

## Offences Against Precepts of the Religion of Islam

by Dato' Seri Mohd Hishamudin Yunus<sup>1</sup>

Malaysia is a federation of 13 States<sup>2</sup> with Islam declared in the Federal Constitution as the religion of the Federation.<sup>3</sup> Being a federation, there is a division of legislative and executive powers between the federal and state governments.<sup>4</sup> A subject matter that is within the legislative and executive competence of the States are matters pertaining to the religion of Islam. The details are enumerated as follows in Item 1 of the State List of the Federal Constitution:

"1. ...Islamic law and personal and family law of persons professing the religion of Islam including ... 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;<sup>5</sup>..."

We will observe from the above paragraph that Item 1 of the State List (as provided for in List II of the Ninth Schedule of the Federal Constitution) confers on the State Legislature the power to legislate on all matters pertaining

to the religion of Islam as enumerated in the paragraph, including the power to create offences relating to the *precepts of the religion of Islam*, as well as the power to establish Syariah Courts.

Upon close reading of Item 1 of the State List, one will note that while the said paragraph empowers the State to establish Syariah Courts via State legislation, the same also limits the jurisdiction of the Syariah Courts. The limitations prescribed are as follows:

- (a) the Syariah Courts shall only have jurisdiction over persons professing the religion of Islam; and
- (b) the Syariah Courts shall have jurisdiction in respect only of any of "the matters included in this paragraph", meaning in respect only of the matters enumerated in Item 1 of the State List.

And as far as dealing with offences connected to the matters enumerated in Item 1 is concerned, it is important to note a further limitation: the Syariah Courts will only have jurisdiction over such offences *if* there is a federal law that empowers the Syariah Courts to deal with such offences. This means that whenever a State Enactment creates an offence (connected to the matters enumerated in Item 1), it does not automatically follow that the Syariah Courts have jurisdiction to deal with such offence. The Syariah Courts will only have the jurisdiction to do so if Parliament so authorises by way of an Act of Parliament. Otherwise, such offences will have to be dealt with by the regular/civil courts, meaning the Magistrates' Courts or the Sessions Courts.

1 Former judge of the Court of Appeal.

2 The 13 States are set out in Art 1, cl 2 of the Federal Constitution.

3 Article 3(1) provides:

**Religion of the Federation**

Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.

But it is important to note cl (4) of the Article that provides:

**(4) Nothing in this Article derogates from any other provision of this Constitution.**

4 See Arts 74 and 80 of the Federal Constitution, read with the Ninth Schedule of the Federal Constitution.

5 Item 1 of List II — State List, Ninth Schedule, Federal Constitution.

However — and herein lies the problem — Item 1 of the State List does not define what is meant by the expression, “offences against precepts of the religion of Islam”; and the phrase “precepts of the religion of Islam” has led to problems of judicial interpretation as exemplified by the cases of *Sulaiman Takrib*<sup>6</sup> and *Fathul Bari*.<sup>7</sup> In the absence of any definition, the question arises: What kind of act or offence is considered to be an offence against the precepts of the religion of Islam? This is a difficult question, and the opinions of scholars or experts differ.

In *Sulaiman Takrib*, the Syariah Criminal Offences (Takzir) (Terengganu) Enactment 2001 (SCOT) created the following offences:

- (a) the offence of “acting contrary to fatwa”; and
- (b) the offence of “having possession of material contrary to *Hukum Syarak*”.

These offences were provided for under ss 10 (the offence of “acting contrary to fatwa”) and 14 (the offence of “having possession of material contrary to *Hukum Syarak*”), respectively, of SCOT. The issue was whether these offences were offences against the precepts of the religion of Islam. The court held that they were, although one of the three experts on Islamic law who gave their opinions before the court had opined that such offences were not offences against the precepts of the religion of Islam.

The author shall quote extensively from the judgment of the Federal Court, as delivered by Abdul Hamid Mohamed CJ, in order to show the difficulty encountered

in determining what amounts to an offence against the precepts of the religion of Islam. On this issue, the court began by saying:

### Precepts of Islam

“[51] It was argued that the offences created by the impugned sections are not offences against the precepts of Islam. As has been said earlier, one of the limits imposed by the Constitution on the State Legislative Assembly in creating offences under Item 1, List II is that the offences must be offences against the ‘precepts of Islam’ as used in the Constitution. It is important to remember that this Court is interpreting the Constitution, not writing a thesis on the ‘precepts of Islam’.

“[52] There is no definition of the word ‘precepts’ in the Federal Constitution. The Malay translation of the Constitution uses the word ‘perintah’. The *Istilah Undang-Undang* (Sweet & Maxwell Asia, 3rd ed) uses the word ‘ajaran’. According to the *Siri Glosari Undang-Undang* of the Dewan Bahasa dan Pustaka ‘precepts’ means ‘perintah’, ie, ‘Suruhan dan Larangan melakukan sesuatu, contohnya dalam agama.’ According to the *Oxford English Dictionary* the word ‘precept’ means ‘a general command or injunction; an instruction, direction or rule for action and conduct; esp. an injunction as to moral conduct; a maxim. Most commonly applied to divine commands ... ‘ In my view, the meanings of the word ‘precept’ quoted above point to the same thing as described in greater detail in the *Oxford English Dictionary*. I accept them all.

6 *Sulaiman Takrib v Kerajaan Negeri Terengganu* [2009] 2 CLJ 54 (FC)

7 *Fathul Bari Mat Yahya v Majlis Agama Islam Negeri Sembilan* [2012] 4 CLJ 717 (FC)

The court then referred to the opinions of three experts as follows:

“[53] Opinions of three ‘experts’ were also produced. They are Tan Sri Sheikh Ghazali bin Haji Abdul Rahman who was the Director General of the Syariah Judicial Department, Malaysia and had served as Chief Syariah Judge for the Federal Territory and still sits on the Syariah Court of Appeal in eight States. The second is Professor Dr. Mohd Kamal bin Hassan who was the Rector of the International Islamic University, Malaysia. Their opinions were produced by the Intervener, the Government of Malaysia. The third is Professor Muhammad Hashim Kamali who was the Dean of the International Institute of Islamic Thought and Civilization. Reading their Curriculum Vitae and knowing them personally, I have no hesitation to say that they are worthy expert witnesses on Islam.

...

“[57] Whatever their backgrounds are, let us look at their opinions. Tan Sri Ghazali starts off by saying:

‘Precepts of Islam’ bermaksud ajaran-ajaran atau perintah-perintah agama Islam sebagaimana terkandung di dalam Al-Quran dan As-Sunah. Ia bukan hanya terhad kepada Rukun Islam yang lima. Ajaran Islam meliputi ‘Aqidah, Syariah dan Akhlak.

“[58] Professor Dr Mohd Kamal Hassan opines, *inter alia*, as follows:

2.2 In the context of the religion of Islam, the expression ‘precepts of Islam’ has a broad meaning to include commandments, rules, principles, injunctions — all derived from

the Qur’an, the Sunnah of the Prophet, the consensus of the religious scholars (*ijma’*) and the authoritative rulings (fatwas) of legitimate religious authorities, for the purpose of ensuring, preserving and/or promoting right beliefs, right attitudes, right actions and right conduct amongst the followers of Islam.

2.3 With regard to the scope of applicability of the precepts of Islam, human actions and behaviour fall into three major and interrelated domains, namely creed (*aqidah*), law (*shari’ah*) and ethics (*akhlak*). The creed is concerned with right beliefs and right attitudes (deemed as actions of the heart), the law with right actions and ethics with right conduct, right behaviour and right manners.

2.4 Therefore the precepts of Islam possess the force of enjoining or commanding or prohibiting actions or behaviour which Islam considers good (*ma’ruf*) or bad (*munkar*), correct or deviant, obligatory (*wajib*), recommendatory (*sunnah*) undesirable (*makruh*), permissible (*halal*), prohibited (*haram*), allowable (*mubah*).

“[59] Professor Dr Muhammad Hashim Kamali, *inter alia*, opines as follows:

A precept of Islam is an indisputable fundamental principle, or a fundamental principle in connection with which there is no serious dispute or debate amongst jurists. The ‘precepts of Islam’ essentially refer to the cardinal principles of belief, law and morality that constitute the core of the Islamic identity of a Muslim individual and society which are enunciated in the clear text of the Qur’an and authentic *hadith*. Yet not all that

is established in the clear text, such as certain commercial contracts and punishments, on which the Qur'an is clear, yet one would hesitate to classify these under 'the precepts of Islam'.

Precepts must be founded in the 'syariah', that is derived from the Holy Qur'an and the authentic and undisputed hadith of the Holy Prophet, peace be upon him (pbuh). 'Syariah' must be distinguished from 'fiqh', the latter being a derivative of the former in which juristic reasoning has been employed. Precepts cannot be found on 'fiqh' alone;

The most commonly accepted precepts are the recital of the 'syahadah', the five daily prayers at designated times, the fast in the month of Ramadhan, the payment of alms and the pilgrimage of the Haj to the Holy city of Mecca.

"[60] The learned professor goes on to give his opinion that acting against a fatwa does not amount to acting against the precepts of Islam. For that reason the offence created by s 10 is not an offence against the precept of Islam. With respect, these are matters for this court to decide and not for him.

"[61] It can be seen that all the three expert witnesses agree that:

- (a) precepts of Islam cover three main domains, i.e. creed or belief ('*aqidah*'), law ('*shariah*') and ethics or morality ('*akhlak*');
- (b) precepts of Islam are derived from the Qur'an and Sunnah."

The Federal Court then came to the following decision:

"[62] Learned counsel for the petitioner urged this court to accept the opinion of Professor Dr Hashim Kamali which, according to him, confines precepts of Islam to the 'five pillars' of Islam only and nothing else. With respect, it is not correct to say that Professor Dr. Hashim Kamali said that only the five pillars of Islam form the precepts of Islam. In fact, he started off para 7.3 with the words 'The most commonly accepted precepts are ...' They are not exhaustive.

"[63] In any event, what is most important for our present purpose is that all of them agree that 'aqidah' falls squarely within the meaning of the word 'precept' used in the Constitution.

"[64] However, if I have to choose between the opinions of Tan Sri Sheikh Ghazali and Professor Dr Kamal Hasan and the apparently more restrictive view of Professor Dr Hashim Kamali, in Malaysia context and bearing in mind the English word 'precepts' used in the Constitution, I would prefer to broader views of Tan Sri Sheikh Ghazali and Professor Dr Kamal Hassan.

"[65] In my judgment offences created by s 10 SCOT are offences regarding the 'precepts of Islam'.

"[66] Coming now to s 14 SCOT. The offence is for printing, publishing, producing, recording, distributing, having in possession etc of any books, pamphlet, document etc. containing anything which is contrary to 'Hukum Syarak'.

"[67] We have seen that the three experts agree that 'precepts of Islam' include 'law' or 'Shariah'. We should also note that the Federal Constitution uses

the term 'Islamic law' which, in the Malay translation, is translated as 'Hukum Syarak'. Indeed, all the laws in Malaysia, whether Federal or State, use the term 'Islamic Law' and 'Hukum Syarak' inter-changeably. It is true that, jurisprudentially, there is a distinction between 'syariah' and 'fiqh', as pointed out by Dr. Hashim Kamali. However, in Malaysia, in the drafting of laws and in daily usage, the word 'syariah' is used to cover 'fiqh' as well. A clear example is the name of the 'Syariah Court' itself. In fact, 'Syariah' laws in Malaysia do not only include 'fiqh' but also provisions from common law source – see, for example the respective Syariah Criminal Procedure Act/Enactments, Syariah Civil Procedure Act/Enactment; the Syariah Evidence Act/Enactments, and others. We will find that provisions of the Criminal Procedure Code, the Subordinate Courts Rules 1980 and the Evidence Act 1950, used in the 'civil courts' are incorporated into those laws, respectively.

“[68] Coming back to the offences created by s. 14 SCOT, the key words are contrary to Hukum Syarak, which necessarily means the same thing as precepts of Islam. Even if it is not so, by virtue of the provision of the Federal Constitution, the words 'Hukum Syarak' as used in s. 14 SCOT and elsewhere where offences are created must necessarily be within the ambit of 'precepts of Islam'.”

In *Fathul Bari*, the petitioner was charged in the Syariah Subordinate Court for an offence under s 53(1) of the Syariah Criminal (Negeri Sembilan) Enactment 1992 for conducting a religious talk without a *tauliah*. The issue before the Federal Court was whether such an offence is against the precepts of the religion of Islam. Just as in the case of *Sulaiman Takrib*, the five experts called to assist the court differed in their opinions. The Federal Court held

that it was an offence against the precepts of the religion of Islam by relying on a *Hadith* of the Holy Prophet (peace be upon him) concerning the sending of Muaz bin Jabal to Yemen that some sort of verification was necessary before a preacher was allowed to teach the religion to others.

The judgment began by alluding to the judgment of the Federal Court in *Sulaiman Takrib* and agreed with the judgment of the court as delivered by Abdul Hamid Mohamad CJ as to what is meant by “precepts of Islam”.

Thereafter, the judgment introduced the experts:

“[13] We completely agree with the above view. In the present case, both parties have also filed their respective expert opinions by way of affidavits. For the petitioners, we have Tan Sri Dato' Seri Dr Haji Harussani bin Haji Zakaria (the Mufti of Perak) and Professor Madya Dato' Alim Panglima Haji Mat Jahya bin Haji Hussin (the former Mufti of Perlis) who is also the father of the first petitioner.

“[14] Whereas, for the respondents, we have Tan Sri Sheikh Ghazali bin Haji Abdul Rahman, the Syariah Legal Adviser at the Attorney General's Chambers; Dato' Hj. Mohd Yusof bin Hj. Ahmad (the Mufti of Negeri Sembilan) and Ustaz Muhammad Fuad bin Kamaludin, the Chairman for Aqidah (Belief, Islamic Religious Council of Negeri Sembilan). We have no doubt that they are all worthy expert witnesses on Islam. Though the former Mufti of Perlis is giving his expert opinion in support of his own son, the 1<sup>st</sup> petitioner, this court found that his opinion is purely academic and far from being bias in favour of the 1<sup>st</sup> petitioner.”

The courts then alluded to the experts' opinions:

"[15] Briefly, this is what they said. The former Mufti of Perlis holds the view that *tauliah* does not fall within the precepts of Islam. Instead, what is important to consider is the level of knowledge of that person and the correctness of the contents of his teachings according to the Al-Quran and As-Sunnah. He then concluded the offence of teaching without a *tauliah* is merely an administrative offence in nature, rather than an offence against the precepts of Islam.

"[16] The Mufti of Perak shares the same sentiment that is, teaching the religion of Islam without a *tauliah* is not an offence against the pillars of Islam but rather an offence under the administration of Islamic law. However, he admitted that *tauliah* is an important mechanism to keep the teaching of Islam in line with Al-Quran and As-Sunnah.

"[17] The Mufti of Negeri Sembilan and Ustaz Muhammad Fuad Kamaludin hold the view that *tauliah* is a prerequisite before one could teach the religion of Islam, based on the Hadith of the Holy Prophet (peace be upon him). It was narrated in that Hadith that before the Holy Prophet sent his companion Muaz bin Jabal to Yemen to be his representative, including to teach the religion of Islam to the Yemenites, the Holy Prophet (peace be upon him) had asked several questions to Muaz bin Jabal to Yemen as to how he would decide on a particular case referred to him. This incident shows that the Holy Prophet (peace be upon him) himself had examined his companion before accrediting with the authority to teach the religion to society. Though the word *tauliah* is not used, but in effect, it is a *tauliah* in every sense of the word.

"[18] On the other hand, the Mufti of Perak and the former Mufti of Perlis stated that there is no authority from Al-Quran or As-Sunnah requiring a *tauliah*. Regarding the Hadith of the Holy Prophet (peace be upon him) on the mission sending out Muaz bin Jabal to Yemen, the Mufti of Perak said, the Holy Prophet (peace be upon him) did not view it as a *tauliah* when he chose Muaz bin Jabal but instead had considered the level of his knowledge and the accuracy of his teachings. That he said cannot be equated with *tauliah*. They maintained that the *tauliah* system that we practise today is different in that a preacher is guilty if he teaches without a *tauliah*, without considering the contents of the preaching."

The court thereafter gave its opinion as follows:

"[19] From the above, we are of the view that there is a clear authority premised on the Hadith of the Holy Prophet (peace be upon him) concerning the sending of Muaz bin Jabal to Yemen that some sort of verification is necessary before a preacher is allowed to teach the religion to others. In any event, all the experts share the common view that the teaching of Islam needs to be regulated to prevent deviant teachings. How else can the authority do this without first verifying whether a preacher is sufficiently qualified to teach or preach the religion? This must be done before the preacher goes around preaching and not after. As we see it, the requirement of *tauliah* is just a mechanism to achieve this purpose.

"[20] Further, we are of the view that the term precepts of Islam must be accorded a wide and liberal meaning. This is in line with the authorities on the interpretation of the heads or fields of the legislation as appearing in the legislative lists of the Federal Constitution. As

was observed by Gopal Sri Ram JCA (as he then was) in the case of *Ketua Pengarah Jabatan Alam Sekitar & Anor (supra)* as follows...

...

“[24] Section 53 of the Enactment is enacted pursuant to Item 1, State List, Ninth Schedule of the Federal Constitution which confers upon the State Legislature the power to enact laws relating to the religion of Islam generally. One of the entries in Item 1 is the creation of offences by persons professing the religion of Islam against the precepts of that religion. Section 53 of the Enactment makes it an offence for any person to engage in the teaching of Islam to any person, other than to members of his family, without first obtaining a *tauliah*. The purpose of this provision is clear, that is to protect the integrity of the *aqidah* (belief), *Syariah* (law) and *akhlak* (morality) which constitutes the precepts of Islam. The requirement is necessary to ensure that only a person who is qualified to teach the religion is allowed to do so. This is a measure to stop the spread of deviant teachings among Muslims which is an offence under s. 52 of the Enactment. It is commonly accepted that deviant teachings is an offence against the precepts of Islam. Therefore, the respondents contend that, by necessary implication, the teaching of Islam without a *tauliah* could similarly be construed as an offence against the precepts of Islam. In our judgment, there is merit in the respondents’ contention. For those reasons, we hold that the State Legislative Assembly of Negeri Sembilan had acted within its legislative power in enacting s. 53 of the Enactment.”

It is not the author’s intention to embark on a critical analysis of the above judgments, notwithstanding the

fact that he may have some misgivings about them. However, for the purposes of this article, it suffices to say that from the above two judgments of the Federal Court, interpreting the term “precepts of the religion of Islam” is a task fraught with difficulty, made all the more so each time Islamic scholars or experts have to be called upon to assist the court in determining the issue. The difficulty is further compounded when the experts have differing opinions among themselves, leaving the court to decide whose opinion to follow. With respect, in the author’s view, the two judgments are not useful as precedents, as they do not provide clear guidelines for future courts to follow in order to determine what is meant by “precepts of the religion of Islam”.

Be that as it may, there is yet another problem. Item 1 of the State List in the same breath also provides that the *Syariah* Courts shall have *no* jurisdiction to deal with offences connected with the matters enumerated in Item 1 *except in so far as conferred by federal law* (i.e. by an Act of Parliament). This means that, in the absence of federal law (such federal law is an instance where Parliament is conferred the power to legislate over a State matter), such offences including “precepts of the religion of Islam” offences can only be dealt with by the normal/civil courts (for example, the Magistrate Courts or the Sessions Courts); and not by the *Syariah* Courts. In other words, in order for the *Syariah* Courts to have jurisdictions over precepts of the religion of Islam offences, Parliament must first pass an Act to specify what kind of offences are deemed by Parliament to be offences against the precepts of Islam and to formally confer upon the *Syariah* Courts the jurisdiction to deal over such offences; thereafter, followed by the State Legislature passing a State Enactment adopting the offences. In my view, the intention of the restrictive provision in Item 1 of the State List is for Parliament to exercise control over the

State Legislatures in creating such offences and over the Syariah Courts in exercising jurisdiction over the same.

In spite of this constitutional restriction imposed on the State Legislatures and the Syariah Courts by Item 1 of the State List, yet, perhaps due to oversight, after Independence (that is to say, after the coming into force of the Federal Constitution on 31 August 1957), Parliament did not take prompt action to pass an Act to confer on the Syariah Courts jurisdiction to deal with precepts of the religion of Islam offences. It was only some eight years later, in 1965, that Parliament passed the Syariah Courts (Criminal Jurisdiction) Act 1965 (Revised 1988) (**Act 355**) to confer on the Syariah Courts the jurisdiction to deal with precepts of the religion of Islam offences.<sup>8</sup>

However, with respect, the author observes a serious shortcoming in the drafting of the Act. It is to be noted that although the Act purports to confer jurisdiction on Syariah Courts to deal with precepts of the religion of Islam offences, it does not *specify* the offences over which the Syariah Courts will have jurisdiction. Section 2 of the Act merely provides in general terms, effectively parroting the wording of Item 1 of the State List:

**2. Criminal Jurisdictions of Syariah Courts**  
**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 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 with any combination thereof. [Emphasis added.]**

Note the words:

*... are hereby conferred jurisdiction in respect of offences against precepts of the religion of Islam...*

Instead, Act 355 only focuses on the *punishment* aspect of the offences by limiting the powers of the Syariah Courts to impose imprisonment up to a maximum of three years only; to impose a fine up to a maximum of RM5,000 only; and to order whipping up to a maximum of six strokes only. The effect of this legislative deficiency is this: Parliament is seen to be merely leaving it to the State Legislatures to determine what are offences against the precepts of the religion of Islam over which the Syariah Courts have jurisdiction, instead of Parliament itself specifying the offences. Is this the intention of Item 1 of the State List?

It is the author's submission that this cannot be the intention. The intention of the Federal Constitution is for *Parliament* to specify the precepts of the religion of Islam offences so that Parliament would have control over the State Legislatures in creating such offences and over the Syariah Courts when it comes to exercising jurisdiction over such offences. In other words, what we see here is a situation where Parliament has — perhaps unintentionally — abdicated its constitutional responsibility over an important subject matter in favour of the State Legislatures.

<sup>8</sup> In the meantime, the Syariah Courts of the States had been unlawfully exercising jurisdiction over precepts of Islam offences, and so in order to 'validate' such purported exercise of jurisdiction by the Syariah Courts, Act 355 contains a 'validation' provision in the form of s 3. The provision reads:

**Validation**

All offences under Islamic law which before the commencement of this Act in relation to the states of West 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 shall be deemed to have been validly tried as if jurisdiction in respect thereof had been conferred on those Courts by Federal law.

It is imperative that Parliament by federal law should specify the precepts of the religion Islam offences, instead of leaving it to the State legislatures; or, instead of leaving it to judicial interpretation. If Parliament were to specify the offences, Parliament would not only be carrying the role as expected of it by the Constitution, but there will also be uniformity in the laws of the States as far as offences against the precepts of the religion of Islam are concerned. And the judiciary will be spared the difficult task of determining whether a particular offence is an offence against the precepts of the religion of Islam. Further, members of the public will be able to know in advance what offences are deemed by Parliament to be offences against the precepts of the religion of Islam. Of course, it is to be acknowledged that the task of specifying the offences in the Act will be a formidable one for Parliament.

Since under Item 1 of the State List (List II of the Federal Constitution) it is the duty of Parliament, by an Act of Parliament, to list out and specify what are the precepts

of the religion of Islam offences for the purpose of the State Syariah Courts, unless and until Parliament does so, and the State Legislatures subsequently adopting the offences, the State Syariah Courts will not have the jurisdiction to deal with such offences.

In this regard, it must be pointed out that there is lack of uniformity among the States in specifying offences against the precepts of the religion of Islam. Take, for instance, cross-dressing, which is supposed to be an offence against the precepts of the religion of Islam. Yet, the States differ in defining such an offence. Some, such as Negeri Sembilan,<sup>9</sup> Sabah, Perlis, Kedah and Kelantan, deem cross-dressing *per se* an offence. The others (i.e. the majority States) do not deem cross-dressing *per se* an offence. They only deem it so if the cross-dressing is for an immoral purpose.<sup>10</sup> In Melaka, cross-dressing is an offence only if it is done without any reasonable cause, thus implying that if cross-dressing is with a reasonable cause (for example, a person cross-dresses because he/she is a transgender), then it is not an offence.<sup>11</sup>

9 Section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 provides:

**Male person posing as a woman.**

Any male person who, in any public place, wears a woman attire and poses as a woman shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.

In *Muhamad Juzaili Mohd Khamis & Ors v State Government of Negeri Sembilan & Ors* [2015] 1 CLJ 954 (“the transgenders’ case”) the Court of Appeal held that this provision was null and void by reason of being contrary to Arts 5, 8, 9 and 10 of the Federal Constitution. It was an undisputed fact before the court that the transgenders/appellants were persons with an incurable medical condition called “gender identity disorder” (GID). “A female soul trapped in a male’s body”. On appeal to the Federal Court by the State Government of Negeri Sembilan, the judgment of the Court of Appeal was set aside by the Federal Court, supposedly on a technicality: that by reason of Art 4 Clauses (3) and (4) of the Federal Constitution, the constitutional law issues raised could only be heard before the Federal Court, and not before the High Court or the Court of Appeal (see *State Government of Negeri Sembilan & Ors v Muhamad Juzaili Mohd Khamis & Ors* [2015] 8 CLJ 975). However, in the recent case of *Alma Nudo Atenza v PP & Anor* [2019] 5 CLJ 780, the Federal Court (a panel of nine judges) held that the judgment of the Federal Court in *State Government of Negeri Sembilan & Ors v Muhamad Juzaili Mohd Khamis & Ors*, in setting aside the judgment of the Court of Appeal, had erred in its interpretation of Art 4 Clauses (3) and (4) and hence the Federal Court’s judgment was held to be *per incuriam*.

10 For example, s 30 of the Syariah Criminal Offences (Selangor) Enactment 1995 provides:

**Male person posing as a woman.**

Any male person, who in any public place, wears a woman’s attire or poses as a woman for immoral purposes shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.

11 Section 72 of the Enakmen Kesalahan Syariah (Negeri Melaka) 1991 provides:

**Lelaki berlagak seperti perempuan.**

Seseorang lelaki yang memakai pakaian perempuan dan berlagak seperti perempuan di mana-mana tempat awam tanpa alasan munasabah adalah merupakan suatu kesalahan dan apabila disabitkan kesalahan boleh dikenakan hukuman denda tidak melebihi satu ribu ringgit atau dipenjarakan selama tempoh tidak melebihi enam bulan atau kedua-duanya sekali.

Taking the matter further, some States deem cross-dressing an offence only if the cross-dresser is a male Muslim. The State Enactments in question do not mention anything about cross-dressing by a female Muslim, implying that cross-dressing by a female Muslim is permissible. But, the fact is, under Islamic law, the prohibition against cross-dressing does not apply to Muslim males only. The prohibition applies to both male and female Muslims. Thus some States prohibit both males and females from cross-dressing.<sup>12</sup>

However, it is acknowledged that it will be a monumental task for Parliament to list out and specify the offences against the precepts of the religion of Islam. Not only that, the offences listed out and specified must be acceptable to the States, as matters pertaining to Islam are within the jurisdiction of the States; and the creation of such offences will have to be adopted by the State Legislature eventually.

In this regard, the author is of the opinion that the Conference of Rulers<sup>13</sup> must be invited to play a leading role in the formulation of such an Act, bearing in mind that Islam is essentially a State matter and Their Highnesses, the Sultans, are the heads of Islam in their respective States. It is suggested that a taskforce comprising Islamic law experts be appointed to assist the Conference of Rulers in formulating a draft Bill for Parliament to consider.

**LH-AG**

#### About the author



**Dato' Seri Mohd Hishamudin Yunus** (mhy@lh-ag.com) served 23 years on the Bench and wrote close to 750 judgments in the High Court and the Court of Appeal before retiring in 2015. He is a consultant with Lee Hishammuddin Allen & Gledhill.

12 For example, s 92 of the Sabah Syariah Criminal Offences Enactment 1995 provides:

**Male posing as woman or vice versa.**

Any male person who, in any public place, wears a woman's attire and poses as a woman or vice versa shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.

13 Article 38 of the Federal Constitution spells out the functions of the Conference of Rulers