The debate about the scope of Syariah offences in Malaysia in reality impinges on the pertinent question of the limits to legislation by the state government.

Commentators have often noted that since Malaysia does not follow the doctrine of Parliamentary supremacy, the power of Parliament to enact laws is constrained by the Federal Constitution, which declares itself the “supreme law of the Federation”. If Parliament enacts laws contrary to the constitution, the judiciary is empowered and authorized to declare such legislation unconstitutional and hence null and void. Criminal law—such as the Penal Code—as the law that belongs under Federal List, is thus subjected to the same test, whereby if Parliament enacts laws that, among others violate fundamental liberties, then it follows that the court may declare the law unconstitutional. Such arrangement is only necessary for a democratic society.

When it comes to Islamic law, however, the case is different. Although the constitution assigns criminal law to the federal government, state government is authorized to legislate on selected matters involving Islamic law, among others to create “offences against the precepts of Islam”. The actual scope of this power has been a point of contention, least of all in the very definition of “precepts of that religion [i.e. Islam]” as used in the constitutional text, but also because of the tenuous distinction between “offence” and “crime”. These two points have been at the very centre of debates on the proper right of Syariah courts to exercise their jurisdiction. Thus in several cases, the court conceded to the difficulty of distinguishing between “offence” and “crime”. This was made explicit in the case of Sulaiman Takrib v Kerajaan Negeri Terengganu, whereby the presiding judge, Abdul Hamid Mohamad CJ remarked, “I admit that it is not easy to draw the dividing line between ‘criminal law’ and [Shariah offences]. Every offence has a punishment attached to it. In that sense, it is criminal law. However, if every offence is criminal law, then no offence may be created by the State Legislature”. But surely a line has to be drawn somewhere. The only available limit to the creation of Shariah offence appears to be the Syariah Offences (Criminal Jurisdiction) Act 1965, which restricts the sentencing power to three years imprisonment, five thousand ringgits of fine, or six strokes of whipping. Apart from this, there is no clear boundaries or limits to the type of offences that may be created, or what may and may not be criminalized.

The lack of clear guidelines in the constitution or federal law could have been resolved by the courts, yet the case law reveals a reluctance to do so in their part. In
Mamat bin Daud v Government of Malaysia, the Supreme Court—the apex court then, now the Federal Court—chose to leave the question unanswered.\(^4\) Again in Sulaiman Takrib, the Federal Court explicitly refused to do so, describing any such attempt as serving more harm than good. The court nevertheless offered the barest guidelines, namely that, on the one hand, if the offence is against the precept of Islam, it is not deemed to be criminal law, and on the other, if similar provision is to be found in federal law, it is regarded as criminal law. Other than this, the court preferred the issue to be handled on a case by case basis. The issue becomes more complex in Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara, a trilogy that went through the High Court, the Court of Appeal and finally, the Federal Court. This case was the first opportunity for the court since the constitutional amendment inserting Article 121 (1A) to examine the scope of state government and Syariah courts with regards to Syariah offences. The court concluded that if an offence falls within the jurisdiction of both civil and Syariah courts, the accused may be prosecuted in either court. However, the court is silent on the role of state legislature itself.

This lack of clear guidelines also means that there is little limit to the scope of Syariah offence as may be legislated by state government. This is aggravated by a liberal interpretation adopted by the court in interpreting “the precepts of Islam”. In Sulaiman Takrib, the very definition of this phrase was contested. To resolve this quandary, the opinions of three court experts were adduced: two favored a liberal approach, whereby “precepts” were wide enough to cover anything encompassing belief, law and ethics (‘aqidah, Shari‘ah, akhlaq), yet one minor view took a restrictive stance whereby “precepts” were confined to those fundamental points on which there is little disagreement among the jurists, albeit may encompass all three areas. The court adopted the liberal interpretation of the majority and consequently, was able to hold the impugned enactment provisions valid. These liberal interpretations have left state government unimpeded in its powers to create Syariah offences, giving it leeway towards vast territorial expansion. Only recently, the Federal Court upheld an enactment criminalizing the dissemination of Irshad Manji’s Allah, Liberty and Love (or more specifically, its Malay translation, Allah, Kebebasan dan Cinta), on the ground that the book contains materials contrary to Islamic law. The court cited with approval Sulaiman Takrib, as was later followed by subsequent cases, such as Fathul Bari Mat Jahya v Majlis Agama Islam Negeri Sembilan.\(^5\)

Now to recall from the federal structure, when Parliament enacts laws violating the constitution, the court may turn them down for want of constitutionality. Is the same arrangement replicated for Islamic law? Arguably no: the reason is that the courts have repeatedly insisted that constitutional interpretation is the province of the civil rather than Syariah courts.\(^6\) The effect is that, in the Syariah courts
at least, constitutional protection of fundamental liberties is not available to the parties. If indeed, they wish to rely on it, a separate avenue has to be pursued, namely in the civil courts to challenge the constitutional validity of the enactment provision in question. However, this only happens at the judicial level, not the legislative level.

In fact, the very act of separating jurisdictions itself serves as a check on the limits to legislative competence of state government with regards to offences. By excluding criminal matters from the jurisdiction of state government, the constitution in effect forces the matter to be addressed at the platform where constitutional protection of fundamental liberties is available, namely, the civil courts. We submit, however, that this arrangement is not always desirable. While it may be argued that such an arrangement retains the supervisory role of the civil courts over the Syariah courts, in fact the 1988 amendment as encapsulated in the insertion of Article 121 (1A) envisaged an independent and parallel jurisdiction for the Syariah courts. Consequently, if indeed fundamental liberties of individuals need to be protected, this should occur even within the framework of state Islamic legal system. Toward this end, two options may be advanced.

The first possibility is to open the scope for Syariah courts towards constitutional interpretation—limited, however, to the extent necessary to resolve the issue in question. The Syariah court’s power nevertheless will not be the same as that of the civil courts, in which lies the judicial function of the Federation. The Syariah courts will thus not be able to declare an enactment unconstitutional, or adopt a constitutional interpretation binding on the civil courts. Instead, they will be able to apply constitutional provisions proportionate to the case at hand.

The second possibility is to enact a ‘micro’ form of constitutional protection of liberties. Given the limited jurisdiction of state legislature, the latter may not be able to enact positive legislation protecting fundamental liberties per se. What it may nevertheless do, is to adopt negative rather than positive protection of rights, that is to say, to legislate on matters in which the Syariah courts are not allowed to encroach, meaning that liberties will be safeguarded, not by conferring direct rights (positive protection)—which it cannot do—but by restraining the state government from encroaching on fundamental liberties (negative protection).

Notes

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2. Federal Constitution, Ninth Schedule, List II—State List includes the “creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List”. (emphasis added)


