Item 9 of the State List* reads:

“Creation of offences in respect of any of the matter included in the State List or dealt with by State law, proofs of State law and of things done thereunder, and proof of any matter for purposes of State law.”
[Emphasis added]

These are meant to be general State law offences, not specific “precepts” offences which could only be committed by Muslims.

To illustrate, consider the offences in sections 151 and 152 of Selangor’s Administration of Muslim Law Enactment 1952 titled ‘Intoxicating liquor’ and ‘Food in Ramadhan’ respectively:

“151. Whoever shall in any shop or other public place purchase or sell or consume any intoxicating liquor shall be punishable with a fine not exceeding twenty-five dollars, or, in the case of a second or subsequent offence, not exceeding fifty dollars:

Provided that it shall not be an offence for any person so to purchase or sell as agent

for a principal who does not profess the Muslim religion.

152. Whoever shall during the hours of daylight in the month of Ramadan purchase for immediate consumption, or sell to a person professing the Muslim religion for immediate consumption, or consume, any food, drink or tobacco shall be punishable with a fine not exceeding twenty-five dollars, or, in the case of a second or subsequent offence, not exceeding fifty dollars."

These offences are derived from rules of conduct, commands or injunctions ordained by the primary religious text of the religion of Islam, the Qur'an, and which read:

"Chapter 2:219: They ask thee concerning wine and gambling. Say: "In them is great sin, and some profit, for men; but the sin is greater than the profit." They ask thee how much they are to spend; say, "What is beyond your needs." Thus God make clear to you His Signs: in order that ye may consider -

Chapter 2:185: Ramadhan is the (month) in which was sent down the Qur-an, as a guide to mankind, also clear (Signs) for guidance and judgment (between right and wrong) so every one of you who is present (at his home) during that month should spend it in fasting, but if any one is ill, or on a journey, the prescribed period (should be made up) by days later. God intends every facility for you; He does not want to put you to difficulties. (He wants you) to complete the prescribed period,

and to glorify Him in that He has guided you; and perchance ye shall be grateful.”
[Abdullah Yusuf Ali Translation]

On the other hand, some of the offences in Selangor’s Administration of Muslim Law Enactment 1952 [TABLE 3] are certainly *not* offences in respect of “precepts” given there being, to the author’s knowledge, no derivation from any rules of conduct, commands or injunctions ordained by the religion of Islam. One evident example would be section 163 of Selangor’s Administration of Muslim Law Enactment 1952 titled ‘Willful neglect of statutory duty’ and which reads:

“163. Whoever, being charged by this Enactment with the duty of registering any matter or proceeding, or of making, preparing, keeping or maintaining any assessment list, report, book of account, estimate, register, counterfoil book, minute book, or subscription list, or of issuing any certificate, receipt or certified copy, refuses or willfully neglects or fails to perform such duty, or willfully performs the same in an unlawful or improper manner, shall be punishable with imprisonment for a term not exceeding three months or with fine not exceeding two hundred and fifty dollars.”

In that regard and for its failure to preserve the Constitution, the Federal Court decisions of *Sulaiman Takrib*, *Fathul Bari* and *ZI Publications* are fragile precedents; monoliths for misdirection to successive cases. More forcefully

stated by a prominent commentator earlier this year; *Sulaiman Takrib* and *Fathul Bari* “are not useful as precedents.”³⁵

Significantly, and remaining elusive to the legal consciousness of the Malaysian public, is the dissonance these Federal Court decisions create with respect to the powers of Parliament to confer the Muslim courts or *Syariah* courts within the States with jurisdiction in respect of “offences”. This is significant because it was the intention of the drafters of the Constitution to limit the jurisdiction of the Muslim courts in matters of offences.³⁶

Given that the impugned laws in *Sulaiman Takrib*, *Fathul Bari* and *ZI Publications* are not derived from rules of conduct, commands or injunctions ordained by the religion of Islam, but are merely in ‘pith and substance’ general State law “offences” in respect of “the determination of matters of Islamic law and doctrine and Malay custom” or “the control of propagating doctrines and beliefs among persons professing the religion of Islam” as included in Item 1 of the State List, these “offences” remain to be tried by the Subordinate Courts and not the *Syariah* courts.³⁷

It would accordingly follow that prosecution for these general State law “offences” can only be instituted by the Attorney General,³⁸ and not the Chief Syarie Prosecutor of the State.³⁹ And most disturbingly, prosecutions under those

³⁵ Dato’ Seri Mohd Hishamudin Yunus, “Some Thoughts on the Federal Constitution in Relation to Offences Against the Precepts Of The Religion Of Islam”, *Current Law Journal*, [2021] 1 CLJ i.

³⁶ *Haji Laugan Tarki bin Mohd Noor v Mahkamah Anak Negeri Penampang* [1988] 2 MLJ 85 at 90E – F (right), SC.

³⁷ Sections 3(2), 85, 76, 82 and 87, Subordinate Courts Act 1948; Hishamudin, “Some Thoughts,” viii.

³⁸ Pursuant to Article 145(3) of the Constitution, the Attorney General has the power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a *Syariah* court, a native court or a court-martial.

³⁹ *E.g.* Pursuant to section 78(2) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003, the Chief Syarie Prosecutor

impugned laws in the *Syariah* courts within the States in Malaysia *presently* would arguably be void.⁴⁰

Only with Parliamentary validation, through amendment of the *Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355)*, can this 56-year state of *ultra vires*⁴¹ be remedied.

Parliament: A Call to Amend the Syariah Courts (Criminal Jurisdiction) Act 1965, and Uniform Laws

Parliament must be moved to have oversight over this matter through Select Committees, pursuant to Order 76 and 81 of the Standing Orders of the Dewan Rakyat. Similar procedures exist for the Dewan Negara. These Committees can be empowered to conduct inquiries and to request and demand written evidence or call people to testify at hearings in Parliament. Their findings are published in reports and can be debated in Parliament.

Given the breadth of the task of amending Act 355 and, it is the author's hope, the introduction of uniform laws for the administration of the religion of Islam,⁴² Parliamentary Select

has the power exercisable at his discretion to institute, conduct or discontinue any proceeding for an offence before any *Syariah* court.

⁴⁰ *Public Prosecutor v Mohd Noor bin Jaafar* [2005] 6 MLJ 745 at [36] – [41], HC.

⁴¹ *Black's Law Dictionary* (Thomson West, 8th Ed., 2004): “*ultra vires*”: Unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law.

⁴² Pursuant to Article 76(1)(b) of the Constitution, Parliament may make laws with respect to the Muslim religion and Malay custom as enumerated in Item 1 of the State List; the said laws can come into operation in the States once adopted by a law made by the respective State Legislatures pursuant to Article 76(3) of the Constitution. The author submits that reform on Anglo-Muhammadan Laws is best achieved by introducing three uniform laws: (i) Muslim religious affairs (including doctrines and offences), (ii) Muslim personal law, and (iii) Muslim courts (including procedures and evidence). Conceptually, this would be similar to the National Land Code 1965 or the Local Government Act 1976 i.e. laws enacted for the purposes of promoting

Committees would ensure that the proposed amendments and uniform laws would be consistent with the Constitution and reflective of the necessity and expediency required by the Malaysian public and its Muslim majority in the 21st century.

These Committees may call expert witnesses (historians, lawyers, representatives of the Conference of Rulers, academicians on religion and representatives of civil society), provide a draft of the proposed amendments to Act 355 and uniform laws, and publish them in reports to inform the public and gather criticisms or comments from stakeholders. Parliamentary oversight over this matter would promote openness in government and in the administration of laws for Muslims in Malaysia, while preventing aspersions being cast that intended reforms to Anglo-Muhammadan Laws are partial, collusive or tainted with an ulterior motive.

The Committees must consider the public concerns and criticisms preceding the Muhammadan Offences Enactment 1904 and its 1938 re-enacting; the compulsion for mosque attendance on Fridays, clauses affecting the morals of women, the application to immigrants, the conflict with substantive Islamic law, the necessity to ensure orthodoxy, the control of sermons, religious matters and publication of religious books, and the prevention of unqualified persons from teaching and propagating. Additionally, the Committees must ascertain consensus on Muslim religious precepts, the enforceability of such precepts in 21st century Malaysia including proportionate punishments, and the effects of its enforceability on Malaysia's diverse communities of religion, race, place of birth, descent and gender. Finally, the Committees must consider the consistency of these precepts with Malaysia's constitutional framework, the application of general State law offences to persons who are not Muslims or minorities, and the moral concerns of dignity and privacy in enforcement.

uniformity of the laws between the States with respect to land and local government respectively.

Given the status of the respective Rulers as the Heads of the religion of Islam within each State⁴³ and the effect of the proposed amendments and uniform laws to the administration of the religion of Islam in the States, the author submits that there is a political duty on part of the Prime Minister and the Menteri-Menteri Besar or Chief Ministers to consult the Conference of Rulers before the relevant Bills are tabled in Parliament. More than anything, this consultation is the cornerstone for the co-ordination required in the adoption of the proposed uniform laws by the State Legislatures, and its subsequent execution by the State Executive Councils.⁴⁴

All in, the author regards this legislative course of action as the minimum necessary to preserve Malaysia's democratic way of life with respect to the administration of the religion of Islam. More tellingly, it would reveal the commitment of our democratic institutions to the Rule of Law, in this case, to reforming the legal heritage that is the Anglo-Muhammadan Laws of British Malaya. And overwhelmingly, it would exemplify Malaysia as a Muslim nation of grace, wisdom and mercy.

⁴³ Preserved by Article 3(2) of the Constitution which provides that “[i]n every State other than States not having a Ruler the position of the Ruler as the Head of the religion of Islam in his State in the manner and to the extent acknowledged and declared by the Constitution of that State, and, subject to that Constitution, all rights, privileges, prerogatives and powers enjoyed by him as Head of that religion, are unaffected and unimpaired; but in any acts, observances of ceremonies with respect to which the Conference of Rulers has agreed that they should extend to the Federation as a whole each of the other Rulers shall in his capacity of Head of the religion of Islam authorize the Yang di-Pertuan Agong to represent him”.

⁴⁴ Regulations of the National Council for Religious Affairs Malaysia 1968.