AMENDMENTS TO SYARIAH COURTS (CRIMINAL JURISDICTION) ACT 1965 – CONSTITUTIONAL AND PRACTICAL ISSUES

Dato' Mohamad Ariff bin Md Yusof

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A. INTRODUCTION AND THE UNFOLDING LEGISLATIVE BACKGROUND

[1] On the 26th of May 2016, last year, the Member of Parliament for Marang moved a motion in the Dewan Rakyat for leave of the House to propose and introduce a Private Member's Bill, cited as Rang Undang-Undang Mahkamah Syariah (Bidangkuasa Jenayah) (Pindaan) 2016. This Bill has entered the public domain discussion with the shorthand reference, RUU 355.

[2] The Hansard reported the Motion as one brought under Standing Order 49(1) of the Standing Orders of the Dewan Rakyat, it being the relevant provision governing Private Member's Bills.[1] The circumstances surrounding the introduction and reading of the Motion were quite out of the ordinary. The same Motion had been placed in the Order Paper much earlier, but was edged out by more pressing Government business. In the May sitting last year, however, this same Motion was allowed to be moved. The Motion by Marang was therefore read, but on the Honourable Member's request, further debate on it was adjourned to the next sitting. This was allowed by the Speaker.

[3] As is known, this Motion was retabled on the 24th of November 2016, but this time the original Motion was amended by the Honourable Member for Marang. Two days before this , an invitation was issued to all Muslim MPs to attend a meeting session called by the Deputy Prime Minister and chaired by the Minister in the Prime Minister's Department in charge of religious affairs, itself an unprecedented move. What actually transpired seems a bit obscure, it not being in the public domain. Judging from the media reports it seemed that there were expected to be

[1] (1) Any private member desiring to introduce a Bill may, subject to the provisions of Article 67 of the Constitution, apply to the House for leave to do so, and shall, at the same time, submit a copy of the Bill with an explanatory statement of the objects and reasons but shall not contain any argument.

amendments to the original proposed amendments and further, the Government would be recommending that a Parliamentary Select Committee, multi-ethnic in character, would be appointed to consider and comment on the amendments, and it was again re-emphasised that the proposed Amendment Bill was not about "*hudud*" but was merely to strengthen ("*memperkasakan*") the criminal jurisdiction of the Syariah Courts.

[4] The Hansard of 24.11.16 is informative. I can do no better than to quote the particular section in the Hansard on this:

> Dato' Seri Haji Abdul Hadi bin Awang [Marang]…bahawa Dewan ini memberikan kebenaran menurut Peraturan Mesyuarat 49(1) dibaca bersama Peraturan Mesyuarat 28, Peraturan-peraturan Majlis Mesyuarat Dewan Rakyat kepada Yang Berhormat bagi kawasan Marang untuk mencadangkan suatu Rang Undang-undang Ahli Persendirian bernama Rang Undang-undang Mahkamah Syariah (Bidang Kuasa Jenayah) (Pindaan) 2016 seperti berikut: -
> Pindaan Seksyen 2 - Akta Mahkamah Syariah (Bidang Kuasa Jenayah) 1965, *[Akta 355]* dipinda dalam proviso kepada seksyen 2 dengan menggantikan perkataan *"penjara selama tempoh melebihi tiga tahun atau denda melebihi RM5,000 atau sebatan melebihi enam kali"* dengan perkataan *"penjara selama tempoh melebihi 30 tahun atau denda melebihi RM100,000 atau sebatan 100 kali sebagaimana ditadbir selaras dengan*
> *tatacara jenayah syariah".*
> Memandangkan pindaan ini memerlukan pemahaman yang jelas, walaupun sudah ada secara bertulis yang diedarkan namun masih ada lagi kekeliruan dan berbagai-bagai polemik di luar Dewan ini melibatkan semua pihak. Walaupun rang undang-undang ini khusus bagi penganut Islam sahaja, berkait dengan bidang kuasa Raja-raja, namun masih ada pertikaian dan perbahasan yang hangat maka saya pohon untuk membuat huraian pada sesi akan datang selaras dengan Peraturan Mesyuarat 15(5). ..

[5] The Honorable Speaker is reported to have responded as follows:

> **Tuan Yang di-Pertua:** Terima kasih. Baiklah Yang Berhormat, saya izinkan usul ini disambung ke Mesyuarat akan datang. Ini Ahli-ahli Yang Berhormat sebagai makluman. Ini belum pun sampai kepada bacaan kali pertama. Belum pun sampai kepada bacaan kali pertama. Kalau kerajaan yang bawa usul untuk rang undang-undang seperti begini tidak pun dibahas, tidak pun disokong, cuma dia sebut sahaja *title*. Itu bacaan pertama. Yang ini cuma usul yang akan nanti dibincang.

[6] The Honourable Member for Marang referred expressly to Standing Orders 28 and 15(5), in addition to the earlier-mentioned Standing Order 49.[2] Standing Order 28 allows a Motion to be amended by giving proper notice to the Setiausaha and, provided the amendment does not materially alter any principle in the original motion or its scope, the amended notice shall run from the time of the original notice. The effect of Standing Order 15(5) is worth noting at this stage, although it will not be very important in the scheme of things. A Private Member's Motion that is not fully disposed of, and adjourned to the next session of Parliament will take precedence over other Private Member's Motion.

The Amended Upper Limits on Punishments

[7] That is the present state of the unfolding legislative saga. An impartial observer can reasonably conclude things have not moved very much, legislatively speaking, except of course when the Motion reappears in the next session of Parliament the proposed draft Bill will have these amendments up for debate. The criminal jurisdiction of the Syariah Courts will be enhanced but there will be defined upper limits, namely:

- Maximum of RM100,000.00 fine;
- Maximum of 30 years' imprisonment; and
- Maximum of 100 lashes for any whipping imposed "*sebagaimana ditadbir selaras dengan tatacara jenayah syariah".*

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[2] **28.** If a member desires to alter the terms of a motion standing in his name, he may do so by giving to the Setiausaha an amended notice of motion, provided that such alteration does not, in the opinion of Tuan Yang di-Pertua, materially alter any principle embodied in the original motion or the scope thereof. The amended notice shall run from the time at which the original notice was given.

15. (1) On every sitting day Government business shall have precedence over Private Members business.

(2) Government business shall be set down in such order as the Government thinks fit and communicate to the Setiausaha.

(3) Private Members' notices of motions shall have precedence over Private Members' Bills and shall be set down in the order in which notice of each motion appeared in the Order Book.

(4) Private Members' Bills shall be taken in the order in which they stand in the Order Book.

(5) A Private Members' motion which has been moved but not disposed of at a meeting of the House shall, upon due notice given by the mover for continuance thereof at a subsequent meeting, take precedence at such subsequent meeting over other Private Members' motions.

[8] So, let's look at the legal crystal ball and anticipate what can happen when our Dewan Rakyat reconvenes in March 2017. The uncompleted business of this Private Member's Motion in relation to the proposed Rang Undang-Undang Mahkamah Syariah (Bidang Kuasa Jenayah) (Pindaan) 2016 [now read 2017] will be again placed in the Order of Business, still as a Private Member's Motion, it will be allowed to be proceeded further at some point depending on the precedence given to it by the Government, and being a Motion, it will be debated and a vote will be taken on it. If an insufficient number of MPs are not in support of the Motion, it will not get passed. There the matter will end. If it gets passed after a debate, the Bill will be deemed to be tabled as a First Reading, and thereafter, as indicated, the Government will initiate the formation of the Parliamentary Select Committee, to be followed by the Second and Third Readings.

[9] From my understanding of what transpired, this should be the predicted outcome. The Honourable Member for Kota Bharu, himself an alumnus of this Faculty, seemed to have got it right when he said the issue of the appointment of the Parliamentary Select Committee would be relevant only after the deemed First reading if, after debate, the Private Member's Motion was passed. I quote:

> Dato' Takiyuddin bin Hassan [Kota Bharu]: Terima kasih Tuan Yang di-Pertua. Saya bersetuju dengan cadangan Yang Berhormat Parit Buntar tadi. Apabila sampai di peringkat kerajaan mengambil alih, sekarang ini, ini adalah *private members' bill*.
>
> *…*
>
> Takkanlah Yang Berhormat Marang ini boleh membuat apa-apa jawatankuasa.
>
> Sebagaimana Peraturan Mesyuarat 49, apabila lulus bacaan kali pertama, kerajaan mengambil alih pengendalian bil ini, barulah kerajaan menubuhkan jawatankuasa. *Not at this stage*…

[10] Just to complete the narrative, soon thereafter the Prime Minister was reported as saying the Government would be "taking over" the Bill. It is unclear at what stage the Bill would be

"taken over". We will have to wait to see what will happen next month when the Dewan Rakyat reconvenes.

B. THE GENERAL ISSUES ON CONSTITUTIONALITY AND PRACTICAL PROBLEMS

[11] Much has changed since about August 2016 when I was invited to speak on this topic. I have left the topic of this lecture untouched since I believe, despite the subsequent developments, many of the constitutional issues remain current and deserve mention and analysis. The level of controversy generated earlier when the original, unamended Private Member's Bill was introduced, should, I hope, have reduced to a stage when it should be possible to have a moderate, honest, meaningful and temperate discussion on it.

[12] May I just say at the outset, it is perhaps no longer accurate, nor helpful, to talk of the Bill as a "*Hudud*" Bill. I will return to this issue of *Hudud* in a moment, but it is not my intention to engage in any discussion on theological doctrines. This should be assigned to others with better credentials than me. The remit of my lecture is a narrow one, in keeping with the spirit and purpose of this Constitutional Law Lecture Series. My focus will be on legality premised on the objective standards of our Federal Constitution, read in conjunction with the State Constitutions. In layman's language, sometimes more precise and exact than the language of legal men and women, I hope to address the questions, "Is it legal", "Can it be done?", Should it be done?" "Can it be done in a better legal way?" and "Will there be any practical problems?"

[13] On a more general note, the issue of constitutionality will invariably be a dynamic and often contentious legal territory. Constitutional law phraseology can be sometimes open-ended, and its meaning cannot be deduced by a mechanical application of words in the Constitution. Most times, the larger context, the constitutional intendment and purpose, will clothe these technical words with the more accurate meaning. These seem to be fairly obvious propositions, but trust me, not only lawyers will argue on the correct meaning, judges do too.

C. PROVISIONS OF THE SYARIAH (CRIMINAL JURISDICTION) ACT 1965 IN FORCE

[14] I began this lecture by bringing you, ladies and gentlemen, to the present state of affairs in relation to the Bill, and that is still evolving. Allow me presently to consider the beginning and invite your attention to the Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355) and the original form the Bill took. I have no doubt absolutely many in this audience know of the details, but I will outline it just the same for emphasis.

[15] Act 355 is itself a very brief piece of legislation. The long title to the Act describes it as "an Act to confer jurisdiction upon the Courts constituted under any State law for the purpose of dealing with offences under Islamic law." Thus, it has to be appreciated that prior to the passing of this Act, there were already in existence State enactments dealing with the subject matter of offences under Islamic law. To illustrate the point, we can look at, for instance the provisions in the Administration of Muslim Law Enactment of Kedah (Enactment No.9 of 1962) which constitutes the Kathis' Courts by the authority of "His Highness".[3] In its criminal jurisdiction, the Kathi's Court could try any offence committed by a Muslim and punishable under this Enactment, and may impose any punishment therefor as provided under the Enactment. The punishment which could be imposed cannot exceed a term of imprisonment of two months or a fine not exceeding two hundred "dollars", or both.[4]

[16] When Act 355 was passed, it initially dealt with the all the States of Peninsular Malaysia, but by Act A370 (Syariah Courts (Criminal Jurisdiction) (Amendment and Extension) Act 1989, the operation of Act 355 was extended to all the States of Malaysia, The original title of Act 355 was the Muslim Courts (Criminal Jurisdiction) Act 1965, and it provided only the jurisdiction of the Muslim Courts to impose two months' imprisonment or one thousand

[3] See Section 40 of the Enactment.
[4] See Section 41, *ibid.*

ringgit, or both. The limits on the jurisdiction was increased in 1984 through the Muslim Courts (Criminal Jurisdiction) (Amendment) Act 1984, to the limits now found in the present Act 255 in force.[5]

Since Ac 355 is very brief, allow me to take an excerpt from its provisions:

Short title and applications

1(1) This Act may be cited as the Syariah Courts (Criminal Jurisdiction) Act 1965.

(2) This Act shall apply to all the States of Peninsular Malaysia.

Criminal Jurisdiction of Syariah Courts

2. The Syariah Courts duly constituted under any law in a State and invested with jurisdiction over persons professing the religion of Islam and in respect of any of the matters enumerated in List II of the State List of the Ninth Schedule to the Federal Constitution are hereby conferred jurisdiction in respect of offences against the precepts of the religion of Islam by persons professing that religion which may be prescribed under any written law:

Provided that such jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or any combination thereof.

Validation

3. All offences under Islamic law which before the commencement of this Act in relation to the States of Peninsular Malaysia and which before the commencement of the Syariah Courts (Criminal Jurisdiction) (Amendment and Extension Act 1989 in relation to the States of Sabah and Sarawak, had been tried by any of the Courts aforesaid

[5] See Shamrahayu A Aziz, *Criminal Procedure in the Syariah Courts* (2011; Sweet & Maxwell Asia)), p. 24

shall be deemed to have been validly tried as if jurisdiction in respect thereof had been conferred on those Courts by federal law.

[17] This in short is the legal setting against which the original unamended version of the Private Member's Bill from the Honourable Member for Marang was sought to be introduced and debated.

C. THE CONSTITUTIONAL SETTING

[18] The constitutional setting is broader and can be traced to the Legislative Lists in the Ninth Schedule, Article 3, Article 11, Article 75, Article 76A and 121(1A) of the Federal Constitution. May I just say that the lines of distinction here between State and Federal power are not crystal clear, can be contentious and can lead to differing constitutional interpretations, but on any plausible view of constitutional interpretation, whatever was sought to be achieved by the unamended version of the Private Member's Bill is, to my mind, most likely unconstitutional.

[19] For clarity, I outline the relevant parts of the constitutional provisions that I mentioned a moment earlier.

[20] As for the Legislative Lists, List 1 (the Federal List), item 4 refers to "Civil and criminal law and procedure other than Syariah Courts, including-

(a) Constitution and organization of all courts other than Syariah Courts;

(b) Jurisdiction and powers of all such courts;

…

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

…"

[21] Under List II (State List), item 1, the nub of the issue on the constitutional position of the Syariah Courts and their criminal jurisdiction is placed in sharp focus. The importance

of a careful analysis of the constitutional analysis here requires us to consider the full provision.

I therefore propose to cite this provision in full:

> "1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, *creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution , organization and procedure of Syariah courts which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law;* the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom."

[22] As far as the other provisions are concerned, Article 3 states Islam "is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation. Article 11 is the operative provision on freedom of religion, but I wish to draw your attention to Article 11(4) which states;

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

[23] Article 75 stipulates if any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void.

[24] Article 76A is an interesting provision; it allows Parliament to authorize the Legislatures of the States, or any of them, to make laws with respect to any matter in the Federal List, subject to such restrictions as Parliament may impose.

[25] Then we have Article 121(IA), introduced in 1984, whereby Federal Courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts."

D. THE MAY 2016 MOTION ON THE PRIVATE MEMBER'S BILL

[26] It is against these disparate constitutional provisions that the original version of the Private Member's Bill was subjected to intense support as well as criticism.

[27] Let us consider what it originally sought to achieve.

First it sought to amend and substitute the entire Section 2 with a new Section 2 reading:

Bidang Kuasa Jenayah Mahkamah Syariah

2. Mahkamah Syariah akan mempunyai kuasa ke atas seseorang penganut agama Islam dan di dalam hal-hal kesalahan di bawah perkara-perkara yang disenaraikan di dalam Butiran 1 Senarai Negeri di bawah Jadual Kesembilan Perlembagaan Persekutuan.

[28] Compare this with the present section 2:

The Syariah Courts duly constituted under any law in a State and invested with jurisdiction over persons professing the religion of Islam and in respect of any of the

matters enumerated in List II of the State List of the Ninth Schedule to the Federal Constitution are hereby conferred jurisdiction in respect of offences against the precepts of the religion of Islam by persons professing that religion which may be prescribed under any written law:

It will be noticed that the proposed amendment omits the words “offences against the precepts of the religion of Islam.”

[29] I have excluded the proviso, however. This will become relevant when the next section is considered. “Seksyen baru 2A” reads:

2A Dalam menjalankan undang-undang jenayah di bawah Seksyen 2 Mahkamah Syariah berhak menjatuhkan hukuman yang dibenarkan oleh undang-undang syariah berkaitan hal-hal kesalahan yang disenaraikan di bawah seksyen yang disebutkan di atas, selain dari hukuman mati.”

[30] This new Section 2A is to replace the existing formula in the proviso, which, if you will recall, reads:

Provided that such jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or any combination thereof.

[31] The intendment behind the drastic rewording of the current provisions can be gleaned in part from the Explanatory Note appended to the Private Member’s Bill, reading:

Fasal 2 bertujuan untuk meminda seksyen 2 Akta 355 untuk menggantikan peruntukan yang sedia ada yang berhubungan dengan bidang kuasa jenayah Mahkamah Syariah ke atas orang yang menganut agama Islam. Pindaan ini bertujuaan untuk memperjelaskan bahawa bidang kuasa jenayah Mahkamah Syariah ke atas orang yang

menganut agama Islam *bukan hanya terhad kepada perintah agama sahaja tetapi termasuk apa-apa kesalahan lain yang berhubungan dengan apa-apa Perkara yang disebut dalam Butiran 1 Senarai Negeri yang dinyatakan dalam Jadual Kesembilan Perlembagaan Persekutuan.*

[32] These earlier amendment provisions in the Private Member's Bill are most definitely far-reaching and, in my view, unconstitutional. They offend the structure of the Federal Constitution, and in seeking to confer almost unlimited jurisdiction on the Syariah Courts (save the jurisdiction to impose the death penalty), they purport to confer a jurisdiction on the Syariah Courts in excess of constitutional limits.

The KJS (II) (1993) 2015

[33] What is troubling to large segments of the population is the prospect that the proposed amendments could allow the implementation of the Syariah Criminal Code Enactment (II)(1993) 2015 of Kelantan ("KJS(II)") which covers syariah criminal offences on *hudud*, *qisas* and *ta'zir.* With the enhanced criminal jurisdiction, all the *hudud* and *qisas* punishments under this State Enactment except the penalty of death could be imposed.

[34] Under the Kelantan Syariah Criminal Code Enactment II, the hudud offences are listed as:

(a) Sariqah (theft);

(b) *Hirabah* (robbery);

(c) *Zina* (adultery) including *Liwat* (sodomy);

(d) *Qazaf (false witness)*

(e) *Syurb* (consumption of alcohol); and

(f) *Irtidad* or *riddah* (apostasy).[6]

[6] S.5, Kanun Jenayah Syariah (II) (1993) 2015

[35] The *qisas* offences relate to intentionally causing death or causing death by a non-intentional act; and causing bodily injury.[7] These are defined in the KJS(II) 2015 as *qatl al-'amd*, *qatl syibhi al'-`amd*, and *qatl al-khata'*.

The prescribed punishments for these hudud and qisas offences are as follows:

(i) *Sariqah* – hudud punishment of amputation of the right hand for the first offence; amputation of the left leg for the second offence; and for third and subsequent offences, imprisonment for a term not exceeding 15 years.[8]

(ii) *Hirabah* – hudud punishment of death followed by crucifixion if the victim is killed, or any property under the offender's care is taken; death penalty where the victim is killed but no property is taken; amputation of the right hand and the left leg if only property is taken without killing or injuring the victim, but if injury is caused, *diyat* or *arsy* is to be paid in addition to the punishment of amputation.[9]

(iii) *Zina, Liwat* – where the offender committing *zina* is *mohsan*, stoning until death; where the offender is *ghairu mohsan*, 100 lashes and imprisonment for a year.[10] The same punishments apply for the offence of *liwat*[11].

(iv) *Qazaf* – 80 lashes.[12]

(v) *Syurb* – maximum of 80 lashes and not less than 40 lashes.[13]

(vi) *Irtidad, Riddah* – imprisonment until the offender repents, and if he fails to repent, imposition of the hudud punishment.[14] It appears from the text of KJS(II) that the specific nature of this "hudud punishment" is left open.

[7] Ss. 25,26,27, ibid.
[8] Ss.5,7, ibid.
[9] S.9,10, ibid.
[10] Ss. 13, ibid.
[11] S.14, ibid.
[12] Ss17,18, ibid.
[13] S. 22, ibid.
[14] S.23, ibid.

(vii) *qatl al-'amd* - *qisas* punishment: death penalty, unless diyat is paid or a *wali* of the victim pardons the offender the death penalty is imposed; if the qisas punishment cannot be imposed, a *ta'zir* punishment of life imprisonment or for such suitable period as decided by the court shall apply.[15]

(viii) *qatl syibhi al'-`amd* - payment of diyat to the *wali* of the victim and additionally a ta'zir punishment of imprisonment of not exceeding 14 years, in the words of the Enactment "*untuk menjadikan pesalah itu sedar dan sesal.*"[16]

(ix) *qatl al-khata'* – payment of diyat and may be subject to a ta'zir punishment of imprisonment for a period not exceeding 10 years "*untuk menjadikan pesalah itu sedar dan sesal*."[17]

[36] To be fair, it needs also to be highlighted that this State Enactment provides for a long list of exclusions in respect of these offences and very strict evidential pre-requirements reflective of Syariah law.

[37] For completeness of discussion, some mention must be made of the equivalent Enactment of the State of Terengganu, which is Enactment No. 2 of 2002, called Enakmen Kesalahan Jenayah Syariah (Hudud dan Qisas) Terengganu. This Enactment is technically still in force as law but has not been implemented after the State Government changed from the Pas-led Government to the present BN-led Government.[18]

[38] Let me now present my arguments why I believe the giving of the "blank cheque" under the earlier May 2016 version of the RUU 355 is unconstitutional. In concluding so, my argument gives due credit and recognition to Article 3 of the Federal Constitution and the broad legal proposition that the Federal Constitution is a secular constitution. There is no inherent dichotomy between the two, for in the context of accepted norms of constitutional

[15] Ss.27,28,29, ibid.
[16] S. 31, ibid.
[17] S.32, ibid.
[18] See the excellent article by Dr Zulqarnain bin Lukman in Zulkifli Hasan (ed) *Hududisme: Antara Retorik dan Realiti (*2016;Ilham Books), at pp 115 -125.

interpretation the provisions of the constitution have to read as a whole,[19] suitable to its nature as a living document which sets out the ground rules for public governance, proper constitutional behavior, respect for human rights, and, in our context, federal-state relations. In short, public discourse of the rights and wrongs of any political action, be it legislative, executive or judicial action, requires grounding on a neutral, objective criterion. And that, I surmise, is the Federal Constitution of Malaysia, read in conjunction with the State Constitutions.

The Secular Federal Constitution

[39] The nature of the Federal Constitution as a secular constitution is clear. The Reid Commission recognises it expressly and this is repeated in the Proclamation of Independence. Article 3 existed then in its present form. Therefore, any attempt to extrapolate Article 3 to argue that somehow the Federal Constitution is not secular and thus it is constitutionally permissible to legislate hudud law to supplant ordinary criminal law, or to reconstitute the system to revert to the Syariah as the predominant legal system belongs to constitutional imagination, not constitutional reality.

E. DECISIONS OF MALAYSIAN COURTS ON "ISLAM" AND "PRECEPTS OF ISLAM"

[40] In this connection, it is perhaps very useful to remind ourselves that even the Supreme Court has recognised the Federal Constitution as a secular one in *Che Omar bin Che Soh v PP; Wan Jalil bin Wan Abdul Rahman & Anor v PP*.[20] To quote the relevant passage:

> It is the contention of [counsel]…that because Islam is the religion of the Federation, the law passed by Parliament must be imbued with Islamic and religious principles…and in addition…because Syariah law is the existing law at the time of Merdeka, any law of general application in this country must conform to Syariah law. Needless to say, that this submission, in our view, will be contrary to the constitutional and legal history of the

[19] See e.g. the Federal Court's statement in *ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener)* [2016] 1 MLJ 153.
[20] [1988] 2 MLJ 55

Federation and also to the Civil Law Act which provides for the reception of English common law in this country…

…we have to set aside our personal feelings because the law in this country is still what it is today, secular law, where morality not accepted by the law is not enjoying the status of law…[21]

[41] No court has so far disputed this statement, although more recent decisions do show a tendency to expand the reach of Islamic law, by enlarging the constitutional formula "precepts of the religion of Islam", as stated in List 2, item 1 of the Ninth Schedule. Notably, we have the Federal Court decisions in *Mamat bin Daud & Ors v Government of Malaysia,*[22] *Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications*[23], *Fathul Bari bin Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Ors* [24]and more recently, *ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener)*.[25]

[42] *ZI Publications* quotes extensively from the earlier decision of *Sulaiman bin Takrib,* and acknowledges that the creation and punishment of offences against the precepts of the religion of Islam have four limitations:

(a) it is confined to persons profession the religion of Islam;
(b) it is against the precepts of Islam;
(c) it is not with regard to matters included in the Federal List; and
(d) it is within the limit set by s. 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965.[26]

[21] At p. 57, ibid.
[22] [1988] 1 MLJ 119.
[23] [2009] 6 MLJ 354.
[24] [2012] 4 MLJ 281.
[25] [2016] 1 MLJ 153.
[26] Para. 21, ibid.

[43] At para. 24 of the Judgment in *ZI Publications,* the expansive meaning of "precepts of Islam" is accepted. I invite all to consider its breadth as well as the limitation. This is what is said in the Judgment:

> Abdul Hamid Mohamed CJ [in *Sulaiman bin Takrib*], in addressing the issue held that 'precepts of Islam' include 'law' or 'syariah' and the Federal Constitution uses the term 'Islamic Law' which in the Malay translation is translated as 'Hukum Syariah'. It was pointed out that all the laws in Malaysia whether federal or state, use the term 'Islamic Law' and Hukum Syariah' interchangeably…Since the offences were against the precept of Islam and since there is no similar offence in Federal law and the impugned offence cover Muslims only and pertaining to Islam only, it clearly could not be argued that they were 'criminal law' as envisaged by the Federal Constitution.[27]

[44] As this passage seems to demonstrate, while the concept of "precepts of Islam" covers "offences against Hukum Syarak", it must still be established that there is no similar offence in Federal law (in the sense of being part of the criminal law legislatively assigned to the Federal Legislature), and it falls within the limitations imposed by s. 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965.

[45] I wish to suggest that this interpretation of Article 3 read in conjunction with Item 1, List II of the Ninth Schedule maintains the constitutional balance within our secular constitution, although some may argue that "precepts" should have a more limited meaning and not embrace all acts against "Hukum Syarak", irrespective whether the precepts relate to *aqidah*, *Syariah* or *akhlak*, as defined by the courts.

F. SOME BASIC CONSTITUTIONAL PROPOSITIONS

[27] Per Raus Sharif PCA.

[46] Reading the Federal Constitution as a whole, I suggest a number of basic propositions can be stated.

(1) The Constitution is secular;

(2) However, Article 3(1), in proclaiming Islam as the religion of the Federation, recognises a special position to Islam, with the express caveat that other religions may be practiced in peace and harmony in any part of the Federation;

(3) By virtue of Article 3 (4), which states that "Nothing in this Article derogates from any other provision of this Constitution", even this special position of Islam is made subject to other provisions of the Federal Constitution;

(4) The division between secular laws and Islamic laws is spelt out in detail in Schedule 9, List I, item 4 and List II, item 1, and these are to be read harmoniously;

(5) Any legislation passed under both legislative lists can be tested for constitutionality in the civil courts, and this position is recognized in the cases, more recently in the Court of Appeal decision in *Muhamad Juzaili Mohd Khamis & Ors v State Government of Negeri Sembilan & Ors*[28]*;*

(6) Seen in its proper constitutional context, the Syariah Courts established under State laws are courts of limited jurisdiction;

(7) The Syariah Courts shall have jurisdiction only over Muslims and in respect only of the matters included in item 1, List II;

(8) The Syariah Courts have no jurisdiction in respect of offences except "in so far as conferred by federal law";

[28] [2015] 1 CLJ 954. See also the Federal Court decision on appeal in *State Government of Negeri Sembilan & Ors v Muhamad Juzaili Mohd Khamis & Ors* [2015] 8 CLJ 975, reversing the Court of Appeal on a technical point that the Federal Court has original jurisdiction where State law is being challenged.

(9) State legislatures have the legislative power over the creation and punishment of offences by Muslims “against the precepts of that religion”, “except in regard to matters included in the Federal List”.

[47] Let me return to the issue of “blank cheque” purported to be given to the State legislatures in the earlier May 2016 version of RUU 355. It appears that if allowed to be passed it will in effect change the limited jurisdiction of the Syariah Courts into an almost unlimited jurisdiction, since Syariah Courts can be conferred jurisdiction by State law to impose all forms of punishment except death. It invariably will mean all the hudud and qisas offences under KJS (II) of Kelantan will be accorded legislative support and all the mandated punishments can be imposed except the death penalty. The hudud offences of sariqah , hirabah , zina , liwat, irtidad, syurb and qazaf, and the qisas offences related to causing death or injury to another, can attract the punishments prescribed except the death penalty.

[48] If the test of constitutionality is taken as the effect of the legislation against provisions of the Federal Constitution, the conclusion is, I submit, clear. In purporting to change the nature of the Syariah Court from courts of limited jurisdiction to courts of almost unlimited jurisdiction, the defined structure within the Constitution will be violated. In providing legislative remit to the offences of *sariqah*, *hirabah*, *qatl al-‘amd , qatl syibhi al’-`amd* and *qatl al-khata’,* which reflect offences already existing under the Penal Code (the criminal offences of theft, robbery, culpable homicide, murder, hurt, grievous hurt), and to this extent there will be a violation of the very important imperative that offences against the precepts of Islam cannot transgress into matters included in the Federal List. Further, as highlighted earlier, there is Article 75 to consider, whereby State law, if inconsistent with federal law, will be rendered void. All of these effects do not therefore sit very easily within the clear legal position that the Federal Constitution is a secular constitution, albeit Islam having a special position.

G. TESTING THE CONSTITUTIONAL EFFECT OF THE PROPOSED NOVEMBER 2016 AMENDMENTS

[49] Let us now consider the amended version with a particularization of the punishments, which to remind ourselves, read:

> Pindaan Seksyen 2 - Akta Mahkamah Syariah (Bidang Kuasa Jenayah) 1965, *[Akta 355]* dipinda dalam proviso kepada seksyen 2 dengan menggantikan perkataan *"penjara selama tempoh melebihi tiga tahun atau denda melebihi RM5,000 atau sebatan melebihi enam kali"* dengan perkataan *"penjara selama tempoh melebihi 30 tahun atau denda melebihi RM100,000 atau sebatan 100 kali sebagaimana ditadbir selaras dengan tatacara jenayah syariah".*

[50] Applying the same tests I used earlier to question the constitutionality of the earlier version of RUU 355, I will argue that as amended the RUU 355 that will re-tabled in Parliament in March is constitutional. My conclusion is based on the following grounds:

(1) Unlike the earlier version, there is no "blank cheque" issue;

(2) The status of the Syariah Courts as courts of limited jurisdiction is maintained;

(3) The upper limits of punishments that can be imposed by the Syariah Courts are spelt out with greater particularity;

(4) As the proposed upper limits now stand, no jurisdiction will be conferred on the Syariah Courts or the State legislatures to create or impose the harshest forms of hudud and qisas punishments as amputation, death, crucifixion, stoning, forfeiture of property and banishment;

(5) Even in relation to whipping which is proposed to be up to the upper limit of 100 lashes, it is now also expressly made clear that the punishment shall be "*sebagaimana ditadbir selaras dengan tatacara jenayah syariah".*

(6) There is no issue that the proposed amendments will obviously concern only Muslims ;

[51] Perhaps I should also add that in my view there will be no violation of Article 8 on equality before the law since Muslims as a group will satisfy the requirement of reasonable classification in relation to the legislative purpose.

[52] I hope I have answered the question on constitutionality: “Can it be done?” The answer is, “Yes.”

[53] Let us now consider the more difficult questions: “Should it be done?”, “Can it not be done in a better way?”

[54] As things stand now, we are not informed on what basis the proposed upper limits of punishment are now being proposed, giving the impression they could very well have been picked at random, or to approximate punishments currently found in the Penal Code, or, in the case of whipping of 100 lashes, to still reflect one form of *hudud* punishment.

[55] These are admittedly large questions which should concern both Muslims and non-Muslims alike in a multi-religious and multi-ethnic society such as ours. Both Muslims and non-Muslims occupy the same territorial and economic spaces and obviously major changes in the law concerning *hudud* and *qisas* affecting one will concern the other too from a number of perspectives. Whilst the argument that the proposed amendments are meant merely to enhance the jurisdiction of the Syariah Courts and has little to do with the implementation of *hudud* offences may be accepted, questions of their appropriateness in relation to the stated legislative purpose will still linger. Is it necessary, for instance, to place the upper limit of imprisonment to 30 years from the present 3 years? Will it not still allow some forms of punishments in KJS (II) for several of the offences I have discussed earlier? Must the sentence for *zina* be 100 lashes although it becomes a *ta'zir* offence when 40 lashes or less might be considered more just and appropriate? Given the very high upper limits, will it be an answer to simply sidestep the

problems by saying it will be up to each State legislature to decide what would be deemed appropriate in the particular State? Will it not lead to disproportionate discrepancies in punishment between the States?

[56] It will be interesting to see what happens next in Parliament next month, but some good justification must be given by the mover and supporters of the Private Member's Bill why the Bill is necessary to "enhance" ("*memperkasakan*") the jurisdiction of the Syariah Courts the way it is being mooted, and to dispel more convincingly that it is not about *hudud*. If I may humbly suggest, the upper limits should be spelt out further in greater detail by relating to specific offences, and the best way to approach the matter is to have a detailed schedule of offences against which the maximum punishments against the specific offences can be measured along the lines of the Schedule found in the Criminal Procedure Code. In this way discrepancies in State legislation can be minimized, if not avoided altogether. And this will necessary require a more deliberate and mature deliberation in the anticipated Parliamentary Select Committee, if the motion passes muster.

CONCLUSION

[57] As indicated earlier, the topic of this lecture was chosen when RUU 355 was in its unamended form. I have maintained the topic since it is necessary to discuss this topic as a continuing and unfolding event. I have argued why I believe the earlier version of RUU 355 is unconstitutional, and any attempt to allow the full-scale imposition of hudud or qisas offences will run counter to the secular nature of the Federal Constitution. That is why allowing the Syariah Courts to impose all forms of punishment except the death penalty is objectionable constitutionally.

[58] I have also stated the legal grounds to support this conclusion. On the same grounds and with the same analysis, but judged against the amended version of RUU 355. I have stated my opinion that the amended version is most probably constitutional, but I have in the same token posed a number of questions to suggest that even this amended version in its present from may not be wise and appropriate in terms of policy bearing in mind the reality of Malaysian society. While I believe there is a case to be made for enhancing the jurisdiction of the Syariah Courts, this preoccupation with severe punishments merely without considering the various ways to enhance the institution and the administration of the institution itself, might distract us from the priorities that really matter. Some might say a better way to enhance the Syariah Courts system is to enhance its efficiency in dispensing justice in areas of marriage, family and inheritance laws among Muslims, the staple of Islamic personal laws in Malaysia, rather than being too preoccupied with imposing the harshest punishments for Syariah criminal offences. On this general point, there are several noble approaches in Islamic jurisprudence that can be adopted for a more meaningful and inclusive discourse in Malaysian society – to name three: fiqh *awlawwiyat*, *fiqh wagi'* and *fiqh maqasid*. These doctrines counsel us to be sensitive and conscious to priorities, societal reality and the higher objectives of the Syariah. I leave it to others more qualified than me to expand this area of public discourse at some other appropriate forum. Ladies and gentlemen, on this note I end my lecture.

Thank you for your kind attention.

Dato' Mohamad Ariff bin Md Yusof

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