

Re-Legislating the Kelantan Syariah Criminal Code: A Doctrinal Analysis of Constitutional Limits and State Legislative Competence

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ABSTRACT

This article examines the constitutional implications of the Kelantan State Government's proposal to re-legislate sixteen provisions of the Syariah Criminal Code (I) Enactment 2019 that were declared unconstitutional by the Federal Court in *Nik Elin Zurina & Anor v. Kelantan State Government* (2024). While the Court held that the annulled provisions exceeded State legislative competence by intruding into matters assigned to the Federal List, the judgment also provides a clear doctrinal and constitutional framework within which Kelantan may legitimately exercise its authority. This article contends that with doctrinally precise drafting and alignment with constitutional parameters, the State can re-enact provisions that uphold the precepts of Islam while remaining constitutionally compliant. The Kelantan initiative, therefore, represents an opportunity to strengthen the legitimacy and clarity of State-level Syariah law.

Keywords: Syariah criminal law; State legislative competence; Federal Constitution; Nik Elin decision; Constitutional limits on state power; Re-legislation.

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1. Introduction

The relationship between Islamic law administered by the States and general criminal law under federal authority has historically generated structural tension within Malaysia's constitutional framework. This tension was highlighted by the landmark Federal Court decision in *Nik Elin Zurina & Anor v. Kelantan State Government* (2024), where sixteen provisions of the Syariah Criminal Code (I) Enactment 2019 (EKJS 2019) were declared unconstitutional and void. The Court held that these provisions exceeded the boundaries of State legislative competence under the Federal Constitution, principally because they duplicated or encroached upon criminal matters assigned to the Federal List.¹ The judgment reaffirmed that while States may legislate on 'offences relating to the precepts of Islam', such powers exist only within the corridor defined by the Ninth Schedule. Any provision whose 'pith and substance' substantially overlaps with federal criminal law is *ultra vires*, irrespective of its Islamic contextualization (Faruqi, 2019).

The Federal Court's decision immediately triggered legal and political responses. Of particular relevance is the resolution passed by the Kelantan State Legislative Assembly on 6 March 2024, in which the State expressed its intention to re-legislate the sixteen invalidated provisions. The resolution emphasised that refinements could be made to restore these provisions in a constitutionally sustainable form (Kelantan State Legislative Assembly, 2024). The State framed this initiative as essential to defending its legislative authority in matters relating to Islam and to preserving the integrity of State-level Islamic institutions. Members of the Assembly argued that the invalidation of the provisions should not signal legislative retreat, but instead motivate the State to examine, revise, and—where constitutionally permissible—re-enact offences legitimately within its powers.

This article engages academically with this legislative initiative, providing a rigorous doctrinal analysis of the constitutional limits governing the re-legislation of Syariah criminal offences in the wake of *Nik Elin* (2024). The central question is whether, and to what extent, the Kelantan State Legislature may validly revive provisions previously declared unconstitutional. While the State retains significant autonomy over Islamic law matters, this autonomy is not absolute. The Federal Constitution assigns criminal law principally to the Federal List under Article 74 and the Ninth Schedule. The courts have consistently held that State Legislatures cannot enact criminal offences in respect of matters falling within federal legislative competence or duplicate offences already governed by federal law, as reaffirmed in *Mamat Daud* (1988), *Sulaiman Takrib* (2009), and most recently *Nik Elin* (2024).

The importance of this inquiry extends beyond Kelantan. The Federal Court's reasoning establishes a framework affecting all States enforcing Syariah criminal law, clarifying the constitutional boundaries of State legislative competence. The decision also signals heightened judicial scrutiny over Syariah criminal laws, suggesting that future enactments must be drafted with exceptional doctrinal and constitutional precision. The Kelantan

¹ *Nik Elin Zurina & Anor v. Kelantan State Government* [2024] 2 Malayan Law Journal 150 (Federal Court, Malaysia).

proposal therefore provides an important case study for examining broader questions of federalism, constitutional supremacy, and the evolving relationship between Islamic law and Malaysia's civil legal system.

This study employs doctrinal legal research methodology. Analysis is grounded in primary constitutional texts, including the Ninth Schedule, federal and state legislation, and landmark judicial decisions such as *Nik Elin* (2024), *Sulaiman Takrib* (2009), *Latifah Mat Zin* (2007), and *Mamat Daud* (1988).² Secondary sources, including authoritative commentaries on Malaysian constitutional law and academic writings on Islamic criminal law, support and deepen the doctrinal analysis (Faruqi, 2019). This methodology is appropriate because the validity of state legislation is determined through constitutional interpretation, and empirical or sociological data are neither necessary nor determinative for assessing legal competence.

The article's objectives are threefold. First, it clarifies doctrinal principles arising from Federal Court jurisprudence, particularly the constitutional constraints shaping the permissible scope of Syariah criminal offences. Second, it evaluates avenues through which Kelantan might re-legislate annulled provisions in a manner avoiding conflict with federal criminal law. Third, it assesses the broader implications of such re-legislation for Malaysia's constitutional federalism.

The analysis demonstrates that re-legislation is feasible but requires careful doctrinal precision. A State may re-enact provisions only if they fall squarely within the category of 'offences against the precepts of Islam' and do not overlap with federal statutes. Offences concerning public order, bodily harm, property, or general morality are unlikely to withstand constitutional scrutiny, even if rewritten. However, offences directly tied to Islamic doctrines, rituals, moral obligations, and personal conduct specific to Muslims remain within the State's domain, provided their 'pith and substance' aligns with Islamic legal justification (Faruqi, 2019).

This doctrinal assessment concludes that attempts to revive invalidated provisions must adhere strictly to constitutional discipline. Re-legislation cannot merely replicate previous texts, even with Islamic terminology, but must structurally reflect genuine Islamic legal concepts entirely outside the Federal List's scope. By doing so, Kelantan may restore parts of its Syariah Criminal Code in a constitutionally sound and doctrinally authentic manner. Failure to adhere to these principles will render provisions susceptible to judicial review once again. Nevertheless, the legislative initiative reflects the State's attempt to ensure that the re-enacted provisions remain within the constitutional limits prescribed by the Federal Constitution while preserving the substantive objectives of Islamic criminal law, thereby seeking to reconcile constitutional federalism with the State's legislative responsibility over Islamic law.

² *Sulaiman Takrib v. Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener)* [2009] 6 Malayan Law Journal 354 (Federal Court, Malaysia); *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 Malayan Law Journal 101 (Federal Court, Malaysia); *Mamat Daud v. Selangor State Government* [1988] 1 Malayan Law Journal 119 (Supreme Court, Malaysia).

2. Methodology: Doctrinal Legal Research

This article employs the doctrinal legal research method as its primary analytical framework. Doctrinal research—often described as ‘blackletter law’ analysis—focuses on identifying, interpreting, and systematising the existing law through an examination of authoritative legal sources (Hutchinson, 2018). It involves analysing legal rules and principles found in constitutional provisions, statutes, and judicial decisions, and organising them into a coherent structure that explains the state of the law as it currently stands (Hutchinson, 2018).

This method is particularly suited to the present study because the central question—whether Kelantan may constitutionally re-legislate the provisions invalidated by the Federal Court—requires a close analysis of the Federal Constitution and binding judicial authority rather than empirical fieldwork or socio-legal inquiry (Chynoweth, 2008).

Doctrinal research operates by engaging deeply with primary legal materials. The Federal Constitution forms the bedrock of this analysis, especially Articles 3, 4, 74 and 75, together with the Ninth Schedule which delineates the distribution of legislative powers between the Federation and the States.³ Federal legislation such as the Penal Code, the Criminal Procedure Code, and the Syariah Courts (Criminal Jurisdiction) Act 1965, as well as State enactments including the Syariah Criminal Code (I) Enactment 2019, are examined in order to determine the legal boundaries relevant to the subject matter.⁴ Judicial decisions provide essential interpretive guidance. Leading cases such as *Nik Elin* (2024), *Sulaiman Takrib* (2009), *Latifah Mat Zin* (2007), and *Mamat Daud* (1988) illuminate the doctrinal limits of State legislative power, clarify how courts construe ‘offences against the precepts of Islam’, and reaffirm federal supremacy in criminal matters.⁵ Secondary sources—including constitutional commentaries, textbooks, and academic articles—are used to provide interpretive context, scholarly perspectives, and analytical reinforcement (Faruqi, 2019; Harding, 2012).

The choice of doctrinal methodology is justified by the nature of the legal issue under consideration. The constitutionality of State legislative action is resolved through legal reasoning based on textual interpretation, structural analysis, and the application of precedent, rather than through empirical data. As constitutional interpretation is fundamentally a doctrinal exercise, the method enables precise engagement with the judicial reasoning in *Nik Elin* (2024) and with the interpretive doctrines governing the division of legislative powers (Faruqi, 2019). It also facilitates an analysis of key constitutional concepts

³ Federal Constitution of Malaysia, arts. 3, 4, 74, 75 and Ninth Schedule.

⁴ Penal Code (Act 574); Criminal Procedure Code (Act 593); Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355).

⁵ *Nik Elin Zurina & Anor v. Kelantan State Government* [2024] 2 Malayan Law Journal 150 (Federal Court, Malaysia); *Sulaiman Takrib v. Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener)* [2009] 6 Malayan Law Journal 354 (Federal Court, Malaysia); *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 Malayan Law Journal 101 (Federal Court, Malaysia); *Mamat Daud v. Selangor State Government* [1988] 1 Malayan Law Journal 119 (Supreme Court, Malaysia).

such as ‘criminal law’, ‘precepts of Islam’, and ‘pith and substance’, as well as their doctrinal implications for State competence in enacting Syariah criminal legislation (Shuaib, 2008).

In applying doctrinal research, this study undertakes a layered analysis. It begins by examining the text and structure of the Federal Constitution to establish the scope of State and federal legislative powers.⁶ It then analyses judicial decisions that have shaped the constitutional landscape of Islamic legislation, drawing connections between case law principles and the issues raised in the Kelantan context.⁷ In addition, it incorporates Islamic legal doctrinal principles to determine whether certain offences can be said to fall genuinely within the ‘precepts of Islam’ as allowed under State jurisdiction (Mohammad, 2008). Although doctrinal research does not address empirical realities such as enforcement practices or political motivations, its focus on binding legal materials ensures analytical precision and doctrinal coherence in addressing the constitutionality of proposed re-enactments (Hutchinson, 2018).

3. The Constitutional Framework Governing State Legislative Power

The division of legislative authority between the Federation and the States is central to Malaysia’s constitutional structure and forms the foundation for assessing whether Kelantan may validly re-enact the Syariah criminal provisions previously invalidated by the Federal Court. The Federal Constitution distributes legislative powers through the Ninth Schedule, read with Articles 74 and 75, which collectively determine the validity of State legislative action (Federal Constitution of Malaysia, arts. 74 and 75; Ninth Schedule). Under this framework, criminal law is vested exclusively in Parliament, while Islamic personal law and offences against the precepts of Islam fall within State jurisdiction—but only to the extent permitted by the State List (Federal Constitution, Ninth Schedule, List II [State List]). Article 75 further provides that any State law inconsistent with a federal law is void to the extent of the inconsistency (Federal Constitution, Art 75). These constitutional provisions establish a hierarchy of legislative authority that delimits the legislative competence of the States under Articles 74 and 75 of the Federal Constitution. However, they do not preclude the State Legislature from re-enacting provisions that remain within matters assigned to the State List.

The scope of Islamic criminal law under the State List is narrower than classical understandings of Syariah. Item 1 permits State Legislatures to enact laws relating to Islamic law, personal and family matters of Muslims, the organisation and jurisdiction of Syariah courts, and the creation and punishment of offences by Muslims against the precepts of Islam—provided that such matters do not fall within the Federal List (Federal Constitution, Ninth Schedule, List II, Item 1). In *Nik Elin* (2024) and related cases (*Sulaiman Takrib* (2009); *Latifah Mat Zin* (2007); *Mamat Daud* (1988)), the Federal Court clarified that ‘precepts of Islam’ refers only to matters rooted in recognised Islamic legal sources and applicable

⁶ Federal Constitution of Malaysia, Ninth Schedule.

⁷ *Nik Elin Zurina & Anor v. Kelantan State Government* [2024] 2 Malayan Law Journal 150 (Federal Court, Malaysia).

exclusively to Muslims, and does not extend to subjects such as public order, security, bodily harm, property, or other criminal conduct under the Federal List.⁸ Crucially, this interpretation does not deny the State the ability to legislate within its exclusive sphere; rather, it delineates the doctrinal boundaries for constitutionally valid re-legislation (Faruqi, 2019).

The Federal List, particularly Item 4, confers exclusive authority upon Parliament to legislate on general criminal law, including offences involving public order, bodily injury, property, sexual misconduct, narcotics, national security, corruption, commercial crimes, and other matters of the general criminal justice system (Federal Constitution, Ninth Schedule, List I, Item 4). Courts have consistently interpreted ‘criminal law’ broadly. Any State offence substantially resembling a federal offence or intruding upon federal subjects is constitutionally invalid. However, provisions addressing matters unique to Islamic legal doctrine, rituals, or moral obligations applicable only to Muslims may be re-enacted if framed with careful attention to their ‘pith and substance’ (Nik Elin, 2024; Shuaib, 2008). The preclusion clause in Item 1 of the State List reinforces the need for such doctrinal precision but does not eliminate the possibility of constitutionally sound Syariah legislation.

State authority is also defined by the jurisdiction of Syariah courts under Article 121 (1A) and Act 355 (Syariah Courts [Criminal Jurisdiction] Act 1965). The statutory limits on punishments—fines not exceeding RM5,000, imprisonment not exceeding three years, and whipping not exceeding six strokes—signal that Syariah offences are minor in character and must avoid overlapping with serious federal offences. Nevertheless, these limits still permit substantive Islamic criminal law applicable to Muslims, provided the legislation is carefully structured to remain within the State’s competence (SIS Forum, 2022).⁹

Judicial interpretation plays a critical role in enforcing these constitutional boundaries. The ‘pith and substance’ test ensures that the true nature and purpose of a law, rather than its label, determines validity. Likewise, the doctrine of ‘colourable legislation’ invalidates laws that appear within State competence but actually legislate on federal matters (Nik Elin, 2024; Mamat Daud, 1988). For Kelantan, this framework highlights that re-legislation is possible, provided that provisions are carefully recrafted to reflect genuine Islamic legal principles without encroaching on federal criminal law.

Taken together, these constitutional constraints establish a well-defined but workable space for State-level Syariah criminal legislation. States may regulate religious obligations and Islamic conduct applicable only to Muslims but may not duplicate federal offences. By applying doctrinal precision and adhering to the ‘pith and substance’ principle, Kelantan

⁸ Nik Elin Zurina & Anor v. Kelantan State Government [2024] 2 Malayan Law Journal 150 (Federal Court, Malaysia); Sulaiman Takrib v. Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) [2009] 6 Malayan Law Journal 354 (Federal Court, Malaysia); Latifah Mat Zin v. Rosmawati Sharibun & Anor [2007] 5 Malayan Law Journal 101 (Federal Court, Malaysia); Mamat Daud v. Selangor State Government [1988] 1 Malayan Law Journal 119 (Supreme Court, Malaysia).

⁹ SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener) [2022] 3 Current Law Journal 339 (Federal Court, Malaysia).

may successfully re-enact provisions in a constitutionally sound manner. This approach not only respects federal supremacy but also affirms the State's legitimate authority to legislate in matters intrinsic to Islamic law, thereby supporting the broader goal of harmonising religious and constitutional obligations.

4. Analysis of The Federal Court Decision in *Nik Elin* (2024)

The Federal Court's decision in *Nik Elin* (2024) marks a significant turning point in Malaysian constitutional jurisprudence, particularly in relation to the scope of State legislative authority over Syariah criminal law. The case confronted the longstanding tension between State aspirations to expand Islamic criminal legislation and the constitutional allocation of criminal law within the Federal List. The Court, in an 8–1 majority, held that sixteen provisions of the Syariah Criminal Code (I) Enactment 2019 were invalid because their subject matter fell within federal criminal law rather than the precepts of Islam as interpreted within the constitutional framework governing State legislative power.

Notwithstanding its restrictive outcome, the decision is equally significant for the doctrinal clarity it provides regarding the permissible scope of State legislation. Rather than extinguishing State authority, the judgment articulates a structured framework within which States may validly legislate on Syariah criminal matters, thereby offering guidance for future legislative refinement.

In reaching its decision, the Court applied the doctrinal test of 'pith and substance', which requires judicial scrutiny of the true nature and purpose of a law, rather than its form or legislative label. Although Kelantan framed the provisions as Syariah offences applicable only to Muslims, the Court emphasised that constitutional validity depends on substance, not terminology. Many of the impugned provisions criminalised conduct already addressed under federal legislation, such as bodily injury, property offences, fraud, sexual misconduct, and public-order matters—subjects that fall squarely within the Federal List under Item 4 of the Ninth Schedule.¹⁰ As such, the Court concluded that the provisions were, in reality, attempts to legislate on matters within exclusive federal jurisdiction.

Importantly, however, the application of the 'pith and substance' doctrine also implies that carefully framed provisions—whose substantive character is genuinely rooted in Islamic doctrine and does not overlap with federal criminal law—may withstand constitutional scrutiny. The doctrine therefore operates not only as a limiting principle, but also as a doctrinal tool through which States may structure constitutionally valid legislation (Faruqi, 2019).

The Court also highlighted the doctrine of colourable legislation, noting that States cannot evade constitutional limits by recharacterising federal criminal offences as religious offences. Even if conduct is considered sinful or prohibited in Islamic jurisprudence, it cannot be legislated by a State if it overlaps with or duplicates federal criminal law. This

¹⁰ Federal Constitution of Malaysia, Ninth Schedule, List I, Item 4.

approach reflects the Court's insistence on constitutional supremacy under Article 4 and the operation of Article 75, which invalidates any State law inconsistent with federal legislation.¹¹

At the same time, the Court's reasoning clarifies that the prohibition is directed at duplication and encroachment, rather than at the existence of Syariah criminal law per se. Properly distinguished offences—those grounded in religious obligations, doctrine, and moral accountability unique to Muslims—remain within the legitimate legislative domain of the States (Shuaib, 2008).

A key aspect of the judgment is the Court's interpretation of the phrase 'offences against the precepts of Islam' in the State List. Drawing on earlier cases such as *Sulaiman Takrib* (2009) and *Latifah Mat Zin* (2007), the Court held that State-created offences must be rooted in Islamic doctrines concerning faith, religious observance, and moral obligations applicable only to Muslims.¹² Offences that resemble general criminal law fall outside State competence even if they are religiously prohibited. The Court therefore reaffirmed that the constitutional allocation of powers is intentional, designed to prevent overlapping or parallel criminal jurisdictions.

Nevertheless, this interpretation simultaneously affirms that a distinct category of 'purely religious offences' remains constitutionally protected within State jurisdiction. This provides a principled basis upon which States, including Kelantan, may re-legislate offences that are doctrinally grounded in Islamic teachings and do not intrude into the Federal List. The judgment also underscores the structural limits imposed by the Constitution on the Syariah courts' jurisdiction, particularly the statutory restrictions under the Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355). Since Syariah courts may only impose relatively minor punishments, the Court reasoned that States cannot legislate matters traditionally considered serious crimes, such as those involving harm, coercion, or public safety.

However, these jurisdictional limits also indicate the intended constitutional role of Syariah criminal law—as a system of religious regulation rather than general criminal enforcement. Within this defined role, there remains meaningful legislative space for States to enact offences that regulate religious conduct and uphold Islamic norms among Muslims.

Overall, the *Nik Elin* (2024) judgment narrows the scope for State-level Syariah criminal legislation in relation to general criminal law. At the same time, it provides important doctrinal guidance on how such legislation may be validly structured. The decision makes clear that while States must avoid duplication of federal criminal law, they retain the authority to legislate offences grounded in Islamic doctrine, ritual, and moral obligations.

For Kelantan, the ruling should therefore be understood not solely as a constraint, but as a constitutional framework for legislative refinement. Any attempt to reintroduce the

¹¹ Federal Constitution of Malaysia, arts. 4 and 75.

¹² *Sulaiman Takrib v. Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener)* [2009] 6 Malayan Law Journal 354 (Federal Court, Malaysia); *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 Malayan Law Journal 101 (Federal Court, Malaysia).

invalidated provisions must avoid overlap with federal criminal law but may validly proceed if the provisions are recrafted to reflect genuinely Islamic obligations with distinct doctrinal foundations. Properly approached, the decision offers a viable pathway for constitutionally compliant re-legislation rather than a barrier to it.

5. Analysis of The Sixteen Invalidated Provisions

The sixteen provisions of the Syariah Criminal Code (I) Enactment 2019 that were struck down in *Nik Elin* (2004) illustrate the constitutional tension between Kelantan's legislative aspirations and the structural limits imposed by the Federal Constitution. A closer examination of the provisions, as interpreted by the Federal Court, reveals that their underlying subject matter was found to mirror federal criminal law rather than representing offences rooted exclusively in Islamic doctrine. Although couched in religious terminology, many of the provisions addressed forms of conduct already regulated under the Penal Code, public-order statutes, and other federal laws, thereby rendering them constitutionally impermissible in their existing form.

However, it is important to note that the Court's reasoning does not necessarily foreclose the possibility of regulating similar subject matter altogether. Rather, the decision underscores that constitutional invalidity arose from the manner in which the offences were framed—particularly their substantial overlap with federal criminal law—rather than from the broader objective of regulating conduct from an Islamic normative perspective. Properly reconceptualised, certain categories of conduct may still fall within the permissible domain of State legislation if their “pith and substance” is demonstrably grounded in the precepts of Islam.

This conclusion must be understood against the broader evolution of Federal Court jurisprudence on State legislative competence. A useful point of doctrinal comparison arises from the Court's treatment of such issues in *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia* (1999) and *Iki Putra Mubarrak v Kerajaan Negeri Selangor* (2021). In *Sukma Darmawan* (1999), the Court adopted a relatively accommodative approach in recognising the validity of State-enacted Syariah offences within the framework of the State List, without subjecting such offences to intensive scrutiny based on overlap with federal criminal law.¹³ By contrast, *Iki Putra* (2021) reflects a significant doctrinal shift towards a more restrictive interpretation, emphasising the constitutional limitation imposed by the Federal List, particularly in relation to ‘criminal law’ of general application. The Court in *Iki Putra* (2021) underscored that State legislatures cannot, in the guise of regulating religious offences, enact provisions that in pith and substance fall within the domain of federal criminal law.¹⁴ This divergence illustrates an evolving judicial trajectory—from a more

¹³ *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia* [1999] 2 Malayan Law Journal 241 (Federal Court, Malaysia).

¹⁴ *Iki Putra Mubarrak v. Kerajaan Negeri Selangor* [2021] 3 Current Law Journal 465 (Federal Court, Malaysia).

deferential stance towards State legislative autonomy to a stricter enforcement of federal supremacy in criminal matters.

This doctrinal development is further illuminated when considered alongside the interpretation of “precepts of Islam” in *Lina Joy v Majlis Agama Islam Wilayah Persekutuan* (2007). Although *Lina Joy* (2007) did not directly concern the validity of Syariah criminal offences, the Federal Court’s reasoning reflects an acknowledgment of the State’s authority in matters intrinsically connected to Islamic law and religious identity. The case illustrates that ‘precepts of Islam’ may encompass fundamental aspects of belief, doctrine, and religious observance.¹⁵ However, subsequent decisions, particularly *Iki Putra* (2021) and *Nik Elin* (2024), demonstrate that such recognition is not without constitutional limits. The phrase ‘precepts of Islam’ cannot be interpreted so expansively as to permit the States to encroach upon areas of general criminal law reserved to Parliament. Accordingly, the modern judicial position suggests that while the concept retains a degree of doctrinal breadth, its application in the context of criminalisation is subject to a structured constitutional inquiry grounded in the ‘pith and substance’ doctrine and the preclusion clause in the State List.

Several of the invalidated provisions criminalised conduct involving harm or potential harm to the person, including acts analogous to causing injury, threats, or coercion. These categories fall squarely within the Federal List, which accords Parliament exclusive power to legislate on offences involving bodily harm and personal security.¹⁶ The Court emphasised that the State List does not contemplate the creation of bodily injury offences, even if such conduct is prohibited in Islam, because the pith and substance of such laws lies in the protection of physical safety—a federal responsibility.

Nevertheless, the constitutional objection in this category may be understood as targeting harm-based criminalisation rather than all forms of religious regulation relating to personal conduct. This suggests that while States cannot legislate offences framed around physical injury or coercion, there remains scope to regulate conduct through religious or moral obligations that do not centre on harm as their defining element. In this sense, the decision leaves open a pathway for legislative reformulation grounded in Islamic ethical duties rather than general criminal prohibitions.

Other invalidated provisions concerned sexual conduct, including illicit relations and acts deemed immoral under Islamic teachings. Although certain aspects of sexual morality fall within the precepts of Islam, the Kelantan provisions were framed in ways that substantially overlapped with federal sexual offences under the Penal Code, including provisions dealing with indecency and outrage of modesty.¹⁷ The Federal Court held that States cannot legislate on sexual misconduct where Parliament has enacted comprehensive federal laws governing such behaviour.

¹⁵ *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan* [2007] 4 Malayan Law Journal 585 (Federal Court, Malaysia).

¹⁶ Federal Constitution of Malaysia, Ninth Schedule, List I, Item 4.

¹⁷ Penal Code (Act 574).

At the same time, the Court's reasoning does not deny that aspects of sexual morality may fall within State jurisdiction where they are framed as violations of religious obligations applicable exclusively to Muslims. The critical distinction lies in whether the offence is constructed as a general prohibition of sexual misconduct—thereby overlapping with federal law—or as a breach of specific Islamic norms relating to modesty, morality, or religious discipline. This distinction provides an important doctrinal basis for potential re-legislation within constitutional limits.

A number of the provisions related to property-based offences, including conduct analogous to theft, misappropriation, or fraud. These offences clearly fall within federal criminal law and have long been regulated by the Penal Code. The Court rejected the argument that such offences could be reclassified as Syariah offences merely because they were committed by Muslims or prohibited under Islamic law. This reflects a strict adherence to the constitutional demarcation of legislative powers.

Yet, the underlying reasoning again suggests that what is impermissible is the replication of property-based criminal offences, not necessarily all forms of regulation relating to honesty or ethical conduct in Islam. Legislative efforts that focus on moral accountability, religious obligations, or ethical breaches—without reproducing the elements of federal property offences—may still fall within the scope of 'precepts of Islam', provided that their pith and substance is doctrinal rather than criminal in the general law sense.

Certain provisions were also invalidated because they concerned public-order matters such as false reporting, dissemination of misleading information, intoxication, or behaviour endangering the community. These matters fall within the domain of federal legislation, such as the Communications and Multimedia Act 1998, the Police Act 1967, and the Dangerous Drugs Act 1952.¹⁸ The Court underscored that States lack competence to legislate on issues relating to public disorder or intoxicating substances because such matters are closely connected to national regulatory frameworks and enforcement mechanisms.

However, even within this category, the reasoning of the Court may be read as drawing a distinction between public-order regulation and religious discipline. While the State cannot legislate on intoxication as a matter of public safety or criminal control, there may remain constitutional space to regulate it as a matter of religious obligation and moral conduct applicable only to Muslims, provided that the legislative framework avoids elements associated with federal criminal law.

Collectively, the invalidated provisions demonstrate that State Legislatures cannot rely on Islamic terminology or moral framing to circumvent constitutional constraints. The Court's analysis reaffirmed that the substance of an offence—not its label—determines legislative competence. At the same time, the decision should not be understood as excluding broad areas of Islamic moral regulation altogether, but rather as requiring that such regulation be carefully confined within constitutionally permissible boundaries.

¹⁸ Communications and Multimedia Act 1998 (Act 588); Police Act 1967 (Act 344); Dangerous Drugs Act 1952 (Act 234).

The invalidation of the sixteen provisions therefore serves not only as a limitation, but also as a form of doctrinal guidance. It delineates the boundaries within which State legislation must operate, while implicitly indicating that offences grounded in genuine religious obligations, ritual conduct, and moral accountability remain constitutionally viable.

Ultimately, the decision provides a structured foundation for re-legislation. While the original provisions were invalidated due to their overlap with federal criminal law, the underlying objective of regulating conduct in accordance with Islamic principles may still be pursued through careful legislative redesign. The key challenge for Kelantan is not whether re-legislation is possible, but how such provisions may be reformulated so that their pith and substance lies squarely within the precepts of Islam and outside the domain of federal criminal law.

6. Policy And Jurisprudential Implications of Re-Legislation

The proposal to re-legislate the sixteen invalidated Syariah criminal provisions carries significant policy and jurisprudential implications for federal–state relations, the development of Islamic law in Malaysia, and the structure of constitutional review. From a constitutional standpoint, the Federal Court’s decision in *Nik Elin* (2024) reflects a firm judicial commitment to preserving the supremacy of federal criminal jurisdiction and preventing the emergence of a parallel criminal justice system differentiated by religion.¹⁹ Any attempt to re-enact similar offences therefore raises questions about the sustainability of Malaysia’s dual legal framework and the practical boundaries of State authority over Islamic criminal law.

At the policy level, Kelantan’s move to re-legislate these offences may be understood as a response to societal expectations within the State to strengthen Islamic norms. Yet, this objective must be balanced against constitutional limitations that prevent States from expanding Syariah criminal law beyond matters rooted in the precepts of Islam.²⁰ This tension reflects a recurring theme in Malaysian constitutional development: while State governments have legitimate aspirations to regulate moral conduct and religious identity, the constitutional structure strictly reserves general criminal law to the Federation (Faruqi, 2019). The re-legislation exercise may therefore intensify debates on whether the current delineation of powers adequately accommodates the evolving role of Islamic law in contemporary governance.

From the jurisprudential perspective, the Federal Court’s reasoning reinforces doctrinal clarity regarding legislative competence. The Court has consistently held—from *Mamat Daud* (1988) to *Sulaiman Takrib* (2009) and *SIS Forum* (2022)—that the State List must be interpreted narrowly, and that only offences whose pith and substance relate directly to Islamic

¹⁹ *Nik Elin Zurina & Anor v. Kelantan State Government* [2024] 2 Malayan Law Journal 150 (Federal Court, Malaysia).

²⁰ Federal Constitution of Malaysia, Ninth Schedule, List II, Item 1.

doctrine, ritual, or moral duties can be validly enacted by State Legislatures.²¹ The attempt to re-legislate offences previously held unconstitutional may reanimate judicial scrutiny, particularly under the doctrine of ‘colourable legislation’, whereby a law that purports to legislate on a State matter but is, in substance, a federal criminal offence, will be struck down as unconstitutional.²² Thus, the re-enacted provisions must be crafted with doctrinal precision to avoid replicating elements of harm, coercion, property loss, or public order—the hallmarks of federal criminal law.

Beyond doctrinal analysis, the issue of overlapping offences has also attracted sustained critique from policy-oriented and civil society perspectives. Several studies have highlighted that the duplication between Syariah criminal provisions and federal criminal law generates significant legal uncertainty, particularly in relation to enforcement, prosecutorial discretion, and the risk of inconsistent outcomes. From a rule of law standpoint, such overlap raises concerns not only about jurisdictional competence, but also about fairness and coherence within the broader criminal justice system.

For instance, analyses by organisations such as the Sisters in Islam have emphasised that the expansion of State criminal offences into areas already regulated by federal law risks blurring the constitutional boundaries between religious regulation and general criminal law. Similar concerns have been echoed in policy discussions by the Malaysian Bar, which has cautioned against the proliferation of parallel offences that may, in substance, criminalise the same conduct under different legal regimes. This duplication may give rise to practical difficulties, including forum selection issues, uneven enforcement, and the perception of double punishment, even where formal double jeopardy rules are not strictly engaged.

These critiques reinforce the position taken by the Federal Court in *Iki Putra* (2021)²³ and subsequently in *Nik Elin* (2024), where the emphasis was placed on maintaining a clear constitutional demarcation between State and federal legislative domains. In this regard, the problem of overlapping offences is not merely technical, but structural. It reflects the inherent tension within Malaysia’s federal system in accommodating religious criminal law within a constitutional framework that assigns primary authority over criminal law to Parliament.

There are also implications for the institutional balance between Parliament and State Assemblies. If re-enacted provisions trigger further litigation, courts may be compelled to revisit the boundaries of Islamic criminal law more comprehensively, potentially leading to an expanded body of jurisprudence clarifying the scope of ‘precepts of Islam’ within the

²¹ *Sulaiman Takrib v. Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener)* [2009] 6 Malayan Law Journal 354 (Federal Court, Malaysia); *Mamat Daud v. Selangor State Government* [1988] 1 Malayan Law Journal 119 (Supreme Court, Malaysia); *SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener)* [2022] 3 Current Law Journal 339 (Federal Court, Malaysia).

²² *SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener)* [2022] 3 Current Law Journal 339 (Federal Court, Malaysia).

²³ *Iki Putra Mubarrak v. Kerajaan Negeri Selangor* [2021] 3 Current Law Journal 465 (Federal Court, Malaysia).

constitutional context (Harding, 2012). Such judicial developments may influence long-term policy considerations, including whether amendments to federal legislation—such as Act 355—are necessary to support State aspirations for a more extensive Syariah criminal framework.²⁴ However, the Federal Court has thus far been cautious in acknowledging any broadening of State criminal jurisdiction, emphasising that constitutional amendments are the only legitimate avenue for altering the allocation of legislative powers.

In addition, re-legislation may produce administrative and enforcement challenges. The Syariah courts, bound by their limited jurisdiction under Act 355 and constrained procedural powers, may struggle to enforce provisions that resemble substantive criminal offences without federal procedural and evidentiary support (Shuaib, 2008). This institutional mismatch raises policy questions regarding the operational capacity of the Syariah legal system, particularly when offences approach the threshold of general criminality. Without parallel reform to procedural frameworks, enforcement risks inconsistency, overlapping jurisdiction, or conflict between Syariah and civil authorities.

Politically, the attempt to re-legislate may also shape public perceptions of the judiciary and federal–state dynamics. The decision in *Nik Elin* (2024) has generated debates over judicial ‘activism’ and the perceived centralisation of power at the federal level (Mohammad, 2018). Re-enactment efforts may heighten these debates, particularly if the resulting legislation is again invalidated. While judicial oversight remains a constitutional safeguard, recurrent invalidations may create an impression of unresolved structural conflict between the constitutional design and State aspirations for Islamic governance.

At a broader jurisprudential level, the controversy underscores an unresolved theoretical tension within Malaysian constitutionalism: whether Islamic law is to be understood as a matter of religious observance limited to ritual and moral obligations, or whether it forms part of a wider legal system capable of regulating substantive criminal behaviour (Mohammad, 2008). The Federal Court’s decisions suggest a strong preference for the former understanding, while certain State governments advocate the latter. The re-legislation initiative may therefore become a focal point in the ongoing constitutional discourse on the place of Islamic law in a federal system founded upon liberal-democratic principles and secular legal structures.

Ultimately, the policy and jurisprudential implications of re-legislating the invalidated provisions extend well beyond Kelantan. The outcome will influence how other States conceptualise their Syariah legislative powers, how courts continue to interpret the State List, and how Malaysia navigates the complexities of dual legal systems operating under a single constitutional structure (Harding, 2012). The manner in which Kelantan approaches the re-enactment process may either reinforce constitutional harmony or deepen existing tensions, making the endeavour a crucial test of both legislative prudence and constitutional fidelity.

²⁴ Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355).

7. Pathways For Constitutionally Compliant Re-Enactment

The re-legislation of the sixteen invalidated provisions requires Kelantan to carefully reconstruct its Syariah criminal framework so that each offence falls squarely within the constitutional limits of State authority while also retaining doctrinal legitimacy under Islamic law. The Federal Court in *Nik Elin* (2024) reaffirmed that the substance of an offence, rather than its religious label or moral character, determines legislative competence.²⁵ For Kelantan to proceed constitutionally, any new provision must therefore be rooted in Islamic legal doctrine and demonstrably linked to obligations that arise exclusively for Muslims under the concept of *taklif*, rather than resembling general criminal law traditionally within federal jurisdiction.

In Islamic jurisprudence, *taklif* denotes the imposition of legal and moral responsibility upon a mukallaf (a morally accountable Muslim), encompassing duties relating to belief, ritual conduct, and moral behaviour (Mohammad, 2003). Offences grounded in *taklif*—such as violations of ritual obligations or acts that undermine the integrity of Islamic doctrine—lie at the heart of what the Constitution recognises as ‘precepts of Islam’.²⁶ These duties involve inherently religious matters such as worship (*ibādah*), creed (*‘aqidah*), modesty (*hayā*), moral purification (*tazkiyah*), and obedience to Islamic norms that have no direct analogue in general criminal law. The Federal Court has accepted that States may legislate within this domain, provided that the offences apply only to Muslims and do not intrude upon federal subjects.²⁷ This creates a doctrinal framework within which Kelantan may legitimately craft new provisions.

For these reasons, Kelantan’s re-enactment must shift away from offences that resemble harm-based or public-order crimes and towards offences that reflect duties arising from Islamic religious obligations. This may include conduct that is spiritually wrongful but not criminalised by federal law—such as violations of religious etiquette, neglect of ritual purity, blasphemous expressions within a strictly theological context, or acts that contravene established Sunni doctrine in ways recognised within traditional Islamic jurisprudence.

However, the State must avoid incorporating elements relating to deception, injury, coercion, intoxication, or acts affecting bodily integrity or property, as these elements belong clearly to the Federal List.²⁸ The Federal Court has repeatedly held, most recently in *Nik Elin* (2024), that States cannot legislate on matters falling within federal criminal law even where the same acts are religiously prohibited.²⁹

²⁵ *Nik Elin Zurina & Anor v. Kelantan State Government* [2024] 2 Malayan Law Journal 150 (Federal Court, Malaysia).

²⁶ Federal Constitution of Malaysia, Ninth Schedule, List II, Item 1.

²⁷ *Sulaiman Takrib v. Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener)* [2009] 6 Malayan Law Journal 354 (Federal Court, Malaysia).

²⁸ Penal Code (Act 574); Criminal Procedure Code (Act 593).

²⁹ *Nik Elin Zurina & Anor v. Kelantan State Government* [2024] 2 Malayan Law Journal 150 (Federal Court, Malaysia).

Kelantan must also ensure that any new provisions are drafted using terminologies drawn from Islamic legal discourse rather than from the technical vocabulary of the criminal law. Drafting provisions using terms grounded in Islamic jurisprudence—such as *munkar*, *fasād*, *‘ibādāt*, *ḥudūd al-‘ibādah* or other classical categories—strengthens the argument that the offence pertains to religious obligations rather than to general criminality. This doctrinal anchoring helps to demonstrate that the provision’s purpose is spiritual regulation, not penal enforcement. The courts have indicated, however, that linguistic reformulation alone is insufficient. Where the practical effect or substantive elements of an offence mirror federal crimes, the legislation will still be struck down under the doctrine of ‘colourable legislation’.³⁰ Thus, Kelantan must ensure that the elements of each offence are genuinely religious in substance and not merely reframed versions of previously invalidated provisions.

Another dimension of constitutional compliance relates to the narrowing of the scope of application. Offences must apply exclusively to Muslims, and where appropriate, may be further confined to specific religious settings—such as mosques, religious classes, or contexts involving acts of worship—to demonstrate their inherently religious nature (Faruqi, 2019). Narrowing the scope in this way strengthens the argument that the offence is not a parallel version of federal criminal law but pertains specifically to Islamic obligations. The Federal Court’s jurisprudence indicates that an offence closely linked to religious practice, religious institutions, or religious rites is more likely to be constitutionally valid than one framed around general societal conduct.³¹

The limited criminal jurisdiction of Syariah courts under Act 355 also indirectly frames what the State may validly legislate. The modest maximum penalties under the Act—three years’ imprisonment, RM5,000 fine, and six strokes of whipping—signal Parliament’s intention that Syariah offences should be minor and should not overlap with serious offences traditionally prosecuted under federal law.³² This statutory limitation reinforces the need for re-enacted offences to concern matters of religious discipline rather than general criminality. An offence that inherently warrants heavier punishment than the maximum permitted under Syariah court jurisdiction is presumptively beyond State legislative authority.

A constitutionally compliant re-enactment would therefore require Kelantan to identify conduct that federal law does not criminalise but which Islamic jurisprudence recognises as a breach of moral or ritual obligations (Shuaib, 2008). Such offences may involve failures of religious practice, acts of doctrinal deviation, moral improprieties affecting faith or ritual integrity, or behaviour that disrupts the sanctity of religious institutions. Legislating in these areas would allow the State to exercise its constitutional mandate without duplicating federal law.

³⁰ *SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener)* [2022] 3 Current Law Journal 339 (Federal Court, Malaysia).

³¹ *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 Malayan Law Journal 101 (Federal Court, Malaysia).

³² Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355).

Nevertheless, any new enactment will likely be scrutinised closely by the courts, especially if the provisions appear to replicate or approximate previously invalidated offences. The Federal Court's insistence on the supremacy of federal criminal law and its strict interpretation of the State List indicate that even minor overlaps may trigger constitutional invalidation. The State must therefore adopt a cautious and principled approach, ensuring that the re-enacted provisions reflect an authentic integration of Islamic legal doctrine and constitutional constraints.

In sum, the pathway towards constitutionally valid re-legislation requires Kelantan to navigate a narrow and carefully defined corridor. The State may legislate only on matters grounded in *taklif* and the precepts of Islam, and must avoid any substantive resemblance to the federal criminal law regime.³³ Success depends on doctrinal precision, careful drafting, and a genuine commitment to ensuring that the re-enacted offences reflect religious obligations rather than parallel criminal offences. If Kelantan achieves this balance, the State can strengthen its Islamic legal framework while remaining faithful to Malaysia's constitutional structure.

8. Normative and Constitutional Reform Proposals for Re-Legislation

The preceding analysis demonstrates that the constitutional invalidation of the sixteen provisions in *Nik Elin Zurina & Anor v Kelantan State Government* was not merely a question of drafting deficiency, but rather a structural consequence of the constitutional limits imposed on State legislative competence. Any attempt at re-legislation must therefore move beyond superficial textual revision and instead adopt a principled framework that aligns constitutional doctrine, Islamic legal theory, and legislative technique. This section advances four interrelated proposals aimed at achieving that objective.

8.1 Constitutional Entrenchment of State Legislative Competence: The Proposed Article 28A

One possible approach to addressing the uncertainty surrounding State legislative competence is the introduction of a new provision—referred to here as Article 28A—within the Undang-Undang Perlembagaan Tubuh Kerajaan Kelantan (UUT). Such a provision would restate, with structural reorganisation, Item 1 of the State List in the Ninth Schedule of the Federal Constitution.

At first glance, this approach raises constitutional concerns. The reproduction of federal constitutional provisions within a State Constitution may risk interpretive distortion and could be perceived as an indirect attempt to expand State legislative power. There is a legitimate concern that restatement may evolve into reinterpretation, thereby creating inconsistency with the Federal Constitution.

³³ *Mamat Daud v. Selangor State Government* [1988] 1 Malayan Law Journal 119 (Supreme Court, Malaysia).

However, this objection is not determinative. From a doctrinal perspective, such a provision may be characterised as declaratory rather than constitutive. Its function would be to clarify and affirm the scope of legislative competence already conferred by the Federal Constitution, rather than to create new powers. In this sense, it operates as an internal interpretive aid within the State constitutional framework.

Support for this approach may be drawn from the Federal Court's reasoning in *SIS Forum* (2022), where the Court adopted a disjunctive reading of Item 1 of the State List based on semicolon separation. This interpretive method suggests that the various components of Item 1 may be understood as distinct categories. A structured restatement within a State Constitution would therefore be consistent with, rather than contrary to, the Court's own interpretive approach.

Comparative support may also be found in State legislative practice. Certain State enactments have restated aspects of jurisdiction derived from the State List without being regarded as constitutionally problematic, provided that such restatement does not introduce substantive deviation.

Nevertheless, the constitutional sustainability of such a provision depends entirely on its drafting. It must remain strictly declaratory in nature, avoiding any implication of expansion, modification, or reinterpretation of the Federal Constitution. If framed with sufficient restraint, Article 28A may enhance doctrinal clarity while remaining within constitutional limits.

8.2 Reconceptualising Syariah Offences Through the Doctrine of *Taklīf*

A more substantive reform lies in the incorporation of *taklīf*-based statements within each offence provision of the Syariah Criminal Code. This proposal reflects a conceptual shift in legislative drafting, aimed at addressing a central difficulty highlighted in *Nik Elin* (2024): the limited engagement of civil courts with Islamic legal concepts when determining the validity of Syariah offences.

In *Nik Elin* (2024), the Federal Court articulated a two-tier framework for interpreting the phrase 'precepts of Islam'. The first category encompasses matters expressly enumerated within Item 1 of the State List, while the second extends to 'purely religious offences' relating to *aqidah*, the sanctity of Islam, and Islamic morality. Only offences falling within these categories—and not overlapping with general criminal law—may be validly enacted by the States.

The incorporation of *taklīf* seeks to give practical effect to this framework. By explicitly grounding each offence in the religious obligations of a *mukallaf* (legally accountable Muslim), the provision signals that the offence is normative and religious in character, rather than merely regulatory. It provides a doctrinal basis for classifying the offence as a "purely religious offence" within the meaning articulated by the Federal Court.

From the perspective of Islamic jurisprudence, *taklif* is closely linked to the objectives of Shariah, or *Maqasid al-Shariah*, which emphasise the protection of religion, intellect, lineage, morality, and property. Embedding these principles within offence provisions enhances both doctrinal authenticity and normative coherence.

Importantly, this approach restructures the logic of legislative drafting. Rather than beginning with prohibition and punishment, the provision begins with obligation and accountability. The offence is framed as a breach of religious duty, with penal consequences arising as a secondary element. This distinguishes Syariah offences from general criminal law, which is primarily concerned with regulating public order and societal harm.

However, the effectiveness of this approach in constitutional adjudication remains uncertain. Civil courts have traditionally relied on structural doctrines such as ‘pith and substance’, rather than theological reasoning. It is therefore unclear whether *taklif*-based drafting will be treated as determinative of constitutional validity, or merely as contextual support. Nonetheless, it represents a significant attempt to bridge the conceptual divide between Islamic legal theory and constitutional doctrine.

8.3 Definitional Expansion of ‘Persons Professing the Religion of Islam’

A further proposal involves expanding the definition of ‘orang Islam’ to include not only natural persons, but also artificial persons—such as corporations—operated or controlled by Muslims. The objective is to ensure that legal entities used as vehicles for activities affecting Islamic law do not fall outside the scope of Syariah legislation.

This proposal, however, raises significant doctrinal challenges. Malaysian courts have consistently held that only natural persons are capable of professing a religion, as religious belief entails mental and spiritual commitment. This principle was affirmed in *Kesultanan Pahang* (1998) and reaffirmed in *SIS Forum* (2022), where the Federal Court emphasised that corporations lack the capacity to profess faith.³⁴

In light of this jurisprudence, any definitional expansion appears, *prima facie*, to be inconsistent with established constitutional interpretation. It raises deeper conceptual questions regarding the nature of legal personality in the context of religion, particularly whether a non-natural entity can meaningfully be said to bear religious obligations.

A more defensible interpretation, however, may be framed in functional terms. Rather than attributing religious belief to corporations, the provision may be understood as regulating the conduct of natural persons acting through corporate structures. On this view, the focus is not on the entity itself, but on the human agents behind it who remain subject to Islamic obligations.

Even so, the constitutional sustainability of this approach remains uncertain. Given the strength of existing precedent, any attempt to extend the definition of ‘persons professing

³⁴ *Kesultanan Pahang v. Sathask Realty Sdn Bhd* [1998] 2 Malayan Law Journal 513 (Federal Court, Malaysia).

the religion of Islam' beyond natural persons is likely to be subjected to close judicial scrutiny. The proposal therefore addresses a genuine regulatory concern, but must be advanced with caution and supported by careful doctrinal justification.

8.4 Normative Language and the Structure of Religious Obligations

A further refinement concerns the replacement of the term 'hendaklah' (shall) with 'berkewajipan' (is obliged) in the formulation of *taklīf*-based provisions. Although linguistic in form, this shift carries significant conceptual implications.

The term 'hendaklah' reflects a conventional legislative style associated with command-based regulation, where compliance is mandated through enforceable legal directives. In contrast, 'berkewajipan' conveys a duty-based framework grounded in moral and religious responsibility. This distinction is particularly significant in the context of Syariah law, where legal accountability is intrinsically linked to spiritual obligation.

By adopting the language of obligation rather than command, the provision reinforces the conceptual foundation of *taklīf*. It emphasises that liability arises from the failure to fulfil a religious duty, rather than merely from the breach of a statutory prohibition. This strengthens the classification of such offences as 'purely religious offences', thereby enhancing their constitutional defensibility.

Comparative support may be found in Malaysian legislation that articulates duties without necessarily attaching immediate penal consequences, such as the Persons with Disabilities Act 2008. Such examples demonstrate that duty-based legislative drafting is not foreign to the Malaysian legal system.

This linguistic refinement therefore complements the broader structural shift in Syariah offence drafting. It contributes to a more coherent normative framework in which obligation, accountability, and sanction are integrated in a manner consistent with both Islamic jurisprudence and constitutional principles.

8.5 Synthesis: Towards a Constitutionally Sustainable Syariah Criminal Framework

Taken together, these proposals reflect a shift from reactive amendment to principled reconstruction. The introduction of a declaratory constitutional provision clarifies legislative competence; the incorporation of *taklīf* redefines the nature of offences; the reconsideration of definitional scope addresses regulatory gaps; and the refinement of legislative language enhances doctrinal coherence.

Collectively, these reforms represent an attempt not merely to preserve State legislative authority, but to rearticulate the constitutional identity of Syariah criminal law within Malaysia's federal structure. Whether such reforms will ultimately withstand judicial scrutiny remains uncertain. However, they offer a coherent framework through which State

legislation may be recalibrated within the narrow constitutional corridor identified by the Federal Court.

In this respect, re-legislation should not be understood as a process of replication, but as an opportunity for doctrinal recalibration—one that aligns Islamic legal principles with the constitutional architecture of Malaysia.

9. Conclusion

The Federal Court's decision in *Nik Elin* (2024) establishes a clear constitutional boundary for Syariah criminal legislation in Malaysia, reaffirming that criminal law in its substantive sense remains within the exclusive jurisdiction of Parliament.³⁵ At the same time, the decision does not extinguish State legislative competence in Islamic matters. Rather, it clarifies the constitutional parameters within which such competence must be exercised, particularly in relation to offences grounded in the precepts of Islam as recognised under the State List.³⁶

This article has argued that the State retains meaningful and constitutionally legitimate space to legislate Syariah offences, provided that such offences are firmly anchored in Islamic theological, ritual, and moral obligations applicable exclusively to Muslims. The invalidation of the sixteen provisions should therefore not be understood as a rejection of Syariah criminal legislation per se, but as a doctrinal recalibration requiring greater precision in legislative design. While provisions that substantially mirror offences under the Penal Code or other federal statutes are likely to remain unconstitutional, this does not preclude the possibility of re-enactment through careful conceptual and structural reformulation.

The challenge for Kelantan is thus not one of legislative impossibility, but of principled reconstruction. By reframing offences in terms of religious obligations (*taklif*), moral accountability, and doctrinal authenticity—rather than harm-based or public-order criminality—the State may develop a Syariah criminal framework that operates within constitutional limits while fulfilling its religious and policy objectives (Kamali, 2008; Shuaib, 2008).

The wider implications of this development extend beyond Kelantan. The future trajectory of Syariah criminal law in Malaysia will depend on how State Legislatures interpret and respond to the doctrinal guidance articulated in *Nik Elin* (2024) and earlier authorities such as *Sulaiman Takrib* (2009) and *Latifah Mat Zin* (2007).³⁷ The decision may catalyse a more disciplined and conceptually coherent approach to Islamic law-making—

³⁵ *Nik Elin Zurina & Anor v. Kelantan State Government* [2024] 2 Malayan Law Journal 150 (Federal Court, Malaysia); Federal Constitution of Malaysia, arts. 4, 74 and 75.

³⁶ Federal Constitution of Malaysia, Ninth Schedule, List II; *Sulaiman Takrib v. Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener)* [2009] 6 Malayan Law Journal 354 (Federal Court, Malaysia).

³⁷ *Sulaiman Takrib v. Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener)* [2009] 6 Malayan Law Journal 354 (Federal Court, Malaysia); *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 Malayan Law Journal 101 (Federal Court, Malaysia).

one that integrates constitutional fidelity with Islamic jurisprudential principles (Faruqi, 2019; Harding, 2012).

In this regard, the re-enactment of the invalidated provisions should be viewed not merely as a constitutional risk, but as a structured opportunity for doctrinal innovation within the federal framework. If undertaken with analytical rigour and legislative care, re-legislation may contribute to a more refined articulation of the relationship between Islamic law and the Federal Constitution. Conversely, failure to engage with the constitutional principles articulated by the Federal Court may result in continued cycles of invalidation.

Ultimately, the path forward requires a calibrated balance between constitutional supremacy and the legitimate role of States in regulating Islamic law. The *Nik Elin* (2024) decision, properly understood, provides not only a limitation but also a roadmap—one that enables States such as Kelantan to pursue Syariah criminal legislation in a manner that is both constitutionally sustainable and jurisprudentially coherent.

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Conflict of Interest Declaration

The authors declare that they have no conflict of interest in this study.

Ethics Approval

This study did not involve human or animal subjects or personal data and therefore did not require ethical approval.

AI Usage Declaration

The authors declare that artificial intelligence tools, namely ChatGPT and Grammarly, were used solely to assist in language editing, structural refinement, and research organization. No AI tool was used to generate the substantive legal analysis, arguments, or original content of this article, all of which remain the authors' own work.

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