Sharia Incorporated

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Published by Leiden University Press

Otto, Jan Michiel.
Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present.

first ed. Leiden University Press, 0.
Project MUSE.muse.jhu.edu/book/46349.

11 Sharia and national law in Malaysia

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Abstract

Malaysia is a multi-cultural Commonwealth country with a Muslim majority and a constitution based on the Westminster model, embodying federalism, multi-party democracy, constitutional monarchy, common law institutions and freedom of religion. Its legal infrastructure involves an increasingly contested bifurcation of jurisdiction between common law institutions – signally the civil courts and the legal profession – and the Islamic (Syariah) Courts, in which Islamic law is confined to personal law for Muslims. This divide is the legacy of the colonial legal system and the pre-independence accommodation between the different communities, which are increasingly defined by religion rather than race. This chapter traces the development of the complex relationship between the two systems in the context of Malaysia's evolving but strained constitutional structure and studies the terrain of the conflict between them in the context of a variety of deeply contested legal and political issues.

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Malaysia is a multi-ethnic federal state with a population of approximately 25 million people, of whom about 60 per cent are Muslim and 40 per cent are non-Muslim. The group of non-Muslims consists of Buddhists (19%), Christians (9%), Hindus (6.3%), and Sikhs (0.4%). The members of the native tribes of East Malaysia (Sabah and Sarawak) and of the orang asli (original inhabitants) of West Malaysia (the Malaysian peninsula) profess animistic religions, although large numbers of Dayaks, Ibans, and Kadazans in East Malaysia have converted to Catholicism. The largest ethnic group in Malaysia are the Malays (50%), followed by the Chinese (24%), the indigenous people (11%), and the Indians (i.e. those of South Asian heritage, 8%). Bahasa Malaysia is the official language, but English, Chinese (Cantonese, etc.), Tamil, Telugu, Malayalam, Panjabi, Thai and several indigenous languages in Eastern Malaysia are also widely spoken.

(Source: Bartleby 2010)

11.1 The period until 1920

Colonial legal dualism and first codifications of Islamic law

Islam came to Malaysia[2] in the fourteenth century by means of Arab merchants and Sufi missionaries. When the Malacca sultanate was created in the early fifteenth century, its Hindu founder Parameswara converted to Islam. The royal houses of the Malay states, which culturally and politically derived from the Malacca sultanate, linked themselves symbolically with the Arab mainstream Islamic tradition, generally attempting to base their laws and governments on Islamic principles and Malay custom (*adat*). Hence, the Ruler of a state was head of both *adat* and Islam.

Nonetheless, for the purpose of this study it is important to realise that at the time there did not exist a sharp distinction between *adat* and Islam. It was simply not conceived that *adat* and Islam could be in conflict with each other. As Joseph Minnatur (1968) says,

> [i]n pursuit of justice and fair play, the adat considers itself to be in harmony with religious law. It declares:
>
> Customary law hinges on religious law,
> Religious law on the word of God.
> If custom is strong, religion is not upset,
> If religion is strong, custom is not upset.[3]

In reality, however, some of the *adat* principles actually contradicted Islamic law, especially with regard to the position of women[4], and in general one could claim that the restraining influence of *adat* prevented the full adoption of Islamic law.[5]

The pre-colonial legal system was, thus, influenced by Islamic law as well as *adat* law. The administration of justice varied from state to state and from time to time. Islamic law played an important role as the personal and religious law of Muslims (family law, succession, religious law relating to mosques, trusts (*waqf*), taxes (*zakat*), and so on), while *adat* played an important role in criminal law and in cases of property and inheritance, but only a marginal role in family law. The influence of *adat* was the strongest in the state of Negri Sembilan. Interestingly, there were no customary courts and conflicts were usually judged by the *khadi* (Muslim judge), demonstrating once again that *adat* and Islam were not viewed as being in conflict with each other. Parties were given the opportunity to appeal to the Sultan-in-Council. Although academic scholars describe the nineteenth century legal systems of Malaya as Islamic, in practice they were often very far from the Islamic ideal, though to a large degree this depended on the power and the inclination of the Ruler of a particular state (styled 'Raja' or 'Sultan'), as well as on the extent of adherence to *adat* in that state.

The legal system as a dualistic whole of Islamic law and *adat* continued to exist until the coming of the British administration at the end of the nineteenth century. The degree of pluralism further increased with the migration of people from South China and from the Indian subcontinent throughout the second half of the nineteenth and first half of the twentieth century. The pre-colonial nineteenth century legal system in the Malay states is exemplified by Terengganu, a state that has been – at least up to the state elections of 21 March 2004 – at the forefront of Islamisation. That legal system was summarised by British colonial official Hugh Clifford in his report to the Colonial Secretary entitled *An Expedition to Terengganu and Kelantan, 1895*. Clifford claimed that before his arrival, the powerful usurper Sultan Baginda Umar (1837-1876) had applied the sharia corporal punishments with harshness but impartiality. But by the time Clifford visited the state, the legal system, both civil and criminal, was being used by powerful aristocrats to exploit and terrorise the lower orders for their own benefit; there was no semblance of justice, Islamic or otherwise. The mere fact that Clifford commented on this, seems to suggest that it was quite unusual for Islamic law to be applied in an undiluted fashion.

The British established 'indirect rule' throughout the Malay states, which were technically protected states during the colonial period, and now form nine of Malaysia's thirteen states. The other four states – Penang, Malacca, Sabah and Sarawak – were already British colonies

from around the late eighteenth or early nineteenth centuries.[6] Under the treaties concluded between the British Crown and the Rulers of the Malay states, the Ruler was obliged to receive and act on the advice of the Resident (the British advisor under Treaty provisions), except in relation to matters pertaining to 'Islam and Malay custom' (Maxwell & Gibson 1924; Kamali 2000). With their field of influence having become limited to 'Islam and Malay custom', the Malay ruling class started to embark upon regulating Islamic matters. To this purpose they used two British-introduced instruments: the State Councils and the positive law (Orders in Council) (Roff 1998: 212). According to Roff, much of the institutionalisation of Islam in Malaysia took place in this context and under the auspices of the British (ibid).

The eventual outcome (by about 1920) was a system that could be called 'colonial legal dualism', in the sense that judicature was divided between English 'common law' and Islam/*adat*. Common law became the general law, with Islamic law and Malay *adat* existing under its aegis together with Chinese customary law and other forms of customary and religious law. This description began to apply to the various Malay states at different dates between 1874 and 1920. It was only after 1920 that English law penetrated to such an extent that the description became wholly accurate. English-style legal institutions and legal principles were gradually introduced either through legislation (for example, the Anglo-Indian codes) or through judicial interpretation. Islamic law remained the personal and religious law of Muslims. In general, *adat* no longer played a role in criminal law after its replacement by the Federated Malay States Penal Code of 1915 (now Law No. 574, Malaysia). Of course this code only applied to the Federated Malay States (FMS), not the Unfederated Malay States (UMS), as discussed below.

The Malay Rulers of the different states did not in general resist the introduction of English legal institutions in the form of common law principles, courts, and English-style legislation and governance. Indeed several of them owed their thrones to British intervention in internal conflicts. In the colonies formed by the Straits Settlements English law was also introduced as the general law, but modified in its application to the different communities (Harding 2001, 2002). An important exception was that Islamic law was, by statute, applied as the personal law for Muslims.

However, the Malay Rulers did to some extent attempt to resist British efforts to integrate the nine Malay states. Only four states joined the Federation of Malay States (FMS) in 1895, namely Selangor, Negri Sembilan, Perak, and Pahang. The other five were known under the name 'Unfederated Malay States', consisting of Johor, Kelantan, Terengganu, Kedah, and Perlis. The process of progressive federalisation

caused internal resistance because it was considered to be a disguised attack on the sovereignty of the Rulers (rather than on Islam as such, which was in fact unaffected by the 1895 federalisation and subsequent forms of centralised control).

In the period between the 1870s and 1920, the main effect of British intervention on Islam was that it tended to concentrate religious power in the hands of religious scholars (*ulama*), who depended directly on the Ruler for their positions. This group of conservative religious scholars was referred to as 'the Old Group' (*Kaum Tua*). As an indirect consequence of British colonial intervention, a recognisable split between these conservative legal scholars (*Kaum Tua*) and Muslim activists (*Kaum Muda*) began to appear (Tregonning 1962: 162). The *Kaum Muda*, also referred to by some as 'the Young Group', threatened the position of the *Kaum Tua* from about 1900 onwards (Peletz 2002: 53). They had strong links with the Middle East, Cairo in particular, and in opposition to the *Kaum Tua*, which was often associated with the ruling class, sought to achieve independence. They wanted to bring down the established authority and introduce Islamic modernism in its stead (Roff 1998: 214-215). In the judgement of a British District Officer who studied *adat* extensively in the early twentieth century, it is likely that in this context Islamic law would have replaced *adat* as the general law if British intervention had not checked it (Wilkinson 1908: 48-49). As we have seen, in the end the British successfully introduced British common law, leaving sharia to apply as personal law for Muslims only. This did not serve a *divide et impera* strategy, as was the case in other colonised countries. In fact, the British attempted to integrate as much as possible.

Another result of British intervention was a tendency to formalise the Islamic system of justice as a reaction to the injection of common law institutions. Indeed in the late nineteenth and early twentieth centuries the ruling Malay class and the *Kaum Tua*, under the 'guidance' of the British, began the process of formally codifying the Islamic system. This process included some codification of substantive law and 'reorganization and rationalization' of the Syariah (Sharia) Courts, of which the latter process had started to unfold around the 1890s (Peletz 2002: 47-63).[7] Codification of the Islamic system occurred both in the Malay States (federated and unfederated) and in the Straits Settlements, and covered criminal law as well as personal and family law. For example, the 1917 Code of Criminal Procedure of the state Kedah stipulated, on the basis of sharia, that a person who caused severe physical suffering could be punished with *diyya* (blood money). In 1916 the ruling Malay class and the *Kaum Tua* set up a Religious Council (*Majlis Agama Islam*) in Kelantan to ensure proper administration of justice in the field of Islam (see 11.2 below). This would also happen in Kedah in 1948 and

in the other Malay states in 1949. The Religious Councils followed the Shafi'ite school in its legal interpretations, but in case the results of the interpretations were in conflict with the general interest, they could also make use of the Hanafi, Maliki, or Hanbali schools. The British, of course, made sure that these initiatives were within the boundaries of what they saw as acceptable judicial practice.

11.2 The period from 1920 until 1965

Consolidation and constitutional change

During the interbellum there were few changes in the relations between colonial common law, Islam, and *adat*, except for the above-mentioned reorganisation of the Syariah Courts, a process which continued during the 1920-1965 period. A policy of legal harmonisation was in general pursued, in which legal pluralism was accommodated within a common-law framework. The position of the common law also remained virtually unchanged between 1920 and 1965, although the legal institutions based on British law continued to spread in this period from the Straits Settlements to all the Malay States.

The Japanese occupation of 1941-1945 left no legal changes of lasting interest. It contributed, however, to a heightened sense of ethnic polarisation between Malays and Chinese in particular (Peletz 2002: 59). Hence, when the British attempted to establish a Malayan Union in 1946, which would have established a unitary state and accord more or less equal treatment to Malays, Chinese, and Indians under the constitution of this Union (Peletz 2002: 59), a Malay political opposition movement came into existence in which Islam played but a subordinate role to Malay nationalist sentiment. As a consequence of this resistance, in 1948, the Union was replaced by a federation of eleven states that formed the Federation of Malaya and consisted of a combination of the former Straits Settlements of Penang and Malacca and the nine other states located on the Malay peninsula, of which only four had joined the Federation of Malay States (FMS) in 1895 (see 11.1). Under the new federation, the Malays were given back some of their pre-war privileges (Peletz 2002: 60) and, crucially, traditional governance was reinstated in the Malay states.

In 1957 the Federation became formally independent with the proclamation of the Merdeka (Independence) Constitution. The former British colonies Sarawak and Sabah, both located on the island of Borneo, joined the Federation in 1963. This move was initially opposed by the Indonesian government and led to the so-called Indonesia-Malaysia Confrontation (*Konfrontasi*) of 1962-1966. Nevertheless, the Federation of Malaysia, comprised of fourteen states, came into being

with the joining of the Federation of Malaya with Singapore, Sabah and Sarawak. Singapore separated from the Federation in 1965.

The Merdeka Constitution was drafted and adopted in 1957, when Islam was a much more peripheral issue than it is now, being much less important in the minds of the constitution-makers than emergency powers or the monarchy, for example. Essentially, the Report of the Constitutional Commission of 1957, a drafting body consisting of five Commonwealth jurists under the chairmanship of Lord Reid, a Scottish judge, formed the basis of the Constitution of the Federation of Malaya (1957) (the Merdeka Constitution), and later of the Federal Constitution of Malaysia (1963), which entered into force with the formation of Malaysia.

Concerning the role of Islam, the constitution entrenched the situation which had applied under British rule in the Malay States: in the Federation's political system this role was confined to the States and dealt with by the Ruler of a state in consultation with the Religious Council, of which the first had been installed in Kelantan in 1916 (see 11.1), and which were established in all states by 1949. Islamic law was, thus, outside the purview of the common law courts, but its sphere of operation was nonetheless ultimately constrained by the British legal structure. In terms of jurisdiction, Islamic law was confined to personal status law for Muslims, notably family law. In brief, it had no role, or only a ceremonial role, to play in the constitution. It was clear that an Islamic state as such was not contemplated and that the issue of making Islam the official religion of the Federation was merely a symbolic recognition of Malay Muslim identity.

Ironically, none of the Commissioners, who were appointed by their respective governments, was Malayan and only one of them, the Pakistani Judge Abdul Hamid, was Muslim. It seems likely, however, that the latter was included for his experience of constitution-making in Pakistan. His stance as a dissenter on several issues such as citizenship and fundamental rights was in fact generally based on constitutionalist, rather than Islamic, principles. In his note of dissent, he did express support, however, for making Islam the official religion of the Federation, which is now the position under Article 3.[8]

Abdul Hamid's view was in fact in accordance with the position of the multi-party Alliance, the predecessor coalition to the current Barisan Nasional (BN), then led by Tunku Abdul Rahman. The Tunku was in favour of Article 3 on the grounds that the provision was innocuous; would not prevent the state from being secular in nature; was similar to provisions in constitutions of other Muslim countries (Afghanistan, Iran, Iraq, Jordan, Saudi Arabia and Syria were cited); was found in the constitutions of some of the Malay States; and was agreed to unanimously by the Alliance, which also included non-

Muslim parties (Federation of Malaya Constitutional Commission 1956: 96).[9] The latter's acceptance of Islam as the official religion of the Federation was part of a political settlement in return of which they would obtain citizenship and the right to education in their mother tongue. In the constitution, Islam was thus proclaimed to be the religion of the Federation when it came into effect on 31 August 1957 (Harding & Lee 2007).

Islam *per se* was little discussed in the drafting process and there was no proposal that an Islamic state along the lines of Pakistan, for example, should be adopted. Despite the apparent failure to fully address in the constitution the religious predisposition of the majority of the population, the 1957 Constitution was approved by the federal and state legislatures and all key stakeholders. Islamic jurists, of whom there appear to have been rather few at that time, also appear to have supported (secular) constitutionalism. For example, the late professor Ahmad Ibrahim (1917-1999), the doyen of Islamic jurisprudence in Malaysia for many years and the founding Dean of the Khulliyyah (College) of Laws at the International Islamic University Malaysia (now named after him), wrote several pieces from a constitutionalist perspective, even though he was also a fervent advocate of Islamisation (Ibrahim 1977, 1989a, 2000).

The Constitutional Commission did not, however, have *carte blanche* in settling the constitution; it was tied by its terms of reference, which were agreed upon in London in negotiations between the Malay leadership and the British Government in 1956. Essentially, their brief was to give constitutional effect to: (1) the survival of the existing monarchies (the sultanates of the nine Malay States) and the federal system to which it was linked; (2) political agreements concerning special privileges for the economically disadvantaged Malays; and (3) citizenship and related rights of the non-Malays.

Thus, the constitution that emerged was an entrenchment of a social contract reached between the main communities. Otherwise, everything was left more or less as it had been under British rule, albeit with some advances in terms of democracy and constitutionalism more generally, for example in the enumeration of fundamental rights.

Resistance to British rule focussed on issues relating to ethnicity and unification rather than religion. Just as they resisted the federalisation attempts of the British in 1895, the Malays had again objected to the British attempt in 1946 to do away with the Rulers and the State governments, which were seen to be quintessential elements of Malay culture. They also objected to the granting of equal citizenship to the non-Malays. Thus, in spite of the constitutional enumeration of fundamental rights the process of federalism, independence and constitution-making also resulted in the special position of the Malays being recognised in

terms of special privileges (e.g. quotas for university places, scholarships, places in the public service, and trade licences), and even as an exception to the general principle of equality before the law.[10] Hence, it was Malay nationalism, defined in relation to the Chinese and Indian communities, rather than Islam, defined in relation to Buddhism and Hinduism, that characterised the politics of this period. The historical facts about religion and law were entrenched in the 1957 Constitution, but not essentially changed by it.

Since the beginning of the Malayan Union of 1946 there have been two political currents among the Malays in Malaysia. The United Malays National Organisation (UMNO) of the Malay nationalists formed the largest political force in Malaya and was also the leading member of the Alliance (later Barisan Nasional – BN), which included non-Malay coalition partners.[11] UMNO was formed out of an independence movement that opposed the British Malayan Union proposal of 1946. Since independence, UMNO has ruled without interruption. The other primary political current, the Islamic party, Partai Islam Semalaysia (PAS), was founded in 1948, but its existence for the time being had little effect. This would change from the 1970s onwards (see 11.3 below). Suffice it here to mention that according to Roff (1998: 218) the PAS policy covered elements of thinking of both the old *Kaum Tua* and the younger, activist *Kaum Muda*, safeguarding Malay interests and promoting the establishment of an explicitly Islamic polity.

The previous section explains why in Malaysia Islam is within state, as opposed to federal, jurisdiction and within personal rather than public law. Islamic law operates as an exception to the common law, the latter being the general law as received (now) under the provisions of the Civil Law Act of 1956, which codified what was already the case and that which had previously been consolidated in similar provisions of different dates for the varying States (see 11.1 above). 'Law' according to the 1957 Constitution is the written law, common law, custom, and habits; Islamic law is explicitly excluded in this article, suggesting, oddly, that the constitution-makers did not consider it worth mentioning in this context.

One of the great tasks of Islamic law in Malaysia has been, and continues to be, the achievement of uniformity among the state jurisdictions. Since 1952 attempts have continued to be made to provide uniformity between the various State Enactments on Islamic law. The states were competent to make material and procedural legislation to support administration of justice according to Islamic law, but their competence was limited to personal and family law and to limited jurisdiction in related religious matters falling under the purview of criminal law. As explained elsewhere, this criminal jurisdiction is not general, but confined

to personal law-related issues, such as in the case of *khalwat* (close proximity between unmarried persons of the opposite sex). The result is that while Islam is generally regarded as 'official' only in the ceremonial sense (although even this position is contested), there are actually fourteen different systems of Islamic religious administration and Islamic law, and each state (plus the Federal Territories) has its own Administration of Islamic Law Enactment and its own Islamic Family Law Enactment.[12]

In each state the Ruler retained a dual function as Head of Islam and primary authority responsible for the enforcement of *adat*. He was advised by the Religious Council (*Majlis Agama Islam*) (see 11.1), which was led by a jurist (*mufti*), who was also competent to promulgate formal religious legal opinions (*fatwas*) (Ishak 1989: 415). Since these *fatwas* were issued by the Religious Council they had official status. Moreover, a few years after independence, a State Department for Religious Affairs was established in each state that became responsible for the Syariah Courts and other syariah matters as well as for the appointment of judges and for the enforcement of Islamic law in general. According to Peletz, *adat* was not accorded a place within the jurisdiction of this Department and it '[...] received no institutional supports in any way comparable to those underwriting Islam' (2002: 60). State legislation concerned, for example, the registration of Muslim marriages and divorces. In these laws Islamic law was not in general codified; they merely provided the basis for enforcing Islamic law. Appeal could be made to the Ruler-in-Council, who had the authority to appoint a commission to handle the appeal. The state laws determined that the legal principles of the Shafi'ite school were applicable.[13]

With regard to the position of women, this varied according to whether Islamic law was or was not modified by *adat*. Under the matrilineal and democratic *adat perpatih* of Negeri Sembilan, women enjoyed extensive property rights and a married man joined his wife's family (see also note 4). *Adat temenggong*, prevailing in other states of Malaysia (see also note 4), was patrilineal and authoritarian in most of its forms. As such, the position of women was the same as their common position within Islam, except that under the rule of *harta sepencarian* ((division of) matrimonial property), divorcing spouses divided (and still divide) equally property brought into the marriage. While something resembling a women's movement can be discerned in the Straits Settlements in the early twentieth century, it was not until after World War II that women's rights became a major issue in the Malay States. An incident in 1951, in which functionaries of the ruling party UMNO spread a pamphlet stating that *adat* law with regard to property was not in accordance with Islam and was not justified towards men, stirred

feelings of resentment in Negeri Sembilan, where *adat perpatih* was applicable (Ali 1963: 33; Hooker 1972, 1973: 509).

In summary, the position of sharia in relation to common law, as personal law for Muslims, in fact remained unchanged, notwithstanding the national struggle against the British attempts to form the Malayan Union (1946), the subsequent creation of the Federation of Malaya (1948), and the independence of the Federation with its new constitution (1957 and 1963).

11.3 The period from 1965 until 1985

The politics of ethnicity, nationalism, and religion

Although Malaysia had emerged by 1965 as a Muslim-majority state, the maldistribution of the benefits of economic development had not been solved by the special privileges of the Malays as authorised by the 1957 Constitution. Rural Malay disaffection surfaced in serious riots following favourable results for non-Malay parties in the 1969 elections. The riots, collectively known as the 'May 13 riots' resulted in the imposition of martial law under emergency powers for almost two years. Religion played no role in the May 13 riots.

The resumption of democratic normality in 1971 was conditional on renegotiation of the 'social contract' concluded in 1957. The special privileges of the Malays were extended and entrenched – so much so that they were placed beyond public debate and formed the basis of a New Economic Policy designed to give *bumiputera* (now defined as Malays and natives of Sabah and Sarawak) a 30 per cent share in the economy within twenty years (i.e. by 1990). In terms of religion and the legal system, these measures had the effect of increasing authoritarianism but did not affect the constitutional position of Islam.

During the late 1970s and 1980s Malaysian society experienced a resurgence of Islam in the wake of the Iranian revolution of 1979. This is referred to as the '*dakwah* (lit. call; missionary) movement' (Nagata 1984; Muzaffar 1987; Anwar 1987). During this period, the Islamic Party PAS, whose influence had previously been minimal, was able to press legal claims at the boundaries where Islam and the common law met. As a self-proclaimed 'true follower of both Malayan and Islamic principles', PAS worked for the establishment of a true Islamic state, in which only Muslims were to hold political power (Kamali 2000: 8). At the end of the 1970s PAS took over the state government of Kelantan, a State that was traditionally Islamic, for a short period of time. For hundreds of years Kelantan has been the Malaysian state with the closest relations with the Islamic world in general and the Middle East in particular (cf. Roff 1996). During PAS' tenure of its state government at that

time, and again from 1990, PAS promoted Islamisation to the full extent possible given the limited powers of a state government in this regard.

The Islamic revival in Malaysia signified a challenge for the policy of harmonisation with which the government had until then been able to keep Islamic aspirations in check, or to a certain degree marginal. Events in the Middle East and the development of increasingly powerful Islamic movements in Iran and Pakistan, though, resulted in a stronger call for Islamisation in the political domain.

The ruling Barisan Nasional (BN), a coalition of parties representing different ethnic communities, led by Dr Mahathir Mohamed from 1981 to 2003, took its stand on the basis of Malay political dominance and economic development. With the aim of undercutting PAS' appeal, it mounted a modest programme of Islamisation of state and law: in the legal system, where the process of harmonisation of Islamic law and institutional reform was commenced; in education with the creation of an International Islamic University and assistance for Muslim students; and in banking with the creation of an Islamic banking system (Islamic Banking Act of 1983; Hidayat Buang 1998: 44).

Government policy under Mahathir, emphasising economic development, leaned towards 'Islamic values' such as discipline, reliability, integrity, cooperation, and hard work (Kamali 2000: 160), but this policy did not lead to radical changes in the position of sharia. The Islamic Family Law (Federal Territory) Act 1984, for instance, was aimed at unifying and modernising the personal and family law for Muslims. For example, it provided certain conditions to be complied with before a court could sanction polygamy. The attempt to create a uniform family law to be applied in each of the states was found by conservative elements to be too radical in its modernising measures and not in accordance with traditional sharia, as a result of which three states (Kelantan, Terengganu, and Perak) either rescinded their provision similar to the the Islamic Family Law (Federal Territory) Act 1984 or retained their own un-reformed law, so that merely the court's consent was required.[14] In the result, although the 1984 reformed law was speedily copied by various states, nothing was done to increase the actual scope of the sharia *per se*, which remained limited to personal status law for Muslims.

11.4 The period from 1985 until the present

Islamic revival and inter-religious conflict

During the late 1980s and early 1990s there was some discussion promoted by the then Lord President (chief justice) of the development of

a 'Malaysian common law' that would incorporate Islamic values and other elements. Ultimately this discussion came to nothing; it was pointed out by the legal profession that the common law in Malaysia was already a 'Malaysian common law', as the law had developed from the original English model in line with the legal culture and social facts of Malaysian society. But it could hardly be said that Malaysian law had become in any real sense more Islamic as the imprint of British common law remained strong. Indeed, it was only in 1985 that appeals to the Judicial Committee of the Privy Council in London were finally abolished.

Under Mahathir, the Westminster system of government based on the 1957 Constitution had, however, become more authoritarian, with successive constitutional and legislative amendments giving more power to the government.[15] In 1988 the matter of jurisdiction over Islamic law cases came to a head, when the government decided to restrict the jurisdiction of the civil courts. An amendment to Article 121 of the constitution limited the jurisdiction of the civil courts regarding decisions of the Syariah Courts (see 11.5). As a result, Syariah Courts were granted much more independence in the field of personal law. This was done in the context of a constitutional crisis over government interference with the judiciary, which had become more activist in the brief period following the abolition of the appeal to the Privy Council in London.

Developments in three states

The period in question also marks the rise, and perhaps also the fall, of PAS. Having briefly taken over the government of the state of Kelantan in the late 1970s, PAS was able to capture the state again in 1990. After the election victory a coalition of PAS and an anti-Mahathir splinter party of the UMNO took over the administration of Kelantan. They possessed an overwhelming majority in the State Legislative Assembly and PAS' popular leader, Nik Abdul Aziz Nik Mat, became the Chief Minister. Kelantan subsequently commenced a program to incorporate Islamic principles into the law and government policy. These attempts at Islamisation first involved some small changes in the rules for the government apparatus, such as dress codes and stipulations concerning public entertainment and the sale of alcohol. The second initiative for new legislation, namely a *hudud* code of criminal law that introduced Islamic criminal offences and punishments, such as cutting off the right hand for theft, was extremely controversial. However, on November 25, 1993, the State Legislative Assembly unanimously approved the *hudud* law.[16] A chorus of dismay met the passing of the *hudud* law in Kelantan, not just from lawyers, non-Muslim groups and political parties, but also Muslim groups such as the Sisters in Islam, who

vigorously objected to the discriminatory effect of several provisions against women and its inconsistency with the concept of fundamental rights in the constitution (Ismail 1995). The *hudud* law of Kelantan was even accused by some (who perhaps had their tongues firmly in cheek and were attempting, as they saw it, to call PAS' bluff) of being *insufficiently* Islamic in that it did not apply automatically to non-Muslims (who were allowed, however, to opt into the *hudud* law).

In Terengganu, where PAS took over the State government between 1999 and 2004, a *hudud* law was also passed. It should be mentioned that Terengganu PAS Chief Minister, Hadi Awang, was instrumental in the *hudud* episode. He also twice proposed in Parliament a bill providing for the death penalty for Muslims who apostatise. The *hudud* affairs in these two states developed into a new conflict between the PAS and the BN.

In the small northern state of Perlis, dominated by the BN, steps were made to solve the 'problem of apostasy' by the passing of the *Islamiah Aqidah* (Islamic religious belief) Protection Enactment in 2000. This law, *inter alia*, empowers the Judge in the Syariah Court to make an order detaining for up to one year in an *Aqidah* Rehabilitation Centre a person who attempts to change his or her religion if the person refuses to recant. Until now, this is the most extreme position taken with regard to the issue of apostasy. In none of the states is apostasy punishable by death, although Malaysia adheres to the Shafi'i school of law and according to prevailing Shafi'i interpretations apostasy should so be punished. There is presently a range of opinions both within the Muslim and non-Muslim communities as to the proper limits of Islamisation. Judging by the election results of 2004, and especially those of 2008, the majority view apparently supported by non-Muslims and many moderate Muslims is that Islamisation has proceeded far enough. While PAS gained votes from the BN, other secularist opposition parties made even greater gains, and even took over control of the state governments in Selangor, Penang, Perak and Kedah.

Dilemmas for the federal government

These developments placed the Federal Government in a politically difficult position: it was concerned about isolating PAS, which by then (although no longer) had become its main political rival and appeared to be fully Islamic. Thus, it maintained a policy of Islamisation that, as has been indicated above, was visible in the fields of education and in commerce and banking, policies which had begun in the early 1980s. At the same time, it did not wish to compromise economic growth, especially in circumstances in which its moral legitimacy from an Islamic standpoint might well be questioned.[17] In any case, it could not

support *hudud* law without placing great pressure on the inter-racial, inter-religious nature of the ruling BN coalition itself and alarming the non-Muslim minorities, on whose support it increasingly depended. However, it could also not oppose *hudud* law without appearing to Muslims to be un-Islamic as alleged by PAS.

The electoral successes of PAS created a new environment for the discussion of the role of Islamic law. Beginning around 1999, for example, there was public debate about the concept of an Islamic state, which intensified and broadened following an announcement by the Prime Minister Dr Mahathir Mohamad in Parliament that Malaysia was an 'Islamic state'. Dr Mahathir even went so far as to say that Malaysia was a 'fundamentalist, not a moderate Islamic state', and that it was also a 'model Islamic state'.[18] These statements sparked great controversy. Catholic bishops and non-Muslim parties, for example, denounced them as creating a climate of fear and discrimination in a society that has always embraced religious and ethnic pluralism, and as being factually incorrect as an analysis of the Federal Constitution. On the other side, PAS criticised Dr Mahathir's statements as being false and not in accordance with Islam. An Islamic state, they said, is precisely what they wish to create if they get into power, and what they have been attempting to implement in Kelantan and Terengganu, albeit within the severe constraints of a federal constitution. For half a century PAS had based its politics on the idea that Malaysia should become an Islamic state. PAS sees the order established by the Federal Constitution of 1957 as secular, un-Islamic, corrupt, and, together with the common law, as an obstacle to the establishment of an Islamic state. PAS, however, covers many different opinions, and is as such forced to reach political accommodation with other opposition parties (which proved successful in the 2008 elections); for that reason it has refrained from explicitly making clear what an Islamic state would look like.

The constitution in fact has made precious little concession to the notion that the Federation has a Muslim majority. There is, for instance, no requirement that the Prime Minister must be a Muslim (otherwise for state Chief Ministers). Although Article 3 names Islam as the religion of the Federation, it has until recently always been agreed that this provision does not in any sense establish an Islamic state, but merely provides for the religious nature of state ceremony. Article 3 goes on to say 'but other religions may be practised in peace and harmony in any part of the Federation' (Kamali 2000: chapter 3). While Article 3 has historically been viewed as a provision with mere ceremonial significance, there is now a debate in which certain scholars argue that the article gives a mandate for the application of Islamic law as fundamental law, and in any case that Islam has more than mere ceremonial significance.

The 1999, 2004, and 2008 electoral events and jurisdictional struggles

The constitutional debate intensified into profound political struggle during a passage of events between 1997 and 2004. Despite the apparently calm rejection of the majority of the population in the 1999 elections of calls by PAS for reform, that election indicated some surprising developments. Large numbers of Malay/Muslim voters (traditional Government supporters) were angry with the treatment of former Deputy Prime Minister, Finance Minister and anointed successor to Mahathir, Anwar Ibrahim, who was dismissed, arrested, and charged with corruption and sodomy in 1988. They were also dismayed by the fallout from the economic crisis of 1997-1998 and defected to PAS, which based its campaign on a platform of furthering attempts to create an Islamic state. As a result, PAS not only substantially increased its representation in the federal *Dewan Rakyat* (lower house) from seven to 27 seats, enabling them to lead the parliamentary opposition for the first time in Malaysian history, but also retained control over Kelantan and additionally won control of Terengganu, another traditionally Muslim state.[19] The post-election period saw the Government attempting to control the spread of support for PAS by for example: restricting the publication of its newspaper *Harakah* to twice-monthly and only for party members; interfering with the political content of Friday sermons in the mosques; and presenting UMNO as the party of true, moderate Islam, and PAS as the agent of international terrorism (by claiming that PAS is supportive of international terrorist groups). In the meantime, PAS itself appeared to be undergoing a predictable internal power struggle in which the 'traditionalists' (principally the *ulama*) have been attempting to reassert themselves against the 'young professionals'.[20]

Attempts to Islamise the states under PAS control brought constitutionalism and the common law directly into question. Islam is a state as opposed to a federal subject, and the powers of the different States are severely circumscribed to the extent that implementation of such a programme requires the cooperation of the federal legislature in effecting constitutional amendments which, as matters stand, cannot obtain the support of the crucial two-thirds majority in lower and upper houses. In fact, the federal opposition itself, the Barisan Alternatif (Alternative Front), inaugurated in 1999 and now replaced in 2008 by the Pakatan Rakyat (People's Alliance), is made up of parties that hold directly contradictory views on the relationship between Islam, the common law, and the constitution. PAS, on the other hand, is restricted by the need to cooperate with the other opposition parties. And the post 9/11 environment has generally reduced their appeal in the eyes of the electorate. This was particularly evident in the federal and state elections of March 2004, when PAS' position was shown to have seriously eroded. It won

only six seats in Parliament, losing its position as main opposition party to the mainly Chinese Democratic Action Party (DAP), and also lost Terengganu and only won its heartland state of Kelantan by the narrowest of margins following a recount. In contrast, the BN under the new Prime Minister Abdullah Ahmad Badawi increased its proportion of the vote from 54 per cent to 64 per cent. This reversal could be ascribed to a number of factors, including: PAS' failure to convince voters of its moderate intentions; the lack of any consensus between the opposition parties concerning the Islamic state issue; the subsidence of disquiet over the economy and the Anwar Ibrahim issue; and the 'honeymoon' popularity of the new Prime Minister, who was only the fifth in 47 years since independence.

The *hudud* matter has in effect been resolved by the *de facto* position that the state *hudud* laws of Terengganu and Kelantan cannot be enforced due to doubts as to their constitutionality. A case in which the Federal court was petitioned directly on the basis that the *hudud* law of Kelantan was beyond the power of a state to enact was taken to the Federal Court by a back-bench UMNO Member of Parliament and Kelantanese lawyer, Zaid Ibrahim; it was dropped in 2006 following the Prime Minister's intervention. Still, some experiments were performed in the field of Islamic governance within the existing constitutional limitations at the state level, particularly in Kelantan and Terengganu. These initiatives related for example to restrictions on the retail sale of food, public performances, and the implementation of a dress code. In the end, these experiments proved either illusory as with the *hudud* law, relatively trivial in their implications, or of short duration.[21]

Since the 2004 election there has been an intensified struggle around the issue of civil and sharia jurisdiction, based on the 1988 amendment to Article 121 of the constitution. While space precludes detailed discussion of the many important and problematical cases dealing with this crucial jurisdictional issue, suffice it to say that case law culminated in the long-awaited decision of the Federal Court in the *Lina Joy* case, which will be discussed in 11.5.

The 2008 elections have, however, turned upside down the political configuration of Malaysia. The BN lost its two-thirds parliamentary majority for the first time ever, lost control over five state governments (Kelantan, Kedah, Penang, Perak, and Selangor), and obtained only 49 per cent of the vote in Peninsular Malaysia. As an indication of opposition gains, the BN won only one parliamentary seat in the Federal Territory, whereas the opposition won ten. The opposition parties now have 82 out of 222 parliamentary seats, of which PAS has 23. Anwar Ibrahim's Parti Keadilan is now the largest opposition party. The BN's

hold on government is water-thin, with many understanding these results as a rebuff for the BN amongst non-Malay voters in particular, partly due to its failure to resist over-ambitious Islamisation of the legal system, but also because of its failure to address other reform issues and to take charge of the economic situation. The overall result, despite PAS' increased representation, is to reinforce the multi-cultural imperative that lies at the roots of Malaysian society and to de-emphasise the Islamic state issue.

In the political and legal situation in Malaysia at this moment one can recognise the government's efforts towards inter-ethnic reconciliation and economic development. However, the historical basis and practical consequences of this reconciliation do not seem to be accepted by newer generations of Malaysian voters. For centuries Malaysian society has embraced a culture of mutual tolerance, and the principle of non-interference in religious affairs is deeply rooted. Pluralism has been a characteristic of many Islamic societies, but Malaysia is in this respect an outstanding present-day example because the country lies in a part of the world, Southeast Asia, where pluralism is a penetrating fact that deeply influences Islam along with other social phenomena.[22]

Yet, the position and role of sharia in national law has now become a matter of political conflict, as government and society are dealing with self-proclaimed followers of 'true Islam', such as PAS. The political situation is therefore now different from the country's longstanding experience, the very characterisation of this experience itself becoming contested. The 2008 elections have created new politics on both sides of the political equation, in which Islam is just one of several issues that appear to be profoundly intertwined. One small pointer might be that in the aftermath of the 2008 elections a problem arose under the State Constitution of Perak, where a DAP/PKR/PAS coalition has taken power. The problem centred around the fact that the constitution says that the Menteri Besar (Chief Minister) must be a Malay Muslim, but DAP is a mainly Chinese party and as such has no credible Malay/Muslim Members of the Legislative Assembly that might be appointed. Several possible solutions were canvassed, but in the end, the three opposition parties agreed that a leading PAS member, a Malay/Muslim, would be appointed even though PAS actually had fewer seats than either of its coalition partners. In the event this solution proved short-lived, and a controversial change in the state government occurred due to defections of assembly members and the head of state's dismissal of the Chief Minister in early 2009.

The abiding impression of the politics of this period is that much turbulence has occurred but very little actual movement on the underlying issues of religion and the identity of the Malaysian polity. As this chapter is finalised in January 2010 it is reported that arsonists set fire to

eight churches over one weekend in different parts of Malaysia in incidents which are attributed to yet another legal/religious conflict, over a High Court decision allowing the use of the word 'Allah' in a Catholic magazine published in Malay to describe the Christian God.[23]

11.5 Constitutional law

As in India, Pakistan, and Bangladesh, Malaysia is one of those countries in which constitutionalism along Westminster lines is also a legacy of the British colonial past. The basic structure of the 1957 Constitution is still unimpaired, although there have been many, and frequently drastic, amendments. The result of this is a state termed semi-authoritarian or quasi-democratic, but nevertheless based on the principles of the rule of law. Interestingly, those who resist Islamisation trust the constitution, and even though they often also criticise it, they are reluctant to initiate any changes, as change itself is seen as a threat to their constitutional rights and status.

Malaysia has had to engage with Islam both legally, as an important topic to be dealt with as an aspect of the constitutional order, and philosophically, as an alternative conception of what the constitutional order might be. Four constitutional topics will be discussed below that have influenced that role and position of Islam in Malaysia.

Islam as the religion of the Federation

Article 3 of the Federal Constitution names Islam as the religion of the Federation. It has generally been agreed until recently (see 11.4 and below) that this provision does not in any sense establish an Islamic state, but merely provides for state ceremony. Article 3 goes on to say 'but other religions may be practised in peace and harmony in any part of the Federation'.[24] There is also no provision for the sharia to be a source, much less the primary source, of legislation. Yet, according to former Prime Minister Dr Mahathir, Article 3 is conclusive evidence of the existence of an Islamic state.

This matter was tested in the 1988 case of *Che Omar vs. Public Prosecutor*,[25] in which it was argued that the enactment of a mandatory death penalty was contrary to Islam and therefore unconstitutional. The Supreme Court (now the Federal Court) rejected this argument, holding that Article 3 was not a clog or fetter on legislative power. In doing so, the court drew a sharp distinction between private law, where Islamic law applies, and public law, where it does not, and referred to the basic facts of Malaysian history to explain this position. This position, however, has been expressly or implicitly

rejected in a number of recent cases (e.g. *Kaliammal a/p Sinnasamy vs. Pengarah Jabatan Agama Islam Wilayah Persekutuan* [2006] 1 MLJ 685; *Subashini a/p Rajasingam vs. Saravanan a/l Thangathoray* [2007] 2 MLJ 798; also *Lina Joy* below).

Freedom of religion

Religious rights are constitutionally guaranteed in terms of the right to practise and profess any religion in peace and harmony; in the prohibition of discrimination on religious grounds; in the right of every religious group to establish and maintain institutions for the education of children in its own religion; and in the prohibition on requiring a person to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.

Article 11(1) provides that '[e]very person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.' Article 11(4) allows the states to legislate for the control or restriction of the propagation of any religious doctrine among persons professing Islam. Thus Article 11, while safeguarding freedom of religion, draws a distinction between the *practice* and the *propagation* of religion. The states have in fact exercised their right to enact restrictive laws as envisaged by Article 11(4); and since the states include Penang and Melaka, former British colonies where Islam is not even the state religion, it seems that the restriction of proselytism has more to do with the preservation of public order than with religious priority as such. The restriction of propagation of non-Islamic religions among Muslims and state control over the propagation of Islamic doctrine may also serve the purpose of maintaining social stability.

Article 11 has very much been restricted in its scope by the decision in the abovementioned *Lina Joy* case, discussed in more depth below. In this case a Muslim woman attempted to convert from Islam to Christianity, but it was ruled she could only do so by an order of the Syariah Court. In its decision of 30 May 2007, the Federal Court elevated Article 3 to a higher status than Article 11, which provides for religious freedom.

Article 11(5) creates a further restriction on freedom of religion by providing that Article 11 does not authorise any act contrary to any general law relating to public order, public health or morality.[26] Freedom of religion is, however, bolstered by other provisions. Article 11(2), for example, states: 'No person shall be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own.' Article 11(3) further provides that: 'Every religious group has the right (a) to manage its own religious affairs; (b) to establish and maintain institutions for religious or charitable

purposes; and (c) to acquire and own property and hold and administer it in accordance with law.'

Similarly, Article 12(1) prevents discrimination on religious grounds in the administration of public education and scholarships. Article 12(2) gives every religious group the right to establish and maintain institutions for the education of children in its own religion, as stated above; the same clause adds that the States or the Federation may establish or maintain institutions providing instruction in Islam.

Legislation during an emergency, sanctioned by Article 150, and legislation against subversion under Article 149, may not interfere with freedom of religion, and may not interfere with the legislative powers of the states with regard to Islamic law. Thus, primacy is given by the constitution to religious rights even where the security of the state itself is at risk. This primacy has in effect been endorsed by the Supreme Court in *Jamaluddin Othman*, a *habeas corpus* case in which freedom of religion under Article 11 was held to override even the power of preventive detention under the Internal Security Act. The detainee, a Malay/Muslim who had converted to Christianity, was granted *habeas corpus* to secure his release from detention, which had been effected on the grounds that his alleged attempts to convert Muslims was a threat to national security.[27]

Islam as a state subject

Islam is recognised as a state subject under Schedule 9 of the constitution, in which the following competences of states are summarised:

> [...] Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the state; Malay customs, Zakat, Fitrah and Baitumal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organisation and procedure of Syariah Courts which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any matters included in

> this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.

The courts have attempted[28] to clarify the way in which state and federal powers are divided with regard to religion in the 1988 case of *Mamat bin Daud and Others vs. Government of Malaysia*. The plaintiffs were charged under an amendment to the Penal Code, section 298A, which created a new offence of commission of an act on religious grounds whose effect was likely to cause disunity or disrupt harmony between people professing the same or different religions. They were charged with committing an act likely to prejudice unity amongst Muslims in that they acted as unauthorised *bilal* (one who gives the call to prayer), *khatib* (one who gives the sermon), and *imam* (one who leads the prayer) at Friday prayers. In response, the plaintiffs sought declarations that section 298A was *ultra vires* Article 74 of the Federal Constitution because in pith and substance it dealt with Islam, a state matter, and was therefore beyond the power of Parliament to enact. On a careful analysis of section 298A, a lengthy, complex and sweeping provision, the Supreme Court decided, by a majority of three to two, that the acts prohibited by the section had nothing to do with public order, a federal matter, but were directly concerned with religion, a state matter, and that therefore the plaintiffs were correct.

The dualistic administration of justice

The Syariah Courts administer personal status laws with respect to Muslims, but the ordinary criminal courts have jurisdiction over Islamic criminal matters provided for under the various Administration of Islamic Law Enactments. Following an amendment to the constitution in 1988 and subsequent amendments, notably that of 1994,[29] Article 121 provides for the jurisdiction of the High Courts, the Court of Appeal, and the Federal Court, but adds: '(1A) The courts referred to in clause (1) [i.e. the High Courts and inferior courts] shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.' Thus, Article 121 separates the jurisdiction of these courts (commonly known as the 'civil courts') and that of the Syariah Courts.

As indicated above, since the 2004 election there has been an intensified struggle around the issue of civil and sharia jurisdiction, based on the 1988 amendment to Article 121 of the constitution. Case law[30] culminated in the long-awaited decision of the Federal Court in the already mentioned case of *Lina Joy vs. Federal Territory Islamic Council* in

a 2-1 decision on 30 May 2007. Professor Thio Li-ann summarises the position following this crucial decision as follows:

> The majority found that the [National Registration Department] had acted lawfully in requesting further documentary evidence such as a statement of apostasy from the Syariah Court and in rejecting a personal statutory declaration provided by Lina that she was a Christian. Following *Soon Singh,* the majority judgement delivered by Chief Justice Ahmad Fairuz opined that if a Muslim wanted to leave the religion of Islam, this entailed the exercise of a "right" under the context of Syariah law which had its own jurisprudence on apostasy. He reasoned in interpreting Article 11(1) that for a Muslim who practised and professed Islamic Law this was to be done in compliance with Islamic law which prescribed the method of converting into and out of Islam. Chief Justice Ahmad Fairuz reportedly observed: "You can't at whim and fancy convert from one religion to another."[31] One might observe that Lina Joy's battle to exercise free conscience for more than a decade is hardly whimsical. Thus, Islamic tenets were referenced in public law construction. By reason of Article 121(1A) apostasy as a matter relating to Islamic law lay within the exclusive jurisdiction of Syariah Courts.[32]

In an intellectually rigorous dissent demonstrating fidelity to constitutional supremacy, dissenting judge Richard Malanjum found that the NRD had acted without power in requiring such a certificate from a religious authority as this was an extraneous factor in the context of the existing Regulations. It was not the NRD's function to ascertain whether the appellant had properly apostasised. He found that the NRD policy failed the test of objective reasonableness and noted that even a reasonable policy 'could well infringe a constitutional right', as in the present case, where there was unequal treatment under the law. He argued that as apostasy involved 'complex questions of constitutional importance', including the federal-state division of legislative powers and fundamental rights, and noted that it was of 'critical importance' that civil superior courts 'not decline jurisdiction by merely citing Article 121(1A)'. He clarified that Article 121(1A) only protected Syariah Court jurisdiction in a matter 'which does not include the interpretation of the provisions of the Constitution'.[33] In displaying a rights protective consciousness, Malanjum HMP noted that where the prospect of curtailing fundamental rights was implicated, 'there must as far as possible be express authorisation for curtailment or violation of fundamental freedoms, which power should not be easily assumed by implication'.[34]

It is not surprising that this latest decision, which turns on a particular way of interpreting Article 121(1A) as well as definition of the substantive content of religious freedom, has provoked disquiet to the point of eliciting a statement from Prime Minister Abdullah Badawi that the Federal Court majority decision was not politically motivated and in reaffirming that Malaysia 'upholds the Constitution and supremacy of the law, otherwise, we would have become a "failed state"'.[35] Nevertheless, there is a sense that this regressive interpretation goes beyond a question of religious choice and forbodes a 'potential dismantling of Malaysia's [...] multi-ethnic, multi-religious character'.[36] Consequently, certain concerned citizens consider that political recourse is now the only option.

While the divided Federal Court decision goes some way in clarifying the ambiguities and gaps in protection surrounding interpretations of Article 121(1A) in relation to defining the jurisdictional ambits of civil courts and Syariah Courts, this is unsatisfactory in terms of principle, constitutional history and interpretive method. Further rationalisation of the dual court system is needed.

The preceding discussion should sufficiently indicate the bifurcated nature of Malaysian law under prevailing constitutional arrangements. In many ways the underlying issues that divide these two legal worlds have not until recently been explored and the engagement is slow and very controversial, the terms of reference being themselves a matter of disagreement.

11.6 Family law and inheritance law

While matters of civil law, including family law in general, fall under the jurisdiction of the federal government, Islamic personal and family law and *adat* law fall under the jurisdiction of the states (Harding 1996: 61-72). Muslim marriages are regulated by the Departments of Religious Affairs of the states. Besides satisfying the marriage requirements of the sharia, those Muslims who wish to enter into marriage must also complete administrative procedures and take a marriage course approved by the State's Department of Religious Affairs.

Even though Islamic family law matters are the most important affairs in which Syariah Courts are competent to judge, there is no uniform Islamic family law for all Malaysian states.[37] The most authoritative or exemplary statement of sharia-based family law is provided by the Islamic Family Law (Federal Territory) Enactments 1984-1994.[38] This law has been called an extremely important and guiding 'landmark legislation', based on the *siyasah shariyyah* (policy based on sharia) (Kamali 1997: 153-154). Its provisions, although resisted from some

quarters, now form the basis of the law in most parts of Malaysia, with the exception of Kelantan, Terengganu, and Perak (Kamali 1997: 160; Ibrahim 1993). The law attempts to provide a better and uniform protection of property rights of married Muslim women. The law also aims to act as a model to be followed by the various state laws in ensuring that a Muslim woman's right to divorce and her subsequent rights relating thereto are regulated more fairly and consistently.[39]

Polygamy and registration of marriages

The Islamic Family Law Enactments 1984-94 determine in section 23(4) that polygamy is permissible according to Islamic tradition, albeit dependent on judicial approval. A Muslim man who desires a polygamous marriage must satisfy at least five conditions: the intended marriage must be 'reasonable and necessary'; the man must possess enough financial resources to support his family; his current wife must give her permission; the man must be capable of treating his wives equally; and the intended marriage may not harm the current wife or wives.

Despite these limitations, it must be noted that the regulations in various states have largely hollowed out the intent and purpose of the original 1984 law. The decision to approve of a polygamous marriage is made by the Muslim judge, the *khadi*. The Islamic Family Law Enactment is not very detailed in Kelantan and no mention is made of punishing polygamy lacking approval from the judge. In Terengganu, a similar regulation applies (Ahmad Ibrahim 1993: 299). The regulation in Perak provides that no person may enter into another marriage as long as the current marriage endures, unless a prior written approval from the judge is given (Kamali 2000: 65). In practice, judges presumably focus mostly on the question about whether the man can support his new wife (Kamali 2000: 162).

A 1994 law that amends the 1984 law allows for polygamous marriages without the approval of the judge, provided the marriage is in accordance with sharia; it leaves it up to the judge to decide whether or not to register the marriage. The disappearance of the prohibition of registering polygamous marriages lacking the judge's approval has turned back the clock, in that the inequality between sexes has increased.[40] This trend appears to be confirmed in 2002 in the northern state of Perlis. There, the authorities loosened the procedural and administrative requirements for polygamous marriages and permitted men to enter into a polygamous marriage without requiring permission from the first wife (Kent 2003).

In Malaysia under the Law Reform (Marriage and Divorce) Act 1976 every non-Muslim marriage requires registration; non-registration is a criminal offence, but does not render the marriage void or voidable. For

Muslims the registration of marriages is mandatory based on the 1984 law, in which neglecting to register a marriage is also a criminal office, punishable with a fine and/or detention.[41] A non-Muslim man who wishes to marry a Muslim woman must first convert to Islam.[42]

Divorce – unilateral and by mutual approval

The *talaq* or unilateral divorce by the husband is implicitly recognised by law, under the condition that he fills out a set form in which he mentions his reasons and that an attempt at reconciliation has been made. Section 124 of the 1984 law provides that pronouncing the *talaq* without the judge's approval is punishable, but it does not mention whether the marriage is subsequently dissolved or not (Kamali 2000: 86-87). Section 55(a) of the 1984 law as modified in 1994 holds that the judge must give approval after the *talaq* that has been enunciated without the judge's prior approval. If the judge then gives his approval, the *talaq* is considered to be in accordance with sharia. The judge must, however, make attempts at reconciliation for a maximum period of six months. If the judge then decides that there is an irreconcilable dispute in the marriage, the husband will be asked to pronounce the *talaq*, after which the divorce is registered.

In 2003 a remarkable case caused some fierce discussion. The occasion was a judgement by a Syariah Court that found a *talaq* in the form of an SMS message to be an adequate form of announcing a divorce. The religious advisor Abdul Hamin Othman agreed with the judgement, arguing that an SMS message is clear and unambiguous and therefore valid according to sharia law. The political elite and Islamic fundamentalists, on the other hand, fiercely opposed the judgement. According to Prime Minister Mahathir, it was in contradiction with Malaysian culture and the spirit of sharia law.[43]

Divorce based on mutual approval, or *khul'*, takes place when the woman starts the procedure by returning the dowry. In addition, section 52 of the 1984 law permits divorce by the woman on the following grounds: the husband is missing for more than one year; she has been living for three months without financial support; the husband is sentenced to prison for three years or longer; he does not fulfil his marital duties for one year; chronic impotence, but only in case the woman was not aware of this fact at the time of the marriage; a mental disease lasting longer than two years, leprosy or a transmissible sexual disease; when the woman opposes the marriage because it was effected by her father or grandfather before she had reached the age of sixteen, as long as the woman is under the age of eighteen and the marriage is not consummated; cruel treatment; the husband refuses sexual intercourse for four months; illegality of the consent to marry one of the women (for

example because the consent was obtained by force or based on fallacy); or any other recognised ground for dissolution or nullification, such as *talak takliq* (breach of marriage contract) (Kamali 2000: 95-96). For non-Muslims a divorce is only possible when proclaimed by a competent court.[44]

Despite their acknowledgment that the Islamic Family Law (Federal Territory) Enactments 1984-94 comprise enlightened legislation, the Sisters in Islam handed in a list of complaints and reform proposals to the government in 1997.[45] The complaints concerned matters such as unnecessary delay when a woman asks for divorce (whereas the man can obtain a divorce immediately when he pronounces the *talaq*); unnecessary delay in mediation procedures when the husband does not appear; the lack of uniformity in the laws of different states, allowing husbands to choose the state that best suits their case;[46] attempting to evade the obligations of spousal support by moving to another state; and a lack of well-educated judicial and legal personnel, which presents an obstacle in the administration of justice and disproportionately affects women as they are most often the victims.

A Muslim woman whose husband unjustly divorced her can ask for a payment during the three menstrual cycle waiting period following divorce (*idda*) and gift on divorce payment (*muta*) periods. The judge determines the sum of the payment according to the 1984 act. Income or property obtained during the marriage through joint efforts is divided by the judge according to division of joint property (*harta sepencarian*, under *adat*). The judge can also divide income obtained through individual effort, by taking into consideration the extent to which the other party, for example through household work and care for the family, has contributed to the building of that income.

Inheritance

With regard to inheritance issues, Muslims follow uncodified Islamic law, based on the general rule that women receive half the share of what men in the same position would. In order to create a fair distribution of inheritance among all family members, it is usual in a will to follow the general rule of Islamic law that the testator does not have free possession of one third of his inheritance. Meanwhile adat, including matrilinear adat, is also still followed in inheritance matters.

11.7 Criminal law

The regular courts for criminal cases have jurisdiction over all acts punishable under the Penal Code, including acts which would be

punishable if Islamic criminal law were applied. The Syariah Courts have some limited criminal jurisdiction, the precise scope of which is unclear given that the *hudud* laws have not been pronounced upon constitutionally. In general one could say that their criminal jurisdiction probably extends only to offences which are incidental to the Syariah Court's jurisdiction, e.g. failure to comply with a court order. However, some offences, such as *khalwat* (close proximity between unmarried persons of the opposite sex), are purely Islamic and are punishable only in the Syariah Court, as indicated below. As stated above, state laws make the spreading among Muslims of religious doctrines other than Islamic doctrines a punishable offence. And in the state of Perak, it is forbidden for non-Muslims to use a word from a list of 25 important Islamic words. The state has also forbidden the teaching of Islamic doctrine without written approval or in a manner that is not deemed to be in accordance with Islamic law. In some states it is forbidden to publish an Islamic book without permission. Additionally, state law prohibits *khalwat*. The Syariah Criminal Offences (Federal Territory) Act 1997 contains radical, but not atypical, criminal offences that are far-reaching in terms of restricting constitutional rights on freedom of religion and freedom of expression.[47] There is a religious police force which concerns itself specifically with the enforcement of rules such as these. As is explained above, *hudud* law is on the statute book in two states, but is not in practice enforced, is opposed by the Federal Government, and is probably unconstitutional. In one episode in 2005, which led to great public concern, the religious police raided a discotheque in Kuala Lumpur, isolated all the Muslim young men and women dancing there, including a well-known pop singer, and arrested them for being indecently dressed. They were later released and Prime Minister Badawi publicly stated that this incident should not have occurred.

11.8 Other areas of law, in particular economic law

The Islamic Banking Act of 1983, which emerged from the *dakwah* ('prayer') movement of the 1970s and gained influence especially since the creation of the Islamic Development Bank, forms the core of Islamic banking in Malaysia. The Malaysian Central Bank derived from this law its competence to supervise the Islamic banks. The Government Investments Law of 1983 granted the government competence to hand out state debentures on the basis of sharia principles. The subsequent creation of Bank Islam Malaysia Berhad (BIMB) was described by the Minister of Finance at that time as the first step in the government's endeavour to give Islamic values a place in the economic and financial system of the country (Razaleigh 1982). In 1991 the

Islamic Religious Council for the Federal Territories founded the 'Centre for Levying *Zakat*', with the task of informing the Muslim public of the obligation to pay Islamic taxes (*zakat*) and regulating the collection thereof. The two above-mentioned laws exist alongside legislation for the conventional banking system. Since 1993, when the 'programme for interest-free banking' was introduced, the existing banks have been encouraged to offer Islamic banking services in accordance with sharia. In 1997 the central bank also created the National Shariah Advisory Council (for the Islamic Banking System and Insurances), the highest sharia authority in this field in Malaysia.

11.9 Obligations with respect to human rights

The constitution contains a bill of rights which follows the standard pattern of 1950s de-colonising constitution-drafting and bears a strong similarity to its Indian equivalent. However, both religious rights and civil liberties, such a freedom of speech, are hedged around with loosely prescribed exceptions and provisos. For example Article 11, while allowing freedom of religion, restricts the propagation of non-Islamic religions among Muslims. The state also assumes control over the propagation of Islamic doctrine, and restrictions on apostasy for Muslims are regarded as constitutionally valid and indeed serving the purpose of maintaining social stability. The problem with these laws is that they are contrary to the spirit of freedom of religion and equality before the law, and place the adherents of other religions (or Muslims who hold to unorthodox religious tenets) at a disadvantage as compared with Muslims (or orthodox Muslims). Thus, in the long term, the maintenance of these restrictions may well have the effect of undermining the overarching principle of religious freedom, which, as may be seen, is a fundamental right that has historically existed at a higher level, in practice, than other fundamental rights. While Malaysia has not signed any of the international human rights covenants except the CRC and CEDAW, the latter of which has resulted in the inclusion of gender discrimination as an impermissible form of discrimination under Article 8 of the constitution, which deals with equal protection, it has clearly developed its own distinctive approach to human rights.[48] The language of cultural relativism 'Asian values' is never far from the lips of those in power when human rights issues are being addressed (Thio 1999; Langlois 2001).

Having said this, there have been some positive developments in recent years. In 1999 the National Human Rights Commission Act was passed, setting up the NHRC as a monitoring body without powers to deal finally or definitively with human rights concerns. This at least ensures a forum in which concerns can be raised and matters investigated

(Whiting 2003). Moreover, the Malaysian Bar has been unflinching over several decades in its determination to point out human rights failings and breaches of the rule of law and judicial independence, usually in effect leading the civil society charge against authoritarian government. While one can observe something of a split along religious lines between Muslim and non-Muslim lawyers, the more remarkable fact is the maintenance of long-term solidarity in spite of such internal cleavages.[49]

11.10 Conclusion

The constitutional balance can be said to have reverted in some ways to where it was before the tumultuous events following the economic crisis of 1997. The 1999 election result, an apparently conservative electoral reaction to those events, appeared to change the nature of the constitutional debate in Malaysia. The 2004 and 2008 election results appear to indicate that an Islamic state of the kind that PAS seeks to create is unacceptable to the generality of Muslim as well as non-Muslim voters. However, the issue of the Islamic state has re-emerged in the form of a struggle waged in the courts to define the respective jurisdictions of the civil courts and Syariah Courts.

With this caveat, after the dust of the intense political struggle of 1997-2004 had settled, there seemed, at least until the 2008 elections, to be little disturbance of the inter-ethnic, inter-religious, and political alignments and understandings that have obtained since 1957. To put the position simply, the liberal-democratic order implied in the 1957 Constitution has been partially maintained, but with two concessions: exceptional powers to the executive, which embodies Malay nationalism, inter-ethnic accommodation, and economic development, at the expense of democratic freedoms; and the privileging of Islam as a religion, and Malay/Muslims as a race (*bumiputera*) over other races (non-*bumiputera*) and other religions, at the expense of the democratic principle of equality before the law. Both of these concessions are, however, both problematical and increasingly contested.

If Malaysia manages to reach a new constitutional settlement acceptable both to Islamists and *reformasi* supporters (these are not of course mutually exclusive categories) it will have set a precedent of great interest and importance in the Islamic world and beyond. The success of the legal cultures of Southeast Asia over hundreds of years in absorbing and melding various legal worlds and concepts indicates that a syncretic, creative, and peaceful solution to the problem of Islam and constitutionalism is by no means impossible.[50] At present it seems as though such an ideal solution is fraught with both political controversy and intellectual confusion. Nonetheless, to describe the situation set out in

this report as a 'clash of civilizations', while not without resonance in the Malaysian situation, would ignore the fact of peaceful cohabitation of Islam and other conceptions of state and law for more than one hundred years.

The apparent contemporary polarisation along religious lines, rendered complex by the new politics of 2008 and beyond, should not obscure this history. There have been and continue to be significant skirmishes at the borders, which are expressed principally in terms of legal struggles over territory or 'jurisdiction'. These skirmishes seem likely to veer towards an even more intense conflict. There are also, however, far-reaching compromises on both sides: Islam largely concedes, in practice and for the time being, that Islamic law is not fundamental in the constitutional order, while the constitutional order concedes that strict equality for Muslims and non-Muslims will not apply. But which society does not have such skirmishes and compromises, and are they not evidence of an underlying but significant degree of tolerance and acceptance of difference?

The Malaysian example is certainly one of conflict, but conflict has existed (apart from the May 13 riots of 1969) as purely political and litigious, not violent. Significantly, whereas the 1969 election resulted in ethnic rioting, in 2008, electoral results even more adverse to the government were accepted on all sides without any such incidents. Malaysia is also an example that shows the possibility of a tolerant, progressive, pragmatic, moderate, and consensus-based, if not always strictly democratic or egalitarian, Muslim-led government; and the sustained viability, over a century, of a dualistic legal system. The constitution and the institutions of the common law have indeed provided the means whereby accommodation between two fundamentally contradictory conceptions of legality has been achieved.

Notes

1 Professor of Asia-Pacific Law, University of Victoria, B.C., Canada. The author wishes to thank Ng Wei, David Chen, and Nadia Sonneveld for their support in research and their suggestions, as well as Jan Michiel Otto for his extensive and helpful comments and assistance.

2 This chapter uses the word 'Malaysia' to refer to the present-day Federation of Malaysia. The term 'Malaya' is used to refer to the Malay States and the Federation of Malaya in the period before Malaysia was created in 1963. The term 'Malay' is used for the language and ethnic group of Malay/Muslims living in Malaya/Malaysia.

3 See also Wilkinson 1970: 6 et seq.

4 *Adat perpatih* was the democratic *adat* law that was brought to the Malay state of Negeri Sembilan by immigrants from Minangkabau, West Sumatra. The more common form of *adat* was known as *adat temenggong*. According to *adat perpatih*, ancestral land passes via the female line (i.e. from mother to daughter). According to

tradition, the *adat temenggong*, which prevailed in other parts of Malaya, stems from the same matrilineal community of Minangkabau, but Hindu influences in this case changed *adat* to the extent that it now refers mostly to customs based on a patrilineal system. See also 11.2.

5 I say in general since the relation between *adat* and Islamic law varied (and still varies) a lot, depending on the state in question. In the state Negeri Sembilan, for example, *adat* played (and still plays) an important role, while Islamic law is more important in the state of Kelantan.

6 Singapore, Penang, and Malacca formed the so-called Straits Settlements between 1842 and 1941.

7 It is not easy to precisely establish the origins of Malaysia's Syariah Courts. Peletz argues that 'their precedents and genealogies qua religious symbols and judicial institutions can be traced back to the early modern period (which extends from the fifteenth to the eighteenth centuries)' (2002: 26).

8 This stipulation, the current Article 3 of the constitution, was originally not part of the design made by the Reid Commission but was later inserted during the review process in 1957.

9 Mohammad Hashim Kamali comments that 'the prevailing climate of opinion in the judiciary and elsewhere in the higher echelons of Government has not shown any decisive shift of policy to alter the original perception of the secular state as was expressed in the constitutional debate fifty years ago' (Kamali 2000: 35).

10 While the Chinese, and to a certain extent the Indians, controlled business life and the free professions, quotas were introduced to allow for positive discrimination favouring Malays. In the 1957 Constitution explicit mention was made of this exception to the principle of equality before the law (Art. 8(5), and more generally in Chapter X: Government Services).

11 Notably, the Malaysian Chinese Association and the Malaysian Indian Congress.

12 Hereafter there will be some generalisation because it would be too much to distinguish and cite all the different stipulations of fourteen jurisdictions for the purpose of this country study.

13 The reference to this school nowadays has consequences especially for *fatwa* jurisdiction, although the Syariah Courts in practice also follow the doctrines of the Shafi'ite school. Even with *fatwas* it is possible to consider principles of other schools, namely when this is done for the general interest. A *fatwa* can also involve *adat* and in some states the Council by law has to take *adat* into consideration when fulfilling its function. *Fatwas* are particularly important when it comes to determining the duties of Muslims. Compare Ahmad Ibrahim (2000).

14 Kamali (2000: 12-13, 64-65) suggests that a possible reason for the 'disobedience' of these states in adopting modernised family law legislation conforming to the original federal law of 1984 can be found in the fact that this law was primarily modelled after the Hanafi Madzhab of Pakistan and India, while most Malaysian states profess the Shafi'ite tradition. Ibrahim and Joned (1995) suggest that the fact that making Islamic laws is the prerogative of individual states has resulted in a lack of uniformity, despite attempts made by the federal government to unify the interpretation and the application of Islamic family law.

15 Compare Harding (1996). During this period the government coalition also retained the required two-thirds of the majority to amend the constitution.

16 Two members of the opposition also voted for the bill. For further analysis and comments on the *hudud* issue, see Kamali (1995). This book is summarised in a more accessible manner in Kamali 1998: 203. Compare Imam 1994: xxix; Ibrahim 1993: 14.

17 An interesting question arises here: what is the basis of political legitimacy in Malaysia? Is it traditional/Islamic, charismatic, legal-rational, or economic/

pragmatic? One could say that all these aspects are important for legitimacy or perhaps also that, cynically, those who are in power will use whichever aspect is most suitable in their situation. But it is undoubtedly true that the traditional/Islamic basis of legitimacy has long since been detached from the traditional monarchy.

18 CNN, 18 July 2002, see http://asia.cnn/2002/World/asiapcf/southeast/06/18/malaysia.mahathir/, consulted September 2, 2002. His successor as Prime-Minister, Abdullah Ahmad Badawi, made similar comments during the election campaign of March 2004.

19 Ironically enough, commentators attribute the political survival of Mahathir, who took over power in 1981 as an advocate of Malay rights, and the BN in the elections of 1999 to the votes of non-Muslims, which had the effect of compensating for the loss of Muslim votes to the PAS and other opposition parties. Non-Muslims voters must have realised that a vote against the BN could have led to the imposition of an Islamic state by a PAS-led government, although the cooperation of non-Muslims and non-Malay parties of the 'Barisan Alternatif' opposition coalition would have been necessary to actually gain power.

20 *The Sunday Times*, Singapore, 4 June 2000. The statutes of the party in the meantime have been amended in order to give the traditionalists more power at the state level. The PAS has also started a debate about the role of women in politics.

21 Although it appears to be an anomaly that Islam is an issue of the states within the federal structure of a country with a Muslim majority and where Islam is also the religion of the Federation, representatives of the PAS have admitted in a conversation with the author that the possibility to experiment and also eventually make mistakes at state level was actually an important acquisition.

22 Hefner & Horvatich (1997). It is entirely correct to refer to the 'Islam of Java', 'Aceh' or 'Malaysia'. Compare Kamali 2000: 3.

23 See http://english.aljazeera.net/news/asia-pacific/2010/01/201011022583880534 1.html, dated 11 January 2010.

24 A prominent Muslim jurist told the author that the word 'but' in Article 3 is considered to be insulting towards Islam and that it must actually be read as 'and therefore'. Compare also Kamali 2000: chap. 3.

25 [1988] 2 MLJ 55. See, however, the contrary more recent case of *Meor Atiqulrahman bin Ishak & ors vs. Fatimah & ors* [2000] 5 MLJ 375 and the discussion and citations in Bari & Shuaib 2006: 5-10.

26 This clause came up in the case *Halimatussaadiah vs. Public Service Commission* MLJ [1992] 1: 513, in which it was declared that a disciplinary rule of the government that prohibited female employees from wearing the (*purdah*) (clothing covering the entire body), because it made personal identification impossible, was constitutional. For more comments and analysis, see also Zakaria 1993: xxv.

27 *Minister for Home Affairs vs. Jamaluddin bin Othman*, Supreme Court Review (SCR) [1989] 1: 311; [1989] 1 MLJ 369, 418.

28 See *Mamat bin Daud and Others vs. Government of Malaysia* [1988] 1 MLJ 119; 1988 LRC (Const) 46.

29 Constitution (Amendment) Act, A885 of 1994, creating the Court of Appeal. See, also on this article, Jusoh 1991; Ibrahim 1989a: 1; Ibrahim 1989b: xvii.

30 Space precludes the coverage in detail of several important and highly controversial cases, especially Shamala's and Subashini's cases: *Shamala a/p Sathiyaseelan vs. Dr Jeyaganesh a/l C Mogarajah* [2003] 6 MLJ 515; *Shamala a/p Sathiyaseelan vs. Dr Jeyaganesh a/l C Mogarajah* [2004] 2 MLJ 241; *Shamala a/p Sathiyaseelan vs. Dr Jeyaganesh a/l C Mogarajah* [2004] 2 MLJ 648; *Shamala a/p Sathiyaseelan vs. Dr Jeyaganesh a/l C Mogarajah* [2004] 3 CLJ 516; *Subashini a/p Rajasingam vs. Saravanan a/l Thangathoray* [2007] 2 MLJ 798; *Subashini a/p Rajasingam vs. Saravanan a/l*

Thangathoray [2007] 2 MLJ 705; *Subashini a/p Rajasingam vs. Saravanan a/l Thangathoray* [2007] 4 MLJ 97; *Subashini a/p Rajasingam vs. Saravanan a/l Thangathoray* [2008] 2 CLJ 1. See, however, also the case of Indira Gandhi, reported at http://www.malaysianbar.org.my/legal/general_news/conversion_case_indira_gandhi_gets_custody_of_her_3_children.html. For further discussion, see Whiting (2008) and Harding & Whiting (2010).

31 Hamid & Azman 2007.

32 Thio 2007; *Lina Joy* 2007, text in Bahasa Melayu, see http://www.malaysianbar.org.my/index.php.

33 Malanjum 2007, para.s 64, 65, 68.

34 Id., para. 84.

35 The Sun 2007.

36 Beech 2007, quoting Malik Imtiaz Sarwar.

37 In a letter from the *Sisters in Islam* to Prime-Minister Mahathir of August 1997 it was noted that 'Malaysia is the only country in the Muslim world in which every state has independent jurisdiction with regard to religious affairs, which leads to inconsistency and contradiction in the law, interpretation, and implementation', cited in Kamali 1997: 155-156.

38 The Federal Territories comprise Kuala Lumpur, the administrative centre Putrajaya, and the island of Labuan.

39 For non-Muslims, the Law Reform (Marriage and Divorce) Act 1976 unifies the law with respect to marriage and divorce issues with effect from 1 March 1983. The 1976 act moreover introduces reconciliation organs; these must attempt to solve within six months marriage problems brought before them by people who wish to divorce. Section 3(3) explicitly states that the law is not applicable to 'a Muslim or any other who is married according to Islamic law nor to a marriage in which one of the parties professes Islam'. Exemptions exist for natives of the states of East Malaysia, namely Sabah and Sarawak, or for aborigines of West Malaysia whose marriages and divorces are regulated by native customary law or aborigine customary law. Compare section 3(4); para. 384 of the 2004 CEDAW report concerning Malaysia; also 1976 Act, sections 55, 106.

40 In their joint letter to Prime-Minister Dr Mahatir, the *Sisters in Islam* and the Association for female jurists declared that 'the amendments made by several states to the original law have resulted in the man having the exclusive right to decide whether or not a polygamous marriage will take place.'

41 See part III on the registration of marriages of Muslims.

42 See *myGovernment: The Government of Malaysia Official Portal*, the part about marriage: accessible via http://www.gov.my/MyGov/Home/.

43 See http://timesofindia.com/articleshow/104860.cms.

44 A ground for divorce for a marriage between two non-Muslims would be conversion to Islam of one of the spouses during the marriage (1976 Act section 51). Conversion of a husband would have far-reaching legal implications for the woman who does not convert herself, particularly in the context of polygamy, for the right to maintenance and inheritance, and – in the worst case – divorce. The woman does have the right to request a divorce, on the condition that the petition must be started within three months after the conversion. In April 2004, in the case of *Shamala a/p Sathiyaseelan vs. Dr. Jeyaganish a/1 C. Mogarajah (Muhammad Ridzwan bin Mogarajah)*, of 13 April 2004, the court declared itself incompetent to adjudicate custody over the children of a woman whose husband converted himself and the children to Islam.

45 See Reform of the Islamic Family Laws and the Administration of Justice in the Syariah System in Malaysia. The memorandum was presented to the Malaysian government in March 1997. The proposal for the memorandum was formulated and

approved during the national workshop under the same name on 4 January 1997; the information is accessible via: http://www.muslimtents.com/sistersinislam/memorandums/04011997/htm.

46 See *Aishah Abdul Rauf vs. Wan Mohd Yusof Wan Othman* [1990] 3 MLJ ix. In this case the Syariah Court of Appeal of Selangor rejected a husband's request to marry a second woman because he could not sufficiently prove that his decision was 'reasonable and necessary'. Not long after, the man simply went to the state of Terengganu to marry his second wife there.

47 This law contains, among others, the following punishable offences: mistakes in worship (s.3), propagation of false doctrines (s.4), propagation of non-Islamic doctrines among Muslims (s.5), contempt or public disdain of religious authority (s.9), unauthorised giving of religious education (s.11), propagation of opinions that contradict *fatwas* (s.12), publications of religious writings that are in conflict with Islamic law (s.13), and even faults in fulfilling the obligation of Friday prayer (s.14) and encouraging others to fail to fulfil religious duties (s.17).

48 It must be noted here that although the constitution assumes equality of sexes in Article 8 and CEDAW is one of the few international human rights conventions ratified by Malaysia, the country has deviated from these stipulations with regard to testamentary ownership and the appointment of sharia judges, *muftis,* and *imams.* See Thio 1999.

49 Harding & Whiting 2010. This was written as a contribution to the American Bar Foundation's project on political liberalism, for which further information can be found at http://www.americanbarfoundation.org/research/project/32.

50 Compare An-Na'im 1999; Kamali 2000: chap. 15. This approach is reflected in the published work and the speeches of Anwar Ibrahim. In *The Asian Renaissance* (Singapore, Times Publishing, 1996), Anwar frequently refers to the necessity to promote democracy, civil society, and righteousness, whereby he uses an impressively extensive series of authors, Muslim as well as non-Muslim, Eastern as well as Western. Although Anwar does not answer specific constitutional questions, there can be no doubt that that he is an outspoken supporter of independence of the judiciary, democracy, and human rights; and there can also be no doubt about his ideas that these concepts are a significant part of the Asian traditions, including Islamic traditions. Furthermore, he fiercely rejects Eastern despotism. Recently it had become clear that the Parti Keadilan Malaysia (the Justice Party), led by Anwar's wife, Wan Azizah Ismail, has a principally constitutionalist agenda. Anwar's opinions probably differ from Western constitutionalism only in so far as he believes (and perhaps even wrongly) that constitutionalism is hostile with respect to religion. It could well be possible, and several commentators have already pointed this out, that the person who would be best capable of finding a solution to the contradiction between Islam and constitutionalism, is Anwar. Farish Noor (*South*, October 2000) even refers to 'the phenomenon of the *reformasi-Islamisasi*' and emphasises the possible explosive connection between these two concepts.

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