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**THE ‘MIDDLE PATH’ IN THE MALAYSIAN STATE:  
TENSIONS BETWEEN SECULARISM AND THEOCRACY**

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# THE 'MIDDLE PATH' IN THE MALAYSIAN STATE: TENSIONS BETWEEN SECULARISM AND THEOCRACY

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## INTRODUCTION

Prime Minister Dr. Mahathir Mohammad caused some disquiet in Malaysia when he declared that Malaysia *is* an “Islamic State”. This announcement was made in early July 2001, just two months before the tragedy of September 11<sup>th</sup>, in his address at the Convention of the coalition party of *Barisan Nasional* [National Front] in Kuala Lumpur (*Utusan Malaysia*, 8 July 2001, p.2). The Prime Minister again made a similar announcement in his address (as head of the Barisan Nasional [BN] coalition) at the GERAKAN party Annual Delegates Conference in Kuala Lumpur on 29 September 2001 (*The Sun* 30 Sept. 2001, p.4).

The issue of establishing or reconstituting Malaysia into an “Islamic state” is not a new one. It came into some public discussion when the Islamic party PAS, upon winning the state government of Kelantan in the country’s general elections of 1990, declared that ‘establishing an Islamic State’ throughout the country is its ultimate political objective. In fact by early 1980s PAS has already openly adopted a radical Islamist politics explicitly espousing its intention of bringing about a new social, moral and political order embodied by the Islamic State. When PAS won the state of Trengganu in the November 1999 general elections, Abdul Hadi Awang, the new Chief Minister of Trengganu (also at that time, the Deputy President of PAS) stated that PAS will be setting up an Islamic state when it comes into federal power. Abdul Hadi also claimed that this was already stated in the Manifesto of the *Barisan Alternatif* [BA or Alternative Front] of the 1999 general elections (*Utusan Malaysia* 23 June, 2001, p.12).

This pursuit for an Islamic state is not peculiar to an Islamist political movement such as PAS. A perusal of contemporary attempts at ‘Islamic revival’ throughout the Muslim world shows us that almost all these movements are seeking to retrieve and to reinstall a type of religious state that these Islamists claimed had existed at some point in the history of Muslim societies.

The declaration that “Malaysia *is* an Islamic state” by Prime Minister Dr. Mahathir was perhaps intended to promote an argument that in many aspects

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\* “Walking the middle path” was the phrase used by Dr. Shad Saleem Faruqi, a Constitutional legal scholar and a Professor of Law and an Assistant Vice Chancellor (Legal Affairs) at Universiti Teknologi MARA in one of his public forum presentations on the question of “Is Malaysia a secular or an Islamic state?” in October 2001 and throughout 2002. The term ‘middle path’ was consequently used in other discussions to describe the ‘dualistic’ constitutional features of the Malaysian state.

Malaysia is already an Islamic state but without having to make an explicit claim that Malaysia is *not* a secular state. Most probably too, this statement was intended to rebut the claims often made by the opposition party PAS that Islam is not “sincerely or properly upheld” by UMNO--the dominant Malay and Muslim component party of the governing coalition party of *Barisan Nasional* (or BN). Yet at the same time Dr. Mahathir and UMNO could not disclaim that Malaysia, as it exists now, is actually a secular state. This political ‘fudging of the issue’ is not the main concern of this essay. The post-*Merdeka* (Independence) state in Malaysia can be described as secular--at least in its purpose and initial intention. The Malaysian Federal Constitution, unlike that of India or Turkey, does not contain a preamble. The word ‘secular’ does not appear anywhere in the Constitution. However, legal and constitutional scholars writing on the Malaysian Constitution have always pointed out to historical evidence that the country was meant to be secular and the intention of making Islam the official religion of the Federation of Malaya (later that of Malaysia) was primarily for ceremonial purposes (Harding 1996, Tun Mohamed Suffian. *et.al* (eds) 1978).<sup>1</sup>

This ‘ambiguity’ regarding the secular nature or intent of the Malaysian Constitution became an issue of media discussion among leading members of civil society and religious organizations following the announcement made by the Prime Minister. A number of parties took exception to that declaration and expressed great concern at the political and other possible implications of the government’s statement which was actually based on a booklet released by the Ministry of Information, Malaysia sometime in late June or early July 2001. The booklet entitled “*Malaysia adalah sebuah negara Islam*” [emphasis on the cover title of the booklet] was authored by Dato’ Wan Zahidi bin Wan Teh—a religious official of the *Jabatan Kemajuan Islam* or JAKIM (Department of Islamic Development of Malaysia).<sup>2</sup> This booklet was later withdrawn from public circulation due to the controversy and disquiet that it had created among non-Muslim and some Muslim civil society movements.

An understanding of the complexity and problematics of this issue in Malaysian political life and in the context of its Constitution requires a historical understanding of the evolution of Malaysia into an independent modern nation state within the period of at least the past one hundred years. Among other things, the 1957 or *Merdeka* Constitution, is the embodiment of a Westminster-type constitution based on parliamentary democracy, as well as on the principles of the rule of law and separation of powers, with the notion of state and citizen underpinning it. At the same time the Malaysian Constitution is also a unique expression of the country’s varied culture and history.

“It is an amalgam of diverse elements, some having their own origin in Malay constitutional ideas, some in British, some in Indian, and some again which derive from purely Malaysian context determined by the political realities of its multi-cultural, social and political life” (Harding 1996: 47).

One such Malaysian feature was the constitutional policy of maintaining a ‘social contract’ by which since 1957 and especially since 1970 the special

privileges have been accorded to the *bumiputera* population in return for citizenship and fundamental freedoms for the non-*bumiputera* population.

## **STATE AND FEDERAL CONSTITUTIONS IN MALAYSIA: A BRIEF HISTORICAL BACKGROUND**

The constitutional development of Malaysia is closely associated with the era of British rule that began with the Pangkor Treaty of 1874. The treaty established a British “protectorate rule” in Perak—a Malay state in the northern part of the Malay Peninsula. It introduced a rule through a British Resident whose advice had to be asked and acted upon by the Sultan of Perak on all matters except Islam and Malay customs. By 1895 this British residency rule was extended and a Federation known as the “Federated Malay States” comprising of Perak, Selangor, Pahang and Negeri Sembilan was established which provided for the office of a Resident-General above the four Residents in each of the four Malay states. The Federated Malay States existed until the Japanese Occupation in 1941.

Britain then extended its formal influence over the northeastern Malay states of Kedah, Perlis, Kelantan and Trengganu by a treaty with Siam (or Thailand) in 1909 whereby the latter agreed to transfer all rights of suzerainty, protection, administration, and control over them. The British appointed an Adviser to each of these states. In 1914, Johore was the last of the Malay states in the peninsula to accept a British Adviser. This group of five states referred to as the “Unfederated Malay States” remained outside the Federation (i.e. of the Federated Malay States or FMS) for fear of losing their powers to the British as had occurred among the Malay States comprising the FMS. By 1919, in the Federated Malay States a two tier government was formed with the setting up of State Councils in each of the Federated States and a Federal Council now headed by a British High Commissioner sitting in Kuala Lumpur, Selangor. Again under this new system all matters relating to the Muslim religion, mosques, political pensions, native chiefs and *penghulus*, and any other matters which in the opinion of the High Commissioner affected the rights and prerogatives of the Malay rulers (Sultans) remain exclusively under the State Councils.

After the Second World War in 1946, the *Malayan Union* was formed comprising all the nine Malay states in the Malay peninsula together with the two states of Penang and Malacca which were formerly the Straits Settlements under direct British rule. Following popular agitation among the Malay population the *Malayan Union* was dissolved and replaced by the Federation of Malaya in 1948. It was at this time that written constitutions were also introduced in all the Malay states, Penang and Malacca with the exception of Johore and Trengganu which already possessed their own written constitutions promulgated in 1895 and 1911 respectively. The Federation of Malaya Agreement of 1948 stated that a progress should be made towards eventual self-government. And it was with this goal in sight that elections for the Federal Legislative Council were held in 1955 throughout the Federation of Malaya. In 1956 a Constitutional Conference was held in London and the proposals were accepted. Following this a Constitutional Commission led by Lord Reid was set

up to study and report on the type of Constitution for the country. Its report was published on 21<sup>st</sup> February, 1957. A Working Party appointed by the British Government, the Conference of Malay Rulers and the Government of the Federation of Malaya examined the reports and on the basis of its recommendations, the Federal Constitution was promulgated. On 31<sup>st</sup> August, 1957 *Merdeka* was declared and the Federation of Malaya became an independent country.

Today Malaysia is a Federation of fourteen states with a written Federal Constitution which is the supreme law of the country.<sup>3</sup> The Constitution was amended in 1963 to include Sabah, Sarawak and Singapore when Malaysia was formed. Singapore left the Federation of Malaysia in 1965 leaving thirteen states in the Federation. The current fourteenth state is the *Wilayah Persekutuan* or the Federal Territory of Kuala Lumpur which was formed in 1974. The Federal Territories of Kuala Lumpur and Labuan came into being when the *Wilayah Persekutuan Kuala Lumpur dan Labuan* was enlarged to include the island of Labuan in 1982.

Apart from the Federal Constitution, each state in the Federation also possesses its own Constitution regulating the Government of the State but the State Constitution must have certain “essential” provisions enumerated in the Eighth Schedule of the Federal Constitution. If such essential provisions are inconsistent with them, Parliament under Article 71 of the Federal Constitution may make provision to give effect to them or to remove any inconsistencies, as the case may be.<sup>4</sup>

## **THE ‘PROTECTED’ POSITION OF ISLAM, ISLAMIC LAWS AND THE MALAYSIAN LEGAL SYSTEM**

As can be seen from the historical developments described above, like many former colonial countries, which were under British rule, Malaysia is a country whose legal system is comprised essentially of two sets of laws. One set of laws are derived from the British common law tradition, the other is based on its own legal and cultural tradition, the Islamic or *shari’a* laws (Malay: *hukum syara’* or *syariah*).<sup>5</sup> Emerging from the former Federation of Malaya—which became independent from Britain in August 1957 and which in turn had been formed from the coalescence of the various Malay states and British Crown Colonies in the Malay peninsula—modern Malaysia is a federation of 14 states, of which nine have evolved directly from and are thus based upon the pre-colonial Malay sultanates of peninsular Malaysia.

According to the Federal Constitution [Article 3 (1)] (and recognizing the preeminent role played by the Sultans or Rulers of the individual states in religious administration before and under colonial rule), the power to administer Muslim laws is primarily that of the states comprising the Federation. The head of Muslim matters in every state of the Federation of Malaysia is the Sultan or ruler, where there is one. Where there is not, as in the Federal Territories of Kuala Lumpur and Labuan, and in the states of Penang, Malacca, Sabah and Sarawak, the *Yang di Pertuan Agong* (the federal constitutional King of Malaysia elected from among and by the nine sultans) is the head.<sup>6</sup>

The Islamic laws applicable in Malaysia appear to be the Islamic law according to the *Shafie* school and Malay *adat* (customs) as modified by Islamic law.<sup>7</sup> It regulates such matters as marriages, divorce, adoption, legitimacy, inheritance and certain religious offences among Muslims in the state. Similar, and to some extent fairly uniform, enactments dealing with the administration of Muslim law exist in the various states. Except for the Federal Territories (of Kuala Lumpur and Labuan), and the states of Malacca, Penang, Sabah, and Sarawak there is a general pattern whereby the Sultan of each state in his role as the head of Islamic matters in his state is advised by a “Council of Religion and Malay Customs” (*Majlis Agama dan Adat Melayu*).<sup>8</sup> In some states, the *Majlis Agama (Islam)* also possesses the authority to issue *fatwas* (legal opinions; *fatawa*: plural Arabic) on matters concerning Muslim law that are referred to it and also to administer *wakafs* (charitable trusts; in Arabic *waqf*). It can act as executor of the will of a deceased Muslim and in, the case of death occurring intestate, act as administrator.

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

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

In the Federal Territories of Kuala Lumpur and Labuan, for example, the administration of Islamic Law and the organization of the *Syariah* Courts are now governed by the Administration of Islamic Law (Federal Territories) Act, 1993 (Act 505) and Rules (henceforth referred to as FT Act 505). This law provides for the establishment of the Committee of Religious Council (*Jawatankuasa Majlis Agama*), and for the nomination of the *Mufti* (state

jurisconsult), who chairs the Islamic Legal Consultative Committee. Administration matters all come under the Islamic Religious Department of each constituent state.

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

*Pusat Islam*,<sup>9</sup> the Islamic Centre in Kuala Lumpur, has also initiated similar reforms, both of the enactments and in the administration of Islamic law, including the *Syariah* Civil and Criminal Procedure Codes and the Evidence Laws. *Pusat Islam* is a federal government body or agency which evolved from the Islamic Affairs Division (*Bahagian Agama*) of the Prime Minister's Department: within it a *Pusat Penyelidikan Islam* (Islam Research Centre) was set up in 1971 "to promulgate correct Islamic teaching in society"<sup>10</sup>. In 1996 its administrative status was upgraded to become the Department of Islamic Development of Malaysia (known as *Jabatan Kemajuan Islam Malaysia* or JAKIM), but it is popularly known by the name of its imposing white building located next to the National mosque simply as *Pusat Islam*. JAKIM is now the main arbiter "for the planning and management of Islamic affairs and the development of the *umma*. [It] formulates policies for the development of Islamic affairs in the country and safeguard the sanctity of the *aqidah* (faith) and the teachings of Islam. [It also helps] to draft and streamline laws and regulations that are necessary, as well as to evaluate and coordinate the implementation of the existing laws and administration".<sup>11</sup> Apart from sponsoring lectures and publications embodying 'correct Islam', *Pusat Islam* also collects information about the practice in Malaysia of what is deemed "incorrect or deviant Islam", publicizes what it considered "correct" information about such deviations, and where necessary initiates official action against perceived errors and their perpetrators. Associated with *Pusat Islam* is the *Institut Dakwah dan Latihan* (Propagation and Training Institute) whose task is "to strengthen the welfare of, and eliminate the unbelief that increasingly and strongly threatens, Islamic society today".<sup>12</sup>

As a consequence of historical evolution and following the constitution, there are now operating in Malaysia two systems of family laws, one for Muslims (Islamic laws), the other for non-Muslims (common law). Muslim family law is under the legislative authority of the fourteen states, with each of these states having its own state enactments, while in the Federal Territories of Kuala Lumpur and Labuan, and the states of Penang, Malacca, Sabah and Sarawak Muslim family law is regulated under federal authority by an Act of Parliament. Long a matter of some controversy, the division of areas of jurisdiction between

the Civil Courts and the *Syariah* Courts was clarified, very much in favour of the latter, under Article 121 (1A) of the National Constitution. Introduced in 1988, this amendment prohibits the civil courts from intervening in the areas of jurisdiction of the *Syariah* Courts or their decisions. This amendment is of great significance because of its important implications, not just for issues relating to the relationship between religious rights of Muslims and peoples of other faiths, but also for the ability of the *Syariah* Courts and those supporting them to pursue authoritatively their own sociopolitical agenda in Malaysia. That is, it raises questions not simply about freedom *of* but also freedom *from* and *in* religion in Malaysia, for Muslims perhaps even more pointedly than for non-Muslims.

For example, since Malays are, by constitutional definition, required to be of the Muslim faith [Article 160, Clause (2)] all Malays (and other Muslims) are liable to prosecution if their conduct is in violation of Islamic precepts. Therefore despite the constitutional guarantee of freedom of religion, no Muslim can lay a claim to opt out of *Syariah* laws. Muslims in Malaysia are subjected to many religious restraints due to the power of the States to punish Muslims for offences against the precepts of Islam (Schedule 9, List II, Item 1). Throughout the fourteen states, Muslim or *Syariah Criminal Codes* have been established. There are specific provisions for the criminal punishment of Muslims found guilty of consuming alcoholic beverages in public places, eating in public during the fasting month of *Ramadhan* and committing 'sexual offence' of *khalwat* (irregular consorting between sexes). *Khalwat* or improper covert association between sexes is described by the *Jabatan Agama* as "close proximity between male or female who are not *muhrim* [a relative or kin whom one cannot marry] and not legally married. It is not necessary that both parties are Muslims, many cases have been taken to court under this charge where only one of the parties is a Muslim thus compromising the freedom of a non-Muslim from the jurisdiction of Islamic laws as guaranteed by the Constitution.<sup>13</sup>

In brief, Malaysia is neither a full-fledged Islamic state nor a wholly secular state. Since the declaration independence of its Malayan core in 1957, the political definition of the Malaysian state has rested on the axis of non-negotiable Malay dominance in both political and economic terms and the commitment to the essentially multi-ethnic and multi-religious character of the state. The centrality of Islam within this political process has been dictated largely by these structural (pluralistic) constraints and by its relationship to Malay identity, legitimacy and dominance. The Constitution, in granting Malay citizens certain special rights and privileges, defines a Malay as one who professes Islam as a religion, habitually speaks the Malay language and conforms to Malay custom. Malay special rights therefore are recognized through the Constitution as bearing a religious qualification, further reinforcing not only synonymity of Islam with Malay culture but also the special needs of the Malays and therefore of the Muslim community.

Consequently, "the Constitution, in legitimating Malay prerogative through Islam, indirectly but inevitably sanctioned the place of religion in the main arena of politics [and the domain of the state]. The so-called 'innocuous' provision for Islam, as it stands in the Constitution, has left unresolved the precise role of



religion in the contemporary state. Indeed, the conclusion that Malaysia lies somewhere between the character of a secular state and a theocracy, in legal terms at least, has contributed to confusion and unease among the Malaysian public, not to mention the institutional pressure that it has placed on the government, in contemporary times, towards resolving this ambivalence.” (Nair 1997: 22)

In fact since the 1980s, and with the 1988 Constitutional Amendment of Article 121 (1A), the Malaysian state governments have embarked on a policy of ‘Islamisation’ of state and society by implementing more Islamic laws and in greater areas of public life of Malaysian Muslims further complicating the relationship between religion and the state.

## **THE ISLAMISATION AGENDA IN MALAYSIA**

In his first address to the UMNO General Assembly as its President of UMNO in 1982, Dr. Mahathir Mohammad gave his own vision of the kind of Malaysian Muslim identity that the country needs. He articulated his belief that Islam was “a pragmatic and flexible religion” and he defended the government’s policies as being “in no way contrary to Islam”. For him religion is a “strong stabilising factor” whose teachings “if followed properly” would ensure Malaysia’s status as a powerful, disciplined and learned nation that could defend itself and Islam (*New Straits Times*, 17 July 1982).

The following year Mahathir’s Islamization policy was introduced. One of these was instituting moves aimed at bureaucratizing the potential role of Islam in the economy through organizations such as the *Badan Perunding Islam* (Islamic Consultative Body), headed by Anwar Ibrahim, which was by 1983 co-ordinating policy involving community, economic and social development under the Prime Minister’s office. One of the tasks of this body was to find ways of drawing up strategies to ensure that the government’s development projects were in line with Islamic precepts (Nair 1997: 101).

Within the context of Islamic revivalism and debates over the role of Islam in modern Muslim society, the Mahathir’s administration responded with the project of rationalising and bureaucratizing administrative and legal institutions as well as centralizing the functions and authority of *ulama* at the federal level. In fact by 1982 the “Federal Government had over 100 *ulama* in the Prime Minister’s office and some 715 in the Ministry of Education itself in its employment.

At the same time, the federal government was setting the pace for the systematization and bureaucratization of the Muslim judicial system. Prof. Ahmad Ibrahim, a noted Law Professor at the Islamic International University was entrusted with the task of reviewing and rationalizing the Malaysian *Syariah* legal system within the Federal Territories. Within the last two decades, this Islamization policy has resulted in the establishment of a dual and parallel legal systems for family laws in the country (as described p.7-8 of this paper). At the same time each of the fourteen states in the Federation also began to amend and enforce existing State *Syariah* Criminal Enactments. Several new

enactments were also introduced, many of them have the outcome of regulating moral as well as gender and sexual behaviour of Muslims in the states.<sup>14</sup> With the enforcement of these religious criminal laws, Islam in Malaysia has extended itself into the private sphere of Muslim subjects while the collective enforcement of public morals are gradually put into place.

## THE QUEST FOR THE 'ISLAMIC STATE' IN ISLAMIC THOUGHT AND HISTORY

Most discussion of Islam and politics tend to assume that "Islam" makes no distinction between the religious and political realms. The *din wa dawla* doctrine seems to give support to this view of the indivisibility of "religion and state". The impression that such a theory [of an Islamic state] exists is usually reinforced by the fact that contemporary Islamists repeatedly invoke the religious and the juridical texts as well as certain historical precedents of 'Islamic government', in their attempt to prove that it is obligatory if not mandatory for contemporary Muslims to implement this 'Islamic state'.

Yet a close and careful study of the original sources (i.e. the *Qur'an* and the *Hadith*) will show that they have very little to say on matters of government and the state. General principles are stated and can be drawn from these texts. For example, principles of good governance such as trust (*amanah*), justice (*adl*), consultation (*shura*), agreement (*sulh*) and the commandment of ensuring and doing good over evil (*amr bil maaruf wa nahy an al-munkar*) are often described and prescribed in the texts.

To Muslims, the *Qur'an* as the word of god is the absolute authority from which the very conception of legality and every legal obligation. Said Ramadan, in his book *Islamic law*, admits that the *Qur'an*, being basically a book religious guidance, is not an easy reference for legal studies. It is more an appeal to faith and the human soul than a classification of legal prescriptions. According to Ramadan and many other modern Islamic legal scholars (cf. Fathi Osman, Hashim Kamali) legal prescriptions in the *Qur'an* are relatively limited and few. Out of almost 7,000 verses, 70 injunctions are laid out concerning family law, civil in another 70, penal law in 30; jurisdiction and procedure in 13; constitutional law in 25; and economic and financial order in 10. (Such enumeration is also only approximation, seldom explicit). The elaboration and interpretation of Islamic law by early jurists and classical Muslim scholars have often been understood and presented by contemporary Islamic activists and ulama as the word of Allah.

Similarly the same confusion occurred about what classical and early scholars have written about Islamic political order of their time and their theorising about politics and government. Today, when most Islamists and many fundamentalists call for the implementation of *shari'a*, what they really have in mind is the implementation of the jurisprudence formulated by the early jurists. " This jurisprudence has now been extracted from its historical and political contexts, and endowed with essentialist, everlasting qualities. The point is thus overlooked that this jurisprudence was in the first place a human improvisation meant to address certain political and social issues in a certain historical,

geographical and social context” (Ayubi 1991: 2). It has also been argued that the Muslim tradition lacked any elaborated theory of the state. Yet throughout the “Islamic studies” literature, one finds numerous discussions of the notion and theory of the state in Islam or from an Islamic perspective.

The city of Medina at the time of the Prophet Muhammad (622 CE) and the four ‘Rightly-guided Caliphs’ who led the Muslim community in the following four decades after the death of the Prophet are often cited as an example of the ‘Islamic state’. The Charter of Medina, also known as the constitution of Medina, that was enacted after the Prophet’s *hijra* (migration or flight) to Medina provide Muslims of later times with validating authority for the introduction of written constitutions. The political order of the city of Medina was created by alliances through treaties with Jews and Christians and the oath of allegiance of Muslims. The Charter establishes a religious community and does not exclude non-Muslims from the envisaged political domain. However, the Medina state is a 7<sup>th</sup> century model lacking in the 20<sup>th</sup> century phenomenon of constitutionalism and the modern notion of citizenship.

Classical treatises on government are found in later period of the Abbasid Caliphate (established 750CE until middle of the 13<sup>th</sup> Century). Writings by Ibn Hazam [*Treatise on Ethics and Conduct (Kitab al-Akhlaq wa al-Siyar)*], and also those by al-Mawardi [*Treatise on the Principles of Government (Kitab al-Ahkam, al-Sultaniyya)* and *Rules for the Vizirate and the conduct of Authority (Qawanin al-Wazara wa Siyasat al-Mulk)*] are cited by contemporary Islamists as ideal sources and guidance for recreating an Islamic *tadbir* (administration, governance or management). But these are literature that emerged mainly when the caliphate as an historical and political reality was weakening and withering. These treatises were meant as advice or counsel to the prevailing disintegrating political order of their time. They are obsessed with an attempt at rescuing the community from its unhappy destiny by over-emphasising its presumed religious character. They envisaged how things should be, far more than they described how things are in reality.

Nazih Ayubi (1991: 17-18) in his critical analysis of the theory and practice of the Islamic state in Islamic history said that,

“The juridic theory of the Islamic state, trying as it did to incorporate the State into the *shari’a*, was based on fiction (since there is very little in the *Qur’an* and *Sunnah* about politics and the State). The theory of the ‘Islamic state’ is little more than elaborate *fiqh* presented as though it is pure *shari’a*. ...but as the fiction was elaborated upon, repeated and reiterated, in volume after volume, it came to represent to subsequent generations not simply an ideal that *should* be aspired to, but a reality that is believed to have existed—history is read into the *fiqh* (which was *prescribed* by the jurists) and is then taken to be a *description* of what things were like in reality. Hence the renewed political potential (and even power) of that *fiqh-cum-shari’a*.

Furthermore, with the passage of time, and as the gap continued to widen between juristic theory and the social and political realities, the juristic theory which was elaborated 'in the shadow of the State' came ironically to represent in modern times one of the main intellectual tools used by the politico-religious opposition against the colonial-European and the national-secularist governments..."

Thus the view of political Islamist, some contemporary Muslim fundamentalist, and conservative ulama is in reality an invention. It does not represent a 'going back' to any situation that existed in the past. What it keeps from that idealized past is the juridical tradition of linking politics and religion into a real bond. Political Islamists want to reverse the traditional relationship between the two spheres so that politics become subservient to religion, and not the other way round, as was the case historically.

### **THE CONCEPT OF AN 'ISLAMIC STATE': THE MALAYSIAN GOVERNMENT'S VIEW**

The UMNO-led government in Malaysia does not promote any critique or a dissenting and different view of what constitute an Islamic state. The everyday discourse of the mainstream *ulama* and religious authority are only reasserting the view of the political Islamists.

The government's conception of an Islamic state was clearly stated in the booklet that it published and circulated in 2001. The following extracts (see below, p.14 - 16 of this paper) is a summary and a translation of the contents of the first ten pages of the Malaysian government's 25-page booklet entitled "Malaysia *adalah* sebuah negara Islam" which was released sometime in June or early July 2001.

Malaysia, according to the booklet *Malaysia adalah sebuah negara Islam*, is already an Islamic country because it fits into the definition of an Islamic State. The government, it goes on to assert, has fulfilled 12 distinct Islamic duties in ruling the country. According to the author Dato' Wan Zahidi WanTeh, there are four definitions of an Islamic state. [The author derived these definitions from various historical and/or classical and modern ulama]. They are:

1. [According to] Sheikh Muhammad Abu Zuhrah: "An Islamic State is a state under the authority or rule of an Islamic government; the power and defence of the state are in the hands of the followers of Islam. Such a state must be defended by every Muslim"
2. [According to] Muhammad Bin Hasan Al-Shaibani: "A state, Which is ruled by the followers of Islam and where Muslims are able to live in peace."
3. [According to] Imam Al-Fahistani: "An Islamic State is a state where Islamic administrative law is enforced (Islamic law is enforced)."
4. [According to] Imam Shafi'e: "Any state that was an Islamic state will not lose its Islamic status under the *fiqh* (Islamic law), even if the followers of Islam in that state have been defeated. This means that Islamic republics, which are currently under communist rule or other powers, are considered

Islamic States that have been colonised, and it is the responsibility of the followers of Islam to free these states when they are able to.”

## TWELVE DISTINCT DUTIES OF AN ISLAMIC GOVERNMENT

These are taken from the writings of Abu Yaala from the Hanbali school and al-Mawardi from the Shafi'e school. According to al-Mawardi, the general duty of an Islamic administration is to protect the importance of religion and administer state matters and followers. The duties of an Islamic Government are:

1. To preserve the religion (Islam) from any violations of understanding and teaching that may deviate the faith from the true teachings of Islam, which are according to the *ijma'* (consensus of opinions) of Islamic scholars based on the *Qur'an* and the *Sunnah*.
2. To appoint a cabinet to help administer the affairs of the state. According to al-Mawardi, “An infidel (non-Muslim) who is a citizen of an Islamic state (*dhimmi*) may be appointed as a minister to implement the policies of the Islamic government (*wazir tanfiz*).”
3. To equip an army that is able to defend the state and the religion from violations and safeguard peace in the country.
4. To set up a judicial or legal system to resolve conflicts and to uphold justice.
5. To ensure *solat lima waktu* (prayers five times a day), *solat Jumaat* (Friday prayers) and *solat Hari Raya* (Hari raya prayers) are undertaken by building mosques and appointing imams. Al-Qadhi Abu Yaala classified mosques into two categories: (i) *Masjid Sultan*, i.e. state mosques, which are under government's rule, and (ii) *Masjid Am*, (or public mosques). For *Masjid Sultan*, the government has the right to appoint the imam. Therefore, “no one can become the imam in a *Masjid Sultan* unless he is appointed by the government. An imam appointed by the government has the right to be the *imam solat* even if there is another person who is better or more learned than he”. According to Abu Ya'ala: if the official imam has conducted a congregational prayer, there is no need for another person to conduct another congregational prayer because it is feared that such action will be construed as going against the ruling authority.” Imams Shafi'e, Maliki and Hanafi share the same opinion.
6. To manage affairs pertaining to the performance of the *hajj*.
7. To manage affairs pertaining to the collection and distribution of *zakat*, e.g. appointment of *amil* (officer authorised to collect tithes), etc.
8. To collect taxes from other sources in the state (*kharaj*).
9. Matters related to the management and development of land (*ihya al-mawat*).
10. To set up an efficient administrative system to manage affairs pertaining to finance, assets of the government, workers and also the army.
11. To fight against and eradicate crime and impose suitable punishment on criminals. These punishments are either for (a) *hadd* crimes (i.e. crimes for which punishments have been prescribed by *shari'a* or Islamic law with certain conditions, e.g. adultery, consumption of alcohol, theft and armed robbery, rebellion against Islam); or (b) *taazir* crimes (i.e. other crimes for which the government is given the power or discretion to determine the types of punishment).

12. To carry out the function of *hisbah*, which in the context of the modern state is known as the Executive. The aim is to ensure that the culture, character and the eminence of Islam as well as the regulations for the well being of society is upheld.

What has been stated by these two *ulama* could be construed as basic requirements only and do not apply in a general sense. There are yet many other matters that have not been mentioned since they have not yet been taken over by the Government or had not yet emerged at the time, such as the areas of education and health.

It is evident from the above that the requirements to govern an Islamic State involve areas that are vast and are not confined to implementing *hudud* laws only. It, therefore, cannot at all be denied that this appears to be one of the basic requirements that should be implemented. Therefore, it is neither logical nor justifiable to consider implementation of the *hudud* laws alone as the basis for determining as to whether the government is Islamic or not.

In the context of Malaysia--with the exception of some matters that could not be avoided--it could be said that the overall responsibility to ensure the establishment of an Islamic Government has been fulfilled, though there are weakness and shortfalls here and there for which the processes of improvement and appropriate action are ongoing. Since the contemporary system of government has been inherited from the colonial powers, there are some prevailing rules and regulations that do not suit the requirements of Islam.

## **ISLAMIC GOVERNMENT ADMINISTRATION**

In view of these situations, the Government has launched a policy of “Absorption of Islamic Values” [*Dasar Penerapan Nilai-nilai Islam*] in the administration of the Government. Through this policy, everything that contradicts Islam will be realigned to conform to the need of Islam step by step in ways that are wise.

The policy of the “Absorption of Islamic Values” is, in fact, a policy that is broad-based and open and, therefore, it could be said to envelop all values and Islamic tenets that compel the Government to implement it. It is also a policy that will be implemented on a continuous basis until the goal of entrenching Islam into nation’s system is fully achieved.

## **THE ‘RIGHT’ [LEGITIMATE/VALID] GOVERNMENT ACCORDING TO FIGH**

Before we examine the prevailing views in Islamic *fiqh* about the true or legitimacy of a government, it is better for us to clarify as to how the Head of an Islamic State is appointed. In this context, according to al-Mawardi:

“The appointment of the Head of an Islamic State is made in two ways, that is: (i) through an appointment or election by an Islamic community of leaders; and (ii) through appointment by the previous ruling entity (*Wilayah al-Ahd*). Both of these methods are confirmed by a general consensus of eminent or classical ulama.”

As has been evident, the Head of State in Malaysia is appointed by both the above-mentioned methods. For example, The *Yang di-Pertuan Agong*, as the Head of State, is appointed by the Conference of Malay Rulers; while the Heads of State (Sultan) at the level of state governments are appointed by the previous respective rulers; whereas the *Yang di-Pertuan Negeri* is appointed by the *Yang di-Pertuan Agong*. The Head of State has the power to appoint the cabinet ministers. In Malaysia, the Prime Minister who heads the Cabinet is appointed by the *Yang di-Pertuan Agong* from among the members of Parliament that has the confidence of the majority. [End of extracts from the booklet]

The booklet presents several problems of clarity in its use of definition and therefore in its conception of what constitute an Islamic state. There is a lack rigour in the use of the terminology of the Islamic state. In the booklet, the Islamic state seems to refer simply to countries where Muslims constitutes a clear majority of the population. At other times there are also references of the Islamic state as a majority-Muslim country which has Islamic law as the law of the land or to a Muslim country where Islamic law is part of the law of the land. There is also an interchangeable use between the terms--state, government and the nation-state. For example, Islamic state (*negara Islam*) and Islamic government (*kerajaan Islam*) are used very loosely in the text.

## CONCLUSION

In a secular constitution there is no prescribed official religion and no state aid is given to any religion or for any religious purposes. This is certainly not the case with Malaysia. The Malaysian legal system permits legal pluralism. Muslims are governed by Islamic laws or shari’ah in a number of specific fields. In other fields their life is regulated by Malay adat. Non-Muslims in Malaysia are entirely regulated by secular laws.

Despite the process of Islamisation since the early 1980s, no constitutional changes have been made to declare Malaysia an Islamic state or to put shari’a on a higher position than the law of the Constitution. If there is such a move to amend the Constitution to declare Malaysia to be an Islamic state, it will then require a two-thirds majority in the Parliament plus the consent of the Conference of Rulers and the Governors of Sabah and Sarawak.

Moreover, the jurisdiction of the *Syariah* courts throughout Malaysia is not inherent but is derived from federal law. The Constitution, in Schedule 9, List II, Item 1 says that *Syariah* courts “shall not have jurisdiction in respect of offences except in so far as conferred by federal law”. The relevant federal law is the *Syariah Courts (Criminal Jurisdiction) Act 1965*. It imposes limits on jail terms and fines that the *syariah* courts in the states can impose (Faruqi 2002).

However, Islamic norms tend to prevail in Malaysian State and society. Despite the current limits or constraints in the jurisdiction of Islamic laws and Syariah courts in Malaysia, the implementation of a bundle of Islamic laws in civil and criminal matters at the state and federal levels in the last two decades have significant impact on both Muslim and non-Muslim populations. A number of these recent legislation and rulings have adversely affected the democratic space, and fundamental rights such as freedom of religion and freedom of expression. Malaysia has been described by political scientists as a 'semi-democracy', 'quasi-democracy' or 'limited democracy' in view of the various authoritarian laws that prevail in the country. Therefore the effect of those recently enforced Muslim laws is in addition to the existing undemocratic 'secular' laws such as the Internal Security Act, Societies Act 1966, Police Act 1967, the Printing Presses and Publications Act 1984, and the Sedition Act 1948 (amended in 1970).

The Malaysia state is indeed neither fully secular nor fully theocratic. It has been described as a 'hybrid state' for it permits legal pluralism (Faruqi 2002). The Malaysian State is different from the secular states of France, Turkey or India. Despite the primacy of Islam (the official religion) and the existence of dual or parallel legal systems (common law and Muslim laws), it has so far avoided the kind of religious control of all aspects of life such as those found in Saudi Arabia, Iran or Afghanistan under the Taliban.

This 'middle path' is currently vulnerable to the political tensions caused by some radical tendencies in the Islamization policies of the state. At the same time there is also some 'fanatical tendencies' within Islamist politics in Malaysia among the Muslim opposition party as well as among the conservative religious authority who are supporters and supported by the ruling party of UMNO. A 'mixed' or 'hybrid' state within a plural and multi-religious country such as Malaysia has a tough 'balancing act' to maintain as it confronts the pressures and tensions of competing ethnic politics and the politics of cultural identity.



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## GLOSSARY

<b>'Abbasids</b>	dynasty of caliphs ruling from Baghdad from AD750 to 1258, although with little actual power after AD 945.
<b>Bayan</b>	the 'revealing' of meaning through linguistic textual analysis.
<b>Da'wa</b>	literally 'call'; signifies proselytisation and missionary and propaganda work with the intention of both spreading and confirming the Islamic message
<b>Dawla</b>	originally 'turn' or 'cycle', subsequently 'dynasty'; currently 'State' (in the European sense)
<b>Hadith</b>	sayings attributed to Prophet Muhammad
<b>Hakimiyya</b>	a new coinage by the political Islamists. Derived from <i>hukm</i> which meant originally 'adjudication' but has gradually been extended to mean ruling or governing (hence, <i>hukuma</i> : government). Hakimiyya is the principle that maintains that absolute sovereignty and rulership should be for god alone, not for the people or for the law
<b>Hijra</b>	emigration (or immigration). The main <i>hijra</i> in Islam is that of Prophet Muhammad from Mecca to Madina in AD 622.
<b>Hudud</b>	Islamic penalties
<b>Ijtihad</b>	independent reasoning with regard to religious issues. A gradual 'Closing of the Gate of Ijtihad' started to take place fairly early in the tenth century AD.
<b>Imam</b>	leader – religious (and sometimes political). <i>Imama</i> : leadership. It may range from casual leadership of collective prayers, to being a religious leader of an entire community. Has a much grander and more revered spiritual significance in Shi'ism.
<b>Shari'a</b>	also Shar' (adj. <i>Shar'i</i> ) originally 'path' or 'way'; subsequently the 'legislative' part of religion as stipulated in the Quran and Hadith.
<b>Siyasa</b>	originally connoting the effective way to handle animals or minors, used in modern times to signify 'politics' or 'policy'
<b>Taqiyya</b>	strictly, caution; concealment of real religious beliefs in adverse conditions

## ABBREVIATIONS

ABIM	Angkatan Belia Islam Malaysia
Aliran	Persatuan Aliran Kesedaran Negara
APU	Angkatan Perpaduan Umma
ASEAN	Association of Southeast Asian Nations
BN	Barisan National (National Front)
DAP	Democratic Action Party
FOSIS	Federation of Student Islamic Societies
GERAKAN	Gerakan Rakyat Malaysia
HAMIM	Parti Hizbul Muslimin Malaysia
IDB	Islamic Development Bank
IIFSO	Islamic Federation of Student Organizations
IKIM	Institut Kefahaman Islam di Malaysia
IRC	Islamic Representative Council
LUTH	Lembaga Urusan dan Tabung Haji
MCA	Malaysian Chinese Association
MIC	Malaysian Indian Congress
MSA	Malaysian Student Association
MSD	Malaysian Student Department
MNLFMoro	National Liberation Front Moro
NDP	National Development Policy
NOC	National Operations Council
OIC	Organization of Islamic Conference
PAS	Parti Islam Se-Malaysia [earlier known as PMIP, see PMIP below]
Perkim	Pertubuhan Kebajikan Islam Se –Malaysia (Islamic Welfare and Missionary Association of Malaysia)
PKPIM	Persatuan Kebangsaan Pelajar-pelajar Islam Malaysia (National Association of Muslim Students Malaysia)
PMIP	Pan-Malayan Islamic Party established in 1951, its name later changed to Parti Islam Se-Malaysia (PAS)
PPIM	Pusat Penyelidikan Islam Se-Malaysia
PUM	Persatuan Ulama Malaysia (Malaysian Ulama’s Association)
RISEAP	Regional Islamic Dakwah Council for Southeast Asia
UMNO	United Malays National Organization
UN	United Nations Organization
WAMY	World Assembly of Muslim Youth

## Endnotes

<sup>1</sup> Article 3 of the Federal Constitution provides that Islam is the religion of the Federation. The same article goes on to provide that all religions may be practised in peace and harmony in any part of the Federation. The Report of the Reid Commission, the Constitutional Commission convened to study the setting up of the Constitution (see p. 4 of this essay) carefully documents the deliberations, negotiations and agreements which finally took the form of the Constitution. Article 3 was included in response to the Memorandum of the Alliance Party (coalition of UMNO, MCA and MIC) to the Reid Commission. The Memorandum states that the Federation of Malaya will be a secular state. The relevant extract reads: "...religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising other religions and *shall not* imply that the state *is not* a secular state." [note the double negative in italics].

<sup>2</sup> See the following section for a description of JAKIM (p. 7)

<sup>3</sup> The Malaysian Parliament does not enjoy legislative supremacy like its English counterpart. The English Parliament can make and unmake any law and the validity of such acts cannot be challenged by the courts which are bound to accept them as law. In Malaysia, Parliament exists under a written Constitution so that its legislative acts must not be inconsistent with the Constitution. If any such act is inconsistent with the Constitution, it is regarded as void on grounds of unconstitutionality.

<sup>4</sup> This feature is significant when we later review how some of the Islamic Criminal Enactments such as the Hudud laws introduced by the State governments of Kelantan and Trengganu cannot be enforced without first amending the Constitution.

<sup>5</sup> *Syariah* (other cognates *syar'ie*, *syara'*) is the modern Malay transliteration of the Arabic word *shari'a* (or *shari'ah*). In this paper the Malay transliteration is only used when referring to the various Malaysian *shar'ia* enactments, documents, courts or judicial institutions. Otherwise the English transliteration *shari'a* is used throughout the essay.

<sup>6</sup> Malaysia has a constitutional monarch called the *Yang di-Pertuan Agong*. He is the Head of State and government is carried out in his name. The office of *Yang di-Pertuan Agong* was first created in 1957 upon independence and it is both hereditary and elective. It is hereditary in the sense that only the nine Sultans of the States are eligible for the post; the appointed *Yang di-Pertua Negeri* (previously called Governors) of Sabah, Sarawak, Penang and Malacca are not eligible. It is elective in that one of the nine Sultans is elected to hold the office for a term of 5 years in accordance with a set of rules based on a system of rotation so that each Sultan will have a chance of being elected unless he declines. This election is carried out at a "Conference of Rulers" made up of all the Sultans when the office falls vacant, either on an incumbent's death or the normal expiration of the term of office. The Conference of Rulers is also empowered to remove an incumbent *Yang di-Pertuan Agong* from office. In Perlis and Negeri Sembilan, the rulers are called *Raja* and *Yang di-Pertuan Besar* respectively. There is also a provision in the constitution for a Deputy head of state termed *Timbalan Yang di-Pertuan Agong*.

<sup>7</sup> For further details, see Ahmad Ibrahim, *Islamic Law in Malaya*, MSRI Singapore 1965; on the administrative aspect, see also Ahmad Ibrahim "The Administration of Muslim Law in Southeast Asia" 13 *Mal.L.R.* 124 (1971), and "The Administration of Muslim Law in Sabah", 2 *JMCL* 2 (1975).

<sup>8</sup> See also William R. Roff "The Origin and Early Years of the *Majlis Agama*" in William R. Roff (ed.) *Kelantan: Religion, Society and Politics in a Malay State*. Kuala Lumpur: Oxford University Press; 1974.

<sup>9</sup> Pusat Islam is the central agency in the planning and management of Islamic affairs in Malaysia. It is a federal government agency comprising of several divisions all under the "Department of Islamic Development" (*Jabatan Kemajuan Islam Malaysia* or JAKIM), placed under the Prime Minister's Department.

<sup>10</sup> Quoted from the Pusat's own journal, in Mohamad Abu Bakar, *Penghayatan Sebuah Ideal: Suatu Tafsiran tentang Islam Semasa* (Kuala Lumpur: Dewan Bahasa dan Pustaka), 1987, p.78.

<sup>11</sup> See the website of Pusat Islam, <http://www.islam.gov.my/>, from its homepage.

<sup>12</sup> From the brochure of the *Yayasan Dakwah Islamiah Malaysia* (YADIM); see also William R. Roff "Patterns of Islamization, 1890s-1990s: Exemplars, Institutions, and Vectors" in *Journal of Islamic Studies* 9:2 (1998) pp. 210-228.

<sup>13</sup> Since 1986 a non-Muslim party to a *khalwat* arrest can be detained for not more than 14 days by the police for purpose of investigation in the case.

<sup>14</sup> I have described in some detail the problems that arose from the enforcement of these criminal rules. See "Islam and the State in Malaysia: A Problem of Democratization and Pluralism" paper written for the German Institute for Federal Studies, University of Hannover, Dec. 1999.