

TOWARDS AN ISLAMIC LAW FOR MUSLIMS IN MALAYSIA *

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"¹

The Yang di-Pertuan Agong in his oath of office swears *inter alia* "We do solemnly and truly declare the We shall at all times protect the Religion of Islam and uphold the rules of law and order in the Country"²

Article 11 of the Federal Constitution reads "every person has the right to profess and practise his religion and subject to clause (4) to propagate it."³

This paper discusses the right of the Muslims in Malaysia (a) to practise the religion of Islam in peace and harmony under Article 4(1) of the Constitution and (b) to profess and practise the religion of Islam and to propagate it. In order to understand the religion of Islam it is necessary to know the meaning of the word "Islam" and its derivative "Muslim." The Prophet (s.a.w.) in a long hadith stated in answer to the question "What is Islam?" — "It consists in giving your heart solely to Allah"⁴. The lexical meaning of a Muslim is "a person who has dedicated his worship exclusively to Allah for just as we say in Arabic that something is "salima" to a person meaning that it becomes solely his own, so in the same way "Islam means making one's religion and faith Allah's alone"⁵

The common definition of Islam among the Muslims states that it has three constituents: first confession with the tongue that there is no god but Allah and that Muhammad is the Messenger of Allah; secondly, believing from the heart in everything that the Prophet proclaimed in matters of faith, law, ethics and the social system; and thirdly, living in practice according to all that Islam requires by doing what it enjoins and refraining from what it forbids.⁶

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¹Federal Constitution, Article 4(1)

²*Ibid*, Fourth Schedule

³*Ibid*, Article 11(4)

⁴Hadith narrated by Ahmad ibn Hanbal referred to in Abdul Haleem Mahmud, *The Creed of Islam*, London 1978, p. 13.

⁵Al-Fakhr al-Razi Commentaries on the Holy Quran, quoted in Abdel Haleem Mahmud, *The Creed of Islam*, London 1978, p. 13.

⁶Abdel Haleem Mahmud, *The Creed of Islam*, London, 1978, p. 13.

Obedience to Allah and His Messenger is therefore incumbent on a Muslim and the fundamental law for the Muslims is the Islamic Shariah. The Holy Quran states to the effect⁷ —

“O you who believe! Obey Allah and obey the Messenger and those charged in 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”.

Islamic law has its foundations in Divine revelation. It is the Muslim belief that Allah has sent his messengers from time to time and in different places to guide men to the right path. All these messengers were inspired to teach men the correct way of behaviour and life so that they can achieve the good of this world and the good of the Hereafter. Mohammed (s.a.w.), we believe, is the last of these Prophets. His mission was not to initiate new religious laws and beliefs but to perfect those taught previously. The true religion, the religion of Adam, Noah, Abraham, Moses and Jesus was based on the oneness of Allah which depends on the unity of His Creation. The message revealed to the Prophet Mohammed (s.a.w.) has been preserved in the Holy Quran, which has come down to us in its original form. The text of the Holy Quran has been preserved not only in the written form but in the hearts and minds of the Muslims, many of whom have learnt it by heart. Indeed Allah says to the effect⁸ —

“We have without doubt sent down the Message and We will assuredly guard it from corruption”.

In addition to the text of the Holy Quran we have the example of the Prophet (s.a.w.) who in his lifetime exemplified the teachings of the Holy Quran and showed how it should be put into practice. In this respect we believe that the Prophet (s.a.w.) was guided by Allah, so that the interpretation of the Holy Quran is also based on revelation. The Holy Quran states to the effect⁹

“Your Companion (Mohammed) errs not nor is he deceived. Nor does he say anything of his own desire. It is no less than inspiration sent down to him”

In the Islamic system therefore Allah alone is the author of all laws. This is because Allah is the Creator and is the Knower of all things. The Holy Quran states to the effect¹⁰ —

“Whatever is in the Heavens and on earth declare the praises and glory of Allah. For He is the Exalted in Might, the Wise. To Him belongs the domi-

⁷Surah An-Nisaa (4): 59

⁸Surah Al-Hijr (15): 9

⁹Surah An-Najm (53): 2-4

¹⁰Surah al-Hadid (57): 1-3

nion of the Heavens and the Earth; it is He who gives life and death; and He has power over all things. He is the First and the Last, the Outward and the Inward; and He has full knowledge of all things¹¹.

There are many ayat in the Holy Quran which emphasise this fact — that the Command is only from Allah. Among them are ayat to the effect —

“The Command is for none but Allah. He has commanded that you worship none but Him; that is the right religion but most men understand not”,¹¹

“We have sent down to you the Book in truth that you might judge between men as guided by Allah”,¹²

“Follow the revelation given to you from your Lord and follow not as friends and protectors other than Him”,¹³

We believe that only the law which comes from Allah is without any defect and any shortcomings because it is laid down by Him, the All-Knowing, the All-Wise. Allah the Almighty alone has no interest to maintain or desire to fulfil and He alone knows the innermost secrets of the human soul. His Divine knowledge encompasses all men’s past, present and future until the Day of Judgment.

The Shariah is laid down by Allah, the All-Knowing, who created men and knows all the innermost secrets of his soul. He also knows all that men needs. The Holy Quran states to the effect¹⁴ —

“Should He not know — He that created? and He is the One that understands the finest mysteries and is well acquainted with them.”

The Shariah revealed in the last message was meant to comprehend the entirety of men’s life in all its political, economic, social, intellectual and spiritual aspects. It was also meant to absorb the sound and normal growth of human life. Some aspects of human life are stable and unchangeable or ought to be so because they are basic and life cannot be righteous without them. On the other hand there are ever-changing and ever-growing aspects of human life which will have to be allowed sufficient room to grow and move in, otherwise humanity will fail to achieve the progress which is part of its function and existence on earth. But in the course of growth and mobility, the ever-changing and ever-growing aspects of human life, must be controlled otherwise mankind will suffer from the evil consequences of these changes. The Shariah, revealed to comprehend and absorb human

¹¹Surah Yusuf (12): 49

¹²Surah An-Nisaa (4): 105

¹³Surah al-A'raf (7): 3

¹⁴Surah al-Mulk (67): 14

life for all time was intended to respond to both aspects of human life, the changing and the changeless, in order to meet all the needs of men.

The basic and changeless aspects of human life have been regulated by Divinely inspired changeless and detailed rules. The question of Divinity for instance, and all that is associated with it; the necessity of worshipping the Creator without associating any partner or partners with Him in matters relating to rituals or the implementation of the Shariah, as well as divine laws which guarantee that men's blood, property or moral integrity and reputation should be safeguarded, all the above questions have been settled and regulated by Divine changeless rules.

As for the ever-changing aspects of human life, the political, economic and social, the Shariah has provided a permanent structure and firm frame for each and has entrusted those who are committed, believing and learned with fixing the right practice into the right frame. Thus the political, social or economic picture of society constantly changes to suit the age and as a consequence the theoretical and applied sciences have been acquired and developed. But while changing they do not lead men astray or undermine the fundamental principles on which they base their lives.

The teachings of the Holy Quran and the decisions of the Prophet (s.a.w.) are absolutely binding on the Muslims. The Holy Quran states to the effect¹⁵

"It is not fitting for a believer 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 on a clearly wrong path"

Such teaching are also eternal and cannot be modified or amended by any human being. This does not mean however that the Islamic Law is fixed and rigid and cannot be adapted to the needs of a particular time or place. Rather we find that because the legislation in the Quran and the Sunnah are basically inclined towards establishing general rules without indulging in much detail and from the beginning the texts were directly meant to deal with actual events, there is in fact ample room for interpretation and expansion so that the legislation can meet the needs of the particular time and place. This is shown clearly in the lifetime of the Prophet (s.a.w.) himself. We are told in a hadith that when the Prophet appointed Muadh Ibn Jabal to be the governor of Yaman he asked the governor-designate

"How would you decide?" "According to the Book of Allah". "If you do not find precision therein?" "Then according to the Sunnah of the Messenger of Allah". "If you do not find precision there too?" "Then I will exert myself to form my own judgment" "Praise be Allah who has enabled the messenger of the Messenger of Allah to a thing which pleases the Messenger of Allah" exclaimed the Prophet (s.a.w.)¹⁶

¹⁵Surah Al-Ahzab (33): 36

¹⁶Sunan Abu Dawud Kitab Al Aqdiyah Cap 1348 in Translation Vol 3 p. 1019

The Prophet (s.a.w) also encouraged his Companions to use their intellect to resolve their problems. Thus the Prophet (s.a.w.) asked Amr ibn Al-as to hear and decide a certain case. On what basis he asked? The Prophet said "If you attain the real truth you have the double reward from Allah, if not you still attain the single reward"¹⁷

Thus besides the primary revealed sources of the law, we have the secondary sources which are based on the use of reasoning or *ijtihad*. As Imam Shafii states¹⁸

"For every issue concerning a Muslim either there is a binding text (of the Holy Quran or the Sunnah) that rules it or there is guidance that may indicate the way to truth. If there is a text then the Muslim has to follow it. In case there is no text directly applicable then he has to seek a guidance to truth by *al-ijtihad*"

Imam Shafii also explains the difference between the authority of these two sources. He says¹⁹

"Knowledge applies to two categories of truth; one which is a factual truth in appearance and in fact and one which is a seemingly probability of truthfulness. The first category only applies to the texts of the Holy Quran and Sunnah successively authenticated generation after generation. These texts alone may allow or forbid and this in our opinion is the basic fact that no Muslim may either ignore or doubt — Knowledge attained through the medium of *al-ijtihad* belongs to the second category; thus what it attains is binding only on the one who exercised it and not on other men of knowledge".

Imam Shafii proceeds to illustrate the difference between the two categories by means of an example. He asks²⁰

"When we find ourselves in the Sacred Mosque at Mecca and see the Kaaba before us are we obliged to face it with exactitude?" When his interlocutor answers "Yes" Al-Shafii proceeds "Are we obliged, wherever we may be, to turn in our prayers to the Kaaba?". The answer naturally is "Yes". Thereupon Al-Shafii asks "Are we in such a case absolutely certain that we are facing the Kaaba with exactitude?". The answer is "If you mean that you are facing it with the same exactitude as when you had it before your eyes, the answer is no. But even so you have done your duty". Then Al-Shafii says "It follows therefore that our obligation with regard to something that is not visible to our eyes is different from our obligation with regard to

¹⁷Sunan Abu Dawud Kitab Al-Aqdiyah Cap 1339 in Translation Vol 3 p 1013

¹⁸Imam Shafii Risala translated as Islamic Jurisprudence by Majid Khadduri Chapter XII on Qiyas p 288; Said Ramadan, Islamic Law, p. 85

¹⁹Ibid p 289-290; Said Ramadan, Islamic Law, p. 85

²⁰Ibid p 290-291; 302-303; Said Ramadan, Islamic Law, p. 85-86

something that is not seen. Similar is the case with regard to that on which there is no binding injunction in the text of the Quran or Sunnah; for in this case we are striving by means of *ijtihad* and we are obliged only to the extent of what we consider to be the truth".

Thus the Holy Quran states to the effect²¹—

"To you We have sent the Book in truth, confirming the scriptures that came before it and guarding it in safety; so judge between them by what Allah has revealed and follow not their vain desires, diverging from the truth that has come to you. To each of you have We prescribed a Law and an Open Way. If Allah had so willed He would have made you a single people, but His plan is to test you in what He has given you: so strive as in a race in all virtues. The goal of you all is Allah; it is He that will show the truth of all matters in which you dispute. And this He Commands "Judge you between them by what Allah has revealed and follow not their vain desires but beware of them lest they beguile you from any of that teaching which Allah has sent down to you. And if they turn away be assured that for some of their crimes it is Allah's purpose to punish them. And truly most men are rebellious. Do they then seek after a judgment of the Days of Ignorance? But who, for a people whose faith is assured, can give better judgment than Allah?"

During the time of Malay rule in Malacca and later in the Malay States, the law that was followed was the Islamic Law superimposed on the Malay adat. There is little record of the way the law was administered but the law has been embodied in the legal digests, the Malacca Digest of about 1450, the Pahang Digest of 1596, the eighteenth century Ninety-nine laws of Perak, the Digests in Kedah from 1650 to 1784 and the Johore Digest of 1789²². In the Federated Malay States in the case of *Ramah v. Laton*²³ a majority of the Court of Appeal held that Muslim Law was the law of land and the Courts had to propound that law itself and were not competent to take evidence as to what it was. In Johore it was held in *Fatimah v Haji Ismail*²⁴ that Muslim Law is a part of the law in Johore and is not foreign law. In the case of *State of Johore v. Salleh bin Haji Hassan*²⁵ it was even held that the laws of religion and the Muslim Law in Johore cannot be varied by enactment, though this must unfortunately be now read in the light of the later decision of the Court of Appeal in *Anchom v Public Prosecutor*²⁶. In the recent case of *Dato Bentara Luar decd*²⁷

²¹Surah Al-Maida (5): 51-53

²²See Liaw Yock Fang *Undang-undang Melaka*, Hague, 1976, 1976; M.B Hooker *Adat Laws in Modern Malaya*, Oxford, 1972, p. 72f

²³[1927]6 F.M.S.L.R. 128

²⁴[1939] MLJ 134

²⁵[1939] Johore Law Reports 73

²⁶[1940] MLJ 22

²⁷[1982]2 MLJ 264

Salleh Abas F.J. (as he then was) held that the basic law of Johore in 1911 was the Muslim Law. However all this was changed by British influence. Through their power to advise the Malay Sultans, the British were able to have a number of laws enacted which replaced the Muslim Law with codes borrowed from India based on English principles. Thus the Penal Code, Evidence Enactment, and the Criminal Procedure Code were introduced in place of the Islamic Law relating to crime, evidence and criminal procedure. The Contract Enactment and the Specific Relief Enactment were introduced to replace the Islamic Law of Contract. In the field of Land Law, the Islamic Law was replaced by a system of registration of title based on the Torrens System. Moreover when courts were set up in the Malay States and manned by British judges they introduced the principles of English Law even in the absence of any written law. Thus the English principles of tort and equity were introduced in the Malay States. This judicial legislation was approved by the legislature with the enactment of the Civil Law Enactment, 1937²⁸ which originally applied to the Federated Malay States but was extended to the other Malay States in 1951²⁹. Finally the Civil Law Ordinance of 1956³⁰ provided that save in so far as other provision has been made or may hereafter be made by any written law 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 on the 7th April 1956. Thus in effect English Law replaced the Islamic Law as the basic law and Islamic Law was relegated to a subsidiary and subordinate status.

Under the terms of the various treaties under which British influence was introduced in the Malay States, the Malay Rulers agreed to accept the advice of the British in all matters except the Muslim religion and Malay custom. In practice however the British interfered with the administration of the Muslim Law with the result that the powers of the Shariah Courts, which administered the Islamic Law, were curtailed and subordinated to that of the Civil Courts. In the Federated Malay States the Courts for the administration of Civil and Criminal Law in the states included the Court of a Kathi and the Court of an Assistant Kathi.³¹ In Kedah there was an elaborate system of courts established under the Courts Enactment of 1905³² consisting of

- (i) The State Council that could sit as a Court of Appeal and hear cases from the Chief Court; in religious suits it was advised by two Ulema.

²⁸No 3 of 1937

²⁹Civil Law (Extension) Ordinance, 1951 (No 49 of 1951)

³⁰No 5 of 1956

³¹Perak Order in Council No 11 of 1890; Negeri Sembilan Order in Council No 1 of 1893; Courts Enactment 1900; Courts Enactment, 1905; Courts Enactment 1918 (No 14 of 1918) and the Courts Enactment (Cap 2 of Revised Edition) 1935.

³²Kedah Annual Report, 1905

- (ii) The Chief Court presided over by a member of the State Council that was empowered to hear all cases and appeals from the District Officer's Court.
- (iii) The Kathi's Court which dealt with Muslim personal matters only — succession, marriage and divorce.
- (iv) The District Officer's Court presided over by a Malay Magistrate.

In 1909³³ the courts system was reformed and replaced by the following —

- (i) The Court of the State Council
- (ii) The Court of Appeal
- (iii) The High Court
- (iv) The Shariah Courts
- (v) The District Courts

Appeals from the District Courts and the Court of Appeal were decided by the Court of the State Council consisting of members of the Council, other than its President and the British Adviser; the assistant adviser (an Englishman) and two experts in the Shariah joined it for the hearing of appeals from the High Court and the Shariah Courts. It had besides a general control of all the courts of the state and every sentence of death or of imprisonment of fourteen years and above had to be referred by the High Court to it. The British Adviser sat in all cases in which Europeans or British subjects were involved.

From 1912 onward certain improvements were made in the Shariah Courts. More highly qualified Kathis were appointed and their salaries raised. Appeals went to the High Court and were heard by the Malay judges, of whom the Sheikh al Islam was usually one.³⁴

Under the Courts Enactment (Enactment No 25)³⁵ the Courts for the administration of Civil and Criminal Law in the State were —

- (i) The Court of Appeal
- (ii) The First Division of the High Court
- (iii) The Second Division of the High Court
- (iv) The Court of a Magistrate of the First Class
- (v) The Court of a Magistrate of the Second Class
- (vi) The Court of a Magistrate of the Third Class
- (vii) The Shariah Courts.

Appeals from the decisions of the Shariah Courts were heard and determined by the Second Division of the High Court but no appeal lay from the decision of a Shariah Court in a criminal case

³³Enactment No 10 of 1339; Kedah Annual Report, 1909

³⁴Kedah Annual Reports 1912-1920

³⁵Courts Enactment (Enactment No 25), Laws of Kedah, 1934, Vol 2 Shariah Courts Enactment (Enactment No 109)

- (a) except by the person convicted against his conviction;
- (b) except with the written sanction of the Chief Kathi against an acquittal;
- (c) except by the person convicted, to the extent or legality of the sentence.

Appeals from the decisions of the Shariah Court were heard with the aid of the Sheikh-ul-Islam.

In Perlis the court structure was basically similar to that in Kedah and was established by the Courts Enactment of 1330/1912³⁶. They comprised —

- (i) The Court of the Raja in Council, that is, the State Council sitting in a judicial capacity; it heard appeals from the Senior Court or decided cases referred to it by the Court;
- (ii) The Senior Court consisting of a Malay judge sitting together with the British Adviser and exercising original and appellate civil and criminal jurisdiction;
- (iii) The Junior Court consisting of a single Malay judge, from which appeals went to the Senior Court;
- (iv) The Shariah Court of the Kathi or assistant Kathi with jurisdiction over Muslims in matters of marriage and divorce, custody of children and religious observances.

It was provided that when any difficult question of Muslim Law arose in any proceeding in any court the Kathi may be called upon to sit with such court and give his opinion upon such question.

In Kelantan there was a High Court, a Central Court and a Court of Small Causes. The Sultan and one of his uncles constituted the High Court which was also the Court of Appeal. There was a separate Shariah Court of three judges in the main for suits connected with marriage, divorce, inheritance and breaches of morality. The Kelantan Courts Enactment of 1930³⁷ regularised the system of Courts. The Courts then were the following —

- (i) The Court of Revision with a bench of one, the Sultan who had to consult the British Adviser before taking a decision;
- (ii) The Court of the Senior Magistrate, with unlimited jurisdiction in criminal, probate and civil matters as well as being a Court of Appeal. The Mufti sat as adviser in Muslim criminal cases and on Islamic Law;
- (iii) Courts of Magistrate of the First and Second Class;
- (iv) The Court of the Penggawa, for petty offences only, appeals lying to a Court of the Magistrate of the First Class;

³⁶Courts Enactment, 1330 (No 4 of 1330)

- (v) The Court of the Chief Kathi with jurisdiction in civil matters according to Islamic Law and Malay Custom. Its criminal jurisdiction was confined to cases of assault between husband and wife; appeals went to the Sultan;
- (vi) The Court of a District Kathi: appeals went to the Mufti or after 1919 to the Majlis Ugama Islam.

The Kelantan Enactment described in detail the authority of the Kathi Court to wit, marriage and divorce; dissolution of marriage, maintenance of wives and children; division of property of a husband and wife before or after divorce; determination whether a person was entitled to a share in any inheritance and other matters of a religious matter. When the value of a dispute exceeded \$500 it had to be heard by the judicial governor, sitting with the Chief Kathi or Mufti, whose advice was sought in settling any question of Islamic Law. Appeals from the decisions of the Court of a Kathi or Chief Kathi or of the judicial governor in an Islamic matter lay to the Sultan and his decision was final.

The Enactment of 1930 was replaced by the Courts Enactment of 1938³⁸ which provided that the Courts for the administration of Civil and Criminal Courts in the State shall be as follows:-

- (a) The High Court
- (b) Courts of Magistrates of the First Class
- (c) Courts of Magistrates of the Second Class
- (d) Courts of Kathis and of the Chief Kathi
- (e) Courts of Penggawa

The Enactment reenacted the provisions relating to the Courts of Kathis and of the Chief Kathi. It was also provided that notwithstanding anything contained in any law relating to evidence or civil procedure, any court before which any question of Islamic Law arises in any civil suit or matter may refer such matter to the Mufti for his opinion. Upon the receipt of such opinion from the Mufti, the Court which made the reference shall proceed to determine the matter in accordance with such opinion. No appeal shall lie from the order or decree of any court in so far as such order or decree is based on and is in accordance with the opinion of the Mufti.

In Terengganu three courts existed. They were:-

- (i) The Mahkamah Balai, in which the British agent sat with a Malay judge. The two had equal powers and administered Islamic Law as well as the Laws of the State;
- (ii) The Court of the Malay Judge (Hakim) sitting alone;
- (iii) The Mahkamah Shariah.³⁹

³⁷Kelantan Annual Reports 1930

³⁸Courts Enactment (No 31 of 1938) in Legislation in Kelantan, 1938, Vol 2

³⁹Terengganu Annual Report 1918

The appeals procedure was introduced in 1917.⁴⁰ The Sultan sat as President of a Court of Appeal of three judges and the other courts were changed to the First Magistrate's Court (Mahkamah Shariah) and the Second Magistrate's Court (Mahkamah Magistrate). In 1921 the Courts Enactment⁴¹ reorganised the civil and criminal courts. The courts were

- (i) The Court of the State (which was also the Court of Appeal) consisting of the British Adviser with two of the Mentris appointed by the Sultan. Normally the Mufti and the Sheikh-ul-Islam sat together with the British Adviser and heard and decided all appeals from the Supreme Court;
- (ii) The Supreme Court in three divisions; the Kuala Trengganu Division consisted of a Malay Chief judge and a European member but only the former was entitled to decide matters relating to Muslim Law; the other Divisions were the Kemaman Division and the Besut Division;
- (iii) The Courts of Magistrates of the First and Second Class;
- (iv) Court of a Kathi to deal with all religious matters, marriage and divorce and disputes between husband and wife, appeals going to the Sultan;
- (v) Courts of Penghulus.

Johore too defined the constitution and powers of its Courts in 1911.⁴² The Courts were:-

- (i) Court of the Sultan in Council;
- (ii) The Supreme Court;
- (iii) Courts of the Magistrate of the First, Second and Third Class;
- (iv) Courts of the Kathi and Assistant Kathis.

The Court of the Sultan in Council was the State Council itself sitting in its judicial capacity with the Sultan or his representative. It was the final Court of Appeal in all matters, civil and criminal, and no death penalty could be carried out without its prior confirmation.

In 1914 the Courts were reorganised as follows⁴³:-

- (a) The Supreme Court, comprising of the Court of a Judge and the Court of Appeal
- (b) The Court of a Magistrate of the First Class;
- (c) The Court of a Magistrate of the Second Class;
- (d) The Court of a Kathi and the Court of an Assistant Kathi.

⁴⁰*Ibid*

⁴¹Courts Enactment, 1921 (Cap 2) in Laws of Trengganu 1941, Vol 1

⁴²Courts Enactment 1911 (No 11 of 1911)

⁴³Courts Enactment, 1914 (No 16 of 1914)

This provision was reenacted in the Courts Enactment of 1920⁴⁴ with the addition of the Courts of Penghulus and the legislation was included in the Revised Edition of 1935 as Enactment No 54.⁴⁵

Thus until 1948 the Shariah Courts, that is the courts of the Chief Kathi, Kathis and Naib Kathis, were part of the judicial structure in the Malay States. It was the Courts Ordinance of 1948⁴⁶ which set up a system of Federal Courts. The Federal Constitution in dealing with the judicial power does not refer to the Shariah Courts nor does the definition of Law include the Islamic Law.⁴⁷

In the early case of *Reg v Willans*⁴⁸ Maxwell R. referred to the view of Lord Coke in *Calvin's case*⁴⁹ where he said "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". In commenting on this Maxwell R said — "Although Lord Mansfield treated this proposition as absurd, the Indian Law Commissioners were well justified I think, in asserting that "a system of law which according to its own principles, can only be administered by Mohametan Judges and Mohametan arbitrators, upon the testimony of Mohametan witnesses, is not a system which can devolve *de 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*".

It cannot be argued that English Law has no connection whatsoever with Christianity. There are opinions of many judges to show that Christianity is part of the law of England. In *Taylor's Case*⁵⁰ Hale Chief Baron said "To say that religion is a cheat is to dissolve all those obligations whereby the civil societies are preserved. Christianity is parcel of the laws of England and therefore to reproach the Christian religion is to speak in subversion of the Law".

In *Cowan v. Milbourn*⁵¹ Kelly C.B. said "there is abundant authority for saying that Christianity is part and parcel of the law of the land".

In the case of *In re Bedford Charity*⁵² Lord Eldon said "I apprehend that it is the duty of every judge presiding in a court of justice when he is told that there is no difference between worshipping the Supreme Being

⁴⁴Courts Enactment, 1920 (No 17 of 1920)

⁴⁵Courts Enactment (Enactment No 54) in Laws of Johore, 1935, Vol 1

⁴⁶Courts Ordinance, 1948 (No 43 of 1948)

⁴⁷Federal Constitution Part IX and Article 160

⁴⁸(1858) 3 Ky. 16

⁴⁹7 Coke's Rep 1, 10; 77 E.R. 377, 388

⁵⁰1 Vent 293; 86 E.R. 189

⁵¹(1867) 2 Ex 230

⁵²2 Swants. 470; 36 E.R. 696

in chapel, church or synogogue, to recollect that Christianity is part of the law of England."

In *Bowman v. Secular Society Ltd*⁵³ Lord Finlay L.C. in a dissenting judgment said "It has been repeatedly laid down by the courts that Christianity is part of the law of the land and it is the fact that our civil polity is to a large extent based upon the Christian religion. This is notably so with regard to the law of marriage and the law affecting the family. The statement that Christianity is part of the law of the land has often been given for punishing criminally contumelious attacks upon Christianity. It is true that expressions have in some cases been used which would seem to imply that any attack upon Christianity however decently conducted would be criminal. For the reasons I have already given I do not think that this view can be accepted as having represented the common law of England at any time. But the fact that Christianity is recognised by the law as the basis to a great extent of our civil polity is quite sufficient reason for holding that the law will not help endeavours to undermine it".

Lord Sumner was one of the judges who disagreed with Lord Finlay in *Bowman v Secular Society Ltd* but he said in his judgment⁵⁴ — "Ours is, and always has been a Christian State. The English family is based on Christian ideas and if the national religion is not Christian there is none. English law may well be called a Christian Law but we apply many of its rules and most of the principles with equal justice and equally good government, in heathen communities, and its sanctions, even in courts of conscience, are material and not spiritual."

Because of their devotion to English Law and its principles their slight knowledge of and sometimes their prejudice against Islamic Law, English judges and some English trained judges tended to ignore and avoid the Islamic Law. Thus in the case of *Anchom v Public Prosecutor*⁵⁵ the judges of the Court of Appeal in Johore failed to appreciate the difference between *hadd* and *ta'azir* offences under the Islamic Law and therefore rejected the argument that an enactment of the legislature would be void if it is contrary to the Islamic Law of the State. In the Singapore case of *In re Maria Hertogh*⁵⁶ the Court of Appeal applied the English principles of domicile to render a Muslim marriage, valid under Islamic Law, null and void. On the other hand in *Martin v Umi Kalsom*⁵⁷ the English principles of domicile were applied to make a marriage clearly invalid under the Islamic Law valid. Where there was a statute of general application like the Evidence Ordinance, it could be applied so as to affect the personal law of Muslims, as in *Ainan v Syed Abu Bakar*⁵⁸. A right to bring an ac-

⁵³[1917] A.C. 406 at p 428

⁵⁴*ibid* at p 464

⁵⁵[1940] MLJ 22

⁵⁶[1951] MLJ 64

⁵⁷[1963] MLJ 1

⁵⁸[1939] MLJ 209

tion for damages for breach of promise of marriage — unknown in Islamic Law and now abolished in England — is still available for Muslims in Malaysia as shown in *Nafsiah v Abdul Majid*⁵⁹. Even where the legislation expressly states that its provisions shall not be applicable if contrary to the Islamic Law, it can be interpreted to allow English principles to apply, as in *Myriam v Mohamad Ariff*.⁶⁰

Even an express provision as in section 25 of the Civil Law Act, 1956 that nothing in Part VII of the Act shall affect the disposal of any property according to Islamic Law has been overridden as in *Re Man bin Minhat*⁶¹ and in *Commissioner of Religious Affairs v Tengku Mariam*.⁶² Decisions of the Kathis courts can be altered by decisions of the Civil Courts and in some cases the views of the Mufti as to the Islamic Law are ignored and brushed aside.

Although the Yang di-Pertuan Agong and the Malay Sultans are heads of the Islamic religion in their respective states, they have no power to legislate in matters of Islamic Law. Such laws have to be enacted by Parliament or the State Legislative Assemblies. Some of the Malay Sultans felt and voiced their responsibilities in this matter. Thus in 1898 the Sultan of Pahang is recorded as stating in the State Council as follows:-⁶³

“His Highness says that he is growing an old man and that the thought of his responsibility in this matter fills him with fear that he will shortly be called upon to render an account to God for all actions and of his neglect to fulfil His law. His Highness says that he feels sure that if the Government realises his position in the matter and the immense importance which this question must have in his eyes, it will find a means of punishing such crimes as he has named and will relieve him of the weight of a moral responsibility which he finds himself quite unable to bear”.

The call for the application of the Islamic Law in Malaysia must therefore be seen in its proper light. The Muslims in Malaysia have been deprived of the right to follow their religion and their laws and all they are asking is that they be given the right to profess and practise their religion and their way of life.

The most urgent legislative change that they seek is a provision for the better administration of the Islamic Law in properly organised and well-equipped courts headed by trained and qualified judges. At present the position of the Islamic courts and their judges lags much behind that of the Civil courts and therefore efforts have been made to improve the status and prestige of the courts and the judges. Legislation has been enacted in

⁵⁹[1969] 2 M.L.J. 174

⁶⁰[1971] 1 M.L.J. 265

⁶¹[1965] 2 M.L.J. 1

⁶²(1970) 1 M.L.J. 222

⁶³Pahang Government, Gazette No 23 Vol II December 21, 1898 p 377

some states like Kedah and Kelantan and is being considered in other states.⁶⁴

The legislation relating to the administration of the Islamic Family Law needs also revision and amendment to consolidate and improve the provisions and to make them more or less uniform among the states. Here again efforts have been made to propose a draft bill which can be adopted by the states and already a number of states like Kelantan, Kedah, Wilayah Persekutuan, Melaka, Negeri Sembilan, Penang, Selangor and Perak have enacted new Islamic Family Law legislation.⁶⁵

Until recently the Muslims were handicapped in improving their economic status because of the dominance of interest in all aspects of commercial life and even in public finance. The prohibition against the giving and taking of interest is basic in Islamic Law and as the Holy Quran says to the effect —⁶⁶

- 1) "O you who believe! Fear Allah and give up what remains of your demand for *riba* (interest) if you are indeed believers.
2) If you do it not, take notice of war from Allah and His Messenger; but if you turn back you shall have your capital sums. Deal not unjustly and you shall not be dealt with unjustly".

This then explains the call for an Islamic bank, a system of Islamic *takaful* and systems of public finance not based on interest.⁶⁷ The opportunities for investment in ways not contrary to the Islamic Law have also enabled the development of projects to improve the administration of the *bait-ul-mal* and a system of credit to replace the pawnshops. The collection, administration and disbursement of zakat and the development of wakaf properties are in urgent need of study and reform and this matter is being actively considered.

Islam also is against gambling in all its forms and here again efforts have been made to restrict the participation of the Government in gambling activities and prevent Muslims from taking part in them.

In order to improve the administration of Islamic Law in the Shariah Courts, efforts have also been made to enact laws relating to evidence and procedure to be followed in the Shariah Courts. Some of the provisions of the Evidence Act and the Criminal Procedure Code and of the rules of Civil Procedure are not in accordance with the Islamic Law and therefore

⁶⁴Kedah Mahkamah Syariah Enactment, 1983 (No 1 of 1983); Kelantan Administration of the Syariah Court Enactment, 1982 (No 3 of 1982)

⁶⁵Kelantan Islamic Family Law Enactment 1983; Kedah Islamic Family Law Enactment 1979 (No 1 of 1984); Islamic Family Law (Federal Territory) Act, 1984 (Act 303); Malacca Islamic Family Law Enactment, 1983 (No 8 of 1983); Negeri Sembilan Islamic Family Law, Enactment, 1983 (No 7 of 1983); Penang Islamic Family Law Enactment, 1984; Selangor Islamic Family Law Enactment, 1984 (No 4 of 1984); Perak Islamic Family Law Enactment, 1984 (No 13 of 1984)

⁶⁶Surah al-Baqarah (2): 278-279

⁶⁷See Islamic Banking Act, 1983 (Act 276) and Takaful Act, 1984 (Act 312)

the legislation has to be modified or replaced to be applicable to the Shariah Courts. Such legislation has already been enacted in Kelantan and Kedah⁶⁸ and is being actively considered in the other states.

The Islamic Criminal Law against which there is so much prejudice in fact is only part of the Islamic Law. The aim of the punishments imposed under the Islamic Law is not to punish the offenders but to deter offenders and to remind them of the punishment not only in this world but in the hereafter. The Muslims would like to have the Islamic Law applicable to them because it is the law laid down by Allah for their training and benefit. The law we are assured will be a sufficient deterrence and it will be unnecessary except in extreme cases and where the high standards of evidence and proof are fulfilled to punish offenders. It is significant for example to note that while the *hadd* offences for zina, theft and drunkenness have been imposed in Pakistan for some time, no one has yet been punished with the *hadd* punishments. Such cases as have occurred have been dealt with by the *ta'azir* punishment.

The provisions in the Federal Constitution which states "Other religions may be practised in peace and harmony in any part of the Federation"⁶⁹ is in line with the teachings of the Islamic Law. Islamic Law guarantees to the non-Muslims freedom in regard to their religious observances and their religious and customary laws. Indeed even in the Malay States the Perak Order in Council of 1893⁷⁰ gave the Chinese complete freedom in following their customary law and this was only changed by the Distribution Enactment of 1929⁷¹ which introduced and applied the English principles of law to them. Just as the Muslims would like the non-Muslims to be free to follow their own religions and customary laws, so too the Muslims would like to have the freedom to follow their religion and law. The recent trend towards Islamisation in Malaysia is only an attempt to restore to the Muslims the right to profess and practise their religion, from which they have for long been deprived.

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⁶⁸Kelantan Syariah Criminal Procedure Enactment, (No 9 of 1983) Kelantan Syariah Civil Procedure Enactment, 1984 (No 5 of 1984) Kedah Islamic Civil Procedure Enactment, 1979 (No 2 of 1984)

⁶⁹Federal Constitution, Article 3(1)

⁷⁰Perak Recognition of Chinese Laws Order in Council, 1893 (No 23 of 1893)

⁷¹Enactment No 12 of 1929 reenacted in Distribution Ordinance (Cap 71) of the Revised Edition, 1933. See now the Distribution Ordinance 1958 (No 1 of 1958).