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Shari'ah and Legal Pluralism in Malaysia

Constance Chevallier-Govers

► **To cite this version:**

Constance Chevallier-Govers. Shari'ah and Legal Pluralism in Malaysia. International Institute of Advanced Islamic Studies Malaysia, pp.89, 2011, 978-9-83442747-4. hal-01809970

HAL Id: hal-01809970

<https://hal.science/hal-01809970>

Submitted on 2 May 2024

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IAIS Malaysia Monograph Series No. 2

Shari'ah and Legal Pluralism in Malaysia

Constance Chevallier-Govers

Foreword by
Mohammad Hashim Kamali

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Shari'ah and Legal Pluralism
in Malaysia

Constance Chevallier-Govers

Foreword by

Mohammad Hashim Kamali

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International Institute of
Advanced Islamic Studies Malaysia
Jalan Ilmu off Jalan Universiti
59100 Kuala Lumpur Malaysia
Tel : +603-79569188
Fax : +603-79562188
www.iais.org.my

Mailing Address:
P.O Box 12303
50774 Kuala Lumpur

Perpustakaan Negara Malaysia Cataloguing-in-Publication Data
Chevallier-Govers, Constance, 1970-
Shariah and legal pluralism in Malaysia /
Constance Chevallier-Govers.
(IAIS monograph series ; No.2)
ISBN 978-983-44274-7-4
1. Islamic law-Malaysia. 2. Legal polycentricity--Malaysia.
I. Title.
340.59

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Printed by:

Ilmiah Publishers Sdn.Bhd.
Regalia Business Centre,
No 33, Jalan USJ 1/1C, USJ 1
47620 Subang Jaya, Selangor Darul Ehsan

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Foreword

Dr Constance Chevallier-Govers, who has a doctorate from the University of Paris II, is Associate Professor of Law at the University of Grenoble, France, and currently also an International Associate at the Asia-Europe Institute in the University of Malaya, has written an impressive and thorough study of the Malaysian legal system. Although the roots of legal pluralism are found in the colonial period, the landscape changes all the time. Her study is up to date and includes some very important landmark cases, such as the conversion and child custody cases that occupied the nation's attention through 2009.

Her presentation is also well constructed and compact. She very clearly identifies the relevant forces of the changing legal system and provides critical observations. Her examination of the judicial crisis of 1988 is especially well thought out.

This study provides five significant recommendations. There are unresolved issues that need to be addressed in the country about the relation of States' Law to the Constitution, judicial review, and the dual court system (*sharī'ah* and civil). Her work provides a background and a way forward for legal pluralism in Malaysia.

The monograph is compact and void of trivial details. Students and teachers of the Malaysian legal system will be interested in this work, which shows us the up to date status of how the *sharī'ah* and civil law operate side by side in the dual legal system of Malaysia.

Mohammad Hashim Kamali
Founding Chairman and CEO
IAIS Malaysia
Kuala Lumpur, 20 July 2010

Acknowledgements

I would like to express my sincere gratitude to HE Vincent Piket, the Ambassador of the European Union and Head of the EU Delegation to Malaysia having availed to me the opportunity to work on such a fascinating subject. I also would like to thank Professor Mohammad Hashim Kamali, the Chairman and CEO of IAIS Malaysia, for accepting this monograph for publication. I am also indebted to Dr Christoph Marcinkowski (Principal Research Fellow and Co-Chair of Publications, IAIS Malaysia) who painstakingly went through the manuscript, preparing it for publication in the IAIS Monograph Series (his colleague, Dr Eric Winkel, has seen an earlier draft). Needless to say, I alone am responsible for any errors and oversights that remain.

Constance Chevallier-Govers
Kuala Lumpur, 8 September 2010

I. Introduction

In 2008, Malaysia's Prime Minister Najib Tun Razak appears to have parted from the motto of *Islam Hadhari* or 'Civilisational Islam' proposed by his predecessor Tun Abdullah Ahmad Badawi and has proposed a new concept – *IMalaysia*.¹ This monograph is an attempt to investigate whether this new vision of Malaysian society would be compatible with a pluralist legal system.

Islam is the most widely practiced religion in Southeast Asia, numbering approximately 240 million adherents which translate to about 40% of the entire population, with majorities in the three ASEAN member nations Brunei, Indonesia and Malaysia. Of these three countries, two have adopted Islam as the state religion: Malaysia and Brunei. The difference between Brunei and Malaysia is that in Malaysia, Islam in general is the state religion whereas in Brunei it is only the Shāfi'ī school of Islam in particular, which is a Sunni legal school.² Indonesia has long prided itself as being neither a secular nor a religious state but one inspired by the religious ideology of *Pancasila* or 'Five Principles'.³ In four countries, Buddhism is the state religion: Thailand, Cambodia, Myanmar and Laos. Singapore, Vietnam and the Philippines are secular states.

The focus of this monograph is on how the Malaysian state recognises the legal dimensions of Islam in a pluralist society.⁴ To understand the role of Islam in Malaysian society and in its legal system one has to keep in mind the diversity of the population. According to figures from the 2000 census, the

distribution amongst the different ethnic groups is as follows: Malays represent 50.4 % of the population, Chinese 23.7%, Indians 7.1% and others 11%. Regarding the religious set-up, 60% of the population practice Islam; 19% Buddhism; 9% Christianity; 6% Hinduism and 3% Confucianism, Taoism and other Chinese religions.⁵ In the Malaysian legal system, Islam enjoys a privileged status. This preferential status of Islam in the Constitution, politics and case law raises the question whether Malaysia is or is not a secular state. Malaysia can be best characterised as an intermediate hybrid along the secular-theocratic continuum or ‘quasi-secular’ and ‘quasi-Islamic’ state.⁶

The main object of this reflection is not to qualify the Malaysian state but to analyse how two sets of laws – common law and the *sharī‘ah* – coexist. Malaysia’s legal system is indeed based on legal pluralism, a concept which has first to be explained and whose roots have to be identified. The coexistence of common law and *sharī‘ah* law is set in the Constitution and has been interpreted by the courts in ways which are still changing.

1.1 Definition of Concepts

1.1.1 Legal Pluralism

Jacques Vanderlinden defines legal pluralism as “the existence within a particular society of different legal mechanisms applying to identical situations.”⁷ Barry Hooker has put a particular focus in his study on the “systems of legal pluralism in the contemporary world which have resulted from the transfer of whole legal systems across cultural boundaries.”⁸ He studied different forms of legal pluralism which have arisen from legal transplants or receptions; for instance, the cases of territories in Africa or Asia colonised by Britain, in which the common law received during the colonial period coexists with religious jurisprudence or customary law.

Legal pluralism, as an academic concept, is closely related to the West's colonial past: the unitary myth of law was challenged by the coexistence in the 'civilised societies' colonies of colonial law with multiple indigenous systems of 'primitive law'. Having found its raw material in the 'exotic' remote corners of the world, in the 21st century, the concept of legal pluralism seems to have transcended geographical boundaries. Nowadays, it is no longer confined to 'exotic societies' but serves as a general tool to understand law in all its complexity as every society is legally plural, whether or not it has a colonised past.⁹

In most of the states of the Middle East – because of the structuring of the local, multicultural and multi-religious societies – the pluralism of the personal statuses is always effective, although it is limited nowadays to family law. Many countries recognise that in such matters as validity of marriage, dissolution of marriage, adoption, child custody and maintenance, succession, dependency and title to property, the customs and usages of the individual's social group should be implemented. In some countries, such as Israel, there exists no general law in these areas and the individual must designate the religious/customary regime that will be applied to him or her in personal law matters.¹⁰ This is called 'personal status' or 'personal law'.¹¹

India can also be taken as an example of legal pluralism in Asia. Article 25 of the Indian Constitution of 1949 concerning the freedom of religion rejects any state religion or any shape of patronage of a particular religion by means of public activities. This clause insures a form of 'Indian-style' secularism which consists of the sidelining of religion in the public sphere.¹² Nevertheless, India chose to respect the variety of the religious forms by the admission of the plurality of the laws relative to personal status. There are thus four series of personal statuses (Hindu, Christian, Parsi, and Muslim). This recognition already existed under English colonial rule. In 1937, Muslim personal law came to be added to the other special legislations relative to

Christians, Parsis and Hindus. Today, only Muslims have the legal possibility of polygamy, forbidden to Christians, Parsis and Hindus. Personal status is allowed, but no one can be compelled to observe it. Although Article 44 of the Indian Constitution lays down that a uniform civil code, imposing the same civil rights on all male and female citizens, will be adopted by India, but this has never been fully implemented.¹³

In this monograph on legal pluralism in Malaysia, the special status given to indigenous customary law will not be studied. Indeed, a hierarchy of indigenous courts exists in the Malaysian states of Sabah and Sarawak to hear and determine disputes amongst indigenous peoples in relation to local customary laws.¹⁴ This local customary law is applicable to non-Malay indigenous people (who are defined as non-Muslims). Here, legal pluralism shall be only apprehended through the prism of the *sharī'ah*.

1.1.2 *Sharī'ah*

The *sharī'ah* is a set of rules of conduct applicable to Muslims. The term used in Arabic in the religious context means 'path to be followed'. It refers to the sacred law of Islam. The *sharī'ah* is derived from two primary sources: the divine revelations set forth in the Qur'ān and the sayings and examples set by the Prophet Muḥammad in the *Sunnah*. The principles of the divine law contained in the Qur'ān have been explained in the *ahādīth* of the *Sunnah*.¹⁵ *Fiqh*, or Islamic jurisprudence, interprets and extends the application of the *sharī'ah* to questions not directly addressed in the primary sources by including secondary sources.¹⁶ Different countries and cultures have varying interpretations of the *sharī'ah*. In this monograph, *sharī'ah* law refers to the *sharī'ah* as implemented in Malaysia, which is composed of mainly Sunni Muslims. The interpretation of the *sharī'ah* is therefore influenced by the Sunni doctrine. We shall also see that *sharī'ah* law in Malaysia has been largely influenced by Malay custom (*adat*, from Arabic *'ādah*).

1.2 The Origins of Legal Pluralism in Malaysia

Malaysian legal pluralism is rooted in the country's colonial legacies: the co-existence of different normative or legal orders and a dual system of courts is the result of Malaysia's colonial experience. Contrary to European liberalism in the nineteenth and early twentieth century, colonial governance in Malaysia was concerned with the management, and even the production, of diversity. The definition and the boundaries of ethnic and religious identities, the units whose cultural differences the Malaysian state sought to recognise, are of colonial origin.

1.2.1 Main Historical Landmarks

Malaysia was under the domination of Hindu culture from the seventh to the fourteenth century before the advent of Islam from the tenth century onwards.¹⁷ The European expansion in Southeast Asia began with the conquest of Malacca by the Portuguese in 1511. They were subsequently ousted by the Dutch in 1641. Malacca was then ceded to the British with the Anglo-Dutch Treaty of 1824. In 1826, the British Settlements of Malacca, Penang and Singapore were combined to form the Colony of the Straits Settlements. They remained under British rule as British colonies until 1942 and the invasion of Japan. From 1945 to 1957, the eleven States were again incorporated as British protectorates and, in 1948, became the Federation of Malaya.¹⁸ In 1957, Malaya finally gained its independence. Then, in 1963, the Federation was enlarged with the accession of Singapore, Sabah and Sarawak, and also renamed as the Federation of Malaysia.¹⁹ Singapore left the Federation in 1965.²⁰

1.2.2 Before British Rule

Prior to British rule, Islamic law was of great importance. The earliest record of Islamic law in Malaysia is the Terengganu stone inscription, which dates back to 1303. It gives the punishments for some offences following the provisions in the

Qur'ān and *Sunnah*.²¹ In pre-colonial Malaysia, the Sultans in each of their respective States were the heads not only of the religion of Islam, but also were the political leaders in their States. They were 'Islamic' in the true sense of the word, because, not only were they themselves Muslims, their subjects too were Muslims and the law applicable in the states was Muslim law. Under such law, the Sultan was regarded as 'God's vicegerent (representative) on Earth'. He was entrusted with the power to run the country in accordance with the law ordained by Islam, that is, Islamic law, and to see that the law was enforced.

For other authors, such a picture oversimplifies an immensely complex situation. A look at the legal system prior to *Merdeka* (independence) from Britain in 1957 indicates the presence of a myriad of competing and conflicting streams of legal pluralism. Hinduism and Buddhism from India held sway in Southeast Asia between the first to the thirteenth centuries and left an indelible imprint on Malay political and social institutions, court hierarchy, prerogatives and ceremonies, marriage customary rites and Malay criminal law. According to Ahmad Ibrahim, there were attempts before the coming of the British to modify Malay custom and to adopt Islamic law. This process was in progress when the British came and exercised their influence in the Malay States.²² J. Wilkinson says that "there can be no doubt that Muslim law would have ended by becoming the law of Malaya had British law not stepped in to check it," as the British relegated Islamic law primarily to personal matters.²³

1.2.3 During British Rule

By ascribing sovereignty to the ruler, the British turned the system into a secular institution. Thus all laws, including the administration of Islamic law, had to be validated through a secular fiat. Islamic law was only applicable to Muslims as their personal law. It can be seen that during the British colonial

period, through their system of indirect rule²⁴ and establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law to marriage, divorce, and inheritance only.

Under the treaties made by the Malay Sultans with the British, the Sultans agreed to receive British Residents or Advisers in the States and to follow their advice in all matters of administration – except in relation to the Muslim religion and Malay custom. Under the provisions of these treaties, the British Resident ‘advised’ the Sultan to make laws, such as the Contracts Act 1949, the Penal Code 1936, the Evidence Act 1950, the Criminal Procedure Code 1935 and the Civil Procedure Code, based on the Indian modifications of English law, and in the case of land, laws following the legislation in Australia based on the Torrens system of registration of title.

Upon the advice of the British, the Malay Sultans set up civil courts – and these were chaired by British judges. In the absence of legislation applicable to the matter, the judges tended to refer to the law in England, and in this way the English law of torts and the English rules of equity were introduced in the Malay States. The result was that English law replaced Islamic law in many matters. This was confirmed by the civil law legislations, culminating in the Civil Law Act 1956. The attitude taken by the British judges was confirmed by the Civil Law enactments of 1937 and 1951 and finally the Civil Law Ordinance of 1956 which stated that in the absence of any written law, the court shall apply in West Malaysia (i.e. the Malay Peninsula) the Common Law of England and the rules of equity “as administered in England on the 7th day of April 1956.” As a result of British influence, Malaysia has inherited, in Peninsular Malaysia, a dual system of courts.

Legal pluralism in Malaysia is implied by the status of Islam in the Malaysian Constitution. It has consequences on the distribution of legislative powers between the Federation and the States on the one hand and on the distribution of powers between civil and *shari‘ah* courts on the other hand.

2. The Constitutional Framework of Legal Pluralism in Malaysia

Understanding the circumstances in which the Constitution of Malaysia has been adopted in 1957 will help to clarify the status of Islam within the constitutional framework.

2.1 The Adoption of the Constitution

The Constitution was drafted by a group of experts in 1957 under the auspices of the country's former British rulers. A Commission was appointed to prepare a Constitution for an independent Malaya. It was headed by Lord Reid, who was jointly appointed by the British sovereign and the Malay Rulers. Although no Malayan was directly involved in the drafting of the Constitution, the Reid Commission undertook a consultative process in obtaining the views of the people.²⁵

Malaysia's Federal Constitution was promulgated on 31 August 1957 after successful negotiations for independence with the British colonial masters. The system of government created by the Constitution is a federal parliamentary democracy with a constitutional monarchy. The Constitution created a system of constitutional monarchy through a system of rotational Kingship among the Sultans.²⁶ According to Vanitha Sundra Karean, "The foundational character of the Malaysian Constitution sought to preserve the socio-political position of the Malay monarchy and Islam amongst and for the benefit of the persons professing the Muslim religion."²⁷

The Constitution that stands today is not exactly the one that was adopted when the country became independent in 1957. Over the years many amendments have been made.²⁸ As of 2010, the Constitution has been amended nearly 50 times over the 53 years since independence. According to Faruqi, “There is no doubt” that “the spirit of the original document has been diluted.” The Malaysian Constitution has no Preamble to pronounce the fundamental eternal or unalterable facts of national life or philosophies. And the courts have held that there is no implied limitation on the Parliament’s powers of amendment of the Constitution, and some of the amendments have touched on fundamental aspects of the Constitution, emergency powers and the promulgation of Ordinances under those emergency powers, jurisdiction of the courts, assent to the legislation by the *Yang di-Pertuan Agong* (Malaysia’s ‘paramount ruler’, i.e. HM the King) etc. The word ‘Islamic’ or ‘secular’ does not appear anywhere in the Constitution.²⁹ However, there is historical evidence in the Reid Commission papers that the country was meant to be secular. Included in the proposed Federal Constitution was a declaration that Islam is the religion of the Federation. In the 1956-1957 report, such a provision was proposed: “Islam shall be the religion of the State of Malaysia, but nothing in this article shall prevent any citizen professing any religion other than Islam to profess, practice and propagate that religion, nor shall any citizen be under any disability by reason of being not a Muslim.” But it was not adopted as such.³⁰

As a constitutional state, the Federation of Malaysia – comprising 13 States and 3 Federal Territories – formally endorses the principles of a democratic constitutional state, namely democracy, checks and balances, rights and liberties and the rule of law. The Constitution adopted in 1957 used the western liberal constitutional model, especially the British Westminster model of parliamentary democracy, but it took into account the existence of collective identities in the Malaysian society. Besides a bill of rights, containing an enumeration of the

classical individual rights and liberties (Articles 5 to 13), the Malaysian constitution also accepts group-specific rights and foresees the possibility of positive action policies. In this respect, the Malaysian constitutional experiment departs from the current constitutional models of western liberalism. Instead, it opts for what some authors have called ‘communalism’, which not only provides for individual rights and safeguards religious and cultural minorities in the Constitution but also group rights and group-based quotas in education and public employment. In fact, Malaysia has institutionalised policies of multiculturalism. Further, the Constitution accommodates legal pluralism regarding family and personal matters.

Malaysia inherited the English Common Law tradition at its independence. A large component of its received law therefore consists of the common law derived from its former colonial power, Britain. However, the Constitution has brought Islamic family law under the legislative powers of the member states in the Malaysian federation. As a matter of fact, the historical developments in Malaysia have led to the existence of two systems of family law (and in a limited sense also penal and land law), which are recognised by the Constitution: one for non-Muslims and one for Muslims. The organisation and procedure of the Islamic courts and respectively native courts are a power attributed to the thirteen state legislators.

2.2 The Status of Islam in the Malaysian Constitution

The Federal Constitution provides a handful of provisions that directly deal with Islam or religion in general: Islam as state religion, freedom of religion, and ‘special status’ for Malays.

2.2.1 Islam as State Religion

Islam is the official religion of the federal state, although other religions may be practiced in peace and harmony in any part of the federation.

Article 3(1) declares Islam the official state religion and guarantees religious freedom.³¹ Article 3(3) and (5) state that the rulers of states are declared heads of the religion of Islam by the State Constitutions; in the absence of Muslim rulers (i.e. the States of Malacca, Penang, Sabah and Sarawak) or in the Federal Territories (Kuala Lumpur and Labuan) the *Yang di-Pertuan Agong* is declared the head of the religion of Islam. During the colonial period, Penang and Malacca were within the Straits Settlements and were governed by governors. Similarly, Sabah and Sarawak were also governed by governors. The Conference of Rulers has its roots in the early British rule and the Federation of Malaya. Apart from appointing the *Yang di-Pertuan Agong*, the Conference of Rulers has some legislative powers including those concerning the amendments to the Constitution. The Constitution allows them to discuss any matter and to take part in the appointment of key posts including the judges and the election commission.³² The supreme head of the Federation, the *Yang di-Pertuan Agong*, is under a constitutional duty to protect Islam. This is obvious in the oath of office as prescribed in the Fourth Schedule of the Constitution.³³

Article 3(4) stipulates that nothing in this article derogates from any other provision of this Constitution. This provision has been analysed as a paradox: on one hand, the Constitution seems to declare Islam as the faith of the nation, but at the same time it has put a certain amount of restraints on the provision. In *Che Omar Che Sob v PP* ([1988] 2 MLJ 55) the Supreme Court asserted that though Islam is the religion of the federation, it is not the basic law of the land.

Article 11 of the Constitution provides for freedom of religion: "Every person has the right to profess and practice his religion and, subject to Clause (4), to propagate it."³⁴ Clause 4 empowers the state legislatures to enact anti-proselytising laws to regulate the propagation of other religions amongst the Muslims. Hence there exists a constitutionally backed prohibition to proselytising among Muslims.

Article 12 prohibits discrimination on the grounds of religion, race, descent or place of birth, but authorises Islamic educational and other institutions to be subsidised.³⁵ Indeed article 12(2) provides that it shall be lawful for the Federation or a state to establish or maintain Islamic institutions, provide instruction in the religion of Islam to Muslims and incur expenditure for these purposes. Constitutional provisions concerning equality before the law and non-discrimination on grounds of religion, gender, race, etc. explicitly exclude their application to the legislation concerning personal laws (Article 8(5)).³⁶

Historically speaking, Islam was the religion of the nine Malay States that formed the Federation of Malaya in 1957. The Malacca and Penang Constitutions did not have a provision on Islam as the religion of state during the formation of the Federation in 1957. A provision was later included in the constitutions of these two states through a constitutional amendment in 1993 and 1995, respectively. Sabah amended the State Constitution in 1973 in order to include a provision on Islam as state religion. Sarawak, however, has yet to amend its constitution to include Islam as state religion.

2.2.2 Freedom of Religion

Articles 3(1) and 11 state the right of individuals, especially non-Muslims, to profess and practice their religion freely, without any fear and interference. The special status of the religion of Islam, enshrined in Article 3(1), does not mean that non-Muslims have no right in matters of freedom of religion. However, the Federal Constitution seems to restrict the right to freedom of religion, in the sense that freedom of religion in Malaysia is not absolute.

There have been several restrictions imposed not only within the constitutional framework but also other general legislations. Such restrictions can be seen in Articles 11(4), 11(5) and 10(2) of the Federal Constitution. Article 11 contains limitations in

sub-section (4) wherein there is a restriction of propagating any religious doctrine or belief to Muslims. The restriction of propagation of non-Islamic religions amongst Muslims and state control over the propagation of Islamic doctrine is supposed to serve the purpose of maintaining social stability. However, this is contrary to the principle of freedom of religion in so far as it places the adherents of other religions at a disadvantage compared to Muslims.³⁷

Moreover, the Malaysian parliament has also passed several laws allowing such restrictions. This can be seen in, among others, the Internal Security Act (ISA) of 1960, the Societies Act of 1966, the Police Act of 1967, the Printing Presses and Publications Act of 1984, the Town and Country Planning Act of 1976 and the Penal Code. As such, Muslims and non-Muslims alike must adhere to certain religious constraints for the sake of public order, public health and morality.³⁸

There are several provisions of the Penal Code criminalising offences against religion. The provisions are placed under Chapter XV of the Code with the title “Offences relating to Religion”:³⁹

- insults against religion and religious feelings: injuring or defiling places of worship and sacred objects, trespassing on burial places and places of worship, indignity to human corpses and disturbing funeral ceremonies,
- disturbing religious assemblies and
- causing disharmony on the grounds of religion.

Finally, the right to convert out of one’s faith is not mentioned explicitly in the Constitution as it is the case in the Universal Declaration of Human Rights (cf. *infra*, status of apostasy in Malaysia).

2.2.3 ‘Special Status’ of the Malays

Last but not least, Article 153⁴⁰ gives a legal basis for affirmative action in favour of Malays. During the colonial period, the

British had already put into practice preferential treatment in the selection and training of Malays for the elite administrative service. In 1948, an article in the Federation of Malaya Agreement stipulated that the Malay ruler has to “safeguard the special position of the Malay and to ensure the reservation for Malays of such position as he may deem reasonable of positions in the public service and of scholarships, exhibitions and other educational or training privileges [...] and, [...] of business permit and licenses.” This later became part of Article 153 of the Malaysian Constitution.⁴¹

The Malay ‘special rights’ were, according to the Malays, part of the ‘social contract’ agreed to by the non-Malays in exchange for their receiving citizenship status during the constitutional negotiations. The 1956 Reid Commission explicitly called for the removal of article 153 ten years after independence as it regarded it as in conflict with the principle of equality. Preferential treatment for the Malays and other indigenous groups is written into Malaysian Constitution. Affirmative action is therefore a constitutionally sanctioned policy.

Affirmative action in Malaysia differs from those of other countries, such as the United States of America, because it is the politically dominant majority group which introduces preferential policies to raise its economic status as against that of economically more advanced minorities (Chinese and Indian). It is interesting to note that Article 153 begins by this clause: “1(1) It shall be the responsibility of the *Yang di-Pertuan Agong* to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this Article.” The interests of the other communities are also mentioned.

Affirmative action measures introduced in the 1960s were largely ineffective and inadequate. It is only with the New Economic Policy (NEP) in 1970 that a comprehensive system of

ethnic preferential policies that benefited the Malays was implemented.⁴² This policy emerged after the 1969 racial riots and was meant to reach unity through economic equality. It was successful in what it was set up to do, that is to narrow the intra-ethnic inequality gap, especially between Malays and Chinese. However, there is now growing evidence of rising poverty among the Indian community. One side-effect of this policy is the brain drain of ethnic Chinese and Indians who could not enter universities in Malaysia and went to study abroad. The NEP was also supposed to last for twenty years only, but it continues to be enforced on the argument that the targets have not been met yet.

Having drawn the general constitutional framework relating to the status of Islam in the Constitution, the issue of the distribution of legislative powers between the Federation and the States shall be explained.

3. The Distribution of Legislative Powers Between the Federation and the States

The constitutional framework of distribution of power between State and Federal legislatures seems to be quite clear: *sharī'ah* law is under the responsibility of the States. *Sharī'ah* laws adopted by the states are nevertheless sometimes overlapping federal powers.

3.1 Provisions of the Constitution

To study the extent of the legislative power of the states concerning *sharī'ah* law, one has first to refer to the lists of the Ninth Schedule, then to the scope of application *sharī'ah* law: that is, to whom it can be applied.

3.1.1 The Lists of the Ninth Schedule

Article 74 of the Constitution regulates the distribution of legislative powers between the Federation and the States and refers to the lists of the Ninth Schedule.⁴³ This Ninth Schedule of the Federal Constitution sets out the Federal and State lists containing subjects on which the Federal (List I) and State (List II) governments can legislate. In addition, there is a concurrent list of subjects (List III) on which both the Federation and the states can legislate.

3.1.1.1 Exclusive Powers

The Federal List (List I) contains 27 paragraphs referring to topics on which the Federal Parliament has exclusive legislative competence. For instance, civil law (and family law as a subset of civil law) comes under federal legislature's jurisdiction. Family law relating to non-Muslims is in federal jurisdiction.

The State List (List II) enumerates 13 areas for which State Assemblies have exclusive power. The first paragraph states that except with the respect to the Federal Territories of Kuala Lumpur and Labuan, this comes under states' jurisdiction:

- Islamic law and personal and family law of persons professing the religion of Islam come under State competences including Islamic law relating to succession, marriage, adoption, divorce etc.;
- Islamic religious revenue, mosques or any Islamic public places of worship;
- creation and punishment of offences by persons professing the religion of Islam against the precepts of that religion, except in regard to matters included in the Federal list;
- organisation and procedure of *sharī'ah* courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only to any of the matters included in this paragraph, but shall not have jurisdiction in respect to offences except in so far as conferred by federal law;
- control of propagating doctrines and beliefs among Muslims;
- Malay customs;
- determination of matters of Islamic law and doctrine and Malay custom.⁴⁴

The States are empowered to make personal laws governing Muslims and laws relating to religious offences, and establish and regulate *sharī'ah* courts for application of Islamic law. Islamic law is a matter falling within the State List, meaning that the State legislatures are empowered to enact the law. Exceptions to this are the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, in which Islamic law is enacted by the Malaysian Parliament.

The use of such generic expressions as ‘matters of Islamic law’ has given rise to an engaging debate about the extent of the powers of the States to legislate on Islamic matters. One view is that State Assemblies have legislative monopoly whenever a measure, in its pith and substance, deals with an Islamic civil or criminal matter. The decision in *Mamat Daud v Government* ([1988] 1 MLJ 119) lends credence to this view. The other view is that States have only a limited power confined to the explicitly mentioned areas of Islamic law in Schedule 9, List II, Paragraph I. The rest of the field of Islamic law is open to federal jurisdiction. It is submitted that the second view represents the constitutional scheme of things. The term ‘Islam’ or ‘Islamic law’ in Schedule 9 List II, Paragraph I does not refer to Islamic law in its entirety but only to such areas of Islamic law as are explicitly enumerated in that paragraph.⁴⁵

Item I of List II of the Ninth Schedule permits State legislation “to create and punish offences by persons professing the religion of Islam against the precepts of that religion.” The word ‘precepts’ of Islam is of great importance and should be analysed as such because it determines the extent of the State’s competence. What are the precepts of Islam? Beliefs, tenets, dogmas, principles, articles of faith, canons, maxims, rules, doctrine and teaching of Islam? There is no definition of the word ‘precepts’ in the Federal Constitution. According to the Oxford English Dictionary the word ‘precept’ means “a general command or injunction; an instruction, direction or rule for action and conduct, especially an injunction as to moral conduct; a maxim; most commonly applied to divine command [...]” The Federal Court has recently had the opportunity to define the meaning of this word more precisely. In the *Sulaiman bin Takrib v Kerajaan Negeri Terengganu* ([2009] 6 MLJ) case, a Muslim was arrested and charged with having committed an offence under Section 10 of the *Shari‘ah* Criminal Offences (Terengganu) Enactment 2001 by having defied or disobeyed a *fatwā* and an offence under Section 14 of the this same act for having a VCD that contained material that was contrary to “the

precepts of Islam.” Pending his trial, the petitioner applied for and obtained leave to file a petition pursuant to Article 4(4) of the Federal Constitution. The petitioner sought a declaration that Sections 10 and 14 of the *Sharī‘ah* Criminal Offences Terengganu Enactment were null and void because the State Legislative Assembly of Terengganu had no power to make such provisions. Indeed, the power to create offences is limited to the offences against the precepts of Islam and, according to the petitioner, this was not an offence to the precepts of Islam. The Federal Court had therefore to define what the precepts of Islam are. The Court does not really give a definition but states that the precepts of Islam are derived from the Qur’ān and *Sunnah* and that they cover three main domains: creed (*‘aqīdah*), law (*sharī‘ah*) and ethics or morality (*akhlāq*). It considered that the offences created by Section 10 are offences regarding the precepts of Islam thus giving the word a vast meaning.

However, the power of the State to enforce Islamic criminal law is limited by the words “except in regard to matters included in the Federal list” or “dealt with by federal law.” The power of the State to legislate in criminal matters is therefore limited in two ways.

Firstly, State legislatures cannot create or punish offences already dealt with in List I. List II acknowledges that certain areas of Islamic law are part of the federal jurisdiction. State powers over Islam are neither exclusive nor comprehensive. Among matters included in the Federal List are “civil and criminal law and procedure” (List I, Item 4) and “betting and lotteries” (List I, Item 4(1)). The words “except in regard to matters included in the Federal List” and the assignment of criminal law and procedure and betting and lottery to the federal jurisdiction clearly imply that State power over Islamic law offences is subordinated to federal power and is residual and not inherent. Crime is mostly a matter for federal supervision. Murder, theft, robbery, rape, incest and homosexuality are all offences in Islamic law but are clearly in federal hands due to Schedule 9, List I, Item 4(h) and the Federal Penal Code.

Murder is covered by Sections 300, 302 and 307 of the Penal Code. Theft is dealt with by Sections 378-382A; robbery by Sections 390 to 402; and rape in section 375-376. Incest and homosexuality can be covered by Sections 377A to 377C of the Penal Code. State Enactments on these federal matters would, therefore, be *ultra vires* the powers of the States.

Each State has enacted a *Shari'ah* Criminal Code. Most of the Islamic Law that has been enacted in the States of Malaysia has developed into an independent legal system, substantially different from the strict Islamic laws of the *shari'ah*, except perhaps in family law.⁴⁶ Many states have adopted criminal law which are federal offences and, therefore, outside the powers of the State (cf. *infra*).

A second limitation to the power of the state is that the Ninth Schedule authorises the States to punish those who “profess” the religion of Islam (“creation and punishment of offences by persons professing the religion of Islam against precepts of that religion”). As Faruqi explains it clearly, “professing is a matter of inner feeling. It is not something that can be imposed from outside. This means that those who deny the religion or voluntarily renounce it and become *murtads* or apostates are no more in the state of professing the religion of Islam.”

States are permitted to punish Muslims for offences against Islamic precepts but in doing so they should also respect human rights guaranteed by the Constitution such as Article 11 on freedom of religion. *Shari'ah* law has to respect the fundamental rights provisions of the Constitution (Article 5 to 13). Some States have penalised any criticism to a *fatwā* (Perak: Section 21, *Shari'ah* Crimes Enactment 3/1992; Penang: Section 12 Enactment 3/1996, Federal Territories: Section 12 Act 559). This is in breach with Article 10 of the Constitution related to free speech.

3.1.1.2 Concurrent Powers

List III is related to the concurrent powers. In these fields both the federal Parliament and the State legislatures can enact laws which can have similar objectives and provisions dealing with the same subject matter. According to Article 75, if there is any inconsistency between a State law and a Federal law, the Federal law shall prevail and the State law will be void to the extent of inconsistency.⁴⁷

3.1.1.3 Residual Powers

If any subject matter is not already included in any of the legislative lists, it forms residual matters. Article 77 provides that the legislature of the State shall have the powers to make laws with respect to any matter which is not enumerated (for example, environment).

3.1.1.4 'Uniformisation' Power

Finally according to Article 76 §1(b), the Federal Parliament may make laws with respect to any matter enumerated in the State List for the purpose of promoting uniformity of the laws of two or more States.⁴⁸ Such legislation shall not come into operation until adopted by a law passed by the Legislature of the State and when adopted shall become State law and may accordingly be amended or repealed by a law made by the Legislature (Article 76§3). The power of the Federation to pass laws to promote uniformity in law was confirmed by the Federal Court.⁴⁹

3.1.1.5 The Scope of the Application of *Sharī'ah* Law

Sharī'ah law applies only to Muslims, who are persons professing the religion of Islam. The faith of each Muslim citizen appears on his/her national identity card. All ethnic Malays are classified as Muslims which make them subject to the jurisdiction of the *sharī'ah* courts and a system of laws that

only applies to Muslims including a ban on marriage to people of other faiths. Indeed according to article 160 of the Constitution 'Malay' means

- a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom,
- was before Merdeka Day [31 August 1957] born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or Singapore, and
- is the issue of such a person.

If only one of the parents is Malay, that is sufficient to give him or her 'Malay identity'. So, all Malays are Muslims but not all Muslims are Malays. Indeed, in the Muslim community in Malaysia there are many persons of Chinese, Indian or even European origin. All Muslims are subject to Islamic law in matters enumerated in the List II of the Ninth Schedule. However, in many areas Muslims are allowed to have a choice between *sharī'ah* provisions and ordinary civil law. Among these areas are banking, trust, adoption and a whole range of commercial transactions, matters not enumerated in List II of the Ninth Schedule.

This link between ethnicity and religion is influenced by the Malay custom, as according to Islamic doctrine, there is no link between ethnicity and religion.⁵⁰

3.2 *Sharī'ah* Laws Adopted by the States

Sharī'ah law in Malaysia has been largely influenced by Malay custom. According to Wilkinson,⁵¹ at the time of *Merdeka* (independence) the Islamic law that existed in Malaya was an "Islamic law which had absorbed portions of the Malay *adat* and was, therefore, not pure Islamic law." There has been a very important influence of Malay *adat* on Malay-Muslim personal law. *Adat* has preserved traditional Malay society for many centuries and the importance of *adat* is reflected in the Malay maxim "let the child rather than the custom die."⁵² According

to Shad Saleem Faruqi, “in some States like Negeri Sembilan *adat* (custom) displaces *agama* (religion) in some areas of family law.”⁵³

The Islamic law enactments are different from State to State.⁵⁴ This lack of uniformity in *sharī‘ah* law is a consequence of the constitutional framework. The rules of *sharī‘ah* are set by various Sultans, who serve as head of the Islamic religion in their respective States. Because Islamic law is administered by the respective States, there is a lack of uniformity in the administration of Islamic law in Malaysia.⁵⁵ Although Islam is the religion of the Federation, there is no head of the Muslim religion for the whole of the Federation. The King (*Yang di-Pertuan Agong*) continues to be the head of Islam in his own State, and under the Constitution, is also the head of Islam in the Federal Territories, Malacca, Penang, Sabah and Sarawak as these States have no Malay rulers of their own. The King’s representatives in these states, known as *Yang di-Pertuan Negeri*, are effectively the patrons of Islam. The remaining nine States of Malaysia have each their own ruler, or Sultan, as head of Islam. The Conferences of Rulers have agreed, however, that in respect to ceremonies and observances that cover the whole of the Federation, the King is authorised to represent each and every one of the rulers as the heads of religion in their states. The State Assemblies can legislate in two fields: personal and family law in the one hand and criminal law in the other hand.

3.2.1 Laws of the States Regarding Personal and Family Law

The Constitution has empowered State legislatures to promulgate Islamic law and personal and family law for all persons professing the religion of Islam (except in regard to matters included in the Federal List) such as succession, betrothal, marriage, divorce, maintenance, adoption, guardianship, trusts, Islamic religious revenue and mosques.

This construction entails that there are many different versions of Islamic law enactments in the different member

States.⁵⁶ The Islamic Family Law Act of 1984 adopted for the Federal Territories was designed to serve as a model for the other Malaysian States. It was considered to be amongst the most progressive codified Muslim family laws in terms of rights and protection for women.⁵⁷ However, since 1984, a series of amendments has effectively rescinded many of the positive provisions for women in the original codification. The conservative trend that surfaced in the early 1990s led to the Islamic Family Law (Amendment) Act 1994 (known as IFLA), which effectively overruled some of the positive reforms for women of the 1984 Act. In late 2005, new amendments to the Islamic Family Law were passed by the Parliament and the Senate. These amendments further discriminated against women by loosening restrictions on polygamy, for example. Due to intense public pressure, however, the government decided to temporarily suspend the implementation of this new bill. Upon the request of the cabinet, the Attorney General has convened a broad commission charged with negotiating a compromise in the way the law is drafted. A new bill has been finalised but still awaits submission to Parliament.

As mentioned, the IFLA was intended to serve as a model to promote uniformity among the States.⁵⁸ However family law in some States deviates from the federal model in several important respects. For example, the Federal act requires the consent of the bride to marry. Section 13 of IFLA states that a marriage shall not be recognised or registered under this Act unless both parties freely consent to the marriage and either the *walī* (the woman's guardian for marriage) or in the absence of the *walī* the *sharī'ah* judge has also consented.⁵⁹ Nevertheless the Family Law Enactment of Kelantan follows conventional Shafie legal practise permitting marriage by compulsion.

In contrast to Malaysian civil marriage, Muslim marriages are regarded as polygamous in principle, even if the man only has one wife. The IFLA 1984 seeks to regulate the practice of polygamy to avoid injustice to women by imposing conditions to take a second wife. Five conditions are required for a man to

have another wife: the proposed marriage is “just and necessary;” the applicant has the financial means to support his existing and future dependants; the consent of the existing wife; the applicant’s ability to accord equal treatment to his wives and that the proposed marriage does not cause harm under the *sharī‘ah* to the existing wife. These conditions have to be checked by the court when it registers a polygamous marriage. These conditions are not required in all States (for instance in Kelantan, Terengganu, Perlis and Perak). The Islamic Family Law Act seeks to limit arbitrary unilateral repudiation (*talāq*) by requiring the husband to apply to the court for permission to pronounce the *talāq* in Court. Extrajudicial *talāq* is subject to punishment by fine and/or imprisonment.⁶⁰

3.2.2 Criminal and *Hudūd* Laws of the States

As seen above, the power of State Assemblies to legislate for crimes is a limited and derived power. The Constitution in Schedule 9, List II, Item 1, says that *sharī‘ah* courts “shall not have jurisdiction in respect of offences except in so far as conferred by federal law.” The relevant federal law is the *Sharī‘ah* Courts (Criminal Jurisdiction) Act 1965. It confines jurisdiction to such offences as are punishable with a maximum of three years jail, RM5,000 fine and six lashes (whipping not exceeding six strokes).⁶¹ Any State law imposing larger penalties would be *ultra vires*. Moreover, if a *sharī‘ah* provision is a duplication of a penal code provision, the later shall prevail as it is federal law.

All States have adopted criminal offences enactments.⁶² These enactments are not *hudūd* laws but are considered as *ta‘zīr* (criminal offences). Indeed *sharī‘ah* criminal law distinguishes *hudūd* from *ta‘zīr* offences. *Hudūd* crimes, the most serious ones, are those which are punishable by a pre-established punishment found in the Qur’ān. These crimes are found by an exact reference in the Qur’ān to a specific act and a specific punishment for that act.⁶³ *Ta‘zīr* crimes are less serious

than the *ḥudūd*. These ‘minor felonies’ might include acts which are forbidden by Islamic law but where the punishment is not specifically fixed in the Qur’ān or the *Sunnah*. The punishment is left to the discretion of the Government or the judge.⁶⁴ *Tā’zīr* can be imposed on *ḥudūd* offences where the offender cannot be punished with the *ḥadd* (singular of *ḥudūd*) punishment if the evidence does not satisfy the conditions laid down for providing the *ḥadd* offence.

The *ḥudūd* laws have been adopted only in Kelantan and Terengganu. Kelantan was the first State to adopt *ḥudūd* law on 25 November 1993.⁶⁵ Terengganu has since then adopted a very similar law.⁶⁶ Thus in these two States the *ḥudūd* laws are not implemented because they are unconstitutional.⁶⁷ As explained by Mohammad Hashim Kamali,⁶⁸ “On 25 November 1993, the State legislature unanimously passed the Bill and the Chief Minister of Kelantan who announced this also made it clear that the Bill could not be implemented until the Federal Government of Malaysia made changes to the Federal Constitution.” This was an acknowledgment on the part of the State Government that by passing the *ḥudūd* bill the State legislature had exceeded its jurisdiction. The first problem is that some offences under the Bill are already federal law offences, giving rise to the issue of double-jeopardy (e.g., for theft, robbery, killing, rape). The second problem is that the Bill is made applicable not only to the Muslims of Kelantan but also to non-Muslims (clause 56).⁶⁹ It is not an automatic application to non-Muslims but it gives them the choice in each case to decide if the law should be applied to the case.⁷⁰ The Bill clearly provides that it shall apply to any Muslim “in respect of any offence committed by him in the State of Kelantan” (Clause 56). Clause 57 provides that “any person who abets, assists, conspires or plots in the perpetration of a *ḥadd* offence stands guilty of that offence even if he is not a Muslim.”⁷¹ Third, the punishments exceed the limit fixed by the 1965 Act: punishments foreseen in this law are death, cutting off of one’s hand, or 80 lashes. The Kelantan government has suggested that

the Federal Parliament should pass an Act using Article 76A of the Constitution specifically to authorise the Kelantan government to enforce the proposed law. This Article 76A of the Federal Constitution provides that the Federal Parliament may authorise the State legislature to make laws pertaining to matters that appears under the Federal List.

If these laws were implemented, one would have to determine which law should apply in cases where the same offence is punished differently in both of the criminal laws, the *ta'zīr* and *ḥudūd*. For example, in Kelantan, *zinā* is punished by stoning to death in the *ḥudūd* law and a milder punishment is foreseen in the *ta'zīr* law (3 years imprisonment, RM5,000 and 6 lashes). According to *sharī'ah* law principles, *ḥudūd* punishments are implemented only if there is enough evidence. Otherwise the offence would be considered as *ta'zīr*. For example, if the proof of adultery is difficult, the judge can transform this *ḥadd* into a *ta'zīr*.

Many States have adopted *ta'zīr* criminal offences enactments which are to some extent unconstitutional because of overlapping Federal powers. Some of the offences appear to overlap with offences already in existence in the Penal Code and other federal laws. *Liwāt* (sodomy), for example, appears to overlap with "sexual intercourse against the order of nature" and "outrages on decency" (Sections 377A and 377D of the Penal Code, respectively). *Muncikari* and "indecent acts in a public place" overlaps with "outrages on decency" (Section 377D of the Penal Code which includes "procures or attempts to procure") and "gambling" with "gaming in common gaming house" and "gaming in public" (Sections 6 and 7, respectively, of the Common Gaming Houses Act 1953) (Act 289). According to Abdul Hamid Mohamad, some newly created offences in the State law are unconstitutional, as they are under 'criminal law' in the Federal List, such an offence having existed before Independence. Furthermore, Article 75 of the Federal Constitution clearly states: "If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall,

to the extent of the inconsistency, be void.”

Whether in future cases the superior courts will restore the constitutional scheme of things and declare that State Assemblies do not have equal or concurrent power over crimes committed by Muslims remains to be seen. In a recent case, *Sulaiman bin Takrib v Kerajaan Negeri Terengganu* ([2009] 6 MLJ), the Federal Court has clearly stated that “creation and punishment of offence have further limits: it is confined to persons professing the religion of Islam; it is against the precept of Islam; it is not with regard to matters included in the Federal List and it is within the limit provided by the 1965 Act.”

Many provisions of the criminal offences enactments have actually not really been applied by the authorities of the states. The Kartika case has brought fears that these laws might actually be implemented.

3.2.3 Two Recent Cases Dealing with the Legislative Power of the States

3.2.3.1 The Kartika Case

In December 2007, Kartika Sari Dewi Shukarno, who lives in Singapore, was caught drinking beer at a hotel in Kuantan, in Malaysia’s Pahang State. The *Sharī‘ah* High Court in Pahang sentenced her to six strokes of the cane and fined her RM5,000 after she pleaded guilty. She declined to appeal and came back to Malaysia for the punishment. However, the appeals panel of the *Sharī‘ah* High Court in Kuantan upheld the sentence. She finally obtained the Sultan’s pardon. He has commuted the caning sentence to work of general interest. Indeed according to Section 133 of the Pahang *Sharī‘ah* Criminal Procedure Enactment 8/2002, the Sultan can commute a punishment but he has to get first the advice of the *muftī*.⁷²

The day she was caught by the JAIP (Pahang Islamic Affairs Department), two other persons had been arrested: a 22-years-old waitress from Selangor and a 38-years-old man from

Terengganu. They were both fined RM5,000 each and ordered to be given six strokes with the *rotan*. However, their cases were still pending appeal in 2010.⁷³ The sentence of the *Sharī'ah* Appeals Court will be of great importance. One has to keep in mind that Kartika refused to appeal the judgement which is therefore definitive.

3.2.3.2 Legal Issues Raised by the Kartika Case⁷⁴

Kartika's sentence was under Section 136 of the Pahang Islamic and Malay Traditional Practices Enactment 1982 (amendment 1987). The sentence for consuming alcohol was made stricter when the Islamic Religious Administration and Pahang Malay Tradition Enactment 1982 was amended in 1987. Under Section 136 of the Pahang Islamic and Malay Traditional Practices Enactment (Amendment) 1987, those found guilty of consuming alcohol can be fined up to RM5,000 or jailed for a maximum of three years, or both, and sentenced to six strokes of the *rotan*. This law seems to be constitutional. There are no federal offenses as such and therefore it does not overlap with the federal list. Furthermore the penalty of six strokes of the cane and a fine of RM5,000 is within the limits fixed by the Federal Act of 1965. The only question which could be raised is whether drinking alcohol is against the precepts of Islam. It is a sin forbidden by the Qur'ān and therefore can be considered as against the precepts of Islam.⁷⁵ Even if one can debate whether this could be a *ḥadd*, Kartika was punished for having committed a *ta'zīr* and not a *ḥadd*.⁷⁶

One question which can be raised is whether the Kajang prison which is established under Federal law can execute an order issued by the *sharī'ah* court which is under State jurisdiction? Section 289 of the Criminal Procedure Code does not allow any female offender and any male fifty years old and above to be whipped. The provisions of the States must be in line with federal statutes so as to ensure their validity. The whipping sentence was supposed to be carried out by a federal agency, namely the Prison Department.

Caning is a form of cruel, inhuman and degrading punishment and is prohibited by the International Covenant on Civil and Political Rights (ICCPR). But Malaysia is not part either of this treaty nor of the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment of 1984. Articles 5 to 10 of the Malaysian Constitution do assert a certain number of fundamental rights such as freedom of speech or religion. However, there is no provision on the prohibition of torture or cruel, inhuman and degrading punishment. Malaysia is part to the CEDAW (Convention on Elimination of Discrimination against Women), ratified – with reservations – on 5 July 1995.⁷⁷ However, caning as such cannot be considered as discrimination against women. Malaysia is also part of the Convention on the Prevention and Repression of Genocide of 1948, ratified on 20 December 1994 and is also committed to the 1988 ASEAN Declaration on the Advancement of Women, as well as the 2004 ASEAN Declaration on the Elimination of Violence Against Women. One can consider that caning constitutes violence against women and would be in breach with the declaration. However, as a declaration, it is not legally binding.

3.2.3.3 The ‘Allah’ Case

Malaysia’s Constitution provides each citizen with “the right to freedom of speech and expression”, but allows for limitations on this right. The 1984 Printing Presses and Publications Act (PPPA) requires all publishers and printing firms to obtain an annual operations permit and gives the Prime Minister the authority to revoke licenses at any time, without judicial review.

In January 2009, the Home Ministry approved the publication permit of the *Herald* – a Roman Catholic weekly paper – on condition that the usage of the word ‘Allah’ was omitted and the word ‘limited’ (*terhad*) be endorsed on its front page to mean that it must be circulated only among Christians. The Home Minister had prohibited the usage on grounds of national security and to avoid misunderstanding and confusion

among Muslims. The Archbishop of Kuala Lumpur, as publisher of the *Herald*, had filed an application on 16 February 2009 for a judicial review to seek a declaration that the minister's decision for the prohibition was illegal and that the word 'Allah' was not exclusive to Islam.

In the Kuala Lumpur High Court's judgment of 31 December 2009, Judge Lau said the decision by the Home Minister prohibiting the *Herald* from using the word 'Allah' was illegal and thus null and void. She said the minister had failed to adduce evidence that the use of the word would threaten national security and create misunderstanding and confusion among Muslims. In her decision, Justice Lau Bee Lan also declared that under Article 3(1) of the Federal Constitution, the applicant, Titular Roman Catholic Archbishop Tan Sri Murphy Pakiam, had the constitutional right to use 'Allah' in the *Herald* in the exercise of his right that religions other than Islam might be practiced in peace and harmony in the country. She further ruled that the Constitution, which states that Islam is the country's religion, did not empower the minister to make such a prohibition. "In pursuant to Article 10, the applicant also has the right to use the word 'Allah' in the *Herald* in the exercise of his right to freedom of speech and expression", she said in her oral judgement. Justice Lau ruled as ground for her judgement that both respondents – the minister and the Malaysian government – had failed throughout the trial to prove how the use of the word 'Allah' could threaten national security.

According to Article 11(4) of the Constitution, States do have the power to control or restrict the propagation of religion among Muslims. Ten States have legislation controlling the propagation of non-Islamic religions among Muslims⁷⁸ – all except Penang, Perak, Sabah, Sarawak and the Federal Territories. In the ten States which have adopted laws controlling the propagation of religion amongst Muslims, the use of 'Allah' by non-Muslims is prohibited. For example, under Section 9(1) of the Control and Restriction of the Propagation of Non-Islamic Religions Enactment 1989 of Pahang it is an

offence for a person to use the words, or any of its derivatives and variations, to express or describe anything related to a non-Islamic religion (religions other than Islam). There are 25 words including 'Allah' that cannot be used or associated with a non-Islamic religion in Pahang. Those who violate the law can be fined a maximum of RM5,000 or two years jail or both. In Selangor, the Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactment 1988, Section 9 and the Schedule prescribe that it is a criminal offence for non-Muslims to use the word 'Allah' in relation to their worship. States can legislate in this matter according to Article 11(4) of the Constitution and according to Schedule 9 which foresees that States have exclusive legislative power to control the propagation of doctrines and beliefs amongst Muslims. One can argue whether this law is or is not a *sharī'ah* law. If it is a *sharī'ah* law, it applies only to Muslims; if not it applies to Muslims *and* non-Muslims. According to Professor Kamali, this legislation can be described if not substantive *sharī'ah*, at least a ruling that partakes in the actual goals of the *sharī'ah* or *siyāsah shar'īyyah*.⁷⁹

In Sabah and Sarawak, the term 'Allah' had been used before the two states joined Malaysia, and it is difficult to stop them from doing so now. With regard to the Federal Territories, i.e. is the law applicable to the case, no state law to control the propagation of religions amongst Muslims has been adopted. There is only a *sharī'ah* law: the *Sharī'ah* Criminal Offences (Federal Territories) Act 1997. Section 5 of this Act states that: "Any person who propagates religious doctrines or beliefs other than the religious doctrines or beliefs of the religion of Islam among persons professing the Islamic faith shall be guilty of an offence 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."⁸⁰ But there is no explicit ban on the use of the word 'Allah'.

The National *Fatwā* Council had ruled in May 2008 that in Malaysia the term 'Allah' could only be used by Muslims. The

government suggests to non-Muslims the use of the Malay expression 'Tuhan', but Christians say 'Tuhan' is more like 'Lord' and cannot replace 'Allah'.

The 'Allah' ban is rather unusual in the Muslim world. There are even two verses in the Qur'ān which show without ambiguity that the word 'Allah' can be used by the 'People of the Book'.⁸¹ The historical use of 'Allah' actually predates Islam. It has equivalents in different Semitic languages. Today, the Arabic word is commonly used by Christians to describe God in such countries as Egypt and Syria. Christians (as well as Muslims) in Pakistan and Iran use the Persian word *Khudā* for God. The 'Allah' case can be interpreted as an attempt from the judiciary to recover its freedom. But one has to wait for the ruling of the Court of Appeal and perhaps even of the Federal Court to be able to draw any conclusion on the trends concerning Islamisation.

3.2.4 Other Islamic Laws

The Federal Parliament can only legislate in matters dealing with Islamic law and religion for the Federal Territories of Kuala Lumpur, Putrajaya and Labuan and has no power to legislate for the rest of Malaysia. Article 76 of the Federal Constitution thus stipulates that Parliament can legislate on matters pertaining to the State list in order only to realise "uniformity of law and policy" and in matters of Islamic law and the Malays custom "if so requested by the Legislative Assembly of any State." And even when Parliament makes law at the request of the State Legislative Assembly, such law "shall not come into operation in any State until it has been adopted by a law made by the legislature of the State."

Although the administration of Islam is a matter for the States, over the years the federal government has created many institutions relating to Islam: the Department of Religious Development⁸² is an agency under the purview of the Prime Minister or the National Council of Religious Affairs (created in

1968) chaired by the Prime Minister or the National *Fatwā* Committee. The federal government has also initiated the incorporation of Islamic banking. Some of the statutes, such as those on Islamic banking and Muslim matrimonial matters are merely Islamic law that have been codified and passed by the legislature at the federal level. Islam assumes quite a major influence in the law-making process. Meanwhile the Constitution has prevented interference from civil courts on the jurisdiction of the *sharī'ah* courts: the former are not barred from dealing with Islamic matters. This is due to the fact that they have exclusive jurisdiction on the constitutional provisions which are deeply immersed in Islam. Islamic banking issues also fall under the jurisdiction of the civil courts.

At the outset, the most important departure of Islamic banking from conventional banking is the prohibition of *ribā* (interest), and promoting Profit and Loss Sharing (PLS) as an alternative to *ribā*. The prohibition of interest is obvious in the Qur'ān as well as in the *Sunnah*.⁸³ An Islamic bank is a financial institution that conducts its operations in accordance with *sharī'ah* principles. Separate Islamic legislation and banking regulations exist side-by-side with those for the conventional banking system. The legal basis for the establishment of Islamic banks was the Islamic Banking Act (IBA) which came into effect on 7 April 1983. The IBA provides the Bank Negara Malaysia (BNM) with powers to supervise and regulate Islamic banks, similar to the case of other licensed banks.

The jurisdiction over Islamic banking and finance matter rests with the civil courts. This is due to the fact that banking and finance matters are within List I of the Ninth Schedule on mercantile law. Although the term 'Islamic law' in §1, List II is wide, its application is limited to persons professing the religion of Islam. The legislations on Islamic banking and finance are all federal legislations that are subject to the civil courts' jurisdiction.⁸⁴ Parliament can make law on these items including Islamic law. By virtue of article 121(1A), the High Court shall have no jurisdiction where the matter falls within the jurisdiction

of the *sharī'ah* courts. Matters relating to banking, insurance, companies and other related matters do not fall within the State List but instead come within the Federal List. The jurisdiction over these matters is therefore with the civil courts.⁸⁵ A 'Muamalat Division' within the civil court system has been established by the Practice Direction dated 6 February 2003, issued by the Chief Judge⁸⁶ (cf. *infra*).

3.3 The Supremacy of Federal Law over *Sharī'ah* Law

In Malaysia, Islamic law is subject to the supremacy of the Constitution and Federal law. Article 4 of the Constitution declares that the constitution is the supreme law of the land, such that incompatible legislation is void.⁸⁷ Article 75 of the Constitution stipulates that in case of conflict between the Federal law and State law, the Federal law shall be applicable. The supremacy of the Constitution means that native law, received law and religious legal practice are subject to the constitutionality test. Moreover, Article 160 of the Constitution, which defines law, does not refer to Islamic law at all. In this sense, Malaysian constitutional law is different from, for example, that of Pakistan or Egypt.

3.3.1 Constitutional Review

The Federal Court has the power to review Federal and State legislation on the ground of unconstitutionality. In Article 4(1), the Federal Constitution declares itself to be the supreme law of the Federation. According to Article 128,⁸⁸ the Federal Court is conferred the exclusive jurisdiction to settle disputes "on any question" between the States or between the Federation and any States, and also, more specially, on the question as to whether a law passed by Parliament or the legislature of a State is invalid on the ground that it makes provisions with respect to a matter regarding which Parliament or the legislature of a State has no power to make laws. Moreover Article 128(2) gives the Federal

Court a referral jurisdiction. In any proceedings before another court, if a question arises as to the effect of any provisions of the Constitution, the Federal Court shall determine that question and remit the case back to the Court to be disposed of in accordance with such determination.

The *Yang di-Pertuan Agong*, Malaysia's Head of State,⁸⁹ who acts on the advice of the Federal Cabinet, may also refer to the Federal Court for its position on any question as to the effect of any provisions of this Constitution which has arisen or appears to him likely to arise, and the Federal Court shall pronounce in open court its opinion on any question so referred to it.⁹⁰ The advisory opinion given by the Federal Court pursuant to such a reference is binding although there is nothing in the constitution that stipulates that such opinion shall be binding on the parties concerned. Only once was an advisory opinion sought by the Federal Government under Article 130, in the Kelantan case in 1968.⁹¹

The courts have the constitutional duty to enforce compliance and observance by the State and the Federal Governments of the supremacy of the Constitution by virtue of the power conferred by Articles 4(3) and 4(4). Under Article 162(6) and (7) any pre-*Merdeka* law which is inconsistent with the Constitution, may be amended, adapted or repealed by the courts to make it fall in line with the Constitution. Executive actions can also be challenged on the ground of constitutionality (*Surinder Singh Kanda v Government of Malaya* (1962) 28 MLJ 169).

As we have seen, states and the state *sharī'ah* courts have jurisdiction over only such Islamic criminal offences as are not dealt with by federal law, offences like consuming alcohol, not fasting during the Muslim fasting month of Ramaḍān, *zinā*, *khalwat* ('close proximity' of people of different gender) and missing Friday prayers. However, a wide gap has developed between theory and practice. In relation to Islamic matters, a silent, informal rewriting of the Constitution seems to have

taken place. A great deal of legislation on Islamic matters appears to disregard constitutional limitations. State authorities are behaving as if the entire field of Islamic civil and criminal law were within their jurisdiction.

The superior courts appear reluctant to intervene or to adjudicate whenever an Islamic law's constitutionality is challenged. Because of the passage of Article 121(1A) civil courts are extremely reluctant to examine the constitutionality of *shari'ah*-based legislation even when human rights violations are involved. It is submitted that Article 121(1A) was never meant to oust constitutional or jurisdictional issues (cf. *infra*). According to Faruqi,

in Malaysia, barring a short period of judicial renaissance in the mid-eighties, the courts have a lacklustre performance in the matter of enforcing constitutional supremacy, promoting human rights, curbing arbitrary powers and improving transparency and accountability in government. As in many other countries, our courts speak boldly but act timidly. Local authorities and police officers get chastised now and then. But central government powers remain largely unquestioned. On 'sensitive issues' every possible legal argument is found to avoid or evade the constitutional issues [...]. The principle of constitutional supremacy, boldly proclaimed in Article 4(1), is more notional than real. Over the last 48 years, Malaysian courts have shown extreme reluctance to invalidate parliamentary legislation on the ground of constitutionality. The judges seem to be steeped in the British tradition of parliamentary supremacy which has no legal basis here. There have been 14 or so cases of 'successful' judicial review of federal and state legislation in 48 years.⁹²

3.3.2 The Problem of the Rule of Law in Malaysia

Article 4 of the Constitution, which states that the Constitution is the supreme law of the land, is viewed as the cornerstone of rule of law. The rule of law implies that all inferior laws should conform to the superior law.⁹³ According to Ahmad Masum, "the efficacy of judicial review in the litmus test for the existence

of the rule of law in the country.” But “by looking to the approach adopted by the Malaysian courts, it becomes inevitable to conclude that the principle of constitutional supremacy proclaimed in Article 4(1) is more notional than real [...] The judges seem to be steeped in the British tradition of parliamentary supremacy which has no legal basis due to the fact that in Malaysia, we have a written Constitution, unlike in the United Kingdom.”⁹⁴

Nevertheless the Federal Court had once acknowledged, in the case *Ab Thian v Government of Malaysia* ([1976] 2 MLJ 112), that the doctrine of Parliament does not apply to Malaysia, which has a written Constitution. The power of Parliament and State legislatures in Malaysia is limited by the Constitution and they cannot pass any law as they please. It has since then changed its position to a more restrained position. For example, in the case of *Loh Kooi Choon v Government of Malaysia* ([1977] 2 MLJ 187), it was stated by the court that “the question of whether the impugned Act is harsh and unjust is a question of policy to be debated and decided by Parliament and therefore not fit for judicial determination.”

As a conclusion of this first part, it has to be pointed out that the *shari‘ah* is not the supreme law of the State and is limited to the private sphere. In *Che Omar bin Che Sob v Public Prosecutor & Anor Case* ([1988] 2 MLJ 55), the Federal Court has confined the operation of this Article 160 to a ceremonial and ritual function for the Islamic religion. In this case, it was argued that the enactment of a mandatory death penalty for drug trafficking was contrary to Islam. The Supreme Court made an important distinction between civil law and the public law asserted that Islamic law can be only applied to Muslims and only in the sphere of personal and family laws. Article 3 of the Constitution has never had as its objective enlargement of the application of Islamic law to the domain of public law. Would it have been otherwise, the formulation of this article would have been being different; for example: “Any law contrary to the injunctions of Islam is void.”⁹⁵

As we have seen, States have the legislative power to make laws based on the *sharī'ah* but they also have the competence to create and administer *sharī'ah* courts. This plural law system raises the question of the distribution of jurisdiction between civil and *sharī'ah* courts.

4. The Distribution of Jurisdiction Between Civil and *Sharī'ah* Courts

The *sharī'ah* court system predates the civil court system. Indeed, there was a court system prior to the British intervention, which was a system of one set of courts – the *qāḍī* courts. The then applicable law was Islamic law. The Malay rulers, assisted by a *muftī* (jurisconsult), sat as a judge in the court, whereby the ruler was the highest court of appeal.

The court system introduced by the British in the Malay States in the nineteenth century was supposed to help streamline the existing administration of justice. The new courts were supposed to apply the existing law but the refusal or the inability of the British judges in the new courts to apply Islamic law to most of the cases necessitated a separate court system.⁹⁶ The judges of the civil courts felt they were incompetent to deal with questions of Islamic Law. A device was adopted giving the civil courts power to refer questions of Islamic Law and Malay customs to the State Executive Council of various States. This power under The Muhammadan Law and Malay Custom (Determination) Enactment of 1930⁹⁷ was repealed with the passing of legislation for the administration of Muslim Law in each State and the setting up of the *sharī'ah* courts. Thus, the dual system of courts was set up. The *sharī'ah* courts were removed from the structure of the courts under the Courts Ordinance 1948⁹⁸ and ceased to be federal courts. They became courts under each State.

The British introduced the Courts Enactment in 1919, which created a hierarchy of courts: the Supreme Court (comprising of the Court of Appeal and Courts of Judges), Courts of Magistrate First Class, Courts of Magistrate Second Class, *qāḍī* courts and *penghulu* (village chief) courts. The Courts Enactment created a single system of courts whereby the *qāḍī* courts were placed as the second courts in the hierarchy. In 1948, the Courts Ordinance created a new hierarchy of courts and excluded the *qāḍī* courts from the hierarchy. It thereby created two parallel courts systems. However, there were no express provisions in the ordinance regarding the segregation. It was done indirectly by the British: non-Islamic matters were placed under civil court's jurisdiction; the law of England and the imported statutory laws from India were applied. Islamic matters were left with the *qāḍī* courts and Islamic laws were applied.⁹⁹

Today, Malaysia's secular legal system is based on English common law. However, Muslims are subject to the *sharī'ah*, the interpretation of which varies regionally. Non-Muslims (Malaysian and otherwise) are subject only to secular law and secular courts but Muslims (both Malaysian and otherwise) are subject to both secular and *sharī'ah* law. So, Muslim Malaysians are subject to *two* sets of laws. *Sharī'ah* law in Malaysia is under the jurisdiction of thirteen separate States with their own interpretations.

One has to be aware of the organisation of the dual court system to be able to understand the impact of the constitutional amendment of 1988, which was supposed to clarify the distribution of jurisdiction between *sharī'ah* and civil courts. Yet, one has to admit that the amendment did not fully reach its initial goal as there remain some issues regarding the allocation of cases between the courts.

4.1 The Organisation of the Dual Court System

4.1.1 Civil Courts

The Subordinate Courts consist of the Sessions Courts, the Magistrate Courts and, in West Malaysia, the *penghulu* courts. The High Courts have general supervisory and revisionary jurisdiction over all the subordinate courts and hear appeals from the subordinate courts in civil and criminal matters. Generally, the Court of Appeal hears all civil appeals against decisions of the High Court, except where against judgment or orders made by consent. The Court of Appeal also hears criminal appeals against decisions of the High Courts. All appeals from the Court of Appeal are heard by the Federal Court.

The Federal Court reviews decisions referred from the Court of Appeals. It has original jurisdiction in constitutional matters and in disputes between States or between the Federal Government and a State. The Peninsular Malaysian as well as the East Malaysian States of Sabah and Sarawak each have a High Court. The Federal Court, earlier known as the Supreme Court and renamed the Federal Court (see Act A885 effective from 24 June 1994), stands at the apex of this pyramid. The Federal Court consists of a president, styled as the Chief Justice (formerly called the Lord President), the President of the Court of Appeal, the two Chief Judges of the High Courts in Malaya and Sabah and Sarawak (formerly called Chief Justices) and presently four Federal Court judges.

The Chief Justice is the head of the Malaysian judiciary. His appointment, like those of the President of Court of Appeal, the two Chief Judges, judges of the Federal Court, the Court of Appeal and the High Court, is made by the *Yang di-Pertuan Agong* on the advice of the Prime Minister after consulting the Conference of Rulers. As to the appointment of a judge to the Federal Court, the Court of Appeal and the High Courts, the Federal Constitution provides that the Prime Minister before

tendering his advice shall consult the Chief Justice, the President of the Court of Appeal and the two Chief Judges. On the advice of the Chief Justice, the *Yang di-Pertuan Agong* may also appoint a person who has held high judicial office in Malaysia to be an additional judge of the Federal Court.

The Malaysian Human Rights Commission (*Subakam*) has suggested the establishment of an independent Judicial Appointments Commission (JAC) to rehabilitate and to return general confidence in the judiciary. The Judicial Appointments Commission Act was adopted in November 2008 and came into effect on 2 February 2009 at the very end of the term of office of the Prime Minister Abdullah Ahmad Badawi. It should help restore the public's confidence on the judiciary to be impartial and independent. The main function of the JAC is to select suitably qualified persons who merit appointment as judges for the Prime Minister's consideration so that the Prime Minister, if he accepts any of the persons recommended by the JAC, may proceed to tender his advice to the *Yang di-Pertuan Agong* in accordance with Article 122B of the Federal Constitution, which provides that superior court judges are appointed by the King, acting on the advice of the Prime Minister, after consulting the Conference of Rulers. Judges, even civil judges, are appointed after consulting of the Conference of Rulers (heads of Islam in the States).

4.1.2 *Sharī'ah* Courts

At the time of Malaysia's independence in 1957, *sharī'ah* courts were excluded from the federal system dominated by the civil courts. According to List II of the Ninth Schedule, States are responsible for the "constitution, organisation and procedure of Syariah [*sharī'ah*] 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 far as conferred by federal law." Originally, this system of *sharī'ah* courts

compromised only in two levels: the Chief *Qāḍī* Court and the subordinate *qāḍī*. In the 1990s, the government implemented statutory initiatives to enhance the overall authority of the *sharī'ah* courts. Legislation pertaining to the administration of the *sharī'ah* courts was passed by each State under the auspices of the federal religious authorities (notably the Department of the *Sharī'ah* Judiciary). The *sharī'ah* courts were reorganised into a three tier hierarchy.¹⁰⁰

Today there are three levels of *sharī'ah* courts in a system parallel to and independent of the civil courts: *Sharī'ah* Subordinate Courts, *Sharī'ah* High Court and *Sharī'ah* Appeal Court.

- *Sharī'ah* Subordinate Courts have jurisdiction as indicated by State legislation over criminal suits liable to punishment up to RM2,000 and/or imprisonment up to two years and civil suits in which the value of the subject in dispute is up to RM100,000 or not estimable in cash.
- The *Sharī'ah* High Court has appellate jurisdiction over Subordinate Court decisions in civil suits of 500 ringgit or more and criminal suits.
- The *Sharī'ah* Appeal Court has appellate jurisdiction over decisions arising out of the *Sharī'ah* High Courts original jurisdiction; all appeals are heard by the Chief *Sharī'ah* Judge and two other members and decisions are by majority opinion.

Various improvements have also been made in the administration of *sharī'ah* courts. For the purpose of improvement in the administration of justice, the *Sharī'ah* Appeal courts have been unified through the Department of the *Sharī'ah* Judiciary, though the lower courts remain in the hands of the States. There is only one panel of judges to form a bench of this *sharī'ah* appellate court throughout the country, instead of having different panels for different States. This is to insure a uniform and systematic application of Islamic law in the country. There are different methods of appointments of *sharī'ah* judges, depending on the governing statutes. In

general, they are appointed by the Sultan on the advice of the States Council of Islamic Religion.¹⁰¹

4.2 The Constitutional Crisis of 1988 and the Amendment of the Constitution

In 1988, there was a political crisis between the executive and the judiciary which led to the amendment of the Federal Constitution. The main aim of this amendment was to clarify the distribution of jurisdiction between *sharī'ah* and civil courts.

4.2.1 The 1988 Political Crisis

The Supreme Court in the years leading up to 1988 had been increasingly independent of the other branches of the government. Following a string of judicial rulings against the government in 1987-88, including one that declared UMNO's very existence illegal, the government moved to strip the judiciary of its power of judicial review. Ever since the attack on the judiciary in 1988, the judiciary has repeatedly failed to uphold the rule of law and to rule in independence of all powers, notably the executive.

The case of the two journalists had begun when John Berthelsen and Raphael Pura authored a series of articles on financial transactions of dubious ethical and legal nature carried out by government officials. The *Asian Wall Street Journal* which published them was promptly banned and Dr Mahathir Mohamad in his capacity as Home Affairs Minister had Berthelsen's and Pura's work permits revoked. However, the Supreme Court overturned the cancellation of Berthelsen's work permit because he had not been given a chance to answer the charges of the government. As a result, the ban on the *Asian Wall Street Journal* was also lifted. In a different case, the Supreme Court used its power of judicial review and nullified amendments to the Criminal Procedure Code which gave the Attorney General the power to initiate criminal proceedings in

the High Court without first going to a Magistrate Court. After Operation Lallang' in 1987, where the government detained several political dissidents without trial under the Internal Security Act (ISA), the High Court granted Karpal Singh's application to be released from detention due to technicalities in the way he had been detained.

Matters then came to an end during the second term of Dr Mahathir as Prime Minister when he manifested his belief in the supremacy of the executive and legislative branches. Many saw his eventual sacking of Salleh Abas and two other Supreme Court judges as the end of judicial independence in Malaysia, and Mahathir's actions were condemned internationally.

The Malaysian Bar Council, the International Bar Association, LAWASIA and Transparency International Malaysia established a 'Panel of Eminent Persons' to investigate and report on the events and implication of the 1988 constitutional crisis, including an examination of alleged 'judicial misbehaviour'. The panel met in Kuala Lumpur on three or four occasions over eight months, writing up their reports on the various issues independently. It has handed in its final report in September 2008, concluding that the Malaysian judiciary never fully recovered from the scandal. The panel's final report concluded that the suspension of the Chief Justice was inappropriate and entirely without justification, and found that the ramifications of this kind of political interference could affect public confidence in the judiciary for generations to come. On 17 April 2008, a good-will *ex gratia* payment was made by the government to the six wronged judges.

4.2.2 The Amendment of the Constitution

The secular courts used to be in a position of higher authority until the 1988 amendment to the Constitution which redefined the relationship between the secular courts and the *sharī'ah* courts.

Some State enactments also contributed to the prevalence of the decisions of the civil courts over the *sharī'ah* courts decisions in the event of a conflict. For example, Section 45(6) of the Administration of Muslim Law Enactment Selangor states: "Nothing in the Enactment contained shall affect the jurisdiction of any civil courts and in the event of any difference or conflict between the decision of a court of a Kadi Besar or a Kathi and the decision of a civil court acting within its jurisdiction, the decision of the civil court shall prevail [...]." The Courts of Judiciary Act 1964 also states in Section (4): "In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail."

Some argue that the Federal Constitution places *sharī'ah* courts secondary to civil courts since it does not provide for the structure of *sharī'ah* courts. According to Wu Min Aun,

[t]he secular courts had overriding jurisdiction and the state legislation establishing the *sharī'ah* courts could not exclude the secular High Court. The reason was that the Constitution itself established the secular court system whereas the *sharī'ah* court system was established only by state legislation itself independent on the Constitution for its validity. *Qāḍī* jurisdiction was, therefore, derivative and dependent.¹⁰²

One of the first indications of a conflict of laws and jurisdictions between the common law courts and the *sharī'ah* courts arose over the issue of custody of a Muslim child (*Myriam v Arif* ([1971] 1 LNS 88; [1971] 1 MLJ 265). To avoid conflicting orders being made by the common law court and the *sharī'ah* court over the same or similar matters in the future, the Federal Constitution was amended. The amendment 121(1A) introduced by the Act A704 of 10 June 1988 provided that the High Courts were to "have no jurisdiction in respect of any matter within the jurisdiction of the *sharī'ah* courts."¹⁰³

Before the 1988 amendment Article 121(1), the provision that vested the judicial power in the high courts, provided, *inter alia*, that “the judicial power of the Federation shall be vested in two High Courts of coordinate jurisdiction and status.” The provision has been amended and now it merely provides for the jurisdiction of the High Courts, Courts of Appeal and the Federal Court. The phrase ‘judicial power’ has been deleted from the Article 121(1). This is a sign that the judicial power is not recognised as equal with executive and legislative powers. But some analyse this amendment in the sense that it is supposed to protect the *sharī‘ah* courts’ jurisdiction. Indeed it is not only the civil courts which are vested with judicial power. It has weakened further the position of the supervisory role of civil courts over *sharī‘ah* courts.¹⁰⁴

It was a very simple amendment. It merely says that where the *sharī‘ah* courts have jurisdiction over a matter, the common law courts do not have jurisdiction over it. The aim of this change was to prevent litigants from appealing *sharī‘ah* court decisions to the High Court.

4.2.2.1 Different Interpretations of the Amendment

Everybody thought the problem was solved but there have been different interpretations of the aim and consequences of this amendment.¹⁰⁵ The 1988 constitutional amendment has created an interpretative quandary.¹⁰⁶ Does the application of the amendment mean that whenever a matter comes within the possible purview of the *sharī‘ah* courts through an expansionist interpretation of the *sharī‘ah* courts’ express and implied jurisdiction, the High Courts are automatically stripped of jurisdiction regardless of whether the matter may raise issues relating to constitutionally guaranteed human rights?¹⁰⁷ Some authors like Rasamani Kandiah argue that

[t]he amendment does not purport to oust the jurisdiction of the High Court to review decisions of the *sharī‘ah* courts. It merely says, in effect, that the ordinary courts cannot exercise

the *sharī'ah* court's jurisdiction, a position which, it should be noted, applies to any inferior jurisdiction: it is indeed a cardinal principle of judicial review that the court cannot substitute its decision for that of the inferior jurisdiction whose decision is reviewed. It does not therefore seem possible that the *sharī'ah* courts, by this small amendment, have been converted into a totally separate legal system [...] As things stand the civil courts exercise the power of judicial review and this is of course part of the judicial power. Nothing in clause 1A attempts to interfere with this proposition.¹⁰⁸

In the *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia* case, the Court of Appeal held in 1999 that the word 'jurisdiction of the *sharī'ah* courts' in Article 121(1A) refers to the exclusive jurisdiction of the *sharī'ah* courts. Therefore where there was an overlap of jurisdiction, the civil court will together with the *sharī'ah* court have jurisdiction over the matter. According to Professor Kamali,

[t]he new amendment thus seeks to ensure that decisions made within jurisdiction by *sharī'ah* courts are not reversed by civil courts. It does not, however, overrule the general jurisdiction of the High Court to overrule decisions of *sharī'ah* courts, for it merely says that civil courts cannot exercise the *sharī'ah* courts' jurisdiction. The new amendment in other words, articulates what would normally be expected in matters of jurisdiction: no court may exercise the jurisdiction of another court; this by itself did not envisage new development in the overall structure of the judiciary, and subsequent developments seem to endorse this. The civil courts have exercised the power of judicial review that clause 121 (1A) did not remove.¹⁰⁹

Salbiah Ahmad asserts, that

[s]tate *sharī'ah* courts are not courts inferior to the federal courts as the term 'inferior court' is understood in terms of appeal and judicial review by superior courts over inferior

courts. The state *sharī'ah* courts are in a separate hierarchy to that of the federal civil courts. There is no right of appeal from the state *sharī'ah* courts to the federal civil courts. There is no power of judicial review by the federal high court over the state *sharī'ah* court. However, this does not mean that the federal courts are not empowered to deal with Islamic law.¹¹⁰

This is also the opinion of Kamali according to whom Article 121 was to address problems arising out of conflicting jurisdiction and not to create a new jurisdiction or introduce any basic changes in the status of the civil courts as of general jurisdiction in the country. *Sharī'ah* courts are not integrated into the federal legal system but belong to State jurisdiction.¹¹¹

According to Farid Sufian Shuaib, “the two court systems are clearly meant to be co-equal, each with its own respective jurisdiction.”¹¹²

For Faruqi, Article 121(1A) insulates the *sharī'ah* courts from interference by the civil courts in matters within the jurisdiction of the *sharī'ah* courts. In actual practice, however, what has happened is that on any issue that is connected with Islamic law, whether it is within or outside the jurisdiction of *sharī'ah* courts, the civil courts are extremely reluctant to pronounce a judgement even if issues of jurisdiction, constitutionality and human rights are involved. Article 121 (1A) was not meant to give superiority to *sharī'ah* courts over the civil courts.

4.2.2.2 Ways to Ease Remaining Issues Concerning the Distribution of Jurisdiction

Two problems have not been solved by this amendment. First, the subject matter may fall within the jurisdiction of the *sharī'ah* court but one of the parties is a non-Muslim and the *sharī'ah* court has no jurisdiction over non-Muslims. Which court is to hear the case? Second, in the same case there may be issues falling within the jurisdiction of the common law courts and also

issues falling within the jurisdiction of the *sharī'ah* court. Which court is to hear the case?

Sharī'ah courts and civil courts can indeed have concurrent jurisdiction in the cases between Muslims and non-Muslims. But since 1988 the civil courts have generally shown great restraint in any matter where there is the slightest whiff of an Islamic religious issue. On any issue that is connected to Islamic law whether it is within or outside the jurisdiction of the *sharī'ah* courts, the civil courts are extremely reluctant to pronounce a judgment even if issues of jurisdiction, constitutionality and human rights are involved. The superior courts are generally refusing jurisdiction in cases involving mixed questions of civil and *sharī'ah* law. In doing so they are subordinating human rights in Article 5 to 13 to the power of the States to legislate on Islam under the Ninth Schedule (*Kemariah Ali v Kelantan* [2002]2 MLJ 657). According to Karean,¹¹³

a better way forward will be for the judiciary to engage in a mission to rediscover the constitutional ethos within the Malaysian Constitution. The spirit of the Constitution which prevailed in cases like *Teoh Eng Huat v Kagi* or *Pasir Mas and Minister of Home Affairs v Jamaluddin bin Othman* must be resurrected. This cannot be done through a literal reading of the constitutional provisions. The Constitution is a political document: unlike ordinary legislation, the Constitution is a living document capable of creative and purposive exposition with a view to producing best possible outcomes. The 1988 amendment should not be read as a truncation of the jurisdiction of the High Court over litigation concerning constitutional issues. The Constitution is supreme. The *sharī'ah* courts cannot and do not have supremacy over the Constitution. Most importantly, *sharī'ah* courts have not been given the jurisdiction to adjudicate on fundamental liberties guaranteed by the Constitution. Ultimately, if a *sharī'ah* court does engage in interpretation of the Constitution or if a decision of a *sharī'ah* court or any religious authority is violative of a fundamental constitutional

right, then by virtue of Section 25 (2) and §1 schedule of the Courts of Judicature Act 1964¹¹⁴ an application for judicial review of the impugned decision will lie in the High Court.

The amendment was flawed because it did not create an authoritative method for determining questions of conflict of jurisdiction. According to Faruqi,

In any system with legal pluralism, overlaps are bound to occur and jurisdictional conflicts are unavoidable. The conflicts can be resolved either through judicial interpretation or through legislative guidance. The civil courts have singularly failed in this area. A legislative initiative is, therefore, necessary to clarify issues arising under Article 121(1A).¹¹⁵

Some authors propose some ways ahead. Abdul Hamid Mohamad, former Chief Justice of Malaysia, suggested two ways to overcome the problem of distribution of power regarding the cases in which both common law and *sharī'ah* law arise. His first suggestion would be to combine the two court systems. Common law cases would be heard by judges trained in common law and *sharī'ah* cases would be heard by judges trained in *sharī'ah* law. Where a case involves both common law and *sharī'ah* issues, it should be heard by two judges, one common law judge and one *sharī'ah* judge.¹¹⁶ But this first solution is not politically feasible as it would involve amendments to the Federal and State Constitutions. His second suggestion is to leave the courts as they are. However, cases in which both Islamic law and common law issues arise, whether the parties are all Muslims or not, should be heard by the common law court with two judges, one common law judge and one *sharī'ah* judge.

For Farid Sufian Shuai, another proposal is to federalise *sharī'ah* courts.

The reason why there is a jurisdictional conflict between civil courts and *sharī'ah* courts is that *sharī'ah* courts are under the State governments in contrast to civil courts which are

under the Federal government, except for *sharī'ah* courts in the Federal territories (hereinafter non reference will be made to the exception of the Federal territories). Thus, the obvious answer to the problem of jurisdictional conflict, one may be excused to think, is to amalgamate *sharī'ah* courts and civil courts. If there is only one court system that administers both civil and Islamic law there would be no issue of jurisdictional conflict [...]. Although amalgamation of civil courts and *sharī'ah* courts may solve the problem of jurisdictional conflict, it will not address the issue of laws [...]. Short of amalgamation, efforts to federalise *sharī'ah* courts are under way through a mechanism of a joint service scheme at the federal level. States may participate in this joint service scheme. Under this scheme, Islamic affairs officers, which include *sharī'ah* judges and other officers of *sharī'ah* courts, can be transferred or promoted within participating States. There is now a Department of *Sharī'ah* Judiciary of Malaysia subsumed under the Prime Minister's Department.¹¹⁷

A last proposition would be to create a body responsible in cases of conflict of jurisdiction. There should be a mechanism put in place where a distribution body manned by judges familiar with both civil and *sharī'ah* laws to adjudicate upon the matter.¹¹⁸ This distribution body would have as only power to allocate difficult cases. In case of a tie, the chief Justice would allocate the case either to civil or to *sharī'ah* courts.

4.3 Sensitive Issues Related to the Distribution of Powers Between *Sharī'ah* and Civil Courts

There has been an evolution of the case law regarding *sharī'ah* issues. Before the 1990s, the secular courts and notably the Supreme Court which became the Federal Court in 1994 dared to impose their views. In a landmark judgment of the Malaysian Supreme Court, the court clearly said that Malaysia was a secular State and that Islam was only relevant for ceremonial purposes (*Wan Jalil Bin Wan Abdul Rahman & Anor v Public Prosecutor* ([1988] ILNS 150). In the *Che Omar bin Che Sob v Public*

Prosecutor ([1988] 2 MLJ 55) case, the court analysed Malaysian legal history during British colonial rule and concluded that the *sharī'ah* only provides for the personal laws of Muslims.

In the meantime, partly aided by external factors such as the Iranian revolution of 1979, the Iran-Iraq War, the rise of the Taliban, 'September 11', Osama Bin Ladin, the wars in Iraq and Afghanistan, the situation in Israel/Palestine, the victory of Islamist parties in other countries and even the 'war on terror', Malaysia's own Islamist party, PAS (along with the other opposition parties), gained greater influence and success in the Malaysian general elections of 2008. Now, PAS controls two States and is a member of the coalition that rules three other States. In fact, even the governing Malay nationalist UMNO party (the United Malays' National Organisation, one of the main partners in the National Front, BN, that had ruled the country for fifty years) has also become more Islamist than nationalist.¹¹⁹ So, the States want more powers to be given to *sharī'ah* courts. Moreover, one can notice a kind of stiffening of the case law regarding sensitive issues such as apostasy and interreligious marriages.

4.3.1 The Legal Status of Apostasy

Many passages in the Qur'ān regard apostasy as a great sin. However, nowhere is there a requirement of punishment unless the apostate wages war or indulges defamation. Even the Qur'ān says, "Let there be no compulsion on religion" (2:256), and "Whoever wishes to believe, let him believe, and whoever wishes to disbelieve, let him disbelieve" (18:29). But we also read: "And whoever seeks a religion other than Islam, it will never be accepted of him, and in the Hereafter he will be one of the losers" (3:85). It is clear that apostasy is a sin punishable in the afterlife. Other interpretations of the Qur'ān assert that punishment for apostasy was mandatory in Islam with no distinction between peaceful and violent conversion. Many

Muslim jurists rely on two known *hadith* or saying of the Prophet that apostates should be advised, imprisoned and – if they persist – killed.¹²⁰

In contrast to the generally individualist traditions of Western liberal social theory, Islamic tradition presents a communitarian view. It is not unique in this respect – the Confucian view of society likewise lays emphasis on the community prevailing over the individual. According to such concepts, the self is realised collectively. It is defined through traditions and concepts of honour. In Islam, individualism must be realised within the *ummah*, or community, which is of paramount importance. Accordingly, from a Muslim perspective, the renunciation of the Islamic faith does not simply affect the particular individual concerned. It is harmful to the community as a whole.

In Malaysia, the right to convert from one religion to another was unquestioned until the late 1980s. Till the early 80s, Muslim enactment in several States recognised apostasy by imposing a simple registration on all who entered the faith and all who exited from it. Many States' laws implicitly recognise conversions out of Islam by requiring a register to be kept of those who become *murtad* (renegades) and a similar register is kept of those who adopt the Islamic faith. However in the 1980s, with Islamisation catching on, the unilateral right to register a renunciation was repealed.

Every Malaysian has an identity card, *MyKad*, which contains his personal information and for Muslims their religion is also mentioned. The National Registration Administration is responsible for issuing these cards. According to Rules 14(1) and (2) of the National Registration Regulations 1990 (Amendment 2001), each person who applies for a name change or to correct details of identity card other than the address shall immediately apply for a replacement identity card.

4.3.1.1 The Legislation of the States on Apostasy

The *hudūd* laws of Terengganu (Terengganu *Sharī'ah* Criminal Offences Bill, passed on 8 July 2002) and Kelantan (*Sharī'ah* Criminal Code Enactment 1993) are the most deterrent laws as they impose the death penalty. In Terengganu, the person who intends to convert away from Islam can 'repent' until the execution of the death penalty and he can be imprisoned up to five years. However, (so far) these laws have not been implemented. *Tā'zīr* laws of the States are very heterogeneous on the issue of apostasy.

Negeri Sembilan is the only State which 'allows' a Muslim to leave Islam subject to certain procedural conditions. Under its Administration of Islamic Law Enactment 2003, a Muslim cannot renounce or be deemed to have renounced Islam unless he has a declaration to the effect from the *Sharī'ah* High Court of the State. The applicant must specify the grounds for his application with a supporting affidavit. The *sharī'ah* court judge then adjourns the application for 90 days and refers the person to the Mufti for counselling. If after 90 days the judge feels that such a person will not repent, he will then adjourn the hearing of the application for a period of up to a year, during which time the applicant is required to undergo a counselling session to reconsider his decision. After this period, the judge can make a conclusion whether to declare the applicant an apostate or otherwise.¹²¹

The five States of Pahang, Perak, Malacca, Sabah, and Terengganu¹²² criminalise apostasy. Perak, Malacca and Sabah have criminalised apostasy with fines not exceeding RM3,000 and/or imprisonment of not more than two years. In Malacca and Sabah, an intending apostate can be detained in a rehabilitation centre for a period provided by the law (6 months in Malacca, 36 months in Sabah) and would only be punished if he does not renounce converting out of Islam. Pahang's *sharī'ah* laws contain the harshest sentences where, upon conviction, an apostate is liable to a fine not exceeding

RM5,000 and/or imprisonment of not more than three years, and possibly six strokes of the cane.¹²³ In other States, apostates are sent to rehabilitation centres, such as those in Selangor or Kelantan. Finally, in some States applications to renounce Islam are rejected on the grounds that there is no provision under their *sharī'ah* laws for such applications to be heard. There are also no provisions on apostasy in Kedah, Perlis, Penang, Federal Territories, Johor and Sarawak.

These laws have raised a constitutional issue. Some argue that the freedom of religion guaranteed by Article 11(1) of the Federal Constitution is conditional on Article 3(1), which states that Islam is granted special status as the country's official religion. Hence to take legal action against Muslims who choose to depart from Islam or convert to other religions does not contravene the provisions of the Constitution. Others argue that Article 11 is broad enough to permit a change of faith and though Article 11(4) restricts propagation of any religion to Muslims, the law nowhere forbids voluntary conversion of a Muslim to another faith.

The penal approach to apostasy violates the Constitution's grant of freedom of religion (Article 11) even if the right to convert out of one's faith is not mentioned explicitly in the Malaysian Constitution. The freedom of religion is broad enough to permit change of faith. Even forced rehabilitation is in interference with personal liberty guaranteed in Article 5(1). It also violates Article 10(1)(a) which guarantees liberty of speech and expression and Article 10(1)(c) which guarantees the right to associate. The Court has accepted that the right to disassociate is inherent to the right to associate concerning the right to leave a political party (*Dewan Undangan Negeri Kelantan v Nordin b. Salleh* [1992]1 MLJ343). Article 12(3) says that no person shall be forced to receive instruction or take part in any ceremony or act of worship of a religion other than his own. The forced rehabilitation laws violate this right.

In *Kamariah Ali v Kerajaan Negeri Kelantan* ([2002] 3 MJL 657) the judge ruled that Article 11 should not be

interpreted so broadly as to vitiate legislation that imposes duties and prohibitions on Muslims. (In this case, Kamariah Ali, a former religious teacher and follower of the Sky Kingdom 'deviant sect' was sentenced to two years in prison for apostasy). According to Faruqi,

[i]n other words the judge implies that the fundamental right in Article 11 is subordinate to the legislative power of the State in Schedule 9. This is an exceptional view. Around the world legislative lists are subject to fundamental rights. It is not fundamental rights which are subject to the legislative lists.

The right to convert out of one's religion is alluded to in Article 18 of the Universal Declaration of Human Rights (UDHR) 1948. It declares that "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom [...]." The UDHR has been given partial recognition by section 4 (4) of Malaysia's Human Rights Commission Act 1999,¹²⁴ but this only to the extent to which it is not inconsistent with the Federal Constitution.

In 1948, at the Third Committee of the United Nations General Assembly, the freedom to change one's religion or belief was challenged by certain Islamic states, including Saudi Arabia, claiming it was contrary to the Qur'an. The representative of Pakistan, which then was the United Nations' member with the largest Muslim population, did not agree on this. Muhammad Zafrulla Khan, the foreign minister of Pakistan and head of its UN delegation, told the delegates that the article on freedom of religion would have the support of Pakistan citing a passage from the Qur'an for the proposition that faith could not have an obligatory character. Moreover, he pointed out that Islam was "a proselytising religion that strove to persuade others to change their faith and to alter their way of living. It recognised the same right of conversion for other religions. The freedom to change beliefs, he concluded, was consistent with Islamic religion."¹²⁵

Article 18 of the International Covenant on Civil and Political Rights 1966 (ICCPR) does not mention explicitly the right to change religion; it only mentions the right to adopt one's religion.¹²⁶ Nevertheless according to United Nations Human Right Committee, this should be interpreted as including the right to change religion.¹²⁷ But, unfortunately, Malaysia is not part of this treaty.

4.3.1.2 Case Law

In the *Minister v Jamaluddin Othman* case of 1989 the preventive detainee had converted from Islam to Christianity. His detention was held to be unconstitutional because it violated his freedom of religion which is not subject to suspension under Article 149 or legislation like the ISA derived from Article 149. The Court held that changing faith was not a threat to public order.

Another incident was the 'Lina Joy Case'. Lina Joy was born in Malaysia into a Muslim family. At birth, she was given the name Azalina binti Jailani. In 1998, however, she decided to convert to Roman Catholic Christianity. She announced her intention of marrying a Christian man. Under the Malaysian Law Reform (Marriage and Divorce) Act 1976, she would not be able to contract such a marriage unless her new status as a non-Muslim was recognised. For these reasons, Azalina applied to the Malaysian National Registration Department (NRD) to change her name on her identity card to a Christian name. She was successful in having the name changed to Lina Joy, but the NRD refused to have her religion changed. Lina Joy contested the decision of the NRD in the High Court of Malaysia. She raised the administrative law point that the National Regulations did not, and should not require an order or certificate of apostasy to change her religion on her identity card. More importantly, she argued that the NRD's insistence infringed her right to freedom of religion under the Malaysian Constitution.

Upon the rejection of her application by both the High Court and Court of Appeal, Lina Joy seized the Federal Court where she argued that the requirement that she must obtain the approval from the *sharī'ah* court to exercise her choice of religion was unconstitutional. By a majority of two to one of the judges participating in the ruling, the Federal Court found against Lina Joy. The Supreme Court held that the NRD policy of requiring a certificate of apostasy was lawful. The question whether Lina Joy was a Muslim or not was a decision exclusively for the Islamic courts.

The problem was to know which court should have jurisdiction to authorise her to change religion. In 2007, the Federal Court ruled that Lina Joy could not change her religion outside the *sharī'ah* court system. The judges chose to leave it to the *sharī'ah* court's jurisdiction. A Muslim who wishes to declare apostasy must first get the *sharī'ah* court to confirm that he has left the religion. Until the act of renunciation is validated by the *sharī'ah* court, a Muslim is deemed to be a person of the Muslim faith.

The court invoked a public order argument by stating Article 11(4) which enable States to enact law regulating the propagation of other faiths to Muslims and 11(5) which is the public order clause. For him these clauses serve to protect the "harmony and well-being of the multi-racial and multi-religious communities of this country."¹²⁸ Therefore a Muslim's choice to change religion implicates public order. This is contrary to *Minister for Home Affairs Malaysia v Jamaluddin bin Othman*.

In doing so the Federal Court deprived her of her right to choose her religious as apostasy is a serious matter and even a crime in some States (namely Pahang, Perak, Melaka, Sabah and Terengganu). Many commentators have stressed those constitutional issues such as these should be dealt with in the civil courts and not the *sharī'ah* courts.

One can easily conceptualise the Lina Joy decision as a violation of a Malaysian citizen's constitutional right to religious

freedom, and many scholars and commentators have done so.¹²⁹ The Federal Court's decision constituted an equally egregious violation of the universally recognised women's rights enshrined in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to which Malaysia is a State Party. The Federal Court's refusal to recognise Lina Joy's Christian status assaulted both her right to equality with men and her right to equality with non-Muslim women under the Convention, depriving Joy of the comparably permissive right to marry that is afforded to Muslim men, the unrestricted right to marry that is enjoyed by non-Muslims, and the right to choose one's religion that is granted to non-Muslims.¹³⁰ According to Thio Li-Ann,

[t]he reasoning is confusing as in stating that a constitutional right is subjected to statutory *sharī'ah* law norms by virtue of Article 3(1), indicating a conflict between constitutional and *sharī'ah* law norms [...]. Faiza J (Federal Court judge) sought to give effect to the supremacy of Islamic values and a particular Islamic view of apostasy through attributing a quasi-*grundnorm* status to Article 3 and through that to *sharī'ah* law.¹³¹

The Federal Court is therefore considered to accord official or preferential status to Islam without creating a theocratic State.¹³² It also has to be noted that the Federal Court, which is a civil court, commented on Qur'ānic injunctions citing seven verses. This raises the question of the propriety of citing a divine source of law within secular court. According to Nurjaanah Abdullah alias Chew Li Hua,

[a] person is therefore still required to get an order from the *Sharī'ah* Court even though there are neither procedures nor legal provisions on renouncement. Jurisdiction of the said court is assumed. It is difficult to follow this reasoning as it ignores the reality that whether or not a person has renounced Islam is actually a question of fact, not of law. How can the renouncement of an individual of his faith be 'a matter of

Islamic law'? When there is no provision at all in the said Islamic law on the matter of renouncement, how can it be 'a matter of Islamic law'?¹³³

The Federal Court states that under Article 160(2) a "Malay remains in the Islamic faith until his or her dying days." This interpretation raises an equal protection issue. Malays cannot claim religious freedom as they cannot convert. However non-Muslim persons can convert and therefore they truly enjoy a freedom of religious choice. A non-Malay convert to Islam who decides to leave Islam can do so and must report such decision to the relevant state Islamic authority who determines the validity of the renunciation.

4.3.1.3 Ways Ahead

According to Faruqi, *sharī'ah* courts have no jurisdiction over non-Muslims. Therefore the matter must be committed to a civil court or to a newly created Special court. This special court could also have jurisdiction in cases in which one of the parties to a family law dispute is a Muslim and the other a non-Muslim. The creation of such a special court will require a constitutional amendment to harmonise the position of the Special Court or a Judicial Committee of the Conference of Rulers with the existing Article 121(1A).

According to the Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism and Taoism (MCCBCHST), Parliament should consider the conflict that has arisen as a result of introducing Article 121(1A). It should find ways and means not to subject non-Muslims to hardship. In this regard it is suggested that Parliament consider inserting a proviso to Article 121(1A) in suitable terms to ensure that the *sharī'ah* courts shall have no jurisdiction where there is a dispute:

- (a) as to whether or not a person professes Islam as his religion, or

- (b) in which a necessary party to the litigation is a person who does not profess Islam as his religion, or
- (c) civil courts should be empowered with jurisdiction to adjudicate on these issues.

Another proposition by Dato' Abdul Hamid bin Haji Mohamad is to unify the civil and the *sharī'ah* courts at all levels. It also means federalising the *sharī'ah* courts. People qualified in civil law as well as people qualified in Islamic law would be appointed judges of the same court at all levels. Islamic law cases, civil or criminal, would be heard by judges qualified in Islamic law. Non-Islamic law cases would be heard by judges qualified in civil law. If, in a case where there are issues involving both laws, two judges should sit, one from each discipline. The judge with Islamic law qualification would decide issues of Islamic law. The judge with civil law qualification would decide the other issues. The final judgment of the court would be given by both of them, jointly.¹³⁴

The *sharī'ah* courts should have exclusive jurisdiction only when both parties are Muslim. Thus, the civil courts should not be excluded from hearing such a case especially where one of the parties is non-Muslim. Another proposition is that there should be a mechanism in place as where the High Court has a *sharī'ah* division manned by judges familiar with both civil and *sharī'ah* laws to adjudicate upon the matter. It could also be possible to invoke advisory jurisdiction of the Federal Court under Article 130 to address this conflict of jurisdiction.¹³⁵

Our position is that Malaysia should have a standard law on apostasy. Other States should follow Negeri Sembilan where there is a counselling process to try to persuade those who aspire to convert out of Islam. In Singapore, Muslims who want to renounce Islam must go to the *muftī*'s office for 'counselling'. A federal law on apostasy could be passed on the basis of Article 76 of the Constitution, allowing the Federal Parliament to make laws with respect to any matter enumerated in the State List for the purpose of promoting uniformity of the States' laws.

It should indeed be possible to reconcile Islam and freedom of religion as apprehended by the Universal Declaration of Human Rights. The evolution of the position of the Catholic Church regarding human rights can open a new perspective on this matter. In the Canon Code of the Catholic Church, there are also crimes like apostasy or excommunication. But in Pope John XXIII's encyclical *Pacem in Terris* of 1963, the Catholic Church has embraced the Universal Declaration of Human Rights. There is therefore acceptance of freedom of religion for external but not for internal forums. Could it also be possible for Islam?

4.3.2 Interreligious Marriages

4.3.2.1 The Ban of Interreligious Marriages for Muslims in Malaysia

In general, Muslim men are not permitted to marry non-Muslim women. As stated in the Qur'ān, "Do not marry unbelieving women until they believe; nor marry your girls to unbelievers until they believe [...]." ¹³⁶ If it is clear that a Muslim woman must marry a Muslim man (2:221), an exception is made for Muslim men to marry chaste or pious Jewish and Christian women, who are referred to as 'People of the Book'. This comes from the understanding that Jews and Christians share similar religious outlooks, for example, a belief in One God, following the commandments of Allah, a belief in revealed scripture (Books), etc. This is supported by one of the verses of the Qur'ān: "[...] Lawful to you in marriage are not only chaste women who are believers, but chaste women among the People of the Book, revealed before your time, when you give them their due dowers, and desire chastity not lewdness" (5:5). Malaysia has a restrictive interpretation which might be influenced by the Malay custom on this aspect.

Section 10 of the Islamic Family Law (Federal Territories) Act 1984 provides that no Muslim man shall marry a non-

Muslim except a *kitābiyyah*, while no Muslim women shall marry a non-Muslim. Section 2 of the Islamic Family Law (Federal Territories) Act 1984 gives a narrow definition of this concept. A *kitābiyyah* is generally, in traditional Islamic practice throughout the centuries, regarded as a person of the ‘People of the Book’, i.e., a Jew or a Christian, but Section 10 of the Islamic Family Law Act gives a more restrictive interpretation:

- a woman whose ancestors are from the Banī Ya‘qūb; or
- a Christian woman whose ancestors were Christians before the prophethood of the Prophet Muḥammad (who lived in the seventh century CE !); or
- a Jewess whose ancestors were Jews before the prophethood of Prophet ‘Isā. ‘Prophet ‘Isā is of course the Jesus Christ of the Christians. The ‘Banī Ya‘qūb’ are the descendants of the Prophet Ya‘qūb’ (one remembers, the tribe of Jacob, the patriarch of the Old Testament), who had twelve sons who formed the twelve tribes of Israel. Incidentally, this means only Malayalee Christians in Malaysia – the Mar Thomites and the Syrian Christians – would probably comply with this requirement. The definition of *kitābiyyah* in the Shāfi‘ī school (as adopted in Malaysia, one is tempted to add) is very strict. It is rather unlikely that there will be found any *kitābiyyah* in Malaysia (*U Viswalingam v S Viswalingam* [1980] 1 MLJ 10). Some States do not have this strange provision at all, instead forbidding Muslims to marry non-Muslims (like Sarawak or Kelantan).
- *Sharī‘ah* courts shall have jurisdiction only over persons professing the religion of Islam according to Item 1 State List.

Some statutes establishing *sharī‘ah* courts provide that *sharī‘ah* courts shall have no jurisdiction over non-Muslims. For example:

- Section 40 of the Administration of Islamic Law Enactment 1959 of Penang: “No decision of the Court of the Kadi Besar or a Kathi shall affect any right of property of any non-Muslim.”

- Section 59 of the Administration of Islamic Religious Affairs Enactment of Penang State 1993: “No decision of the *Sharī‘ah* Subordinate Court, *Sharī‘ah* High Court and the *Sharī‘ah* Appeal Court shall prejudice or involve the rights, interests or properties of any non-Muslim.”

Marriages between non-Muslims in Malaysia are registered under the civil law known as the Law Reform (Marriage And Divorce) Act 1976 (Act 164) (“LRA”). Section 3 of the LRA provides that the Act shall not apply to “a Muslim” or to “any person who is married under Islamic law.”

4.3.2.2 Conversion of One of the Spouses to Islam

There is an exception to the rule according to which the LRA does not apply to non-Muslims. Indeed according to Section 3(3) the court may still grant a decree of divorce under Section 51 where one party to the marriage has subsequently converted to Islam and such decree shall be valid and binding against the party to the marriage of who has converted to Islam. According to Section 51 LRA:

Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce: provided that no petition under this section shall be presented before the expiration of the period of three months from the date of conversion. The Court upon dissolving the marriage may make provision for the wife or husband, and for the support, care and custody of the children of the marriage, if any, and may attach any condition to the decree of the dissolution as it thinks fit.

The Supreme Court in *Tan Sung Mooi (f) v Too Miew Kim* ([1994] 3 MLJ 117, SC), ruled that the civil High Courts have jurisdiction and that civil law continues to apply even though one spouse has converted to Islam. This decision was generally respected and enforced.

However, according to Islamic law, the marriage is terminated upon the expiration of three months of the

conversion if the other spouse does not convert to Islam. The converted spouse is thus free to marry according to his or her personal law, that is, Islamic law. The problem now occurs because converts go to the *sharī'ah* courts to get these orders rather than coming to the civil high courts; using the convenient excuse that section 51 of the Law Reform (Marriage and Divorce) Act 1976 only allows the non-converting spouse to petition for divorce. Indeed this provision gives a right to petition for divorce only to the person who refuses to convert to Islam. A person who converts to Islam cannot file for divorce in civil court. So if the other party refuses to apply for divorce then the marriage continues to exist according to civil law.¹³⁷ And in some States, like in Negeri Sembilan,¹³⁸ a convert's non-Muslim marriage can be dissolved by *sharī'ah* courts. These new laws state that a non-Muslim marriage is not dissolved until the Court (defined in the *Sharī'ah* Enactments as the *sharī'ah* courts) declares it so.

There are cases where the *sharī'ah* courts pretended that the wife of a convert to Islam had to go to the *sharī'ah* court for relief as the husband had already begun proceedings there. But the Supreme Court first asserted the contrary in the *Tan Sung Mooi (F) v Too Miew Kim* case of 1994:

The legislature, by enacting Section 51, clearly envisaged a situation where one party to a non-Muslim marriage converted to Islam, the other party who has not converted may petition to the High Court for divorce and seek ancillary reliefs [...]. Further, it would seem to us that Parliament, in enacting Sub-Section 51(2), must have had in mind to give protection to non-Muslim spouses and children of the marriage against a Muslim convert [...]. It would result in grave injustice to non-Muslim spouses and children whose only remedy would be in the civil courts if the High Court no longer has jurisdiction, since the *sharī'ah* courts do not have jurisdiction over non-Muslims.

This was confirmed in the *Subashini Rajasingam v Saravanan Thangathoray* case of 2007 but the Supreme Court

said that the converted husband could still seek divorce in the *sharī'ah* court albeit the rulings made by the *sharī'ah* court would not bind the civil court.

According to the Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism and Taoism (MCCBCHST), Section 51 of the LRA should contain a provision requiring the converting spouse to fulfil all his obligations under the civil law before converting to Islam.¹³⁹ A draft amendment is being discussed in the Federal assembly. It would modify article 51 to make sure that the converting spouse has fulfilled all his obligations under the civil law before converting to Islam (ancillary relief, maintenance of the spouse and children, custody of the children).¹⁴⁰

4.3.2.3 The Unilateral Conversion of Children in Case of Conversion of one of the Spouses to Islam

According to Article 12(4) of the Constitution, “the religion of a person under the age of eighteen years shall be decided by his parent or guardian.”

Under civil law, Section 5 of the Guardianship of Infants Act 1961 gives equal rights to a mother and father on the upbringing and custody of their children. Religious upbringing is one aspect of custody. So, under civil law both parents have to agree on this matter. And in case of divorce, Section 89(2) (a) of the Law Reform (Marriage and Divorce) Act 1976 dealing with custody so as to prevent abuse foresees, that an order for custody may “contain conditions as to the place where the child is to reside, as to the manner of his or her education and as to the religion, in which he or she is to be brought.”

A few cases have raised the question whether only one of the parents could convert children under the age of eighteen. This was notably the problem in the *Subashini Rajasingam v Saravanan Thangathoray* case of 27 December 2007.¹⁴¹ Subashini Rajasingam was married to her husband Saravanan under the civil law and under Hindu rites. They had two sons.

The husband converted to Islam and went away with her elder child. She did not hear from her husband until she suddenly received a notification from the Islamic courts that they would be hearing a custody application in respect of her elder son, who had been given a Muslim name and converted unilaterally by his father. The Federal Court was seized in last resort and ruled that any parent had a right to convert the child of marriage to Islam. In a 2–1 majority judgement, the Court held that the word ‘parent’ in Article 12(4) of the Federal Constitution which states that the religion of a person under the age of 18 shall be decided by his parent or guardian, means a single parent.

Provisions in certain newly enacted State legislation on Islamic law allow “the mother or father or guardian” to consent to the conversion to Islam of a minor thus denying the parental rights of the non-Muslim parent.¹⁴²

On 22 April 2009, the Malaysian Cabinet made a statement that children of divorced parents should be raised in the religion of the time of their marriage should one of them later convert to another religion. “Religion should not be used as a tool to escape marriage responsibilities. Conversion is not a ground for the automatic dissolution of a marriage,” he said at a press conference at Parliament building. The children should be brought up in the common religion. “For the spouse who intends to convert into Islam, he or she would also have to ‘come clean’,” he said. Nazri also that said religious conversion must come with the innocent party being protected from being victimised, as well as protection being afforded to the new religion of the converted person. “Civil marriages have to be resolved according to civil laws. The conversion takes effect on the day of conversion and is not retrospective. The convert would have to fulfil his or her marriage responsibilities according to civil laws prior to the conversion,” he added. Laws now need to be changed.

Some are concerned that without any amendments to the existing and related laws, the cabinet’s decision may not be

helpful. As pointed out by Malaysian Bar Council president Regulate Kesavan, the cabinet directive is a policy statement that requires amendments to existing laws for its full realisation.

Perhaps it had some influence on the issue of *Indira Gandhi v Mohd Ridzuan Abdullah* case. Indira lodged a police report after she claimed her estranged husband entered her home by force and assaulted her before making off with the birth certificates of their three children. She then found out that her husband had converted to Islam and had converted their children. On 25 April 2009, the High Court of Ipoh granted Indira interim custody for her three children and issued an injunction against her husband preventing him from entering her home overriding the custody order granted to Mohd Ridzuan by the *sharī'ah* court on 8 April 2009. However, the husband kept the youngest child.

In the case of *Shamala*, the Court of Appeal has asked an advisory opinion to the Federal Court. Shamala and her husband were Hindus when they married in 1998. In 2002, her husband converted to Islam, and did the same for his two children without informing his wife. Shamala went to court and applied for custody of the two children. She also sought to nullify the conversion. Both parents were awarded joint custody, and the children got to live with their mother but Shamala did not succeed in nullifying the conversion. Meanwhile, the father had also filed for custody but in the *sharī'ah* court. He was granted custody a month later. After multiple lawsuits and counter-suits, both parties finally agreed to put their case before the Court of Appeal.¹⁴³ Just subsequently, the Court of Appeal has decided to refer the case to the Federal Court on 29 April 2009, under Article 128(2) of the Federal Constitution. It has referred three constitutional questions to the apex court before hearing the appeals as it wanted the Federal Court to adjudicate on conflicting Islamic and civil laws governing conversion and the freedom of the practice of religion:

- whether the Administration of Islamic Law (Federal Territories) Act 1993, which gave the right to a converted

parent to convert his or her children from a civil marriage without the knowledge and consent of the other parent, is inconsistent with the Guardianship of Infants Act 1961. This is because the amended Guardianship of Infants Act gives equal rights to a mother and father on the upbringing and custody of their children;

- whether the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) is in conflict with the Federal Constitution and a federal law relating to the issue of converting a minor by a parent;
- whether there is jurisdiction for the High Court or *sharī'ah* court to make conflicting orders and if there had been a conversion of the children from a civil marriage into Islam by one parent without the consent of the other parent, where then would the non-Muslim parent seek remedy.

Normally, cases before the Federal Court are heard by a full Court comprising of three judges. However, in certain special cases, for example one which involves interpretation of the Constitution or a principle of law of major public importance, the Chief Justice may convene a bigger panel of five or even seven judges to deal with the matter. It is very likely that the Chief Justice might convene a large panel of judges for the *Shamala* case. The position of the Federal Court would then have more authority than in the *Subashuni* case where the court was comprised of only three judges. The ruling of the Federal Court could be of great importance, if it dares to take a position.

4.3.2.4 The Issue of Inheritance in Case of Conversion of One of the Spouses to Islam

Section 2 of the Distribution Act 1958 provides that the Act shall not apply to the estate of any person professing the Muslim religion, and non-Muslims are generally not allowed to inherit under *farā'id* (religious duties) principles of asset distribution.¹⁴⁴ As a result, the non-converting next-of-kin of a

Muslim convert is adversely affected by the conversion, as they fall between the cracks and are unable to inherit under either civil law or according to *farā'id* principles. According to Rasamy Kandiah,

It is imperative that section 51 of the LRA be amended to allow converting party to end his marriage and settle all the ancillary relief in the civil court before the Religious Authority accepts the conversion of any party. This will stop the abuse of any converting spouse from neglecting the responsibility one has under the civil law marriage. The aggrieved spouse has the right to maintenance and division of property as stipulated in the Sections 76 and 77 LRA.

It seems that this dual legal system results in discrimination against women. Malaysia is part to the CEDAW with reservations to Articles 5a, 7b, 9§2, 16§1a and 16§2. It is not part of the optional protocol of 1999. By ratifying the Optional Protocol, a State recognises the competence of the Committee on the Elimination of Discrimination against Women – the body that monitors States parties' compliance with the Convention – to receive and consider complaints from individuals or groups within its jurisdiction. But as party to the CEDAW, Malaysia is nevertheless submitted to the periodical review of the CEDAW Committee. In its periodical review of 2006, the CEDAW Committee has expressed some concerns about the existence of the dual legal system of civil law and multiple versions of *sharī'ah* law, which results in continuing discrimination against women, particularly in the field of marriage and family relations.¹⁴⁵

5. Conclusions and Recommendations

Malaysia's legal order is based on a very original form of legal pluralism. One point which has to be highlighted is the fact that in Malaysia there is a combination of personal status for Muslims and also positive discrimination in favour of Muslims. It is perhaps the mix of these two aspects which leads to greater Islamisation. Another specificity of legal pluralism in Malaysia is that personal status applies only for Muslims. The other religious groups do not benefit from a specific personal status and civil law is applied. Usually in pluralist States there is a personal status for each religious group, as in India. It was the case before 1976 but the Family Law Act has harmonised the other personal status applying civil law.

The Malaysian example of legal pluralism is particularly interesting in showing that in the context of legal pluralism there is always a dominant and a servant law. The balance between the dominant and the servant law nevertheless oscillates. Legal pluralism in Malaysia could be seen as a model if the issue of distribution of jurisdiction between *sharī'ah* and civil court was solved. The Gordian knot of this problem lies in the treatment of conversion out of and into Islam, as at this particular time conflicting laws can apply. Some small adjustments in the legal system could smooth the relationship between the two sets of laws.

- *Install an optional constitutionality check before gazetting of State laws.* To ensure the conformity of the laws of the States with the Constitution, a preliminary constitutional recourse

could be created. Before the gazetting of a law, a group of the State's MEP could transfer the bill to the Federal Court in order to check for its constitutionality. If declared unconstitutional the law would not be gazetted. This could be done only through a constitutional amendment.

- *Make judicial review more efficient by creating a binding constitutional recourse.* During a judicial procedure, if one of the parties asks for judicial review on the ground of unconstitutionality of a law, the judge should be deemed to refer the question to the Federal Court. This is today possible according to Article 128 §2 of the Constitution.¹⁴⁶ It should be made compulsory and not discretionary for the judge to raise the question to the Federal Court. This would insure the supremacy of the Constitution and protect the distribution of legislative powers between the States and the Federation.
- *Create a distribution body to allocate sensitive cases either to shari'ah or to civil courts.* There should be a mechanism put in place where a distribution body manned by judges familiar with both civil and shari'ah laws to adjudicate upon the matter.¹⁴⁷ This distribution body would have as only power to allocate difficult cases. In case of a tie, the chief Justice would allocate the case either to civil or to shari'ah courts.
- *Adopt a Federal law on apostasy taking as a model Negeri Sembilan's enactment.* On the basis of Article 76 of the Constitution, allowing the Federal Parliament to make laws with respect to any matter enumerated in the State List for the purpose of promoting uniformity of the laws of the States, the Federal Parliament should pass a law on apostasy. It would take as example the Administration of Islamic Law Enactment of 2003 in Negeri Sembilan.
- *Amend Article 51 of LRA.* Article 51 should be modified to make sure that the converting spouse has fulfilled all his obligations under the civil law before converting to Islam.

Endnotes

- 1 Terence Chong, "The Emerging Politics of *Islam Hadhari*," in: Saw Swee-Hock and K. Kesavaany (eds.), *Malaysia: Recent Trends and Challenges* (Singapore: Institute of Southeast Asian Studies, 2005), 27-46.
- 2 Article 3 of the Constitution of Brunei: "The religion of Brunei Darussalam shall be the Muslim religion according to the Shafi'ite sect of that religion."
- 3 The five principles are: devotion to God, mutual respect, unity of Indonesia, democracy, and social justice. The wording of the first principle was chosen to indicate clearly that the meaning is monotheism and not simply religiousness.
- 4 Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Basingstoke [UK]: Palgrave Macmillan, 2006, 2nd ed.), 409.
- 5 The remainder was accounted for by other faiths, including animism, Sikhism and the Baha'i faith.
- 6 Thio Li-Ann and Jaclyn Ling-Chien Neo, "Religious Dress in Schools: The Serban Controversy in Malaysia," *International and Comparative Law Quarterly* 55 (2006), 671-688.
- 7 J. Vanderlinden, "Le pluralisme juridique," in: J. Gilissen (ed.), *Le pluralisme juridique: Etudes* (Etudes d'histoire et d'ethnologie juridiques 11) (Brussels: Centre d'histoire et d'ethnologie juridiques, Institut de sociologie, Universit  Libre de Bruxelles, 1972); J. Vanderlinden, "Vers une nouvelle conception du pluralisme juridique," *Revue de la recherche juridique-Droit prospectif* 18, no. 2 (1993), 573-583; C. Younes, "Le pluralisme juridique: penser l'homme pour penser le droit," *Cahiers d'anthropologie du droit* (2003), 35-50; S. F. Moore, "Law and Social Change: The Semi-Autonomous Field as an Appropriate Subject of Study," in: S. F. Moore, *Law as Process: An Anthropological Approach* (London: Routledge and Kegan Paul, 1978), Chapter 2, first published in *Law and Society Review* 7 (1973), 719-746.
- 8 B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Oxford University Press, 1975).
- 9 Sally Engle Merry, "Legal Pluralism," *Law and Society Review* 22, no. 5 (1988), 869.
- 10 D. Weisbrot, "Comment on the ALRC Discussion Paper: Customary Law," *Aboriginal Law Bulletin* 2 (1981), available online at <http://>

- www.austlii.edu.au/au/journals/AboriginalLB/1981/3.html (accessed on 19 July 2010).
- 11 It is the system of rules applicable by any court to an individual in respect of the topics covered by the law, determined by reference to the religion which he professes or purports to profess or is assumed to profess.
 - 12 M. Galanter, *Law and Society in Modern India* (New Delhi: Oxford University Press, 1992), 99.
 - 13 J. Duncan M. Derrett, *Religion, Law and the State in India* (New Delhi: Oxford University Press, 1999), 616.
 - 14 Wu Min Aun, *The Malaysian Legal System* (Shah Alam [Malaysia]: Fajar Bakti Sdn Bhd, 1999, 2nd ed.), 175–208.
 - 15 According to Professor Kamali, “*ḥadīth* differs from *Sunnah* in the sense that *ḥadīth* is a narration of the conduct of the Prophet whereas *Sunnah* is the example or the law that is deduced from it. *Ḥadīth* in this sense is the vehicle or the carrier of *Sunnah*, although *Sunnah* is a wider concept and used to be so especially before its literal meaning gave way to its juristic usage;” see Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 2006 3rd ed.)
 - 16 These secondary sources usually include the consensus of the religious scholars (*ijmāʿ*) and analogy (*qiyās*), based on Qurʾān and *Sunnah*. Shiʿite jurists replace *qiyās* with ‘*aql*, ‘reason’.
 - 17 Virginia Matheson Hooker, *A Short History of Malaysia: Linking East and West* (Crowns Nest NSW [Australia]: Allen and Unwin, 2003), 345; Cheah Boon Kheng, *Malaysia: The Making of a Nation* (Singapore: Institute of Southeast Asian Studies, 2002), 263.
 - 18 J. C. Fong, *Constitutional Federalism in Malaysia* (Petaling Jaya, Selangor [Malaysia]: Sweet and Maxwell Asia, 2008), 7.
 - 19 Brunei which had initially participated to the intergovernmental conference decided not to join Malaysia because it would have had to retain all revenues from her rich oil reserves for only 10 years after the formation of Malaysia.
 - 20 C. Letta, *Malaysia-Europe: Strategic Partnerships for the Pacific Century* (Kuala Lumpur: Ministry of Foreign Affairs, 2009), 13.
 - 21 This is the law relating to the punishment for *zinā*.
 - 22 Ahmad Ibrahim and Ahilemah Joned, *The Malaysian Legal System* (Kuala Lumpur: Dewan Bahasa dan Pustaka and Kementerian Pendidikan Malaysia, 1987), 45.
 - 23 R.J. Wilkinson (ed.), *Papers on Malay Subjects* (Kuala Lumpur: Oxford University Press, 1971).
 - 24 Under the treaties concluded between the Malay Sultans and the British, the Malay rulers remained sovereign in their own right. In law, the Malay States were just protectorates, not colonies like the Straits Settlements of Penang, Singapore and Malacca all of which were administered directly by the Colonial Office in London. As far as the Malay states were concerned, the British put in place what was known as ‘indirect rule’ whereby the indigenous system and structures were retained though the actual running of the States was actually done by the British officers. Under the treaties the Sultans were required to act on the officers’ advice. For more see Rupert Emerson, *Malaysia: A Study in Direct and Indirect Rule* (Kuala Lumpur: University of Malaya Press), 1970.

- 25 The other members of the Reid Commission were Sir Ivor Jennings nominated by the United Kingdom, Sir William McKell nominated by the Australian Government, B. Malik nominated by the Indian Government, Justice Abdul Hamid nominated by the Government of Pakistan.
- 26 Article 38 of the Federal Constitution.
- 27 Vanitha Sundra Karean, "The Malaysian Constitution and its Identity Crisis: Secular or Theocratic?," *Law Asia Journal* 1 (2006), 50.
- 28 The Constitution can be amended only by a two-thirds majority in each House of Parliament according to article 159 of the Constitution.
- 29 The word 'Islam' is mentioned at least 24 times in the Constitution.
- 30 Mohammad Hashim Kamali, *Islamic Law in Malaysia: Issues and Developments* (Kuala Lumpur: Ilmiah Publishers, 2000), 33- 35.
- 31 Article 3 of the Constitution:
- (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 States not having a Ruler the position of the Ruler as the Head of the religion of Islam in his State in the manner and to the extent acknowledged and declared by the Constitution, all rights, privileges, prerogatives and powers enjoyed by him as Head of that religion, are unaffected and unimpaired; but in any acts, observance 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 religion of Islam authorise the *Yang di-Pertuan Agong* to represent him.
 - (3) The Constitution of the States of Malacca, Penang, Sabah and Sarawak shall each make provision for conferring that the *Yang di-Pertuan Agong* shall be Head of the religion of Islam in that State.
 - (4) Nothing in this Article derogates from any other provision of this Constitution.
 - (5) Notwithstanding anything in this Constitution the *Yang di-Pertuan Agong* shall be the Head of the religion of Islam in the Federal Territories of Kuala Lumpur and Labuan; and for this purpose Parliament may by law make provisions for regulating Islamic religious affairs and for constituting a Council to advise the *Yang di-Pertuan Agong* in matters relating to the religion of Islam.
- 32 According to article 38 (2) of the Constitution.
- 33 Shamrahayau A. Aziz, "Some Thoughts on the Relationship Between Law and Religion in Malaysia," *Current Law Journal* 4 (2009), xxii.
- 34 Article 11 of the Constitution:
- (1) Every person has the right to profess and practice his religion and, subject to Clause (4), to propagate it.
 - (2) No person shall be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own.
 - (3) Every religious group has the right:
 - (a) to manage its own religious affairs;
 - (b) to establish and maintain institutions for religious or charitable purposes;

- (c) to acquire and own property and hold and administer it in accordance with law.
- (4) State law and in respect of the Federal Territories of Kuala Lumpur and Labuan, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.
- (5) This Article does not authorize any act contrary to any general law relating to public order, public health or morality.
- 35 Article 12 of the Constitution:
- (1) Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth.
- (2) Every religious group has the right to establish and maintain institutions for the education of children in its own religion, and there shall be no discrimination on the ground only of religion in any law relating to such institutions or in the administration of any such law; but it shall be lawful for the Federation or a State to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or assist in providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose.
- 36 Article 8 of the Constitution:
- All persons are equal before the law and entitled to the equal protection of the law.
- Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent or place of birth in any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.
- There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of the State.
- No public authority shall discriminate against any person on the ground that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority.
- This Article does not invalidate or prohibit:
- (a) any provision regulating personal law;
- (b) any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion;
- (c) any provision for the protection, wellbeing or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;
- (d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election;
- (e) any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day;
- (f) any provision restricting enlistment in the Malay Regiment to Malays.

- 37 Ahmad Masum, "Freedom of Religion Under the Malaysian Federal Constitution," *Current Law Journal* 2 (2009), iv.
- 38 Mohamed Azam Mohamed Adil, "Restrictions in Freedom of Religion in Malaysia: A Conceptual Analysis with Special Reference to the Law of Apostasy," *Muslim World Journal of Human Rights* 4 (2007).
- 39 Sections 295, 296, 297, 298 and 298A.
- 40 Article 153 of the Constitution:
- (1) It shall be the responsibility of the *Yang di-Pertuan Agong* to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this Article.
 - (2) Notwithstanding anything in this Constitution, but subject to the provisions of Article 40 and of this Article, the *Yang di-Pertuan Agong* shall exercise his functions under this Constitution and federal law in such manner as may be necessary to safeguard the special provision of the Malays and natives of any of the States of Sabah and Sarawak and to ensure the reservation for Malays and natives of any of the States of Sabah and Sarawak of such proportion as he may deem reasonable of positions in the public service (other than the public service of a State) and of scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government and, when any permit or licence for the operation of any trade or business is required by federal law, then, subject to the provisions of that law and this Article, of such permits and licences.
 - (3) The *Yang di-Pertuan Agong* may, in order to ensure in accordance with Clause (2) the reservation to Malays and natives of any of the States of Sabah and Sarawak of positions in the public service and of scholarships, exhibitions and other educational or training privileges or special facilities, give such general directions as may be required for that purpose to any Commission to which Part X applies or to any authority charged with responsibility for the grant of such scholarships, exhibitions or other educational or training privileges or special facilities; and the Commission or authority shall duly comply with the directions.
 - (4) In exercising his functions under this Constitution and federal law in accordance with Clauses (1) to (3) the *Yang di-Pertuan Agong* shall not deprive any person of any public office held by him or of the continuance of any scholarship, exhibition or other educational or training privileges or special facilities enjoyed by him.
 - (5) This Article does not derogate from the provisions of Article 136.
 - (6) Where by existing federal law a permit or licence is required for the operation of any trade or business the *Yang di-Pertuan Agong* may exercise his functions under that law in such manner, or give such general directions to any authority charged under that law with the grant of such permits or licences, as may be required to ensure the reservation of such proportion of such permits or licences for Malays and natives of any of the States of Sabah and Sarawak as the *Yang di-Pertuan Agong* may deem reasonable, and the authority shall duly comply with the directions.

- (7) Nothing in this Article shall operate to deprive or authorise the deprivation of any person of any right, privilege, permit or licence accrued to or enjoyed or held by him or to authorised a refusal to renew to any person any such permit or licence or a refusal to grant to the heirs, successors or assigns of a person any permit or licence when the renewal or grant might reasonably be expected in the ordinary course of events.
- (8) Notwithstanding anything in this Constitution, where by any federal law any permit or licence is required for the operation of any trade or business, that law may provide for the reservation of a proportion of such permits or licences for Malays and natives of any of the States of Sabah and Sarawak; but no such law shall for the purpose of ensuring such a reservation:
- (a) deprive or authorise the deprivation of any person of any right, privilege, permit or licence accrued to or enjoyed or held by him;
 - (b) authorise a refusal to renew to any person any such permit or licence or a refusal to grant to the heirs, successors or assigns of any person any permit or licence when the renewal or grant might in accordance with other provisions of the law reasonably be expected in the ordinary course of events, or prevent any person from transferring together with his business any transferable licence to operate that business; or
 - (c) where no permit or licence was previously required for the operation of the trade or business, authorise a refusal to grant a permit or licence to any person for the operation of any trade or business which immediately before the coming into force of the law he had been bona fide carrying on, or authorise a refusal subsequently to renew to any such person any permit or licence, or a refusal to grant to the heirs, successors or assigns of any such person any such permit or licence when the renewal or grant might in accordance with the other provisions of that law reasonably be expected in the ordinary course of events.
- (8A) Notwithstanding anything in this Constitution, where in any University, College and other educational institution providing education after Malaysian Certificate of Education or its equivalent, the number of places offered by the authority responsible for the management of the University, College or such educational institution to candidates for any course of study is less than the number of candidates qualified for such places, it shall be lawful for the *Yang di-Pertuan Agong* by virtue of this Article to give such directions to the authority as may be required to ensure the reservation of such places for Malays and natives of any of the States of Sabah and Sarawak as the *Yang di-Pertuan Agong* may deem reasonable, and the authority shall duly comply with the directions.
- (9) Nothing in this Article shall empower Parliament to restrict business or trade solely for the purpose of reservations for Malays and natives of any of the States of Sabah and Sarawak.
- (9A) In this Article the expression 'natives' in relation to the State of Sabah or Sarawak shall have the meaning assigned to it in Article 161A.

- (10) The Constitution of the State of any Ruler may make provision corresponding (with the necessary modifications) to the provisions of this Article.
- 41 Lee Hock Guan, "Affirmative Action in Malaysia," *Southeast Asian Affairs* (2005), 211–228.
- 42 M. Bakri Musa, *The Malay Dilemma Revisited: Race Dynamics in Modern Malaysia* (Gilroy CA: Merantau Publishers, 1999), 368.
- 43 Article 74 of the Constitution:
- (1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).
 - (2) Without prejudice to any power to make laws conferred on it by any other Article, 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.
 - (3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.
 - (4) Where general as well as specific expressions are used in describing any of the matters enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.
- 44 Ninth Schedule (List II) of Article 74 of the Constitution:
 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 customs. Zakat, Fitrah 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 far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine Malay custom.
- 45 Shad Saleem Faruqi, "Jurisdiction of State Authorities to Punish Offences Against the Precepts of Islam: A Constitutional Perspective," 28 September 2005, available online at http://www.malaysianbar.org.my/constitutional_law_jurisdiction_of_state_authorities_to_punish_offences_against_the_precepts_of_islam_a_constitutional_perspective.html (accessed on 1 July 2010).
- 46 According to Shaikh Mohamed Noordin, "Researching Islamic Law: Malaysian Sources," (Hauser Global Law School Program, New York

University School of Law), available online at http://www.nyulawglobal.org/globalex/Researching_Islamic_Law_Malaysian_Sources.htm (accessed on 20 July 2010):

The Qur'ān is the primary source of Islamic law, as it contains all the fundamental directives and instructions of God. The Sunnah is the second source of Islamic law. Sunnah is an Arabic word which means 'Method', and it refers to the statements, actions, and agreements of the Prophet Muhammad. Its authority is derived from the text of the Qur'ān. The Qur'ān and the Sunnah are complimentary – the laws described in the Qur'ān are general in nature, and the Sunnah makes them specific and particular. The Sunnah explains the instructions of the Qur'ān. The Qur'ānic injunction is sometimes implicit; the Sunnah makes it explicit by providing essential ingredients and details. Ijmā' (consensus of opinion of scholars) and Qiyās (laws derived through analogical deduction) are the secondary or dependent sources of Islamic law.

47 Article 75 of the Constitution: "If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void."

48 Article 76 of the Constitution:

(1) Parliament may make laws with respect to any matter enumerated in the State List, but only as follows, that is to say:

(a) for the purpose of implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organisation of which the Federation is a member; or

(b) for the purpose of promoting uniformity of the laws of two or more States; or

(c) if so requested by the Legislative Assembly of any State.

(2) No law shall be made in pursuance of paragraph (a) of Clause (1) with respect to any matters of Islamic law or the custom of the Malays or to any matters of native law or custom in the States of Sabah and Sarawak and no Bill for a law under that paragraph shall be introduced into either House of Parliament until the Government or any State concerned has been consulted.

(3) Subject to Clause (4), a law made in pursuance of paragraph (b) or paragraph (c) of Clause (1) shall not come into operation in any State until it has been adopted by a law made by the Legislature of that State, and shall then be deemed to be a State law and not a federal law, and may accordingly be amended or repealed by a law made by the Legislature.

(4) Parliament may, for the purpose only of ensuring uniformity of law and policy, make laws with respect to land tenure, the relations of landlord and tenant, registration of titles and deeds relating to land, transfer of land, mortgages, leases and charges in respect of land, easements and other rights and interests in land, compulsory acquisition of land, rating and valuation of land, and local government; and Clauses (1) (b) and (3) shall not apply to any law relating to any such matter.

49 *East Union (Malaya) Sdn Bhd v Government of Johore & Anor* [1981] 1 MLJ, 151.

- 50 From a discussion with Professor Kamali in May 2010.
- 51 Wilkinson (ed.), *Papers*.
- 52 *Biar mati anak, jangan mati adat*.
- 53 Shad Saleem Faruqi, *Document of Destiny: the Constitution of the Federation of Malaysia* (Petaling Jaya [Malaysia]: Star Publications Berhad, 2008), 125.
- 54 Laws from the Federal State are called 'Acts', laws from the states are called 'Enactment', except in Sarawak were they are called 'Ordinances'; see R. H. Hickling, *Malaysian Law* (Kuala Lumpur: Professional Law Books Publishers, 1987), 78.
- 55 "The effect of the lack of uniformity of the laws can be seen from the event of the different day in the celebration of the Hari Raya Aidilfitri in Perak and other states. This occurred in 1982, when the state of Perak celebrated it one day earlier from the date announced by the *Yang di-Pertuan Agong*. The difference also can be seen from the madhhab point of view when for example, the state of Perlis does not state that it follows which madhhab, while other states announce that they follow the madhhab of Shāfi'ī." cf. Hamid Jusoh, *The Position of Islamic Law in the Malaysian Constitution with Special Reference to the Conversion Case in Family Law* (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1991), 4–5; see <http://www.docstoc.com/docs/3776377/The-posiiton-of-Islamic-law-in-Malaysia> (accessed on 1 July 2010).
- 56 Islamic Family Law Enactments: Islamic Family Law (Federal Territories) Act 1984 (Act 303); Enactment of Islamic Family Law (Johor) 2003 (Mr. 3.17); Enactment of Islamic Family Law (Kedah) in 2008 (Mr. 7 / 08 / Mr. 11); Kelantan Islamic Family Enactment 2002 (Mr. 6 / 2002); Enactment of Islamic Family Law (State of Melaka) 2002 (En. 2.12); Enactment of Islamic Family Law (Negeri Sembilan) in 2003 (Mr. 03/ 11); Enactment of Islamic Family Law in 2005 (Mr. 3 / 05); Enactment of Islamic Family Law (State of Penang) 2004 (En 5th / 2004 / Mr. 3); Enactment of Islamic Family (Perak) in 2004 (Mr. 6 / 04); Administration of Islamic Family Law in 1991 (Mr. 4 / 92) Perlis; Enactment of Islamic Family Law in 2004 (Mr. 8 / 04) Sabah; Ordinance of the Islamic Family Law in 2001 (Chapter 43/2001) Sarawak; Enactment of Islamic Family Law (Selangor) 2003; Enactment of Law 1985 Islamic Family Administration (Mr. 12/85) Terengganu.
- 57 "In the early 1980s, Malaysia took a step forward in the reformation of Islamic family laws under the doctrine of *siyasah shar'iyah*. This doctrine allows the state to choose the most suitable option for each provision from the opinions of the different schools of law, with the goal of serving the best interests of the community. The resulting Islamic Family Law (Federal Territories) Act of 1984 was to serve as a model for each state to follow. Although many people believe that Malaysia's laws are or can be based only on the Shāfi'ī school of law, the process of drafting the Islamic Family Law Act, whose provisions are based on different schools"; cf. Norani Othman, "Islam, Constitution, Citizenship Rights and Justice in Malaysia," in: Birgit Krawietz and Helmut Reifeld, *Islam and the Rule of Law: Between Sharia and Secularisation* (Berlin: Konrad-Adenauer-Stiftung, 2008), 108, also available online at http://www.kas.de/wf/doc/kas_13008-544-2-30.pdf (accessed on 20 July 2010).

- 58 Suad Joseph and Afsaneh Najmabadi (eds.), *Encyclopedia of Women and Islamic Cultures*, vol 2: "Family, Law, and Politics" (Leiden: Brill, 2005), 394.
- 59 The guardian's unreasonable refusal to consent to his ward's marriage may be considered either as an abuse of a right or a failing in duty. If the *walī* withholds the consent unreasonably, the *sharī'ah* court may act on his behalf as *walī ḥākim* to give the consent.
- 60 Joseph and Najmabadi (eds.), *Encyclopedia*, 394; Nik Noriani Nik Badli Shah, *Marriage and Divorce: Law Reform Within Islamic Framework* (Kuala Lumpur: International Law Book Services, 2000), 47; Sayed Sikandar Shah Haneef, "Modern State-Enacted Islamic Laws: Towards a Purposive Legal Codification," *Shariah Law Report* 1 (2008), 39-64.
- 61 The former name of the *Sharī'ah* Courts (Criminal Jurisdiction) Act 1965 was Muslim Courts Act 1965. It was amended in 1984 to increase the punishment jurisdiction of the *sharī'ah* court. The original punishment provided by the 1965 Act was six months imprisonment, or one thousand RM fine or a combination of both. This Act was revised in 1988 and renamed the *Sharī'ah* Courts (Criminal Jurisdiction) Act 1965.
- 62 *Sharī'ah* Criminal Offences Act of Federal Territory 1997, *Sharī'ah* Criminal Offences Enactment of Johor, No. 4/1997, Syariah Criminal Code Enactment of Kedah 1988 (Mr. 9/88), *Sharī'ah* Criminal Offences Enactment of Kelantan, No.2/1985, *Sharī'ah* Offences Enactment of Melaka 1991 (Mr. 6 / 91), *Sharī'ah* Criminal Offences Enactment of Negeri Sembilan, No.4/1992, Administration of the Religion of Islam and the Malay Custom Enactment of Pahang, No. 8/1982, *Sharī'ah* Criminal Offences Enactment of Pulau Pinang, No.3/1996, *Sharī'ah* Criminal Offences Enactment of Perak, No.3/1992, *Sharī'ah* Criminal Offences Enactment of Perlis, No. 4/1993, *Sharī'ah* Criminal Offences Enactment of Sabah, No. 3/1995, *Sharī'ah* Criminal Offences Ordinance of Sarawak, No.6/1991 modified by *Sharī'ah* Criminal Offences Ordinance No. 46/2001, *Sharī'ah* Criminal Offences Enactment of Selangor, No. 9/1995, *Sharī'ah* Criminal Offences Enactment of Terengganu No. 7/2001.
- 63 There are only five *ḥudūd* in Qur'ān: theft, adultery, slander accusation, killing and robbery (i.e. offences for which the punishment explicitly dealt with).
- 64 Ahmad Mohamed Ibrahim, *The Administration of Islamic Law in Malaysia* (Kuala Lumpur: Institute of Islamic Understanding Malaysia (IKIM), 2000), 583.
- 65 *Sharī'ah* Criminal Code Enactment of Kelantan No. 11/1993:
Shurb (consuming liquor or intoxicating drinks): whipping between 40 and 80 lashes, depending on whether the person is repeat offender, and a prison term if the court deems it fit.
Qadhf (an accusation of unlawful carnal intercourse which cannot be proven by four witnesses): 80 lashes of the *rotan* and his testimony shall no longer be accepted until he has repented.
Zinā (unlawful carnal intercourse): the defender is *muḥsan* (married and has consummated the marriage), he/she faces death by stoning, but the stones will be of medium size. If the defender is a *ghayr muḥsan* he or she

faces whipping of 100 lashes in addition to one year in prison.

Liwāt (sodomy): same punishment as *zinā*.

Sariqah (theft): amputation of the right hand for the first offence and the left foot for the second offence. The offender faces jail for a period at the discretion of the judge for the third and subsequent offences.

Ḥirābah (robbery): death followed by crucifixion if the robbery victim is killed and his property is taken away; amputation and payment of *diyyah* or *arsh* (compensation) if the victim is injured, and jail if only threats are issued.

Irtidād (apostasy): death and forfeiture of property if the offender fails to repent. If there is repentance at any stage before the death sentence is executed, the sentence is set aside, and the property is returned. However, the offender can be ordered to serve up to five years imprisonment.

- 66 *Sharī'ah* Criminal Offences Enactment of Terengganu (*Hudūd and Qiṣās*) No. 4/ 2002:

Shurb (consuming liquor or intoxicating drinks): whipping between 40 and 80 lashes, depending on whether the person is repeat defender, and a prison term if the court deems it fit.

Qadhf (an accusation of unlawful carnal intercourse which cannot be proven by four witnesses): 80 lashes of the *rotan* and his testimony shall no longer be accepted until he has repented.

Zinā (unlawful carnal intercourse): if the defender is *mukhsan* (married and has consummated the marriage), he/she faces death by stoning, but the stones will be of medium size.

Liwāt (sodomy): a man who has anal sex with another man or with woman, other than his wife is liable being stoned to death using medium-sized stones.

Incest: stoning to death using medium-sized stones. If the proof is not as that required for *zinā*, but if there is irrefutable scientific evidence, the offender faces a punishment under *ta'zīr*.

Sariqah (theft): amputation of the right hand for the first offence and the left foot for the second offence. The offender faces jail for a period at the discretion of the judge for the third and subsequent offences.

Ḥirābah (robbery): death followed by crucifixion if the robbery victim is killed and his property is taken away; amputation and payment of *diyyah* or *arsh* (compensation) if the victim is injured, and jail if only threats are issued.

Irtidād (apostasy): death and forfeiture of property if the offender fails to repent. If there is repentance at any stage before the death sentence is executed, the sentence is set aside, and the property is returned. However, the offender can be ordered to serve up to five years imprisonment.

- 67 Here we shall not discuss if these offences are real *hudūd*. But one can consider that many of the offences which are qualified *hudūd* in these two enactments of Kelantan and Terengganu are not mentioned as such in the Qur'ān. Indeed drinking alcohol or apostasy are sins but there are no specific punishment for them in the Qur'ān. So they should be punished only as *ta'zīr*.
- 68 Mohammad Hashim Kamali, *Punishment in Islamic Law: An Enquiry into the Hudud Bill in Kelantan* (Kuala Lumpur: Ilmiah Publishers, 1995), 7;

Rose Ismail, *Hudud in Malaysia* (Kuala Lumpur: Ilmiah Publishers and Sisters in Islam, 1995), 210.

69 Clause 56 :

- (1) Subject to subsection (2), this Enactment shall apply to every Muslim who is mukallaf (legally competent person) in respect of any offence committed by him in the State of Kelantan.
- (2) Nothing in this Enactment shall preclude a non-Muslim from electing that this Enactment apply to him in respect of any offence committed by him within the State of Kelantan, and in the event of such non-Muslim electing as aforesaid, the provisions of this Enactment shall, mutandis, apply to him as they apply to a Muslim.

70 Muddathir Abdel Rahim, "The Position of Non-Muslims in an Islamic State," *IKIM Journal of Islam and International Affairs* 1, no. 2 (2003), 71-105; Shamrahayu Aziz, "Islamic Criminal Law in the Malaysian Federal Structure: A Constitutional Perspective," *IIUM Law Journal* 1 (2007), 101-120.

71 Clause 58:

Where an offence is committed by several persons in furtherance of a common intention of all, each of such persons is liable for that offence in the same manner as if the offence were done by him alone and shall be liable to be punished with the *ta'zīr* punishment of imprisonment not exceeding ten years.

72 Section 133:

His Majesty the Sultan on the advice of the Mufti, without the consent of the person who has been punished, removing any one of the following sentence by replacing it with any subsequent sentence pronounced, namely: (A) stripes; (B) imprisonment; or (C) fine.

73 Husairy Othman and Hamzah Jamaludin, "Kartika to be Caned after Ramadan," *New Straits Times* (Kuala Lumpur), 25 August 2009, 1.

74 Ashgar Ali Ali Mohamed, "Drinking Intoxicating Liquor or Alcohol: The *Sharī'ah* Punishment with Reference to the Case of Kartika Sari Dewi Shukarno," *Sharī'ah Law Report* (2009), 1-25; Siti Zubaidah Ismail, "Wooing Whipping Sentence for *Sharī'ah* Offenders: Situating the Difference, Encouraging the Execution," *Sharī'ah Law Report* (2006), 35-41.

75 Qur'ān 5:90 (Yusuf Ali tr.): "O ye who believe! Intoxicants and gambling, (dedication of) stones, and (divination by) arrows, are an abomination of Satan's handwork: eschew such (abomination), that ye may prosper".

76 There is no specific punishment provided in the Qur'ān regarding drinking alcohol.

77 On 6 February 1998, the Government of Malaysia notified the Secretary-General that it had decided to modify its reservation made upon accession as follows:

With respect to Article 5 (a) of the Convention, the Government of Malaysia declares that the provision is subject to the Syariah law on the division of inherited property.

With respect to Article 7 (b) of the Convention, the Government of Malaysia declares that the application of said article 7 (b) shall not affect appointment to certain public offices like the Mufti Syariah Court Judges,

and the Imam which is in accordance with the provisions of the Islamic *sharī'ah* law.

With respect to Article 9, paragraph 2 of the Convention, the Government of Malaysia declares that its reservation will be reviewed if the Government amends the relevant law.

With respect to Article 16.1 (a) and paragraph 2, the Government of Malaysia declares that under the Syariah law and the laws of Malaysia the age limit for marriage for women is sixteen and men is eighteen.

In keeping with the depositary practice followed in similar cases, the Secretary-General proposed to receive the modification in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of its notification (21 April 1998), that is to say, on 20 July 1998.

- 78 Control and Restriction of the Propagation of Non-Islamic Religions (Johor) Enactment 1991 (Enactment 12/1991); Control and Restriction of the Propagation of Non-Islamic Religions (Kedah) Enactment 1988 (Enactment 11/1988); Control and Restriction of the Propagation of Non-Islamic Religions (Kelantan) Enactment 1981 (Enactment 11/1981); Control and Restriction of the Propagation of Non-Islamic Religions to Muslims (Malacca) Enactment 1988 (Enactment 1/1988); Control and Restriction (Propagation of Non-Islamic Religions Among Muslims) (Negeri Sembilan) Enactment 1991 (Enactment 9/1991); Control and Restriction of the Propagation of Non-Islamic Religions (Pahang) Enactment 1989 (Enactment 5/1989); Control and Restriction of the Propagation of Non-Islamic Religions Enactment (Perak) 1988 (Enactment 10/1988); Non-Islamic Religions (Control of Propagations Among Muslims) (Selangor) Enactment 1988; (Enactment 1/1988); Control and Restriction of the Propagation of Religious Belief and Doctrine which is Contrary to the Religion of Islam Enactment 2002 (Perlis Enactment No.6 of 2002); Enactment of the Development Control and Non-Islamic restrictions in 1980 (Terengganu) (Mr. 1 / 80)
- 79 According to Ibn al-Qayyim (*Turuq*, cf., Kamali, *Principles*, 271), “*Siyāsah sharī'iyah* comprises all measures that bring the people close to well-being (*ṣalāh*) and move them further away from corruption (*fasād*), even if no authority is found for them in divine revelation and the *Sunnah* of the Prophet.”
- 80 Laws of Malaysia, Act 559 – *Sharī'ah* Criminal Offences (Federal Territories) Act 1997, The Parliament of Malaysia, available online at <http://www.parlimen.gov.my/AKTA/1997/ACT-559.pdf> (accessed on 20 July 2010).
- 81 Qur'ān 29:46 (Yusuf Ali tr.):
And dispute ye not with the People of the Book except with means better (than mere disputation) unless it be with those of them who inflict wrong (and injury): but say “We believe in the Revelation which has come down to us and in that which came down to you; Our Allah and your Allah is one; and it is to Him we bow (in Islam);”
Qur'ān 22:40 (Yusuf Ali tr.):

(They are) those who have been expelled from their homes in defiance of right,- (for no cause) except that they say, "our Lord is Allah". Did not Allah check one set of people by means of another, there would surely have been pulled down monasteries, churches, synagogues, and mosques, in which the name of Allah is commemorated in abundant measure. Allah will certainly aid those who aid his (cause); for verily Allah is full of Strength, Exalted in Might, (able to enforce His Will).

82 *Jabatan Kemajuan Islam Malaysia (JAKIM).*

83 Qur'an 2:275-279; 3:130; 4:161.

84 Engku Rabiah Adawiah bt Engku Ali, "Constraints and Opportunities in Harmonisation of Civil Law and *Shari'ah* in the Islamic Financial Services Industry," *The Malayan Law Journal* 4 (2008), xii.

85 Mohamed Ismail Bin Mohamed Shariff, "The Legislative Jurisdiction of the Federal Parliament in Matters Involving Islamic Law," *Malayan Law Journal* 3 (2005), cxviii

86 Arahan Amalan No.1/2003, Pendaftaran kes-kes Muamalat di Mahkamah (Kod Pengklasan).

87 Art 4(1) of the Constitution:

This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with the Constitution shall, to the extent of inconsistency, be void.

88 Article 128 of the Constitution:

(1) The Supreme Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction –

- (a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and
- (b) disputes on any other question between States or between the Federation and any State.

(2) Without prejudice to any appellate jurisdiction of the Supreme Court, where in any proceedings before another court a question arises as to the effect of any provision of this Constitution, the Supreme Court shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with the determination.

(3) The jurisdiction of the Supreme Court to determine appeals from a High Court or a judge thereof shall be such as may be provided by federal law.

89 Malaysia is a constitutional monarchy with an elected monarch as head of state. The position of *Yang di-Pertuan Agong* is *de facto* rotated every five years among the nine rulers of the Malay States.

90 Article 130 of the Constitution:

The Yang di-Pertuan Agong may refer to the Supreme Court for its opinion any question as to the effect of any provision of the Constitution which has arisen or appears to him likely to arise, and the Supreme Court

- shall pronounce in open court its opinion on any question so referred to it.
- 91 J. C. Fong, *Constitutional Federalism in Malaysia*, 91.
 - 92 "Constitutional Interpretation in a Globalised World," paper delivered at the 13th Malaysian Law Conference, 17 November 2005.
 - 93 J. M. Maravall and A. Przeworski, *Democracy and the Rule of Law* (Cambridge: Cambridge University Press, 2003), 321.
 - 94 Ahmad Masum, "The Rule of Law under the Malaysian Federal Constitution," *Malayan Law Journal* 6 (2009), cxii.
 - 95 "There can be no doubt that Islam is not just a mere collection of dogmas and rituals but it is a complete way of life covering all fields of human activities, may they be private or public, legal, political, economic, social, cultural, moral or judicial. [...] The question here is this: Was this the meaning intended by the framers of the Constitution? [...] it can be seen that during the British colonial period, through their system of indirect rule and establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only. [...] In our view, it is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word "Islam" in the context of Article 3. If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void. Far from making such provision, Article 162, on the other hand, purposely preserves the continuity of secular law prior to the Constitution, unless such law is contrary to the latter."
 - 96 Farid Sufian Shuaib, "Constitutional Restatement of Parallel Jurisdiction Between Civil Courts and *Shari'ah* Courts in Malaysia: Twenty Years On (1988–2008)," *Malayan Law Journal* 5 (2008), xxxv; James Foong, "The Malaysian Judiciary: A Record from 1786 to 1993," *Malayan Law Journal* 1 (1994), 1.
 - 97 Federated Malay States Enactment No. 4 of 1930.
 - 98 Ord. 43, 1948.
 - 99 Shamrahayu A. Aziz, "The Malaysian Legal System: The Roots, the Influence and the Future," *Malayan Law Journal* 3 (2009), xcvi.
 - 100 Kikue Hamayaotsu, "Politics of Syariah Reform: The Reform of the State Religion Legal Apparatus," in: V. Hooker and N. Othman (eds.), *Islam, Society and Politics* (Singapore: Institute of Southeast Asian Studies, 2003), 55–79.
 - 101 Shuaib, "Powers," 32.
 - 102 Wu Min Aun (ed.), *Public Law in Contemporary Malaysia* (Petaling Jaya [Malaysia]: Longman, 1999), 62.
 - 103 Together in the amendment was the inclusion of a proviso to clause (4) of article 5 which gives a constitutional 'facelift' to the *shari'ah* courts. The amendment states that the *shari'ah* offender shall be brought to the *shari'ah* court within twenty four hours.
 - 104 Abdul Aziz Bari, *Malaysian Constitution: A Critical Introduction* (Kuala Lumpur: The Other Press, 2003), 110.
 - 105 Ahmad Ibrahim, "The Amendment to Article 121 of the Federal Constitution: Its Effect on Administration of Islamic Law," *Malayan Law Journal* 2 (1989), xvii.

- 106 Karean, "The Malaysian Constitution," 51.
- 107 Farid Sufian Shuaib, "Powers and Jurisdiction of Sharī'ah Courts in Malaysia," *Malayan Law Journal* (2003), 145.
- 108 Rasamani Kandiah, *Marriage and Dissolution Handbook* (Kelana Jaya, Selangor [Malaysia], 2nd ed., 2007), 156.
- 109 Kamali, *Islamic Law*, 47.
- 110 Salbiah Ahmad, "Islam in Malaysia: Constitutional and Human Rights Perspectives," *Muslim World Journal of Human Rights* 2, no. 1 (2005), available online at <http://www.bepress.com/mwjhr/vol2/iss1/art7> (accessed on 1 July 2010).
- 111 Kamali, *Islamic Law*, 56.
- 112 Shuaib, "Powers," 23.
- 113 Karean, "The Malaysian Constitution," 57.
- 114 This legislative provision gives the High Court the "power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranta and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose."
- 115 Faruqi, *Document*, 131.
- 116 Abdul Hamid Mohamad, "Harmonisation of Common Law and *Sharī'ah* in Malaysia: A Practical approach", lecture at the Islamic Legal Program, Harvard Law School, 6 November 2008, available online at <http://www.law.harvard.edu/programs/ilsp/events/Harmonisation%20of%20Common%20Law%20and%20the%20Shari'ah%20in%20Malaysia.pdf> (accessed on 20 July 2010).
- 117 Shuaib, "Powers," 130.
- 118 Masum, "Freedom," xiii.
- 119 Syed Ahmad Hussein, "Muslim Politics and the Discourse on Democracy," in: Francis Loh Kok Wah and Khoo Boo Teik (eds.), *Democracy in Malaysia: Discourses and Practices* (Richmond, Surrey [UK]: Curzon, 2002), 74-107.
- 120 Faruqi, *Document*, 343.
- 121 According to Mohamed Azam Mohamed Adil ("Restrictions"), over the nine-year period in which he had obtained official data, there were only 84 applications by Muslims to seek declaration by the Negri Sembilan *sharī'ah* courts for the renunciation of Islam. Of these, 16 applications were granted, 29 were rejected, and the remaining 39 'kept in view'.
- 122 Section 7 of the Syariah Criminal Offences (Ta'zīr) Enactment of Terengganu 2001: "A Muslim who claimed himself as a non-Muslim, to prevent himself from any action taken under this Enactment or any other Law in force shall be guilty of an offense and liable to a fine not exceeding five thousand ringgit or to imprisonment for a period not exceeding three years or to both."
- 123 In Pahang, Section 185 of the Administration of the Religion of Islam and the Malay Custom provides for a punishment of a fine not exceeding RM5,000.00 or for a term of imprisonment not exceeding three years and to whipping of not more than six strokes for a Muslim who states that he has ceased to be a Muslim.

- 124 4(4): “For the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution.”
- 125 M. A. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), 168.
- 126 “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”
- 127 The UN Human Rights Committee in 1993 issued an authoritative General Comment on Article 18 of the ICCPR making the following points that, “The freedom to ‘have or to adopt’ a religion includes the right to replace one’s current religion or belief with another [...]”.
- 128 Shamrahayu A. Aziz, “Apostasy and Religious Freedom: A Response to Thio Li-Ann,” *Malayan Law Journal 2* (2007), i.
- 129 Thio Li-ann, “Apostasy and Religious Freedom: Constitutional Issues Arising from the Lina Joy Litigation,” *Malayan Law Journal* (2006).
- 130 J. E. Barry, “Apostasy, Marriage, and Jurisdiction in Lina Joy: Where was CEDAW?” *International Law and Politics* (2009), 407-450.
- 131 Thio Li-ann, “Apostasy,” xiv.
- 132 Lee Choon Min, “Freedom of Religion in Malaysia,” *Malayan Law Journal 2* (2004).
- 133 Chew Li Hua (alias Nurjaanah Abdullah), “Legislating Faith in Malaysia,” *Singapore Journal of Legal Studies* (2007), 264-289.
- 134 Dato’ Abdul Hamid bin Haji Mohamad, “Civil and Syariah Courts in Malaysia: Conflict of Jurisdictions,” paper presented at the *International Seminar on Islamic Law in the Contemporary World*, organised by the Institute of Islamic Understanding Malaysia (IKIM), Kuala Lumpur, 24-25 October 2000.
- 135 Masum, “Freedom,” xiii.
- 136 Qur’ān 2:221.
- 137 Ahmad Mohamed Ibrahim thinks that the LRA regards conversion to Islam as a fault which is a ground for divorce. And this would be the reason why the person who converts to Islam cannot petition for divorce; seen Ahmad Mohamed Ibrahim, *Administration*, 215.
- 138 Islamic Family Law (Negeri Sembilan) Enactment 2003, s. 46, s. 2
- 139 Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism and Taoism (MCCBCHST), “Respect The Right to Profess and Practise One’s Religion, 2005 Memorandum.”
- 140 Zaleha Kamaruddin, “Divorce Laws in Malaysia (Civil and Shariah),” *Malayan Law Journal* (2005), 227.
- 141 Federal Court [2008] 2 MLJ, 1.
- 142 Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003, Section 117.
- 143 Lisa Goh, “Shamala Conversion Case: To the Federal Court,” *The Star* (Kuala Lumpur), 28 April 2009.

144 The role of the *farā'id* is to provide a system or method of distribution of one's assets after death in accordance with Islamic principles. These principles are specifically laid down in the fourth chapter of the Qur'an.

145 Concluding comments of the Committee on the Elimination of Discrimination against Women: Malaysia, CEDAW/C/MYS/CO/2 of 31/5/2006:

The Committee is concerned about the existence of the dual legal system of civil law and multiple versions of Syariah law, which results in continuing discrimination against women, particularly in the field of marriage and family relations. The Committee is also concerned about the State party's restrictive interpretation of Syariah law, including in the recent Islamic Family Law (Federal Territories) Amendment Act 2005, which adversely affects the rights of Muslim women. The Committee is further concerned about the lack of clarity in the legal system, particularly as to whether civil or Syariah law applies to the marriages of non-Muslim women whose husbands convert to Islam.

The Committee urges the State party to undertake a process of law reform to remove inconsistencies between civil law and Syariah law, including by ensuring that any conflict of law with regard to women's rights to equality and non-discrimination is resolved in full compliance with the Constitution and the provisions of the Convention and the Committee's general recommendations, particularly general recommendation 21 on equality in marriage and family relations. In this regard, it encourages the State party to obtain information on comparative jurisprudence and legislation, where more progressive interpretations of Islamic law have been codified in legislative reforms. It also encourages the State party to take all necessary steps to increase support for law reform, including through partnerships and collaboration with Islamic jurisprudence research organisations, civil society organisations, women's nongovernmental organisations and community leaders. The Committee further recommends that a strong federal mechanism be put in place to harmonize and ensure consistency of application of Syariah laws across all States.

146 Article 128 §2 of the Constitution:

Without prejudice to any appellate jurisdiction of the Supreme Court, where in any proceedings before another court a question arises as to the effect of any provision of this Constitution, the Supreme Court shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with the determination.

147 Masum, "Freedom," xiii.

About the Author

Dr Constance Chevallier-Govers is Associate Professor of Law at the University of Grenoble (France) and International Research Associate at the Asia-Europe Institute in Kuala Lumpur's University of Malaya. She holds a MA (1994) and a PhD in European Law from the University of Paris 2- Assas (1998) and has obtained her *habilitation* from the University of Grenoble (2004). From 2004 to 2009 she launched and directed the Master's Degree on International and European Law of the University of Grenoble. Previously, she has taught as Associate Professor at the University of Paris 12- Saint Maur (1999-2001) and as a Lecturer at the National Law School of Bangalore (India) and at Saransk University (Russia). Her main fields of research are related to European and International Law, especially the areas of freedom, security, and justice in the European Union on which she has published more than 20 articles and 2 books (*De la coopération à l'intégration policière dans l'Union européenne*, Bruylant, 1999, and *Le traité de Lisbonne: déconstitutionnalisation ou reconfiguration de l'Union européenne*, Bruylant, 2009). Subsequently, she has been researching on different aspects of human rights issues, such as the question of universalism versus relativism, and has published articles on these issues, notably "Natural Law and International Protection of Human Rights" or "Security and Human Rights in the European Union". In 2010, during her sabbatical in Kuala Lumpur, she was attached to the Delegation of the European Union and worked on various aspects of issues pertaining to *shari'ah* law in Malaysia. Her in-depth research led to the publication of the present monograph.

Shari'ah and Legal Pluralism in Malaysia

This study offers an understanding of the dynamics of the dual system of Malaysia and how the *shari'ah* and civil law relate to one another in the courts of this country. The author advances constructive criticism and offers suggestions for improvement of the often strained relationship of the two systems of law in the pluralist environment of Malaysia.

Professor Mohammad Hashim Kamali
Founding Chairman & CEO
LAIS Malaysia

Dr. Constance Chevallier-Govers has written an accurate account of the coexistence side-by-side of civil law and *shari'ah* in Malaysia. Her work offers a carefully researched presentation that is also fairly up-to-date.

Dr. Christoph Marcinkowski
Principal Research Fellow
LAIS Malaysia

The Author

Dr. Constance Chevallier-Govers is Associate Professor of Law at the University of Grenoble (France) and International Research Associate at the Asia-Europe Institute in Kuala Lumpur's University of Malaya

ISBN 978-983-44274-7-4

