

# ISLAMIC LAW AND HUMAN RIGHTS IN MALAYSIA

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**Abstract:** This article deals with the Islamic law and human rights principles which constitute the two important elements of the Malaysian legal system. Human rights, despite being a basic tenet of Islam, have frequently and widely been misunderstood by many Muslims. Indeed, the protection of human rights is consistent with the very objective of the coming of Islam i.e. as a mercy to the whole universe and for safeguarding the sacred values of humanity. As such, it is not an exaggeration to consider that Islam is a strong proponent of human rights and violations of human rights may be tantamount to disregarding Islamic principles. Nevertheless, due to constitutional constraints, the protection of human rights in Malaysian law may not necessarily be based on Islamic law. This is because the Federal Constitution of Malaysia limits the jurisdictions of Islamic law to selected matters such as matrimonial issues and other limited criminal jurisdictions. Despite Article 3 of the Constitution that clearly names Islam as the religion of the Federation, this provision, does not provide for the full application of Islamic law in Malaysia. Thus, the protection of human rights in Malaysia is selectively covered based on Islamic law, whereas the major scope of protections is covered by Federal-based civil law, in accordance with the specification of jurisdiction vested by the Constitution.

## Introduction

Malaysia is a well-known Muslim-majority country due to its predominant Muslim population. A demographic viewpoint of the country suggests that, out of its estimated population of 29.6 million<sup>1</sup>, approximately 60.4 per cent belong to the Islamic faith.<sup>2</sup> In addition, the Federal Constitution of Malaysia (hereinafter the “Constitution”), under Article 3, designates Islam as the religion of the country while at the same time guaranteeing the principle of freedom of religion to its multi-ethnic communities. Despite Islam being named as the religion of the Federation, Islamic law or *Shari’a Law*, has never been considered by the same Constitution as the law or legal system of the federation. In other words, the status of Islam as the religion of the Federation does not extend to its legal dimension. The Constitution, as mentioned under Article 4, is considered as the supreme law of the country which shall always prevail over any other laws passed after the *merdeka* day whereas Islamic law is only made a subordinate law falling under the States’ list with a very limited jurisdiction confined to personal matters and offences relating to morality only.

On the other hand, human rights, are a pertinent aspect of the Constitution. Articles 5-13 of the Constitution, always dubbed as ‘Fundamental Liberties’, reflect the Constitutional protection of human rights enjoyment guaranteed to every Malaysian citizen. Even though Islam is a strong proponent of human rights and the wellbeing of mankind, Islamic law in Malaysia, however, is not practised in such a manner that reflects the traditional principles of Islamic law. Rather, the scope and jurisdiction of Islamic law in Malaysia have been curtailed from what they are supposed to be. This is because the Constitution has specified that Islamic law in Malaysia shall only be related in limited scope to certain spheres such as matrimonial matters and minimal criminal jurisdictions empowered to the State authorities. With many jurisdictions covering human rights falling under the federal law (i.e. the Civil law), it may well be said that not all human rights in Malaysia can be protected using Islamic law.

This article aims at understanding Islamic law and its relationship with human rights within the Malaysian perspective. The first section discusses the historical background of Islamic law in Malaysia, dating back from the earlier stage of arrival of Islam in Malay Archipelago until the colonial era. It further analyses the drafting of the Constitution – spearheaded by the British colonialists which has significant impacted on the practice of Islamic law in Malaysia. Departing from the Constitutional perspective of Islam, the next section examines human rights from the viewpoint of the Constitution to know the perspective of human rights in Malaysia. In the final sections, this article examines human rights from the Islamic perspective and the extent of its protection under Islamic law in Malaysia. This article concludes that, despite the jurisdictional limitations vested on Islamic law in Malaysia, human rights are an important element in Islam.

## **Islam and Islamic Law in Malaysia**

### **Historical Overview**

Islam came to the Peninsula of Malaya by the fourteenth century.<sup>3</sup> It is perceived that Parameswara, Malacca’s first ruler, had converted to Islam because of his marriage to a Pase (*Pasai*) princess.<sup>4</sup> Parameswara was later known as Sultan Iskandar Shah. Malacca became well known as a trading port between India and China. One of the facts that promoted the rapid growth of Malacca was its acceptance of Islam. Its strategic geographical position and Chinese patronage which helped in resisting the claims of nearby Siam were other factors that contributed to the rapid growth.<sup>5</sup>

Islam spread rapidly in Malacca and in the entire Peninsula of Malaya, perhaps due to the conversion of Parameswara to Islam. It was a tradition that Malays paid their highest respects to their Sultan and obeyed him in their deeds and words.

Because of these reasons, there was no exception for the Malays not to embrace Islam. Being a non-Muslim could be considered as a treasonous act as the Malay words say “*derhaka kepada raja*” (became treason to the King). Therefore, the usual norms among Malays were to follow the footstep of their Ruler.<sup>6</sup>

Since Islam came to the soil of Malacca, it rapidly changed the law. Historians and legal writers have unanimously agreed that the influence of Islamic law together with Malay customs contributed largely to the application of law in Malacca. *Hukum Kanun Melaka* or the Malacca law is one of the best examples that could prove this claim. The significance and contribution of this law, in certain extent, had largely shaped the drafts of other Malay laws in other respective states in the Peninsula of Malaya. This could be seen in Johore Law, Pahang Laws, Kedah Laws and the *Undang-undang Sembilan Puluh Sembilan* (Ninety-nine Laws of Perak), where most of the provisions in these laws originated from the *Hukum Kanun Melaka*.<sup>7</sup>

### **Islam in the Federal Constitution**

When the Reid Commission<sup>8</sup> first issued its White Paper, there was no provision on Islam as the State religion. It was the idea of Justice Abdul Hamid of Pakistan, a member of the Commission who made a note of dissent with regard to this matter. It was later accepted by the Alliance party that a provision on Islam as the religion of the Federation should be inserted in the Constitution. In the first place, however, the Malay Rulers rejected such an idea fearing that they will lose the only power left for them, i.e. matters pertaining to Islam. In the end, after a series of explanations, the Malay Rulers had agreed to that idea after the Alliance had made it clear that this provision would not jeopardise the prerogative and rights of the Rulers. The White Paper indicated that the provision that ‘Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation’<sup>9</sup> will not prevent the State from being a secular State. This last part of the report has led to a series of debates among practitioners and scholars. For some scholars, Malaysia is a secular state, while others suggest that Malaysia is an Islamic state.<sup>10</sup>

Article 3(1) appears, to some extent, to reiterate the rights protected under Article 11(1) and also to reaffirm the supremacy of the position of Islam under the Constitution. Furthermore, the interpretation on the position of Islam is very crucial. Islam seems to be placed beyond other religions in the Federation.<sup>11</sup> Even though some legal commentators agree to the higher position given to Islam, it was otherwise decided in *Che Omar bin Che Soh v Public Prosecutor*.<sup>12</sup> The Supreme Court held that “although there can be no doubt that Islam is not just a mere collection of dogmas and rituals but it is a complete way of life covering

all fields of human activities, may they be private or public, legal, political, economic, social, cultural, moral or judicial”, the provision of Article 3(1) merely provided for a ritualistic and ceremonial role of Islam.<sup>13</sup> Sheridan also seems to agree with the *Che Omar* decision. He posits that Article 3(1) does not mean anything except that it imposes an obligation on the participants in any Federal ceremonial to regulate any religious parts of the ceremony according to Muslim rites.<sup>14</sup>

However, according to Abdul Aziz Bari, the *Che Omar* case does not elaborate the clear picture of the position of Islam as stated in the Reid’s Commission Report and the White Paper.<sup>15</sup> Thus, he further argues that the *Che Omar* decision merely ruled that Article 3(1) should not become the basis to challenge the legality of statutes. In other words, it merely limits the operation of Islam as stated in the provision. It must also be noted that the extent and implementation of Islam in the Constitution should not be assessed or interpreted solely from the context or point of view of Article 3(1).<sup>16</sup>

However, it is also contended that the *Che Omar* decision merely differentiated the position of Islamic law as prescribed by Article 3(1) of the Constitution. It is argued that since Islam is the religion of the Federation,<sup>17</sup> and since the Constitution is the supreme law of the Federation,<sup>18</sup> the imposition of the death penalty upon drug traffickers, not being an Islamic law *per se*, i.e. not in accordance with *hudud* or *qisas* laws, is contrary to Islamic injunction and is therefore unconstitutional.<sup>19</sup>

The Supreme Court rejected this argument, saying that the provision in Article 3(1) does not actually give the meaning that Malaysia is an Islamic state, since in reality Islamic law only applies to Muslims merely on matters related to personal laws. And since the Constitution makes a clear distinction between private law and public law,<sup>20</sup> offences like drug trafficking are under the Federal List, and therefore are constitutional.<sup>21</sup>

### **The Position of Islamic Law in Malaysia**

In the clear wording of the Federal Constitution, the word ‘law’ in Article 160 does not mention Islamic law at all.<sup>22</sup> It is a pity that the word law in this Article only ‘includes any written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof’. Similarly, no provision is traced in the Federal Constitution for the jurisdiction and powers of the *Shari’a* Courts. The only provision where the Federal Constitution does state the word ‘*Shari’a* Courts’ is in Article 121 (1A), where it takes away the jurisdiction of the Civil Courts on matters that are within the jurisdiction of the *Shari’a* Courts.<sup>23</sup>

In addition, the only jurisdiction of Islamic law is specially provided in the Ninth Schedule, List II - State List, which among other things covers only persons professing the religion of Islam.<sup>24</sup> Matters that are provided under this jurisdiction are strictly confined to personal laws such as marriage, divorce, and all ancillary matters related to them and succession. With regard to criminal laws, it has jurisdiction over only punishment of offences by persons professing the religion of Islam against precepts of that religion such as offences of eating and drinking in public during the month of *Ramadhan*, neglecting performance of Friday prayer, committing *zina* and *khalwat* and other matters that are restricted to those provided in the various respective States' Islamic Criminal Laws.<sup>25</sup>

Because the question of Islamic law is particularly confined under the jurisdiction of the respective states except in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Parliament cannot make laws with respect to any matters of Islamic law or the custom of the Malays, and no Bill for such a law shall be introduced into either House of Parliament until the Government of any State concerned has been consulted,<sup>26</sup> and this includes the purpose of promoting uniformity of the laws of two or more States,<sup>27</sup> or if so requested by the Legislative Assembly of any state.<sup>28</sup> Although the Yang di-Pertuan Agong is the supreme Head of the Federation, there is no paramount head of Islam in the entire Federation. Apart from being the Head of Islam in his own state, he is the Head of religion in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya; and also in the states of Malacca, Penang, Sabah and Sarawak.<sup>29</sup>

Since the subject of Islam has been confined under the jurisdiction of respective states, the administration of Islamic law and its relation to Muslim matters are subject to the authority of the Ruler of each state. Consequently, "the power to legislate on matters related to Muslim law lies with the State legislature".<sup>30</sup> Thus, it is the State Legislative Assembly that has the power to enact any law that is related to Muslim law, but it cannot legislate any law that is contrary to the Federal law. This is because, where any state law is inconsistent with that of the Federal law, the Federal law shall prevail, and the State law shall, to the extent of the inconsistency, be void.<sup>31</sup>

It must be noted that Parliament has no power to legislate any law that has been awarded to the Ninth Schedule, State List - II. In *Mamat bin Daud & Ors. v Government of Malaysia*,<sup>32</sup> Section 298A of the Penal Code was declared null and void as being *ultra vires* the Constitution, in respect of Federal and States jurisdictions. The Supreme Court held that it was the power of the respective State Legislative Assemblies, not the Parliament, to pass such law as being legislation on the Islamic religion according to Article 11 (4) and item 1 of List II, Ninth Schedule of the Constitution. The appellant was convicted by the High Court of being an unauthorised *bilal* (a person who calls for prayers), an act which could

cause disharmony and disunity among the local community whose religion is Islam. It was held by the Supreme Court (as it then was) that there must be a declaration that Section 298A of the Penal Code is a law with respect to which Parliament has no power to make law and such section was invalid and therefore null and void and of no effect. The ruling however, shall not apply to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya.

The jurisdiction of the *Shari'a* Criminal law is also confined to persons professing the religion of Islam. The *Shari'a* Courts Act 1965 (Criminal Jurisdiction) gives a jurisdiction to the *Shari'a* Courts to punish with up to 6 months imprisonment, or fine up to RM1,000.00, or a combination of both. The *Shari'a* Courts jurisdiction pertaining to criminal matters was amended in 1984 which gave the *Shari'a* Courts a jurisdiction of sentence up to 3 years imprisonment, or fine up to RM5,000.00 or up to 6 strokes, or any combination of these punishments.<sup>33</sup> In a nutshell, it can be said that the *Shari'a* Court cannot hear cases related to *hudud* and *qisas*. The *Shari'a* Courts can only hear cases on matters pertaining to Islamic laws that are listed under List II in the Ninth Schedule of the Constitution and the provisions embodied in the State's Islamic Law Enactments. In other words, the Civil Courts enjoy wider jurisdictions to hear cases which may include some Islamic laws which are not listed under List II of the Constitution.

## Human Rights in Malaysia

### Human Rights at a Glance

It has been acknowledged that the bulk of human rights principles include legal, ethical and philosophical foundations as well as the rather vague definition of "all that is good for human beings."<sup>34</sup> It is not the aim of this article to include all of them due to our limited scope. It is only the legal dimension of human rights which will be discussed in more detail here as it reflects the topic being discussed. In general, the basic understanding of human rights could be obtained by examining the term 'human rights' itself. Literally speaking, 'human rights' means the rights which are based on respect for the dignity and worth of all human beings and seek to ensure freedom from 'fear and want'.

Rooted in ethical principles and usually inscribed in a country's constitutional and legal framework, human rights are essential to the well being of every man, woman and child. Also, being premised on fundamental and inviolable standards, they are universal, indivisible and inalienable. Human rights are in fact a defined area of international law laid down in various international treaties and conventions and also interpreted by various international bodies and international courts.<sup>35</sup> There are many definitions of human rights and people may well differ

and argue about the relevant importance of particular rights. Human rights can be defined in various ways, such as generally accepted principles of fairness and justice inherent in every individual by virtue of their humanity or moral rights that belong equally to all people simply because they are human beings.<sup>36</sup>

The basic foundation for international law on human rights can be found in the Universal Declaration of Human Rights (UDHR), a universally recognised human rights standard adopted and proclaimed by the General Assembly of the United Nation in 1948.<sup>37</sup> The entitlement of the rights and freedoms enshrined in the UDHR applies to all human beings regardless of their race, skin, colour, sex, language, religion, political or other views, national or social origin, property, birth, or any other criteria. Indeed, the almost universal acknowledgment of the idea that all people have inalienable rights that are not conferred or granted by the state, a party, or an organisation but that are non-negotiable principles is one of the greatest achievements of civilisation.<sup>38</sup> In general, the UDHR defines human rights, embracing three critical areas:

1. ***Rights protecting life and security of the person***, developed through, *inter alia*, the rights to life, liberty and security; the right to be free from slavery, servitude, torture, and cruel, inhuman or degrading treatment or punishment; the right to equal protection under the law; the right to be free from arbitrary arrest; and the right to judicial remedy against human rights violations before a court.
2. ***Economic, social and cultural rights***, encompassing, *inter alia*, the right to standard of living adequate for health and well-being that includes food, clothing, housing, medical care and access to social services and social security; the right to education; the right to just and favourable remuneration ensuring the worker and the worker's family an existence worthy of human dignity; the right to form and join trade unions; and the right to rest and leisure.
3. ***Personal and political rights and freedoms***, including freedom of movement and rights protecting a person's privacy in matters concerning family, home and correspondence; the right to take part in government; the right to vote; the right to equal access to public service; the right to own property; and the right to freedom of expression, religion, peaceful assembly and association.

From the UDHR, various instruments and treaties have been derived - most notably the 1966 International Covenant of Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social and Cultural Rights (ICESCR). Although being enumerated and prescribed in various instruments and at different levels, the human rights principles own identical fundamental characteristics like universal, indivisible, inalienable, interdependent and interrelated.

## Fundamental Rights in the Constitution

To have a sound understanding of human rights in Malaysia, it is worthwhile to examine the main legal source of the country i.e. the Constitution. In general, human rights protection in Malaysia is provided under Articles 5-13 of the Constitution - commonly referred to as the 'Fundamental Liberties.' The meaning of the term 'Fundamental Liberties', however, was not explained, neither by the drafter of the Constitution i.e. the Reid Commission nor the Government. It was only in 1999, when the Human Rights Commission of Malaysia Act (Act 597) was enacted, when the meaning of 'fundamental liberties' was specifically clarified. Section 2 of the Act, in particular, provides that 'human rights refer to fundamental liberties in Part II of the Federal Constitution'.

In the light of that Section, we may summarise that 'fundamental liberties' provided in the Constitution reflect the basic human rights guaranteed for the citizens. As such, any discussion about human rights in Malaysia is incomplete without referring to any of the Articles in Part II of the Constitution. Nevertheless, it should also be noted that, for the purpose of the Act, references can also be made to the Universal Declaration of Human Rights 1948 (UDHR) insofar as it is not contradictory to the Federal Constitution.<sup>39</sup>

## Islam and Human Rights

There have been too many debates on whether the notion of 'human rights' is compatible with Islamic tenets. While people always refer to the *Magna Carta* or the Universal Declaration of Human Rights (UDHR) 1948 to reflect their human rights' perspectives, Muslims responded to international human rights discourse with diverse opinions and perceptions. Some groups of Muslims viewed human rights as compatible with Islam due to the fact that Islam is a mercy to the whole of mankind and thus aims to protect the welfare of every human being. On the other hand, other groups of Muslims viewed human rights pessimistically, and took a 'hard-line' approach by connecting human rights to Western philosophy with a hidden agenda that is clearly incompatible with Islam and therefore needs to be rejected. In the light of these contradicting responses, Baderin stated that Muslims' responses reflect the entrapment of human rights between humanitarianism and international politics rather than actual disagreements with the concept of human rights in Islamic law.<sup>40</sup>

It is therefore important to look at human rights within the margin of Islamic law or *Shari'a* in order to know and understand what Islam's position is in relation to human rights. In principle, Islam is actually a strong proponent of the full enjoyment of human rights. In fact, the first major contribution of Islam is a paradigm shift towards human rights. The key terms used by the Qur'an and

the *Sunnah* in this regard are *huquq Allah* and *huquq al-‘ibad*, the rights of the Creator and Sustainer, and the rights of Allah’s servants, i.e., human beings. In upholding such rights, Islam advocates values of equity, “‘*adl*” or justice, which means “placing something in its rightful place or equal treatment to others”, which forms the axiological basis for human rights in Islam.<sup>41</sup> Thus, ‘*adl* signifies “moral rectitude and fairness since it means that things should be where they belong. It is closely related to equality where it aims for a state of equilibrium in the distribution of rights and duties, and advantages and obligations in the community”.<sup>42</sup> However, it is misleading to say that justice and equality are identical, because under certain circumstances justice may only be achieved through an unequal distribution of wealth.<sup>43</sup> It begins from the point that a human being must act with justice and cause no harm or danger to his/her own self. It also requires the observance of justice towards parents, spouses, children, servants, neighbours, even strangers who may be in need of help and assistance.

The purpose of the human presence on earth, in the Islamic worldview, is to realise ‘*adl* in individual life, family, society, economy, polity and culture, or observance of human rights. ‘*Adl* also refers to fair and sincere observance of human rights even for those one may not like. The Qur’an reminds its followers:

“O you who believe, be steadfast witnesses for Allah in equity, and let not hatred of any people deviate you from justice that you deal not justly. Deal justly that is near to your duty (*taqwa*). Observe your duty to Allah. Lo Allah is informed of what you do...”<sup>44</sup>

Additionally, the sources and methods of Islamic law contain common principles of good government and human welfare that validate modern international human rights ideals. Upholding justice, protection of human life and dignity are core principles inherent in the *Shari’a*.<sup>45</sup> They constitute the overall purpose of *Shari’a* (*Maqasid al-Shari’a*) to which the Qur’an refers.

“Behold, God enjoins justice, and the doing of good, and generosity towards [one’s] fellow-men; and He forbids all that is shameful and all that runs counter to reason, as well as envy; [and] He exhorts you [repeatedly] so that you might bear [all this] in mind.”<sup>46</sup>

In general, the overall purpose of *Shari’a* or *Maqasid al-Shari’a* consists of five core and inherent rights guaranteed by Islam. They involve the protection of the right to life (*hifzal-nafs*), the right to a dynamic role and value of the intellect (*hifzu al-‘aqli*), the right to preservation of honour, dignity and lineage of humankind (*hifzu nasab wa al-muru’ah*), the right to ownership and property (*hifzul mal*), and finally the right to “religious” freedom, tolerance and pluralism (*hifzuddin*). The right to religious freedom should be understood to affirm that a

non-Muslim cannot be forced to accept Islam, since, freedom of religion means Islam recognises the right for others to observe their religion in a pluralistic world.<sup>47</sup> The five main and core rights constitute the global ethical principles advocated by Islam as the key foundations to establish full respect for human rights.<sup>48</sup> Many other rights such as the right to freedom of expression, freedom of speech, assembly and association, and the right to education (to name a few) stem from the aforementioned five main basic rights.<sup>49</sup> To have a more detail understanding on Islam and Human Rights, a number of selected human rights provisions in the Constitution will be analysed from an Islamic viewpoint:

### **Islam, Fairness and Equality – Articles 7 and 8**

Islam has made it clear that it recognises and guarantees the protection of the right to equal treatment under the principle of human brotherhood regardless of race, colour or nationality. This principle is in line with Article 8 of the Constitution which provides equality of all persons before the law and that all persons are entitled to the equal protection of the law. The ‘colour-blind’ human rights principle emphasised by Islam is due to the fact that one can neither choose his/her ethnic group nor can he/she request to be born as a person from any specific ethnic identity.<sup>50</sup> In other words, it is beyond human control to decide what ‘colour’ one will be after birth, and due to that fact it is definitely wrong to differentiate or discriminate people on the basis of their skin colour. Every one of us is descended from one set of parents, i.e. Adam and Eve.<sup>51</sup> Allah says in the Qur’an; “O mankind! We created you from a single (pair) of male and female, and made you into nations and tribes that ye may know each other” (Qur’an, 49:13).

Islam also makes it clear that non-Muslims are also to be treated respectfully – “*To you be your Way and to me mine,*”<sup>52</sup> and that there should be no compulsion in religion. Pride of place goes not to any particular family, race or nation, but rather to those who are righteous. Allah says; “*Verily, the most honoured of you in the sight of Allah is (he who is) the most righteous of you.*”<sup>53</sup> The idea of equality is also reinforced by the Prophet’s last sermon in which he said; “*No Arab has superiority over any Non-Arab, and no non-Arab has any superiority over an Arab; no dark person has superiority over a white person and no white person has any superiority over a dark person. The criterion of honour in the sight of Allah is righteousness and honest living*”.<sup>54</sup>

It is important to note that in Islam no one is above law. The right to equal treatment extends to equality before the law. When a woman of high rank was brought for trial for being involved in a theft, and it was recommended that she be treated leniently because of her rank, the Prophet replied: “*The nations that lived before you were destroyed by Allah because they punished the common man for*

*their offences and let their dignitaries go unpunished for their crimes; I swear by Him (Allah) who holds my life in His hand that even if Fatima, the daughter of Muhammad, had committed this crime, then I would have amputated her hand.*<sup>55</sup>

As far as equal treatment between men and women is concerned, Islamic law clearly recognises such equality on the principle of ‘equal but not equivalent.’<sup>56</sup> Although males and females are considered as equal, that may not imply equivalence or a total identity in roles, especially within the family.<sup>57</sup> As stated under Article 6 of the OIC Cairo Declaration on Human Rights in Islam:

- (a) Woman is equal to man in human dignity and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage.
- (b) The husband is responsible for the support and the welfare of the family.

Indeed, Islam did not discriminate against women on the basis of their ‘weaker’ or ‘softer’ natural characteristic as compared to men. Over fourteen hundred years ago, Islam addressed gender discrimination that was commonplace at that time. It established the dignified position of women as human by sharing equal rights with their male counterparts in almost all spheres of life.<sup>58</sup>

In addition, Article 7 of the Constitution provides protection against retrospective criminal laws and repeated trials. In other words, there should not be any element of unfairness in the enforcement of punishment, for instance, by punishing a person for doing something which he could not have known during the commission. Also, it is unfair for a person to be held with ‘double jeopardy’ i.e. by being tried again on the same charges following a legitimate acquittal or conviction, or by being put before multiple disciplinary proceedings based on the same set of cases and facts.

Indeed, the protection from these elements of unfairness is strongly emphasised in Islam. This is based on the Qur’anic verse that says, “*Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing.*”<sup>59</sup>

Among notable cases related to double jeopardy are *Zakaria Abdul Rahman v Ketua Polis Negara, Malaysia*<sup>60</sup> and *Shari’a Deputy Prosecutor v Kartika Seri Dewi binti Sukarno*.<sup>61</sup> In *Zakaria*’s case, he was downgraded to a lower rank and later dismissed from work on the ground that he did not seek permission to marry another wife from his superior as stipulated in the police force regulations. The Court held that he was not given an opportunity to defend himself and double jeopardy might have occurred. The Court ordered that he should be reinstated to his former position with all the due remunerations.

In *Kartika's* case, she was found guilty by the Kuantan *Shari'a* High Court of drinking liquor in public. She was sentenced to a fine of RM5,000.00 and six whippings. Later, the *Shari'a* Public Prosecutor requested before the same judge an order to place Kartika in jail in order to execute the whipping sentence. This sparked the issue of double jeopardy and caught public attention, which resulted in the end, with the Sultan of Pahang, as the Head of Islam in the State of Pahang, interfering in the case. Kartika was spared the whipping and ordered to carry out community service as a substitute.

### **Islam, Life and Security – Article 5 of the Federal Constitution**

The first and the foremost ethical principle on which human rights in Islam are founded is the value pertaining to protection of life. Perhaps nowhere has the sanctity of human life been so emphatically established as in the Qur'an, which says: "*Whosoever killed a human being for other than manslaughter or corruption on the earth, it shall be as if he had killed all mankind, and whoso saves the life of one, it shall be as if he had saved the life of all mankind...*"<sup>62</sup> Taking a life can only be done in accordance with the due process of law (*bi'l haqq* – literally "with the truth"). At the same time the Qur'an emphasises the value of human life by equating one life with that of the entire people. These injunctions apply to all human beings regardless of race or religion and make it clear that Muslims are obliged to protect life wherever possible, as well as to be careful about how a life should be taken.

In addition, many people have misunderstood the idea that 'Islam was meant for Muslims and therefore non-Muslims shall benefit nothing from it.' This is totally against the very objective of Islam as a mercy to the whole universe and as such the mercy and blessings of Islam should be experienced by all of mankind. In reality, Islam also guarantees the rights of non-Muslims since they are also human beings and this was emphasised in the address which the Prophet delivered on the occasion of the Farewell *Hajj* (pilgrimage). In this address the Prophet stated about the *dhimmi*s (the non-Muslim citizens of the Muslim state): "*One who kills a man under covenant (i.e., Dhimmi) will not even smell the fragrance of Paradise.*"<sup>63</sup>

Indeed, the provisions related to rights to life provided by the Constitution (Article 5) and many other human rights standards are in accordance with Islamic law. In one Tradition, the Prophet Muhammad PBUH is reported to have warned that: "The first offence to be judged by God between mankind on the judgment day will be unlawful taking of lives."<sup>64</sup> Based on the aforementioned Qur'anic verses and Prophetic traditions, Islamic jurists have unanimously agreed on the sacredness of human life and as such, acts against this principle such as suicide and the notion of 'right to die' are totally unIslamic.<sup>65</sup>

### Islam and Freedom of Expression – Article 10

Mohammad Hashim Kamali, in his book on Freedom of Expression in Islam<sup>66</sup> has observed that ‘it is generally acknowledged that freedom of expression in Islam is in many ways complementary to freedom of religion; that it is an extension and a logical consequence of the freedom of conscience and belief which the *Shari’ah* has validated and upholds’. Indeed, as provided by Article 10 of the Constitution, freedom of expression which may be manifested through speech or involvement in assembly and association constitute one of the core human rights principles. This is because the intellect is the greatest instrument of human life and its full and utmost potential can only be achieved through interaction of ideas and the impartation of information among individuals. Under the *Shari’a*, the main objective of this right is the ‘discovery of truth and upholding human dignity’. Islamic law endeavours a balance between these two principal objectives and does not accommodate the spread of evil or obscenity under its threshold of freedom of expression.

While the Qur’an affirms that God gave mankind the power and freedom of expression, it also directs mankind to be always apposite in speech. It states clearly in *Surah al-Nisa’* verse 148 that; “*God loves not the public utterance of evil speech*”, and in *Sural al-Nur* verse 19 that; “*Those who love [to see] scandal broadcasted among the believers will have the grievous penalty in this life and in the hereafter*”. Thus the freedom of expression under Islamic law is not absolute but restricted to apposite speech and expressions. Indeed, it is pretty clear that there is no such thing as absolute freedom in this life. While acknowledging the fact that there is a crucial need to respect one’s freedom of expression, there are, however, limits and borders which everyone has to heed.<sup>67</sup>

### Protection of Human Rights under Islamic Law in Malaysia

Under classical Islamic law, offences that violate basic rights under the overall objective of *Shari’a* or *Maqasid Shari’a*, are punishable by very strict punishment. The offences of murder (that violates the rights to life – *hifz al-nafs*), and adultery (that violates the rights to preservation of honour, dignity and lineage of humankind – *hifz al-nasab wa al-muru’ah*) are both punishable with the death penalty. In addition, the offence of drinking alcohol (that violates the right to a dynamic role and value of the intellect – *hifz al-‘aql*) shall be punishable with whipping whereas the offence of theft or robbery (that violates the rights to ownership and property – *hifz al-mal*) is punishable with amputations of hands or feet. The nature of punishments provided under classical Islamic law for the abovementioned offences show how serious Islam protects the basic rights of a human being.

Nevertheless, as far as the application of Islamic law in Malaysia is concerned, it is crystal clear from the previous discussion that such law has a very limited jurisdiction. It only covers the matters stipulated within the jurisdictions stated in the State List, under the Ninth Schedule of the Constitution. In other words, the implementation of Islamic law is purely under the jurisdiction of the State government which is mainly concerned with the non-criminal offences related to matrimonial issues. There are also some provisions granted to Islamic law to punish a number of criminal offences but that shall be in so far as it is not '*ultra-vires*' or contradictory to jurisdictions of the federal law. The maximum punishments that could be made by the *Shari'a* Court are three years imprisonment, RM5,000.00 fine and six times whipping. The *Shari'a* Court has no power to give a death penalty sentence as such power is only given by the Constitution to the Civil law under the federal government's jurisdiction.<sup>68</sup>

As such, the powers and jurisdictions granted by the Constitution to *Shari'a* law/Courts in Malaysia are confined within the prescribed jurisdictions, which may not cover the Islamic law as a whole. Therefore, there will be instances where the protection of basic human rights advocated and guaranteed by Islam may fall under the jurisdictions of Civil Laws and any related litigations shall be referred to the Civil Courts. For example, the protection of the rights to life (*hifz al-nafs*), i.e. the prohibition of murder, is not within the jurisdiction of *Shari'a* Law/*Shari'a* Court but rather, it is provided under Section 302 of the Penal Code which carries the mandatory death sentence.

### **Islamic Law Institutions and their Human Rights Roles**

Since Islam has clearly been indicated in the Constitution as the religion of the Federation, the Government, to the extent of that position, has the power to establish institutions and agencies that could mobilise the development and progress of Muslims in Malaysia. There are a number of religious authorities in Malaysia whose jurisdictions govern the issues related to Muslims including the protection of their rights as Muslims. Among notable bodies is the Department of Islamic Development Malaysia (JAKIM) which generally aims firstly, to coordinate the Islamic Affairs administration in Malaysia, of which its main role is implemented by the State Islamic Division and Council, and secondly, to create an integrated Islamic Affairs administration through effective planning, coordination and implementation. Under the purview of these two objectives, JAKIM plays a key role in legislation and the standardisation of Islamic law, Islamic administration coordination as well as the adjustment and development of Islamic education.<sup>69</sup>

Since Islamic affairs including Islamic law are under the State jurisdictions, the State governments are each required to establish a State Islamic Council or

*Majlis* which will be the religious authority at the state level. The powers of such *Majlis* are provided by the Administration of Islamic Law Enactment of their respective State. In addition to that, Islamic affairs in Malaysia are also handled by several agencies e.g. Department of *Shari'a* Judiciary Malaysia – JKSM (Islamic Judiciary and *Shari'a* Courts), the State Mufti Department (issuance of *fatwa*), and the *Tabung Haji Board* (*haji*/pilgrimage). From the above religious authorities, JAKIM, the *Majlis* and the JKSM are the main bodies who have powers to protect human rights in so far as such protection relates to specific jurisdictions vested in them by the Federal or State Constitutions.

In all respective states, offences relating to morality are punishable on the ground of protecting human rights. This can be seen with respect to intoxicating drinks<sup>70</sup>, gambling,<sup>71</sup> sexual-oriented offences like incest,<sup>72</sup> prostitution,<sup>73</sup> sexual intercourse out of wedlock,<sup>74</sup> *liwat* (sodomy),<sup>75</sup> *musahaqah* (lesbian)<sup>76</sup> and *khalwat* (close proximity between unmarried males and females).<sup>77</sup>

### **Selected Cases of Offences Relating to Punishment by the *Shari'a* Courts**

#### **1. Drinking Alcohol**

In the drinking alcohol case of *Shari'a Deputy Prosecutor v Kartika Seri Dewi Shukarno*,<sup>78</sup> the Kuantan *Shari'a* High Court in the State of Pahang caught public attention, not only nationally but also internationally, when it sentenced a model to a RM5,000.00 fine and six whippings after she pleaded guilty to consuming an alcoholic drink in public in 2008.<sup>79</sup> In his judgement, *Shari'a* judge Datuk Abdul Rahman Yunus said in the event Kartika Sari Dewi Sukarno, 33, from Sungai Siput, Perak failed to pay the fine, she would be imprisoned for three years. Kartika was accused of consuming a beer at Cherating Bay Lounge, the Legend Hotel in Cherating at about 11.40pm on July 11, 2008. She was charged under Section 136 of the Pahang Administration of Islam Law and Malay Custom Enactment 1982 (Amendment 1987). However, after a number of 'flip-flop' events, including the intervention by the Sultan of Pahang who is the Religious Head of the State and the fact that 'no experts' could mete out the caning punishment, the punishment was finally changed to community service.<sup>80</sup>

In another case in Negeri Sembilan, *Norazlisham bin Ramli v Shari'a Chief Prosecutor of Negeri Sembilan*,<sup>81</sup> the Negeri Sembilan *Shari'a* Subordinate Court sentenced a Muslim man to thirty days imprisonment for consuming alcohol in public. The appellant argued that this was his first offence and appealed to the *Shari'a* High Court. He was sentenced to thirty days imprisonment or a fine of RM2,500.00.

These two cases show that the *Shari'a* law in Malaysia, through institutions like the *Shari'a* Court has imposed punishment to ensure Muslims abstain from drinking alcohol. As drinking alcohol will be harmful to drinkers intellectually,

such protection will maintain people's rights to a dynamic role and value of their intellect – *hifzal- 'aql*.

## 2. Sexual-related Offences

In Malaysia, *khalwat* is considered an offence which is tantamount to an act preparatory to sexual intercourse out of wedlock or *zina*. Preventing *khalwat* is considered a precautionary means to avoid *zina* and therefore will guarantee the people's rights to preservation of the honour, dignity and lineage of humankind – *hifzun nasab wal-muru'ah*. This is in accordance with the principles of *saddu al-Zarai'e* and 'prevention is better than cure', which signify the need to address any problem at its very beginning.

In a recently decided case, *Salim Parlan*,<sup>82</sup> a senior official at the Youth and Sport Ministry and his former personal assistant, Nur Diyana Norslan were both fined RM 3000 respectively for committing *khalwat* at a hotel in Batu Feringghi in Penang. They were charged under Section 27 of the Penang Syariah Criminal Enactment 1996 which carries a maximum jail term of two years or fine not exceeding RM 3000 or both upon conviction. Despite both accused having pleaded guilty, the Syarie Judge Nik Bukhari Nashimy Nik Yahya said that there was still enough reason to view the case as serious because both were civil servants who should have been good examples to others.

Sexual intercourse out of wedlock (*zina*) is also considered an offence under the States' *Shari'a* Criminal law. In *Shari'a Prosecutor of Sabah v Rosli bin Abdul Japar*,<sup>83</sup> the *Shari'a* High Court of Sabah accepted the DNA test carried out on a child to prove that *zina* took place between the accused and Cik Murni binti Muhammad. The Court sentenced both with a fine of RM3,000.00 each and if failing to comply, six months imprisonment.

## 3. Apostasy and Faith-related Offences

In the Negeri Sembilan case of *Akbar Ali and another v. Majlis Agama Islam*,<sup>84</sup> the *Shari'a* High Court in Seremban rejected the applicants' applications for a declaration that they had left the religion of Islam and for a declaration that the Registrar of Converts registers the fact that they had done so. Dissatisfied with such decision, the applicants appealed the case before the *Shari'a* Court of Appeal. The Appeal Court ruled that the issue of renouncing the religion of Islam or apostasy/*murtad* is very crucial in Islam and therefore must be carefully investigated and having regard to *Hukum Syara'* and this can be done by the Court. In this case, it was observed that the applicants/appellants had failed to provide reasons for their decision to leave Islam, to make a statutory declaration and to show that they had done anything contrary to Islam. In view of such failure, the *Shari'a* Appeal Court finally dismissed the applications.<sup>85</sup> The decision affirms the fact that the *Shari'a* Law/ Courts in Malaysia have a role to play in guaranteeing and protecting the faith of a Muslim.

## Conclusion and Recommendations

Islamic law and human rights are two important elements of the Malaysian legal system which have been strongly emphasised by the Federal Constitution of Malaysia. Human rights are not alien to Islam because the coming of Islam is meant to serve as a mercy for the whole universe and to safeguard the sacred principles of humanity. As such, it is not an exaggeration to consider that any violation of human rights may be tantamount to disobeying Islamic principles. Indeed, Islam has a very close relationship with Malaysia for a twofold reason. Firstly, because, unlike other religions, Islam is the only religion whose name has specifically been mentioned in the Federal Constitution to symbolise its status as the religion of federation. The second applies because the majority of Malaysia's population is Muslim. Nevertheless, such a close relationship did not extend to the extent of full application of Islamic law. Rather, the current practice of Islamic law in Malaysia only covers a limited jurisdiction due to constitutional constraints.

From the viewpoint of the Malaysian legal system, Islamic laws become State laws with limited jurisdiction, whereas human rights are vested in the Federal Constitution. Thus, the protection of human rights may not necessarily lie under the scope of Islamic law, but rather the Civil laws or the Federal laws.

- From a policy standpoint, human rights are protected by both the Federal Constitution of Malaysia as well the Islamic Law practised in Malaysia.
- It is not an exaggeration to consider Islam as a strong proponent of human rights in accordance with its objective as a 'mercy to mankind'. Thus, any violations of human rights are equivalent to disobeying Islamic principles.
- Human rights are protected in Malaysia by the Federal Constitution through Part II (Fundamental Liberties) ranging from Articles 5 to 13.
- Despite the fact that Islam strongly supports human rights, not all human rights principles are protected by Islamic law in Malaysia. Rather, most human rights protections lie under the jurisdictions of Civil Law/Courts due to the constitutional constraints inherited since the colonial era.
- Two things need to be addressed in order to understand the topic properly; first, the notion of 'human rights' which might be different from the Western and Islamic perspectives, and second, Islamic law might also be different from its traditional principles and Malaysian law perspectives.
- Consideration could be given to amend the Constitution so that in Articles 5-13, Islamic principles and values may be considered in the application of human rights rulings in Malaysia.

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## Notes

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- 1. "Malaysia Demographics Profile 2013", last modified February 21, 2013, accessed on January 20, 2014, available online at [http://www.indexmundi.com/malaysia/demographics\\_profile.html](http://www.indexmundi.com/malaysia/demographics_profile.html).
- 2. *Ibid.*
- 3. Syed Muhammad Naguib al-Attas, *Preliminary Statement on a General Theory of the Islamization of the Malay-Indonesia Archipelago* (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1969), 11.
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- 5. *Ibid.*
- 6. Mahmood Zuhdi Hj. Ab. Majid & Raihanah Azhari, *Undang-Undang Keluarga Islam: Konsep dan Perlaksanaannya di Malaysia* (Kuala Lumpur: Karya Abazie, 1989), 38; see also Mahmud Saedon Awang Othman, "Penyelesaian Masyarakat Majmuk Melalui Perundangan Islam", *Majalah Dakwah* (September 1984), 43.
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- 8. The Reid Commission was set up by the British government to draft a new constitution for Malaya upon its independence on 31 August 1957. It was led by Lord Reid. Out of its five members, only one was a Muslim with no local representative.
- 9. This provision was included into Article 3(1) of the Federal Constitution.
- 10. For further reading on the debate of this, please refer to Mohamed Azam Mohamed Adil, "Law of Apostasy and Freedom of Religion in Malaysia", *Asian Journal of Comparative Law* 2 (2007), 145-147; Shad Saleem Faruqi, "Constitutional Perspectives on Freedom of Religion, Secularism and Theocracy" in Ibrahim Abu Shah (ed.), *Islam, Democracy and Good Governance – The Malaysian Experience Essays in Honour of Tun Dr Mahathir Mohamad* (Shah Alam: Pusat Penerbitan Universiti Teknologi MARA, 2004), 88.
- 11. See judgement in *Meor Atiqulrahman bin Ishak & Anor. v. Fatimah Bte Sihi & Anor*, [2000] 5 MLJ 382; In this case, the learned judge, Dato' Mohd Noor Abdullah interpreted Article 3(1) that states "Islam is the religion of the Federation but other religions may be practised in peace and harmony in any part of the Federation" which means that Islam is the supreme religion and its position is not in par with other religions such as Christianity, Buddhism, Hinduism and others. It is placed beyond other religions in the Federation; see also Abdul Aziz Bari "Islam in The Federal Constitution: A Commentary on The Decision of *Meor Atiqulrahman*" [2000] 2 MLJ at cxxxv-cxxxix; see also Abdul Aziz Bari, "Murtad Dalam Konteks Kebebasan Beragama di Malaysia" *Malaysian Journal of Law and Society (MJLS)* 3 (1999), 54-57; Abdul Aziz Bari, "Negara Islam Dalam Kerangka Perlembagaan Malaysia" *Dewan Masyarakat*, Dewan Bahasa dan Pustaka, (November 2001), 22.

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15. See Abdul Aziz Bari, *Islam Dalam Perlembagaan Persekutuan* (Petaling Jaya: Intel Multimedia and Publication, 2005), 21-23, 80-81; see also Abdul Aziz Bari, “Murtad Dalam Konteks Kebebasan Beragama”, MJLS 3 (1999), 55; see also Abdul Aziz Bari, “Islam in The Federal Constitution: A Commentary on The Decision of *Meor Atiquilahman*” [2000] 2 MLJ at cxxxviii; see also Abdul Aziz Bari, “Negara Islam dan Kerangka Perlembagaan Malaysia”, *Dewan Masyarakat* (November 2001), 22.
16. See Abdul Aziz Bari, “Islam in The Federal Constitution: A Commentary on The Decision of *Meor Atiquilahman*” *ibid* at cxxxix.
17. Article 3(1) of the Federal Constitution.
18. Article 4(1) of the Federal Constitution.
19. See *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55; see also Kevin Tan *et.al*, “Constitutional Law in Malaysia and Singapore,” *Malayan Law Journal Sdn. Bhd* (1996), 691.
20. Ninth Schedule, List 1, Federal List; List 2, State List, and List 3, Concurrent List.
21. Ibid; see also Andrew Harding, “The *Keris*, The Crescent and the Blind Goddess: The State, Islam and the Constitution in Malaysia.” *Singapore Journal of International and Comparative Law* 6 (2002), 166-167.
22. Ibid; Prof. Harding suggests that “there is no provision for the *Shari’a* to be a source, or the basic source, of legislation”.
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24. It says that ‘Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trust; *Wakafs* and the definition and regulation of charitable and religious trusts, the appointment of trustees and incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; *Zakat*, *Fitra* and *Bait al-Mal* or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organisation and procedure of *Shari’a* Courts which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as concerned by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom’.
25. Ninth Schedule, List II – State List.

26. Article 76 (2) of the Federal Constitution.
27. Article 76 (1) (b) of the Federal Constitution.
28. Article 76 (1) (c) of the Federal Constitution.
29. Article 3 (2) of the Federal Constitution.
30. Article 74 (2) of the Federal Constitution; see also Hamid Jusoh, *The Position of Islamic Law in the Malaysian Constitution With Special Reference to the Conversion Case in Family Law* (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1991), 35.
31. Article 75 of the Federal Constitution.
32. [1988] 1 MLJ 119.
33. The *Shari'a* Courts Act (Criminal Jurisdiction) of 1965 (Amended in 1984).
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