

## **ACHIEVING JUSTICE THROUGH IMPLEMENTATION OF SHARIAH: CHALLENGES AND THE WAY FORWARD\***

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### **INTRODUCTION**

*Assalamu'alakum warahmatullahi wa barakaatuh*

It is my great pleasure to be invited to speak at this auspicious event in the honour and memory of our beloved teacher the late Tan Sri Professor Emeritus Ahmad Mohamad Ibrahim, or Professor Ahmad Ibrahim or as we used to address him Prof Ahmad. Indeed, I am very honoured to be here today, amongst colleagues and friends. Many of us have known Prof Ahmad for so long and many of us have personal experience learning from him and working with him or under his supervision. I am sure, many of us have a lot more to say about Prof Ahmad.

Given the range of issues that Almarhum Prof Ahmad has worked on during his distinguished years as “the” Professor of law, when the Ahmad Ibrahim Kulliyah of Laws Dean invited me to give this lecture, I have to think quite a bit to focus on. I settled on what issues Almarhum Prof Ahmad would have focussed on making the Islamic legal system, which includes Islamic law and the Shariah courts, the mechanism to achieve justice. In relation to the subject, I would like to speak on a few critical issues facing the Shariah in Malaysia. The rest of my speech is structured as follows.

I will commence by setting out the general matter about the Constitution, the Shariah Courts and Shariah legislations. This discussion shall include issues on the jurisdiction of the Federal and State legislatures on Shariah matters. I shall then highlight the critical

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matters on matrimonial matters with a particular emphasis on how the law has been improved in order to give justice, and playing on this, I will highlight some improvements that should have been made to make a just law, which includes the formation of the Malaysian Common Law.

## **BACKGROUND**

It is a well-known fact that the practice of dual jurisdiction means the Parliament enacts laws at the federal level that apply throughout the country and the state legislative assembly enacts laws that have limited application for its respective state. The separation of federal and state jurisdiction in the Malaysian legal system also implies that there are civil and Shariah courts. Though the reason for this segregation originated from the historical setting of this country, the position of Islam as the religion of the Federation is given a special mention in the Federal Constitution, for example, under Articles 3, 11, 12, 37, and the Fourth Schedule to the Constitution.

Meanwhile, List II (State List) of the Ninth Schedule states to the effect that all States forming the Federation are given authority to govern Islamic law in their respective states. This includes matters dealing with, among others, family and personal law, and offences against the precepts of Islam. At the same time, States are also empowered to legislate laws pertaining to the administration of Islamic law including the formulation of substantive, procedural law, as well as the organisation of Shariah courts.

Historically, Islam has long been established in the country and transformed the culture of the Malays since the fourteenth century<sup>1</sup> before the conquest of Malacca by the Portuguese in 1511 and continues to be so under the British. Muslim law with the relic of Malay customary law was followed and preserved during the Portuguese and Dutch, but mostly replaced during the British

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<sup>1</sup> Mohd. Taib Osman, *Islamisation of the Malays: A Transformation of Culture* in Ahmad Ibrahim et al., *Readings of Islam in Southeast Asia*, (1985) Institute of Southeast Asian Studies, pp. 44-47 at p. 47

administration. Be that as it may, Islamic law was recognised as the law of the land.<sup>2</sup>

According to Professor Ahmad Ibrahim, through the establishment of indirect rule and the establishment of secular institutions, replacing Islamic law and Malay *adat* (custom) with English law, Islamic law was rendered isolated in the narrow confinement of personal status.<sup>3</sup> Pushing the administration of Muslim law to the *Qadis* Court with limited facilities had further subjugated the position of Islamic law in Malaysia.<sup>4</sup>

This is in contrast to the other developments in many Middle Eastern countries where Shariah courts were transferred to national courts while in Malaysia the Shariah courts 'have crystallised into almost rival judiciaries with concurrent though restricted jurisdiction'.<sup>5</sup>

Thus, in practice, many cases involving Islamic law disputes had been interfered with by civil courts where principles in Islamic law were not used to resolve the disputes. Islamic law has been neglected and subordinated to the civil courts during the time of British control in *Tanah Melayu* and had been said to continue to remain so after independence.

In some cases, even though the principles cited are not plainly contrary to Islamic law, the civil court chose to apply civil law as the basis of the decision. For example, in a custody dispute involving Muslim children between *Myriam v Mohamed Ariff*<sup>6</sup> the mother applied for the custody of two young children; a girl aged 8 years and a boy aged 3 years old. The facts revealed that the mother had been divorced by the respondent, the father of the infants. There was a consent order giving custody of the children to the father and the

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<sup>2</sup> *Ramah v Laton* (1927) 6 FMSLR 128. See also M.Hashim Suffian, (1976) *An Introduction to the Constitution of Malaysia*, 2<sup>nd</sup> Edition, p. 43. Muhammad Kamil Awang, (2002) *The Sultan and the Constitution*, (2000) Dewan Bahasa dan Pustaka, p. 89.

<sup>3</sup> Ahmed Ibrahim, *The Introduction of Islamic values in the Malaysian Legal System* [1994] 2 IKIM Law Journal 27-44, p.36

<sup>4</sup> *Ibid.* 41

<sup>5</sup> See Abdul Majeed Mohamed Mackeen, *The Shari'ah Law Courts in Malaya*, in Ahmad Ibrahim et al., *Readings of Islam in Southeast Asia*, (1985) Institute of Southeast Asian Studies, pp.229-235, at p. 229

<sup>6</sup> [1971] 1 MLJ 265

mother remarried to a man not related to the children which would deprive the mother's right to custody though the ruling is not absolute. The mother applied for custody of the two children in the civil High Court.

One of the issues that were raised in this case was whether the High Court has the jurisdiction to deal with the custody of Muslim children instead of *Kathi (Kadi) Besar* under the Selangor Administration of Muslim Law Enactment 1952. The High Court concluded that it has the jurisdiction to adjudicate the matter based on the same Enactment that also provides for the right of the civil court to adjudicate. Furthermore, the civil law principle of the subject matter in dispute is consistent with the Muslim religion and custom of the Malays in which the welfare of the children is paramount.

The court decided to use its discretionary power and based its judgment on the Guardianship of Infants Act 1961. Even though the welfare principle as envisaged in the Act of 1961 is in line with the Islamic principle regulating child custody (*hadanah*), it does not necessarily mean that the court must 'adhere strictly to the rules laid down under the Muslim religion'. Thus, the custody of the girl was given to the father and the younger boy to the mother.

While admiring the accuracy of the judgment of the court in elucidating details of welfare principles from both common law and Islamic law perspectives, the civil court had interfered with the power and jurisdiction of the *Kathi* to adjudicate matters of Shariah. The interference also has subjugated the competency and deprived the opportunity of the Shariah court to fully develop the Islamic law.

Similarly in *Robert v Umi Kalthom*<sup>7</sup> in which the *Kathi*'s court was conferred with the jurisdiction under the Administration Muslim law Enactment to decide on a dispute involving *harta sepencharian* (jointly acquired property). Instead, the matter was brought by the parties to the civil court. While recognising the contribution of the spouse as *harta sepencharian*, the court concluded that *harta sepencharian* is a Malay *adat* where such practice must be given judicial recognition.

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<sup>7</sup> [1966] 1 MLJ 98

This judgment seems to gain influenced from earlier decided case of *Hajah Lijah v Fatimah*<sup>8</sup> where a widow claimed her share in the property of the deceased. The judge ruled that *harta sepencharian* is not rooted from Islamic law but rather a Malay *adat*, an utter confusion between *adat* law and Islamic law.

The same approached was echoed in *Boto binti Jaafar v Taha*<sup>9</sup> where the wife claimed her share on *harta sepencharian* and the case was heard in civil High Court. The claim for *harta sepencharian* is provided under the state Islamic Family law which is under the jurisdiction of Shariah courts. Though the wife's claimed has been successfully established, the High Court remarked that *harta sepencharian* is rooted in custom or Malay *adat* rather than Islamic law.

The above shows that the uncertainty and difficulty in the application of general law for Muslim was due to utter confusion of English judges which often described as 'Muhammadan law varied by local custom'<sup>10</sup> in understanding the root source of Islamic law causing the judge to adopt the Malay custom in deciding the case of *harta sepencharian*.<sup>11</sup>

This is also debatable among earlier writers and legal researchers where the writings connote the understanding that matrimonial property among Malay families was strongly influenced by the Malay custom which is of matriarchal origin.<sup>12</sup> Only in later cases that *harta sepencharian* found its root in Islamic law.<sup>13</sup>

The failure of the judges to address the basic principles of Islamic law governing this issue reflects their unfamiliarity when

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<sup>8</sup>[1950] MLJ 63

<sup>9</sup> [1985] 2 MLJ 98

<sup>10</sup> As quoted in Abdul Majeed Mohamed Mackeen, The Shari'ah Law Courts in Malaya, in Ahmad Ibrahim et al., *Readings of Islam in Southeast Asia*, (1985) Institute of Southeast Asian Studies, pp.229-235, p. 232

<sup>11</sup> M.B. Hooker (1991), *Undang-undang Islam di Asia Tenggara*, (Kuala Lumpur; DBP) 156-157

<sup>12</sup> See Ahmad Ibrahim (1984), *Family Law in Malaysia and Singapore*, (Singapore:MLJ) 252 ; David C.Baxbaum, (1968) *Family Law and Customary Law in Asia ; A contemporary Legal Perspective*. p. 130.

<sup>13</sup> See for example decision of Syariah courts in *Zainuddin v Anita*(1982) 4 JH 73 and *Mansjur v Kamariah* [1988] 3 MLJ xlix

dealing with Islamic law. This development prompted an appreciation for the Shariah matters to be dealt in Shariah courts where Islamic law can be best illustrated and developed.

### **ISLAMIC LAW IS NOT ONLY THE BEST IN THEORY BUT ALSO THE BEST IN PRACTICE**

The issue that remains to be answered is whether Shariah court judges are also competent to deal with complex legal arguments. On that note, as reiterated by Professor Ahmad Ibrahim that a great deal still remains to be done to reestablish the Shariah courts so that they can hold the position of respect and authority corresponding with that of ordinary courts so that *Islamic law is not only the best in theory but also the best in practice*.<sup>14</sup>

In improving the Islamic legal system practices in the country, Article 121 of the Federal Constitution was amended. In 1988, there were two important amendments made to the Federal Constitution. Both are related to one another.

An amendment was on Article 121(1) and the other amendment is the inclusion of Article 121(1A). Article 121(1A) could not have effect if Article 121(1) was not amended. Amendment to Article 121(1) deleted the vesting clause which says to the effect that the judicial power is vested in the judiciary. In addition, the judicial power is as determined by Parliament.

Meanwhile, the new clause, that is Clause (1A) of Article 121 provides that the civil courts not exercised its jurisdiction over matters that fall within the jurisdiction of the Shariah courts. If the dispute is for example, on the validity of *wakaf*, only the Shariah court which will have the jurisdiction. As has been mentioned earlier, before this amendment was made, the civil court several times made decisions on Islamic matters and to some extent overruled decisions of Shariah courts.

It is submitted that Almarhum Professor Ahmad Ibrahim is known as instrumental in initiating the insertion of Clause (1A) into Article 121. He predicted that “it would appear that the effect of the

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<sup>14</sup> See for example Ahmad Mohamed Ibrahim, “The Superiority of the Islamic System of Justice” [1994] 4 IIUMLJ ,pp.11-12

amendment to art 121 of the Federal Constitution would be to prevent for the future any conflict between the decisions of the civil courts and the Shariah courts, as the matters can only be brought to the Shariah courts and the High Court will no longer have jurisdiction to deal with them.” Hence, by virtue of the amendments, it was expected that the Shariah court would become free from the civil court’s interference and all Shariah matters fall within the Shariah court’s jurisdiction.

In tabling the amendment on 17 March 1988, the Prime Minister of the time explained that we had our own civilisation and by using foreign laws, "the courts make interpretations that run away from the meaning and spirit of the laws that were enacted." They were "not bound by the purpose and meaning of laws enacted by Parliament." Furthermore, the civil court often interfered with the decisions of the Shariah court. This caused dissatisfaction among Muslims. In his speech as recorded in Hansard the Prime Minister stated:

“Tuan Yang di-Pertua, satu perkara yang sering menjadi sungutan dan menimbulkan rasa tidak puas hati di kalangan masyarakat Islam di negara ini ialah keadaan di mana mahkamah-mahkamah sivil dapat mengubah atau membatalkan suatu keputusan yang telah dibuat oleh mahkamah Syariah. Misalnya, pernah berlaku keadaan di mana seseorang yang tidak puas hati dengan keputusan mahkamah Syariah tentang penjagaan kanak-kanak telah membawa guaman itu ke Mahkamah Tinggi pula dan berjaya mendapat keputusan yang berlainan. Kerajaan berpendapat bahawa keadaan seperti itu menjejaskan kewibawaan mahkamah Syariah dan pelaksanaan dan pentadbiran Hukum Syara’ di kalangan umat Islam di negara ini. Adalah sangat penting menjamin kewibawaan mahkamah Syariah oleh kerana sudah sewajarnya mahkamah Syariah diberi kuasa penuh untuk menentu dan memutuskan perkara-perkara yang termasuk dalam bidanguasanya, apatah lagi kerana perkara-perkara itu melibatkan Hukum Syara’.

Oleh yang demikian, adalah dicadangkan juga supaya ditambah satu Fasal baru kepada Perkara 121 itu, iaitu Fasal (1A), yang menjelaskan bahawa mahkamah-mahkamah yang tersebut dalam Perkara itu tidak mempunyai bidanguasa berkenaan dengan apa-apa perkara yang terletak di bawah bidanguasa mahkamah Syariah. Adalah menjadi hasrat Kerajaan untuk mengadakan Mahkamah Tinggi supaya rujukan boleh dibuat oleh pihak yang tidak berpuas hati.”

It is very clear that the inclusion of Article 121(1A) was introduced to guarantee the authority or the jurisdiction of the Shariah court. Since this constitutional amendment was made, the positions of the civil court and the Shariah court have been recognised as equivalent and go hand in hand according to their respective jurisdictions. Not one is higher than the other.

Before the amendments were made, it was not surprising to see that some Muslims sought remedies in civil court in certain Islamic matters on the belief that civil court is more competent to decide<sup>15</sup> and lack of statutory provisions to support the claim.<sup>16</sup> Thus enacting statutory laws is necessary to avoid cases being brought and heard in civil court even though the subject matter is within the State List.

This has been suggested in the decision of *Muhammad Habibullah bin Mahmood v Faridah bte. Dato' Talib*<sup>17</sup>. The applicant's wife applied for an interlocutory order to restrain the husband from abusing her pending divorce proceeding in Selangor's Shariah Court. The High Court granted her application. However, the husband appealed against the order to the Supreme Court on the ground that the civil High Court has no jurisdiction to make such order as a similar remedy is available in Shariah court<sup>18</sup> referring to Article 121 (1A) as the authority to support his argument. The judge, Harun Mahmud Hashim (as he then was) decided that the civil court shall not have jurisdiction on matters where the remedy is statutorily available under the Shariah legislation, that is Section 107 of Islamic Family law of Selangor Enactment. The judgment in a way is an affirmation that the Shariah court has full authority on matters that involve Muslims and Islamic law after the amendment was made to Article 121(1) and (1A).

However, in another context, what would be the case when the specific area of Islamic law is not statutorily provided. This concern was raised due to the fact there are many aspects of Islamic law have not been explicitly regulated such as inheritance, *wakaf* and *nazar*, (to mention a few) where the dispute arises from this subject matter could

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<sup>15</sup> See *Hajjah Amin@Che Tom bt Kassim v Haji Abdul Rashid bin Abdul Hamid* (1994) 9 JH 209

<sup>16</sup> See *Lim Chan Seng V Pengarah Jabatan Agama Islam Pulau Pinang* (1996) 3 CLJ 231

<sup>17</sup> [1992] 2 MLJ 783

<sup>18</sup> See Selangor Family law Enactment, s. 107



be litigated in civil courts if the restrictive approach in *Mohammad Habibullah's* case is to be the guiding principle.

As pronounced by Justice Abdul Hamid that the decision of the Federal Court in *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia*<sup>19</sup> has settled the issue where the court ruled that the correct approach is to see whether or not the Shariah court has been expressly conferred jurisdiction on the given matter.<sup>20</sup> The issue is what would be the guiding principles in cases where there is no express provision in statutory form such as apostasy.

### **AMENDMENT TO ARTICLE 121 AND PURSUIT OF JUSTICE**

Both Islamic law and civil law are branches of the legal system applicable in our country where justice is in pursuit. In a dual legal system, both court systems must cooperate with each other in attaining this noble objective rather than escalating judicial rivalries. Particularly, in the context of family law, both laws are compatible in many respects and there are abundant opportunities for the law in both jurisdictions to be treasured in celebrating peaceful co-existence between different legal systems.

Since the 1988 amendment, there have been cases where the civil courts respect the Shariah court's exclusive jurisdiction over matters listed in Item 1. For example, the case of *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793, whereby the Supreme Court held that the Shariah court had the jurisdiction, and thus by virtue of Article 121(1A), the jurisdiction of the High Court was ousted.

Be that as it may, recently, the recognition of basic structure doctrine by the court has turned its back on the 1988 constitutional amendment. The Basic Structure Doctrine is applied by the court by recognising the court decisions from India and Canada. It has been argued by some sectors that the Federal Constitution must be

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<sup>19</sup> [1999] 1 MLJ 489

<sup>20</sup> Abdul Hamid Mohamad, Civil and Syariah Courts in Malaysia; Conflict of Jurisdiction in Zainal Azam Abdul Rahman(ed) (2003) *Islamic Law in the Contemporary World*, IKIM, 9-30

interpreted by the Court through a secular judicial point of view, and secular human rights are part of this 'basic structure' doctrine.

Thus, *via* the Basic Structure Doctrine, it has been argued that judicial power is exclusive to the judiciary at the federal level. Based on this principle, the court then decided that as a basic structure of the constitution, the civil court is higher than the Shariah court, and this means that this arrangement could never be changed.

Meanwhile, the unanimous Federal Court's decision in *Indira Gandhi* [2018] 1 MLJ 545 on the subject matter can be summarised as follows, that is to say, 1988 amendment to Article 121, by the inclusion of Clause (1A) does not constitute a blanket exclusion of the jurisdiction of the courts at the federal level in Islamic law matters if the question of unconstitutionality or illegality is present in the case. This means that, Article 121(1A) did not oust the jurisdiction of the civil courts nor did it confer judicial power on the Shariah courts. Consequently, the jurisdiction could not be excluded from the civil courts and be conferred upon the Shariah courts by virtue of Article 121(1A) of the Constitution.

It is clear that the Federal Court's decision in *Indira Gandhi* has rejected the argument that Article 121(1A) recognised the Shariah court's exclusive jurisdiction. Thus, it follows that the intended effect of the amendment to Article 121(1) was rejected by the court.

This leads us to the discussion on challenges faced by the Islamic Legal System in Malaysia.

## **CHALLENGES FACED BY ISLAMIC LEGAL SYSTEM IN MALAYSIA**

Meanwhile, another issue faced by the Islamic legal system in Malaysia is the legal challenge to the validity of many legislations relating to Islamic law. For instance, in the case of *Iki Putra* [2020] 6 CLJ 133, the Federal Court has determined that states making up the Federation no longer have jurisdiction to legislate on Shariah offences on matters under the Federal List.

Such determination has opened up avenues for challenging Shariah offences. Consequently, the authority and jurisdiction of the Shariah court are being challenged by strategic litigations. In addition,

the basic structure doctrine would also be used to invalidate and purge Shariah laws especially those concerning Shariah offences, which are only applicable to people professing the religion of Islam. It is possible that the law made in pursuance to the State List, even if it involves the precepts of Islam and only applies to Muslims, be declared invalid because it contradicts the basic structure doctrine.

In this regard, there is a constitutional challenge at the Federal Court on the claim that 20 provisions of the Kelantan Syariah Criminal Code (I) Enactment 2019 are invalid as there are federal laws covering the same offences. Through the court challenge, the applicants are seeking for a declaration from the Federal Court that the 20 provisions of Kelantan's Syariah Criminal Code (I) Enactment 2019 are invalid and null and void, as the Kelantan state legislature has no powers to make laws on these matters.

It is observed that the legacy of Professor Ahmad Ibrahim in enhancing the Shariah court system and Islamic law in Malaysia continues facing challenges.

Now I would like to focus the presentation on matters relating to family law.

## **DEVELOPING ISLAMIC FAMILY LAW SYSTEM**

Developing Islamic Family Law in Malaysia is among the ways forward to achieve justice in the Malaysian legal system. In Malaysia, the current national family policy highlights family welfare based on common family values such as love, honesty, justice and equality, regardless of gender and age. This policy is intended to encourage all interested parties to focus on the family's perspectives on the design, strategy and development of the country that are to be implemented. The objective of this policy is to develop a harmonious family that is healthy and sustainable in order to ensure social stability.

As far as the Islamic family court is concerned, for Muslims, Shariah courts are claimed as family court because the power and jurisdiction handled by Shariah courts are family-related matters despite the fact that many aspects of the family court system are not in

place.<sup>21</sup> However, the need to have a specialised family court with relevant processes and procedures is required to replace the current litigation processes<sup>22</sup> for both civil and Shariah courts. To avoid conflict of jurisdiction, going forward, particularly in family matters, we may consider to establish a single-family court system presided by judges with expertise in civil and Shariah.

It may be considered There may be a single-family court can be established. If we choose to have two different court systems to apply civil and Shariah matrimonial matters, judges to preside over the court shall be those who are experts in Islamic law matters, to be specific, judges who are experts on Islamic family law. At this juncture, it would be proper to say that, having a single-family court to hear cases involving Muslims and non-Muslims parties is a way forward towards achieving justice.

In addition to the proposed “Development of Islamic Family Law System”, there must also be reform to the family law.

## **REFORM OF FAMILY RELATED MATTERS**

Malaysian Family Law has not seen much changes in the recent years. But where changes have occurred it has been a result of government-led reform, rather than evolutionary changes in the courts. Even where reform was instituted, it required grievances to be raised at the national level (in effect overriding the state-centric approach of the existing law). This can be seen in the latest reform of the law related to the unilateral conversion of children by one spouse to Islam. The issue, in fact, was overdue for more than 30 years.

Twenty-first century family law is adopting a more pragmatic approach in order to bring families together, regardless of their marital status, after experiencing the severe impacts of divorce. The adoption of a friendlier family dispute resolution process, operated through a well-structured family court system, would significantly improve family relationships post-divorce. Not only is this approach consistent with positions adopted in other common law and civil law jurisdictions,

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<sup>21</sup> Ibid.

<sup>22</sup> Shamsuddin Suhor, “Mahkamah Keluarga (Family Court) in Shamsuddin Suhor and Noor Aziah Mohd. Awal (2007) Undang-undang Keluarga (Sivil), Dewan Bahasa dan Pustaka.

but it is also consistent with the spirit of Qur'anic injunctions that emphasise amicable settlement in resolving marital conflicts internally or in the forms of mediation or reconciliation by the relevant authorities. To date, those mechanisms, though available, are scattered and handled by different agencies and ministries.

To realise the government's vision of empowering family and community systems that are sustainable, the reform of family-related matters will be a turning point in solving comprehensive and holistic family conflicts. Since the family is the nucleus of the society, it is important to ensure that family institutions are strengthened in establishing a fully moral and ethical society.

The need for a one-stop local centre capable of addressing all family-related issues irrespective of race, religion and political affiliation is inevitable in providing support system to those who are in marital conflict. Studies have shown that these family-related problems are global problems that need to be addressed comprehensively.

In addition, reforms must also address the applicable laws. Thus, the Islamic law applicable in this country must be contextualised in the needs of the people who would not dispense with the fundamental principles of Islamic law.

## **CONTEXTUALISING ISLAMIC LAW**

We should be confident of the superiority of Islamic law. Thus, the needs to have codified Islamic law and also the need to amend the law when its application does not serve justice. Both Islamic law and common law are adaptable to the theory of change and have universal values to commensurate human needs.

As observed by Professor Ahmad Ibrahim in his article, "Superiority of the Islamic System of Justice",<sup>23</sup> the strength of English law is that it has been able to change from time to time, abandoning what is unsuitable and taking what is better suited to the needs of

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<sup>23</sup> [1994] 4 IIUM Law Journal pp. 1-12, at p. 11.

society and this way has come nearer to Islamic law.<sup>24</sup> Thus, new situations and challenges suggest the need to develop possible and permissible methods that necessitate the application of fundamental principles in an ever-changing world and modern realities in line with the objectives of Shariah.

Therefore, contextualising Islamic law in matters that involve *ijtihadi/fiqhi* approach,<sup>25</sup> such as determining the religious status of a child in interfaith relationship, is an example where the law can be harmonised. The applied law must take into account the reality in the society. The failure to consider the needs of such change would result in the failure of justice.

In order to make contextual Islamic law or Shariah legislations, the aspirations and the idea of Malaysian Common Law, as initiated by Almarhum Professor Ahamad Ibrahim is the most notable.

## MALAYSIAN COMMON LAW

Common law has a variety of meanings. It may refer to the old English customs decided by English judges and rules developed by common law courts. Common law in this paper refers to judge-made laws in contrast to statutory laws.<sup>26</sup>

The judiciary could help much in sculpting the law of Malaysia to achieve justice. We have inherited the English common law through the development of the plural legal system in Malaysia. The Malaysian legal system which is founded on Islamic law and customs incorporated the English common law after the British intervention in Malaya and Borneo in the nineteenth century. In this respect, the judicial method in developing the law as found under the English common law could

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<sup>24</sup> Ahmad Mohamed Ibrahim, "Superiority of the Islamic System of Justice" [1994] 4 *IIUM Law Journal* pp. 1-12, at p. 11

<sup>25</sup> For further discussion see Najibah Mohd Zin, Roslina Che Soh, Legal Disputes in Determining the Religion of the Child when one Parent Converts to Islam under Malaysian Law, *Australian Journal of Basic and Applied Sciences*, 6(11): 66-73, 2012

<sup>26</sup> Farid Sufian Shuaib, "Towards Malaysian Common Law: Convergence between Indigenous Norms and Common Law Methods" (2009) 13 *Jurnal of Law* 159.

be used to develop Malaysian common law, molded after the indigenous norms and customs.<sup>27</sup> Examples of such legal development may take place in the area of law of torts (such as law of defamation and nuisance) and the law of contract.

Almarhum Professor Ahmad Ibrahim envisaged the amendment to Section 3 and 5 of the Civil Law Act 1956 to facilitate the development of the Malaysian common law. He proposed that a provision should be inserted to provide that where there is *lacuna* or gaps in the written law, the courts should develop the Malaysian common law taking into account the local religion and custom.<sup>28</sup>

Unfortunately, there is no amendment to sections 3 and 5 that is relevant to the development of the Malaysian common law. However, this is not to say that the Malaysian courts have not considered altogether the local condition – which should include the religion and custom of the locals. The court in *The Ritz Hotel Casino v Datuk Seri Osu Haji Sukam*<sup>29</sup> has considered religious teaching of Malaysian in considering the issue of the enforcement of foreign judgment for recovery of gambling debt.

Since there is no legislative intervention – it is still hopeful that judges to consider local beliefs and customs in developing Malaysian common law. A law that is developed from the indigenous norms and customs, which include Shariah, would certainly be more fitting to achieve justice.

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<sup>27</sup> Farid Sufian Shuaib, “Towards Malaysian Common Law: Convergence between Indigenous Norms and Common Law Methods” (2009) 13 *Jurnal of Law* 159.

<sup>28</sup> Ahmad Ibrahim, “Common Law di Malaysia” (1989) 1 (1) *KANUN* 3.

<sup>29</sup> *The Ritz Hotel Casino v Datuk Seri Osu Haji Sukam* [2005] 6 *MLJ* 760.

## CONCLUSION

Let me wrap up with a few thoughts.

First, I want to outline what I consider to be Almarhum Professor Ahmad Ibrahim's overall approach to uphold the Shariah system as the best legal system to be applied in Malaysia – a deep recognition to the holistic justice that the Shariah system can offer to the nation with diversity and dynamic sociology.

Secondly, debate on the current judicial attitude towards the jurisdiction of the Shariah court, the application of the doctrine basic structure and the interpretation of Article 121; and the public perceptions towards the Islamic legal system in Malaysia shall always be among the challenges that need new and refreshing ideas to make Professor Ahmad Ibrahim's aspirations and ambitions a reality.

Thirdly, humanising and contextualising Islamic law and Islamic legislation is the way forward. This requires undivided commitment by all parties, including the academia and the practitioners. Meanwhile, the public must at all times be educated on the subject. Most important, I must say, is the government's commitment. The government will ensure further improvement for the development of Islamic legal system in this country for the sake of achieving justice. This is indeed part of the government's commitment that I can give assurance.

Thank You

Wassalamu'alaikum wrt wbt.