ISLAMIC LAW IN MALAYSIA

Malaysia has an area of about 130,000 square miles and a population of about 14,003,000 of whom about 55% are Malays who are by definition Muslims. The Federal Constitution defines a Malay as "a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom" and was born or domiciled in the Federation or in Singapore.[1] Article 3 of the Federal Constitution provides that Islam is the religion of the Federation but other religions may be practised in peace and harmony in any part of the Federation. Article 11 of the Federal Constitution provides that every person has the right to profess and practise his religion and subject to the qualification in the Article to propagate it; the qualification is that the law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.

Islam came to Malaysia early but was established in Malacca in the 14th century. Before the coming of Islam the Malays followed the customary law which was influenced to a certain extent by Hindu concepts but after the Malay rulers and people embraced Islam attempts were made to modify the Malay customs so as to conform to Islam and to adopt the Islamic Law. The process can be seen in the various versions of the Malacca Law — the Risalat Hukum Kanun or the Undang-Undang Melaka.[2] In the earliest version it is the customary law which is set out but in later versions both the customary law and the Islamic Law are set out. Thus in the provision relating to illegal sexual intercourse it is stated

> "If a man seizes a free woman and then forces her to have sexual intercourse and the latter informs the judge, he (the offender) shall be summoned before the judge and ordered to marry her. If he refuses to marry her he shall be fined three

[1] Federal Constitution, Article 160.

[2] Liaw Yock Fang *Undang-Undang Melaka*, The Hague 1976.

tahil and one paha and in addition to pay a wedding gift as is customary for a subject of the Ruler. But according to the law of God if he is a *muhsan* he shall be stoned to death. The meaning of *muhsan* is a woman who has a husband or in the case of a man, he who has a wife. — In the case of a person who is non-*muhsan* he shall be sentenced to be caned with eighty strokes".[3]

The later versions of the Risalat Hukum Kanun contain a part dealing with marriage and divorce and this is based on the Islamic Law as set out in Abu Shuja's *At-Taqrib*. There are sections dealing with rules concerning people who need a wali, rules governing marriage witnesses, and rules governing khiyar and talak.[4]

There is also a chapter dealing with other transactions including rules relating to weights and measures, laws relating to sale and the prohibition of riba, rules governing the sale of land, rules relating to bankruptcy, rules on the supply of capital, rules governing trusteeship and rules governing acknowledgement.[5] These are based on Abu Shuja's *At-Taqrib*, ibn al-Qasim Al-Ghazzi's *Fath al-Qarib* and Ibrahim al Bajuri's *Hashiya Ala'l Fath Al-Qarib*.

The later versions of the Risalat Hukum Kanun also contain chapters on evidence and procedure and on the punishment of killing, unlawful intercourse, sodomy and bestiality, slander and alcoholic drinks and it is significant that in such cases these later provisions differ from the provisions occurring earlier in the law. Thus

(a) Section 37—38 relating to the testimony of witnesses and procedure and the taking of an oath are in conflict with section 14.
(b) Section 39 relating to killing is in conflict with section 5—9.
(c) Section 40 relating to unlawful intercourse and sodomy is in conflict with section 12.

[3] Undang-Undang Melaka, 12.2.

[4] Undang-Undang Melaka, Chapters 25—28.

[5] Undang-Undang Melaka, Chapters 29—35.

(d) Section 41 relating to slander is in conflict with section 12.

In the Pahang laws, which were prepared during the reign of Sultan 'Abd Al-Ghafar (1592–1614 A.D.)[6] and follow the Risalat Hukum Kanun we find that the influence of the Malay custom is less and that the Islamic Law is more generally followed. Thus there are provisions based on the Islamic Law dealing with qisas (s. 46–47), fines (S. 48), illegal sexual intercourse (s. 49), sodomy (s. 50), defamation (s. 51), drinking intoxicating liquor (S. 52), theft (S. 53), robbery (S. 54), apostacy (S. 54), omission to pray (S. 60), Jihad (S. 61), procedure (S. 62), witnesses (S. 63), and oaths (S. 64). There are also provisions dealing with trade, sale, security, guaranty, investments, trusts, payment for labour, land, gifts and wakafs.

The Johore laws too follow the Risalat Hukum Kanun and in addition at the beginning of the twentieth century, the codifications of the Islamic Law which were made in Turkey and Egypt were translated into Malay and adopted. Thus the *Majallat Al-Ahkam*[7] was translated as the Majallah Ahkam Johore and the Hanifite code of Qadri Pasha was adopted and translated as the *Ahkam Shariyyah Johore.*[8] In 1895 too a Constitution was drafted for Johore and this while showing the influence of its drafting by English lawyers shows some influences of the Islamic Law.[9].

In Trengganu too a constitution was promulgated in 1911 and this again shows influences of the Islamic Law.[10] In addition there exists a law relating to the constitution of the Courts issued in 1885 which appears to provide for the administration of the Islamic Law in Trengganu.[11]

[6] J.E. Kempe and R.O. Winstedt A Malay Legal Digest, JRASMB XXI Part I 1948.

[7] Majallah Ahkam Johore, 1331 A.H.

[8] Ahkam Shariyyah Johore, Johore 1949. See Hapipah binte Monel, Sejarah Pentadbiran Undang-Undang Islam Negeri Johore, Project Paper, Faculty of Law, University of Malaya, 1979/80.

[9] Laws of the Constitution of Johore, Malayan Constitutional Documents Vol. 2.

[10] Laws of the Constitution of Trengganu, 1911, Malayan Constitutional Documents Vol. 2.

[11] Undang-Undang Mahkamah, Trengganu, 1885. See Zubir Embong Sejarah Undang-Undang dan Kehakiman Islam di Trengganu sebelum campur tangan Inggeris, Project Paper, Faculty of Law, University of Malaya, 1978.

These examples shows that there were attempts in the period before the coming of the British to modify the Malay custom and adopt the Islamic Law. This process was in progress when the British came and exercised their influence in the Malay States, but after that the process was arrested. As R.J. Wilkinson said

> "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."[12]

Islamic Law then was the law of the land in Malaysia before the coming of the British. The school of law that was followed was the Shafii School, which is the dominant school not only in Malaysia, but also in Indonesia, the Philippines and the States of Indochina. In the case of *Shaik Abdul Latif and others* v. *Shaik Elias Bux*[13] Braddel C.J.C. in his judgment said —

> "Before the first treaties the population of these states consisted almost solely of Mohammadan Malays with a large industrial and mining Chinese in their midst. The only law at that time applicable to Malays was Mohammedan modified by local customs".

The Court of Appeal of the Federated Malay States held in *Ramah* v. *Laton*[14] that the Muslim Law is not foreign law but local law and the law of the land. The Court must take judicial notice of it and must propound the law. In the various treaties entered into between the Malay rulers of the various states and the British under which the Malay Rulers agreed to accept the advice of the British it was expressly provided that this should not apply in questions touching the Malay religion and custom. Despite these clauses however we find that in all the Malay States the British did directly or indirectly interfere with the Muslim Law and its administration. Indirectly the spread of

[12] R.J. Wilkinson, Papers on Malay Subjects, Law Part I, 1922, p. 49.

[13] (1915) 1 F.M.S.L.R. 204.

[14] (1927) 6 F.M.S.L.R. 127.

British influence favoured the introduction of the English Law. Acting on the advice of the British Residents, the Malay Sultans in the States constituting the Federated Malay States enacted a number of laws which adopted the Indian codification of the principles of English Law. Thus the Penal Code of the Straits Settlements (which was based on the Indian Penal Code) was first adopted in Perak by Order in Council of 28th June 1884 and then in the various states which constituted the Federated Malay States, being eventually incorporated in the Revised Edition of the Laws of the Federated Malay States 1936 as Chapter 45. Similarly the Evidence Ordinance of the Straits Settlements (which was based on the Indian Evidence Act) was first adopted in Selangor by the Courts Regulation of 1893 and in Perak by Order in Council No. 9 of 1894 and then in the various states which constituted the Federated Malay States, being eventually incorporated in the Revised Edition of 1936 as Chapter 10. The Contract Act of India was originally adopted by the Selangor Courts Regulation 1893 and subsequently by enactments in Perak, Selangor and Negeri Sembilan in 1899 and in Pahang in 1900. It was eventually incorporated in the Revised Edition of 1936 as Chapter 52. The Criminal Procedure Code of India was adopted and enacted in the various Malay States constituting the Federated Malay States in 1900 and was eventually incorporated in the Revised Edition of 1936 as Chapter 6. Land Enactments were enacted in the various states in 1897 and later in 1903 and these introduced the Torrens System of registration of title. In all these matters, criminal law, evidence, criminal procedure, contract and land, the effect of the legislation was to replace the former Malay-Muslim Laws by enactments based on the principles of English Law.

The British Residents also advised the Malay rulers to set up courts of justice in the Malay States. Before the year 1896 appeals in each of the Federated Malay States lay to the Resident's court with a final appeal to the Sultan in Council. In 1896 the Judicial Commissioner's Regulations and Orders in Council came into force and these abolished the Courts of the Residents and Sultans in Council and introduced a Judicial Commissioner as the final court of appeal for the Federation. He was appointed by the Sultans with the consent of the Residents, the qualification being of a barrister or equivalent of

at least ten years standing. He heard appeals from the Senior Magistrates, who had unlimited jurisdiction. The Senior Magistrate system was introduced at different times in the four states and the Magistrates were civil servants appointed and transferred from the other civil service posts. In 1905 the Courts Enactment was enacted and this abolished the Judicial Commissioner's Court and Senior Magistrates' Courts. A Supreme Court was created consisting of the Chief Judicial Commissioner and two Judicial Commissioners appointed by the Resident-General with the approval of the High Commissioner. A third Judicial Commissioner was added subsequently. The Court of Appeal consisted of any two or more of the Judges. By the Federated Malay States Appeals Order in Council 1906 passed by the King-Emperor in Council provision was made for an appeal in civil actions from the new Supreme Court to the Privy Council. In 1921 by reciprocal legislation in all three countries, the Judicial Commissioners were made ex-officio judges of the Straits Settlements and Johore and the Judges of the Straits Settlements and Johore ex-officio Judicial Commissioners. In 1923 it was provided that the Federated Malay States Court of Appeal should consist of not less than three judges. In 1925 the titles were altered from "Chief Judicial Commissioner and Judicial Commissioner" to Chief Justice and Judge.

The Judges in the new Courts were all trained in the British system of law and it was natural for them to refer to and apply the English Law, when there was no written law to apply. The Selangor Courts Regulation of 1893 had provided that subject to local law and established custom all questions arising in any of the courts of the State were to be dealt with and determined according to the principle, procedure and practice, so far as applicable, of the Straits Settlements Penal Code and Evidence Ordinance and of the Indian Civil Procedure Code, Specific Relief Act and Court Fees Act. In the other States too the Judges were ready to introduce English principles. In the case of *Re the Will of Yap Kwan Seng deceased*[15] Sproule Ag. C.J.C. had to decide whether the English rule of perpetuities applied in the Federated Malay States. He said —

[15] (1924) 4 F.M.S.L.R. 313.

"It is submitted to me that one prime cause for the adoption of the rule in the Colony (of the Straits Settlements) is absent here, seeing that these States never were either ceded or newly settled territory but states which by treaty invited a certain measure of British protection and control. The general law of England was never introduced or adopted here at any time. The most that can be said was that portions of that law were introduced by legislation which adopted not English Law, but English principles and models for local laws. That is fair and cogent argument and the only one in this matter which has caused me hesitation. I overcome it by reason of my strong belief in the rule against perpetuities as a rule of general public policy, the other prime cause which influenced Sir Benson Maxwell in the Colony and afterwards their Lordships of the Privy Council in his support. To my mind the question to be put is "why reject a good public policy because it is English?" The law fails in virtue if it is not progressive to study the needs and further the best interests of these progressive states.

We have as a matter of fact adopted freely in these states a great mass of English rules of law and equity, civil and criminal procedure, either directly or derivatively. The latter might be said to a certain extent even of our land tenure and registration. The commercial law of England is welcomed here. Our judges are interchangeable with those of the Colony.

There are other ties. The wills of our rich Chinese merchants, for example often cover lands not only here, but in the Colony as well. The very will now under construction provides an example. I do not think one can cavil at the proposition that these states have been consistently fain to welcome and adopt English rules and principles of law, so far as they are applicable to local conditions. I think also a certain measure of uniformity of rules and principles of law throughout the Colony and the Federated Malay States, subject to the same proviso, has rightly been the policy of the legislature of these states, and is on the face of it desirable in view of the close ties and common interests that bind us and the Colony.

These considerations are so strong, as in my opinion, render most mischievous any objection to the rule against perpetuities based entirely upon its English origin or its prevalence in the Colony.

Supposing it to be said however that whatever the soundness or suitability of the rule, it is for the legislature to accept or reject it, and that it is no function of the Courts to introduce or make new law, I think there is a three fold answer to such an objection. One is the difficulty of concise expression or codification of the law as to perpetuities. Again the rule exists in English apart altogether from statute and is judge-made. One other reason is this, that if a will or bequest is submitted to my jurisdiction for construction and I find in it trusts that are objectionable and repugnant to good public policy, as I am trained to see it, by reason of remoteness and all its consequences, I should fail in my duty as a judge in equity, if I pronounced in favour of the validity of such trusts".

In *Motor Emporium* v. *Arumugam*[16] Terrell Ag. C.J. considered whether the English rules of equity were applicable in the Malay States. He said –

"It is said that the English rules of equity, as administered in the Courts of Chancery, have no application in the Federated Malay States, as the Court has not been given the jurisdiction of the Courts of Chancery nor is there any Civil Law Enactment incorporating into the law of the Federated Malay States the equitable principles applied in England. This is perfectly true so far as it goes, but under section 49(i) of the Courts Enactment, the Supreme Court has the widest possible jurisdiction in all suits, matters and questions of a civil nature, and although the legislature has given no indication on what principles such jurisdiction should be exercised every court must have inherent jurisdiction to do justice between the parties, and apply such principles as are necessary or desirable for attaining such object and for giving decisions which are in conformity with the requirements of

[16] [1933] M.L.J 276.

the social conditions of the community where the law is administered. Looked at in this light, it would hardly be reasonable to exclude in the Federated Malay States a principle of natural justice merely because a not less civilised community, namely England, has adopted such a principle as part of its recognised legal system. On the contrary it is a cogent reason for adopting the same principle in the Federated Malay States.
The Courts of the Federated Malay States have on many occasions acted an equitable principles, not because English rules of equity apply, but because such rules happen to conform to the principles of natural justice."

As regards the law of torts in *Panicker* v. *Public Prosecutor*[17] Braddell Ag. C.J.C. said –

"I am of opinion that we ought to construe the enactment (that is the Labour Code) in conformity with the Common Law, for although it is not part of the law of these States, yet in questions of tort it is nevertheless the acknowledged guide to which we must turn in arriving at just decisions upon questions arising under that branch of the law."

In *Government of Perak* v. *Adams*[18] Woodward J.C. said –

"In dealing with cases of tort, the Court has always turned for guidance, as to fundamental principles, to English decisions".

while in *Mohamed Gunny* v. *Vadveng Kuti*[19] Burton J. said –

"But although no code of civil wrongs has ever been passed, the courts in this country have always followed the law of England".

[17](1915) 1 F.M.S.L.R. 169.

[18](1914) 2 F.M.S.L.R. 44.

[19](1930) 7 F.M.S.L.R. 170.

When the Civil Law Enactment, was enacted in 1937 to introduce the English Law, it merely gave a statutory authority to what the Courts had been doing anyway. As Terrell Ag. C.J. said in the case of *Yong Joo Lin & Others* v. *Fung Poi Fong*[20]

> "Principles of English Law have for many years been accepted in the Federated Malay States where no other provision has been made by statute. Section 2(i) of the Civil Law Enactment therefore merely gave statutory recognition to a practice which the Courts had previously followed".

The material parts of the section read as follows —

> "Save in so far as other provision has been or may hereafter be made by any written law in force in the Federated Malay States, the common law of England and the rules of equity, as administered in England at the commencement of this Enactment, other than any modifications of such law or any such rules enacted by Statute, shall be in force in the Federated Malay States:
> Provided always that the said Common Law and rules of equity shall be in force in the Federated Malay States so far only as the circumstances of the Federated Malay States and its inhabitants permit and subject to such qualifications as local circumstances render necessary".

Section 10 of the Civil Law Enactment 1937, expressly provided that nothing in the enactment shall effect the Muslim Law governing the relations of husband and wife. Section 2 of the Civil Law Enactment, 1937, was extended to the Unfederated Malay States of Johore, Kedah, Kelantan, Perlis and Trengganu by the Civil Law (Extension) Ordinance, 1957. In 1956 the Civil Law Ordinance, 1956, was enacted to apply to the whole of the Federation of Malaya, which included the Malay States and Penang and Malacca. The Ordinance repealed the Civil Law Enactment, 1937.

[20] [1941] M.L.J. 63.

Section 3 of the Ordinance provided that —

"Save in so far as other provision has been made or may hereafter be made by any written law in force in the Federation or any part thereof, the Court shall apply the Common Law of England and the rules of equity as administered in England at the date of coming into force of this Ordinance:
Provided always that the said Common Law and rules of equity shall be applied only so far as the circumstances of the States and Settlements comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary".

Section 5 of the Ordinance deals with mercantile law and provides —

(1) In all questions or issues which arise or which have to be decided in any Malay State with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Ordinance, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.
(2) In all questions or issues which arise or which have to be decided in the Settlements with respect to the law concerning any of the matters referred to in the last preceding subsention, the law to be administered shall be the same as would be administered in England in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law".

Only Part VII of the Ordinance (which contains provisions relating to the disposal and devolution of property) was made

inapplicable to Muslims. Nothing in the part it was provided shall effect the disposal of any property according to Muslim Law. The saving in section 10 of the Enactment in regard to the Muslim law governing the relations of husband and wife was not however re-enacted.

The Civil Law Ordinance 1956 has now been extended to Sabah and Sarawak and revised as the Civil Law Act, 1956. Although therefore in theory Islamic Law is the law of the land and the basic law at least in Peninsular Malaysia, in practice and in effect it is the English Law which has become the basic law.

The position of Islam and Islamic Law under the Federal Constitution shows that only a limited jurisdiction is given to the States and to the Shariah Courts. Although Islam is stated to be the religion of the Federation in Article 3(1) of the Federal Constitution, Article 3(4) provides that nothing in the Article shall derogate from any other provision in the Constitution. "Islamic Law" is not even expressly included in the definition of law in Article 160 of the Federal Constitution and Article 4 of the Federal Constitution provides that it is the Constitution which is the supreme law.
When the Federal Council was first constituted in 1909, Article 9 of the agreement provided as follows:

> "Laws passed or which may hereafter be passed by the State Councils shall continue to have full force and effect in the States except in so far as it may be repugnant to the provisions of any law passed by the Federal Council and questions connected with the Mohammedan religion, mosques, political pensions, native chiefs and penghulus and any other questions which in the opinion of the High Commissioner effect the rights and prerogatives of any of the Rulers or which for other reasons he considers shall properly be dealt with by the State Councils shall be exclusively reserved to the State Councils".[21]

Neither this article nor any other article in the agreement empowered the Federal Council to pass laws at all. It was

[21] J. de v. Allen, A.J. Stockwell and L.R. Wright Collection of Treaties and other documents affecting the States of Malaysia 1981 Vol. 2 0. 54.

impliedly assumed that laws passed by the Federal Council would be binding on each state from the fact that the Malay rulers had conferred their law-making powers for their states on the Council.

In the Federation of Malaya Agreement, 1948, which constituted the Federation of Malaya, the power of the Federal Legislative Council to make laws was expressly set out. Clause 48 of the agreement provided that –

> "Subject to the provisions of this agreement, it shall be lawful for the High Commissioner and their Highnesses the Rulers, with the advice and consent of the Legislative Council, to make laws for the peace order and good government of the Federation with respect to the matters set out in the Second Schedule to this agreement and subject to any qualifications therein".[22]

Clause 100 of the Agreement provided that the Council of State established in each State shall have power to pass laws on (a) any subject, including the Muslim religion or the custom of the Malays, other than those in respect to which the Legislative Council has power under Clause 48 to pass laws and (b) any other subject in respect of which by virtue of a law made under Clause 48 such Council of State is for the time being authorised to pass laws.[23]

It may be noted that while the Second Schedule to the agreement gave power to the Legislative Council to make laws for the establishment, jurisdiction, powers, fees and expenses of all Courts, this did not include Muslim religious courts,[24] so that the power to make laws for the establishment, jurisdiction, powers, fees and expenses of Muslim religious Courts may be said to be with the State Council of State. Moreover Clause 101 of the Agreement preserved the reserved power of the Ruler to make laws "in the interest of public order, public faith or good government in his State", even though such law is not passed by the Council of State and the expression "public order, public

[22] *Ibid*, p. 138.

[23] *Ibid*, p. 161.

[24] Ibid. p. 200.

faith or good government" included *inter alia* all matters affecting the Muslim religion and the custom of the Malays.[25]

With the Federal Constitution of 1957 however the powers of the Rulers and the State Legislatures were further restricted. The Federal Constitution sets out among the subjects which are in the State List the following:—

> "Except with respect to the Federal Territory, Islamic Law and personal and family law of persons professing the religion of Islam, including the Islamic Law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay custom; Zakat, Fitrah and Bait-ul-Mal or similar Islamic religious revenue; mosques or any Islamic public place or worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Islamic courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic Law and doctrine and Malay custom."[26]

It can be seen that the jurisdiction given to the State and the Shariah Courts is limited. Even in regard to the subjects included in the items in the State List, there are many Federal Laws which limit the scope and application of Federal Laws. For example in the field of succession, testate and intestate, account

[25] Ibid, p. 161–162.

[26] 9th Schedule, List II(1).

has to be taken of the Probate and Administration Act[27] and the Small Estates (Distribution) Act,[28] with the result that the Kathis are in effect only given the function of certifying the shares to be allotted to the beneficiaties under the Islamic Law. In the field of criminal law in particular the jurisdiction of the Shariah Courts is very limited. It has jurisdiction only over persons professing the religion of Islam and it has only such jurisdiction in respect of offences as is conferred by Federal Law. The Muslim Courts (Criminal Jurisdiction) Act, 1965,[29] provides that such jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term not exceeding six months or any fine exceeding $1,000/- or with both. This in effect means that none of the *hadd* offences can be dealt with in the Shariah Courts. Even the power for the State Legislature to create and punish offences by persons professing the religion of Islam against precepts of that religion, does not apply to "matters included in the Federal List," which in effect means that if the offence is dealt with by Federal Law, the power to create offences can only be exercised by the Federal Parliament and not by the State Legislature. Even although the Ruler is the head of the religion of Islam in his State and may act in his discretion in the performance of his functions as head of the religion of Islam, in effect laws are made by the State Legislature. Even the form of the laws being made by the Ruler "with the advice and consent of the Legislative Assembly" has been abandoned, except in the case of Negeri Sembilan.

Despite the clauses in the treaties excepting matter ralating to the Malay religion and Malay custom from the scope of the advice of the British Resident or British Adviser we find that in all the Malay States, the British did interfere in the administration of the Muslim Law. The State Councils which were originally purely advisory became in time the legislative body for the states and although in theory the assent of the Ruler was necessary for the validity of the law in fact the State Councils were directed by the British Resident or the British Adviser.

[27]Act 97.

[28]Act 98.

[29]No. 23 of 1965.

The British advisers regarded the proper organization and supervision of the Kathis who administered the Muslim Law of marriage and divorce and punished matrimonial offences and breaches of religious observances as matters which closely affected the peace and good order and administration of the States. The appointments, salaries, suspensions and dismissals of Kathis were decided by the State Council and as the Council minutes did not come into effect until approved by the Governor, we find that even the appointment of Kathis had to be approved by the Governor. Legislation was enacted in the Malay States for the registration of Muslim marriages and divorce, for the jurisdiction and supervision of the Kathis and for the punishment to be imposed in cases of Muslim offences. In every Malay State the independent jurisdiction of the Kathis was minimised, the more serious cases were transferred to the magistrates and the work of the Kathis was supervised in other ways. No adequate provision was made for an independent system of courts and appeals therefrom. No provision was made for the training and status of Kathis. There were no powers given for investigation and the procedures laid down for the courts were an amalgam of the English Law and the Islamic Law. The result is that today the position of the Shariah Courts and the Kathis are inferior even to that of the Magistrates' Courts and the Magistrates. The status and respect given to the administration of the Islamic Law must therefore suffer by comparison with the administration of the Civil Law in Malaysia.

In some areas where the Islamic Law should have been applied, we find that as a result of the decisions of the civil courts in Malaysia Islamic Law has been displaced or ignored. Thus in *Ainan* v. *Syed Abu Bakar*[30] it was held that as the Evidence Ordinance is a statue of general application, section 112 of the Ordinance applies in questions of legitimacy to the exclusion of the rule of Islamic Law. Thus if a child is born to a woman less than six months after her marriage to a man, the child is deemed to be legitimate in the civil courts, although he is deemed to be illegitimate under the Islamic Law. Even where as in the Guardianship of Infants Act, 1961 it is provided

[30] [1939] M.L.J. 209.

in an Act that "nothing in the Act which is contrary to the Muslim religion or custom of the Malays shall apply to any person under the age of eighteen years who professes the Muslim religion", the learned judge in *Myriam* v. *Mohamed Ariff*[31] could hold that a mother who has remarried a stranger is entitled to the custody of her infant child. The learned Judge could perhaps have found authority in the Islamic Law for his view but in his judgment he said —

> "In my endeavour to do justice, I propose to exercise my discretion and have regard primarily to the welfare of the children. In doing so, it is not my intention to disregard the religion and custom of the parties concerned or the rules under the Muslim religion but that does not necessarily mean that the court must adhere strictly to the rules laid down under the Muslim religion. The Court has not, I think, been deprived of its discretionary power".

The result in that case was that the High Court in effect reversed the decision of the Kathi who had given custody of the children to the father. In the case of *Commissioner of Religious Affairs, Trengganu & Ors.* v. *Tengku Mariam*,[32] the High Court rejected the authority of a fatwa issued by the Mufti declaring a wakaf to be valid and held instead that the wakaf was void on the authority of the decisions of the Privy Council from India and Africa. Although the actual decision was reversed in the Federal Court[33] the judges in the Federal Court stated that if they were free to decide on the validity of the wakaf, they also would have held it to be void in reliance on the Privy Council decisions. In *Nafsiah* v. *Abdul Majid*[34] the High Court held that a Muslim woman who had been seduced by a man on his promise to marry her, could bring an action for breach of promise of marriage against him, although such an action would

[31] [1971] 1 M.L.J. 265. See *Wan Abdul Aziz* v. *Siti Aishah* (1977) 1 Jernal Hukum I, 50.

[32] [1969] 1 M.L.J. 110.

[33] [1970] 1 M.L.J. 222. See also *Haji Embong* v. *Tengku Nik Maimunah* [1980] 1 M.L.J. 286.

[34] [1969] 2 M.L.J. 175.

not lie under the Islamic Law. In this respect it might be noted that in England actions for breach of promise have been abolished, so while the law in England seems to comply with the Islamic Law, the law in Malaysia is still at variance with the Islamic Law. These are only some of the examples where Islamic Law has been displaced or ignored in the civil courts. In fact some of enactments relating to the administration of Islamic Law specifically provide that in the event of any difference or conflict arising between the decision of the court of the Kathi Besar or a Kathi and the decision of a civil court acting within its jurisdiction, the decision of the civil court shall prevail.[35] By contrast we find that in the Supreme Court of Judicature Act of Singapore it is provided that the "High Court shall have no jurisdiction to try any civil proceeding which comes within the jurisdiction of the Shariah Courts constituted under the Administration of Muslim Law Act".[36]

The Islamic Law and its scope have been misunderstood. In an early case, *Ong Cheng Neo* v. *Yap Kwan Seng*[37] it was stated "As to the Mohamedan Law, the entire Mohamedan Law is a personal law. Founded in religion it gives rights only to those who acknowledge Islamism". In an earlier Penang case, *Reg.* v. *Willans*[38] Maxwell R. stated as one of the objections to the continuance of the law of Kedah in Penang what he called the nature of the Mohamedan Law. He said –

> "Lord Coke laid it down in Calvin's Case 7 Rep. 10 that "if a Christian king should conquer a kingdom of an infidel and bring them under his subjection, then *ipso facto* the laws of the infidel are abrogated"; and although Lord Mansfield treated this proposition as absurd, the Indian Law Commissioners are well justified in asserting that a "system of law which according to its principles can only be administered by Mohametan judges and Mohametan arbitrators upon the testimony of Mohametan witnesses, is not a system which

[35] See for example Selangor Administration of Muslim Law Enactment, 1952, S. 45(6).

[36] Singapore Supreme Court of Judicature Act (Cap. 5.) S. 16(1).

[37] (1897) 1 S.S.L.R. Supp. 1.

[38] (1858) 3 Ky. 16.

can devolve ipso jure and without express acceptance upon a Government and people of a different faith". It seems to me impossible to hold that any Christian country could be presumed to adopt or tolerate such a system as its *lex loci*".

Whilst it is understandable that English jurists should misunderstand the nature of the Islamic Law, it is sad to find that many Muslims today question the validity of the Islamic Law and its applicability in our society. If even Muslims in Malaysia are not prepared to accept the Islamic Law as the law of the land,[39] is it any wonder that non-Muslim lawyers too dare to raise their objections?

It is clear that there is considerable ignorance and prejudice against the Islamic Law. It is sad too to note that some Muslims have dared to question the validity of the Islamic Law. As Muslims we must believe that the law of Islam has been revealed to us as a guide for us in all times and under all circumstances. If we accept that there is no God but Allah and that Mohamed is the Prophet of Allah we must accept the truth and validity of the Islamic Law which was revealed by Allah though his Prophet for our guidance. The Prophet in the early part of his mission in Mecca strove to strengthen the belief and faith of the Muslims, to make them sure of and accept without hesitation the Islamic faith that there is no God but Allah and Mohamed is His Prophet. It was only after the faith of the Muslims became strong and impregnable that the principles of the law were conveyed to them. When the Muslims heard the legal commandments they accepted them without hesitation, as they were sure that they came from Allah, who has full power over all things. The Muslims of today have declined in faith and belief and foreign influences especially that of Christian colonialism have weakened their hold in Islam. How else can they doubt their duty to uphold, apply and follow the Islamic Law in the light of the verses of the Holy Quran to the effect —

"If any do fail to judge by what Allah has revealed, they are unbelievers" (Surah Al-Maidah 5:47)

[39] See for example Tun Mohamed Suffian, Parliamentary System versus Presidential System, [1979] 2 M.L.J. lvi.

"If any fail to judge by what Allah has revealed, they are wrongdoers". (Surah Al-Maidah 5:48)

"If any fail to judge by what Allah revealed, they are those who rebel". (Surah Al-Maidah 5:50)

"It is not befitting for a believer, man or woman, when a matter has been decided by Allah and His Messenger to have any option about their decision. If anyone disobeys Allah and His Messenger, he is indeed clearly on a wrong path". (Surah Ahzab 33:36)

"Then is it only a part of the Book that you believe in and do you reject the rest? But what is the reward for those among you who behave like this but disgrace in this life? And on the day of judgment they shall be consigned to the most grievous penalty. For God is not unmindful of what you do". (Surah Baqarah 2:85).

"Oh you who believe! Obey Allah and obey His Messenger and those charged with authority among you. If you differ in anything among yourselves refer it to Allah and His Messenger, if you do believe in Allah and the Last Day. That is best and most suitable for final determination". (Surah An-Nisaa 4:59).

The Muslim in Malaysia have unfortunately slipped back and it is necessary for them to do all they can to strengthen their faith and their belief, so that thay can be worthy of receiving, accepting and implementing the Islamic Law. The Muslims have for the most part ceased to accept Islam as a way of life. Many of them take pride in regarding Islam as a religion in the Christian sense and do not believe that Islam has to be accepted as a guide in all aspects of their life. The influence of colonialism has divided the Muslims into two camps, which may be called the Western-oriented camp and the traditional oriented camp. Colonialism has also succeded in introducing foreign standards into the life of the Muslims with the result that in many aspects of their life — in their system of government, politics, economics, society and law, they no longer accept and apply the Islamic standards but ape the ways of their erstwhile colo-

nial masters. The result of this colonial influence from which independence has not yet been obtained is that –

(a) While Islam can solve all problems, the Muslims are unable to solve many of these problems.
(b) Although most Muslims can be said to hold to their religion emotionally and by tradition their way of life and the system and structure of their politics and economics are no longer based on Islam but follow the ways of the west.
(c) Islam requires the Muslims to devote all their energies to Islam, but today the Muslims devote only a part of their time and give only part – time and partial attention to Islam.
(d) Islam requires the Muslims to strive to achieve a way and system of life which is based on Islamic principles but the majority of them are content and satisfied with the position, employment and profits they are able to get from the political, economic and social system which is contrary to Islam.

It may be acknowledged that the Western-oriented Muslims have benefited from a high standard of education and they are trained in the fields of science, technology, economics and administration. They have helped us to achieve independence and the power has been transferred from the colonial rulers to them, so that at present they hold the reins of political and economic power in Malaysia. They have helped to bring independence, peace and prosperity to the country and although in doing so they have used the slogans of nationalism and secularism and have based their programmes on what they have learnt from the West we should not entirely blame them. The principles of Islamic politics, economics and law have for a long time been buried in the textbooks and there was no Islamic system or society where those principles were practised. As there was no model for an Islamic system, which the Western-oriented leaders could use, they had perforce to follow the system they learnt from the West. At the very least their efforts have enabled us today to have Muslims who are experts in the fields of science, technology, economics, politics and adminis-

tration. The Western educated Muslim too has shown that he is dedicated and can work hard to achieve his aims. It may be regretted that his aims are not all in line with the Islamic principles. In Islam we are taught to work and strive to attain the pleasure and acceptance of Allah. The Western oriented Muslim works hard and spends all his energies to achieve a good degree, a well-paid position, a confortable home and a place in society. In his preoccupation with all this he may tend to forget Islam. In their way the Western oriented Muslims feel they have achieved success and they have done so by following what they learnt from the West. They have not found it necessary to follow the teachings of Islam and they therefore regard the teachings of Islam as impractical and unnecessary in this age of progress.

On the other hand the traditional oriented camp has withdrawn itself from the wiles of the West. In the colonial era they were separated from the political and economic system of the country and called the religious group. They were encouraged to concern themselves only with religious matters and not to interfere with wordly matters. We owe a debt of gratitude to the traditional-oriented camp for preserving the teachings and books of Islam and safeguarding them from being corrupted by Western influence. But this camp too has its weaknesses. Because the traditional oriented Muslims have had to keep themselves away from practical politics and public life, they have encouraged an approach to Islam which may be said to be defeatist. They have not sought to assail the influence of the West by showing the merits of the Islamic system of politics, economics, society, education and law but have accepted the Western institutions as a fait accompli. They may be said to have retired to the mosque, the surau and the madrasah and have neglected the treasures of Islam in science, economics and jurisprudence. It is because of the passive acceptance by the traditional-oriented camp that the jurisdiction given to Islamic Law and the Syariah Court can be so narrowly defined in the Federal Constitution.

If therefore we seek for the reasons why Islamic Law is not accepted and practised as the law of the land in Malaysia we can mention two, firstly the ignorance and prejudice of the Western-Oriented camp and secondly the weakness of the traditional oriented camp.

The ignorance and prejudice of the Western Oriented camp can be removed only by education and greater understanding. The Government in Malaysia has already taken steps to make Islamic education compulsory for Muslims in all schools and it is hoped that this policy will also be extended to the Universities. We have already a Faculty of Islamic Studies in the Universiti Kebangsaan Malaysia and recently the Faculties of Shariah and Usuluddin have been set up in the University of Malaya. There is a danger however of Islamic education being compartmentalised and separated from other disciplines and perhaps efforts should be made to integrate the teaching of Islam in all fields of learning for example in science, medicine, economics and law. There has been a great deal of interest in Islamic economics lately and the time has come for the faculties of economics in our universities to take into account the teachings of Islam. Especially in the field of law there is need for the integration of Islamic jurisprudence in all branches of the law. We must remove the misconception that Islamic Law is concerned only with the family law and that it only seeks to punish people for *khalwat* and *zinah*. We must teach our students to appreciate the principles of Islam in all fields of law for example in contract, tort, criminal law, family law, property law, constitutional law and international law. There has been a lot of misunderstanding of and prejudice against the Islamic Law and this must be removed. In the Holy Quran it is stated to the effect —

> "Allah commands justice, the doing of good and liberality to kith and kin, and He forbids all shameful deeds, and injustice and rebellion. He instructs you that you may receive admonition". (Surah An-Nahl 16:90).

In his *A'lam*, Ibn Qayyim well sums up the essence of the Islamic Law —

> "The foundation of the Shariah is wisdom and safeguarding of the people's interests in this world and the next. In its entirety it is justice, mercy and wisdom. Every rule which sacrifices justice to tyranny, mercy to its opposite, the good to the evil and wisdom to triviality does not belong to the

Shariah although it might have been introduced by implication. The Shariah is Allah's justice and blessing among His people. Life, nutrition, medicine, light, recuperation and virtue are made possible by it. Every good that exists is derived from it and every deficiency in being results from its loss and dissipation for the Shariah which Allah entrusted to His prophet to transmit is the pillar of the world and the key to success and happiness in this world and the next."[40]

It is the realization of this fact that we must try to achieve in every Muslim and more particularly among the Muslim lawyers and jurists in Malaysia. If the Muslims in Malaysia learn once again to be proud of and accept Islam and the Islamic Law, there will be no difficulty in the implementation of the Islamic Law. What is needed is a reform in the way of life of the Muslims. Islamic Law cannot be properly administered unless the Muslims are resolved to live their lives as Muslims.

Once the Muslim lawyers and jurists have accepted the Islamic Law it will not be difficult to persuade the non-Muslims in Malaysia to accept it. The non-Muslims of Malaysia will not be forced to accept the Islamic Law and they will be free to accept it or to follow their own system of law, especially in matters relating to the family law and their religion and customs. At the same time they must respect the administration of the law in Malaysia. If for example "khalwat" is made an offence by a State Law duly passed by the legislature of the State then every citizen should respect that law. The law will not applicable to non-Muslims unless they chose to accept it, but if a non-Muslim abets a Muslim in committing the offence, he should accept his liability to punishment.

The weaknesses of the traditional oriented camp can be removed by improving their knowledge, capacity and status. Unfortunately the traditional Muslim lawyers in Malaysia too have accepted the restricted jurisdiction given to the Islamic Law. Very little effort has been made to study and do research in the Islamic Law in the other fields like contract, constitutional law, commercial law, labour law, constitutional law

[40] Ibn Qayyim, A'lam III, 1 quoted in S. Mahmasani, Philosophy of Jurisprudence in Islam, 1961, p. 106.

and international law to show how the teachings of Islam can be applied in a society like Malaysia. It is unfortunate that for long the development of the Islamic Law has been divorced from its practice. As Khalid M. Ishaque in his article on *Islamic Law – Its Ideals and Principles*[41] says:–

> "The companions of the Prophet were never unmindful of the Quranic mandate of advancing remedy, promoting virtue and suppressing mischief (Surah An-Nahl 16:90). At all times their concern was to preserve the internal social structure of the Muslim community in its formative period. All their decisions were taken in grave earnestness on the basis of an undying and positive loyalty to Allah and His Prophet. The message for Muslims today seems on this basis to be that when reminded of the signs of Allah they should not fall upon them deafly and blindly (Surah Furqan 25:73) but should with the clear guidance provided in the Book itself, look at, ponder and understand its decision in the light of the Book. They should always remain aware that while discharging their obligations their primary duty is still to advance virtue and remedy, and to suppress mischief in the way that is best suited to meet the challenge of each specific situation.
>
> The Quran itself provides more than enough examples of this principle to remind the community that while applying the law they should not be unmindful of the object of the law.
>
> It was unfortunate for the community that in the development of Muslim Law in the following centuries, an attempt was made to apply each decision rigidly and indiscriminately as though it were a principle. Regrettably this led cumulatively to the creation of a situation where the community was called upon to adhere to a form irrespective of changed circumstances. The community thus became the victim of form at the expense of the principle –.
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> One result of such excessive loyalty to form was that the Muslim Law became increasingly more theoretical in character and more alienated than ever from the realities of life. Many well-intentioned people were parties to such develop-

[41] The Challenge of Islam edited by Altaf Gauhar, 1978 p. 172–174.

ment in the mistaken hope they were guarding the law of Allah for better times, without realizing that it was their duty at all times to struggle as Abu Bakar did (with those who while accepting Islam would not accept the *Zakat*) in seeking the implementation of the Divine Law, irrespective of a hostile environment. The community remains under an abiding duty to guard the Divine guidance by constantly seeking to implement it in a world of harsh realities and so permeate this world with its truth. Putting the Divine Book in silken covers and recording long opinions about legal problems of little practical utility is no substitute".

The Muslim jurists – the Muftis and Kathis – need to equip themselves better to meet the harsh realities of our modern society. While preserving and strengthening their knowledge of the Holy Quran and the Sunnah and their ability to use the precedents in the textbooks of Islamic Law, they should learn also about other systems of law, in particular the system of law that is followed in the civil courts in Malaysia. In this way they will be in touch with the practical problems faced by judges and lawyers, know how they are dealt with in the civil courts and decide whether those cases can be followed or not in the Islamic Law. The administration of the Civil Law in Malaysia has attained a high standard of competence and impartiality. The Judges are given a high and honoured place in society and they are free and independent in their work, so they can even declare an Act of Parliament to be invalid or an act of the Government to be contrary to law. The Kathis should try to attain this high standard of competence, impartiality and respect. At present the position and status of the Kathis are even lower than that of Magistrates. Efforts should be made to raise their position and status. In order to attract graduates from the Faculties of Islamic Studies and Syariah the starting salaries of Kathis should be as high as that of Magistrates and after service of at least ten years they should be eligible for appointment as Chief Kathis whose salary, position and status should be equivalent to that of a Judge. The Mufti should have the position of the Legal Adviser in a State and should for example be a member of the Pardons Board for each State.

There is an urgent need for uniformity in the administration of Islamic Law in the States of Malaysia. At present various states are looking into their own state enactments and tinkering with amendments to them, to bring them more in line with Islamic principles. It is true that there are many defects in the State enactments, and they are in need of overhaul. The opportunity should however be taken to bring about uniformity and a more efficient system of administration of the Islamic Law throughout Malaysia. It is suggested that a conference be held of representatives of the various State religious councils and departments to discuss and formulate a national policy for the administration of the Islamic Law in Malaysia. We have already in Malaysia the National Land Council and the National Council for Local Government, which have the task of formulating a national policy for land and local government respectively, both of which are State subjects. We have also a National Council for Religious Affairs. What is needed is a committee to consist of representatives of the various state Religious Councils and Religious Departments and the State Legal Advisers to discuss matters relating to the Islamic Law in Malaysia. The primary task of the Committee will be the drafting of a uniform law for the administration of Islamic Law in Malaysia. Such a law can then be passed by Parliament under the provisions of Article 76(1)(b) of the Federal Constitution and the law can then be adopted by each of the States in Malaysia. Such a law will nor come into force in any State until it has been so adopted by the Legislature of the State and when so adopted it will become a State Law, subject to any amendment considered necessary by the State Legislature. In this way it will be possible to have a uniform law which will not trespass on the rights, privileges, prerogatives and powers of the Ruler as Head of the religion of Islam in his State. The law should also provide for the service and enforcement of the process and orders of the Shariah Court throughout Malaysia. For example a summons issued by a Kathi in Selangor can be enforced in Johore if it has been endorsed for service outside jurisdiction and authenticated by a Kathi in Johore; similarly an order of the Kathi's Court in Selangor can be enforced in Johore, if authenticated by a Kathi's Court in Johore.

The position and status of the Kathis and Kathi's Courts in Malaysia should be upgraded and improved. Not only should their status, salaries and terms of service be improved, but their judgments and decisions should receive due consideration and respect. One way in which this can be done is to publish the reports of the decisions of the Kathis or at least of the Boards or Courts of Appeal. An effort has already been made by the publication of Jernel Hukum[42] and this should receive the support and co-operation of all those engaged in the administration of the Islamic Law.

If we go back to the time of the Prophet (Peace be upon him) and the early Caliphs we find that decisions were given on actual cases brought before the Prophet or the Caliphs. Indeed we find that the Prophet discouraged the Muslims from raising question on matters which have not actually happened.

Thus we read in the Hadith of a number of cases decided by the Prophet. A few example are given below –

(a) Khansa binte Khidam Al-Ansariya reported that her father gave her in marriage when she was a *thayyib* and she disliked the marriage. So she went to Allah's Messenger (Peace be upon him) and he declared the marriage invalid. (Sahih Al-Bukhari Vol. 7 p. 52: Hadith 69).

(b) Ayesha reportd: Sa'd b. Abu Waqqas and Abd' b. Zaman disputed with each other over a young boy. Sa'd said "O Messenger of Allah, he is the son of my brother Utba b. Abu Waqqas, as he made it explicit that he was his son. Look at his resemblance". Abd' b. Zaman said "O Messenger of Allah, He is my brother as he was born on the bed of my father from his slave girl". (Allah's Messenger may peace be upon him) looked at his resemblance and found a clear resemblance with Utba. But he said "He is yours O Abd' (b. Zaman) for the child is to be attributed to one on whose bed it is born and stoning is for the fornicator". (Sahih Muslim Vol. 11 p. 744; Hadith 3435)).

[42] Published by Religious Department, Prime Minister's office, Malaysia.

(c) Ayesha reported: There came the wife of Rifa'a alQurazi to the Messenger of Allah and said "I was married to Rifa's but he divorced me, making my divorce irrevocable. Afterwards I married 'Abd al-Rahman b. Al-Zubair, but all he possesses is like the fringe of a garment." Thereupon Allah's Messenger smiled and said, "Do you wish to return to Rifa'a. You cannot do it until you have tasted his sweetness and he Abd Al Rahman has tasted your sweetness". (Sahih Muslim Vol. 11 p. 729; Hadith 3354).

(d) Ibn Abbas narrated: The wife of Thabit bin Qais came to the Messenger of Allah and said "O Messenger of Allah: I do not blame Thabit for any defects in his character or his religion but I dislike to behave in an unIslamic manner (in another narration; but I cannot endure to live with him)". On that Allah's Messenger said to her "Will you give back the garden which your husband has given you?" She said, "Yes". Then the Prophet said to Thabit "O Thabit! Accept the garden and divorce her". (Sahih Al-Bukhari Vol. VII p. 150; Hadith 177).

(e) Narrated Ibn Abbas: Barira's husband was a slave called Mughith. I imagine I can see him now, going behind Barira, and weeping with his tears flowing down his beard. The Prophet said to Ibn Abbas "O Abbas! are you not astonished at the love of Mughith?" The Prophet then said to Barira "Why don't you return to him?" She said "O Messenger of Allah! Do you order me to do so?" He said, "No, I only intercede for him". She said, "I am not in need of him". (Sahih Al-Bukhari Vol. VII p. 154; Hadith 154).

(f) Jaber reported that the wife of Sa'ad b. Rabiy came with her two daughters by Sa'ad to the Messenger of Allah. He said "O Messenger of Allah, they are the two daughters of Sa'ad b. Rabiy. Their father was martyred on the day of Uhud, and their uncle has taken their property. He has not left any property for them and they cannot be married unless they have got property." He said, "Allah will decide about

that". Then the verse of inheritance was revealed. So the Prophet sent for their uncle and said, "Give the two daughters of Sa'ad two-thirds and give their mother one-eighth and what remains is for you". (Mishkat-ul-Masabih) Vol. II p. 334; Hadith 54).

(g) Sa'd bin Abu Waqqas narrated: "The Prophet came visiting me while I was sick in Mecca". I said "O Allah's Messenger. May I will all my property in charity?" He said, "No". I said, "Then may I will half of it?" He said "No". I said, "one-third?" He said, "Yes, one-third, though one-third is too much. It is better for you to leave your heirs wealthy than to leave them poor begging from others". At that time Sa'd had only one daughter. (Sahih Al-Bukhari Vol. IV p. 3:Hadith 5).

We are told that when Abu Bakr the First Caliph had to pass a judgment he looked into the Quran. If he found an applicable text therein, he would apply it. If not he turned to the Sunnah. If he found an applicable text therein he would apply it. If not, he would ask the people whether any of them know of a judgment passed by the Prophet on the particular issue. It sometimes happened that some people would come forward and state that the Prophet had passed a judgment on it. If there was nothing at all, he would summon the chief representatives of the people and consult with them. Umar, the Second Caliph did the same, except that he used to ask whether Abu Bakar had passed judgment on the issue before he passed it.[43]

There is no reason why we should not follow a rule of precedent in Islamic Law. By relying on decided cases as precedents we will be keeping closer to the practical aspect of the law. Indeed it would be better for fatwas or rulings on the law to be given in relation to the facts of a particular case and after argument by the parties or their representatives. It is not suggested that we should follow a strict doctrine of binding precedent as is to be found in the English law applied in Malaysia. There is no need for us to copy the English doctrine,

[43] Ibn Qayyim, *'I'lam al-Muwaqqi' in* I, 62 and 85–86, quoted in Said Ramadan, Islamic Law, 1970, p. 35.

as we have had our own principles of precedent long before English law was born.

We might end by quoting some extracts from a letter written by Umar the Second Caliph to a qadi, Abu Musa Al-Ash'ari:[44]

> Jurisdiction is to be administered on the basis of the Quran and Sunnah. First understand what is presented to you before passing any judgment. Full equality for all litigants: in the way they take their places in your presence, and in the way you look at them, and in your jurisdiction. That way no highly placed person would look forward to your being unjust nor would a weak one despair of your fairness. The burden of proof is the responsibility of the plaintiff and the oath is upon the denying party. Compromise is always the right of litigants except if it allows what Islam has forbidden or forbids what Islam has allowed. Clear understanding of every case that is brought to you for which there is no applicable text of the Quran and Sunnah. Yours then is a role of comparison and analogy, so as to distinguish similarities and dissimilarities — thereupon seeking your way to the judgment that seems nearest to justice and apt to be best in the eyes of Allah. Never succumb to anger or anxiety, and never get impatient of your litigants".

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[44] *Ibid.*