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Conceptualizing Legal Harmonization Approach In Malaysia

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Abstract

Legal harmonization is a fundamental notion of comparative law that has been on the international and national agendas for the last decade. Harmonization, which derives from the word "harmony," has a variety of meanings, one of which, in the perspective of the discussion of this topic, is the readiness and the openness to recognize, acknowledge, adopt, or accept anything produced, practiced by or originating from man-made laws, modern secular traditions, customs and usages, cultures, societies, systems or institutions which is considered to be in "harmony" with or not opposed to the worldview, principles, values, teachings, and norms of Islam. Thus, the conceptualizing approach of harmonization of legal knowledge and education is a process of actualizing the divine imperatives in the legal arena. In Malaysia, several endeavors have sought the similarity between legal rules from different jurisdictions; however, their achievements remain contested since there is no comprehensive understanding of the nature and extent of harmonization. Thus, this article examines different facets of harmonization by considering it a legal phenomenon instead of a distinct process of drafting similar rules. Adopting a comprehensive understanding of harmonization as a legal phenomenon may help better assess the strengths of the implementation processes and formulate adequate new legal endeavors.

A. Introduction

The Federal Constitution of Malaysia was the result of the agreement arrived at not only between the Rulers and Governments of the States in the Federation and the British Government but also between the various inhabitants of the Federation, the Malays, the Chinese, and the Indians, and

the Constitution was framed based on that agreement. The Constitution of the Federation of Malaya and later of Malaysia is a legal document, a social contract, and an agreement based on mutual agreement and understanding.[1]

It is easy to take a negative view and say that the Malaysian Constitution is not based on Islamic principles since the Reid Commission drafted it. It obstructs the authorities from implementing Islamic criminal law in the country. Nevertheless, the Malaysian Federal Constitution is not the absolute barrier to implementing Islamic criminal law. Suppose the authority at the federal level wants to make efforts toward the full implementation of Islamic criminal law. In that case, it can be done in the existing frame of the Constitution.[2] The authority at the state level can implement Islamic criminal law. Still, the Federal Constitution needs to be amended, among other things, to exclude Islamic criminal law from the federal lists and to upgrade or alter the laws that limit the jurisdiction of the Syariah Court.

What is needed is systematic and consistent efforts toward preparing a suitable and conducive legal environment to implement Islamic criminal law. Amendments to the laws are also needed apart from the Constitution, such as the Civil Law Act of 1956, the Court of Judicature Act of 1964, the Penal Code, the Criminal Procedure Code, the Evidence Act of 1950, and so forth. Unfortunately, all these are not there at present, and there are no steps taken toward implementing Islamic criminal law at the federal level.

There are views that the efforts suggested above are difficult to implement due to the character of Malaysia's Constitution, i.e., secular. Because of that, every step taken towards implementing Islam will be challenged in court. It agreed with the opinion of Abdul Aziz Bari when he said that the Constitution is not entirely secular. What is claimed to be secular is the conclusion, which is made based on the existence of some of the provisions and the judgments of the court. Thus, the view, which claims that the Constitution is secular, is not final. In the meantime, many Acts have been passed to allow the implementation of Islam, including the Islamic Banking Act 1983,[3] Takaful Act 1984[4] , and others. The Malaysian Constitution and other laws, which have been passed by Parliament, can, in general, be characterized as practical and accept whatever contents as long as it fulfills the conditions and procedures that have been fixed. Until now, the laws from various sources

[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

have been accepted: England, Australia, etc. Our laws are not ideological, and thus, whatever sources: Christianity, Islam, and others, could be the source and inspiration as long as the jurisdiction, which is needed, is fulfilled.[5]

According to Hashim Mehat, introducing Islamic law does not mean, as usually thought to be throwing out the already established, modern laws. It is against Islamic principles to reject something because it has not originated from Islam when it is inconsistent with Islamic injunctions.[6]

Instead of resorting to a complete switch of the legal system, Salleh Abas said, "It would be better for Malaysia to take the 'middle path' to achieve its objectives." He also said, "It would be advisable to consider whether the existing laws oppose Islamic laws and principles and 'if they do not, it is of no use meddling with the laws for they may as well be retained.' However, it is important that a research study to ensure that what is being done is not against Islam."[7]

Islam has historically proved that it accepted anything that is not repugnant to Islamic injunctions and principles. For example, some pre-Islamic practices were maintained in Islamic law, such as laws of qisās, diyat, inheritance, etc. Even when implementing new laws, Islam respected the circumstances that prevailed in the society, such as the law of drinking wine, which was enforced in stages before it came to the total complete prohibition.[8]

Drinking wine or taking an intoxicant is a great sin in Islam. Although there may be some benefits in drinking it, the harm, according to the Quranic guidance, is greater than the benefit, especially when one looks at it from a social as well as an individual point of view. The Arabs, even after they had accepted Islam, used to drink wine. They used to ask the Prophet (s.a.w.) many questions about it when the following verse was revealed:[9]

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

The above verse only pointed out the evils of wine drinking but did not prohibit it. Later, the Divine Revelation forbade its use partially, as they were asked not to pray when they were drunk:[10]

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

While intoxicated, the Arabs used to commit many horrible crimes, which are recorded in the books of history. They continued drinking after the advent of

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

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

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

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

[10] al-Qur'an, Surah al-Nisā' 4: 43

Islam until the migration (hijrah) from Mecca to Medina in the year 632 A.D. Gradually, and they were weaned away from this vice. The verse below contains the injunction of the final prohibition of wine drinking.[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 excite enmity and hatred between you, with intoxicants and gambling, and hinder you from the remembrance of Allah and prayer: Will ye not then abstain?"[12]

According to Hashim Mehat, implementing Islamic law means infusing better laws with the present law system and making it more effective in solving numerous pertinent problems today.[13] He added that switching to an Islamic legal system does not mean a complete switch of the legal system nor the replacement of the existing Constitution of Malaysia. It means a few minor amendments should be made to the Constitution to enable Islamic law, such as criminal law, to be implemented in Malaysia. Any existing and future laws held to be repugnant to the injunctions of Islam shall be considered null and void to the extent to which it is held to be so objectionable. Steps shall be taken to amend the laws to bring such laws or provisions into conformity with the injunctions of Islam.[14] This is the term 'harmonization' meaning used in this article.

With regards to the Kelantan Enactment, the Deputy Chief Minister of Kelantan, Abdul Halim Abdul Rahman, announced, days before the ratification of the Syariah Criminal Code (II) Enactment, Kelantan, 1993 in the State Assembly that "the Kelantan Government would have fulfilled its responsibilities in tabling and getting the State Legislative Assembly to pass the *hudūd* laws. It will then be up to the Federal Muslim leaders to prove their stand on Islamic sharia. He further pointed out that the State Government would not be able to enforce the proposed law unless specific provisions of the Federal Constitution were amended.[15]

This means that the state of Kelantan knew that the Kelantan Enactment could not be enforced unless and until amendments in the Federal Constitution. This article will outline some of the amendments needed to ensure that Malaysian laws align with Islamic laws and give room for implementing the whole Islamic criminal law in this country.

B. Discussion

1. Amendment of the Federal Constitution

According to Ahmad Ibrahim:

[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

[15] Hudūd laws may not be enforced, News Strait Times, 22 October 1993

> "It is easy to take a negative attitude and say that Malaysia's Federal Constitution is not following Islam. It was drafted by a Constitutional Commission whose members were not Malaysians, and most were not Muslims. It does not reference Islamic government principles and is based on the so-called Westminster form of government. Our respected first Prime Minister of Malaysia, Tunku Abdul Rahman, insisted that Malaysia is a secular state and that many of our leaders have accepted his view. What, then, is the remedy?
>
> Another way to approach the Malaysian Constitution more positively is to accept it and try our best to work it to uphold the principles of the Islamic government. The acceptance of the Federal Constitution was made possible by the negotiations and compromises arrived at by all the communities in Malaysia. We should respect the agreement based on the understanding and friendship between the various communities. At the same time, we should try to think and act positively and work the Constitution in such a way as to uphold the principles of Islamic government and have regard to the interests of all the communities in Malaysia."[16]

We agree with the above statement. It tries to look into our Federal Constitution from a positive angle. It thus tries to interpret the provisions in the Constitution in such a manner to be in line with Islam or, in other terms, 'an Islam-friendly approach.' Nevertheless, we still believe that we should make some amendments to the Constitution for the Constitution to recognize Islamic law as the basis of the law in this country.

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 an inaccurate description of Islam's concept of freedom of religion.[18] He based his opinion on the word 'but' used in the Federal Constitution. I agree 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 may argue that the court accepted the positive interpretation of Article 3

[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 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.

(1) under Meor Atiqulrahman bin Ishak & Ors v. Fatimah Bte Sihi & Ors.[20] In this case, the court accepted Islam as the principal religion compared to other religions practiced in this country, like Christianity, Buddhism, Hinduism, and others. It means that Islam is not on par with other religions. It occupies a superior position, moving first in the field, and its voice is clearly heard. If it is not like that, Islam is not the religion of the Federation, but it is one among other religions practiced in this country. Every person is equally free to practice any religion in which he believes, with no privilege between one over the other.[21]

Nevertheless, it is believed that amendment needs to be done concerning Article 3 of the Constitution by adding a new provision as (1A) under Article 3 to make our Federal Constitution an Islamic State constitution. Sulaiman Abdullah regarded this as the most necessary amendment that needs to be done.[22]

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;[23] and in the event of any lacuna or the absence of any matter not expressly provided for the statutes, the court shall apply the Islamic law."

"Islamic law" is defined as the laws of Islam in any recognized madhhab or school of law. Thus Islamic law is the basis of all the legislation, and the courts have the duty of interpreting and applying Islamic law. In doing so, courts will refer to the primary sources of Islamic law, the Qur'ān and the Sunnah, and also the subsidiary sources, that is, legislation, the views of the jurists, the decision of the courts, and the legal opinion of the mufti.[24]

Since Article 3 becomes the foundation of the Constitution, thus amendment has to be also done for its Clause (4), which reads as:

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

It is suggested that Article 3 (4) should be amended to be read as:[25]

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

[20] [2000] 5 MLJ 375

[21] Ibid., pp. 382 B-C

[22] 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.

[23] Ibid.

[24] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 24-25

[25] Sulaiman Abdullah, Model Perlembagaan Islam, pp. 7

this Article's provisions."

3. The Supremacy of the Federal Constitution

Under the above discussion, it means that Article 4 (1) of the Federal Constitution relating to the supremacy of the Constitution has to be amended to:

> "Subject to Article 3, 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."

Other than that, clauses (2), (3), and (4) under Article 4 of the Federal Constitution should be deleted.[26] This is because those provisions obstruct the public from challenging the validity of specific laws in court. Those provisions are:

> "4 (2) The validity of any law shall not be questioned on the ground that-
>
> (a) it imposes restrictions on the right mentioned in Article 9 (2) but does not relate to the matters mentioned therein; or
> (b) it imposes such restrictions as are mentioned in Article 10 (2), but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned 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 ground that it makes provision concerning any matter concerning which Parliament or, as the case may be, the Legislature of the state has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or-

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

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court, and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause."

However, according to Ahmad Ibrahim, Article 4 can be read

[26] Ibid., pp. 6-7.

positively. Article 4 (1) reads:

> "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 said it should be argued that this refers only to the written law. The Constitution is the supreme law of the Federation. Even so, it only affects the validity of any law passed after Merdeka Day. Pre-Merdeka laws have a unique position, which is not rendered invalid by inconsistency with the Constitution but has to be modified. In a case from Singapore, the Privy Council has decided that the Constitution is subject to common law principles and may be limited by it. In Malaysia, it can be argued that the Constitution cannot affect the validity of the Sharī`ah, which is non-written and is undoubtedly not passed after Merdeka Day. However, it may affect the legislation for the administration of Islamic law.[27] Nevertheless, it is believed that this argument is not popular. Thus, it is better to amend Article 4 as stated above.

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

Choo Chin Thye wrote that the Federal Constitution does not confer meaningful authority on the Yang di-Pertuan Agong and the Malay Rulers. The Reid Commission described the role of the Yang di-Pertuan Agong as a mere 'symbol of unity.'[28] This was deliberate and was based upon the Westminster model's doctrine concerning the monarch's somewhat restricted role.[29]

However, it is believed that Malaysian Muslims are still fortunate because the Malay Rulers system that they have now reflects the power of Islam. Tunku Abdul Rahman, in his retirement, stated that the monarchy must be preserved because the role of the Malay Rulers is not merely to defend the Islamic faith but also to defend and protect the rights and freedom of the people.[30]

According to Ahmad Ibrahim, the unique position of Islam is seen in the form of the oath to be taken by the Yang di-Pertuan Agong, who solemnly and truly declares that he will justly and faithfully perform his duties in the administration of Malaysia following the laws and Constitution which have been promulgated or which may be promulgated from time to time in the future. Further, it states, "We solemnly and truly declare that we shall at all

[27] 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.

[28] Para 58 of the Reid Commission Report.

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

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

times protect the Religion of Islam and uphold the rules of law and order in the Country."[31]

Concerning the position of the Conference of Rulers, Abdul Aziz Bari said that it might be argued that something is needed to protect the dignity of Islam at the federal level. The role of the Conference of Rulers might be essential to prevent Islamic matters from being taken by the federal government, which was tried to avoid during the discussions on independence previously. From this angle, the Conference's role is to protect the status of Islam. The status and utility of the Conference of Rulers concerning Islam became the center of attention when Islamic associations headed by the Muslim Scholars Association of Malaysia (Persatuan `Ulama' Malaysia-PUM) submitted a memorandum asking the Conference of Rulers to take action against a group of journalists, which according to them, had disrespected the Prophet (s.a.w.) and Islam.[32] This memorandum, submitted on 4th February 2002, is interesting because it recognized the position of the Conference of Rulers as having the highest authority relating to the religion of Islam at the federal level.[33]

Another memorandum submitted to the Conference of Rulers is the memorandum relating to the issue Sekolah Agama Rakyat (SAR) submitted on 25th January 2003.[34] According to this issue, Abdul Aziz Bari commented that going to the Rulers in submitting the memorandum relating to Sekolah Agama Rakyat (SAR) cannot be said to be dragging the Rulers into politics. This is because they have a role and official power in Islamic matters. Apart from that, the Rulers also have a position above the political parties. Thus, it can be said that Muslims – regardless of their political affiliation- have a right to face the Rulers, who must see them and hear their grievances. The issue of the government and the obligation to follow its advice is irrelevant because, in Islamic matters, the Rulers are not compulsory to follow them as the Rulers may do something contrary to the advice, as long as it is not contrary to Islam.[35]

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

[32] 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.

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

[34] 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

[35] Abdul Aziz Bari, Kontroversi Sekolah Agama Rakyat: beberapa perspektif perlembagaan dan perundangan, the working paper presented at the National Convention on

Abdul Aziz Bari then concluded that, the Federal Constitution only regulates Islam as an official religion in its nature and, thus, permits for using the Malays Rulers' power and the general fund for Islamic purposes, while in other aspects, under the provision relating to the freedom of religion, the Conference of Rulers does not have absolute power. Thus, the issue of Islam under the Federal Constitution is still vague, and its scope is still unclear.[36]

At the present time, Article 3 (2) of the Federal Constitution refers to the position of the Malay Rulers as the Head of religion of Islam in their respective states. Amendment could be done to proclaim that the Rulers are not only the Head of the religion of Islam in their respective states, but also has the power, which guarantees the status of Islam in this country. Therefore, it is believed that the concept of constitutional monarchy should be strengthened to guarantee the status of Islam in this country.[37]

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 religion of Islam in his State in the manner and to the extent acknowledged and declared by the Constitution of that State, and, subject to that Constitution, all rights, privileges, prerogatives, and powers enjoyed by him as Head of that religion, are unaffected concerning which the Conference of Rulers has agreed that they should extend to the Federation as a whole each of the other Rulers shall on his capacity of Head of the religion of Islam authorize the Yang di-Pertuan Agong to represent him."

After the suggested amendment, it will be read as:

> "In every State other than States not having a Ruler, the position of the Ruler as the Head of the religion of Islam and has the power which guarantees the status of Islam in his State in the manner and to the extent acknowledged and declared by the Constitution of that State, and, subject to that Constitution, all rights, privileges, prerogatives, and powers enjoyed by him as Head of that religion and has the power which guarantees the status of Islam, are unaffected concerning which the Conference of Rulers has agreed that they should extend to the Federation as a whole each of the other Rulers shall depend on his capacity of Head of the religion of Islam and has the power which guarantees the status of Islam authorize the Yang di-Pertuan Agong to represent him."
>
> The amendment also can be done in clauses (3) and (5) for the states of

Sekolah Agama Rakyat, organised by Muslim Scholars Association of Malaysia (PUM) on 15 March 2003 at Anjung Rahmat, Gombak, pp. 6.

[36] Abdul Aziz Bari, Majlis Raja-raja: kedudukan dan peranan dalam Perlembagaan Malaysia, pp. 122.

[37] Sulaiman Abdullah, Model Perlembagaan Islam, pp. 7.

Malacca, Penang, Sabah, and Sarawak, and the Federal Territories of Kuala Lumpur, Labuan, and Putrajaya relating to the power of Yang di-Pertuan Agong.[38] Article 3 (3) of the Federal Constitution reads as:

> "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 be read as follows:

> "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 and has the power which guarantees the status of Islam in that State."

Article 3 (5) of the Federal Constitution reads as:

> "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 suggested amendment, Article 3 (5) should be read as follows:

> "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 advise the government, Yang di-Pertuan Agong, and the courts with the fatwá relating to the steps that should be taken, it is suggested that a unique body or Experts Council, which consists of well-known scholars, has to be established according to a new provision of the Constitution (Article 4A).[39] The Article may be drafted as follow:

> "A special body or Experts Council 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."

Last but not least, this country's citizens must always be aware that absolute

[38] Ibid.

[39] Ibid., pp. 8

power is in Allah's hands.[40] Thus, the Islamic State's Constitution should have at least the preamble which pronounces that:[41]

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

6. Amendment of the laws to enforce Islamic criminal law

It is found that there are at least three ways or alternatives to solve With regards to the issue of conflicting jurisdiction between the Federal and State government to implement the whole Islamic criminal law,[42] as well as the issue of lack of jurisdiction of the Syariah Court in terms of its punishments.[43] Become barriers in the implementation of Islamic criminal law. These problems, namely, authorize the State Legislatures to enforce Islamic criminal law to expand the power of the State government to legislate on Islamic criminal law or to infuse Islamic criminal law into the administration of justice and judicial system in Malaysia.

7. Authorize the State Legislatures to enforce Islamic criminal law

Ahmad Ibrahim suggested that the Parliament pass an Act using Article 76A of the Constitution expressly to authorize the Kelantan Government to enforce the Kelantan Enactment. According to Article 76A of the Federal Constitution, Parliament may authorize the State Legislatures to make laws about matters that appear under the Federal List.

Article 76A (1) says:

> "It is now declared that the power of Parliament to make laws concerning a matter enumerated in the Federal List includes the 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 of 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."

Therefore, it is evident that under Article 76A, the State Legislative Assembly may alter or omit the Federal law. Thus, the Syariah Court

[40] This principle of sovereignty can be seen for example in these verses; Surah Yūsuf 12: 40, Surah Āli-`Imrān 3: 26, Surah Hūd 11: 107, Surah al-Anbiyā' 21: 22-23, Surah al-Mu'minūn 23: 88-89, and Surah al-H_ashr 59: 22-24.

[41] Sulaiman Abdullah, Model Perlembagaan Islam, pp. 5

[42] The part of the provisions that are suggested to be amended, are put in italic and underlined

[43] Ibid.

(Criminal Jurisdiction) Act 1965 could be altered or omitted.[44]

When the Federal Parliament authorizes the Legislature of a State to make such laws under Article 76A of the Federal Constitution, such laws will be treated as if they were matters enumerated in the Concurrent List. But the learned author added that it would not be easy to do this considering the difficulties and problems arising from the Federal Constitution and the present laws in Malaysia. As a preliminary step, it was suggested to have a compilation that would clarify and explain Islamic criminal laws, which the Council of Religion can adopt in the Federal Territories and the states. If and when such a compilation is generally acceptable and can be enacted into law, this can be done by Parliament or the State Legislative Assemblies. But it is suggested that the laws should not be enacted until all preparations for their implementation have been completed.[45]

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

Another alternative would be that Parliament could expand the Fourth List under the Ninth Schedule of the Constitution to include *hudūd*, *qisās_*, and *ta`zīr* within its ambit, thereby enabling the State government to legislate on these matters.[46] Ahmad Ibrahim said that this amendment needs to be done as there are no barriers on the State Legislative Assembly to enforce Islamic criminal law and no Federal law which can limit the jurisdiction of the Syariah Court on these matters. With this amendment, the state government can enforce Islamic criminal law.[47]

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

However, according to Hashim Mehat, it is better to infuse Islamic criminal law into the justice and judicial system administration in Malaysia.[48] He added that the infusion of Islamic law into positive (modern law) law, such as Malaysia, is not intended for its religious obligation. Still, it is expected to offer a practical alternative solution to the present serious problems faced by

[44] 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.

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

[46] Hudūd laws may not be enforced, News Straits Times, 22 October 1993

[47] 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.

[48] Hashim Mehat, Islamic criminal law and criminal behaviour, pp. 5.

the country, such as the increasing crime rate commissions, dangerous drug abuse, and corruption threatening its stability. In this context, the relevancy of infusing Islamic criminal law should be viewed.[49]

Ahmad Ibrahim said the Parliament could not pass Islamic criminal law except for the Federal Territories. This is because the law relating to the religion of Islam and Islamic laws are under the jurisdiction of the State (except for the Federal Territories).[50]

In the case of Mamat bin Daud & Ors. v. Government of Malaysia,[51] each petitioner was charged with an offense under s. 298A of the Penal Code for doing an act likely to prejudice unity among persons professing the Islamic religion. They allegedly acted as an unauthorized bilāl, khātib, and imām at a Friday prayer in Kuala Terengganu without being appointed under the Administration of Islamic Law Enactment, Terengganu, 1955.[52] 298A of the Penal Code is invalid on the grounds that it makes provision concerning a matter with respect to which Parliament has no power to make laws. The issue before the court is whether the said section, which Parliament enacted by an amending Act in 1983, is ultra vires Article 74 (1) of the Federal Constitution since the subject matter of the legislation is reserved for the State Legislatures and, therefore beyond the legislative competency of Parliament. Leave was obtained for the petitioners to file a suit for declaratory orders to the effect of the news.

It was held by the majority[53] that the provisions of s. 298A of the Penal Code pretends to be legislation on public order when in pith and substance, it is a law on religion concerning which only the states have the power to legislate under Articles 74 and 77 of the Federal Constitution. There must be a declaration that s. 298A of the Penal Code is a law concerning which Parliament has no power to make law and a declaration that s. 298A of the Penal Code is invalid, therefore null and void, and of no effect.

However, according to Ahmad Ibrahim, Islamic criminal law can be enforced by Parliament under Article 76 of the Federal Constitution, which gives power to the Parliament to make the laws for the states on some issues.[54] Article 76 (1) provides:

> "Parliament may make laws concerning any matter enumerated in the State List, but only as follows, that is to say:

[49] Ibid., pp. 10.

[50] Ahmad Ibrahim, Perlaksanaan undang-undang h_udūd, pp.162

[51] [1988] 1 MLJ 119

[52] (En. 4/1955).

[53] 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.

[54] 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

(a) to implement 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) to promote uniformity of the laws of two or more States; or
(c) if so requested by the Legislative Assembly of any State."

Thus, the Federal government can enact the *hudūd, qisās*, *diyat* and *ta`zīr* laws to promote uniformity of laws between the states under Article 76 (1) (b) of the Federal Constitution. Such laws will operate in the Federal Territories and, if adopted by the legislatures of the States, will also operate in the States.[55]

However, the problem will still arise in relation to which court will enforce the jurisdiction under the said suggestion. If the Syariah Court is established under the State government, the court is still subject to the Syariah Court (Criminal Jurisdiction) Act 1965. Thus, the jurisdiction should be given to the courts established under Federal law, either the civil court or the new Syariah Court.[56]

10. Amendment of other related laws

The amendment must also be made to other statutes to ensure that all Malaysian laws align with Islamic laws. The author will discuss briefly some of those amendments below:

a. Syariah Courts (Criminal Jurisdiction) Act 1965

Among the laws passed by the Parliament relating to the jurisdiction of the Syariah Court is Syariah Courts (Criminal Jurisdiction) Act 1965. Before the amendment made in 1984, the Syariah Court could not hear a criminal case if the punishment for its offenses was more than six months imprisonment or a fine of more than RM 1000. Thus, if the State Legislative Assembly passed a law that punishes a Muslim who commits *zinā*, for instance, by whipping a hundred stripes, this case cannot be heard in the Syariah Court.

However, the Syariah Courts (Criminal Jurisdiction) Act 1965 was amended in 1984, and Syariah Court has been given more power to provide punishments for *sharī`ah* offenses. The amendment gives the Syariah Court power to punish the offender with more severe punishments, i.e., imprisonment for not more than three years, or a fine of not more than RM 5000, and whipping not more than six stripes.[57]

Those punishments are clearly not in line with those prescribed in the Holy Qur'ān and the Sunnah of the Prophet (s.a.w.). For instance, in Islamic criminal law, the punishment for murder is death, the punishment for *zinā* is stoning to death or whipping hundred stripes, the punishment for drinking liquor is whipping forty stripes, the punishment for *qadhf* is whipping eighty

[55] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 639
[56] Ahmad Ibrahim, Perlaksanaan undang-undang h_udūd, pp.163.
[57] Section 2 of Syariah Courts (Criminal Jurisdiction) Act 1965

stripes, the punishment for theft is amputation of the right hand, and the punishment for apostasy is death. Thus, the Syariah Courts (Criminal Jurisdiction) Act 1965 has to be amended again to give the power to the Syariah Court to sentence the criminals with the punishments as prescribed by the Qur'ān and the Sunnah of the Prophet (s.a.w.).

There is also a suggestion that the Syariah Courts (Criminal Jurisdiction) Act 1965 should be repealed.[58] Mohamed Imam gives another exciting opinion. He said that, it can be argued that the Syariah Courts Criminal Jurisdiction Act 1965 is invalid as it is ultra vires Parliament's power in so far as it prescribed the limits up to which the Syariah Courts will have jurisdiction to award punishments.[59]

b. Civil Law Act 1956

Civil Law Act 1956[60] should be amended so that English law no longer becomes the basis of the law in Malaysia. It should be amended to put that Islamic law should be accepted as the basis of the law in Malaysia. To understand this in more detail, the author would like to discuss the relevant sections in Civil Law Act 1956 related to the issue discussed.

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

> "(1) Save so far as other provision has been made or may hereafter be made by any written law 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 said common law, rules of equity, and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary."

According to Section 5:

[58] Ahmad Mohamed Ibrahim, The administration of Islamic law in Malaysia, pp. 639

[59] Ibid.

[60] Revised 1972 (Act 67).

> "(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 concerning 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 concerning 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 concerning 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) provide that if no provision had been made or is going to be made by written law, the courts in Malaysia have to use common law and the rules of equity which have been used in England on 7th April 1956 (for West Malaysia), on 1st December 1951 (for Sabah) and on 12th December 1949 (for Sarawak).

The common law and rules of equity are to apply to save so far as 'other provision has been made or may hereafter be made by any written law in force in Malaysia.' A literal interpretation of paragraph (a) of section 3 (1) would disallow the application of the common law of England and rules of equity when local statutes are enacted to cover the subject matter. In Bagher Sigh v. Chanan Singh,[61] it was decided that section 3 (a) of the Civil Law Ordinance 1956[62] could only be invoked where there was a lacuna. In this case, since section 42 of the FMS Land Code had made provision for fraudulent land dispositions, there was no hiatus, and the common law principles relating to fraud should not be applied.

The Privy Council in United Malayan Banking Corporation Bhd & Anor v. Pemungut Hasil Tanah, Kota Tinggi,[63] strongly expressed the view that where there was already in existence written law in Malaysia which made provision for a particular subject (in this case, being land and land dealings), section 3 (1) of the Civil Law Act 1956 could not be relied upon for the importation of English rules of equity, mainly where the provisions of the

[61] [1961] MLJ 328.
[62] No. 5 of 1956.
[63] [1984] 2 MLJ 87.

local written law were inconsistent with such rules.[64]

The application of English law under Section 3 is provided so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary. Thus, it may be argued that the English common law and equity rules shall be applied "only so far as the circumstances of the Muslim inhabitants permit." Unfortunately, this argument has never been accepted in the civil courts. It may be that the judges and counsel in the civil courts are not convinced of the necessity and benefits of a Muslim following Islamic law.[65]

The acceptance of English law in commercial matters is provided by Section 5. Subsection (1) applies to the states of West Malaysia, which correspond to the former Federated and Unfederated Malay States, whereas subsection (2) applies to the former Straits Settlements colonies of Penang and Malacca and also the Borneo states of Sabah and Sarawak. The difference between the two subsections above is not limited to mere application. Still, there is also an essential substantive difference in that under subsection (1) for the states of West Malaysia other than Malacca and Penang, the law to be administered concerning mercantile law generally is the same as would be administered in England in the like case at the date of the coming into force of this Act, however, under subsection (2), the same as would be administered in England in the like case 'at the corresponding period. Therefore, there is a cut-off date for applying English law in commercial matters to the states of West Malaysia except for Penang and Malacca, that is, 7 April 1956, the date of the coming into force of this (the Civil Law) Act. In contrast, for Penang, Malacca, Sabah, and Sarawak, there is no cut-off date as the law to be applied that of the corresponding period. It would appear, therefore, that statute has provided for the continuing reception of English law in mercantile matters for Penang, Malacca, Sabah, and Sarawak. In contrast, for the other Malaysian states, there is no such continuous reception.[66]

In conclusion, it can be said that since the enforcement of the Civil Law Act of 1956, when there is a lacuna in the local laws, it has to be filled up with the application of the principles of English law.[67] Thus, these provisions should be amended to put that Islamic law should be accepted as the basis of the law in Malaysia and refer to Islamic law when there is a lacuna

[64] Sharifah Suhana Ahmad, Malaysian legal system, pp. 129-130

[65] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 57-58.

[66] 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.

[67] 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.

in our written law.[68]

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.[69] 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 deals with the provision to prevent conflict of laws. It provides: "In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions shall prevail."

In *Shahamin Faizul Kung bin Abdullah v. Asma bte Haji Junus*,[70] the court held, inter alia, that the Courts of Judicature Act 1964, except for section 5, came into force on 16 March 1964. Section 5 came into force on 16 September 1964. But, article 121 (1A) came into force only recently as 10 June 1988 under Act A704. In other words, it was not in force at the commencement of the Courts of Judicature Act 1964. Therefore, under section 4 of the Courts of Judicature Act 1964, sections 23 and 24 would still prevail to confer jurisdiction on this court to hear the present application. It would have been otherwise if article 121 (1A) had been enacted with retrospective effect to have been in force at the commencement date of the Courts of Judicature Act 1964. Therefore, Faiza Haji Tamby Chik suggested that section 4 of the Courts of Judicature Act 1964 be repealed.[71]

d. Penal Code

There is a conflict between the provisions in the Penal Code and those under Islamic law. The provisions in the Penal Code may be regarded as for ta`zīr offenses (except perhaps for murder and treason), but there is a need to supplement them with provisions relating to h_udūd and qis_ās_. H_udūd punishments may be regarded as extreme penalties to be imposed where the evidence is clear and the offense severe. Still, where the proof of the nature of the offense does not satisfy the requirements for the punishment of *hadd* or

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

[69] 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.

[70] [1991] 3 MLJ 327 HC.

[71] Faiza Haji Thamby Chik, Islamic law in civil court, pp. 122

mandatory punishment, then the *ta`zīr* punishment can be imposed. On the other hand, in the case of deliberate murder, the punishment of death may be remitted by the relatives of the deceased out of mercy and forgiveness and the payment of compensation. For non-deliberate and accidental killing or for causing hurt, compensation will be ordered by the court. In addition, however, the court, both in the case of murder and causing hurt, can impose punishment through *ta`zīr*.[72]

It is viewed that the idea of blood money, its nature, concept, and application can be introduced and incorporated into the present civil, criminal law in Malaysia as a practical solution to the problem of the victim's families for their survival.[73]

According to Mahmud Saedon Awang Othman, the h_udūd punishments not provided in the Penal Code, such as *riddah*, *zinā* and drinking wine should be added.[74] He then concluded that, maybe it is the time for us to make a book and to make a considerable amendments to the Penal Code to make it in line with Islam. If this happens, it means that Islamic criminal law and its punishments will be the basis to the criminal law in Malaysia.[75]

e. Evidence Act 1950

Concerning the rules of evidence, the law applied in the civil courts in Malaysia is based on the Evidence Act of India. In so far as such laws are not inconsistent with the principles of Islamic law, they can be adopted, but there are certain features of Islamic law that need to be incorporated. For example, in addition to *bayyinah* or the evidence of witnesses, which can be heard and assessed by the court, we have *shahādah* or solemn evidence, which if accepted, will bind the court, and this, is the evidence, which is required for the proof of the *hadd* offences.

Under the Islamic law, confessions outside the court are generally not acceptable in criminal cases and in cases of *zinā* they can be withdrawn even up to the time of the execution of the sentence. In civil cases, the Islamic law encourages compromise and settlement and the oath can sometimes be resorted to in the decision of cases.[76]

Section 112 of the Evidence Act 1950 dealing with the presumption of legitimacy of a child is clearly in conflict with the Islamic law and therefore should be made not applicable to Muslims. It reads as:

"The fact that any person was born during the continuance of a valid

[72] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 55-56.

[73] 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.

[74] 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.

[75] Ibid., pp. 169

[76] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 56

> 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, sections 110-113 of the Islamic Family Law (Federal Territories) Act 1984[77] 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 interpretation of wills in Malacca, Penang, Sabah, and Sarawak should be made following English law, should similarly not apply to Muslims.[78]

f. Guardianship of Infants Act 1961

In Re Susie Teoh,[79] the girl was seventeen years and eight months when she ran away from home and converted to Islam. The father sought custody of the daughter and sought, among other things, declarations that he could decide her religion and that her conversion without his consent was null and void. Abdul Malek J. in the High Court held that the girl had the right under Article 11 (1) to choose her religion. This decision was overruled on appeal in the Supreme Court.[80] Abdul Hamid L.P. giving the judgment of the court, said:[81]

> "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, and liabilities of infants and regulates the relationship between infants and parents. We do not find favor with the learned judge's view that the rights relating to religion are not covered by the Act on the ground that the word 'religion' is not spelled out in the law. In our view, religious practice is one of the infant's rights, exercised by the guardian on his behalf until he becomes major."

Under this case, it is clear that a non-Muslim under the age of eighteen has no right to choose their religion. This provision is not in line with Islamic law, which gives the right to a person who has attained the age of majority to

[77] Act 303

[78] 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.

[79] [1986] 2 MLJ 228.

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

[81] Ibid., per Abdul Hamid L.P., pp. 302.

choose his/her religion. The amendment has to be made to give the freedom of religion to any person as long as he/she is of sound mind, attains the age of majority according to Islamic law, and is in a position to decide.

The Islamic family law legislation in many states still references the Guardianship of Infants Act 1961. This provision should be deleted to clarify that the Guardianship of Infants Act 1961 does not apply to Muslims.[82]

There are already adequate and detailed provisions relating to the custody and guardianship of infants in the Islamic family law legislation of the States. Section 103 of the Islamic Family Law (Federal Territories) Act 1984, which makes the Guardianship of Infants Act applicable to Muslims, has been deleted by the Islamic Family Law (Federal Territories) (Amendment) Act 1994.[83]

g. Trustee Act 1949

Although waqf comes under the jurisdiction of the States and the Syariah Court, as waqfs are usually created by a will or a trust, disputes relating to waqfs are dealt with by the civil courts as it is argued they are trusts. It is therefore suggested that the Trustee Act 1949[84] should be amended to provide that "waqf" be excluded from the definition of trust. This will follow the provision in section 4 (2) (e) of the National Land Code 1965.[85] It says: "Except in so far as it is expressly provided to the contrary, nothing in this Act shall affect the provisions of any law for the time being in force relating to *wakaf* or bait-ul-mal."

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 that is void under the Act, shall continue until dissolved:[86]

(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 same provision applies to marriages solemnized before the date of coming

[82] 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.

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

[84] (Revised 1978) Act 208

[85] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 145. See also Ahmad Mohamed Ibrahim, Pindaan undang-undang bertulis, pp. 35.

[86] Act 164

into force of the Act, which are deemed to be registered under the Act.[87] "Court" is defined to mean the High Court or a Judge thereof or the Sessions Court or a Judge thereof.[88]

Although the Law Reform (Marriage and Divorce) Act 1976 does not generally apply to Muslims or persons married under the Islamic law,[89] yet section 51 provides that where a party to a marriage has converted to Islam, the other party who has not converted may petition for divorce, after the expiration of three months from the date of conversion.

Section 51 of the Act provides:

> "51 (1) Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce: Provided that no petition under this section shall be presented before the expiration of the period of 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."

This, in effect, makes the conversion to Islam a matrimonial offense giving the innocent party a right to ask for a divorce. Under the section, the party who has converted to Islam is regarded as having committed a matrimonial offense thereby enabling the other party who has not converted to petition for divorce. According to Ahmad Ibrahim, what is perhaps more remarkable is that despite the pious statement in the Federal Constitution that Islam is the religion of the Federation, this section has made the conversion to Islam a matrimonial offense, enabling the other party to apply for divorce.[90]

What is worse is the effect of the law, i.e., there is no right given to the person who has converted to Islam. He or she cannot apply for divorce under the Law Reform (Marriage and Divorce Act) 1976, but the marriage is deemed to continue until dissolved by the High Court. He or she cannot apply for divorce under the Islamic Family Law Act or Enactment, as the Syariah Court has no jurisdiction to deal with any case where the parties are not Muslims. Thus, he or she has no remedy. Therefore, it can be said that the provision of section 51 of Law Reform (Marriage and Divorce Act) 1976 is not in line with the Islamic law.

The position under the Islamic law is that if a husband or wife embraces the Islamic faith and the other party does not follow him or her during the period of `iddah, the marriage automatically comes to an end. In the Islamic Family Law (Federal Territories) Act 1984, it is stated however in section 46 (2) as follows:

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[87] Law Reform (Marriage and Divorce) Act 1976, section 4 (3).
[88] Ibid., section 4 (2).
[89] Ibid., section 2.
[90] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 215.

> "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 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. [91]

In the case of *Pedley v. Majlis Agama Islam, Pulau Pinang*,[92] the plaintiff, a Roman Catholic, had married a Roman Catholic lady according to Catholic rites in 1966. In 1987 the wife embraced the religion of Islam without the plaintiff's knowledge and assumed a Muslim name. Subsequently, Chief Qādi Penang wrote to the plaintiff that if he did not become a Muslim following his wife, his marriage would be dissolved following Islamic law. The plaintiff applied for a declaration that the conversion of his wife had not determined his marriage to her.

The learned Judge of the High Court held that it was clear under section 51 (1) of the Law Reform (Marriage and Divorce) Act 1976 that a non-Muslim marriage is not dissolved upon one of the parties converting to Islam. It only provides a ground for the other party who has not converted to petition the civil court for a divorce. The learned judge also said that the assertion of Chief Qādi did not and will not affect the plaintiff's legal position in the eyes of his laws and the civil laws of this country. However, the application for the declaration was refused as the learned judge held it was purely academic and the plaintiff was not going to benefit in any way from the declaration. He was only asking for the declaration of a mere legal right and not for any consequential relief.[93]

In the case of *Ng Siew Pian v. Abdul Wahid bin Abu Hassan and another*,[94] the plaintiff and the second Buddhist defendant were married under the Civil Marriage Ordinance 1952. The first defendant, the Qādi, gave notice to the plaintiff, to attend at the Court of the Qādi. Subsequently the first defendant in the absence of the plaintiff annulled the marriage on the ground that the plaintiff had refused to follow the second defendant in embracing Islam. Subsequently the husband, the second defendant embraced Islam and he applied to the Qādi's Court to annul the marriage on the ground that the plaintiff, his wife, had refused to embrace Islam with him.

The plaintiff applied for declarations that the first defendant had no power to make the order dissolving the marriage; that the order made was contrary to law and had no legal effect; that the marriage between the plaintiff and the second defendant was still subsisting; that she be given liberty to apply for divorce and ancillary relief under section 51 of the Law Reform (Marriage

[91] Ibid., pp. 211.
[92] [1990] 2 MLJ 307.
[93] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 48.
[94] Penang Originating Summons No. 24-750-94

and Divorce) Act 1976; and that the order is based on the refusal of the plaintiff to become a Muslim, contravened her right under Constitution to follow and practice the religion of her choice. The High Court declared that the Qādi's court had no jurisdiction to make the order annulling the marriage and that the Qādi's court had no jurisdiction to hear the husband's application as the wife was not a Muslim. On the other hand, the High Court has the jurisdiction to dissolve the marriage, but only on the plaintiff's application. The High Court, however, also held that it had no jurisdiction to declare that the judgment of the Qādi's Court was valid or not, for to do so would be contrary to Article 121 (1A) of the Federal Constitution, which has separated the jurisdiction of the civil court and that of the Syariah Court.[95]

In the case of *Eeswari Visuvalingam v. Government of Malaysia*,[96] the facts were that the appellant was married according to Hindu rites on 15th November 1950 to Visuvalingam s/o Ponniah, and the marriage was registered. Her husband subsequently, on the 16th of June 1978, embraced the Islamic religion. He was a government pensioner who died on the 7th of January 1985. The appellant applied to the Public Services Department for a derivative pension. The Pensions Department rejected the appellant's application. This was upheld in the High Court. The appellant appealed. The Supreme Court held that as the appellants' marriage remained valid under civil law at the time of the death of Visuvalingam s/o Ponniah, she was, therefore, a dependent under the pensions laws entitled to a derivative pension.

According to Ahmad Ibrahim, this appeared to be a complex case. Although entitled to do so, the appellant did not apply for divorce under section 51 of the Law Reform (Marriage and Divorce Act) 1976. Although the husband embraced Islam in 1978 and remained a Muslim until he died in 1985, he could not obtain a divorce or otherwise put an end to the marriage. It may be assumed that he was no longer living with his former wife, and it may be said that the marriage had irretrievably broken down, yet he could not obtain a divorce under section 54 (d) of the Law Reform (Marriage and Divorce Act) 1976. There is no evidence of whether he married again after converting to Islam. However, the judgment of the Supreme Court in the case states that "for the pensions laws, the appellant is certainly a widow (or one of the widows) of the deceased."[97]

The Syariah Court has no jurisdiction to deal with any cases unless all the parties are Muslims. The only remedy, therefore, is to amend section 51 of the Law Reform (Marriage and Divorce) Act 1976 to provide that where one of the parties has converted to Islam, either party can apply to the High Court for divorce. This is more in line with the provision of the Act that makes

[95] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 212-213.
[96] [1990] 1 MLJ 84
[97] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 216-217

the breakdown of the marriage the sole ground for divorce.[98]

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:[99]

> "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."

However, according to Noor Aziah Haji Mohd Awal, this suggestion has not been accepted because it is presumed that the probability of men converting to Islam is higher than women. The objective of the provision is to protect the rights of non-Muslim women who have been left by their husbands who have converted to Islam.[100]

This certainly creates what conflict of law term as 'limping marriages. On the one hand a non-Muslim couple was married according to the civil laws where the marriage is monogamous. Some years later one of the parties converted to Islam. According to Islamic law, the marriage is terminated after the expiration of `iddah period if the other party also does not convert to Islam. Thus, the party that has converted is free to marry according to his or her personal laws, i.e. Islamic law. In Malaysia this is what has happened. If the party that has converted is the husband, he then married another woman in accordance with Islamic law. Now, there are two marriages in existence. According to the Penal Code,[101] he shall be guilty of bigamy because he is still married under the Law Reform (Marriage and Divorce Act) 1976. However, this law on bigamy is not applicable to Muslims. Thus no action has been taken on the many occasions where non-Muslim men who have converted

[98] Ibid., pp. 44.

[99] Ibid., pp. 357

[100] 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

[101] Section 494 of the Penal Code.

married according to Islamic law even though his first marriage under the Law Reform (Marriage and Divorce Act) 1976 has not been terminated because the non-Muslim wife did not petition for divorce.[102]

Noor Aziah Haji Mohd Awal then gives alternative suggestion that conversion to Islam should just be added as one of the facts alleged as causing or leading to the breakdown of the marriage under section 54 of the Act. According to her, this would certainly solve the problems of 'limping marriages' created by section 51. She then concluded that in a multi-religious society like ours, it is true that conversion from one religion to another is a very sensitive issue but sensitivity must not be used as an excuse not to act. Failure to act either by the courts or the Legislature may cause grave injustices to all parties concerned particularly to women and children of the marriage.[103]

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

The Married Women and Children (Enforcement of Maintenance) Act 1968,[104] needs to be amended to enable the maintenance orders made by the Syariah Court in a state to be enforced by the making of attachment of earnings orders, which will have effect not only in the state but also outside it. The position where the employer is a non-Muslim need also to be provided for.[105]

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

The Contracts Act 1950[106] and the Sale of Goods Act 1957[107] 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.

The explanation to section 17 of Contracts Act 1950 provides that mere silence as to the facts likely to affect the willingness of a person to enter into a contract is not generally fraud. Again, the exception to section 19 of the Act provides that if such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

It has therefore been suggested that the explanation to section 17 and the exception to section 19 should be repealed and that it should be clearly provided as required in Islamic law that a person should inform the other party

[102] Noor Aziah Haji Mohd Awal, Section 51 of the Law Reform (Marriage and Divorce) Act 1976: an overview, pp. 134.

[103] Ibid., pp. 141.

[104] Revised 1988 (Act 356).

[105] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 146. See also Ahmad Mohamed Ibrahim, Pindaan undang-undang bertulis, pp. 35

[106] Revised 1974 (Act 136).

[107] Revised 1989 (Act 382).

if there is any known defect in the articles the subject of the contract.

Similar provisions should also be inserted in the Sale of Goods Act 1957, and a provision be made that the seller is obliged to inform the buyer of any defects in the goods. In this respect, it may be learned from the experience of Pakistan, where the Federal Syariah Court has suggested amendments to the Contracts Act to bring it in line with Islamic law.[108]

In Federation of Pakistan v. Public at Large,[109] the *Syariat* Appellate bench has ruled that the doctrine of caveat emptor is not valid in Islam because, in Islam, the seller is under an obligation to himself disclose to the buyer the defects that exist in his sound or his property, even without being explicitly questioned in regard to that by him.[110]

j. Arbitration Act 1952

When Muslims enter into a contract or an agreement, they can provide that the contract should be interpreted according to Islamic law and that any dispute that arises shall be referred to the decision of arbitrators or hakam according to Islamic law. The arbitration can be held under the Arbitration Act 1952[111] , but the Act should be amended to enable the appointment of arbitrators who are conversant with the Islamic law and to provide for appeals from the arbitrators to the Syariah Court.[112]

C. Conclusion

According to Ahmad Ibrahim, although the Federal Constitution was not drafted as an Islamic Constitution, it can be applied or operated to comply with or at least not go against Islam's teachings. The Federal Constitution is a man-made law and is not free from limitations and errors. There is a way to amend it. If Muslims want to make the Constitution more in line with Islam, they have to ensure that they will be in a position to amend it, that is, by registering as voters and electing representatives who can have a two-thirds majority in the Houses of Parliament for such amendments to be adopted. For this purpose, we must strive to be united so that we can better serve the cause of our people, our religion and our country.[113]

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

[109] (1988) SCMR 2041, (1988) (3) PSCR 63.

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

[111] (Revised 1972) Act 93

[112] 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 Mohamed Ibrahim, Pindaan undang-undang bertulis, pp. 35.

[113] Ahmad Mohamed Ibrahim, The administration of Islamic law, pp. 400.

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