Available online at
https://borneoakademika.uitm.edu.my

Borneo Akademika
Volume 9(1) June 2025, 111-136

e-ISSN: 2735-2250

Exploring The Legal Framework of Islamic Offences in Malaysia: A Constitutional and Judicial Analysis

Izmi Izdiharuddin B Che Jamaludin Mahmud[1*], Che Mohd Hilmi Safiuddin[2]

[1]*Faculty of Law, Universiti Teknologi MARA, Raub Campus Pahang Branch*
[2]*Faculty of Civil Engineering, Universiti Teknologi MARA Pulau Pinang Branch*

*izdiharuddin@uitm.edu.my

Received Date: 20 April 2025
Accepted Date: 1 May 2025
Published Date: 30 June 2025

ABSTRACT

Malaysia is a multicultural and multiethnic country characterised by a diverse range of religious beliefs, with Islam as the state religion. Despite Islam's status, Malaysia's government structure is grounded in British-style secularism, where the law is human-made rather than derived from a divine source. As such, Malaysia is not a theocratic state. At the same time, it is not hostile to religious inclination. The Federal Constitution allows federal and state legislatures to enact Islamic offences, as Item 1 of the State List of the Ninth Schedule outlines. However, a vague and often misunderstood legal framework surrounding Islamic offences under Item 1 has led to contentious debates and legal challenges. This Article will examine the issues related to the legal framework of Islamic offences in Malaysia and explore potential solutions to address the ongoing uncertainty.

Keywords: Federal Constitution; Islamic law; Item 1 of the State List of the Ninth Schedule; secular country; theocratic state

INTRODUCTION

A religious law is based on divine sources, applies only to those who follow the same belief, and its authority is generally derived from textual scriptures. In Malaysia, this concept is reflected in Islamic law, which is one of the country's sources of law. In defining Islamic law, the juristic view holds that Islamic law, or *Syariah*, refers to "the sum total of Islamic teachings and the system revealed to Prophet Muhammad (s.a.w), recorded in the Quran and deducible from the Prophet's divinely guided lifestyle, known as the Sunnah" (Akram, 2025). Its legitimacy is based on various sources of Islamic law, but the most widely accepted by Islamic jurists are (Akram, 2025):

(i) *Al-Quran*: Textual scripture containing God's speech revealed to the Prophet Muhammad (s.a.w) in Arabic;
(ii) *Al-Sunnah*: The actions or approvals of Prophet Muhammad (s.a.w), with the recorded actions or approvals of the Prophet compiled by Islamic scholars, known as *Hadith*;
(iii) *Ijma*: Consensus among Islamic jurists; and
(iv) *Qiyas*: Analogical deduction based on the text found in the Al-Quran or *Al-Sunnah*.

Every Muslim must comply with Islamic law, or it would be construed as a violation of divine commands. One of the types of Islamic law is Islamic offences, which comprises:

a) *Hudud*: A compilation of offences concerning *zina* [Fornication], *qazaf* [False accusation of fornication], *sariqah* [Theft], *hirabah* [Banditry], *shurb al-khamr* [Alcohol consumption], *bughah* [Rebellion], and *riddah* [Apostasy];
b) *Qisas*: Homicide and bodily harm; and
c) *Takzir*: A violation for which the punishment is not explicitly prescribed in the textual scriptures.

However, the definition of Islamic law differs from a Malaysian legal perspective. It can be defined as a body of rules based on Islamic principles but subject to restrictions imposed by written laws. This definition reflects that the legitimacy of Islamic law in Malaysia is grounded in the Federal Constitution, which governs the authority to enact laws.

The Federal Constitution contains at least two provisions allowing Islamic principles into the criminal law. The first, Article 11 (4), stipulates that a non-Muslim is prohibited from propagating their religion to Muslims if the legislative bodies enact a law to restrict or control such propagation. The second one is Article 74. Article 74 divides the power to make laws into three categories: the Federal, State, and Concurrent Lists. These categories are stated in the Legislative Lists of the Ninth Schedule.

The Legislative Lists in the Ninth Schedule outline three ways to create Islamic offences. The first method involves ordinary laws that incorporate Islamic principles. The second method is based on explicit matters in the Federal List, such as Item 1 (h) [Pilgrimages to places outside Malaysia] and Item 4(k) [Ascertainment of Islamic law for federal law]. However, the first and second methods have limitations, as any laws incorporating Islamic principles must apply universally, regardless of religious belief. If a law were to apply only to a specific religious group, it would be invalid, as it would violate the equality clause under Article 8 (2).

Lastly, it is based on matters in the State List. Item 1 of the State List recognised the power to make Islamic offences solely for Muslims, provided these laws are consistent with the "precepts of that religion." Therefore, the constitutional interpretation of Islamic offences under Item 1 of the State List must align with the theological sources of Islamic law.

However, the laws of Malaysia are grounded in the doctrine of constitutional supremacy. According to Article 4 (1) of the Federal Constitution, the Federal Constitution is the supreme law of Malaysia. As a result, the enactment of laws under Item 1 of the State List is subject to the limitation imposed by the Federal Constitution. One limitation is the preclusion clause stipulating "except in regard to matters included in the Federal List." Therefore, Islamic offences under Item 1 of the State List are invalid if they fall within the matters covered by the Federal List.

Early judicial decisions, such as Sukma Darmawan v Ketua Pengarah Penjara Malaysia [1999] 1 MLJ 266 (CA), Sulaiman Takrib v Kerajaan Negeri Terengganu [2009] 6 MLJ 354 (FC), and ZI Publications v Kerajaan Negeri Selangor [2016] 1 MLJ 153 (FC), suggested that Islamic offences under Item 1 of the State List would not be subject to the Federal List's preclusion clause criterion if the offences applied exclusively to Muslims. This interpretation is consistent with the nature of the Federal Constitution, which mandates that laws enacted under the Federal List must apply universally except Item 6 (e), which is similar to Item 1 of the State List. Given that a law under the Federal List can't apply exclusively to Muslims, those decisions gave a signal that it is possible to create Islamic offences under Item 1 of the State List in various areas, as long as they apply only to Muslims.

However, recent Federal Court decisions, such as Iki Putra Mubarrak v Kerajaan Negeri Selangor [2021] 2 MLJ 323 (FC) and Nik Elin Zurina Nik Abdul Rashid v Kerajaan Negeri Kelantan [2024] 2 MLJ 150 (FC), have altered this legal landscape. These decisions assert that an Islamic offence under Item 1 of the State List will be declared invalid if the subject matter of offences falls within matters in the Federal List, regardless of whether Islamic offences apply solely to Muslims. As a result, there is now uncertainty regarding the extent to which the power to make Islamic offences under Item 1 of the State List.

Therefore, this paper aims to examine the extent to which the Federal Constitution permits Islamic offences and explore potential solutions to resolve the ongoing issues surrounding their implementation.

LITERATURE REVIEW

The literature review focuses on the five perspectives: (1) Islamic law in the Malay Peninsula and Borneo before the Federal Constitution, (2) the position of Islam in the Federation of Malaya and Malaysia Agreements, (3) the role of Islam in the Federal Constitution, (4) Article 11 of the Federal Constitution, and (5) Article 74 and Legislative Lists of the Ninth Schedule of the Federal Constitution.

Islamic law in the Malay Peninsula and Borneo before the Federal Constitution

This topic is divided into three subtopics: (1) the glory of Islamic law during the Malay Kingdoms, (2) the decline of Islamic law during British rule, and (3) the reconciliation between Islamic and English laws during British rule.

The glory of Islamic law during the Malay kingdoms

In the earliest civilisations of Southeast Asia, the Malay Peninsula and Borneo were governed by various Malay Kingdoms, and their legal systems were a fusion between custom and Islam (Fang, 2007). The Malacca Sultanate (1400–1511) is the apex of civilisation in the Malay Peninsula. The Malay language is the region's *lingua franca*, mainly due to Malacca's role as a prominent international port (Zarina, 2023). Thus, it becomes a benchmark for Malay kingdoms concerning legal rules and structures of government (Hasanuddin et al., 2022).

The literature has conflicting opinions about the first Malacca Sultan, who converted to Islam. The first view provided that Parameswara (1400-1414) was the first Muslim Malacca Sultan and changed his name to Sultan Megat Iskandar Syah / Iskandar Shah (1414-1424) (Wey & Latif, 2018). The second view is that Sultan Megat Iskandar Syah / Iskandar Shah is the son of Parameswara and converted to Islam (Zahirwan et al., 2012). Regardless of the views, the consequence of conversion influenced the Malay population as the subject of the Sultan adhered to Islam (Azhar, 2019).

Generally, the Malacca Sultanate practices an absolute monarchy wherein the Sultan wields absolute power (Nurdiyawati & Adnan, 2021). However, a partial separation of power exists. In terms of the executive body, several vital officials were established, such as *Bendahara* (Prime Minister), *Temenggung* (Chief of Public Security), *Laksamana* (Chief of Navy), *Penghulu Bendahari* (Chief of Finance), *Shahbandar* (Port Master), and *Mandulika* (Governor for the colony) (Monir, 2023). Meanwhile, concerning the judiciary, the Sultan had appointed *Qādīs* as judges and advisers in religious matters, like *Qādī* Yusuf and *Qādī* Menawar, who are mentioned in the Malay Annals (Boon & Rahman, 1998).

There are two sets of sources of law during the Malacca Sultanate. The first one is the unwritten law of *Adat Temenggung,* which refers to the Sultan's decree (Hasbullah & Najibah, 2009). The second is the written law, *Undang-Undang Melaka,* also known as *Hukum Kanun Melaka.* It is a combination of civil and criminal rules and was compiled during the reign of Sultan Muhammad Syah (1422/1424-1444) (Fauzi et al., 2018).

Hukum Kanun Melaka is deeply based on Islamic law, which follows the *Shafi'i* school. For instance, Chapter 40 of *Hukum Kanun Melaka* provides evidence that the rule to prove the offence of sodomy is similar to the offence of fornication, which requires four male Muslim witnesses (Paizah, 2007; Ali, 2018). It is not a pure coincidence that the Islamic education system during the Malacca Sultanate was based on sources from Shafi'i jurists such as al-Ghazali, al-Rafi'i, al-Nawawi, al-Isfihani, al-Shirazi, al-Asnawi, and al-Subki (Idris & Sarina, 2007).

Meanwhile, the position of Islamic law in Borneo is similar to that of the Malay Peninsula. Most Borneo territories were initially part of the Brunei Sultanate (Awg, 2022). It was recorded that Islam was established in Brunei in the fourteenth century, as Awang Alak Betatar, or his Muslim name Sultan Muhammad Shah (1363–1402), was the first Sultan who converted to Islam (Brahim & Kathrina, 2022). The Islamic law was codified into a written law called *Hukum Kanun Brunei*

(Norfaezah, 2022). Several provisions in the *Hukum Kanun Brunei* resemble *Hukum Kanun Melaka,* making Brunei adhere to the *Shafi'i* school (Noranizah et al., 2023).

The decline of Islamic law during British rule

The government structure in the Malay Kingdoms underwent significant changes with the arrival of European colonial powers. In terms of the Malay Peninsula, it had three European colonial masters: Portugal, the Dutch, and Britain (Nordin, 2002). The most influential colonial master was Britain, which was the last colonial master, and it colonised the Malay Peninsula for more than 150 years. It started when Francis Light, a British citizen, took possession of the island of Penang from the Kedah Sultanate in 1786 under the aegis of the East India Company (Azam, 2000).

Concerning Borneo, European colonialism began when the Brunei Sultanate relinquished its territory to James Brooke, another British citizen, in 1841, making him the first Rajah of a territory known as Sarawak (Noranizah & Saimi, 2024). Meanwhile, the Treaty of Labuan was signed on 18.12.1846, allowing Britain to obtain Labuan Island as a colony. James Brooke was installed as Governor of Labuan in addition to his earlier position as Rajah (Bashiran & Asiah, 2009). Later, his descendant Charles Vyner Brooke, the third Rajah, ceded Sarawak to the British in 1.7.1946 (Ling, 2019).

Later, part of the Borneo region, known today as Sabah, was initially leased to the American consul, Charles Lee Moses, on 11.8.1865 (Awg, 2022). The colonisation was changed hands to several entities: American Trading Company of Borneo, Baron von Overbeck, Alfred Dent, and British North Borneo Company (Galbraith, 1965). Overbeck and Dent are the most influential among colonists as they signed an agreement with the Sultan of Brunei on 29.12.1877 and the Sultan of Sulu on 22.1.1878 for a cession of money to control Sabah's territories. The agreement was signed with the Sulu Sultanate since there was an allegation that Brunei gave up control of part of the territory to Sulu in 1658 as a reward for assisting the Bruneian Civil War (Amrullah et al., 2018). Later, Dent, a British citizen, was allowed to establish a royal charter company known as the British North Borneo Company on 1.11.1881, which had the right to administer Sabah and transfer to the said company. Lastly, the British government executed an agreement on 26.6.1946, wherein the company ceded all its rights to the British (Rosdianah & Arshad, 2020).

The control of British colonial authorities in Southeast Asia led to the adoption of English law, primarily to ensure the effective administration of justice in the region. This implementation of English law occurred in three key ways: (1) the introduction of written laws modelled after English legal principles, (2) the establishment of a court system resembling the English judiciary, and (3) the adaptation of English law to suit the specific conditions of the territory. As a result, the local law, like Islamic law, was marginalised. The British perceived Islamic law as unfamiliar and incompatible with European legal and administrative systems (Badlihisham, 2012).

The most well-known case can be illustrated in Re Maria Huberdina Hertogh [1951] 1 MLJ 164 (SGCA). During World War II, Maria's father became a prisoner of war in the Dutch East Indies, and her foster mother, Che Amina, raised her in the Muslim faith for over seven years. Maria later married Inche Mansoor with her consent. However, her father sought custody, arguing that he never agreed to let Che Amina care for Maria and claimed the marriage was invalid under Dutch law. The court sided with the father, even though the marriage was valid under Islamic law.

The reconcilation between Islamic and English laws during British rule

However, certain aspects of Islamic law have been recognised, mainly due to the British shift in its policy. Initially, British rule was characterised by military incursions and direct control, as evidenced during the Naning War (1831-1832). The British spent £100,000 on the conflict, only to secure a meagre annual revenue of just $100 (Chew, 1998). This costly experience led the British to reconsider their approach, shifting towards greater political influence and cooperation with the Malay population, rather than relying solely on military force (Ghazali, 2024).

Thus, most Malay kingdoms in the Malay Peninsula agreed with the British, establishing British protectorates and allowing the British to appoint residents (Nisar, 2023). The purpose is to

advise all matters the Sultan must follow, except Malay religion and customs, while providing protection and acknowledging the Sultan's status as the state's leader. This statement is reflected in the Pangkor Treaty of 1874, as the clause in the treaty provided that Islam and Malay customs are matters within the Sultan's discretion and not the British advisor.

A few examples of written laws wherein elements of Islamic law were introduced, such as (Ahmad, 1975; Paizah, 2007; Paiva, 2022):

(i) Perak: Adultery by Muhammadan 1894;
(ii) Sabah: Muhammadan Customs Proclamation 1902;
(iii) Federated Malay States: the Muhammadan Laws Enactment 1904, which was codified into Chapter 198, Revised Law of 1935, and Courts Enactments 1900 and 1918 to establish a Court of Kathis and Assistant Kathis;
(iv) Sarawak: *Undang-Undang Mahkamah Melayu Sarawak* 1915; and
(v) Kelantan: Muhammadan Offences Enactment 1938.

There is a circumstance in the colonial court that recognises the principle of Islamic law. One of them is in the case of Ramah Ta'at v Laton Malim Sutan [1927] 1 LNS 13 (CA), where a dispute arose among wives over the inheritance of their husband. One wife claimed her share of the *harta sepencarian* [property division], and the court initially awarded her half of the husband's property. On appeal, the court ruled that there was an error in law as the trial judge had relied too heavily on an expert witness to prove the existence of Islamic law. The court stated that the judge should have independently determined whether the principle of *harta sepencarian* was part of the unwritten law in force in Selangor.

The position of Islam in the Federation of Malaya and Malaysia Agreements

The international political environment underwent significant changes after World War II, marking the beginning of the decline of colonial rule dominance. Key factors driving this shift were the aftermath of the war, coupled with the rising influence of international law, particularly the principle of self-determination, which advocated for the right of peoples to govern themselves free from external interference (Represa, 2019). Thus, several countries under Western powers' control began to demand independence. The position is similar to that of Britain. As the world moved towards decolonisation, Britain became increasingly unable to maintain its hold on regions like Southeast Asia, where local populations pushed for sovereignty (Lowe, 2009).

In the Malay Peninsula, the political climate began to shift in response to these changes. The *Parti Perikatan* (Alliance Party), later known as *Barisan Nasional,* emerged as a central force advocating for self-rule from British control (Ayu et al, 2019). The Alliance Party played a crucial role in negotiating for greater autonomy. These negotiations between the Alliance Party and the British led to significant treaties that laid the foundation for the eventual independence of the Malaya states. The country is known as the Federation of Malaya. The political landscape shifted further when Sabah and Sarawak joined the Malaya states to form Malaysia.

Three treaties led to this nation's existence: the Federation of Malaya Agreements of 1948 and 1957 and the Malaysia Agreement of 1963. Thus, this topic is divided into two subtopics: (1) the Federation of Malaya Agreements of 1948 and 1957, and (2) the Malaysia Agreement of 1963.

The Federation of Malaya Agreements of 1948 and 1957

The Federation of Malaya Agreements of 1948 aimed to replace the unpopular Malayan Union due to unrestricted *jus soli* citizenship (Smith, 1994). The 1948 agreement established the government structure as a continuation of the Federated Malay States, with federalism as its foundation. Thus, there will be two sets of government, federal and state. Concerning Islamic law, the 1948 agreement allows the state to enact laws concerning Islamic law and Malay customs, but most of the legislative power remains vested at the federal level (Ahmad, 1981).

Meanwhile, the Federation of Malaya Agreement 1957 was concluded due to the desire for independence among Malay states (Ahmad, 1974). The negotiation on the structure of the Federation of Malaya was recorded in the Report of the Federation of Malaya Constitutional

Commission 1957. The outcome of these discussions led to the creation of a codified constitution of the nation, known as the Federal Constitution.

The Reid Commission highlighted two points regarding the status of Islam. The first concern is whether the recognition of Islam as a state religion can affect the civil liberty of non-Muslims. Most are non-Malay and brought by the British for economic reasons (Rathakrishnan, 2017). The Reid Commission addressed it by stating that the structure of the Malaysian government remains a secular country, and it will not impede the rights of non-Muslims from practising their religion. In this context, the term "secular" refers to a state that takes a neutral stance on religion, where the legal framework is not based on textual scriptures, and there is no obligation to create laws grounded in religious principles unless explicitly intended by lawmakers (McLean & Peterson, 2011).

This statement is reflected in Articles 3 (1), 3 (4), and 4 (1) of the Federal Constitution. While Article 3 (1) designates Islam as the state religion, it emphasises that this recognition does not impede the right of non-Muslims to practice their beliefs. Article 4 (1) further establishes the Federal Constitution as the supreme law of Malaysia. Thus, although Islam's status has been acknowledged, it does not hold legal supremacy over other constitutional provisions. As such, the Federal Constitution, a human-made law, remains the highest law in Malaysia. Furthermore, Article 3 (4) of the Federal Constitution reinforces that the status of Islam in the Federation will not go beyond other provisions of the Federal Constitution. In other words, while Islam is the state religion, laws are valid even if they contradict Islamic principles.

The authoritative decision of this matter is in Che Omar Che Soh v PP [1988] 2 MLJ 55 (SC). The case concerns whether the former Firearms (Increased Penalties) Act 1971, which imposes the death penalty, is inconsistent with Islamic law. The Supreme Court (currently known as the Federal Court) dismissed the accused's arguments and held that Article 3 cannot be used to justify invalidating written law. The purpose of Article 3 (1) is only to permit the government to adopt Islamic rituals and ceremonies if the policy does not infringe on non-Muslims practising their religions in peace and harmony. Thus, Article 3 (1) is regarded as a symbolic feature with no binding legal consequences (Moustafa, 2008).

The decision in the Che Omar Che Soh case on Article 3 (1) has faced significant criticism for overlooking the deep-rooted historical significance of Islam in Malaysia. Critics argue that the ruling undermines Islam's long-established role within the country's legal and cultural framework (Ahmad, 2021). Additionally, it dismisses the relevance of Islamic offences during British colonisation (Imam, 1994a). Some also contend that the judge, trained in English law, may not have fully grasped the historical and cultural context of Islam in Malaysia (Imam, 1994b).

Nevertheless, recent appellate court decisions have shown an apparent inclination towards Che Omar Che Soh's decision. As a ruling made by the highest court, it has significantly impacted the interpretation of Islam within the context of the Federal Constitution. In Malaysia, decisions made by the Federal Court are binding on subsequent courts through the common law principle of *stare decisis* (precedent). This principle, derived from English law, dictates that "the court must follow earlier judicial decisions when the same points arise again in litigation" (Garner, 2009).

This principle is embedded in the Malaysian legal system in three key ways. First, the definition of "law" under Article 160 (2) includes common law as part of the legal framework. Second, Part IX of the Federal Constitution adopts a court structure similar to the English judiciary. The English judiciary emphasises the hierarchy of courts, where decisions from lower courts can be appealed. Finally, the Civil Law Act 1956 enables the application of common law to civil cases, further solidifying its integration into Malaysian law.

Thus, the decision in Che Omar Che Soh established a binding precedent that must be followed when addressing issues related to the limits of Islamic law in the country. Several cases highlight this position, emphasising that matters in Item 1 of the State List of the Ninth Schedule, like Syariah court and Islamic offences, do not have jurisdiction over specific issues, regardless of Islam's status as the state religion. These cases include:

(i) ZI Publications v *Jabatan Agama Islam Selangor* [2020] 9 CLJ 774 (CA): A company published a book contrary to Islamic injunctions, which led to a raid by the Selangor Islamic Religious Department on the company's office and the confiscation of several copies of the

book. The Selangor Islamic Religious Council later prosecuted the company's director at the Syariah court as he was a Muslim. The issue is whether the prosecution before the Syariah court is valid for activities committed by the company. The court held that it was invalid as the company's liability was separated from its director. Furthermore, Islamic offences and Syariah court under Item 1 only apply to natural persons and do not extend to legal entities like a company. The basis is that a company cannot profess a religion.

(ii) Rosliza Ibrahim v *Kerajaan Negeri Selangor* [2021] 2 MLJ 181 (FC): A woman disputes her religious status of Islam. Her mother was a non-Muslim Chinese born out of wedlock to a Malay man, Ibrahim. The dispute occurred when Ibrahim applied for her identification card and inserted Islam as her religion and Malay as her race. The key issue was whether the Syariah court had jurisdiction over this matter. The court ruled that the Syariah court did not have jurisdiction. It is because the case involves an administrative error by a public authority, specifically a mistake in registering her as a Muslim. Consequently, only a civil court could address matters related to administrative law since it is not part of Item 1.

(iii) *Ketua Pegawai Penguatkuasa Agama* v Maqsood Ahmad [2021] 1 MLJ 120 (CA): Selangor Islamic Religious Department raided a premise used by the Ahmadiyya Muslim Community. The basis of the raid is that it is alleged that the Ahmadiyya erected buildings to use them for Islamic activities without written permission and, therefore, contrary to Islamic law in Selangor. However, Ahmadiyya is a deviant religious group and not a Muslim, even though its beliefs have similarities with Islam. In Selangor, *fatwas* (legal rulings) declare the status of Ahmadiyya as non-Muslims. The court held that the raid was illegal as Item 1 does not grant the Islamic religious department the power to extend its jurisdiction against a non-Muslim.

(iv) *Pendaftar Mualaf Negeri Perlis* v Loh Siew Hong [2025] 2 MLJ 324 (FC): This case concerns the jurisdiction of the Syariah court over the unilateral conversion of children. In this case, the children were converted to Islam without the mother's consent. The Federal Court ruled that the Syariah court does not have jurisdiction. The court reasoned that Article 12 (4) of the Federal Constitution, which governs the religious status of minors (below 18 years old), is based on the parent or guardian's religious belief. The term "parent" was interpreted under Article 12 (4) to mean both the father and the mother, meaning their approval is necessary for a minor's conversion to be valid. Consequently, the Registrar of Mualafs, Perlis, was found to have committed an administrative error. Thus, the matter falls within the administrative law, which is not part of the Syariah court's jurisdiction.

Additionally, the Reid Commission specifies that the Federation of Malaya's government structure was modelled after the British system. The British system is based on the common law principle of the separation of powers (Anderson v Secretary of State for the Home Department, 2002). Under this principle, the government is divided into three branches: (1) legislative, (2) executive, and (3) judiciary. The legislative body in Britain, Parliament, is the most significant among these branches, as all laws must originate within this body. The law made by Parliament is known as the Act of Parliament. Parliament, controlled by human beings, can make an Act of Parliament concerning any matter without restriction, unless it imposes such restrictions on itself (Miller v Prime Minister, 2019).

Thus, the power to make laws is vested in a human-made legislative body, rather than being derived from a textual scripture (Raza et al, 2024). Furthermore, when Parliament makes laws, it is not obligated to base its decisions on theological principles. An example is the case of British Railways Board v Pickin [1974] 1 All ER 609 (UKHL), where the issue was whether a private citizen could disregard the application of the British Railways Act 1968, an Act of Parliament. Lord Reid stated in affirming the validity of the Act:

> *"I must make it plain that there has been no attempt to question the general supremacy of Parliament. In earlier times, many learned lawyers seemed to have believed that an Act of Parliament could be disregarded insofar as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was finally demonstrated by the revolution of 1688, any such idea has become obsolete."*

Consequently, both the executive and judiciary bodies must observe the law made by Parliament. The executive body, the Cabinet, must exercise its discretionary power within the limits

conferred by Acts of Parliament (Izmi & Suria, 2022). Meanwhile, the judiciary, which adopts the common law system, must interpret the law based on the intention of the Parliament (Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG, 1975). Additionally, no principle of statutory interpretation within the common law system requires English courts to consider a theological perspective when interpreting laws (Bowman v Secular Society, 1917).

Meanwhile, the separation of powers in Britain is almost identical to the Malaysian experience. The Federal Constitution establishes that the Federation of Malaya follows a federal system of government, with two sets of governments operating within one territory.

On the federal level, Article 66 (1) of the Federal Constitution grants the power to make laws to the federal legislature, Parliament. Meanwhile, the executive authority is stated in Article 39, which is de facto led by the Cabinet/Federal Government. The judiciary, which is comprised of civil courts, is mentioned in Part IX. Meanwhile, at the state level, Section 11 (1) of Part I of the Eighth Schedule grants the power to make laws to the State Legislative Assembly. Section 2 of Part I of the Eighth Schedule establishes the Executive Council/State Government as the state's executive authority.

At both levels of government, no provision mandates adherence to a theological source in executing their functions. The court decision has further strengthened the argument that the government structure established by the Federal Constitution is a secular country.

A good example is in Commissioner for Religious Affairs, Terengganu v Tengku Mariam [1970] 1 MLJ 222 (FC). The facts are that there was a dispute regarding the administration of *wakaf* lands. *Wakaf* refers to the practice of surrendering owned property for the use and benefit of the public (Malaysian government, n.d.). The parties agreed to settle the dispute before the Mufti (Islamic jurist), who issued a *fatwa* (legal ruling) that the *wakaf* was valid, relying on the Hanafi school. However, one of the family members disagreed with the decision and sued in the High Court. The High Court in [1969] 1 MLJ 110 (HC) and the Federal Court in [1970] 1 MLJ 222 (FC) ruled that the *fatwa* does not bind civil courts. This is because the Terengganu Administration of Islamic Law Enactment, 1955, the legislation empowering the Mufti to issue *fatwas* at that time, does not contain provisions requiring civil courts to comply with such *fatwas*.

The second concern relates to the state's power to legislate Islamic offences. The Reid Commission recommended that this power be retained under the Federal Constitution, subject to two conditions. The first condition is that the authority to legislate criminal law should predominantly remain at the federal level, in line with the Federal Constitution's framework, which emphasises "a strong central government with a measure of autonomy to the states." This recommendation has been reflected in Item 4 of the Federal List (criminal law) for the Parliament and Item 1 of the State List (Islamic-related laws) for the State Legislative Assembly.

The second condition requires adherence to the principle of a fair hearing, meaning that there must be written laws to facilitate prosecution, and any individual charged must be tried in a court of law. This ensures the process is transparent, just, and under legal standards. A notable example is the Syarie Prosecutor of Selangor v Mohd Asri Bin Zainul Abidin, Case No: 10007-137-0108-2009 (SYSC). In this case, the accused was prosecuted before the Syariah court for teaching without a *tauliah* (licence) offence in Selangor. The court ruled that the accused was not guilty due to the prosecution's failure to present corroborative evidence, such as a video recording, to substantiate the claim of the accused teaching without a *tauliah*.

The Malaysia Agreement of 1968

Meanwhile, the Malaysia Agreement 1963 is an international treaty that enabled Sabah and Sarawak to become part of Malaysia. The Malaysia Agreement is based on findings made by the Cobbold Commission, and it was recorded in the Report of the Inter-Governmental Committee, 1962. Several provisions in the agreement pertain to Islam, including the role of the *Yang di-Pertuan Agong* as the head of Islam in Sabah and Sarawak. It also grants these states the right to establish an Islamic Religious Council to assist and advise the *Yang di-Pertuan Agong* on Islamic affairs. This statement is reflected in Article 3 (3) of the Federal Constitution and state law, such as the *Majlis Islam Sarawak* Ordinance 2001 and the *Majlis Ugama Islam Negeri Sabah* Enactment 2004.

At the same time, there are arrangements related to Muslims, such as criteria to provide Muslim education and propagation of any religious doctrine or belief among Muslims in Sabah and Sarawak, which are included in Articles 161C and 161D. However, they were repealed by the Constitution (Amendment) Act 1976 with support from Members of Parliament from Sabah and Sarawak (*Dewan Rakyat*, 1976; *Dewan Negara*, 1976). While no specific reason for the repeal is provided in the Hansard of Parliament, it is stated that one of the objectives of the amendment was to mitigate sentiments of statehood and to align Sabah and Sarawak more closely with the other states in Malaysia.

The role of Islam in the Federal Constitution

The decision in Che Omar Che Soh v PP [1988] 2 MLJ 55 (SC) affirms that Article 3 (1) of the Federal Constitution does not grant civil courts the jurisdiction to declare laws void because they are un-Islamic. This position contrasts with another common law system, such as Pakistan, where Article 203D (1) of its Constitution grants the Federal Shariah Court the authority to examine and determine whether any law is repugnant to the injunctions of Islam.

However, there are instances where appellate courts adopted a different perspective when interpreting Article 3 (1) compared to Che Omar Che Soh's decision. This is evident in cases such as Kamariah bte Ali v *Kerajaan Negeri Kelantan*, Malaysia [2002] 3 MLJ 657 (FC), Lina Joy v *Majlis Agama Islam Wilayah Persekutuan* [2007] 4 MLJ 585 (FC), and *Menteri Dalam Negeri* v Titular Roman Catholic Archbishop of Kuala Lumpur [2013] 6 MLJ 468 (CA). In the Kamariah bte Ali and Lina Joy cases, it was ruled that the only avenue for Muslims seeking apostasy is through the Syariah court. This was based on the principle that Article 121 (1A) of the Federal Constitution ousts the civil court's jurisdiction from intervening in matters under the purview of the Syariah court.

Meanwhile, in *Menteri Dalam Negeri* v Titular Roman Catholic Archbishop of Kuala Lumpur [2013] 6 MLJ 468, CA, the court upheld the ban on the use of terms such as *"Allah," "Kaabah," "Solat,"* and "*Baitullah"* in the Malay version of the Catholic Weekly. The court's reasoning was that allowing these terms could conflict with laws enacted under Article 11 (4), which permits state legislatures to restrict the propagation of non-Islamic religions to Muslims.

While the facts of these cases differ, they share a consistent interpretation of Article 3 (1) of the Federal Constitution. They emphasise that Article 3 (1) affirms Islam's unique position within the Federal Constitution, setting it apart from other religions. Therefore, analysis reveals several provisions in the Federal Constitution that allowed Islam to play a central role in the nation's identity and governance, which are:

Table 1. The Provisions of the Federal Constitution

Provisions of the Federal Constitution.	**Explanation.**
Articles 3 (1) and 3 (4).	The state religion of Malaysia.
Articles 3 (2), 3 (3), and 3 (5).	Positions of Ruler of the State, *Yang di-Pertuan Agong*, and the Federal Territories Islamic Religious Council.
Article 5 (4).	The duration of detention for Syariah's offence.
Articles 8 (5) (a) and 8 (5) (b).	Rights to personal law and exclusions for certain positions.
Article 11.	Freedom of religion for Muslims and the right to impose restrictions concerning the propagation of any religious belief towards Muslims.
Article 12.	Rights to education as Muslims.
Articles 34 (1) and 34 (7).	The positions of *Yang di-Pertuan Agong, Timbalan Yang di-Pertuan Agong*, or the ruler who exercises the Yang di-Pertuan Agong's function as the head of Islam in the state.
Articles 38 (2) (b) and 38 (6) (d).	The standard policy of Islamic acts, observances, or ceremonies by the Conference of Rulers.
Articles 71 (1), 71 (2), and 71 (4).	Criteria of Ruler and Menteri Besar.
Article 74.	The power to make laws of legislative bodies in Malaysia.
Article 121 (1A).	Ouster clause that limits the jurisdiction of the High Court concerning matters under the Syariah court's jurisdiction.

The relevant provisions for this paper are Articles 11 and 74 of the Federal Constitution. Article 11 guarantees the freedom of religion, while Article 74 outlines the legislative powers of the federal and state legislatures.

Article 11 of the Federal Constitution

Article 11 guarantees the right to profess and practice one's religion. This right includes: (1) the right not to pay taxes unrelated to one's religion, (2) the right to manage religious affairs, (3) the right to establish and maintain religious institutions, and (4) the right to acquire property for religious purposes.

However, Muslims have an additional right to propagate their religion, which is not extended to other faiths. Under Article 11 (4), no person other than a Muslim is permitted to propagate their religion to Muslims, provided the legislative bodies enact laws to restrict or control such propagation. Article 11 (4) is read with Item 9 of the State List, allowing the State Legislative Assembly to create offences related to State law.

As a result, several states, excluding the Federal Territories, Penang, Sabah, and Sarawak, have enacted laws under Article 11 (4). One application of Article 11 (4) can be seen in PP v Krishnan a/l Muthu (Magistrate Case No MA-83-146-2002), where the accused was convicted in Pahang for attempting to convert a Muslim to Hinduism. He was fined RM1,500 and sentenced to 20 days in jail.

Article 74 and the Legislative Lists of the Ninth Schedule of the Federal Constitution

Article 74 specifies that the division of legislative authority is based on the Federal, State, and Concurrent Lists in the Legislative Lists of the Ninth Schedule. The Legislative Lists are crucial to the government structure, as Article 80 (1) further provides that the executive authority of Malaysia, encompassing both the Federal and State Governments, is derived from what is prescribed for their respective legislative bodies in the Legislative Lists.

The Federal List refers to matters exclusively within the jurisdiction of Parliament, while the State List pertains to issues under the authority of the State Legislative Assembly. The Concurrent List includes matters on which both legislative bodies can legislate. However, when Parliament or the State Legislative Assembly enacts laws concerning the Concurrent List, Article 80 (2) generally stipulates that such laws do not extend to the executive bodies of the other government level.

According to the Federal List, twenty-seven matters fall within the jurisdiction of the Parliament. Meanwhile, for the State List, thirteen matters fall within the jurisdiction of the State Legislative Assembly. According to the Concurrent List, the Parliament shall share fourteen issues with the State Legislative Assembly. The Supplement to the State List provides an additional six for Sabah and five matters for Sarawak, respectively. Meanwhile, the Supplement to the Concurrent List further provides that Parliament will share nine more matters with Sabah and eight with Sarawak.

The Legislative Lists have their roots in being drafted based on the Commonwealth countries' experiences (Fernando, 2006). It also had a similarity with the Seventh Schedule to the Constitution of India. The legal resemblance is not coincidental, as the Federal Constitution is modelled after the Indian Constitution (Harding, 2022). Both legal systems are part of the British legacy, with the common law principle of statutory interpretation playing a significant role in shaping the origin of the country's legal framework (Sheridan, 1961).

The Legislative Lists are a product of a concession between the rulers and the nation's leaders. The State Government retained a certain degree of autonomy, along with privileges and dignities for the rulers of the states in exchange for a high degree of centralisation of power for the Federal Government (Fernando, 2014). This statement is evident in Articles 74 and 76. Under Article 74 (1), Parliament holds the majority of legislative power as national-level matters like external affairs [Item 1], defence [Item 2], and internal security [Item 3] are part of its responsibilities. Additionally, Article 76 allows Parliament to extend its legislative power to matters in the State List, subject to specific criteria.

Meanwhile, Article 74 (2) grants the State Legislative Assembly the power to make laws for the State Government, as outlined in the State and Concurrent Lists. State-specific matters like Islamic-related laws [Item 1], land [Item 2], and agriculture and forestry [Item 3] empower the State Legislative Assembly to legislate. At the same time, the state legislature holds the power to make the law known as residual power under Article 77. The residual power refers to matters not mentioned in the Federal List and which Parliament does not exclusively have the power to make the law.

The purpose of Legislative Lists is to avoid power conflicts between the Federal and State Governments. Thus, Article 74 (3) mandates that legislative bodies comply with conditions or restrictions stated in the Federal Constitution when they make laws. In Gin Poh Holdings Sdn Bhd v The Government of the State of Penang [2018] 3 MLJ 417, (FC), it was held that the Legislative Lists are designed to provide a clear demarcation of subject matter between the two levels of government, ensuring that each government's powers are well-defined.

In Wong Shee Kai v Government of Malaysia [2022] 6 MLJ 102 (FC), the Federal Court further clarified that if legislative bodies enact laws that overlap with the subjects assigned to the other level of government in the Legislative Lists, such laws are rendered void due to the legislative body's lack of competence to legislate on those matters.

There are several examples of the consequential effects of non-compliance with the Legislative Lists. In Mamat Daud v Government of Malaysia [1988] 1 MLJ 119 (SC), several Muslims were charged for serving as unauthorised Bilal, Khatib, and Imam during Friday prayers without being officially appointed by the Terengganu Islamic Religious and Malay Customs Council. The offence falls under federal law and was based on Section 298A of the Penal Code. Section 298A is a catch-all provision that criminalises conduct that causes disharmony between persons or groups, whether they profess the same or different religions. The court, however, held that Section 298A did not apply to other states or non-Muslims, declaring the provision void in these contexts. The rationale was that the law's object was designed explicitly for Islamic offences under Item 1 of the State List, which governs the control of propagating Islamic doctrines and beliefs among Muslims.

The decision in Mamat Daud was revisited in Tan Jye Yee v PP [2014] 6 MLJ 609 (CA). In this case, the accused were prosecuted for several offences under Section 298A of the Penal Code. The case facts involved the accused posting a photo on Facebook showing themselves enjoying Bak Kut Teh, accompanied by a halal logo and Hari Raya greetings. The court held that the decision in Mamat Daud was binding, as Section 298A was construed as pertaining specifically to Islamic offences under Item 1 of the State List. Therefore, the provision could not be applied to non-Muslims.

Another important aspect is that Article 74 (4) expressly provides that the specific expressions used in the Ninth Schedule should not be construed as limiting the general interpretation of the matters in the Legislative Lists. This statement is expressed in Mohd Khairul Azam Abdul Aziz v *Menteri Pendidikan Malaysia* [2020] 1 MLJ 398 (FC), as there is an application to challenge provisions in the Education Act 1996 that allowed the establishment of national-type Chinese and Tamil primary schools. It was argued that the provisions are void due to the Parliament's lack of jurisdiction to enact the law. The court dismissed the application and held that the word "Education" in Item 13 of the Federal List should be interpreted broadly and not restricted by specific expressions in Item 13 itself.

Thus, equipped with this explanation, an analysis of the Malaysian legal system reveals that both Parliament and the State Legislative Assembly can make laws concerning Islamic offences in three ways. Thus, this topic will be divided into three subtopics, which are (1) ordinary laws that incorporate Islamic principles, (2) explicit matters in the Federal List, and (3) explicit matters in the State List: Item 1 of the State List.

Ordinary Laws that Incorporate Islamic Principles

The conciliatory approach to Article 3 (1) suggests that its inclusion serves as an aspirational provision, encouraging the legislative body to enact laws that reflect Islamic principles

(Shamrahayu, 2009). This is because the Federal Constitution does not prevent the enactment of laws based on religious conviction.

This argument becomes particularly relevant compared to the Turkish legal system, where secularism is explicitly enshrined in Article 2 of the Constitution of the Republic of Turkey. As a result, the Grand National Assembly of Turkey, the country's legislative body, prohibits enacting any religious laws. A notable example is the Turkish court's decision to declare *Refah Partisi* (The Welfare Party) an unlawful organisation due to its advocacy for Islamic principles in government, which conflicted with Turkey's secularism (European Court of Human Rights, 2003). Article 136, which governs the *Diyanet* (Presidency of Religious Affairs), is the only exception related to Islam in Turkey. This administrative body oversees matters concerning belief, worship, and the moral foundations of religion, particularly Islam (Öztürk, 2018).

Furthermore, the English legal framework recognises the enactment of laws based on religious conviction. Examples include the Church of England Assembly (Powers) Act 1919 and the Chancel Repairs Act 1932, among the few Christian-related Acts of Parliament that remain relevant in the English legal system.

The application of these laws was upheld in the case of Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and Another [2003] 3 All ER 1213 (UKHL). In this case, the Parochial Church Council, a statutory body under the Church of England Assembly (Powers) Act 1919 and Parochial Church Councils (Powers) Measure 1956, exercised its statutory power under the Chancel Repairs Act 1932 to compel a landowner of certain rectorial land to repair the chancel of the parish church. The landowner contested the obligation, arguing that it violated the Human Rights Act 1998, which prohibits a public authority from acting in a way that interferes with personal property rights. However, the court ruled that the Parochial Church Council was not a public authority. This was because the Church of England is not a statutory entity controlled by the government, despite providing public services. The court concluded that the act was an enforcement of a civil debt within the domain of private law, not a public authority action.

By analysing various Malaysian written laws, it is evident that several legislations incorporate elements of Islamic principles. These include, but are not limited to:

Table 2. List of Legislations

Federal List.	Legislations.
• Item 7: Finance.	• Section 6A (3) of the Income Tax Act 1967. This section allows a Muslim to claim a tax rebate for payments made towards zakat, fitrah, or other Islamic religious dues; • Islamic Development Bank Act 1975; • Loans (Islamic Development Bank) Act 1977; • Islamic Financial Services Board Act 2002; • International Islamic Trade Finance Corporation Act 2007; • Labuan Islamic Financial Services And Securities Act 2010; and • International Islamic Liquidity Management Corporation Act 2011;
• Item 8: Trade, commerce, and industry.	• Trade Descriptions Act 2011 and its subsidiary legislations, such as Trade Descriptions (Certification and Marking of Halal) Order 2011, Trade Descriptions (Definition of Halal) Order 2011, and Trade Descriptions (Certification and Marking of Halal Fees) Regulations 2011.
• Item 13: Education.	• Sections 18, 50, 52, 75, and the Schedule of the Education Act 1996 outline key provisions related to Islamic education: 1. Section 18 stipulates that all schools in the National Education System must follow the National Curriculum prescribed by the Minister responsible for the Education Act 1996. One of the core subjects in the National Curriculum is Islamic Education, which is required for Muslim students, as outlined in the Schedule of the Education Act 1996; 2. Section 50 allows certain educational institutions to provide religious teaching in Islam, whose teachers are approved by the State Authority; 3. Section 52 permits both the Federal and State Governments to provide financial assistance to Islamic educational institutions; and 4. Section 75 authorises the Minister to require a private educational institution offering post-secondary education to teach Islamic education for Muslim students.

Table 2. (continued)

• Item 14: Medicine and health, including sanitation in the federal capital.	• Traditional and Complementary Medicine Act 2016.
• Item 21: Newspapers; publications, publishers, printing, and printing presses.	• Printing of Qur'anic Texts Act 1986.

Several court decisions validate the authority of the Parliament in enacting Islamic laws. For instance, in PP v Wee Mee Industries [1986] 1 MLJ 505 (HC), it was held that the Parliament was competent in introducing the law regulating the halal food industry through the false trade description offence. Meanwhile, in Ramli Ghani v Kementerian Kesihatan Malaysia [2022] 3 MLJ 674 (FC), a traditional medical practitioner sought a declaration that the Traditional and Complementary Medicine Act 2016, a piece of legislation that regulates Islamic and traditional Malay medicines, was void as the Parliament was not competent to enact laws concerning Islamic law. The court disallowed the practitioner's application. The Federal Constitution grants the Parliament the authority to legislate on matters related to 'medicine and health' under Item 14 of the Federal List.

At the same time, the government can use ordinary law to protect the sanctity of Islam. One example is Lee May Ling v PP [2019] 8 MLJ 396 (HC). The accused was charged with various offences for posting a photograph on Facebook that depicted two individuals with the words *"Selamat berbuka puasa with Bak Kut Teh"* alongside the *halal* logo. Among the offences was Section 4 (1) (c) of the Sedition Act 1948, which criminalises the publication of seditious publications. One criterion for a seditious publication is "to promote feelings of ill-will and hostility between different races." The accused was found guilty and sentenced to a fine of RM5,000 or six months' imprisonment in default. The court ruled that the publication was intended to insult the Muslim community by associating a Chinese dish containing non-halal ingredients, prohibited for Muslims, with the sacred act of breaking fast during Ramadan.

Another example is Arunakirinathan a/l Thillainathan v PP [2024] 9 MLJ 785 (HC). In this case, the accused made an insulting statement on Facebook directed at Muslim Malays and the Sultan, who is the head of Islam in the state. It was held that the accused guilty under Section 233 (1) (a) of the Communications and Multimedia Act 1998 (Online communication that is grossly offensive with the intent to annoy any person) and Section 504 of the Penal Code (Intentional insult with the intent to provoke a breach of the peace). The accused was imprisoned for four months and a RM 15,000 fine for both offences.

Explicit Matters in the Federal List

The second method is based on explicit matters in the Federal List, such as Item 1 (h) [pilgrimages to places outside Malaysia], and Item 4 (k) [Ascertainment of Islamic law for federal law]. A notable instance of Item 1 (h) of the Federal List is the *Tabung Haji* Act 1995. The act establishes *Lembaga Tabung Haji*, which has two main functions: managing the Muslim pilgrimage of *Hajj* and providing financial services. Section 27 criminalises the act of organising a Muslim pilgrimage of *Hajj* without a licence from *Lembaga Tabung Haji.* Failure to comply can result in a fine of no less than one hundred thousand *ringgit*, imprisonment for up to one year, or both. There has been a reported case on the prosecution under this provision (*Agus Rizal tidak mengaku salah tawar pakej haji furada tanpa lesen, 2022).*

For Item 4 (k) of the Federal List, the Islamic Financial Services Act 2013 is a relevant example. This act is the primary legislation governing Islamic financial institutions in Malaysia. The applicable provision concerning Islamic offences is found in Section 28. Under Section 28, the *Bank Negara*'s *Shariah* Advisory Council, established under Section 51 of the Central Bank of Malaysia Act 2009, has the jurisdiction to determine whether an Islamic financial services institution, licensed by the Minister of Finance or approved by Bank Negara Malaysia, is Shariah-compliant. If it is found

that the business of an Islamic financial services institution does not adhere to Shariah-compliant standards and the institution fails to submit a rectification plan to the Bank Negara within thirty days of becoming aware of the non-compliance, it may face imprisonment for a term not exceeding eight years, a fine not exceeding twenty-five million *ringgit*, or both.

The legality of *Bank Negara's Shariah* Advisory Council was raised in JRI Resources v Kuwait Finance House [2019] 3 MLJ 561 (FC). One of the key issues in the case was whether referencing Bank Negara's Shariah Advisory Council was constitutionally permissible, as it could potentially undermine the judicial power of the civil courts in resolving the dispute. The court ruled that Parliament can enact laws concerning the *Bank Negara's Shariah* Advisory Council. The reasoning behind this decision is that no provision in the Federal Constitution prohibits Parliament from delegating dispute-resolution authority to another body to enhance government efficiency, while still allowing civil courts to scrutinise decisions made by that body. The court also reasoned that civil court judges, being untrained in Islamic law principles, may not fully grasp the nature of Islamic law, which differs significantly from civil law.

Limitations in Ordinary Laws that Incorporate Islamic Principles and Explicit Matters in the Federal List

However, any ordinary laws that incorporate Islamic principles and explicit matters in the Federal List methods have their limitation; they cannot conflict with the Federal Constitution. For example, if a law applies only to a specific religious group, it may be invalid, as it would violate the equality clause under Article 8 (2) of the Federal Constitution. One of the key provisions of Article 8 (2) states: *"…there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth, or gender in any law…"*

This principle was affirmed in Iki Putra bin Mubarrak v *Kerajaan Negeri Selangor* [2021] 2 MLJ 323 (FC). The case concerned the constitutionality of Section 28 of the Syariah Criminal Offences (Selangor) Enactment 1995, which criminalises sexual relations between persons of the same gender among Muslims. The offence carries a penalty of a fine of RM3,000, imprisonment for up to two years, or both. One of the key issues in the case was whether Section 28 created discriminatory circumstances for non-Muslims, given the existence of similar offences under Section 377A of the Penal Code, which criminalises carnal intercourse against the order of nature. However, unlike Section 28, Section 377A applies to all individuals, regardless of religious belief, and imposes severe penalties as outlined in Sections 377B and 377C. Section 377B prescribes imprisonment for up to twenty years and whipping for consensual relations, while Section 377C imposes a prison sentence of between five and twenty years, along with whipping, for non-consensual acts.

Azahar Mohamed CJ (Malaya) ruled that Section 28 was void, affirming that creating a similar offence category for Muslims and non-Muslims violated the equality clause under Article 8 (2) of the Federal Constitution. The court found that non-Muslims were subjected to harsher penalties compared to Muslims for the same offence category, thereby breaching the constitutional guarantee of equal treatment before the law.

The position in Iki Putra's case is similar to Lai Hen Beng v PP [2024] 1 MLJ 225 (FC), with both instances addressing the potential conflict between legislation and fundamental liberties under Article 8 (2) of the Federal Constitution. In Lai Hen Beng v PP, the case concerned the constitutionality of Section 498 of the Penal Code, which criminalises the act of a man enticing another man's wife with the intention to have sexual intercourse. The court held that Section 498 was unconstitutional, as it violated Article 8 (2) of the Federal Constitution. The court reasoned that the provision was discriminatory based on gender, as it only protected husbands and did not guarantee the same legal recourse for wives. Consequently, the law fails to ensure equal treatment for both genders.

Another example from case law is the infringement of the common law principle of natural justice. The principle of natural justice is derived from English law and refers to a duty imposed by the court on a person to act fairly in decision-making (O'Reilly v Mackman, 1983). It is embodied in

the Federal Constitution under Articles 5 [Liberty of the person] and 8 [Equality] (Tan Tek Seng v *Suruhanjaya Perkhidmatan Pendidikan,* 1996).

One illustration is in Islamic Renaissance Front v The Minister of Home Affairs [2020] 5 MLJ 399 (CA). The case involved the Minister of Home Affairs' decision to ban several books from circulation, based on a report from the Department of Islamic Development Malaysia and the Publication and Quranic Text Control Division. The report stated that the books contained material deviating from the teachings of Islam as practised in Malaysia. The publisher applied for judicial review and filed a discovery application to obtain documents from both departments. However, the Ministry of Home Affairs provided an incomplete report from the Department of Islamic Development Malaysia. It failed to submit the Publication and Quranic Text Control Division report. The court quashed the ban, ruling that failing to comply with the discovery order was critical, as it deprived the publisher of the right to be heard under the common law principle of natural justice.

Explicit Matters in the State List: Item 1 of the State List

Item 1 of the State List grants the State Legislative Assembly the power to enact laws concerning Islamic-related laws and Malay customs. Similarly, the Parliament can make the same under Item 6 (e) of the Federal List as its law-making power closely mirrors that of Item 1 of the State List for this purpose. Item 1 of the State List provides there are nine subject matters, which are (1) Islamic family and personal law, (2) Islamic charitable and trust law, (3) Islamic religious revenue law, (4) Islamic place of worship law, (5) the control of propagating doctrines and beliefs among Muslim, (6) Islamic offences, (7) the determination of matters of Islamic law and doctrine, (8) the constitution, organisation, and procedure of Syariah court, and (9) Malay customs.

Concerning Islamic offences, the Federal Constitution has imposed five criteria for the Islamic offences to be valid, which are (1) territorial limit, (2) *in personam* (against the person) jurisdiction, (3) within the precepts of Islam, (4) the federal law's preclusion clause, and (5) the Federal List's preclusion clause.

Territorial limit

The first criterion of the territorial limit of the Syariah offences under Item 1 of the State List is outlined under Article 73 of the Federal Constitution. There are two parts. Article 73 (a) focuses on the territorial limit of the Parliament when it makes laws, while Article 73 (b) is for the State Legislative Assembly.

Article 73 (a) empowers the Parliament to make laws applicable throughout Malaysia. However, a significant limitation to this broad power is provided by the decision in Mamat Daud v Government of Malaysia [1988] 1 MLJ 119 (SC), where the court clarified that the territorial limit of Parliament for matters under Item 6 (e) of the Federal List is restricted to the Federal Territories borders. The reasoning behind this limitation stems from Item 6 (e), granting the Parliament a power similar to the one the State Legislative Assembly possessed. This effectively means that the power to legislate on Islamic offences within the Federal Territories is akin to that of the state. Thus, it only applies within the defined areas of Kuala Lumpur, Putrajaya, and Labuan.

Meanwhile, Article 73 (b) of the Federal Constitution sets out the territorial limit for the State Legislative Assembly to make laws. This provision allows the State Legislature to enact laws within its respective state borders.

Two key legal precedents illustrate the application of these constitutional provisions in both civil and Syariah court contexts. The case of Noh Atan @ Khamis v Shakila Mohamed [2004] 1 SHLR 61 (SYCA) is a notable example of a Syariah court decision related to the territorial scope of jurisdiction under Article 73 (b) of the Federal Constitution. In this case, the ex-husband sought a property division in the Kuala Lumpur Syariah Court, even though the Selangor Syariah Court had affirmed his divorce. The Kuala Lumpur Syariah Court rejected the ex-husband's application because the divorce was officially registered in Selangor. The court held that since the divorce took place within the jurisdiction of the Selangor Syariah Court, it was within the authority of the Selangor court to deal with matters related to the divorce, including property division.

From the civil courts' perspective, a significant authoritative decision is found in the Court of Appeal case Kassim @ Osman Ahmad v Jamil Khir Baharom [2016] 5 MLJ 258 (CA). The central issue in this case was whether laws passed under Item 6 (e) of the Federal List related to Islamic offences can be enforced beyond the territorial borders of the Federal Territories. In this case, Kassim was a resident of Kedah. He was arrested by officers from the Federal Territories Islamic Religious Department while in Kedah. Subsequently, he was transferred by flight to Kuala Lumpur, where he was charged with committing Syariah offences under the jurisdiction of the Federal Territories. Specifically, he was charged under Section 7(b) (for deriding, mocking, or ridiculing Islamic practices or ceremonies) and Section 9 (for defying a *fatwa* issued by the *Mufti* of Federal Territories) of the Syariah Criminal Offences (Federal Territories) Act 1997. Kassim filed for a judicial review, challenging the legality of his arrest. He argued that his arrest was unlawful because it was carried out by the Federal Territories Islamic Religious Department, a body whose jurisdiction is limited to the Federal Territories. The court agreed with Kassim's contention, ruling that the arrest was illegal. The court emphasised that Syariah offences under the jurisdiction of the Federal Territories cannot extend beyond the borders of the Federal Territories.

In Personam (Against the Person) Jurisdiction

The second criterion for the validity of Syariah offences under Item 1 of the State List is that the offence must apply exclusively to Muslims. From a juristic perspective, a person is considered a Muslim if they believe in the Five Pillars of Islam and the Six Articles of Faith. However, within the context of the Malaysian legal system, there are seven recognised ways to establish that a person is a Muslim. These are:

(i) The person is Malay and automatically regarded as a Muslim based on the definition of Malay under Article 160 (2) of the Federal Constitution. Malay refers to a Muslim who habitually speaks the Malay language, conforms to Malay custom, and was either born in Singapore or Malaysia before *Merdeka* Day (31.8.1957), one of whose parents was born in Malaysia or Singapore, or is domiciled in Malaysia or Singapore. This definition is adopted by all State Constitutions in Malaysia, except for Sabah and Sarawak;
(ii) The identity card is issued under the National Registration Act 1959. One of its subsidiary legislations, specifically Regulation 4 (cc) (v) of the National Registration Regulations 1990, mandates that individuals provide details regarding their religion as part of the identity card information;
(iii) The birth certificate of a person issued in Peninsular Malaysia. The governing law is the Births and Deaths Registration Act 1957. According to its subsidiary legislation, Rule 2 (1) of the Births and Deaths Registration Rules 2019, Form JPN.LM01 is to be used for birth registration. One of the required details on this form is the child's religion. However, there is no similar requirement for the declaration of faith in Sabah and Sarawak, as their respective Registration of Births and Deaths Ordinances do not mandate it.
(iv) The certificate of conversion issued by an Islamic religious council upon a person's conversion to Islam;
(v) A person affirms under the Statutory Declarations Act 1960 that he is Muslim before a sessions court judge, magistrate, commissioner for oaths, or notary public;
(vi) The written law provides that the person is Muslim; and
(vii) It has been proven before the court that the person is a Muslim through evidence of testimony.

Within the precepts of Islam

The third criterion is that Islamic offences under Item 1 of the State List are permissible if they align with the precepts of Islam. This means that the validity of such offences depends on Islamic theological perspectives. Since Sulaiman Takrib v *Kerajaan Negeri Terengganu* [2009] 6 MLJ 354 (FC), the civil courts have adopted the Sunni interpretation of Islam, which aligns with the beliefs of most Muslims in Malaysia. This interpretation has been upheld in subsequent civil court decisions,

including Iki Putra Mubarrak v *Kerajaan Negeri Selangor* [2021] 2 MLJ 323 (FC) and Nik Elin Zurina Nik Abdul Rashid v *Kerajaan Negeri Kelantan* [2024] 2 MLJ 150 (FC).

In the context of Sunni Islam, a Muslim is a person who upholds both the *Al-Quran* and the *Al-Sunnah* (Khadijah & Zaidi, 2022). Adherents of the Sunni interpretation must fulfil two key responsibilities: (1) *Fard Kifayah*, a collective obligation upon the entire community, and (2) *Fard al-Ayn*, a personal obligation that every individual Muslim must fulfil. The imposition of these obligations must, at this juncture, be framed within the sources of Islamic law relevant to *aqidah* [creed], *fiqh* [practice], and *akhlaq* [ethics], ensuring that the obligations are consistent with both personal faith and legal principles of Islam.

As a result, various sources of Islamic law from juristic perspectives like *Al Quran, Al-Sunnah, Ijma,* and *Qiyas*, although not mentioned in the Federal Constitution, will be deployed to justify the legality of Islamic offences under Item 1 of the State List. Indirectly, those sources of Islamic law become unwritten law in implementing Islamic offences.

An application of this position can be illustrated in Sulaiman Takrib v *Kerajaan Negeri Terengganu* [2009] 6 MLJ 354 (FC). In this case, several petitions are related to deviant teachings in Islam. The first petitioner is a follower of *Ayah Pin*'s teachings. The Terengganu *fatwa* (legal ruling) declared that the *Ayah Pin* teachings are contrary to Islam. Thus, the first petitioner was accused of acting contrary to the gazette *fatwa* and possessing material contrary to Islamic law. Meanwhile, the second and third petitioners were prosecuted for Selangor Islamic offences related to deviant Kahar Ahmad's teachings.

The key issue in Sulaiman Takrib's case was whether these offences fell within the precepts of Islam. In dismissing the petitions, the court held that "precepts of Islam" refers to a general command that all Muslims are obligated to follow. Consequently, offences concerning matters of creed were meant to protect the integrity of the authentic teachings of Islam. The court emphasised that such offences are necessary to safeguard Islamic beliefs and practices from deviation or misrepresentation.

Another case is Syarie Prosecutor v Mohd Asri Zainul Abidin @ Abdul Talib [2010] 3 SHLR 136 (SYHC). The accused was prosecuted for teaching without a *tauliah* (license) in Selangor. He argued that the *tauliah* requirement was contrary to Islamic law. However, the Syariah court rejected this argument, emphasising that the *tauliah* rules align with the Islamic principle of *Siyasah al-Syariyyah* [Islamic governance], which permits the government to regulate all aspects of society deemed necessary for the welfare and needs of the people. The Syariah court, following the decision in Sulaiman Takrib, held that the purpose of the *tauliah* was to safeguard the Muslim creed. It ensures that any Islamic teachings in Selangor follow the Sunni interpretation of Islam.

The last sample is Pendakwa Syarie v Mohd Fadzil bin Yusoff [2013] 1 SHLR 106 (SYSC). Two accused were charged with the *khalwat* offence in Terengganu. It is an offence because two people who could be married to each other were mixed in a secluded place. The court held that the offence of *khalwat* was within the precepts of Islam, relying on the *Al-Quran* [Surah Al-Isra (17:32)] and *Al-Sunnah* [*Hadith* narrated by Imam Ahmad (14651)].

Federal law's preclusion clause

Generally, Islamic offences of Item 1 of the State List can be prosecuted in civil or Syariah courts, as the Federal Constitution does not impose any restrictions. For instance, in PP v Mohd Noor Jaafar [2005] 6 MLJ 745 (HC), the accused was charged before the magistrate for maintaining an unregistered religious school in Malacca, *Tadika Pasti Al-Kauthar*. The court held that the prosecution was valid since state law granted the jurisdiction to the civil court to hear the matter. The decision is consistent with Item 4 of the Federal List, which states that "the administration of justice" issues are still within the Parliament's responsibilities.

However, the delegation of power by the state legislature must be done with the consent of the Federal Government, as signalled in Articles 80 (1), 80 (2), and 80 (5) of the Federal Constitution. Article 80 (1) states that the executive authority of the Federal Government is derived solely from the legislative authority granted to Parliament. However, Article 80 (2) allows the state legislature to delegate certain executive powers to the Federal Government. Article 80 (5) further

clarifies that the Federal and State Governments may make arrangements regarding the costs incurred due to the delegation of power.

Thus, the fourth criterion is relevant if Islamic offences were prosecuted before the Syariah court. It states in Item 1 of the State List *"the constitution, organisation and procedure of Syariah courts,……but shall not have jurisdiction in respect of offences except in so far as conferred by federal law."* This preclusion clause aims to balance the authority between the Federal and State Governments, ensuring that Islamic offences of Item 1 of the State List do not conflict with the broader framework of Malaysia's legal system. Since most criminal law policies and matters related to internal security, such as the place of imprisonment, are vested at the federal level, this preclusion clause ensures harmonious coordination between the Federal and State Governments in executing the Syariah offences.

Thus, the Parliament has enacted legislation called the Syariah Court (Criminal Jurisdiction) Act 1965 (Act 355), which provides that the punishment for Islamic offences before Syariah court shall not exceed imprisonment for a term exceeding three years or with any fine exceeding RM5000 or with whipping exceeding six strokes or with any combination thereof.

Federal list's preclusion clause

The last criterion is that Islamic offences under Item 1 of the State List shall not infringe on the matters in the Federal List. The question that needs to be raised is whether the Parliament can enact the offence. If affirmative, the state legislature is precluded from making such Islamic offences.

The topic will be divided into two parts: (1) the governing law to challenge the competency of Islamic offences under item 1 of the State List, and (2) the conflict between the Federal List and Item 1 of the State List.

The governing law to challenge the competency of Islamic Offences under Item 1 of the State List

The procedural rules governing the competency of legislative bodies to make laws on this matter are outlined in Articles 4 (3), 4 (4), and 128 (1) (a) of the Federal Constitution. Article 4 (3) provides that a declaration is the remedy for constitutional matters concerning the State Legislative Assembly infringing the Legislative Lists by making laws on matters in the Federal List or the Parliament making laws on matters in the State List. Article 4 (4) stipulates that a person must obtain leave from the Federal Court to commence the proceeding. Article 128 (1) (a) further specifies that only the Federal Court has exclusive original jurisdiction to hear such matters.

Nordin Salleh v *Kerajaan Negeri Kelantan* [1993] 3 MLJ 344 (FC) is one example of how the procedural rules for constitutional challenges work. The case involved an application for leave before the Federal Court to challenge the constitutionality of Section 73 of the Kelantan Council of Religion and Malay Custom Enactment 1966 (repealed), which addressed the offence of contempt of the *Pegawai Masjid*. Among the arguments raised for the law's invalidity were: (a) that the offence violated the freedom of speech and expression, (b) that it lacked the precepts of Islam, and (c) that it dealt with matters within the Federal List. The court granted leave to hear the challenges related to points (b) and (c), as these were relevant under Articles 4 (3), 4 (4), and 128 (1) (a) of the Federal Constitution.

The application to challenge the competency of legislative bodies is based on a petition, according to Rule 5 of the Rules of the Federal Court 1995. The burden of proof lies on the person who filed the petition. This approach stems from the principle that civil courts are generally cautious in declaring unconstitutional laws made by legislative bodies due to the potential overlap of powers between Parliament and the State Legislative Assembly.

There are two key reasons for this caution. The first is the cardinal rule of constitutional interpretation: any provisions in the Federal Constitution must be interpreted harmoniously (*Danaharta Urus* v Kekatong, 2004). Thus, the analysis of the Federal Constitution must be based on its entire framework, and every provision should not be read in isolation (CCH v *Pendaftar Besar*

bagi Kelahiran dan Kematian, 2022). Every provision in the Federal Constitution must be construed broadly and not in a pedantic way (Dato Menteri Othman Bin Baginda v Dato Ombi Syed Alwi Bin Syed Idrus, 1981).

At this juncture, the Federal Constitution recognises Malaysia's mixed legal system and federal structure, particularly regarding the roles of the Syariah courts and Islamic offences under Item 1 of the State List. Item 1 of the State List provides an independent power to the state legislature and should operate in parallel with other provisions in the Federal Constitution. The harmonised approach ensures that the civil and Syariah systems operate cohesively within the broader legal framework (Dahlia Dhaima bt Abdullah v *Majlis Agama Islam Selangor,* 2025).

This interpretation was approved in *Jabatan Pendaftaran Negara* v A Child [2020] 2 MLJ 277 (FC). The issue is whether an illegitimate child of a Muslim is entitled to have a father's name on the birth certificate. The National Registration Department refused it and maintained that 'bin Abdullah' was included in the birth certificate. The basis is that it adheres to the *fatwas* (legal rulings) that the National *Fatwa* Committee (currently known as the *Muzakarah* Committee) issued. The family decided to challenge the decision made by the National Registration Department. However, the court disallowed the family's suit since the issue of the legitimacy of a person falls within the personal law. Therefore, the Islamic law in Johor applies since the family is Muslim and the child was born in Johor. The Islamic law in Johor prohibits an illegitimate Muslim child from being ascribed to the name of the father.

Nevertheless, the court in A Child's case further concluded that the National Registration Department wrongly applied *fatwas* issued by the National Fatwa Committee, as it is not part of Islamic law in Johor. The basis is that the Johor Islamic Religious Council never gazettes those *fatwas*. Therefore, the court ordered that the child be given only his name without the father's name, with his name simply reading "Child" and not "Child *bin Abdullah*".

The second reason is the existence of a judicial presumption known as the presumption of constitutionality. This framework of constitutional interpretation, developed by the court, holds that a legislative body authorised by a codified constitution is presumed not to enact laws that are inconsistent with the constitution, unless the conflict is apparent (*Ketua Pengarah Jabatan Alam Sekitar* v Kajing Tubek, 1997).

An example is Government State of Penang v Government of Malaysia [2014] 6 MLJ 322 (FC). In this case, the Penang Government sought to declare Sections 10 and 15 of the Local Government Act 1976 as void. These provisions prevented the State Government from conducting local government elections. The Penang Government argued that its legislation, the Local Government Elections (Penang Island and Province Wellesley) Enactment 2012, superseded the Local Government Act 1976, because local government elections fall within the jurisdiction of Item 4 (a) of the State List.

However, the Federal Government disagreed. It affirms that Parliament has the authority to enact uniform laws for local government under Article 76 (4), except for Sabah and Sarawak, as outlined in Article 95D. Additionally, the Local Government Act 1976 was enacted based on the decision of the National Council for Local Government under Article 95A. Article 95A (5) stipulates that the Federal and State Governments must follow decisions made by the National Council for Local Government, except for Sabah and Sarawak, under Article 95E (2). Furthermore, the Penang Government had not consulted the National Council for Local Government regarding any proposed policy changes. The court ruled in favour of the Federal Government, holding that the Enactment 2012 was void as it conflicted with the Local Government Act 1976.

The conflict between the Federal List and Item 1 of the State List

Currently, there are two contentious positions on this matter. The first view is that the state legislature will avoid the Federal List's matters if the State legislature enacts Islamic offences, which are restricted to Muslims only. The basis of this view is that the Parliament cannot enact a criminal law for Muslims only, apart from Item 6 (e) of the Federal List; otherwise, it would infringe on the equality clause under Article 8. Since the Parliament cannot enact such a law, it remains within the jurisdiction of the state legislature.

Three case laws from appellate courts construed to hold this view. In Sukma Darmawan v *Ketua Pengarah Penjara Malaysia* [1999] 1 MLJ 266 (CA), affirmed by the Federal Court in [1999] 2 MLJ 241 (FC), the court held that due to Article 121 (1A), a person could be charged for the offence of sodomy in either civil or Syariah courts. Meanwhile, in Sulaiman Takrib v *Kerajaan Negeri Terengganu* [2009] 6 MLJ 354 (FC), the court held that as long as the Islamic offence applies to Muslims only, it escaped the preclusion clause, i.e., the Federal List.

Lastly, in ZI Publications v *Kerajaan Negeri Selangor* [2016] 1 MLJ 153 (FC), the court recognised the dual sovereignty principle as a person can be liable for offences on printing and printing presses under the federal law and religious publication contrary to Islamic law under the state law. This is because Muslims in Malaysia are subjected to the general laws enacted by Parliament and the Islamic offences under Item 1 of the State List.

The second view asserts that Parliament has ultimate control over criminal law in Malaysia, as reflected in Item 3 [Internal security] and Item 4 [Criminal law] of the Federal List. This structure of the Federal Constitution implies a dominant role for the Federal Government in matters of criminal law policy. Consequently, the state legislature cannot enact Islamic offences if Parliament has the authority to legislate on similar subjects. As a result, the power of state legislatures to legislate on criminal law is subordinate to Parliament's authority.

The second view is based on recent decisions by the appellate court. For example, in Iki Putra Mubarrak v *Kerajaan Negeri Selangor* [2021] 2 MLJ 323 (FC), a Muslim sought a declaration that the offence of attempting to commit sodomy, as defined by the combined reading of Sections 28 and 52 of the Syariah Criminal Offences (Selangor) Enactment 1995, was unconstitutional, arguing that the subject matter fell within the Federal List. The court allowed the application, ruling that Parliament could legislate on this specific sodomy offence under Item 4 of the Federal List [Criminal law], even though Selangor's Islamic offences only apply to Muslims. In doing so, the court partly rejected the interpretation in Sulaiman Takrib.

Similarly, in Nik Elin Zurina Nik Abdul Rashid v *Kerajaan Negeri Kelantan* [2024] 2 MLJ 150 (FC), a Muslim sought a declaration that several Islamic offences in the Kelantan Syariah Criminal Code (I) Enactment 2019 were void. The court allowed the petition, ruling that these provisions were unconstitutional, except for Section 13 [Selling or giving away a child to a non-Muslim or morally reprehensible Muslim] and Section 30 [Words capable of breaking peace]. The court found the unconstitutionality in various provisions, among others, Section 36 [Anything intoxicating] and Section 37(1) (b) [Gambling]. They conflicted with matters under Item 4 (I) [Betting and lotteries] and Item 14 (d) [Intoxicating drugs and liquors] of the Federal List.

METHODOLOGY

This research integrates doctrinal research with the historical method by exploring the historical development of Islamic law in the Malay Peninsula and Borneo, alongside its present-day application in Malaysia. It will analyse both written and unwritten laws within the Malaysian legal system to better understand the issues surrounding Islamic offences in the country.

RESULTS AND DISCUSSION

The topic will be divided into two main sections: (1) Item 1 of the State List is the only viable option, and (2) Approaches to the Federal List’s preclusion clause criterion in Item 1 of the State List.

Item 1 of The State List is the only viable option

Based on the analysis of Islamic offences in the literature review, Item 1 of the State List presents the most feasible solution for Muslims seeking to establish Islamic offences aligned with their theological perspective. This statement is because Islamic offence issues are highly divisive in Malaysia (Asif, 2024). On one hand, critics argue that implementing Islamic offences could be repressive, as these laws differ significantly from internationally recognised governance standards, particularly those based on secular or human rights principles (Marzuki, 2017).

On the other hand, proponents contend that the imposition of Islamic offences is an essential expression of their faith, as it aligns with their religious values and moral framework (Marzuki, 2017). Moreover, the establishment of Islamic offences is often seen as a means of reviving the historical legacy of the Malay Kingdoms, which once operated under a system influenced by Islamic law (Na'im & Haydar, 2023). For many, this revival is a matter of religious duty and a way to reclaim a cultural and political identity that they believe was part of their historical glory.

Therefore, the position of moderation within the context of the Malaysian legal system is that Islamic offences should apply exclusively to Muslims. This principle is grounded in the structure of the state legislature, as Islamic offences were framed in Item 1 of the State List with the understanding that they would apply only to the Muslim population. Under normal circumstances, Parliament cannot enact Islamic offences solely for Muslims, except through Item 6 (e) of the Federal List, which also derives its jurisdiction from Item 1 of the State List. The purpose of Item 1 of the State List is to accommodate the pluralistic composition of Malaysia while allowing for the fulfilment of the religious and cultural aspirations of the Muslim community.

Thus, Syariah courts and Islamic offences are central to this arrangement. The Syariah courts play a critical role in administering Islamic law to Muslims. Meanwhile, Islamic offences act as a mechanism for addressing the differing interests of Muslims and non-Muslims. While certain activities may be permissible for non-Muslims, they may be prohibited for Muslims based on Islamic teachings. As such, Islamic offences can be enacted to ensure that Muslims adhere to their religious convictions. At the same time, Parliament retains control over criminal law policies for the general population, ensuring that criminal cases involving non-Muslims or matters beyond the scope of Item 1 of the State List are tried in civil courts.

This view is not unfamiliar to the Malaysian legal tradition. Since Merdeka Day, the late Emeritus Professor Tan Sri Datuk Ahmad bin Mohamed Ibrahim has championed a dual legal system in Malaysia, emphasising the importance of the co-existence of both civil and Syariah courts (Nabil, 2023). His advocacy for this duality has been fundamental in shaping the legal landscape of Malaysia, ensuring that both systems can operate in tandem (Nabil, 2023). One of his pioneering ideas includes Article 121 (1A) as part of the Constitution (Amendment) Act 1988, which causes civil courts to have no jurisdiction over matters in Item 1 of the State List (Na'im, 2023).

Approaches to the Federal List's preclusion clause criterion in Item 1 of the State List

The primary conflict arising from judicial decisions in implementing Islamic offences under Item 1 of the State List pertains to the issue of the Federal List's preclusion list criterion. The other four criteria, like territorial limit, *in personam* (against the person) jurisdiction, within the precepts of Islam, and the federal law's preclusion clause, do not create significant issues through analysing judicial decisions in the literature review.

This Federal List's preclusion clause criterion has gained attention in light of the cases Iki Putra Mubarrak v *Kerajaan Negeri Selangor* [2021] 2 MLJ 323 (FC) and Nik Elin Zurina Nik Abdul Rashid v *Kerajaan Negeri Kelantan* [2024] 2 MLJ 150 (FC). These landmark decisions have given rise to three distinct legal opinions on addressing this conflict, which are:

(i) Repealing the preclusion clause: This view advocates for removing it, allowing the state legislature more flexibility in determining the scope of its legislative authority over Islamic offences (*Perlembagaan Persekutuan perlu dipinda, 2024).* It is also suggested that Islamic offences be included in the Concurrent List, allowing Parliament and the State Legislative Assembly to enact laws in this area without restriction (Hariz & Hidayat, 2021);

(ii) Maintaining the legal framework: This perspective opposes any amendments, arguing that such changes could result in a theocratic state and infringe upon the Federal Constitution, which upholds a strong central government and delegates criminal law policy decisions to the federal level (Rajamanikam, 2024); and

(iii) Harmonising civil and Syariah courts: This proposal suggests merging the civil and Syariah court systems, thereby applying the same laws to Muslims and non-Muslims (Nisar, 2023). This desire is based on those who advocate that Islamic law should be part of the sources of

law to interpret every aspect of the Federal Constitution, considering Malaysia is a Muslim majority population (Amir, 2024).

Despite these differing opinions, it is evident that there is significant uncertainty regarding the Federal List's preclusion clause and the jurisdiction of the state legislature to legislate on Islamic offences (Najwa et al., 2022). This uncertainty arises because Item 4 of the Federal List is broadly defined, encompassing all aspects of criminal law in Malaysia. As a result, the state legislature faces challenges reconciling its authority to create Islamic offences under Item 1 of the State List. The difficulty stems from the lack of explicit provisions that outline which Islamic offences the state legislature is permitted to create without overlapping with the Federal List's scope.

The solution to this issue appears to be a constitutional amendment, which would resolve the uncertainty surrounding the Federal List's preclusion list criterion and clarify the limits of the state legislature's authority (Yusfarizal et al, 2022). One potential approach to maintaining a balanced position would be to amend the phrase "except in regard to matters included in the Federal List" in Item 1 of the State List to "subject to being determined by Parliament."

There are four advantages to this proposal. First, it creates a certainty similar to the framework established by the federal law's preclusion clause criterion. The Syariah Court (Criminal Jurisdiction) Act 1965 (Act 355) clarifies the precise jurisdiction for the state legislature to create Islamic offences under Item 1 of the State List. By adopting a similar approach, the proposal ensures legal certainty about the scope of the state legislature's authority in matters related to Islamic offences.

Second, the implementation of Islamic offences under Item 1 of the State List will be a reflection of the people's will. This statement is because Members of Parliament represent all states in Malaysia, ensuring that diverse regional interests are considered. Additionally, members of the Dewan Rakyat (House of Representatives) are democratically elected by the people. Thus, if most of the population supports the enhancement of Islamic offences, any such changes would be made under the democratic process.

Third, implementing this proposal will promote public accountability. This statement is because Parliament, as the national legislative body, operates under greater public scrutiny than the State Legislative Assembly. Parliament's proceedings are more visible to the public, as they are televised nationally. Furthermore, records such as *Hansard* and the list of bills to be presented before the Parliament are accessible online. As a result, any decisions regarding Islamic offences will be subject to extensive oversight and debate. This ensures transparency, as Parliament is directly accountable to the electorate, and its actions are open to public review. A good example is the scenario of the *Mufti* (Federal Territories) Bill 2024, which has been postponed since its first reading on 02.07.2024. The delay has been attributed to allegations that the bill excludes particular Muslims in Malaysia, highlighting how public debate and scrutiny influence legislative processes.

Fourth, this proposal would enhance cooperation and consensus between the Federal and State Governments in matters related to Islamic law. Although constitutional amendments may provide room for flexibility, it is essential to recognise that Malaysia is a relatively small nation in population and geographic size. The existence of multiple, potentially overlapping legal systems, particularly in criminal law, can lead to confusion and uncertainty among the general public, mainly when laws differ significantly from one state to another. This is one of the key reasons criminal law policies have been centralised at the federal level since Merdeka Day. It ensures consistency, clarity, and uniformity in legal administration nationwide. Thus, with federal oversight, this proposal can create a cooperative federal-state framework where the State Legislative Assembly can legislate on Islamic offences within clearly defined constitutional limits set up by the Parliament. This proposal helps balance respecting religious autonomy while preserving national legal coherence.

However, any such amendment would require approval from the Conference of Rulers, as Islamic law matters are directly tied to the status of His Highness as Head of Islam under Articles 3 (2), 38 (2) (c), (4), and 159 (5) of the Federal Constitution.

CONCLUSIONS

Islamic law existed in Malaysia even before European colonisation and continues to be practised today. However, its full implementation has been constrained by restrictions imposed by the Federal Constitution, given Malaysia's multicultural and multiethnic makeup. Despite this, the legal decisions in the Iki Putra and Nik Elin Zurina have sparked significant debate, as they failed to provide a clear framework for distinguishing between matters within the Federal and State Lists. This has left the state legislature's ability to legislate on Islamic offences in a state of uncertainty.

As a result, only a constitutional amendment can resolve these legal impediments. Nevertheless, even with the amendment, the discussion surrounding Islamic law in Malaysia remains contentious and continues to evolve.'

ACKNOWLEDGEMENTS

The authors would like to express their gratitude to all those who have supported this article.

CONFLICT OF INTEREST

It is declared that the authors do not hold any conflict of interest regarding this article.

AUTHORS' CONTRIBUTIONS

Izmi Izdiharuddin carried out the research and wrote the article. Che Mohd Hilmi Safiuddin revised and formatted the article's submission.

REFERENCES

Agus Rizal tidak mengaku salah tawar pakej haji furada tanpa lesen. (2022, August 23). *Berita Harian*. https://www.bharian.com.my/berita/nasional/2022/08/986289/agus-rizal-tidak-mengaku-salah-tawar-pakej-haji-furada-tanpa-lesen.

Ahmad, I. (1974). Malaysia as a Federation. *Journal of Malaysian and Comparative Law*, 1, 1 – 27.

Ahmad, I. (1975). The Administration of Muslim Law In Sabah. *Journal of Malaysian and Comparative Law*, 2, 309 – 340.

Ahmad, I. (1981). Islamic Law in Malaysia. *Journal of Malaysian and Comparative Law*, 8, 21 – 51.

Ahmad, W. F. W. H. (2021). Insights: The interpretation of Islam within the legal framework of the indigenous Malaya. *Journal of Governance and Integrity*, 4(2), 1 – 9.

Ali, A. (2018). *Undang-undang Melaka*. Sahifah.

Akram, M. L. (2025). *Islamic law: An introduction*. Isra Institute.

Amir, M. A. (2024). Analyzing the Dynamics Between Sharia Law and Civil Law in Governing Divorce Proceedings Among Muslims in Malaysia and Comparing Legal Outcomes. *Law and Economy*, 3 (4), 29 – 38.

Amrullah, M., Zaini, O., Marsitah, M. R., & Saffie, M. A. R. (2018). Komuniti Suluk dan persoalan migrasi:'sirih pulang ke gagang'. *Jurnal Kinabalu*, 24, 35 – 55.

Anderson v Secretary of State for the Home Department, [2002] 4 All ER 1089 (UKHL).

Anonymous. (2024, February 18). Perlembagaan Persekutuan perlu dipinda bagi perkasa undang-undang syariah. *Kosmo*. https://www.kosmo.com.my/2024/02/18/perlembagaan-persekutuan-perlu-dipinda-bagi-perkasa-undang-undang-syariah/

Asif, M. (2024). Application of Islamic criminal law in Malaysia: Legal and political implications. *World Affairs*, 28 (3), 58 – 80.

Awg, A. M. (2022). Islamic Law in Brunei Darussalam (1425–2014): *A Historical Perspective and Its Relationship With the Malay Islamic Monarchy Concept*. In Routledge Handbook of Contemporary Brunei (pp. 155-169). Routledge.

Ayu, N. A. M., Ali, M. H., & Wayu, N. A. M. (2019). Perlembagaan Persekutuan Malaysia mengharmonikan ikatan masyarakat majmuk di Malaysia: Harmonising the Community in Malaysia Through the Malaysian Federal Constitution. *Journal of Muwafaqat*, 2(1), 60 – 74.

Azam, M. M. A. (2000). Bidangkuasa dan kedudukan mahkamah syariah di Malaysia pasca alaf 20: Ke Arah Mana?. *Jurnal Syariah*, 8(2), 103 – 122.

Azhar, K. M. (2019). Peranan Ulama Dalam Penyebaran Ajaran Islam Di Pulau Besar, Melaka *Journal of Al-Tamaddun*, 14(2), 65 – 74.

Badlihisham, M. N. (2012). Islam dan Dakwah dalam Zaman Kebangkitan Awal Islam dan Era Penjajahan Barat di Tanah Melayu. *Islāmiyyāt: International Journal of Islamic Studies*, 34, 5 – 12.

Bashiran, B., & Asiah, N. N. (2009). Labuan: Its legal history and land tenure system. *Journal of the Malaysian Branch of the Royal Asiatic Society*, 17 – 54.

Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] 1 All ER 810 (UKHL).

Boon, C. K., & Rahman, A. H. I. (1998). *The Malay Annals*. Kuala Lumpur: Malaysian Branch of the Royal Asiatic Society.

Bowman v Secular Society Ltd [1917] AC 406 (UKHL).

Brahim, T., & Kathrina, M. D. (2022). *An overview of Bruneian literature: History, Historiography, and Critical Approaches*. In Routledge Handbook of Contemporary Brunei, 189 – 217. Routledge.

CCH v Pendaftar Besar bagi Kelahiran dan Kematian [2022] 1 MLJ 71 (FC).

Chew, E. (1998). The Naning War, 1831-1832: Colonial Authority and Malay Resistance in the Early Period of British Expansion. *Modern Asian Studies*, 32(2), 351 – 387.

Dahlia Dhaima bt Abdullah v Majlis Agama Islam Selangor [2025] 1 MLJ 334 (FC).

Danaharta Urus v Kekatong [2004] 2 MLJ 257 (FC).

Dato Menteri Othman Bin Baginda v Dato Ombi Syed Alwi Bin Syed Idrus [1981] 1 MLJ 29 (FC).

Dewan Negara. (1976, August 9). Rang Undang-Undang Perlembagaan (Pindaan), 718 – 784. (Hussein bin Onn, Prime Minister).

Dewan Rakyat. (1976, July 13). Rang Undang-Undang Perlembagaan (Pindaan), 2132 – 2228. (Hussein bin Onn, Prime Minister).

European Court of Human Rights. (2003, February 13). *Refah Partisi (The Welfare Party) and Others v. Turkey* (Applications nos. 41340/98, 41342/98, 41343/98, and 41344/98).

Fang, L. Y. (2007). Naskah undang-undang Melaka: suatu tinjauan. *Sari*, 25, 85 – 94.

Fauzi, W. A. W. H., Anisah, C. N., & Anwar, M. O. D. (2018). Konsep kedaulatan dalam Hukum Kanun Melaka. *Jurnal Undang-Undang Dan Masyarakat*, 22, 61 – 73.

Fernando, J. M. (2006). Sir Ivor Jennings and the Malayan Constitution. *The Journal of Imperial and Commonwealth History*, 34(4), 577–597.

Fernando, J. M. (2014). Defending the monarchy: The Malay rulers and the making of the Malayan constitution, 1956–1957. *Archipel*, 88, 149–167.

Garner, B. A. (Ed.). (2009). *Black's Law Dictionary* (9th ed.). Thomson Reuters.

Galbraith, J. S. (1965). The chartering of the British North Borneo Company. *Journal of British Studies*, 4(2), 102 – 126.

Ghazali, A. Z. (2024). Kemerdekaan dalam memori kolektif sejarah negara Malaysia: Sudut Pandang Sejarah. *Journal of Malaysia Dari Segi Sejarah*, 49, 40 – 73.

Hariz, M. S. M. H. S., & Hidayat, A. B. (2021). Penambahbaikan undang-undang jenayah syariah dalam menangani isu transgender di malaysia: cabaran dan cadangan: the enhancement of the sharia criminal laws in coping with transgender issue in malaysia: challenges and proposals. *Sains Insani*, 6(3), 8 – 20.

Harding, A. (2022). *The constitution of Malaysia: A contextual analysis* (2nd ed.). Hart Publishing.

Hasanuddin, M. M. Y., Zuliskandar, R., & Uzair, M. I. (2022). Ancient Malay Laws Regarding Business Rules and Ethics Enacted in the Malaysian Peninsula. *International Journal of Academic Research in Business and Social Sciences*, 12(1), 202 – 210.

Hasbullah, M. A., & Najibah, M. Z. (2009). Historical developments of financial rights after divorce in the Malaysian Islamic family law. *Asian Culture and History*, 1(2), 148 – 157.

Idris, A., & Sarina, T. A. T. K. (2007). Pembudayaan mazhab Syafi'i dalam masyarakat Islam di Malaysia. *Jurnal Fiqh*, 4, 157 – 172.

Imam, M., (1994a). Freedom of Religion under Federal Constitution of Malaysia - A Reappraisal. *Current Law Journal*, [1994] 2 CLJ lvii (June).

Imam, M., (1994b). Making Laws Islamic In Malaysia: A Constitutional Perspective. *Current Law Journal*, [1994] 2 CLJ vii (July).

Izmi, I. C J. M., & Suria, F. M. F., (2022). The relationship between the doctrine of ultra vires & R Rama Chandran in the Malaysian and English administrative laws. *Gading Journal for Social Sciences*, 25(1), 54-62.

Ketua Pengarah Jabatan Alam Sekitar v Kajing Tubek [1997] 3 MLJ 23 (CA).

Khadijah, M. K., & Zaidi, M. D., (2022). Pemerkasaan Akidah Ahl al-Sunnah wa al-Jamā'ah: Ke Arah Penguatkuasaan dan Penyeragaman Standard Sighah Fatwa. *Journal of Ifta and Islamic Heritage*, 1(1), 88 – 119.

Ling, H. H. (2019). Gerakan Antipenyerahan Di Sarawak, 1946-1949: Penentangan orang Melayu terhadap penjajah British. *Journal of Al-Tamaddun*, 14(1), 73 – 88.

Lowe, P. (2009). The Cold War and nationalism in Southeast Asia: British strategy, 1948–60. In *The International History of East Asia, 1900-1968* (pp. 152-170). Routledge.

Malaysian Government. (n.d.). Managing waqf. MyGOV. Retrieved May 10, 2025, from https://www.malaysia.gov.my/portal/content/27676.

Marzuki, M. (2017). Contesting Syariah laws in Malaysia: Religion, human rights and the state's response. *Journal of Politics and Law*, 10 (5), 140 – 148.

McLean, I., & Peterson, S. (2011). Secularity and secularism in the United Kingdom. *BYU Law Review*, 3 (4), 637 – 656.

Miller, R. (on the application of) v Prime Minister; Cherry v Advocate General for Scotland, [2019] 4 All ER 299 (UKSC).

Monir, A. Y. (2023). Pengaruh adat hukum kanun melaka dalam adat istiadat negeri Pahang. *Jurnal Tuah*, 4 (1), 56 – 62.

Moustafa, T. (2008). *Constituting religion: Islam, liberal rights, and the Malaysian state*. Cambridge University Press.

Nabil, A. A. (2023). Ahmad Ibrahim and the Islamization of law in Malaysia. *Advances*, 4 (3), 84 – 92.

Na'im, M. M. (2023). Achieving justice through implementation of Shariah: Challenges and the way forward. *IIUM Law Journal*, 31 (2), 27 – 42.

Na'im, M. M. & Haydar, H. A. T. (2023). The Islamic legal system in Malaysia: Challenges and strategies. *IIUM Law Journal*, 31 (1), 39 – 68.

Najwa, A., Hariati, I., Marina, S. A., Jusniza, A. J., & Namirah, M. A. (2022). Clash of legislative competency on matters of offences relating to decency. *International Journal of Law, Government And Communication*, 7 (28), 97 – 106.

Nisar, M. A. (2023, December 1). *Jurisdictional conflict between syariah and civil laws in Iki Putra Case: the way forward for Malaysian legal system*. International Seminar on Islam and Science (SAIS 2023), 95 – 107.

Noranizah, Y., Saimi, B., Razak, A. A. K., Fatimah, H., & Ariffin, W. W. Y. (2023, November). *Perkembangan perundangan Islam di sarawak sebelum kedatangan penjajah barat: satu tinjauan awal*. In Proceedings Borneo Islamic International Conference eISSN 2948-5045 (Vol. 14, pp. 66-72).

Noranizah, Y., & Saimi, B. (2024). Impak penjajahan barat terhadap sistem perundangan dan kehakiman islam di Sarawak. *MANU Jurnal Pusat Penataran Ilmu dan Bahasa*, 35(2), 99 – 124.

Nordin, H. (2002). A tale of two colonial port towns in the Straits of Melaka: Dutch Melaka and English Penang. *Journal of the Malaysian Branch of the Royal Asiatic Society*, 75 (2) (283), 65 – 98.

Norfaezah, S. (2022). Jenayah curi menurut undang-undang syariah dan undang-undang Brunei Darussalam dari perspektif mazhab Syafi'i. *Al-Shafi'i| International Journal of Islamic Contemporary Studies*, 2 (2), 45 – 67.

Nurdiyawati, A., & Adnan, J. (2021). Kesan Pemerintahan Kolonial Terhadap Kegiatan Ekonomi Masyarakat Melayu Di Melaka Hingga Era Kemerdekaan. *Asian Journal of Environment, History and Heritage*, 5 (2), 29 – 46.

O'Reilly v Mackman [1983] 2 AC 237 (UKHL).

Öztürk, A. E. (2018). Transformation of the Turkish Diyanet both at home and abroad: Three stages. *European Journal of Turkish Studies, Social Sciences on Contemporary Turkey*, 27, 1 – 14.

Paizah, I. (2007). Kedudukan Mazhab Syafi'i dalam Undang-undang Jenayah Islam di Malaysia. *Jurnal Fiqh,* 4, 237 – 250.

Paiva, A. (2022). Offences By Persons Professing The Religion Of Islam Against Precepts Of That Religion. *INSAF, The Journal of the Malaysian Bar*, 39 (1), 115 – 153.

Rajamanikam, S. R. (2024). Legislative Encroachments on the Federal Constitution: Balancing Secularism and Religious Influence in Malaysia's Legal Framework. *International Journal of Academic Research In Business And Social Sciences*, 14 (12), 4502 – 4517.

Rathakrishnan, M. (2017). Penghijrahan buruh India ke Pulau Pinang: Kajian mengenai corak migrasi dan pengaruh sosio-ekonomi sebelum tahun 1930. *Jebat: Malaysian Journal of History, Politics and Strategic Studies*, 44 (2), 94–114.

Represa, G. G. (2019). The Secession-remedy episodes: Massive and grave violations against the human rights of minorities and peoples. *Estudios de Deusto: revista de Derecho Público*, 67 (2), 163-180.

Rosdianah, Y., & Arshad, I. (2020). The Effects of Japanese Occupation in Sabah: During and After World War II (1941-1963). *Intellectual Discourse*, 28 (2), 511 – 527.

Shamrahayu, A. A. (2009). Some Thoughts On The Relationship Between Law And Religion In Malaysia. *Current Law Journal*, [2009] 1 CLJ(A) xix.

Sheridan, L. A. (1961). *The Federation of Malaya Constitution: Text, annotations and commentary*. University of Malaya Law Review.

Smith, S. C. (1994). The rise, decline, and survival of the Malay rulers during the Colonial period, 1874–1957. *The Journal of Imperial and Commonwealth History*, 22 (1), 84 – 108.

Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan [1996] 1 MLJ 261 (CA).

Raza, S. S. G., Ali, M. A., & Aisha, N. Q. (2024). Supremacy of the Parliament and the Rule of Law in the UK: An Analysis. *Journal of European Studies* (JES), 40 (1), 15 – 26.

Wey, A. L. K., & Latif, A. H. (2018). Grand strategy of the Malacca Sultanate, 1400–1511. *Comparative Strategy*, 37 (1), 49 – 55.

Yusfarizal, Y., Farzana, S. S. R., & Ahmed, S. K. A. R. (2022). Resolving Jurisdictional Dilemma In Recent Religious Disputes By Legal Mechanisms. *INSAF | The Journal of the Malaysian Bar,* 39 (1), 74 – 114.

Zahirwan, M. H. Z. A., Nizam, S. Z., Rahman, H. R. M. Y., Yusri, M. Y., Paiz, H., Munir, A. M. N., & Muhaizam, M. M. I. (2012, December 11-12). *History of the arrival of Islam in Malaysia: an analysis of early Islamic occupation in Malaysia*. The 9th Regional Symposium of The Malay Archipelago 2012 (Simposium Nusantara 9 2012), 731 – 738.

Zarina, O. (2023). English Malay Maritime Words in the Malay Seas. *3L: Language, Linguistics, Literature*, 29 (4), 1 – 14.

ABOUT THE AUTHORS

Izmi Izdiharuddin B Che Jamaludin Mahmud is a Faculty of Law UITM Raub Pahang lecturer. His main research activity is mainly on the Malaysian legal system, and he has published widely on these subjects in publications like Gading Journal for Social Sciences, Journal of Islamic, Social, Economics, and Development (JISED), CRELDA Journal, and Malayan Law Journal. He can be contacted at izdiharuddin@uitm.edu.my.

Che Mohd Hilmi Safiuddin is a PhD student at the Faculty of Civil Engineering, UiTM Pulau Pinang. He once had published in Jurnal Kejuruteraan, and the International Journal of Recent Technology and Engineering (IJRTE). He can be contacted at hilmisafiuddin@gmail.com.