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**The Implementation of Islamic Law In Contemporary Malaysia:  
Prospects and Problems**

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## ABSTRACT

While the Federal Constitution of Malaysia readily proclaims Islam to be Malaysia's official religion, opinions have fiercely diverged among legal scholars and practitioners as to how substantive should the relevant clause on this be interpreted. Such vagueness is typical of the document, whose drafting took place amidst intense negotiations among Malaysia's multi-racial communities, resulting in an informal bargain or 'social contract' which until today has become a subject of bitter dispute amidst rising polarisation along 'Muslim versus non-Muslim' lines. Locating origins of contemporaneous legal conflict to divergent understandings of constitutional clauses, this article proceeds to discuss contemporary controversies which shed light on Malaysia's struggle to identify itself as a nation-state which integrates the best of both modern and Islamic civilisations. It is argued that this delicate balance has been recently threatened by the increasing penetration of a form of orthodox Islamist legalism which antagonises non-Muslim minorities and unduly homogenises its Malay-Muslim population.

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# ISLAMIC LAW IN CONTEMPORARY MALAYSIA: PROSPECTS AND PROBLEMS

## Historical Background

It has been widely established that Islam in Malaysia locates its provenance to thirteenth century peripatetic Sufi missionaries whose trading guilds simultaneously played the role of fronts for proselytisation.<sup>1</sup> As the indigenous Malays were then deeply steeped in Hindu-Buddhist and animist traditions, the Sufis prioritised social over politico-legal transformation. Many elements of the pre-Islamic customs were initially incorporated as part of early Malay-Muslim polity, giving rise to the once-popular view of Malaysian Islam as being imbued with syncretic qualities. Islam in traditional Malay society has not uncommonly been discussed in terms of constant tension between *shari'a* (Islamic law) and *adat* (customary law).<sup>2</sup> In terms of legal systems, as documented by Winstedt,<sup>3</sup> contradictions between the *shari'a* and indigenous legal digests of pre-colonial Malay states abound. Nevertheless, there was evidence of the politico-legal structures of medieval Malay states gradually being Islamised, such that by 1908, wrote colonial administrator R.J. Wilkinson, “*There can be no doubt that Moslem law would have ended by becoming the law of Malaya had not British law stepped in to check it....*”<sup>4</sup>

This checking came in the form of treaties between the British and Malay states which bound Malay rulers into accepting a ceremonial role as protector of Islam and Malay custom. Clause VI of the Anglo-Perak Pangkor Treaty of 1874 - a model for subsequent British treaties with other Malay states, specified that a British Resident's advice “*must be asked and acted upon on all questions other than those touching Malay religion and custom*”.<sup>5</sup> Malays' individual lives were thereafter

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<sup>1</sup> Ahmad Fauzi Abdul Hamid ‘The Impact of Sufism in Pre-colonial Malaysia: An Overview of Interpretations’, *Islamic Studies*, vol. 41, no. 3 (2002), pp. 467-493.

<sup>2</sup> Roy F. Ellen, ‘Social Theory, Ethnography and the Understanding of Practical Islam in South-East Asia’ in M.B. Hooker (ed.), *Islam in Southeast Asia* (Leiden: E.J. Brill, 1983) p. 69.

<sup>3</sup> Richard Winstedt, *The Malays: A Cultural History* (revised and updated by Tham Seong Chee), (Singapore: Graham Brash, 1961), pp. 99-119.

<sup>4</sup> Quoted in William R. Roff, ‘Patterns of Islamization in Malaysia, 1890s – 1990s: Exemplars, Institutions, and Vectors’, *Journal of Islamic Studies*, vol. 9, no. 2 (1998), p. 211.

<sup>5</sup> Quoted in Gordon P. Means, ‘The Role of Islam in the Political Development of Malaysia’, *Comparative Politics*, vol. 1, no. 2 (1969), p. 274.

governed by Muhammadan law, which was essentially “culturally defined” personal and local religious law applied to “those who acknowledge[d] Islamism.”<sup>6</sup> Through a gradual formalisation of its substantive rules into statute, Muhammadan law became a prelude to the Civil Law Enactment for the Federated Malay States, which recognised English law as law of the land.<sup>7</sup> In 1951, its application was extended to the whole Federation of Malaya - formed in 1948 out of the former Federated Malay States and the Unfederated Malay States. The Civil Law Ordinance of 1956 secured a permanent place for English law in the Malaya’s legal system.<sup>8</sup>

Under British colonialism, *shari’a* was completely usurped by English statute law in socio-religious matters affecting *waqf* (endowments), *zakat* (alms-giving) and *bayt al-mal* (treasury). According to Hooker, “The only substantive Muslim principles dealt with were “offences against religion” i.e. attendance at mosque for prayers, fasting, teaching religion without authority, and unlawful proximity.”<sup>9</sup> In order to administer Muslim affairs, Islam was administratively bureaucratised. On top of the religious hierarchy of each state was now a *Majlis Agama Islam dan Adat Istiadat Melayu* (Council of Islamic Religion and Malay Customs), which supervised a Department of Religious Affairs (*Jabatan Hal-Ehwal Agama Islam*).<sup>10</sup> The *Majlis* personified a newly found alliance between the sultans, the aristocratic elite and a nascent religious bureaucracy linked to colonial officialdom.<sup>11</sup> *Shari’a* courts were instituted, but their verdicts could be overridden by civil and magistrate courts. Religious personnel such as *muftis*, district *qadis* and *imams* were made public servants dependent on state payroll.<sup>12</sup> Thus was born an official class of *ulama*

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<sup>6</sup> M.B. Hooker, ‘Muhammadan Law and Islamic Law’ in M.B. Hooker (ed.), *Islam in Southeast Asia* (Leiden: E.J. Brill, 1983), pp. 161, 172; Norhashimah Mohd. Yasin, *Islamisation / Malaynisation: A study on the Role of Islamic Law in the Economic Development of Malaysia: 1969-1993* (Kuala Lumpur: A.S. Noordeen, 1996), p. 96.

<sup>7</sup> Hooker, ‘Muhammadan Law and Islamic Law’, p. 172.

<sup>8</sup> Norhashimah Mohd. Yasin, *Islamisation / Malaynisation*, p. 91.

<sup>9</sup> Hooker, ‘Muhammadan Law and Islamic Law’, pp. 173-174. In Malaysia, the offence of ‘unlawful proximity’ is commonly known as *khalwat*, taken specifically to mean the act of being in close proximity with a marriageable member of the opposite sex in a secluded place, such that might arouse suspicions of an intended carnal relationship.

<sup>10</sup> William R. Roff, *The Origins of Malay Nationalism* (New Haven: Yale University Press, 1967), pp. 73-74; Means, ‘The Role of Islam in the Political Development of Malaysia’, p. 274.

<sup>11</sup> Roff, *The Origins of Malay Nationalism*, p. 74; William R. Roff, ‘The Origin and Early Years of the *Majlis Ugama*’ in William R. Roff (ed.), *Kelantan: Religion, Society and Politics in a Malay State* (Kuala Lumpur: Oxford University Press, 1974), pp. 132-134; Clive S. Kessler, *Islam and Politics in a Malay State: Kelantan 1838-1969* (Ithaca and London: Cornell University Press, 1978), pp. 52-61.

<sup>12</sup> Means, ‘The Role of Islam in the Political Development of Malaysia’, p. 274; Moshe Yegar, ‘The Development of Islamic Institutional Structure in Malaya, 1874-1941: The Impact of British

(religious scholars) who were increasingly divorced from the masses, over whom they had been granted authoritarian policing powers.

## 2. Islamic Law in the Federal Constitution and Recent Controversies

The Malayan delegation that negotiated for independence with the British government in 1956 comprised representatives of state rulers and ministers of the UMNO-Malayan Chinese Association (MCA)-Malayan Indian Congress (MIC) Alliance, which had won an overwhelming victory in the 1955 general elections. A Commonwealth Commission chaired by Lord Reid, Lord of Appeal in Ordinary, was duly appointed by the Queen and the Conference of Rulers to draft the Federation of Malaya's Constitution. The other members were Sir Ivor Jennings, Master of Trinity Hall, Cambridge; Sir William Mckell, former Governor-General of Australia; B. Malik, former Chief Justice of Allahabad High Court and Mr. Justice Abdul Hamid of the West Pakistan High Court. Ironically, no Malayan citizen, who would presumably be sensitive to local conditions, was included in the Commission.<sup>13</sup>

The Alliance memorandum submitted to the Constitutional Commission proposed that “*the religion of the Federation of Malaya shall be Islam,*” but that this “*shall not imply that the State is not a secular State.*”<sup>14</sup> The Commission had made it clear that should any provision to the effect that Islam be made Malaya's state religion be included in the Constitution, it must not “*in any way affect the civil rights of non-Muslims.*” The state rulers initially opposed any declaration installing Islam as the established religion of the Federation, for they feared such an enactment would transfer any authority they wielded as heads of Islam in their own states to the

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Administrative Response’ in R. Israeli and A.H. Johns (eds.), *Islam in Asia (vol. II: Southeast and East Asia)* (Jerusalem: The Magnes Press, 1984), pp. 198-199.

<sup>13</sup> M. Suffian Hashim, ‘The Relationship between Islam and the State in Malaya’, *Intisari*, vol. 1, no. 1 (1962), p. 9, fn. 62; Shad Saleem Faruqi, ‘Legacy of our forefathers’, *The Star* (Petaling Jaya, Malaysia), 8 August 2007.

<sup>14</sup> For details on the clauses on Islam in the Federal Constitution as referred to in this paragraph, see Suffian Hashim, ‘The Relationship between Islam and the State in Malaya’, pp. 8-11; Ahmad Ibrahim, ‘The Position of Islam in the Constitution of Malaysia’ in Ahmad Ibrahim, Sharon Siddique and Yasmin Hussain (eds.), *Readings on Islam in Southeast Asia* (Singapore: Institute of Southeast Asian Studies, 1985), pp. 213-216; Hamid Jusoh, *The Position of Islamic Law in the Malaysian Constitution with special reference to the conversion case in family law* (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1991), pp. 31-34; and E.I.J. Rosenthal, *Islam in the Modern National State* (Cambridge: Cambridge University Press, 1965), pp. 289-290.

proposed Head of Federation. The sultans finally relented after the Alliance explained to them that the purpose of making Islam the official religion, far from intending to usurp their powers, was “*primarily for ceremonial purposes, for instance to enable prayers to be offered in the Islamic way on official public occasions such as the installation of the Yang diPertuan Agong, Independence Day and similar occasions.*”

Article 3(1) of the Federal Constitution states: “*Islam is the religion of the Federation, but other religions may be practised in peace and harmony in any part of the Federation.*”<sup>15</sup> State rulers retain their positions as heads of the Muslim religion in their respective states, while the *Yang diPertuan Agong*, elected as Head of Federation from among the state rulers every five years, continues to become head of Islam in his own state and assumes a similar role in Malacca and Penang, and later by a constitutional amendment, in the Federal Territory, Sabah and Sarawak. However, the Federal Constitution does not oblige the various states to proclaim Islam as their official religion, such that Penang, Malacca and Sarawak have not done so in their state constitutions.

Article 8(2) guarantees “*no discrimination against citizens on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority....*”<sup>16</sup> Hence, although the Head of Federation will necessarily be a Muslim, no provision in the Federal Constitution prevents him from appointing a head of government, a minister or a federal high official who is a non-Muslim. Consequently, post-independence state constitutions have been amended to enable sultans to appoint non-Muslims as Chief Ministers. Article 11 confers on every individual the right to profess, practise and propagate his religion, but the propagation of any religious doctrine or belief among Muslims may be controlled or restricted by state law, or in respect of the Federal Territory, by federal law.<sup>17</sup> Thus, not only are non-Muslim missionary activities subject to strict regulation or even prohibition in the states, but Muslim missionaries also must obtain a *tauliah* (letter of authority) from state religious departments. Article 11 also authorises all religious groups to manage their own religious affairs, to establish and maintain institutions for religious or charitable purposes and to acquire, possess, hold and administer property in accordance with the law. Article 12 extends such religious

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<sup>15</sup> *Federal Constitution With Index* (Kuala Lumpur: MDC Publishers Printers, 1998), p. 1.

<sup>16</sup> *Federal Constitution With Index*, p. 4.

<sup>17</sup> *Federal Constitution With Index*, pp. 6-7.

freedom to the purview of education, but specifies only Islamic institutions as lawful for the Federation or state to establish, maintain and assist in establishing or maintaining.<sup>18</sup> The Federation or a state is also empowered to provide, or assist in providing, Islamic religious instruction and incur expenditure as may be necessary for the purpose.

Islam also plays a vital ethno-cultural function as a determinant of Malayness – the prime indigenous group who benefits from their “*special position*” as entrenched in Article 153.<sup>19</sup> Such privileges include measures to accelerate Malay economic and educational progress, protection of Malay land reservations and preference in the recruitment for public service. The constitutional definition of a ‘Malay’, as embedded in Article 160(2), is “*a person who professes the Muslim religion, habitually speaks the Malay language, conforms to Malay custom.*”<sup>20</sup> Under the so-called ‘Bargain of 1957’ or ‘social contract’, the aforesaid privileges, together with provisions to ensure the positions of Islam as the official religion, of Malay sultans as heads of the various states and of Malay as the national language, were *quid pro quos* for non-Malay demands for relaxed conditions for citizenship, the continued use of the English language in official matters for ten years and the preservation of the free market economy.<sup>21</sup>

Technically, the administration of Islam falls under the jurisdiction of states, such that, according to a legal expert, “*the provision that Islam is the religion of the Federation has little significance....*”<sup>22</sup> Accordingly, through a series of Administration of Muslim Law Enactments, the various states have instituted Councils of the Islamic Religion (*Majlis Agama Islam*) to aid and advise the sultans in their capacity as heads of the Islamic religion, Departments of Religious Affairs (*Jabatan Agama Islam*) to handle daily affairs of Muslims and *shari’a* courts to

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<sup>18</sup> *Federal Constitution With Index*, p. 7.

<sup>19</sup> Gordon P. Means, ‘Public Policy Toward Religion in Malaysia’, *Pacific Affairs*, vol. 51, no. 3 (1978), pp.393-394; Gordon P. Means, ‘Malaysia: Islam in a Pluralistic Society’ in Carlo Caldarola (ed.), *Religions and Societies: Asia and the Middle East* (London: Mouton Publishers, 1982), pp. 473-474; *Federal Constitution With Index*, p. 107.

<sup>20</sup> *Federal Constitution With Index*, p. 113.

<sup>21</sup> R.S. Milne and Diane K. Mauzy, *Politics and Government in Malaysia* (Vancouver: University of British Columbia Press, 1978), pp. 38-39; R.S. Milne and Diane K. Mauzy, *Malaysia: Tradition, Modernity and Islam* (Boulder and London: Westview Press, 1986), pp. 28-30.

<sup>22</sup> Ahmad Ibrahim, ‘Law and Religion - The Malaysian Experience’, *Islam and the Modern Age*, vol. 5, no. 3 (1974), pp. 6-7.

adjudicate in Muslim matters.<sup>23</sup> Although the federal government has endeavoured to coordinate the administration of Islamic affairs within the federation by setting up, in 1968, a National Council for Islamic Affairs with the authority to issue *fatwa*<sup>24</sup> through its National *Fatwa* Committee, it is decisions at state level which are ultimately binding upon Muslim residents in a state. Set up via the Conference of Rulers, the National Council cannot encroach upon any authority, rights and privileges of sultans as heads of Islam in their states.<sup>25</sup>

Nonetheless, states are not free to implement the *shari'a* even if they wish to do so. Firstly, they are bound by Article 75 of the Constitution, which states that in the event of any inconsistency between state law and federal law, the latter shall prevail.<sup>26</sup> Secondly, the jurisdiction of the *shari'a* courts is extremely limited. Theoretically, it covers only Muslim personal law, successor of the Muhammadan law of the colonial era. This includes family law, charitable property, religious revenue, places of worship and religious offences such as adultery and other forms of sexual misconduct, defamation, non-payment of alms and consumption of liquor.<sup>27</sup> In criminal matters, *shari'a* courts can only try offences which involve no punishment beyond the stated maximum imprisonment or fine under federal law, making it impossible for them to impose *hudud* punishments.<sup>28</sup> Even a *fatwa* issued by the state *mufti*, and understood to be binding upon all Muslim residents in the state, can practically be rendered null and void by a simple recourse to a conflicting decision of the High Court.<sup>29</sup>

In practice, until 1988, the authority of the *shari'a* courts was circumscribed even within its limited jurisdiction. Where *shari'a* courts differed in opinion from

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<sup>23</sup> Ahmad Ibrahim, 'The Position of Islam in the Constitution of Malaysia', p. 216; Hamid Jusoh, *The Position of Islamic Law*, pp. 34-38.

<sup>24</sup> *Fatwa* is an authoritatively considered legal opinion; the figure authorised to issue a *fatwa* is called a *mufti*. For details on the history, definition, position and principles of *fatwa* and *muftis*, see Othman Haji Ishak, *Fatwa Dalam Perundangan Islam* (Kuala Lumpur: Penerbit Fajar Bakti, 1981), pp. 1-19.

<sup>25</sup> Ahmad Ibrahim, 'The Position of Islam in the Constitution of Malaysia', p. 218; Hamid Jusoh, *The Position of Islamic Law*, pp. 38-39.

<sup>26</sup> Hamid Jusoh, *The Position of Islamic Law*, p. 52; *Federal Constitution With Index*, p. 46.

<sup>27</sup> Abdul Majeed Mohamed Mackeen, 'The Shari'ah Law Courts in Malaya' in Ahmad Ibrahim, Sharon Siddique and Yasmin Hussain (eds.), *Readings on Islam in Southeast Asia* (Singapore: Institute of Southeast Asian Studies, 1985), pp. 229-235; Hamid Jusoh, *The Position of Islamic Law*, pp. 51-53.

<sup>28</sup> Ahmad Ibrahim, 'Law and Religion - The Malaysian Experience', p. 13; Hamid Jusoh, *The Position of Islamic Law*, p. 52. *Hudud* punishments are criminal penalties instituted by the Quran and *Sunnah* after lawful conviction in a court of law, such as amputation of the hand for thieves, flogging of eighty lashes for consuming intoxicating liquor, flogging for libel, stoning to death for adultery and flogging of one hundred lashes for fornication.

<sup>29</sup> Ahmad Ibrahim, 'Law and Religion - The Malaysian Experience', pp. 11-12; Hamid Jusoh, *The Position of Islamic Law*, pp. 72-80.

civil courts, verdicts of the latter prevail. The Rule of High Courts 1980 and the Court of Judicature Act 1964 conferred power upon High Courts to override decisions of lower courts.<sup>30</sup> In 1988, Article 121 of the Federal Constitution was amended so as to include clause (1A): that the courts referred to in clause (1) i.e. the High Courts of Malaya and of Sabah and Sarawak, “*shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.*”<sup>31</sup> Raising the status of *shari’a* courts and judges to be at par with their civil counterparts, the amendment effectively created jurisdictional dualism in Malaysia’s legal system. It was hurriedly passed through Parliament under controversial circumstances, as many vocal non-Muslim opposition parliamentarians were then confined under the Internal Security Act (ISA) following the Operation Lalang crackdown in October 1987.<sup>32</sup>

After a spate of high profile court cases involving disputed conversions into and out of Islam, Article 121 (1A) has of late become a bone of contention dividing civil society into a Muslim ‘pro-*shari’a*’ and a largely non-Muslim ‘pro-freedom of worship’ camps. The latter, embodied by the ‘Article 11’ coalition,<sup>33</sup> calls for a review of Article 121 (1A) in the wake of the perceived injustice meted out to non-Muslim families of new Muslim converts who may have converted without their knowledge. The reluctance of civil courts to interfere in cases involving claims made by state Islamic authorities to bodies of the converts upon their deaths, or involving forced conversion of children to Islam by the converting spouse, leaves the baffled non-Muslim kin without any legal remedy.<sup>34</sup> ‘Article 11’ calls for a return to the original spirit of the Federal Constitution, which guarantees all citizens fundamental liberties,<sup>35</sup> which concerned non-Muslims see as having been usurped by federal

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<sup>30</sup> Hamid Jusoh, *The Position of Islamic Law*, pp. 54-55; Norhashimah Mohd. Yasin, *Islamisation / Malaynisation*, pp. 137-140.

<sup>31</sup> *Federal Constitution With Index*, p. 79.

<sup>32</sup> ALIRAN, ‘The Moorty Maniam Case: Compassion and justice missing’, *Aliran Monthly*, vol. 25, nos. 11-12 (2005), pp. 2-6.

<sup>33</sup> A coalition of thirteen non-governmental organisations (NGOs) formed in May 2004 to fight for the safeguarding of Article 11 of the Federal Constitution on ‘freedom of religion’; see <http://www.article11.org> (accessed 2 December 2008) and *Federal Constitution With Index*, pp. 6-7.

<sup>34</sup> Ooi Kee Beng, ‘Malaysia: Abdullah Does It His Own Vague Way’ in Daljit Singh and Lorraine C. Salazar (eds.), *Southeast Asian Affairs 2007* (Singapore: Institute of Southeast Asian Studies, 2007), pp. 184-186.

<sup>35</sup> See Article 11 coalition’s statements of intent at <http://www.article11.org/Resources/FAQ.html> (accessed 14 January 2009).

judges who pronounce that non-Muslims could seek redress in *shari'a* courts.<sup>36</sup> Such decisions arguably not only trample upon the non-Muslim litigants' rights, but also contradict the Ninth Schedule of the Federal Constitution: that the "*constitution, organisation and procedure of Syariah courts.... Shall have jurisdiction only over persons professing the religion of Islam....*"<sup>37</sup>

The former camp, represented by the Organisations for the Defence of Islam (PEMBELA: *Pertubuhan-pertubuhan Pembela Islam*) and the Allied Coordinating Committee of Islamic Non-Governmental Organisations (ACCIN), grew out of rising concern that there were concerted attempts to subvert Islam's entrenched position in the Federal Constitution and the national polity. The anchor group behind PEMBELA are Muslim professionals and lawyers who are worried that cases involving apostasy might get a hearing in civil courts, paving the way for Muslims to leave Islam at will via legal channels.<sup>38</sup> The establishment of PEMBELA in July 2006 was triggered by court cases such as the Moorthy Maniam @ Muhammad Abdullah and the Lina Joy cases, in which there was danger that verdicts would threaten the authority of *shari'a* courts. On 29 September 2007, a memorandum containing 701,822 signatures was presented to the Yang diPertuan Agong and the Prime Minister, outlining aggressive attempts, allegedly with international support, to whittle away the substance of Islam's constitutional role. These attempts comprised the demands to establish an Interfaith Commission (IFC), to repeal Article 121 of the Federal Constitution, and to advocate unbridled freedom of worship, including to renounce Islam by a simple change to one's religious identity in one's national identity card.<sup>39</sup> Until the present time, court verdicts have generally upheld PEMBELA's stance. In the Moorthy Maniam @ Muhammad Abdullah case, this national mountaineer's corpse was buried in December 2005 according to Islamic rites after the High Court, in adherence to Article 121 (1A), refused to hear the litigation of S. Kaliasammal, Moorthy's widow

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<sup>36</sup> Honey Tan Lay Ean, 'Subashini's pain, Malaysia's anguish', *Aliran Monthly*, vol. 27, no. 2 (2007), pp. 7-8; Dato' Chee Peck Kiat, 'Ensure non-Muslims' full access to civil courts', *Aliran Monthly*, vol. 27, no. 2 (2007), pp. 8-9.

<sup>37</sup> *Federal Constitution With Index*, p. 157.

<sup>38</sup> 'Muslim lawyers set up movement to "defend" Islam', 14 July 2006, <http://www.asianews.it/view.php?l=en&art=6703> (accessed 14 January 2009).

<sup>39</sup> 'Memorandum dan Kempen Tanda Tangan Diserahkan kepada Seri Paduka Baginda Yang diPertuan Agong dan DYMM Raja-raja Melayu serta YAB Datuk Seri Abdullah Ahmad Badawi, Perdana Menteri Malaysia', *Demi Masa* – official newsletter of the Muslim Youth Movement of Malaysia (ABIM: *Angkatan Belia Islam Malaysia*), 29 September 2007.

who contested claims that he had converted to Islam.<sup>40</sup> In the Lina Joy case, the Federal Court rejected, in a 2-1 majority decision, Azlina Jailani aka Lina Joy's appeal to compel the National Registration Department to remove the word 'Islam' from her national identity card. Such a deed, ruled the Federal Court, needed the sanction of the *shari'a* court which held jurisdiction over matters concerning apostasy.<sup>41</sup> The verdict, lauded by PEMBELA, was lamented by non-Muslim groups.<sup>42</sup> While PEMBELA focuses on legal issues, ACCIN, an umbrella body of 14 Muslim non-governmental organisations (NGOs), coordinates endeavours to oppose the formation of the IFC, which is seen as a front by the secular legal community to usurp powers of the state's Departments of Religious Affairs, by-pass *shari'a* courts in Islamic legal matters, and interfere in intra-Muslim affairs.<sup>43</sup>

In the early years after independence, Islamic law made slow progress because there was a lack of political and intellectual will to further its cause among Malay-Muslim members of the ruling elites and the judiciary. Having enjoyed British education and legal and public administration training, Malay-Muslim leaders who inherited the reins of government exhibited socio-political inclinations hardly different from their colonial forefathers'.<sup>44</sup> Their favourite themes in opposing a greater role for Islam in managing politico-legal affairs revolved around the supposed incompatibility of Islam with racial harmony and national economic development. For example, Tunku Abdul Rahman, Prime Minister 1957-70, once noted, "... *unless we are prepared to drown every non-Malay, we can never think of an Islamic Administration.*"<sup>45</sup> In opposing suggestions of making Friday a public holiday, he insisted that it was "*impossible to apply the Islamic religion in every way to the*

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<sup>40</sup> ALIRAN, 'The Moorty Maniam Case: Compassion and justice missing'.

<sup>41</sup> See the various essays in Nathaniel Tan and John Lee (eds.), *Religion Under Siege? Lina Joy, the Islamic State and Freedom of Faith* (Kuala Lumpur: Kinibooks, 2008).

<sup>42</sup> Francis Loh, 'Merdeka, modernity and the Lina Joy controversy', *Aliran Monthly*, vol. 27, no. 4 (2007), pp. 2-7; Sophie Lemiere, 'Apostasy and Islamic Civil Society in Malaysia', *ISIM Review*, no. 20 (2007), pp. 46-47. See also statements by A. Vaithilingam, President of Malaysia Hindu Sangam, at <http://www.malaysianbar.org.my/content/view/9157/2/> and by Bishop Paul Tan, Chairman of the Christian Federation of Malaysia (CFM) at <http://www.malaysianbar.org.my/content/view/9159/2/> (both posted 30 May 2007, accessed 14 January 2009).

<sup>43</sup> See the anti-IFC website at <http://bantahifc.bravehost.com/index.html> (accessed 14 January 2009).

<sup>44</sup> Hussin Mutalib, *Islam and Ethnicity in Malay Politics* (Singapore: Oxford University Press, 1990), pp. 34-35.

<sup>45</sup> *Straits Times*, 1 May 1959, as quoted in Fred R. von der Mehden, 'Religion and Politics in Malaya', *Asian Survey*, vol. 3, no. 12 (1963), p. 611.

*administration of the country*”<sup>46</sup> When a Muslim member introduced in the Federal Legislative Council of 1958 a motion to prohibit the serving of alcoholic beverages in federal government functions, he retorted, “.....*this country is not an Islamic State as it is generally understood, we merely provide that Islam shall be the official religion of the State.*”<sup>47</sup> The same sentiment was echoed by Mohamed Suffian Hashim, the first Lord Chief Justice of independent Malaya: “*For many generations the various ethnic groups in Malaya have lived in peace and harmony and there was no overwhelming desire that the newly independent State should be an Islamic State.*”<sup>48</sup>

Nonetheless, after the onset of Islamic resurgence in Malaysia, there has been rival upping the ante on Islamisation between independent Islamists on the one hand and the state on the other. While the state undeniably responded to the increasing demands from the grassroots Malay-Muslim constituency for a greater role for Islam in public affairs via coercion and tight regulation,<sup>49</sup> the stick was applied concomitantly with the carrot via dexterous co-optation of Islamist figures and Islamisation initiatives which were to have direct impact on the future course of Islamic law. Since the early days of Dr. Mahathir Mohamad’s Premiership, there had been equivocal indications that he was not averse to Islamic rule, though not of the theocratic or ‘Islamic state’ ala-Iran type as aspired to by the *ulama* leadership of the opposition PAS.<sup>50</sup> Co-opted Islamists such as former Muslim Youth Movement of Malaysia (ABIM: *Angkatan Belia Islam Malaysia*) leader Anwar Ibrahim, until his unceremonious dismissal as Deputy Prime Minister in September 1998, and former PAS Vice President Nakhaie Ahmad, who heads the state-sanctioned National *Dakwah* Foundation of Malaysia (YADIM: *Yayasan Dakwah Islamiah Malaysia*), and Islamic think-tanks such as the Institute of Islamic Understanding (IKIM: *Institut Kefahaman Islam Malaysia*), were highlighted so as to portray a moderate image of Malaysia’s ruling regime in terms of the application of *shari’a* at public level.<sup>51</sup> Under

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<sup>46</sup> *Straits Times*, 24 March 1959, as quoted in von der Mehden, ‘Religion and Politics in Malaya’, p. 613.

<sup>47</sup> Quoted in Ahmad Ibrahim, ‘The Position of Islam in the Constitution of Malaysia’, p. 217.

<sup>48</sup> Quoted in Suffian Hashim, ‘The Relationship between Islam and the State in Malaya’, p. 9.

<sup>49</sup> Simon Barraclough, ‘Managing the Challenges of Islamic Revival in Malaysia: A Regime Perspective’, *Asian Survey*, vol. 23, no. 8 (1983), pp. 970-972.

<sup>50</sup> R.S. Milne and Diane K. Mauzy, ‘The Mahathir Administration in Malaysia: Discipline through Islam’, *Pacific Affairs*, vol. 56, no. 4 (1983), pp. 617-648.

<sup>51</sup> David Camroux, ‘State Responses to Islamic Resurgence in Malaysia: Accommodation, Co-option and Confrontation’, *Asian Survey*, vol. 36, no. 9 (1996), pp. 856-863; Ahmad Fauzi Abdul Hamid, ‘Patterns of State Interaction with Islamic Movements in Malaysia during the Formative Years of Islamic Resurgence’, *Southeast Asian Studies*, vol. 44, no. 4 (2007), pp. 454-461.

state patronage, tertiary Islamic education, of which *shari'a* education is a cornerstone, greatly improved, reaching a new milestone in June 1983 with the founding of the International Islamic University of Malaysia (IIUM). This spurred the production of new cohorts of *shari'a*-based lawyers, consultants, economists, judges and religious officials to fill posts in the expanding Islamic bureaucracy and widening network of state-encouraged Islamic financial institutions.<sup>52</sup>

Although ridiculed by the PAS leadership as “*little islands amidst an ocean of secular institutions*,”<sup>53</sup> and qualified by government spokesmen as no guarantee that Malaysia will become an Islamic state,<sup>54</sup> the piecemeal Islamisation measures by the federal government emboldened the various UMNO-controlled states’ authorities into executing more *shari'a*-based legislation. For example, Penang and Johore imposed stiffer penalties for Muslims convicted of Islamic criminal offences,<sup>55</sup> Terengganu affirmed its commitment to an Islamic economic package including the formation of an Islamic-based securities company,<sup>56</sup> Kedah started a programme to revive the role of the mosque as a social and educational centre,<sup>57</sup> Perlis passed a law on apostasy for converts, and Selangor started charging Muslims deemed to have acted immorally by working in liquor-serving outlets and participating in beauty contests.<sup>58</sup> Yet, these actions were not short of controversy. Following the row over three Muslim beauty contestants’ arrests in 1997, the Selangor *mufti*, Ishak Baharom, was implicated with slighting ruling state politicians for their not defending the religious authorities’ action, and with accusing the Prime Minister of almost committing apostasy by criticising the religious authorities’ ‘misuse of power’.<sup>59</sup> Ishak Baharom’s contract as *mufti* was eventually terminated, ostensibly on account of old age.<sup>60</sup> In 2005-06, following a spate of nightclub raids in search of Muslim offenders and the proposed formation of religious snoop squads, serious unease over the states’ religious

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<sup>52</sup> M. Kamal Hassan, ‘Some Dimensions of Islamic Education in Southeast Asia’ in Taufik Abdullah and Sharon Siddique (eds.), *Islam and Society in Southeast Asia* (Singapore: Institute of Southeast Asian Studies, 1986), pp. 53-57; Roff, ‘Patterns of Islamization in Malaysia’, pp. 221-224.

<sup>53</sup> Interview with Fadzil Noor, PAS President 1989-2002 in the London-based magazine, *Impact International*, November 1995.

<sup>54</sup> See the interview with Anwar Ibrahim, reproduced in Hussin Mutalib, *Islam in Malaysia: From Revivalism to Islamic State?* (Singapore: Singapore University Press, 1993), pp. 92-94.

<sup>55</sup> *The Star*, 5 December 1996; *Berita Harian* (Kuala Lumpur), 23 May 1997.

<sup>56</sup> *Berita Harian*, 15 March 1997, 28 March 1997.

<sup>57</sup> *Berita Harian*, 9 November 1996, 14 January 1997.

<sup>58</sup> Patricia A. Martinez, ‘The Islamic State or the State of Islam in Malaysia’, *Contemporary Southeast Asia*, vol. 23, no. 3 (2001), pp. 482-483.

<sup>59</sup> *Berita Harian*, 4 July 1997, 15 July 1997, 23 July 1997, 15 August 1997, 26 August 1997.

<sup>60</sup> *Berita Harian*, 16 October 1997.

authorities' overzealousness in 'moral policing' was articulated by both liberal Muslim quarters and non-Muslims who feared a spillover effect affecting the rights of non-Muslim communities.<sup>61</sup>

Whatever the brouhaha which Islamic morality laws had created by trespassing, rightly or wrongly, into the public sphere in recent years, it is indicative of the extent to which *shari'a*-based laws, albeit still within a limited purview and jurisdiction, have progressed in Malaysia. Ironically, this took place amidst constant affirmation by the Malaysian state that it was nowhere near to becoming a puritanical Islamic state. The Islamic outlook of long-time Prime Minister Dr. Mahathir, despite his occasional lip service to fundamentalist Islam, was more of a modernist reformer ala-Turkey's Kemal Ataturk, who revelled in reprimanding orthodox jurists and *ulama* for their intellectual stagnation and emphasis on the form rather than the substance of Islam.<sup>62</sup> Judith Nagata has summarised such an eclectic approach as attempting to "be Islamic without being an Islamic state."<sup>63</sup> In September 2001, on the occasion of the 30<sup>th</sup> national delegates assembly of the non-Muslim-dominated *Gerakan Rakyat Malaysia* (GERAKAN) – a component party of the ruling National Front (BN: *Barisan Nasional*) coalition, Dr. Mahathir shocked the nation by declaring that Malaysia had already become an Islamic state.<sup>64</sup> In support of the Prime Minister, government spokesmen and Islamic think-tanks argued that significant elements of the country's legal and administrative systems had manifestly Islamic foundations, and that Islam was increasingly prominent in the economic, educational and constitutional spheres.<sup>65</sup> In fact, an Islamic State Discussion (*Muzakarah Daulah Islamiah*) on 3 August 2001 chaired by Dr. Abdul Hamid Othman, the Religious Advisor to the Prime Minister, had gathered seventy religious scholars, notables and

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<sup>61</sup> See the article 'Policing Morality' in the National Evangelical Christian Fellowship of Malaysia newsletter, May-June 2006 issue, <http://necf.org.my/newsmaster.cfm?&menuid=12&action=view&retrieveid=732>, 16 May 2006, and similar protests by Malay-Muslim bloggers, 'Malaysia: Bloggers Protest Religious Policing', <http://www.globalvoicesonline.org/2007/07/07/malaysia-bloggers-protest-religious-policing/>, 7 July 2007 (both accessed 14 January 2009).

<sup>62</sup> See Dr. Mahathir's keynote address at the international symposium on 'The Islamic World and Global Cooperation: Preparing for the Twenty-first Century', co-organised by the Oxford Centre for Islamic Studies and IKIM in the *New Straits Times* (Kuala Lumpur), 26 April 1997. Also, Ooi Kee Beng, 'Mahathir as Muslim Leader' in Daljit Singh and Lorraine C. Salazar (eds.), *Southeast Asian Affairs 2006* (Singapore: Institute of Southeast Asian Studies, 2006), pp. 172-180.

<sup>63</sup> Judith Nagata, 'How to be Islamic without being an Islamic state: Contested models of development in Malaysia' in Akbar S. Ahmed and Hastings Donnan (eds.), *Islam, Globalization and Postmodernity* (London and New York: Routledge, 1994), pp. 63-90.

<sup>64</sup> *Mingguan Malaysia* (Kuala Lumpur), 30 September 2001.

<sup>65</sup> *Utusan Malaysia* (Kuala Lumpur), 1 October 2001, 4 October 2001.

academics who reached an unequivocal agreement, on the basis of scholarly opinions since the Umayyad and Abbasid caliphates, that Malaysia qualified as an Islamic state.<sup>66</sup>

In June 2002, Dr. Mahathir reinforced his stance by laying claim to Malaysia as a “*model Islamic fundamentalist state*” instead of a “*moderate Muslim state*.”<sup>67</sup> This was followed by a loud chorus of approval from a panel of experts discussing the implementation of *shari’a* laws in Malaysia.<sup>68</sup> Under Dr. Mahathir, Malaysia’s legitimacy as a model Islamic state was very much based on its economic achievements and related accolades from other Muslim countries and the Organisation of Islamic Conference (OIC).<sup>69</sup> Since his retirement, Dr. Mahathir has continued to shun ‘moderateness’ as being part of Islam, and has even re-affirmed his conviction that Malaysia is an Islamic state by virtue of Islam being practised in Malaysia’s administration, regardless of whether or not there is explicit mention of this in the Federal Constitution.<sup>70</sup> But since the conventional yardstick to measure the Islamicity of a polity is the status of the *shari’a* – in the Malaysian case, via statutory enactment,<sup>71</sup> such claims would have rung hollow if Dr. Mahathir’s Islamisation had not been accompanied by a corresponding entrenchment of the *shari’a* in Malaysia’s legal system. This entrenchment did take place, albeit incompletely and surrounded by weaknesses. In retrospect, Francis Loh views the Federal Court verdict in the Lina Joy case to be in tandem with the increasing propensity of Islam to assume “*the authority of civil state’s laws*” within the whole scheme of expanding the Islamic legal system, making Dr. Mahathir’s proclamation of Malaysia as an Islamic state “*not that far-fetched*.”<sup>72</sup>

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<sup>66</sup> *Mingguan Malaysia*, 5 August 2001.

<sup>67</sup> Ooi Kee Beng, ‘Mahathir as Muslim Leader’, p. 176.

<sup>68</sup> *Berita Harian*, 18 June 2002.

<sup>69</sup> See for example the interviews with Rachdi Allal, OIC’s Director of Trade and Development in *Utusan Malaysia*, 15 October 2003, and with Malaysia’s Foreign Minister, Syed Hamid Albar, in *Mingguan Malaysia*, 19 October 2003.

<sup>70</sup> *Utusan Malaysia*, 15 September 2006, 25 July 2007; *Mingguan Malaysia*, 25 February 2007.

<sup>71</sup> Roff, ‘Patterns of Islamization in Malaysia’, p. 211.

<sup>72</sup> Loh, ‘Merdeka, modernity and the Lina Joy controversy’, p. 6.

### 3. The Unsuccessful Attempts to Establish *Hudud* in Kelantan (1993-96) and Terengganu (1999-2002)

The experience of Islamic political parties in the democratic process of post-colonial Muslim states shows that even in a relatively tolerant political environment, Islamist parties would be tolerated only up to the point where their presence is just enough to legitimise the established order. In authoritarian states, Islamist parties are usually proscribed. Encountering severe limitations and lack of a peaceful initiative apart from succumbing to defeat and incurring humiliating penalties, and further driven by a firm belief in the infidelity of Muslim leaders who repudiate the *shari'a*, some Islamists have chosen to take up arms in their fight against the secular state. In Malaysia, the need for a militant Islamist struggle has been obviated by a relatively tolerant political environment and a political culture which abhors violence. The peaceful political climate explains why the government has invariably invoked images of violence that would allegedly be perpetrated whenever it wants to crush its political opposition conveniently labelled as anti-state or subversive.<sup>73</sup> The pugnacious portrayal of its political enemies by the national media often serves to justify the government's use of draconian measures such as the ISA, which authorises detention without trial upon anybody who “*has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia.*”<sup>74</sup>

The orderly transfer of power in the state of Kelantan after a stunning electoral victory by PAS over the incumbent BN government in 1990 and the continuous success of PAS in retaining control over Kelantan until today,<sup>75</sup> shows that on paper,

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<sup>73</sup> Ahmad Fauzi Abdul Hamid, *Islam and Violence in Malaysia*, Working Paper Series No. 124 (Singapore: S. Rajaratnam School of International Studies, Nanyang Technological University, 2007), pp. 12-20.

<sup>74</sup> ALIRAN, *ISA dan Keselamatan Negara* (Penang: Aliran Kesedaran Negara, 1988).

<sup>75</sup> The People's Unity Front (APU: *Angkatan Perpaduan Ummah*) coalition, comprising PAS and splinter BN parties – *Semangat 46* (Spirit of 1946), *Hizbul Muslimin* (HAMIM) and *Barisan Jamaah Islamiah Malaysia* (BERJASA), swept all 13 parliamentary and 39 state legislative seats in Kelantan in the 1990 elections and withstood BN gains to hold on to the state government in 1995. APU outlived its purpose after the erstwhile UMNO dissident Tengku Razaleigh Hamzah dissolved *Semangat 46* in 1996, its members rejoining UMNO *en masse*. However, PAS retained Kelantan in 1999 through the newly formed Alternative Front (BA: *Barisan Alternatif*), comprising the pro-*Reformasi* National Justice Party (KEADILAN: *Parti Keadilan Nasional*), the Chinese-dominated social-democratic Democratic Action Party (DAP) and the Malay socialist-oriented People's Party of Malaysia (PRM: *Parti Rakyat Malaysia*). PAS also unexpectedly captured Terengganu, forming the state government for the first time since losing it through a vote of no confidence in 1961. In 2004, in one of its worst-ever electoral setbacks, PAS witnessed its representation drop from 27 to 6 seats in the federal Parliament and from 98 to 36 seats in state legislative assemblies. Its leader lost his status as Leader of

the democratic wishes of an Islamic-oriented electorate for a *shari'a*-based polity at state level are constitutionally respected by the federal government. Such precedents initially raised hopes of grassroots Islamists that the 'political opposition' approach offered a viable alternative towards an Islamic state. As then PAS Deputy President Abdul Hadi Awang confidently proclaimed in connection with its status as the chief component of Kelantan's state government: "*We already have a vehicle to implement an Islamic state.*"<sup>76</sup> Such a project may now be initiated in Kelantan, whose experience offered examples for the formulation of electoral strategies to capture other states and the federal legislature. Indeed, PAS's success in expanding its power into other states forms one scenario by which Malaysia can eventually be transformed into an Islamic state.<sup>77</sup> But the practical difficulties of administering changes from a secular-based to an Islamic legal system are highlighted by the obstacles encountered by the PAS-led government in its bid to introduce the *shari'a*, as embodied in the *hudud* laws, in Kelantan.

As the cornerstone of PAS's 1990 election manifesto, the implementation of *hudud* laws would inevitably feature prominently in the Kelantan government's plans. As a prelude, the newly elected state government initiated small-scale Islamic measures such as ending extravagant state functions, banning gambling, partially outlawing consumption of liquor and extending maternity leave. The non-Malay minorities were appeased by the state government's appointing their representatives to the state legislative assembly and reaching a compromise over alcohol proscription.<sup>78</sup> After the *hudud* debate had got under way, PAS understandably distanced itself from the radical image it had cultivated since 1983. While affirming *hudud* laws as an ultimate aim of the state government, Kelantan Chief Minister-cum-PAS *Mursyid al-'Am* (General Guide) Nik Aziz Nik Mat asserted that immediate implementation had been ruled out in order to avoid accusations of cruelty by detractors.<sup>79</sup> So dilatory was PAS in its legislative programme on *hudud* that UMNO was prompted into

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the Opposition in Parliament, while at state level, PAS lost Terengganu but held on to Kelantan by a slender 3-seat (24 to 21) majority in the state legislature. In the historic 2008 elections, PAS not only recovered its comfortable majority in Kelantan, but also wrested Kedah from BN, while playing substantive roles in the newly formed People's Coalition (PR: *Pakatan Rakyat*) state governments of Selangor and Perak, whose Chief Minister is from PAS.

<sup>76</sup> *Far Eastern Economic Review* (Hong Kong), 3 September 1992.

<sup>77</sup> Hussin Mutalib, *Islam in Malaysia*, pp. 81-82.

<sup>78</sup> *Far Eastern Economic Review*, 31 January 1991.

<sup>79</sup> *Berita Minggu* (Kuala Lumpur), 3 February 1991.

challenging PAS to realise its rhetoric by submitting constitutional proposals to enable the implementation of *hudud* laws in Kelantan.<sup>80</sup>

At first, Prime Minister Dr. Mahathir Mohamad declared that the federal government was willing to allow PAS to enforce *hudud* laws in Kelantan, even if it necessitated amendments to the Federal Constitution. To Dr. Mahathir, Islamic teachings offered many extenuating circumstances which disputed the appropriateness of *hudud* laws in present-day Malaysia. He viewed PAS's rhetoric on *hudud* laws as a political gimmick, whereby the federal government could be blamed for allegedly thwarting the legislative path of *hudud*.<sup>81</sup> Dr. Mahathir's extraordinary concession, which caused consternation in non-Muslim circles, was then interpreted as a political ploy to woo Malay-Muslim voters in a forthcoming state by-election in Bukit Payung, Terengganu.<sup>82</sup> The tactic appeared to have paid off when the BN snatched the seat away from PAS.<sup>83</sup> But it also strengthened PAS's resolve to push through plans on the *hudud* laws.

The Kelantan state government's procrastination in putting forward proposals for *hudud* laws could be explained by two factors. Firstly, the relative inexperience of PAS's *ulama*, most of whom were trained in religious sciences in the traditional mould, in drafting legal documents for contemporary application. Such deficiency necessitated requesting the assistance of non-PAS academic scholars,<sup>84</sup> some of whom were staggered to discover the considerable lack of preparation and effort on the part of PAS's committee responsible for drafting the *hudud* proposals.<sup>85</sup> Secondly, the lack of understanding of *hudud* laws among both Muslims and non-Muslims in Kelantan.<sup>86</sup> Since premature implementation may prove politically counter-productive, PAS was compelled to conduct state-wide explanatory sessions, even though the considerable time spent for them exposed them to accusations of prevarication.<sup>87</sup> Despite its

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<sup>80</sup> *Far Eastern Economic Review*, 28 May 1992; *Berita Harian*, 11 November 1992.

<sup>81</sup> *Berita Harian*, 17 April 1992; *Utusan Malaysia*, 17 April 1992.

<sup>82</sup> *Far Eastern Economic Review*, 28 May 1992.

<sup>83</sup> The by-election on 21 April 1992 was called after a court declaration that the 1990 election result, which gave PAS victory by a majority of seventeen, was null and void due to technical errors in voting. This time, the BN candidate pulled off a 389-vote majority. PAS sources however claimed that victory was denied to them by UMNO's disreputable tactic of importing non-resident voters whose travelling expenses were fully covered; see *Far Eastern Economic Review*, 7 May 1992.

<sup>84</sup> *Utusan Malaysia*, 20 April 1992.

<sup>85</sup> Ustaz Ashaari Muhammad, *Falsafah Perlaksanaan Hukum Hudud Dalam Masyarakat* (Kuala Lumpur: Penerbitan Hikmah, 1992), pp. 102-103.

<sup>86</sup> *Berita Harian*, 11 June 1992.

<sup>87</sup> Nagata, 'How to be Islamic without being an Islamic state', p. 71.

sluggishness, PAS's strategy of bringing the issue to the public showed signs of bearing fruit by late 1992. Chief Minister Nik Aziz Nik Mat claimed that his government's clarification of *hudud* laws had convinced Kelantanese, Muslims and non-Muslims alike, to accept their implementation.<sup>88</sup> Although the claim was disputed by Chinese opposition leaders,<sup>89</sup> independent polls did suggest that non-Muslims in Kelantan did not face discrimination and were reasonably content with proposals to turn Kelantan into a full-fledged Islamic state, so long as their businesses were not interfered with.<sup>90</sup>

The long-awaited *hudud* enactment bill was eventually debated and passed by the Kelantan state legislature as the *Kanun Jenayah Syariah (II) 1993 (Enakmen Undang-undang Kanun Jenayah Syariah (II) 1993 (Hukum Hudud) 1994)*. Its implementation, however, was conditional upon amendments to the Federal Constitution intended to accommodate the jurisdictional expansion of *shari'a* courts, and effectively exalting the status of Islamic law as the supreme law of the land in Kelantan.<sup>91</sup> Hostile to such an idea, the federal government rallied sympathetic *ulama* from among academics and religious functionaries to its endeavour of exposing the weaknesses and impracticalities of *Kanun Jenayah Syariah (II) 1993*.<sup>92</sup> While deficiencies of *Kanun Jenayah Syariah (II) 1993* were pin-pointed and revisions were proposed to the document, hardly any of the invited scholars rejected the implementation of *hudud* laws in principle.<sup>93</sup> But the federal government considered the scholars' critical comments of *Kanun Jenayah Syariah (II) 1993* as sufficient grounds to reject what it dubbed as 'PAS's *hudud*'. In a personal letter to the Kelantan Chief Minister clarifying the decision, Prime Minister Dr. Mahathir Mohamad cited, among other things, concern that the proposed laws would potentially create chaos by implementing a two-tier system of justice separating Muslims and non-Muslims who would remain under existing secular laws.<sup>94</sup> Understandably appalled by the federal government's renegeing its previous promise to allow the implementation of *hudud* laws in Kelantan, PAS's leaders challenged the federal government to propose its own

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<sup>88</sup> *Utusan Malaysia*, 19 October 1992.

<sup>89</sup> *Berita Minggu*, 1 November 1992; *Far Eastern Economic Review*, 3 September 1992.

<sup>90</sup> Hussin Mutalib, *Islam in Malaysia*, p. 82.

<sup>91</sup> Ahmad Ibrahim, 'Penjelasan Kanun Jenayah Syariah' in *Pelaksanaan Hukum Hudud di Kelantan* (Kota Bharu: Telda Corporation, 1994), pp. 56-59.

<sup>92</sup> Nagata, 'How to be Islamic without being an Islamic state', p. 71.

<sup>93</sup> Ahmad Ibrahim, 'Penjelasan Kanun Jenayah Syariah', pp. 59-64.

<sup>94</sup> *Harakah* (Kuala Lumpur), 22 July 1994, 25 July 1994.

version of *hudud* or accept their invitation for a dialogue to break the deadlock. Instead of responding constructively, Dr. Mahathir replied somewhat mockingly that the 'UMNO *hudud*' was already in the Quran.<sup>95</sup> Although independent research by the Malaysian Bar Council acknowledged the concurrence of *Kanun Jenayah Syariah (II) 1993* with Islam,<sup>96</sup> the political environment in Malaysia ensured the political inefficacy of such opinions without the ruling elite's backing. Until today, UMNO, unabashed at their denial of democratic rights to the Kelantanese, appears content to let the *hudud* issue rest until such a time when it recaptures Kelantan from PAS.

Demoralised by its incapacity to carry out its most important pledge to the Kelantan electorate, PAS was constantly kept under pressure by UMNO and the federal government. The UMNO elite seemed intent upon provoking PAS into reviving its radical posture, in order to discredit it in public eyes. When the UMNO General Assembly of 1994 proposed a motion to urge PAS to drop from its name the term 'Islam' for supposedly connoting disunity, PAS interpreted it as an attack on the sanctity of the Islamic struggle itself.<sup>97</sup> The fierce outburst from PAS leaders was handily exploited by UMNO to portray PAS as a prevaricator and a security threat, resulting in PAS being given a stern warning by the Inspector-General of Police to stop arousing public tension.<sup>98</sup> The establishment's media assaults on PAS were handed a boost by the widely publicised arrest of a prominent Kelantan PAS leader for sexual impropriety, the case of which was summarily dismissed by Chief Minister Nik Aziz Nik Mat as a conspiracy.<sup>99</sup>

On PAS's own admission, its rule in Kelantan had been grossly undermined by undue interference from the federal authorities and the Kelantan royal family.<sup>100</sup> In mid-1996, PAS's coalition partner *Semangat 46* decided, citing a series of irreconcilable rifts with PAS, to sever links with PAS, dissolve its party and rejoin UMNO.<sup>101</sup> The most contentious issue was PAS's decision to table a bill to curb the

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<sup>95</sup> *Harakah*, 3 October 1994; Nik Abdul Aziz Nik Mat, *Islam Boleh* (Nilam Puri: Maahad ad-Dakwah Wal-Imamah, 1995), p. 155.

<sup>96</sup> *Harakah*, 7 October 1994.

<sup>97</sup> *Harakah*, 12 December 1994; Nik Abdul Aziz Nik Mat, *Islam Boleh*, p. 69.

<sup>98</sup> *New Straits Times*, 10 December 1994, 16 December 1994; *New Sunday Times* (Kuala Lumpur), 11 December 1994, 8 January 1995, 5 February 1995.

<sup>99</sup> A Vice-Chief of PAS Youth well-known for his outspokenness, Mohamad Sabu was caught red-handed allegedly being in a compromising situation with a friend's wife in hotel room. Both defendants were eventually acquitted on grounds of insufficient evidence. Mohamad Sabu is now a PAS Vice-President. See *New Straits Times*, 2 February 1995, and Nik Abdul Aziz Nik Mat, *Islam Boleh*, 73-75.

<sup>100</sup> *Berita Harian*, 14 June 1996; *The Star*, 14 June 1996.

<sup>101</sup> *The Star*, 22 June 1996; *Berita Harian*, 12 July 1996, 19 August 1996, 7 October 1996.

powers of the Kelantan sultan, who was a kin of the *Semangat 46* leader, Tengku Razaleigh Hamzah.<sup>102</sup> With its decline in strength, PAS conveniently moderated its image by forging closer ties with the federal government, acknowledging the federal government's financial help for development projects and even toying with the idea of a coalition pact with UMNO in Kelantan.<sup>103</sup> On official occasions, senior PAS leaders publicly reaffirmed PAS's commitment to democracy, and advised younger members to forsake radical methods and maintain a moderate profile.<sup>104</sup> These manoeuvres took place amidst continuous attacks on PAS's rule in Kelantan by its former partners of the defunct *Semangat 46*. For example, former *Semangat 46* Deputy Liaison Chief in Kelantan, Shukri Mohamed, lambasted PAS's failure to tackle poverty and pressing issues of development in Kelantan,<sup>105</sup> and Tengku Razaleigh Hamzah rebuked PAS for failing to administer Kelantan according to true Islamic principles.<sup>106</sup>

PAS's failure to administer Kelantan according to its cherished ideals sheds some light on the weaknesses of the opposition party political alternative towards the establishment of an Islamic legal system at state level. The realities of federal-state relations in Malaysia circumscribe PAS's Kelantan government's capacity to manoeuvre. Realistically, PAS's political objectives can only be achieved by mustering at least a two-thirds majority of federal parliamentary seats, by which it can amend the Federal Constitution. But judging by the present political map, such a scenario remains far-fetched until PAS broadens its appeal beyond its traditional strongholds in the north and northeast of Peninsular Malaysia. Continual reliance on federal funds for development projects renders powerless the state government's attempts to counter the ruling elite's perennial strategy of tying votes for the BN with development.<sup>107</sup> The creation of a Federal Development Department responsible to the federal government, and especially to monitor federal projects in Kelantan, compounds the state government's problems of coordinating development initiatives in an Islamic-oriented fashion.<sup>108</sup>

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<sup>102</sup> *Berita Harian*, 27 June 1996.

<sup>103</sup> *Berita Harian*, 1 August 1996, 22 October 1996, 17 November 1996.

<sup>104</sup> *Berita Harian*, 5 April 1997, 30 May 1997.

<sup>105</sup> *Berita Harian*, 13 November 1996.

<sup>106</sup> *Berita Harian*, 8 November 1997.

<sup>107</sup> *Far Eastern Economic Review*, 28 February 1991, 23 January 1992.

<sup>108</sup> Muhammad Syukri Salleh, 'Establishing an Islamic State: Ideals and Realities in the State of Kelantan, Malaysia', *Southeast Asian Studies*, vol. 37, no. 2 (1999), p. 248.

A similar fate befell PAS's one-term government of Terengganu (1999-2004) under the Chief Ministership of Abdul Hadi Awang, who also officially assumed the post of PAS President in 2003. In Terengganu, PAS unsuccessfully attempted to impose the *kharaj* (land tax) on non-Muslims and to force through the *Shari'a* Criminal Offences (*Hudud* and *Qisas*) Enactment, which was *ultra vires* with respect to the Federal Constitution.<sup>109</sup> Economically, PAS's Terengganu government was denied oil royalty payments, which were arbitrarily stopped by the federal government which suddenly realised its 'mistake' of contributing directly to the state government's budget. The funds were now converted to goodwill money which was distributed via federal development agencies specially created in Terengganu.<sup>110</sup>

#### 4. Problems in the Implementation of Islamic Law in Malaysia

Islamic law has come a long way in Malaysia since colonial times, when it was tainted with syncretism, and since the first thirty years of Malaysia's independence, when it was marginalised *vis-à-vis* civil law, as derived principally from English common law. The clause "*Islam is the religion of the Federation....*" in Article 3(1) of the Federal Constitution was never intended by the original drafters to mean that Islam had more than a ceremonial role in the new nation state. In fact, the provision in Article 3(4): "*nothing in this Article derogates from any other provision of this Constitution*" ensures that despite Islam's exalted status, the *shari'a* occupies an inferior position to constitutional clauses even if they may not strictly conform to Islamic requirements. In addition, Article 3(1) does not trump guarantees of fundamental liberties as provided in Articles 5 until 13 of the Federal Constitution.<sup>111</sup>

However, as Professor Shad Saleem Faruqi observes, for the past decade, "*a critical mass of Muslim lawyers, judges and politicians has adopted the view that Islam is the core, central, overriding feature of the Constitution.*"<sup>112</sup> The mainstay of their argument is that even though the Federal Constitution does not explicitly

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<sup>109</sup> *Utusan Malaysia*, 19 June 2002, 20 June 2002, 28 October 2003.

<sup>110</sup> Jan Stark, 'Constructing an Islamic Model in Two Malaysian States: PAS Rule in Kelantan and Terengganu', *Sojourn*, vol. 19, no. 1 (2004), pp. 70-71; Mohd Izani Mohd Zain, *Islam dan Demokrasi: Cabaran Politik Muslim Kontemporari di Malaysia* (Kuala Lumpur: Penerbit Universiti Malaya, 2005), pp. 140-143, 149-152.

<sup>111</sup> *Federal Constitution With Index*, pp. 3-7.

<sup>112</sup> Shad Saleem Faruqi, 'Bedrock of our nation', *The Star*, 22 August 2007.

mention Malaysia as an Islamic state, the very existence of Article 3 itself is proof that Malaysia is not a secular state either. Article 3 enables the federal government to disburse preferential funds towards the development and propagation of Islam, which would have been impossible to do in a secular state. Moreover, Article 11(4) empowers state legislatures and in the case of federal territories, the Parliament, to “control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.”<sup>113</sup> That Islam occupies a permanently pivotal place in Malaysia’s legal system is confirmed by the Article 121 (1A) amendment which, despite many non-Muslims increasingly seeing it as a symbol of injustice and a portent for future legal impasse and emotional misery, these Muslim legal practitioners will stoutly defend.<sup>114</sup>

The critical factor providing the main impetus towards a defence of the position of Islamic law within Malaysia’s whole legal corpus is the political will demonstrated by the powers that be. As we have seen, Dr. Mahathir started a pro-Islamisation drive which culminated in his Islamic state declarations of 2001-02. The crusade might have initially been solely an attempt to outflank PAS, but Islamisation soon acquired a dynamics of its own as the UMNO ruling elite derived manifest political advantages from it. The presence and meteoric rise of Anwar Ibrahim – long-time icon of Islamic resurgence among the Muslim youth, in government, and his patronage of Islamic intellectual endeavours such as the IIUM, augured well for the future of Islamic law in Malaysia. Indeed, the progress of Islamic law survived the ouster of Anwar from the ruling party and government in 1998. Dr. Mahathir made sure he did not lose legitimacy among pro-*shari’*a enthusiasts by replacing Anwar as Deputy Prime Minister and heir apparent with Abdullah Ahmad Badawi, who enjoyed a reputation as a clean politician and a religious scholar in his own right, with an honourable pedigree.<sup>115</sup>

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<sup>113</sup> *Federal Constitution With Index*, p. 7.

<sup>114</sup> For arguments along these lines, see for example newspaper articles by Muslim lawyers: Zainul Rijal Abu Bakar and Nurhidayah Muhd Hashim, ‘Sejarah bukti Malaysia bukan negara sekular’, *Berita Harian*, 1 August 2007; and Norizan Abdul Rahman, ‘Nilai Islam dalam Perlembagaan’, *Berita Harian*, 30 August 2007.

<sup>115</sup> Abdullah was a grandson of Haji Abdullah Fahim, a religious scholar credited for having chosen the date of independence for Malaysia – 31 August 1957, based on its equivalent date in the Islamic calendar. Abdullah’s father, Haji Ahmad Badawi, was also a scholar and active UMNO politician who had been a member of Penang’s state legislative assembly continuously from 1959 until his death in 1978. Loyal to the family tradition, Abdullah opted to read Islamic studies at the University of Malaya despite having obtained a scholarship to read economics. Upon graduating in 1964, Abdullah joined the civil service until 1978, when he contested in the general elections and became UMNO/BN Member of

Although Abdullah Ahmad Badawi has refrained from unequivocally proclaiming Malaysia as an Islamic state, his promotion of Islam Hadhari, officially translated as ‘civilisational Islam’, as a fundamental tenet of his administration sends cues throughout Malaysian society that he is not about to halt the progress of Islamic law in Malaysia’s polity begun by Dr. Mahathir. In spite of the simmering inter-religious tension that appears to have been created and perpetuated by Article 121 (1A) of the Federal Constitution, Abdullah and fellow Muslim cabinet ministers have several times insisted that the contentious clause will not be amended or repealed.<sup>116</sup> In fact, in January 2006, when all nine non-Muslim cabinet ministers – all of them leaders of BN component parties, unprecedentedly presented Abdullah with a memorandum requesting a review of Article 121 (1A), the Prime Minister was quick to show his displeasure such that the memorandum was swiftly withdrawn.<sup>117</sup> Notwithstanding this apparent rigidity, Abdullah portrays to the outside world that under his Islam Hadhari administration, the practice of Islam “*has been moderate.*”<sup>118</sup> To Abdullah, Islam Hadhari calls for values and principles of a state to be compatible with Islam, without necessarily forging a state which incorporates the Islamic legal framework, which is understood as being constantly prone to change and not fixed. Thus Abdullah repeatedly exhorts for a reappraisal of past *ijtihad*s (legal opinions) so as to make them relevant with contemporary developments.<sup>119</sup> In a speech delivered at the Oxford Centre for Islamic Studies, he explains the position of the *shari’a* in his Islam Hadhari grand design:

The Syariah must not only be seen as a set of black-letter laws but also as a system of values, where the specific rules and laws are manifestations of those overriding values. The science of al-Maqasid al-Syariah was an important but often neglected development in Islamic history. Its development by thinkers such as Hujjatul Islam al-Imam al-Ghazzali and al-Shatibi was motivated out of a similar concern that we face today – that Islamic thought must concern itself with the broader objectives of our religion and not solely on its prohibitive aspects or

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Parliament for Kepala Batas, Penang. Prior to assuming the Premiership in November 2003, he held posts at federal level continuously, except for a brief lull in 1987-91, when he was thrown into the political wilderness for having sided with Dr. Mahathir’s opponents during the UMNO factional crisis of 1987.

<sup>116</sup> *Utusan Malaysia*, 21 January 2006, 25 July 2006, 11 July 2007.

<sup>117</sup> *Mingguan Malaysia*, 22 January 2006; Ooi Kee Beng, ‘Malaysia: Abdullah Does It His Own Vague Way’, p. 185. It was initially thought that only one non-Muslim cabinet minister, the Tourism Minister Leo Michael Toyad, had refused to sign the memorandum. While he did refuse to sign the document, it was later disclosed that he had secretly converted to Islam before the issue erupted.

<sup>118</sup> *The Star*, 25 January 2007.

<sup>119</sup> *Utusan Malaysia*, 5 August 2004.

exclusively literal interpretations.... The science of al-Maqasid allows Muslims to focus on a more fundamental notion of religion, freeing us from excessive literalism and legalism. It is through this that I believe Muslims can find answers to contemporary problems from within our faith. By understanding al-Maqasid al-Syariah and by placing it as a basis for contemporary *ijtihad*, we are also rekindling a tradition of reason and intellectual inquiry, which will in turn lead to a culture of learning among Muslims.... As far as Malaysia is concerned, I believe we have tried to walk the middle path of moderation. While we recognise that rituals are important, that the written word of the Quran is sacred, we also believe that as Muslims we must also understand the spirit and ultimate objectives of our religion. We also believe that rituals alone will not make us good Muslims. We are enjoined to find success in this world and in the hereafter. We must therefore never forget about progress in this world.... We call this approach Islam Hadhari, literally civilisational Islam, or an approach towards a progressive Islamic civilisation.<sup>120</sup>

While Abdullah Ahmad Badawi's background and explication of his Islamic scheme provide reason for one to be optimistic of the future of Islamic law in Malaysia, there remain serious operational obstacles which have to be overcome before the *shari'a* becomes the bedrock of Malaysia's legal system. Firstly, the federal structure of government, whereby Islamic matters are put under the 'State List' in the Federal Constitution,<sup>121</sup> means that whatever policy on Islam is proclaimed at the federal level, its grassroots efficacy is subject to implementation at state level. Efforts since Dr. Mahathir's Premiership to effect administrative streamlining between the federal Islamic bureaucracy and the states' Councils of the Islamic Religion and Departments of Religious Affairs, have met with mixed and lethargic response. For example, only the Federal Territory and four states, viz. Malacca, Penang, Selangor and Negeri Sembilan agreed to be covered by a law to coordinate the role of religious officials between federal and state levels.<sup>122</sup> In early 1997, the Islamic Centre - the central arm of the federal government's Islamic bureaucracy, was elevated to the Department of Islamic Development of Malaysia (JAKIM: *Jabatan Kemajuan Islam Malaysia*) under the Prime Minister's Department. Despite being granted purportedly wider responsibilities, JAKIM's functions are primarily secretarial; its directives having advisory rather than binding effect in

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<sup>120</sup> Datuk Seri Abdullah Ahmad Badawi, 'Muslim world needs a meeting of minds', *New Straits Times*, 5 October 2004.

<sup>121</sup> *Federal Constitution With Index*, p. 157.

<sup>122</sup> *Berita Harian*, 14 May 1997, 13 August 1997.

states.<sup>123</sup> Whatever grandiose visions articulated by JAKIM on behalf of the Prime Minister, they do not necessarily get implemented in the precise form and manner as envisaged by federal-level policy makers. As has been shown in the cases of Kelantan and Terengganu under PAS rule, the federal government is wont to reject proposals for *shari'a*-based reforms, in spite of their veracity from a legal point of view, if the political mileage from such measures is going to be gained by the opposition party. Political impulses get the better of ruling UMNO politicians in matters where political advantage is at stake, even when the advancement of Islam and the *shari'a* regardless of political affiliation should be prioritised.

Even in states which have agreed to cooperate more closely with the federal government, there exist serious problems of administration and implementation which hamper the uplifting of Islam's and *shari'a*'s dignity. It is at state level that the Muslim populace encounter Islam as a 'living religion' relevant to their daily activities, yet in popular parlance, Islam is widely perceived as nothing more than "*rules and laws and fines.... always telling us what to do.*"<sup>124</sup> Despite the lofty ideals aspired to by their political masters at federal level, state religious functionaries have focused on anti-vice operations in which they have continually engaged in wanton abuse of powers. For example, in raids conducted against Muslim couples suspected of *khalwat* and potential adultery or fornication, state religious officials have been reportedly filming on videotape the physically unclothed conditions of disgraced couples, arguing that such circumstantial evidence was needed in court to incriminate the suspects. Worse, some of these sexually compromising images were leaked to the tabloid press and circulated via the internet by none other than the religious officials.<sup>125</sup> Investigating officers of religious departments have been charged with requesting for sexual bribes from alleged sex offenders in order to settle their cases.<sup>126</sup> The effects of religious officials' spying and snooping for sex offenders have been deleterious to the public image of religious departments and the Muslim populace,

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<sup>123</sup> For a list of JAKIM's functions, see 'Fingsi JAKIM', <http://www.islam.gov.my/portal/fungsi.php> (accessed 14 January 2009) and the special supplement on JAKIM in the *New Straits Times*, 10 September 2007.

<sup>124</sup> Martinez, 'The Islamic State or the State of Islam in Malaysia', p. 485.

<sup>125</sup> See 'Hentikan rakaman pasangan berkhalwat', [http://www.malaysianbar.org.my/berita/komen\\_undang-undang/hentikan\\_rakaman\\_pasangan\\_berkhalwat.html](http://www.malaysianbar.org.my/berita/komen_undang-undang/hentikan_rakaman_pasangan_berkhalwat.html), 27 March 2007 (accessed 14 January 2009) for reports of the public outcry against such an operation in Penang in March 2007, and the erroneous justification given by Faizal Ibrahim, head of the operations unit of Penang's Department of Islamic Religious Affairs (JAIPP: *Jabatan Agama Islam Pulau Pinang*).

<sup>126</sup> *The Star*, 6 November 2007.

especially when couples were found to be lawful spouses or tourists. But despite calls for the end to such a practice which encroaches on privacy and intentionally shames suspects, religious functionaries have stoutly defended it.<sup>127</sup> Even officials of the Islamic administration of justice have not been spared disgraceful allegations. A judge of Perak's *shari'a* high court was hauled to the sessions court on five counts of corruption,<sup>128</sup> while an official in Kuala Lumpur's *shari'a* court was sentenced to three years in jail and three times caning for falsification of legal documents.<sup>129</sup> In a raid to detain and charge the hosts and guests of a company function allegedly organised to revive the banned Darul Arqam movement, Penang's religious officials rode roughshod over the accused perpetrators, constantly and mercilessly violating not only their fundamental human liberties but also their Islamic rights to proper conditions of ritual worship.<sup>130</sup>

Finally, the process of *fatwa*-making in Malaysia is blemished with weaknesses that erode the legitimacy of *fatwas* and threaten the credibility of *muftis*. In his seminal study, Othman Haji Ishak outlines five criticisms of *fatwa*-making in Malaysia.<sup>131</sup> Firstly, the inconsistencies of *fatwas* among the states weaken the *fatwas*' authority and confuse the public, who can simply move from one state to another to escape the binding effect of a particular *fatwa*. Questionable conduct by the *ulama* further compounds a *fatwa*'s weak authority. Secondly, *fatwas* issued have failed to list down satisfactory references and explain the methods of jurisprudence used to derive them. Thirdly, some methods persistently used in the states have been found to be inconsistent with Islamic law. For instance, the usage of opinions generally accepted as weak (*qaul dhaif*), the application of majority voting in deliberations of a state *fatwa* committee, and the acceptance of *adat* as a basis for drawing out Islamic enactments. Fourthly, the authority of *fatwas* lacks legal effect due to the *shari'a* court's subservience to civil courts and the ensuing reluctance to implement them on the part of the authorities. However, much of this weakness has been remedied by the 1988 amendment of Article 121 of the Federal Constitution, as

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<sup>127</sup> See for example the arguments against snooping given by the reform-oriented Perlis *mufti*, Dr. Mohd. Asri Zainul Abidin in the *New Straits Times*, 15 December 2006, and *The Sunday Star*, 17 December 2006, and the rejection of his views by JAKIM Director, Mustafa Abdul Rahman in the *New Sunday Times*, 17 December 2006, and by other religious figures in *Berita Harian*, 18 December 2006.

<sup>128</sup> *Utusan Malaysia*, 21 November 2007.

<sup>129</sup> *Utusan Malaysia*, 20 December 2006.

<sup>130</sup> As disclosed by a victim of the operation, see the account of his ordeal in Detainee, 'Treated as deviant even before court hearing', *Aliran Monthly*, vol. 27, no. 9 (2007), pp. 32-36.

<sup>131</sup> Othman Haji Ishak, *Fatwa Dalam Perundangan Islam*, pp. 186-193.

previously discussed. Fifthly, the qualifications of members of state *fatwa* committees, in terms of expertise and not necessarily formal degrees, are found to be extremely lacking. Hardly any possess knowledge beyond the limited purview of Shafie jurisprudence, the dominant Sunni legal school followed by Muslims in Malaysia.

Except for the fourth criticism, the other four criticisms still hold sway today. In the case of the banning of Darul Arqam in 1994 for instance, the National *Fatwa* Committee on 31 March 1994 had originally instructed the various states' Councils of the Islamic Religion and Departments of Religious Affairs to use provisions in the states' Islamic enactments to halt Darul Arqam's activities.<sup>132</sup> There was lackadaisical response from the states, where Darul Arqam was hugely popular among the Malay-Muslim masses for its economic projects and systematic missionary activities, as opposed to the less than people-friendly reputation of religious departments. The National *Fatwa* Committee followed suit with a comprehensive *fatwa* banning Darul Arqam on 5 August 1994, based on nine facets of Darul Arqam's teachings which were deemed to have deviated from Islam.<sup>133</sup> But this was not before the repressive state apparatus engaged in media vilification of Darul Arqam and systematic persecution of its members at the national level. None other than Zainal Abidin Abdul Kadir, the Chief Director of Islamic Centre – JAKIM's predecessor, had accused Darul Arqam of trying to usurp political power through a 'magical struggle'.<sup>134</sup> While deviationism served as the ostensible reason for Darul Arqam's proscription, the Islamic Centre first impressed on the public that Darul Arqam was a militant group which was fomenting revolution in Malaysia via the formation of a suicide squad called the 'Badr Army' based in Bangkok, Thailand.<sup>135</sup> A week before the promulgation of the *fatwa* proscribing Darul Arqam, Abdullah Fahim, chief research officer at the Islamic Centre, sensationally confessed to Reuters reporters that the 'suicide army' charge against Darul Arqam was actually "*a propaganda exercise.... to get people ready for a comprehensive fatwa*" banning Darul Arqam.<sup>136</sup> Only after this national *fatwa*, and indeed after Darul Arqam members had been demoralised,

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<sup>132</sup> See results of the National *Fatwa* Committee's deliberations at [http://www.e-fatwa.gov.my/jakim/keputusan\\_view.asp?keyID=110](http://www.e-fatwa.gov.my/jakim/keputusan_view.asp?keyID=110) (accessed 14 January 2009).

<sup>133</sup> *The Star*, 6 August 1994; *The Sun* (Petaling Jaya, Malaysia), 6 August 1994.

<sup>134</sup> *Berita Harian*, 6 May 1993.

<sup>135</sup> *Utusan Malaysia*, 13 June 1994, 14 June 1994.

<sup>136</sup> *Daily Express* (Kota Kinabalu, Malaysia), 30 July 1994.

boycotted and harassed throughout the country, did states follow suit with their own *fatwas* outlawing Darul Arqam.<sup>137</sup>

Evidence abounds to show that, despite government's disclaimers, its stern measures taken against Darul Arqam, culminating in the ISA arrests of its leaders throughout September 1994, were politically inspired rather than theologically grounded.<sup>138</sup> Both the national and states' *fatwa* committees had conspicuous lack of experts in *tasawwuf* (Sufism), the branch of Islamic spiritualism which Darul Arqam professed. Hardly any members of the committees had done any specialised research on Islamic eschatology, under which the disputed futuristic-messianic theories of Darul Arqam's leader, Ustaz Ashaari Muhammad, could be judiciously investigated.<sup>139</sup> But due to lax requirements in terms of listing of references from various schools of Islamic thought, the *fatwas* got away with conveying a monolithic portrayal of Darul Arqam as guilty of deviant teachings. Whatever the motivations of the ruling elites were, the less than professional manner in which *fatwas* were issued in Malaysia enabled the system to be exploited by vested interests. Whatever methods were used to elicit them, the *fatwas* on Darul Arqam had to support the political elites' demand that the movement be disbanded. Throughout Southeast Asia, where Darul Arqam had built influential business networks, Muslim communities refused to abide by the Malaysian *fatwas*.<sup>140</sup> Only Brunei agreed to ban Darul Arqam at national level.<sup>141</sup> In Indonesia, where a healthy tradition of religious pluralism had long existed, the *Nahdatul Ulama* (NU: Renaissance of *Ulama*), Indonesia's largest Islamic organisation with sixty-million members, issued a contrary *fatwa* which exonerated

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<sup>137</sup> See for examples the *fatwas* issued by Selangor, dated 11 August 1994, at [http://www.e-fatwa.gov.my/mufti/fatwa\\_warta\\_view.asp?keyID=411](http://www.e-fatwa.gov.my/mufti/fatwa_warta_view.asp?keyID=411); by Perak, dated 18 August 1994, at [http://www.e-fatwa.gov.my/mufti/fatwa\\_warta\\_view.asp?keyID=296](http://www.e-fatwa.gov.my/mufti/fatwa_warta_view.asp?keyID=296); and by Kedah, dated 18 August 1994, at [http://www.e-fatwa.gov.my/mufti/fatwa\\_warta\\_view.asp?keyID=485](http://www.e-fatwa.gov.my/mufti/fatwa_warta_view.asp?keyID=485) (all accessed 14 January 2009).

<sup>138</sup> Ahmad Fauzi Abdul Hamid, 'Political Dimensions of Religious Conflict in Malaysia: State Response to an Islamic Movement', *Indonesia and the Malay World*, vol. 28, no. 80 (2000), pp. 32-65; Ahmad Fauzi Abdul Hamid, 'The Banning of Darul Arqam in Malaysia', *Review of Indonesian and Malaysian Affairs*, vol. 39, no. 1 (2005), pp. 87-128.

<sup>139</sup> Ahmad Fauzi Abdul Hamid, 'The Futuristic Thought of Ustaz Ashaari Muhammad of Malaysia' in Ibrahim M. Abu-Rabi' (ed.), *The Blackwell Companion to Contemporary Islamic Thought* (Malden and Oxford: Blackwell Publishing, 2006), pp. 195-212.

<sup>140</sup> Johan Hendrik Meuleman, 'Reactions and Attitudes towards the Darul Arqam Movement in Southeast Asia', *Studia Islamika: Indonesian Journal for Islamic Studies*, vol. 3, no. 1 (1996), pp. 43-78; Ahmad Fauzi Abdul Hamid, 'Southeast Asian Response to the Clampdown on the Darul Arqam Movement in Malaysia, 1994-2000', *Islamic Studies*, vol. 45, no. 1 (2006), pp. 83-119.

<sup>141</sup> *New Straits Times*, 28 July 1994; *Straits Times* (Singapore), 4 August 1994.

Darul Arqam from charges of deviationism and exhorted the government not to ban Darul Arqam on the basis of creed.<sup>142</sup>

## 5. Concluding Remarks

The various controversies that have arisen in recent years, as chronicled in this article, signify the growing importance of Islamic law in Malaysia's polity. Large prospects for the further progress of Islamic law are afforded by the political will that exists among the ruling elites. Hitherto, these elites have been too steeped in their political prejudices, such that Islamic endeavours pursued not through UMNO or official government channels, such as PAS's Islamic law bills in Kelantan and Terengganu, have been throttled. In the case of Darul Arqam, which had erected miniature Islamic societies in its numerous self-sustaining villages scattered throughout the country, and was thus considered "*way ahead of other revivalist groups that desire to see the actualisation of Islamic law in Malaysia*,"<sup>143</sup> the whole organisation was forcibly disbanded. The Darul Arqam saga had exposed myriad weaknesses in the process of the making and dissemination of *fatwas* in Malaysia. Intellectual rigour is not given due importance in *fatwas*, the writers of which have wilfully neglected to mention scholarly references upon which they base their decisions.<sup>144</sup> Lax procedures have rendered the *fatwas* vulnerable to political manipulation and arbitrary judgement by *muftis* and *shari'a* committees, in addition to the lack of room for views of other than the dominant school of Islamic thought in Malaysia to feature in deliberations of the *fatwa* committees. In November 2007, Islamic officials of the states of Perak and Penang raided functions and premises of Rufaqa' Corporation, the private limited company founded by the former Darul Arqam leader in 1997, after the *muftis* of both states had pronounced that the company propagated false teachings.<sup>145</sup> The pronouncements were based on their

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<sup>142</sup> Pengurus Besar Nahdlatul Ulama, *Keputusan Pengurus Besar Syuriah Nahdatul Ulama Tentang Aqidah Darul Arqam* (Jakarta: Nahdatul Ulama, 12 August 1994); *Kompas* (Jakarta), 13 August 1994.

<sup>143</sup> Mohamad Abu Bakar, 'Islamic Revivalism and the Political Process in Malaysia', *Asian Survey*, vol. 21, no. 10 (1981), p. 1049.

<sup>144</sup> Such concerns were passionately expressed in the light of the recent national *fatwa* banning yoga in Malaysia; see Hariati Azizan, 'In a twist over fatwa ruling', *The Sunday Star*, 30 November 2008.

<sup>145</sup> *Berita Harian*, 3 November 2007; *Utusan Malaysia*, 8 November 2007.

scrutiny of contents of a video-tape recording which displayed a Ruffaqa' director, Major (Retired) Abuzar, allegedly spreading deviant doctrines whilst speaking at a closed Ruffaqa' function.<sup>146</sup> Ironically, while Abuzar remains free today after brief detention for questioning by religious officials of Selangor where he resides, Ruffaqa' employees and guests in Perak and Penang were maliciously apprehended, interrogated, incarcerated and hauled to the *shari'a* court for allegedly opposing the states' *fatwas*.<sup>147</sup> The federal structure of government compounds the dubious *fatwa*-making procedures in Malaysia.

The greatest challenge in realising Islamic law in Malaysia has been the wide perception that exists among non-Muslims and an increasing number of Muslims themselves that the whole Islamic bureaucratic and judicial structures forego compassion and social propriety in dealings with the public. State Islamic administrators, through their holier-than-thou attitudes, have cultivated the public image of abominable witch-hunters and undisciplined office-bearers. The public is not convinced that Islamic institutions are able to dispense justice to them,<sup>148</sup> while federal structures of power display increasing reluctance to interfere in the workings of the Islamic administrations, despite their actions having flouted fundamental liberties as guaranteed in the Federal Constitution. The judicial powers of state religious courts and the policing powers of religious functionaries have aggrandised so rapidly and menacingly that the federal executive's powers are unwittingly being threatened. Political scientist Farish Noor cynically traces the whole problem to the Islamisation policy:

the entire Islamisation policy had little to do with Islam or the promotion of Islamic ethics, but more to do with creating a massive (and costly) parallel bureaucracy whose main aim was to employ Malaysian Muslims with the hope that they would not fall out of the bureaucratic net and thereby end up voting for the Opposition.... we have reached the stage where there is a dispersion of power and the weakening of the executive branch of the state. If we allow local religious courts to impose more sentences like this, or allow local self-appointed moral police

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<sup>146</sup> See the Perak and Penang *muftis*' pronouncements at <http://mufti.perak.gov.my/isu1/ruffaqa'.pdf> and <http://mufti.penang.gov.my/Microsoft%20Word%20-%20Document1.pdf> respectively (both accessed 12 December 2007; the Perak pronouncement has since been scrapped from its *mufti*'s website at <http://mufti.perak.gov.my>). For details of Abuzar's speech, see reports entitled 'Abuya rasa macam tahi ayam', *Mastika* (Kuala Lumpur), November 2006, and 'Abuya Boleh Tangguhkan Kematian', *Majalah I* (Shah Alam), no. 52, February 2007.

<sup>147</sup> Detainee, 'Treated as deviant even before court hearing'.

<sup>148</sup> See for example a recent letter to the editor entitled 'Bapa kecewa layanan Mahkamah Tinggi Syariah' in *Utusan Malaysia*, 2 November 2007.

to go around harassing Malaysian citizens like they have done, then the net result will be the weakening of state power and the erosion of the state.<sup>149</sup>

That a collusion very possibly exists between ruling political elites and the religious bureaucracy is shown by the fact that Chief Directors of the Islamic Centre and JAKIM have upon retirement successively contested for UMNO in general elections, become Members of Parliament and even Ministers.<sup>150</sup> In the case of Penang, the Council of the Islamic Religion is headed by Shabudin Yahaya, an *ulama-cum-UMNO* state assemblyman for Permatang Berangan. With such interlocking relationships, chances are slim that Muslims of the non-UMNO variety would be treated fairly by the states' religious bureaucracy. Although Shabudin's relationship with the new DAP-led state government has been tense due to attempts to dislodge him, Shabudin stood his ground by seeking a direct audience with the *Yang diPertuan Agong*, Penang's head of the Islamic religion.<sup>151</sup>

It is even more regrettable that non-Muslims have been harbouring a negative view of states' Islamic judiciaries and administrations as having trampled upon their fundamental rights as Malaysian citizens. As a result of a spate of legal decisions which many non-Muslims perceive as having victimised them, there has been a conspicuous and continuous worsening of ethnic relations during Abdullah Ahmad Badawi's tenure as Prime Minister.<sup>152</sup> Small wonder that when the Chief Justice, Ahmad Fairuz Sheikh Abdul Halim, floated the idea that Malaysia forego the use of English common law as the basis of Malaysia's legal system, the Bar Council, whose leadership is dominated by non-Muslim lawyers, voiced their disapprobation.<sup>153</sup> The Ahmad Fairuz-led bench had previously been rebuked by the Bar Council for prioritising personal religious beliefs and implied jurisdiction of the *shari'a* courts

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<sup>149</sup> See his interview in *The Sun*, 15 July 2005.

<sup>150</sup> They are, Dr. Mohd. Yusof Nor – former Minister in the Prime Minister's Department, former Minister of Primary Industries and currently chairman of the Federal Land Development Authority (FELDA); Dr. Abdul Hamid Othman, former Minister in the Prime Minister's Department and presently religious advisor to the Prime Minister; Zainal Abidin Abdul Kadir, former one-term state assemblyman for the Melor constituency in Kelantan (1995-99) and then Malaysian ambassador to Egypt; and Abdul Hamid Zainal Abidin, former Minister in the Prime Minister's Department and now Member of Parliament for Parit Buntar in Perak-cum-chairman of the Council of Trust for Indigenous Peoples (MARA: *Majlis Amanah Rakyat*).

<sup>151</sup> *Utusan Malaysia*, 2 May 2008.

<sup>152</sup> Johan Saravanamuttu, 'The Slide in Ethnic Relations', *Aliran Monthly*, vol. 26, no. 6 (2006), pp. 2-7; Loh, 'Merdeka, modernity and the Lina Joy controversy'.

<sup>153</sup> *The Star*, 23 August 2007; *The Sun*, 23 August 2007.

over constitutional provisions in the Lina Joy case.<sup>154</sup> The Bar Council similarly expressed disapproval of Deputy Prime Minister Najib Razak's claim that Malaysia is an Islamic rather than a secular state.<sup>155</sup> Being an ethnically mixed country *par excellence*, it is urgent for the Malaysian state to find intellectually credible solutions to accommodate non-Muslim concerns if Malaysia's politico-legal system is going to increasingly assume Islamic features. But the situation will not improve if partisan politics keeps on exercising control over institutions which are integral to nation-building and supposed to be run in a politically neutral manner. Hence, for instance, while the newly established National Unity Advisory Panel had proposed the formation of an Institute of Ethnic Relations to manage issues of national unity and integration,<sup>156</sup> worries were expressed that research conducted by the Institute would be politically influenced by the powers that be.<sup>157</sup>

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<sup>154</sup> Ambiga Sreenevasan, 'Federal Constitution must remain supreme', *Aliran Monthly*, vol. 27, no. 4 (2007), pp. 13-14.

<sup>155</sup> *The Sun*, 18 July 2007.

<sup>156</sup> *New Straits Times*, 13 July 2007.

<sup>157</sup> Chandra Muzaffar, 'Ethnic relations institute can promote unity', *The Sun*, 30 July 2007.

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