ADMINISTRATION OF MATTERS PERTAINING TO ISLAM

G25
MALAYSIA

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EXECUTIVE SUMMARY

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1. OVERVIEW

Malaysia, a nation of diverse ethnicities, cultures and religious heritage, is a creation of the Federal Constitution - a secular legal document drafted in 1957. The Constitution proclaims itself as the supreme law of the Federation. Historically and legally, the State legislatures are empowered to make laws for Muslims with respect to their religious affairs and personal law only including courts to determine these matters. The laws in Malaysia are made, executed upon and interpreted by three secular institutions, namely, the Parliament, the Yang di-Pertuan Agong (or Cabinet), and the Courts respectively.

With decades of exuberant exercise of legislative powers, disregard for the use of precise language in legislation and increased bureaucracy in matters of the Muslim religion, there is now uncertainty with respect to the position and application of Muslim laws in the country. Since 1976, these laws began to be colloquially termed "*Syariah* laws". Awareness even among political leaders on the jurisdiction and powers of religious authorities and the administration of Muslim laws in Malaysia is lacking. As a result, several misconceptions flourish.

Most critically, underpinning the present state of affairs is a system of Muslim religious education that requires change; from rote learning to active learning.

Adding to this complexity is the subject matter in question – the Muslim religion - which has historically and legally been a prerogative of the

respective Rulers, but has been used by politicians for sloganeering, political one-upmanship and, most upsettingly, to misrepresent Malaysia's constitutional and legal history to the public.

This study on the administration of matters pertaining to Islam is part of G25's continuous efforts to engage the leadership and the public in promoting Moderation (al-wasatiyyah) as a value when administering laws for Muslims in Malaysia. This study follows from the open letter to the Prime Minster of 7 December 2014 (See **APPENDIX I**) by G25 which enlists several issues of concern.

2. BACKGROUND

The general objective of the study is to conduct a review of the administration of matters pertaining to Islam throughout the evolution of Malaysia, from the British colonial era to the present time. Specifically, it aims to (i) trace the historical evolution of the administration of matters pertaining to Islam in the country; (ii) trace the establishment and evolution of the relevant religious authorities and government departments at the State and Federal level; (iii) elicit information on the strengths and weaknesses of the administration of matters pertaining to Islam; and (iv) make recommendations to remedy the weaknesses found. The study uses both primary data (government publications including from the National Archives, reports and websites) and secondary data through a desk review of various sources including documents, books, journals, reports of studies, and theses written by students in institutions of higher learning. The study also utilises the experience of a team of advocates and solicitors who have undertaken court cases relating to this subject matter. Due to resource and other constraints, primary data from interviews of possible respondents were not included.

3. HISTORICAL AND LEGAL OVERVIEW

3.1. In pre-British Malaya, Islamic law coexisted with indigenous custom (adat), and the inconsistencies between them went largely unnoticed. The British made changes to these two basic sources of law and introduced a third: British statutory and common law. The relationship between adat and Islamic law conflicted at times. The Malays never adopted the whole of the Islamic law; and its application varied from State to State. Before the British era, historians had differing views about the status of Islam as the state religion. However, in general, it can be said that although the Ruler of the state was acknowledged to be the highest authority in all matters whether religious or secular, Muslim institutions were not actively supported by royal power. After the founding of the British colony on the island of Penang by Capt. Francis Light of the British East India Company in 1786, British Administration was established gradually in stages until the whole of the Peninsula was brought under British dominion by 1909. The British governed through colonial departments and no native authority was recognised as an executive instrument. However, publicly, Malay authority was still seen to be sovereign, and Malay hierarchies and institutions were preserved. British rule brought law and order, with a British system of justice, enshrining the rights of the individuals and the Rule of Law, and a new relationship came into being between the ruler and the ruled. The British established State Councils, but their membership was by appointment, and the Councils were no more than advisory bodies to the Colonial Government. The extension of British colonial administration to the Malay States involved a structuring of Islamic religious institutions. Every treaty made with the British declared that the Ruler agreed to accept a British Resident/Adviser, whose advice

must be asked and acted upon on all questions other than those touching on the Malay religion and custom. Colonial religious policy avoided any meddling in such matters and sought to assure the Malays that their traditional way of life was not threatened. The safeguarding of and deference to Islam gave the Malays a psychological assurance that the country was still theirs despite the influx of Chinese and Indian immigrants. In due course, the role of the Rulers as the protectors of 'Malay religion and custom' became more important, and this compensated in part for the loss in their sovereignty. The preservation of the traditional bases of authority created a more authoritarian form of religious administration, with the concentration of authority in the hands of a hierarchy of officials directly dependent on the Rulers. Written and codified systems of general civil and criminal laws were enacted, and these generated pressure to establish a more formal system of Islamic law. Courts were established, legal procedures laid down, and a legal bureaucracy was built to administer them. There was now an organised religious officialdom. Muslim courts were established in each State to enforce Muslim law and adat.

3.2. The Federation of Malaya (Persekutuan Tanah Melayu) was the outcome of the Federation of Malaya Agreement 1948 ('the FMA') between the British Crown and the Rulers of the Federated Malay States (Perak, Selangor, Pahang, and Negeri Sembilan) and Unfederated Malay States (Johor, Kedah, Perlis, Kelantan, and Terengganu). Under the FMA, the two Crown Colonies namely the Straits Settlements of Penang and Malacca, were incorporated into the Federation. The Head of the new Federal Government was the High Commissioner who had wide legislative and administrative powers. Under the FMA, a Federal

Legislative Council was established, presided by the High Commissioner and having powers to make laws with respect to all matters set out in the Second Schedule to the Agreement. The FMA also provided for the establishment of a Conference of Rulers consisting of all the Rulers of the Malay States. Under the Agreement, a Federal Executive Council was established to aid and advise the High Commissioner in the course of the exercise of his functions. The FMA vested the State Councils with limited legislative powers; the States were empowered to legislate, among others, on matters relating to the Muslim religion or the custom of the Malays. The Rulers undertook to govern their States according to written constitutions. A British Adviser was appointed in each State and the Rulers undertook to accept the advice of their Advisers on all State affairs other than those relating to the Muslim religion and Malay custom. The FMA also preserves the continuance of existing laws in the Federation which included existing Muslim Laws.

3.3. 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. The Federation of Malaya Constitutional Commission ('the Reid Commission') was appointed to draft a Constitution for the newly independent nation. The Reid Commission heard evidence from government officers, interested organisations and individuals, the Rulers and the political parties in the Alliance. The Commission recommended that the Federation of Malaya be a united, free and democratic nation, fair to all sections of the community, and that Malay custom and religion shall be a State subject. As to Islam being the religion of the Federation, there was universal agreement that if any such provision

were inserted, it must be made clear that it would not in any way affect the civil rights of non-Muslims. In the memorandum submitted by the Alliance, it was stated as follows – 'The religion of Malaya shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religion and shall not imply that the State is not a secular State.' The counsel for the Rulers informed the Commission that their Highnesses were of the view that it was not desirable to insert some declaration to establish the Muslim faith (Islam) as the religion of the federation. The Rulers' objection to the provision was based on two grounds - firstly, in the existing Constitutional arrangement, they were the heads of the Muslim faith in their respective States, and, secondly, religion under both the existing and proposed Constitutions was a state matter. A provision declaring Islam as an official religion for the Federation would encroach on their individual positions as head of the faith, and the rights of the States to deal with matters of faith.

3.4. A Working Party was appointed to examine the Commission's Report and to submit a Constitutional Proposal for the Federation of Malaya (the White Paper). At the first meeting, the leader of the United Malays National Organisation (UMNO), Tunku Abdul Rahman, requested that a provision declaring Islam as the religion of the Federation be included in the Constitution, as had been proposed in the Alliance memorandum. The UMNO leaders argued that a provision for an official religion would have an important psychological effect on the Malays. This also had a political basis because Islam is an identity marker; it is a central condition for the definition of a Malay, whose rights are protected in the Constitution. At the same time, the Tunku assured

the Working Party that the state would be secular. In deference to the objections of the Rulers and the concerns of non-Muslims, the Alliance agreed that the new article should include two provisions – firstly, the new article should not affect the position of the Rulers as heads of the Islamic faith in their respective States; and, secondly, that the practice and propagation of other religions would be assured. In agreeing to the Alliance's proposal, the Rulers stated that they were against the setting up of a Federal Department of Religious Affairs. This resulted in a statement to that effect; therefore, the setting up of any federal body to administer Islam is unconstitutional. There was an additional guarantee from the Alliance to protect the Rulers' position and status in their respective States. Tunku Abdul Rahman reassured the Rulers that if a Federal Department was set up, it would be under the jurisdiction of the Yang di-Pertuan Agong, and it would be for 'liaison purposes only'. On the possibility of the provision on religion being misinterpreted, Tunku assured the Working Party that 'the whole Constitution was framed on the basis that the Federation would be a 'secular State'. In the end, the Constitution as recommended by the Reid Commission resulted in the insertion of Article 3(1) providing for Islam to be the religion of the Federation. Significantly, Article 3(4) states, "Nothing in this article derogates from any other provision of this Constitution" thus ensuring, firstly, the supremacy of the Constitution; and, secondly, that the Federation is a secular country. Article 74(2) was inserted to provide for the legislature of a State to make laws with respect to specific matters on the Muslim religion and Malay custom. Therefore, while the Federal Constitution does not mention the word "secular"; historical records of what transpired in 1956, Article 3(4), and other provisions in the Federal Constitution provide clear evidence that the Constitution was intended to provide for the federation to be secular.

What Clause (4) of Article 3 means is that although Islam is the religion of the Federation, Malaysia is not free to practise Islam in accordance with strict Islamic law. This means that suppose a State was to pass a law to impose hudud law for all Muslims in that State, that will not be lawful as that is not permitted by Article 3(4). The imposition of hudud law is unconstitutional as such a law goes against the provisions of the Federal Constitution on fundamental liberties and on the distribution of legislative powers. Punishments such as the amputation of hands for theft and stoning to death for adultery, although permitted by Islamic law, are not permitted by the Federal Constitution.

3.5. When Malaysia was formed in 1963, the main structure of the administration of matters pertaining to Islam was put in place following the adoption of the Federal Constitution in accordance with the Malaysia Agreement of 1963. What follows after 1963 were mainly the refining of the state administration and amendments to the legislation to give effect to these refinements.

3.6. The Selangor Administration of Muslim Law Enactment 1952 became a template that other States could use. This single consolidating legislation subsequently underwent several changes, and it led to specific subject matters in the 1952 Enactment being made in separate enactments, for example, separate laws for family matters, Muslim offences, evidence, *Wakaf*, etc.

3.7. In 1965, 8 years after *Merdeka*, the Muslim Courts (Criminal Jurisdiction) Act 1965 was enacted by the Parliament pursuant to Item 1 of the State List in the Ninth Schedule of the Federal Constitution

to confer the Muslim courts with jurisdiction with respect to offences against the precepts of the religion of Islam. By reason of this belated measure by the Parliament, a provision was included in the Act to validate offences tried by the said Muslim courts between *Merdeka* till 1965.

3.8. Since *Merdeka*, there have been several amendments to the Federal Constitution. By the amendment in 1976, for the first time, the word '*Syariah*' appeared in the Constitution, and the 'Muslim Court' is now known as the '*Syariah* Court'. The amendment in 1988 was significant: it was for the insertion of a new Clause into Article 121, namely Clause (1A) which reads: 'The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the *Syariah* courts'. In effect, the High Courts can now no longer exercise its jurisdiction with respect to matters exclusively within the jurisdiction of the *Syariah* courts. Nonetheless, in January 2018 the Federal Court in the case of Indira Gandhi confirmed that despite Article 121(1A) the High Courts continue to have the power to judicially review the actions of religious authorities and to supervise the jurisdiction of the *Syariah* courts.

In the historical development of the administration of matters pertaining to Islam in Malaysia, there are specific matters that are pertinent. These include:

- Muslim offences and punishments - A central feature of Islam is the concept of responsibility of the ruler or the public authority to supervise the moral behaviour of individuals and public piety, and

to promote good and combat evil

- *Wakaf* administration - this is a charitable endowment in perpetuity of the capital and income of property for religious or charitable purposes

- Zakat, fitra, and *baitulmal* - The revenues from these went mainly to the building and upkeep of mosques, the payment of mosque officials and the employment of teachers

- Haj - Attention was given to pilgrimage and the need to regulate it because of the social evils and health hazards that it presented

- Religious education - The earliest form of education in the Malay Peninsula was the pondok school which was a non-formal form of residential school; and with time, several changes were made, with a more formal and systematic involvement of the Ministry of Education

4. ADMINISTRATION OF MATTERS PERTAINING TO ISLAM - INSTITUTIONAL ARRANGEMENTS

4.1. Each of the States have four key religious authorities: the Majlis Agama, the Mufti (or Fatwa Committee), the *Kathi* courts (which later became the *Syariah* Courts), and the Registrar of Marriages and Divorces. As for the functions of these religious authorities, the States emulate the Selangor legislation, the Administration of Muslim Law Enactment (Selangor) 1952, and Administration of the Religion of Islam Enactment (Selangor) 2003. All States have a Religious Department or Jabatan Agama Islam which is generally led by a Director appointed from the public service. These departments were created by the respective State Governments.

4.2. The Conference of Rulers (Majlis Raja-Raja) was formed in 1948 under the Federation of Malaya Agreement of 1948. The continued existence of the Conference of Rulers is provided for by Article 38 of the Federal Constitution. It is the successor to the Durbar that was first held in Kuala Kangsar in 1897 with the participation of the Rulers of the four Federated Malay States. Earlier in July 1895, the Treaty of the Federation of 1895 was entered into between the British and the Federated Malay States. The Treaty constituted the four Federated Malay States as 'a Federation to be known as the Protected Malay States to be administered under the advice of the British Government'. Under the Treaty, the Rulers of the four States agreed to accept a British officer styled the 'Resident-General' as the agent and representative of the British Government under the Governor of the Straits Settlements;

and to follow his advice 'in all matters of administration other than those touching the Muhammadan religion'. One significant development as a result of the Federation was the introduction of the Rulers Conference (or Durbar) which was meant to be purely consultative and advisory. The first conference took place in July 1897. This meeting was significant in that it was the first occasion when Rulers from the four States met in an atmosphere of peace and friendship. It was convened under the chairmanship of the High Commissioner of the Federated Malay States (who was also the Governor of the Straits Settlements). It had no legislative jurisdiction, but it did furnish a forum for airing grievances and discussing common problems. The Durbar gave dignity to the Rulers and became an important forum for the Rulers to discuss various issues such as the administration of matters pertaining to Islam, the Malay language, and the plight of the Malays. The FMA of 1948 retained the semblance of the Durbar by establishing the Conference of Rulers, comprising the Rulers of the Malay States. The Conference would consider draft legislation, new draft salary schemes, any draft scheme for the creation or major reorganisation of any department or service of the Federal Government, and major changes in immigration policy. The present Conference of Rulers is provided for under Article 38 of the Constitution which also prescribes the functions and powers of the Conference. The Keeper of the Rulers' Seal acts as the Secretary to the Conference. There is a direct link between the Conference of Rulers and the Majlis Kebangsaan Hal Ehwal Islam (MKI) – which is reported to have been established by the Conference of Rulers itself. The link to the Jabatan Kemajuan Islam (JAKIM) is indirect; JAKIM serves as the secretariat to the MKI. There is, however, lack of clarity in these linkages.

4.3. It was pointed out earlier that the setting up of a federal body to administer Islam is unconstitutional since religion is a matter to be administered by the States. Be that as it may, in 1997, a federal body was established in the Prime Minister's Office (PMO), the Malaysian Islamic Development Division or Jabatan Kemajuan Islam Malaysia (JAKIM).

- Historical development: JAKIM was established in 1997 as the replacement of BAHEIS (Bahagian Kebangsaan Bagi Hal Ehwal *Ugama* Islam, to serve as secretariat to the existing National Council for Islamic Affairs/Majlis Kebangsaan bagi Hal Ehwal *Ugama* Islam Malaysia (MKI) in the Prime Minister's Department. The Regulation that establishes the National Council, the Regulations of the National Council for Religious Affairs Malaysia 1968, declared that no action of the National Council shall touch on the position, rights, privileges, prerogatives and powers of the Ruler as the Head of the religion of Islam in his State.

- On the unconstitutionality of JAKIM, the Prime Minister's Department defended its establishment by saying that JAKIM is the only institution that can safeguard Islam's position as the religion of the Federation. This defence argument has no constitutional basis because the Federal Constitution does not envisage the creation of the National Council for Islamic Affairs by the Conference of Rulers (COR) or by the Federal Government - the Muslim religion and Malay custom being matters exclusive to the State Legislatures and the State

Executive Councils. However, the framers of the Federal Constitution did express the intention before *Merdeka* that '[i]f it is found necessary for the purposes of co-ordination to establish a Muslim Department of Religious Affairs at federal level, the Yang di-Pertuan Agong will, after consultation with the Conference of Rulers, cause such a Department to be set up as part of his establishment'. However, this was unconstitutional because the powers of the Conference of Rulers are limited by Article 38 of the Federal Constitution; therefore, to make the establishment of JAKIM constitutional, it would have necessitated amending the Federal Constitution to provide COR with this power.

- There is also the rationale of establishing JAKIM for the intention of ensuring the uniformity of the laws between the States. Assuming that this was needed, this could have been legally achieved by using the Federal Constitution via Article 76 which prescribes a legislative procedure. The Parliament, for the purposes of promoting the uniformity of laws, may make laws with respect to any matter enumerated in the State List including matters concerning the religion of Islam and Malay custom, as enumerated in Item 1 of the State List; and such law will only come into operation in a State once it is adopted by the Legislature of that State. Such uniform law, once adopted by the State Legislature through the passing of a State Enactment, is deemed to be State law (and not Federal law) and the State Enactment (that adopts the Federal law) may be amended or repealed by a law made by the State Legislature.

Since the Parliament was not involved, and Article 76 was not used, MKI and JAKIM are not legally and constitutionally established agencies and can be perceived as arising out of a policy decision to meet a need felt necessary for coordination and uniformity. In that regard, any advice or recommendations of the National Council or JAKIM on promoting uniformity of Muslim Laws remains just that - advice or recommendations; it has no legal effect. Acceptance and execution of the National Council's and JAKIM's advice or recommendations by a public authority would merely be adherence of a policy out of political deference.

- Likewise, the fatwas of the Fatwa Committee under JAKIM do not have any legal effect, and merely represent a religious consensus at a 'national' level on a matter concerning Islam in Malaysia. They have no legal effect in a State until adopted by the State via a fatwa by the State Mufti or State Fatwa Committee and gazetted in accordance with the procedure as prescribed by State law. Such fatwas, therefore, can be challenged in the civil courts by persons adversely affected on the grounds that the subject matter of the fatwa is not within the jurisdiction of the Fatwa Committee.

- Despite not being constitutional, JAKIM has come into existence and it was imperative that it be furnished with a vision, goals, objectives, roles and functions, organisational structure, and financing. Information on JAKIM, which was mainly from its website, states that JAKIM is a Department with four sectors, and each sector has several Divisions. JAKIM is headed by

a Director General who is assisted by two Deputy Directors General and a Senior Director. Subordinate to these positions are 20 directors responsible for specific functions, and two Heads of Unit.

- For the purposes of budget allocation, JAKIM is under the Prime Minister's Office (PMO). There are six (6) programmes under PMO and one of these are "Kemajuan Islam", under which there are 11 activities - one of these is JAKIM.In terms of the budgetary allocation towards JAKIM, there have been several statements that suggest contradicting perceptions; JAKIM itself claimed that the budget it receives should be increased to carry out its functions, while some critics have questioned not directly the amount it gets, but its lack of transparency and accountability. For 2018, JAKIM received RM810,890,000 in operating budget (an increase from 2017 when it was RM 744,947,800. This constituted about 16% of the total budget of the PMO, and a very substantial proportion (79%) of the budget allocated to the programme "Kemajuan Islam" which has 11 activities under its purview including JAKIM.

- The JAKIM website provides information on what JAKIM perceives as its challenges (one of which are negative perceptions by the public), and based on these, the Department has formulated its strategic directions.

- In terms of the output by JAKIM, there is a collection of guidelines on matters with respect to religion, for e.g., business, sports, medical, education and publications.

5. GOOD PRACTICES ARISING FROM THE CURRENT PRACTICE OF THE ADMINISTRATION OF MATTERS PERTAINING TO ISLAM

The study revealed some good practices worthy of emulation by other Muslim or Muslim-majority countries. These include:

- The Pilgrims Management Board (Lembaga dan Urusan Tabung Haji): It has a reputation as one of the best pilgrim management bodies in the world.

- Islamic Finance: Malaysia is recognised as the leader among countries of the world to have introduced Islamic finance in a grand way. This includes Islamic banking and insurance (takaful).

- Halal Certification: JAKIM is the sole agency responsible for the issuance of halal certification to companies. There is, however, a debate on this.

- Tilawah al Quran: Malaysia is also well-known and respected as a country that has consistently hosted this event.

- *Wakaf*, Zakat, Fitra, and Baitumal: Malaysia has institutionalised these arrangements since the 20th century.

- Religious education: This ranges from pre-kindergarten to tertiary levels. This provides parents with the option to enrol their children in these religious schools throughout a child's schooling years.

- Friday prayer sermon: This offers many opportunities for the development and nurturing of a united, well-informed, tolerant, and a more pious ummah. However, this has been misused on several occasions – it is used to vilify certain actions, individuals and groups or to stoke inter-religious and inter-ethnic hatred.

- Pre-marriage training for Muslim couples: This potentially positive initiative can offer tremendous opportunities for bringing about changes that can nurture a good family life based on Islamic values and principles. However, like the Friday prayer sermon, there has been misuse and abuse.

6. THE ISSUES OF CONCERN ARISING FROM THE ADMINISTRATION OF MATTERS PERTAINING TO ISLAM AND ISLAMISATION

Over and above issues identified in the three preceding sections on the historical and legal developments, the organisational arrangements, and the good practices related to administration of matters pertaining to Islam; the study also identified several specific issues of concern. They are as follows:

- Lack of clarity and common understanding of 'precepts' of the religion of Islam is a major issue that needs to be urgently addressed. Given that Islam is not just a mere collection of dogmas and rituals but covers human activities relating to the legal, political, economic, social, cultural, moral and judicial realms, the extent of the State's legislative powers with respect to the creation of Muslim 'precept offences' has to be clearly defined, understood and interpreted correctly and consistently.

- There is a misconception on the alleged overlapping jurisdiction of the High Courts and the *Syariah* Courts. Article 74(2) of the Federal Constitution empowers the State Legislatures to make laws for the State in respect of the matters enumerated in List II of the Ninth Schedule (the State List). The States have exercised this legislative power and have constituted *Syariah* Courts in the States under the respective enactments. These State laws, in creating offences against precepts of the religion

of Islam, are subject to the limitations as imposed by federal law (meaning, by the Parliament), that is the *Syariah* Court (Criminal Jurisdiction) Act 1965 (Act 355), as prescribed by the Federal Constitution (Item 1 of the State List). In this regard, there is no question of conflicting provisions in the Federal Constitution. In the federal structure as prescribed by the Federal Constitution, matters of Islamic law and Malay custom are exclusively a State subject matter.

- There is also a misconception on the effect of Clause (1A) of Article 121 on the judicial powers of the High Courts. Clause (1A) provides that the High Courts 'shall have no jurisdiction in respect of any matter within the jurisdiction of the *Syariah* courts'. The Federal Court on two occasions has held that 'Article 121(1A) was introduced not for the purpose of ousting the jurisdiction of the civil courts. It was introduced in order to avoid any conflict between the decision of the *Syariah* courts and the civil courts which had occurred in a number of cases before'.

- Along-standing issue is that which is related to the binding effect of a fatwa in Malaysia. The Constitution provides that the States may make laws conferring the relevant Islamic authorities in the States to issue fatwas. There have been times where fatwas go beyond 'Islamic law, doctrine and Malay custom' and directly affect the secular character of the country such as pluralism and liberalism. There appears to be some public opinions that fatwas shall only be advisory, and not have

a legal status, and therefore, anyone not following a fatwa shall not be deemed as having committed an offence under any law, unless the fatwa has been put in the State enactment.

- The proposal to implement hudud in Malaysia is an ongoing debate. There was a private member's Bill seeking to amend the *Syariah* Courts (Criminal Jurisdiction) 1965 Act (Revised 1988) (Act 355) to confer on the *Syariah* Courts the power to impose increased punishments for Islamic law offences created by State legislation. This proposal is linked to *Syariah* laws enacted in the States of Kelantan and Terengganu providing for hudud offences. While it cannot be denied that hudud is part of the Islamic justice system, there are convincing constitutional and other arguments as to why hudud cannot be applied in Malaysia.

- There are difficulties attached to anyone who renounces the Islamic faith in Malaysia (apostasy). A misconception arose after the introduction of a new particular in the Malaysian identity card (IC) prescribing that the word 'Islam' must be affixed on the IC of Muslims. There are no constitutionally permitted grounds to prohibit the mere profession of one's religion; the right to profess a religion of one's choice is a right guaranteed by Art 11 of the Federal Constitution. Apart from the constitutional law perspective, from an Islamic law perspective, the issue of apostasy (including the legal consequences of being an apostate) is a subject of debate among Islamic jurists.

- Despite clearly documented historical evidence that the Constitution provides for Malaysia to be secular, there is lack of appreciation of this fact among lay persons, administrators, enforcement authorities, and the ulamas. This has led to instances of controversial and conflicting interpretations of the Constitution, in particular, Article 3 (1), of the Federal Constitution.

- There have been transgressions committed by religious authorities. These can be viewed as executive exuberance, trespass on the Federal List, violation of human rights, and jurisdiction of the *Syariah* Courts. Incidents of unacceptable moral policing have also been reported. Recently, three incidents of transgressions were widely reported - a 'Muslim-only' launderette which the operator and a religious authority linked to JAKIM claim to be acceptable; the arrest and detention of an award-winning Turkish author/scholar for allegedly 'teaching' Islam without credentials; and the case of the late Kassim Ahmad who was first taken to court by JAWI in 2014 on three charges of allegedly insulting Islam and defying religious authorities which turned out to be illegal.

- There are numerous Islamic institutions, and many of them have overlapping roles. These institutions presumably were established with good intentions and clear objectives, and several of them do commendable work in promoting Islam, and in doing so, they have not deviated from the provisions of the Constitution. However, a recently established institution,

the Institut Kajian Strategik Islam Malaysia (IKSIM), has been seen to go against the Constitution and is attempting to erode the secular character of Malaysia. In its booklet of 28 March 2017, IKSIM claimed that 'secularism, liberalism and cultural diversity are elements that will undermine the Islamic agenda and destroy the country's sovereignty', and that 'although Malaysians can embrace other religious faiths, the country is not duty-bound to protect other religions'. IKSIM goes further to challenge the supremacy of the Federal Constitution. Clearly, these views go against the principles of the Federal Constitution; therefore, organisations such as this are unconstitutional. There are also many Islamic (and Islamists) NGOs that share similar views. While these are not involved in the administration of matters pertaining to Islam, they do have an influence, and certainly, their activities impact significantly on Malaysians. However, if they do not encroach on the matters prescribed in the Constitution as precepts of Islam, such organisations cannot be deemed as unconstitutional. Nevertheless, a few have been seen to be intolerant and violent, with links to similar organisations outside Malaysia, including links with the terrorist Islamic State (IS). There is, therefore, a need for the public to have a better understanding of these institutions.

- Intolerance towards non-Muslims has been on the rise. Related to intolerance and bigotry is the issue of discourse on Islam often taking the exclusive (instead of the inclusive) approach. Several examples are cited such as the desecration of places of worship of other religions.

- Gender injustice has been encountered despite the fact that Islam is against any form of discrimination, oppression, inequality and injustice. Administrators of Islam tend to interpret the Quran and especially the hadith to justify their stand (influenced by the culture of patriarchy) on the unjust treatment of women. Examples cited are the amendments to the Islamic Family Law in 1994 (that undid a progressive amendment made in 1984); and the reservations made when Malaysia ratified the Convention on the Elimination of all Forms of Discrimination Against women (CEDAW). In general, there is lack of political will in advancing women's rights although some positive developments have taken place.

- There is also observed injustice against children that has negatively affected their legal status and their well-being including their health such as rejection of vaccines to prevent diseases. One issue that is often overlooked and under-reported is child marriage. The plights of children born out of wedlock and children of a parent who has unilaterally converted to Islam have attracted a lot of media attention in recent years. There are barriers imposed by Islamic authorities for a parentless child to be adopted by well-meaning couples.

- Sectarianism and divisiveness within the Ummah among Muslims of different mazhabs is a strong feature of Malaysian religious-cultural life. Islam in Malaysia is understood in a narrow domain – Sunni Islam of the Shafie mazhab, to the exclusion of all other forms of Islam. The religious authorities in

Malaysia appear not to acknowledge the Amman Message of 2004 to which the then Prime Minister of Malaysia is a signatory which recognises eight schools of Islamic jurisprudence.

- Deviation from the values and principles of the Constitution manifests in a lack of understanding and appreciation for the role of Islam under the Constitution, in particular, Article 3(4) that stipulates that the practice of Islam in this country is subject to compliance with the Constitution including compliance with the fundamental liberties provisions of the same, such as the right to life and personal liberty, the right to equality, the right to freedom of movement and association, the right to freedom of speech and expression, and the right to profess a religion of one's choice.

- Finally, there is marginalisation and neglect of the Rukunegara, in both its aspirations or goals and its principles.

7. IMPACT OF ISLAMIC RESURGENCE

7.1 Some trends are described such as the changing norms in attitudes, values and behaviour, such as the wearing of Islamic attire, particularly, women emulating Arabic culture, equating being Arabic to being Islamic. This Arabisation trend has now even expanded into the adoption of the Arabic language.

7.2 The study also has a chapter on the assessment and comparison of the practice of Islamic values by countries from three studies. One of these are on how 'Islamic' Malaysia is compared to other countries in terms of inculcation of Islamic values and governance. Another is on how closely countries follow the *Syariah* and meet the objectives of Islam, using the '*Syariah* index', and the third is on how tolerant countries are towards their people who profess other faiths.

8. SUMMARY OF FINDINGS

The findings described in Chapter 3 to Chapter 7 of the report are summarised. Matters concerning Islam and Muslims have been administered in the country throughout history. This Administration of matters pertaining to Islam – in its legal provisions, policies and institutional arrangements – must be in accordance with the Federal Constitution. However, in recent times, there were several instances of discordance in the administration of matters pertaining to Islam. While there are some positive trends and good practices, the issues of concern, however, far outweigh these positive trends and good practices. It is necessary, therefore, that steps are taken to address these issues.

9. RECOMMENDATIONS

Based on the findings, described in Chapters 3 to Chapter 7 which are summarised in Chapter 8, the following broad recommendations are made. Since several issues of concern identified in these findings may be dealt with by the same recommendations, the following seven broad recommendations are identified for the aforementioned issues identified:

1) To develop greater acceptance and understanding of religious diversity.

2) To review religious education so as to make it relevant to current situation and needs.

3) To foster greater appreciation and understanding of the underlying principles and values of the Federal Constitution and the Rukunegara.

4) To enhance the understanding of, and to provide greater clarity on, Islamic laws so as to ensure greater consistency in the approach and application of these laws. Under these broad recommendations, two specific actions are needed: (i) to specify the offences that are deemed to be against the "precepts" of Islam, and (ii) to ensure uniform Islamic laws for which three categories are recommended – law on Muslim religious affairs, Muslim personal law, and Muslim courts including procedures and evidence. (iii) to establish Parliamentary oversight on the administration of Islam.

5) To focus on justice for women and children.

6) To adopt a more inclusive discourse on Islam.

7) To institute reforms of religious institutions so as to ensure consistency with the Federal Constitution. This concerns three specific entities:

   i) JAKIM;
   ii) Other Islamic institutions; and
   iii) The Conference of Rulers.

10. IMPLEMENTATION OF THE RECOMMENDATIONS

On embarking on this study, it was the intention of G25 to be able to find out what the situation is regarding the administration of matters pertaining to Islam in Malaysia, and to make use of the findings to make appropriate recommendations. To achieve this objective, G25 will engage with as many stakeholders as possible. A multi-stakeholder Working Group will be established by G25 whose main function is to develop an Implementation Plan for the purposes of carrying out the recommendations in this report. The Working Group shall have three main functions, namely:

(i) To identify the strategies and activities ('what' is to be done) needed to operationalise each of the recommendations in this report; and as much as possible to also identify 'who', 'when' and 'how' these activities will be carried out.

(ii) To identify methods to monitor and assess the progress of the implementation of each of these activities for every recommendation.

(iii) To develop a clear reporting structure to ensure that the deliverables of the Working Group are achieved in a transparent and accountable manner.

The Working Group also suggests that G25 disseminates this study in the form of a report.

CONCLUSION

This study has elicited evidence that there are weaknesses and shortcomings in the way matters pertaining to Islam are administered in this country, and these need remedial actions that will undo, or at least, ameliorate the negative and disturbing trends that are seen today. This will transform Malaysia into a model nation. With Islam as the official religion, Muslims can practice moderate Islam, while non-Muslims are free to practice their faiths.

RINGKASAN EKSEKUTIF

1. TINJAUAN AM

Malaysia, sebagai sebuah negara berbilang kaum, budaya dan agama, wujud dengan lahirnya Perlembagaan Persekutuan - iaitu suatu dokumen perundangan yang bercorak sekular yang telah digubal dalam tahun 1957. Perlembagaan itu telah diperakukan oleh penggubalnya sebagai undang-undang tertinggi negara. Dari segi sejarah dan undang-undang, Dewan Perundangan Negeri diberi kuasa hanya untuk menggubal undang-undang Islam dan undang-undang peribadi sahaja bagi rakyat Islam di negeri tersebut, selain dari menubuh mahkamah-mahkamah untuk mengendalikan hal tersebut. Undang-undang di Malaysia digubal, dilaksana, dan ditafsir oleh tiga institusi sekular, iaitu Parlimen, Yang Dipertuan Agong (atau Jemaah Menteri) dan Mahkamah-mahkamah.

Dengan peredaran masa telah berlaku penggubalan undang-undang secara rawak, tanpa menghirau isu ketepatan bahasa perundangan, ditambah dengan birokrasi yang lebih berat dalam hal-hal keagamaan, telah timbul kekeliruan dan ketidakpastian tentang kedudukan penerapan undang-undang Islam dalam negara ini. Sejak 1976, undang-undang ini lebih dikenali sebagai "undang-undang Syariah". Juga didapati kesedaran dan pemahaman pemimpin-pemimpin politik mengenai bidang kuasa perundangan badan-badan yang bertanggungjawab dalam soal pentadbiran agama adalah sangat tipis. Akibatnya berbagai salah tanggapan (misconceptions) telah timbul.

Lebih kritikal lagi, sistem pendidikan agama yang menyangga keadaan begini perlu perubahan dari penekanan pada belajar secara menghafaz kepada belajar secara aktif. Yang lebih memudaratkan lagi

ialah kedudukan agama Islam itu sendiri - yang dari zaman dahulu lagi diterima sebagai prerogatif Raja-raja Melayu, tetapi telah di guna oleh ahli-ahli politik sebagai bahan slogan politik mereka, dengan itu memberi gambaran yang serong mengenai sejarah perlembagaan dan perundangan negara kepada rakyat.

Kajian ini yang dilakukan untuk meninjau cara pentadbiran hal-hal yang berkaitan dengan Islam di negara ini, merupai sebahagian daripada usaha berterusan G25 untuk mengimbau para pemimpin serta masyarakat untuk menghormati serta mengamal nilai al-wasatiyyah dalam mentadbir undang-undang Islam di kalangan rakyat Malaysia. Kajian ini juga adalah lanjutan kepada surat terbuka G25 pada YAB Perdana Menteri bertarikh 7 Disember 2014 (sila lihat Lampiran II) yang telah mengemukakan beberapa isu yang membimbangkan.

2. LATAR BELAKANG

Tujuan 'am kajian ini ialah untuk meninjau pentadbiran hal-hall yang berkaitan dengan Islam sepanjang perkembangan negara Malaysia, dari sebuah negara takluk British hingga ke zaman sekarang. Secara khusus ia bertujuan (i) menggalur evolusi sejarah pentadbiran hal-hal berkaitan Islam di negara ini; (ii) menggalur pengasasan dan evolusi badan-badan berkuasa agama dan jabatan-jabatan kerajaan berkenaan pada peringkat kerajaan Negeri dan Persekutuan; (iii) mencari maklumat tentang kekuatan dan kelemahan yang terdapat dalam pentadbiran hal-hal yang berkaitan dengan Islam; dan (iv) memberi syor-syor (recommendations) untuk mengatasi kelemahan-kelemahan yang didapati. Kajian ini mengguna data dari sumber primer (penerbitan-penerbitan kerajaan dari Arkib-arkib Negara, laporan-laporan dan laman-laman web), dan dari sumber sekunder melalui tinjauan "dari meja" ("desk review") pelbagai sumber termasuklah dokumen-dokumen, buku-buku, jernal-jernal, laporan daripada kajian-kajian, dan tesis yang ditulis oleh penuntut-penuntut di institusi-institusi pengajian tinggi. Kajian ini juga telah mengguna kepakaran sepasukan peguambela dan peguamcara yang berpengalaman daripada kes-kes mahkamah yang ada kaitan dengan perkara ini.Oleh kerana kekangan-kekangan yang tidak dapat dielakkan, data primer dari temuduga dengan responden-responden tertentu tidak dapat diadakan.

3. TINJAUAN SEJARAH DAN UNDANG-UNDANG

3.1. Di Malaya sebelum pemerintahan British, undang-undang Islam wujud di samping adat resam orang Melayu, dan percanggahan yang terdapat di antara dua ini, secara amnya, tidaklah dihiraukan sangat. Pemerintahan British membuat perubahan-perubahan kepada dua asas undang-undang ini dan memasukkan sumber ketiga: undang-undang statut dan undang-undang 'common law' British. Kadangkala berlaku percanggahan di antara undang-undang adat dan undang-undang Islam. Orang-orang Melayu tidak mengambil undang-undang Islam sepenuhnya; dan penggunaannya berbeza dari sebuah negeri ke sebuah negeri yang lain. Sebelum zaman pemerintahan British, para sejarahwan tidak sepakat tentang status Islam sebagai agama resmi negeri. Walau pun Pemerintah sebuah negeri itu diterima sebagai pihak berkuasa tertinggi atas semua perkara, sama ada yang bersabit dengan hal ehwal agama atau hal-hal sekular, tiada bukti yang pihak istana telah terlibat dengan institusi-institusi Islam secara aktif. Selepas jajahan takluk British diasaskan di Pulau Pinang oleh Kapt. Francis Light di atas nama British East India Company pada tahun 1786, Pentadbiran British mula bertapak, secara berperingkat-peringkat, sehingga seluruh tanah semenanjung jatuh ke bawah naungan British menjelang tahun 1909. Kerajaan British memerintah melalui jabatan-jabatan pentadbiran kolonial, dan dengan itu mana-mana kuasa pribumi yang wujud sebelum itu tidak lagi diiktiraf sebagai memiliki kuasa eksekutif. Tetapi, dari pandangan awam, kuasa orang-orang Melayu dilihat sebagai masih berdaulat, dan hieraki dan institusi-institusi Melayu masih dipelihara. Pemerintahan British membawa ketenteraman dengan pentadbiran berasaskan undang-undang, dengan wujudnya sistem pengadilan

British, penerimaan hakikat bahawa setiap orang mempunyai hak, dan juga Kedaulatan Undang-Undang. Satu perhubungan baru wujud diantara pemerintah dan yang diperintah. Pihak British menubuhkan Majlis-Majlis Negeri, tetapi anggota-anggotanya dilantik dan tugas Majlis-Majlis itu tidak lebih daripada sebagai badan penasihat sahaja kepada Kerajaan Kolonial. Apabila pentadbiran kolonial British merebak di Negeri-Negeri Melayu, ini membawa pula pembentukan institusi-institusi agama Islam. Setiap perjanjian yang dibuat dengan pihak British menyebutkan bahawa Pemerintah bersetuju untuk menerima seorang Residen/Penasihat, dan nasihatnya mesti diminta dan dilaksanakan bersabit dengan semua perkara kecuali perkara-perkara yang menyentuh agama dan adat istiadat orang-orang Melayu. Dasar agama pemerintah kolonial mengelakkan campur-tangan dalam hal-hal sedemikian dan mereka cuba meyakinkan orang-orang Melayu bahawa cara hidup tradisional mereka tidak terancam. Pemeliharan dan penundukan kepada agama Islam itu memberikan jaminan psikologi kepada orang-orang Melayu bahawa negara itu masih milik mereka walau pun pendatang-pendatang Cina dan India datang masuk dengan banyaknya. Kemudiannya peranan Raja-Raja Melayu sebagai pelindung 'agama dan adat resam orang-orang Melayu' menajdi lebih penting, dan ini, pada sebahagiannya, menggantikan kehilangan kedaulatan mereka. Pemeliharan asas-asas kuasa tradisional ini membentukkan satu kuasa pentadbiran agama yang lebih keras, dengan penumpuan kuasa itu pada satu susunan hieraki pegawai-pegawai yang, secara langsungnya, bergantung kepada Raja-Raja. Sistem undang-undang awam dan jenayah yang dikanunkan dan tertulis diwujudkan melalui akta, dan ini menguatkan lagi tekanan supaya diadakan juga satu sistem undang-undang Islam yang lebih

formal. Ini membawa kepada pembentukan mahkamah-mahkamah dan prosedur undang-undang serta terbentuknya satu birokrasi undang-undang untuk pentadbirannya. Maka wujudlah darinya satu badan pegawai-pegawai ugama yang formal. Mahkamah-mahkamah Islam diadakan di setiap negeri untuk melaksanakan undang-undang Islam dan adat resam.

3.2. Persekutuan Tanah Melayu ialah hasil daripada Perjanjian Persekutuan Tanah Melayu 1948 ('FMA' - Federation of Malaya Agreement 1948) diantara Kerajaan British dan Raja-Raja Negeri-Negeri Melayu Bersekutu (Perak, Selangor, Pahang, Negeri Sembilan) dan Negeri-Negeri Melayu Yang Tidak Bersekutu (Johor, Kedah, Perlis, Kelantan, Terengganu). Di bawah perjanjian FMA, kedua-dua buah tanah jajahan British (Crown Colonies), ia itu Negeri-Negeri Selat Pulau Pinang dan Melaka dimasukkan ke dalam Persekutuan itu. Ketua Kerajaan Persekutuan baru ini ialah seorang Pesuruhjaya Tinggi yang mempunyai kuasa perundangan dan pentadbiran yang luas. Di bawah FMA ini juga telah ditubuhkan satu Majlis Perundangan Persekutuan yang dipengerusikan oleh Pesuruhjaya Tinggi itu. Majlis Perundangan itu mempunyai kuasa untuk membuat undang-undang untuk semua perkara yang diaturkan di dalam Jadual Kedua Perjanjian itu. FMA juga mempunyai peruntukan untuk pembentukan sebuah Majlis Raja-Raja yang dianggotai oleh Raja-Raja Negeri Melayu. Di bawah Perjanjian ini telah ditubuhkan satu Majlis Eksekutif Persekutuan untuk membantu dan menasihat Pesuruhjaya Tinggi dalam tugas-tugasnya. FMA telah memberi kuasa terhad kepada Majlis-Majlis Negeri untuk membuat undang-undang; di antara lainnya, Negeri-Negeri diberi kuasa untuk membuat undang-undang berkaitan dengan agama Islam atau adat

istiadat orang-orang Melayu. Raja-Raja Melayu bersetuju untuk memerintah Negeri masing-masing mengikut perlembagaan tertulis. Seorang Penasihat British dilantik di setiap Negeri dan Raja-Raja berjanji untuk menerima nasihat mereka tentang semua hal-ehwal Negeri selain daripada yang berkaitan dengan agama Islam dan adat istiadat Melayu. FMA juga memeliharakan semua undang-undang yang sedia wujud di dalam Persekutuan itu, termasuklah Undang-Undang Islam yang sedia ada.

3.3. Pada tahun 1956, satu Persidangan Perlembagaan telah diadakan di London di mana satu persetujuan telah dicapai dengan Kerajaan British bahawa pemerintahan sendiri sepenuhnya dan kemerdekaan akan diisytiharkan selewat-lewatnya pada bulan Ogos 1957. Satu Suruhanjaya Perlembagaan Persekutuan Tanah Melayu ('Reid Commission') telah dilantik untuk menggubalkan satu Perlembagaan untuk negara yang baru merdeka itu. Reid Commission ini telah mendengar keterangan daripada pegawai-pegawai kerajaan, badan-badan dan individu-individu yang berminat, Raja-Raja Melayu dan parti-parti politik di dalam Parti Perikatan. Suruhanjaya itu telah mengesyorkan pembentukan Persekutuan Tanah Melayu sebagai sebuah negara yang bersatu, bebas dan demokratik, adil kepada setiap anggota masyarakatnya; dan adat istiadat dan agama orang-orang Melayu akan diletak di bawah kuasa kerajaan Negeri. Berkenaan dengan Islam pula sebagai ugama Persekutuan, telah dipersetujui oleh semua pihak bahawa jika dimasukkan peruntukan sebegitu, mestilah dinyatakan dengan jelasnya bahawa ini, dengan apa cara pun, tidak akan menjejaskan hak-hak awam orang-orang bukan Islam. Dalam satu memorandum yang di ketengahkan oleh pihak Perikatan, ada disebut

– 'agama Malaysia ialah agama Islam. Pegangan kepada prinsip ini tidak akan mengenakan sebarang sekatan ke atas warganegara bukan Islam daripada menganuti dan mengamalkan agama mereka sendiri dan tidak pula membawa pengertian bahawa Negara ini bukan negara sekular.' Majlis Raja-Raja telah memberitahu Suruhanjaya itu bahawa mengikut pendapat Raja-Raja Melayu, Islam tidak perlu diisytiharkan di dalam Perlembagaan sebagai agama yang ditetapkan untuk persekutuan itu. Bangkangan Raja-Raja Melayu kepada peruntukan itu bersandarkan kepada dua alasan; pertamanya, dalam peruntukan Perlembagaan yang ada, merekalah ketua agama Islam di Negeri masing-masing; dan, keduanya agama, dalam Perlembagaan yang sedia ada dan di dalam Perlembagaan yang sedang dicadangkan juga, jatuh ke bawah urusan Negeri. Jika diadakan satu peruntukan yang mengisytiharkan Islam sebagai agama resmi Persekutuan, itu akan menyentuh kedudukan Raja-Raja sebagai ketua agama dan juga hak setiap Negeri untuk menentukan perkara-perkara berkaitan dengan hal-ehwal agama.

3.4. Satu Jawatankuasa Kerja telah dilantik untuk mengkaji Laporan Suruhanjaya itu dan untuk membuat Perlembagaan Cadangan untuk Persekutuan Tanah Melayu (Kertas Putih). Pada mesyuarat pertama Jawatankuasa, ketua Pertubuhan Melayu Bersatu (UMNO), Tunku Abdul Rahman, telah meminta supaya satu peruntukan dimasukkan ke dalam Perlembagaan itu bahawa Islam adalah agama Persekutuan, seperti yang telah dicadangkan di dalam memorandum Parti Perikatan. Pemimpin-pemimpin UMNO mengemukakan hujjah bahawa peruntukan untuk satu agama resmi akan memberi kesan psikologi yang penting kepada orang-orang Melayu. Ia juga mempunyai asas politik sebab

Islam adalah penunjuk identiti, satu syarat penting untuk mentakrifkan seorang Melayu, yang haknya dilindungi oleh Perlembagaan. Di samping itu juga Tunku telah memberi jaminan kepada Jawatankuasa Kerja itu bahawa negara yang terbentuk adalah sebuah negara sekular. Menunduk kepada bantahan daripada Raja-Raja Melayu dan kerisauan orang-orang bukan Islam, Parti Perikatan memberi persetujuan mereka bahawa perkara baru dalam perlembagaan itu memerlukan dua peruntukan – pertamanya, peruntukan baru itu tidak menjejas kedudukan Raja-Raja Melayu sebagai ketua agama Islam di negeri masing-masing; dan, keduanya, bahawa amalan dan penyebaran agama-agama lain terjamin. Semasa menyetujui cadangan Perikatan itu, Raja-Raja Melayu menyatakan bahawa mereka menentang penubuhan sebuah Jabatan Hal Ehwal Agama Kerajaan Persekutuan. Dari sini satu kenyataan telah dibuat untuk tujuan itu; jadi penubuhan sebarang badan Persekutuan untuk pentadbiran agama Islam adalah bertentangan dengan Perlembagaan. Ada satu lagi jaminan yang diberi oleh Perikatan untuk melindungi kedudukan Raja-Raja Melayu di negeri masing-masing. Tunku Abdul Rahman memberi jaminan bahawa jika sebuah Jabatan Persekutuan ditubuhkan, ia akan diletakkan di bawah kuasa Yang di-Pertuan Agong, dan ia hanyalah untuk tujuan perhubungan sahaja. Tentang kemungkinan akan timbul salah pentafsiran daripada peruntukan tentang agama itu, Tunku telah memberi jaminan kepada Jawatankuasa Kerja itu bahawa seluruh Perlembagaan telah dibentukkan di atas asas bahawa Persekutuan itu akan ditubuh sebagai satu 'Negara sekular'. Akhirnya, Perlembagaan yang disyorkan oleh Suruhanjaya Reid membawa masuk Perkara 3(1) yang menjadikan Islam agama Persekutuan. Yang pentingnya ialah, Perkara 3(4) menyebut "Tidak ada sesuatu pun di dalam

peruntukan ini yang memansuhkan apa-apa yang terdapat pada mana-mana peruntukan di dalam Perlembagaan ini". Jadi ia menjaminkan, pertamanya, kedudukan tertinngi Perlembagaan; dan, keduanya, bahawa Persekutuan itu ialah sebuah negara berbentuk sekular. Perkara 74(2) dimasukkan untuk membolehkan dewan Perundangan negeri membuat undang-undang berkenaan hal-hal tertentu dalam agama Islam dan adat istiadat Melayu. Jadi, walau pun Perlembagaan Persekutuan tidak menyebut perkataan "sekular", rekod-rekod sejarah tentang apa yang berlaku pada tahun 1956, Perkara 3(4) dan peruntukan-peruntukan lain di dalam Perlembagaan Persekutuan menjadi bukti yang jelas bahawa Perlembagaan Persekutuan adalah berbentuk sekular.

Tentang apa yang dimaksudkan dalam Fasal (4) Perkara 3 ialah walau pun Islam adalah agama Persekutuan, Malaysia tidak bebas untuk mengamalkan agama Islam mengikut hukum Islam yang ketat. Maksudnya di sini ialah, katakanlah sebuah Negeri meluluskan undang-undang untuk mengenakan undang-undang hudud keatas semua orang Islam di Negeri itu; ini tidak boleh menjadi undang-undang sebab ia tidak dibenarkan oleh Perkara 3(4). Pelaksanaan undang-undang hudud bertentangan dengan Perlembagaan kerana undang-undang seperti itu bertentengan dengan peruntukan dalam Perlembagaan mengenai hak kebebasan asas dan tentang pengagihan kuasa perundangan. Hukuman-hukuman seperti memotong tangan kerana kesalahan mencuri dan hukuman rejam untuk kesalahan zina tidak dibenarkan oleh Perlembagaan Persekutuan, walau pun dibenarkan oleh undang-undang Islam.

3.5. Apabila terbentuknya Malaysia pada tahun 1963, struktur utama pentadbiran perkara-perkara yang berkaitan dengan agama Islam diwujudkan selepas penerimaan Perlembagaan Persekutuan mengikut Perjanjian Malaysia tahun 1963. Yang menyusul selepas tahun 1963 ialah, pada sebahagian besarnya, penghalusan pentadbiran negeri dan pemindaan undang-undang untuk melaksanakan butir-butir penghalusan itu.

3.6. Enakmen Pentadbiran Undang-Undang Islam Selangor 1952 menjadi garis asas yang boleh digunakan oleh Negeri-Negeri lain. Ini merupakan satu undang-undang pergabungan yang kemudiannya mengalami beberapa perubahan, dan mendorong kepada perkara-perkara khusus dalam Enakmen tahun 1952 itu dijadikan enakmen-enakmen berasingan, misalnya, undang-undang berasingan untuk hal-hal keluarga, kesalahan-kesalahan dari segi agama Islam, keterangan, Wakaf, dll.

3.7. Pada tahun 1965, 8 tahun selepas Merdeka, Akta Mahkamah-Mahkamah Islam (Bidang Kuasa Jenayah) 1965 telah digubal oleh Parlimen mengikut Perkara 1 daripada Senarai Negeri dalam Jadual Ke Sembilan Perlembagaan Persekutuan untuk memberi mahkamah-mahkamah Islam bidang kuasa bersabit dengan kesalahan-kesalahan yang melanggar hukum-hukum Islam. Oleh kerana langkah ini diambil lewat oleh Parlimen, satu peruntukan telah dimasukkan ke dalam Akta itu untuk memberi pengesahan kepada kesalahan-kesalahan yang telah dibicarakan oleh mahkamah-mahkamah Islam tersebut di antara Kemerdekaan hingga tahun 1965.

3.8. Semenjak Merdeka, beberapa pindaan telah dibuat kepada Perlembagaan Persekutuan. Dengan satu pemindaan yang dibuat pada tahun 1976, perkataan 'Syariah' muncul buat pertama kalinya dalam Perlembagaan, dan 'Mahkamah Islam' sekarang dikenali sebagai 'Mahkamah Syariah'. Pemindaan pada tahun 1988 itu penting kerana pemasukan satu Fasal baru kepada Perkara 121, iaitu, Fasal (1A) yang berbunyi: 'Mahkamah-mahkamah yang disebutkan dalam Fasal (1) tidak akan mempunyai bidang kuasa mengenai sebarang perkara di dalam bidang kuasa mahkamah-mahkamah Syariah'. Kesannya ialah, Mahkamah-Mahkamah Tinggi sekarang tidak lagi boleh mengguna bidang kuasanya ke atas perkara-perkara yang secara eksklusifnya jatuh di bawah bidang kuasa mahkamah-mahkamah Syariah. Walaubagaimanapun, pada Januari 2018 di dalam kes Indira Gandhi Makamah Persekutuan telah memutuskan bahawa, walaupun tedapat Art. 121(1A), namun, Mahkamah Sivil masih mempunyai kuasa kehakiman untuk mengawasi dan menentukan kesahan sesuatu tinakan pihakberkuasa agama atau sesuatu keputusan Mahkamah Syariah.

3.9. Dalam perkembangan sejarah pentadbiran perkara-perkara yang berkaitan dengan agama Islam di Malaysia ada terdapat perkara-perkara khusus yang berkaitan. Ini termasuklah:

- *Kesalahan-kesalahan Islam dan hukuman-hukumannya – Satu sifat utama dalam Islam ialah konsep tanggungjawab pemerintah atau badan awam untuk mengawasi kelakuan moral individu dan amalan agama pihak awam; serta untuk*

memupuk kebaikan dan menghakis kejahatan.

- *Pentadbiran wakaf - ini ialah pembiayaan amal untuk selama-lamanya dari modal dan pendapatan dari harta untuk tujuan kemajuan agama atau khairat.*

- *Zakat, fitra, dan baitulmal - Hasil pendapatan daripada semua ini ditujukan, sebahagian besarnya, untuk pembinaan dan penjagaan masjid, pembayaran gaji untuk pegawai-pegawai masjid dan tenaga pengajar*

- *Haj – Perhatian diberikan kepada urusan haji dan keperluan untuk mengawalnya sebab ada masalah-masalah sosial dan ancaman kesihatan yang mungkin timbul darinya.*

- *Pendidikan agama – Bentuk pendidikan terawal di semenanjung Tanah Melayu ialah sekolah-sekolah pondok yang merupai satu sistem sekolah berasrama yang tidak formal; dan dengan peredaran masa, beberapa perubahan telah dilakukan, dengan adanya penglibatan Kementerian Pendidikan dengan cara yang lebih formal dan sistematik.*

4. PENTADBIRAN HAL-HAL YANG BERKAITAN DENGAN AGAMA ISLAM – PENYUSUNAN INSTITUSI

4.1. Setiap Negeri mempunyai empat pihak berkuasa agama yang penting: Majlis Agama, Mufti (atau Majlis Fatwa), mahkamah-mahkamah kathi (kemudiannya menjadi Mahkamah-Mahkamah Syariah) dan Pendaftar Perkahwinan dan Perceraian. Berkenaan dengan fungsi-fungsi pihak-pihak berkuasa agama ini, setiap Negeri mengambil contoh daripada perundangan di Negeri Selangor, Enakmen Pentadbiran Undang-Undang Islam (Selangor) 1952, dan Enakmen Pentadbiran Agama Islam (Selangor) 2003. Setiap Negeri mempunyai sebuah Jabatan Agama Islam, dan secara amnya ia diketuai oleh seorang Pengarah yang dilantik daripada perkhidmatan awam. Jabatan-jabatan ini ditubuhkan oleh Kerajaan-Kerajaan Negeri tertentu.

4.2. Majlis Raja-Raja telah ditubuhkan pada tahun 1948 di bawah Perjanjian Persekutuan Tanah Melayu 1948. Majlis Raja Raja ini terus wujud di bawah Perkara 38 dalam Perlembagaan Persekutuan. Majlis ini ialah susulan kepada majlis Durbar yang bermesyuarat pertama kalinya di Kuala Kangsar pada tahun 1897 dengan penyertaan Raja-Raja dari empat buah Negeri Melayu Bersekutu. Sebelum itu, pada bulan Julai 1895, Perjanjian Persekutuan 1895 telah ditandatangani oleh pihak British dan Negeri-Negeri Melayu Bersekutu. Perjanjian itu menjadikan empat Negeri Melayu Bersekutu itu sebagai 'satu Persekutuan yang akan dikenali sebagai Negeri-Negeri Melayu Yang Dilindungi, yang akan ditadbirkan di bawah nasihat Kerajaan British'. Di bawah Perjanjian ini, Raja-Raja dari empat buah Negeri

itu bersetuju untuk menerima seorang pegawai British yang dipanggil 'Resident General' sebagai agen dan wakil Kerajaan British di bawah Gabenor Negeri-Negeri Selat; dan bersetuju untuk mengikut sebarang nasihatnya 'dalam semua hal pentadbiran selain daripada yang menyentuh agama Islam'. Satu perkembangan penting daripada penubuhan Persekutuan ini ialah bermulanya Persidangan Raja-Raja (atau Durbar) yang tujuannya dimaksudkan hanya untuk perundingan dan nasihat. Persidangan pertamanya diadakan pada bulan Julai 1897. Mesyuarat ini penting kerana inilah pertama kalinya Raja-Raja dari empat buah Negeri itu bertemu dalam suasana damai dan muhibah. Persidangan itu dipengerusikan oleh Pesuruhjaya Tinggi Persekutuan Tanah Melayu (yang juga memegang jawatan Gabenor Negeri-Negeri Selat). Ia tidak mempunyai bidang kuasa untuk membuat undang-undang tetapi ia memberikan ruang untuk menyuarakan sebarang ketidakpuasan dan membincang masalah bersama. Durbar itu memberi martabat kepada Raja-Raja dan menjadi forum yang penting untuk mereka membincangkan berbagai isu, seperti pentadbiran perkara-perkara berkaitan dengan agama Islam, bahasa Melayu dan nasib orang Melayu. Akta Persekutuan Tanah Melayu 1948 meneruskan keadaan yang seolah-olahnya sama dengan Durbar ini juga, dengan terbentuknya Majlis Raja-Raja yang dianggotai oleh Raja-Raja Melayu. Majlis ini akan mengkaji rang undang-undang, sebarang deraf sekim gaji baru, sebarang deraf skim untuk penciptaan atau penyusunan semula mana-mana jabatan atau perkhidmatan Kerajaan Persekutuan, dan perubahan-perubahan besar dasar imigresen. Majlis Raja-Raja yang ada sekarang adalah di bawah peruntukan Perkara 38 dalam Perlembagaan yang juga menentukan fungsi dan kuasa Majlis itu. Penyimpan Mohor Raja Raja Melayu bertugas sebagai Setiausaha

kepada Majlis itu. Majlis Raja-Raja dan Majlis Kebangsaan Hal Ehwal Islam (MKI) ada mempunyai perhubungan secara langsung. MKI ini dilaporkan telah ditubuhkan oleh Majlis Raja-Raja sendiri. Perhubungan Majlis Raja Raja dengan Jabatan Kemajuan Islam (JAKIM) adalah secara tidak langsung; JAKIM bertugas sebagai sekretariat kepada MKI, tetapi tidak dapat ditentukan secara jelas apakah perkaitan sebenarnya diantara mereka.

4.3. Seperti yang telah disebutkan, penubuhan satu badan di peringkat persekutuan untuk pentadbiran Islam itu adalah bertentangan dengan Perlembagaan kerana agama ialah perkara yang terletak di bawah pentadbiran negeri. Namun begitu, pada tahun 1997, satu badan Persekutuan telah ditubuhkan di Pejabat Perdana Menteri (PPM) yang diberi nama the Malaysian Islamic Development Division atau Jabatan Kemajuan Islam Malaysia (JAKIM).

- *Perkembangan sejarah: JAKIM ditubuhkan pada tahun 1997 untuk mengganti BAHEIS (Bahagian Kebangsaan Bagi Hal Ehwal Agama Islam), sebagai sekretariat kepada sebuah badan yang sedia wujud pada masa itu, iaitu Majlis Kebangsaan bagi Hal Ehwal Agama Islam Malaysia (MKI), di Jabatan Perdana Menteri. Peraturan yang digunakan untuk menubuhkan Majlis Kebangsaan itu, iaitu Peraturan-Peraturan Majlis Kebangsaan Untuk Hal Ehwal Agama Malaysia 1968, mengisytiharkan bahawa tidak ada tindakan Majlis Kebangsaan ini yang akan menyentuh kedudukan, hak-hak, keistimewaan, prerogatif dan kuasa Raja sebagai Ketua agama Islam di Negerinya.*

- *Tentang status JAKIM sebagai badan yang bertentangan dengan Perlembagaan, Jabatan Perdana Menteri telah mempertahankan penubuhannya dengan berkata JAKIMlah satu-satunya badan yang menjadi benteng kepada kedudukan agama Islam sebagai agama Persekutuan. Pembelaan ini tidak ada asas dari segi Perlembagaan kerana Perlembagaan Persekutuan tidak membayangkan pembentukan sebuah Majlis Kebangsaan Untuk Hal Ehwal Islam oleh Majlis Raja Raja atau oleh Kerajaan Persekutuan; agama Islam dan adat istiadat Melayu adalah perkara-perkara yang eksklusif kepada Dewan-Dewan Perundangan Negeri dan Majlis Tndakan Negeri. Tetapi, penggubal Perlembagaan Persekutuan ada menyebut niat yang ada sebelum Merdeka ia itu '[jika] didapati perlu untuk tujuan penyelarasan untuk menubuhkan satu Jabatan Untuk Hal Ehwal Agama Islam di peringkat persekutuan, maka Yang di-Pertuan Agong akan, selepas berunding dengan Majlis Raja Raja, menyebabkan Jabatan sebegitu ditubuhkan sebagai sebahagian daripada badan-badan dibawahnya'. Tetapi, ini adalah bertentangan dengan perlembagaan kerana kuasa Majlis Raja Raja terhad oleh Perkara 38 Perlembagaan Persekutuan; jadi, untuk mengesahkan penubuhan JAKIM dari segi perlembagaan akan memerlukan pemindaan Perlembagaan Persekutuan untuk memberi kuasa ini kepada Majlis Raja-Raja.*

- *Ada juga cara pemikiran bahawa JAKIM ditubuhkan dengan niat untuk menyeragamkan undang-undang di antara Negeri. Jika diambil tanggapan bahawa ini perlu dilakukan,*

maka ia boleh dilakukan mengikut undang-undang dengan mengguna Perlembagaan Persekutuan melalui Perkara 76 yang mengaturkan satu prosedur undang-undang. Parliamen, untuk tujuan menyelarasakan undang-undang, boleh membuat undang-undang berkenaan dengan sebarang perkara yang disebutkan dalam Senarai Negeri, termasuklah perkara-perkara yang berkaitan dengan agama Islam dan adat istiadat Melayu, seperti yang disebutkan di dalam Butiran 1 Senarai Negeri; dan undang-undang sebegitu akan berkuatkuasa di sebuah Negeri sebaik sahaja ia diterima oleh Dewan Perundangan Negeri itu. penyeragaman undang-undang sebegitu, sebaik sahaja ia diterima oleh Dewan Perundangan Negeri dengan diluluskan sebagai Enakmen Negeri, dianggap sebagai undang-undang Negeri (dan bukan undang-undang Persekutuan) dan Enakmen Negeri (yang menerima undang-undang Persekutuan itu) boleh dipinda atau dimansuhkan oleh undang-undang yang dibuat oleh Dewan Perundangan Negeri. Oleh kerana tiada penglibatan Parlimen, dan Perkara 76 tidak digunakan, maka MKI dan JAKIM bukanlah agensi yang ditubuhkan mengikut undang-undang dan Perlembagaan, dan boleh dilihat sebagai muncul dari satu keputusan dasar untuk memenuhi tujuan yang dianggap perlu untuk penyelarasan dan penyeragaman. Susulan dari itu sebarang nasihat atau syor dari Majlis Kebangsan atau JAKIM untuk mewujudkan penyeragaman Undang-Undang Islam merupakan hanya nasihat dan syor semata-mata. Tidak ada kesan undang-undang darinya. Penerimaan dan pelaksanaan nasihat atau syor dari Majlis Kebangsaan atau JAKIM oleh sesuatu badan

awam hanyalah satu langkah patuh pada dasar sahaja, yang timbul daripada keperluan menghormati kehendak pihak berkuasa politik.

- *Begitu juga, fatwa-fatwa daripada Jawatankuasa Fatwa di bawah JAKIM tidak mempunyai kesan undang-undang dan hanya merupakan satu konsensus di peringkat 'kebangsaan' tentang satu perkara yang ada kaitan dengan agama Islam di Malaysia. Fatwa-fatwa itu tidak ada kuasa undang-undang di peringkat Negeri sebelum ianya diterima oleh Negeri itu melalui satu fatwa oleh Mufti Negeri atau Jawatankuasa Fatwa Negeri dan diwartakan mengikut prosedur seperti yang disebutkan oleh undang-undang Negeri. Jadi, fatwa-fatwa sedemikian boleh dipersoalkan di mahkamah awam oleh orang-orang yang menerima kesan buruk daripadanya dengan alasan bahawa perkara yang disentuhi oleh fatwa itu adalah diluar bidang kuasa Jawatankuasa Fatwa.*

- *Walau pun kewujudannya tidak berasaskan kepada Perlembagaan, JAKIM telah wujud dan perlu diberikan wawasan, tujuan, objektif, peranan dan fungsi, struktur organisasi dan pembiayaan. Maklumat tentang JAKIM yang, sebahagian besarnya, didapati daripada laman webnya, menyatakan bahawa JAKIM ialah satu Jabatan yang mempunyai empat sektor, dan setiap sektor mempunyai beberapa Bahagian. JAKIM dipimpin oleh seorang Ketua Pengarah yang dibantu oleh dua Timbalan Ketua Pengarah dan seorang Pengarah Kanan. Di bawah jawatan-jawatan ini*

terdapat dua puluh pengarah yang bertanggungjawab untuk tugas-tugas khas, serta dua ketua Unit.

- *Untuk tujuan peruntukan belanjawan, JAKIM adalah di bawah Pejabat Perdana Menteri (PPM). Ada terdapat enam (6) program di bawah PPM dan satu daripadanya ialah "Kemajuan Islam", di bawahnya terdapat sebelas kegiatan, satu daripadanya ialah JAKIM. Dari segi peruntukan belanjawan kepada JAKIM ada terdapat banyak kenyataan yang membayangkan persepsi yang bercanggah; JAKIM sendiri mendakwa bahawa belanjawan yang diterimanya patut ditambah untuk melaksanakan tugas-tugasnya, sementara beberapa pengkeritik telah menyoal tentang, bukan sahaja jumlah yang mereka terima tetapi lebih lagi cara peruntukan itu diberi yang kurang telus dan kebertanggungjawapan. Untuk tahun 2018, JAKIM telah menerima RM 810,890,000 untuk belanjawan operasi (penambahan daripada tahun 2017 apabila jumlahnya sebanyak RM 744,947,800). Ini lebih kurang 16% daripada jumlah belanjawan PPM, dan merupakan nisbah yang besar (79%) daripada belanjawan yang diperuntukkan kepada rancangan "Kemajuan Islam" yang mencakupi 11 aktiviti termasuk JAKIM.*

- *Di laman web JAKIM ada terdapat maklumat tentang apa yang dilihat oleh mereka sebagai cabaran kepadanya (satu daripadanya ialah persepsi negatif oleh orang awam), dan Jabatan ini telah merumuskan arah strategiknya berdasarkan cabaran ini.*

- *Dari segi hasil kerjanya pula ada terdapat sekumpulan garis panduan tentang perkara-perkara yang berkaitan dengan agama, meliputi bidang-bidang yang tidak semestinya dalam lingkungan kemahiran JAKIM. misalnya, bisnes, sukan, pendidikan, perubatan dan penerbitan.*

5. AMALAN-AMALAN BAIK YANG TIMBUL DARIPADA APA YANG DILAKUKAN SEKARANG DALAM PENTADBIRAN HAL-HAL YANG BERKAITAN DENGAN AGAMA ISLAM

Kajian ini menunjukkan beberapa amalan baik yang boleh ditiru oleh lain-lain negara Islam atau yang mempunyai penduduk majoriti beragama Islam. Ini termasuklah:

- *Lembaga dan Urusan Tabung Haji: Lembaga Tabung Haji ini terkenal sebagai satu daripada badan-badan pengurusan jemaah haji terbaik di dunia.*

- *Kewangan Islam: Malaysia diiktiraf sebagai negara di baris hadapan di dunia yang memperkenalkan bidang kewangan Islam secara besar-besaran. Ini termasuklah perbankan Islam dan insurans (takaful).*

- *Pensijilan Halal: JAKIM adalah agensi tunggal yang bertanggungjawab mengeluarkan sijil halal kepada syarikat-syarikat. Tetapi terdapat perbahasan tentang perkara ini.*

- *Tilawah al Quran: Malaysia juga terkenal dan disegani sebagai negara yang berterusan menjadi tuan rumah kepada acara ini.*

- *Wakaf, Zakat, Fitra, dan Baitumal: Malaysia telah menginstitusikan semua ini semenjak abad ke 20.*

- *Pendidikan Agama: Ini diadakan dari peringkat tadika kepada peringkat menengah. Ini memberikan ibu bapa pilihan untuk memasukkan anak-anak mereka ke sekolah-sekolah agama sepanjang peringkat persekolahan mereka.*

- *Khutbah Jumaat: Ini membukakan satu peluang besar untuk pemupukan ummah yang bersatu, berpengetahuan, bertoleransi, di samping memupuk kefahaman dan ketaatan yang lebih mendalam pada agama. Tetapi ini seringkali disalahgunakan – ia digunakan untuk menyerang perbuatan-perbuatan, individu-individu dan kumpulan-kumpulan tertentu, atau digunakan untuk menyalakan api kebencian antara agama dan kaum.*

- *Latihan pra-perkahwinan untuk pasangan beragama Islam: Inisiatif yang ada kemungkinan membawa kesan-kesan positif ini boleh memberi banyak peluang untuk membawa perubahan-perubahan untuk memupuk hidup berkeluarga yang baik berasaskan kepada nilai dan prinsip-prinsip Islam. Tetapi, seperti yang terdapat dengan khutbah Jumaat, ada juga berlaku penyelewengan.*

6. ISU-ISU YANG MENIMBULKAN KEBIMBANGAN DARIPADA PENTADBIRAN HAL-HAL YANG BERKAITAN DENGAN AGAMA ISLAM DAN PENGISLAMAN

Lanjutan dari isu-isu yang telah dikenalpasti di tiga bahagian terdahulu, Kajian ini ditumpukan kepada beberapa isu tertentu yang membimbangkan seperti berikut:

- *Kekurangan pencerahan dan persefahaman tentang apakah 'ajaran-ajaran' (precepts) Islam merupai isu besar yang perlu ditangani dengan segera. Dengan penerimaan bahawa Islam bukanlah hanya beberapa fahaman (dogmas) dan upacara tetapi meliputi kegiatan-kegiatan manusia yang berkaitan dengan undang-undang, politik, ekonomi, sosial, kebudayaan, moral dan perundangan, keluasan kuasa-kuasa perundangan negeri bersabit dengan penciptaan 'kesalahan-kesalahan syar'I' (precept offences) perlu ditakrifkan, .*

- *Terdapat salah tanggap tentang pertindihan bidang kuasa di antara Mahkamah-Mahkamah Tinggi dan Mahkamah-Mahkamah Syariah. Perkara 74(2) Perlembagaan Persekutuan memberi kuasa kepada Dewan-Dewan Perundangan Negeri untuk membuat undang-undang negeri bersabit dengan perkara-perkara yang disebutkan di dalam Senarai II Jadual Ke Sembilan (Senarai Negeri). Negeri-Negeri telah mengguna*

kuasa perundangan ini dan telah menubuhkan Mahkamah-Mahkamah Syariah negeri di bawah enakmen-enakmen berkenaan. Undang-undang ini, yang mencakupi kesalahan-kesalahan terhadap hukum Islam, adalah tertakluk kepada had-had yang dikenakan oleh undang-undang persekutuan (maknanya, oleh Parlimen), ia itu, Akta Mahkamah Syariah (Bidang Kuasa Jenayah) 1965 (Akta 355) seperti yang ditentukan oleh Perlembagaan Persekutuan (Item 1 di dalam Senarai Negeri). Dalam hal ini tidak timbul soal peruntukan-peruntukan yang bertentangan di dalam Perlembagaan Persekutuan. Di dalam bentuk struktur persekutuan seperti yang di peruntukkan oleh Perlembagaan Persekutuan, hal-hal berkaitan dengan undang-undang Islam dan adat istiadat Melayu terletak secara ekslusifnya di bawah Negeri.

- *Ada juga terdapat salah tanggap tentang kesan Fasal (1A) Perkara 121 ke atas kuasa perundangan Mahkamah-Mahkamah Tinggi. Fasal (1A) menyatakan bahawa Mahkamah-Mahkamah Tinggi 'tidak akan mempunyai bidang kuasa berhubung dengan sebarang perkara di dalam bidang kuasa mahkamah-mahkamah Syariah'. Mahkamah Persekutuan telah membuat dua keputusan bahawa 'Perkara 121(1A) telah dimasukkan bukan untuk menolak bidang kuasa mahkamah-mahkamah sivil. Dalam dua kes Mahkamah Persekutuan telah menetapkan yang Perkara 121(1A) telah di perkenalkan bukanuntuk menidakkan bidang kuasa mahkamah tinggi. Ia diperkenalkan untuk mengelak berlakunya konflik antara keputusan mahkamah Syariah dan mahkamah sivil seperti yang telah berlaku beberapa kali sebelum itu.*

- *Satu isu yang sudah begitu lama belum mendapat penyelesaian ialah kesan mengikat (binding effect) daripada undang-undang fatwa di Malaysia. Perlembagaan membolehkan Negeri-Negeri membuat undang-undang yang memberi kuasa kepada pihak-pihak berkuasa Negeri untuk mengeluarkan fatwa. Ada kalanya fatwa-fatwa itu menjengkau lebih daripada 'undang-undang Islam, doktrin dan adat Melayu' dan secara langsungnya menjejaskan sifat-sifat sekular negara seperti fahaman kemajmukan dan liberalisme. Nampaknya ada terdapat beberapa pendapat umum bahawa fatwa itu hanyalah setakat nasihat, dan tidak mempunyai status undang-undang, jadi sesiapa yang tidak mengikut fatwa tidaklah boleh dianggap sebagai melakukan kesalahan di bawah mana-mana undang-undang, kecuali jika fatwa itu telah dimasukkan kedalam enakmen Negeri.*

- *Cadangan untuk menguatkuasakan undang-undang huddud di Malaysia telah melahirkan perbahasan yang masih berlansung. Ada satu Rang Undang-Undang anggota persendirian di Parlimen untuk meminda Akta Mahkamah-Mahkamah Syariah (Bidang Kuasa Jenayah) 1965 (Disemak 1988) (Akta 355) untuk memberi kuasa kepada mahkamah-mahkamah Syariah untuk mengenakan hukuman-hukuman yang lebih berat untuk kesalahan-kesalahan di bawah undang-undang Islam yang dibuat oleh kuasa perundangan Negeri. Cadangan ini dikaitkan kepada undang-undang Syariah yang di luluskan di Negeri Kelantan dan Terengganu untuk kesalahan-kesalahan huddud. Ada hujjah-hujjah kukuh berdasarkan perlembagaan dan lain-*

lain sumber yang memberi sebab-sebab kenapa huddud tidak boleh dilaksanakan di Malaysia.

- *Orang-orang yang keluar dari agama Islam (murtad) menghadapi beberapa masalah di Malaysia. Satu salah tanggap (misconception) timbul selepas dimasukkan satu butiran baru ke dalam kad pengenalan Malaysia (IC) yang memerlukan perkataan 'Islam' dimasukkan kepada IC orang-orang Islam. Tidak terdapat sebarang alasan daripada perlembagaan untuk menghalang seseorang itu daripada menganuti agamanya; hak untuk menganuti agama pilihan seseorang itu ialah satu hak yang dijaminkan oleh Perkara 11 Perlembagaan Persekutuan. Selain daripada pandangan daripada kacamata undang-undang perlembagaan, soal murtad ini (termasuklah akibatnya dari segi undang-undang) ialah perkara yang dipertikaikan di kalangan ahli-ahli fiqh Islam.*

- *Walau pun ada terdapat bukti tersurat dalam Perlembagaan yang Malaysia ialah sebuah negara sekular, perkara ini kurang difahami oleh orang-orang biasa, pentadbir-pentadbir, pihak-pihak penguatkuasa dan para ulama. Akibatnya ialah pentafsiran Perlembagaan yang kontroversial dan bercanggah, khususnya, Perkara 3(1).*

- *Ada beberapa kejadian pelanggaran (transgressions) yang telah dilakukan oleh pihak-pihak berkuasa agama. Ini boleh dilihat sebagai keterlebihan eksekutif, pencerobohan Senarai Persekutuan, pelanggaran hak asasi manusia, dan bidang*

kuasa mahkamah-mahkamah Syariah. Kegiatan-kegiatan pengawalan akhlak yang tidak boleh diterima juga telah dilaporkan. Baru-baru ini tiga kejadian pelanggaran telah mendapat laporan luas – sebuah pusat mencuci pakaian (laundrette) 'untuk orang-orang Islam sahaja' yang didakwa boleh diterima oleh seorang pengendali dan satu badan agama Islam yang ada perkaitan dengan JAKIM; penangkapan dan penahanan seorang penulis/cendekiawan Turki yang terkenal, di atas tuduhan 'mengajar' agama Islam tanpa bertauliah; kes Allahyarham Kassim Ahmad yang pada mulanya dibawa ke mahkamah oleh JAWI pada tahun 2014 untuk menghadapi tiga tuduhan menghina agama Islam dan mencabar pihak-pihak berkuasa Islam, perbuatan ini akhirnya didapati bertentangan dengan undang-undang.

- *Ada terdapat banyak institusi Islam dan sebahagian besar darinya mempunyai peranan yang bertindih. Institusi-institusi ini barangkali ditubuhkan dengan niat baik dan mempunyai objektif-objektif yang jelas, dan sesetengahnya melakukan kerja-kerja yang boleh dipuji di bidang dakwah Islam, dan, dalam melakukan itu mereka tidak menyeleweng daripada peruntukan-peruntukan Perlembagaan. Tetapi, sebuah badan yang baru sahaja ditubuhkan, Institut Kajian Strategik Islam Malaysia (IKSIM), dilihat sebagai bertentangan dengan Perlembagaan dan seolah mencuba untuk meruntuhkan sifat sekular Malaysia. Dalam sebuah buku kecilnya bertarikh 28 Mac 2017, IKSIM mendakwa bahawa 'sekularisma, liberalisma dan kepelbagaian budaya adalah unsur-unsur yang akan*

melemahkan agenda Islam dan menghancurkan kedaulatan negara', dan ia juga menyatakan bahawa 'walau pun orang-orang Malaysia boleh menganuti agama-agama lain, negara ini tidak berkewajipan untuk melindungi agama-agama lain'. Selanjutnya IKSIM telah mencabar keagungan (supremacy) Perlembagaan Persekutuan. Jelas sekali pandangan-pandangan sebegini bertentangan dengan prinsip-prinsip Perlembagaan Persekutuan; jadi badan-badan seperti ini boleh dianggap tidak menghormati Perlembagaan (unconstitutional). Ada juga terdapat banyak Pertubuhan Bukan Kerajaan (NGO) Islam dan Islamist yang berpendapat yang sama. Walau pun mereka tidak terlibat dalam pentadbiran hal-hal yang berkaitan dengan agama Islam, mereka adalah badan-badan yang berpengaruh dan tentu sekali kegiatan-kegiatan mereka membawa kesan yang besar kepada orang-orang Malaysia. Tetapi kalau mereka tidak mencampuri hal-hal yang diaturkan di dalam Perlembagaan sebagai ajaran-ajaran Islam, maka badan-badan sedemekian tidak boleh dianggap sebagai di luar Perlembagaan. Namun begitu, ada beberapa badan yang dilihat sebagai tidak bertoleransi dan ganas, ada perhubungan dengan badan-badan yang sama di luar Malaysia, di antara mereka gerakan pengganas Islamic State (IS). Jadi pihak awam perlu mengetahui dan memahami institusi-institusi ini dengan lebih dekat lagi.

- *Sikap tidak bertoleransi terhadap orang-orang bukan Islam sekarang ini kian meningkat. Sejajar dengan sikap tidak bertoleransi dan ketaksuban (bigotry) ini juga terdapat isu*

perbincangan mengenai Islam yang kerapkali mengambil pendekatan yang eksklusif (dan tidak inklusif). Ada beberapa contoh yang boleh diberi mengenai pendekatan ini, seperti pemusnahan tempat-tempat ibadat orang-orang beragama lain.

- *Ketidakadilan yang timbul daripada perbezaan gender juga didapati walau pun pada hakikatnya Islam menentang sebarang diskriminasi, penindasan, ketidaksamaan dan ketidakadilan. Pentadbir-pentadbir Islam cenderung ke arah pentafsiran Quran dan hadith untuk mempertahankan pendirian mereka tentang layanan yang tidak adil terhadap kaum wanita (mungkin kerana dipengaruhi oleh budaya patriarki). Contoh-contoh amalan sebegini dapat dilihat melalui pindaan-pindaan kepada Undang-Undang Keluarga Islam 1994 (yang merombak satu pindaan progresif yang dibuat pada tahun 1984); dan penerimaan terhad Konvensyen Untuk Penghapusan Semua Bentuk Diskriminasi Terhadap Wanita (Convention of the Elimination of all Forms of Discrimination Against women - CEDAW). Secara amnya, terdapat kekurangan daya politik (lack of political will) untuk memajukan hak-hak wanita, walau pun beberapa perkembangan positif telah berlaku.*

- *Juga terdapat ketidakadilan terhadap kanak-kanak yang telah menjejaskan hak dan status mereka dari segi undang-undang, keselesaan hidup dan kesihatan mereka, umpamanya keengganan ibu-bapa untuk membenarkan anak-anak mereka disuntik untuk mengelak penyakit.. Satu isu yang sering diketepi*

dan kurang dilaporkan ialah perkahwinan kanak-kanak. Nasib anak-anak yang lahir di luar nikah dan anak-anak kepada seorang ibu atau bapa yang memeluk Islam telah menarik banyak perhatian media dalam tahun-tahun kebelakangan ini. Pihak-pihak berkuasa Islam mengadakan berbagai syarat ketat kepada pasangan yang berniat baik untuk mengambil kanak-kanak yang tiada ibu-bapa sebagai anak angkat mereka.

- *Satu sifat yang jelas terdapat di dalam kehidupan agama-budaya di Malaysia ialah fahaman berpuak-puak di.kalangan Ummah mengikut pegangan mazhab masing-masing. Islam di Malaysia difahami secara sempit – iaitu mengikut fahaman ahli sunnah mazhab Shafie secara eksklusif, tanpa mengiktiraf fahaman-fahaman Islam yang lain. Pihak berkuasa Islam di Malaysia nampaknya tidak menerima Perutusan Amman (the Amman Message) 2004, yang telah ditandatangani oleh Perdana Menteri Malaysia ketika itu, yang mengiktiraf lapan mazhab fiqh Islam.*

- *Oleh kerana masalah kurang-faham dan kurang sedar tentang peranan Islam di bawah Perlembagaan, telah mengakibatkan penyelewengan dari nilai-nilai dan prinsip-prinsip asas Perlembagaan: khususnya, Perkara 3(4) yang menyatakan bahawa amalan agama Islam di negara ini tertakluk kepada pematuhan kepada Perlembagaan negara, termasuk pematuhan pada hak-hak asasi seperti hak untuk hidup dan kebebasan diri, hak persamaan, hak kebebasan bergerak dan*

berpersatuan, hak kebebasan bersuara, dan hak menganuti agama pilihan sendiri.

- *Akhir sekali, terdapat pengabaian pada Rukunegara dari segi hasrat/matlamat dan prinsip-prinsipnya.*

7. IMPAK KEBANGKITAN ISLAM

7.1. Beberapa tren baru dapat dilihat, seperti perubahan norma sikap, nilai dan kelakuan, contohnya kegemaran memakai pakaian Islam, khususnya kaum wanita yang meniru budaya Arab, menyamakan pengAraban dengan pengIslaman. Tren ke arah pengAraban kini merebak kepada penerimaan bahasa Arab dalam perbualan harian.

7.2. Kajian ini juga mengandungi satu bahagian yang menilai dan membanding amalan nilai-nilai Islam mengikut negara, yang diambil daripada daripada tiga kajian. Satu daripadanya ialah tentang betapa 'Islam'kah Malaysia dibandingkan dengan lain-lain negara dari segi penyerapan nilai-nilai Islam dan urus tadbir. Keduanya ialah betapa kuatnya negara-negara itu berpegang pada Syariah dan menepati objektif-objektif Islam, dengan mengguna 'indeks Syariah'; dan ketiganya ialah tahap toleransi negara-negara itu terhadap orang-orang beragama lain dikalangan mereka.

8. RINGKASAN DAPATAN-DAPATAN KAJIAN

Dapatan-dapatan Kajian yang dinyatakan dalam Bahagian 3 hingga Bahagian 7 di atas diringkaskan di sini:

Hal-hal mengenai agama Islam dan orang-orang Islam telah ditadbirkan sejak zaman berzaman di negara ini. Pentadbiran hal-hal yang berkaitan dengan Islam – mengikut peruntukan-peruntukan undang-undangnya, dasarnya dan susunan institusinya – mestilah mengikut peruntukan-peruntukan dalam Perlembagaan Persekutuan. Tetapi kebelakangan ini terdapat banyak percanggahan di dalam pentadbiran hal-hal yang berkaitan dengan agama Islam. Walau pun ada juga beberapa tren yang positif dan amalan-amalan yang baik, isu-isu yang membimbangkan lebih banyak daripada tren-tren positif dan amalan-amalan baik itu. Jadi langkah-langkah perlu diambil untuk menghadapi isu-isu ini.

9 . BEBERAPA CADANGAN

Berasaskan kepada dapatan-dapatan kajian ini yang dibentangkan dalam Bahagian-bahagian 3 hingga 7, beberapa syor umum boleh dibuat. Oleh kerana beberapa isu utama boleh ditangani oleh syor yang sama, enam syor umum berikut telah dikenalpasti untuk 15 isu yang disenaraikan di atas:

1) *Melebarkan penerimaan dan kefahaman tentang kepelbagaian agama.*

2) *Mengkaji semula pendidikan agama supaya ia relevan dengan keadaan dan keperluan sekarang.*

3) *Menggalakkan penghargaan dan kefahaman yang lebih mendalam tentang prinsip-prinsip dan nilai-nilai yang tersemat dalam Perlembagaan Persekutuan dan Rukunegara.*

4) *Menguatkan lagi penjelasan dan kefahaman tentang undang-undang Islam supaya pendekatan dan penggunaan undang-undang ini lebih konsisten. Dua tindakan khas diperlukan di bawah syor-syor ini: (i) penentuan jenis kesalahan-kesalahan yang dikatakan bertentangan dengan "hukum" Islam, dan (ii) menjaminkan adanya undang-undang Islam yang seragam untuk tiga kategori yang disyorkan – undang-undang tentang hal-ehwal Islam, undang-undang peribadi Islam, dan mahkamah-mahkamah Islam, termasuklah prosedur dan keterangan.*

5) *Tumpuan kepada keadilan untuk kaum wanita dan kanak-kanak.*

6) *Mengamalkan wacana yang lebih inklusif mengenai Islam*

7) *Menyemak semula institusi-institusi agama supaya serasi dengan Perlembagaan Persekutuan. Ini melibatkan tiga badan khusus:*
   i) JAKIM;
   ii) Lain-lain institusi Islam; dan
   iii) Majlis Raja-Raja.

10. PELAKSANAAN SYOR-SYOR INI

Semasa kajian ini dimulakan, niat G25 ialah untuk mengetahui apakah keadaan sebenar bersabit dengan pentadbiran hal-hal yang berkaitan dengan Islam di Malaysia, dan mengguna penemuan-penemuan kajian ini untuk mengemukakan syor-syor yang sesuai. Untuk mencapai objektif ini, G25 akan melibatkan seberapa ramai yang boleh daripada pihak-pihak yang berkepentingan. Satu Kumpulan Kerja pelbagai pihak yang berkepentingan akan ditubuhkan oleh G25 dan tugas utamanya ialah untuk membincang dan mencadangkan satu Rancangan Pelaksanaan untuk melaksanakan syor-syor yang timbul daripada laporan ini. Kumpulan Kerja itu akan mempunyai tiga fungsi utama, ia itu, -

i) *Untuk mengenalpasti strategi-strategi dan kegiatan-kegiatan yang perlu diatur untuk melaksanakan cadangan-cadangan laporan ini; dan juga untuk mengenalpasti 'siapa', 'bila' dan 'bagaimana' kegiatan-kegiatan ini akan dilaksanakan.*

ii) *Untuk mengenalpasti cara-cara memantau dan menilai kemajuan pelaksanaan setiap syor.*

iii) *Untuk menyediakan satu struktur pelaporan yang jelas untuk menjaminkan supaya apa yang disarankan oleh Kumpulan Kerja itu tercapai dengan telus dan cara yang bertanggungjawab.*
Kumpulan Kerja itu juga akan mencadangkan kepada G25 rancangan untuk menyebarluaskan laporan kajian ini.

KESIMPULAN

Kajian ini telah memperoleh bukti kelemahan dan kekurangan dalam cara pentadbiran perkara-perkara yang berkaitan dengan Islam di negara ini, dan perlunya diambil langkah-langkah untuk membetulkannya atau, sekurang-kurangnya, langkah-langkah diambil untuk mengurangkan tren-tren yang negatif dan membimbangkan seperti yang dapat dilihat sekarang ini. Ini akan menjadikan Malaysia satu contoh negara berbagai bangsa dan agama, di mana, dengan Islam sebagai agama resmi, warga Islam di negara ini mengamalkan Islam secara moderat dan penganut-penganut agama lain dibenarkan mengamalkan agama mereka dengan bebas.

PART I:
INTRODUCTION

1. OVERVIEW

Malaysia, a nation of diverse ethnicities, cultures and religious heritage, is created by the Federal Constitution - a secular legal document drafted in 1957. The Constitution proclaims itself as the supreme law of the Federation as opposed to the holy book of any religion. Historically and legally, the State Legislatures are empowered to make laws for Muslims with respect to their religious affairs and personal law only including courts to determine these matters. The laws in Malaysia are made, executed upon, and interpreted by three secular institutions namely the Parliament, the Yang di-Pertuan Agong (or Cabinet), and the Courts respectively.

This study begins by exploring the history of the administration of Islam in British Malaya; how the British, from the 1880s and at the behest of the respective Rulers (who were respective heads of the Muslim religion within a State), endeavoured to codify Muslim law and Malay custom through written law. In doing so, key aspects of the Muslim religion came to be regulated, specifically, Muslim religious affairs and Muslim personal law. Courts for Muslims were also created to hear and determine disputes relating to these matters. This legal endeavour resulted in a unique blend of principles of the Muslim religion, Malay customs of inheritance and succession, and British legal concepts (what can be termed 'the Muslim Laws of British Malaya').

Muslim Laws were actively enacted throughout the first 4 decades of the 20th century till the beginning of World War II. After World War II, following an agreement between the British and the Rulers, the

Federation of Malaya came into existence, but Muslim Laws remained in force and the States continued to exercise exclusive law-making powers on the Muslim religion and Malay customs.

On 31st August 1957, the Federation of Malaya achieved *Merdeka*. Sabah and Sarawak gained independence in 1963 with the formation of Malaysia. Malaysia then consisted of the Federation of Malaya, Sabah, Sarawak and Singapore. Singapore left Malaysia in 1965.

The Constitution provides for Islam as the religion of the Federation. It confirms the position of the respective Rulers as the Head of the religion of Islam in their respective States, and the Yang di-Pertuan Agong for the States not having a Ruler and for the Federal Territories. Additionally, the Constitution distributes legislative powers to the States to make laws with respect to specific matters on the Muslim religion and Malay custom.

Since the formation of Malaysia, the Barisan Nasional or National Front remained politically dominant. From mid-1960s to the beginning of the 21st century, the Federal Government began gradually implementing a policy of developing aspects of the religion of Islam at the federal level (for e.g., trade, banking and education), and Malaysia (between 1982 to 2013) saw a dramatic increase of Muslim Laws enacted in the States.

With decades of exuberant exercise of legislative powers, disregard for the language in legislation and increased bureaucracy in matters of the Muslim religion, there is now uncertainty on the position and application of Muslim Laws in the country. Since 1976, these laws began to be

colloquially termed "*Syariah* laws". Awareness, even among political leaders, on the jurisdiction and powers of religious authorities and the administration of Muslim Laws in Malaysia is lacking. As a result, several misconceptions flourish, such as the possibility of overlap between Muslim Laws and other civil laws, or that the *Syariah* courts and civil High Courts have overlapping jurisdictions. The use of terms like "*Syariah* laws" (in contradistinction to "civil laws") and "dual legal system" can fuel further misconceptions about Malaysia's constitutional and legal framework.

Most critically, underpinning the present state of affairs is a system of Muslim religious education that requires change; from rote learning to active learning. This would help the Malaysian Muslim community understand and appreciate the relevant religious texts, while remaining critical of abuses of power by religious authorities. As it stands, there is currently undue deference being given to religious authorities, and criticism of religious authorities or Muslim Laws may be viewed as "deviant" or "seditious". Following that, abuses of power by religious authorities remain rife, and democratic efforts to remedy or reform such abuses seem futile.

Adding to this complexity is the subject matter in question – the Muslim religion - which has historically and legally been a prerogative of the respective Rulers. This has, however, not hindered politicians from using the religion of Islam for sloganeering, political one-upmanship and most upsettingly, to misrepresent Malaysia's constitutional and legal history to the public. One notable example is the political rhetoric by opposition politicians to "implement Hudud"; an oxymoron, given that Hudud is

already prescribed by the religious texts of Islam, and Malaysia's Penal Code already prescribes the punishments for theft and robbery among others. Hudud, as it is envisaged by these opposition politicians, simply cannot exist under Malaysia's present constitutional and legal order. Another notable example is Malaysia's status as a secular state - a historical fact that has been made obscure for the public since 2001 after the political retort of the then Prime Minister at a national assembly of a political party that Malaysia was an "Islamic state".

This study on the administration of matters pertaining to Islam is part of G25's continuous efforts to engage the leadership and the public in promoting Moderation (al-wasatiyyah) as a value when administering laws for Muslims in Malaysia. This study follows from the open letter to the Prime Minister dated 7 December 2014 (See **APPENDIX I**) by G25 which enlists several issues of concern. This study looks further into these issues by providing a detailed historical and legal account of the administration of matters pertaining to Islam and discussing the recent developments of good practices as well as issues of concern. The study concludes with recommendations and strategies for implementation, with the hope of finding solutions towards a return to an administration of matters pertaining to Islam in Malaysia that is consistent with the laws of Malaysia and the value of Moderation.

2. BACKGROUND OF STUDY

2.1. Why is a study needed?

The issues of concern described in Part III have prompted individuals and NGOs to express their concerns on various platforms including mainstream and alternative social media, and in conferences, seminars and the like. The administration of matters pertaining to Islam lacks understanding and clarity in the eyes of the public, which can generate feelings of confusion, dissatisfaction, suspicion, anxiety and fear. Therefore, it is felt that an evidence-based study needs to be conducted, to expose the weaknesses in the administration of matters pertaining to Islam in Malaysia. Recommendations need to be made, based on these weaknesses. In undertaking this study and in making the appropriate recommendations, it is hoped that G25 would be making a modest contribution to both the practice of the religion in Malaysia and inter-religious harmony.

2.2. Why is G25 conducting the study?

The G25 was created in 2014 by a group of 25 Muslim citizens who were concerned over the Islamisation agenda of the government which was seen to be overzealous and excessive, which if allowed to continue, will threaten the peace and security of the country. The group wrote to the Hon. Prime Minister to express its concern. In the letter (See **APPENDIX I**), the Group had clearly stated that Islamic Laws cannot violate the Federal Constitution, the supreme law of the land as all Acts, Enactments and subsidiary legislation,

including fatwa, are bound by constitutional limits and are open to judicial review. Reference was made in particular to the Federal Constitution provisions on fundamental liberties, federal-state division of powers and legislative procedures. In the same letter, the Group raised their concern on the plural legal system in the country that has led to many areas of conflict and overlap between civil and *Syariah* laws. In particular, they highlighted the urgent need to review the *Syariah* Criminal Offences (SCO) la ws of Malaysia, as they are in conflict with Islamic legal principles and constitute a violation of fundamental liberties and state intrusion into the private lives of citizens. Against this background, there are clear imperatives for G25 to conduct this study, which are to: (i) fulfil the aspiration, vision and mission of the group, (ii) act on the recommendations made at the public forum convened by G25 in December 2015, (iii) respond to the continuance of disturbing trends in the impact of Islamisation, and (iii) complement and support the efforts and initiatives of other organisations and institutions that share the same aspiration for Malaysia to practice good governance and moderate Islam such as the Islamic Renaissance Front (IRF). On 1 December 2017,[1] the chair of IRF Dato' Dr Farouk Musa lamented the rise of Wahabism[2] which is an extreme form of Islam which he views as a bigger ideological threat than the now-familiar complaint about Arabisation of the Malay culture. He said the experience with Wahabism in other Muslim-majority countries had not been positive, and would be even more damaging to a multi-religious society like Malaysia.

[1] As published on Free Malaysia Today of 1st December 2017. The original URL is down and an archived version of the URL is unavailable at the time of printing.

[2] Wahabism is an Islamic doctrine founded by Muhammad Abdul Wahab (1703-1794), variously described as "austere" or "puritanical", as a movement to restore pure monotheistic worship.

2.3. Scope of the study

This study provides an analysis on the Administration of matters pertaining to Islam at the State- and Federal-level in Malaysia. It considers the functions of the relevant religious authorities and government departments, bearing in mind that "religion is a state matter" under the Federal Constitution. In addition, the study places emphasis on the JAKIM, in terms of its historical evolution; objectives, functions and administration; its output and impact; and the legal basis of its establishment. This is the subject matter of Chapter 9 of this report.

The study will cover the Administration of matters pertaining to Islam from the time of British control of the Straits Settlements to its intervention in the Malay States, and from *Merdeka* to notable developments in the last 50 years. Where material dissimilarities exist, a sample of three States will be selected to represent the Straits Settlements, the Federated Malay States, and the Unfederated Malay States, namely Penang, Selangor and Johore respectively. This study is nonetheless constrained by several limitations, specifically being resources (funding and time) and the paucity of information which is mainly due to the difficulty of accessing the required information.

2.4 Objectives

The general objective of the study is to conduct a review of the Administration of matters pertaining to Islam throughout the evolution of Malaysia from the pre-colonial era (when it was Malaya) to the present time, and to describe the current situation - identifying the strengths, weaknesses and the opportunities for improvements.

Specifically, the study aims to:

i. Trace the historical evolution of the Administration of matters pertaining to Islam in British Malaya, the Federation of Malaya and Malaysia;

ii. Trace the establishment and evolution of the relevant religious authorities and government departments at the State- and Federal-level which are concerned with the Administration of matters pertaining to Islam including JAKIM;

iii. Elicit information on the strengths and weaknesses of the administration of matters pertaining to Islam; and

iv. Provide general recommendations to remedy the weaknesses with respect to the matters above and specific recommendations with respect to key national issues.

2.5 Methodology

The three main sources of information:

a. Primary sources of information available in the public domain were also used - including several government documents and publications (including National Archives), government websites, and the e-*Syariah* website by Percetakan Nasional Malaysia Berhad.

b. Secondary data was used extensively, by sourcing information through a desk review of available documents including books, articles in journals, reports of related studies previously carried out, and theses written by students in institutions of higher learning and other academic institutions and other professionals.

c. The study also utilises the experience of the advocates and solicitors commissioned by the G25 to conduct the study, who have undertaken court cases relating to this subject matter.

d.The researchers obtained expert opinions from a team of seven experts at a brain-storming session (on 27 December 2016) who reviewed an early draft of the report and gave opinions and input on the contents of the report. A penultimate draft of the report was given for review from three reviewers in October 2017, who also provided input into the content of the study. Both these reviews amounted to information which added to the findings of the study.

To facilitate the study in order to obtain information that is needed to achieve its objectives, some questions were formulated that have relevance to the Administration of matters pertaining to Islam in Malaya/Malaysia – historically and currently. These questions covered, among other things - how were matters related to Islam administered throughout the historical development of the country - from the early years when the country was under the British colonial government, to the newly independent Federation of Malaya, and to Malaysia after its formation in 1963? In this evolution, what structures were put in place to administer Islam? What were the powers and functions of these agencies? What are the current institutions that administer Islam in Malaysia? What is their relationship to one another?

Since the Department of Islamic Development or JAKIM in the Prime Minister's Department is seen to play a prominent and important role in the Administration of matters pertaining to Islam at the national level (notwithstanding the constitutional provision that "religion is a state matter"), and in recent times, several opinions have been expressed about this institution, and since the public knows little about the way it works, this study places a special focus on JAKIM. The researchers collected information guided by several questions including:

- What is the legal status and constitutionality of JAKIM within the Federal Constitution? Was the decision to establish JAKIM made by the Prime Minister's Office (PMO), Public Service Department (PSD) or the Parliament?

- Are the functions of JAKIM within the provisions of the Federal Constitution? What are their objectives and terms of reference?

- Is JAKIM the coordinator of all work on Islamic matters undertaken by other agencies including those at state-level?

- What is the structure and organisation of JAKIM?

- How much is its budgetary allocation, and is its performance and deliverables audited on the same basis as other government departments?

- What are the strengths and positive outcomes of the work of JAKIM, what have been the benefits, and who are the beneficiaries?

- Have there been any actions by JAKIM that have gone beyond (transgressed) its functions and terms of reference?

PART II:
HISTORICAL AND LEGAL OVERVIEW ON THE ADMINISTRATION OF MATTERS PERTAINING ISLAM

3. HISTORICAL AND LEGAL OVERVIEW

This chapter provides a historical account of the Administration of matters pertaining to Islam from the pre-British era. It traces the evolution from the period when there were no central institutions to govern Islamic religious activities during the pre-British period to the establishment of State Legislatures governing Islamic conduct and activities, and the establishment of a federal institution on Islamic affairs. A detailed account is provided during the period of British Malaya where Islamic activities were institutionalised and bureaucratised by statutory enactments, administrative reforms, rules and practices.

3.1. Pre-British and British Malaya

Before there was British presence in the Malay States, Islam was not institutionalised as the state religion. No public rituals of a distinctly Islamic character were practised legitimising the rule of the Sultans. Muslim *kathis* (religious magistrate) were not employed at the royal courts and no central Muslim institutions existed to act as focal points for religious activities or observances within any State. While Islamic law influenced legal codes or expressions of adat (Malay customary law) in some States, these Islamic laws appear to have been largely ignored in the administration and settlement of disputes. Although the Ruler of the state was acknowledged to be the highest authority on all matters whether religious or secular, Muslim institutions were not actively supported by royal power and revenues. This is a historical fact as propounded by Moshe Yegar, in his excellent book “Islam and Islamic Institutions in British Malaya –

Policies and Implementation" (The Hebrew University of Jerusalem, 1979)[3] However, this may appear to be contentious to some other writers, who argue that Islamic law in pre-colonial Malaya was not ignored. For example, Wilkinson[4] remarked that 'There can be no doubt that Muslim law would have ended up becoming the law of Malaya had not British law stepped in to check it.'

After the founding of the British colony at the island of Penang by Capt. Francis Light of the British East India Company in 1786, British Administration was established gradually in stages, until the whole of the Peninsula was brought under British dominion by 1909 [The year when the 5 Unfederated Malay States ceased to be under Siamese suzerainty and came under British protection]. During the first 20 years, the British governed through colonial departments, and no native authority was recognised as an executive instrument. Yet this mode of administration worked always behind a screen of native rule. However, publicly, Malay authority was still sovereign, Malay hierarchies were preserved, and Malay institutions were used as governing agencies. The British preferred informal control, upholding nominal independence of the Sultanates.

The coming of the British had a manifold significance. Law and order were established. A Western system of justice, enshrining the rights of the individuals, transformed the existence of the Malays. Lives and property were protected and a new relationship came into being between the ruler and ruled. The ruler was now under legal control, his actions were no longer personally or politically motivated. The Sultan's signature was still necessary to give effect

[3] Yegar, Moshe. Islam and Islamic Institutions in British Malaya—Policies and Implementation. The Hebrew University of Jerusalem, Magnes Press, Jerusalem, 1979.
[4] Wilkinson, R. J. Life and Customs, Part 1: The Incidents of Malay Life. J. Russell at the Federated Malay States Government Press, 1908.

to any administrative measure; all such measures were the work mainly of British personnel who assumed the totality of political power in the newly organised States.

Malay Rulers and Malay chiefs were given pensions and allowances, and they may retain their old titles and the outward trappings of power. In legal theory, sovereignty rested with the Sultans – not with the British Crown, but in practice, all his executive powers had been taken away; he was but a ceremonial head of State. The British established State Councils, but their membership were by appointments, not by popular election, and the Councils were never allowed to be more than advisory bodies to the Colonial Government. The Sultans did meet regularly with the British advisers, and the State Councils were encouraged to deliberate on matters of legislation, yet they were of no account in making or prompting official decisions.

By comparison with the Residents of the Federated States, the legal powers of the advisers of the Unfederated States were somewhat restricted, although in executive authority, there was little difference.[5] The greater degree of independence in the Unfederated States was illusory; there, too, administrative policy and direction were the responsibility of British advisers and their European staff.

Basic contrasts between the Straits Settlements and the Malay States affected the status of Islam in both. The Malay States were Muslim long before the British came, but the Settlements were

[5] **Before the Japanese occupation of Malaya in 1941, there were three distinct political entities namely (1) the Crown Colony called the Straits Settlements, which included the Settlements of Singapore, Malacca and Penang; (2) the Federated Malay States, comprising the States of Negeri Sembilan, Pahang, Perak and Selangor which had entered into a Federation by treaty in 1895; and (3) the five States of Johore, Kedah, Kelantan, Perlis and Terengganu known as the Unfederated Malay States.**

new territories with a small and largely Chinese population. The Settlements were a Crown Colony, and the Malay States were bound by treaties. However, the relationship between the States and the Settlements in matters of religion was close.

The extension of British colonial administration to the Malay States inevitably involved a structuring of Islamic religious institutions. Every treaty made with the British declared that the Ruler agreed to accept a British Resident/Adviser, whose advice must be asked and acted upon on all questions other than those touching on Malay Religion and Custom. Thus, the Pangkor Engagement of 1874 and the treaties that followed it reflected British awareness that religion and custom were the two expressions of Malay life in which alien interference was most likely to arouse resentment and even unrest. Colonial religious policy, accordingly, avoided any meddling in such matters and sought to assure the Malays that their traditional way of life was not threatened. Likewise, the safeguarding of and deference to Islam gave the Malays a psychological assurance that the country was still theirs, despite the influx of a multitude of Chinese and Indian immigrants.

However, while that was the official British policy, in effect, interference was inescapable - owing to changing circumstances and British-introduced administrative reform, which touched on all areas of civil administration. In fact, British intervention in religious matters often had almost complete Malay consent, and, at times, responded to the wish or instance of the Malay Rulers. With their political power gone, the duty of the Rulers as protectors of ‘Malay

Religion and Custom' became that much more important, and a new status in the domain of religion and custom compensated them in part for the lost sovereignty. Paradoxically, Islam and Islamic institutions in the Malay States had the benefit of far-reaching development because of British rule.

In general, British tolerance of Islam indirectly assisted in an expansion and consolidation of Islam by legislative and administrative means. However, the preservation and reinforcement of the traditional bases of authority and centralisation in administration combined to create a more authoritarian form of religious administration than any that the Peninsula had known before; British rule allowed for the concentration of doctrinal and administrative religious authority in the hands of a hierarchy of officials directly dependent on the Rulers for their posts and power. The Rulers and their State Councils began to assume a wider responsibility for religious affairs. Written, codified systems of general civil and criminal law enacted generated pressure to establish a more formal system of Islamic law. Courts were established, legal procedures laid down and a legal bureaucracy built to administer them. Many of these developments (notably, the regulation of Muslim/*Kathi* courts), while responding to a real need, were also an emulation of administrative models of the West; the objective being, in this instance, to incorporate the existing religious system into general civil administration, and to preserve the interests of the Malay chiefs and existing ulamas while absorbing them so as to gain their support for changes and neutralise anticipated objections. There was now an organised religious officialdom.

The building up of centralised administration and a legal system for Muslim affairs began after 1884. By the second decade of the 20th century, Malaya was equipped with extensive machinery for governing Islam. A whole new class of ulama, *imam*s and *kathis* was organised and recognised. Between the two World Wars, all the Malay States developed central organisations, following European administrative patterns of executive committee to exercise overall control of religious affairs. In the Federated States, the British intervened directly in the work of the committees, whose diverse and far-reaching tasks included nominating *kathis* and religious teachers, considering points of Islamic law and practice, considering appeals from lower religious courts, supervising religious publications, and dealing with religious legislation.

Muslim courts were established in each State to enforce Muslim law and adat. A *kathi* was appointed for every district to administer Muslim affairs, to try cases within his jurisdiction and to supervise the mosques in his district; occasionally, he served as authority on the adat, especially in matters of land and inheritance. These *kathis* enjoyed a fixed salary, having previously derived income from fines and fees. In almost all the States, British administrators put forward candidates for appointment as *kathis*, muftis and other religious personnel. At the top of the religious judicial hierarchy was the chief *kathi*. The Muslim courts had jurisdiction over Muslims only, and their primary responsibility was to distribute property after death or divorce.

In the pre-British era, each kampung had been largely self-sufficient in meeting its religious needs and maintained either a mosque or

surau. The village elders selected the religious officers to manage the mosque and oversee the religious life of the community. All this was paid for by villagers' gifts of services and goods, and by the traditional zakat and fitra taxes. Bureaucratisation of religious offices under the British Administration changed the situation: the muftis and *kathis*, who became administrators as well as judges of the State, assumed considerable practical control over the affairs of village Islam as well.

In brief, Islam in British Malaya was institutionalised and bureaucratised by statutory enactments, and by administrative reforms, rules and practices; it was not the outcome of any preconceived process and deliberate planning, but emerged by itself out of British colonial policy and the general philosophy of it. British policy on Islamic religious matters in Malaya was unaffected by events in other Muslim countries or pan-Islamic stirrings. British rule and influence retained their stability and were guided, as far as religious matters were concerned, solely by local needs and internal pressures.

3.1.1. Legal System during the pre-British and British era

In pre-British Malaya, Islamic law coexisted easily with indigenous custom (adat), and the inconsistencies between them went largely unnoticed. The reforming drive of the British, and their notions of a consistent written body of law, forced changes and accommodations in these two basic sources of law and introduced a third: British statutory and common law. Three sources of law were amalgamated to form the legal system for Muslims in British Malaya; two of them, adat and Islamic law enjoyed undisturbed coexistence, and friction between them, internally, was never a cause of concern to anyone in the pre-British period.

Adat or customary law compiled from the 15th to 19th century incorporated early unwritten law which mirrors aspects of pre-Muslim society, and mixing together relics of Hindu law and parts of Islamic law. Two notable examples are the adat perpatih and adat temenggong. The former is from the matrilineal law of the Minangkabau, and is practised in Negri Sembilan and some parts of Malacca. The fundamental principle of adat pepatih is tribal. All rules reinforced the integrity of the tribe, and all rules concerning property were designed to conserve the tribe's property, with the aim of continuation of the tribe through its female members. All daughters share the ancestral property equally. Adat temenggong was the law of the Malacca Sultanate and it eventually spread to the other States. It enhances the position of the ruler, following Hindu examples, and raised the

social position of the governing class.

Two principal areas in which conflicts arose between the three sources was property inheritance and divorce, and the courts had to express their opinions and make binding decisions more than once until adequate legislation was enacted.

The relationship between the two systems – adat and Islamic law – conflicted at times. The Malays never adopted the whole of the Islamic law; its application varied from State to State. In practice, they overlap, and in fact Malays do not even distinguish between adat and hukum (an abridged term for hukum syara' or *Syariah* law). The confusion surrounding Malay customary and Muslim laws due to three factors – (i) the *kathis* who were charged with administration of Muslim law were themselves steeped in their own custom or adat to an extent they could not differentiate it from Islamic law in its pure form; (ii) Many British civil servants responsible for adjudicating disputes were not well-versed or were uninformed about the intricacies of the two laws; and (iii) the religious character of adat - because adat is not merely custom, it is for the Malays' part of his/her religion which had been adopted and professed through the various eras especially during Hinduism, and after the coming of Islam, this custom was not abandoned.

The practical expression of the amalgamation of the three sources of law, together with the introduction of British legal concepts, introduced what can be termed 'the Muslim Laws of British Malaya'.

3.1.2. The Straits Settlements

By 1880, Malay commissioners and assessors were constituted to try petty cases (in Penang), and 'Mahomedan registrars' were created to register marriages and divorces of Muslims. Between 1897 and 1906, laws were passed to regulate the Haj pilgrimage. In 1905, the Mahomedan and Hindu Endowments Board was created to administer *Wakafs*. In 1930, religious instruction for Muslims in Malay schools began.

3.1.3. The Federated Malay States

In 1890, *Kathi* courts were constituted in and by 1901, all other States had constituted such courts. Between 1915 and 1938, these courts were subjected to reforms. In 1938, a law was passed permitting the civil courts to refer all questions of Muslim law, should it arise in the said court, to the State Council for determination. In mid-1900, all four Federated States passed identical laws on the registration of Muslim marriages and divorce. Between 1891 and 1915, Quranic education was added to the curriculum of the Malay schools.

With respect to *Wakafs*, the Government of the States would allocate parcels of land for religious purposes such as mosques and Muslim cemeteries under the Land Enactment of 1903; and said lands being entrusted to the local *kathi* or penghulu. In 1897 and 1902, the Ruler of Negeri Sembilan and the Ruler of Perak made proposals for a law and gave instructions on zakat respectively, but it was only after 1916 that Pahang became the

first Federated Malay State to institutionalise zakat collection.

Between the two World Wars, most Malay States developed central organisations to handle Muslim religious affairs; in Perak, it was the Council of Chiefs and Ulama; in Selangor, the Religious and Customary Committee of State (a sub-committee of the State Council); in Negeri Sembilan, the upper chamber (the Yang di-Pertuan Besar, the undangs and the British Resident). In 1930, the four States passed laws to regulate the Haj pilgrimage.

In 1917, in Perak, ad hoc laws were passed to administer the estate of Sultan Idris for special religious and charitable purposes.

3.1.4. The Unfederated Malay States

Between circa 1901 to 1911, *Kathi* courts were constituted in the Unfederated Malay States - Kelantan, Terengganu, Kedah, Perlis and Johor. Between the two World Wars, these courts were subject to reforms. In Johor, many years earlier, in 1895, the Constitution of Johore declared 'Islam' to be the "national religion". In 1919, Johore passed a law recognising a mufti as a religious jurist who could determine questions of religious nature arising in any court of the State.

In 1904, in Kelantan, the first Malay school opened and it provided instruction in Islamic law and Arabic. In 1908, in Kedah, religious classes and the Quran were taught to students in a few schools. By 1914, vernacular schools in Johore began

teaching Islamic law and Quran to pupils. From 1914, in Perlis, Quran and religious teachings were taught to pupils in a few schools.

Between 1911 and 1922, the States began enacting laws relating to the marriage and divorce of Muslims with Johore, Kelantan, Perlis and Terengganu creating respective Registrars. In 1915, Kelantan was the first Unfederated Malay State to establish a council of religion and Malay custom, i.e., the Majlis *Ugama* Islam dan Isti'adat Melayu. Between the two World Wars, Muslim religious affairs in Kedah, Perlis and Terengganu were handled by the Shaikh al-Islam, who was under the control of the respective State Council; in Johore, it was handled by the Council of Ministers.

In respect to *Wakafs*, the situation in Terengganu and Johore was similar to the Federated Malay States; a civil authority could reserve land for religious purposes (*suraus*, mosques and cemeteries) and entrust it to a penghulu or *kathi*. Since 1916, in Kelantan, the Majlis *Ugama* had been in charge of Muslim cemeteries and mosques.

Since 1916, in Kelantan, the collection of zakat and fitra had been entrusted to the Majlis *Ugama* and, by 1938, the Majlis oversaw the *Baitulmal*. In 1926, in Perlis, the systematic collection of zakat and fitra began and, by 1932, zakat and fitra rules were passed. In 1934, Johore established a *Baitulmal* fund, and in 1937, Terengganu followed. In 1911, the Constitution of Terengganu declared 'Islam' to be the "State Religion".

3.2. Administration of matters pertaining to Islam: Federation of Malaya (1948 to 1963)

From December 1941 to August 1945, Malaya was under the Japanese Occupation. After World War II, the British returned to Malaya. On 21st January 1948, the Federation of Malaya Agreement ("the FMA") was entered into between the British Crown and the Rulers of the Malay States; where the Malay States, the Settlement of Penang and the Settlement of Malacca were formed into a Federation with a strong central government and a common form of citizenship to all those who regard the Federation as their real home and the object of their loyalty. The Federation of Malaya or Persekutuan Tanah Melayu came into existence on 1st February 1948. Under the FMA, the two Crown Colonies, namely the Straits Settlements of Penang and Malacca were incorporated into the Federation. The Head of the new Federal Government was the High Commissioner who had wide legislative and administrative powers.

Under the FMA, a Federal Legislative Council was established, presided by the High Commissioner and having powers to make laws with respect to all matters set out in the Second Schedule to the Agreement. The FMA also provided for the establishment of a Conference of Rulers (COR) consisting of all the Rulers of the Malay States. Under the Agreement, there was an established Federal Executive Council to aid and advise the High Commissioner in matters pertaining to the exercise of his functions. The FMA vested

the State Councils with limited legislative powers; the States were empowered to legislate, among others, on matters relating to the Muslim religion or the custom of the Malays. The Rulers undertook to govern their States according to written constitutions. A British Adviser was appointed in each State and the Rulers undertook to accept the advice of their Advisers on all State affairs other than those relating to the Muslim religion and Malay custom.

The FMA also preserved the continuance of existing laws in the Federation which would include existing Muslim Laws. The Courts Ordinance 1948 which consolidated the law relating to the constitution and powers of the Civil and Criminal Courts, repealed all previous ordinances and enactments which constituted courts "except the provisions relating to the Courts of *Kathis* and Assistant *Kathis* and appeals therefrom".

3.2.1 Federation of Malaya Constitutional Commision (Reid Commission)

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. The Federation of Malaya Constitutional Commission ('the Reid Commission') was appointed to make recommendations for a suitable constitution for the nation[6]. The Reid Commission began its work in late June 1956 and presented its report in February 1957 ('the Reid Commission

[6] **The members of the Commission were Lord William Reid (a Lord of Appeals), Sir Ivor Jennings (a Cambridge jurist), Sir William McKell (a former Governor General of Australia), B Malik (a former Chief Justice of India) and Abdul Hamid (a judge in Pakistan).**

Report'); in that time, it had 118 meetings including hearing evidence, meeting government officers, and private discussions while also considering 131 memoranda from interested organisations and individuals including Their Highnesses and parties of the Alliance.[7]

On the Federation of Malaya's system of governance, three paragraphs are cited below from the Commission's report that relate to its State Religion and the Distribution of Legislative Powers: (1) that the Federation of Malaya be a "united, free and democratic nation …. fair to all sections of the community"; (2) Malay custom and religion shall be a State subject; and (3) the insertion of the clause for Islam being the religion of the Federation (this has a complex background shown in paragraph 169 below).

> **"14. In making our recommendations we have had constantly in mind two objectives: first that there must be the fullest opportunity for the growth of a united, free and democratic nation, and secondly that there must be every facility for the development of the resources of the country and the maintenance and improvement of the standard of living of the people. These objectives can only be achieved by the action of the people themselves: our task is to provide the framework most appropriate for their achievement. We must start from the present position as we find it, taking account not only of the history and tradition of Malaya but also of existing**

[7] The Alliance Party (Parti Perikatan) was a political coalition whose membership comprised United Malays National Organisation (UMNO), Malaysian Chinese Association (MCA), and Malaysian Indian Congress (MIC). It was formally registered as a political organisation on 30 October 1957 and was the ruling coalition until it became the Barisan National in 1973.

social and economic conditions. Much that is good has already been achieved and we would not seek to undo what has been done. But many existing arrangements are inappropriate for a self-governing and independent country, and, in recommending the form which the necessary political and administrative changes should take, we have borne in mind that the new provisions must be both practicable in existing circumstances and fair to all sections of the community.

...

114. Clause 5 of the Federation Agreement provides that nothing in the Agreement shall apply in any Malay State to matters relating to the Muslim religion or the custom of the Malays. From the time of the earliest treaties these matters have always been reserved to the States and we recommend that they should be State subjects both in the old States and in the new States of Malacca and Penang. We recommend the continuance of the existing power of the States to create offences in relation to the breach of State Enactments.

...

169. We have considered the question whether there should be any statement in the Constitution to the effect that Islam should be the State religion. There was universal agreement that if any such provision were inserted it must be made clear that it would not in any way affect the civil rights of non-Muslims. In the memorandum submitted by the Alliance it was stated –

'the religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religion and shall not imply that the State is not a secular State.' There is nothing in the draft Constitution to affect the continuance of the present position in the States with regard to recognition of Islam or to prevent the recognition of Islam in the Federation by legislation or otherwise in any respect which does not prejudice the civil rights of individual non-Muslims. The majority of us think that it is best to leave the matter on this basis, looking to the fact that Counsel for the Rulers said to us – 'It is Their Highness' considered view that it would not be desirable to insert some declaration such as has been suggested that the Muslim Faith or Islamic Faith be the established religion of the Federation. Their Highnesses are not in favour of such a declaration being inserted and that is a matter of specific instruction in which I myself have played very little part.' Mr Justice Abdul Hamid is of the opinion that a declaration should be inserted in the Constitution as suggested by the Alliance and his views are set out in his note appended to this Report."

In summary, this view is recorded as "It has been recommended by the Alliance that the Constitution should contain a provision declaring Islam being the religion of the State. It was also recommended that it should be made clear in that provision that a declaration to the above effect will not impose any disability on non-Muslim citizens in professing, propagating

and practicing their religions, and will not prevent the State from being a secular state. As on this matter, the recommendation of the Alliance was unanimous, their recommendation should be accepted and a provision to the following effect should be inserted in the Constitution either after Article 2 in Part I, or at the beginning of Part VIII".

Accordingly, in the Draft Constitution of the Federation of Malaya by the Reid Commission, Article 68(2) provides that the Legislature of a State shall have exclusive power to make laws with respect to "Mohammedan Law, including Muslim *Wakafs*; Malay custom; Zakat and Fitra; mosques" and there was no provision with respect to a State religion. On this last point, it was reported that the UMNO leaders were dissatisfied with the absence of a provision for a state religion. They argued strongly for the inclusion in the Working Party - see paragraph (b) below – which reviewed the Commission's report. The Rulers explained that their objection to the provision was based on two grounds; firstly, in the existing Constitutional arrangement, they were the heads of the Muslim faith in their respective States; and, secondly, religion under both the existing and proposed Constitutions was a state matter. A provision declaring Islam as an official religion for the Federation would encroach on their individual position as head of the faith, and the rights of the States to deal with matters of faith.

3.2.2 The Working Party and the Constitutional Proposals for the Federation of Malaya 1957 (the White Paper)

It then became the task of Her Majesty's Government, the Conference of Rulers and the Government of the Federation to examine the Reid Commission Report and to seek agreement on their acceptance or modifications. As a first step, a Working Party was appointed in the Federation to make a detailed examination of the Commission's Report and to submit recommendations.[8]

Meetings were held between February and May 1957, where the Working Party reported to the Conference of Rulers and the Federal Executive Council. In late May, the Working Party conferred with Her Majesty's Government in London before all the points were accepted, and while this was going on, the draft Constitution was scrutinised by the Office of Parliamentary Counsel in UK to improve its form, and the output of the Working Party was incorporated.

At the first Working Party meeting in February 1957, the Alliance and leader of the UMNO, Tunku Abdul Rahman requested that a provision declaring Islam as the religion of the Federation be included in the new Constitution, as had been proposed in the Alliance memorandum. Tunku assured the Working Party that

[8] **The Working Party consisted of the British High Commissioner to Malaya, four representatives of the Rulers, four representatives of the government of the Federation, the Chief Secretary and the Attorney General.**

the state would be secular. Referring to the Rulers' objections, the Alliance assured them that if the Federal government set up a department of religious affairs, it would be for 'liaison purposes only'. The UMNO leaders argued that a provision for an official religion would have an important psychological effect on the Malays. But in deference to the objections of the Rulers and the concerns of non-Muslims, the Alliance agreed that the new article should include two provisions – firstly, the new article should not affect the position of the Rulers as heads of the Islamic faith in their respective States; and, secondly, that the practice and propagation of other religions would be assured.

In agreeing to the Alliance's proposal with some modifications, the Rulers stated at the same time that they were against the setting up of a Federal Department of Religious Affairs. When the proposed provision on a State religion was discussed again in March 1957, the Rulers' representatives requested that a note be added below the proposed article to be considered at the forthcoming London Conference and that it should read, "The Alliance representatives have given an undertaking that it is not their intention to establish a Federal Department of Religious Affairs with executive functions." This was an additional guarantee sought by the Rulers from the Alliance to protect their position and status in their respective States. Questions were raised when the provision on religion was discussed further in April 1957. The Rulers' representatives raised concerns about the potential for the Department of

Religious Affairs to be headed by a non-Muslim. The possibility of the proposed provision on State religion being misinterpreted was also raised. The Chief Minister and Alliance leader, Tunku Abdul Rahman, however, reassured the Rulers that if a Federal Department was set up it, would be under the jurisdiction of the Yang di-Pertuan Agong, to allay any fears that it would be headed by a non-Muslim. On the possibility of the provision on religion being misinterpreted, Tunku assured the Working Party that "the whole Constitution was framed on the basis that the Federation would be a secular State".

In July 1957, the Alliance government tabled the Constitutional Proposals for the Federation of Malaya 1957 ("the White Paper") in Parliament to explain the changes made to the Reid Commission's draft Constitution by the Working Party. On religion, the White Paper States:

"Religion of the Federation

57. There has been included in the proposed Federal Constitution a declaration that Islam is the religion of the Federation. This will in no way affect the present position of the Federation as a secular State, and every person will have the right to profess and practise his own religion, and the right to propagate his religion, though this last right is subject to any restrictions imposed by State law relating to the propagation of any religious doctrine or belief among persons professing the religion of Islam.

58. The position of each of Their Highnesses as head of that religion in his State and the rights, privileges, prerogatives and powers enjoyed by him as head of that religion will be unaffected and unimpaired. Their Highnesses have agreed however to authorise the Yang di-Pertuan Agong to represent them in any acts, observances or ceremonies agreed to by the Conference of Rulers as extending to the Federation as a whole.

59. At present there is no head of the Muslim religion in either Malacca or Penang, though in Penang the Government obtains advice in matters relating to the Muslim religion from a non-statutory Muslim Advisory Board. Since the Governors of these new States may not be persons professing the Muslim religion it is proposed that the Yang di-Pertuan Agong should be the head of the religion in each of these States and that the Constitution of each should include provisions enabling the Legislature to regulate Muslim religious affairs and to constitute a Council to advise the Yang di-Pertuan Agong in such affairs. These Councils will be concerned solely with Muslim religious affairs and they will not be entitled to interfere in any way with the affairs of people of other religious groups; and the position of the Yang di-Pertuan Agong as head of the Muslim religion will not carry with it authority to intervene in any matters which are the concern of the State Governments or to require the State Governments to make financial provision exclusively for the benefit of the Muslim community.

60. If it is found necessary for the purposes of co-ordination to establish a Muslim Department of Religious Affairs at federal level, the Yang di-Pertuan Agong will, after consultation with the Conference of Rulers cause such a Department to be set up as part of his establishment."

In the end, the constitution as recommended by the Reid Commission resulted in the insertion of Article 3(1) providing for Islam to be the religion of the Federation. Significantly, Article 3(4) states, "Nothing in this article derogates from any other provision of this Constitution" thus ensuring firstly, the supremacy of the Constitution, and secondly, that the Federation is a secular country. Article 74(2) was inserted to provide for the Legislature of a State to make laws with respect to specific matters on the Muslim religion, and Malay custom. The respective provisions read:

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

(2) In every State other than Malacca and Penang the position of the Ruler as the Head of the Muslim religion in his State in the manner and to the extent acknowledged and declared by the Constitution of that State, and, subject to the Constitution, all rights, privileges, prerogatives and powers enjoyed by him as Head of that religion, are unaffected and unimpaired; but in any acts, observances or ceremonies with respect to which the Conference

of Rulers has agreed that they should extend to the Federation as a whole each of the other Rulers shall in his capacity of Head of the Muslim religion authorise the Yang di-Pertuan Agong to represent him.

(3) The Constitution of the States of Malacca and Penang shall each make provision for conferring on the Yang di-Pertuan Agong the position of Head of the Muslim religion in that State.

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

74. (2) The Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List." (See APPENDIX II)

3.2.3 Islam as a Religion of the Federation – The Political Dimension

Why was Islam enunciated as the religion of the Federation at the time of Independence in 1957? It is significant that the UMNO or Alliance leadership was prepared to adopt such a position even though the Sultans who were heads of Islam in their respective states wanted Islam to remain a state matter. The Rulers felt that the new role for Islam would erode their authority over the religion and diminish the powers of the Rulers in their respective states.

For the UMNO leadership, there were a number of factors which justified their stand. Among them was the Malay attachment to Islam. Islam is - and has always been - the community's principal identity marker. Since it defines, to a large extent, Malay identity, it was, and is perceived as the religion that gives the land its identity. If anything, the presence of a huge non-Malay, non-Muslim community and its accommodation in the 50s through citizenship reinforced the Malay desire to assert the identity of the land. After all, this unprecedented accommodation had, in effect, relegated the Malays as a people who had bestowed the land with its identity to a community among communities.

It is partly because of this that the issue of identity has remained at the core of the Malay understanding of Islam and its practice. Nearly all the major concerns and controversies involving Islam from dietary requirements, female attire, hudud, and the Islamic State are inseparable from the question of identity. Understanding identity from the perspective of Islam and Malay history and culture is, therefore, fundamental to a deeper appreciation of the role of the religion in the Malaysian society today.

In Islam, there is both an exclusive and an inclusive dimension. The exclusive is often shaped by the contextual and the specific. The inclusive, on the other hand, is rooted in the eternal and the universal. It is the latter dimension of identity that is not emphasised enough by contemporary Muslim activists.

Yet the inclusive, universal dimension of identity is integral to the Muslim notion of self. The Qur'an not only acknowledges the reality of religious and cultural diversity, but it also reminds us that it is a part of the divine plan (5:48). In the ultimate analysis, it is our virtuous conduct transcending our religious and cultural differences that really matters. (49:13) Righteousness - not religion per se - is what defines our identity and our humanity.
The Prophet's life and mission reflected this vision of identity as seen in the rights he accorded to people of other faiths through various political arrangements such as the Charter of Medina and treaties such as the Treaty of Najran. The early Caliphs such as Omar Ibn Khattab and Ali ibn Talib perpetuated this legacy of justice and fairness to everyone regardless of their ethnic or religious affiliation. Muslim empires that emerged at different times in history from Andalusia, Uthmaniyyah, the Mughals of India to the Malay Sultans of Melaka, embodied this universal spirit of Islam. Melaka, for instance, at the zenith of its glory in the 15th century, was the meeting place of at least 80 languages! That as it may, one cannot deny that it was not always a world of justice, tolerance and understanding, as depicted by the times of the prophet and the early Caliphs, and in the empires mentioned above. There were several negative trends that have brought disrepute to Muslim civilisation – there were bitter internal rivalries and treacherous behaviour among the rulers, which often got the better of them, and which ultimately caused their decline and downfall.

What propelled the inclusive vision of society in Melaka as in many parts of the Muslim world were in part influenced

by the Sufi teachings of Muslim saints and preachers. The peaceful spread of Islam in Southeast Asia was largely due to these teachings. Sufism emphasised accommodation and inclusiveness; it advocated moderation and respect for the other.

It is partly because of the impact of these values that the Malays and other Muslims of Nusantara developed an inclusive and accommodative outlook. Malay identity itself was all-embracing and all-encompassing. It bore the influences of such diverse ethnic, cultural and religious strains that the Malays as a people evolved with an identity that defied any simplistic biological or physiological characterisation.

It is this universal, inclusive notion of Malay identity which resonates with Islam that should be brought to the fore through the mosque and the khutbah, through *madrasah* and usrah, through schools and the media. A counter-narrative on identity rooted in the Quran and the Sunnah that echoes Malay history and anthropology is one of the most effective ways of combating narrow, bigoted interpretations of the religion.

Governance

This study, 'Administration of Matters Pertaining to Islam', itself is, in a manner of speaking, about governance. Governance is about how we manage state and society. As an activity, it is far more significant than determining whether a state is Islamic, democratic or fascist.

If governance becomes our focus, the questions we would ask would be quite different from what would concern us if we were more interested in the ideological orientation of a state. We would ask, for instance, 'What are the values and principles that inform and inspire the state?; What are its goals and aspirations?; What are its leading structures and institutions?; Who are the individuals at the apex of these structures?; What are their policies and programmes?; How have these policies benefitted the people?; and How have they failed the people?'

After 60 years of *Merdeka*, it is a comprehensive evaluation of governance that is missing. Such an evaluation will reveal a great deal about where we are and what more needs to be done. More specifically, a closer look at governance will tell us why corruption has become more serious over the decades. It will also explain why socio-economic disparities are becoming more pronounced. At the same time, a thorough scrutiny of governance will convince us that despite everything, Malaysia remains a functioning democratic, constitutional polity.

To put it in a nutshell, if there is good governance, the administration of matters pertaining to Islam will also begin to reflect the beautiful face of the religion. This is the reason why the secret recipe to good governance is for its ingredients to be justice, compassion and honesty.

3.3. Administration of matters pertaining to Islam in Malaysia (after 1963)

When Malaysia was formed in 1963, the main structure of the Administration of matters pertaining to Islam was already put in place following the adoption of the Federal Constitution in accordance with the Malaysia Agreement of 1963. What followed after 1963 were mainly the refinement of the state administration and amendments to the legislation to affect these refinements.

After *Merdeka*, the 1952 Enactment - a single consolidating legislation - had been the governing law in Selangor until its gradual repeal by a series of State enactments from 1984 to 1999[9] . As a result, the specific subject matters in the 1952 Enactment are now to be found in separate State enactments, for example, separate laws for family matters, Muslim offences, evidence and *Wakafs*. This law-making trend, of deconsolidating subject matters into separate enactments, seem to have begun in Kelantan[10] in 1982 and was followed in all other States thereafter including Penang[11] and Johore[12] .

[9] Islamic Family Law Enactment 1984 (s. 135), Administration of matters pertaining to Islamic Law Enactment 1989 (s. 87), Syariah Criminal Offences (Selangor) Enactment 1995 (s. 55), Syariah Evidence Enactment 1996 (s. 131), and Wakaf (State of Selangor) Enactment 1999 (s. 50)

[10] Administration of the Syariah Court Enactment 1982 (s. 36), Islamic Family Law Enactment 1983 (s. 129), Syariah Criminal Procedure Enactment 1983 (s. 207), Syariah Civil Procedure Enactment 1984 (s. 273), Syariah Criminal Code 1985 (s. 34), and Council of the Religion of Islam and Malay Custom, Kelantan Enactment 1994 (s. 146)

[11] Islamic Family Law (State of Penang) Enactment 1985 (s. 135), Administration of matters pertaining to Islamic Religious Affairs Enactment of the State of Penang 1993 (s. 110), Syariah Criminal Offences (State of Penang) Enactment 1996 (s. 57), Syariah Criminal Procedure (State of Penang) Enactment 1996 (s. 231), Syariah Evidence (State of Penang) Enactment 1996 (s. 132), and Syariah Court Civil Procedure (State of Penang) Enactment 1999 (s. 248)

[12] Islamic Family Law Enactment 1990 (s. 138), Syariah Court Enactment 1993 (s. 32), Syariah Evidence Enactment 1993 (s. 132), Syariah Criminal Offences Enactment 1997 (s. 57), Syariah Criminal Procedure Code Enactment 1997 (s. 231), Administration of the Religion of Islam (State of Johor) Enactment 2003 (s. 124), and Syariah Court Civil Procedure (State of Johor) Enactment 2003 (s. 248)

At present, most States have their respective 'Administration of matters pertaining to Islamic law' enactments - establishing the Majlis Agama and the *Syariah* courts while prescribing the functions and jurisdiction respectively of the said authorities[13]. Certain States, however, have separate enactments to create the Majlis Agama[14] and the *Syariah* courts[15].

In 1965, 8 years after *Merdeka*, the Muslim Courts (Criminal Jurisdiction) Act 1965 was enacted by Parliament pursuant to Item 1 of the State List in the Ninth Schedule of the Federal Constitution to confer the Muslim courts with jurisdiction with respect to offences against precepts of the religion of Islam. By reason of this belated measure by Parliament, a provision was included in the Act to validate offences tried by the said Muslim courts between *Merdeka* and 1965.

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[13]Johore: Administration of the Religion of Islam (State of Johor) Enactment 2003; Malacca: Administration of the Religion of Islam (State of Malacca) Enactment 2002; Negeri Sembilan: Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003; Pahang: Administration of matters pertaining to Islamic Law Enactment 1991; Penang: Administration of the Religion of Islam (State of Penang) Enactment 2004; Perak: Administration of the Religion of Islam (Perak) Enactment 2004; Perlis: Administration of the Religion of Islam Enactment 2006; Selangor: Administration of the Religion of Islam (State of Selangor) Enactment 2003; and Federal Territories: Administration of matters pertaining to Islamic Law (Federal Territories) Act 1993.

[14]Kedah: Administration of matters pertaining to Islamic Law (Kedah Darul Aman) Enactment 2008; Kelantan: Council of the Religion of Islam and Malay Custom, Kelantan Enactment 1994; Sabah: Majlis Ugama Islam Negeri Sabah Enactment 2004; Sarawak: Majlis Islam Sarawak Ordinance 2001; and Terengganu: Administration of matters pertaining to Islamic Religious Affairs (Terengganu) Enactment 2001.

[15]Kedah: Syariah Courts (Kedah Darul Aman) Enactment 2008; Kelantan: Administration of the Syariah Court Enactment 1982; Sabah: Syariah Courts Enactment 2004; Sarawak: Syariah Courts Ordinance 2001; and Terengganu: Syariah Court (Terengganu) Enactment 2001.

Islamic Family Law (State of Penang) Enactment 1985 (s. 135), Administration of matters pertaining to Islamic Religious Affairs Enactment of the State of Penang 1993 (s. 110), Syariah Criminal Offences (State of Penang) Enactment 1996 (s. 57), Syariah Criminal Procedure (State of Penang) Enactment 1996 (s. 231), Syariah Evidence (State of Penang) Enactment 1996 (s. 132), and Syariah Court Civil Procedure (State of Penang) Enactment 1999 (s. 248)

[12]Islamic Family Law Enactment 1990 (s. 138), Syariah Court Enactment 1993 (s. 32), Syariah Evidence Enactment 1993 (s. 132), Syariah Criminal Offences Enactment 1997 (s. 57), Syariah Criminal Procedure Code Enactment 1997 (s. 231), Administration of the Religion of Islam (State of Johor) Enactment 2003 (s. 124), and Syariah Court Civil Procedure (State of Johor) Enactment 2003 (s. 248)

Since *Merdeka*, there have been several amendments to the Federal Constitution, with the notable ones as follows:

(i) Amendment in 1976 - semantic changes

In 1976, a constitutional amendment was passed substituting 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 time the word 'Syariah' appears in the Constitution. A similar semantic shift soon appeared in the Federal and State law. There has also been academic criticism with respect to this shift in terminology.

(ii) Amendment in 1988 – Article 121(A)

The amendment in 1988 was significant: it was for the insertion of a new Clause into Article 121, namely Clause (1A) which reads: 'The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts'. In effect, the High Courts can now no longer exercise its jurisdiction in respect of matters exclusively within the jurisdiction of the Syariah courts.

3.4. Administration of matters pertaining to Islam in the State: the example of Selangor

Muslim Laws in the Federation of Malaya went through a remarkable evolution in the 1950s, beginning with Selangor. In October 1952, His Highness the Sultan of Selangor, with the advice and consent of the Council of State, enacted the Selangor Administration of Muslim Law Enactment 1952 ("the 1952 Enactment") for Selangor. It was the most thorough consolidation of existing laws with respect to the administration of Muslim law and Malay customary law, the constitution and organisation of religious authorities, and the regulation of religious affairs, before *Merdeka*.

Given the material similarities between many of the State enactments, the Selangor Enactment of 1952 is a useful example. The most recent enactment on 'Administration of matters pertaining to Islamic law' in Selangor is the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ("the 2003 Enactment"). It is an enactment "…to make new provisions on the administration of the religion of Islam, the establishment and jurisdiction of the *Syariah* Courts, the establishment and functions of the Majlis Agama Islam Selangor, and other matters related thereto".

While the 2003 Enactment does not deal with matters relating to family, evidence or specific Muslim offences, it is otherwise similar in substance, to the 1952 Enactment, i.e., it regulates Muslim religious affairs and creates a process for administration of justice

with respect to Muslim personal law and Muslim offences. The 2003 Enactment consists of the following eleven parts as summarised below:

PART	SUBJECT MATTER	SECTIONS
Part I	Preliminary	1 – 3
Part II	Majlis Agama Islam Selangor	4 – 43
Part III	Appointment of Mufti; Authorities in religious matters; Fatwas Committee; and Fatwa relating to matters of national interest	44 – 54
Part IV	*Syariah* courts	55 – 77
Part V	Prosecution and representation	78 – 80
Part VI	Finance – *Baitulmal* and financial procedures of the Majlis; Zakat and fitra; *Wakaf*, nazr and trusts	81 – 95
Part VII	Mosques	96 – 105
Part VIII	Charitable collections	106
Part IX	Conversion to the religion of Islam	107 – 117
Part X	Religious education	108 – 121
Part XI	General	122 – 124

3.5. Administration of specific matters

In the historical development of the Administration of matters pertaining to Islam in Malaysia, there are specific matters that are pertinent and five such matters are described below.

3.5.1. Muslim Offences and Punishments

One notable feature of Islam is the concept of responsibility resting on the ruler or the public authority to supervise the moral behaviour of individuals and public piety. Certainly, this is not unique to Islamic governance or to Muslim rulers and authorities. While it is the duty of every Muslim individual in principle, to promote good and combat evil, this feature is especially true of Muslim rulers and leaders in the discharge of their duties in governance; in other words, it is a feature of political Islam. This concept – hisba[16] – was espoused in varying degrees by the Mughals of India. It is from there, most likely, that it penetrated the Malay States where the Sultans showed interest in introducing legislation on religious affairs. In the early stages of British Malaya, Muslim offences only related to mosque attendance and adultery.

In 1885, Perak was the first State to pass a law which made Friday prayer in the mosque compulsory; Muslims who disobeyed were liable to a small fine and the proceeds were applied to the upkeep of mosques. In 1887 and 1893, Sungei Ujong and Negri Sembilan passed similar laws. In 1894, Perak

[16] Hisba is an Islamic doctrine meaning "accountability"of the ruler (government) to intervene in order to keep everything in order according to Islamic law.

passed a law to make adultery an offence; it stipulated that whosoever had sexual intercourse with the wife of another man, provided it was not a rape, both him and the woman were guilty of adultery and liable to punishment[17]. Within a few days, Selangor passed a similar law, adding that the court could act only when a complaint was made by the husband of the woman or her guardian[18].

Between 1895 and 1899, the State Councils of Perak and Negri Sembilan discussed the need to establish a comprehensive 'Muhammadan Code' of behaviour and studied drafts of codification of 'Muhammadan Law'. In July 1897, the Durbar had its first meeting in Kuala Lumpur where the major issue was the compilation of a Code of Muhammadan Laws and Custom to penalise moral offences which did not come within the scope of English criminal law. In 1898, the Sultan of Pahang, in the State Council, complained that all crimes committed in Pahang against Islamic law went unpunished and as a ruler of a Muslim State, he felt personally responsible for all such misdeeds, and steps should be taken for the British Governor to assume the burden of answerability for fining offenders. By 1900, the State Council of Selangor had resolved that the acting Resident should communicate with the Resident-General on the draft of an enactment where the State Council of Negri Sembilan and the Sultan of Perak had proposed amendments. Discussions took place at the conference of Residents in Selangor, in January and July 1902, and thereafter, the legal adviser, T.H. Kershaw, drafted a Muhammadan Laws Enactment which would only

[17] Perak, Order in Council No. 1 of 1894, "Adultery by Muhammadans"
[18] Selangor, Regulation XI of 1894, "Prevention of Adultery Regulation, 1894"

cover cases in which both parties were Muslims. Consultations were held between the Sultanates, State Councils and British Residents on every detail of the draft.

In 1904, in the face of criticisms, the enactment was passed in all the Federated States. The criticism from the High Commissioner of the Straits Settlements was on the basis that:

> **There can be no great need for it in the Federated Malay States where the Malays have no great reputation for orthodoxy.**

> **Such a law would be an inexplicable interference with freedom.**

He objected to giving the ruler the sole right to determine what should be taught as religion for that would let him force his religious views on the whole population and stifle reform.

The draft gave exaggerated powers to the head of the family over its women members.

The eventual Bill aroused some opposition in the press, and even after its passage into law, there was criticism, especially on the clause on compulsory mosque attendance on Fridays and the clauses dealing with the morals of women. Two points were raised: (i) How would this obligatory worship affect all Government servants, policemen, foresters, orderlies and the like, of whom the majority were Muslims?; and (ii) The legislation

should exclude Indians and other Muslims because religious liberties were not interfered with in their native countries.

Subsequent amendments in 1915, 1917 and 1918 (except for Pahang) introduced the offence of Prohibition of Sale of Cooked Food in the month of Ramadan, Prohibition of Cohabitation between Divorced Persons, and Incest respectively. The 9 offences were:

Section	Offence	Punishment
3	Failure to attend prayers at Mosque every Friday.	Fine not exceeding 50 cents before a Court of Penghulu (or a Court of a *Kathi* in Negri Sembilan and Pahang).
4	Enticing any unmarried girl out of the keeping of her parents or guardians.	Imprisonment not exceeding 6 months and fine up twice the amount of "mas kahwin" payable for a marriage of a girl of her class.
5	Absconding to lead an immoral life (unmarried girls).	Imprisonment not exceeding 1 month (3 months for subsequent offences).
6	Adultery with a wife of another man.	Imprisonment not exceeding 1 year and fine not exceeding $250 for the man, and imprisonment not exceeding 6 months for the woman.

7	Incest.	Incest by reason of consanguinity or fosterage: imprisonment not exceeding 5 years for men. Incest by reason of affinity:
7A	Prohibition to cohabit as a man and wife (after three pronouncements of divorces) unless the woman has lawfully married another man and divorced subsequently.	imprisonment not exceeding 6 months for men, or fine not exceeding $250. Fine not exceeding $250 and for subsequent offences, fine not exceeding $500 or imprisonment not exceeding 6 months.
8	Betrothal (breach of promise to marry).	Pay the value of the “mas kahwin” which would have been paid if marriage took place.
9	Teaching religious doctrine in public place without written permission of Sultan or teaching false doctrines.	Fine not exceeding $25.

9A	Prohibition on shopkeepers or retail traders from selling during Ramadhan between 6 a.m. and 6 p.m. to Muslim persons cooked food for immediate consumption[19]	Fine not exceeding $2 and fine not exceeding $10 for subsequent offences before Court of *Kathi*, Court of Penghulu or Court of Magistrate.

Prohibitions touching on personal morality interfered with individual discretion to an unusually high degree: sexual morality would be best regulated by the judgment of the individual, the pressure of public opinion and the tenets of religion.

The draft was ill-suited to 'a modern colonial country', and a Malay woman who had relations with a non-Muslim man should not 'atone for her offence by spending six months in jail'.

Although legislation in that general sense had been on the Statute Book of the Federated States for over 30 years, and no new principles were involved, it was feared that the proposed provisions might encourage active enforcement of what had till now been a dead letter.

There was also criticism on religious grounds: Khalil Anwari (an Indian Muslim), editor of the Singapore monthly Voice of Islam, thought that the Bill was absolutely contrary to the principles of

[19] **"A few years later, the law was widened to forbid Muslims from eating between the hours of 4:30 a.m. and 6.30 p.m. in public places, and a prohibition on the sale of any article of drink, or any tobacco or cigarettes, for immediate consumption was added."**

Islam; it was obligatory on Muslims to pray five times daily and to attend mosque on Friday, but they should attend of their own accord; he disapproved of the principle of compulsion as likely to engender a kind of hypocrisy.

Similar objections were raised by other prominent Malays who regarded the Bill as archaic: under modern conditions, it was impossible to obey the Quran to the letter, and if the laws about to go to the State Councils were enforced in toto, hundreds of Malays would be fined or imprisoned every day for not going to the mosque and for other breaches.

Another Malay said that, "it was incredible…to see compulsory religion being foisted on supposedly free British subjects. Nowhere else under the Union Jack was such an abuse of the principles of religious freedom tolerated."

Objection appeared in readers' letters. *The Warta Malaya*, a Malay daily of Singapore, declared:

The Bill not only unnecessary but dangerous: completely criminal, civil and social laws were presented in the Quran and the provisions of the Bill conflicted with [Islamic law];

It was a needless burden to be compelled to stay on at a mosque to hear the teachings of the *imam* or alim after the prayer.

The Straits Budget, which reprinted that comment, added its own censure:

> **No such legislation existed in Islamic Egypt, Turkey or Persia, or in the Muslim States of India, or in the Netherlands East Indies with their vast Muslim population; it was difficult to see why the Malay States should proceed to blend a religious and a criminal code.**

Conceding that statutory punishment for adultery was warranted, the editor made the point that, however medieval this might seem to Europeans, Malays strongly believed that adultery should be a criminal offence. Clauses as to sexual morality were not criticised by him; his sole concern was with the preservation of penalties for purely religious misdemeanours such as non-attendance at mosque on Fridays.

Public discussion was incessant throughout the first half of 1938. A major criticism was that Friday prayer in the mosque was not compulsory according to [Islamic law], while the five daily prayers were; in other words, a triviality was singled out, more important rites were overlooked. It was the same with control of religious teachings, publication of books on religious subjects, and enforcements of fasting during Ramadhan. On the other hand, the Bill was defended by many who believed that this compulsion was accepted.

Taking Negri Sembilan's Muhammadan (Offences) Order in

Council 1938 as an example, the 13 offences were as follows:

Section	Offence	Punishment
3	Failure to attend Prayers at Mosque every Friday.	Fine not exceeding $5 before a Court of Penghulu.
6	Non-attendance of children at Quran School.	Fine not exceeding $5 before a Court of Magistrate or a Court of Penghulu.
5	Enticing any unmarried girl out of the keeping of her parents or guardians.	Imprisonment not exceeding 6 months and fine up twice the amount of “mas kahwin” payable for a marriage of a girl of her class.
8	Absconding to lead an immoral life (unmarried girls).	Imprisonment not exceeding 1 month (3 months for subsequent offences).
9 (i)	Adultery with a wife of another man	Imprisonment not exceeding 1 year and fine not exceeding $500 for the man, and imprisonment not exceeding 6 months or and fine not exceeding $250 for the woman.

9 (ii)	Khalwat for men: in retirement alone with and in suspicious proximity to any Muhammadan woman whom he is not forbidden to marry.	Imprisonment not exceeding 1 year and fine not exceeding $500 for the man, and imprisonment not exceeding 6 months or and fine not exceeding $250 for the woman as participator.
9 (iii)	Khalwat for women: in retirement alone with and in suspicious proximity to any male not being a Muhammadan.	Imprisonment not exceeding 6 months or fine not exceeding $250.
10	Incest.	Incest by reason of consanguinity or fosterage: imprisonment not exceeding 5 years for men Incest by reason of affinity: imprisonment not exceeding 6 months for men, or fine not exceeding $25
11	Prohibition to cohabit as a man and wife (after three pronouncements of divorces) unless the woman has lawfully	Incest by reason of consanguinity or fosterage: imprisonment not exceeding 5 years for men Incest by reason of affinity: imprisonment not exceeding

	married another man and divorced subsequently.	6 months for men, or fine not exceeding $25
12	Teaching religious doctrines in a public place without the written permission of Sultan or teaching false doctrines	Fine not exceeding $100
13	Prohibition on shopkeepers or retail traders from supplying cooked food, drink, tobacco or cigarettes for immediate consumption during Ramadhan between half an hour before sunrise and the hour of sunset to Muslim persons.	Fine not exceeding $2 and fine not exceeding $10 for subsequent offences before Court of *Kathi*, Court of Penghulu or Court of Magistrate
14	Printing or publishing publications concerning the Muhammadan religion containing precepts of the said religion	Fine not exceeding $200 or imprisonment not more than 1 year, and such book or document shall be liable to forfeiture

	which are contrary to the opinion of the Religious Committee appointed by the Ruler	
15	Breaches of fasting rules in the month of Ramadhan	Fine not exceeding $2 and fine not exceeding $10 for subsequent offences before the Court of *Kathi*, Court of Penghulu or Court of Magistrate

Only persons professing the Muhammadan religion were subject to the enactment. The offences and the relevant sections which were triable before a Court of a Magistrate of the First Class were as follows:

- Enticement (s. 7),
- Absconding to lead an immoral life (s. 8),
- Incest by affinity (s. 10(iii)),
- Prohibition of cohabitation for divorced persons (s. 11),
- Teaching religious doctrine without written permission (s. 12), and
- Publishing publications concerning the Muhammadan religion contrary to religious precepts (s. 14).

The offences that were triable by the Supreme Court were:

- Adultery (s. 9), and
- Incest by consanguinity or fosterage (s. 10(ii)).

When trying such offences, the courts had to cause 2 Muhammadans of standing to be summoned from a list of persons nominated in that capacity by the Majlis Meshuarat Ka'adilan dan Undang to sit with the Court as assessors. The courts were, however, not bound by the opinion of the assessors. All fines recovered from the offenders must be paid to a fund called the "Muhammadan Religious Fund".

In the Unfederated Malay States, the situation followed the development in the Federated Malay States. In 1919, Johor passed a comprehensive 'Muhammadan Law', virtually a replica of the Federated States' legislation of 1904, but more rigorous in its treatment of prostitution. In 1911, Kedah passed a Religious Observance Enactment, to be amended several times; it closely followed the 1904 Muhammadan Laws Enactment of the Federated States (and the Johore law of 1919), and dealt with marriage and divorce, mosque attendance, observance of Ramadhan, enticing, leading an immoral life, adultery, betrothal, incest, inspection by the shaikh-al-Islam of books and documents to do with Islam, and the unauthorised teaching of religion. It was thought that there was no danger of it being used to interfere with freedom of conscience. Before the law was passed, various matters regarding the Bill were decided by a committee consisting of the shaikh-al-Islam, the legal adviser (an Englishman) and the chief judge. Under the law, the shaikh-al-Islam had the authority, with the approval of the president of the State Council, to forbid the importation, possession, sale or use of any book dealing with Muslim religious matters, and the

State Council must approve the rights of religious teachers to impart religious doctrines. In 1921, Perlis also passed a similar law to impose fines with respect to complaints against Muslim women consorting with men of other denominations. In 1938, Kelantan passed a law which consolidated existing Muslim offences and followed the formula of the Federated States with some modifications; there were penalties for inciting others against attending mosque or taking religious instructions, slandering any pegawai masjid, teaching religion without permission of the Majlis *Ugama* Islam and making fatwas on Islamic law. The Majlis also controlled the printing, publishing or importing of any book or document on religious topics, the Quran may not be used in a theatrical performance, and the purchase, sale or consumption (in a shop or other public place) of intoxicating liquors was forbidden.

From 1952, Muslim offences were consolidated into a single enactment in all States. Taking the 1952 Enactment of Selangor as an example, the 27 offences were as follows:

Section	Offence	Punishment
150	Compulsory attendance for Friday prayers at the mosque	Fine up to $25
151	Purchase, sale or consumption of intoxicating liquor	Fine up to $25, and for subsequent offences, up to $50

153	Disobeying Sultan's lawful orders during Ramadhan, Hari Raya Haji or Hari Raya Fitra	Fine up to $25
155(1)	Desertion of wife pursuant to court order	Imprisonment up to 14 days or fine up to $50 or both
155(2)	Ill-treatment of wife	Imprisonment up to 14 days or fine up to $50 or both
156	Wilfully disobeying husband's lawful order	Fine up to $10, and for subsequent offences, imprisonment up to 7 days or fine up to $50
157(1)	Khalwat for men	Imprisonment up to 14 days or fine up to $50, and for subsequent offences, imprisonment up to 1 month or fine up to $100
157(2)	Khalwat for women (including with non-Muslim men)	Imprisonment up to 14 days or fine up to $50, and for subsequent offences, imprisonment up to 1 month or fine up to $100
158	Illicit intercourse between divorced persons	For man, imprisonment up to 1 month or fine up to $100 For women, imprisonment up to 7 days and fine up to $25

159	Unlawful solemnisation of marriage	Imprisonment up to 1 month or fine up to $100
160	Failure to report marriage or divorce	Fine up to $25
161	Failure to report conversions	Fine up to $25
162	Improper retention of funds by pegawai masjid	Imprisonment up to 3 months or fine up to $250
163	Wilful neglect of statutory duty Breach of secrecy	Imprisonment up to 3 months or fine up to $250 Imprisonment up to 3 months or fine up to $250
164	Erecting mosques without written permission of the Majlis *Ugama*	Fine up to $1000
166	Religious teaching, save in own residence, without written permission of *Kathi*	Imprisonment up to 1 month or fine up to $100
167	Teaching of false religious doctrine publicly	Imprisonment up to 3 months or fine up to $250
168	Issuance of fatwa on any question of Muslim law, doctrine	Imprisonment up to 3 months or fine up to $250

	and Malay customary law by persons not authorised under the enactment	
169	Printing or publishing of books contrary to Muslim law, doctrine or fatwa	Imprisonment up to 6 months or fine up to $500
170	Misuse of Qur'an for entertainment or derision	Imprisonment up to 1 month or fine up to $100
171	Contempt of any religious authority	Imprisonment up to 1 month or fine up to $100
172	Contempt of the Muslim religion	Imprisonment up to 6 months or fine up to $500
173	Non-payment of zakat or fitra	Imprisonment up to 7 days or fine up to $100
174	Inciting Muslims to refrain from attending mosque or religious instructions	Imprisonment up to 14 days or fine up to $50

These offences only applied to persons professing the Muslim religion and can only be prosecuted in the Court of the *Kathi* Besar or a Court of a *Kathi*.

In the 1982 State Election of Kelantan and the 1982 General Election, the National Front (Barisan Nasional) retained a majority in the Kelantan Legislative Assembly and Parliament respectively.

In 1984, the *Syariah* Courts (Criminal Jurisdiction) Act 1965 was amended by the Parliament to permit the *Syariah* courts to have jurisdiction in respect of "offences against precepts of the religion of Islam" punishable with imprisonment for a term not exceeding 3 years, any fine not exceeding RM5,000, whipping not exceeding six strokes, or any combination thereof.

A year later, in 1985, Kelantan enacted a new enactment solely for Muslim offences. The 28 offences were as follows:

Section	Offence	Punishment
5	Indecent act or behavior contrary to Hukum Syarak in any public place or any person found making love with a person other than one's spouse	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 6 months or to both.
6	Utterance of any word which is contrary to Hukum Syarak in any place	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 6 months or to both.
7	Pondan: male person wearing a woman's attire and posing as a woman in any public place	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 4 months or to both.

8	Instigating married woman or man to be divorced or neglect duties and responsibilities	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 6 months or to both.
9	Khalwat: any person living with or cohabiting with or in retirement with or hiding with any person of the opposite sex who is not his mahram other than his spouse	Fine not exceeding RM2000 or to imprisonment for a term not exceeding 1 year or to both.
10	Incest: an act or a series of act, which is presumed to be contrary to Hukum Syarak between a man and a woman who are prohibited from marrying each other	Fine not exceeding RM3000 or to imprisonment for a term not exceeding 2 years or to both.
11	Adultery/Zina: sexual intercourse between a man and a woman who are not husband and wife other than rape and persetubuhan syubhat	Imprisonment for a term not exceeding 3 years or to a fine not exceeding RM5000 or to both and to 6 strokes of whipping.

12	An act preparatory to the commission of Zina	Fine not exceeding RM3000 or to imprisonment for a term not exceeding 2 years or to both and to whipping not exceeding 3 strokes.
13	Abetment of the commission of the offence of zina	Fine not exceeding RM3000 or to imprisonment for a term not exceeding 2 years or to both.
14	Liwat: sexual relations between male persons	Fine not exceeding RM5000 or to imprisonment for a term not exceeding 3 years or to both and to 6 strokes of whipping.
15	Musahakah: sexual relations between female persons	Fine not exceeding RM5000 or to imprisonment for a term not exceeding 4 months or to both.
16	Pregnancy outside marriage	Fine not exceeding RM3000 or to imprisonment for a term not exceeding 2 years or to both.
17	Enticing another person's wife	Fine not exceeding RM2000 or to imprisonment for a term not exceeding 1 year or to both.
18	Prostituting wife or child	Fine not exceeding RM3000 or to imprisonment for a term

		not exceeding 2 years or to both.
19	Prostituting (woman)	Fine not exceeding RM4000 or to imprisonment for a term not exceeding 2 years or to both.
20	Enticing a woman to run away from the custody of her parents or guardian	Fine not exceeding RM2000 or to imprisonment for a term not exceeding 1 year or to both.
21	Selling or giving away child to a non-Muslim	Fine not exceeding RM2000 or to imprisonment for a term not exceeding 1 year or to both.
22	Becoming a muncikari/ pimp (a person who acts as a procurer between a female and a male for a purpose which is contrary to Hukum Syarak)	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 6 months or to both.
23	Encouraging maksiat	Fine not exceeding RM500 or to imprisonment for a term not exceeding 6 months or to both.
24	Takfir: uttering or implying that a person is not a Muslim	Imprisonment for a term not exceeding 3 years or to a fine not exceeding RM5000 or to both.

25	Intoxicating drinks: (i) Drinking liquor or any intoxicating drinks. (ii) Making, selling, exhibiting	(i) Fine not exceeding RM5000 or to imprisonment for a term not exceeding 3 years or to both and to whipping not more than six strokes. (ii) Fine not exceeding RM3000 or to imprisonment for a term not exceeding 2 years or to both.
26	Consuming food or drink or smoking any tobacco in the hours of daylight in the month of Ramadan	Fine not exceeding RM500 or imprisonment for a term not exceeding 3 months and for a second and subsequent offence to a fine not exceeding RM1000 or to imprisonment for a term not exceeding 6 months or to both.
27	Failing to comply with, contravening, objecting to or deriding any Qadhi or Pegawai *Ugama* Islam Negeri or Penyelia *Ugama* in the discharge of his duties	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 6 months or to both.

28	Deriding or despising any law in force in the *Syariah* courts	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 6 months or to both.
29	Abetment	Same punishment as if he had committed offence.
30	Attempts	Punishment not exceeding one-half of the punishment provided for the offence.
31	Failing to comply with, contravening, objecting to, deriding or refusing to obey any order of the *Syariah* courts	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 1 year or to both.
32	Failing to comply with an order of His Royal Highness the Sultan on any specific matter which is contrary to Hukum Syarak	Fine not exceeding RM2000 or to imprisonment for a term not exceeding 1 year or to both.

3.5.2. *Wakaf* Administration

A '*Wakaf*' is a charitable endowment in perpetuity of the capital and income of property for religious or charitable purposes that is recognised by Muslim law. A *wakaf* may be granted for a general purpose (*wakaf* am) or a specific purpose (*wakaf* khas). In British Malaya, the problem of responsibility for public trusts (usually grants for charitable and religious purposes) was first felt in Penang. When Penang was opened to settlement in the beginning of the 19th century, the Government made grants of land for Muslim mosques and burial grounds (and for Hindu temples) to attract settlers but had since halted this. Many private donors deeded land to charity. Not seldom, the trustees of endowments disappeared, or the funds were diverted from their declared objective. The value of dedicated property was immense. Certain trust lands were found to be liable to be seized and sold to pay the donor's debts in the absence of a formal deed. And where deeds had been made, an application had to be made to the Supreme Court to appoint successor trustees.

While the British Government was unwilling to deal with such religious matters, given public pressure and press reports of abuses, it could no longer be avoided. A proposal by the Colonial Secretary advised the Government not to interfere directly in or seek to control religious affairs, but to confine itself to the administration of trusts.

In 1905, a law was passed creating a board to deal with the charities and charge it with the administration of trusts and the power to name trustees. The law would apply to future as well as to existing endowments which included mosques, Hindu temples, schools and 'other pious, religious and beneficial purposes'.

In the Federated Malay States, this course was not taken. The Government of the States took it upon themselves to allocate parcels of land for religious purposes such as mosques and Muslim cemeteries under the Land Enactment of 1903 which permitted such allocations for public needs. The reservation of land could be proclaimed by the British Resident or a district officer who would then entrust the mosques or cemeteries to the local *kathi* or penghulu. The trustees, all of them Muslims, were authorised to collect subscriptions from members of the Muslim community towards the expenses of burials and the general upkeep of cemeteries and appoint managers and caretakers of cemeteries. In the Unfederated Malay States, the situation was varied. In Terengganu, the situation was similar to that of the Federated Malay States. The Sultan-in-Council could proclaim land as reserved 'for the advancement of the Muhammadan religion particularly the upkeep of the *Suraus* and Mosques to be maintained by the Secretary for Religious Affairs and his successors'. The reserves were inspected by the Secretary for Religious Affairs; cemeteries came under the authority of local dignitaries or penghulus who were named in official notifications.

In Kelantan, since 1916, the Majlis *Ugama* had been in charge of Muslim cemeteries and mosques. It had a special mosque fund from which salaries of mosque officials were paid, buildings kept up and new ones constructed. The Majlis was appointed as trustee of all mosques and, with the approval of the Sultan, could appoint the *imam* tua, who could choose residents of his mukim to be pegawai masjid (that is, the *imam* muda, khatibs and bilals of the mosque). A mosque could not be built or demolished without the written permission of the Majlis and the Sultan. Mosques could only be built on *wakaf* land. It was the duty of each *imam* to see to the upkeep and repair of his mosque, with the aid of funds provided by the Majlis. The Majlis looked after all *wakaf* land. In 1938, the Majlis was given, by law trusteeship of all *wakaf*s and nazr (an expressed vow to deed property for any purposes allowed by Islamic law). Income of any *wakaf* or nazr, except *wakaf* khas, was credited to the *Baitulmal*.

In 1911, the State of Johore passed a law abolishing all private *wakaf* by declaring that no parcel of land could be declared tanah *wakaf*. Public or charitable *wakaf* were unaffected. In other respects, the situation was similar to the Federated Malay States; the Commissioner of Lands and Mines could declare parcels of land to be reserved for a mosque or cemetery, naming the *kathi* responsible for maintenance.

In Perak, ad hoc laws were passed by the State Council to provide for the appointment of a trustee to administer the estate

of Sultan Idris for special religious and charitable purposes. In 1918, three trustees were appointed, i.e., two Malay dignitaries and the British district officer of Kuala Kangsar.

Since *Merdeka*, Item 1 of the State List in the Constitution permits the State Legislatures to make laws with respect to Muslim charitable and religious trusts and mosques. In contrast, Item 15(c) of the Federal List in the Constitution prohibits the Parliament from making general laws with respect to *Wakaf*s, but permits the making of laws with respect to Hindu endowments. At present, laws with respect to *Wakaf* can be found in all States.

3.5.3. Zakat, Fitra, and Baitulmal

Zakat means the tithe of certain property payable annually in accordance with Muslim law. It is an alms tax, one of the five obligations of Islam, levied on different kinds of property and distributed to eight categories of recipients; it may be given directly to those eligible, but it is preferable to hand it to Muslim authorities for controlled allocation.

Efforts to regularise the collection of zakat and fitra were made early in the British Administration. The revenues went mainly to the building and upkeep of mosques, the payment of mosque officials, and the employment of itinerant teachers and scholars. While there were proposals for a law by the Ruler of Negeri Sembilan and instructions given by the Ruler of Perak

on zakat in 1897 and 1902 respectively, the institutionalisation of zakat collection began in Kelantan. In Kelantan, the collection of zakat and fitra had been entrusted to the Majlis *Ugama* since 1916 by law; it had, till then, been in the hands of the *imam*s of *suraus*, and was so abused that virtually nothing got to the entitled central mosques. With the law in place, the Majlis collected the zakat and fitra annually and the proceeds of sale from unhusked rice were set aside to pay for repairs to mosques and *suraus*; the balance was credited to the Majlis fund in the State. In 1938, all laws and regulations on zakat and fitra were consolidated in Kelantan. Under the new consolidating law, no collection to build a mosque or for any other charitable or religious purpose could be made unless it was with the written permission of the district *kathi* or the Majlis. A special fund, *Baitulmal*, was instituted into which most of the monies collected for religious purposes were paid. The Majlis oversaw the *Baitulmal*; its funds could only be used in accordance with Islamic law for the purposes approved by the Sultan.

Pahang was the second State to institutionalise zakat collection on a similar basis as Kelantan. By 1920, there were discussions in Kedah and Perlis on the collection of zakat within the respective State Councils. In the latter State, systematic collection of zakat and fitra began in 1926. By 1932, the Perlis State Council passed the zakat and fitra rules, and set up the Zakat and Fitra Committee (consisting of departmental heads) which maintained and repaired all mosques, dispensed alms to the poor, and subsidised students who went abroad to further

their religious education. By 1938, the rules for collection of zakat and fitra were revised and codified in Perlis.

In Johore, before the passing of a law in 1934, there was no *Baitulmal*. Under that law, the Sultan-in-Council was authorised to appoint the controller (nathir), the treasurer (amin) and other officers. Only Muslims could fulfil these offices. The treasurer collected any share of the estate of a deceased Muslim which, by Islamic law, was due to the *Baitulmal*. The funds of the *Baitulmal* could be devoted to objects consonant with Islamic law and agreed to by the Sultan-in-Council. The treasurer also ensured the safekeeping of accounts.

In 1937, Terengganu passed a similar law and established a like system as in Johore; till then, *Baitulmal* affairs had been managed by a sub-division of the Department of Religious Affairs. In contrast to the States, there was no legal machinery in the Straits Settlements to enforce payment of either zakat or fitra. Since *Merdeka*, Item 1 of the State List in the Constitution permits the State Legislatures to make laws with respect to zakat and *Baitulmal*. At present, laws with respect to these matters can be found in all States.

Later, under Chapter 5, as an example of good practices, some of the features of zakat distribution will be touched on, and the study revealed some weaknesses related to zakat, mainly in the distribution of zakat money.

3.5.4. Haj

It is the aspiration of Muslims to perform the Haj at least once in their lifetime if they are physically and financially capable of performing the Haj. It is one of the five pillars of Islam. The Haj signified a great deal for the religious life of Malays; *hajis*, by garb and piety, were elevated to a class distinguished from the rest of the population, but were also a source of imported political ideas, intensified Islamic doctrine, and education in the Quran.

Attention was given to the pilgrimage and the need to regulate it because of the social evils and health hazards that it presented. Success of the pilgrimage was plainly in the interest of the British. The Government wished to shield the pilgrims from extortion and prevent the spread of epidemics as well as guarantee the profits of a British commercial venture.

In 1897, a law was enacted in the Straits Settlements to set out tight controls on sailings, inspection and hygienic arrangements. Port officers had been given authority to survey the ships and their services, the space reserved for pilgrims and the medical provision, before certifying their seaworthiness.

By 1906, a law was enacted in the Straits Settlements to regulate and control pilgrim brokers. This put an end to the defrauding of prospective *hajis* arriving in Penang and Singapore to await passage to Jeddah. The chief of police was then empowered

to issue licenses to pilgrim brokers, without which they could not operate.

In 1930, the Federated States passed a law very much on the model of the relevant legislation in the Straits Settlements. There were a few disparities; there was a requirement to produce a certificate of recent vaccination against cholera and smallpox, penalties for pilgrims who tried to evade medical examination or embark without having been vaccinated, and elaborate sanctions on the maintenance of pilgrim ships, food and water for passengers, medical care and inspections, deaths at sea and survey of ships by the harbor-master. Vaccination against smallpox and cholera was introduced in Kelantan in 1929.

It was the custom of the State Councils to make loans to civil servants, penghulus and others to pay for their pilgrimage, letting them draw a few months' salary in advance or granting them long furlough. This custom was observed in Johore and Perlis.

Since *Merdeka*, Item 1(h) of the Federal List in the Constitution permits the Parliament to make laws with respect to pilgrimages. Over the decades since *Merdeka*, the Parliament has made laws with respect to the Haj. This historical development led to Malaysia having a good reputation in handling pilgrims, and this will be described under good practices in Chapter 5.

3.5.5. Religious Education

Early History

The earliest form of education in the Malay peninsula was the pondok school which was a non-formal loose form of residential school with a very flexible timetable where the students' pondok or huts surrounded a mosque or 'surau' which was the centre of Quranic and religious learning activities (Hashim, R., 2014). This pondok education, which exists till today, revolves around a religious teacher who attracts students by dint of his reputation (Tayeb, A., 2012). The educational objective of the pondok school was mainly to educate students to read and understand the Quran as well as to inculcate in them the values needed in order to become good Muslims.

The pondok school was preceded by a system whereby students commuted to the teacher's houses in order to learn how to recite the Quran and basic religious principles. After a while, the number of students had multiplied and the teacher's house could no longer accommodate them. That led to the idea of forming classes at mosques, with students residing in 'huts' (pondok) built around the mosque. The teachers in these pondok schools, known as ulama, were highly respected, both as teachers and as family counsellors in rural communities.

Pondok schools were uniform only in their physical set-up but were different in what they taught. Since they arose out of the needs of the community, they were different from place to

place. There was no standardised curriculum, although there were similarities with what was taught in the schools in Mecca and Cairo. This is understandable considering that the teachers from these pondok were regular visitors to Mecca either on a pilgrimage or to widen their religious knowledge.

Upon 'graduating' from these pondok schools, most of the students would return to their hometowns to teach there, while some would further their studies to the Middle East in places such as Mecca and Cairo, or even to India and Pakistan. In the 1920s, many graduates from the Middle East, particularly Al-Azhar University in Cairo, returned home imbued with reformist ideals to revamp the pre-existing Islamic education. These eager reformers, known collectively as Kaum Muda (Young Turks) led by Shaykh Tahir Jalaluddin and Sayyid Shaikh al-Hadi, established a new kind of Islamic institution called *madrasah* (literally 'school' in Arabic) that employed modern pedagogical techniques as well as the introduction of secular subjects like Mathematics, Science, Geography and English on top of the normal religious curriculum. The Kaum Muda were inspired by the reformist movement in the Middle East created by Jamaluddin al-Afghani, and Muhammad Abduh who was an influential figure at Al-Azhar University in Cairo. In addition, the reform movement stirred by Abduh, the Grand Mufti of Egypt in 1899, had encouraged the activity of ijtihad or freedom of intellectual thought as opposed to *taqlid* or mere following. These new *madrasah*s not only introduced secular subjects into the religious curriculum but also encouraged the use of the

mother tongue in the class. This naturally met with opposition from the Kaum Tua (Old Turks) who upheld the traditional form, content and use of Arabic as the medium of instruction. Some of the Kaum Tua even branded these reformers as kufr (disbelievers). As such, the Kaum Muda had a lot of difficulties in opening new *madrasah*s initially. It was only much later that they managed to convince the people that there was value in learning advanced sciences and technologies from the West.

This opening of the *madrasah* schools coincided with the beginning of the bureaucratisation of state religious authorities which had begun to build and support their own Islamic schools. At the same time, the British colonial administration had also introduced Islamic instruction in the Malay vernacular schools in its attempt to increase attendance in these schools. Although this was a far-sighted move by the colonial administration then, its application left a lot to be desired. In States like Johor, Kelantan, Terengganu, Kedah and Perlis (coincidentally the former unfederated Malay States) where the Malay Rulers had more say, this teaching of Islamic studies was more properly organised and implemented, but in the Federated Malay States, it was very loosely implemented.

The opening of vernacular Malay primary schools towards the end of the 19th century provided a long-awaited educational avenue for the rural Malays then, although the main purpose of such schools was to teach the 3 Rs (Reading, Writing and Arithmetic). Before that, those who could not afford or chose

not to attend the English-medium schools that were mainly in the urban areas, had to rely only on the pondok schools and the *madrasah*s.

Before the Second World War (WW2), many Malay parents were unsure of the benefits of English-medium schools, especially bearing in mind that many of these schools were run by the Christian missionary groups. Many parents were worried that their children, especially their daughters, may become Christians and Westernised if they were educated in these schools. Somehow WW2 (or rather, for Malaysia, the Pacific War, where Malaysians had to endure the atrocities of the Japanese Occupation for a good four years) opened their eyes and minds to the worth of English education.

Pre- and Post-Independence Developments

Although the return of the British colonial masters was welcomed by most Malaysians with the defeat and departure of the Japanese in 1945 and most Malaysians were able to resume a more peaceful and comfortable life in the intervening years between 1945-1955, they were pleased at the idea of approaching independence from the British colonisation. By the time this country gained independence in 1957, the education of the Muslim Malays was in one of three categories of schools: (i) traditional pondok and *madrasah* religious schools; (ii) Malay vernacular schools; and (iii) English schools. With the change in policy and the resulting change of medium of instruction from English to Bahasa Malaysia from 1970, these three categories

slowly became just two categories, viz., (i) the Malay-medium primary and secondary schools; and (ii) the religious schools, henceforth referred to as the dual system.

The years after *Merdeka* in 1957 witnessed a new form of conflict arising out of this dual system, where the country had to deal with the products of the dual educational system, namely those from the Islamic religious schools and those from the English/ Malay medium schools. Those who came from the earlier English medium schools and the subsequent Malay medium schools had been taught the Malay and English languages, the natural sciences, the social sciences, mathematics, and art and crafts with a smattering of Islamic knowledge. They were naturally unfamiliar with the Islamic world view and the branches or disciplines under Religious or Islamic Sciences, which are the three fundamentals of (i) Tawhid (or Aqidah which is related to this); (ii) Fiqh (which is derived from *Syariah*); and (iii) Tasawwuf (or Akhlak which falls under this).

However, these are the people who have prominent roles in running the country politically and administratively. Those who come from the religious schools have studied the fundamentals of Islamic Sciences, the Arabic language and the Quran in depth, but lack the knowledge of the modern sciences. As such, these two groups have different world views.

These conflicting world views led to unnecessary conflicts in their approaches not only towards education but also towards

other sectors like politics, law, economics, governance and much more. By and large, religious educational system had not been able to produce leaders and professionals, let alone captains of industry. Without doubt, there have been exceptions to this general opinion; several personalities with strong Islamic educational background have shown commendable leadership. Two examples that come to mind are Tan Sri Hassan Yunus, a Johor state mufti (from 1941 to 1947) who went on to become the Menteri Besar of Johor (from 1959 to 1967), and Haji Ahmad Badawi bin Sheikh Abdullah Fahim, who was responsible for the creation of the youth organisation Dewan Pemuda slam (which later became Dewan Pemuda PAS) in 1953; and whose son went on to become the fifth Prime Minister of Malaysia.[20] However, in general, most others with this educational experience are not prepared for life in modern society with the need to be able to understand socio-economic, cultural and political development, modern technology as well as to be critical, creative and scientific in solving problems. They were more prepared to be *imam*s in the mosques or in conducting social and religious functions within the community; or as preachers who can guide the community in religious practices, knowledge and values. On the other hand, the secular educated leaders and professionals lacked religious knowledge and experience, and believed in separation of religion and state. They were more liberal in their ideas and in certain cases, may have even proposed policies and actions that, in the eyes of the Islamic scholars, contradict Islamic injunctions. On the other side, those emanating

[20] **"Later, Haji Ahmad Badawi joined UMNO and was the Deputy President of UMNO Youth in 1949 -1956.**

from the religious institutions tended to hold more rigid and conservative views which were not in tandem with the changes in the contemporary world situation.

The Muslim community outside the school had also become more aware of developments taking place in the world around them. Many parents were very concerned and worried about the dire effects of modernisation and the consequent more liberal lifestyle that followed. They were in a dilemma as to the best choice for the type of education for their children. While they saw the advantage of studying the natural sciences, mathematics, the English language and the social sciences, they were also convinced of the need for their children to be imbued with strong religious and spiritual values. They realised that both systems had their strong and weak points. If only the strong elements of each system could be extracted and be combined into one.

Some of the Muslim associations were proactive enough to try to solve the dilemma without waiting for the government to act. One such group known as the Muslim Youth Movement of Malaysia (ABIM) began to set up community-oriented modern Islamic pre-schools called TASKI in the early 1980s. This was followed a few years later by the setting up of the ABIM Islamic Primary schools. In fact, ABIM had started a trend, and similar trends were soon followed by other Muslim groups like Darul Arqam (now defunct), Jemaah Islam Malaysia (JIM) and even the Islamic political party Parti Islam Se Malaysia (PAS). Most

of these early schools were not profit-oriented. They were set up more as a social service to the community. But seeing how popular and valuable these schools were to the Muslim community, other more profit-oriented organisations began to establish fee-paying Islamic private or even international schools - the likes of ADNI, Sri ABIM, Wadi Sofia, Al-Ameen, International Islamic School, Quranic Generation Integrated School, and Itqan Integrated School to name but a few. The motto of one of the integrated schools, "Where Knowledge and Faith Unite" states clearly the operating philosophy of most of these schools.

The Ministry of Education had its own strategy of dealing with this problem. Firstly, it came up with the National Philosophy of Education (NPE) in 1988. This was followed by the introduction of the Integrated Curriculum for Secondary Schools (KBSM) in 1989. The NPE aims at fostering a holistic and balanced education system that can develop students' intellectual, physical, emotional and spiritual potentials to the utmost, based on a belief in and devotion to God. The NPE thus encouraged the development of a faith-based and value-based system. Under the KBSM, greater attention was given to Islamic Studies for the Muslims and Moral Education for the non-Muslims.

At the time when the KBSR (New Primary School Curriculum) was introduced in 1982 and the KBSM in 1989, there existed six types of religious schools in the country:

Primary Level:and

SRAR (Sek. Rendah Agama Rakyat) - People's Religious Primary School (privately run by the community with some financial assistance from the state and the community).

Secondary Level:

SMKA (Sek. Menengah Kebangsaan Agama) - National Secondary Religious School (under the aegis of the MOE);

SMAN (Sek. Menengah Agama Negeri) - State Religious Secondary School (under the control of the State Religious Department);

SMAR (Sek. Menengah Agama Rakyat) - People's Religious Secondary School (privately run by the community with some financial assistance from the State and the community); and

SABK (Sek. Agama Bantuan Kerajaan) - Government Aided Religious Secondary School (these were originally community schools that later agreed to receive government support and therefore, to come under the control of the MOE) .

The schools under the control of the MOE and state Religious Departments must follow educational guidelines set by their

respective authorities and are constantly monitored. What is of concern are the community-run schools (the SAR or 'sekolah agama rakyat'). According to a study conducted by Nor Raudah et al of Akademi Pengajian Islam, University of Malaya (2014), these schools are privately run and employ the 'dinniyah' curriculum wholly-planned and organised by the schools' Board of Governors. They are run on a shoe-string budget with inadequate infrastructure. Their teaching staff are poorly trained or even untrained with a high turnover.

The fact that there are so many community, privately-run Islamic schools at both primary and secondary levels with hardly any supervision or coordination by educational authorities at national and state levels is a cause of grave concern. It is a known fact that teaching-learning procedures and techniques in these schools, as based on current desirable practices, leave a lot to be desired. In fact, questions have been raised among the more discerning members of Muslim society as to the quality of education that students in this type of schools are obtaining. In an online posting on FMT (Free Malaysia Today) on 12 January 2019 by Ainaa Aiman, with the eye-catching headline, 'Don: Our Islamic education doesn't instil Islamic values', academician Azmi Tayeb of University of Science, Malaysia (USM) who had done a comparative study of Islamic education in Malaysia and Indonesia, claimed that neither the syllabus for national schools nor the one used by the JAKIM-approved programme called "kafa" (kelas alQuran dan fardhu ain) incorporates the teaching of such democratic

[21] **"Azmi Tayeb, who is attached to the University of Science, Malaysia (USM), did a comparative study of Islamic education in Malaysia and Indonesia. These are his conclusions. URL: https://www.freemalaysiatoday.com/category/nation/2019/01/12/don-our-islamic-education-doesnt-instil-islamic-values/**

values such as openness and respect for diversity.[21] Azmi found that both the school and the "kafa" syllabi were heavy on the teaching of rituals and avoidance of sins, and he said this made them superficial. He also said that the teaching in schools tended to encourage rote memorisation and to give a narrow interpretation of Islam.

However, the parents of students in these schools seemed satisfied that their children are receiving the kind of religious education they aspire, oblivious of the uncertainty of the socio-economic future of these children.

Emphasis on Integration

In the government-controlled public school system, the newly introduced KBSM placed special emphasis on the principle of values across the curriculum whereby every teacher was expected to instil values regardless of the subject matter he or she was teaching. This brought about major changes to the religious secondary schools, both in the public and private sectors. Because of the emphasis on integration, they began to adopt the KBSM. "This effort really helped to revolutionise the SMKA and all the other religious schools", (Hashim, R., 2014: 6). Due to this major change, it is now common to find professionals who come from these schools. It was discovered that the 56 SMKAs that exist today only prepared 10 percent of their students for a major in Islamic religious studies in the universities. The other 90 percent was prepared for other professional studies in institutions of higher learning.

However, no empirical research has been done to compare the products of KBSM from government-run schools with the products of religious schools in terms of the success of the integrated approach. From early reports on the implementation of KBSM in government schools, teachers were not very confident on the technique of applying the integrated approach in the classrooms. There was no classic model of integrated teaching or integrated learning that they could refer to.[22]

Islamic Higher Education: Growth of Concept of Islamisation of Contemporary Knowledge

On the other side, there was a lively discourse among the Muslim scholars and educationists as to the shape of integrated learning they should promote in the Islamic schools and institutions of higher education. Although many are grateful that the two branches of knowledge namely the Islamic *Syariah* fundamentals (Tawhid, *Syariah* and Tasawwuf) and the acquired sciences are now studied under the same roof by virtue of the Integrated KBSM Curriculum, the issue of whether this is adequate is still being debated. “It is still possible for example that science is taught from the western epistemology in which case it means that students are not going to see the role of the Creator in the functioning of Nature as is emphasised in the Islamic epistemology” (Hashim, R., 2014: 8). The need to ‘reconstruct or restate knowledge from the perspective of the Islamic worldview’ seems to be a common theme in this discourse led by eminent scholars like Syed Naquib al-Attas (1978) and Ismail Al-Faruqi (1981). This movement came to be known as Islamisation of Contemporary Knowledge.

[22] **“Interview with ex-Director General of Education, Tan Sri Asiah Abu Samah**

At the higher education level pre-1983, Islamic education was made available through Faculties and Departments of Islamic Studies. The Klang Islamic College set up in 1955 was tasked with producing teachers needed to teach Islamic studies in secondary schools. When the Universiti Kebangsaan Malaysia (UKM) was set up in 1970, the College was absorbed by the University as its Faculty of Islamic Studies. The other institutions that offered Islamic Studies are the University of Malaya since the 1970s, the International Islamic University Malaysia (IIUM) in 1992[23] and Universiti Sains Islam Malaysia (USIM) in 2009. With the passage of time, it was realised that merely having faculties or colleges was insufficient to service the expanding human resource needs of Islam.

An innovative idea to elevate Islamic education to a higher level was that which was promoted by Dr Mahathir Mohamad, the then Prime Minister. This was the establishment of the International Islamic University Malaysia (IIUM) in 1983. Unlike other Islamic universities in other parts of the world which focussed on *Syariah*-based courses, IIUM is a comprehensive university whose mission is Islamisation, Integration (or harmonisation with the Islamic worldview and values), Internationalisation and Comprehensive Excellence (IIICE), employing English and Arabic as the mediums of instruction. It has a unique integrated curriculum structure whereby four courses from the Islamic disciplines - Islamic World View, Ethics and Fiqh for Everyday Life, Methods of Da'wah and Islam, and Knowledge

[23] **"When IIUM was established in 1983, a Centre for Fundamental Knowledge was created, and in early 1990s, this was made the Department (Kulliyyah) of Islamic Knowledge and Human Sciences; today, it is the largest department in the university.**

and Civilisation - form the core courses required of all students. Thus, this programme is capable of producing a new breed of Muslim professionals who are competent at least in two languages (English and Arabic). In a way, the establishment of IIUM also partially, if not totally, fulfil the call for the Islamisation of Knowledge.

Tahfiz Schools

A new development in the search for a more meaningful appreciation, internalisation, and understanding of the Quran is seen from the huge increase in the setting up of tahfiz schools with emphasis on memorisation and internalisation of the Quran. To date, there are 941 of such schools registered with Persatuan *Madrasah* Tahfiz Al-Quran Malaysia (the national association of tahfiz schools and another 612 registered with the state governments (The Malaysia Insight, 19 September, 2017). However, there may be as many more that exist in nooks and corners of the country that are not registered. Some of these schools are housed in shanty huts that do not deserve to be called schools and pose health and fire hazards not only to their occupants but also to the communities around them. In the better organised and supervised schools that are supported by JAKIM and state governments with the cooperation of the MOE, there may be more wholesome learning besides Quran reading or memorisation. However, in these unregistered schools, it is believed that the concentration is only on Quran reading and memorisation. As it is, about 30 of these schools have caught fire with severe losses of lives and property. It is a grave situation that is in dire need of urgent attention from the authorities.

4. ADMINISTRATION OF MATTERS PERTAINING TO ISLAM - INSTITUTIONAL ARRANGEMENTS

4.1. Administration of matters pertaining to Islam in the States

In pre-British Malaya, Islamic law coexisted easily with indigenous custom (adat), and the inconsistencies between them went largely unnoticed. The reforming drive of the British, and their notions of a consistent written body of law forced changes and accommodations in these two basic sources of law and introduced a third: British statutory and common law.

Religion is a state matter. The following chapter traces the historical antecedents, with what happened in the different States, to four key authorities: the Majlis Agama, the Mufti (or Fatwa Committee), the *Kathi* courts, and the Registrar of Marriages and Divorces.

4.1.1. The Majlis Agama/Council of Religion

Kelantan seems to have been the first State to establish a council of religion and Malay custom in 1915. It was called the Majlis *Ugama* Islam dan Isti'adat Melayu. Its authority and rules were set out in the 'Rules for the Members of the Council of Islamic Religion and Malay Custom' (Enactment No. 14 of 1916, amended in 1938). The Majlis was empowered to

nominate the pegawai masjid and supervised all *imam*s. Any person seeking a ruling on a point of Islamic doctrine had to refer in writing to the Majlis, which could also, at its own instance, publish rulings on such matters; in pronouncing its opinion, it had to follow the tenets of the Shafi'i school. If there would be public inconvenience, it could, with the sanction of the Sultan, modify those tenets or the canons of any of the other three Islamic schools, as it thought fit. Its rulings were binding on all Muslims in Kelantan. The Majlis was also a court of appeal for cases heard by *kathi*s, and it supervised Muslim cemeteries and oversaw the collection of zakat.

Between the two World Wars, all the Malay States developed central organisations, modelled on European administrative patterns, to handle questions of religion. In Perak, it was the Council of Chiefs and Ulama; in Selangor, the Religious and Customary Committee of State (a sub-committee of the State Council); in Negeri Sembilan, the upper chamber (the Yang di-Pertuan Besar, the undangs and the British Resident), supervising all such agenda; in Kedah, Perlis and Terengganu, the Shaikh al-Islam, under the control of the respective State Council; and in Johore, the Council of Ministers. During this period, Islam and Islamic institutions were greatly encouraged by the British.

After the Second World War, most States enacted laws to incorporate a Council of Religion and Malay Custom much like in Kelantan. These laws were subsequently repealed by

the respective pre-*Merdeka* and post-*Merdeka* 'Administration of Muslim Law' enactments but the Council of Religion was maintained.

4.1.2. The Mufti (or Fatwa Committee)

Since 1919, there has been a legislative scheme in Johore which recognised a mufti as a religious jurist who determines questions of a religious nature arising in any court of the State In the Straits Settlements; where English law applied, members of the Legislative Council wanted to avoid a situation where every judge gave his own interpretation of Muslim law based on a particular textbook that he might have read, for the Colony had no recognised treatise on Muslim law.

In the Federated Malay States, what constituted Muslim law and Malay custom was decided following the Muhammadan Law and Malay Custom (Determination) Enactment 1930. The said enactment was based on the previously-mentioned legislative scheme in Johore: to refer all questions of Muslim law to a recognised authority. In Johore, it was the mufti. In the Federated Malay States, given there was no mufti, references were made to the State Council which would decide, and the courts must adjudicate in accordance with the Council's decision.

After the Second World War, the State of Perlis empowered its Majlis *Ugama* Islam dan Adat Isti'adat Melayu, in which a Mufti is a member "to make rulings on any point of Islamic doctrine", either of its own motion or at the request of any person.

4.1.3. The Kathi Courts

Before the British came and modern reforms supervened, the administration of justice in Malaya was entirely in the hands of local chiefs. Justice was done according to the adat and Islamic law as understood and interpreted by the penghulus and chiefs, but without any organised system of courts. In the Malay States, the British Government organised *kathi* courts (or *Syariah* courts as they have come to be referred to now) which had not functioned earlier in any methodical fashion; in the Straits Settlements, it took upon itself the nomination of *kathi*s to the Muslim communities, which the development of the Settlements and immigration brought about. In Penang (Straits Settlements), by 1880, Malay commissioners and assessors were constituted to try petty cases not exceeding Spanish $25 in value, and their decisions were to be final. All religious and family disputes were to be determined according to the laws of the disputants' own religion.

In the Federated Malay States, Perak was the first State to establish a *Kathi* court in 1890. An almost identical legislation was passed in Selangor and in Negeri Sembilan in 1893. The design to install an identical and coordinated courts system for all the Federated Malay States was launched in 1896. In 1900, on the model of the Perak Courts Enactment – Perak, Selangor and Pahang aligned their legal system; Negeri Sembilan joined the same in 1901. All four States made a few changes. First, the Sultan in Council was deprived of his legal authority, and a Court of the Judicial Commissioner took it over. An appeal

from the decision of the Court of a *kathi* or assistant *kathi* lay to the Court of the Senior Magistrate. If an order made by the court of a *kathi*, assistant *kathi*, or penghulu was not obeyed, it was the duty of the District Court of the First Class Magistrate to enforce it.

The jurisdiction of the *kathi* courts was altered in 1915; the power to levy fines (up to $10) was withdrawn; competence was limited, mainly, to suits that concerned marriage and divorce which did not require authority to fine; and appeals had to be heard not by the court of a judicial commissioner but by the ruler of the State in Council or by a committee appointed from the membership of the Council. In 1918, the State of Perak published detailed rules on the procedure of appeals; they were adopted in an almost identical form by the other three States. Appeals against the decision of a *kathi* or assistant *kathi* were lodged with the State Council exclusively. A petition of appeal must be submitted to the district officer who passed it to the Resident. In 1938, the Federal Council extended the authority of committees authoriseauthorised to hear appeals from the *kathi* courts by granting them power to supervise and revise all proceedings in the religious courts; the committees might summon ulamas to be their advisers on Islamic law.

In the Unfederated Malay States, the law and administration were less developed. Reforms were initiated much later. In Kelantan, as of 1903, there was a separate Shari'a Court of 3 judges for suits connected with marriage, inheritance

and breaches of morality. In 1909, regulations were made to regularise it. In 1930, the Courts Enactment regularised the legal system and constituted the Court of the Chief *Kathi* and Court of a District *Kathi*. Slight changes in the administration were introduced in 1938. The courts of the *kathi*s had no jurisdiction over non-Muslims, and only dealt with civil matters if both parties were Muslims. It had jurisdiction over marriage and divorce, maintenance, division of property, inheritance, and other matters of a religious nature. When the value of the dispute exceeded $500, it had to be heard by the judicial governor, who sits with the Chief *Kathi* or mufti, whose advice was sought in settling any question of Islamic law; appeals lay to the Sultan (in person, not in Council) and his decision was final. In Terengganu, between 1901 and 1906, a Mahkama (Shari'a Court) was constituted which dealt with religious matters. Terengganu only introduced an appeals procedure in 1917. In 1921, a law was passed constituting the Court of a *Kathi* to deal with all religious matters, marriage and divorce, and disputes between husband and wife, with appeals going to the Sultan. In 1940, it was given power to enforce its decrees through the Magistrates Court. In Kedah, in 1905, the *Kathi*s' Court was constituted, which dealt with religious matters only - successions, and marriage and divorce. In 1909, it was reformed, and the courts were called the Shari'a Courts. Appeals from the Shari'a courts were heard by a Court of the State Council which would consist of members of the State Council (other than its president and the British adviser), an assistant adviser (an Englishman), and two experts on Islamic

law. In 1934, Kedah reorganised and redefined the powers of the Shari'a Courts. *Kathi*s could no longer inflict punishment exceeding a fine of $50 or jail for more than three months. The Chief *Kathi* could only try cases to do with marriage, divorce, or a woman renouncing Islam. In Perlis, the Shari'a Court was constituted by the Court Enactment of 1911. It had jurisdiction over Muslims in matters of marriage and divorce, custody of children, and religious observances; and could impose fines up to $150 or imprisonment not exceeding 14 days. In Johor, the Courts of the *Kathi*s and Assistant *Kathi*s were constituted in 1911. In 1914, Johore adopted the Federated Malay States' Courts Enactments of 1905 (as Kedah had done at the time in 1905). The *Kathi* courts were competent in all religious matters, especially marriage and divorce; and the Magistrates Court were bound to enforce orders of the respective district courts if they were not obeyed.

The gradual intrusion of concepts of English common law into the Malay legal system affected not only the adat and Islamic law, and mixtures of the two, but the administration of justice as well. British presence acted as a catalyst for judicial reform, modernisation, and a clearer distinction between religious and civil courts.

4.1.4. Registrar of Marriages and Divorces

Muslim marriages and divorces in British Malaya were generally seen to by *kathi*s according to Islamic law as modified by Malay custom. Marriage was a contract legalised by a *kathi*.

In 1880, the Straits Settlements passed Ordinance No. 26 (Mahomedans) - an ordinance to provide for the registration of Marriages and Divorces among Mahomedans, for the appointment of *Kathi*s, and to define the modifications of the Laws of Property, to be recognised in the case of Mahomedan Marriages. The ordinance empowered the Governor of the Straits Settlements to appoint 'Mahomedan registrars' to register marriages and divorces of Muslims. Before making any entry in his books, the registrar had to satisfy himself that the marriage or divorce did take place and that notice had been served on all interested parties including the wali of the woman.

In mid-1900, all four Federated States passed identical laws, prepared by the legal adviser, on the registration of Muslim marriages and divorce. It was similar to the Straits Settlements enactment on the subject, requiring that, within seven days after the marriage or divorce, the husband or the wali of the wife, or the husband or wife, respectively, shall report the fact personally to the *kathi* or the assistant *kathi* of the district who shall register the particulars in a respective register.

In the Unfederated States, the States began enacting laws relating to the marriage and divorce of Muslims from 1911 to 1922 (subsequently making the laws more comprehensive with amendments), with Johore, Kelantan, Perlis and Terengganu thereby creating respective Registrars.

4.1.5. Duties and Powers of Religious Authorities: The Example of Selangor

With the historical perspective that traced the four agencies above, we now examine the duties and powers of religious authorities. For this purpose, the example of Selangor is used. The study examined two enactments, and aims to see the changes made over time:

- Enactment 3 of 1952 – Administration of Muslim Law Enactment (Selangor) 1952

- Enactment 1 of 2003 – Administration of the Religion of Islam Enactment (Selangor) 2003

Before the 1952 Enactment, religious authorities were created under separate enactments in the States. The 1952 Enactment was the first enactment to consolidate all existing religious authorities under a single enactment while stipulating their powers and duties. It became the template for all other States, and in light of that, will be used as an example for this study.

BOX 1: ADMINISTRATION OF MUSLIM LAW ENACTMENT (SELANGOR) 1952

The 1952 Enactment created the following authorities and stipulated their powers and duties:

Majlis Ugama Islam dan Adat Istiadat Melayu, Selangor

1. Act as executor of a will or administrator of the estate of adeceased person or as a trustee of any trust.

2. Aid and advise the Sultan on all matters relating to the religion of Islam and Malay custom.

3. Of its own motion, make and publish a fatwa or ruling on any point of Muslim law or doctrine or Malay customary law.

4. Provide consultation to the Sultan on the granting or revocation of appointment of *Kathi* Besar or *Kathi*.

5. Give sanction for prosecution of the following offences:
   a.Breach of secrecy
   b.Unlawful mosques
   c.Teaching any doctrine or performing any ceremony or act relating to the Muslim religion contrary to Muslim law
   d.Issuing fatwas
   e.Printing, publishing or distributing religious books containing matters contrary to Muslim law or doctrine or to any lawfully issued fatwa
   f. Insulting or bringing into contempt the Muslim religion or the teaching of any lawfully authorized teacher or any fatwa lawfully issued

6. Appoint prosecutors for offences.

7. Administer monies or properties in the *Baitulmal* and to make rules on the same.

8. Be the sole trustee for all *wakaf*, nazr am and Islamic charitable trusts in the State.

9. Collect zakat and fitra and to make rules on the same.

10. Collect or grant licenses for the collection of monies and contributions for charitable purpose for the support and promotion of the Muslim religion, or for the benefits of Muslims in accordance with Muslim laws.

11. Be the sole trustee of all mosques in the State, grant permission for the erection or use of a building as a mosque, to ensure that mosques are kept in a proper state,to determine the boundaries of the kariah, to maintain a register of pegawai masjid, to submit recommendations of pegawai masjid to the Sultan for appointment, to notify the Sultan of any disgraceful conduct by any pegawai masjid and to make rules on the Jawatankuasa Kariah of a mosque.

12. Prescribe the forms of registers to be kept, certificatesto be issued and fees to be paid for marriages and divorces.

13. Maintain a register of persons converted to the Muslim religion within the State.

Mufti

1. Be the Chairman of the Legal Committee of the Majlis.

2. On behalf of the Majlis and after unanimous approval of the draft ruling by the Legal Committee, issue a fatwa or ruling on any point of Muslim law or doctrine or Malay customary law on behalf of the Majlis.

Legal Committee of the Majlis

1. Consider requests to the Majlis to issue a *fetua* or ruling on any point of Muslim law or doctrine or Malay customary law, and to prepare a draft ruling for its own consideration.

2. If in any civil court, any question of Muslim law or doctrine or Malay Customary law falls for decision, to give and certify such opinion to the requesting court.

3. Select candidates for election as pegawai masjid.

Court of the Kathi Besar, Court of the Kathi and Appeal Committee

1. Try any offence committed by a Muslim and punishable under the Enactment.

2. Hear and determine actions with Muslims and relating to Islamic personal law (marriage, divorce, legitimacy, guardianship, family, succession, testacy, gifts, etc. and charitable and religious trusts (*wakf and nazr*).

3. Permit the public teaching of any doctrine of the Muslim religion (s. 166)

Prosecutor (depending on availability and willingness in the following order):- (a) person appointed by Sultan (b) person appointed by Majlis (c) Public Prosecutor or Deputy (d)Police Officer or Penghulu or Imam of the kariah where offence committed (f)Complainant

1. Conduct prosecution of Muslim offences.

Advocate and Solicitor

1. May appear in any court on behalf of a party in civil proceedings unless such appearance would be contrary to the provisions of Muslim law.

Jawatankuasa Kariah with pegawai masjid

1. Be responsible for the proper conduct and good order of the mosque and all Muslim burial grounds within the kariah.

2. Be responsible for the good conduct of the mosque official in matters relating to the Muslim Religion.

3. Give due and prompt information to the Majlis of all matters arising in the mosque area and requiring the attention of the Majlis (s. 118(3)).

Registrar of Marriages and Divorces

1. Solemnize marriages between Muslims.

2. Enter particulars of marriages in a register and issue certificates of marriage.

3. Ascertain and record the amount of mas *kahwin* and *pemberian* for every marriage registered.

4. Enter particulars of divorces in a register and issue certificates of divorce

Box 2: Administration of the Religion of Islam Enactment (Selangor) 2003

The 1952 Enactment was gradually repealed in Selangor by a series of State enactments from 1984 to 1999. At present, the 2003 Enactment is the governing law in Selangor with respect to the 'Administration of matters pertaining to Islamic law'. The 2003 Enactment creates the following authorities while stipulating their powers and duties, as listed below:

The Sultan

1. Approve; the establishment of corporations and companies by the Majlis Agama, the making of disciplinary regulations, the adoption of regulations (s. 40), the *peguam syarie* regulations, the *Baitulmal* regulations (s. 81(5)), *zakat* and *fitra* regulations and the *Jawatankuasa Kariah* regulations.

2. Appoint the Chairman, Deputy Chairman and other members of the Majlis Agama, the Mufti and Deputy Mufti for the State, the Chief Syarie Judge, High Court and Appeal Court, Subordinate Court Judges, Registrars and the Chief Syarie Prosecutor.

3. Confirm the minutes of meetings of the Majlis Agama (s. 22(5)).

Majlis Agama Islam Selangor

1. Aid and advise the Sultan in respect of the religion of Islam in Selangor, except matters of Hukum Syarak and those relating to the administration of justice.

2. Promote, stimulate, facilitate and undertake the economic

and social development of the Muslim community in Selangor, which includes power to:

a. Develop commercial and industrial enterprises
b. Give financial assistance by way of loan or otherwise to carry out the above activities
c. Carry out the above activities with the Federal Government or any State Government including being a managing agent
d. Invest in any authorised investment per Trustee Act 1949
e. Establish schemes for loans from *Baitulmal* to Muslims for higher education
f. Establish and maintain Islamic schools and Islamic training and research institutions
g. Establish, maintain and manage welfare home for orphans

1. Act executor of a will or as administrator of the estate of a deceased person or as a trustee of any trust.

2. Advise the Sultan on the constitution of *Syariah* courts and the appointment of Syarie Judges.

3. Appoint Syarie Prosecutors, Chief Religious Enforcement Officer and Religious Enforcement Officers, Pegawai Masjid and Pembantu Pegawai, the Registrar of Muallafs and the Tauliah Committee.

4. Admit Peguam Syarie and making regulations on the admission and conduct of the same.

5. Administer moneys and property in the *Baitulmal* and making regulations on the same.

6. Collect zakat and fitra and making regulations on the same.

7. Be the sole trustee for all *wakaf*, nazr am and Islamic charitable trusts in the State.

8. Be the sole trustee of all mosques in the State, to grant permission for the use of a building as a mosque, surau or *madrasah* and to determine the boundaries of the kariah, to ensure that mosques are kept in a proper state, to appoint the pegawai masjid and to give tauliahs to the same and to make regulations on the Jawatankuasa Kariah of mosque(s).

9. Collect, or authorize the collection of, moneys or other contributions for any charitable purpose for the support and promotion of Islam or the benefit of Muslims in accordance with *Hukum Syarak*.

10. Make regulations on conversions to Islam.

11. Make regulations on matters relating to the granting of a tauliah.

12. Register Islamic religious schools in the State

Mufti

1. Aid and advise the Sultan in respect of all matters of Hukum Syarak, and in all such matters shall be the chief authority in Selangor after the Sultan.

2. Be the Chairman of the state Fatwa Committee.

Fatwa Committee

1. On the direction of the Sultan, and it may on its own initiative or on the request of any person, prepare fatwa on any unsettled or controversial question of Hukum Syarak.

2. If in any civil court, any question on Hukum Syarak calls for a decision, the court may request for the opinion of the Fatwa Committee.

Syariah courts (Appeal Court, High Court and Subordinate Courts) Rules Committee of the Syariah Courts

1. Try any offence committed by a Muslim and punishable under the relevantant State law,hear and determine actions with Muslims and relating to Islamic personal law, charitable and religious trusts and the administration of mosques.

Rules Committee of the Syariah Courts

1. Make rules on the procedure of the *Syariah* Court of Appeal, *Syariah* High Court and *Syariah* Subordinate Court

Chief Syarie Prosecutor and Syarie Prosecutors

1. Institute, conduct or discontinue any proceeding for an offence before any *Syariah* court..

Chief Religious Enforcement Officer

1. Carry out the investigation of offences under the Enactment for under any other written law which prescribes offences against the precepts of the religion of Islam

Peguam Syarie

1. Represent parties in any proceeding before a *Syariah* court (s. 80(1)

Pegawai Masjid, Jawatankuasa Kariah and Jawatankuasa Pengurusan Masjid

1. Represent parties in any proceeding before a *Syariah* court (s. 80(1)

2. Be responsible for the good conduct of the mosque official in matters relating to Islam.

3. Give due and prompt information to the Majlis of all matters arising in the mosque area that require the attention of the Majlis.

Registrar of muallaf

1. Maintain a register of muallafs in the prescribed form for registration of muallaf.

Islamic Tauliah Committee

1. Grant or withdraw a tauliah for the purpose of the teaching of the religion of Islam

4.1.6. State Religious Departments/ Jabatan Agama Islam

All States have a Religious Department or Jabatan Agama Islam and is generally led by a Director appointed from the public service. These departments are created by the respective State Governments to implement provisions of Muslim Laws within the respective State, for e.g., the registration of Muslim marriages, the enforcement and prosecution of Muslim offences, and the registration of Muslim converts, according to the State Government's policies on these matters.

Besides the above, the said departments are also generally entrusted with functions relating to the management of mosques, Dakwah and Halal management. Most of these departments have their own website which provide information on its history, officers and functions.

Officers of these departments are generally appointed among the members of the State public service, which comes under the jurisdiction of the State Service Commission. Accordingly, the said Commission is responsible for the promotion, transfer and disciplinary control of the said officers. It is these officers who are generally responsible for the arrests, detention and prosecution of Muslim offences such as khalwat, 'Indecent acts', and 'Male person posing as a woman'.

4.1.7. Procedural Laws in the Muslim Courts

Just before *Merdeka*, in Selangor, the procedure for civil and criminal proceedings in the Muslim courts were prescribed in the 1952 Enactment itself. There were 18 sections of law for criminal proceedings and civil proceedings respectively. The sections on criminal proceedings dealt with matters such as instituting a criminal proceeding, summons and warrants, arrests without warrant, bail and remand, procedure at hearing, and appeal. The sections on civil proceedings dealt with matters such as filing a civil proceeding, summons and service, entering a defense, interlocutory proceedings, procedure at trial, judgments, and execution.

Where the 1952 Enactment is silent on matters of practice and procedure, the Muslim courts are legally obliged to have regard to the avoidance of injustice and the convenient dispatch of business (in criminal proceedings) or the disposal of the matters in issue between the parties (in civil proceedings), and may have regard to the practice and procedure in the civil courts in criminal proceedings or civil proceedings respectively.

From 1952 onwards, these procedures were similarly enacted in other States as well, but from 1983 (beginning with Kelantan) were subject to repeal and enacted under separate enactments for criminal procedure and civil procedure which mirrored key provisions of the Federal Criminal Procedure Code and the

Rules of High Court 1980 respectively. As a result, criminal and civil procedure at the Muslim courts have now become a lot more technical if not complex; necessitating, in our opinion, a lawyer for Muslim litigants in certain cases. Taking Selangor as an example, its present criminal and civil procedure enactments have 231 and 248 sections respectively.

A notable provision under the Selangor criminal procedure enactment is that arrests for Muslim offences can be made by a Religious Enforcement Officer or a police officer, and without a warrant in certain circumstances. Under the civil procedure enactment, it is envisaged that a company may be able to commit contempt of court. This is, arguably, unconstitutional given that the *Syariah* courts only have jurisdiction over Muslims, which are natural persons and not companies who cannot profess a religion.

4.2. Conference of Rulers (Majlis Raja-Raja)

The Conference of Rulers, successor to the Durbar that was first held in Kuala Kangsar in 1897 with the participation of the Rulers of the four Federated Malay States, is not only supreme but also unique as it is the only such institution in the world. It was formed in 1948, under the Federation of Malaya Agreement of 1948, when the country was moving towards independence from the British colonial government, and the Conference of Rulers was provided by Article 38 of the Federal Constitution.

4.2.1. The Malay Rulers Before the British Colonial Era

The progenitor of the Malay Sultanates or monarchy was the Malacca Sultanate in the 15th century. This history gives the Malay Sultanates their relevance in according a sense of identity and character which is Muslim Malay. Central to this identity and relevance is the intimate link to the religion of Islam. According to Abd Aziz Bari, it has been suggested that the monarchy was retained for its religious role which conferred it its legitimacy. The same writer contended that the Rulers were not constitutional monarchs as the term is understood today, but they were also not absolute monarchs. The Rulers did not have any platform or mechanism in which they got together as a group; this happened only during the British era when a Durbar was held in July 1897. That too only involved the four Federated Malay States (Perak, Negri Sembilan, Selangor, Pahang).

4.2.2. The Malay Rulers During the British Colonial Era – the Durbar 1897

In July 1895, the Treaty of the Federation was entered into between the British and the Federated Malay States; the Rulers of all four States placed themselves under British protection. The Treaty constituted the four States of Perak, Selangor, Negeri Sembilan and Pahang as a Federation to

be known as the Protected Malay States to be administered under the advice of the British Government. Under the Treaty, the Rulers of the four States agreed to accept a British officer styled the 'Resident-General', as the agent and representative of the British Government under the Governor of the Straits Settlements, and to follow his advice 'in all matters of administration oth er than those touching the Muhammadan religion'. One significant development as a result of the Federation was the introduction of the Rulers Conference (or Durbar) which was meant to be purely consultative and advisory. The first conference took place in July 1897. This meeting was significant in that it was the first occasion when Rulers from the four States met in an atmosphere of peace and friendship. It was convened under the chairmanship of the High Commissioner of the Federated Malay States (who was also the Governor of the Straits Settlements). It had no legislative jurisdiction, but it did furnish a forum for airing grievances and discussing common problems.

In July 1897, the Durbar had its first meeting in Kuala Lumpur where the major issue was the compilation of a Code of Muhammadan Laws and Custom to penalise moral offences which did not come within the scope of English criminal law. The meeting was held with the High Commissioner, the Resident-General presiding and Residents from the constituent States in attendance. The second Durbar, held in July 1903 in Kuala Lumpur, saw the attendance of the High Commissioner, the Resident General, all the Sultans and a large majority of the

members of the State Councils. One of the items on its agenda were the recognition of Malay as the official language and the jurisdiction of *kathi*s and penghulus. Durbars were held in Sri Menanti in 1931, Pekan in 1932 and Kuala Kangsar in 1933.

In theory, the relegation of the Rulers to a Durbar where the proceedings were in Malay gave them an opportunity to freely debate the affairs of the Federated Malay States. The purpose of the Durbar was to give greater dignity to the Sultans. Bari (2013) highlighted that the Durbar became an important forum for the Rulers to discuss and highlight various issues, such as the administration of matters pertaining to Islam, the Malay language, and the plight of the Malays, particularly relating to economic and educational concerns, unemployment, and landlessness among the Malays. In many ways, the Durbar realised the Rulers' collective capacity as the guardians of the Malays.

4.2.3. The Establishment of the Conference of Rulers (Majlis Raja-Raja)

The Federation of Malaya Agreement (FMA) of 1948 retained the semblance of the Durbar by establishing the Conference of Rulers, comprising the Rulers of the Malay States, whose primary function was to assent to Bills (whether to be brought before the Legislative Council or passed by the Legislative Council). The FMA also imposes a number of duties on the

High Commissioner; the Commissioner must send new drafts of salary schemes (or amendments) of Federal public officers and every draft scheme for the creation or major reorganisation of any department or service of the Federal Government to the Conference to be discussed, he must consult the Conference on the immigration policy of the Federal Government, he must explain policies of the Federal Government on matters of importance to the Malay States and to ascertain the opinions and views of Their Highnesses the Rulers for his consideration, and he must ascertain the opinions and views of the Conference for his consideration when he is informed by any Ruler of matters that may be conducive or detrimental to the welfare of that Ruler's State. The Conference, unless unanimous, acts as a majority and collectively under the FMA. Compared to the Durbar, there are aspects that seem to advance the position of the Conference further. Firstly, the Conference was given definitive legal powers through the 1948 Agreement, and secondly, the Conference was made an exclusive assembly of the nine Malay Rulers. As such, the FMA gave the Rulers more power and prestige than under the Durbar.

4.2.4. The Provision in the Federal Constitution – Functions of the Conference of Rulers

The Constitution, at the time of *Merdeka*, retained the Conference of Rulers. Article 38 of the Constitution States that there shall be a Majlis Raja-Raja (Conference of Rulers) with

several prescribed functions (see Chapter 4.2.5 below). The Conference consists of the Their Royal Highnesses, the Rulers, and the Yang di-Pertua-Yang di-Pertua Negeri of States not having a Ruler, save for several exceptions where the Yang di-Pertua-Yang di-Pertua Negeri shall not be members.

Article 38 is shown in full below:

38(1) There shall be a Majlis Raja-raja Conference of Rulers which shall be constituted in accordance with the Fifth Schedule

38(2) The Conference of Rulers shall exercise its functions of:

(a) electing in accordance with the provisions of the Third Schedule, the Yang Di Pertuan Agong (YDPA) and Timbalan Yang Di Pertuan Agong (TYDPA);

(b) agreeing or disagreeing to the extension of any religious acts, observances or ceremonies to the Federation as a whole;

(c) consenting or withholding consent to any law and making or giving advice on any appointment which under the Constitution requires the consent of the Conference or is to be made after consultation with the Conference;

(d) appointing members of the Special Court under Clause 91) of Article 18;

(e) granting pardons, reprieves and respites, or remitting, suspending or commuting sentences under Clause (12) of Article 42 and may deliberate on matters of national policy and any other matters it deems fit.

(3) When the Conference of Rulers deliberates on matters of national policy, the YDPA shall be accompanied by the Prime Minister, and the other Rulers and Yang Di Pertuan Negeri (YDPN) by their Menteri Besar or Chief Ministers; and the deliberations shall be among the functions exercised; by the YDPA in accordance with the advice of the Cabinet. And by the other Rulers and YDPN in accordance with the advice of their Executive Councils.

(4) No law directly affecting the privileges, position, honours or dignities of the Rulers shall be passed without the consent of the Conference of Rulers.

(5) The Conference of Rulers shall be consulted before any change is made to the policy affecting administrative action under Article 153 is made.

(6) The members of the Conference of Rulers may act in their own discretion in any proceeding in relation to the following functions that is to say:

(a) The election or removal from office of the YDPA and TYDPA;

(b) The advising on any appointment;

(c) The giving or withholding of consent to any law altering the boundaries of a Sate; or affecting the privileges, position, honours or dignities of the Rulers;

(d) Appointing members of the Special Court under Clause 9 (1) of Article 182;

(e) Granting pardons, reprieves and respites, or remitting, suspending or commuting sentences under Clause (12) of Article 42.

(7) repealed.

These provisions of Article 38 make up the functions and duties of the Conference of Rulers. It is to be noted that only one of these functions are related to religion (agreeing or disagreeing to the extension of any religious acts, observances or ceremonies to the Federation as a whole).

Over and above the functions provided by Article 38, the Conference may also have other functions. In the website of the Majlis Raja-raja, it is stated that the Conference appoints:

- A representative to sit on the Armed Forces Council pursuant to Article 137 of the Federal Constitution.

- A representative to sit on the Board of Governors of Dewan Bahasa dan Pustaka in accordance with the relevant act.

It must be remembered that the Constitution also provides for the State Ruler to be the head of religion in his respective state, and this has been described in Chapter 4.1.

4.2.5. Meetings and the Secretariat of the Conference of Rulers

The Keeper of the Rulers' Seal, which was previously established by the FMA, is appointed to act as the Secretary to the Conference of Rulers. Generally, the Conference meets three times a year; but the Keeper of the Rulers' Seal must convene the Conference of Rulers whenever required to do so by the YDPA or by not less than three members of the Conference. Every meeting is chaired by one of the nine Malay Rulers who is appointed on rotation. Only a Malay ruler may preside over a meeting, not a Regent or a YDPN. A majority of the members of the Conference of Rulers shall form a quorum and the Conference may determine its own procedure. In any case, where the Conference of Rulers is not unanimous it shall take its decision by a majority of the members voting.

A few days before the Conference of Rulers, a pre-council meeting is held only between the Malay Rulers and the Keeper of the Rulers' Seal (as the secretariat) without the attendance of Chief Ministers. The pre-council meeting determines and discusses issues affecting the country and sets the agenda of the Conference of Rulers. In the past, the Keeper of the Rulers' Seal released statements by the Malay Rulers after convening the pre-council meeting on issues such as the 1MDB case and on the National Security Council Act. When a statement is released by the Malay Rulers, respect for the Rulers is always given. This shows the power the Malay Rulers have in putting the pressure on the leaders of the country concerning issues which could adversely affect the peace and stability of the country. However, statements released are too few and could have an even greater impact should they continue to remind the country of the laws and structures already in place, such as in the Federal Constitution, which needs to be followed so that arbitrary action on the part of the government or officials can be stemmed.

4.2.6. Link Between Conference of Rulers and the Majlis Kebangsaan Hal Ehwal Islam (MKI) and Jabatan Kemajuan Islam (JAKIM)

In the next chapter (Chapter 4.3 on JAKIM), the study revealed findings on the link between the Conference of Rulers with the Majlis Kebangsaan Hal Ehwal Islam (MKI) and Jabatan Kemajuan Islam (JAKIM) which is the successor to BAHEIS (which served as secretariat to the MKI). There is, however, lack of clarity in this inter-relationship (structural and functional) between these institutions. There is also a lack of clarity in the terms of reference intended for these agencies. In other words, was the MKI established to play an "advisory" function to the Conference? In like manner, was BAHEIS (then JAKIM) intended to play a "secretarial" role to the MKI? Does JAKIM, therefore, have any role in advising the Conference of Rulers? Even more fundamental, is the MKI placed under the PM's Department as JAKIM is? Therefore, there appears to be a possibility of incongruous administrative arrangements in these linkages.

Pertaining to this, in the earlier chapters on the historical and legal perspectives (PART II), the relevant points in the Reid Commission report (Chapter 3.2.1), and the White Paper (Chapter 3.2.2), the issue of the establishment of an institution or agency at the Federal level was discussed. The opinions of the three parties (the Malay Rulers, the British government

and the political party UMNO represented by the Tunku) were meticulously recorded. However, these events preceded the creation of MKI and BAHEIS or JAKIM and they offer no information on these issues.

Attempts were made in this study to unravel these unclear and seemingly incongruous linkages, but these were not met with any success.

4.3. Administration of matters pertaining to Islam at the Federal level - Malaysian Islamic development division/ Jabatan Kemajuan Islam Malaysia (JAKIM)[24]

This Chapter will examine the history, functions and legal basis of the Jabatan Kemajuan Islam Malaysia (JAKIM) while providing a brief outline of actions that have been taken by JAKIM which may have an impact on government policies, democratic deliberation and fundamental liberties.

4.3.1. Historical development

JAKIM was established on 1 January 1997 as the replacement for BAHEIS (Bahagian Kebangsaan Bagi Hal Ehwal *Ugama* Islam) but there were several historical landmarks in the Prime

[24] This term was found in an article "History of Prime Minister's Department" on e-tatatertib.jpm.gov.my/userfile/file/1997-2006

Minister's Department even before BAHEIS came into being.[25] These landmarks were:

a. National Council for Islamic Affairs/Majlis Kebangsaan bagi Hal Ehwal Ugama Islam Malaysia (MKI)

As co-ordination of the administration of the Muslim religion between the many States was found necessary by the Conference of Rulers, on 17th October 1968, at its 81st Meeting, the Conference of Rulers ("the Conference") established the National Council for Islamic Affairs, West Malaysia or Majlis Kebangsaan bagi Hal Ehwal *Ugama* Islam Malaysia Barat by way of a regulation. The National Council's role, in relation to the Conference of Rulers, is purely advisory. The National Council's 'secretariat' was placed under the Prime Minister's Department. On 17th June 1971, at the 90th Meeting of the Conference, this body was renamed the National Council for Islamic Affairs, Malaysia or Majlis Kebangsaan bagi Hal Ehwal *Ugama* Islam Malaysia ("the National Council"), referred to as MKI in short. The issue of whether the MKI was constitutionally established is presented in Sub-section 4.3.2 below.

The National Council consists of the following Muslim members: a Chairman and Deputy Chairman appointed by the Conference at the recommendation of the Prime Minister, representatives from all States and five persons appointed by the YDPA with the consent of the Conference.

[25] As seen on JAKIM's website: www.islam.gov.my/en/about-jakim/history

Members are appointed for a period not exceeding three years. All questions presented at a meeting of the National Council is decided pursuant to a 2/3 majority of members voting, and the Chairman is not entitled to vote. The National Council is required to have a meeting at least once every three months. The National Council's first Chairman was Tunku Abdul Rahman Putra Al-Haj. The task of the National Council is two-fold: 1) To discuss, consider and deal with any matter referred to the National Council by the Conference, any State Government or State Religious Council or a member of the National Council, with a view to giving advice or recommendations; and 2) To advise the Conference, the State Government or the State Religious Council on any matter with respect to the law and administration of matters pertaining to Islam and Islamic religious education, with a view to improve, uniformise or promote uniformity of laws or administration. In performing its task, the National Council may correspond with any State Government or State Religious Council to seek any information, report or other matters relating to the religion of Islam or its administration, save matters of policy which must first receive the consent of the Ruler of the State. When an advice or recommendation is submitted by the National Council to the Conference of Rulers and the Conference of Rulers agrees with the advice or recommendation, the relevant State Religious Authorities shall execute the said advice or recommendation, and the same cannot be amended, modified or ceased without the

prior approval of the Conference of Rulers. The National Council may establish ad hoc Committees to deal with any matters related to its tasks. Such ad hoc committees have been established to deal with reviews of polygamy and divorce laws, the Muslim calendar and the *Syariah* court. The Regulations also established a Fatwa Committee which consists of a Chairman appointed by the National Council from its members, every State Mufti or a religious representative, five pious theologians (Alim Ulama) and a Muslim from the Judicial and Legal Service or the legal profession; where the latter two would be selected and appointed by the Conference, for a period not exceeding three years, from candidates confirmed (diperakukan) by the Prime Minister. Only the Muftis and the Alim Ulama are entitled to vote on matters to be decided by the Fatwa Committee. If the Fatwa Committee is not unanimous, its decision shall be made pursuant to a 2/3 majority of members voting.

The Fatwa Committee's task is to consider, decide and issue a fatwa on any matter concerning Islam referred to it by the Conference of Rulers. The Fatwa Committee shall submit its opinions to the National Council which would transmit it along with its recommendations to the Conference of Rulers.

The administration of the National Council is placed under the Prime Minister's Department. All officers and staff who

manage the administrative work of the National Council must be Muslims. The Regulation also declares that no action of the National Council shall touch on the position, rights, privileges, prerogatives and powers of the Ruler as the Head of the religion of Islam in his State.

b. Division of Islamic Affairs/Bahagian Hal Ehwal Islam (BAHEIS)

In February 1974, the Secretariat of the National Council was incorporated as the Religious Affairs Division of the Prime Minister's Department or Bahagian Agama. In May 1985, the said division was upgraded to become the Islamic Affairs Division of the Prime Minister's Department or Bahagian Hal Ehwal Islam (BAHEIS). In September 1996, the Cabinet agreed to upgrade BAHEIS to become a department of its own under the Prime Minister's Department. Essentially, BAHEIS was the precursor of JAKIM.

c. Department of Islamic Development Malaysia/ Jabatan Kemajuan Islam Malaysia (JAKIM)

Following the Cabinet decision in 1996, on 1st January 1997, the Jabatan Kemajuan Islam Malaysia (JAKIM) was formed. There is no Act of Parliament which creates JAKIM although it is referred to in the Counsellors Act 1998 and the Printing of Qur'anic Texts Act 1986.

4.3.2 Objectives

Notwithstanding its unconstitutional status, JAKIM as an agency that was established to meet a policy need (for coordinating Islamic matters among the states), must have a vision, goals and objectives, and a structure with manpower, finances and other resources to enable it to function.

From its website, the purpose of the establishment of JAKIM and its vision is stated to be:

> **Penubuhan JAKIM di lihat sebagai salah satu platform didalam memenuhi keperluan masyrakat Islam seiring dengan perkembangan and pembangunan negara yang menjadikan Islam sebagai agama rasmi. Transformasi yang dibentuk oleh JAKIM adalah seiring dengan visi, misi, moto, objektif dan fungsi jabatan ini sebagai peneraju dalam membina ketemadunan ummah yang unggul.**[26]

This translates into:

> **The establishment of JAKIM is seen as a platform in meeting the needs of the Islamic community, in line with the expansion and development in the country which has made Islam its official religion. The transformation undertaken by JAKIM is in line with its vision, mission, motto, objectives and functions, as a driving force in building an excellent and superior civilisation of the ummah.**

[26] **Sources: http://www.islam.gov.my/en/about-jakim/jakim-s-profile/history; http://islam.gov.my/visi-misi-objektif-fungsi**

From another website, the following was found (in Malay and translated into English for the purposes of this report).

Vision:

To be a leader in excellent management of Islamic affairs by 2020. In the report of the Ministry of Finance on "Estimates of Federal Government Revenue 2018", the vision of the PMO (under which JAKIM is placed) is expressed as "Menjadi penanda aras system penyapaan sokongan dan tadbir urus terbaik sektor awam".

Mission:

To spur the transformation in the management of Islamic affairs to raise the national consultation through empowerment of an Islamic agency by innovative and strategic approach. In the report of the Ministry of Finance on "Estimates of Federal Government Revenue 2018", the mission of the PMO is expressed as "Memenuhi ekspektasi pelanggan melalui penyampaian perkhidmatan yang cekap, berkesan dan berkualiti".

Objectives:

1. Ensure that Islamic teaching is widely disseminated to the community.

2. Create a credible leadership that brings about human resources which are trained, skilled, dedicated and wise.

3. Develop a management system that is founded on Islamic values and ethics.

Clients (of PMO, not JAKIM specifically):

In the report of the Ministry of Finance on "Estimates of Federal Government Revenue 2018", the clients of PMO are listed below as it appears in the report:

- *Mantan Sri Paduka Baginda Yang Di Pertuan Agong dan Raja Permaisuri Agong;*
- *Mantan Perdana Menteri;*
- *Kementerian dan Jabatan Persekutuan;*
- *Kerajaan kerajaan negeri;*
- *Badan badan berkanun;*
- *Ahli Parlimen (Dewan Rakyat dan Dewan Negara);*
- *Tetamu luar negara; and*
- *Orang awam.*

4.3.3. Functions

The functions of JAKIM as highlighted in various sources are as below:

Function 1: Promulgation and harmonisation of *Syariah* laws

Function 2: Coordination of administration of matters pertaining to Islam

Function 3: Development and coordination of Islamic education

In another source[27] , currently JAKIM's stated functions are:

i. Responsible as the planner for the development and advancement of Islamic affairs in the country;

ii. Formulating policies for the development of Islamic affairs in the country and to maintain the purity of the faith and the teachings of Islam;

iii. Help formulate and standardise the necessary laws and regulations and to evaluate and coordinate the implementation of the law and the existing administration from time to time to solve the problems of the Muslim community;

iv. Implement programmes for the development of the Muslim community and the appreciation of Islam in the management of the country;

v. Coordinate law enforcement mechanisms and regulations for the administration of matters pertaining to Islamic affairs throughout the country;

vi. To evaluate the programmes implemented for Islamic affairs in the country;

vii. Act as collectors, disseminators of information and a reference centre for Islamic affairs; and Implement community development efforts through

[27] As seen on JAKIM's website: http://www.islam.gov.my/mengenai-jakim/fungsi-jakim

cooperation at regional and international levels.

viii. In the report of the Ministry of Finance on “Estimates of Federal Government Revenue 2018”, the function of JAKIM which is the first actvity under the Programme number 6 (Kemajuan islam) is stated as:

(a) Memastikan ajaran Islam tersebar luas kepada seluruh masyarakat;

(b) Membentuk kepimpinan yang berwibawa dan melahirkan tenaga pengurusan yang terlatih, berketrampilan, berdedikasi, dan berhikmah; dan

(c) menghasilkan sistem pengurusan yang berteraskan nilai dan etika Islam.

4.3.4. Organisation

From the same website cited earlier[28], when JAKIM was established in 1997 as the successor to BAHEIS, the Department had four sectors, and each sector had Divisions (two of the sectors, Policy and Human Development are shown), which can be perceived as follows:

1. Sektor Dasar (Policy Sector)

- Bahagian Perancangan dan Penyelidikan (Planning and Research),
- Bahagian Kemajuan Islam (Advancement of Islam),
- Bahagian Perhubungan (Communication),
- Bahagian Pengurusan fatwa (Management of Fatwa), and
- Bahagian Penyelarasan undang-undang (Coordination of Laws).

2. Sektor Pembangunan Insan (Human Development Sector)

- Bahagian Dakwah (Missionary Work),

[28] As seen on JAKIM's website: www.islam.gov.my/en/aboutjakim/history

- Bahagian Pembangunan Insan (Human Development),
- Bahagian Keluarga (Family),
- Bahagian Sosial dan Komuniti (Social and Community), and
- Bahagian Penerbitan dan Media (Publication and Media).

3. Sektor Pengurusan (Management Sector)

4. Sektor under Ketua Pengarah (Sector under the Director General)

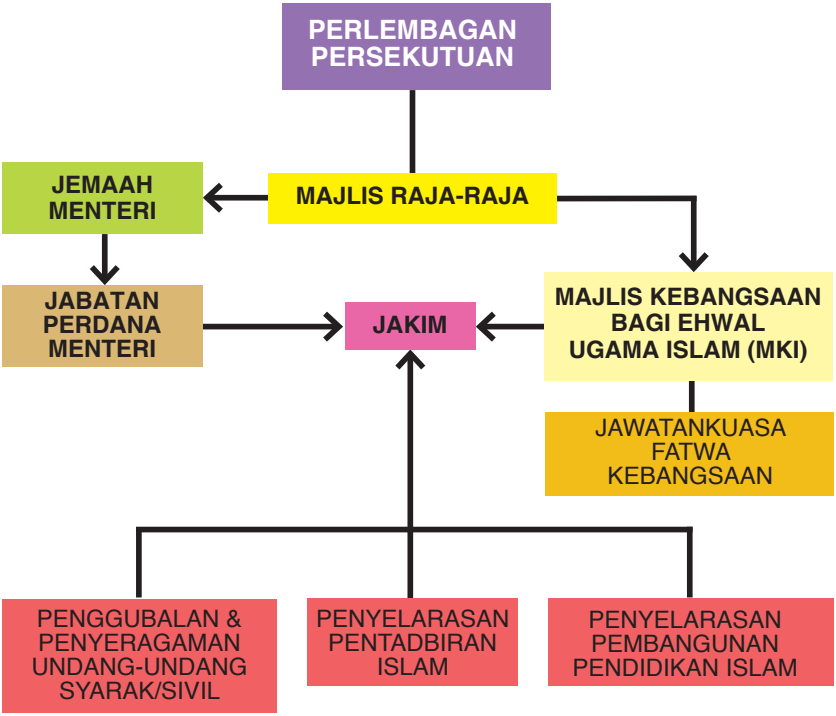
For the purposes of budget allocation, JAKIM is one of the six programmes under the PMO. Under one of these six programmes are "Kemajuan Islam", under which there are 11 activities; one of them being JAKIM. See Chapter 4.3.6. below.[29]

As at May 2017, JAKIM is headed by a Director General who is assisted by two Deputy Directors General and a Senior Director. Subordinate to these positions are 20 Directors responsible for specific functions, and two Heads of Unit.

[29] Taken from the report of the Ministry of Finance "Estimates of Federal Government Revenue 2018".

The number of employees or staff is 1,400 but information on their distribution in the organisation could not be obtained.

The structure of the Islamic Management in Malaysia is as depicted in the diagram below:



Source: JAKIM's strategic plan 2009-2014

4.3.5. Strategic Directions

In a document, Pelan Strategik JAKIM 2009 – 2014, the third chapter (Bab III) identifies nine challenges: [30]

1. Harmonisation of Islamic laws,

2. The level of awareness and internalisation of Islam in the community is not adequate,

3. Threat to akidah (faith), and introduction of thoughts from other religions,

4. The issue of unity among the ummah,

5. Poor coordination in the teaching of Islam in the different States,

6. Negative perception of the management of Islamic institutions,

7. Media propaganda towards Islam,

8. Increasing trend of social ills, and

9. Trend of globalisation that threatens the socio-cultural values of the community.

[30] The document spells out the details of each of these challenges.

To respond to these challenges, the following critical agenda was formulated:

1. Internalisation of Islam in a holistic manner,
2. The administration and management of mosques,
3. Improvement in the competencies of officers in Islamic administration,
4. Elimination of any deviation from the faith,
5. Malaysia made into a hub for the learning of Al Quran and al Hadis,
6. Management and monitoring of fatwas,
7. Professionalisation of ulamak,
8. Coordination and harmonisation of *Syariah* and civil laws,
9. Integration of missionary work in the media, and
10. Management of converts.

In its Strategic Plan for 2015 to 2019, JAKIM outlines its strategic directions and action plans till 2019 as along the same lines

as above which includes, among other things, to standardise Muslim Laws and Fatwas, to implement comprehensive Islamic policies, to perform missionary activities, to strengthen Islamic morals and behaviours, to strengthen faith based on orthodox Sunni Islam, to fend off negative perceptions of Islam, to strengthen halal management, to standardise Islamic education and to strengthen the governance of Islamic agencies and institutions.

4.3.6. Finance and Budget

The budget of JAKIM has been raised several times from various quarters seeking explanations and clarifications from JAKIM itself. Critical citizens have questioned the lack of transparency in the budget allocation of the several entities under the PMO, especially JAKIM, especially with respect to how much is allocated for what type of activities, with some critics suggesting that some of these activities may be not appropriate. There are reports in alternative media by members of the public, bloggers and non-government organisations (NGOs) expressing concern over JAKIM's finances. These reports arose given the large allocations accorded to JAKIM and the matter of priorities in the use of government revenue. Furthermore, the scrutiny over its accounts followed claims by critics that the agency was promoting hard line extremism through its programme which is slowly steering Malaysia towards Islamic conservatism. This criticism becomes even more understandable since JAKIM was established with no constitutional or legal basis.

On 22 November 2015, the Deputy Minister in the Prime Minister's Department was quoted as saying that JAKIM needed more than 1 billion for 2016 if it is to "better combat extremist ideologies like IS, liberalism, pluralism, LGBT".[31] He said this to highlight that the planned allocation of just over RM724 million for 2016 was not enough to counter the efforts of those trying to undermine Islam's position as official religion of the Federation.

The next day, on 23 November 2015, under an article headlined, "JAKIM should get more to serve Muslim interest", he expressed dissatisfaction over the budget allocation for 2016 of RM 724,594,600 which was lower than that for 2015 which was RM 819,074,900. He said that JAKIM needs more than RM1 billion. The same article referred to the sermon at the previous Friday's prayers which stressed the importance of and necessity for the continued existence of JAKIM in Malaysian life.[32]

One month later, on 27 December 2016, His Highness the Sultan of Johor questioned why JAKIM needs more than RM1 billion, and he requested for a report on the details of JAKIM's spending. He also wanted to know if JAKIM distributed money to the States. The Sultan expressed his wish for the matter to be tabled at the meeting of the Conference of Rulers.[33]

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[31] As published on Malay Mail of 22 November 2015. The original URL is down and an archived version of the URL is unavailable at the time of printing.

[32] As seen on: https://coconuts.co/kl/news/deputy-minister-jakim-needs-more-rm1-bil-year-serve-muslim-interests/

[33] As seen on: https://www.malaymail.com/news/malaysia/2015/12/27/johor-sultan-why-does-jakim-need-rm1b-budget/1030189

This study made attempts to find out the details of the spending by JAKIM but there is no information from any available source on this.

For the year 2018, information is obtained from a report of the Ministry of Finance on "Estimates of Federal Government Revenue 2018". The operating budget of JAKIM (which is one of the 11 activities under the programme called "Kemajuan Islam") is RM 810,890,000 (an increase from 2017 when it was RM 744,947,000). The programme "Kemajuan Islam" receives slightly more than RM1 billion (out of about RM 5.2 billion for the Prime Minister's Department or PMD). Therefore, the Programme Kemajuan Islam (one of the six programmes of PMD) gets about a fifth (20%) of the PMO budget, and JAKIM gets the bulk (79%) of the "Kemajuan Islam" budget, which works to about 16% of the PMD budget. For emoluments, the budget allocation is RM79,146, and JAKIM has 1,400 staff.

	Federal budget (RM)	PMO budget (% of federal)	Kemajuan Islam (% of PMO)	JAKIM (% of Kemajuan Islam)
Operating	234,250,449,000	5,212,264,000 (2.2%)	1,029,242,500 (19.7%)	810,890,000 (78.8%)
Development	48,000,000,000	12,214,034,800 (25.4%)	Not Available	Not Available
Total	282,250,449,000	17,429,298,800		

(*) The operating budget of RM 810,890,000 is allocated to three objectives as follows:

1. Emoluments (Emolumen) = RM79,146,100,

2. Services and supplies (Perkhidmatan dan bekalan) = RM135,691,700, and

3. Fixed payments and charges (Pemberiaan dan kenaan bayaran tetap) = RM596,052,200.

In terms of development budget, the PMD receives slightly more than RM12.2 billion (it was slightly more than RM10.3 billion in 2017). Unfortunately, the report from the Ministry of Finance provides only a listing of 57 development projects, without identifying the programmes (for e.g., "Kemajuan Islam") or activities (for e.g., JAKIM) that they come under. The developments, which after some research, could fall under Kemajuan Islam, are as follows and totals RM 30,580,200 only based on those projects we were able to identify (there could be more development projects under Kemajuan Islam that we are unaware of):

- Kompleks Latihan Islam/ Tahfiz/ Pusat Komuniti Orang Asli = RM 7,000,000,

This includes, but may not be limited to the following:

a) Insitut Latihan Islam Malaysia (ILIM) - responsible for providing courses, seminars and training to Islamic Affairs Service Officers from all Islamic religious agencies throughout Malaysia.

b) Darul Quran (a Quranic Institute of Study in Malaysia), and

c) Tahfiz Institutions.

- Pembinaan masjid dan surau/pembaikian/naik taraf = RM6,000,000,
- Pembinaan sekolah agama = RM312,200,
- Development of halal industry = RM300,000, and
- Pembangunan harta *wakaf* = RM16,968,000.

This report on the federal expenditure does not go into further details of the budget break down for each activity.

In comparing the budget allocated to 'Kemajuan Islam', we can see that some Ministries are accorded an even smaller operating budget than JAKIM alone. These are:

- The Ministry of Foreign Affairs = RM616,677,700 (RM194,212,300 less than the Operations Expenditure (OE) for JAKIM);
- The Ministry of Culture and Tourism = RM810,296,000 (RM594,000 less than JAKIM);

- The Ministry of Youth and Sports = RM451,565,900 (RM359,324,100 less than JAKIM); and

- The Ministry of Plantation Industries and Commodities = RM441,074,200 (RM369,815,800 less than JAKIM).

4.3.7. Output and impact

On JAKIM's website presently, there is a collection of guidelines (garis panduan) by it on matters with respect to religion and other aspects like business, sports, medical, education and publications. A number of these guidelines make clear that it is for members of the public and relevant public authorities. These include:

- 'Garis Panduan Orang Islam Turut Merayakan Hari Kebesaran Agama Orang Bukan Islam' detailing, in a nation where 40% of the population are non-Muslims, the criteria for a non-Muslim religious or cultural celebration which permits Muslim attendance;

- 'Garis Panduan Hiburan Dalam Islam (Edisi Kedua) 2014' outlining the personality and appearance of artists, their stage, vocal and dance performances, the lyrical contents of songs, the organisation of entertainment programmes and the contents of video clips, that would be consistent with Islam. One instance where these guidelines were followed by the Government was the prohibition of the book Muslim

Women and the Challenges of Islamic Extremism by SIS FORUM (Malaysia) Berhad (Sisters in Islam). In that case, the Minister of Home Affairs prohibited the said publication under the Printing Presses and Publications Act 1984 on the grounds of being 'prejudicial to public order' because of its tendency to confuse Muslims, particularly Muslim women as it infringed the Garis Panduan Penapisan Bahan-Bahan Penerbitan Berunsur Islam (refer below).

- Garis Panduan Penapisan Bahan-Bahan Penerbitan Berunsur Islam by JAKIM touches on the purity of Islam, it propagandises the creed, tenets and teachings of Islam which conflicts with the Mazhab Ahli Sunnah Wa Jamaah and it raises doubt and public disquiet. The prohibition was quashed by the High Court on the grounds that there were no objective facts to support the Minister's decision, i.e., that the book is prejudicial to public order. The High Court's decision was affirmed by the Court of Appeal, and the Government was unsuccessful in obtaining permission to appeal further in the Federal Court.

4.3.8. Constitutionality and Legal Basis of the Establishment of JAKIM

Critics have questioned the constitutionality of JAKIM given that Islamic affairs come under the purview of individual States and not under the Federation. The Department responded that the entity is the only institution that can safeguard Islam's position as the religion of the Federation. However, this defensive argument by JAKIM using "safeguarding Islam" does not render it constitutional. In this regard, even before its constitutionality is studied and determined, it may be pertinent to ask a more basic question, that is, "Was there a need to establish a federal body for matters pertaining to Islam?" The answer to this has been alluded to above – it was needed for ensuring uniformity and coordination among the states - a valid enough reason.

The Federal Constitution does not empower either the Federal Government or the Conference of Rulers to establish the National Council for Islamic Affairs (NCIA). Matters pertaining to the Muslim religion and Malay custom are within the exclusive jurisdiction of the State Legislatures and the State Executive Councils. There is no provision in the Constitution that prescribes the creation of the NCIA. The Regulations of the National Council for Religious Affairs Malaysia 1968, which purportedly establishes the NCIA, itself makes no reference as to the law under which it is being made.

However, the framers of the Federal Constitution did express the intention before *Merdeka* that '[i]f it is found necessary for

the purposes of co-ordination to establish a Muslim Department of Religious Affairs at federal level, the Yang di-Pertuan Agong will, after consultation with the Conference of Rulers, cause such a Department to be set up as part of his establishment'.

[Refer to the White Paper on the Religion of the Federation, as highlighted in page 55 of this Report.] Although framers of the Constitution intended that a coordination body can be set up at federal level if found needed, it has not been so provided for in the Constitution. As such, despite the intent of framers of the Constitution, it will still be unconstitutional to set up a federal agency for coordination of Islamic rules as this has not been provided for in the Constitution.

It is to be noted that the powers of the Conference of Rulers are limited to only those prescribed by Article 38 of the Federal Constitution, and these powers do not include establishing a federal institution such as the NCIA. Be that as it may, we do appreciate that the intention of establishing the NCIA is to have a federal agency to coordinate and to promote uniformity in the administration of Islamic law among the States. But to reiterate what we have just said, there is no legal justification for its creation, regardless of the fact that it was established by the Conference of Rulers. In our view, if there is the need for such a body, then, in order to legalise its establishment, the Federal Constitution needs to be amended to incorporate a provision somewhat analogous to Article 91 of the Federal Constitution that establishes the National Land Council. In any event, even

assuming for the moment that the NCIA is legally established, its role is merely advisory as confirmed by the Regulations itself. This means that the recommendations are advisory in nature and the States are not legally obliged to implement them.

Perhaps it is relevant to mention here that in the context of promoting the uniformity of State legislation pertaining to the administration of Islamic law, there is another avenue: Article 76(1)(b) of the Federal Constitution. Article 76 prescribes a legislative procedure. The Parliament, for the purposes of promoting the uniformity of laws, may make laws with respect to any matter enumerated in the State List including matters concerning the religion of Islam and Malay custom, as enumerated in Item 1 of the State List; such law will only come into operation in a State once it is adopted by the Legislature of that State. Such uniform law, once adopted by the State Legislature through the passing of a State Enactment, are deemed to be State law (and not Federal law) and the State Enactment (that adopts the federal law) may be amended or repealed by a law made by the State Legislature.

Regarding fatwas, the fatwas of the National Fatwa Committee do not have any legal effect in a State, and merely represent a religious consensus at a 'national' level on a question concerning the Islamic faith in Malaysia. They have no legal effect in a State until adopted by the State via a fatwa by the State Mufti or by the State Fatwa Committee (as the case may be) and gazetted in accordance with the procedure as prescribed by

State law. Such fatwas, however, can be challenged in the civil courts by persons adversely affected on the grounds that the subject matter of the fatwa is not within the jurisdiction of the Fatwa Committee or that the effect of the fatwa purports to restrict freedom of speech and expression.

There have been functions entrusted to JAKIM by Cabinet that is in addition to its responsibility as the secretariat of the NCIA, for e.g., development of Islam and dakwah. The substance of these functions, arguably, exceed the executive authority of the Federation (exercisable by Cabinet) given that the executive authority of the Federation does not extend to the Muslim religion except for the Federal Territories only; thus, Cabinet's entrusting of these specific functions to JAKIM could be said to be inconsistent with article 80(2) of the Constitution. So far, there has been no legal challenge, by any person with legal standing, to the validity of the executive functions exercised by JAKIM in relation to the Muslim religion. A legal challenge of this nature in the courts may clarify the validity of JAKIM's functions and will be of great public interest, particularly given that much of the deliberations of the NCIA or JAKIM do not seem to be openly available to the public.

Considering the matters above, we take the position that there is no constitutional or legal basis for the establishment of JAKIM, the secretariat of the NCIA, and the body responsible for the administration of the NCIA which itself was established without constitutional or legal basis.

PART III:
THE IMPACT OF ADMINISTRATION OF MATTERS PERTAINING TO ISLAM

PART III: THE IMPACT OF ADMINISTRATION OF MATTERS PERTAINING TO ISLAM

The events that have occurred over time throughout the historical evolution in the Islamisation process and the administration of matters pertaining to Islam in the country inevitably will influence and have an impact on the lives of all Malaysians, not only of Muslims but also of non-Muslim. This impact is at all levels – on the individual, family, community and nation as a whole. The impact is not only on the religious aspect, but on the whole spectrum of human experience – social, cultural, economic and political.

With the findings obtained from the historical overview in Chapter 3 and the institutional or organisational arrangements in Chapter 4 on the administration of matters pertaining to Islam, one can detect some positive outcomes and impact (good practices - the subject of Chapter 5), and several negative outcomes or impact (issues of concern – the subject of Chapter 6). On a wider perspective, these good practices and issues of concern will impact on the "behaviour" and "image" of the nation – such as reflected in the way it is governed and the extent to which it inculcates Islamic values. This can be and has been assessed, and comparisons can be made between countries – as seen in Chapter 7.

5. GOOD PRACTICES ARISING FROM THE CURRENT PRACTICE OF THE ADMINISTRATION OF MATTERS PERTAINING TO ISLAM

Malaysia, a Muslim-majority country, has several good practices, worthy of emulation by other Muslim or Muslim-majority countries. In Chapter 3.5. under the historical development of the administration of Islam, we have seen the administration of four specific areas of concern - *wakaf*; zakat/fitra/*baitulmal*; haj pilgrimage (managed by the Pilgrimage Management Board); and religious education). Besides these four, the study found four other activities that can be seen as good practices. These four activities are Islamic finance, halal certification, the international Quran recitation competition (Tilawah Al Quran; Friday prayer sermon (Kutbah), and the pre-marital course for Muslim couples intending to get married. These exemplary practices were driven largely by individual initiative and effort, but it must be recognised that the government machinery has played an important role in ensuring the continued successful implementation of these practices. There remains, however, room for improvement in the implementation of these practices. In order to ensure the continued relevance, and for Malaysia to achieve world-class targets for these practices, their respective administration needs to evolve with the demands of time alongside continued check and balance to ensure adherence to the principles of Islam in its administration. While the administration of these areas can be seen as good practices with good output and impact, there are also some issues identified in some of them, specifically in zakat management and religious education.

5.1. The Pilgrims Management Board (Tabung Haji)

The Pilgrims Management Board (Lembaga Urusan dan Tabung Haji, usually referred to as Tabung Haji) has a reputation as one of the best, if not the best, pilgrim management bodies in the world. The creation of Tabung Haji emerged out of the observation that Muslims were saving their money to use for pilgrimage in traditional ways to be sure the money was free from riba, which can be roughly translated as "usury", or unjust, exploitative gains made in trade or business under Islamic law. Riba is mentioned and condemned in several different verses in the Quran and in many hadiths.[34] In ensuring a more productive way of saving these funds for pilgrimage, the Pilgrims Savings Corporation was incorporated in August 1962. In 1969, the Corporation was merged with Pilgrims Affairs Office, which had been in operation since 1951, to create the Pilgrims Management and Fund Board or Lembaga Urusan Dan Tabung Haji. The Board was established under the Pilgrims Management and Fund Board 1969 Act (Revised 1973). As part of the efforts to modernise and keep Tabung Haji updated and relevant as well as to instil professionalism in the management and staff, the Act was amended and revised in 1995. The amendments also enabled Tabung Haji to be more proactive in its investments.

To date, annually, Tabung Haji continues to enable and facilitate approximately 20,000 Malaysians, especially those with financial constraints, to perform their Haj. Beyond facilitating the Haj pilgrimage, Tabung Haji has also become a significant player in the

[34] While Muslims agree that riba is prohibited, not all agree on what it precisely is; it is often used as an Islamic term for interest charged on loans. However, not all scholars equate riba with all forms of interest, or agree whether its use is a major sin and against syariah (Islamic law), or simply discouraged (makruh)..

Islamic financial market, particularly in supporting the development of the domestic sukuk market. [35]

5.2. Islamic finance

Malaysia can take pride in being the leader among countries of the world to have introduced Islamic finance in a big way. In Islamic banking, the Islamic banks in Malaysia have exceeded global averages of return on assets and asset growth. Islamic banks in Malaysia continue to introduce new products and financial solutions while expanding their client base, including to the unbanked, and in establishing their regional footprints particularly across Southeast Asia.

The first full-fledged Islamic bank, Bank Islam Malaysia Berhad (BIMB), was established in 1983, followed by the introduction of Interest Free Banking Scheme (IFBS) by several commercial banks. IFBS was later replaced with the Islamic Banking Scheme (IBS) in 1998, and by 1999, the second full-fledged Islamic bank, Bank Muamalat Malaysia Berhad, was established. By 2010, there were 17 full-fledged Islamic banks.

Malaysia has also achieved significant milestones in the development of its takaful industry.[36] With the enactment of the Takaful Act 1984, the first takaful company was established in 1985. Since then, Malaysia's takaful industry has been gaining momentum and increasingly recognised as a significant contributor to Malaysia's overall Islamic financial system. Re-takaful operators in Malaysia add an extra layer of depth to the takaful industry

[35] Sukuk are Islamic bonds structured in such a way as to generate returns to investors without infringing Islamic law.

[36] Takaful is a type of Islamic insurance whereby members contribute money into a pooling system in order to guarantee each other against loss or damage; it is based on Syaria and explains how it is the responsibility of individuals to cooperate and protect each other.

through the spreading of risk and added capacity so that more risk can be underwritten.

Malaysia's Islamic finance is supported by a vibrant Islamic capital market. Malaysia is the leader in global sukuk issuances, accounting for 63% of total global issuances in 2016. In the Islamic equity market, 73% of total listed securities on Bursa Malaysia are *Syariah*-compliant.

To support the growth of Islamic finance, Malaysia has also set up various talent development institutes and programmes that focus on Islamic finance to ensure a continuous talent pool that meets the evolving needs of the industry.

Islamic finance in Malaysia is well regulated and supervised, enabling a conducive environment that supports growth and development of the industry.

Regulatory support has additionally enabled healthy competition between the conventional and Islamic banks in the country. The regulation and supervision of Islamic banks is governed by the Islamic Financial Services Act (IFSA) 2013 which places the responsibility on the institutions to ensure end-to-end *Syariah* compliance of their policies, procedures and operations. This provides more autonomy for the institutions to innovate across their product and service delivery. The IFSA also provided greater clarity on the roles of the courts, the central bank and *Syariah* advisory council in terms of dispute resolution, governance and consumer

protection. Oversight of Islamic finance operations and policy are managed independently by Bank Negara Malaysia.

5.3. Halal certification

The halal industry in Malaysia has grown significantly in recent years with the aim of becoming a global halal hub by 2020. Malaysia's halal industry extends beyond food and beverage, into financial products, pharmaceutical, logistics, and tourism. JAKIM is the sole agency responsible for the issuance of halal certification to companies. There is, however, debate surrounding this.

The halal industry is estimated to be worth more than USD2 trillion across the globe and is expected to grow in parallel with the growth of the Muslim population (Izham Shah Datuk Arif Shah, 2016).[37] With such scale, it is exemplary that Malaysia has played a significant role in the growth and development of the Halal industry domestically and internationally. Malaysia needs to continue to build good prospects in this industry as it has huge economic potential for the country if implemented and operationalised efficiently and effectively. Analysts have observed that Malaysia has been at the forefront in the regulation of the Halal industry (Zakaria, Z. and Ismail, S.Z., 2014) pointing to several evidences such as being the first Muslim majority country to (i) declare the development of the Halal sector as one of the country's economic engines of growth; (ii) include the Halal industry in the country's long-term economic planning; (iii) announce the proposal of establishing a Halal hub; and (iv) establish a dedicated agency to oversee the Halal industry.[38] The Government estimates the Halal industry to

[37] As seen on: http://www.themalaymailonline.com/features/article/growth-of-the-halal industry #LHcTGdSgPUjHUTZD.97

[38] Zakaria, Z. and Ismail, S. Z. 2014. The Trade Description Act 2011, Regulating Halal in Malaysia in International Conference Proceedings of ICEHM on Law, Management and Humanities (ICLMH '14), pp. 8-10)

achieve RM50 billion in trade exports by 2020 with a growth rate of 5% to 6% by the end of 2017 (Shah, S.,2017).[39]

The halal certification is backed by Trade Descriptions Act 2011 ("the TDA"). It is noted, however, that historically, there does not seem to be any laws during the period of British Malaya on halal certification or any law passed on it by any of the States. Under Section 28 of the TDA, the relevant Minister is empowered to assign meanings to any expression when used in the course of trade or business as, or as part of, a trade description. Pursuant to that power, the relevant Minister has made the Trade Descriptions (Definition of Halal) Order 2011 [PU(A) 430/2011] ("the 430 Order"). Under Section 29 of the TDA, the relevant Minister is also empowered to impose requirements for securing that goods supplied (or related services) are certified by a competent authority or marked with a mark. Pursuant to that power, the relevant Minister has made the Trade Descriptions (Certification and Marking of Halal) Order 2011 [PU(A) 431/2011] ("the 431 Order").

The 431 Order States that JAKIM and the Islamic Religious Council (Majlis Agama Islam) in the respective States are competent authorities to certify that any food or goods is halal in accordance with the 430 Order. All food and goods cannot be described as halal or be described in other expression to indicate that the food or goods can be consumed or used by a Muslim unless it is certified as halal by said authorities and marked with a specified logo. In the case of imports, the said food or goods cannot be described as halal unless it has complied with the above requirements or

[39] As seen on: https://themalaysianreserve.com/2017/09/06/malaysia-accelerating-halal-industrys-growth/

certified as halal by the foreign halal certification body recognised by JAKIM and marked with the former's name[40].

5.4. International Quran Recitation Competition (Tilawah Al Quran)

Malaysia is also well-known and respected as the country that has consistently hosted the world's oldest international Al Quran recital competition (Tilawah al Quran) founded by Tunku Abdul Rahman, its first Prime Minister. The first competition was held on 9 March 1961 at Stadium *Merdeka*, Kuala Lumpur with seven countries participating. For more than half a decade since then, Malaysia has continued to host this international event. An estimated total of 120 participants that include "hafiz", "hafizah", "qari", "qariah", judges and accompanying officers from all over the world congregate and partake in a six-day festival of Al Quran recitation and memorisation. While this competition is a significant event for tourism in Malaysia, at an individual level, it encourages Malaysians to be more desirous in reciting the Quran.

5.5. Wakaf, Zakat, Fitra, and Baitulmal

Malaysia has institutionalised these arrangements since the 20th century. The historical details of these institutions are provided in Sections 3.5.2.-3.5.3. While these institutional arrangements are at the state level, Malaysia has also established a department on *wakaf*, zakat, and haji (JAWHAR) at the federal level under the

[40] **Ibid., Paragraph 5. The Second Schedule of the 431 Order prescribes recognised foreign halal certification bodies in Australia, Austria, Argentina, Bangladesh, Belgium, Brazil, Brunei, China, Chile, Denmark, France, Germany, India, Indonesia, Japan, Netherlands, New Zealand, Pakistan, Philippines, Poland, Singapore, South Africa, Taiwan, Thailand, Turkey, UK, USA and Vietnam.**

Prime Minister's Department on 27 March 2004, for the coordinating between and the strengthening of the state institutions, and to undertake research. JAWHAR aims to strengthen the institutional arrangements for *wakaf*, zakat, baitumal and haji towards becoming of world-class standard. These institutions at the state and federal levels, most importantly, provide a formal avenue in effectively utilising the assets of Muslims towards productive uses. It is important to assert that these institutions, both at the federal and state levels, need to have clear objectives that are in line with the Federal Constitution, and that are well-managed to ensure the effective management of the assets of Muslims and that they are truly being utilised in line with the principles of Islam.

The researchers had opportunity to engage with persons who have expertise in various aspects of Islam including administration of matters pertaining to Islam, including a mufti of a State. Some of these experts identified issues related to zakat. These issues mainly relate to the distribution of the zakat collected - not transparent especially in terms of the criteria for "poor" to be eligible; failure to identify the poor and eligible; and too much bureaucracy (to the extent that it was reported that some poor Muslims resort to asking for alms from Christian bodies and churches). There is also suspicion of misappropriation and misuse of the zakat collected, but not surprisingly, the researchers were not able to obtain documented evidence on this. It was also pointed out that there may also be a possibility of the zakat money not being expended during the same year it is collected, which is a requirement under Islamic rulings.

5.6. Religious education

Religious education in Malaysia ranges from pre-kindergarten to tertiary level. This provides parents with the option to enroll their children in these religious schools throughout a child's schooling years. The religious education in Malaysia has evolved through time since pre-British to the current period (this has been elaborated in Section 3.5.5). Some of these religious schools have also evolved to integrate the teaching of religion with the national curriculum such as mathematics and science. Although in several religious or tahfiz schools, Islamic sciences may be embedded in the curricula, these schools continue to primarily emphasise memorising the Quran. This has been referred to earlier in Chapter 3.5.5. under the historical and legal evolution of religious education where the observations made by an academician Azmi Tayeb were presented on an online posting headlined, "Don: Our Islamic education doesn't instil Islamic values". He observed that the syllabus of religious education was more devoted to rote learning and memorisation, and the content was more on rites and rituals and not on positive values, such as respect for diversity.

5.7. Friday prayer sermon (Khutbah)

The religious authority in each state or federal territory determines the subject and content of the sermon to be delivered at the congregational prayers every Friday. This offers many opportunities for the development and nurturing of a united, well-informed, tolerant, and a more pious ummah. Some government agencies have used this sermon as an opportunity to benefit their programmes. The

Ministry of Health, for example, has applied to some state religious authorities to use the sermon to touch on the importance of family planning to protect women's health and family well-being. It has also been used to impart information on the dangers of tobacco and cigarette smoking. However, caution must be taken to ensure that these sermons are not used to negatively and unfairly criticise, pass judgement and vilify certain actions, individuals and groups or be used to stoke inter-religious and inter-ethnic hatred. There is evidence that the Friday sermons have been politicised. However, in recent times, this has reduced. In fact, it has been observed that this religious platform has been used for political purposes, which must not be allowed.

On 8 October 2018, Tajuddin Rasdi wrote an article headlined in Malay, "Kenapa khutbah Jumaat tak sebut akhlak buruk ustaz, pemimpin politik?" ("Why do the Jumaat prayer sermons not mention the bad behaviour of the religious and political leaders?").[41]He observed that these sermons always focus on the sins of the ordinary Muslims especially adultery, alcohol consumption, "mat rempit" [42], free mixing between males and females, and lately, the sermons have begun to admonish the lesbian, gay, bisexual and transgender (LGBT) and the people who defend their human rights. In his opinion, Rasdi says that while these are undeniably sins, they do not threaten to destroy the concept of nationhood. On the other hand, the wrongdoings of religious and political leaders that the sermons are silent on can destroy the social structure, economy

[41] As seen on: https://www.freemalaysiatoday.com/category/opinion/2018/10/08/kenapa-khutbah-jumaat-tak-sebut-akhlak-buruk-ustaz-pemimpin-politik/

[42] A mat rempit is a Malaysian term for "an individual who participates in immoral activities and public disturbance with a motorcycle as their main transport"; they are not involved in street racing but rather go against each other for cheap thrills and to rebel against authorities while some of them perform stunts for fun.

and sustenance or resilience of the nation. On the religious aspect, he specifically pointed out the opening of tahfiz schools that do not meet minimum safety standards.

5.8. Pre-marriage training for Muslim couples[43]

This is another potentially positive initiative that can offer tremendous opportunities for bringing about changes that can nurture a good family life based on Islamic values and principles. Like the Friday prayer sermon, government agencies can and have made use of these training sessions to impart messages to couples intending to marry. The Ministry of Health has applied for and obtained a session in the two-day training course to impart awareness, knowledge and skills to these couples on specific subjects such as family health development especially on reproductive, maternal and child health (including family planning, childhood vaccination and the prevention of human immunodeficiency viruses (HIV) or acquired immunodeficiency syndrome (AIDS). It is also an excellent opportunity to reach pre-pregnancy couples because some health interventions need to be given before pregnancy occurs (such as the need of adequate folic acid to prevent neural tube defect) and the health system has no mechanism to reach young people until the wife becomes pregnant or when they need medical consultation and treatment for a complaint or disease, when it may be too late to institute these interventions. Similarly, caution must be taken not to use this platform to impart knowledge that are not useful, or even wrong and dangerous, including messages

[43] A premarital course is a two-day course which is made compulsory for Muslims in Malaysia.

against precepts of human rights, imparted in the name of Islam. One narrative related to the researchers is the information given to the prospective husband on the so-called "Islamic" way on how to beat a wife![44] The instructor reportedly started by stating that unlike other religions, Islam is such a good and fair religion that protects women, that it disallows a husband from beating up a wife in any way he wishes, instead he must follow the "Islamic" way. There was a study conducted by Saidona et al in 2016 on the weaknesses of the governance of the premarital course, but its scope did not include the content/syllabus of the course.[45]

[44] This narrative was not obtained as an approach in collecting information for this study; it was merely narrated by one of the members of the study group whose daughter had undergone the course and had given her feedback.

[45] Examining Weaknesses in the Governance of Premarital Course for Muslims in Malaysia, by Rafeah Saidona, Amal Hayati Ishaka, Baterah Aliasa, Fadhilah Adibah Ismaila, and Suliah Mohd. Arisa. Published by Future Academy www.FutureAcademy.org.uk, 2016.

6. THE ISSUES OF CONCERN ARISING FROM THE ADMINISTRATION OF MATTERS PERTAINING TO ISLAM AND ISLAMISATION.

There are several trends and developments that are matters for concern, and that need to be addressed. Many of these are legal in nature and are captured in Chapter 6.1. below, and which because of its wide and complex scope, is described in several subsections. The other chapters (from 6.2 to 6.13) describe the issues that not legal in nature and are less broad in scope.

6.1. LEGAL MATTERS

6.1.1. Lack of Clarity and Common Understanding of "Precepts" of the Religion of Islam

Contrary to colloquialism, the Constitution does not use the phrase "precepts of the religion of Islam", i.e., a proper noun. The Constitution uses the word "precepts" regarding the Muslim religion, i.e., a common noun. 'Precept' means "[a] standard or rule of conduct; a command or principle that governs thinking or behavior"[46]. Since *Merdeka*, the Constitution envisages, pursuant to Item 1 of the State List, that State Legislatures may create offences in respect of conduct or behaviour by Muslims

[46] Mamat Daud & Ors. v. The Government of Malaysia [1988] 1 CLJ (Rep) 197, SC

which are against rules of conduct prescribed by the Muslim religion. This is, arguably, a narrow legislative power given the preclusion clause that follows, i.e., "except in regard to matters included in the Federal List"; the effect of which is to preclude State Legislatures from creating Muslim 'precept' offences in regards to matters in the Federal List or dealt with by federal law (for e.g., public order, commerce and health).[47]The preclusion clause would be necessary, if not expected, given that Islam is not just a mere collection of dogmas and rituals but covers human activities relating to the legal, political, economic, social, cultural, moral and judicial aspects. The preclusion clause conditions the extent of the State's legislative powers with respect to the creation of Muslim 'precept offences' and has to be clearly defined, understood and interpreted correctly and consistently. The history of Malaya underpins such distribution of legislative powers; in the first Durbar of 1897, the major issue was the compilation of a Code of Muhammadan Laws to penalise moral offences which did not come within the scope of English criminal law.

Furthermore, 5 years before *Merdeka*, the 1952 Enactment of Selangor provided for 27 Muslim offences[48]. Despite the Constitution not being in existence, ascertainment of the true character and substance of some of these laws point to it being 'precept' offences, i.e., it is in 'pith and substance' laws with

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[47] Administration of Muslim Law Enactment 1952: Section 166; "Whoever, save in his own residence and in the presence only of members of his own household teaches or professes to teach any doctrine of the Muslim religion without the written permission in that behalf of the Kathi shall be punishable…".

[48] Sulaiman Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) [2009] 2 CLJ 54, FC

respect to rules of conduct prescribed by the Muslim religion.[49] Some others, on the other hand, are in 'pith and substance' laws with respect to "the determination of matters of Islamic law and doctrine and Malay custom" and "the control of propagating doctrines and beliefs among persons professing the religion of Islam"[50]. The latter laws still exist in most States and have, since 2008, become the subject of legal challenges in the Federal Court.

The misconception is that the following offences have been regarded as Muslim 'precept' offences: 1) defying, disobeying or disputing a fatwa, 2) teaching any matter relating to the religion of Islam without a tauliah (accreditation) by the Majlis Agama Islam, and 3) publishing a publication contrary to Islamic law. In 2008, the Federal Court in Sulaiman Takrib held that Muslim Laws which penalise defiance or disobedience of a fatwa "are offences regarding the 'precepts of the religion of Islam'", and the State Legislatures have the power to make such laws.[51] It is submitted that the former legal finding cannot be correct given that under Islamic legal tradition, a fatwa is a non-binding opinion. The Federal Court did not seem to have considered the legislative history of the offence or applied the correct legal test, i.e., the pith and substance test. Should it have, the Federal Court would have concluded that the law was in 'pith and substance' an offence with respect to "the determination of matters of Islamic law and doctrine and Malay

[49] **Mamat Daud & Ors. v. The Government of Malaysia [1988] 1 CLJ (Rep) 197, SC**
[50] **Administration of Muslim Law Enactment 1952: Section 166; "Whoever, save in his own residence and in the presence only of members of his own household teaches or professes to teach any doctrine of the Muslim religion without the written permission in that behalf of the Kathi shall be punishable…".**

custom", and the State Legislatures have been conferred with power to create offences in respect of such a matter pursuant to Item 9 of the State List. While the decision in Sulaiman Takrib is correct, i.e., that the law is constitutional, it would still be necessary for the Federal Court to revisit its erroneous legal reasoning and correct it given its potential to misdirect Judges in similar cases. For example, adopting the erroneous legal reasoning in Sulaiman Takrib, the Federal Court in Fathul Bari and ZI Publications went on to hold that the offence of teaching religious matters without a tauliah (accreditation) and publishing a publication cont rary to Islamic law respectively are also "offences against precepts of the religion of Islam".[52] Once again, it will be submitted that this cannot be correct given that these are not religious precepts. These laws are in 'pith and substance' offences with respect to "the control of propagating doctrines and beliefs among persons professing the religion of Islam". In both these cases too, the Federal Court did not seem to have considered the legislative history of the relevant laws or applied the correct legal test.

[51] **Sulaiman Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) [2009] 2 CLJ 54, FC**
[52] **Fathul Bari Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Ors [2012] 4 CLJ 717 at paras. 24 – 25, FC.**

6.1.2. Misconception on the Overlapping Jurisdiction of the High Court and Syariah Courts

The High Court in Malaya and the High Court in Sabah and Sarawak are constituted by Article 121(1) of the Constitution. The Courts of Judicature Act 1964 provides the general and specific civil jurisdiction of the High Courts.

- Courts of Judicature Act 1964: Section 23; all civil proceedings where - (a) the cause of action arose; (b) the defendant or one of several defendants resides or has his place of business; (c) the facts on which the proceedings are based exist or are alleged to have occurred; or (d) any land the ownership of which is disputed is situated, within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

- Courts of Judicature Act 1964: Section 24: (a) jurisdiction under any written law relating to divorce and matrimonial causes; (b) the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981; (c) jurisdiction under any written law relating to bankruptcy or to companies; (d) jurisdiction to appoint and control guardians of infants and generally over the person

and property of infants; (e) jurisdiction to appoint and control guardians and keepers of the person and States of idiots, mentally disordered persons and persons of unsound mind; and (f) jurisdiction to grant probates of wills and testaments and letters of administration of the estates of deceased persons leaving property within the territorial jurisdiction of the Court and to alter or revoke such grants.

Article 74(2) of the Constitution empowers the State Legislatures to make laws for the State in respect of the matters enumerated in List II of the Ninth Schedule of the Constitution (the State List). Pursuant to Item 1 of the State List, the State Legislatures are empowered to make law on the "constitution, organisation and procedure of *Syariah* courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in [Item 1 of the State List]". The States have exercised this legislative power and have constituted *Syariah* courts in the States under the respective enactments. These State laws, in creating offences against precepts of the religion of Islam, are subject to the limitations as imposed by federal law (meaning, by the Parliament), that is to say the *Syariah* Court (Criminal Jurisdiction) Act 1965 (Act 355), as prescribed by the Federal Constitution (Item 1 of the State List). In this regard, there is no question of conflicting provisions in the Federal Constitution. In the federal structure as prescribed by the Federal Constitution, matters of Islamic law and Malay custom are exclusively State subject matter. These State laws, generally, impose three limits

of jurisdiction on the *Syariah* courts: 1) subject matter (generally Muslim personal law), 2) subject person (Muslims only), and 3) territorial (within each state) (**APPENDIX IV** describes these limits further).

As is a well-accepted and established fact in law, legal drafters do not contradict themselves in a legal document. The notion that the Federal Constitution conflicts with itself can never be entertained. Should there even seem to be an internal inconsistency, principles of legal interpretation call for Judges to adopt an interpretation that gives effect to all provisions of the Constitution without destroying any one, i.e., the rule of harmonious construction - another well-known and established fact in law.

In the current federal structure of Malaysia, matters of Islamic law and Malay custom are exclusively State subject matter. It follows, so should the jurisdiction of the *Syariah* courts. It would, therefore, be correct to conclude, as the Federal Court has on two occasions, that "if laws are made by Parliament and the Legislatures of the States in strict compliance with the Federal List and the State List and unless the real issues are misunderstood, there should not be any situation where both courts have jurisdiction over the same matter or issue". The notion that the High Court and the *Syariah* courts have overlapping jurisdictions is, in our opinion, effectively, a fiction. The High Court and the *Syariah* courts are not courts of "concurrent jurisdiction".[53]

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[53] Black's Law Dictionary, (8th Ed., Thompson West, (1999)): "concurrent jurisdiction"; "1. Jurisdiction that might be exercised simultaneously by more than one court over the same subject matter and within the same territory, a litigant having the right to choose the court in which to file the action." (p. 868)

What does happen, in our experience, is that *Syariah* courts are granting orders outside of its subject matter, subject person or territorial jurisdiction. In such instances, Article 121(1A) will become an issue. This leads to the next issue.

There is also a misconception on the effect of Clause (1A) of Article 121 on the judicial power of the High Courts. Clause (1A) provides that the High Courts 'shall have no jurisdiction in respect of any matter within the jurisdiction of the *Syariah* courts', prohibits the High Court from exercising supervisory power over the *Syariah* courts when it acts without or in excess of its subject matter, subject person or territorial jurisdiction. The Federal Court, on two occasions, has held that 'Article 121(1A) was introduced not for the purpose of ousting the jurisdiction of the civil courts. It was introduced in order to avoid any conflict between the decision of the *Syariah* courts and the civil courts which had occurred in a number of cases before'. The most notable example of this is the case of Myriam v Ariff.[54]

In fact, the civil courts have, in recent years, made legal findings or declarations that *Syariah* court orders are 'null and void', 'not binding' or 'without effect', on the grounds of being in excess of the *Syariah* courts' subject matter, subject person and territorial jurisdiction. This is a correct approach by the civil courts as the *Syariah* court is a "court of limited jurisdiction" or, in legal parlance, an "inferior court"; as a result, its decision on matters outside its jurisdiction have no validity. It can be quashed by

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[54] Myriam v Mohamed Ariff [1971] 1 MLJ 265 at 267C right – 268A left, HC (After having entered a consent order in the Syariah court, the Plaintiff then obtained an order over the same subject-matter in the High Court, thereby frustrating the Syariah court consent order)

the High Court, which has supervisory jurisdiction over all inferior tribunals. Since the enactment of Article 121(1A), the *Syariah* courts may also be referred to as courts of "exclusive jurisdiction".

A decision of the Supreme Court [Dalip Kaur Gurbux Singh v Pegawai Polis Daerah (OCPD) Bukit Mertajam and Anor (1991) 1 CLJ (Rep) 77], an earlier case, also confirms that Article 121(1A) has not taken away the jurisdiction of the civil courts to interpret state law enacted for the administration of matters pertaining to Islamic law and that if, in any civil court, a question on Islamic law calls for a decision, the civil court may request for the opinion of the State Fatwa Committee on the question and decide accordingly. Laws to the latter effect have existed and presently exists under the respective State enactments.

Therefore, for Article 121(1A) to apply, i.e., that the High Court shall have no jurisdiction in respect of a matter, it must first be demonstrated that: 1) the matter is within the legislative competency of the State, and 2) the *Syariah* court has been conferred, by law, jurisdiction over the matter.

In January 2018 the Federal Court in the case of Indira Gandhi confirmed that despite Article 121(1A), the High Courts continue to have the power to judicially review the actions of religious authorities and to supervise the jurisdiction of the *Syariah* courts.

6.1.3. The Binding Effect of a Fatwa in Malaysia

Before *Merdeka*, the 1952 Enactment of Selangor created a Legal Committee under the Majlis to issue fatwa or rulings on any point of "Muslim law or doctrine or Malay customary law" when requested to do so by any person or a Civil Court. This Legal Committee was chaired by the Mufti for the State. Similar laws existed even before 1952 in the Muhammadan Law and Malay Custom (Determination) Enactment 1930 (cap. 196, Federated Malay States).

The Constitution provides that the States may make laws conferring the relevant Islamic authorities in the States the rights to issue fatwas, i.e., in Item 1 of the State List, "the determination of matters of Islamic law and doctrine and Malay custom". Item 9 of the State List confirms that the States can enact offences in respect of this matter.

The State of Selangor will be used as an example. The Fatwa Committee in Selangor is chaired by the Mufti for the State with several official members. At present, the 2003 Enactment confers similar fatwa-making powers on the Fatwa Committee for the State of Selangor. Most States have also created a similar committee with equivalent powers and legal effect respectively. It must be remembered that Islam is a matter for the States. Consequently, any fatwa issued by the Fatwa Committee of the National Council for Islamic Affairs or Jawatankuasa Fatwa

Majlis Kebangsaan bagi Hal Ehwal *Ugama* Islam has no legal effect.

The Fatwa Committee is empowered "to prepare fatwa on any unsettled or controversial question of or relating to Hukum Syarak (Islamic law)"; whether on the direction of the Sultan, on its own initiative, or on the request of any person by letter. Also, if a question on Islamic law calls for a decision in the civil court, the court may request the Fatwa Committee's opinion on the question.

The procedure in making a fatwa is provided for in law:

1. Before a fatwa is made, the Mufti may cause any study or research to be carried out and a working paper to be prepared.

2. Whenever the Committee proposes to make a fatwa, the Mufti shall call a meeting of the Fatwa Committee to discuss the proposed fatwa.

3. After a fatwa is prepared by the Fatwa Committee, the Mufti shall submit the fatwa to the Majlis.

4. The Majlis may, after deliberating upon the fatwa, make a recommendation to the Sultan for his assent for publication in the Gazette.

5. The Majlis' recommendation shall be accompanied by an explanatory memorandum and comments if the Majlis considers it necessary.

6. When a fatwa has been assented to by the Sultan, the Majlis shall inform the State Government and thereafter shall cause the fatwa to be gazetted.

7. A gazetted fatwa must be accompanied by a statement referring to the relevant section it is made under.

In issuing a fatwa, the Fatwa Committee shall follow the accepted views of Mazhab Syafie. If the Fatwa Committee considers that following the accepted views of Mazhab Syafie will lead to a situation which is repugnant to public interest, the Fatwa Committee may follow the accepted views of Mazhab Hanafi, Maliki or Hanbali. If none of the four Mazhabs may be followed without leading to a situation which is repugnant to public interest, the Fatwa Committee may make the fatwa according to ijtihad (independent reasoning).

Upon gazetting, a fatwa shall be binding on every Muslim in Selangor as a dictate of his religion and it shall be his religious duty to abide by and uphold the fatwa, unless he is permitted by Islamic law to depart from the fatwa in matters of personal observance. The Fatwa Committee may amend, modify or revoke any fatwa that has been gazetted. A fatwa is recognised by all courts in Selangor of all matters stated.

Besides the above general fatwa-making powers, the law also permits the making of fatwa which relates to matters of national interest.

There have been times where fatwas go beyond 'Islamic law, doctrine and Malay custom' and directly affect the expressions of information and ideas of a secular nature, for example, pluralism and liberalism. This would adversely affect Muslims who express such information and ideas given that, in many States, any person who "defies, disobeys or disputes" a fatwa or "disseminates any opinion…contrary to any fatwa" can be prosecuted for an offence. Non-conformance to a fatwa should, therefore, not be made a criminal offence.

Given that fatwas are made pursuant to the law by a public authority created by law (e.g. the Fatwa Committee), it must follow that the legality of these fatwas can be subject to judicial review on the grounds that: 1) that the 'pith and substance' of the fatwa is not envisaged by State law or the Constitution and thus not within the jurisdiction of the Fatwa Committee, or 2) that it purports to restrict freedom of speech and expression. The Court of Appeal has confirmed that a fatwa can be challenged on administrative law and constitutional law grounds. The Federal Court has, recently, granted leave to appeal against the Court of Appeal's decision.

Furthermore, any attempt by the State Legislature to confer "judicial review" powers on the *Syariah* court over the Fatwa

Committee's fatwas like in Selangor would, arguably, be unconstitutional given that the *Syariah* courts can only have jurisdiction over person's professing the religion of Islam. These must be natural persons and not public authorities who cannot profess a religion. A constitutional challenge under Article 4(3) of the Constitution would, arguably, be sustainable, i.e., that the State Legislature has no power to make such laws.

In addition to these several issues related to the binding effect of a fatwa, there is another more mundane issue regarding fatwas - the lack of a mechanism for members of the public to be made aware of a fatwa that has been gazetted; after all, the large majority of the public do not read the government gazette (or are not even aware of it).

6.1.4. Proposal to Implement Hudud in Malaysia

The proposal to implement hudud in Malaysia is an ongoing debate. There was a private member's Bill seeking to amend the *Syariah* Courts (Criminal Jurisdiction) 1965 Act (Revised 1988) (Act 355) to confer on the *Syariah* courts the power to impose increased punishments for Islamic law offences created by State legislation. This proposal is linked to *Syariah* laws enacted in the State of Kelantan's *Syariah* Criminal Code (II) (1993) 2015[55] providing for hudud offences.

Just before *Merdeka*, in Selangor, the *Syariah* courts (called *Kathi* courts) were empowered to try any offence committed by

[55] **Date of Royal Assent: 23 April 2015. Date of publication in the Gazette: 27 August 2015. Date of coming into operation: Not Yet In Force (shall come into operation on a date to be appointed by His Royal Highness the Sultan by notification in the Gazette).**

a Muslim and punishable under the 1952 Enactment. Among the 27 offences contained in the said enactment, the heaviest punishments applied to the offence of 'Illicit intercourse between divorced persons', 'Religious books' and 'Contempts of religion', i.e., imprisonment for a term not exceeding six (6) months or with fine not exceeding $500.

Since *Merdeka*, Article 74(2) of the Federal Constitution (read together with Item 1 of the State List) provides the States with the power to make laws with respect to the following matter: "the constitution, organisation and procedure of *Syariah* courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in [Item 1 of the State List], but shall not have jurisdiction in respect of offences except in so far as conferred by federal law".

On 1st April 1965, the Muslim Courts (Criminal Jurisdiction) Act 1965 (Act 23 of 1965) was enacted to confer the Muslim courts with jurisdiction in respect of offences. The Constitution does not require the consent of the Conference of Rulers to pass the said Act. The Constitution would expressly say so otherwise.

Section 2 of the said Act reads as follows:

> "The Muslim Courts duly constituted under any law in a State and invested with jurisdiction over persons professing the Muslim religion and in respect of any of the matters

enumerated in List II of the State List of the Ninth Schedule to the Federal Constitution are hereby conferred jurisdiction in respect of offences against precepts of the Muslim religion by persons professing that religion which may be prescribed under any written law:

Provided that such jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding six months or with any fine exceeding one thousand dollars or with both."

In 1984, the said Act was amended to permit the *Syariah* courts to have jurisdiction in respect of offences punishable with "imprisonment for a term not exceeding 3 years or with any fine not exceeding RM5000 or with whipping not exceeding 6 strokes or with any combination thereof".

In 1988, the Act was revised and renamed the *Syariah* Courts (Criminal Jurisdiction) Act 1965 (Act 355) ("the SCA"). Section 2 of the SCA now reads:

"The Syariah Courts duly constituted under any law in a State and invested with jurisdiction over persons professing the religion of Islam and in respect of any of the matters enumerated in List II of the State List of the Ninth Schedule to the Federal Constitution are hereby conferred jurisdiction in respect of offences against precepts of the religion of Islam by persons professing that religion which may be prescribed under any written law:

Provided that such jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof."

On its face, it must be observed that the words in bold are an error. List II is the State List. The words in bold should be deleted and the sentence reworded.

At this juncture, it must be observed that:

i. The State List prescribes both a specific legislative matter and general legislative matter with respect to "offences". The former is found in Item 1 and phrased "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 latter is found in Item 9 and phrased "[c]reation of offences in respect of any of the matter included in the State List or dealt with by State law…".

ii. Selangor, for example, has enacted an offence relating to mosques and an offence relating to Muslim charitable contributions. The creation of such offences is an exercise of legislative power pursuant to Item 9 (read together with the sub-matter "mosque", "charities and charitable institutions" respectively in Item 1) of the State List, and not under the

'precept offences' sub-matter in Item 1. These are not 'precept offences'; there is no authority in Islam, according to our knowledge, that requires a Muslim to obtain written authorisation from a religious council before collecting money for the support and promotion of Islam, or to obtain written permission from a religious council before using a building as a mosque.

iii. The SCA only confers jurisdiction on the Syariah courts "in respect of offences against precepts of the religion of Islam", and not "in respect of all offences under Muslim Law". As a result, offences with respect to "mosques" and "charities and charitable institutions", for example, can only be tried in the Magistrates courts, and prosecution instituted by the Attorney General and not the Chief Syarie Prosecutor of the State.

On 26th May 2016, a Member of the House of Representatives (Dewan Rakyat) ("the MP") from Marang, Terengganu, proposed a Private Member's Bill in Parliament to increase the jurisdiction of the *Syariah* courts in respect of offences. The proposed amendment to Section 2 of the SCA, albeit being confusingly worded, seeks to permit the *Syariah* courts to impose all punishments permitted under substantive Islamic law save for the death sentence.

On 24th November 2016, the MP tabled an amended Private Member's Bill which would permit the *Syariah* courts to impose punishments for offences that prescribe a maximum of 30

years imprisonment or a fine of RM100,000.00 or 100 lashes ("the Amendment to the SCA"). The MP then asked for the said Bill to be debated in the next sitting in 2017.

On 6th April 2017, the MP was allowed to table his amended Private Member's Bill. The Speaker of the House of Representatives, however, decided to halt the proceedings in respect of the said Bill; postponing the debate to the next Parliamentary sitting in July, where it was once again deferred to the next Parliamentary sitting, and without allowing Members of the Opposition to be heard. Since then the Bill has been stuck in limbo.

Capital offences in Islamic criminal justice system are called hudud (the plural for hadd), meaning "restraint" or prohibition. These are offences that are specified in the Qur'an and Sunnah. Hudud crimes are often seen as criminal behaviour against Allah, or public justice.

In Malaysia, its laws are made, executed upon and interpreted, by three secular institutions, namely the Parliament, the Yang di-Pertuan Agong (or Cabinet) and the Courts respectively. The Constitution, a secular document, remains the supreme law of the Federation, to which the legislature, the executive and the judiciary remain subordinate to. Islamic law, unless enacted by the legislature (a secular institution), has no place in the present constitutional and legal framework. Therefore, there is no question of hudud applying in Malaysia.

In fact, this was the contention raised in the Supreme Court case of Che Omar[57].

What the Amendment to the SCA, in effect, seeks to do is to permit the *Syariah* courts to impose increased punishments for particular Muslim offences created by the States - offences which the state of Kelantan refers to as "Huddud" and enacted in Kelantan's *Syariah* Criminal Code (II) (1993) 2016[58]. Table on hudud 'Offences under *Syariah* Criminal Code (II) (1993) 2015 (Kelantan)' is shown in **APPENDIX V**.

Shad Saleem Faruqi (G25 Malaysia, 2016)[59] raised several constitutional issues on the introduction of "Huddud" offences, among them:

1. Federal-state division of powers: States have the authority over items under Schedule 9 List II, except in regards to matters included in the Federal List. Criminal law and procedure are under the federal jurisdiction. For instance, the language used for the offence of Sariqah (theft) and Hirabah (robbery) in Kelantan's Syariah Criminal Code (II) (1993) 2015, for instance, suggests it being both a public wrong and a moral wrong; the general characteristics of a crime and is, therefore, related to "criminal law"; a matter within the Federal List of the Constitution[60]. Given that the

[57] Che Omar Bin Che Soh v Public Prosecutor [1988] 2 MLJ 55, SC

[58] Date of Royal Assent: 23 April 2015. Date of publication in the Gazette: 27 August 2015. Date of coming into operation: Not Yet In Force (shall come into operation on a date to be appointed by His Royal Highness the Sultan by notification in the Gazette).

[59] G25 Malaysia (2016), Breaking the Silence: Voices of Moderation. Islam in a Constitutional Democracy, Kuala Lumpur, Marshall Cavendish.

said offences are, arguably, in 'pith and substance', laws with respect to "criminal law", the State Legislature of Kelantan does not have the power to make such laws. These offences are, accordingly, unconstitutional. At present, both offences can also be found in the Penal Code. [61]

2. Syariah courts have no jurisdiction over non-Muslims: Schedule 9 List II, Paragraph 1 clearly States that Syariah courts only have jurisdiction over persons professing the religion of Islam.

3. Penalties that may be imposed by Syariah courts are prescribed by Syariah law: The relevant federal law is the Syariah Courts (Criminal Jurisdiction) Act 1965. It imposes limits on penalties that the Syariah courts can impose. Death by stoning, amputations and life imprisonments are outside the powers of the state.

4. Possible constitutional challenges to hudud laws: In the event PAS succeeds to legislate for criminal law in Kelantan, the State Enactment may be challenged in court
on several constitutional grounds such as equality before the law, and no religious discrimination.

In addition to these arguments based on the Constitution, there

[60] **Federal Constitution: Ninth Schedule, List 1, Item 4**
[61] **Penal Code: Theft (Section 378/imprisonment for a term which may extend to seven years or with fine or with both) and Robbery (Section 390/imprisonment for a term which may extend to fourteen years, and he shall also be liable to fine or to whipping)**

are also other arguments that have been put forward by several writers and scholars of Islam. These arguments include:

The 14 references to hudud in the Quran are not what are referred to by the currently-proposed amendment to the SCA 1965.

The Quran is clear on the need for punishments to follow the principles of compassion (ihsan) and proportion (setimpal), with the judge exercising the principle of discretion (budibicara or takzir); hudud being part of the Islamic legal system, has to follow these principles.

- The Quran in several surahs and ayats (examples are Surah 4:16-18; Surah 5:39; and Surah 7:153) also provides for a sinner to be given opportunities for repentance, even repeatedly so, and hudud punishments may not give the
- sinner this opportunity.
  That contextually, hudud is not applicable in today's situation as opposed to the situation in the 7th century.

  A society that imposes hudud must be a society that makes it unnecessary for anyone to commit the crimes of hudud –
- for example, it should be one where stealing is not needed or justified because no one needs to steal.

Additionally, Chandra Muzaffar has highlighted comparisons between countries that have implemented hudud and those

that have not. In the countries that have implemented hudud, nearly all of them are authoritarian, adopt a literal approach to laws and religious precepts, marginalise non-Muslim minorities and subordinate women. From the perspective of human dignity and social justice, not one of them is worthy of emulation. Of the countries that have non-implemented hudud, Indonesia has, since its founding in 1945, remained committed to Panca Sila as its national ideology. Panca Sila whose first principle is the Oneness of God makes no mention of hudud. Turkey also chooses secular law as the basis of its system of governance. Neither The Freedom and Justice Party in Egypt, nor the An-Nahda of Tunisia, incorporated hudud into its manifesto when it sought power in the post-2011 scenario following the Arab uprisings. Chandra Muzaffar further argues that hudud in Malaysia has been reinforced by the intimate link between Islam and Malay ethnicity which has strengthened identity consciousness as a whole in a situation where the Malay-Muslim populace has always perceived the large, economically stronger Chinese community as a challenge to its own position in what is historically a Malay land.

Two features are noteworthy here – firstly, this proposal for introducing hudud came from a leader of a political party, which would render it as an attempt at politisation of a religious matter, which is unacceptable. Secondly, provisions for the punishment of all the crimes under hudud (theft, highway robbery, illicit sexual intercourse, false accusation of illicit sexual intercourse, drinking alcohol and apostasy) are already provided for under

the penal code, thus rendering hudud unnecessary and of no added value.

6.1.5. Difficulties Attached to Anyone who Renounces the Islamic Faith in Malaysia (Apostasy)

A misconception arose after the introduction of a new particular in the Malaysian identity card (IC) prescribing that the word 'Islam' must be affixed on the IC of Muslims. This was introduced by the then Minister of Home Affairs in 2000 through a retrospective amendment to the National Registration Regulations 1990.[62] Abdullah Ahmad Badawi, later Prime Minister of Malaysia. National Registration (Amendment) Regulations 2000 PU(A) 70/2000: Regulation 14 (in force from: 1-10-1999)]

The National Registration Department or Jabatan Pendaftaran Negara then began executing a policy, i.e., that to remove the word 'Islam' from the IC, the applicant had to procure an order of the *Syariah* court to the effect that he had renounced Islam. This became the subject matter in the case of Lina Joy. Lina Joy was born as a Malay and Muslim (Azlina Jailani); she converted to Christianity at the age of 26 and applied to change the "religion" in her IC from Islam to Christianity but she faced administrative and bureaucratic barriers in doing so. The change of name from Azlina Jailani to Lina Joy was, however, done. Because of the negative and potentially threatening publicity over her case, she was forced to go into hiding.

The Federal Court's majority decision seems to have been confined to matters of administrative law, leaving out substantive

[62] **Abdullah Ahmad Badawi, later Prime Minister of Malaysia. National Registration (Amendment) Regulations 2000 PU(A) 70/2000: Regulation 14 (in force from: 1-10-1999)**

considerations of constitutional law. From the perspective of administrative law, the Federal Court's majority decision may have some practical basis. There is no denying that having been a Muslim, a person might have pending legal obligations under Islamic law which require determination owing to his apostasy or renunciation of Islam. Given that apostasy in Islam would affect the apostate's Muslim marriage, matrimonial property (harta sepencarian), guardianship (perwalian), custody of children (hadhanah), succession and inheritance, a policy requiring conclusive determination of these matters before particulars in identity documents are changed, can be considered reasonable.

However, when one considers constitutional law, the Federal Court's majority decision becomes problematic. As noted by the minority Judge of the Federal Court:

> **"...In my view apostasy involves complex questions of constitutional importance especially when some States in Malaysia have enacted legislations to criminalize it which in turn raises the question involving federal-state division of legislative powers. It therefore entails consideration of Arts. 5(1), 3(4), 11(1), 8(2), 10(1)(a), 10(1)(c), 12(3) and the Ninth Schedule of the Constitution.**[63]

Another aspect of the unreasonableness of the policy of NRD is in its consequence if followed.

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[63] Richard Malanjum FCJ (later CJSS)

In some States in Malaysia apostasy is a criminal offence. Hence, to expect the appellant to apply for a certificate of apostasy when to do so would likely expose her to a range of offences under the Islamic law is in my view unreasonable for its means the appellant is made to self-incriminate." [Emphasis added]

Laws penalising apostasy by way of fines, imprisonment and rehabilitation can be found in several States in Malaysia. However, it is our opinion that these laws are all, arguably, unconstitutional for being inconsistent with the right to profess, guaranteed by Article 11(1) of the Constitution:

- **Enakmen Kesalahan Syariah (Negeri Melaka) 1991: section 66; (1) Apabila seseorang Islam dengan sengaja, sama ada dengan perbuatan atau perkataan atau dengan cara apa jua pun, mengaku hendak keluar dari Agama Islam atau mengisytiharkan dirinya sebagai orang yang bukan Islam, Mahkamah hendaklah, jika berpuashati bahawa seseorang itu telah melakukan sesuatu yang boleh ditafsirkan telah cuba menukarkan iktikad dan kepercayaan Agama Islam sama ada dengan pengakuan atau perbuatannya sendiri, memerintahkan orang itu supaya ditahan di Pusat Bimbingan Islam untuk tempoh tidak melebihi enam bulan dengan tujuan pendidikan dan orang itu diminta bertaubat mengikut hukum syarak.**

- **Crimes (Syariah) Enactment 1992 (Perak): Section 13: Any Muslim who willfully, either by his action or words or in any manner, claims to denounce the Religion of Islam or declares himself to be a non-Muslim is guilty of an offence of deriding the Religion of Islam and shall, on conviction, be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.**

- **Syariah Criminal Offences Enactment 1995 (Sabah): Section 63: (1) Whenever a Muslim person by his word or conduct whatsoever intentionally claims to cease to profess the religion of Islam or declares himself to be non-Muslim, the Court shall, if it is satisfied that such person attempts to change iktikad and belief on the Islamic religion either by his word or conduct, order that the person be detained in the Islamic Rehabilitation Centre for a term not exceeding thirty-six months for rehabilitation purposes and such person be asked to repent in accordance with Hukum Syarak.**

- **Syariah Criminal Offences Enactment 2013 (Pahang): Section 10: Any person who declares that he has left the religion of Islam, whether orally, in writing or in any other manner, for any purpose commits an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.**

Freedom of thought, conscience and religion is intrinsic to human dignity.[64] Arguably, without respect for freedom of thought, conscience and religion, a democratic society would cease to exist. Article 11 of our Constitution is titled 'Freedom of religion'. Article 11(1) guarantees to "every person" in Malaysia (and not merely citizens or non-Muslims) three distinct rights, i.e., the right to profess, practise and propagate his religion.

There is no constitutionally permitted ground to prohibit the mere profession of one's religion; the right to profess a religion of one's choice is a right guaranteed by Art 11 of the Federal Constitution. This would also be consistent with the constitutional position in the United States of America (USA), Canada and the United Kingdom (UK).

However, the right to practise is subject to general laws relating to public order, public health or morality,[65] and the Constitution permits the States to control or restrict, by law, "the propagation of any religious doctrine or belief" among Muslims.[66] Article 11(2) confirms that a non-Muslim cannot be compelled to pay to the funds of *zakat, fitra* and *baitulmal*.[67]

There have been two Supreme Court decisions in Malaysia which have expressly and impliedly affirmed the right of a person to change his religion in Malaysia (even if it be from

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[64] **Universal Declaration of Human Rights 1948, Article 18**
[65] **Federal Constitution: Article 11(5)**
[66] **Ibid., Article 11(4)**
[67] **Ibid., Item 1 of State List; "Zakat, Fitra and Baitulmal or similar Islamic religious revenue"**

Islam to some other religion).[68] There also used to be clear Muslim Laws which validate a person's conversion out of Islam;[69] these laws have now been repealed and replaced with a vague legal provision in most States that permit the *Syariah* High courts to make "a declaration that a person is no longer a Muslim.[70] The State of Negeri Sembilan is an exception; it has a very elaborate process for renouncing Islam.[71]

Apart from the constitutional law perspective, from an Islamic law perspective, the issue of apostasy (including the legal consequences of being an apostate) is a subject of debate among Islamic jurists. Apart from the legal perspective of apostasy, from an Islamic perspective, apostasy has a different connotation. Since no one can be coerced to believe in God, in Islam, it follows that no one can be coerced to remain in Islam. Thus, a Muslim may choose to leave Islam. It is not a right as such, but a person exercising their choice. Leaving Islam is something that is regrettable. A Muslim who wants to exercise that choice should be persuaded to remain within the fold. However, if he persists to forsake Islam, it is between him and God. There is no earthly punishment provided in the Quran.

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[68] Minister for Home Affairs, Malaysia & Anor. v Jamaluddin Othman [1989] 1 CLJ Rep 105 at 107d, g – h, SC (per Abdul Hamid Omar LP, Hashim Yeop Sani CJ (Malaya) & Ajaib Singh SCJ); Dalip Kaur Gurbux Singh v Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor [1991] 1 CLJ (Rep) 77 at 83h, SC (per Hashim Yeop Sani CJ (Malaya) & Harun Hashim SCJ)

[69] Administration of Muslim Law Enactment 1965 (Perak): Section 146; (2)
Administration of matters pertaining to islamic Law Enactment 1978 (Johore): Section 141; (2)
Administration of the Religion of Islam and the Malay Custom Enactment 1982 (Pahang): Section 103;(2)

[71] Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003: Section 119; Renunciation of the Religion of Islam.

[70] E.g. Johore: Administration of the Religion of Islam (State of Johor) Enactment 2003 (s. 61(3)(b)(x)). Kedah: Syariah Courts (Kedah Darul Aman) Enactment 2008 (s.13(3)(b)(x)). Kelantan: Council of the Religion of Islam and Malay Custom Enactment 1994 (s. 102(1)).

6.1.6. Lack of Appreciation that Malaysia is a Secular State as Provided for by the Federal Constitution

There is very little to no regard by the Government in providing legal education in schools and in the media on the provision by the Federal Constitution for Malaysia to be a secular state.

Section 3.2 has extensively presented the historical evidence of the events in 1957 – the deliberations of the Reid Commission and the Working Group, with the unambiguous outcome that Malaya/Malaysia was to be a secular state created by a secular document, i.e., the Federal Constitution. In a chapter titled "The Governance of Religious Diversity in Malaysia: Islam in a Secular State or Secularism in an Islamic State?" from the book "The Problem of Religious Diversity: European Challenges, Asian Approaches",[72] academicians Ahmad Fauzi Abdul Hamid and Zawawi Ibrahim pointed out clearly:

> **"Enunciation of a Federal Constitution in 1957, by crystallising such separation between religion and state, effectively established secularism as a governing principle despite an absence of reference to it in words. Although nowhere in the Constitution is the word 'secular' mentioned, the secular basis of an independent Malaya was arguably affirmed by parties deliberating the drafting of the document. Tunku Abdul Rahman**

[72] The Problem of Religious Diversity: European Challenges, Asian Approaches (edited by Triandafillidou A, Moodood T), Edinburgh University Press, page 180

(1903–90), leader of the Alliance coalition and later first Prime Minister of independent Malaya, assured fellow members among the Working Party that reviewed the draft prepared by the British-appointed Reid Commission, that the whole exercise of framing the Constitution was undertaken on the understanding that the resultant federation would be a secular state."

The administration of matters pertaining to Islam in Malaysia requires adherence to the provisions of a secular document, i.e., the Federal Constitution; however, there is evidence that there is generally poor understanding among Muslims of the Federal Constitution. In the chapter by Fauzi and Zawawi mentioned above, the writers went on to state that:

"With such varied understandings, the practice of secularism and experience of secularisation have not been uniform even among Western countries that agree that secularism and secularisation are positive attributes of modern statecraft. Responses from the Muslim world have ranged from outright rejection to qualified acceptance, if only for its practical unavoidability. Some have gone to great lengths in pitting Islam against secularism in antithetical positions, without any common ground between the two."

This lack of appreciation (wilful or otherwise) by leaders and the public has led to endless debates and controversial

interpretations of Article 3(1) of the Federal Constitution - which states that, “Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation”. These interpretations are to bolster the view that Malaysia is something other than a “secular state”. However, when Article 3 (including its five clauses) is interpreted as a whole, the conclusion as to its meaning is evident. The phrase, “Islam is the religion of the Federation” places Islam as the State religion insofar as it enables the Conference of Rulers to extend any Muslim religious acts, observances or ceremonies to the Federation as a whole; with each Ruler, in his respective capacity as Head of the religion of Islam, authorising the YDPA to represent him, as confirmed by Article 3(2), e.g., determining the commencement of fasting in Ramadhan and the dates of Hari Raya Puasa and the Hari Raya Haji. Besides, and particularly in light of Article 3(4), the phrase “Islam is the religion of the Federation” remains to be a declaration without any legal effect.

Crucially, although the word ‘secular’ is not used in the Federal Constitution, there is clear evidence from the report of the Reid Commission and the provisions of the Federal Constitution itself that Malaysia is meant to be a secular state (as outlined in Section 3.2.1. on the Reid Commission report in Box 3 below). To quote Tunku Abdul Rahman, who on 1 May 1958 said, “I would like to make it clear that that this country is not an Islamic state as it is generally understood; we merely provided that Islam shall be the official religion of the state”. Again, on

February 8 1983, he said that, "…the country has multiracial population with various beliefs; Malaysia must continue as a secular state with Islam as the official religion". For Tunku Abdul Rahman, Malaysia is not an Islamic state because *Syariah* is not the basis of law in the country as it is civil law/common law that governs the land.

Box 3: Features upholding Malaysia's position as a secular state, as contained in Section 3.2.1. of the Report of the Reid Commission

On Malaysia's historical development, the Reid Commission Report notes:

"169. We have considered the question whether there should On Malaysia's historical development, the Reid Commission Report notes:

"169. We have considered the question whether there should be any statement in the Constitution to the effect that Islam should be the State religion. There was universal agreement that if any such provision were inserted it must be made clear that it would not in any way affect the civil rights of non-Muslims. In the memorandum submitted by the Alliance it was stated – 'the religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religion and shall not imply that the State is not a secular State.' There is nothing in the draft Constitution to affect the continuance

of the present position in the States with regard to recognition of Islam or to prevent the recognition of Islam in the Federation by legislation or otherwise in any respect which does not prejudice the civil rights of individual non-Muslims. The majority of us think that it is best to leave the matter on this basis, looking to the fact that Counsel for the Rulers said to us – 'It is Their Highness' considered view that it would not be desirable to insert some declaration such as has been suggested that the Muslim Faith or Islamic Faith be the established religion of the Federation. Their Highnesses are not in favour of such a declaration being inserted and that is a matter of specific instruction in which I myself have played very little part.' Mr Justice Abdul Hamid is of the opinion that a declaration should be inserted in the Constitution as suggested by the Alliance and his views are set out in his note appended to this Report.

...

Note of Dissent by Mr Justice Abdul Hamid

...

11. It has been recommended by the Alliance that the Constitution should contain a provision declaring Islam be the religion of the State. It was also recommended that it should be made clear in that provision that a declaration to the above effect will not impose any disability on non-Muslim citizens in professing, propagating and practising their religions, and will not prevent the State from being a secular State. As on this matter the recommendation of the Alliance was unanimous their recommendation should be accepted and a provision to the following effect should be inserted in the Constitution either after Article 2 in Part I or at the beginning of Part XIII.

"Islam shall be the religion of the State of Malaya, but nothing in this article shall prevent any citizen professing any religion other than Islam to profess, practise and propagate that religion, nor shall any citizen be under any disability by reason of his being not a Muslim."

12. A provision like one suggested above is innocuous. Not less than fifteen countries of the world have a provision of this type entrenched in their Constitutions, Among the Christian countries, which have such a provision in their Constitutions, are Ireland (Article 6), Norway (Article 1), Denmark (Article 3), Spain (Article 6), Argentina (Article 2), Bolivia (Article 3), Panama (Article 36) and Paraguay (Article 3). Among the Muslim countries are Afghanistan (Article 1), Iran, (Article 1), Iraq (Article 13) Jordan (Article 2), Saudi Arabia (Article 7), and Syria (Article 3). Thailand is an instance in which Buddhism has been enjoined to be the religion of the King who is required by the Constitution to uphold that religion (Constitution of Thailand, Article 7). If in these countries a religion has been declared to be the religion of the State and that declaration has not been found to have caused hardships to anybody, no harm will ensue if such a declaration is included in the Constitution of Malaya. In fact in all the Constitutions of Malayan States a provision of this type already exists. All that is required to be done is to transplant it from the State Constitutions and to embed it in the Federal."

The July 1957 Constitutional Proposals for the Federation of Malaya unequivocally notes:

"Religion of the Federation

57. There has been included in the proposed Federal Constitution a declaration that Islam is the religion of the Federation. This will in no way affect the present position of the Federation as a secular State, and every person will have the right to profess and practise his own religion, and the right to propagate his religion, though this last right is subject to any restrictions imposed by State law relating to the propagation of any religious doctrine or belief among persons professing the religion of Islam."

A close consideration of Malaysia's basic law or the Federal Constitution highlights the following features which uphold its position as a secular state:

i. While Islam is declared to be the State religion, the Constitution stipulates that its position is subject to the provisions on fundamental liberties, citizenship, the separation of the legislative, executive and judicial powers in Malaysia, federal-state relations, finances, elections, public services, etc. [Article 3(4)]

ii. The Constitution proclaims itself to be the supreme law of the Federation, as opposed to the holy book of any religion. [Article 4(1)]

ii The Constitution does not create a Head of the religion of Islam for Malaysia.

iv. The Constitution guarantees the Rule of Law and Separation of Powers i.e. Malaysia's laws are made, executed upon and interpreted

by three secular institutions, namely, the Parliament, the Yang di-Pertuan Agong (or the Cabinet or any other person as determined by the Parliament) and the Courts respectively. [Article 39, 44 and 121]

v. The Constitution confirms that decisions in Parliament are made by a majority; a basic feature of Democracies, and not Theocracies. [Article 62(3)]

vi. The Constitution regards "written law" and "common law" as the applicable laws in Malaysia. Substantive Islamic law is not considered "law" under the present legal framework; it must be legislated for. [Article 160 and 74(2)]

vii. The creation of key religious authorities, i.e., the Majlis Agama, the Mufti and the *Syariah* courts, are all pursuant to laws passed by a secular institution, i.e., the State Legislative Assembly. [Item 1 of State List]

viii. All Ministers of Cabinet, members of the Houses of Parliament and Judges take an oath of office which requires them to "preserve, protect and defend" the Constitution, as opposed to any religion. [Sixth Schedule]

ix. There is no religious qualification with respect to office(s) in Government; thus, a person of any religious affiliation can be a member of the Legislature, Executive or Judiciary in Malaysia.

x. The Constitution guarantees freedom of religion for all persons. [Article 11(1)].

On Malaysia's system of governance, 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."

Further to the evidence shown in Box 3 on the secular character of Malaysia, there have been several cases that have reaffirmed this; the most often-cited is Che Omar Che Soh in which it was argued that the punishment of death penalty for drugs and firearms offences was unconstitutional for being inconsistent with Islam, pursuant Article 3(1) of the Constitution. The Supreme Court rejected this argument on the grounds that the two (2) legal submissions raised – "because Islam is the religion of the Federation, the law passed by Parliament must be imbued with Islamic and religious principles" and "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" – are both contrary to the constitutional and legal history of Malaysia.

6.2. Transgressions

From casual observation, media reports and anecdotes from members of the public, there clearly have been actions by religious authorities that were beyond their mandate. Some of these are presented below.

In a paper by Prof Shad Saleem Faruqi, "Recent Developments Eroding Malaysia's Position as a Moderate Islamic Nation", he presented the transgressions under four headings (executive exuberance; trespass on federal list; violation of human rights; and jurisdiction of *Syariah* courts) and provided examples for them.[73]

1. Executive exuberance:

The Constitution did not envisage that ecclesiastical authorities of one religion will enforce their fiat on followers of another religion. Increasingly, this is taking place. Instead of letting the police enforce state laws that forbid non-Muslims from preaching their religion to Muslims, (Article 11(4) of the Federal Constitution), some *Syariah* authorities are taking it upon themselves to violate the sanctity of Christian places of worship. They enter churches and seize Bibles containing the word Allah. In Selangor, 321 seized Bibles were retained for about one year despite an instruction from the then Menteri Besar (MB) to return the Bibles and a decision by the Attorney-General under Article 145(3) that no offence was committed. Only with the intervention of the Sultan was this issue partly resolved. Some time ago, there was a raid on a church to arrest

[73] Extracted from Prof Shad's Article, December 2014

Muslims suspected of being proselytised. A Hindu wedding was disrupted to arrest the bride suspected of being a Muslim. Funerals have been disrupted by forcing wailing, non-Muslim relatives to surrender the bodies of their loved ones because of suspicion that the deceased was a Muslim before death. There is some overzealousness in converting minors in orphanages and boarding schools (particularly in Sabah) to Islam, and that too, without parental approval or knowledge. Recently, there was a raid on the Borders bookstore to unlawfully seize a book that was not banned and to question the shop's Muslim and non-Muslim workers.

Fatwas have been issued against "liberalism" and "religious pluralism" without defining these terms precisely. It should be noted that the word "liberal" is employed approvingly even in our Rukun Negara. Some time ago, a fatwa was issued against the practice of yoga. In Negri Sembilan, the MB recently warned religious enforcers not to go overboard by entering homes to detain a man who was dressed like a woman.

2.Trespass on federal list:

In the matter of Islam, State Legislatures have power over 25 personal law matters plus very limited power to create and punish "offences against precepts of the religion of Islam" provided that the crimes are not in the Federal List or covered by federal law. In reality, state assemblies are passing laws as if the entire field of Islam is within their jurisdiction. Many State Legislatures are ignoring the federal-state division of powers

in the Constitution. State Legislatures are passing "huddud-like" laws such as legislating against homosexuality, betting, lotteries and HIV-testing even though these are all within federal jurisdiction. Some state authorities are operating rehabilitation centres and reformatories for Muslims who have deviated from the right path. Under the Constitution, all prisons, rehabilitation centres and reformatories are in federal hands. The case of Revathy aka Siti Fatimah in 2007 illustrates this. Revathy was the daughter of a Hindu couple who converted to Islam, who changed Revathy's name to Siti Fatimah. Revathy, however, did not live her with parents, and was raised by her grandparents and she continued to live and practise as a Hindu, despite having a Muslim name. She married a Hindu man according to Hindu rights and they had a daughter. Subsequently, she was charged with apostasy and ordered by state *Syariah* court to be detained for 100 days at the Ulu Yam Faith Rehabilitation Centre in the outskirts of Kuala Lumpur.[74]

3.Violation of fundamental rights:

All citizens are entitled to freedom of speech and expression except on grounds of public order, national security, incitement to an offence, defamation, morality, etc. However, a Negri Sembilan state law confers absolute power on a Ta'uliah committee to forbid a Muslim without a Ta'uliah from conducting a religious talk. In Fathul Bari Mat Jahya (2012), this law was challenged but was upheld by the court. Any Muslim discourse without a Ta'uliah can be prosecuted. Dr Mohd Asri Zainul Abidin, the Mufti of Perlis, found that out to his detriment. In

[74] As seen on: https://www.aljazeera.cin/news/asia-pacific/2007/05/200852513390760277.html

many States, any challenge to a fatwa is a crime, no matter how respectfully the questioning may take place, no matter how learned the challenge may be. Freedom of speech in the Constitution is disregarded.

*Wakaf*s created by Muslims may be compulsorily taken over by *Syariah* authorities in some States, the right to property in Article 13 notwithstanding.

Many Arabic and Malay words are forbidden to non-Muslims even if there is no connection with any attempt to convert. The irony is that the word Allah occurs in some state national anthems. The words Allah and Muhammad are part of police badges. Are we then going to hold that any non-Muslim who sings the state anthem or dons a police uniform is attempting to proselytise a Muslim and therefore, violating the state law and committing a crime?

4.Jurisdiction of Syariah courts:

Under the Constitution's Schedule 9, List II, Para 1; *Syariah* courts have no jurisdiction over non-Muslims. However, there are innumerable cases in which *Syariah* courts give orders dissolving non-Muslim marriages registered under civil law when only one spouse has converted to Islam. This, in manifestation, disregards several superior court decisions that a marriage contracted under civil law can only be dissolved under civil law by the civil courts. Many *Syariah* courts separate pining non-Muslim mothers from their infant children by granting custody

to the father who has converted to Islam. Most of the time, such custody orders are issued ex parte (after hearing one side only), and behind the back of the grieving mother. It is difficult to reconcile such judicial practices with the command of Allah in the Holy Quran (5:8) to be just and fair: "O Ye who believe! Stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong or depart from justice. Be just: that is next to piety …". Some *Syariah* courts and authorities convert infant children to Islam without the knowledge of the non-Muslim parent. In one instance, a *Syariah* court ordered the exhumation of a corpse in a Hindu burial ground – something only a magistrate is empowered to do under the provisions of the Local Government Act.

One contentious issue which is related to abuse of power is moral policing, and the consequent debate on what offence constitutes a "personal sin" (committed by individuals often with no victims, thus not justifying state intervention) and what constitutes a "crime" (that have victims and implications on society for which the state will have to intervene such as corruption, violation of human rights, and bigotry). The most frequent enforcement of personal sin as an offence is khalwat (close proximity between a man and a woman who are not husband and wife). The abuse of power is made worse by wrongful enforcement such as married couples being caught and detained for failure to show their marriage certificate.[75] There have also been serious untoward implications of khalwat raids as seen in the news in December 2016 which was headlined, "Cop dies, another seriously injured jumping out of windows to escape

[75] As seen on: https://www.malaymail.com/news/malaysia/2017/02/17/khalwat-arrest-of-married-couple-shows-jawi-spares-no-one-lawyer-says-video/131721576
[76] As seen on: https://www.thestar.com.my/news/nation/2016/12/06/crime-cop-dies-another-injured-khalwat-raids/

khalwat raids".[76] This puts into question the wisdom or even validity of the intent of such a law. The issue of personal sins being made crimes also apply to eating in public during Ramadan, consuming alcohol, and not attending the Friday congregational prayers.

In another paper, Prof Shad Saleem Faruqi highlighted actions by religious authorities which, in his opinion, cannot even be deemed as personal sins. He cited a posting, which went viral over social media, that warned that Muslim women who failed to don head scarves would be slapped with an RM80 fine for their first offence while they faced an RM120 fine for indecent dressing. It also claimed that Muslims riding motorcycles with those unrelated to them would be punished by an RM80 fine for men and RM100 for women. All businesses had to stop operating from 12.30 p.m. until 2.30 p.m. on Fridays. Those caught behaving in an "unIslamic way" would have to undergo counselling.

There are various other instances of transgressions by religious authorities with the more recent ones relating to:

(i)The Muslim-only launderette in Johor and Perlis, in which the operator and a religious authority linked to JAKIM and claimed that it is acceptable due to the issue of cleanliness. This had drawn criticisms from the Rulers of Johor and Perlis and subsequently, the Conference of Rulers issued a decree calling on all Muslims to behave with respect, moderation and inclusiveness in a country that is home to people of diverse faiths and ethnic groups.

Mustafa Akyol, an award-winning Turkish author, journalist and scholar, was arrested, detained and questioned for 18 hours by the Federal Territory Religious Department (JAWI) authorities, for allegedly 'teaching' Islam without credentials. Mustafa Akyol has been to Malaysia before and this is his fifth visit and on this occasion was scheduled to participate in a series of talks and discussions on current issues. The first session was a roundtable discussion titled, "Does freedom of conscience open the floodgates to apostasy?" The second was a lecture titled, "Democracy still relevant? The experiences of Turkey, Malaysia and other nations". His third session, unfortunately, was cancelled due to pressure by religious authorities (Loh, F., 2017).[77]

(iii) Kassim Ahmad who passed away on 10 October 2017, is one of Malaysia's foremost intellectuals and a well-read and respected Muslim thinker. He was first taken to court by JAWI in 2014 on three charges of allegedly insulting Islam and defying religious authorities. The Court of Appeal ruled in December 2015, and the Federal Court in March 2016, that JAWI's prosecution of Kassim was invalid and illegal. Despite this, JAWI refused to withdraw its charges against Kassim. It was only on 7th August 2017 that the Syariah prosecutors, on the instruction of the Syariah court, finally dropped the charges against Kassim.[78]

(iv) The actions taken by the Selangor Islamic Religious Department (JAIS**)** to seize the Bahasa Malaysia version of the Allah, Liberty and Love by Irshad Manji under the Syariah Criminal Offences (Selangor) Enactment 1995, and

[77] **As seen on: https://aliran.com/newsletters/2017-newsletters/religious-extremism-bigotry-midst/**
[78] **Ibid.**

to charge the director of the publishing company under the said Enactment, contravenes Article 10(1) of the Federal Constitution, which guarantees Malaysians the right to freedom of speech, freedom of assembly and freedom of association. Azmi Sharom (Chow, M. D., 2017)[79]

(v)highlights that, pursuant to Article 10(2) of the Constitution, freedom of expression can only be restricted by laws made by the Parliament and not the Selangor State Legislative Assembly. This is of particular relevance given that the said book may not even be a "religious publication" but merely a critique on religion and spirituality in the 21st century.

6.3. Unclear roles and objectives of certain Islamic institutions, and questionable credentials of muftis and other Islamic leaders

Several Islamic institutions have been established in recent years often with overlapping roles. These institutions – some international - presumably were established with good intentions and clear objectives. Some examples of these institutions (non-exhaustive) have made a good name for themselves, and even if some of the work they do sometimes overlap with each other's, and that of other institutions, it has not resulted in any negative outcomes. Indeed, it has enhanced the awareness and knowledge of Islam not only among Malaysians but also the international community. An important institution is the International Islamic University of

[79] As seen on: http://www.freemalaysiatoday.com/category/nation/2017/11/08/professor-only-parliament-can-limit-freedom-of-expression/

Malaysia (IIUM), established in 1983, and founded on Islamic principles; Islamic values are inculcated into all the disciplines taught at the university which has 14 faculties.

Three other institutions have also gained respect and repute. These are IKIM (Institut Kefahaman Islam Malaysia), ISTAC (International Institute of Islamic Thought and Civilisation), and IAIS (International Institute of Advanced Islamic Studies). These institutions largely focus on proliferating greater appreciation and understanding of Islam and Islamic civilisation through academic teaching, learning, research, and exchange of ideas and knowledge. These institutions strive to be the centre of excellence for research and education on Islam, civilisation, and contemporary issues by promoting high quality thought and discourse. While they are not involved in the administration of matters pertaining to Islam, they do have an influence, and certainly their activities have significant impact on Malaysians. However, if they do not encroach on the matters prescribed in the Constitution which constitute the "precepts" of Islam (and many of them do not), such organisations cannot be deemed as unconstitutional, and should not be viewed negatively. Many of these conduct activities to promote the understanding of Islam and to improve the lives of Muslims; some also carry out missionary activities.

However, there are other institutions that appear to have activities that overlap with other institutions and are supported by public funding and therefore, puts into question its efficiency. This can result in the public having a negative perception of the institution,

made worse by a management that is opaque. It is noteworthy that the Strategic Plan 2009-2014 of the Jabatan Kemajuan Islam Malaysia (JAKIM) identified nine challenges, and one of these are the "negative perception of the management of Islamic institutions" – which clearly shows that JAKIM itself recognises that it suffers from a negative perception.

One newly established institution, which the public has very little information on, is IKSIM (Institut Kajian Strategik Islam Malaysia). As its name implies, this institution is a research institution, and that it deals with "strategic research" in Islam. In this context, it was noted in Chapter 4.3. that JAKIM has a research division under the sector dealing with policy. Besides this lack of clarity of its purpose and possible overlapping role, IKSIM has been observed to have deviated from the principles of the Constitution. In its booklet dated 28th March 2017, IKSIM claimed that 'secularism, liberalism and cultural diversity are elements that will undermine the Islamic agenda and destroy the country's sovereignty'. The booklet also states that, 'although Malaysians can embrace other religious faiths, the country is not duty-bound to protect other religions' (Faruqi, S. S., 2017).[80] IKSIM goes further to challenge the supremacy of the Federal Constitution by stating that it is a "misperception" that Islam's status is lower than that of the Constitution and goes on to state that the Constitution has stated clearly that Islam is the religion of the Federation and is therefore one of the country's most supreme laws. Clearly the views of IKSIM go against the principles of the Federal Constitution and should have no place in a multi-religious, multicultural society like Malaysia.

[80] As seen on: https://www.thestar.com.my/opinion/columnists/reflecting-on-the-law/2017/11/23/religious-radicalism-on-the-rise-doctrinal-and-cultural-diversity-existed-in-muslim-societies-even-i/

While many Islamic based NGOs do not threaten the secular nature and peace and security of the country, there are a few which have been shown to be intolerant, even violent and militant, preaching hatred and practising bigotry. Even more worrying, some of these are part of transnational networks with links to similar organisations outside Malaysia. The Jemaah Islamiyah, a pan-Asian extremist NGO, has a presence in this country, and it gained notoriety when Malaysian Nordin Mohd Top became Indonesia's most wanted terrorist, until he was killed in 2009 by Indonesian forces in an ambush.

A related issue of concern is the questionable qualifications and credentials of some Islamic leaders including some state Muftis. It is also to be noted that even those with adequate academic qualifications may not have the right attitude and personal values. This statement is made in this study and report based on the observed behaviour and statements or rulings made by some of the muftis, often with political undertones. In June 2016, a statement was made by a mufti on "kafir harbi" [81], in which he ruled that it is a major sin for Muslims to cooperate with non-Muslims. He specifically cited the political party Democratic Action Party (DAP), lending a political undertone to this statement by a state-sanctioned religious leader. Earlier, in November 2015, another mufti made a statement that a Muslim woman has no right to reject her husband's demand, adding that there is no such thing as rape in marriage, which according to him, is a European idea.[82] He quoted a hadith that uses a distasteful example – that a wife is to obey her husband even if he demands to have sexual intercourse while riding a camel.

[81] As seen on: http://www.utusan.com.my/berita/politik/dap-tergolong-kafir-harbi-wajar ditentang-1.346464

[82] As seen on: thecoverage.my/news/malaysian-women-must-give-their-husbands-sex-even-on-camels/

6.4. Intolerance towards non-Muslims and exclusivity in discourse on Islam

Malaysia has seen intolerance towards non-Muslims on the rise. The harassment of non-Muslims started many decades ago – the Kerling incident[83] in 1978 was the first major incident but this has gained increased momentum in recent years. Several examples include the desecration of places of worship of other religions; several reports of churches being desecrated, crosses taken down and bibles burnt; body-snatching upon the death of a person; requirement for all business premises in Kelantan including even those without any Muslim workers, to close on Fridays; unilateral conversion of children; and prohibition of the use of the word 'Allah' by non-Muslims. Often this harassment and persecution amounts to violating their human rights. Recently, a new debate has emerged - whether Muslims can offer greetings to non-Muslims on their festival days such as Christmas, Deepavali and Chinese New Year.

Dr Maszlee Malik has expanded on this issue in a paper titled, 'Turning Malaysia Off in Inter-faith Strife'[84] in which he lamented the current excessive resurgence of Islamisation in the public sphere and the over-institutionalisation of Islam. He took note of several recent incidents that threatened the very fabric of the multi-plural character of Malaysian society, such as the cow head incident in Selangor in 2009 at the site where a Hindu temple was being proposed, and the torching of three churches in Selangor. He also observed that discourse on Islam tend to take the exclusive and

[83] In 1978, in a small town Kerling in the state of Selangor, five Muslim youths were ambushed and killed by Hindu youths; these Muslim youths had been desecrating Hindu temples in the area.
[84] This paper was published by the Yusof Ishak Institute, in PERSPECTIVE Issue 2016, No. 16, on 3 Nov 2016.

not the inclusive approach. It is pertinent to note that Dr Maszlee does not refer to what is used and understood as a specific concept and doctrine of “religious exclusivism”, which is common to all religions but especially to the three Abrahamic faiths. By this belief, followers of a certain religion believe that their religion is the only true religion, and only they will experience salvation. Rather, he refers to exclusivity as a generic concept and as an approach - used in all areas of human activities besides religion. However, it is more commonly used as its antonym “inclusivity” - such as inclusive education, inclusive social policy, which is often expressed as “leaving no one behind”.

6.5. Gender injustice

Islam is against any form of discrimination, oppression, inequality and injustice. Yet, in the administration of matters pertaining to Islam in matters pertaining to gender, this is often overlooked. Administrators of Islam tend to interpret the Quran and especially the hadith to justify their stand on the unjust treatment of women. In his book, ‘Hadith and Gender Justice’, Indonesian scholar Faqihuddin Abdul Kadir reminds readers that the Quran emphasises a number of aspects regarding the relations between men and women. Firstly, men and women are created from the same entity (Surah Al Nisa 4:1) and for that reason, they are of equal standing. Secondly, both men and women have the obligation to lead good lives and do good work (surah Al Nahl 16:97). Thirdly, men and women have the same right to be rewarded for their work (Surah Al Ahzab 33:35). These principles need to be applied to practice. As an example, he cites marriage – a man and woman who contracts

a marriage assume equal responsibility, share a commitment to create a good family life, treat each other with kindness, and consult each other to solve problems. The author also laments the way erroneous interpretations have maligned mainstream Islam; citing the arrogant views of religious superiority and exclusivism, the growing Arabisation of Islam, and the idea that women are somehow less in value than men.

Patriarchy which is pervasive in almost all cultures plays an important role in the subordination of women. Men have traditionally been accepted as having the right to control and treat women in any way that they wish to. Many people tend to forget that one of the revolutionary innovations of the Quran was the recognition of rights of women. In the pre-Islamic period, except for rare examples such as Khadijah, wife of the Prophet pbuh, a woman was practically a slave to a man. She had no right to property, in fact, she was the property of a man. Islam changed that to a large extent. Unfortunately, this right has been and is being dismissed from several aspects in many Muslim societies.

In Malaysia, commendable progress was made in 1984 when the Islamic Family Law (Federal Territories) Act 1984[85] granted several rights to Muslim women and was regarded as one of the most progressive in the Muslim world. However, subsequent amendments to this Law in 1994 and 2005 diminished the rights of Muslim women in Malaysia. More legal rights were given to men and the use of gender-neutral language extended to men the legal rights that historically were seen as the rights of women. Zainah

[85] Islamic Family Laws are legislated at the State level. Generally, the State laws provisions are similar.

Anwar[86] attributes this discriminatory legal reform arising from the growing conservatism and politicisation of Islam in the country that led to increasing discrimination against women in the name of Islam.

The discriminatory provisions include:

- The right of the husband to claim a share of his existing wife's assets upon his polygamous marriage (Section 23(9));

- The husband's burden of proof to justify a polygamous marriage in court is reduced by amendments to Sections 23(3) and 23(4)(a). In the original 1984 law, a proposed polygamous marriage had to be shown to be "just and necessary". The 2005 amendments changed this to "just or necessary"

- The wife must choose either maintenance or division of harta sepencarian (matrimonial assets) upon a husband's polygamous marriage (Section 23(9)(a)) thus significantly disadvantaging a woman in terms of maintaining her standards of living prior to the polygamy). Furthermore, the husband now can sell the matrimonial home and divide the proceeds even as he enters into a polygamous marriage;

- Extending the wife's right to fasakh divorce to the husband (Section 52(1)); and

- A husband can now get a court order to stop his wife from disposing of her assets (Section 107A).

[86] G25 Malaysia (2016), Breaking the Silence: Voices of Moderation. Islam in a Constitutional Democracy, Kuala Lumpur, Marshall Cavendish.

In response to these discriminatory amendments to the Islamic Family Law, Sisters in Islam (SIS) drafted a model Muslim Family Law drawing on best practices from Muslim countries, a national consultation on the Law, and the live examples and realities facing Malaysian women. Alongside other women's groups, SIS has also sent memoranda and letters to government ministries and agencies urging them to address discrimination faced by women in law and in practice. A committee was set up by former Prime Minister Tun Abdullah Ahmad Badawi after there was a public outcry over the 2005 amendments to the Islamic family law. This committee was chaired by the Attorney General's Chambers and SIS, and other members of the women's rights coalition group known as the Joint Action Group for Gender Equality were represented. An agreement was reached to amend discriminatory amendments.

The government submitted the amendments on the Islamic Family Law to the Council of Rulers, with amendments to the Law Reform (Marriage and Divorce) Act 1976 (on the rights of non-converting spouses in cases of forced conversion of children to Islam where one spouse has converted (Section 51)). The Malaysian Council of Rulers said that they needed more time to consult with their state religious authorities. As of 2012, these amended Islamic family laws were with the Department of Islamic Development Malaysia (Jabatan Kemajuan Islam Malaysia (JAKIM)). Thereafter, the women's groups were informed that the Ministry of Women, Family and Community or the Attorney General's Chambers oversaw these matters considering the model law. To date, these amendments have not been tabled in the Parliament. The government has

demonstrated a lack of political will to push these changes through.

Malaysia has ratified the Convention on the Elimination of all Forms of Discrimination Against women (CEDAW) in 1981, after the United Nations (UN) adopted it in 1979. This convention has three core principles – non-discrimination, state obligations, and substantive equality. Many governments especially from Organisation of Islamic Cooperation (OIC) countries, have ratified CEDAW with reservation on Article 16 which is on marriage and family life. MUSAWAH[87] has argued that full implementation of CEDAW without reservations is possible because the core values and principles of Islam and CEDAW are compatible. In its publication in 2011,[88]MUSAWAH provides for guidelines and responses to claims of governments of Muslim or Muslim-majority countries that use Islam to justify non-compliance to CEDAW, with useful examples.

The lack of political will in advancing women's issues, interests and rights within the context of Islam is becoming a significant challenge in our society. Women's groups have had significant resistance in engaging the Government on issues that continue to affect them. The extremely conservative approach towards the religion has negated the consideration of women's lived realities. Is Islam a religion which condones laws and practices which cause injustice, and indeed harm and abuse? Where such injustice and harmful impact has been made evident, why are such laws still being defended and strengthened in the name of religion? We continue to face difficulties in dealing with issues of inheritance, the uneven playing field in the case of a woman instituting divorce

[87] Taken from knowledge building briefs (number 04) from MUSAWAH, published in 2017, which can be obtained from http://www.musawah.org/knowledge-building-briefs
[88] CEDAW and the Muslim Family Laws: In Search of a Common Ground (2011)

proceedings, the financial, psychological and emotional impact on the wives and the children of polygamous marriages, and so on. Law reform for critical areas such as marital rape and child marriage have not received political sanction because of the conservative Muslim lobby. Issues such as female genital mutilation continue to affect a majority of Muslim women and are now being defended by authorities as a matter that should not be considered as a serious issue. Teenage pregnancy, baby dumping, incest and rape are rising in statistics by the year and at the same time, sex education is prohibited for fear of encouraging immoral behaviour.

The gradual Islamisation process, largely state-sponsored, in Malaysia, has had an impact on women's rights, either through the judicial system and officialdom, or through societal pressures. The two most prevalent trends with Islamisation are (i) the segregation of women, and (ii) the call to adhere to a dress code, which has led to the veiling of women (manifested by various degrees – from head scarf, "mini telekung", hijab to nikab). In the state of Kelantan, a woman who is not veiled can be arrested; there is a policy for gender segregation at various places including pay counters at supermarkets.

Interaction especially physical, between men and women, is severely censored, both by official policy and societal norms. Society has also begun to censor the shaking of hands between men and women. The professor emeritus of Islamic law, Hayrettin Karaman, in Turkey, when asked of this answered (Akyol, M.),[89] "At the place and time in which there was no custom of handshaking,

holding hands between young men and women was much more likely to have a sexual connotation. The old jurists can be right from that regard. But today this custom is wide spread, it has become natural, and thus its connection with sexual passion has been weakened. It has become even a necessity".

It is commendable that movements like Sisters in Islam have come forward to find ways to redress this gender injustice perpetrated in the name of Islam and fight against Malaysian laws that stray from the true intent of Islam. In the words of Zainah Anwar (2003), "When injustice is committed in the name of religion, today's women will go directly to the religion's source to find out for themselves whether it could be so unjust to half of its followers".

On a more positive side, there has been encouraging trends in Malaysia. Religion has not been a barrier in giving girls and women educational opportunities. There is an encouraging trend for women to occupy positions of authority and decision-making although this is offset by two other trends – firstly, the number of these women is still relatively low compared to in some other countries (as in the number of women as Members of Parliament); secondly, the number of women occupying these positions is disproportionately low compared to the number and levels of achievement in universities and other educational institutions. It was a great step when two women were appointed as judges in the *Syariah* High Court in 2010, following a fatwa issued in 2006 allowing women to be appointed as judges.

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[89] **Akyol, M, Islam Without Extremes: A Muslim Case for Liberty, pp 236-237**

6.6. Injustice towards children

The rights of women especially mothers, are inseparable from the rights of children, on both biological and social grounds. The mother-child dyad underlies an integral relationship. The injustice towards women inevitably affects children as well. In a joint publication by Al Azhar University and UNICEF,[90] guidelines based on *Syariah* on several areas of child health were given. One is that family planning is allowed in Islam for spacing of pregnancies to ensure that the mother regains her health between her pregnancies. The same publication cited Sahih Al Bukhari on the command of the *Syariah* for husbands to take care of their wives at all times but particularly during pregnancy. The invocation in the Quran (Al Baqarah verse 233) on the command for mothers to breastfeed their infants for up to two years is well-known.

Mention was made above (on gender injustice) on child marriage and the rising trend of teenage pregnancy, which is a trend almost exclusively among Malay-Muslims. The implications and ramifications of unintended and unwanted teenage pregnancies are wide-ranging. Baby dumping is a social ill that has been recognised, and although some interventions have been introduced, these are clearly not enough. The limited, even lack of access to safe abortion services, is purely out of religious considerations.

Besides the link between the health of the child and mother, there are other aspects of child health that are issues of concern. The publication by Al Azhar Univerity and UNICEF cited above contains

[90] **Children in Islam: Their Care, Upbringing and Protection, Al Azhar University in cooperation with UNICEF (2005)**

a statement - that immunising (vaccinating) children against diseases is a duty in Islam. Last year, there was an unfortunate incident where the number of cases of diphtheria (a serious and potentially fatal disease in childhood) occurred in some states in Malaysia, with some of them being fatal. Diphtheria is a vaccine-preventable disease, and the government provides vaccines against several diseases during childhood through a well-managed health service which is free. Alarmingly, most of the cases were Malay-Muslim children whose parents did not bring them for vaccination, for reason of fear that vaccines may be haram. This unfounded fear may have arisen from the revivalism of Islam in which these parents obtained such baseless information through their own social networking. However, even if the religious authorities in the administration of matters pertaining to Islam have played no role in this, obviously, they did nothing to prevent it from happening, and were not forthcoming in taking remedial measures. The group G25 produced a video for dissemination to the public, urging parents not to deprive their children of life-saving vaccines.

The promulgation of the Child Sexual Offences Act 2017 recently is a positive development towards the protection of children. Under the law, serious punishment is accorded to sexual crimes against children such as grooming (touching and befriending children as a prelude to sexual abuse), making and possessing child pornography and child sexual abuse or if a person is found withholding information on sexual crimes against children. A special court will also be set up under the new law to deal with child sexual abuse cases more quickly.

The case of the unilateral conversion to Islam of the husband of Indira Gandhi provides a clear example of the injustice towards their child. The infant Prasana Diksa, was still dependent on the maternal care and nurturing including breastfeeding by her mother, and she was taken away by the father.

In January 2018, the Federal Court reached a unanimous decision, holding:

i) That the civil High Court has the exclusive jurisdiction to judicial review decisions of the Registrar of Muallaf (Converts) in registering persons as Muslims, i.e., whether the laws have been complied with before the registration is made;

ii) That a person below 18 must, by law, recite the Kalimah Shahadah (Profession of Faith) before he can be considered a Muslim and then be registered as one; and

iii) That it is a constitutional requirement under Article 12(4) of the Federal Constitution for the consent of both parents to be obtained before a person below 18 may be registered as a Muslim.

Sadly, throughout this custody battle, Indira has only seen her daughter once during the court hearing at the Ipoh High Court in 2009 when the toddler was one year and six months.

An issue which Sisters in Islam has been lobbying for intensely

is the issue of child marriage. The 2000 Population and Housing Census revealed that there were 53,196 married women in Malaysia who were between the ages of 15 and 19 (Department of Statistics Malaysia 2001). It was also estimated that a total of 11,400 children below the age of 15 were married: 6,800 girls and 4,600 boys. In the 2010 Population and Housing Census, it was shown that a total of 152,835 persons of the age group 15-19 were married (Department of Statistics Malaysia 2011). Of these, a total of 72,640 were males and 80,195 were females. A more recent indication was provided in March 2016 whereby the KPWKM revealed that a total of 10,240 child marriage applications were recorded by the *Syariah* Court over the course of 10 years, from 2005 to 2015 (KPWKM 2016). A further breakdown was provided whereby there was an indication of a hike in child marriage applications as the average number of the same for 2005 to 2010 was 849 but rose to 1,029 for 2011 to 2015 (KPWKM 2016).

Section 8 of Islamic Family Law (Federal Territories) Act 1984 stipulates the minimum age of marriage for Muslims to be 18 years old for boys and 16 years old for girls [91]. However, an exception is provided that allows a child under those ages to marry with the consent of the *Syariah* Court, for which there is no minimum age provided. There is no specific penalty provided if such an approval is not obtained. The marriage would be in contravention of the law thus it cannot be registered. However, if it is in accordance with Hukum Syarak, then the marriage may be registered, nonetheless. Effectively, the Islamic Family Laws do not provide a minimum age of marriage.

In contrast, Section 10 of the Law Reform (Marriage and Divorce) Act 1976 states that marriage for non-Muslims provides for a minimum age for marriage of 18 for both sexes, and prospective brides and grooms below the age of 21 years old require the consent of their parents to marry. Girls between the ages of 16 and 18 years old may marry with the permission of a Chief Minister but such permission cannot be given to persons below 16 years of age.

Compounding the issue, Section 375 of the Penal Code provides for an exception to rape where there are sexual relations in a marriage. An issue that has arisen in Malaysia is that of child marriage being used as a way out for perpetrators from being prosecuted for rape (even though at the time of the sexual intercourse, the two were not married).

Proposals to include the proposal for a minimum age of marriage to 18 in the amendments made to the Child Act in 2015 were not included, mainly as a result of the Muslim conservative lobby.

The National Fatwa Council has issued two fatwas in 1981 and 2003 respectively following the issue of illegitimate child (anak tak sah taraf) that a child cannot be surnamed to his or her father if he or she is born less than 6 months according to the Islamic Qamariah calendar. This has led to the practice of registering Muslim children's surnames as "binti/bin Abdullah" when they are born less than 6 months of the date of its parents' marriage. There are serious and unjust repercussions on the children's overall upbringing and well-being including their right to receive maintenance from paternal

family members, ability to inherit and not to mention the emotional trauma of having to face social stigma at a very tender age and as they grow up. In July this year, the Court of Appeal decided that a child who was born short of 6 months before a marriage can take his father's name. The decision was made based on compassionate reasons and to uphold the best interests of the child. It was welcomed by many parties as a progressive and enlightened approach towards the legalisation of religious requirements.

However, unsurprisingly, the conservative Muslim voices protested vehemently to the decision. The Malaysian Sharie Lawyers Association (PGSM) said the Court of Appeal decision would cause a quandary in family relationships among Muslims in future (Bakar, A. A., 2017).[92] The National Registration Department itself said that it will continue the practice of adding the surname "bin Abdullah" when registering a Muslim child whose parents are not married, and would appeal to the Federal Court. The Deputy Prime Minister and Home Minister, Datuk Seri Dr Ahmad Zahid Hamidi, said that the ministry supports the NRD to continue the practice of using the surname 'bin Abdullah' as surname in the birth certificate of children born out of wedlock. Zahid called on Muslims to unite and uphold the sanctity and tenets of Islam, and that decisions made by the National Fatwa Council should not be challenged by any quarter, be it individuals or judicial organs.

There are also no concrete and definitive measures undertaken by the government to remove inconsistencies between civil and *Syariah* laws that impact children. For example, in relation to the definition

[92] **As seen on: http://www.freemalaysiatoday.com/category/nation/2017/07/28/abdullah-issue-muslim-lawyers-body-wants-to-be-intervener-in-appeal/**

of the child, the Children and Young Persons (Employment) Act 1966 (Act 350) still defines a child to be any person who has not completed his or her 14th year, whereas the Child Act 2001 (Act 611) defines a child as a person under the age of 18. Additionally, under the *Syariah* Criminal Offences (Federal Territories) Act 1997 (Act 559) and the respective States' legislation pertaining to *Syariah* criminal offences, liability for a criminal act is attributed to the act of a person who has attained baligh, of sound mind and of free will. The main source of authoritative applicable principles in the administration of *Syariah* laws in Malaysia is Mazhab Shafie, and his view is that the age of puberty for both male and female is 15 years old. This would mean that a girl of 15 years of age may even be charged for 'khalwat' and a boy of 15 years of age may be imprisoned for failure to perform the Friday prayers. Prosecution for statutory rape of Muslim girls in such cases may become problematic. The provisions of the *Syariah* Criminal offence (Federal Territories) Act 1977 (Act 559) are contrasted with that of the *Syariah* Criminal Procedure (Federal Territories) Act that defines a 'youthful offender' as one between the ages of 10 and 16. Furthermore, the Penal Code sets the minimum age of criminal responsibility at 10, but the Internal Security Act applies regardless of age.

Another form of injustice towards children is the status of statelessness of children, which has a wide range of implications. There are difficulties and barriers posed by the religious authorities in the adoption of children (often parentless or abandoned); acknowledging that adoption is one of the best interventions for such children. Recently, there was news about the difficulties faced by the NGO Yayasan Chow Kit which was trying to get two brothers

adopted by a couple; and the difficulties were barriers placed by the religious authorities.

6.7. Sectarianism and divisions within the *ummah*

Sectarianism and divisiveness among Muslims of different schools of thoughts or mazhabs is a strong feature of Malaysian religious-cultural life. Islam in Malaysia is understood in a narrow domain – Sunni Islam of the Shafie mazhab, to the exclusion of all other forms of Islam. While there may be argument for not encouraging the other forms of Islam (which is believed by the authorities to threaten unity of the ummah), it is to be remembered that the Federal Constitution provides for freedom of religion. There is animosity and hostility of the Sunni Muslims in Malaysia towards the followers of the Shia denomination, who are subjected to various forms of harassment and persecution. The followers of the Ahmadiyya sect have also been subjected to similar harassment and persecution. The relationship between the Sunni and Shi'ite Muslims particularly has intensified over the last few years in the Muslim world, including Malaysia.

Syed Farid Alatas identifies one of the attributing factors that has led to such divisions within the ummah, as the lack of political will in putting into practice the values that inform the Amman Message.[93] The Amman Message, in brief, reflects the desire of Muslims around the world to be united and live lives free of sectarian conflict and strife. The Amman Message, which recognises the eight Islamic

[93] **Alatas, Syed Farid. Muslim Sectarianism and the Amman Message. In Breaking the Silence: Voices of Moderation. Islam in a Constitutional Democracy, G25 Malaysia Kuala Lumpur, Marshall Cavendish, 2016.**

schools, calls for tolerance and unity among the Muslims of the orld and deals with three fundamental issues known as the 'Three Points of the Amman Message'.

The first of the three points of the Amman Message recognises eight legal schools of the *Syariah* (which by logical extension are recognised creeds of Islam):

1)Sunni Hanafi;
2)Sunni Shafie;
3)Sunni Maliki;
4)Sunni Hanbali;
5)Syia Ja'fari;
6)Syia Zaydi;;
7)Zahiri; and
8)Ibadi.

By June 2006, more than 500 leading Islamic scholars and leaders from 84 countries had endorsed the Amman Message including the then Prime Minister of Malaysia Tun Abdullah Ahmad Badawi (although it was in his personal capacity, not on behalf of Malaysia). It should also be noted that Islam as provided for in Article 3 of the Federal Constitution does not limit Islam to specific Islamic groups and can therefore be inferred to be inclusive of all eight Islamic schools as provided in the Amman Message. However, over the past 30 years there has been increasing animosity towards the Shi'ite minority in Malaysia. At the Second International Seminar on "Islam Without Sectarianism", organised by the Islamic Renaissance Front (IRF) on 10th September 2016, academician Farid Alatas

highlighted several examples of incidences in Malaysia that had restricted the spread and practice of Shi'ism with some religious and political authorities openly encouraging the demonisation of Shi'ism and the persecution of Shi'ites.

There needs to be greater commitment and political will at the leadership level to build better appreciation and understanding among the Muslims in Malaysia, particularly between the Sunni and Shi'ites.

6.8. Deviation from the values and principles of the Constitution

Various levels of the Malaysian population exhibit a lack of understanding and appreciation of the fundamental liberties of the Federal Constitution. This manifests from a lack of understanding and appreciation of the role of Islam under the Constitution, in particular, Article 3(4) that stipulates that the practice of Islam in this country is subject to compliance with the Constitution including compliance with the fundamental liberties provisions of the same, such as the right to life and personal liberty, the right to equality, the right to freedom of movement and association, the right to freedom of speech and expression, and the right to profess a religion of one's choice. Ranita Hussein claims that the rise of conservative Islam has led to the views that there are competing interests between Islamic principles and the fundamental liberties of the Federal Constitution.[94] Ranita Hussein further points out that the Malaysian courts have not been consistent either- certain civil courts have not wanted to deal with cases involving fundamental liberties where

[94] **Hussein, Ranita. Islam and Human Rights in the Federal Constitution of Malaysia. Breaking the Silence: Voices of Moderation. Islam in a Constitutional Democracy, G25 Malaysia Kuala Lumpur, Marshall Cavendish, 2016.**

such cases are perceived to come under the purview of the *Syariah* courts. In contrast, the Court of Appeal decided on a transgender case in 2012 highlighting that the State law contravened several fundamental liberties ranging from personal liberty, equality, freedom of movement and freedom of expression.

6.9. Marginalisation and neglect of the Rukunegara

The marginalisation of the Rukunegara corresponds with the escalation of an identity-based approach to Islam. The Rukunegara, in both aspirations and principles, is a repudiation of the quest for a *Syariah*-oriented Islamic state. In Indonesia, the Pancasila plays a significant role and this is relevant to the administration of matters pertaining to Islam, especially in a secular country with Muslim majority, such as Malaysia and Indonesia (the latter happens to be the country with the biggest Muslim population in the world).

The Rukunegara embodies 5 aspirations or goals, and 5 principles which are:

Aspirations/goals	Principles
i. Greater unity in society	**• Belief in God**
ii. Democratic way of life	**• Loyalty to King and country**
iii. Ensuring a liberal approach to the rich and varied cultural traditions of the land	**• Upholding the constitution**
	• Rule of law
A just society in which the prosperity of the nation is shared in a just and equitable manner	**• Good behaviour and morality**

The five goals of Rukunegara have, however, been given less prominence. Chandra Muzaffar opines that this lack of focus or prominence given to the goals of Rukunegara could be attributed to several reasons: (i) Constant reminders of the goals of Rukunegara will make the people more evaluative of government leaders and policies; (ii) Aversion to the use of the word 'liberal' in the goals as it could be interpreted by some to mean absolute, unrestrained freedom; and (iii) some influential segment of society views goals such as 'a democratic way of life' or 'a progressive society' as "secular" and therefore, antithetical to their agenda of establishing an Islamic state guided by *Syariah* as interpreted by a segment of the ulama.

7. IMPACT OF ISLAMIC RESURGENCE

7.1. Some observed trends

Islamic resurgence or attempts to re-establish values, practices, institutions Islamic laws in the daily lives of Muslims have been on the increase in Malaysia. This is evident from several examples as follows:

- Greater internalisation of Islam, which is seen as a process whereby Islamic norms, attitudes, and values are absorbed and assimilated into a person's daily behaviour: Using Islamic attire, particularly for women, such as the hijab, is an example of this. Sometimes, this leads to a situation where everything Arabic is seen as Islamic. One way this can be clearly seen is the way in which Malay-Muslims began to dress, emulating Arabic culture, equating being Arabic to being Islamic. The manifestation of this is mainly in the rules of attire for both men and women but the impact is more felt for women, and it is more common to see women dressed like Arabs and not in traditional Malay costume. More recently, the Arabisation trend has now even expanded into the adoption of the Arabic language.

- When a religion spreads from one region to another, it is quite normal that elements of the culture of the society of origin of that religion be adopted by its new adherents. When Malays adopted Islam, the Malay language was influenced, as we can see in the emergence of Jawi. Many Arabic words also

found their way into Bahasa Melayu, for example, “tadbir” and “mustahil”. Other words are less obvious, such as “kuat” (from the Arabic “quwwah”) and “pasal” (from the Arabic “fasl”). This is the process of acculturation which is perfectly normal whenever there is contact between two different cultural areas.

- However, this kind of Arabisation from the early days of the coming of Islam to the Malay world must be distinguished from what is being referred to as Arabisation today. What is happening today is actually a very worrying trend. What is happening is the inappropriate aspect of the acculturation process. For example, adopting the niqab, gender segregation and using more Arabic vocabulary in daily discourse by an extreme segment of Malay society. This results in their marginalisation from the larger Malay society, promoting the notion that they are practicing a more “authentic” and “pure” version of Islam. This leads to exclusivism, which, in the Malaysian context, breeds discontent and hatred, both among moderate Muslims (adherents to wasatiyyah) and the non-Muslims.

- When Islam arrived in the Malay world centuries ago, it adapted itself to the culture of the region and did not marginalise the culture of its people. For example, the “zapin” (Arabic “zafin”), a musical and dance genre from the Hadhramaut, was indigenised to suit local conditions. The language of the song text of zapin became Malay and the dance was not gender-segregated, unlike in Hadhramaut. However, the situation today is extreme and exclusive. Malay music and dance genres such as wayang

kulit and mak yong are said to be un-Islamic and discouraged. The trend now is to erode or eliminate all things Malay in the name of “Arabisation”.

- Evidence points to the decline in the proficiency of Malay language among the younger generation of Malaysians. [Awang Sariyan, holder of the Malay Studies Chair at the Beijing Foreign Studies University, China, states that there are very few studies done on this phenomenon but nevertheless, the worrying trend has been highlighted by Dewan Bahasa dan Pustaka (DBP).] This is not solely due to the rise in the demand for the use of English. English proficiency in Malaysia is at an alarmingly low level as well, which goes to show that both Malay and English languages proficiency are on the decline. The situation is exacerbated by the Arabisation of Malay culture, and the infusion of Wahabbi and Salafi doctrine, accompanied by the use of Arabic words in daily life.

- Imposing Islamic norms, attitudes and values on society at large including non-Muslims: This includes actions taken by government agencies requiring the wearing of certain forms of attire when dealing with them or their agencies and putting up public signages touching on public behaviour that are acceptable and non-acceptable.

- One outcome of resurgence of Islamisation is the mushrooming of religious personalities, many of them passing off as “scholars” or “authorities”, and it is believed by many real

scholars that these newly emerging personalities do not have the required credentials. Even more disturbing is the use by these persons of all possible media, especially social media, with the expected consequence of them having large following among Malay-Muslims who themselves are not equipped to assess the credentials of their "idols" and "celebrity *imam*s" (often called "*imam* muda" suggesting their potential appeal to young followers, especially females). This is reminiscent of the televangelism trend in the USA in the 1970s and 1980s when a wide range of media that were relatively uncontrolled emerged. Some of these televangelists were found to be not only unqualified, but were frauds and opportunists making money.

- The increasing tendency to label individuals or groups who subscribe to a position that is different from that of mainstream Islam as liberals, secularist, pluralist, or modernist: The extreme manifestation of this would be the practice of labelling those who subscribe to a different view as takfiri. "Kafir" which was derived from takrifi is a term that is used to describe Muslims who are perceived to have betrayed or deviated from the faith as those that use this term believe that they are the only genuine Muslims. The purpose behind this is to delegitimise the views of the individuals or groups and the individuals or groups themselves.

- Islamisation of public policies: This process of Islamisation is believed to have occurred from the 1960s and is largely

driven by political interests. Under the premiership of Mahathir Mohamad, UMNO pursued various Islamic policies as part of their efforts to secure Muslim votes, against the threat of the votes going to PAS. Various policies and programmes were then introduced following the government's announcement of the Inculcation of Islamic Values policy in 1981; and in 2001, Mahathir Mohamad declared Malaysia as an Islamic state. These events contributed to the intensification of the process of Islamisation in Malaysia. A clear manifestation of greater Islamisation among Muslims is the increasing ritualistic demonstration of piousness and less demonstration of intrinsic Islamic values. Recent events in Malaysia show that while the manifestations of piousness are very clear and widespread, there is less demonstration of Islamic values such as tolerance and respect. It is also observed that there appears to be acceptance of, or at least indifference to, social ills and crimes like corruption (the relative lack of responses by religious leaders to the most recent alleged case of kleptocracy illustrates this well). On an individual level, while Malay-Muslims are very pious in terms of observing external rites and rituals, they appear to pay less attention to the internal spirit of the religion (ilmu tasawuf)[95] . This includes poor understanding of two particular precepts of Islam - wassatiyah (moderation) and Maqasid *Syariah* (the higher intent and spirit of Islam).

[95] **Tasawuf is a branch of Islamic knowledge which focusses on the spiritual development of the Muslim; some scholars refer to it as the inwardness (as opposed to the outward demonstration) of Islam.**

7.2. Assessing and comparing the practice of Islamic values by countries

Against this background of Islamic resurgence and increasing Islamisation, a relevant question is "So how 'Islamic'" is Malaysia and how tolerant is it?" This question clearly has relevance to the administration of matters pertaining to Islam. To provide some insight into this, three assessments are cited:

a) *How "Islamic" are countries of the world?* Islamisation, if carried out properly, is commendable, with the nurturing of Muslims who are not only pious and demonstrating religious conduct, but who are also truly following the teachings of Islam. However, it is regrettable that often, this is not the case. External demonstrations of religiosity are often at the expense of other practices demanded by Islam – ensuring justice, not practising or tolerating corruption, preserving community well-being, and protecting the environment. In a study conducted by a researcher/academician, the Iranian-born Dr Hossein Askari in George Washington University,[96] 208 countries were assessed as to how 'Islamic' they were. Countries that ranked high on being Islamic are not Muslim or Muslim-majority countries. Significantly, among the Muslim-majority countries, Malaysia had the highest rank at 33 (which we can judge as dismally low), to be followed by Kuwait which ranked 55. Dr Askari made the following statement, "The teachings of the Quran are best represented in Western societies than in

[96] How Islamic are Islamic countries?, Rehman S, Askari H, Global Economy Journal, Volume 10, Issue 2, 201

Islamic countries which have failed to embrace the values of their own faith in politics, business, law and society". He further commented, "Many countries that profess Islam and are called Islamic are unjust, corrupted, underdeveloped and are in fact not "Islamic" by any stretch of the imagination." This reflects the cause for concern mentioned in Section 2.1.4. – there is ample external manifestation of Islam with relatively less attention to the internal Islamic values.

b) *How closely do countries follow the Syariah and meet the objectives of Islam?* Malaysia introduced in 2015, the '*Syariah* index' – the first in the world – which serves as a benchmark to determine if a country is fulfilling the objectives of Islam[97] which is taken to be five principles of Maqasid *Syariah*, which are the protection of five aspects (religion, life, mind, race or progeny, and property). These are measured in eight primary areas – judicial, economy, education, infrastructure and environment, health, culture, politics and social. In the inaugural assessment in 2016, Malaysia scored 74.42% which is judged to be "very good" (above 80% is judged "excellent").[98]Before Malaysia introduced the *Syariah* Index, it played a prominent role in the *Syariah* Index Project (SIP) spearheaded by a team or conference of scholars led by *Imam* Feisal Abdul Rauf.[99] The team published a book, 'Defining Islamic Statehood: Measuring and Indexing Contemporary Muslim States'. Although the Conference of Rulers has not finalised the *Syariah* Index, their deliberations have been very rich and encompassing, and they

[97] As published on The Star of 11 February 2015. The original URL is down and an archived version of the URL is unavailable at the time of printing.
[98] As published on The Malay Mail. The original URL is down and an archived version of the URL is unavailable at the time of printing.
[99] Imam Feisal is the founder and chairman of the Cordoba Institute in the USA, a non-profit organisation dedicated to improving Muslim-West relations.

have achieved in defining the domains and parameters of the *Syariah* Index - an opportunity which Malaysia has used to formulate the index.

c) *How tolerant are countries towards their people who profess other faiths?* This is measured by the Social Hostility Index.[100] In a study conducted in 2015 by the United States (US)-based think-tank Pew Research Centre[101] which surveyed 198 countries, it is noteworthy that Malaysia was placed in the "very high" category, ranking 6th while Saudi Arabia ranked 7th, Indonesia ranked 8th and Brunei ranked 14th. Significantly, Malaysia was not listed in the "very high" or even "high" category in similar assessments conducted in 2014 and the years before that, suggesting that there is an increasing trend of social hostility (and therefore, intolerance and violence) against non-Muslims in Malaysia.

[100] The social hostility index measures hostile actions that effectively hinder the religious activities of targeted individuals or groups; these actions can be by government or private individuals, organisations or social groups and is based on 13 questions that relate to harassment, violence, and intimidation.
[101] Ibid.

PART IV:
CONCLUSION AND RECOMMENDATIONS

8. CONCLUSION

Findings of the study have been presented in the preceding chapters that describe:

- The historical evolution especially with regards to legal matters (Chapter 3) and organisational or structural arrangements (Chapter 4) in PART II; and

- The impact that is seen – this is as positive trends (Chapter 5), issues to be addressed (Chapter 6, most of the issues pertain to the legal aspect) and the effects of Islamic resurgence (Chapter 7) in PART III.

From these five sections, the following summary can be derived; from this summary, recommendations will be made in the next Chapter (Chapter 9).

Matters concerning Islam and Muslims have been administered in the country throughout history – from the pre-colonial era, the British colonial period (with the three entities of Straits Settlements, Federated Malay States and Unfederated Malay States), the Federation of Malaya in 1957 on gaining independence, to the formation of Malaysia in 1963 until what is practised today. In this historical evolution, the administration of matters pertaining to Islam – in its legal provisions, policies and institutional arrangements – must be in accordance with the Federal Constitution.

However, in recent times, there were several instances of discordance in the administration of matters pertaining to Islam. This report has confirmed some of these observations. Besides this major issue of discordance, there are other issues of concern, largely arising out of the trend of conservatism and Islamisation that began in 1970s, and which neither has been the impetus for, or the outcome of, administration of matters pertaining to Islam. While there are some positive trends and good practices; the issues of concern, however, far outweigh these positive trends and good practices. It is necessary, therefore, that steps are taken to address these issues. Specific recommendations are therefore made by the report, which when implemented, will offer an opportunity for Malaysia to be a model multi-religious, multicultural, multiracial secular country with moderate, tolerant and progressive Muslims.

9. RECOMMENDATIONS

In light of the above findings, inferences and conclusion from the report, the following recommendations are made. The issues of concern that need to be addressed are not confined to Chapter 6 alone (which is the chapter that describes the issues), because several other issues were identified while describing the historical evolution (Chapter 3, especially the legal aspects), the administrative arrangements (Chapter 4), the positive trends (Chapter 5, where while some have no issues to be resolved, like the tilawah al Quran, others do have issues as in religious education, Friday sermons and the premarital courses), and Chapter 7 (which sees some disturbing trends and the performance of countries in terms of its practice of Islamic values).

Since the issues of concern identified in these sections are many with some overlaps, several issues may be dealt with by the same recommendations. The following seven broad recommendations are made for the several issues described in the preceding chapters.

Seven broad recommendations

(1) To develop greater acceptance and understanding of religious diversity;

(2) To review religious education to make it relevant to the current situation and needs;

(3) To foster greater appreciation and understanding of the underlying principles and values of the Federal Constitution and the Rukunegara;

(4) To enhance the understanding of, and provide clarity on, Islamic laws for which there are two specific recommendations: (i) Specifying Offences Relating to th e Precepts of the Religion of Islam, and (ii) Introducing Uniform Laws;

(5) To focus on justice for women and children;

(6) To adopt a more inclusive approach in discourse on Islam; and

(7) To institute reforms of religious institutions in Malaysia so as to ensure consistency with the Federal Constitution, and for this recommendation, three institutions were identified namely (i) JAKIM; (ii) All Other Islamic institutions; and (iii) The Conference of Rulers.

9.1. To develop greater acceptance and understanding of religious diversity

There must be greater appreciation and understanding that there are different religions and sects, and doctrinal schools within a religion. This is the reality everyone must live with. For the believers of the different religions and sects, their own religion or sect is the correct path. This is not a problem, as long as we understand that others also believe fervently in the validity of their faith. We must respect this and accept it. This is what accepting pluralism is all about. Specifically, this recommendation calls for the following actions:

1. Instil in the people and educate them that it is important to accept the reality of religious pluralism. For Muslims, who have shown

to be less accepting than the other religious groups, to remind them that there are invocations in the Quran for tolerance and acceptance of followers of other faiths, and that there is no coercion in faith. For example, Surah 5:48 states that this is the divine will of Allah, because if Allah had so intended, he would have made us into a single people.

2. Build inter-religious relationships at the grassroot level: This entails ensuring that religious education in schools emphasises the importance of building a cohesive society and teaching all students about all the major religions and creating the platform for social cohesion, which allows Malaysians to come together and have an open dialogue to appreciate the other religions.

3. Engender greater political will and commitment towards ensuring religion is not used for political purposes: Besides the will to build inter-religious cohesion, there is also a need for Muslims in Malaysia to promote intra-religious peace and acceptance, especially honouring the Amman Message which several Malaysian leaders were signatory to. This can be implemented through specific regulations and official policies including those related to practices by officials of religious authorities such as JAKIM.

9.2. To review religious education to make it relevant to the current situation and needs

Religious education forms the core foundation in inculcating good spiritual values and in nurturing an active, inquisitive generation of young people who can engage in meaningful discourse on religion. The religious education as taught in schools is an important foundation in building good behaviour and character. The Ministry of Education and all other agencies that are involved in running Islamic education in the country either at federal or state levels have to ensure that they are not managing a dysfunctional system of Muslim religious education - one that is based on rote learning rather than active learning thereby resulting in a Muslim community that seems insufficient in its appreciation of Islamic doctrines. Specific recommendations to address this issue include the following:

1. The Government through the Cabinet should review the system of religious education for Muslims in Malaysia in a holistic manner, and if necessary, recommend potential amendments to the Education Act 1996 by the Parliament.

2. The review should investigate the goals, organisation, structure, and content of religious education for the entire educational system, both in the public and private domains. This should include recommendations to incorporate the standard school curriculum into these religious schools, which includes the

teaching of mathematics and science and other relevant educational disciplines.

3. Special attention should be given to the methodology and pedagogy of religious instruction, so that it is in sync with trends in educational practices to ensure meaningful internalisation of religious knowledge and practices.

4. The review should lead to Islamic religious education that is systematised and regularised, although the decentralisation of religious education to the states with the necessary oversight by the Federal Ministry of Education should be favourably considered and implemented.

5. As this review may take time, it is recommended that urgent issues like the problems surrounding tahfiz schools mentioned in Chapter 3.5.5 above be tackled separately.

6. Appoint a review committee to examine this issue and make comprehensive proposals: The Committee should comprise experts in education and religion.

9.3. To foster greater appreciation and understanding of the underlying principles and values of the Federal Constitution and the Rukunegara

These two instruments are fundamental to inculcate a culture of good citizenship and should be understood by every Malaysian. To inculcate greater understanding of the Federal Constitution and Rukunegara, the following approaches are proposed:

1. Include the underlying principles and values of the Federal Constitution and the Rukunegara and their historical evolution as part of the National Education Curriculum and encourage discourse to enable greater appreciation and understanding of the Constitution and the Rukunegara.

2. Ensure the reciting of the Rukunegara at schools and any public events including the principles and goals of the Rukunegara as opposed to the current practice of only reciting the principles.

3. Revive implementation of Rukunegara principles, starting in primary schools, inculcating Rukunegara practices through specially-designed projects in secondary schools and tertiary institutions.

4. Conduct more public engagements via social and print media and conducting open dialogue sessions to discuss the Constitution and the Rukunegara, which would also help to address any concerns the public may have on these issues.

Quotation 1: The Quránic conception of justice goes well beyond the confines of its legal connotations and courtroom proceedings. As their principal mission on building a just social order, Muslims are enjoined to act justly at all times, not only occasionally nor selectively, and to reject oppression and injustice. For justice is an emphatic command; it is a universal objective and its impartiality may not be compromised as far as possible, regardless of colour and creed " (Kamali, M. H., 2015).[102]

9.4. To enhance the understanding of, and provide greater clarity on, Islamic laws

In Chapter 6.1, issues of concern related to legal matters including laws on Islam were identified and discussed, and these underscore the need to ensure greater consistency in the approach and application of these laws. This would aid Muslims, Malaysia's majority population, in understanding the significance of Muslim Laws in their lives while making it accessible to all Malaysians. It would also encourage the participation of Muslims in their religious affairs and instilling democratic values on the community. Crucially, these consolidated uniform laws would give needed clarity to the public on the duties and powers of the respective religious authorities.

[102] **Mohd Hashim Kamali, "The Middle Path of Moderation in Islam", 2015, Oxford University Press, pp85**

9.4.1. Specifying Offences Relating to the Precepts of the Religion of Islam.

Item 1 of the State List (as provided for in List II of the Ninth Schedule of the Federal Constitution) confers on the State Legislature the power to create offences relating to the precepts of the religion of Islam, as well as the power to establish *Syariah* Courts. However, Item 1 does not define what is meant by 'offences against precepts of the religion of Islam'; the phrase 'precepts against the religion of Islam' has led to problems of interpretation as exemplified by the case of Sulaiman Takrib[103] and Fathul Bari.[104] Be that as it may, in the same breath, Item 1 of the State List also provides that the *Syariah* Courts shall have no jurisdiction to deal with such offences except in so far as conferred by federal law (i.e., by an Act of Parliament). This means that in the absence of federal law (such federal law is an instance where the Parliament is conferred the power to legislate over a State matter), such 'precepts of Islam' offences can only be dealt with by the normal ir civil courts (for example.g.,, the magistrate courts or the Sessions Courts), and not by the *Syariah* Courts. In other words, in order for the *Syariah* Courts to have jurisdiction over precepts of Islam offences, Parliament must first pass an Act to specify the kinds of actions or deeds deemed by the Parliament to be offences against the precepts of Islam and to formally confer upon the *Syariah* Courts the jurisdiction to deal with such offences; thereafter, followed by the State Legislature passing a State Enactment adopting the

[103] **Sulaiman Takrib v Kerajaan Negeri Terengganu [2009] 2 CLJ 54**
[104] **Fathul Bari Mat Yahya v Majlis Agama Islam Negeri Sembilan [2012] 4 CLJ 717**

offences (unless the State Legislature had, prior to the passing of the Act, already passed a State Enactment creating such offences). In our view, the intention of the restrictive provision in Item 1 of the State List is for the Parliament to exercise control over the State Legislature in creating such offences and over the *Syariah* Courts in exercising jurisdiction over the same.

In spite of this constitutional restriction imposed on the State Legislature and the *Syariah* Courts by Item 1 of the State List, yet, perhaps due to oversight, after Independence (that is to say, after the coming into force of the Federal Constitution on 31 August 1957), the Parliament did not take any prompt action to pass an Act to confer on the *Syariah* Courts jurisdiction to deal with the precepts of Islam offences. It was only some eight years later, in 1965, that the Parliament passed the *Syariah* Courts (Criminal Jurisdiction) Act 1965 (Revised 1988) (Act 355) to confer on the *Syariah* Courts the jurisdiction to deal with precepts of Islam offences.[105] However, with respect, we find a serious shortcoming in the drafting of the Act. We note that although the Act purports to confer jurisdiction on *Syariah* Courts to deal with precepts of Islam offences, it does not specify what the offences are over which the *Syariah* Courts will have jurisdiction. Section 2 of the Act merely provides in general terms, effectively parroting the wordings of Item 1 of the State List:

> **...are hereby conferred jurisdiction in respect of offences against precepts of the religion of Islam...**

[105]In the meantime, the Syariah Courts of the States had been unlawfully exercising jurisdiction over precepts of Islam offences, and so in order to 'validate' such purported exercise of jurisdiction by the Syariah Courts, Act 355 contains a 'validation' provision in the form of Section 3.

Instead, Act 355 only focussed on the punishment aspect of the offences by limiting the powers of the *Syariah* Courts to impose imprisonment up to a maximum of three years only; to impose a fine up to a maximum of RM5000 only; and to order whipping up to a maximum of six strokes only. By so doing, what the Parliament had done is to merely leave it to the State Legislature to determine what offences against the precepts of the religion of Islam are over which the *Syariah* Courts would have jurisdiction, instead of Parliament itself specifying the offences. Is this the intention of Item 1 of the State List? With respect, this report does not think so. In our view, the intention of the Federal Constitution is for the Parliament to specify the offences so that the Parliament would have control over the State Legislature in creating such offences and over the *Syariah* Courts when it comes to exercising jurisdiction over such offences. In other words, what is seen here is a situation where the Parliament has abdicated its constitutional responsibility over an important subject-matter in favour of the State Legislature.

This report shows that it is imperative that the Parliament, by federal law, should specify the precepts of Islam offences, instead of leaving it to the State Legislatures. If the Parliament were to specify the offences, the Parliament would not only be carrying out the role as expected of it by the Constitution, but also, there will be uniformity in the law of the States as far as offences against the precepts of Islam are concerned. Furthermore, members of the public

will be able to know in advance what offences are deemed by the Parliament to be offences against the precepts of Islam. Of course, it is acknowledged that the task of specifying the offences in the Act will be a formidable one for the Parliament.

In this regard, the Conference of Rulers must be invited to play a leading role in the formulation of such an Act, bearing in mind that Islam is essentially a State matter and Their Highnesses, the Sultans, are the heads of Islam of their respective States. This report proposes that there must be a panel of experts to assist the Conference of Rulers in formulating a draft bill for the Parliament to consider. Such an arrangement may probably require an amendment to Art 38 of the Federal Constitution to specifically empower the Conference of Rulers to undertake the following:

(i) Advise the federation or the states on the formulation of either federal or state laws relating to offences against the precepts of the religion of Islam (and perhaps on other matters as well pertaining to Islam to promote uniformity of State laws); and

(ii) Establish a committee or panel of experts to assist the COR for the purposes mentioned in (i) above.

9.4.2. Introducing Uniform Laws

Greater clarity on Islamic laws can be achieved by introducing three uniform laws[106] (i) Muslim religious affairs (including doctrines and offences), (ii) Muslim personal law, and (iii) Muslim courts (including procedures and evidence). Conceptually, this would be similar to the National Land Code 1965 or the Local Government Act 1976, i.e., laws enacted for the purposes of promoting uniformity of the laws between the States.

(i) Law on Muslim religious affairs

Muslim religious affairs, which would generally include doctrines and beliefs, places of worship (e.g., mosques), religious trusts (e.g., *wakaf*), religious tithes (e.g., zakat), and charitable funds (*baitulmal*) can continue to be administered as in the current form by a central state authority, for e.g., the Majlis Agama. However, the duties of the Majlis Agama should be clarified. Under the present laws, the Majlis Agama has a duty "to promote, stimulate, facilitate and undertake the economic and social development of the Muslim community." This is a departure from the 1952 Enactment of Selangor which did not impose any such duty on the Majlis Agama. "Such a vague conception – 'economic and social development' – may, arguably, not even be related to religious affairs, and the conduct of the Majlis Agama's affairs could result in maladministration. Thus, it would bode well for the Muslim community for provisions to be enacted to ensure transparency, such as making it a

[106] **Pursuant to Article 76(1)(b) of the Constitution, the Parliament may make laws with respect to the Muslim religion and Malay custom as enumerated in Item 1 of the State List; the said laws can come into operation in the States once adopted by a law made by the legislatures of the respective States pursuant to Article 76(3) of the Constitution.**

legal requirement to disclose the Majlis Agama's activities, financial reports, including budget and investments." Some of the specific areas to be covered by this law are shown in **APPENDIX VI.**

(ii) Muslim personal law

Muslim personal law, under the Constitution, includes marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession, testate and intestate. At present, most States have a comprehensive set of laws on these matters.[107] These laws can be retained as much as possible with modifications being made to ensure that no injustice occurs or is perpetuated through existing provisions (for e.g., provisions relating to the minimum age of marriage, polygamy or a Muslim woman's right to divorce). Identifying the advantages and disadvantages of the current Muslim personal law in the States is outside the scope of this Report and can only be meaningfully elaborated upon after sufficient collection of data.

(iii) Muslim courts including procedures and evidence

Without a constitutional amendment, Muslim courts must necessarily retain their name, '*Syariah* courts'. Be that as it may, a large aspect of the present structure on Muslim courts can be retained. Three areas that could do with clarity are jurisdictional uncertainties, legal representation

[107] E.g. Johore: Islamic Family Law (State of Johor) Enactment 2003; Kedah: Islamic Family Law (Kedah Darul Aman) Enactment 2008; Kelantan: Enakmen Keluarga Islam Negeri Kelantan 2002; and Malacca: Islamic Family Law (State of Malacca) Enactment 2002.

and sources of substantive religious jurisprudence.

In the case of jurisdictional uncertainties, there should be a provision to the effect that should there arise an issue within the jurisdiction of the civil High Court (for e.g., constitutional law, company law or land law), the Muslim court is legally obligated to stay the proceedings before it and to refer the issue to the High Court for determination. Additionally, there should be a provision confirming that the civil High Court continues to have supervisory jurisdiction over the Muslim courts, i.e., that Muslim courts can be subject to judicial review where it is demonstrated that the said courts have exceeded its territorial, subject matter or subject person jurisdiction.

With respect to legal representation, Advocates and Solicitors (regardless of their religion) should be permitted to represent litigants in the Muslim court. This would guarantee better access to justice for Muslim litigants. Under the repealed 1952 Enactment of Selangor, Advocates and Solicitors "may appear in any court on behalf of a party in civil proceedings".[108] Under the present 2003 Enactment of Selangor, only a Peguam Syarie may represent parties in the *Syariah* courts:[109] and a Peguam Syarie need not be an Advocate and Solicitor.[110] Following this, the law should also stipulate specific books on substantive religious jurisprudence as proof of Islamic law. This will ensure consistency in the understanding of Islamic law between litigants, their legal representatives and Muslim court judges.
With respect to criminal and civil procedures in the Muslim courts, these procedures can be simplified.

[108] **Administration of Muslim Law Enactment 1952: Section 50**
[109] **Administration of the Religion of Islam (State of Selangor) Enactment 2003: Section 80**
[110] **Peguam Syarie (State of Selangor) Rules 2008: Rule 8**

Some of the positive outcomes and benefits of this exercise include:

- With the reduction of Muslim offences, so will there be a reduction in the need for an elaborate criminal procedure code. Additionally, and considering the recommendations above, it would follow that religious enforcement officers would also become increasingly redundant.

- Civil procedure code should become more specific, i.e., to deal with specific matters like marriages, divorces, inheritance, religious trusts, etc. while retaining simplicity for general matters like 'procedure at trial'. Simpler procedural codes make for easier understanding by members of the Muslim community.

This recommendation has several implications:

- There needs to be effective legal training before and after the appointment of a person as a *Syariah* court judge. Such training could be implemented by the respective State Governments under its relevant departments.

- Ensure only competent persons are appointed as *Syariah* court judges. This can be facilitated by the creation of a specialist body, much like the Judicial Appointments Commission[111] to select suitably qualified persons who

merit appointment as *Syariah* court judges for the Ruler's consideration.

Muslim litigants must be provided with access to information concerning Muslim Laws.

- Need to build public awareness on the proposed amendments to the *Syariah* Court (Criminal Jurisdiction) 1965 Act (SCA). This includes providing the public with simple yet comprehensive information regarding Malaysia's constitutional and legal framework.

Quotation 2: Justice is the closest conceptual synonym of wasatiyyah, which also underpins the Quránic designation of the ummah a "witness unto mankind " (Kamali, M. H., 2015). and creed " (Kamali, M. H., 2015).[112]

[111] Judicial Appointments Commission 2009: Section 21

[112] Mohd Hashim Kamali, "The Middle Path of Moderation in Islam", 2015, Oxford University Press, p 83

9.4.3. Establish Parliamentary Oversight on the Administration of Islam

A Parliamentary oversight mechanism can be established by a Parliamentary Select Committee. A Parliamentary Select Committee (PSC) is a committee made up of a small number of parliamentary members that are appointed to deal with a particular issue or area of issues. PSCs originated in the Westminster system of parliamentary democracy, and thus can be found in the British, Australian and New Zealand Parliaments.

In Malaysia, a Parliamentary Select Committee or Special Select Committee can be constituted pursuant to Order 76 and 81 of the Standing Orders of the Dewan Rakyat. Similar procedures also exist for the Dewan Negara. PSCs can be empowered to conduct inquiries and to request and demand written evidence or call people to testify at hearings in Parliament. Their findings are published in reports and may be debated in Parliament.

As a rule of practice, the PSCs formed from the Lower House usually are responsible for issues pertaining to the work of government departments and agencies, whereas PSCs formed from the Higher House usually consider general issues, e.g., the constitution or the economy. Parliamentary oversight, by way of Select Committees, are an important check on the government, and their inquiries can pave the way for major reforms.[113]

[113] Centre for Public Policies Study, "CPPS Fact Sheet: Parliament Select Committees (PSC)", URL: http://cpps.org.my/wp-content/uploads/2017/10/Parliament-Select-Committees-Factsheet.pdf

Given the breadth of the task of specifying offences in respect of Parliamentary oversight, by way of Select Committees, be pursued in order to ensure that the proposed laws enacted are consistent with the Federal Constitution and reflective of the necessity and expediency required by the Malaysian Muslim community in the 21st century.

The PSCs may call expert witnesses (historians, lawyers and academicians), provide a draft of the proposed amendments to Act 355 and the proposed uniform laws, and publish them in reports to inform the public and gather criticisms or comments from stakeholders. All in all, this would promote openness in the government and in the administration of laws for Muslims in Malaysia, while preventing aspersions being cast that such reforms to Muslim Laws are partial, collusive or tainted with an ulterior motive.

9.5. To focus on justice for women and children

To address the issues described under Chapter 6.5 (Gender injustice) and Chapter 6.6. (Injustice against children), several imperatives are called for:

1. There needs to be specific laws and policies that protect women and children from any negative consequences of Islamic laws, policies, rules and programmes. The regressive Family Law that replaced the 1984 progressive law should be

reviewed. Public awareness and education through various means including the media can play a positive role in imparting knowledge to the public on the real imperatives of Maqasid *Syariah* and wasatiyah, that go beyond gender segregation and the attire of women.

2. Given that religion is used to govern the public and private lives of citizens, everyone, therefore, has the right to discuss, provide their views, and speak out, on any injustices imposed on them. Similarly, those who have been impacted by these Islamic laws, particularly, have a right to speak out and demand for treatment based on Islamic principles of justice, equality, and compassion. Some specific recommendations are as follows:

   i. To review the current distribution of inheritance in estate matters under *Syariah* law where male heirs are given a double share under the Faraid distribution; the rationale for this rule is that men have the legal responsibility to provide maintenance for the family, and thus every female should always have a man to provide for her needs, be he a father, a brother, a husband or a son. The faraid rules were laid down in a period where women were uneducated, could not own properties, and it was a heavy responsibility for the family unit to care and provide for any woman whose husband is deceased. Therefore, men were given the privilege to have the responsibility over women. However, as women become financially independent and responsible

for taking care of aging parents until their deaths, it is considered unfair for the sons to receive double the shares of inheritance. Since privilege is linked to responsibility, those who fail to carry out their duties should not be given the entitlement. This is also now becoming a matter of greed, a way to justify usurping property and monies that they did not earn and should not have any claim to. Currently, there is no mechanism in the present legal system for women to obtain redress that would reflect on the balance and justice that was originally intended by the *Syariah*.

ii.

To (a) seek ways to allow wills to be written, by everyone regardless of his religion or race or gender: At present, only non-Muslims are permitted to write wills to heirs and make the law equal to all citizens; (b) allow wills to be accepted in its entirety, without limitations of one-third, and without limitations to exclude heirs, as how non-Muslims have it; (c) in the absence of wills, seek ways to ensure that females receive the same amount as males for inheritance; (d) in the absence of wills, seek ways to ensure that in the event that there are no male heirs, the estate should be divided equally among the heirs, and; (e) encourage the male heir(s) and female kins to decide on equal distribution of the property left by the deceased parents through the process of syura in the spirit of fairness, humaneness, moderation and tolerance.

9.6. To adopt a more inclusive approach in discourse on Islam

In the article by Dr Maszlee Malik 'Turning Malaysia Off Inter-faith Strife', the author made two recommendations – to popularise an inclusive approach in discourse on Islam, and to nurture mutual respect and understanding among the followers of different faiths. He wrot,: "For deeper and more lasting effect, there is also a need for an inclusive Islamic discourse to be practised and for universal values and ethics to be embraced. It should be quite clear to Muslims that the call of Islam is not towards the homogenization of society into one single culture, identity or faith but for the observation and practice of good conduct and civility so as to ensure that diversity will nurture peace and serve the common good. Religious hegemony and intolerance in a pluralistic society will invariably result in conflict and nullify the claim that Islam is a religion of compassion, peace and freedom. Logically therefore, mutual respect and recognition of other believers and their beliefs should be sacred to Muslims, and sine qua non in ensuring a harmonious and peaceful community. To realize this vision, for a start, a neutral non-governmental and non-political platform is required to encourage Muslim scholars, intellectuals and like-minded academics with Islamic studies background to embrace this discourse. And once this discourse has been accepted among Islamic NGOs, joining with other faith and non-faith organizations in a collective effort to combat radicalism and extremism would not be difficult. Malaysia have many moderate, open-minded Islamic scholars, intellectuals and academics, but they have not enjoyed the space or the opportunity to mainstream their inclusive discourse of Islam."

On the nurturing of mutual respect and developing a culture of mutual learning, one major obstacle to understanding and tolerance across religious divides is in fact the ignorance about, or lack of, exposure to Malaysian society's multi-faith and multi-racial essence. This has easily led to misconceptions, prejudices and distrust, which is a recipe for racial and religious discord. Dr Maszlee recommends that the subject 'Introduction to religions and cultures in Malaysia' should be made a core subject in schools and campuses; young minds would become aware of the plural nature of Malaysia and be sensitive to other faiths and be respectful of them. Other practical approaches to improve mutual understanding early on in life among Malaysian school children from various communities include inter-school projects such as student exchange, teacher exchange, friendly sports, and cultural, intellectual, communal and other jointly-organised events. This should include twinning programmes between schools with different orientations and between schools from different localities, both urban and rural.

9.7. To institute reforms of religious institutions in Malaysia to ensure consistency with the Federal Constitution

In Chapter 4, the organisational aspect of the administration of Islam was described under three structures - the organisation in the States, the Conference of Rulers, and JAKIM as the structure at the federal level. Additionally, in Chapter 6.3, an issue of concern was identified - unclear objectives and functions of Islamic institutions. It

was pointed out that these institutions were presumably established with good intentions and clear objectives, and indeed many of these conduct activities to promote the understanding of Islam and to improve the lives of Muslims. However, as the institutional framework evolved to facilitate coordination among states and to give greater powers to bodies like JAKIM, their operations and coverage appeared to deviate considerably from the provisions of the Federal Constitution. The role of the Council of Rulers as provided by the Constitution seemed to erode, while Islamic religious matters which are State matters under the Constitution, seemed to be increasingly directed and administered at the Federal level. In Chapter 4.3.2, it has been analysed that it is not constitutional for Islamic religious department involved in the administration of Islam to be set up at the Federal level, least of all under the office of the Prime Minister.

There are also other religious Islamic bodies which are involved less directly in the administration of Islam set up at the Federal level. Many of these are involved in research or the spread of religious teachings. These institutions are also funded from the Federal Budget.

In light of the evolution of these Islamic religious institutions at the Federal level and the various transgressions against the provisions of the Federal Constitution, a holistic review of these institutions need to be undertaken to ensure these institutions perform their functions more effectively and efficiently, operate within the laws of the country, accord all rights of all Malaysians as guaranteed under

the Federal Constitution, and enable the practice of moderate Islam in accordance with the Quranic principles of justice, equity, compassion and mercy. In achieving this, several proposals are made below to restore the consistency of the institutional framework in the administration of Islam in Malaysia in line with the Federal Constitution.

9.7.1. JAKIM

Notwithstanding its unconstitutional status as discussed in Chapter 4, the establishment of JAKIM, as traced in its historical evolution (Section 4.3), was to serve a particular purpose, i.e., as 'Secretariat' to the National Council or Majlis Kebangsaan Bagi Hal Ehwal Agama Islam Malaysia (MKI). However, over time, the functions of JAKIM expanded to beyond those of a secretariat to MKI, extending even to licensing of halal certification. Many of these additional functions performed by JAKIM is outside what is permitted for the Federal Executive Government and is inconsistent with Article 80(2) of the Federal Constitution, which states, "The executive authority of the Federation does not extend to any matter enumerated in the State List".

It is clear in the analyses in the earlier chapters that legally, JAKIM cannot remain status quo and needs to be reviewed and re-organised, re-constituted or reformed to be aligned to the Federal Constitution, and to also be a more effective body operating on the principles of mercy, justice, compassion.

A final determination requires a serious in-depth review on the legal, institutional and regulatory set-up of JAKIM as well as the governance of its decision-making, implementation, processes and procedures. Given that the Malay Council of Rulers (MCOR)[114] is the apex body provided by the Federal Constitution to determine Islamic religious matters for the country, it is proposed that the relevance and review of JAKIM be taken up by the MCOR. Should the MCOR decide that JAKIM is truly necessary, the Constitution needs to be amended to include a provision making JAKIM constitutional (along the same lines as the constitutionality of the National Land Council). Should JAKIM be found to be unnecessary, where its functions can be found to be sufficiently run by the State (in implementing Islamic affairs) and governed by existing legislation and bodies (similar to Islamic finance governed by economic policies already in place under the purview of the Ministry of Finance and its subsidiaries), JAKIM can then be dissolved.

It is also proposed that the MCOR engage a special task force of *Syariah* and constitutional experts to undertake the review of JAKIM. Upon agreement on the final course of action, MCOR can take its proposals to the bigger COR for final endorsement and implementation.

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[114] Under the Constitution, there are two levels of the COR: the MCOR, comprising only the Sultans of the Federated and Unfederated Malay States, without Chief Minister and leaders of states that are not headed by Sultans; and 2) the full COR which comprises MCOR and all other states.

9.7.2. All Other Islamic institutions

In line with the review of JAKIM, all other Islamic institutions as highlighted in Section 6.3 needs to be reviewed in terms of their consistency with the Federal Constitution, and the overlap of their roles with one another and with other Islamic institutions. One institution that was mentioned specifically in Chapter 6.3 is IKSIM, because besides the lack of clarity and transparency of its purpose and objective (except stated as "strategic research" for which the public has not seen much in terms of output), IKSIM has made several statements in its booklet of March 2017 that clearly go against the spirit and tenets of the Federal Constitution.

The same review process as proposed in Chapter 9.6.1. above to be undertaken by MCOR, should be extended to include the review of all Islamic entities. Where the existence of these institutions is found to be in line with the Federal Constitution, their roles and functions should be made clear with distinctive roles that differentiate each of these institutions. Where overlapping objectives and functions are found, these institutions should be disbanded or consolidated to ensure a more efficient and effective execution of duties.

The continued existence of any of these institutions will need to be alongside more effective and transparent management. As a first step, there needs to be clear and transparent information on the finances of these institutions, reported to the Parliament, and published on these institutions' respective

websites. Secondly, information on these institutions, such as their specific functions (not just the broad functions), recent activities and announcements, structure of organisation, also needs to be clearly published on their website; and thirdly, these institutions need to establish a channel through which the public can exchange communication with these institutions to seek any clarifications on the usage of funds, recent announcements or activities of these institutions.

9.7.3. The Conference of Rulers (COR)

Given that religion is a state matter with the Rulers as the head of Islam in the respective States, it is proposed that the Conference of Rulers (COR) should play its role more actively and effectively on all matters relating to the practice of Islam in Malaysia as provided for in the Constitution. In order for the COR to be effective, it must be supported by an administrative machinery and a governance process as in other agencies implementing the provisions of the Constitution. Similarly, the COR must also receive a proper budget and its allocations and operations fully transparent and accountable as any other government agency. As highlighted in Box 4 below, it is envisaged that this objective of strengthening the functioning of the COR can be achieved through two approaches: (i) enhance the existing secretariat of the COR to enable them to undertake expanded administrative duties, which includes liaison with the public, and the panel of experts; and (ii) to establish a panel of experts made up of constitutional law and *Syariah* experts to

discuss and raise issues with COR. The COR secretariat must have as its core staff qualified personnel on both constitutional, religious, financial and governance issues to enable the COR to make well-researched, informed and considered decisions. To be aligned with the Constitution, the Keeper of the Rulers' Seal may need to lead the Secretariat of the COR.

The Secretariat of the COR will also support the panel of experts. The proposed Terms of Reference of the Secretariat and the panel of experts are described in Boxes 5 and 6 below. The Constitution also provides for the existence of the Council of Malay Rulers (MCOR) which technically is the pre-council of the COR. The issues surrounding the administration of Islam raised were initially discussed during the pre-council meeting which involved only the Malay Rulers and the Keeper of the Rulers' Seal (as its Secretariat). The COR Secretariat should also service the work for the MCOR discussions. Similarly, the MCOR should have access to the panel of experts to advise them on all religious matters affecting the country. After deliberations within MCOR, issues will be discussed at the COR for consensus of all states prior to implementation.

In this way, statements released, and reminders and proposals made by the pre-council on matters affecting the country (as what had been done for the 1MDB scandal, and the National Security Council Act) will remain consistent with the intent of the Constitution, and will be seen as the common position of all states as represented by the COR.

It is recommended that once the re-organisation of MCOR, COR and all its supporting agencies are completed, the COR should organise a series of meetings on the role of Islam in the Malaysian social fabric today. All relevant actors need to be invited to this meeting, ranging from religious bureaucrats to politicians from various parties. This meeting should address issues relating to 'what it is to be a Muslim today in the 21st century' and 'what it is to be a Muslim in a multi-religious society'. Upon the conclusion of these series of meetings, non-Muslims should be invited to discuss and ponder the role of religions in Malaysia today through a series of follow-up meetings. All relevant actors need to be invited. At the end of these series of meetings, a declaration on the common commitments of the Muslims and non-Muslims should be announced and made public.

Finally, the Task Force entrusted to review the functions of religious authorities will have in its terms of reference the modalities to carry out the recommendations in this report. These will include the mechanisms needed to be installed within the government structure and processes to ensure that checks and balances remain despite the strengthening of the functions of the COR.

Box 4: Greater role for the COR

In brief, it is anticipated that the COR through the exercise its functions diligently and appropriately as provided by the Constitution through the following:

1. Rulers and Heads of States are clearly recognised as the main and final arbiter and authority on Islamic matters.

2. Rulers and Heads of State are to exercise their functions as provided for by the Constitution individually with autonomy in their States through the respective state legislative bodies. There is a need to reform state Constitutional Ordinances to resolve current transgressions against the Constitution.[115]

3. The COR would be strengthened to undertake coordinating functions for consistency of implementation of state Islamic laws. The functions of the COR to be institutionalised to ensure that the COR do not lead to unintended consequences of dictatorship on Islamic laws.

4. The Panel of Experts[116] will exist to support and advise the MCOR and COR to consider the best way of effecting Recommendations 1 and above.

5. Under the new arrangement, COR and MCOR must institute a transparent governance process and procedures, and its operationsn must be fully accountable to the public through processes of consultations on new rules, regular reports on financial management, and its operations.

[115] See rationale and explanations in the Open Letter to the Prime Minister by G25 in APPENDIX I
[116] Similar to recommendation in the Open Letter to the PM by G25 in APPENDIX I

Box 5: Proposed Terms of Reference for COR Secretariat

The Secretariat will be responsible for planning, coordinating and providing administrative support to the pre-council of the Conference of Rulers (MCOR), the COR, and the panel of experts within the framework set out in the Terms of Reference as follows:

1. Implementing the governance processes in the operations of the MCOR and COR, and directives by MCOR and the COR as provided for by its governance framework;

2. Undertaking research and policy papers for decision-making by MCOR or COR;

3. Supporting all administrative arrangements for MCOR and COR, such as all matters related to meetings;

4. Maintaining records of work by MCOR and COR, and facilitating the exchange of information among members of the MCOR and COR;

5. Drafting and issuing decrees arising from any decisions made by the COR; anda

6. Identifying issues for deliberation of the MCOR and COR based on feedback gathered from the public.

7. Managing communications between the COR and the public to get a better understanding of the issues of concern to the public and to explain CORs' position on the issues to the public.

8. Service the panel of experts.

Act as a focal point between the MCOR and the COR and the panel of experts, and perform administrative secretariat functions for then panel of experts.

Box 6: Proposed Terms of Reference for the Panel of Experts

Members

The Panel of Experts is to be made up of Constitutional Law experts and religious scholars, to be identified by the Task Force that will carry forward the recommendations in this report.

Scope of duties

To identify issues and develop recommendations for deliberation by the MCOR and COR. Suggested issues are as follows:

1.Legal

i. Advise the COR on a uniform law for the States relating to offences against the precepts of the religion of Islam, and to assist the COR in formulating a draft bill for Parliament to consider.

ii. Develop proposals towards introducing three uniform laws for (i) Muslim religious affairs; (ii) Muslim personal law; and (iii) Muslim courts (the details of this were discussed in Section 9.4, paragraph 9).

2.Education and Awareness

i.Advise on constitutional literacy programmes at all levels to improve the understanding of the Federal Constitution as the supreme law of the land and the provisions of Civil Law and Muslim Laws, especially on matters, disputes or issues that touch on interethnic, intercultural and interreligious relations.

ii.Advise on the development of public awareness programmes for various stakeholders viz religious bodies and administrative authorities, political, religious and community leaders and religious organisations on citizens' rights to justice and equality, fundamental liberties and human dignity.

iii.Advise on the development of programmes for better insight into the rich diversity of interpretative texts and juristic opinions that influence reform in and development of *Syariah* law in the context of an evolving society. For instance, in the context of the changing roles and status of women, there is a greater need for reform to ensure that the principles of justice and equality are upheld.

3.Process and Practice

i.The process must involve the right of Muslim citizens to participate in the discussion and debate on the ways in which the *Syariah* is used as a public law to govern their lives.

ii.Review transgressions against the Constitution and abolish moral policing.

iii.Religious authorities in its operations are governed by the philosophy of practice of Islam on principles of justice, mercy and compassion as opposed to focussing on punishments. This approach is to be mainstreamed into all operations of these authorities.

iv.An avenue must be provided for non-Muslim citizens to comment on the *Syariah* laws that may impact their lives in a multicultural, multireligious society.

Good practice in implementation and governance standards must be adopted to ensure that the right policies are in place in regard to the implementation of *Syariah*.

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APPENDIX I: OPEN LETTER TO THE HON. PRIME MINISTER BY G25

Letter to the people of Malaysia: Champion open debate and discourse on Islamic law

We, a group of concerned citizens of Malaysia, would like to express how disturbed and deeply dismayed we are over the continuing unresolved disputes on the position and application of Islamic laws in this country. The on-going debate over these matters display a lack of clarity and understanding on the place of Islam within our Constitutional democracy. Moreover, they reflect a serious breakdown of federal-state division of powers, both in the areas of civil and criminal jurisdictions.

We refer specifically to the current situation where religious bodies seem to be asserting authority beyond their jurisdiction; where issuance of various fatwa violate the Federal Constitution and breach the democratic and consultative process of shura; where the rise of supremacist NGOs accusing dissenting voices of being anti-Islam, anti-monarchy and anti-Malay has made attempts at rational discussion and conflict resolution difficult; and most importantly, where the use of the Sedition Act hangs as a constant threat to silence anyone with a contrary opinion.

These developments undermine Malaysia's commitment to democratic

principles and rule of law, breed intolerance and bigotry, and have heightened anxieties over national peace and stability.

As moderate Muslims, we are particularly concerned with the statement issued by Minister Datuk Seri Jamil Khir Baharom, in response to the recent Court of Appeal judgement on the right of transgendered women to dress according to their identity. He viewed the right of the transgender community and Sisters in Islam (SIS) to seek legal redress as a “new wave of assault on Islam” and as an attempt to lead Muslims astray from their faith, and put religious institutions on trial in a secular court.

Such an inflammatory statement from a Federal Minister (and not for the first time) sends a public message that the Prime Minister’s commitment to the path of moderation need not be taken seriously when a Cabinet minister can persistently undermine it.

These issues of concern we raise are of course difficult matters to address given the extreme politicisation of race and religion in this country. But we believe there is a real need for a consultative process that will bring together experts in various fields, including Islamic and Constitutional laws, and those affected by the application of Islamic laws in adverse ways.

We also believe the Prime Minister is best placed with the resources and authority to lead this consultative process. It is urgent that all Malaysians are invested in finding solutions to these long-standing areas of conflict that have led to the deterioration of race relations, eroded citizens’ sense of safety and protection under the rule of law, and undermined stability.

There are many pressing issues affecting all of us that need the urgent leadership and vision of the Prime Minister, the support of his Cabinet and all

moderate Malaysians. They include:

1) A plural legal system that has led to many areas of conflict and overlap between civil and *Syariah* laws. In particular there is an urgent need to review the *Syariah* Criminal Offences (SCO) laws of Malaysia.

These laws, which turn all manner of "sins" into crimes against the state have led to confusion and dispute in both substance and implementation. They are in conflict with Islamic legal principles and constitute a violation of fundamental liberties and state intrusion into the private lives of citizens.

In 1999, the Cabinet directed the Attorney-General's Chambers to review the SCO laws. But to this day, they continue to be enforced with more injustices perpetrated. The public outrage, debates over issues of jurisdiction, judicial challenge, accusations of abuses committed, gender discrimination, and deaths and injuries caused in moral policing raids have eroded the credibility of the SCO laws, the law-making process, and public confidence that Islamic law could indeed bring about justice.

2) The lack of public awareness, even among top political leaders, on the legal jurisdiction and substantive limits of the powers of the religious authorities and administration of matters pertaining to islamic laws in Malaysia.

The Federal Constitution is the supreme law of the land and any law enacted, including Islamic laws, cannot violate the Constitution, in particular the provisions on fundamental liberties, federal-state division of powers and legislative procedures.

All Acts, Enactments and subsidiary legislation, including fatwa, are bound by constitutional limits and are open to judicial review.

3) The need to ensure the right of citizens to debate the ways Islam is used as a source of public law and policy in this country. The Islamic laws of Malaysia are drafted by the executive arm of government and enacted in the legislative bodies by human beings. Their source may be divine, but the enacted laws are not divine. They are human-made and therefore fallible, open to debate and challenge to ensure that justice is upheld.

4) The need to promote awareness of the rich diversity of interpretive texts and juristic opinions in the Islamic tradition. This includes conceptual legal tools that exist in the tradition that enable reform to take place and the principles of equality and justice to be upheld, in particular in response to the changing demands, role and status of women in the family and community.

5) The need for the Prime Minister to assert his personal leadership as well as appoint key leaders who will, in all fairness, champion open and coherent debate and discourse on the administration of matters pertaining to Islamic laws in this country to ensure that justice is done. We especially urge that the leadership sends a clear signal that rational and informed debate on Islamic laws in Malaysia and how they are codified and implemented are not regarded as an insult to Islam or to the religious authorities.

These issues may seem complex to many, but at the end of the day, it really boils down to this - as Muslims, we want Islamic law, even more than civil law, to meet the highest standards of justice precisely because it claims to reflect divine justice. Therefore, those who act in the name of Islam through the administration of matters pertaining to Islamic law must bear the responsibility of demonstrating that justice is done and is seen to be done.

When Islam was revealed to our Prophet (SAW) in 7th century Arabia, it was astoundingly revolutionary and progressive. Over the centuries, the religion

has guided believers through harsh and challenging times. It is our fervent belief that for Islam to continue to be relevant and universal in our times, the understanding, codification and implementation of the teachings of our faith must continue to evolve. Only with this, can justice, as enjoined by Allah SWT, prevail.

Sincerely,

1. Tan Sri Datuk Abdul Rahim Haji Din, former Secretary-General, Home Affairs Ministry
2. Tan Sri Ahmad Kamil Jaafar, former Secretary-General, Foreign Affairs Ministry
3. Tan Sri Dr Aris Othman, former Secretary-General, Finance Ministry
4. Tan Sri Dr Ismail Merican; former Director-General, Health Ministry
5. Tan Sri Mohd Sheriff Mohd Kassim, former Secretary-General, Finance Ministry
6. Tan Sri Dr Mustaffa Babjee, former Director-General, Veterinary Services Department
7. Tan Sri Nuraizah Abdul Hamid, former Secretary-General, Energy, Communications and Multimedia Ministry
8. Tan Sri Dr Yahya Awang, cardiothoracic surgeon and core founder, National Heart Institute
9. Datuk Seri Shaik Daud Md Ismail, former Court of Appeal Judge
10. Datuk' Abdul Kadir Mohd Deen, former Ambassador
11. Datuk Anwar Fazal, former senior regional advisor United Nations Development Programme
12. Datuk Dali Mahmud Hashim, former ambassador
13. Datuk Emam Mohd Haniff Mohd Hussein, former ambassador
14. Datuk Faridah Khalid, representative of Women's Voice
15. Datuk Latifah Merican Cheong, former Assistant Governor, Bank Negara

16. *Lt Gen (Rtd) Datuk Maulob Maamin, Lieutenant General (Rtd)*
17. *Datuk Noor Farida Ariffin, former ambassador*
18. *Datuk Ranita Hussein, former Suhakam Commissioner*
19. *Datuk Redzuan Kushairi, former ambassador*
20. *Datuk Dr Sharom Ahmat, former Deputy Vice-Chancellor, Universiti Sains Malaysia*
21. *Datuk Syed Arif Fadhillah, former ambassador*
22. *Datuk Zainal Abidin Ahmad, former Director-General, Malaysian Timber Industry Board*
23. *Datuk Zainuddin Bahari, former Deputy Secretary-General, Domestic Trade, Co-operatives and Consumerism Ministry*
24. *Datin Halimah Mohd Said, former lecturer, Universiti Malaya and President, Association of Voices of Peace, Conscience and Reason (PCORE)*
25. *Puan Hendon Mohamad, Past President, Malaysian Bar*

APPENDIX II: NINTH SCHEDULE OF THE FEDERAL CONSTITUTION

(Sub-section 3.2.2. page 38)

LEGISLATIVE LISTS

List II - State List

1. Except with respect to the Federal Territories of Kuala Lumpur and Labuan, 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 endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay custom. Zakat, Fitra and *Baitulmal* or similar Islamic religious revenue, mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organisation and procedure of *Syariah* courts, which shall have jurisdiction only over person 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 fat 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 Malay custom.

2. Except with respect to the Federal Territories of Kuala Lumpur and Labuan, land including -

(a) Land tenure, relation of landlord and tenant; registration of titles and deeds relating to land; colonization, land improvement and soil conservation; rent restriction;

(b) Malay reservations or, in the States of Sabah and Sarawak, native reservations;

(c) Permits and licences for prospecting for mines; mining leases and certificates;

(d) Compulsory acquisition of land;

(e) Transfer of land, mortgages, leases and charges in respect of land; easements; and

(f) Escheat; treasure trove excluding antiquities.

3. Except with respect to the Federal Territories of Kuala Lumpur and Labuan, agriculture and forestry, including -

(a) Agriculture and agricultural loans, and

(b) Forests.

4. Local government outside the Federal Territories of Kuala Lumpur and Labuan, including -

(a) Local administration; municipal corporation; local town and rural board and other local authorities; local government services, local rates, local government elections;

(b) Obnoxious trades and public nuisances in local authority areas;

(c) Housing and provision for housing accommodation, improvement trusts.

5. Except with respect to the Federal Territories of Kuala Lumpur and Labuan, other services of a local character, that is to say -

(a) (Repealed).

(b) Boarding houses and lodging houses;

(c) Burial and cremation grounds;

(d) Pounds and cattle trespass;

(e) Markets and fairs; and

(f) Licensing of theatres, cinemas and places of public amusement.

6. State works and water, that is to say -

(a) Public work for State purposes;

(b) Roads, bridges and ferries other than those in Federal List, regulation of weight and speed of vehicles on such roads; and

(c) Subject to the Federal List, water (including water supplies, rivers and canals); control of silt; riparian rights.

7. Machinery of the State Government, subject to the Federal List, but including -

(a) Civil List and State pensions;

(b) Exclusive State services;

(c) Borrowing on the security of the State Consolidated Fund;

(d) Loans for State purposes;

(e) Public debt of the State; and

(f) Fees in respect of any of the matters included in the State List or dealt with by State law.

8. State holidays.

9. Creation of offences in respect of any of the matters included in the State List or dealt with by State law, proof of State law and of thing done thereunder, and proof of any matter for purposes of State law.

10. Inquiries for State purposes, including commissions of inquiry and collection of statistics with respect to any of the matters included in the State List of dealt with by State law.

11. Indemnity in respect of any of the matters in the State List or dealt with by State law.

12. Turtles and riverine fishing.

List IIA - Supplement to State List for State of Sabah and Sarawak

13. Native law and custom, including the personal law relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession testate or intestate; registration of adoptions under native law or custom; the determination of matters of native law or custom; the constitution, organization and procedure of native courts (including the right of audience in such courts), and the jurisdiction and powers of such courts, which shall extend only to the matters included in this paragraph and shall not include jurisdiction in respect of offences except in so far as conferred by federal law.

14. Incorporation of authorities and other bodies set up by State law, if incorporated directly by State law, and regulation and winding up of corporations so created.

15. Ports and harbours, other than those declared to be federal by or under federal law; regulation of traffic by water in ports and harbours or on rivers wholly within the State, except traffic in federal ports or harbours; foreshores.

16. Cadastral land surveys.

17. Libraries, museums, ancient and historical monuments and records and archaeological sites and remains, other than those declared to be federal by or under federal law.

18. In Sabah, the Sabah Railway.

19. (Repealed).

List II B - (Repealed)

List III - Concurrent List

1. Social welfare; social services subject to Lists I and II; protection of women, children and your persons.

2. Scholarships.

3. Protection of wild animals and wild birds; National Parks.

4. Animal husbandry, prevention of cruelty to animals; veterinary services; animal quarantine.

5. Town and country planning, except in the federal capital.

6. Vagrancy and itinerant hawkers.

7. Public health, sanitation (excluding sanitation in the federal capital) and the prevention of diseases.

8. Drainage and irrigation.

9. Rehabilitation of mining land and land which has suffered soil erosion.

9A. Fire safety measures and fire precautions in the construction and maintenance of building.

List IIIA - Supplement to Concurrent List for State of Sabah

and Sarawak

10. Personal law relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession testate and intestate.

11. Adulteration of foodstuffs and other goods.

12. Shipping under fifteen registered tons, including the carriage of passengers and goods by such shipping, maritime and estuarine fishing and fisheries.

13. The production, distribution and supply of water power and of electricity generated by water power.

14. Agricultural and forestry research, control of agricultural pests, and protection against such pests, prevention of plant diseases.

15. Charities and charitable trusts and institutions in the State (that is to say, operating wholly within, or created and operating in, the State) and their trustees, including the incorporation thereof and the regulation and winding-up of incorporated charities and charitable institutions in the State.

16. Theatres; cinemas; cinematograph films; places of public amusements.

17. Elections to the State Assembly held during the period of indirect elections.

18. In Sabah until the end of the year 1970 (but not in Sarawak), medicine and health, including the matters specified in items 14 (a) to (d) of the Federal List.

List III B - (Repealed).

APPENDIX III: LAWS PENALISING TRANSGENDER WOMEN

(Sub-section 3.5.1.)

Year	State	Section	Fine	Prison	Model of Law
1985	Kelantan	Seksyen 7. Pondan.	1,000	6 bulan	Seseorang lelaki yang memakai pakaian perempuan dan berlagak seperti perempuan di mana-mana tempat awam adalah bersalah atas suatu kesalahan dan boleh, apabila disabitkan, dikenakan hukuman denda tidak melebihi (x) atau penjara selama tempoh tidak melebihi (x) atau kedua-duanya
1988	Kedah	Seksyen 7. Pondan.	1,000	6 bulan	(1) Mana-mana orang lelaki yang berlagak seperti perempuan (tasyabbuh) di mana-mana tempat awam adalah bersalah atas suatu kesalahan dan boleh, apabila disabitkan, dikenakan hukuman denda tidak melebihi (x) atau penjara selama tempoh tidak melebihi (x) atau kedua-duanya.
1991	Perlis	Seksyen 7. Pondan.	5,000	3 tahun	(2) Mana-mana orang perempuan yang berlagak seperti lelaki (tasyabbuh) di mana-mana tempat awam adalah bersalah atas suatu kesalahan dan boleh, apabila disabitkan, dikenakan hukuman denda tidak melebihi (x) atau penjara selama tempoh tidak melebihi (x) atau kedua-duanya.

1992	Negeri Sembilan	Seksyen 66. Lelaki berlagak seperti perempuan.	1,000	6 bulan	Mana-mana orang lelaki yang memakai pakaian perempuan atau berlagak seperti perempuan di mana-mana tempat awam adalah melakukan satu kesalahan dan hendaklah apabila disabitkan dikenakan hukuman denda tidak melebihi RM (x) atau penjara selama tempoh tidak melebihi (x) atau kedua-duanya.
1995	Sabah	Seksyen 92. Lelaki berlagak seperti perempuan atau sebaliknya.	1,000	6 bulan	Seseorang lelaki yang memakai pakaian perempuan atau berlagak seperti perempuan atau sebaliknya di mana-mana tempat awam adalah bersalah atas suatu kesalahan dan boleh, apabila disabitkan dikenakan hukuman denda tidak melebihi satu ribu ringgit atau penjara selama tempoh tidak melebihi enam bulan atau kedua-duanya sekali.
1991	Melaka	Seksyen 72.Lelaki berlagak seperti perempuan	1,000	6 bulan	Seseorang lelaki yang memakai pakaian perempuan dan berlagak seperti perempuan di mana-mana tempat awam tanpa alasan yang munasabah adalah merupakan suatu kesalahan dan apabila disabitkan kesalahan boleh dikenakan hukuman denda tidak melebihi RM (x) atau dipenjara selama tempoh tidak melebihi (x) atau kedua-duanya sekali.

1992	Perak	Seksyen 55. Lelaki berlagak seperti perempuan.	1,000	6 bulan	Seseorang lelaki yang memakai pakaian perempuan dan berlagak seperti perempuan di mana-mana tempat awam bagi tujuan maksiat adalah melakukan suatu kesalahan dan hendaklah, apabila disabitkan, dikenakan hukuman denda tidak melebihi RM (x) atau penjara selama tempoh tidak melebihi (x) atau kedua-duanya.
1995	Selangor	Seksyen 30. Lelaki berlagak seperti perempuan	1,000	6 bulan	Mana-mana lelaki yang memakai pakaian perempuan atau berlagak seperti perempuan di mana-mana tempat awam untuk tujuan yang tidak bermoral adalah melakukan suatu kesalahan dan apabila disabitkan boleh didenda tidak melebihi RM (x) atau dipenjarakan selama tempoh tidak melebihi (x) atau kedua-duanya.
1996	Penang	Seksyen 28.Lelaki berlagak seperti perempuan	1,000	1 tahun	Mana-mana orang lelaki yang memakai pakaian perempuan dan berlagak seperti perempuan di mana-mana tempat awam atas tujuan tidak bermoral adalah melakukan suatu kesalahan dan apabila disabitkan boleh didenda tidak melebihi RM (x) atau dipenjarakan selama tempoh tidak melebihi (x) atau kedua-duanya.
1997	W/Pers.	Seksyen 28 Orang Lelaki berlagak seperti perempuan	1,000	1 tahun	
1997	Johor		1,000	1 tahun	

2001	Sarawak	Seksyen 25. Lelaki berlagak seperti perempuan	1,000	1 tahun	Mana-mana orang lelaki yang memakai pakaian perempuan dan berlagak seperti perempuan di mana-mana tempat awam atas tujuan tidak bermoral adalah melakukan suatu kesalahan dan apabila disabitkan boleh didenda tidak melebihi RM (x) atau dipenjarakan selama tempoh tidak melebihi (x) atau kedua-duanya.
2001	Tereng-ganu	Seksyen 33. Lelaki berlagak seperti perempuan	1,000	1 tahun	
2012	Pahang	Seksyen 33 dan 34. Lelaki berlagak seperti perempuan dan perempuan berlagak seperti lelaki	1,000	1 tahun	33. Mana-mana lelaki yang memakai pakaian perempuan dan berlagak seperti perempuan di mana-mana tempat awam atas tujuan yang tidak berakhlak melakukan suatu kesalahan dan boleh, apabila disabitkan, didenda tidak melebihi RM (x) atau dipenjarakan selama tempoh tidak melebihi (x) tahun atau kedua-duanya 34. Mana-mana perempuan yang memakai pakaian lelaki dan berlagak seperti lelaki di mana-mana tempat awam atas tujuan yang tidak berakhlak melakukan suatu kesalahan dan boleh, apabila disabitkan, didenda tidak melebihi RM (x) atau dipenjarakan selama tempoh tidak melebihi (x) tahun atau kedua-duanya

APPENDIX IV: LIMITS OF JURISDICTION ON THE SYARIAH COURTS IMPOSED BY THE STATE LAWS

(Section 6.1.2. page 172)

Subject matters (generally)
(i) betrothal, marriage, *ruju'*, divorce, annulment of marriage *(fasakh), nusyuz*, or judicial separation *(faraq)* or any other matter relating to the relationship between husband and wife; (ii) any disposition of or claim to property arising out of any of the matters set out in subparagraph (i); (iii) the maintenance of dependants, legitimacy, or guardianship or custody *(hadhanah)* of infants; (iv) the division of, or claims to, *harta sepencarian;* (v) wills or gifts made while in a state of *marad-almaut*; (vi) gifts inter vivos, or settlements made without adequate consideration in money or money's worth by a Muslim; (vii) *wakaf or nazr*; (viii) division and inheritance of testate or intestate property; (ix) the determination of the persons entitled to share in the estate of a deceased Muslim or the shares to which such persons are respectively entitled; (x) a declaration that a person is no longer a Muslim; (xi) a declaration that a deceased person was a Muslim or otherwise at the time of his death; (xii) administration of mosques and surau; and (xiii) other matters in respect of which jurisdiction is conferred by any written law. See: *Johore*: Administration of the Religion of Islam (*State of Johor*) Enactment 2003 (s. 61(3)(b)). *Kedah: Syariah* Courts (*Kedah Darul Aman)* Enactment 2008 (s. 13(3)(b)). *Kelantan*: Administration of the *Syariah* Court Enactment 1982 (section 9(2)). *Malacca*: Administration of the Religion of Islam (State of Malacca) Enactment 2002 (s. 49(3)(b)). Negeri Sembilan: Administration of the Religion of Islam *(Negeri Sembilan)* Enactment 2003 (s. 61(3)(b)). *Pahang*: Administration of matters pertaining to islamic Law Enactment 1991 (s. 47(2)(b)). *Penang*: Administration of the Religion of Islam (State of Penang) Enactment 2004 (s. 61(3)(b)). *Perak*: Administration of the Religion of Islam *(Perak)* Enactment 2004 (s. 50(3)(b)). *Perlis:* Administration of the Religion of Islam Enactment 2006 (s. 61(3)(b)). *Sabah*: *Syariah* Courts Enactment 2004 (s. 11(3)(b)). *Sarawak*: *Syariah* Courts Ordinance 2001 (s. 10(3)(b)). *Selangor:* Administration of the Religion of Islam (State of Selangor) Enactment 2003 (s. 61(3)(b)). *Terengganu*: *Syariah* Court (*Terengganu*) Enactment 2001 (s. 11(3)(b)). Federal Territories: Administration of matters pertaining to islamic Law (Federal Territories) Act 1993 (s. 46(2)(b)).

Subject persons

Muslims. See: *Johore*: Administration of the Religion of Islam (State of Johor) Enactment 2003 (s. 74(1)). *Kedah*: *Syariah* Courts (Kedah Darul Aman) Enactment 2008 (s. 24), *Kelantan*: Administration of the *Syariah* Court Enactment 1982 (s. 9(2)). *Malacca*: Administration of the Religion of Islam (State of Malacca) Enactment 2002 (s. 62). *Negeri Sembilan*: Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003 (s. 74). *Pahang:* Administration of matters pertaining to islamic Law Enactment 1991 (s. 64). *Penang*: Administration of the Religion of Islam (State of Penang) Enactment 2004 (s. 74). *Perak*: Administration of the Religion of Islam (Perak) Enactment 2004 (s. 63). *Perlis:* Administration of the Religion of Islam Enactment 2006 (s. 74). *Sabah*: *Syariah* Courts Enactment 2004 (s. 26). *Sarawak: Syariah* Courts Ordinance 2001 (s. 23). *Selangor:* Administration of the Religion of Islam (State of Selangor) Enactment 2003 (s. 74(1)). *Terengganu*: *Syariah* Court (Terengganu) Enactment 2001 (s. 11(3)(b)). Federal Territories: Administration of matters pertaining to Islamic Law (Federal Territories) Act 1993 (s. 46(2)(b)).

Territorial

Throughout the State. See: *Johore*: Administration of the Religion of Islam (State of Johor) Enactment 2003 (s. 61(1)). *Kedah: Syariah* Courts (Kedah Darul Aman) Enactment 2008 (s. 13(1)). *Kelantan*: Administration of the *Syariah* Court Enactment 1982 (s. 8(3)). *Malacca:* Administration of the Religion of Islam (State of Malacca) Enactment 2002 (s. 49(1)). *Negeri Sembilan*: Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003 (s. 61(1)). *Pahang:* Administration of matters pertaining to Islamic Law Enactment 1991 (s. 47(1)). *Penang*: Administration of the Religion of Islam (State of Penang) Enactment 2004 (s. 61(1)). *Perak*: Administration of the Religion of Islam (Perak) Enactment 2004 (s. 50(1)). *Perlis:* Administration of the Religion of Islam Enactment 2006 (s. 61(1)). *Sabah: Syariah* Courts Enactment 2004 (s. 11(1)). *Sarawak*: *Syariah* Courts Ordinance 2001 (s. 10(1)). *Selangor*: Administration of the Religion of Islam (State of Selangor) Enactment 2003 (s. 61(1)). *Terengganu*: *Syariah* Court (Terengganu) Enactment 2001 (s. 11(1)). Federal Territories: Administration of matters pertaining to islamic Law (Federal Territories) Act 1993 (s. 46(1)).

APPENDIX V: 'HUDDUD' OFFENCES UNDER SYARIAH CRIMINAL CODE (II) (1993) 2015 (KELANTAN)

(Section 6.1.4, page 185)

Section	Offence	Punishment
6	*Sariqah:* Secretly moving a movable property out of lawful custody or possession of the owner without his consent, the act of which is committed with the intention to deprive him of the property from his custody or possession.	First offence: amputation of right hand Second offence: amputation of left foot Third and subsequent offence: imprisonment of not more than fifteen years. (s. 7)
9	*Hirabah:* Confiscating the property of another with violence or wrongful restrain or making threat.	Death (if death is cause), and amputation of right hand and left foot (if no death or injury is caused). (s. 10)
12	*Adultery:* Sexual intercourse between a man or a woman whom are not her or his legally spouse.	Stoning (for married persons), and whipping of one hundred lashes (for unmarried persons). (s. 13)
14	*Sodomy:* A man having carnal intercourse with another man, or a man who having an anal intercourse with a woman.	Stoning (for married persons), and whipping of one hundred lashes (for unmarried persons). (s. 15)
17	*Qazaf:* Making an accusation of adultery or sodomy, which is not substantiated by four witnesses.	Whipping of eighty lashes. (s. 18)
22	*Syurb:* Drinking liquor or any other intoxicating drinks whether he is intoxicated or not, irrespective of the quantity consumed.	Whipping of not more than eighty lashes and not less than forty lashes. (s. 22)

23	*Irtidad* or *riddah:* Whoever voluntarily, deliberately and aware of making an act or uttered a word affects or against the faith in Islamic religion. (The acts or the words which affect the *aqidah* (belief) are those which concern or deal with the fundamental aspects of Islamic religion which are deemed to have been known and believed by every Muslim as part of his general knowledge for being a Muslim, such as matter pertaining to Rukun Islam, Rukun Iman and matters of *halal* (the allowable) or haram (the prohibited).	Death. (s. 23)

APPENDIX VI
Some areas suggested to be covered by the Law on Religious Affairs

(refer Section 9.4.2.)

There must be a provision prescribing a procedure to determine the rights and obligations of persons who have renounced the religion of Islam; facilitating the exercise of one's absolute constitutional right to profess his chosen religion. There should be an effective, accessible and legal procedure to determine the rights and obligations of the Affected Persons under Islamic law, after a declaration is made renouncing Islam. Additionally, and to prevent instances of "unilateral conversions" of children of civil marriages, a section should be added to harmonise the operation of Sections 88(2) and 89(2)(a) of the Law Reform (Marriage and Divorce) Act 1976 (LRA) and Muslim Laws, i.e., to legally stipulate the status of children of converts. Such a section could read:

"*Section XX*. Status of children of converts.

If a convert to Islam has a child under the age of eighteen years, the child shall be considered a Muslim only when ordered by the Court, other than the *Syariah* court, to be in the custody of the said convert and to be brought up a Muslim." This ensures that a child of a civil marriage can only be considered a Muslim after both parents and the child (if he or she is able to express an independent opinion) has been given an opportunity to be heard in the civil High Court under the LRA, and an order made on the child's religious upbringing. Crucially, this section can already be added to the relevant existing State law i.e. the 'Administration Islamic law' enactments. In the civil High Court, the overriding principle that should inform its discretion when deciding religious upbringing is

'that a religion which a child has been brought up in should not subsequently be disturbed[117]

With respect to "propagating doctrines and beliefs", while the present system of tauliah (accreditation) can be maintained[118] , the law must state with sufficient precision the accepted (or unaccepted) doctrines and beliefs of Islam in order enable a Muslim person to regulate his conduct and avoid the commission of an offence e.g. by inadvertently spreading false doctrines.

With respect to the "determination of matters of Islamic law, doctrine and Malay custom", the Fatwa Committee (or Mufti) should be restricted in its fatwa-making powers. Under the present law, the Fatwa Committee may prepare a fatwa "on its own initiative or on the request of any person by letter addressed to the Mufti". This may give rise to fatwas that in 'pith and substance' relate to matters outside the Fatwa Committee's competence (e.g. commerce, health and communications). The law should stipulate that Fatwa Committees are only permitted to make fatwas on the direction of the Sultan (whether with or without the advice of the Majlis Agama) and when requested by a civil court. The fatwa-making process itself should involve, in certain circumstances, consultation with the Muslim community[119]. This is critical as the current procedure in making fatwas that relate to "Islamic law, doctrine and Malay custom" within the State has no involvement from lay members of the Muslim community despite the binding effect of fatwas on them and the potential of committing offences should they dispute it.

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[117] The Queen v Gyngall [1893] 2 QB 232 at 243, CA (UK) (adopted in Arumugam s/o Seenivasagam v Sinnamah (F) [1959] 1 MLJ 130 at 132F right, 133F-H left, HC); Rajan Chawla v Lisbon John Miranda AIR 2013 Bom 29 at pp. 33 – 34, para 22, HC (India)

[118] It has been the law in Malaya since 1904 i.e. The Muhammadan Laws Enactment 1904 (Federated Malay States, section 9.

[119] See Section 9.3.2

At present, there are officials and committees constituted in most States responsible for the conduct and order in mosques i.e. the Pegawai Masjid and Jawatankuasa Kariah respectively. The duties of these officials and committees can be extended to i) To give notice of a fatwa that is proposed to be made by publishing it in the relevant mosque together with details of time and place for an enquiry, ii) To hold the said enquiry to obtain the views of lay members of the Muslim community regarding the proposed fatwa, and iii) To gather and transmit the views obtained to the Fatwa Committee for its consideration at its meeting to discuss the proposed fatwa; (2) To have clear guidelines that prevent fatwa committees from making fatwas on issues that are not central to "Islamic law, doctrine and custom'" and those that have implications on non-Muslims; (3) To have proper checks and balances to ensure that Muftis do not announce a fatwa until it has undergone the full procedure and gazetted; and (4) A proper mechanism needs to be put in place to ensure that the public is well-informed and have easy access of all the fatwas that have been gazetted.

Such a procedure would inform the Fatwa Committee of the present needs of the Muslim community, the potential effect of the proposed fatwa and would create an inclusive environment for the Muslim community i.e. that they may be heard on matters concerning religious affairs which may adversely affect them. Such an inclusive approach would also ensure the procedures in the issuance of fatwas are adhered to and that public are better informed before and after the issuances of fatwas. Additionally, there should be advocacy and proposals for the repeal of laws that permit the making of fatwas that relate to 1) matters in the Federal List of the Constitution, or 2) government policies. Such laws could potentially affect Malaysia's system of democratic governance by impelling the relevant Governments to execute policies that are based on purely religious considerations rather than on science, evidence and the present needs of Malaysians.

With respect to Muslim offences generally, there should be a reduction of it. Under present laws and given the large number of Muslim offences enacted, some potentially transgress into federal matters (e.g. criminal law), and some others may be inconsistent with the Constitution (e.g. "Male person posing as woman" laws). Further, the present statutes themselves do not generally give an indicator whether these offences are 'precept' offences or other Muslim offences; making it difficult to assess its 'pith and substance' while giving the erroneous impression that, for instance, obedience of a *"fatwa"* is a precept of the religion of Islam. The 27 offences in the 1952 Enactment of Selangor can be used as a starting point during a review; with 'precept' offences reduced to a minimum (e.g. non-attendance at mosque and *zina* only), and other Muslim offences placed under specific headings reflective of the language in Item 1 of the State List. Additionally, there should also be consideration of replacing custodial punishments with non-custodial ones such as community sentence[120]. A community sentence combines punishment with activities carried out in the community. It can include one or more of 13 requirements on an offender. This could be carrying out up to 300 hours of unpaid work, which might include things like removing graffiti or clearing overgrown areas. Overall, the requirements aim to punish offenders, to change offenders' behaviour so they don't commit crime in the future, and to make amends to the victim of the crime or the local community (United Kingdom Sentencing Council, "Community Sentence).

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[120] **As seen on: https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/community-sentences/**