

# **‘SYARIAH’ IN MALAYSIA**

by

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“Some religious fanatics talk of bringing in a Muslim system of government, but the many Muslim countries of the world themselves practise a wide variety of governmental systems, and it is unrealistic to imagine that a system of government suitable for conditions in the desert five or six centuries ago would be suitable for a country with daily rain, with rivers, grass and trees and of whose population some 45% are non-Muslim.”

Tun Mohamed Suffian Lord President, “*Parliamentary System versus Presidential System – The Malaysian Experience*” [1979] 2 MLJ lii at lxv

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## **Brief History of Malaysia**

Malaysia is a Federation comprising thirteen (13) states (Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Sabah, Sarawak, Selangor and Trengganu) and three (3) federal territories (Kuala Lumpur, Labuan and Putrajaya).

Historically, Malaysia's ethnic Malays and other indigenous populations lived in village societies and believed in animism. Animism was overlaid by Hinduism and later subsumed by Islam in 15<sup>th</sup> century Malacca.

Before the coming of the British in the 18<sup>th</sup> century, the Sultans in each state were the heads of the religion of Islam and the political leaders in their states, which were Islamic; the Sultans were Muslims, their subjects were Muslims and the law applicable in the states was Muslim law. Under such law, the Sultan was regarded as God's representative on earth. He was entrusted with the power to run the country in accordance with Islamic law<sup>2</sup>.

When the British came, they imposed a system of indirect rule on the states with Sultans through a series of treaties. In some states, a Council of State was set up to advise the Sultan. In other states, the Rulers accepted the office of a

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<sup>2</sup> *Che Omar Bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55 at 56F – H (left), SC

British Resident who had exclusive authority over the administration of the state. These states were effectively protectorates. This period also saw an influx of workers to Malaya (as Malaysia was then known) from China and India. The migrants brought with them their religions and belief systems; Buddhism, Christianity, Confucianism, Hinduism, Sikhism and Taoism.

Thus, under British rule, the Sultans ceased to be regarded as God's representative on earth and were considered a sovereign within his territory. By ascribing sovereignty to a human, the divine source of legal validity is severed and the British turned the system into a secular institution. Thus all laws, including Muslim Law, had to receive its validity through a secular fiat<sup>3</sup> i.e. enacting by a secular authority, which in post-*Merdeka* Malaysia could comprise of *elected* representatives of different ethnicities and religious affiliation.

In 1956, a Constitutional Conference was held in London where an agreement was reached with the British Government that full self-government and independence should be proclaimed by August 1957. A commission known as the Reid Commission<sup>4</sup> was appointed to make recommendations for a suitable constitution for the nation. These recommendations formed the basis of the

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<sup>3</sup> *Ibid.* at 56FH (left) – B (right)

<sup>4</sup> The Commission consisted of Lord William Reid (a Lord of Appeal), Sir Ivor Jennings (a Cambridge Jurist), Sir William McKell (a former Governor-General of Australia), B. Malik (a former Chief Justice in India) and Abdul Hamid (a Judge in Pakistan): *Report of the Federation of Malaya Constitutional Commission 1957*, pp. 5 and 7

Federal Constitution and the Federation of Malaya gained independence on 31<sup>st</sup> August 1957.

The states of Sabah and Sarawak gained independence in 1963 with the formation of the Federation of *Malaysia*. Malaysia consisted of the then Federation of Malaya, Sabah, Sarawak and Singapore. Singapore left the Federation of Malaysia in 1965.

At 2010, the demographics of Malaysia is estimated<sup>5</sup> as follows:-

- a. *Ethnicity*: Malay 50.1%, Chinese 22.6%, indigenous 11.8%, Indian 6.7%, other 0.7%, non-citizens 8.2%;
- b. *Religion*: Muslim 61.3%, Buddhist 19.8%, Christian 9.2%, Hindu 6.3%, Confucianism, Taoism, other traditional Chinese religions 1.3%, other 0.4%, none 0.8%, unspecified 1%.

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<sup>5</sup> Central Intelligence Agency, The World Factbook, Malaysia (est. 2010), (<https://www.cia.gov/library/publications/the-world-factbook/geos/my.html>)

## **The Malaysian Federal Constitution**

The Federal Constitution (“**the Constitution**”) establishes the following features in Malaysia<sup>6</sup>:-

- a. A federation<sup>7</sup>;
- b. A constitutional monarchy<sup>8</sup>;
- c. A parliamentary democracy<sup>9</sup>;
- d. Islam as the religion of the federation<sup>10</sup>, but it does not establish Malaysia as a theocracy<sup>11</sup> and expressly guarantees freedom of religion<sup>12</sup>;
- e. Provides for the rule of law<sup>13</sup>; and
- f. An independent judiciary<sup>14</sup>.

Article 3 of the Constitution reads:-

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<sup>6</sup> *An Introduction to The Legal System of Malaysia*, Tun Muhammad Suffian, Penerbit Fajar Bakti Sdn Bhd (1988), p. 10

<sup>7</sup> Article 1

<sup>8</sup> Article 39, 40 and 43

<sup>9</sup> Article 44 and 62(3)

<sup>10</sup> Article 3(1)

<sup>11</sup> Article 3(4) and 162

<sup>12</sup> Article 11

<sup>13</sup> Article 4

<sup>14</sup> Part IX

**“Article 3. Religion of the Federation.**

(1) Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.

...

(4) Nothing in this Article derogates from any other provision of this Constitution.”

Professor R. H. Hickling writes:-

“...as a general proposition Muslim law cannot be regarded as “the law of the land.” Islam is indeed the religion of the Federation, just as the protestant Church is the established Church of England: but in each case, the state is a secular state, and it is wise to keep religion out of law (as well as out of politics) for the two mix ill.”<sup>15</sup>

Article 4(1) declares the Constitution to be the supreme law of the Federation while articles 5 to 13 (Part II) guarantees the following fundamental liberties respectively:-

- a. life and personal liberty;
- b. slavery and forced labour to be prohibited;

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<sup>15</sup> “*Malaysian Law*”, R.H. Hickling, Professional Law Books Publishers, 1988, pp. 143 – 144

- c. protection against retrospective criminal laws and repeated trials;
- d. equality and non-discrimination;
- e. freedom of movement;
- f. freedom of speech, assembly and association;
- g. freedom of religion;
- h. education rights; and
- i. right(s) to property.

Before a cosmetic constitutional amendment in 1976<sup>16</sup>, article 74(2) (read together with the 9<sup>th</sup> Schedule List II Item 1) empowers State Legislatures to legislate on the following matters relating to the Muslim religion and Malay custom:-

*“Muslim Law* and personal and family law of persons professing the *Muslim religion*, including the *Muslim Law* relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts;

*Muslim Wakafs* and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of *Muslim* religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State;

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<sup>16</sup> *Constitution (Amendment) Act 1976*, ss. 44 and 45, w.e.f. 27-8-1976: the expression “Muslim”, “Muslim religion” and “Muslim court” wherever it appears in the Constitution was substituted with the word “Islamic”, “religion of Islam” and “Syariah court” respectively

Malay custom;

Zakat, Fitrah and Baitulmal or similar *Muslim* revenue; mosques or any *Muslim* public places of worship, creation and punishment of offences by persons professing the *Muslim religion* against precepts of that religion, except in regard to matters included in the Federal List;

the constitution, organization and procedure of *Muslim* courts, which shall have jurisdiction only over persons professing the *Muslim religion* 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 *Muslim religion*;

the determination of matters of *Muslim Law* and doctrine and Malay custom.”

On the significance of “Malay custom”, Justice Hashim Yeop Sani (later the Chief Judge of Malaya) writes:-

“...in Malaysia, Muslim laws are not applied to the whole community nor are they applied in their pure form. It is also to be noted that the various State



legislations in Malaysia and Singapore in the main deal with the administration of Muslim laws and not with the substantive Muslim laws. The substantive Muslim law that is applied is the Muslim law of the Shafii School as *varied* or *modified* by Malay custom.”<sup>17</sup>

On “Islamic law”, Professor R. H. Hickling observes:-

“Islamic law takes its inspiration from the Koran, that revelation made to Muhammed of the word of God, and recorded by the Prophet’s followers after his death.

...

The corpus of Islamic law is known generally as the *Sharia*, the way: and a basic consequence of the origin of such law being in principle divine revelation is that it cannot be altered. Like truth itself, it is changeless. Further, being of divine origin, it extends to all areas of human life, from the moment of wakefulness to the moment of sleep. Like God, it is omnipresent, covering the whole of human existence.”

Under our Constitution, the expression “law” whenever used “includes written law, the common law [of England]...and any custom or usage having the force of law”<sup>18</sup>.

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<sup>17</sup> *Our Constitution*, Datuk Justice Hashim bin Yeop A. Sani, Law Publishers (M) Sdn Bhd, p. 153

<sup>18</sup> Article 160(2)

Thus, *Syariah* is not part of what constitutes “law” under the present constitutional and legal framework of Malaysia<sup>19</sup>. And had it been so, there would be no need for the Constitution to expressly confer legislative powers on the State Legislatures *to enact written laws* relating to the Muslim religion<sup>20</sup>.

All of this goes to show that in Malaysia, it is *democracy*, and not *theocracy*<sup>21</sup>, that prevails.

### **The Islamisation of Popular Legal Consciousness in Malaysia**

Professor Farish A. Noor comments:-

“The Islamisation race really began in 1960, after [Parti Islam Se-Malaysia (PAS)/Pan-Malaysian Islamic Party] scored a major victory at the 1959 elections and won control of Kelantan and Terengganu. The government of the day -- then under [Tunku Abdul Rahman] -- did not expect this result and did not know how to react.

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<sup>19</sup> See also: *Che Omar Bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55 at 57A – C (left), SC

<sup>20</sup> 9<sup>th</sup> Schedule, List II, Item 1

<sup>21</sup> *Black’s Law Dictionary*, 8th Edition, “*theocracy*” – “1. Government of a state by those who are believed to be or represent that they are acting under the immediate direction of God or some other divinity”

The next year, Tunku and the [United Malays National Organisation (UMNO)]-led government had the country's first Quran-reading contest to show how "Islamic" Umno was. They failed to realise that the appeal of PAS then (it was under the leadership of Burhanuddin al-Helmy) was because it championed the cause of the poor farmers and rural community of Kelantan and Terengganu.

Failing to understand that, Umno and the Tunku's government opted for a cosmetic and short-term approach instead. Believing that PAS was concerned only about Islam, they sought to demonstrate their own Islamic credentials in their own superficial way.

Since 1960, successive Umno-led governments have been making the same embarrassing mistake, and as a result the country's political arena has been moving closer and closer to the Islamic register.”<sup>22</sup>

Similar views are also expressed by Professor Andrew Harding:-

“...during the 1980's, Malaysian society experienced a resurgence of Islam in the wake of the Iranian revolution of 1979. During this period, the Islamic Party PAS made specifically legal claims at the boundaries where Islam and the common law met, working for the establishment of an Islamic state. At the end of the 1970's for a short period PAS took over the State Government

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<sup>22</sup> “*Writing the Malaysian story*”, the Sun, 16 July 2005, (<http://www.thesundaily.my/node/177371>)

of traditionally Islamic Kelantan. During PAS's tenure of the State Government...until today, PAS promoted Islamisation so far as was consistent with State powers. These measures involved, for example, regulation of public entertainments and public service dress codes, the sale of alcohol, and gambling.

...

With the aim of undercutting PAS' Islamist appeal, the [Barisan National/National Front] Government mounted its own programme of Islamisation. This involved initiatives in Islamic education and Islamic finance. With regard to the legal system, it has pursued the harmonization of Islamic law (family law, and the law of evidence, for example) and institutional reform (the syariah courts and legal profession, and the religious bureaucracy). In 1988 it succeeded obtaining the amendment to Article 121 of the Constitution that...divided the syariah courts from the civil courts by providing that the civil courts could not exercise jurisdiction in any case falling under the jurisdiction of the syariah courts' jurisdiction."<sup>23</sup>

Perhaps the craftiest of measures is a *cosmetic* constitutional amendment in 1976<sup>24</sup> which substituted, the expression "Muslim", "Muslim religion" and "Muslim court" wherever it appears in the Constitution, with the word "Islamic", "religion of Islam" and "Syariah court" respectively. This is the first

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<sup>23</sup> *The Constitution of Malaysia*, Andrew Harding, Hart Publishing (2012), pp. 230 – 231

<sup>24</sup> *Constitution (Amendment) Act 1976*, ss. 44 and 45, w.e.f. 27-8-1976

time the word ‘*Syariah*’ appears in our Constitution. A similar semantic shift soon appeared in Federal and State laws<sup>25</sup>. Professor Tamir Moustafa argues:-

“In all of these amendments, the shift in terminology exchanged the *object of the law* (Muslims) for the purported *essence of the law* (as ‘Islamic’). This semantic shift, I argue, is a prime example of what Erik Hobsbawm calls ‘the invention of tradition’. The authenticity of the Malaysian ‘shariah’ courts is premised on fidelity to the Islamic legal tradition. Yet, ironically, the Malaysian government reconstituted Islamic law in ways that are better understood as a subversion of the Islamic legal tradition. That distinct form of Anglo-Muslim law, it must be remembered, is little more than a century old. But every reference to state ‘fatwas’ or the ‘shariah courts’ serves to strengthen the state’s claim to embrace the Islamic legal tradition. ... It is with the aid of such semantic shifts that the government presents the syariah courts as a faithful rendering of the Islamic legal tradition, rather than as a subversion of that tradition. In this regard, a parallel may be drawn to nationalism. *Just as nationalism requires a collective forgetting of the historical record in order to embrace a sense of nation, so too does shariah court authority require a collective amnesia vis-à-vis the Islamic legal tradition.*

*This semantic shift was likely an effort to endow Muslim family law and Muslim courts with a religious personality in order to brandish the government’s religious credentials.* The shift in terminology came during a period when the

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<sup>25</sup> E.g. the Administration of *Muslim* Law Enactment 1952 became the Administration of Islamic Law (Federal Territories) Act 1993, and the *Muhammadan* (Offences) Enactment 1938 of Selangor became the *Syariah* Criminal Offences (Selangor) Enactment 1995

*dakwah* (religious revival) movement was picking up considerable steam in Malaysian political life. The ruling UMNO faced constant criticism from PAS President Asri Muda to defend Malay economic, political, and cultural interests through the early 1970s.

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During [Mahathir's] 22 years of rule, the religious bureaucracy expanded at an unprecedented rate, and aspects of Islamic law were institutionalized to an extent that would have been unimaginable in the pre-colonial era. New state institutions proliferated, such as the Institute of Islamic Understanding (Institut Kefahaman Islam Malaysia, IKIM) and the International Islamic University of Malaysia (IIUM). Primary and secondary education curricula were revised to include more material on Islamic civilization, and radio and television content followed suit. But it was in the field of law and legal institutions that the most consequential innovations were made.”<sup>26</sup> [Emphasis added]

These legal and institutional changes seem to have come to a head in 2001 when then Prime Minister Mahathir Mohammad declared that Malaysia was an “Islamic state”<sup>27</sup>.

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<sup>26</sup> “*Judging in God’s Name: State Power, Secularism, and the Politics of Islamic law in Malaysia*”, Professor Tamir Moustafa, Oxford Journal of Law and Religion, Vol. 3, No. 1 (2014), 152, pp. 160 – 161

<sup>27</sup> *Supra* n. 23, p. 231; “*Judging in God’s Name: State Power, Secularism, and the Politics of Islamic law in Malaysia*”, Professor Tamir Moustafa, Oxford Journal of Law and Religion, Vol. 3, No. 1 (2014), 152, p. 161

All these changes coupled with scant regard for legal education in primary and secondary schools or in the media have resulted in an atrophied legal consciousness among Malaysian Muslims. In a survey conducted by Merdeka Center for Opinion Research<sup>28</sup> on 1,043 Malaysian Muslims in 2009, it was found that 78.5% of respondents agreed that “[e]ach of the laws and procedures applied in the [Malaysian] shari’a courts is clearly stated in the Qur’an.”

This is a major fallacy as all laws, including State enacted Islamic laws<sup>29</sup>, are enacted by a secular institution (the State Legislature) after deliberation by elected assemblypersons, who vary in religion and ethnicity. Malaysia is both a *democracy* and a nation of *diversity*.

The disheartening consequence of these misconceptions by the Malaysian public was elaborated upon by Professor Tamir Moustafa:-

“These misconceptions are not merely significant in a religious sense. Because Islamic law is used extensively as an instrument of public policy, popular misconceptions about basic features of Islamic jurisprudence have significant implications for *democratic deliberation* on a host of substantive issues, of

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<sup>28</sup> “*Islamic Law, Women’s Rights, and Popular Legal Consciousness in Malaysia*”, Professor Tamir Moustafa, *Law & Social Inquiry*, Volume 38, Issue 1, 168–188, Winter 2013, p. 179

<sup>29</sup> The most clearest way, to my mind, to refer the laws enacted under the 9<sup>th</sup> Sch., List II, Item 1 since the 1976 constitutional amendment without doing violence to the meaning of the word ‘*Syariah*’

which women's rights is just one important example. *When the public understands the shari'a courts as applying God's law unmediated by human influence, people who question or debate those laws are likely to be viewed as working to undermine Islam.* Indeed, it is the presumed divine nature of the laws applied in the shari'a courts that provides the rationale for criminalizing the expression of alternative views in the Shari'a Criminal Offenses Act. As a result, laws concerning marriage, divorce, child custody, and other issues critical to women's well-being are difficult to approach as matters of public policy.

...

Women's rights activists, even those operating within the framework of Islamic law, are easily depicted by their opponents as challenging core requirements of Islamic law, *or even Islam itself.* Conversely, the discursive position of conservative actors is strengthened by popular misunderstanding of epistemological commitments in Islamic law. *Religious officials, political parties, and other groups wishing to preserve the status quo can easily position themselves as defenders of the faith, given popular understandings of Islamic law as singular and fixed.*

Of course, Islamic law is also deployed as an important instrument of public policy in other issue areas beyond women's rights. Popular legal consciousness therefore has far-reaching implications for a variety of other substantive public policy issues. Islamic law has been used in Malaysia as the pretext for outlawing "deviant" sects, policing public morality (Liow 2009, 128–31), and curtailing freedom of expression (SUARAM 2008, 69–71). In each of these areas, Islamic law is not only cast in a conservative vein—perhaps more



significantly, Islamic law is consistently deployed in a manner that *closes down public debate and deliberation*.”<sup>30</sup> [Emphasis added]

### **Judicial Decisions**

The Supreme Court in *Che Omar bin Che Soh*<sup>31</sup> was unequivocal in its pronouncements:-

“It is the contention of Mr. Ramdas Tikamdas that because Islam is the religion of the Federation, the law passed by Parliament must be *imbued with Islamic and religious principles* and Mr. Mura Raju, in addition, submitted that, because Syariah law is the existing law at the time of Merdeka, any law of general application in this country must *conform to Syariah law*. Needless to say that this submission, in our view, *will be contrary to the constitutional and legal history of the Federation* and also to the Civil Law Act which provides for the reception of English common law in this country.

...

...the standard of justice naturally varies from individual to individual; but the *only yardstick* that the court will have to accept, apart from our personal feelings, is the *law that was legislated* by Parliament.

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<sup>30</sup> *Ibid.* pp. 180 and 185

<sup>31</sup> [1988] 2 MLJ 55

...

...we have to set aside our personal feelings because the law in this country is still what it is today, secular law, where morality *not accepted by the law* is not enjoying the status of law.” (at p. 57A – F right) [Emphasis added]

Since then, the superior courts of Malaysia (the Federal Court, the Court of Appeal and the High Court) have:-

- i. made findings in law or declarations that Syariah court orders are null and void or not binding, on the ground of being without or in excess of the Syariah court’s subject matter<sup>32</sup>, subject persons<sup>33</sup> and territorial<sup>34</sup> jurisdiction;
- ii. decided that public authorities enforcing State enacted Islamic laws (e.g. to arrest, search, seize or prosecute) can be subject to judicial review on the ground that their actions were unlawful, unreasonable or unconstitutional<sup>35</sup>; and

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<sup>32</sup> *Indira Gandhi Mutho v Patmanathan Krishnan And (Anyone Having Custody And Control Over Prasana Diksa)* [2015] 6 CLJ 35 at [41] – [54], HC; *Karambunai Corp Bhd & Ors v Ag Damit bin Ag Tengah* [2014] 8 MLJ 16 at [19] – [21] and [27] – [29], HC

<sup>33</sup> *Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah* [2004] 2 MLJ 241 at 246F-I, 250A-E, 254H-I and 256C-H, HC; *Subashini a/p Rajasingam v Saravanan a/l Thangathoray & Other Appeals* [2008] 2 CLJ 1 at 31G - I, FC

<sup>34</sup> *Potensi Bernas Sdn Bhd v Datu Badaruddin Datu Mustapha* [2009] 8 CLJ 573 at [4] to [6] and [12] to [17], HC

<sup>35</sup> *Jabatan Agama Islam Wilayah Persekutuan & Ors v Berjaya Books Sdn Bhd & Ors* [2015] 3 MLJ 65 at [3] – [11], [17] and [31], CA

- iii. declared a State enacted Islamic law, which codifies an offence against a precept of Islam, unconstitutional for being inconsistent with constitutional rights<sup>36</sup>.

The pronouncements by two recent superior court decisions deserve specific consideration.

In *Indira Gandhi*<sup>37</sup>, the High Court held:-

“**[109]** To put the position beyond any pale of doubt and to put the proper perspective on the preeminence given to Islam as the religion of the Federation, there was introduced the non-derogatory provision in art. 3(4) which reads:

Nothing in this Article derogates from any other provision of this Constitution.

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<sup>36</sup> *Muhamad Juzaili Mohd Khamis & Ors v State Government of Negeri Sembilan & Ors* [2015] 1 CLJ 954, CA

<sup>37</sup> [2015] 6 CLJ 35

[110] The Bahasa Malaysia rendering of this art. 3(4) is even more plain and punchy. *It conveys the meaning that art. 3 will not in any way undermine any of the other provisions of the Federal Constitution.* It reads:

Perkara 3(4) Tiada apa-apa jua dalam Perkara ini **mengurangkan mana mana peruntukan** lain dalam Perlembagaan ini. (emphasis added)

[111] In the context of the issue at hand, the prominence and preeminence given to the religion of Islam *shall not undermine* the rights given to non-Muslims under the federal laws be it under the Guardianship of Infants Act 1961 or the Law Reform Act as *constitutionally guaranteed under art. 8 and 11 of the Federal Constitution.*” [Emphasis added]

In the *Transgender* case<sup>38</sup>, the Court of Appeal held:-

“[30] But what is more important for the purpose of our judgment is the fact that *art. 3(4) qualifies the status of Islam* in following terms:

...

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<sup>38</sup> [2015] 1 CLJ 954

(4) Nothing in this Article derogates from any other provision of this Constitution.

[31] What art. 3(4) means is that art. 3(1) is *subject to, among others, the fundamental liberties* provisions as enshrined in Part II of the Federal Constitution.” [Emphasis added]

### **The Way Forward**

Malaysian politicians have appropriated the word ‘*Syariah*’ from the Malaysian Muslim community for their own self-centered political pursuits. They have named laws passed by State Legislatures, and courts created by State law, after it. In doing so, they have defiled the sanctity associated with the word ‘*Syariah*’, and reduced it to a tool for sloganeering (to increase their credentials), political one-upmanship (to “discredit” their opponents) and to misrepresent Malaysia to Malaysians (fracturing democracy).

As a result, many Malaysians (particularly Muslims) now live in ignorance about their constitutional rights, of Islam and of each other’s religious heritage.

Malaysians, Malaysia and Islam deserve better.

### *Malaysians: Public Education*

In present day Malaysia and given the current state of legal consciousness, there beckons a pressing and vital need for civil society<sup>39</sup> to continuously, inclusively and extensively re-educate the public on the role of Government in a democracy like Malaysia, that:-

- i. Judges cannot revise the Constitution according to their own predilections or moral values, or evaluate and give effect to public opinion<sup>40</sup>.
- ii. members of Cabinet, the State Executive Council(s) and public authorities cannot taint their decision making processes with the doctrines and beliefs of their religion<sup>41</sup>; and

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<sup>39</sup> "...the wide array of non-governmental and not-for-profit organizations that have a presence in public life, expressing the interests and values of their members or others, based on ethical, cultural, political, scientific, religious or philanthropic considerations. Civil Society Organizations (CSOs) therefore refer to a wide of array of organizations: community groups, non-governmental organizations (NGOs), labor unions, indigenous groups, charitable organizations, faith-based organizations, professional associations, and foundations", World Bank, *"Defining Civil Society"*

(<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20101499~menuPK:244752~pagePK:220503~piPK:220476~theSitePK:228717,00.html>)

<sup>40</sup> *Reyes v The Queen* [2002] 2 WLR 1034 at [26], Privy Council (Belize). Cf. *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLJ 468 at [33], [48], [52], [96], [104] and [129] – [139], CA; *Lina Joy v Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585 at [14], FC; [2005] 6 MLJ 193 at [33], CA; [2004] 2 MLJ 119 at [31], HC

<sup>41</sup> E.g. *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor* [2010] 2 MLJ 78 at [12](ii) and (viii), HC

- iii. members of Parliament and the State Legislative Assemblies should not pass laws which do not reflect the good conscience of the people they represent.

From my experience, organising frequent forums, assemblies and outreach sessions for the Malaysian public and vulnerable communities helps empower and inform them of their rights and their recourse when rights violations do take place. Justice for Sisters<sup>42</sup>, for example, have undertaken an outstanding campaign in the media (the internet<sup>43</sup>, radio and print) to raise awareness among Malaysians on the problems faced by the *Mak Nyah* community in Malaysia and Malaysia's democratic processes.

### *Malaysia: Reforms*

Malaysia is in need of a number of critical reforms to restore the harm done to democracy over the decades by politicians.

There needs to be laws on:-

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<sup>42</sup> A Malaysian association raising public awareness on the stigma, discrimination and violence suffered by the *Mak Nyah* (transwomen) community of Malaysia. See: <https://justiceforsisters.wordpress.com>; [https://twitter.com/justice\\_sisters](https://twitter.com/justice_sisters); <http://www.themalaymailonline.com/malaysia/article/10-things-about-justice-for-sisters-defenders-of-transgenders>

<sup>43</sup> "*Chit Chat bersama Jelita*", I am You Campaign Videos, (<https://www.youtube.com/channel/UCAZ9afNlbGuZUnfwVIm4XCA>)

*Equality:* to protect citizens from discrimination in the workplace and in their access to goods and services.

*Religious Freedom:* to prescribe the administrative procedures relating to apostasy, and to create a reconciliation commission to mediate inter-religious and intra-religious disputes.

*Family:* to allow for interreligious marriages, the preservation of the human rights of children and the criminalisation of any cultural or religious practice that harms human dignity.

These reforms go towards achieving many things in the long run for Malaysia. It assists in preventing stigma and discrimination among Malaysians (by the Government and others). It would help integrate Malaysians towards achieving a genuine sense of nationhood and a truly unique identity globally. Most importantly, it preserves the choices of individual Malaysians; that a Malaysian is entitled to pursue all that which gives him personal contentment, self-worth and inner peace.

These reforms are only achievable through concerted advocacy, engagement and activism by civil society with the relevant political representatives over



time. An election may change the Government, but it does not guarantee a Government with democratic ideals. In the interim, there is much that can be done by way of promoting public discourse<sup>44</sup>, engaging with Government officials<sup>45</sup> and supporting international human rights organisations with their efforts<sup>46</sup>.

### *Islam: In Malaysia*

Islam is one of the world's great religions. It is a great religion that remains thriving in a 21<sup>st</sup> century world of human rights, political ideologies and self-determination. Islam prescribes a way of life.

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<sup>44</sup> E.g. Projek Dialog, social discourse project that aims to promote healthy debate and understanding, within and among the diverse cultural, ethnic and religious groups in Malaysia. (<http://www.projekdialog.com>)

<sup>45</sup> E.g. “Review and Consultation on the Policy and Legal Environments Related to HIV Services in Malaysia”, United Nations Country Team, Malaysia and the Human Rights Commission of Malaysia (SUHAKAM), 9 January 2015, p. 23:-

*“Public statements by Muslim religious leaders and senior government officers of religious affairs department such as those denouncing transgenders and issuing recommendation that are not evidence based to ‘rehabilitate’ transgenders further magnifies already prevalent stigma associated with mak nyahs. Such pronouncements do not aid the Department of Islamic Development in their strategy to reach out to the mak nyah community offering pathways to employment, self-development and HIV education.”*

<sup>46</sup> E.g. Human Rights Watch Report, “I’m Scared to Be a Woman”, Human Rights Abuses Against Transgender People in Malaysia (2014), ([http://www.hrw.org/sites/default/files/reports/malaysia0914\\_ForUpload.pdf](http://www.hrw.org/sites/default/files/reports/malaysia0914_ForUpload.pdf))

In a majority of countries, Islam is allowed to be professed, practised and propagated precisely because the Government of those countries respect freedom of thought, conscience and religion<sup>47</sup>, a fundamental human right.

In that regard, it would be a great disservice to Islam for anyone to say that human rights is incompatible with the way of life prescribed by it. In fact, no rational minded Muslim I have spoken to has ever found repugnance with fundamental human rights like respect for human dignity and privacy, the freedom to criticise your Government or the prohibition of slavery. Indeed, it is these fundamental human rights that guarantee the existence of societies and ensures that Islam endures to inspire the lives of people.

In Malaysia, this symbiosis must be appreciated, and not disdained.

For it to be appreciated, Malaysians must start looking past doctrinal differences in their respective religions and rationally assess the problems faced by *all Malaysians* in this era of economic uncertainty, political corruption and environmental degradation. This is fundamental for there is a clear distinction between universal human values, such as, compassion, peace and forgiveness, and particular religious rules such as the prohibition of eating ham

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<sup>47</sup> Universal Declaration of Human Rights 1948 (UDHR), article 18. The UDHR is an acceptable aid in interpreting the fundamental liberties in our Constitution: Human Rights Commission of Malaysia Act 1999, section 2 (interpretation of “human rights”) and 4(4). See also: *Mat Shuhaimi bin Shafiei v Public Prosecutor* [2014] 2 MLJ 145 at [86] – [88], CA

and drinking wine. The former are proclaimed by all religions; the latter are not. As aptly stated by the Supreme Court of Pakistan in *SMC No 1 of 2014*<sup>48</sup>:-

“[36] The spirit of pluralism reflected in the Holy Quran constantly points out that Muhammad (PBUH) had not come to cancel the older religions, to contradict their prophets or to start a new faith. To the contrary, his message is the same as that of Abraham, Moses, David, Solomon or Jesus. The cherished goal of creating a more pluralistic society where fundamental rights are respected would continue to elude us unless we realise that we are living in a world of globalised interdependence, a world of interconnectivity, of cyber space, of shrunken distances, of cross border migration, and a world of rapidly changing cultural identities. We are all members of one race of humans with common challenges, and we cannot confront these challenges without forging a common alliance. This paradigm shift in the world around us can be achieved at the international and domestic levels only by discouraging sectarian, racial and ethnic biases which are violative of shared values and fundamental rights, and by the promotion of and strict compliance with these values and rights.”

Dated: 16 September 2015

*Aston Paiva*  
Advocate & Solicitor

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<sup>48</sup> [2015] 2 LRC 583