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Islam and the State in Malaysia: A Problem of Democratization and Pluralism

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Introduction

The relationship between religion, the state and democracy in any contemporary Muslim country is seldom a simple matter. A multiethnic and economically fast-modernizing country, Malaysia is one such example. Like many former colonial countries which were under British rule, Malaysia is a country whose legal system is comprised essentially of two set of laws: one derived from the British common law tradition, the other is based on its own legal and cultural tradition, the Islamic or *shari'a* laws (Malay: *hukum syara' or syariah*).[1] Emerging from the former Federation of Malaya, which became independent from Britain in August 1957 and which in turn had been formed from the coalescence of the various Malay states and British Crown Colonies in the Malay peninsula, modern Malaysia is a federation of 14 states, of which nine have

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[1] *Syariah* (other cognates *syar'ie*, *syara'*) is the modern Malay transliteration of the Arabic word *shari'a* (or *shari'ah*). In this paper the Malay transliteration (*syariah*, *syar'ie*, and *syara'*) is only used when referring to the various Malaysian or Indonesian *shar'ia* enactments, documents, courts or judicial institutions. Otherwise the English transliteration *shari'a* is used throughout the paper.

evolved directly from and are thus based upon the pre-colonial sultanates of peninsular Malaysia.

Under its present constitution, the powers of the central government—the Federal government of Malaysia—as in many new national development states are overwhelming. But the constituent states do have some significant powers and constitutional prerogatives. Having evolved from the former sultanates consolidated under British colonial rule, these states now express not just their own individual identities but also the historical continuity of peninsular Malay society generally and the primacy within the modern nation of its indigenous Malay/Muslim (or *Bumiputera Melayu*) population. Nine of these states (all of them in the Malay peninsula) are still headed by rulers or sultans who are descendants of the former ruling sultans and their families. These states and their royal heads still enjoy a significant constitutional position: for while much of their roles is now decoratively ceremonial, the position of the Malay rulers as symbols of Malay continuity and ascendancy within modern Malaysia is powerfully entrenched within their own constitutionally-based prerogatives, and those of their state governments, over the administration of the Islamic religion within their own domains.

Since national independence of 1957 this division of powers between the central government, on the one hand, and the state administration and their royal figureheads, on the other, has given rise to recurring constitutional tensions over the division between federal and state powers, often involving conflicts over competing *shari'a* jurisdiction and enforcement prerogatives. The political rivalry over Islamic legal administration to which this overlapping of federal and state concerns in Islamic religious matters has given rise profoundly affects all Muslims, but especially Muslim women, in Malaysia as shall be outlined in this essay.

The twin aspects of Islam—as faith in the heart and as actualized in society through public policy—underlie the attempt of Islamist[2] jurists, especially the Sunni, to consider *din* as a formulation of public policy where religion, state, and faith merge in a single form of action. The emphasis on religion as the basis for public policy has led numerous Muslim political groups—including their thinkers, writers, pamphleteers—to claim that Islam is not only a religion but *din wa dawla* or "religion and state", i.e., a religion fused with a state order. Islamists' or Islamicists' religious discourse is therefore not simply religious in nature but also inescapably social and political in its implications. Yet the political background from which the modern movements of Islamic resurgence and re-politicization arise in Southeast Asia, and which they also reflect, is the Middle Eastern heartlands of Islamic civilization, which are not, however, notable exemplars of political modernity and democratic pluralism. This makes it imperative for us today to analyse how the approach and practice of these contemporary Islamization initiatives in Southeast Asia are mediated through a traditional Arab-centric interpretation of Islam—and how in consequence the ideologues of Islamization have anachronistically and even deceptively projected the meaning of various modern political concepts (such as state, sovereignty, legislation, democratic rights, constitutionalism and citi-

[2] In this paper, I use the term "Islamist" to refer to groups or discourses of those contemporary Muslims committed to the introduction of an Islamic state or at the very least the implementation of more or greater scope of Muslim laws in the state as a way of reviving the Islamic character in public life of their country. "Islamicist" is another term which has been used by others to refer to similarly-oriented Muslim groups.

zenry) onto the past, while simultaneously importing many archaic social and political ideas from a largely imagined or idealized Islamic political past into the present and thereby seeking to legitimize their mandatory institutionalization within the order of modernity itself.

William R. Roff in his recent historical overview of the patterns of Islamization in Malaysia, 1890s-1990s, argues that 'Islamization' was, and had long been, in train at the time of the onset of British paramountcy "and it was precisely that signal feature of British law, the statutory enactment, that was to become the vehicle for much subsequent 'Islamization' of Malay society… right up to the present day".[3] According to him, already in the nineteenth century there were numerous forces broadly recognized as 'Islamization' at work in Malay society. The Malay ruling class in British Malaya—stripped of their political authority under treaties of 'protection' and 'indirect rule' but left very much in charge of 'Malay religion and custom'—asserted a strong desire to regulate Islamic matters, using two instruments introduced, in point of fact, by the British, namely State Councils (or legislative assemblies) and the positive law represented by enactments or Orders in Council.[4] This institutional 'Islamization' (as Roff calls it) forms the basis for an understanding of the contemporary dynamics of Islam and the state in modern Malaysia. Today's state-sponsored "Islamization from above", in its preference for proceeding via the enactment of statute laws regulating the performance of Islamic duties and their subsequent enforcement, reflects the continuing influence of British styles of governance.

The Constitutional and Judicial System of Malaysia: A Brief Background

Malaysia has a written constitution, drafted in the years just before the country achieved its independence from British colonial rule. According to the Federal Constitution (and recognizing the preeminent role played by the sultans or rulers of the individual states in religious administration before and under colonial rule), the power to administer Muslim laws is primarily that of the states comprising the Federation. The head of Muslim matters in every state of the Federation of Malaysia is the Sultan or ruler, where there is one; where there is not, as in the Federal Territories of Kuala Lumpur and Labuan, and in the states of Penang, Malacca, Sabah and Sarawak, the *Yang di Pertuan Agong* (the federal constitutional King of Malaysia elected from among and by the nine sultans) is the head.[5]

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[3] William R. Roff "Patterns of Islamizationin Malaysia, 1890s-1990s: Exemplars, Institutions, and Vectors" in *Journal of Islamic Studies*, 9:2 (1998) pp. 210-228.

[4] William R. Roff *ibid*. p. 211-213.

[5] Malaysia has a constitutional monarch called the *Yang di Pertuan Agong*. He is the Head of State and government is carried out in his name. The office of *Yang di-Pertuan Agong* was first created in 1957 upon independence and it is both hereditary and elective. It is hereditary in the sense that only the nine Sultans of the States are eligible for the post; the appointed *Yang di-Pertua Negeri* (previously called Governors) of Sabah, Sarawak, Penang and Malacca are not eligible. It is elective in that one of the nine Sultans is elected to hold the office for a term of 5 years in accordance with a set of rules based on a system of rotation so that each Sultan will have a chance of being elected unless he declines. This election is carried out at a "Conference of Rulers" made up of all the Sultans when the office falls vacant, either on an incumbent's death or the normal expiration of the term of office. The Conference of Rulers is also empowered to remove an incumbent *Yang di Pertuan Agong* from office. In Perlis and Negeri Sembilan, the rulers are called *Raja* and *Yang di-Pertuan Besar* respectively. There is also a provision in the constitution for a Deputy head of state termed *Timbalan Yang di-Pertuan Agong*.

The Islamic laws applicable in Malaysia appear to be the Islamic law according to the Shafie school and Malay *adat* (customs) as modified by Islamic law.[6] It regulates such matters as marriages, divorce, adoption, legitimacy, inheritance and certain religious offences among Muslims in the state. Similar, and to some extent fairly uniform, enactments dealing with the administration of Muslim law exist in the various states. Except for the Federal Territories (of Kuala Lumpur and Labuan), and the states of Malacca, Penang, Sabah, and Sarawak there is a general pattern whereby the Sultan of each state in his role as the head of Islamic matters in his state is advised by a "Council of Religion and Malay Customs" (*Majlis Agama dan Adat Melayu*).[7] In some states, the *Majlis Agama* (*Islam*) also possesses the authority to issue *fatwas* (legal opinions; *fatawa*: plural Arabic) on matters concerning Muslim law that are referred to it and also to administer *wakafs* (charitable trusts; in Arabic *waqf*)*)*. It can act as executor of the will of a deceased Muslim and in, the case of death occurring intestate, act as administrator.

Normally there is also a "Department of Religious Affairs" in each state (*Jabatan Agama Islam Negeri*) to manage the day-to-day administration of religious matters. In Malaysia even at the time of British rule, there was a separate system of Muslim or *Syariah* Courts comprising the Courts of the Chief *Kadis* and Assistant *Kadis*. They possess jurisdiction in proceedings between parties who are Muslims in such varied matters as marriages, divorce, judicial separation, maintenance, guardianship of infants and wills. Other than civil matters, they also have limited criminal jurisdiction to try and impose punishment for offences committed by Muslims against the religion (for example, alcohol consumption, violation of the fasting month prohibitions, and sexual impropriety). An appeal against the decision of the *Kadis*' Court at that time may be made to an Appeal Committee or Appeal Board constituted under the relevant state enactments.

At present, the *Syariah* Court System provided for under the Federal Territories (FT) Act 505 is a three-tier system consisting of the *Syariah* Subordinate Courts, the *Syariah* High Courts, and the *Syariah* Appeal Court, headed by the chief *Syariah* Judge. It should be noted, however, that this law is still very new and may not yet be fully operational in the Federal Territories, or in all the states. This same Act also provides for the appointment of the *Syariah* Prosecutor, empowered to institute and conduct proceedings for offences before a *Syariah* Court, and of *Peguam Syarie* (*Syariah* attorneys) who are persons with sufficient knowledge of Islamic Law to represent parties in any proceedings before any Syariah Court. The registration, regulation and control of the *Peguam Syarie* is under the Religious Council, without whose formal recognition no person can appear in any *Syariah* Court on behalf of any party.

As a consequence of historical evolution and following the constitution, there are now operating in Malaysia two systems of family laws, one for Muslims, the other for non-Muslims. Muslim family law is under the legislative

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[6] For further details, see Ahmad Ibrahim, *Islamic Law in Malaya*, MSRI Singapore 1965; on the administrative aspect, see also Ahmad Ibrahim "The Administration of Muslim Law in Southeast Asia" 13 *Mal.L.R.* 124 (1971), and "The Administration of Muslim Law in Sabah", 2 *JMCL* 2 (1975).

[7] See also William R. Roff "The Origin and Early Years of the *Majlis Agama*" in William R. Roff (ed.) *Kelantan: Religion, Society and Politics in a Malay State*. Kuala Lumpur: Oxford University Press; 1974.

authority of the fourteen states, with each of these states having its own state enactments, while in the Federal Territories of Kuala Lumpur and Labuan and the states of Penang, Malacca, Sabah and Sarawak Muslim family law is regulated under federal authority by an Act of Parliament. Long a matter of some controversy, the division of areas of jurisdiction between the Civil Courts and the *Syariah* Courts was clarified, very much in favour of the latter, under Article 121 (1A) of the National Constitution. Introduced in 1988, this amendment prohibits the civil courts from intervening in the areas of jurisdiction of the *Syariah* Courts or their decisions. This amendment is of great significance because of its great implications, not just for issues relating to the relationship between religious rights of Muslims and peoples of other faiths, but also for the ability of the *Syariah* Courts and those supporting them to pursue authoritatively their own sociopolitical agenda in Malaysia. That is, it raises questions not simply about freedom *of* but also freedom *from* and *in* religion in Malaysia, for Muslims perhaps even more pointedly than for non-Muslims.

In the Federal Territories of Kuala Lumpur and Labuan, the administration of Islamic Law and the organization of the *Syariah* Courts are now governed by the Administration of Islamic Law (Federal Territories) Act, 1993 (Act 505) and Rules (henceforth referred to as FT Act 505). This law provides for the establishment of the Committee of Religious Council (*Jawatankuasa Majlis Agama*), and for the nomination of the *Mufti*, (state jurisconsult), who chairs the Islamic Legal Consultative Committee. Administration matters all come under the Islamic Religious Department of each constituent state.

Malaysian Muslim family laws which have been codified and are administered under the legislative authority of the respective states differ from one another. Historically-evolved from the *Hukum Syara'* of the old colonial Malay states, they are basically similar in terms of principle. They do, however, differ in their details, especially in their implementation and administrative procedures. An effort was made to reform the Muslim Family Law and to make the various state enactments uniform in the early 1970s. It was only in 1983 that a draft bill (of the federally-sponsored standard Muslim Family Law) was at last submitted to the various states for adoption; each state however, made its own amendments to the bill before passing it. As a result, the state enactments continued and still continue to differ from one another again.

Pusat Islam,[8] the Islamic Centre in Kuala Lumpur, has also initiated similar reforms, both of the enactments and in the administration of Islamic law, including the *Syariah* Civil and Criminal Procedure Codes and the Evidence Laws. *Pusat Islam* is a federal government body or agency which evolved from the Islamic Affairs Division (*Bahagian Agama*) of the Prime Minister's Department: within it a *Pusat Penyelidikan Islam* (Islam Research Centre) was set up in 1971 "to promulgate correct Islamic teaching in society"[9]. In 1996 its administrative status was upgraded to become the Department of Islamic Development of Malaysia (*Jabatan Kemajuan Islam Malaysia*

[8] Pusat Islam is the central agency in the planning and management of Islamic affairs in Malaysia. It is a federal governmant agency comprising of several divisions all under the "Department of Islamic Development" (*Jabatan Kemajuan Islam Malaysia* or JAKIM), placed under the Prime Minister's Department.

[9] Quoted from the Pusat's own journal, in Mohamad Abu Bakar, *Penghayatan Sebuah Ideal: Suatu Tafsiran tentang Islam Semasa* (Kuala Lumpur: Dewan Bahasa dan Pustaka) , 1987, p.78.

or JAKIM), but it is popularly known by the name of its imposing white building located next to the National mosque simply as *Pusat Islam*. *Pusat Islam* is now the main arbiter "for the planning and management of Islamic affairs and the development of the *umma*. [It] formulates policies for the development of Islamic affairs in the country and safeguard the sanctity of the *aqidah* (faith) and the teachings of Islam. [It also helps] to draft and streamline laws and regulations that are necessary, as well as to evaluate and coordinate the implementation of the existing laws and administration".[10] Apart from sponsoring lectures and publications embodying 'correct Islam', *Pusat Islam* also collects information about the practice in Malaysia of what is deemed "incorrect or deviant Islam", publicizes what it considered "correct" information about such deviations, and where necessary initiates official action against perceived errors and their perpetrators. Associated with *Pusat Islam* is the *Institut Dakwah dan Latihan* (Propagation and Training Institute) whose task is "to strengthen the welfare of, and eliminate the unbelief that increasingly and strongly threatens, Islamic society today".[11]

The State and Constitution in Malaysia

Most discussions of Islam and politics in Malaysia tend to assume that "Islam" makes no distinction between the religious and political realms. The *din wa dawla* doctrine seems to give support to this view of the indivisibility of "religion and state". Yet one can also argue that the division of spiritual and temporal powers is integral to Islamic history, having occurred definitively on the death of the Prophet Muhammad in 632. The caliphate was merely a temporal institution; religious succession to Muhammad, the "seal of the Prophets", was by definition impossible.

It has also been argued that the Muslim tradition lacked any elaborated theory of the state.[12] Yet throughout the social scientific literature on Islam as well as the "Islamic studies" literature, one finds numerous discussions of the notion

and theory of the state in Islam or from an Islamic perspective.[13] Despite the absence of a clear mandate in the textual sources of Islam (*Qur'an* and *hadith*) concerning the definition and attributes of an Islamic state, the view has prevailed among many contemporary *ulama* (particularly those within Islamist parties) that Islam does in fact propose a certain political order, that Islam is both a religion and state, and that these two aspects of Islam cannot be meaningfully separated from one another.

From a more critical perspective neither the *shari'a* nor the juristic doctrine of Muslim scholars provides a specific pattern for the constitution of an Islamic state. The lack of any definitive paradigm of political organization is also attributable to the absence in formative Islam (i.e., during the lifetime and

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[10] See the website of Pusat Islam, http://www.islam.gov.my/, from its homepage.

[11] From the brochure of the *Yayasan Dakwah Islamiah Malaysia* (YADIM); see also William R. Roff "Patterns of Islamization, 1890s-1990s: Exemplars, Institutions, and Vectors" in *Journal of Islamic Studies* 9:2 (1998) pp. 210-228.

[12] See Asma Larif-Bẽatrix "The Muslim State: Pursuing a Mirage?" in Norani Othman (ed.) *Shari'a Law and the Modern Nation-State: A Malaysian Symposium*. Kuala Lumpur: SIS Forum Malaysia, 1994, pp. 33-44; cf. Mohammad Hashim Kamali "The Islamic State and Its Constitution" in *idem*.

[13] See also Rafiq Zakaria, *The Struggle within Islam: The Conflict between Religion and Politics*. Harmondsworth: Peguin Books, 1988; Abu-l A'la al-Mawdudi 1983 *First Principles of the Islamic State*. 6th ed. Rev. Translated and edited by Khurshid Ahmad. Lahore: Islamic Publications; and James P. Piscatori *Islam in a World of Nation-States*. Cambridge: C.U.P., 1986.

prophethood of Muhammad) of any clear source or precedent for the idea of a written constitution as the supreme law of the state. The Charter of Medina, also known as the constitution of Medina, that was enacted after the Prophet's *hijra* (migration or flight) to Medina may be considered as providing Muslims of later times with validating authority for the introduction of written constitutions.

In Malaysia, religion as defined by the Malaysian Constitution (especially before 1988) remains a private matter in so far as the purview of *shari'a* laws was then somewhat restricted to family laws. However, the Muslim Enactments of the various Malaysian states also establish Muslim or *Syariah* Criminal Codes; until lately most of the provisions of these criminal codes were concerned with maintaining the religious parameters of moral conduct and sinful behaviour. Accordingly, there are specific provisions for the criminal punishment of Muslims found guilty of consuming alcoholic beverages in public places, eating in public during the month of *Ramadhan* and committing the 'sexual offence' of *khalwat* (irregular consorting between the sexes: *khalwat* or improper covert association between the sexes is described by the *Jabatan Agama* as "close proximity between a male or female who are not *muhrim* [a relative or kin whom one cannot marry] and not legally married". It is not necessary that both parties are Muslims, many cases have been taken to court under this charge where only one of the parties is a Muslim thus compromising the freedom of a non-Muslim from the jurisdiction of Islamic laws as guaranteed by the Constitution.

Prosecution of Muslims under such "religious offences" in most of the states in Malaysia seems to be "biased" against young Muslim women, particularly those who have migrated from villages or rural areas to the city Kuala Lumpur and its surrounding suburbs known locally as the Klang Valley. Many of these women are factory workers in the electronics industry.

For the purpose of this discussion focusing on the theme of "Constitution, Islam and Democracy", this analysis is limited to three themes. While the problems involved here are many, in the context of a multiethnic and pluralistic nation-state of Malaysia the significant issues are:

- Constitutionalism calls for institutional defences and bulwarks against the abuse of powers. It implies a limited government, the existence of institutions, principles and methods for effective regularized restraints upon governmental actions. Constitutionalism springs from the belief that the exercise of government power should be controlled to prevent government itself from undermining the values it was intended to promote. According to An-Na'im for example,

to this end "the constitution must impose institutionalized and effective limitations on the powers of government in order to protect each and every individual subject of the state against interference with his or her personal liberty and autonomy. Yet the constitution may regulate and limit personal liberty in the interest of total social justice because the latter is an essential and indispensable means for achieving the former. It must be emphasized, however, that such regulation and limitation must be strictly justified with reference only to and through such methods as are fully consistent with the fundamental objectives of maintaining and enhancing the life, liberty, and dignity of every subject of the state. In other words we must always keep in sight the proper relationship between the end of constitutionalism, enabling everyone to achieve complete individual liberty, and its

essential and indispensable means, enabling the community to achieve total social justice.[14]

- Modern day constitutionalism (as I understand it) rests on a written and supreme constitution which provides effective legal and political restraints upon the exercise of the state power, including the power to amend or repeal law dealing with constitutional safeguards. Frequent and patchy alterations or amendments that undermine the basic edifice of the national constitution reflect a lack of commitment to the values on which the constitutional assumptions were constructed in the first place.
- Following from the objective of upholding total social justice, constitutionalism encompasses not only limitations on the powers of government but also the imposition of positive obligations on the government to maintain and enhance the life, liberty, and dignity of its citizenry. But various cultural and ideological traditions may and do differ in their ranking of individual liberty and social justice. Like An-Na'im, I do not think that these differences negate the two core aspects of constitutionalism; individual liberty and social justice may be achieved through a combined pursuit, but not necessarily through identical methods.

In a state such as Malaysia (which cannot be categorized as a totally secular state), it therefore becomes imperative that an Islamic support and justification for constitutionalism is of the utmost importance and relevant not only to Muslims but all its citizens. Such an approach (i.e., one arguing for the realization of constitutionalism) is the only guarantee for a peaceful and democratic coexistence of its religiously pluralistic citizens.

Islam, Constitution and Law in Malaysia

In order to demonstrate the complicated relationship of *shari'a* laws and the constitution in Malaysia, I shall use the recent Malaysian case of the "*Fatwa* Controversy" in the months of July to September 1997 as an example of the problem of the interpretation of foundational texts into law and their implementation in contemporary Muslim societies.

The "*Fatwa* Controversy" began with the arrest and immediate prosecution of three Muslim young women who were contestants in "The Miss Malaysia Petite" beauty pageant. The way that the three women were arrested by the officers of the *Jabatan Agama Islam Negeri Selangor* (Department of Islamic Affairs and Administration of Selangor or JAIS) was itself the cause of considerable protest. These officials apparently bought tickets to the pageant, witnessed the whole proceedings, and then at the crowning ceremony suddenly went on the stage to arrest the three Muslim participants (one of them won the title), producing handcuffs in full view of the entire (predominantly non-Muslim) audience.

Letters written to the editors of some newspapers and public comments in the print and electronic media by leading members of women's groups and human rights groups questioned the manner of the arrest. Many of them questioned the real motive for these JAIS functionaries in subjecting

[14] Abdullahi A. An-Na'im "Shari'a and Modern Constitutionalism" p. 98, chapter 4 in An-Na'im *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law*, New York: Syracuse University Press, 1990.

people to such public humiliation. Some of the more vocal women commentators expressed their criticism by pointing out that only a few days earlier a body-building contest had taken place in the same state of Selangor. That event involved many Malay (Muslim) males exhibiting their well-toned bodies in the most brief under wear (and therefore exposing much more of the male *aurat* [or *aurah*, part of the body which a Muslim cannot expose]). The male body-building contest, however, was never interrupted nor were any of the Muslim male participants arrested for a similar breach of the prevailing *Syariah* laws requiring modesty and banning Muslims from exposing their *aurat*.[15]

In addition, for many years before this incident, Muslim women had participated in such contests without being charged with any *Syariah* offence. Almost all of the women commentators remarked that they do not necessarily condone beauty contests (which they saw exploitative to women and reduce them as sexual objects); but their main objection was that the arrest of the young women and the way the arrest was carried out were indeed a demonstration of gender-bias in the implementation of religious laws. The incident also demonstrated selective prosecution and victimization by the Islamic religious authorities, since only Muslim women were punished, but not Muslim men, for similar transgression of "exposing their *aurat*".

The intense debate in the national newspapers and electronic media which followed the incident highlighted the Malaysian public outcry at the arbitrariness with which the law had been implemented. JAIS had cited Section 12 (c) of the *Selangor Syariah Criminal Offences Enactment 1995* as its basis for the arrest and prosecution. This section states that "any person who acts in contempt of religious authority or defies or disobeys or disputes the orders or directions of the Sultan as head of the religion of Islam, the *Majlis Agama Islam* or the *Mufti*, expressed or given by way of *fatwa* shall be guilty of an offence". This section of the *Syariah Criminal Offences Enactments 1995* certainly gives wide powers to persons who are not democratically-elected to make laws that are binding on the public—and to silence and suppress those who question their often regressive views or their authority to impose them on society.

Of paramount concern to both the women's groups and human rights groups which took up the debate on this issue was their discovery that over the past two years, most of the Malaysian states had quietly adopted the federal government's model *Syariah* Criminal Offences Act or Enactment which

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[15] I have discussed the controversial aspects between the stated or actual Qur'anic verses, *hadith*, and the traditional and classical interpretation of *aurah* (rule of modesty and the regulation or definition of what body parts that a Muslim female and male can expose) in my essay "Hukum Aurah" in Sisters in Islam, (eds.) *Islam, Gender and Women's Rights: An Alternative View*. Kuala Lumpur: SIS Forum Berhad, 1993. See also "Modesty According to the Qur'an" by Sisters in Islam (SIS) in the "Saturday Forum" page in the Malaysian newspaper the *New Straits Times*, August 9, 1997; the Malay version of the same article also appeared in the Malay media: entitled "*Kesopanan dalam Islam: al-Qur'an dan kesederhanaan*" in *Berita Harian*, 5 Aug. 1997; and "*Pakaian: Tafsiran JAIS Sempit*" in the 'Forum Hujung Minggu' [Weekend Forum] page of *Utusan Malaysia*, 9 Aug. 1997; see also the several letters to the editor from members of the public in the two main Malay-language newspapers concerning the respective articles by *Sisters in Islam*. The group made a decision not to respond to these letters because, as in earlier times, most of the letters in response to articles or letters by the group simply questioned the 'Islamic status or credential" of the group (SIS) in daring to discuss the issue of interpretation by the established *ulama* and religious authorities. The arguments provided by SIS in the article were not critically addressed in these responses.

contained several provisions that had little basis in the textual sources of Islam. Furthermore many of these provisions violate the basic principles of democracy and the fundamental liberties guaranteed by the Federal Constitution of Malaysia. For example, Section 9 of the *Syariah Criminal Offences Act* (FT) makes subject to criminal prosecution any person who "acts in contempt of religious authority or defies, disobeys or disputes the orders or directions of the *Yang di Pertuan Agong* as Head of the religion of Islam, the *Majlis* or the *Mufti*, expressed or given by way of *fatwa*." It is also a criminal offence for any person to give, propagate or disseminate any opinion concerning Islamic teachings, Islamic law or any issue contrary to any *fatwa* for the time being in force (Section 12 of the same Act). Meanwhile, Section 29 of the Act (FT) makes it an offence for "any person who, contrary to Islamic law, acts or behaves in an indecent manner in any public place"—though what constitutes "indecency" here remains largely undefined and therefore subject to the exercise of arbitrary discretion. Section 36 (1) of the Administration of Islamic Law (Federal Territories) Act, 1993 grants the *Mufti* the sole power to amend, modify or revoke a *fatwa* issued earlier by him or by any previous *Mufti*: a huge discretionary power entrusted to his keeping but again a massive exclusion of the public, including many Muslims of good faith, from any say in major matters affecting them.

The three young women who participated in the beauty pageant were charged, immediately brought to court a few weeks later, found guilty and fined for indecent dressing under Section 31 of the *Selangor Syariah Criminal Enactment* (or Section 29, in the FT Act). This display of efficiency and alacrity, for which the *shari'a* system has seldom been known, was noted by many aggrieved parties, particularly women whose cases for divorce, maintenance and custodial rights have long dragged on without any great prospects of resolution. In addition to the first charge mentioned, and with ominous implications of "double jeopardy" at the point of intersection between Malaysia's "common law' and "*Syariah*-based" legal systems, these same women were also charged in the following month (August 1997) in the Shah Alam High Court under Section 12C (similar to Section 9 of the FT Act) for violating the *fatwa* in the state of Selangor, where the pageant took place. No less ominously, soon after the women were fined on the first charge, the local newspapers reported that JAIS (*Jabatan Agama Islam Selangor* or the Selangor Religious Department) had recently hired 70 new contract officers to further full enforcement of the *Selangor Syariah Criminal Enactment*. This intensified enforcement only highlights an obsessive, even prurient, determination on the part of the religious department to treat punitively breaches of religious ethics which its officers consider "criminal behaviour".

What is also pernicious in laws is that under the *Syariah* Criminal Offences laws passed by most states in the country, the *fatwas* (Arabic plural: *fatawa*) issued by the various state *Mufti* are given the automatic force of law without first going through any proper legislative process. After approval by the State Executive Council and the Sultan, a *fatwa*, it seems, needs only to be gazetted to become law. It is not tabled to permit debate in the legislative body. Any violation of the *fatwa* is consequently a criminal offence; any effort to dispute the *fatwa* or to give an opinion contrary to it is also a criminal offence. Such provisions in effect gave an immediate binding status to *fatwas* and further sanctify them by legally preventing any potential disagreement or rejection of the opinion contained in the *fatwas*.

First and foremost, historically in Muslim societies and states, *fatwas* never had and still do not normally have the automatic force of law. Offered as *responsa* or advisory opinions, often on quite hypothetical issues, *fatwas* are exercises in theological and legal reasoning given by a *mufti* or other *alim* (scholar) to enlighten and educate the public about Islam and to assist them in arranging their affairs in accordance with the *shari'a*. Historically, the issuing of a *fatwa* was no exclusive monopoly held by government appointed *muftis* and scholars; they were issued by those who turned to them for advice, just as in many Western legal systems citizens will seek a legal opinion from an experienced senior counsel of repute, often outside the context of actual litigation and quite separate from any formal process of authoritative enforcement. Properly understood, *fatwas* have normally been regarded as advisory opinions, not binding and enforceable on the *umma* (community of believers). For centuries *fatwas* were developed, as noted, in the context of a flexible question-and-answer process wherein various *Mufti* and other reputable exegetes responded to problems posed by individual questioners. If a person was dissatisfied with the *fatwa* of one *Mufti* or exegete, he or she was free to consult a different *Mufti* or *'alim* (Islamic scholar) for another opinion.

Fatwas, then, have historically provided not definitive legislation nor authoritative adjudication; the views which they set out have not been seen as mandatory and enforceable (a distinction between *'ifta*--the act of issuing fatwas--and *qada* or the act of judging).[16] A *fatwa* merely offers guidance, an individual scholar's considered guidance, to the *umma*; and it was up to the community of believers to choose voluntarily whether to follow it or not. Until 1995 in Malaysia f*atwas* have not been seen or treated as orders which state governments are obliged to enact and enforce by law.[17] Until recent times, no Muslim country has ever given a *fatwa* the automatic force of law and made it a crime for a citizen to defy, disobey or dispute a *fatwa*. Further, the countries other than Malaysia where of late this practice has begun to appear, such as Saudi Arabia, tend to be of a quite authoritarian character in many respects, not simply in their approach to Islam; in Malaysia there is therefore a special problem not experienced elsewhere in reconciling the recourse to the authoritarian issuing and enforcement of *fatwas* with the country's more general claims to democratic constitutionalism. Such provisions in its *shari'a* criminal laws, given Malaysia's claims to operate on democratic constitutional principles, are unprecedented in the history of Islam. They also violate a fundamental principle in the modernist Islamic vision claimed by the federal government of Malaysia that any change to be effected by their Islamization policies must occur gradually through education and the evolution of enlightened community opinion, not through force and coercion as is now made ever more possible by the secretive issuing and only narrowly considered imposition of *fatwas* in the manner lately instituted in Malaysia.

Second, in making it a crime to question, dispute or give an opinion contrary to any *fatwa* in force, the legislative bodies have transformed the *Mufti* and the state religious authorities into infallible beings, in effect, equating their opinion with the word of God. A faith community whose proud boast was long that it placed no intermediaries between the Almighty and the indi-

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[16] See Muhammad Khalid Masud, Brinkley Messick and David Powers (eds.), *Islamic Legal Interpretation: Muftis and Their Fatwas*. Cambridge, Mass.: Harvard University Press, 1996.

[17] See also Barry Hooker, "Fatawa in Malaysia 1960-1985--Third Coulson Memorial Lecture" in *Arab Law Quarterly* vol.8, Part 1, April 1993; pp 93-105.

vidual and therefore had no Pope now runs the risk, thanks to this new Malaysian practice and its proliferation of state religious authorities, of having more popes at any one time than the Catholic church has had throughout the history of Rome and Avignon! One reason why binding precedent did not evolve as a principle and procedure in Islamic law, as it did at the core of the common law system, is the widely accepted belief among Muslims historically that the opinion of one *mujtahid* (an interpreter with the capacity to exercise *ijtihad* or independent reasoning) can never be regarded as the final wisdom in understanding the infinite message of the *Qur'an*. Another *'alim*, it has been generally recognized, may always give a different and equally valid opinion based on his/her own learned understanding of the text. In the context of law-making in a democracy, these differences of opinion should be debated; it should be the legislative body which then decides which opinion it wants to enact as law. After all, diversity of opinion based upon the exercise of reason is not only the essence of pluralism and the lifeblood of democracy but also, in principle, of Islamic society.

Third, constitutionally, the legislative authority to make laws in Malaysia lies with Parliament at the Federal level, and with legislative assemblies at the state level. A *fatwa* issued by a *Mufti* should not have automatic force of law without first being scrutinized by the legislative body. Those not democratically elected—a state *Fatwa* Committee sitting under a *Mufti*, a closed body, and which formally holds that others have no right to discuss, debate and question matters of religion—cannot in a democracy be allowed to make by decree laws that affect, and drastically narrow, the fundamental liberties of the citizenry. Neither should the *Mufti* have the sole power to revoke or amend a *fatwa* as provided for by legislation. This amounts to rule by decree, an alien kernel of a theocratic dictatorship within the democratic body politic.

What is most disconcerting for Muslim modernists, such as the Muslim women's group *Sisters in Islam*, is how such provisions in law could have been sanctioned by the state and federal level *Syariah* Technical Committees, State Legal Advisors and the Attorney General, the Executive Council and then passed as legislation by the elected representatives without so much as a demur or any discussion of the legitimacy or wisdom of casting such an undemocratic scheme into law. This excessive delegation seems a violation of constitutional trust by the legislative body which has in effect given a blank cheque to an administrative arm of the government to make law, especially where, as in this particular area, the measures introduced narrow individual human rights and go against several articles of the Malaysian Constitution.

In their submission of a memorandum concerning this issue to the Prime Minister of Malaysia, Dr. Mahathir Mohammad, the women's group *Sisters in Islam* stated that that this indeed poses a threat to parliamentary government. To remove such a threat, the group suggested, each *fatwa* issued by the *Mufti* should require the endorsement of an affirmative resolution by the legislative body before it can come into effect. This would ensure that every *fatwa* is subjected to a democratic process of debate before it becomes law (especially criminal law), thus also fulfilling the contemporary or modern understanding of the principle of *shura* (consultation) in governance in Islam. Such open debate, widely reported in the press, would also invite public participation in the making of legislation that affects the fundamental liberties of citizens. Even though Islamic laws in Malaysia have jurisdiction only over

Muslims domiciled in Malaysia, many facets of those laws, both family and criminal laws, in their recent implementation have been shown to implicate non-Muslim individuals.

Fourth, the right to restrict basic liberties lies solely with Parliament. Several provisions in the *Syariah* Criminal Offences laws restrict the right of Malaysian Muslims to freedom of speech and expression. Sections 9 and 12 for example, which impose a blanket ban on the freedom of speech and expression of Muslims, are therefore unconstitutional, since the provisions make no reference to any of the eight grounds on which freedom of speech may be curtailed under Article 10 (2) (a) of the Federal Constitution of Malaysia. In the case of *Nordin Salleh v Dewan Negeri Kelantan* [Kelantan State Assembly] (1992) and *Tun Dato' Haji Mustapha v Legislative Assembly of Sabah* (1993), for example, the Supreme Court held that restrictions on the constitutional right to freedom of association can only be imposed by the Federal Parliament and not the legislative assemblies of the states. If the same principle applies to the freedom of speech, then Section 9 and 12 may be unconstitutional on the grounds that the state has legislated to restrict fundamental liberties, matters that are the sole privilege of Parliament.

For the present author, the pertinent question here that still remains to be discussed and tested is this: to what extent does the 1988 Amendment under Article 121 (1A) of the Federal Constitution (which has decided, substantially in the latter's favour, the division of areas of jurisdiction between the Civil Courts and the *Syariah* Courts of Malaysia) now restrict the making of any legal challenge to Section 9 and 12 of the *Syariah* Criminal Offences Act (for FT) or Enactments (for all other states of Malaysia) by requiring them to be heard in *Syariah* Courts of the various states and in the higher appeal courts of the *Syariah* legal system itself? Or would the power of decision in such cases, despite the autonomy granted to the *Syariah* courts in their appointed area of jurisdiction by the 1988 amendment, still reside with the higher constitutional and appeal courts of the derivatively common law legal system? If the autonomy granted by the 1988 amendment to the *Syariah* court system now entails that those courts have the right to hear such an appeal under their newly granted exclusive power to decide the extent of their own jurisdiction and to operate within it as they see fit, then the constitutional machinery for the legal institution of unrestricted religious authoritarianism has already been created in Malaysia. For, if the legitimacy of those provisions were to be so challenged, could one possibly expect any of the state *Syariah* Courts not to uphold the authority of the *fatwa* made by the state *Mufti*? Such a case would indeed be an interesting test of the nature and extent, if any, of democratic sensitivity and impulses within the system of *shari'a* justice in contemporary Malaysia.

Fifth, besides contravening several articles of the Federal Constitution (such as Article 10 (2)(a) on the freedom of speech and expression, insofar as the Act declares it an offence to "dispute or to give an opinion contrary to the *fatwa*), the provision to punish indecency under section 29 of the FT *Syariah* Criminal Act (or Section 31 of the Selangor *Syariah* Criminal Enactment) also amounts to an unconstitutional trespass on federal powers. The Federal Constitution's Ninth Schedule, List II, Item 1 provides that State Assemblies have jurisdiction over the "creation and punishment of offences by persons professing the religion of Islam" except in regard to matters included in the Federal List. Thus, Section 294A of the Penal Code could conceivably

cover the offence of indecency as set out in the *Syariah* Criminal Offences laws. This overlapping of competing or ambiguous jurisdictions can lead to instances of double jeopardy, violating legal and constitutional principles that no person can be punished twice for the same offence (Article 792 of the Federal Constitution).

Moreover, while Section 29 of the *Syariah* Criminal Offences (Federal Territories) Act appears to be gender-neutral in theory, in its implementation it has discriminated against women. In the cases reported so far, it is women who have been arrested and charged for indecent dressing (plus from some transvestite men). While there is a *fatwa* forbidding Muslim women from taking part in beauty contests, there is none against Muslim men participating in body building contests. The Muslim men who took part in the Mr. Malaysia contest (shortly before the controversial beauty contest of June 1997) wearing the briefest swimming trunks were never charged for indecent dressing. This again amounts to a violation of Article 8 of the Federal Constitution which guarantees that all persons are equal before the law.

Democracy and freedom of opinion and expression in Islam

The Syariah Criminal Offences laws make it an offence for a Muslim to dispute a *fatwa* or even to give an opinion contrary to any *fatwa* which has been gazetted into law. This has no basis in Islam.

The "*fatwa* laws" contravene an Islamic principle of government or rule prescribed in the Qur'an, namely the rule of *shura* (or consultation) requiring the head of state and government leaders to conduct community affairs through consultation with community members. In *Sura al-Imran*, (*Qur'an*, 3: 159), Allah commanded the Prophet Muhammad to consult the *umma* in community affairs. This, be it noted, was to a Prophet who was the recipient of divine revelation. The Qur'anic command should be all the more emphatic with regard to the subsequent generations of Muslims who no longer have their Prophet among them and lack direct access to revelation. In *Hadith* literature (confirmed anecdotal accounts of the Prophet's own views and actions, which have historically constituted an important basis for Islamic legal reasoning) it is often reported that in managing both private and public affairs the Prophet habitually solicited counsel from his companions and at times gave preference to their views over his own.

The *Qur'an* also grants the *umma* the freedom to criticize. Disputation or *jadal* is one of the major themes which occurs no less than 25 occasions where the *Qur'an* expresses humanity's inclination, as rational beings, towards argumentation. *Sura Mujadila* (*Qur'an*, 58: 1) recognizes the right of an individual, a woman in this case, to argue her problem with the Prophet. The whole *sura* which begins with this passage bears the title *Mujadila* (disputation).[18] If the *umma* has the right to argue with the Prophet, surely we present day Muslims have a right to argue with a mere local and humanly constituted religious authority. Furthermore, a *sahih* (or authoritative) *hadith* quotes the Prophet as saying that "differences of opinion in my community are a blessing". It was the Prophet's opinion that only through the voicing and exploration of such differences can one strive to find the best opinion, the best solution to

[18] See also Muhammad Hashim Kamali, *Freedom of Expression in Islam*; Kuala Lumpur: Berita Publications Berhad, 1994; pp. 61-72.

meet the community's needs. In this light, current developments within Malaysian *shari'a* law are not only disturbing from the perspective of modern constitutionalism and democracy; they also demonstrate a flagrant disregard of Islamic tradition in governance and the managing of affairs of the community.

More important questions also arise here. Foremost among them is whether in a democratic modern society matters of religion can ever be the exclusive preserve of a narrowly based religious estate, the *ulama*. Open discussion, debate and the decision-making process must be participatory and must reflect the tolerance of pluralism in Islam and diversity of Malaysian society. However, there are several impediments to engendering such an open discussion on religion in Malaysian society today.

First, the *ulama* and many in authority who hold the mainstream view that the doors of *ijtihad* (independent and innovative legal reasoning) have long been closed, believe that those not traditionally educated in religion do not have the right to speak on or question any matter of religion.

Second, very few Muslims in Malaysia have the courage to question, challenge or even discuss matters of religion, even when they do doubt teachings that appear unjust or inappropriate to the changing times and circumstances of their own lives. They have been socialized to accept that those in religious authority know best what is Islamic and what is not, or they feel ignorant about Islam compared to the *ulama*; ashamed by their ignorance, they therefore believe that they should not proffer any opinion but only concur.

Third, for these reasons, few Malaysian elected representatives (at either the federal or state levels) are willing to debate at length the details of any bill put forward in the name of Islam, and certainly not to question its declared purposes. Their inner constraint is compounded by an overriding pragmatic concern, fatal to politicians, that they might be seen or accused of being against Islam if they so much as question the wisdom of any of the provisions set out in any *Syariah* bill.

Fourth, as Prime Minister Dr. Mahathir Mohamad himself has recently pointed out in several speeches,[19] many Malay Muslim political leaders use Islam to gain political mileage and therefore are quite unwilling to act in the public interest if their personal ambition and popularity would be affected by speaking up on any Islamic issue.

Fifth, without going through the democratic process of open debate in the legislative bodies, *fatwa* and Islamic laws that govern so many aspects of the private and public life of Muslims are imposed on the *umma* without their being aware that changes have been made fundamentally affecting their way of life.

Hence the pernicious silence—the shroud of secrecy, fear and ignorance in matters of religion—which seems to pervade every locus of authority in the decision-making and law-making processes of the Malaysian governmental and bureaucratic system. In the various State Executive Councils, the offices of the State Legal Advisors, the federal Attorney-General's chambers, in the *Syariah* Technical Committees, in the federal Parliament and the State Legislative Assemblies: at all these levels those placed in positions of trust

[19] See the text of the various speeches by the Prime Minister, Dr. Mahathir Mohammad, which are published, often in full, by the *New Straits Times*; see especially his speeches from February/March 1993; and more recently the text of his speech entitled "Lessons of history to progress" *New Straits Times*, 23 Aug. 1997.

and responsibility have often failed to consult, to question, to open their minds to critical views or alternative interpretations that are more appropriate to our times and specific circumstances.

A notable example of this disturbing lack of civil courage, institutional and personal, among Malaysians in significant public positions occurred during—and was actually triggered by—the "*Fatwa* Controversy" itself and the arrest of the three beauty contest contestants. The present author was invited to take part in a serious discussion of the issue as the member of a panel for a reputable public affairs television programme. Just a few hours before this pre-recorded discussion, which brought together Muslim women's rights activists with a representative of the *Mufti* of Selangor, was due to be aired, efforts were made to ban it. Forthright public discussion of the issue, regardless of the content of that discussion or the rights and wrongs of the matter, was clearly seen by some as disruptive, or not in the public interest, since it presented the quite unusual spectacle of the pronouncements of the state religious officialdom being openly challenged. It was only the tenacity of the relevant heads of the television station that enabled to programme to be aired at all—but only at a very late hour (almost midnight), outside of "prime time" and at a quite different time from that which had be advertised. The courage shown by the producers and supervising executives of that television programme—a risk-taking programme of a new and struggling television station that dared to be courageous—was, regrettably, the exception rather than the rule for the contemporary Malaysian media, especially those from the closely government-identified mainstream media. And even their brave efforts were in significant measure frustrated, to the public's detriment.

This exaggerated prudence, even timorousness, has placed Malaysian Muslims in the kind of legal and constitutional predicament that I have attempted to describe by highlighting this one issue, the "*Fatwa* Controversy of June 1997". (There are several other examples which might equally well have been selected to illustrate the same underlying problem, including in the altogether unsatisfactory working of some aspects of Malaysia's Muslim Family Laws—at the federal level, between federal and state authorities, and among the various state governments themselves with their differing approaches; these problems further highlight the serious predicament of having two parallel sets of family laws, one for Muslims and another for all non-Muslims). Here, too, the underlying problems is the same; that Malaysians have in effect delegated total and absolute responsibility for the interpretation and implementation of Islam to a tiny, often authoritarian, minority whose views and values are often contrary to the vision of Islam held by some Federal leaders and by the silent majority of Malaysians, as well as what is best in the rich legacy of Islamic civilization. Yet to resent in silence the power which has passed into the hands of this unrepresentative minority is to regret, often without recognizing the fact, the popular acquiescence in its claiming that undue power. This abdication of civil courage and responsibility by both Muslims and citizens of other faiths and religious affiliations has encouraged the fostering of an incipient Islamic theocracy in Malaysia and the rule of a minority in matters of Islam.

The very absence of debate in the legislative assemblies on the specific provisions of the *Syariah* Criminal Offences legislation has led to an ominous silence in the Malaysian media concerning the widespread impact of these laws on fundamental liberties in the country. Nor, of course, was any

public information or discussion on the merits of such laws initiated by those who promoted these legal "reforms". The Malaysian public remained ignorant that their lives could be regulated in such a manner until the religious authorities shocked them by enforcing some of these laws. Yet this was not the only occasion when Islamic laws inimical to the public interest and against the principles of justice and equality in Islam have been passed in silence by the legislative bodies of Malaysia. In the past few years, several amendments to the Islamic Family laws detrimental to the rights of women have been passed with hardly any open discussion. Women have found out only gradually that these legislative injustices have occurred, when they have been made to bear the practical consequences of these amendments.

Those in religious authority in Malaysia must understand that they operate in a democratic multiethnic society where fundamental liberties are protected by the Federal Constitution, where political leaders have to answer or be accountable to the electorate, and where citizens are not only increasingly better educated but also better informed on Islam and its eternal values of justice, equality, freedom and virtue. Educated citizens are no longer willing to be cowed into silence in the face of injustice, extremism and zealotry committed in the name of religion.

Fourteen hundred years ago, the *ulama* may have been the main repository of knowledge in the Muslim world, and therefore it was their duty to impart that knowledge to the rest of society. Today, education is universal. Knowledge is both increasingly specialized and multidisciplinary. Society is complex and ever more rapidly changing. No one can be an expert on everything. Decision-making on any matter, including matters of Islam as law and a way of life, can no longer be the sole responsibility of the *ulama* in any contemporary Muslim society. As I have elsewhere set out the matter:

> Contrary to the urgings of individual moral autonomy and responsibility (*taqwa*) that characterize Qur'anic Islam, Malaysian Muslims are routinely cautioned … not to question the knowledge and authority of the *ulama*. Deference to them is made the sign of piety and the proof of faith.
>
> Yet, … as part of their efforts to fashion … an Islamic culture of modernity, forward-looking Muslims in Malaysia–and elsewhere in the worldwide *umma*—will have to devise and make use of new methods of sociolegal and religious reasoning.
>
> Renewal (*islah*) and innovation (*tajdid*)—in general, an Islamic culture of modernity that is congruent with the Islamic principle of a reasoned participatory activism—will require action on a basis that goes beyond conventional understandings of *ijtihad*.
>
> The new understanding of *ijtihad* presumed by the idea of an Islamic culture of modernity entails a dual recognition: of the moral autonomy and responsibility of the thinking Muslim individual; and of the need for the process of "ijtihadic" reasoning in which these individuals are involved to be conducted not anarchically but in a dialogical or communitarian manner within the *umma*.

> This is not a proposal for "disenfranchising" the *ulama*. Rather, it is an argument that, consistent with both the spirit of modernity and the central principles of Islam in its formative moment, the *ulama* must democratize their procedures and practice.
>
> That is, they must learn to exercise their own *ijtihad* in cooperatrive engagement together with the "laity" or ordinary members of the *umma*.
>
> Their own continuing role will depend upon their learning to do so as part of a common endeavour to give expression to the enduring principles of our common faith: in ways and forms, including within forms of sociolegal reasoning and through the devising of legal institutions, that are appropriate to the dignity of modern believers and the times in which we all now live.[20]

In his speech opening the international seminar on the "Administration of Islamic Laws" at IKIM (*Institut Kefahaman Islam Malaysia*, or Institute of Islamic Understanding Malaysia) in July 1996, Prime Minister Dr. Mahathir called on the religious authorities entrusted with interpreting Islamic laws not to act alone or unilaterally but, in the process of making new Islamic laws, to consult and include experts in other fields of knowledge and sciences.

There is also an immediate need for the Malaysian public and their elected federal and state representatives in particular to be reeducated or socialized within a modernist Islamic perspective: to understand the difference between what is revealed and therefore divine and infallible in Islam and what is the result of human effort in interpreting; and therefore to acknowledge that those interpretations are fallible and changeable, having been fashioned and transmitted historically by human minds. Any opinion of a State *Mufti*, *Fatwa* Council or a state religious authority is likewise merely the product of a human effort in interpreting the limitless message of the *Qur'an*. All their opinions or interpretations are open to questioning, public debate and discussion.

Islamic Law and Public Morality

It was also reported in the national press soon after the arrest of the three Muslim beauty contestants that the Minister of Islamic Affairs in the Prime Minister's Department, Datuk Dr. Hamid Othman, was planning to meet with all heads of state religious departments in order to streamline guidelines and mode of enforcement for an Islamic legislation relating to "indecent dressing and behaviour among Muslims". The Minister announced that the meeting, which was to be convened in the months of August or September 1997, would discuss what constitutes indecent dressing and behaviour before the law was enforced throughout the fourteen states. Such a plan again reflects an obsessive need of Islamists within the government to define and cast into law their own notions of what is indecent dressing and behaviour.

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[20] Norani Othman, "Epilogue: Hudud Law or Islamic Modernity?", chap. 14 in Norani Othman (ed.), *Shari'a Law and the Modern Nation-State: A Malaysian Symposium*, Kuala Lumpur, SIS Forum Malaysia, 1994, pp. 152-153. This commentary appeared originally, in a slightly different form, as the "Saturday Forum" Op-Ed column in the *News Straits Times*, 29 January 1994.

Such a move further highlights the competing views and controversial debates within Islam on issues of sexuality, of public and private morality. Muslims of modernist persuasion claim that such "decency laws" have no basis in Islam. The Qur'anic discussion on dress, for them, centres on the principle of modesty, and not on how much material, and of what style, colour, and shape, one should have on one's body. The *Qur'an* indicates that modesty is a self-monitoring act that arises from one's own "God-consciousness" or *taqwa*. Others cannot impose that pious consciousness by coercing the covering or uncovering of heads, face or body. Hence the principle of the freedom to choose. The *Qur'an* itself states, "Let there be no compulsion in religion" [*Sura Baqara*, 2: 256]. One interpretation or commentary claims that "religion depends upon faith and will, and these would be meaningless if induced by force"[21]. Yielding to coercion with an outward show of acceptance, such as the donning of the *hijab* (head cover), is not a mark of faith, merely of blind or fearful obedience. What remains in contentious debate among contemporary Muslims, including those in Malaysia and Indonesia, is whether as a matter of faith dress should be left to the inner conviction (*iqna'a*) of the believer. Yet all too often, those in religious authority are more concerned with enforcing formal, outward compliance and the imposition of legal sanctions, as demonstrations of their own authority, than with genuine "theological" questions and the need for open and democratic discussion among contemporary believers. This has produced the all too familiar story in many Muslim countries: of the dragooned compliance required of so many of Islam's adherents, and of the fear of the state and of Islamic rule that is understandably prevalent among so many of them.

On pragmatic or sociological grounds, a further question may be raised: how enforceable is a law which attempts to regulate a citizen's life to the minutest detail (such as legislating a mode of dress)? Will the impact of its implementation be so wide the law itself will be made susceptible to selective prosecution, victimization and transgression of basic human rights—as is now happening in Afghanistan with the aggressive imposition on women of the Taliban dress code? Unless those in authority intend to turn Malaysia into a state policed by thousands of guardians of public morality—forever patrolling the streets and arresting, intimidating or harassing every woman deemed not properly dressed or covered—one cannot imagine how such a law is to be enforced fully and equally.

There was much public uncertainty among Malaysians in the weeks that followed the arrest of the three participants of the beauty pageant. Many athletes expressed the fear that their sportswear, technically designed to promote proficiency in sport, could be deemed unIslamic. Some of the questions posed by members of the public interviewed by one local newspaper were: will women in swimsuits or even T-shirts and shorts at the beach, public swimming pools, and elite country clubs be arrested if such a legislation is put into place? Will this dragnet extend to everyone, including members of the various and, by reputation, often religious lax royal families? Or will only those who are powerless and marginalized, like factory girls and young women from small towns and villages seeking work, glamour or money in the big city be arrested? The record of the religious authorities to date in implementing this

[21] See Abdullah Yusuf Ali. *The Holy Qur'an: Text, Translation and Commentary*. The Islamic Foundation: London; 1975 p. 103, see his commentary in footnote No. 300.

and similar laws has displayed just this sort of selectivity and bias.[22] JAIS's recent action in arresting the three beauty contest participants in fact unleashed, and also legitimized, an authoritarian and vigilante mind-set—expressed in personally confronting actions, taken in the name of Islam and based on the claim that self-appointed individuals have a right to chastise or refuse service (even services provided to all citizens by government-at taxpayer expense) to women they consider inappropriately dressed. Young women have complained of harassment by security guards in public buildings and university campuses, refusal of service by government servants, and public chastisement by male strangers in the streets for the way they dress.

One positive outcome, however, of this recent controversy has been the ensuing public outcry, expressed both in the Malay and the English language press. Many Malaysians, young and old, are very uncomfortable with the growing intolerance and over-zealousness displayed by those in religious authority and those in state and local governments who seek to impose their obscurantist moral values on the rest of society. What is of greater concern to many women activists is the question: should these same people now be given the power to define unilaterally and unaccountably what is decent and indecent behaviour, proper and improper dress, in Islam?

Other pertinent issues related to democracy and public laws can also be raised from this one case of implementing an Islamic law based on a *fatwa*. This case demonstrates the propensity of such laws to be designed on issues of social and public morality. Is it the business of the state, even if Islam is the official religion as in Malaysia, to use the instrument of the law to enforce moral propriety? Unless there is an explicit attempt to equate the sphere of crime with that of sin, there must remain a sphere of private morality that is best left to the individual conscience. The so-called "moral majority"—whose existence is extremely problematic if not impossible to prove—has no right to dictate repressively to the minority how it ought to live; still less

[22] Another example, often quoted by Malaysians in the streets, is that most of the arrests made in *khalwat* cases are those of young and ordinary people. Whenever a case of arrest for *khalwat* involving notable or a public figure occurs, it is often accompanied by many rumours or stories of victimization due to some political rivalry, or a manipulation or abuse of power related to a "political conflict or conspiracy".

if those zealots are in fact a minority, which they cannot disprove either, seeking to impose their views on a sceptical or moderate moral majority. Individuals have a right to the widest possible autonomy and freedom of choice unless their conduct causes detriment to the society of which they are a part. The crucial issue here is one of democracy and value pluralism. But such a position does not sit well with the repressive mentality of the Islamists and moralists.

For them, state intervention in matters of sex morality is justified because a pervasive moral permissiveness and emptiness permeates modern society. Many in Muslim societies feel that their society is threatened more by moral anarchy than by dictatorship, more by decadence than by fanaticism. Under these circumstances, democratic engagement and debate are all the more necessary as modern Muslim societies seek to harmonize the spiritual aspects of their life with modernity. However, most of us in the modern world will agree that in relation to "moral wrongs" like taking part in prohibited beauty contests, the choice of what punishment to impose should be guided by a generous degree of compassion and a good knowledge of criminology. Education, the inculcation of awareness, the fostering of a thoughtful body of public opinion, and (if necessary as a final recourse) psychological counseling seem more appropriate for these types of "offences" than the punitive application of the organized might of the state authorities. One may even question the wisdom of "criminalizing these moral wrongs".

From a gender or feminist perspective, another controversial issue may also be raised here. This concerns women's dignity and the popular "sexploitation" of women to titillate the libido. Beauty contests, despite their pretence to be celebrations of beauty are primarily about the sex appeal of contestants. Should the law, which is seeking to control sexist behaviour in the workplace, also seek to control sex exploitation in the market place? The issue is not merely a moral one but has a human rights dimension. Many social institutions and practices demean the female sex. They, in fact, reinforce the cultural myths and presumptions with which most males grow up and which they readily absorb. Even if there is "voluntary" cooperation by some women in the perpetuation of these practices, is it correct from the human rights point of view for the law to adopt a "hands off" attitude towards these entrenched practices which contribute to the "atmosphere" of moral laxity and permissiveness in which exploitation of women, as mere adornments and playthings for the voyeuristic pleasure and implicit gratification of men, thrives?

This point was, in fact, put to the author by one Islamic religious functionary in a personal conversation before both of us appeared on the controversial television programme mentioned above that aimed to discuss the "Beauty Contest Incident" (as he would like to call it). My response to his question was that even though I am a politically-committed feminist, I would not consider a legal move to ban beauty contests an appropriate action. One must consider other strategies and approaches to overcome such "public activities" which symbolize the "demeaning of women as sexual objects". From this particular conversation—and several others which I had with officers in the religious departments during the campaign initiated by *Sisters In Islam* to question the Islamic and constitutional validity of the *Hudud* Bill proposed by the Kelantan state government in November 1993 (which sought to make mandatory in that state the so-called *hudud* punishments of stoning and amputation in certain cases)—I came to the realization that a great lack of sensi-

tivity and thought is evident among these religious functionaries, notably in their efforts, through the introduction of new legal means and criminal sanctions, to ensure and elevate the quality of Islamic piety and observance in Malaysian society.

Conclusion: Islam, Democracy and Civil Society in Malaysia

Roff's historical analysis suggests that the "Islamization" of Malaysian society and the Malaysian state was perhaps irresistible; his view that it was "British Law"—specifically the introduction by the colonial authorities of the systematic enactment of statute law, and their inclination to drive change through heavy reliance on that institutional device—which provided the model and vehicle for much subsequent Islamization is accurate. But the Malaysian borrowing of British ways here was partial and selective.

The legal tradition which was borrowed to implement the "Islamization" of laws by the various Malaysian states was that of British colonial authoritarianism, not of enlightened metropolitan British legal culture. This derivatively colonial legal culture—one concerned with maintaining order and authority, not securing and enlarging citizens' rights within the state—is decidedly not one which values the legal safeguards and the democratic presuppositions characteristic of the development of modern British legal tradition at home. The Malaysian borrowing from that rich tradition was not merely incomplete; it was also pursued without much thought about the implications of this selective adoption of the more authoritarian elements of an intellectually far more liberal legacy of governance. What Malaysians have inherited and adapted to their post-colonial regime requirements has been a peculiar or even deviant version of that liberal tradition, deformed by its elaboration under conditions, and to met the needs, of colonial authoritarianism.

One part of the problem is this model of procedure of authoritarianism by statute enactment; another concerns the substance or legal content of what that process has sought to institutionalize. Islamic laws, it must be recalled, as they evolved up to the late nineteenth century, were of a kind not intended to be codified into bodies or systems of statute law of the western or British type. What the "*shari'a*-minded" now invoke as legitimating models and instruments for their Islamization initiatives is also open to a further question. The elaboration of the Islamic legal culture which contemporary Islamists now invoke as their model was far more flexible than these new legalists understand; they fail to recognize that it was the result of an evolution in legal practice which assimilated the cultural imperatives of its time. The living *shari'a* which resulted was never as rigid or immutable as the contemporary Islamists would have us believe.

Failure to recognize this fact—generally the result of the Islamists' quite ahistorical view of the evolution of *shari'a* principles into law—has often led in the modern Muslim world to confusion: to efforts to enact in codified form not just aggregations of scattered existing legislation supposedly awaiting systematization (which is what many of the *shari'a*-minded imagine is the practical task facing them), but rather to codify, as if they were such scattered pieces of practical legislation, bodies of often abstract, normative or theoretical jurisprudential argumentation. This kind of legal scholarship does not readily lend itself to such treatment; efforts to give expression in this way to such materials with their normative visions have often yielded quite authori-

tarian results. Those who, under the Islamist impetus, have taken the lead in such state-sponsored initiatives implement the *shari'a* via formal codification and statute enactment have very often failed to understand, or think through, what they are actually doing.

If (as the Islamists and their legal technicians believe) the implementation of *shari'a* law principles under modern conditions of governance now requires their systematic enactment and codification, this project requires modern Muslims, and especially modern Muslim legislators and legal scholars, to commit themselves to the serious and intelligent consideration of what the development of a "modern Islamic legal culture" would entail, and especially of the kind of approach to the interpretation of *shari'a* principles which the decision to codify and enact those Islamic laws makes necessary. In their rush to use modern state powers to systematize, codify and enact their "*shari'a* based blueprints", the Islamists and their technicians have barely allowed themselves time to recognize, let alone actually to consider, this fundamental problem.

The advancing process of Islamization of laws affects the prospects for democracy and the development of a civil society in Malaysia: not because there is any intrinsic contradiction between Islam and democracy but because the resurgent movements of political Islam do not recognize the intellectual prerequisites which the task of seeking to reactualize *shari'a* principles in the modern world with its democratic trajectory entails. They have demonstrated a consistent lack of intellectual imagination and integrity in considering how best to articulate the animating principles of formative Islam and of Islam's subsequent historical legacy; and how further to give effect to them in benign, just and humanitarian laws, and a Muslim legal culture, congruent with the common emancipatory impulse of both the *Qur'an* itself and the trajectory of modernity.

The project of establishing democratic values in contemporary Muslim states is therefore never a simple one. In the case of Malaysia, such an effort must address two closely interrelated features of the nation's modern political culture: namely, the authoritarianism which pervades its mainstream, so-called "secular" political culture and the total absence of any democratic consciousness or spirit within its ever more insistent Muslim politics.[23]

All the complex questions which have been raised in this paper about democracy, Islamic law, Muslim politics and legal culture—it must be noted—are really a part of a greater problem of politics and culture in Malaysian society at large. Islamic legal culture and Muslim politics reflect some of the basic characteristics of mainstream Malaysian political culture. Both contexts provide evidence of strong elements of authoritarianism and intolerance towards dissent, political criticism and opposition. In the dialectic of "archaism and modernity" in contemporary Malay political culture, it is often the former that frames or sets the context for the latter: hence in politics and society the inclination, even preference, among the rulers and also many of their followers to see considerations of loyalty override those of legality and even compassion-

[23] For an overview of the nature of Muslim politics within its geographical setting and its relationship with national identities, economic circumstances, and social status in the Muslim world, see Dale F. Eickelman and James Piscatori, *Muslim Politics*; Princeton: Princeton University Press; 1996.

ate humanity.[24] Also characteristic of contemporary political culture in Malaysia are the emphasis—the special privilege and strength—now accorded to claims of legitimacy and strategies of justification that are made by the established forces or authority, as well as the Islamist opposition, in the name of Islam.

The wholesale rejection, now almost habitual, of dissenting and opposing views within the arena of Muslim politics and legal culture establishes a dangerous precedent, and has serious implications, for the political life of the entire Malaysian nation. Yet the fault here cannot be laid solely at the door of the Islamist resurgents and *shari'a*-minded zealots. The same refusal of human openness and intellectual thoughtfulness, the same authoritarianism and paternalism, are no less characteristic of mainstream "secular" political culture in Malaysia. Reform and change within Muslim politics and legal culture therefore remain to some degree limited by, and dependent on the enlarging of, the "openness" of Malaysian cultural and political life at large. But their prospects also will depend very much on the kind of modernity or reform project that the Malaysian government itself is willing to undertake, in the face of authoritarian pressures from both the Islamist political opposition and within its own ranks; and indeed on the political will and imagination which the government manages to summon when it eventually dares to implement change in the religious education system currently prevailing in Malaysian schools and *madrasahs*.

The modernist Muslim scholar Fazlur Rahman believes that the injection of politics into the religious sphere has been damaging, both to Islam itself and to its believers and their societies. He argues that Islamic precepts should govern politics; instead, twentieth century experience has repeatedly displayed the unedifying spectacle of the exploitation of Islamic concepts and organizations by political groups and elites—both religious and secular. The result, according to him, has been "sheer demagoguery" rather than morally inspired politics. "The slogan 'in Islam religion and politics are inseparable' is employed," he sadly notes, "to dupe the common person into accepting that, instead of politics or the state serving the long-range objectives of Islam, Islam should come to serve the immediate and myopic objectives of party politics".[25]

Sadiq al-'Azm, an internationally acclaimed Syrian philosopher, has trenchantly criticized the prevailing ideological straight-jackets and deceptions of the modern age, whether they be those of Arab nationalism or religion. In his view, "fundamentalism"—Christian or Islamic—is based on a "principled rigidity". He acknowledges that fundamentalists may perhaps adapt to the needs of the modern world; but if they do, this will mark the triumph of secular reason. In his own words, "in the longer run the resulting socio-historical secular reality will inevitably burst through the mystical shell of Islam".[26]

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[24] See Clive S. Kessler "Archaism and Modernity: Contemporary Malay Political Culture" chap.6 in in *Fragmented Vision: Definitions of the Future in Malaysian Political Culture*, edited by J.S. Kahn and F.K.W. Low, Sydney: Allen Unwin; 1992, pp. 133-157.

[25] Fazlur Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition*; Chicago: Chicago University Press, 1982 p. 140.

[26] Sadiq J. al-Azam, "Islamic Fundamentalism Reconsidered: A Critical Outline of Problems Ideas and Approaches, Part II". *South Asian Bulletin* 13, no. 2: 73-98, 1993, see p. 97.

Aziz al-Azmeh similarly highlights the assumption of an indivisibility of religion and politics in Islam. Rather than making secularism the antithesis of Islam, he questions the dichotomy and points to the possibility of an "Islamic secularism".[27] This implies that contemporary Islam and its adherents must address the issue of "Islam and Modernity". They must confront openly and with candour the challenging complexities of devising just and enlightened Islamic ways of thinking about—and also ways of in practice realizing such thought in—politics, governance, and the laws of modern nation states.

The main problem confronting modern Muslims has been succinctly expressed by the prominent Egyptian judge and writer Muhammad Sa'id al-'Ashmawi—who argues that many of the past failures of Islamic history have been due to the very mixture of religion and politics. An examination of Islamic law in his view reveals that the *Qur'an* contains relatively few direct legal commands. The attempts of the "fundamentalists" to prescribe, and to justify as purportedly required by *shari'a*, modes of action in every sphere of life is, he maintains, simply self-aggrandizing. This presumptuousness, he suggests, inevitably leads to distortions of Islam and limitations on individual liberties.[28] For many modernist Muslims this has been precisely the character and effect of the recent promulgation in Malaysia of anti-democratic *fatwas*.

[WORD COUNT: 12,007 words]

[27] Al Azmeh, Aziz, *Islams and Modernities*. New York: Verso, 1993.

[28] See al-'Ashmawi, Muhammad Sa'id, *Al Islam a-Siyasi* [Islam and the political order], Cairo: Sina-li'm-Nashr; 1987. Cf. Carolyn Fluehr-Lobban (ed.), *Against Islamic Extremism: The Writings of Muhammad Sa'id al-'Ashmawy*; Gainsville, Florida: University of Florida Press, 1998; and William E. Shepard, "Muhammad Sa'id Al-'Ashmawi and the Application of the Shari'a in Egypt" *International Journal of Middle East Studies* 28 (1); 39-58; 1996.

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