

G25

## **BREAKING THE SILENCE**

On 7 December 2014, a group of 25 prominent Malaysian Malays (G25) issued an open call for moderate Malays and Muslims to speak out against the hate speeches targeted at non-Muslims by supremacist groups. They stressed that the extremist and intolerant voices do not speak for the general Muslim community, and they called for a review of Shariah law and civil law to be in line with the supremacy of the Federal Constitution.

Will it be possible to arrest these destructive forces that are taking control of the future wellbeing of Malaysia? The G25 hopes it would, and that this book will bring greater awareness of the dangers that are tearing apart Malaysia's social fabric.

In this important volume, 22 leading academics, lawyers and social activists discuss the impact of Islamic bureaucracy in Malaysia and its consistency with the provisions of the Federal Constitution. They also address the socio-political dimensions and cultural-economic implications on Malaysian society.

*"While the principles of equality and justice are fundamental to the Qur'an, a deeper and broader understanding of both is critical at this point in time.*

*But more than understanding the two principles, it is ensuring that they are put into practice that is the real challenge."*

– Dr Chandra Muzaffar,  
President of the International Movement for a Just World

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**BREAKING THE SILENCE**  
VOICES OF MODERATION

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# **BREAKING THE SILENCE**

## VOICES OF MODERATION

*Islam in a Constitutional Democracy*



**G25  
MALAYSIA**

For Review only

# **BREAKING THE SILENCE**

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VOICES OF MODERATION

*Islam in a Constitutional Democracy*

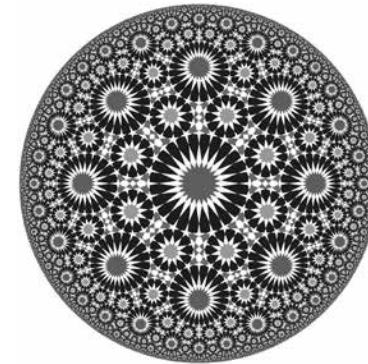
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MALAYSIA**

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*This book is dedicated  
to those who seek a more just, peaceful  
and harmonious Malaysia*

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## FOREWORD

TUN ABDULLAH BADAWI

This book is an initiative by G25, a group made up of former senior civil servants, professionals and members of civil society organisations, many of whom have served the nation with distinction, and who are people I have worked with closely in my years in government. It is about Islam within a Constitutional Democracy. It contains a collection of articles that throws light on the relationship between Islam in Malaysia and the Malaysian Federal Constitution.

The Federal Constitution provides for a dual legal system, and the members of G25 are particularly concerned over recent developments pertaining to the administration of Shariah laws in the country. The longstanding conflicts of jurisdiction between the civil and Shariah courts reflect a lack of clarity and understanding on the place of Islam within our Constitutional Democracy, and has led to disputes and conflicts in and outside the courts. Much confusion has worried both Muslims and non-Muslims, raising questions on the legal jurisdiction and substantive limits of the Shariah laws within the Federal Constitution, and the powers of the religious authorities and the way they administer them. If left unresolved, these may well affect peace and harmony in our multiracial and multireligious country.

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The book consists of articles by leading scholars and prominent members of civil society organisations, covering a wide range of subjects. I share the hope of my friends in G25 that its publication would further encourage an informed and rational dialogue on the ways Islam is used as a source of public law and policy in multiracial and multireligious Malaysia, yet within the letter and spirit of the Federal Constitution, and the hope that an inclusive Consultative Committee of Experts to advise the government in finding solutions to harmonise the Shariah laws with the Federal Constitution and in the spirit of the Rukun Negara, will be set up. These aspirations have been well articulated in the G25 open letter of 7 December 2014.

I continue to believe in the wisdom and validity of *Islam Hadhari*, a moderate and comprehensive concept of Civilisational Islam for the promotion and development of Islam as a religion of peace, social justice and compassion.

I wish my patriotic friends in G25 success in their noble cause in pursuit of a moderate and tolerant Islam with justice for all.

**Tun Abdullah Badawi**

28 October 2015

## PREFACE

G25

On 7 December 2014, a group of 25 prominent Malay Muslims comprising retired senior civil servants, academics and professionals published an open letter to the Prime Minister of Malaysia to express their deepest concerns about the state of the debate on many issues of conflict on the position and application of Islamic laws in Malaysia. They felt that it was high time moderate Malays and Muslims speak out on these issues. They emphasised that the extremist, immoderate and intolerant voices of some Malay Muslim groups do not speak in their name.

Given the impact of such vitriolic rhetoric on race relations and the political stability of this country, the group felt it was incumbent upon them to take a public position and urge for an informed and rational dialogue on the ways that Islam is used as a source of public law and policy in Malaysia.

Most importantly, the letter called on the Prime Minister to exercise his leadership and to demonstrate the political will to establish an inclusive consultative committee to find solutions to the intractable problems that had been allowed to fester for far too long. The group believed that the Prime Minister is best placed with the resources and the authority to facilitate this consultative process. The group also urged more moderate



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Malaysians to speak up and contribute to a better informed and rational public discussion on the place of Islam within a constitutional democracy and the urgency to address the breakdown of federal-state division of powers and to find solutions to the heart-wrenching stories of lives and relationships damaged and put in limbo because of battles over turf and identity. The open letter highlighted the following issues of concern:

i) **A plural legal system that has led to many areas of conflict between civil and Shariah laws.**

In particular, there is an urgent need to review the Shariah Criminal Offences (SCO) laws of Malaysia. These laws which turn all manner of 'sins' into crimes against the state have led to confusion and dispute in both substance and implementation. They are in conflict with Islamic legal principles and constitute a violation of fundamental liberties and state intrusion into the private lives of citizens. The public outrage, debates over issues of jurisdiction, judicial challenge, accusations of abuses committed, gender discrimination, and deaths and injuries caused in moral policing raids, have eroded the credibility of the SCO laws, the law-making process, and public confidence that Islamic law could indeed bring about justice.

ii) **The lack of public awareness, even among top political leaders, on the legal jurisdiction and substantive limits of the powers of the religious authorities and administration of Islamic laws in Malaysia.**

The Federal Constitution is the supreme law of the country and any law enacted, including Islamic laws, cannot violate the Constitution and, in particular, the provisions on fundamental liberties, federal-state division of powers and legislative procedures. All Acts, Enactments and subsidiary legislation, including fatwa (opinion of

religious authorities), are bound by constitutional limits and are open to judicial review.

iii) **The need to ensure the right of citizens to debate the ways Islam is used as a source of public law and policy in this country.**

The Islamic laws of Malaysia are drafted by the Executive arm of government and enacted in the Legislative bodies by human beings. Their source may be divine, but the enacted laws are not divine. They are human-made and are therefore fallible, open to debate and challenge to ensure that justice is upheld.

iv) **The need to promote awareness of the rich diversity of interpretative texts and juristic opinion in the Islamic tradition.**

This includes conceptual legal tools that exist in the tradition that enable reform to take place and the principles of equality and justice to be upheld, in particular in response to the changing demands, role and status of women in the family and community.

v) **The need for the Prime Minister to assert his personal leadership as well as appoint key leaders who will, in all fairness, champion open and coherent debate and discourse on the administration of Islamic laws in this country to ensure that justice is done.**

The political leadership must send a clear signal that rational and informed debate on Islamic laws in Malaysia and how they are codified and implemented are not regarded as an insult to Islam or to the religious authorities.

The open letter resonated with the Malaysian public and received widespread support although there were a few detractors from mainly conservative Muslim groups and individuals.

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The original group of 25 has since expanded to double that number but has decided to retain the name 'Group of 25' or simply 'G25', as this is the name that the Malaysian public is familiar with.

The G25 members share a common value, that while recognising that Malaysia is a predominantly Muslim country with Islam as the official religion, the group believes that its administration should be in line with the constitutional provisions regarding the role of Islam and which guarantee all citizens their fundamental rights to freedom of expression and worship. To this end, the group is agreed that Islam must be administered in a manner that ensures justice to Muslims and non-Muslims alike, as this is crucial for peace and stability in our multiracial country.

As the G25 is a group of influential Malays, the group believes that it is in a better position than other civil society organisations to play a constructive role as the voice of moderation on religion. Further, it can also make a difference as an advocate for change and reforms to strengthen the institutions of law and order and other public institutions to improve the standards of governance in the administration of the country. The basic principles of good governance are integrity, transparency and accountability. The G25 supports these fundamental principles of a clean government. It is passionate about making Malaysia a corruption-free country, as corruption is the greatest destroyer of morals and is therefore one of the biggest sins in Islam.

The G25 is a strong champion of *Al-Maqasid al-Shariah*, which is the higher purposes of the Shariah, which recognises justice as the first principle of Islam. It is about opening the door to *Ijtihad* (the independent interpretation of problems not precisely covered by the Qur'an and Hadith). The group sees its role as a strong advocate with the religious authorities to give due emphasis to the Shariah principles of economic and social justice so that Islam will be seen as a religion of compassion for the poor, the sick and the old, and of gender equality.

The G25 believes that while its central focus is to achieve moderation in Islam, this objective can best be realised when the country moves forward with wide-ranging reforms not only on religious administration but also in the overall system of governance. The group is convinced that good governance in the public and corporate sectors will improve the capacity and ability of the government to implement changes towards the promotion of moderation in Islam.

The G25 will work towards convincing the authorities to re-establish Malaysia as a country of moderate Islam. The G25 is not political or aligned to any political party or faction. The group is driven to push the government to do what is right for the country.

While there can be heightened expectations by the public due to the composition of the G25 membership, it is beyond the G25 to meet public expectations beyond what the G25 as a Group has agreed as its mandate.

The G25 is conscious of the fact that we are living in a multicultural society and not a homogenous, monocultural setting. Whatever changes that it has helped to influence and which are put in place will have an impact on future generations.

The G25 will continue its work until its objectives are achieved, in terms of the implementation of the reforms that it has identified.

These are the thoughts and consideration that persuaded the group to publish this book *Breaking the Silence: Voices of Moderation — Islam in a Constitutional Democracy*.

It is our hope of course that the book will create greater awareness that the supremacy and permanence of national interests must be uncompromisingly upheld. Our collective wisdom is to push for a society where peace and progress become a joint aspiration of all Malaysians. We are supported in our efforts by 22 leading academics, lawyers and social activists whose combined contribution gives us encouragement. We cannot thank them enough.

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Finally, our deep and profound appreciation to Yang Amat Berbahagia Tun Abdullah Ahmad Badawi for the invaluable contribution in writing the Foreword.

**G25 Book Committee**

28 October 2015

*Ahmad Kamil Jaafar*

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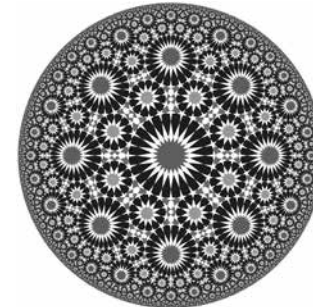
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PART ONE

**LAWS, RIGHTS  
AND PRINCIPLES**



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ONE

## THE APPLICATION OF SHARIAH LAW IN MALAYSIA

NIZAM BASHIR

### INTRODUCTION

The initial paragraphs to Muhammad Asad's seminal book written in the mid-20th century, *The Principles of State and Government in Islam*, offers an arresting snapshot of the time:

“In the life of every nation there comes, sooner or later, a moment when it seems to be given free choice of its destiny: a moment when the decisions as to which way to go and what future to aim at, seem to be freed from the pressure of adverse circumstances, and when no power on earth is able to prevent the nation from choosing one way in preference to another. Such historic moments are extremely rare and fleeting, and it may well be that if a nation fails to avail itself of the opportunity thus offered, it will not be offered another for centuries to come.

This moment of free choice has now arrived for the nations of the Muslim world. After a century of struggles,

hopes, errors, and disappointments, full independence from colonial rule has been won by most of the countries inhabited by Muslims. The achievement of independence has brought to the foreground the question of the fundamental principles by which they should govern themselves in order to ensure happiness and well-being for their peoples. The problem is one not merely of administrative efficiency but also of ideology. It is *for the Muslims to decide whether their newly independent states shall be subordinated to modern Western concepts which deny to religion the right to shape the nation's practical life, or shall, at last, become Islamic polities in the true sense of the word.* A state inhabited predominantly or even entirely by Muslims is not necessarily synonymous with an “Islamic state”: it can become truly Islamic only by virtue of a conscious application of the sociopolitical tenets of Islam to the life of the nation, and by an incorporation of those tenets in the basic constitution of the country.”<sup>1</sup> [*emphasis added*]

When Malaya began its slow march to independence, the Muslim community in the peninsula came to the same crossroads. The articles presently found in the Federal Constitution eloquently articulates the communities' aspirations in relation to the role that Shariah law has to play in the future of the nascent nation.

This chapter traces the application of Shariah law prior to independence, beginning with the Malacca Sultanate in the 14th century to the period of British rule in the Malay States when it became confined to marriage, divorce and inheritance only. With the formation of Malaysia in 1963, the legal system was separated into civil and Shariah

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courts each with its own sources of law leading to jurisdictional conflicts and occasional controversies in resolving disputes and suits. Challenges in how fundamental liberties for cases with religious overtones are resolved in Malaysia will be highlighted.

## SHARIAH LAW BEFORE 1963

Of course, the fact that Shariah law has a place in the Federal Constitution could not have been too surprising as Islam was already present in Malaysia for many centuries prior to the country's independence. Admittedly, there were also Malay customs (*adat*) which to some degree had been Islamised as they were previously influenced by Hinduism and Hindu culture between the 7th and 14th centuries.<sup>2</sup>

Evidence of Islam and the presence of Shariah law in Malaya prior to its independence can be found in:

- a. the legal code of the Malacca Sultanate, i.e. the Canon Laws of Malacca (*Undang-undang Melaka*) compiled during the reign of Sultan Muzaffar Shah in the mid-15th century<sup>3</sup> but added to over the years that followed.<sup>4</sup> Sentences for some offences in the Canon Laws of Malacca, such as amputation and the death sentence for theft and murder respectively, mirrored the ones set out in the Qur'an, but sentences for other offences, like marriage or a fine as the punishment for fornication, departed from the ones in the Qur'an;<sup>5</sup>
- b. the *Batu Bersurat Terengganu*, a stone which dates from the year 1303 containing inscriptions of punishments inspired from the Qur'an and Hadith pertaining to adultery, fornication, theft and other capital crimes;<sup>6</sup>
- c. the Laws of Johore (*Undang-undang Johor*) made in 1788/9, during the rule of Sultan Mahmud al-Ghazi ibn Abdul Jalil Shah;<sup>7</sup>
- d. the Laws of Kedah (*Undang-undang Kedah*) written in 1893;<sup>8</sup> and

- e. the Ninety Nine Laws of Perak (*Undang-undang Sembilan Puluh Sembilan Perak*).<sup>9</sup>

However, the march of Islam and the spread of Shariah law throughout the region came "...to a halt from the 15th century onwards when the Portuguese (1511–1640), and later the Dutch (1641–1785), and subsequently the British (1786–1956), invaded the country".<sup>10</sup> The British, in particular, left an indelible imprint on the legal landscape of the country through the introduction of their legal influence onto the Malay land.<sup>11</sup>

As the Supreme Court in *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ 55 put it:

"Before the British came to Malaya, which was then known as *Tanah Melayu*, the sultans in each of their respective states were the heads not only of the religion of Islam but also as the political leaders in their states, which were Islamic in the true sense of the word, because, not only were they themselves Muslims, their subjects were also Muslims and the law applicable in the states was Muslim law. Under such law, the sultan was regarded as God's vicegerent (representative) on earth. He was entrusted with the power to run the country in accordance with the law ordained by Islam, i.e. Islamic law and to see that law was enforced. When the British came, however, through a series of treaties with the sultans beginning with the Treaty of Pangkor and through the so-called British advice, *the religion of Islam became separated into two separate aspects, viz. the public aspect and the private aspect.* The development

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of the public aspect of Islam had left the religion as a mere adjunct to the ruler's power and sovereignty. The ruler ceased to be regarded as God's vicegerent on earth but regarded as a sovereign within his territory. The concept of sovereignty ascribed to humans is alien to Islamic religion because in Islam, sovereignty belongs to God alone. By ascribing sovereignty to the ruler, i.e. to a human, the divine source of legal validity is severed and thus the British turned the system into a secular institution. Thus all laws including administration of Islamic laws had to receive this validity through a secular fiat. Although theoretically the sovereignty of the ruler was absolute in the sense that he could do what he likes, and govern according to what he thought fit, the Anglo/Malay Treaties restricted this power. The effect of the restriction made it possible for the colonial regime under the guise of 'advice' to rule the country as it saw fit and rendered the position of the ruler one of continuous process of diminution. For example, the establishment of the Federated Malay States in 1895, with the subsequent establishment of the Council of States and other constitutional developments, further resulted in the weakening of the ruler's plenary power to such an extent that *Islam in its public aspect had become nothing more than a mere appendix to the ruler's sovereignty*. Because of this, *only laws relating to family and inheritance were left to be administered and even this was not considered by the court to have territorial application binding all persons irrespective of religion and race living in the state*. The law was only applicable to Muslims as

their personal law. Thus, it can be seen that during the British colonial period, through their system of indirect rule and establishment of secular institutions, *Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only.*" [emphasis added]

While statutes originating from the Straits Settlements may be affirmative of the statement quoted above,<sup>12</sup> nevertheless in statutes from the:

- a. **Federated Malay States**,<sup>13</sup> however, one can find:
  - i. in Negeri Sembilan (Sungei Ujong), for example, Order of 9th August 1887 enacting laws for "Mosque Attendance";<sup>14</sup>
  - ii. in Perak, for example, Order in Council No. 1, 1894 which punished "adultery by Muhammadans" and Order in Council of 1885 (presided by the Sultan of Perak) which required "Muhammadans to pray in mosques on Fridays";<sup>15</sup>
  - iii. in Selangor, for example, Regulation XI of 1894 or the Prevention of Adultery Regulation, 1894;<sup>16</sup>
  - iv. The Muhammadan Laws Enactment, 1904 (applicable in Perak, Selangor, Negeri Sembilan and Pahang in 1904 and which remained in force till at least until 31 December 1920) criminalising:
    - the failure to attend a mosque for Friday prayers or who after the conclusion of the Friday prayer fails to hear the teaching of the imam or ulama for at least one hour (section 3);
    - adultery (section 6);
    - incest (section 7); and
    - religious teaching without written permission from His Highness the Sultan (section 9).<sup>17</sup>

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all clearly enacting laws on areas beyond the subject matters of marriage, divorce and inheritance.

- b. **Unfederated Malay States**,<sup>18</sup> the position was somewhat similar with statutes like the 1917 Code of Criminal Procedure of Kedah, for example, stipulating that a person who caused severe physical suffering could be punished with blood money (*diyyah*);<sup>19</sup> and
- c. **British Borneo**,<sup>20</sup> specifically:
  - i. in Sarawak, there was a “codification” of laws applicable to the Malay Muslim population drafted in 1911 and brought into force in 1915 — the Laws of the Malay Court (*Undang-undang Mahkamah Melayu Sarawak*). The law was concerned with betrothal, marriage, divorce and sexual misconduct. Additionally to the code, regulations were drafted also for Muslim wills and for the disposal of the property of Muslim converts. In both cases it was open to the persons concerned to choose non-Muslim laws to govern the distribution of property.<sup>21</sup>
  - ii. in Sabah, there was no “codification” until the promulgation of the laws and customs of the Muslims (*Undang Adat Orang Islam*) in 1936. This text was never applied outside a small area and its status, at least until the promulgation of present statutes on Shariah law, is uncertain.<sup>22</sup>

Either way, on 31 August 1957, Malaya gained its independence and the supreme law of the Federation became the Federal Constitution.<sup>23</sup> Nevertheless, what has been set out above forms a tapestry which may still prove to be somewhat relevant even today as pre-Merdeka laws continue to be in force unless repealed by the authority having the power to do so.<sup>24</sup>

## SHARIAH LAW AFTER 1963 TILL 2015

After 31 August 1957 and the merger with Sabah and Sarawak, the nation moved on and the 13 States, including the Federal Territories, utilised their legislative powers in the Federal Constitution to enact a number of laws to regulate Islam and the Shariah law in Malaysia.

The subject matters legislated upon range from the purely formal, i.e. the administration of Islam which deals with identifying the institutions relevant to administer Islam in the said state, to the relatively more substantive i.e. family law, civil procedure, evidence, criminal procedure and Shariah criminal offences.

Taken by itself, this was not problematic, but gradually Malaysia’s legal system became more formally institutionalised as one operating with distinct courts dealing with separate sources of law i.e. one civil and the other Shariah.

Occasionally, this has led to controversies between the two courts with each respectively purporting to claim jurisdiction over the subject matter in question. Examples of such controversies are cases dealing with: the right of a minor to convert;<sup>25</sup> the right to apostatise;<sup>26</sup> tortuous claims arising from a marital relationship of a Muslim couple;<sup>27</sup> the right to bury a decedent;<sup>28</sup> custody of children from parents of mixed faiths;<sup>29</sup> and the right to convert a minor.<sup>30</sup>

In 1988, in an attempt to prevent such conflicts from arising, Parliament amended the Federal Constitution and introduced Article 121(1A) which provided that if a matter is within the jurisdiction of the Shariah courts, the High Courts and other inferior courts established by federal law shall have no jurisdiction in respect of those matters.<sup>31</sup> The amendment, to be fair, has its detractors, but at its simplest Article 121(1A) was merely a constitutional manifestation of the deference principle or the principle that civil courts should not enter into the religious thickets.<sup>32</sup>

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The courts were also not sitting idly by when it saw those jurisdictional conflicts erupting from time to time. Over the years, a number of legal principles have developed to resolve such conflicts and the situation is clearer today at least when the following are involved:

- a. where a question arises as to whether a particular statutory provision is in contravention of the Ninth Schedule of the Federal Constitution, perhaps better referred to as a legislative competence issue, the question is to be decided by the Federal Court;<sup>33</sup>
- b. where interpretation of the Federal Constitution is involved, it is not a matter for the Shariah courts;<sup>34</sup> and
- c. where civil courts are called to interpret written laws of the state enacted for administration of Muslim law.<sup>35</sup>

Nevertheless, in time, further exceptions to Article 121(1A) of the Federal Constitution can be developed to enable parties to be certain where a suit or a matter should be filed. For example, where:

- a. fraud and collusion are present;<sup>36</sup> and
- b. neutral principles of law can be relied upon by the civil courts to resolve the dispute before it and no doctrinal questions need be resolved by the civil court<sup>37</sup>

those suits or matters are not matters which ought to be heard by the Shariah courts but by the civil courts.

## THE FUTURE OF SHARIAH LAW

In the years to come, as the nation continues to progress and mature as a democracy, the application of Shariah law will most likely continue to proliferate as states work out the extent of their legislative competence

where Islamic law, personal law and family law are concerned; and the social and communal issues that they wish to regulate based on their legislative competence. This would, in turn, cause a ripple effect with further jurisdictional issues being thrown up for the civil court's consideration.

Jurisdictional matters aside, the real battleground perhaps will lie in the way and manner in which courts choose to uphold fundamental liberties for cases with religious overtones in Malaysia. The first salvo has just been fired and one particular religious council, the Federal Territories Islamic Religious Council (JAKIM; Jabatan Kemajuan Islam Malaysia), has purported to advance the view that Islamic laws should not be tested against rights guaranteed by the Federal Constitution.<sup>38</sup>

However, such an argument — at least in its unmitigated form — cannot be countenanced as it would be contrary to:

- a. the secular features of the Federal Constitution;<sup>39</sup>
- b. the Holy Qur'an and the Prophetic Traditions which affirms the fact that the Almighty has endowed individuals with rights such as the right to privacy and the right to not be compelled in matters of faith;<sup>40</sup>
- c. the fact that Malaysia is a signatory to the Cairo Declaration on Human Rights in Islam;<sup>41</sup> and
- d. the Human Rights Commission of Malaysia Act, 1999 which provides that regard shall be had to the Universal Declaration of Human Rights, 1948 (albeit to the extent the same is not inconsistent with the Federal Constitution).<sup>42</sup>

Conversely, if the nuances inherent in the argument put forward by the Religious Council is disregarded and fundamental liberties are upheld in an unmitigated fashion, will we one day see Shariah law being struck



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down on the basis of an infringement to a purely secular conception of a fundamental liberty?

One former chief justice, Tun Abdul Hamid Mohamad, thinks so and claims that if liberties are recognised in an overly liberal way, it will lead to Islamic laws being increasingly questioned and possibly invalidate such laws including Muslim polygamy as well as those that outlaw adultery and sodomy.<sup>43</sup>

Ultimately, it is all about getting the balance right and we must be mindful of the possible nuances that the Federal Constitution has to offer where liberties are concerned and how the ocean of Shariah law interacts with those liberties. It goes without saying that the ocean should not be made to run dry.

In that regard, perhaps the key question to ask is this: Is it possible to submit to God while promoting human liberty?<sup>44</sup> If we can answer that question and strike that balance between the despotic experience of theocracy and the godless experience of secularism, Malaysia will prove to be a model state in more ways than one.

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## Endnotes

- <sup>1</sup> Muhammad Asad, *The Principles of State and Government in Islam* (Islamic Book Trust, 1980), 1.
- <sup>2</sup> Siti Zubaida Ismail, *At the Foot of the Sultan: The Dynamic Application of Shariah in Malaysia*, *Electronic Journal of Islamic and Middle Eastern Law*, Vol. 3 (2015), 69 at p. 72.
- <sup>3</sup> *Ibid.*
- <sup>4</sup> Abd. Jalil Borham, *Pentadbiran Undang-undang Islam Negeri Johor* (Penerbit UTM, 2002), at p. 57.
- <sup>5</sup> *Ibid.* at p. 58 and p. 59.
- <sup>6</sup> Siti Zubaida Ismail, *At the Foot of the Sultan: The Dynamic Application of Shariah in Malaysia*, *Electronic Journal of Islamic and Middle Eastern Law*, Vol. 3 (2015), 69 at p. 72.

- <sup>7</sup> Paizah Haji Ismail, *Kedudukan Mazhab Syafi'i Dalam Undang-undang Jenayah Islam di Malaysia*, *Journal of Fiqh*, Vol. 4 (2007), 237 at p. 241.
- <sup>8</sup> *Ibid.*
- <sup>9</sup> See note vii at p. 242.
- <sup>10</sup> See note vi.
- <sup>11</sup> See note vi.
- <sup>12</sup> See *The Laws of the Straits Settlements*, Vol. 1, 1835–1900, Waterlow & Sons Limited, London 1920, 311 particularly *Ordinance No. 26 (Mahomedans)* [applicable in Singapore, Malacca and Penang at least until 31.12.1919] containing provisions which deal with the registration of marriage and divorce, property as affected by marriage and the recognition of Kathis.
- <sup>13</sup> A federation of four protected states in the Malay Peninsula — Perak, Selangor, Negeri Sembilan and Pahang — established by the British government in 1895 and lasted till 1946.
- <sup>14</sup> Maznah Mohamad, *The evolution of Syariah and Postcolonial Modernity: Embedding Malay Authority Through Statutory Law*, ISA eSymposium for Sociology, 1 at 4.
- <sup>15</sup> *Ibid.*
- <sup>16</sup> See note xiv.
- <sup>17</sup> A.B. Voules, *The Laws of the Federated Malay States*, Volume 1, 1921, 470–473.
- <sup>18</sup> Five British unfederated protectorates in the Malay Peninsula i.e. Johor and the states ceded by Siam to the British government through the Anglo-Siamese Treaty of 1909, i.e. “*Kelantan, Tringganu, Kedah, Perlis, and adjacent islands*”, and lasted till 1946.
- <sup>19</sup> Rainer Grote & Tilmann J. Roder, *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, (Oxford University Press, 2012), 204.
- <sup>20</sup> The four parts of the island of Borneo i.e. Brunei, Labuan, Sarawak and Sabah.
- <sup>21</sup> M.B. Hooker (ed), *Islam in South-East Asia*, (E.J. Brill, 1988).
- <sup>22</sup> *Ibid.*
- <sup>23</sup> Article 4(1) of the Federal Constitution.
- <sup>24</sup> Article 162 of the Federal Constitution.
- <sup>25</sup> *Teoh Eng Huat v. Kadhi, Pasir Mas & Anor* [1990] 2 MLJ 300.
- <sup>26</sup> *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585.
- <sup>27</sup> *Faridah bte Dato Talib v. Mohamed Habibullah bin Mahmood* [1990] 1 MLJ 174.

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- <sup>28</sup> *Ng Wan Chan v. Majlis Ugama Islam Wilayah Persekutuan & Anor* [1991] 3 MLJ 174 and *Kaliammal a/p Sinnasamy lwn Pengarah Jabatan Agama Islam Wilayah Persekutuan (JAWI) dan lain-lain* [2006] 1 MLJ 685.
- <sup>29</sup> *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors* [2013] 5 MLJ 552 and *Viran a/l Nagapan v. Deepa a/p Subramaniam (Peguam Negara Malaysia & Anor, intervener)* [2015] 3 MLJ 209.
- <sup>30</sup> *Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah & Anor* [2004] 2 MLJ 648 and *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors* [2013] 5 MLJ 552.
- <sup>31</sup> Article 121(1A) of the Federal Constitution.
- <sup>32</sup> See *Watson v. Jones* 80 U.S. (13 Wall.) 679 (1871) and *Serbian E. Orthodox Diocese v. Milivojevic* 426 U.S. 696 (1976).
- <sup>33</sup> *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 CLJ 253 at paragraph [38] on page 277.
- <sup>34</sup> *Ibid.* at paragraph [76] on page 288.
- <sup>35</sup> See *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1 and *Zaina Abidin bin Hamid @ S Maniam & Ors v. Kerajaan Malaysia & Ors* [2009] 6 MLJ 863.
- <sup>36</sup> *Gonzalez v. Roman Catholic Archbishop* 280 U.S. 1 (1929) and *Alberts v. Devine* 395 Mass. 59, 479 N.E. 2d. 113 (1985).
- <sup>37</sup> *Jones v. Wolf* 443 U.S. 595 (1979).
- <sup>38</sup> See <http://www.thestar.com.my/News/Nation/2015/05/15/Islamic-law-not-under-Constitution/>
- <sup>39</sup> *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ 55.
- <sup>40</sup> See Qur'an 49:12, 2:256 and 10:99–100.
- <sup>41</sup> A declaration by member States of the Organisation of the Islamic Cooperation, of which Malaysia joined as a member in 1969, at the 19th Islamic Conference for Foreign Ministers held in Cairo in 1990.
- <sup>42</sup> Section 4(4) of the *Human Rights Commission of Malaysia Act, 1999*.
- <sup>43</sup> See <http://www.themalaymailonline.com/malaysia/article/transgender-court-win-will-lead-to-gay-marriage-former-cj-claims>
- <sup>44</sup> Khaled Abou El Fadl, *Reasoning with God: Reclaiming Shariah in the Modern Age* (Rowman & Littlefield, 2014), 398.

TWO

# THE ISLAMISATION OF POPULAR LEGAL CONSCIOUSNESS IN MALAYSIA

ASTON PAIVA<sup>1</sup>

## INTRODUCTION

Malaysia is a Federation comprising 13 States and three Federal Territories.

Before the coming of the British in the 18th century, the Sultans in each state were regarded as God's representative on earth, entrusted with the power to run the states in accordance with Islamic law.<sup>2</sup>

When the British came, they imposed a system of indirect rule on the states through a series of treaties with the Sultans. The Sultans ceased to be regarded as God's representative and were considered a sovereign within his territory. The British turned the system into a secular institution.<sup>3</sup>

In 1956, a commission known as the Reid Commission<sup>4</sup> was appointed by Her Majesty the Queen and the Conference of Rulers to make recommendations for a constitution which became the basis of the Federal Constitution. The Federation of Malaya gained independence on 31 August 1957.