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The Conceptualization of Legal Harmonization Approach in Malaysia

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Abstract

The term "harmonization," derived from "harmony," encompasses various meanings. In the context of this discussion, it refers to the willingness and openness to recognize, acknowledge, adopt, or accept elements produced by man-made laws, modern secular traditions, customs, cultures, and institutions that are perceived to align with or not contradict the worldview, principles, values, teachings, and norms of Islam. Therefore, the conceptual approach to harmonizing legal knowledge and education is a process of actualizing divine imperatives within the legal sphere. Legal harmonization is a fundamental concept in comparative law that has gained prominence on both international and national agendas over the past decade. In Malaysia, numerous efforts have been made to identify similarities among legal rules across different jurisdictions; however, these efforts have faced challenges due to a lack of comprehensive understanding regarding the nature and scope of harmonization. This article examines various dimensions of harmonization, treating it as a legal phenomenon rather than merely a process of drafting similar rules. A thorough understanding of harmonization as a legal phenomenon can enhance the evaluation of implementation processes and inform the formulation of new legal initiatives.

A. Introduction

The Federal Constitution of Malaysia emerged from negotiations not only between the Rulers and Governments of the States within the Federation and the British Government but also among the diverse populations of the Federation, including Malays, Chinese, and Indians. Consequently, the Constitution was framed as a reflection of this collective agreement. The Constitution of the Federation of Malaya, which subsequently evolved into

that of Malaysia, serves not merely as a legal document but also as a social contract founded on mutual understanding and consensus among its constituents.[1]

While some critics assert that the Malaysian Constitution lacks an Islamic foundation due to its origins in the Reid Commission, which they argue hampers the implementation of Islamic criminal law, this perspective warrants further examination.[2] It is posited that the Malaysian Federal Constitution does not constitute an insurmountable obstacle to the enactment of Islamic criminal law. Should federal authorities pursue comprehensive implementation of such laws, it could indeed be achieved within the existing constitutional framework. State-level authorities possess the capacity to implement Islamic criminal law; however, this would necessitate constitutional amendments to exclude Islamic criminal law from federal jurisdictions and to modify existing legislation that limits the jurisdiction of the Syariah Court.

In addition to constitutional amendments, revisions to several laws—including the Civil Law Act 1956, the Court of Judicature Act 1964, the Penal Code, the Criminal Procedure Code, and the Evidence Act 1950—are essential. A systematic and consistent effort is required to cultivate a conducive legal environment for the implementation of Islamic criminal law. Unfortunately, the current landscape lacks such initiatives, and no significant steps have been taken at the federal level to facilitate the application of Islamic criminal law.

Opponents of these proposed efforts argue that the implementation of Islamic law is hindered by the secular nature of the Malaysian Constitution, which could lead to legal challenges in court. However, this view aligns with the perspective of Abdul Aziz Bari, who contends that the Constitution is not entirely secular. The assertion of secularism is often derived from specific provisions and judicial interpretations. Consequently, the characterization of the Constitution as secular remains open to debate. Concurrently, various legislative measures have been enacted to facilitate the implementation of Islamic principles, such as the Islamic Banking Act 1983[3] and Takaful Act 1984[4]. Overall, the Malaysian Constitution and accompanying laws enacted by Parliament can be described as pragmatic, accepting diverse influences as

[1] Kamali, Hashim, "Harmonization of *Shariah* and Civil Laws: The Framework and *Modus Operandi*" (2015) 11 IIUMLJ 149. Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 395. IIUM Policies & Guidelines on Islamisation, 2015, Centre for Islamisation (CENTRIS), Policy Statement No. 7; Hashim, Kamali, "Harmonisation of Shariah and Civil Law: Proposing a New Scheme" paper presented at International Conference on Harmonization of *Shariah* and Civil Laws, Pan Pacific Hotel, Kuala Lumpur, 29 – 30 June 2015, 233.

[2] Abdul Aziz Bari, Perlaksaan Islam melalui kerangka Perlembagaan dan perundangan Malaysia – masalah dan potensinya, Ins., IKIM law journal, 1999, 3 (2), pp. 83-105.

[3] Act 276.

[4] Act 312.

long as they adhere to established procedures and conditions. To date, laws derived from a range of sources, including those from England and Australia, have been integrated into the Malaysian legal framework. This approach suggests that Malaysian law is not bound by a singular ideological perspective; rather, it is open to inspiration from multiple sources, including Christianity and Islam, provided that the requisite jurisdictional criteria are fulfilled.[5]

According to Hashim Mehat, the introduction of Islamic law should not be misconceived as a wholesale rejection of established modern laws. It is contrary to Islamic principles to dismiss legal frameworks solely because they do not originate from Islam, unless they are inconsistent with Islamic injunctions. In this regard, Salleh Abas advocates for a "middle path" approach, suggesting that Malaysia would benefit from evaluating existing laws to determine whether they conflict with Islamic principles.[6] He asserts that if existing laws do not oppose Islamic tenets, there is little justification for altering them, and they may be retained. Nonetheless, he emphasizes the importance of conducting thorough research to ensure that any legal reforms align with Islamic principles.[7]

Historically, Islam has demonstrated an acceptance of practices that are not repugnant to its teachings. For instance, several pre-Islamic practices were incorporated into Islamic law, including the laws of qisās (retribution), diyat (compensation), and inheritance. Additionally, when introducing new laws, Islam has been mindful of prevailing societal conditions, as exemplified by the gradual enforcement of prohibitions on alcohol consumption, which progressed in stages before culminating in a complete prohibition.[8]

While the consumption of alcohol is regarded as a significant sin in Islam, some argue that it may have potential benefits. However, the Quranic guidance underscores that the harm associated with intoxicants outweighs any perceived benefits, particularly when evaluated from both social and individual perspectives. Even after embracing Islam, many Arabs continued to consume alcohol, often posing questions to the Prophet Muhammad (s.a.w.) about it. In response to these inquiries, the following verse was revealed:[9]

"They ask thee concerning wine and gambling. Say: In them is great sin, and some profit for men; but the sin is greater than the profit."

[5] Abdul Aziz Bari, "Harmonization of Laws: A Survey on the Issues, Approaches and Methodology Involved, paper presented at International Conference on Harmonization of *Shariah* and Civil Laws, Pan Pacific Hotel, Kuala Lumpur, 29 – 30 June 2015, 19. Abdul Aziz Bari, Halangan-halangan pelaksanaan undang-undang jenayah Islam di dalam Perlembagaan Malaysia, pp. 5-6.

[6] New Straits Times, 25 August 1986, pp. 3.

[7] Hashim Mehat, Islamic criminal law and criminal behaviour, pp. 5-6.

[8] Hashim Mehat, Islamic criminal law, pp. 6.

[9] al-Qur'an, Surah al-Baqarah 2: 219.

This verse highlights the negative consequences of wine consumption but does not immediately prohibit it. It was only later that Divine Revelation mandated a partial prohibition, instructing believers not to pray while intoxicated. [10]

> *"O ye who believe! Approach not prayers with a mind befogged, until ye can understand all that ye say."*

While intoxicated, the Arabs committed numerous heinous acts, many of which are documented in historical records. Even after the advent of Islam, they continued to consume alcohol until the migration (Hijrah) from Mecca to Medina in 632 A.D. Over time, however, they were gradually weaned off this vice. The verse below conveys the final injunction against the consumption of wine: [11]

> "O ye who believe! Intoxicants and gambling, (dedication of) stones, and (divination by) arrows, are an abomination – of Satan's handiwork; eschew such (abomination), that ye may prosper. Satan's plan is (but) to exice enmity and hatred between you, with intoxicants and gambling, and hinder you from the remembrance of Allah, and from prayer: Will ye not then abstain?"[12]

According to Hashim Mehat, the implementation of Islamic law involves integrating beneficial legal principles into the existing legal framework to enhance its effectiveness in addressing the myriad issues confronting the world today.[13] He emphasizes that transitioning to an Islamic legal system does not entail a complete overhaul of the current legal structure or the replacement of the Malaysian Constitution. Instead, it requires only minor amendments to the Constitution to facilitate the implementation of Islamic law, particularly in the realm of criminal law. Any existing or future laws deemed repugnant to Islamic injunctions should be considered null and void to the extent of that repugnance, necessitating amendments to align such laws or provisions with Islamic teachings.[14] This concept of alignment is encapsulated in the term "harmonization" used in this article.

Regarding the Kelantan Enactment, the Deputy Chief Minister of Kelantan, Abdul Halim Abdul Rahman, stated shortly before the ratification of the Syariah Criminal Code (II) Enactment, Kelantan, 1993, that “the Kelantan Government would have fulfilled its responsibilities in tabling and securing the passage of the hudūd laws through the State Legislative Assembly.” He further asserted that the enforcement of the proposed law would hinge on amendments to certain provisions of the Federal Constitution by federal Muslim leaders. This indicates that the Kelantan Government recognized that the Kelantan Enactment could not be enforced without

[10] al-Qur'an, Surah al-Nisā' 4: 43.
[11] Abdur Rahman I. Doi, Sharī`ah: the Islamic law, pp. 262-263.
[12] al-Qur'an, Surah al-Mā'idah 5: 90-91.
[13] Hashim Mehat, Islamic criminal law, pp. 6.
[14] *Ibid.*, pp. 8.

corresponding amendments to the Federal Constitution.[15] This article will outline some of the necessary amendments to ensure that Malaysian laws are aligned with Islamic principles, thereby facilitating the comprehensive implementation of Islamic criminal law in the country.

B. Discussion

1. Amendment of the Federal Constitution

According to Ahmad Ibrahim:

> "It is easy to take a negative attitude and to say that the Federal Constitution of Malaysia is not in accordance with Islam. It was drafted by a Constitutional Commission whose members were not Malaysians and the majority of them were not Muslims. It makes no reference to the principles of Islamic government and is based on the so-called Westminster form of government. Our respected first Prime Minister of Malaysia Tunku Abdul Rahman had insisted that Malaysia is a secular state and his view has been accepted by many of our leaders. What then is the remedy?

An alternative approach to engaging with the Malaysian Constitution involves embracing it as a foundation for promoting the principles of Islamic governance. The acceptance of the Federal Constitution was made possible through negotiations and compromises reached among all communities in Malaysia. It is essential to respect this agreement, which reflects the understanding and camaraderie among the diverse populations. Concurrently, there should be a concerted effort to interpret and utilize the Constitution in a manner that upholds the principles of Islamic governance while considering the interests of all Malaysian communities.[16]

We concur with this perspective, as it encourages a positive interpretation of the Federal Constitution, seeking to align its provisions with Islamic principles, often referred to as an "Islam-friendly approach." However, we maintain that it would be prudent to pursue amendments to the Constitution to explicitly recognize Islamic law as a foundational element of the legal system in Malaysia.

2. Islam as the religion of the Federation

At present, Article 3 (1) of the Federal Constitution says:[17]

> "Islam is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation."

According to Sulaiman Abdullah, this provision gives inaccurate description on the concept of freedom of religion in Islam.[18] He based his

[15] Hudūd laws may not be enforced, News Strait Times, 22 October 1993.
[16] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 395.
[17] The discussion on the meaning of Article 3 of the Federal Constitution.
[18] Sulaiman Abdullah, Model Perlembagaan Islam: perspektif Malaysia (beberapa pandangan mengenai cara mencapainya), the working paper presented in the Seminar Models of Islamic

opinion on the word 'but' used in the Federal Constitution. It is agreed with this opinion. Thus, it is suggested that Article 3 (1) should be amended to be read as:[19]

> "Islam is the religion of the Federation; thus other religions may be practiced in peace and harmony in any part of the Federation."

One could argue that the court has embraced a positive interpretation of Article 3(1) as evidenced in the case of Meor Atiqulrahman bin Ishak & Ors v. Fatimah Bte Sihi & Ors. In this case, the court recognized Islam as the principal religion of Malaysia, thereby distinguishing it from other religions practiced in the country, such as Christianity, Buddhism, and Hinduism. This acknowledgment implies that Islam occupies a superior position, asserting its precedence within the legal framework. If this were not the case, Islam would merely be one of several religions practiced in the country, with all individuals enjoying equal freedom to practice their beliefs without any preferential treatment.[20]

However, it is widely believed that amendments are necessary concerning Article 3 of the Constitution. Specifically, the addition of a new provision, designated as (1A) under Article 3, is advocated to establish the Federal Constitution as one reflective of an Islamic State. Sulaiman Abdullah has emphasized that this amendment is of importance.[21]

It can be drafted as below:

> "The laws in this country, including this Constitution, must be based on Islamic law and any part of the laws, including this Constitution, which is inconsistent with the Islamic law shall, to the extent of the inconsistency, be void;[22] and in the event of any lacuna or in the absence of any matter not expressly provided for the statutes, the court shall apply the Islamic law."

"Islamic law" is defined as the body of laws derived from Islam, encompassing any recognized madhhab or school of thought. Consequently, Islamic law serves as the foundation for all legislation, and it is the responsibility of the courts to interpret and apply these laws. In fulfilling this duty, courts refer primarily to the sources of Islamic law, namely the Qur'ān and the Sunnah. Additionally, they consider subsidiary sources, which include legislation, the opinions of jurists, judicial decisions, and the legal opinions of

Constitution organised by Muslim Scholars Association of Malaysia (PUM) on 2-4 March 1990 at KL International Hotel, Kuala Lumpur, pp. 6.

[19] Sulaiman Abdullah, Model Perlembagaan Islam: perspektif Malaysia (beberapa pandangan mengenai cara mencapainya), pp. 6.

[20] *Ibid*., pp. 382 B-C.

[21] Sulaiman Abdullah, Model Perlembagaan Islam: perspektif Malaysia, pp. 6. International Conference on Harmonization of *Shariah* and Civil Laws, Pan Pacific Hotel, Kuala Lumpur, 29 – 30 June 2015.

[22] *Ibid.*

Mufti.[23]

Clause (4) is also amended as follows.

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

Article 3 (4) should be amended into:[24]

> "Nothing in any other provisions in this Constitution derogates this Article and all other provisions in this Constitution will be subjected to this Article's provisions."

3. The Supremacy of the Federal Constitution

It is proposed that Article 4(1) of the Federal Constitution, which pertains to the supremacy of the Constitution, be amended to read:

> "Subject to Article 3, this Constitution is the supreme law of the Federation, and any law enacted after Merdeka Day that is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

Additionally, clauses (2), (3), and (4) of Article 4 should be deleted, as these provisions inhibit the public's ability to challenge the validity of certain laws in court. The provisions in question are as follows:

4(2) The validity of any law shall not be questioned on the grounds that

> (a) it imposes restrictions on the rights mentioned in Article 9(2) but does not pertain to the matters specified therein; or
>
> (b) it imposes restrictions as mentioned in Article 10(2), provided those restrictions were deemed necessary or expedient by Parliament for the purposes outlined in that Article.

4(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the grounds that it makes provisions with respect to any matter for which Parliament or, as the case may be, the Legislature of the State lacks the authority to legislate, except in proceedings seeking a declaration that the law is invalid on that ground or-

> (a) if the law was made by Parliament, in proceedings between the Federation and one or more States;
>
> (b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

4(4) Proceedings for a declaration that a law is invalid on the grounds mentioned in Clause (3) (excluding proceedings falling within paragraphs (a) or (b) of this Clause) shall not commence without the permission of a judge of the Federal Court; the Federation shall be entitled to be a party in any such proceedings, as shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of this Clause.

However, Ahmad Ibrahim states that Article 4 can also be interpreted positively. Article 4(1) states:

[23] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 24-25.
[24] Sulaiman Abdullah, Model Perlembagaan Islam, pp. 7.

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

Ahmad Ibrahim argued that the supremacy of the Constitution pertains only to written law. While the Constitution is indeed the supreme law of the Federation, its applicability is limited to laws enacted after Merdeka Day. Pre-Merdeka laws occupy a unique status; they are not rendered invalid by any inconsistency with the Constitution but instead require modification to align with constitutional principles. The Privy Council, in a case originating from Singapore[25], has determined that the Constitution is subject to the principles of common law and may be constrained by them. In the Malaysian context, one could contend that the Constitution does not undermine the validity of *Sharī`ah* law[26], which is non-written and predates Merdeka Day. However, it may influence legislation pertaining to the administration of Islamic law. Nevertheless, this argument is not widely accepted, thus reinforcing the case for amending Article 4 as previously outlined.

4. The Status of *Yang di-Pertuan Agong* and Conference of Rulers

Choo Chin Thye asserts that the Federal Constitution does not grant the *Yang di-Pertuan Agong* and the Malay Rulers any substantive authority. The Reid Commission characterized the role of the *Yang di-Pertuan Agong* as a mere "symbol of unity,"[27] a position that reflects the deliberate adoption of the Westminster model, which advocates for a limited role of the monarchy.[28]

Despite this, many Malaysian Muslims regard themselves as fortunate, as the current system of Malay Rulers embodies the principles of Islam. Tunku Abdul Rahman, reflecting on his retirement, emphasized the necessity of preserving the monarchy, asserting that the Malay Rulers' role extends beyond the defense of the Islamic faith to encompass the protection of the rights and freedoms of the society.[29]

Ahmad Ibrahim highlights the special status of Islam as enshrined in the oath taken by the *Yang di-Pertuan Agong*, who solemnly pledges to perform his duties in accordance with the laws and constitution of Malaysia. This oath further includes a commitment to "protect the Religion of Islam and uphold the rules of law and order in the country."[30]

[25] Ong Ah Chuan v. Public Prosecutor (1981) 1 MLJ 64.

[26] Zuhairah Ariff, The Theory of Contract and Registration as Methodology for Harmonisation, paper presented at International Conference on Harmonization of *Shariah* and Civil Laws, Pan Pacific Hotel, Kuala Lumpur, 29 – 30 June 2015.

[27] Para 58 of the Reid Commission Report.

[28] Choo Chin Thye, Executive power in Malaysia – limiting its growth, Ins. Insaf, 2000, 31 (1), pp. 24-25.

[29] Tunku Abdul Rahman, Sudut pandangan, Heinemann Educational Books, Kuala Lumpur, 1979, pp. 84.

[30] Part III of the Fourth Schedule & Article 37 of the Federal Constitution. See also Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 396.

Regarding the role of the Conference of Rulers, Abdul Aziz Bari suggests that it serves a crucial function in safeguarding the dignity of Islam at the federal level. The Conference of Rulers plays an important role in preventing the federal government from encroaching upon Islamic matters, a concern that was notably addressed during discussions surrounding Malaysia's independence. From this perspective, the Conference acts as a guardian of Islam's status. The significance of the Conference of Rulers became particularly evident when Islamic associations, led by the Muslim Scholars Association of Malaysia (*Persatuan `Ulama' Malaysia-PUM*), submitted a memorandum on February 4, 2002, urging the Conference to take action against journalists who were alleged to have disrespected the Prophet Muhammad (s.a.w.) and Islam.[31] This memorandum underscores the Conference's recognized authority regarding Islamic matters at the federal level.[32]

Another significant memorandum submitted to the Conference of Rulers pertains to the issue of Sekolah Agama Rakyat (SAR), presented on January 25, 2003.[33] Abdul Aziz Bari remarked that approaching the Rulers with this memorandum cannot be construed as politicizing their role, as they possess official power in Islamic matters. Additionally, the Rulers occupy a position that transcends political parties, which affirms that Muslims, regardless of their political affiliations, have the right to approach the Rulers and that it is the Rulers' duty to listen to their grievances. In this context, the government's advice becomes irrelevant, as the Rulers are not obligated to follow such counsel in matters of Islam, provided their actions do not contravene Islamic principles.[34]

Bari concludes that the Federal Constitution merely designates Islam as the official religion and facilitates the use of the Malay Rulers' authority and general funds for Islamic purposes. However, in other respects, particularly regarding the freedom of religion, the Conference of Rulers does not wield absolute power. Consequently, the provisions concerning Islam in the Federal

[31] To know details on the contents of this memorandum, see Muslim Scholars Association of Malaysia (Persatuan `Ulama' Malaysia-PUM) and Muslim Scholars Association of Kedah (Persatuan `Ulama Kedah-PUK), Kontroversi mengenai Memo kepada Majlis Raja-raja Melayu: Islam dicabar, Rasulullah s.a.w. dan `ulama' dihina, Muslim Scholars Association of Malaysia (PUM) and Muslim Scholars Association of Kedah (PUK), Kuala Lumpur, 2002.

[32] Abdul Aziz Bari, Majlis Raja-raja: kedudukan dan peranan dalam Perlembagaan Malaysia, Dewan Bahasa dan Pustaka, Kuala Lumpur, 2002, pp. 87-88.

[33] Gerakan Bertindak Umat Selamatkan Sekolah Agama Rakyat (GEGAR), Memorandum kepada Majlis Raja-raja Melayu: menjawab fitnah terhadap Sekolah Agama Rakyat, Gerakan Bertindak Umat Selamatkan Sekolah Agama Rakyat (GEGAR), Merbok, 2003.

[34] Abdul Aziz Bari, Kontroversi Sekolah Agama Rakyat: beberapa perspektif perlembagaan dan perundangan, the working paper presented at the National Convention on Sekolah Agama Rakyat, organised by Muslim Scholars Association of Malaysia (PUM) on 15 March 2003 at Anjung Rahmat, Gombak, pp. 6.

Constitution remain ambiguous, and their scope is not clearly defined.[35]

To address this uncertainty, it is proposed that the concept of constitutional monarchy be strengthened to ensure the status of Islam in Malaysia. Currently, Article 3(2) of the Federal Constitution recognizes the Malay Rulers as the Heads of Islam in their respective states. An amendment could assert that the Rulers not only serve as the Heads of Islam but also possess the authority necessary to safeguard the status of Islam throughout the country.[36]

Article 3 (2) of the Federal Constitution reads as:

> "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 is recognized to the extent acknowledged and declared by the Constitution of that State. Subject to that Constitution, all rights, privileges, prerogatives, and powers enjoyed by him as Head of that religion remain unaffected 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, in his capacity as Head of the religion of Islam, shall authorize the *Yang di-Pertuan Agong* to represent him."

After the proposed amendment, Article 3(2) would read as follows:

> "In every State other than States not having a Ruler, the position of the Ruler as the Head of the religion of Islam, and his power to guarantee the status of Islam in his State, is recognized to the extent acknowledged and declared by the Constitution of that State. Subject to that Constitution, all rights, privileges, prerogatives, and powers enjoyed by him as Head of that religion, and his power to guarantee the status of Islam, remain unaffected 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, in his capacity as Head of the religion of Islam and with the power to guarantee the status of Islam, shall authorize the *Yang di-Pertuan Agong* to represent him."

Additionally, amendments can be made to clauses (3) and (5) concerning the powers of the *Yang di-Pertuan Agong*[37] in the states of Malacca, Penang, Sabah, and Sarawak, as well as the Federal Territories of Kuala Lumpur, Labuan, and Putrajaya. Article 3(3) currently states:

> "The Constitution of the States of Malacca, Penang, Sabah and Sarawak shall each make provision for conferring on the *Yang di-Pertuan Agong* the position of Head of the religion of Islam in that State."

After the suggested amendment, Article 3 (3) should read:

> "The Constitution of the States of Malacca, Penang, Sabah and Sarawak shall each make provision for conferring on the *Yang di-Pertuan Agong*

[35] Abdul Aziz Bari, Majlis Raja-raja: kedudukan dan peranan dalam Perlembagaan Malaysia, pp. 122.
[36] Sulaiman Abdullah, Model Perlembagaan Islam, pp. 7.
[37] *Ibid.*

the position of Head of the religion of Islam and has the power which guarantees the status of Islam in that State."

Article 3(5) currently reads:

"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, Labuan and Putrajaya; 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."

After the proposed amendment, Article 3(5) should read:

"Notwithstanding anything in this Constitution, the *Yang di-Pertuan Agong* shall be the Head of the religion of Islam and has the power which guarantees the status of Islam in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya; 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."

5. Other Amendments

To provide guidance to the government, the *Yang di-Pertuan Agong*, and the courts regarding *fatwá* and the necessary steps to be taken, it is proposed that a special body or Experts Council comprising renowned scholars be established under a new provision of the Constitution (Article 4A).[38]

The Article may be drafted as follow:

"A special body or Experts Council which consisting of well-known scholars is to be established to advise the government, *Yang di-Pertuan Agong* and the courts with the *fatwá* relating to the steps that should be taken."

Furthermore, it is crucial for citizens of this country to remain cognizant at all times that absolute power resides solely with Allah. Therefore, the constitution of an Islamic State should include a preamble that proclaims:[39]

"All the powers on all the creatures and on the laws are within the absolute power of Allah s.w.t. only."

6. Amendment of the laws to enforce Islamic criminal law

The conflicting jurisdiction between the Federal and State governments regarding the implementation of Islamic criminal law, along with the limited jurisdiction of the Syariah Court concerning punitive measures, presents significant barriers to the effective enforcement of Islamic criminal law.[40] To address these challenges, three potential solutions may be considered: first,

[38] *Ibid*., pp. 8
[39] Sulaiman Abdullah, Model Perlembagaan Islam, pp. 5.
[40] *Ibid*.

granting authority to State Legislatures to enforce Islamic criminal law; second, expanding the powers of State governments to legislate on Islamic criminal law; and third, integrating Islamic criminal law into the broader framework of the administration of justice and the judicial system in Malaysia.

7. Authorizing the State Legislatures to enforce Islamic criminal law

Ahmad Ibrahim proposed that Parliament should enact legislation under Article 76A of the Federal Constitution to specifically authorize the Kelantan Government to implement the Kelantan Enactment. Article 76A allows Parliament to grant State Legislatures the authority to legislate on matters listed under the Federal List.

Article 76A (1) says:

> "It is hereby declared that the power of Parliament to make laws with respect to a matter enumerated in the Federal List includes power to authorize the Legislatures of the States or any of them, subject to such conditions or restrictions (if any) as Parliament may impose, to make laws with respect to the whole or any part of that matter."

Article 76A (2) says:

> "Notwithstanding Article 75, a State law made under authority conferred by Act of Parliament as mentioned in Clause (1) may, if and to the extent that the Act so provides, amend or repeal (as regards the State in question) any federal law passed before that Act."

Thus, it is evident that under Article 76A, a State Legislative Assembly possesses the capacity to modify or repeal federal laws, including the Syariah Court (Criminal Jurisdiction) Act of 1965.[41]

When the Federal Parliament authorizes a State Legislature to enact such laws under Article 76A, these laws will be regarded as if they were included in the Concurrent List. However, Ibrahim noted that pursuing this course of action may be challenging due to the complexities and issues inherent in the Federal Constitution and current Malaysian laws. As an initial step, he suggested creating a compilation that clarifies and elucidates Islamic criminal laws, which could subsequently be adopted by the Councils of Religion in both the Federal Territories and the States. Should this compilation gain general acceptance and be enacted into law, it could be implemented by either Parliament or the State Legislative Assemblies. Nevertheless, it is recommended that these laws not be enforced until all necessary preparations for their implementation have been completed.[42]

[41] Ahmad Ibrahim, Perlaksanaan undang-undang h_udūd, pp.159. See also Abdul Monir Yaacob, Kedudukan dan pelaksanaan undang-undang jenayah Islam di Malaysia, Ins. Abdul Monir Yaacob and Sarina Othman (edit.), Tinjauan kepada perundangan Islam, 3rd Ed., Institute of Islamic Understanding Malaysia (IKIM), 2000, pp. 111-112.

[42] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 639-640.

8. Expand the power of the State government to legislate on Islamic criminal law

Another alternative would be for Parliament to expand the Fourth List of the Ninth Schedule of the Federal Constitution to include *hudūd*, *qisās*, and *ta`zīr*, thereby enabling State governments to legislate on these matters.[43] Ahmad Ibrahim argued that such an amendment is necessary to eliminate barriers preventing State Legislative Assemblies from enforcing Islamic criminal law and to ensure that no federal laws restrict the jurisdiction of the Syariah Court in these areas. With this amendment, State governments would have unequivocal authority to implement Islamic criminal law, thereby enhancing the legal framework for its enforcement at the state level.[44]

9. Infuse Islamic criminal law into the administration of justice and judicial system in Malaysia

Hashim Mehat contended that it would be more beneficial to integrate Islamic criminal law into the administration of justice and the judicial system in Malaysia.[45] He emphasized that the infusion of Islamic law into the existing positive law—such as that in Malaysia—is not intended solely for religious obligations. Instead, it aims to provide practical alternative solutions to serious contemporary issues, including rising crime rates, drug abuse, and corruption, all of which threaten the country's stability. In this context, the relevance of incorporating Islamic criminal law should be critically assessed.[46]

Conversely, Ahmad Ibrahim noted that Parliament cannot enact Islamic criminal law applicable beyond the Federal Territories, as matters pertaining to the religion of Islam and Islamic laws fall under the jurisdiction of State governments, with the exception of the Federal Territories.[47]

In the case of Mamat bin Daud & Ors. v. Government of Malaysia, each petitioner was charged under Section 298A of the Penal Code for actions likely to prejudice unity among individuals professing the Islamic faith. Specifically, they were accused of acting as unauthorized *bilāl*, *khātib*, and *imam* during Friday prayers in Kuala Terengganu, without proper appointment under the Administration of Islamic Law Enactment, Terengganu, 1955.[48] The central issue before the court was whether Section 298A, enacted by Parliament through an amending Act in 1983, was *ultra vires* Article 74(1) of the Federal Constitution. The petitioners argued that the

[43] Hudūd laws may not be enforced, News Straits Times, 22 October 1993.
[44] Ahmad Ibrahim, Perlaksanaan undang-undang hudūd di Malaysia, pp.159. See also Abdul Monir Yaacob, Kedudukan dan pelaksanaan undang-undang jenayah Islam di Malaysia, Ins. Abdul Monir Yaacob and Sarina Othman (edit.), Tinjauan kepada perundangan Islam, 2000, pp. 112.
[45] Hashim Mehat, Islamic criminal law and criminal behaviour, pp. 5.
[46] *Ibid*., pp. 10.
[47] Ahmad Ibrahim, Perlaksanaan undang-undang h_udūd, pp.162.
[48] (En. 4/1955).

subject matter of the legislation was reserved for State Legislatures, thus exceeding Parliament's legislative competency. They obtained leave to file a suit seeking declaratory orders to declare the amended Section 298A of the Penal Code invalid, on the grounds that it pertained to matters outside Parliament's power to legislate.

The majority[49] held that the provisions of Section 298A of the Penal Code, while ostensibly framed as legislation concerning public order, fundamentally pertain to matters of religion, a subject on which only State Legislatures possess the authority to legislate under Articles 74 and 77 of the Federal Constitution. Consequently, it was declared that Section 298A is a law over which Parliament lacks the power to legislate, rendering it invalid, null, and void.

Conversely, Ahmad Ibrahim argued that Islamic criminal law can be enforced by Parliament under Article 76 of the Federal Constitution, which empowers Parliament to legislate on specific matters enumerated in the State List.[50] Article 76(1) states:

> "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 organization 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."

Consequently, it is feasible for the Federal Government to enact laws concerning *hudūd*, *qisās*, *diyat*, and *ta`zīr* for the purpose of promoting uniformity among the laws of the states under Article 76(1)(b) of the Federal Constitution. Such laws would be applicable within the Federal Territories, and if adopted by the State Legislatures, they could also extend their operation to the respective states.[51]

However, challenges remain regarding which court would have the authority to enforce jurisdiction under this proposal. If the Syariah Court, established under the State Government, is to assume this role, it would still be bound by the provisions of the Syariah Court (Criminal Jurisdiction) Act 1965. Therefore, it may be necessary to designate jurisdiction to courts established under Federal law, whether civil courts or a newly created Syariah Court, to ensure effective enforcement of these laws. This delineation of jurisdiction is critical to avoid potential conflicts and to uphold the integrity

[49] The judgment was given by Salleh Abas L.P. and was supported by Seah J. and Mohamed Azmi J. However, Hashim Yeop A. Sani J. and Abdoolcader S.C.J. were given dissenting judgment.

[50] Ahmad Ibrahim, Perlaksanaan undang-undang h_udūd, pp.162. See also Abdul Monir Yaacob, Kedudukan dan pelaksanaan undang-undang jenayah Islam di Malaysia, pp. 113.

[51] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 639.

of the legal framework within which Islamic criminal law would operate.[52]

10. Amendment of other related laws

To ensure that all Malaysian laws align with Islamic principles, amendments to various statutes are necessary. The author will briefly outline some of these proposed amendments below:

a. Syariah Courts (Criminal Jurisdiction) Act 1965

Among the laws enacted by Parliament concerning the jurisdiction of the Syariah Court is the Syariah Courts (Criminal Jurisdiction) Act 1965. Before its amendment in 1984, the Syariah Court was prohibited from hearing criminal cases where the penalties exceeded six months of imprisonment or a fine of more than RM 1,000. Consequently, if the State Legislative Assembly enacted a law imposing a punishment of one hundred stripes for a Muslim who commits *zinā*, such a case could not be adjudicated in the Syariah Court.

The amendment to the Syariah Courts (Criminal Jurisdiction) Act in 1984 expanded the powers of the Syariah Court to impose penalties for *sharīʿah* offenses. This amendment enabled the Syariah Court to impose harsher sentences, including imprisonment for up to three years, fines of up to RM 5,000, and whipping not exceeding six stripes.[53]

Nevertheless, these punishments remain inconsistent with those prescribed in the Holy Qur'ān and the Sunnah of the Prophet Muhammad (s.a.w.). For instance, Islamic criminal law prescribes the following penalties: the death penalty for murder; stoning to death or whipping one hundred stripes for *zinā*; whipping forty stripes for consuming alcohol; whipping eighty stripes for *qadhf*; amputation of the right hand for theft; and the death penalty for apostasy. Therefore, the Syariah Courts (Criminal Jurisdiction) Act 1965 requires further amendments to empower the Syariah Court to impose sentences that align with the punishments outlined in the Qur'ān and the Sunnah.

Additionally, there are suggestions for the complete repeal of the Syariah Courts (Criminal Jurisdiction) Act 1965.[54] An intriguing perspective presented by Mohamed Imam posits that the Act may be deemed invalid as it is ultra vires Parliament's authority concerning the prescribed limits within which the Syariah Courts can award punishments. This raises critical questions regarding the legislative competencies and jurisdictional boundaries of the Syariah Courts in Malaysia.[55]

b. Civil Law Act 1956

The Civil Law Act 1956[56] should be amended to eliminate English law as

[52] Ahmad Ibrahim, Perlaksanaan undang-undang h_udūd, pp.163.
[53] Section 2 of Syariah Courts (Criminal Jurisdiction) Act 1965.
[54] Ahmad Mohamed Ibrahim, The administration of Islamic law in Malaysia, pp. 639.
[55] *Ibid*.
[56] Revised 1972 (Act 67).

the foundational legal framework in Malaysia. Instead, it should explicitly recognize Islamic law as the basis of Malaysian law. To provide a clearer understanding of this issue, the author will discuss the relevant sections of the Civil Law Act 1956 that pertain to this topic.

Nowadays, the application of English law in Malaysia is enforced by virtue of Section 3 and 5 of the Civil Law Act 1956. According to Section 3:

"(1) General Provision: Unless other provisions have been made by any written law currently in force in Malaysia, the court shall

(a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April 1956;

(b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1st day of December 1951;

(c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12th day of December 1949, …

The provision emphasizes that the common law, rules of equity, and statutes of general application shall be applied only insofar as the circumstances of the states of Malaysia and their respective inhabitants permit, and subject to qualifications that local circumstances may render necessary.

According to Section 5:

"(1) In all questions or issues which arise or which have to be decided in the States of West Malaysia other than Malacca and Penang with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.

(1) In all questions or issues which arise or which have to be decided in the State of Malacca, Penang, Sabah and Sarawak with respect to the law concerning any of the matters referred to in subsection (1), the law to be administered shall be the same as would be administered in England, in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law."

Section 3(1)(a), (b), and (c) of the Civil Law Act 1956 stipulates that, in the absence of provisions made by written law, courts in Malaysia are required to apply the common law and rules of equity as they were established in England on the following dates: April 7, 1956, for West Malaysia; December 1, 1951, for Sabah; and December 12, 1949, for Sarawak.

A literal interpretation of paragraph (a) suggests that the application of English common law and rules of equity is prohibited when local statutes have been enacted to address the relevant subject matter. The provision specifies that these legal principles are to apply only "so far as other provisions have been made or may hereafter be made by any written law in force in Malaysia." This interpretation is supported by the decision in Bagher Singh v. Chanan Singh[57], which established that Section 3(a) of the Civil Law Ordinance 1956[58] can only be invoked in instances where a lacuna exists in the law. In that case, since Section 42 of the FMS Land Code provided for fraudulent land dispositions, there was no lacuna, and the common law principles relating to fraud were deemed inapplicable.

The Privy Council, in United Malayan Banking Corporation Bhd & Anor v. Pemungut Hasil Tanah, Kota Tinggi[59], asserted that where written law in Malaysia already addresses a particular subject—such as land and land dealings Section 3(1) of the Civil Law Act 1956 cannot be used to import English rules of equity, especially when the provisions of local written law conflict with these rules.[60]

The application of English law under Section 3 is constrained to circumstances that allow for such application based on the conditions and needs of the States of Malaysia and their inhabitants. Consequently, one could argue that English common law and rules of equity should apply "only so far as the circumstances of the Muslim inhabitants permit." Unfortunately, this argument has not gained acceptance in civil courts. This may be attributed to the judges and legal counsel's lack of conviction regarding the necessity and advantages of Muslims adhering to Islamic law. The reluctance to recognize Islamic legal principles within the existing legal framework highlights a broader challenge in harmonizing Malaysian law with the religious and cultural values of its Muslim population.[61]

The acceptance of English law in commercial matters is articulated in Section 5 of the Civil Law Act 1956, which delineates the application of this law in different regions of Malaysia. Subsection (1) pertains to the states of West Malaysia, excluding Malacca and Penang, while Subsection (2) covers the former Straits Settlements of Malacca and Penang, as well as the Borneo states of Sabah and Sarawak. The substantive differences between these two subsections are significant. Under Subsection (1), the law administered in the West Malaysian states (excluding Malacca and Penang) with respect to mercantile law is based on the law as it stood in England on April 7, 1956—the date when the Civil Law Act came into force. In contrast, Subsection (2) allows for the application of English law based on the corresponding period

[57] [1961] MLJ 328.
[58] No. 5 of 1956.
[59] [1984] 2 MLJ 87.
[60] Sharifah Suhana Ahmad, Malaysian legal system, pp. 129-130.
[61] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 57-58.

applicable to Penang, Malacca, Sabah, and Sarawak, which does not impose a cut-off date.[62]

This distinction implies that while the states of Penang, Malacca, Sabah, and Sarawak can continue to receive English law as it evolves over time, the other Malaysian states do not enjoy such continuous reception. Therefore, since the enforcement of the Civil Law Act 1956, any lacunae in local laws are to be filled by the principles of English law.[63]

It is suggested that the provisions of the Civil Law Act 1956 should be amended to establish Islamic law as the primary basis of law in Malaysia. This amendment would stipulate that, in the event of a legal gap in written law, reference should be made to Islamic law to provide guidance and clarity.[64]

Apart from that, section 27 of the Civil Law Act 1956, relating to the guardianship and custody of children should be repealed, as there is adequate legislation for Muslims and non-Muslims in this respect.[65] It says:

> "27 In all cases relating to the custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England at the date of the coming into force of this Act, regard being had to the religion and customs of the parties concerned, unless other provision is or shall be made by any written law."

c. Courts of Judicature Act 1964

Section 4 of the Courts of Judicature Act 1964 is crucial for establishing the hierarchy of legal authority in Malaysia. It stipulates that if there is any inconsistency or conflict between this Act and any other written law (excluding the Constitution) that was in force at the time of the Act's commencement, the provisions of the Courts of Judicature Act will take precedence. This ensures clarity in legal interpretation and application, minimizing potential conflicts between different legal statutes.

In the case of *Shahamin Faizul Kung bin Abdullah v. Asma bte Haji Junus*[66], *the* court highlighted the implications of this provision. The ruling clarified that sections 23 and 24 of the Courts of Judicature Act 1964 retained their jurisdictional authority because they were in force prior to the enactment of Article 121 (1A) of the Federal Constitution, which came into effect later

[62] Siti Mashitah Mahmood, Harmonization of the Malaysian National Land Code 1965 and the Shariah Law of Wakaf, paper presented at International Conference on Harmonization of *Shariah* and Civil Laws, Pan Pacific Hotel, Kuala Lumpur, 29 – 30 June 2015. Sharifah Suhana Ahmad, Malaysian legal system, pp. 131.

[63] Ahmad Mohamed Ibrahim and Ahilemah Joned, Revised by Ahmad Mohamed Ibrahim, Sistem undang-undang di Malaysia, 2nd Ed., Dewan Bahasa dan Pustaka, Kuala Lumpur, 1986, pp. 84-90.

[64] This amendment will be in line with the suggested amendment of the Federal Constitution

[65] Ahmad Mohamed Ibrahim, The future of the Shariah and the Shariah Courts in Malaysia, Ins. Journal of Malaysian and comparative law, 1993, 20, pp.53.

[66] [1991] 3 MLJ 327 HC.

on June 10, 1988. This established that the Courts of Judicature Act could still confer jurisdiction for hearing cases even when newer provisions were introduced subsequently, as long as they were not retroactively applied.[67]

d. Penal Code

The tension between the provisions of the Malaysian Penal Code and Islamic law reflects a broader struggle in reconciling modern legal frameworks with religious principles, particularly regarding criminal justice. While the Penal Code addresses certain criminal offenses, it may lack the depth and specificity required for *hūdūd* and *qisāṣ* penalties under Islamic law. These categories represent distinct types of offenses and corresponding punishments, where *hūdūd* relates to fixed punishments for severe crimes with strict evidentiary requirements, and *qisāṣ* pertains to retributive justice, particularly in cases of murder and bodily harm.

The implementation of *hūdūd* punishments is based on clear evidence, which can sometimes be challenging to establish in practice. Thus, the flexibility of *ta`zīr*, which allows judges to impose penalties at their discretion for offenses not meeting the stringent standards for *hūdūd,* becomes essential. This dual system acknowledges the complexity of real-life scenarios, especially in cases of accidental harm or murder, where mercy and forgiveness can play a crucial role in the judicial outcome.[68]

The introduction of concepts like blood money (*diya*) within the Malaysian legal framework offers a pragmatic approach to address the needs of victims' families while allowing for restorative justice. Blood money can serve as a compensation mechanism that aligns with Islamic principles and helps alleviate the financial burdens faced by victims' families, promoting social harmony and justice. [69]

Mahmud Saedon Awang Othman's advocacy for integrating *hūdūd* offenses, such as *ridda* (apostasy), *zinā* (adultery), and the consumption of alcohol into the Penal Code underscores the urgency for legislative reform to align Malaysian criminal law with Islamic principles.[70] Such amendments would not only reflect the cultural and religious values of a significant portion of the population but also aim to provide a comprehensive legal system that addresses the complexities of crime and punishment more holistically.

The call for a thorough revision of the Penal Code to incorporate these elements emphasizes a critical juncture for Malaysia: balancing the need for modernity and adherence to international legal standards while remaining

[67] Faiza Haji Thamby Chik, Islamic law in civil court, pp. 122.
[68] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 55-56.
[69] Abdul Rahman Awang and Mohamad Ismail Mohamad Yunus, Harmonisation of sharī`ah and civil law: a special reference to the concept of punishment, pp. 11.
[70] Mahmud Saedon Awang Othman, Nizam uqubah dalam Islam dan pelaksanaannya di Malaysia, Ins., Abdul Monir Yaacob and Sarina Othman (edit.), Tinjauan kepada perundangan Islam, pp. 168.

respectful of the Islamic legal tradition. This endeavor could establish a legal framework that more accurately represents the values and needs of Malaysian society, fostering a sense of justice and community among its citizens.[71]

e. Evidence Act 1950

The intersection of civil law and Islamic law in Malaysia presents notable challenges, particularly in the rules of evidence. The reliance on the Evidence Act of India as the foundational framework for evidence in civil courts means that provisions may not always align with Islamic principles. While certain aspects of the Evidence Act can be harmonized with Islamic law, essential elements unique to Islamic jurisprudence must be integrated to ensure a comprehensive legal approach.

One critical aspect is the concept of *shahādah* (solemn evidence), which, when accepted, binds the court in matters concerning *hūdūd* offenses. This differs significantly from the more flexible evidentiary standards found in the Evidence Act. The acceptance of witness testimony (*bayyinah*) as sufficient for court decisions in certain cases is essential, especially in cases involving severe punishments. Furthermore, the Islamic law's approach to confessions where they are generally inadmissible if made outside of court, particularly in cases of *zinā* contrasts sharply with civil law principles, which may place more weight on confessions as evidence. The ability to withdraw confessions up to the moment of execution underscores the need for careful consideration of how such confessions are treated in legal proceedings.

In civil disputes, Islamic law promotes reconciliation and settlement, allowing for oaths to play a role in resolving cases. This perspective encourages a different approach than what might typically be found in civil law contexts, where adversarial proceedings are the norm.[72]

The conflicts arising from specific provisions in the Evidence Act, such as Section 112, which presumes legitimacy of a child born during a valid marriage, demonstrate the need for legal reform:

> "The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

In the Federal Territories, section 110-113 of the Islamic Family Law (Federal territories) Act 1984,[73] deal with the legitimacy of children and would appear to override the provisions of section 112 of the Evidence Act.

Section 100 of the Evidence Act 1950, which provides that the

[71] *Ibid*., pp. 169.
[72] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 56.
[73] Act 303.

interpretation of wills in Malacca, Penang, Sabah and Sarawak should be made in accordance with English law, should similarly not be applicable to Muslims.[74]

f. Guardianship of Infants Act 1961

The case of Re Susie Teoh[75] highlights significant tensions between civil law and Islamic law concerning the rights of minors to choose their religion. The High Court's decision, which upheld the right of a minor to choose her religion under Article 11(1) of the Federal Constitution, was ultimately overturned by the Supreme Court[76], which emphasized the authority of a non-Muslim parent to decide matters related to their child's religious upbringing until the child reaches the age of majority. Abdul Hamid L.P. giving the judgment of the court said:[77]

> "Stripped of technical hairsplitting or purely academic arguments, it is our view that under normal circumstances, a parent or guardian (non-Muslim) has the right to decide the choice of various issues affecting an infant's life until he reaches the age of majority. Our view is fortified by the provisions of the Guardianship of Infants Act 1961, which incorporates the rights, liabilities of infants and regulate the relationship between infants and parents. We do not find favor with the learned judge's view that the rights relating to religion is not covered by the Act on the ground that the word 'religion' is not clearly spelt out in the law. In our view, religious practice is one of the rights of the infant, exercised by the guardian on his behalf until he becomes major."

To resolve these inconsistencies, it is essential to amend the relevant laws to clarify that the Guardianship of Infants Act 1961 does not apply to Muslims.[78] This deletion would help eliminate any ambiguity regarding the rights and responsibilities of guardians under Islamic law and reinforce the validity of Islamic family law provisions that govern custody and guardianship issues. For instance, the removal of Section 103 from the Islamic Family Law (Federal Territories) Act 1984 through the Amendment Act 1994 indicates a positive step toward ensuring that Islamic law is given precedence in matters of guardianship for Muslims.[79]

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[74] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 144. See also Ahmad Mohamed Ibrahim, Pindaan undang-undang bertulis, Ins. Abdul Monir Yaacob and Sarina Othman (edit.), Tinjauan kepada perundangan Islam, 3rd Ed., Institute of Islamic Understanding Malaysia (IKIM), Kuala Lumpur, 2000, pp. 34.

[75] [1986] 2 MLJ 228.

[76] Teoh Eng Huat v. Qadi Pasir Mas & Anor [1990] 2 MJL 300

[77] *Ibid*., Abdul Hamid L.P., pp. 302.

[78] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 50. See also Ahmad Mohamed Ibrahim, Pindaan undang-undang bertulis, Ins. Abdul Monir Yaacob and Sarina Othman (edit.), Tinjauan kepada perundangan Islam, pp. 34.

[79] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 144.

g. Trustee Act 1949

Amending the Trustee Act 1949 to explicitly exclude waqf from the definition of trust is essential for clarifying the legal status of waqfs in Malaysia, as they are unique religious endowments meant to benefit the community under Islamic law. Currently, disputes involving waqfs often enter civil courts due to their classification as trusts, which can create confusion and conflict with Islamic principles. By aligning with Section 4(2)(e) of the National Land Code 1965[80], which safeguards laws relating to waqf, this amendment would affirm the autonomy of waqfs and ensure their governance falls under the jurisdiction of the Syariah Court, better reflecting the intended purposes and community benefits of waqfs.

f. Law Reform (Marriage and Divorce) Act 1976

The Law Reform (Marriage and Divorce) Act 1976 provides that every marriage solemnized in Malaysia after the date of the coming into force of the Act, other than a marriage which is void under the Act, shall continue until dissolved:[81]

(a) by the death of one of the parties; or
(b) by order of a court of competent jurisdiction; or
(c) by a decree made by a court of competent jurisdiction that the marriage is null and void.

The Law Reform (Marriage and Divorce) Act 1976 establishes that marriages solemnized before the Act's implementation[82] are automatically deemed registered under its provisions, with "Court" defined to encompass the High Court or a Judge thereof, as well as the Sessions Court or a Judge thereof.[83] While the Act predominantly does not apply to Muslims or those married under Islamic law, Section 51 introduces a significant provision allowing the non-converting spouse to petition for divorce after three months from the date of the other party's conversion to Islam.[84] This clause highlights the legal complexities surrounding religious conversion and marital status, providing a framework for addressing potential disputes while recognizing the unique circumstances that arise when one spouse transitions to a different faith. This provision reflects a nuanced approach to marital law, aiming to balance the rights of both parties in a context where religious and legal obligations intersect.

Section 51 of the Act provides:

"51 (1) Where one party to a marriage has converted to Islam, the other

[80] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 145. See also Ahmad Mohamed Ibrahim, Pindaan undang-undang bertulis, pp. 35.
[81] Act 164.
[82] Law Reform (Marriage and Divorce) Act 1976, section 4 (3).
[83] *Ibid*., section 4 (2).
[84] *Ibid*., section 2.

> 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 the three months from the date of the conversion.
> 51 (2) 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 for the dissolution as it thinks fit."

The Law Reform (Marriage and Divorce) Act 1976 effectively renders conversion to Islam a matrimonial offence, granting the non-converting spouse the right to petition for divorce based on this conversion. This interpretation positions the converting party as having committed a matrimonial wrongdoing, thus allowing the other spouse to seek dissolution of the marriage. Ahmad Ibrahim highlights the irony in this provision, noting that, despite the Federal Constitution's declaration that Islam is the religion of the Federation, the law treats conversion as a basis for divorce, effectively disadvantaging the converting spouse.[85] Consequently, the individual who has embraced Islam finds themselves in a precarious situation: they cannot file for divorce under the Law Reform (Marriage and Divorce) Act, as the marriage is deemed to persist until dissolved by the High Court, nor can they seek recourse through the Islamic Family Law Act or its respective enactments, as the Syariah Court lacks jurisdiction over cases involving non-Muslims. This leaves the converting party without any legal remedy, reflecting a significant misalignment with Islamic law, which dictates that if one spouse converts to Islam and the other does not during the `iddah period, the marriage should automatically dissolve.

In the Islamic Family Law (Federal Territories) Act 1984, it is stated however in section 46 (2) as follows:

> "The conversion to Islam by either party to a non-Muslim marriage shall not by itself operate to dissolve the marriage unless and until so confirmed by the Court."

The implications of a declaration by a Qādi under section 46 (2) of the Islamic Family Law (Federal Territories) Act 1984 have been scrutinized in various Malaysian cases, notably in Pedley v. Majlis Agama Islam, Pulau Pinang.[86] In this case, a Roman Catholic man, unaware that his wife had converted to Islam and adopted a Muslim name, received a letter from the Chief Qādi of Penang indicating that his marriage would be dissolved unless he also converted. The plaintiff sought a declaration that his marriage remained valid despite his wife's conversion. The High Court judge clarified that under section 51 (1) of the Law Reform (Marriage and Divorce) Act 1976, a non-Muslim marriage is not automatically dissolved when one party converts to Islam; rather, it provides grounds for the other party to seek a

[85] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 215.
[86] [1990] 2 MLJ 307.

divorce in civil court. The judge emphasized that the Chief Qādi's assertions did not alter the plaintiff's legal status according to civil law or his personal laws, yet the application for declaration was denied, as it was deemed purely academic and without consequential relief for the plaintiff.[87]

Similarly, in Ng Siew Pian v. Abdul Wahid bin Abu Hassan and another[88], the plaintiff, married under the Civil Marriage Ordinance 1952, faced her husband's decision to convert to Islam. He petitioned the Qādi's Court for annulment based on her refusal to convert alongside him. The Qādi subsequently annulled the marriage in the plaintiff's absence, citing her non-conversion as justification. These cases highlight the complex intersection of civil and Islamic law in Malaysia, particularly regarding the legal status of marriages in the context of conversion.[89]

The effect of a declaration by a Qādi under section 46 (2) of the Islamic Family Law (Federal Territories) Act 1984 or its equivalent in other states has been considered in some cases in Malaysia. [90]

In the case of *Eeswari Visuvalingam v. Government of Malaysia*,[91] the facts are as follows: the appellant was married according to Hindu rites on November 15, 1950, to Visuvalingam s/o Ponniah, and the marriage was duly registered. On June 16, 1978, her husband converted to Islam. He was a government pensioner and passed away on January 7, 1985. The appellant subsequently applied to the Public Services Department for a derivative pension; however, her application was rejected by the Pensions Department, a decision that was upheld by the High Court. The appellant then appealed to the Supreme Court, which ruled that the marriage remained valid under civil law at the time of Visuvalingam s/o Ponniah's death. Consequently, the court determined that she qualified as a dependent under the pensions laws and was entitled to receive a derivative pension.

According to Ahmad Ibrahim, this case presents a complex legal dilemma. Although the appellant had the right to initiate divorce proceedings under Section 51 of the Law Reform (Marriage and Divorce) Act 1976, she did not do so. Despite the husband's conversion to Islam in 1978 and his continued status as a Muslim until his death in 1985, he was unable to secure a divorce or terminate the marriage. It can be reasonably inferred that he was no longer cohabitating with his former wife, leading to the assertion that the marriage had irretrievably broken down. Nevertheless, he could not obtain a divorce under Section 54(d) of the Law Reform (Marriage and Divorce) Act 1976. The available evidence does not clarify whether he remarried after converting to Islam; however, the Supreme Court's judgment affirms that "for the purposes of the pensions laws, the appellant is certainly a widow (or one of

[87] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 48.
[88] Penang Originating Summons No. 24-750-94.
[89] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 212-213.
[90] *Ibid*., pp. 211.
[91] [1990] 1 MLJ 84.

the widows) of the deceased." [92]

Currently, the Syariah Court lacks jurisdiction to adjudicate cases unless all parties are Muslim, rendering the only viable solution the amendment of Section 51 of the Law Reform (Marriage and Divorce) Act 1976. This amendment would allow either party to apply to the High Court for divorce in instances where one party has converted to Islam. Such a provision would align more closely with the Act's stipulation that the breakdown of a marriage constitutes the sole ground for divorce.[93]

Ahmad Ibrahim drafted the suggested amendment to be read as follows:

"Where one party to the marriage has converted to a religion other than the one followed by either of the parties at the time of the marriage, either party 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."

Section 3 (3) of the Act should also be amended to read:[94]

"This Act shall not apply to a Muslim or to any person who is married under Muslim Law and no marriage of one of the parties which professes the religion of Islam shall be solemnized or registered under this Act; but nothing herein shall be construed to prevent a court before which a petition for divorce has been made under section 51 from granting a divorce on the petition of either party to the marriage where one party to the marriage has converted to a religion other than the one followed by either or the parties at the time of the marriage, and such decree shall, notwithstanding any written law of the contrary, be valid against the parties to the marriage."

According to Noor Aziah Haji Mohd Awal, the proposal to amend the Law Reform (Marriage and Divorce) Act 1976 to allow one party to apply for divorce upon conversion to Islam has not been accepted, based on the presumption that men are more likely to convert to Islam than women. This provision aims to protect the rights of non-Muslim women abandoned by their husbands following their conversion[95]

This situation gives rise to a conflict of law, often referred to as "limping marriages." In such cases, a non-Muslim couple may have initially married under civil law, which recognizes monogamous unions. However, if one party later converts to Islam, the marriage is deemed terminated after the expiration of the `iddah period if the other party does not also convert. Consequently, the converting party is then free to marry according to their personal laws, specifically Islamic law. In Malaysia, this has frequently resulted in scenarios where a husband converts to Islam and subsequently marries another woman in accordance with Islamic law. This creates a situation where two marriages

[92] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 216-217.
[93] *Ibid*., pp. 44.
[94] *Ibid*., pp. 357.
[95] Noor Aziah Haji Mohd Awal, Section 51 of the Law Reform (Marriage and Divorce) Act 1976: an overview, Ins., IKIM law journal, 1999, 3 (2), pp. 133-134.

are ostensibly recognized: the first marriage remains valid under the Law Reform (Marriage and Divorce) Act 1976, while the second marriage is recognized under Islamic law. According to the Penal Code[96], the husband would be guilty of bigamy due to his continued marital status under civil law; however, this provision does not apply to Muslims, resulting in a lack of legal repercussions for many non-Muslim men who marry according to Islamic law without formally terminating their first marriages.[97]

Noor Aziah Haji Mohd Awal proposes an alternative approach: to incorporate conversion to Islam as a factor contributing to the breakdown of marriage under Section 54 of the Act. She asserts that this amendment would effectively address the issues of "limping marriages" engendered by Section 51. In a multi-religious society like Malaysia, she acknowledges that religious conversion is a particularly sensitive topic; however, she argues that such sensitivity should not preclude necessary legal reforms. The failure of the courts or the legislature to act could result in significant injustices, particularly for women and children involved in these marriages.[98]

h. Married Women and Children (Enforcement of Maintenance) Act 1968

The Married Women and Children (Enforcement of Maintenance) Act 1968[99] requires amendments to allow for the enforcement of maintenance orders issued by the Syariah Court within a state through attachment of earnings orders. These orders should have jurisdictional effect not only within the state but also beyond its borders. Additionally, it is essential to address the circumstances involving non-Muslim employers to ensure comprehensive applicability and enforcement of maintenance orders across diverse employment contexts.[100]

i. The Contracts Act 1950 and the Sale of Goods Act 1957

The Contracts Act 1950[101] and the Sale of Goods Act 1957[102] draw upon English law, which operates under the principle of caveat emptor, placing the onus on the buyer to ensure a favorable bargain. Section 23 of the Contracts Act 1950 stipulates that a contract is not voidable merely because one party is mistaken about a matter of fact. Additionally, the explanation to Section 17 of the Act clarifies that mere silence regarding facts likely to influence a person's

[96] Section 494 of the Penal Code.
[97] Noor Aziah Haji Mohd Awal, Section 51 of the Law Reform (Marriage and Divorce) Act 1976: an overview, pp. 134.
[98] *Ibid*., pp. 141.
[99] Revised 1988 (Act 356).
[100] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 146. See also Ahmad Mohamed Ibrahim, Pindaan undang-undang bertulis, pp. 35.
[101] Revised 1974 (Act 136).
[102] Revised 1989 (Act 382).

willingness to enter into a contract does not generally constitute fraud. Furthermore, the exception to Section 19 indicates that if consent is obtained through misrepresentation or fraudulent silence (as defined in Section 17), the contract remains valid if the aggrieved party had the means to ascertain the truth through ordinary diligence.

It has been proposed that the explanation to Section 17 and the exception to Section 19 be repealed. It should be clearly articulated, as mandated by Islamic law, that a party must disclose any known defects in the subject matter of the contract to the other party. Similarly, the Sale of Goods Act 1957 should be amended to impose an obligation on the seller to inform the buyer of any defects in the goods.

The experience of Pakistan provides a useful reference in this context. In Federation of Pakistan v. Public at Large[103], the Syariat Appellate Bench ruled that the doctrine of caveat emptor is inconsistent with Islamic principles, which require sellers to disclose any defects in their goods or property, even if not specifically questioned about such defects by the buyer. This precedent underscores the necessity of aligning domestic contracts law with Islamic legal principles to ensure greater consumer protection and fairness in commercial transactions.[104]

The Contracts Act 1950 and the Sale of Goods Act 1957 follow the English law, which has the principle of caveat emptor, that is, the onus is in the buyer to endure that he gets a good bargain. Section 23 of Contracts Act 1950 provides that a contract is not voidable because it was caused by one of the parties to it being under a mistake as to a matter of fact.[105]

j. Arbitration Act 1952

When Muslims enter into a contract or agreement, they can stipulate that the contract be interpreted in accordance with Islamic law, with any disputes arising from the contract referred to arbitrators or *hakam* operating under Islamic principles. While arbitration can be conducted under the Arbitration Act 1952[106], there is a pressing need to amend the Act. Such amendments should facilitate the appointment of arbitrators who possess expertise in Islamic law and establish a framework for appeals from arbitration decisions to the Syariah Court.[107]

[103] (1988) SCMR 2041, (1988) (3) PSCR 63.

[104] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 147-148. See also Ahmad Mohamed Ibrahim, Pindaan undang-undang bertulis, pp. 37.

[105] Nassim Hassan Shah, Islamic civil law: the Pakistan Experience, Ins. Abdul Monir Yaacob, Sistem kehakiman Islam, pp. 173-174.

[106] (Revised 1972) Act 93.

[107] Muhamad Amanullah, "Principles to be followed in Harmonization of *Shariah* and Man-Made Law", paper presented at International Conference on Harmonization of *Shariah* and Civil Laws, Pan Pacific Hotel, Kuala Lumpur, 29 – 30 June 2015.

Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 148. See also Ahmad

C. Conclusion

The Federal Constitution was not originally drafted as an Islamic Constitution, it can nonetheless be interpreted and applied in a manner that aligns with the teachings of Islam, or at least does not contradict them. Acknowledges that the Federal Constitution is a man-made law, inherently subject to limitations and potential errors. To make the Constitution more reflective of Islamic principles, Muslims must ensure their capacity to amend it. This necessitates active participation in the electoral process, including registering as voters and electing representatives who can secure a two-thirds majority in both Houses of Parliament for the amendments to be adopted. Ibrahim emphasizes the importance of unity among Muslims to effectively advocate for the interests of their community, their faith, and their nation.[108]

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