

CONSTRUCTING AN ISLAMIC CRIMINAL LAW SYSTEM IN MALAYSIA

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Abstract

Malaysia operates a federal parliamentary system. The Constitution recognises Islam as the Federation's religion with the proviso that other religions be practised in peace. Islamic law exists alongside common law. This study analyses how the two laws are harmonised and the features of Islamic law in operation. This paper qualitatively analyses the Federal Constitution of Malaysia and examines the features of Islamic law it contains. In particular, this paper studies the current establishment of Syariah courts, its criminal mandate, the enforcement, and Syariah approach in practice in Malaysian federal territories. This paper's findings may help the improvement and betterment of Islamic law, particularly in harmonising common law jurisdiction with Syariah.

Keywords: *Syariah, Criminal Law, Syariah Courts Malaysia*

Intisari

Malaysia menggunakan sistem federal parlementer. Konstitusinya mengakui Islam sebagai agama federasi dengan aturan agama lain boleh dipraktikkan dalam damai. Hukum Islam hadir bersandingan dengan *common law*. Penelitian ini menganalisis sikap dimana kedua hukum bisa harmonis dan fitur hukum Islam dalam praktiknya. Tulisan ini secara kualitatif menganalisis Konstitusi Federal Malaysia dan memeriksa fitur hukum Islam di dalamnya. Secara khusus, tulisan ini mempelajari pembentukan pengadilan Syariah saat ini, mandat pidananya, penegakannya, dan pendekatan Syariah dalam praktik di teritori federal Malaysia. Penemuan dari tulisan ini dapat membantu mengembangkan dan memperbaiki Hukum Islam terutama harmonisasi antara yurisdiksi *common law* dan Syariah.

Kata Kunci: *Syariah, Hukum Pidana, Pengadilan Syariah Malaysia*

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A. Introduction

Over the years, the plurality of common law concepts, which were entrenched in Malaysia's jurisdiction along with Syariah notions, have caused friction within its legal system. Despite efforts to harmonise the dual systems, it still had a long way to go under the cumbersome burden with multi-jurisdictional enforcement agencies and a host of courts. The Malaysian approach for accommodating two opposing legal systems into one sustainable package has shown that the true essence of either system, whether the common law civil jurisdiction, common law criminal jurisdiction or Syariah civil, and Syariah criminal jurisdiction, has not necessarily allowed for the full enforceability in their truest sense. Even different Syariah Courts of individual states of the Federation had issues that differed from the other courts to the extent that summons from one State was not honoured by another Syariah court. The study's motive is to highlight features of Islamic Criminal law in Malaysia with a brief analysis of the position of Islamic criminal law in Aceh.

The Malaysian approach to include shari'ah precepts into its federal constitution is not without controversy. From its reasoning to its inclusion, the constitutional restrictions for its application and enforcement to its observation are mired with an ambiguity.¹ It is open for interpretation and interpretation of laws not being in Syariah courts' jurisdiction and are to be determined by the federal civil courts. These definitive and controlling attributes within the legal system hinder the Syariah courts and make it more difficult to continue its current position mandate.

It is also a common misconception to state that the Malaysian legal system has dual nature, where a

civil law system is run in parallel with a syariah law system. Islamic law or Syariah law in Malaysia is only applicable for Muslims and only in certain few areas of their law. Whilst the civil law is applicable for both the Muslims and the non-Muslims alike.² In theory, they are separated into numerous instances where the two systems collide with each other's jurisdiction.³ It is accepted among the fraternity that precedence is attributed to the Federal High Court. There are more than one instances where the High Court of Malaysia has asserted its ultimatum into cases where the supremacy of the States' jurisdiction of Syariah court is clear and incumbent. This is the case even on matters exclusive and on the jurisdiction of Islamic Law.

It is without a doubt, however, that Malaysian Federal Constitution assumes Islam as the Federation's religion, and has given autonomy on matters related to Syariah, to the States. Despite all, the States in the Malaysian Federation have Syariah courts. In its entirety, the entire Syariah legal system is kept in check by virtue of Malaysia's federal legal system with ultimate overriding authority over each Syariah courts' decision. It has seen matters set out in the federal constitutions state list for Syariah courts were openly appealed, debated, interpreted and decided by federal High Court, just because the state where the particular Syariah Court was established, did not have explicitly given jurisdiction for a particular matter mentioned in the federal constitution's list.⁴ What, then, are the Syariah courts' essential features and what are their jurisdiction in Malaysia? What is the mandate of Syariah Courts as enshrined in the Constitution? These questions need to be studied to make the operations of the Syariah court legible. The study is based upon the qualitative analysis of the Federal

¹ Norani Othman, 2008, "Islam, Constitution, Citizenship Rights and Justice in Malaysia", in Sankt Augustin, *Islam and the Rule of Law: Between Sharia and Secularization*, Berlin.

² Jo-anne Prud'homme, "Policing Belief: The Impact of Blasphemy Laws on Human Rights." *A Freedom House Special Report*, 2010, pp. 59.

³ Tamir Moustafa, "The Politics of Religious Freedom in Malaysia", *Maryland Journal of International Law*, Vol. 29, No. 1, June, 2014, pp. 484.

⁴ Siti Ismail, *et al.*, "Faith and Freedom: The Qur'anic Notion of Freedom of Religion vs. the Act of Changing Religion and Thoughts on the Implications for Malaysia", *Religions*, Vol. 7, No. 7, June, 2016, pp 13.

Constitution of Malaysia. The various document related to syariah courts and their jurisdictions were also being examined. The study also benefitted from the discussion carried out with those who are knowledgeable on the subject. The study shall hopefully benefit the specialists and the layman alike in understanding the nature and the features of syariah courts in Malaysia.

The study is divided into several sections. After discussing the problem under investigation and the justification of such a study, the second section explains albeit briefly the elements of the Syariah legal system with a focus on its criminal provisions. The third section analyses the constitutional supremacy in Malaysia and the powers granted to the states in matter syariah matters. The characteristics of Islamic law in Malaysia are discussed in the fourth section and then followed by the concluding section of this study.

With all these controversial aspects in maintaining syariah courts, the government reassured of a plan to setup a Syariah Federal Appeal Court. For a better Syariah Judicial system, the most important action by the government of Malaysia, was seen as the establishment of Department of Syariah Judiciary Malaysia (JKSM) and Department of Islamic Development Malaysia (JAKIM)); In order to streamline the administration of Syariah courts and to have uniformity of Islamic laws throughout the Federation. The government has created an agency called the JKSM with the main mandate was to unify and persuade the other states in Malaysia to join the Joint Scheme for the purpose of administration and opportunities for the Syariah officers, the independent and autonomous state syariah courts,

into following a uniform structure, particularly the Federal Territory Acts.⁵ Since its inception, JKSM in 1998, it has established a federal level Syariah Appeal Court. This act was seen as one of the many attempts on a national level to harmonise and bring the syariah courts decisions to be appealed at a federal level.⁶ As a federal government department, JAKIM was established in 1997, to preside over the development of Islamic matters and as well as on Islamic laws. It has been one of the main advocating points of JAKIM for the establishment of a five-tiered Syariah Court system instead of the three-tiered currently in place.⁷ It should be noted that there is no constitutional restriction to have and syariah based system with a reach over the entire Federation.⁸

B. Discussion

1. Syariah, The Islamic Law

Syariah law is derived from ten different sources, with its primary source considered to be the Holy Quran and the Sunnah of the Prophet Muhammad (SAW).⁹ Syariah law tends to encompass all aspects of Muslims, from their everyday public life to individual interactions, governance of State, legal system as well as the economic system.¹⁰ For the purpose of this paper we will look into the elements of the Syariah legal system in particular it's criminal provisions.

There are three main categories and punishment modalities of criminal offenses in Syariah; *First, Hudud Crimes*. These crimes are offenses with its punishments prescribed in the Quran and Sunnah of the Prophet (SAW) and the punishments for these crimes could not be changed as it is fixed

⁵ Ramizah Wan Muhammad, "The Administration of Syariah Courts in Malaysia, 1957–2009" *Journal of Islamic Law and Culture*, Vol. 13, No. 2–3, October, 2011, pp 242–52.

⁶ Kerstin Steiner, "Branding Islam: Islam, Law, and Bureaucracies in Southeast Asia", *Journal of Current Southeast Asian Affairs*, Vol. 37, No. 1, April, 2018, pp. 49.

⁷ Helen Ting Mu Hung, "The Politics of Hudud Law Implementation in Malaysia". ISEAS, No. 04, 2016, pp.1-18.

⁸ Farid S. Shuaib, "The Islamic Legal System in Malaysia", *Pacific Rim Law & Policy Journal*, Vol. 21, No.1 January, 2012, pp. 92.

⁹ Mohamad Akram Laldin, 2008. *Shariah and Islamic Jurisprudence*, CERT Publications, Kuala Lumpur, pp. 55.

¹⁰ Yussef Auf, "Islam and Sharia Law: Historical, Constitutional and Political Context in Egypt", Atlantic Council: Rafik Hariri Center for the Middle East, 2016, https://ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/resources/docs/Islam_and_Sharia_Law.pdf.

by Allah (SWT). The crimes in this category are the crimes that violate the rights of Allah, society and public at large. The offenses in this category includes, theft, terrorism (Hirabah), fornication and adultery, false accusation of illegal sexual intercourse, drinking khamr, apostasy and rebellion. Punishments include, amputation of the hand of the thief, flogging the fornicator etc.

Second, Qisas and Diyat Crimes. These crimes are offenses with punishment prescribed as retributory, and are applicable for crimes such as murder, physical injuries, and such. In retributory punishment, seeking right from the legal authority is given to the heirs of the victim. Punishments include, death penalty, equating punishment such as an ‘eye for an eye’ and blood money for the relatives. The rights violated in this type of crimes are rights of Allah and individual.

Third, Ta’zir Crimes. These crimes are offenses that are not in the categories of *hudud* and *qisas*, yet considered for all other offenses, where the judge is given a discretion over the type of punishment to levy on the convict. These offenses otherwise known as violations, such as not offering prayer, public morality violation, bribery etc.¹¹

This shows the broad spectrum of Syariah punishment mechanism. It includes each and every form of offense, whether old or new a form of punishment, and could be levied for the offender under the Syariah legal system. Today, various Muslim majority countries around the world have adopted systems that are either a mix of Syariah and common law,¹² or a secular legal system with an autonomous Syariah legal system running in parallel, or a fully Syariah only legal system. As some countries have chosen some offenses that are

in the scope of conservative Syariah notions into their legal systems, whilst opting out of having some Syariah offenses out of the legal systems for their controversial issues that surrounds these particular offenses. Almost all Muslim majority countries have adopted some form of Syariah based legal systems.

2. Constitutional Supremacy in Malaysia

According to the Constitution of the Federation, Malaysia is a country divided into different federal territories, namely, Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Sabah, Sarawak, Selangor and Terengganu.¹³ Each of these states are governed independently. However, the federations’ constitution mandates that each of these states to adhere to the general articles. As such having given the freedom for anyone to practice a religion of their choice within the territory of the Federation, the constitution adopts Islam as the religion of the Federation.¹⁴ The constitution further mandates that in particular states of Malacca, Penang, Sabah and Sarawak to have provisions in their state constitutions conferring the Yang di-Pertuan Agong¹⁵ as the supreme head of the Federation to act as the Head of Islam religion in those states.¹⁶ The constitutionally vested virtues as the head of Islam of the Federation is also extended to the Yang di-Pertuan Agong in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya.¹⁷ As the head of the religion of Islam, Yang di-Pertuan Agong is also given the authority to pardon, reprieve, respite, remit, suspend or commute sentences for offenses which has led to a conviction from a Syariah court.¹⁸ All the powers of the Federation of Malaysia are derived from the

¹¹ Tayyab Haneef, “Islamic Law of Crimes”, Lecture Paper, Lahore Leeds University Pakistan, 2015, pp.1-7.

¹² Shahin Alam & Tareq M Yazid. “Islamic law and Legal System: is Islamic Law “a Non-National System of Law?”, 4 *ShLR I*, 2016, pp.3-4.

¹³ The Federal Constitution 1957, Article 1(2).

¹⁴ *Ibid.*, Article 3(1).

¹⁵ *Ibid.*, Article 32(1).

¹⁶ *Ibid.*, Article 3(30).

¹⁷ *Ibid.*, Article 3(5).

¹⁸ *Ibid.*, Article 42 (10).

supreme law of the Federation, or in other words, the constitution of the Federation.¹⁹

All laws made by the parliament of the Federation or by any of the States legislature are considered absolute in their own right.²⁰ Unless on the grounds of invalidation proceedings should it circumvent the proemial arrangement between Parliament and State Legislatures. This authority to legislate gives a sense of autonomy for the States within the Federation. However, the constitution of the Federation reigns supreme.

Every person within the Federation is granted fundamental liberties which ensures that a person is protected from vices and grants equal rights and equal protection before the law.²¹ Every person is protected against repeated trials and retrospective criminal laws.²² It has to be noted that although the constitution generally advocates on a ground of no discrimination against its citizens, it has included a provision where an express authorisation by the constitution could allow different handling approaches under laws towards citizens based on religion, race, descent, place of birth or gender.²³ This article of the Federal constitution can be construed as the originating point for the allowance of Syariah punishments, Syariah courts and its assertion just for Muslim citizens of Malaysia. Even though the federal constitution allows the citizens to profess, practice and propagate religion at their personal behest.²⁴ It allows the federal laws and the state laws to “control or restrict propagation of religious doctrine or belief among persons professing the religion of Islam.”²⁵

In addition, the federal constitution authorises the propagation of Islam through institutions and

allows the expenditure of such from the State or Federation.²⁶ Thus authorising the Federation or the State active participation in the propagation of religion, specifically Islam.

3. Characteristics of Islamic Law in Malaysia

The Islamic law and its provisions for adjudicating over matters of anyone who professes that their religion is Islam, is derived from the Federal Constitution of Malaysia, where a State list is mentioned which includes all matters that would be encompassed under Syariah’s reach. The Syariah courts are not allowed to handle issues if the matter is not mentioned in the State list.²⁷

The State list of the Federal Constitution categorises the mandate of Syariah Courts into 6 main categories. They are issues related to a Muslims personal matters, issues related to charity, issues related to zakat, places of Muslim worship, Malay customs and the punishment category. The punishments category is ambiguous in its wording as it only mentions that these courts could be given the mandate to create and punish offenses by persons profession the religion of Islam against the precepts of Islam. This in turn have led in the past for different interpretation by various States. Some have previously been seen to adopt harsh and impossible to enforce rulings, such as ordering for the removal of books from bookshops can be considered to be in contravention and to the States special interpretation of being or having content against the precepts of Islam. These State level decisions were later seen to be challenged at Higher appeal courts.

¹⁹ *Ibid.*, Article 4(1).

²⁰ *Ibid.*, Article 4(3).

²¹ *Ibid.*, Article 8(1).

²² *Ibid.*, Article 7.

²³ *Ibid.*, Article 8(2).

²⁴ *Ibid.*, Article 11(1).

²⁵ *Ibid.*, Article 11(4).

²⁶ *Ibid.*, Article 12(2).

²⁷ *Ibid.*, List II. State List.

Table 1.**State List for Federal Mandate of Syariah Courts**

Related to Personal Matters	Related to Charity	Related to Zakat	Related to Places of Worship	Related to Punishments	Related to Malay Customs
Succession	Gifts	Fitrah	Mosques	Creation of syariah criminal offences against the precepts of Islam	Issues related to Malay customs
Testate	Partitions	Baitulmal	Any Islamic Public place of worship		
Intestate	Non-Charitable Trusts	Islamic Religious revenue			
Betrothal	Wakafs				
Marriage	Appointment of Trustees				
Divorce	Incorporation of persons in Respect to Islamic Religious and Charitable endowments				
Mahr	Institutions				
Nafqah	Trusts				
Adoption	Charities				
Legitimacy	Charitable Institution operative within the State				
Hadanah					

Source: Federal Constitution of Malaysia 1957, Section 9, List II- State List

a. Syariah Criminal Offenses in Malaysia

Syariah Criminal Offences Act 559 of (Federal Territories) [1997] does not stipulate all the *hudud* and *qisas* criminal offenses in Syariah,²⁸ as they are diverted to the mandate of civil courts rather than Syariah Courts themselves. As for punishments, *hudud* punishments are not allowed under the mandate of Syariah Courts. All the punishments authorised are Ta'zir punishments. It should be mentioned that despite having the jurisdiction limited to a scope of maximum punishments for the syariah courts, the punishment guideline

provides a view of the extensive reach of these courts when it comes to considering Syariah offences. Another notable mention is that the law has put a limitation on Syariah Courts from levying any punishment for offenses in its jurisdiction, this limitation only allows Syariah Courts to have the following types of punishments;

- i. An imprisonment term not exceeding 3 years
- ii. A fine not exceeding five thousand ringgits.
- iii. A sentence of whipping not exceeding six strokes with any combination thereof.²⁹

²⁸ R. W. Muhammad, *et al.*, "Challenges in the Enforcement of Shariah Criminal Offences in Selangor: Between Perception and Reality", *Pertanika Journal of Social Science & Humanities*, Vol. 23, No. S, October, 2015, pp. 33.

²⁹ The Syariah Courts (Criminal Jurisdiction) Act 1965, Section 2.

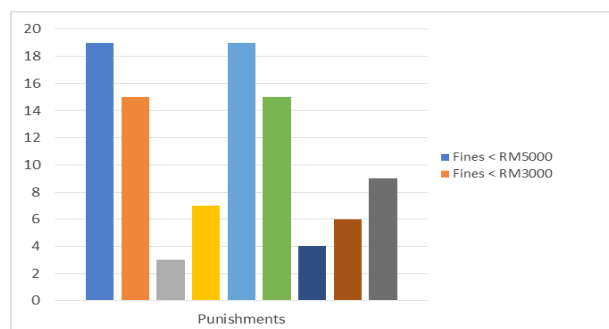
Table 2.
Syariah Offenses in Malaysia

Syariah Offenses	
Wrongful worship	<i>Musahaqah</i>
False doctrine	<i>Khalwat</i>
Propagation of religious doctrines	Male person posing as woman
False claim	Indecent acts in public place
Insulting, or bringing into contempt, etc, the religion of Islam	Giving false evidence, information or statement
<i>Deriding, Qur'anic verses or Hadith</i>	<i>Takfir</i>
Contempt or defiance of religious authorities	Destroying or defiling mosque, surau, etc.
Religious teaching without <i>tauliah</i>	Collection of <i>zakat fitrah</i> without authority
Opinion contrary to <i>fatwa</i>	Illegal payment of <i>zakat</i> or <i>fitrah</i>
Religious publication contrary to Islamic law	Encouraging vice
Failure to perform Friday prayers	Enticing a married woman
Disrespect for <i>Ramadan</i>	Preventing married couple from cohabiting
An act preparatory to sexual intercourse out of wedlock	Instigating husband or wife to divorce or to neglect duties
Instigating neglect of religious duty	Selling or giving away child to non-Muslim
Gambling	<i>Qazaf</i>
Intoxicating drinks	Abuses of halal sign
Incest	Non-payment of <i>zakat fitrah</i>
Prostitution	<i>Liwat</i>
<i>Muncikari</i>	Sexual intercourse out of wedlock

Source: Syariah Criminal Offences Act 559 of (Federal Territories) [1997]

In order to date different States of the Federation, it has adopted various combinations within the allowed punishment criterion. The lack of harmony between punishment pattern between the States is obviously one of the challenges that is to be resolved.

Chart 1.
Offenses to Punish Correlation (Federal Territories)



Source: Syariah Criminal Offences (Federal Territories) Act 1997

When considering the punishment patterns, in regard to the severity scale, we found that for Syariah offenses, the authorised maximum punishments are made applicable on the judge's discretion for majority of the offenses. As a fine of more than RM5000 is not allowed to be meted and an imprisonment sentence exceeding 3 years is not allowed for Syariah courts, the data shows that for 19 offenses out of a potential 38 crimes, the punishment allowance is in the range of the highest possible punishment allowed by the federal constitution. Another 15 offenses are applicable for the next severest from the scale of RM3000 to 2 Years imprisonment. 1 year or less is applicable for just 4 offenses whilst the punishment of whipping not more than 6 strokes is made available for just 9 offenses.

Syariah courts are subordinate courts which are given a mandate and a punishment criterion for offenses, with that less than

the autonomy of a civil magistrate's court. The 3-5-6 Rule [maximum imprisonment 3 years, Maximum Fine RM5,000, Maximum whipping 6 stroke] for Syariah Courts and the 5-10-12 Rule [maximum imprisonment 5 years, Maximum Fine RM10,000, Maximum whipping 12 stroke] for magistrates' courts shows almost double the punishing power a civil magistrate court yields over that of the Syariah Court.³⁰

b. Syariah Courts

State laws enactments allowed the establishment of Syariah Courts with civil and criminal jurisdiction concerning Syariah. The current model of Syariah criminal courts in Malaysia were elaborated under the Syariah Courts (Criminal Jurisdiction) Act 1965. This key piece of legislation gave legality and authority to Syariah courts with the jurisdiction over Muslims in different states of the country. The Syariah Courts Act, by nature limits the authority of these courts to the scope of the list under the federal constitution.³¹ Unlike Civil courts which are under the mandate of the federal government, Syariah Courts were authorised under State governments and their own legislature.

In the federal states, there are 3 levels of Syariah Courts in Malaysia, **First**, Syariah Subordinate Court. This court has a criminal jurisdiction and a civil jurisdiction, where the court is allowed to try cases under enactment related to the religion of Islam and only preside over syariah cases of Muslims.³² The courts civil jurisdiction is on matters of syariah which does not exceed fifty thousand ringgit

value or cases or cases with incalculable monetarily.³³ The judges for these courts are appointed on the recommendation from the Chief Syariah Judge, the appointments are made by the Yang di-Pertuan Agong. The appointments are made from the members of the Federation of Judges of the Syariah Subordinate Courts.³⁴

Second, Syariah High Court. This court has a criminal jurisdiction and a civil jurisdiction where the criminal jurisdiction is extended to all offenses mentioned to be applicable under the Enactments and other offenses against the precepts of the religion of Islam.³⁵ This courts criminal jurisdiction is limited to Muslims. The civil jurisdiction of this court is for syariah matters where all parties of the proceedings are Muslims and matters conferred by law.³⁶ They Syariah High Court acts as a first instance of appeal for both criminal and civil cases concluded from the Syariah Subordinate Court.³⁷ The Syariah High Court judges are appointed by the Yang di-Pertuan Agong, from amongst people who are learned in Islamic Law and have a minimum duration of 10 years of experience as a Syariah Subordinate Court or as a Kathi, Syariah Prosecutor, or as a Syariah Registrar.³⁸

Third, Syariah Appeal Court. This court acts as the last court of appeal for the aggrieved parties for any judgements, whether in the criminal jurisdiction or civil jurisdiction, by the Syariah High Court are meted.³⁹ The Chief Syariah Judge is appointed for the Syariah Appeal Court and

³⁰ Hung, *Op. cit.* pp 12-13

³¹ The Syariah Courts (Criminal Jurisdiction) Act 1965, Section 2.

³² The Administration of Islamic Law (Federal Territories) Act 1993, Section 47 (2) (a).

³³ *Ibid.*, Section 47 (2) (b).

³⁴ *Ibid.*, Section 44.

³⁵ *Ibid.*, Section 46(2)(a).

³⁶ *Ibid.*, Section 46(2)(b).

³⁷ *Ibid.*, Section 48.

³⁸ *Ibid.*, Section 43.

³⁹ *Ibid.*, Section 52.

he is to be of a person learned in Islamic Law and preferably having had served at least 10 years as a Judge, Syariah Prosecutor, or as a Syariah Registrar in a Syariah High Court.⁴⁰ There are an additional panel of judges not exceeding 7 members, appointed for the Syariah Appeal Court by the Yang di-Pertan Agong. The duration for the 7 Syariah Appeal Court judges is maximum 3 years.⁴¹

c. Syariah Criminal Procedure

A very well documented Syariah Court criminal procedure is made available for each of the 13 states implementing Syariah law.⁴² It documents the entire procedure of handling issues of concern and those within the mandate of Syariah Courts, namely issues such as the administrative provisions of the courts, the information on judges and enforcement officers. The information such are handling criminal suspects are also including in this piece of legislation. It goes into details such as restraining, arresting, re-arresting, searching premises, perusing offenders, court summons, arrest warrants and other technical information. The Syariah Criminal Procedure also details the information for the process and procedure of prosecution, how charges can be brought to court, how the trial would be conducted as well as the enforcement and the appellate process following a sentence.

First, investigating Syariah offenses. The main body to investigate Syariah offenses is the Religious Enforcement Officer.⁴³ Religious Enforcement Officers are vested with the powers to carry out investigations consid-

ered offenses under the Syariah code and any of those considered to be an act in contravention to the religion of Islam,⁴⁴ the Religious Enforcement officers work under a Chief Religious Enforcement officer appointed within the general public by the Majlis.⁴⁵

Upon receiving any information regarding an offence, the Religious Enforcement Officer will take the initial statement in writing and the investigation process will begin formally. The Religious Enforcement Officers are authorised to examine witnesses and seek information regarding any particular case.⁴⁶ They are also allowed to take statements from witnesses and perform search suspects for potential evidence.⁴⁷ Upon the completion of investigation by the Religious Enforcement Officer, a report should be provided to the Chief Syariah Prosecutor detailing all the information regarding that investigation.⁴⁸

Second, Syariah prosecution. Syariah prosecutor appointment is conducted by the Chief Syariah Prosecutor. The Chief Syariah Prosecutor is appointed by the Yan di-Pertuan Agong.⁴⁹ The Chief Syariah Prosecutor is vested with the full authority to control and direct all Syariah criminal charges.⁵⁰ Other than presenting a case in a subordinate Syariah Court where a Religious Enforcement Officer could be authorised to act on behalf of the Chief Syariah Prosecutor. The Chief Syariah Prosecutor or a Syariah Prosecutor should be present during the court proceedings.⁵¹ The prosecutor has the right to charge on Syariah

⁴⁰ *Ibid.*, Section 41.

⁴¹ *Ibid.*, Section 42.

⁴² Jo-anne Prud'homme, *Op. cit.* p. 59.

⁴³ The Syariah Criminal Procedure (Federal Territories) Act 1997, Section 54(1).

⁴⁴ The Administration of Islamic Law (Federal Territories) Act 1993, Section 58(4).

⁴⁵ *Ibid.*, Section 58(5).

⁴⁶ The Syariah Criminal Procedure (Federal Territories) Act 1997, Section 58.

⁴⁷ *Ibid.*, Section 63.

⁴⁸ *Ibid.*, Section 66.

⁴⁹ The Administration of Islamic Law (Federal Territories) Act 1993, Section 58(2).

⁵⁰ The Syariah Criminal Procedure (Federal Territories) Act 1997, Section 181.

⁵¹ *Ibid.*, Section. 183.

offenses, withdraw charges.⁵²

Third, right of the accused. If a person is accused of a Syariah offense and is arrested either by the Syariah Enforcement Officers or by Police Officers, the arrested person is to be brought in front of a Syariah Court and charges should be heard before the accused within 24 hours barring the time it takes for the journey. The judge is given the discretion to allow the accused to be released on bail or hold him in police remand or keep him in prison until the case is dealt.⁵³

There are Syariah defence representatives made available on request from the accused.⁵⁴ These special representatives, possess sufficient knowledge in Islamic Law, are called *Penguam Syarie*, and they are appointed by the Majlis for the purpose of representing parties in Syariah Court proceedings.⁵⁵

During the proceedings of the court, if there is a witness who have previously provided a statement to the Religious Enforcement Officer during the investigation state, the Syariah Court will give a copy of that statement and allow the accused to challenge and provide his points to impeach the credit of that particular witness based on their testimony.⁵⁶ The previous evidence statement given to the Religious Enforcement Officer during investigation is also not accepted as evidence in the court.⁵⁷ All confessions or statements are heard in front of a Syariah Court judge in the presence of two witnesses prior to the start of the trial.⁵⁸

During the trial, the accused is

explained of the accusations against him and the charges. The accused is given the opportunity to either to plead guilty or to let the prosecution to provide evidence against him and for the accused to provide his defence for the allegations. The accused or his appointed Penguam Syarie is given the opportunity to cross-examine all the witnesses provided before the court by the prosecution. The accused is also allowed to request the judge to issue summons for particular witnesses to be brought to court for his defence.⁵⁹

In the event if the court acquits the accused, then he is allowed to seek compensation if there are reasonable ground that his initial accusation and the events followed, stemmed from a frivolous or vexatious complaint. The Syariah Court may order the wrongdoer to compensate the accused to an amount not exceeding one thousand ringgits.⁶⁰

Fourth, sentencing by Syariah Court. All judgments are delivered in an open court where the defendant and the prosecution is present⁶¹ and the sentencing of the court is explained to the defendant and a copy of the sentence is provided to the accused.⁶²

In the event if the accused is found not guilty by the subordinate court only the Chief Syariah Prosecutor has the right appeal the decision to a higher Syariah court.⁶³

Fifth, enforcing Syariah courts judgement. Syariah Courts pronounce three types of judgements, they are imprisonment,

⁵² *Ibid.*, Section 103(1).

⁵³ *Ibid.*, Section 22(1); (3); (4); (5).

⁵⁴ *Ibid.*, Section 104.

⁵⁵ The Administration of Islamic Law (Federal Territories) Act 1993, Section 59.

⁵⁶ The Syariah Criminal Procedure (Federal Territories) Act 1997, Section 60(2).

⁵⁷ *Ibid.*, Section 60 (1).

⁵⁸ *Ibid.*, Section. 62.

⁵⁹ *Ibid.*, Section. 96.

⁶⁰ *Ibid.*, Section 99.

⁶¹ *Ibid.*, Section 118.

⁶² *Ibid.*, Section 119.

⁶³ *Ibid.*, Section 136.

fines, and whipping. Although not considered as a general form of a punishment, some conditional judgements are also meted, such as to take up other forms of rehabilitative treatment or to be conditionally released on surety or bonds based on first time offenses or based on the nature of the offence or based on the disposition of the offender such as age, health, mental condition etc.

Sentences for imprisonment will refer the offender to a prison. Where under the custody of a police officer or a Religious Enforcement Officer, the accused will be transferred to the prison.⁶⁴ It has to be noted that there are no Syariah prisons and the convicted are normally confined along with other inmates observing sentences from civil courts.⁶⁵

Imprisonment is also levied in the event if an offender sentenced to pay a Fine and defaults the payment. The duration for imprisonment for a Fine default are set in the law and depending on the amount of default, the imprisonment term could increase up to a quarter of the maximum imprisonment term for that particular offense.⁶⁶

Caning sentences are carried out upon a medical check-up by a Government Medical Officer and only in the presence of the Medical Officer. The Medical Officer could at any time halt the whipping if he is concern about the welfare of the offender. In this instance, the issue will be revised in court and a decision will be delivered by the court. The caning is conducted in a lenient way without causing harm to the offender's

skin. The force allowed for the strikes are of an average force and sensitive and vital parts of the body are prevented from getting hit. It has to be noted that an offender sentenced for caning is to be considered as someone imprisoned until the punishment is carried out.⁶⁷ Caning is also stayed in the event if the case is appealed to a higher court and until a ruling is issued from the court.⁶⁸

All sentences for punishments of any type by the Syariah Court is authorised to be suspended or commuted or rescinded in part or in full, by the Yang di-Pertuan Agong. The offenders have the right to forward an application for consideration from the Yang di-Pertuan Agong. It is also not a condition for Yang di-Pertuan Agong to seek consent from the person sentenced when he decides to commute a sentence.⁶⁹

Lastly, appalling the judgement. The party who dissatisfied with the judgment from the Syariah Court is allowed to appeal the case to Syariah High Court. It has to be noted that there is a limitation for the maximum period in which a person could appeal, which is 14 days from the time of judgement/sentence or order.⁷⁰ The Syariah High Court will conduct the hearing of the appeal and could decide the grounds for appeal is baseless and to dismiss the appeal, to reverse the order of the subordinate court, to acquit the convicted, to order a retrial, to alter the sentence of the subordinate court⁷¹ or order to take further evidence if it thinks further evidence is necessary.

In the event if the either of the parties

⁶⁴ *Ibid.*, Section 121 (a).

⁶⁵ Hussin, Nasimah, Ramizah Wan Muhammad, and Majdah Zawawi. 2013. "Punishment under the Criminal Jurisdiction of Shari'ah Courts of Malaysia: Issues and Prospect for Reform." In *2nd Global Conference: Reframing Punishment: Opportunities and Problems*. Sydney, Australia.

⁶⁶ *Ibid.*, Section 112 (1); (b); (i).

⁶⁷ *Ibid.*, Section 125.

⁶⁸ *Ibid.*, Section 126 (1).

⁶⁹ *Ibid.*, Section 132.

⁷⁰ *Ibid.*, Section 138.

⁷¹ *Ibid.*, Section 146.

is dissatisfied with the judgement of an appeal by the Syariah High Court, and if the dissatisfaction is based on merits such as a fact of the case or on the legality of the sentence; of either the Syariah High Courts original criminal jurisdictional matter or to any written laws where by the Syariah High Court derived its judgement, the dissatisfied party is allowed to seek a remedy from the Syariah Appeal Court.⁷² The Syariah Appeal Court has the mandate to quash the previous courts sentence, confirm the sentence, remit the sentence, order for a retrial at the lower court, issue a less severe or a harsher punishment than the one meted from the lower court,⁷³ or seek additional evidence for any particular case.⁷⁴

C Conclusion

This study is aimed at analysing the features of Islamic law as provided in the federal constitution in Malaysia and the syariah courts in existence and in operation. It is evident from this paper, that Malaysia has in fact established well-documented syariah jurisdiction by the virtue of its federal constitution. Though considered a State level court, and its rulings are only applicable to Muslims and within the respective states. Due to the federal constitution has put limitations on the states jurisdiction of syariah courts in considering offenses and limited punishments; 3, 5 6 punishments. Different states have set a tumultuous beginning where the syariah system found differences in

its approach for application, enforcement and connectivity with other state jurisdictions, were later were attempted to be resolved upon bringing the States to adhere to a single administrative body; that is JKSM Even though Malaysia has not applied a full and comprehensive Islamic punishments as mandated by *shara'*, it does not make Malaysia less Islamic as compared to other Muslim countries.

Today, it can be seen from the syariah legal system, it is significant that from investigation, to rights during trial, to the final appeal stage to enforcement, all rights are allowed for accused persons of syariah offenses through legislature. Syariah Courts in Malaysia are run by intellectuals educated not only in Syariah but also in Common law system. The accused persons can be represented by Syarie lawyer who are also, some of them, are advocates & solicitors. The prosecution and the criminal defense representatives themselves are specialised in syariah jurisprudence. Despite the limitations set by the federal constitution to establish a fully-fledged Syariah compliant, Hudud applicable legal system, the Malaysian approach has shown a gradual reinforcement with a steady foothold within the legal boundary of the constitutional framework and syariah legal system. It is now at a better position than the day it began. To a certain extent, in the course of incorporate Islamic punishments in one's country does not mean to abolish the existing law. It can also be done by harmonising the existing laws, especially the common law as being practiced in Malaysia, with the spirit of Shari'ah and Islamic values as mandated in the divine revelation.

⁷² *Ibid.*, Section 152(1).

⁷³ *Ibid.*, Section 162(1); (2).

⁷⁴ *Ibid.*, Section 163(1).

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