

The Major Trends of Islam in Contemporary Malaysia and their Influence on the Form of Islamic Family and Penal Law

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Background

Modern day Malaysia is one of the most important Muslim countries in the world and is a very important centre for contemporary Islamic thought. Malaysia obtained independence in 1957 and was established as a federation consisting of thirteen independent states and three federal territories. Malaysia is a multiethnic and multicultural country. Ethnic Malay people represent a bare majority and Islam is the essential ingredient in relation to their identity. Non-Malays (mainly Chinese and Indians) make up an important part of the population and require an assurance of their rights. Islam was at first regarded as a local issue only, as a symbol of Malaysian culture, and was strictly separated from politics. But Malaysia's Constitution declares Islam as the official state religion in Article 3 (1), while currently guaranteeing religious freedom for other groups of citizens. The Malaysian Constitution proclaims in Articles 3 (3) and (5) that the rulers of each state are head of the religion of that state as well. Therefore, Islam has become an important part of Malaysian politics.

Malaysia has been led from independence till the present by a coalition called the National Front (*Barisan Nasional*) and this represents the major political force in the country. The National Front comprises the very important Malay nationalistic party the United Malays National Organization (UMNO), the Malaysian Chinese Association (MCA) and the Malaysian Indian Congress (MIC), as well as other small parties. The National Front has always been focused mainly on the economic growth and development of the country and within this field it has achieved significant success. But its long-term dominance has been accompanied by political scandals and accusations of corruption. In the last parliamentary elections in March 2008 there was a weakening of the ruling coalition in favour of the opposition parties.

The current political opposition is called the People's Alliance. It consists of a very conservative Islamic party, *Parti Islam SeMalaysia* (PAS), a moderate Islamic party called the People's Justice Party (PKR) and the secular Democratic Action Party (DAP), focused on the Chinese population. In national elections in 2008 the People's Alliance gained 82 seats (made up of 31 seats for the PKR, 28 for the DAP and 23 for the PAS). The governing coalition, *Barisan Nasional*, achieved 140 seats in these elections, which signifies that *Barisan Nasional* does not currently have the necessary 2/3 majority needed to make constitutional changes. Moreover, the People's Alliance

won in several local state elections in 2008 as well and it formed the state government in the states of Kelantan, Kedah, Penang, Perak and Selangor. The victory of the opposition parties in the elections of 2008 showed that many people were disgusted with the behaviour of the governing coalition. In addition, the result can partially be interpreted as representing a move towards the Islamic parties.

The important social and political changes that are currently underway are similar to events in the Islamic countries of the Near East: public protests against the long-standing, executive dominated and authoritarian government of the *Barisan Nasional*, as well as against the Internal Security Act, demanding liberalization, openness and change. The next scheduled national elections should be held in 2013, the current government having refused to meet the demands of the press to declare early elections in 2012.

The legislation process and system of law in Malaysia is complicated and each individual state and the Federal Territories have their own version of Islamic family law or an alternative system of Islamic penal law. The form of all these laws depends mainly on the leading parties in either the federal or individual state governments. This paper initially and briefly introduces the main political forces in Malaysia, along with their attitudes and their opinions regarding Islamic law. Then it focuses on the actual Islamic family and penal laws in Malaysia, their development and contemporary form.

UMNO

UMNO, which stands for the United Malay National Organization (*Pertubuhan Kebangsaan Melayu Bersatu*), is the most important political party in Malaysia, having been established in 1946. UMNO's first aim was to lead and protect the Malay people against the non-Malay population. It considered Islam as the natural identity of the Malay population and a natural part of nationalism. Nowadays, UMNO is labelled as a nationalist, moderate Islamic party; from the point of view of its critics, it is identified as being sometimes a secularist and elitist party.

UMNO was a very progressive party in its early days. Already by the 1950s it had given women the opportunity to take part in high-level political functions. They were distinguished by a number of important UMNO women-leaders, namely Kahdijah Sidek, Fatimah Hashim and Aishah Haji Abdul Ghani. They led the UMNO women's wing (UMNO *Wanita*) and called for gender reforms, especially in relation to increasing the number of women in governmental and political positions. In the 1970s, UMNO *Wanita* concentrated its energies on reforms to the Malaysian Islamic family law. The UMNO President, Abdul Razak, nominated Aishah Haji Abdul Ghani as a member of the committee working on a new Islamic family law code, the result of which was the gender-balanced and progressive proposal in the form of the modern Muslim Family Law.¹

¹ Helen Ting, "Gender Discourse in Malay Politics : Old Wine in New Bottle?" 77–81.

Islam became a dominant part of Malay politics in the 1970s and especially in the 1980s. UMNO absorbed this tendency and in order not to be accused of secularism it started using Islam in domestic and foreign politics, in official programme objectives and in its rhetoric. In particular, Dr Mahathir Mohamad, the Malaysian prime-minister,² included lots of Islamic values in his political programme and there was the widespread promotion of Islam – compulsory religious education in schools, support for Islamic banks and Islamic universities and the reconstruction of mosques. Anwar Ibrahim, the former ABIM leader and former UMNO opposition leader, joined UMNO in support of its programme.

In 1984 the proposal for the Family law was finally applied, having been prepared in the 1970s by a committee, which included Aishah Haji Abdul Ghani. Despite the negative response of the political opposition, and even some UMNO members, this proposal was enforced and legislated by UMNO as the Muslim Family Law Act 1984, valid for the Federal Territories. This Family Law protected women in many respects (for example it included five conditions for polygamy). This law was considered as a model for certain other Malaysian states and their state laws. However, strong resistance within Islamic circles resulted in a situation where state Family Law acts were adjusted towards a more traditional form of Islamic Family Law and the women-protection details were mostly excluded.³ The progressive federal Family Law was changed within a short space of time for the same reasons and amendments made in the years 1994 and 2005 excluded many of the details that guaranteed at least some degree of gender equality.

The Islamization of society and politics and support for the Islamic tendencies continued in the 1990s and in the 1990 general elections UMNO successfully used Islamic rhetoric again (for example, the proposals to create the Malaysia Islamic Welfare Council, compulsory religious classes for government employees, the introduction of Shari'a law in relation to such selected criminal offenses as prostitution, premarital sex and lesbianism).⁴ As a result, the number and power of Islamic officials began to grow. The authority of Islamic *ulama* (mainly *mufti*) was officially established by the Administration of Islamic law (Federal Territories Act) in 1993. However, Mahathir did not support the idea of an Islamic state or the complete implementation of penal Shari'a. In 1996 Mahathir asserted a clear position against *hukum hudud* (Islamic penal Shari'a).⁵

Nowadays, UMNO has adopted a more cautious attitude in relation to Islamic law. UMNO *Wanita* and its head, Datuk Dr Siti Zaharah Sulaiman, identifies the

² Tun Dr. Mahathir bin Mohamad is one of the most important politicians in Malaysia. He was an important leader of UMNO, Deputy Prime Minister and Malaysian Prime Minister in the period 1981–2003.

³ Helen Ting, "Gender Discourse in Malay Politics : Old Wine in New Bottle?" 77–81.

⁴ Wan Kamal Wan Napi, *The Islamization of Politics in Malaysia : How Religious Political Opportunities and Threats Influence Religious Framing and Counterframing*, 105.

⁵ Zachary Abuza, *Militant Islam in Southeast Asia: Crucible of Terror*, 58.

need to address the problems of women living under *Syariah* (Shari'a) law as one of the UMNO *Wanita* objectives. It simply asks the religious authorities to be more open to female issues and asks for the careful scrutiny of the implementation of Shari'a law in order to guarantee real justice.⁶ In relation to this, the UMNO leadership states that currently "UMNO supports hudud laws in principle" but the country is still not ready for its implementation.⁷

Furthermore, *Barisan Nasional* stands accused that many of the laws have been approved without previous open public debate or relevant information being provided to the public. And this problem has concerned a number of very important laws which have widespread impact on the population – the case of the Administration of Islamic Law.⁸

To sum up, initially UMNO had a very open attitude to the question of Islamic law and the equality of women within Islamic law. The Muslim Family Law Act of 1984 for the Federal Territories is, to a certain extent, progressive and tries to guarantee women's rights. The legislative independence of individual states and the pressure of influential Islamic circles did not allow for a wider adoption of this law. A new problem for UMNO and other Muslim politicians arose during the era of the Islamization of politics and society in Malaysia – they were afraid to oppose or criticize any Islamic issues so as not to be accused of demonstrating non-Islamic behaviour or being labelled as a secular party or even an opponent of Islam. Currently, UMNO is aware of the danger of gradually losing its voter base and this is the reason why it continues to expound its conservative Islamic position (including support for a more rigid form of Islamic family law and Islamic penal law) in order to reverse this trend.

PAS

The *Parti Islam SeMalaysia* (PAS) is currently the major strictly Islamic political party in Malaysia. It represents the main opposition party towards UMNO and it is one of the main constituent parties of the opposition coalition, Alternative Front (*Barisan Alternatif*), now called the People's Alliance (*Pakatan Rakyat*). PAS has acted as the current ruling party in the state of Kelantan since 1990 and in Terengganu since 1999. It also operates as a major political force in Kedah, Perak and Selangor.

PAS was founded in 1951. As an obviously Islamic party, utilising clearly Islamic rhetoric, PAS has established a base of strong and long-term support in northern states (mainly Terengganu, Perlis, Kedah, and Kelantan), all of which are rural states with a majority Malay Muslim population. At the beginning of the 1960s, PAS was

⁶ Ainon Mohd, "Islamic Family Law."

⁷ Teo Cheng Wee, "Anwar 'backs Kelantan's bid to enforce hudud laws'."

⁸ Zainah Anwar, "Law-Making in the Name of Islam: Implications for Democratic Governance," 124.

focused on Islamic reformation and nationalism. The ideology in the 1970s had a strong nationalist touch, together with the Islamic based ideals of social justice and the transnational Islamic ideals of the Muslim Brotherhood. PAS tried to cooperate with the government party, UMNO, and attempted to join *Barisan Nasional* during this period. This short period of cooperation swiftly finished as PAS became more rigid and was expelled from the *Barisan Nasional* in 1977.⁹

At the beginning of the 1980s, the influence of *ulama* among PAS increased and young factions such as ABIM members joined PAS at the same time. In this period, the important PAS leaders such as Yusof Rawa,¹⁰ Tuan Guru Nik Aziz Nik Mat,¹¹ Abdul Hadi Awang¹² and Fadzil Mohd Noor¹³ established themselves at the forefront

⁹ Zachary Abuza, *Militant Islam in Southeast Asia: Crucible of Terror*, 54.

¹⁰ Tuan Guru Haji Yusof Rawa was an important leader of PAS and president of PAS in the years 1982–89. He studied in Mecca. After returning to Malaysia, he started to build a career in politics within PAS. He was very successful in the election 1969 and then he gained several important state posts – as Malaysian ambassador and as Malaysian representative to the United Nations.

¹¹ Tuan Guru Nik Abdul Aziz Nik Mat is one of the most important politicians of contemporary Malaysia and one of the most influential Muslim *alim*. He studied at Deoband College, in Pakistani Lahore and at Al-Azhar University. Deoband especially, influenced him with ideas of the purification of Islam and the need of *ulama*'s leadership. After his studies he started to teach at religious schools in Kelantan. Nik Aziz joined PAS in 1967 and thanks to his authority he was able to immediately win the Kelantan parliamentary seat. Nick Aziz is a very charismatic personality and an excellent speaker; during meetings with the public he usually speaks informally, humorously and he speaks in a strong Kelantanese dialect (*loghat*) in order to intensify his affiliation with the people of Kelantan. Nik Aziz explains Islam to the ordinary people using ordinary language; everybody can clearly understand what he explains. He does not focus on the writing of highly theoretical books; he focuses on ordinary Islam, everyday issues and the common problems of Muslims living in Malaysia. Nevertheless, the *tafsir* of Nik Aziz is considered as being unique; it applies mainly on a clear and undisguised exposition of the Qur'anic meaning to Malay students or the ordinary Malay audiences of Kelantan. (Farish A. Noor, "The Localization of Islamist Discourse in the *Tafsir* of Tuan Guru Nik Aziz Nik Mat, *Murshid 'ul Am* of PAS," 206–13).

¹² Tuan Guru Abdul Hadi Awang is an important Malaysian politician and the current president of PAS (since 2003). He studied Islamic law at the University of Medina in Saudi Arabia and then he continued in his studies in Islamic law at Al-Azhar in the 1970s. He joined PAS in 1964 and started to be very successful in local politics. He held several very important posts in PAS in the 1980s: Vice-President, Deputy President. He gained parliamentary and State Assembly seats in the elections of 1990 and 1995. He also started to build up his reputation in the field of international politics in the 1990s.

¹³ Fadzil Mohd Noor was an important religious teacher, politician and PAS leader and president in the years 1989–2002. He studied Islamic law at Al-Azhar University. He was an important member, deputy chairman and later president of ABIM. Afterwards, he became one of the most important and most influential *ulama* and politicians within PAS. After success in the parliamentary elections of 1999 he was nominated as the leader of the Malaysian opposition.

of the party. These *ulama* studied in the world-famous universities of Deoband and al-Azhar and this helped to form their opinions on Islamic renewal and the importance of *ulama* guidance. The aims, strategy, rhetoric, and arguments of PAS are based on the theoretical work of these *ulama* and on their recommendations originating from Qur'anic interpretations. The opinions and teachings of PAS's leading *ulama* and of most of the Islamic religious authorities in Malaysia are based on the Muslim teachings of the Middle Ages, their interpretations being labelled as traditional, scriptural (literal) and rejecting, especially within the context of Islamic law. The *ulama* required full implementation of Shari'a in controlled states and, as the ultimate, long-term goal – the establishment of an Islamic state. This final goal should be reached only through elections, not through a revolution. The first attempt to introduce an Islamic penal code (*hukum hudud*) in the 1980s was dismissed by the government and caused an even deeper split between PAS and UMNO. PAS went on to become a significant opponent of *Barisan Nasional* at a local level. Simultaneously, PAS has changed from a local nationalistic party to an internationally respected party, resembling the Muslim Brotherhood and *Jamaat-e Islami* Pakistan.¹⁴ The link between the religious authorities and the political party has obviously turned all religious issues into religious-political issues. Tuan Guru Nik Aziz Nik Mat, the prominent Muslim *alim*, spiritual leader of PAS, and governor of Kelantan, has confirmed that situation; stating: "Whether we want to say Ahad, Ahad, Ahad or PAS, PAS, PAS – the two are the same – because for us religion and politics must be made one."¹⁵

PAS has always focused its work in its favourite region (the northern states), spreading its campaign through religious schools and mosques. PAS propagates a set of mainly general Islamic values, but avoids support for radicalism and extremism. In the election campaign of 1990 it used strong and simple Islamic rhetoric; the PAS election slogan was "Developing with Islam" ("*Membangun Bersama Islam*"). The PAS leader, Nik Aziz Nik Mat, urged people to go to the polls, because it was part of the jihad against the UMNO government.¹⁶ PAS claimed in the 1990 elections that it would introduce Islamization proposals: veils for all Muslim women at work, a ban on unisex hair salons, a ban on karaoke, a ban of alcohol licenses, the wider separation of women and men, and the Shari'a penal code (including *hudud*, *qisas* and *ta'zir*).¹⁷ Nik Aziz won the elections in Kelantan in 1990 thanks to his campaign "Islam as a way of life". The strict Islamic style was established in the country after these elections. PAS enacted the Shari'a Penal Law in Kelantan in 1993, but this law has never been implemented. The form of this law will be described in detail in a separate chapter below.

¹⁴ Farish A. Noor, "The Localization of Islamist Discourse in the *Tafsir* of Tuan Guru Nik Aziz Nik Mat, *Murshid'ul Am* of PAS," 199.

¹⁵ *Ibid.*, 232.

¹⁶ *Ibid.*, 209.

¹⁷ Wan Kamal Wan Napi, *The Islamization of Politics in Malaysia: How Religious Political Opportunities and Threats Influence Religious Framing and Counterframing*, 105.

In the period leading up to the elections of 1999, PAS continued to implement its successful strategy of focusing on Islamic values and again announced a clear program “Islam as a way of life (*adeen*), belief and law (*akidah wa Shari’ah*), religion and state (*din wa daulah*).”¹⁸ It was considered as being the right step towards the final goal. In the words of Fadzil Noor: “Malaysia will become an Islamic state when it places Shari’a law above anything else.”¹⁹

After Fadzil Noor’s death in 2002, Abdul Hadi Awang was elected as the president of PAS. Abdul Hadi Awang is considered to be a very radical politician. The implementation of Shari’a penal law and the key idea of establishing an Islamic state has received prominence under his leadership. This influence was most noticeable during the PAS 49th general assembly in 2003.²⁰ Hadi Awang pointed out: “An Islamic state must be guided by the Koran and the Hadith. If we do not have hudud, what kind of Islamic state are we?”²¹

The current official PAS mission is as follows: “PAS policy is Islam. PAS call is Allahu akbar.” The official aims of PAS are stated currently as follows: “Struggle for existence in this country, society and government, for values of Islam and its laws. Defend the sanctity of Islam, the independence and national sovereignty.” From the official PAS strategy we can select, for example: “Struggle for Islam as a faith and syariah and make it as a guide in politics and nation as well as introducing the values of Islam in order to uphold justice and progress in all areas ...; ...to maintain peace and foster human rights and eliminating all kinds of injustice, falsehood, slavery and oppression among the people.”²²

Important changes have occurred in the PAS party in the last few years. It is evident that PAS had been continuously losing its position, even in traditional states (Kelantan and Terengganu). It is assumed that the PAS failure in the elections of 2004 is connected with its attempts to implement *hudud* law in these states or as a consequences of connections (assumed but not proved) with violent forms of Islam.²³ Therefore, it eradicated two polemic wings of the PAS party. The first group is called “Erdogans”²⁴ or “professionals.” This camp is composed of experts who tend towards a more liberal interpretation of the Islamic faith, being open to compromise and dialogue with non-Muslims and non-Muslim parties. The second group represents the *ulama*, clerics of PAS. This PAS wing inclines to a more rigid

¹⁸ Ibid., 166.

¹⁹ Zachary Abuza, *Militant Islam in Southeast Asia : Crucible of Terror*, 54, 60.

²⁰ Ahmad Fauzi Abdul Hamid, “The UMNO-PAS Struggle : Analysis of PAS’s Defeat in 2004,” 110.

²¹ Zachary Abuza, *Militant Islam in Southeast Asia : Crucible of Terror*, 54.

²² Official webpages of PAS and its Mission, Politics and Call, available on http://www.pas.org.my/index.php?option=com_content&view=article&id=200&Itemid=439 [cit. 2011-7-13].

²³ Johan Saravanamuttu, “Malaysia’s Islamic Party (PAS) and the Politics of Reform.”

²⁴ The name “Erdogans” is derived from the name of the Turkish Prime Minister, Recep Tayyip Erdogan, leader of the AKP party (Justice and Development Party), known as an advocate of moderate Islam.

interpretation of Islam and is more radical in its rhetoric and actions as well. The influence of the “professionals” has increased very rapidly. PAS recognises the need for a new direction that emphasises progressive, moderate Islam. For PAS it is very important to establish mutual cooperation with other parties from the political opposition (that includes non-Muslim parties as well). Cooperation and the establishment of at least a partially collective goal and strategy is necessary for its work in the state government (consisting currently of representatives of opposition parties from the States of Kedah, Perak and Selangor) and especially for the achievement of the best possible results in the upcoming elections.

The tendency towards moderate Islam within PAS was definitely confirmed by the results of the party’s internal elections in summer 2011. Non-*alim* Mohamed Sabu became the new deputy president. Non-*ulama* Salahuddin Ayub, Datuk Mahfuz Omar and Datuk Husam Musa became vice-presidents. The “Erdogans” faction, or “moderates,” has thus taken the main posts in the party. Therefore, there are currently twelve non-*ulama* members among the eighteen members of the leadership of the party. Progressive power has triumphed. Nevertheless, the PAS President, Abdul Hadi Awang, and the main ideologist Nik Aziz remain in important positions with strong influence on the party and the public. Abdul Hadi has refused to even admit the existence of any factions within PAS: “The media has reported that the top posts in PAS have fallen to the Erdogans. There are no Erdogans. This is not Turkey! If at all, this is Abdul Hadi and Nik Aziz (team)! ”²⁵ There are many expectations resting with the new party’s leadership, but there have not been any official changes in the objectives or strategy of PAS as yet.

In conclusion, PAS has always been a clearly Islamic party that has espoused the values of Islam and sought to preserve the ethnic Malay population and its Islamic culture. The leading power of respected *ulama*, understandable Islamic rhetoric and work in sensitive regions has ensured the expected success of PAS. Strong voter support for its Islamization programme was visible, especially in the 1990s. The party continued with this winning strategy and gave priority to the promotion of an Islamic penal code and the main goal – building an Islamic state. At this point, PAS then started to lose the support of its voters. The new party leadership, consisting of progressive professionals and moderate Muslims (instead of the previous *ulama*) now tries to gain back the confidence of voters. For PAS it is currently extremely important to continue in the cooperation with the other parties of the opposition coalition; a major obstacle to this is evident within the opposition *Pakatan Rakyat* – the implementation of Islamic penal law. The establishment of this law represents a key strategy of PAS. This idea is also supported by PKR, but the non-Islamic party DAP rejects this idea very strongly. Even the recent meetings of top party leaders did not bring about the desired result and any form of consensus regarding this issue.²⁶

²⁵ Asrul Hadi Abdullah Sani, “Not Erdogans, but Team Nik Aziz-Hadi, says PAS chief.”

²⁶ Patrick Lee, and Tarani Palani, “Hudud held back by lack of consensus.”

Anwar Ibrahim and PKR

Anwar Ibrahim has been one of the most important people in Malaysian politics for more than forty years. As a student activist in the 1960s, Ibrahim was mainly concerned with ideas of ethnic Malay identity through Islam. He acted as the president and main leader of the student activist movement ABIM (*Angkatan Belia Islam Malaysia*, the Malaysian Islamic Youth Movement) between the years 1974 and 1982. The main goal of the ABIM movement was the Islamization of the country and Islamic renewal, following the principles of unity (*tawhid*) and justice (*al-adl*) and the fight against evil and corruption.²⁷ ABIM became a strong opponent of the governing UMNO and attained an important influence in domestic politics and, moreover, international credibility, especially during the period of Anwar Ibrahim's leadership.

Anwar Ibrahim, the former opposition leader, joined UMNO during the period of Islamic renewal, in 1982. Step by step he became the second most powerful man in Malaysia in the 1980s – the Malaysian Deputy Prime Minister and UMNO vice president. He attempted to fulfil some of his ideas through his tenure of these powerful positions – for example the initiation of Malaysian school reform, the fight against corruption, and the cessation of government mega-projects. He acted as mediator and tension reducer between the nationalistic government and PAS.²⁸ At the peak of a brilliant career came a sudden fall. Ibrahim was accused of corruption and subsequently of “inappropriate behaviour” and renounced all his positions in 1998. The courts found him guilty and sentenced him to more than nine years in prison.²⁹

Despite his sojourn in jail, he continued to proclaim his ideas – the so called “*Reformasi*” (i.e. reform). *Reformasi* is a term borrowed from Indonesia where it means the renewal of politics and the system of justice. In the Malaysian context, *Reformasi* means the movement against the current government and against corruption, as well as a request for a new clear political system, for democratic change and transparency. Following the spirit of Ibrahim's ideas a new political party was formed in 2003 – The People's Justice Party, the *Parti Keadilan Rakyat* (PKR) or simply the *KeADILan*. The main goals of this party are: social justice

²⁷ A. B. Shamsul, “The Redefinition of Politics and the Transformation of Malaysian Pluralism,” 220.

²⁸ Wan Kamal Wan Napi, *The Islamization of Politics in Malaysia : How Religious Political Opportunities and Threats Influence Religious Framing and Counterframing*, 124.

²⁹ Anwar Ibrahim was freed by a decision of the Federal Court on September 2, 2004 but not all cases against him have yet been completed. The whole anti-Anwar case deepened the anti-Mahathir's sentiments within the Malay population. People believed that the whole case was trumped up by Mahathir and the UMNO with the aim of eliminating Ibrahim from the government and discrediting him among the Islamic public. Ibrahim is regarded as a charismatic, uncompromising leader and advocate of moderate, socially oriented Islam by the public and this led to national support for campaigns such as “Free Anwar.”

and anti-corruption. Anwar Ibrahim came back into politics officially on April 14, 2008 and he assumed the position of party leader. Thanks to his person, PKR was extremely successful in the 2008 elections and, together with the DAP and PAS parties (and other smaller parties), was able to form a strong political opposition. This coalition was called the Alternative Front (*Barisan Alternatif*) at first, although now a similar coalition acts under the name of the People's Alliance (*Pakatan Rakyat*). Anwar Ibrahim achieved a new outstanding victory in the Permatang Pauh by-election. Since October 28, 2008 he has been a Member of Parliament.

Although Anwar Ibrahim's opinions are based on Islamic thought, he has never concentrated on theoretical topics but rather on the practical tasks associated with social justice and equality. First, as a strong political activist, then as one of the most important men in the Malaysian government, now as a leader of the opposition, he has always called for real action, for changes in politics and in society. Today, he focuses mainly on supporting and initiating actions against corruption, against governmental authoritarianism and for liberalization. Ibrahim is considered to be an advocate of political pluralism, which he identifies as the foundation necessary for a democracy and healthy society. He always acts as mediator between Muslims and non-Muslims, between Islamic and more secular groups. His desire is to build social equality upon such Islamic values as justice (*al-ahl*), tolerance (*al-tasamuh*) and compassion (*al-rahman*).³⁰ Similarly, the PKR party states as its main goals: transparent democracy, sustainable development, and social justice. It assumes a position against racial intolerance and it supports moral and ethical values based on human rights, which is unrelated to religious, racial or other groupings. The PKR calls for the rule of law and independence of the judiciary and this must be consistent with a respect for human rights and dignity.³¹

PKR and Anwar Ibrahim support Islamic principles, including Shari'a law. Ibrahim agrees with the general principles of Shari'a (*maqasid al-Shari'a*) and believes that most of the laws would be without problems and not lead to the oppression of Muslim women if they were based on the Qur'an.³² However, Ibrahim has only stated this issue in a general and very theoretical way. He has still not conveyed which of the versions of Islamic Family Laws in Malaysia (or in foreign countries) correspond best to his idea of social and gender justice or what needs to be changed. It was perhaps a little unexpected that Anwar Ibrahim, often labelled

³⁰ John Esposito, and John Obert Voll, *Makers of Contemporary Islam*, 183, 195.

³¹ Official webpage of PKR / Keadilan and its Politics, available on <http://www.keadilanrakyat.org/en/pakatan-rakyat/dasar-pakatan-rakyat> [cit. 2011-12-05]. The above mentioned goals of the PKR party exceed the confines of Islam. It propagates Islamic values but not exclusively, advocating simple values resulting from the requirements of the modern world. In relation to these ideas PKR is close to the principles of the social movement *Aliran Kesedaran Negara* (*Aliran*, Malay for National Consciousness Movement). This multi-ethnic, reformist, social movement is based on universal values such as justice, freedom and solidarity. Available on the official webpages of *Aliran* and its Basic Principles <http://aliran.com/basic-principles>

³² Farouk A. Peru, "Anwar In the Flesh."

as a “liberal” and “pro-democratic,” has come out in support of the PAS party and its efforts to implement Islamic penal law. “For now, in general, in principle, I believe this can be implemented,” stated Ibrahim, only in a personal capacity.³³ The PKR party evidently shares a similar view because in recent meetings of the highest representatives of the parties of *Pakatan Rakyat* it assumed a position in support of PAS.

Sisters in Islam

Sisters in Islam (SIS) is an Islamic non-governmental organization in Malaysia. It was formed in 1988. It focuses on human rights, especially the rights of Malaysian women living under Islamic law. SIS formulates its mission as follows: “Sisters in Islam is a group of Muslim women committed to promoting the rights of women within the framework of Islam. Our efforts to promote the rights of Muslim Women are based on the principles of equality, justice and freedom enjoined by the Qur’an as made evident during our study of the holy text.”³⁴ SIS does not think that Islam is the cause of inequality in relation to women; injustice and inequality only stem from medieval, rigid and biased interpretations of Islam. SIS focuses mainly on the specific implementation of the ideas of equality, justice and freedom within the Islamic family law. Its aims at a political level are, for example: the appointment of women as Shari‘a judges, the right of women to equal guardianship of children, reform of the laws concerning conditions of polygamy and a general reform of the Islamic Family Law (family and penal law). At a public level SIS concentrates on enlightenment, education, and open discussion about the current situation.³⁵ This progressive Qur’anic interpretation and the efforts of SIS have added substantively to discussions about women’s rights both internally and outside the Malaysian borders. In 2011 SIS won the Casa Asia Award for its contribution to the promotion of women’s rights in the Muslim world.

The new interpretations of SIS in relation to Islam and Shari‘a are grounded in the theoretical work of the famous Islamic female scholar, Amina Wadud.³⁶ Wadud’s Ph.D. dissertation, *Qur’an and Woman: Rereading the Sacred Text from a Woman’s Perspective* (1992) and her subsequent book *Inside the Gender Jihad: Women’s Reform in Islam* (2006) are two of the essential texts for SIS and other female activists and liberal scholars. Amina Wadud analyses the Qur’anic text from

³³ Teo Cheng Wee, “Anwar ‘backs Kelantan’s bid to enforce hudud laws’.”

³⁴ Official webpages of the NGO Sisters in Islam and its Mission, available on <http://www.sistersinislam.org.my/BM/mission.htm>

³⁵ Zainah Anwar, “Sisters in Islam and the Struggle for Women’s Rights,” 243–44.

³⁶ Amina Wadud is scholar, activist, imam, co-founder of the organization Sisters in Islam, an expert on the Qur’an and professor of Islamic studies in the Department of Philosophy and Religious Studies at Virginia Commonwealth University. Amina Wadud represents a new trend in current Islamic society, which is referred to as “gender jihad.” The required reformation of gender relationships is based on Qur’anic ideals.

the following novel view – there is no difference between the roles of women and men, the Qur'an does not proclaim any superiority of males over females, this superiority stems only from inaccurate interpretations.³⁷ Wadud's work implies a new Qur'anic interpretation, based on gender equality and gender justice.³⁸

The Sisters in Islam is one of the organizations that openly and specifically criticizes the form of Malaysian Islamic law. Most of the political parties and other NGOs vaguely support social and gender equality within the law. Unlike them, SIS identifies very specific problems within the law, as well as difficulties in their subsequent implementation, and offers a concrete way in which to effectively help achieve the required degree of equality.

The Sisters in Islam is an NGO, it is not a political party. The same (or similar) viewpoint does not have political expression in contemporary Malaysia. In the current difficult political situation, when all Islamic political parties engage in a holier-than-thou battle, it is difficult to expect that any of them would propagate such an open and liberal attitude. Political parties and their representatives prefer to take a cautious stand and follow conservative opinions based on the work of respected *ulama*. Even Anwar Ibrahim (in other respects a very liberal individual) only identifies general and vague requirements in relation to equality. The same situation applies to the UMNO *Wanita*, the former progressive women's party-wing, which assisted during the development of the new innovative Family Law 1984. At present, UMNO *Wanita* is limited to making very general statements on the need for supervision and real justice within Islamic law. It is no wonder that SIS has found itself in a controversy with traditional opinions of *ulama*, especially with the *ulama*-leaders of PAS, which has even called for the official abolition of the SIS organization.

The Legal System in Malaysia

A dual system of law is valid in Malaysia – secular law and Shari'a law (*Syariah* law). This status is confirmed by virtue of an amendment of the 1988 (Act A704) to the Federal Malaysian Constitution, Article 121 (1A) that says that the secular courts have no jurisdiction over matters which fall under the jurisdiction of the Shari'a courts (*Syariah* courts). Secular law (i.e. law for all non-Muslims) falls under federal jurisdiction and is valid in the whole territory of Malaysia.³⁹ All Muslims in

³⁷ Amina Wadud, "Rights and Roles of Woman," 158.

³⁸ Tamara Sonn, "Voices of Reformist Islam in the United States," 281. Regarding the women's role, Wadud does not question the fact that the basic function of a woman is having a baby. But she points out that the word "primary" (primary function of woman) is used incorrectly – it is interpreted as "the only one". Wadud sees it as "primary, but not the only one". In her view, the Qur'an does not assign women to a single position only, as mothers. Child-bearing in the framework of the Qur'anic text should not be comprehended as a limiting factor but as an exclusive function. (Amina Wadud, "Rights and Roles of Woman," 158–59.)

³⁹ For example, the Marriage and Divorce Act of 1976 is still valid, which is expressly excluded from applying to Muslims.

Malaysia (i.e. all Malay race persons and other Muslims) fall under Shari'a law. The federal Parliament determines Islamic law in Federal Territories only. Administration of Islamic law falls under the jurisdiction of particular states; it means that all other states have independent jurisdictions based on Islamic law (it represents 14 different religious authorities).⁴⁰ The main enactments are set out in *Hukum Syaria*k (Islamic principles) but the application of Islamic law in specific states of Malaysia may be different.⁴¹ To sum up, the execution of Malay family and penal laws depends on the territory and on the ethnic / religious background of the person. Therefore, Malaysian law intersects in a matrix consisting of federal-level and state-level jurisdiction on the one side and the duality of secular and Shari'a law on the other side.

There are difficulties in clearly setting out the responsibilities of Shari'a and secular courts. Shari'a courts are delegated responsibilities over personal Islamic family law issues and selected offences relating to the sanctity of Islam and decency only, while penal law falls under federal jurisdiction (details will follow in the section on Islamic Penal Law). However, according to Islamic law some criminal offenses pertain to Shari'a and thus are subsequently (following Article 121 (1A)) under the purview of Shari'a Courts and some Malaysian states actually consider such cases in this way. The reality of this stalemated situation is as follows: the State of Kelantan has had its authorized Kelantan Islamic Penal Code for nearly twenty years but the government of Kelantan state hesitates to put it into widespread practice due to the pressure of the Federal government. On the other hand, the federal government hesitates to publicly declare this law unconstitutional because it is afraid of accusations that it is taking action against Shari'a and against Islam, which is the official religion of the country; moreover it has tried to rescue its popularity by promoting Islamic ideas.

Unclear accountability in relation to the dual system of law resulted in a very sensitive situation in 2006. Nine non-Muslim ministers signed a memorandum calling for a review of the legal system in Malaysia, especially with respect to equal rights for other religious groups. The then Prime Minister, Abdullah Ahmad Badawi, rejected this demand by announcing that the division of responsibilities was clear and that the rights of religious groups were good. The strong position of Shari'a courts and the ambiguities still remain.⁴²

⁴⁰ Islamic Family Acts (or *Syariah* Civil Procedure Codes) in particular states were issued, for example, in 1983 in the states of Kelantan, Negeri Sembilan, Malacca, in 1984 in the states of Selangor, Kedah, Perak, and in 1985 in the states of Penang, Pahang, Terengganu.

⁴¹ Nisrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations : A Comparative Study*, 54.

⁴² Paridah Abd Samad, *Abdullah Ahmad Badawi. A New Breeze in Malaysia's Politics*, 150–53.

Islamic Family Law in Malaysia

As has been mentioned above, the federal Parliament issued a new progressive Islamic Family Law Act, valid for Federal Territories, in 1984. Some of the Malaysian states changed their family laws in an effort to approximate to this federal law. However, other states insisted on retaining their own traditional form of Islamic law. This form of Islamic Family Law was confirmed or enforced in the northern states, especially after a series of election victories for PAS in the 1990s. Another restriction on the rights of women concerns maintenance and accommodation since there is always the possibility of an allegation of *nusyuz* (*nushuz* – delinquency, inappropriate behaviour of the spouse) and *fahisyah* (public effrontery).⁴³ This was the reason why women's organizations such as SIS (Sisters in Islam), NCWO (National Council of Women's Organizations)⁴⁴ and AWL (The Association of Women Lawyers, Malaysia)⁴⁵ arranged a national workshop and published several memoranda concerning changes and reforms in the law:⁴⁶ *A Memorandum on Reform of the Islamic Family Laws and the Administration of Justice in the Syariah System in Malaysia*⁴⁷ and *A Memorandum on Reform of the Islamic Family Laws on Polygamy*.⁴⁸ Despite the demands of many women's organizations for the revision of Islamic Law, the actual opposite occurred. Under the influence of Islamization, the government issued the Islamic Family Law for the Federal Territories Act Amendments, 1994 and 2005. These are still valid amendments and represent a significant step backwards when compared to the 1984 version.

From the many Family Laws of particular Malaysian states let us mention the Islamic Family Law of the State of Selangor, from the year 2003, which was presented by the government as an optimal way forward in relation to how Islamic law would look in the non-Federal areas of Malaysia. Sometimes, it is identified as a progressive combination of Shari'a and the modern gender-balanced approach. Nevertheless, the SIS criticizes it in many respects, especially with regard to the provisions addressing polygamy, divorce and custody. For example, this law relaxes the conditions of polygamy instead of the original intention, which was to tighten

⁴³ Zainah Anwar, "What Islam, Whose Islam? Sisters in Islam and the Struggle for Women's Rights," 238.

⁴⁴ More about the National Council of Women's Organizations available on <http://www.womensorganizations.org/>

⁴⁵ More about The Association of Women Lawyers in Malaysia available on <http://awlmalaysia.blogspot.com/>

⁴⁶ These memoranda were published, for example, in the Sunday Star, November 3, 1996 and the New Straits Times, January 23, 1997. See Norani Othman, "Islamization and Modernization in Malaysia," 179.

⁴⁷ The text of the memorandum available on <http://www.sistersinislam.org.my/news.php?item.617.54>

⁴⁸ The text of this memorandum available on <http://www.sistersinislam.org.my/news.php?item.820.7>

them. There is ambiguity concerning matrimonial property and other financial provisions.⁴⁹

Let us look more deeply into the main issues in Malaysian Islamic family law – the most important statements concerning marriage, divorce and custody. Shafi'i madhab, with some Hanafi minorities, is widespread in Malaysia (as well as in Indonesia, the Philippines, Singapore and Thailand).

A Muslim woman is only allowed to marry a Muslim man. A Muslim man may marry Muslim women or *Kitabiyah* women. According to the Islamic Family Law Act of 1984 the minimum marriage age is eighteen for males and sixteen for females. A wedding application must be submitted to the public offices (the so called *kariah masjid*) no later than seven days before the marriage. A marriage is solemnized by the *wali*, the representative of the *wali*, the Registrar as the representative of the *wali* or by the *wali Raja* (authorized by the state). Consent to the marriage is required of both parties to the marriage, and either from the *wali* or from the *wali Raja* (this is a provision borrowed from Hanafi madhab). The states of Kelantan, Kedah and Malacca follow strictly Shafi'i madhab, which states that the marriage of a virgin girl may be solemnized without her consent by the *wali*.

The Registrar notes all the requirements of a conventional Muslim wedding arrangement.⁵⁰ *Mahr* is usually replaced by Malay customary rule called the *maskahwin* (*mas kahwin*).⁵¹ Other local Malay wedding and marriage customs are *hantaran* (a gift paid by the man to the woman during the solemnization of the marriage), *pemberian* (all gifts and cash given by the husband to his wife during the duration of the marriage) and *belanja* (optional gifts during the engagement). All these gifts and financial agreements between both parties (families) are included in the wedding contract and officially registered.⁵²

Polygamy presents a very sensitive and adversarial topic in current Malaysia. In the Qur'an and Sunna we can find both traditions in support of polygamy and also of monogamy. Because it is difficult to comply with polygamy (especially regarding the equitability of all co-wives), monogamy is usually recommended. The progressive Malaysian Islamic Family Law Act of 1984 for Federal Territories stated five strict conditions for polygamy: (1) a new marriage is just and necessary in

⁴⁹ Sisters in Islam, "Violation of Muslim Women's Human Rights: Further Discrimination Against Muslim Women Under the Selangor Islamic Family Law Bill 2003 Through Selective Gender Neutral Provisions."

⁵⁰ Abdullahi Ahmad An-Na'im, *Islamic Family Law in a Changing World: A Global Resource Book*, 270.

⁵¹ *Maskahwin* is a part of the large amount of presents given to a woman during the periods of her engagement and marriage. It used to be the money paid by the groom to the bride's parents. Now, this amount is not paid in kind but is a part of the wedding arrangements in case there is a financial settlement during divorce – the same way as *mahr*. See Inche Ahmad bin Mohamed Ibrahim, "Islam and Customary Law in the Malaysian Legal Context," 116.

⁵² Inche Ahmad bin Mohamed Ibrahim, "Islam and Customary Law in the Malaysian Legal Context," 117.

cases where the following circumstances, among others, apply e.g. sterility, physical infirmity or physical unfitness for conjugal relations, wilful avoidance of an order for the restitution of conjugal rights, or insanity on the part of the existing wife or wives, (2) the applicant is able to support all existing and intended dependants, (3) the equitable status of all co-wives, (4) the proposed marriage would not cause any harm (*darar syar'i*) to the existing wife / wives, (5) the proposed marriage would not directly or indirectly lower the standard of living of the existing wife / wives and dependants. All named conditions should have been heard by a court and the existing wife or wives should have been present at the hearing as well.⁵³ Later amendments to the Federal Law removed the fifth condition of polygamy (a guarantee not to decrease the standard of living of the existing wife / wives and dependants). This fifth condition is not included in the Family Laws of particular Malaysian states either. Moreover, in the Islamic Family Laws of these states⁵⁴ the first condition of polygamy is set as “just or necessary” instead of “just and necessary,” thus strongly moderating all conditions of polygamy.⁵⁵

The Islamic Family Law Act of 1984, with its following amendments, recognizes Islamic divorce in the form of *talaq* (unilateral divorce), *khul'* (divorce by redemption), *ta'liq* (divorce under stipulation), divorce by *li'an* (after the enunciation of an oath), and *fasakh* (the dissolution of marriage on specified grounds). All of these divorce forms should be executed only before an official court.

Divorce in the form of *talaq* means the repudiation of a wife. The amendments to the Federal Law of 1984 moderated these conditions and enabled the declaration of *talaq* to take place outside the court; it is only necessary to inform the court within seven days and the judge will confirm the already proclaimed *talaq*.⁵⁶ The period of *'iddah* follows the proclamation of *talaq* as specified in Shari'a. An incomplete *talaq* is revocable and a resumption of conjugal relations is possible. Both parties must inform the Registrar of the *kariah masjid* of reinstated cohabitation. Thereafter, a man must officially proclaim a *ruju'* before the court and a woman must consent to it. The completed *talaq* is irrevocable as normal.

Khul' (*cerai tebus talaq*) stands for divorce by redemption, with mutual consent. A woman can ask for this kind of divorce with the consent of her husband. Both parties must agree the financial amount that the wife must pay her husband for such

⁵³ Islamic Family Law (Federal Territories) Act 1984 with following amendments up to 2006, available on <http://www.agc.gov.my/Akta/Vol.%207/Act%20303.pdf>

⁵⁴ For example, Selangor Family Law Enactment in section 23 (5) (a).

⁵⁵ Zainah Anwar, “What Islam, Whose Islam? Sisters in Islam and the Struggle for Women’s Rights,” 237.

⁵⁶ Andrew Harding, “Sharia and National Law in Malaysia,” 517. A remarkable legal case occurred in 2003. The Syariah Court ruled that if *talaq* is sent in SMS form it is valid in accordance with Shari'a law. The religious advisor Abdul Hamin Othman argued that an SMS message is clear and valid in Shari'a law. See Andrew Harding, “Sharia and National Law in Malaysia,” 517. However, the Malaysian government outlawed such kinds of *talaq* divorce. See Jamila Hussain, *Islam : Its Law and Society*, 102.

a divorce or (and) the wife must give up her claims to *mahr* / *maskahwin* and return all propriety given her during the marriage.

Ta'liq (*cerai ta'alik*, *talaq-i-tafwid*) provides another option for a woman who can ask for this type of divorce when there is a breach of a marriage stipulation, and this can be achieved without the consent of her husband. Special conditions (in cases where the husband delegates the right of divorce to a woman) must be included in the marriage contract and signed by the husband (*ta'liq* certificate). Typical conditions are, for example: an intended second marriage, failure to provide maintenance, or domestic violence. This right is valid during the whole period of the marriage. In cases where there is a failure to meet agreed conditions, the wife can contact the court with the marriage contract, the court then conducts an inquiry into the breach of the marriage agreement and confirms the validity of the divorce according to *Hukum Syarak*. According to the Penang Islamic Family Law Enactment,⁵⁷ a woman should prove the breach of conditions before the court by means of witnesses and an oath. In Hanafi and Maliki madhab this kind of divorce is irrevocable; following Shafi'i madhab it may be revocable, depending on the husband's intention.⁵⁸

Fasah (*fasakh*) is divorce or an annulment of marriage. The wife can ask for *fasakh* through the court on specific grounds. In Malaysia these conditions are included in Islamic Family laws. Based on the Federal Family Law of 1984, women may ask for a *fasakh* divorce in the following cases: the disappearance of a man for more than one year, the failure to provide maintenance for three months, imprisonment for over three years, failure to perform marital obligations for one year without reasonable cause, chronic impotence at the time of marriage (without knowledge of this fact by the wife), long-term (more than two years) mental illness, leprosy, venereal disease, repudiation of a forced marriage arranged when the wife was under sixteen years of age (in cases where this wife is under eighteen years old and the marriage has not yet been consummated), cruel treatment, the husband's failure to consummate the marriage within four months, marriage without the wife's consent or with consent subsequently declared null and void (due to duress, a mistake, unsoundness of mind), and other grounds recognized by *Hukum Syarak*. Conditions for *fasakh* divorce differ in detail in every state's Family law.

The last kind of divorce, *li'an*, is not common. It represents proof of guilt or innocence in relation to adultery before the court through reference to four oaths (sometimes *Syariah* court requires five oaths).

The renunciation of Islam is the reason for an annulment of marriage. The renunciation's confirmation by the court is required in the first instance. To avoid abuse, the Islamic Family Law of 1984 and all the other state laws set out the

⁵⁷ Valid divorce rules in Penang, according to Women's Centre for Change (WCC) Penang, are available on <http://www.wccpenang.org/files/docs/syariah-divorce.pdf>

⁵⁸ Jamila Hussain, *Islam: Its Law and Society*, 108.

punishment for apostasy when only serves annulling a marriage – the imprisonment not to exceed 1 year.⁵⁹

The financial settlement during and after divorce includes the maintenance during the period of *'iddah* and the consolatory gift referred to as *muta'ah* (*mut'ah*). According to Shafī'i madhab *muta'ah* is paid by the husband to a wife in divorce cases where the woman is without fault. The amount of *muta'ah* depends on the *harta sepencarian* (matrimonial assets); usually it represents an amount from one-third to one-half of the property acquired by the spouses during the marriage.⁶⁰ The wife must apply to the court for *muta'ah*, the court checks out the whole case and has the power to order the man to pay an amount adequate to *Hukum Syarak*. The Federal Family Law Act of 1984 confirms the regulations stated by *Hukum Syarak*, which provide women with the right to *mas kahwin* and *pemberian*.

Women are allowed custody over boys until the age of seven and girls until the age of nine. This period can be extended by the court to nine years and eleven years and possibly more.⁶¹ This custom, corresponding to Hanafi madhab, was confirmed by the Islamic Family Law Act of 1984. The same Act, clause 81 (1), determines that “the mother shall be of all persons the best entitled to the custody of her infant children during the connubial relationship as well as after its dissolution.” Then it sets out the list of people having the right to custody (*hadhanah*) of children. All people who apply for the right of *hadhanah* must be Muslims, be of sound mind, be of a proper age, have good Islamic moral standards and their place of abode cannot present any moral or physical risk to the child. The right of custody is forfeit when the woman remarries and new husband is not related to the child. In cases where the child is over the prescribed age limit, the *hadhanah* devolves to the father. Once the child reaches the age of *mumaiyiz* (discernment), she has a right to choose between the parents, unless the court instructs otherwise.

There are several problematic issues regarding Islamic family law in Malaysia – within the law itself and in relation to its specific application. Advertisements by the Sisters in Islam have, over a long period of time, drawn attention to all these inequities and call for an increase in legal protection for women, especially concerning financial provision for her and her children. The SIS indicates that in many legal disputes it has become an unpleasant habit to accept a solution in favour of the man; in contract, similar cases with the same degree of ambiguity in relation to the rights of women, tend to be always resolved in a way that diminishes their rights.⁶²

⁵⁹ It is illegal to declare oneself as a Non-Muslim just to avoid the legal consequences – see, for example, Section 12 Crimes Syariah (Perak) Enactment 1992.

⁶⁰ Jamila Hussain, *Islam: Its Law and Society*, 114.

⁶¹ Abdullahi Ahmad An-Na'im, *Islamic Family Law in a Changing World: A Global Resource Book*, 270–72.

⁶² Sisters in Islam, “Violation of Muslim Women’s Human Rights: Further Discrimination Against Muslim Women Under the Selangor Islamic Family Law Bill 2003 Through Selective Gender Neutral Provisions.”

The Sisters in Islam admit that the contemporary procedures relating to the permission and certification of polygamous marriage following the Selangor Family Law has brought improvement for women. The court requires the personal presence and a period of consultation with all actors – the man, his existing wife, his future wife, and her guardian. In the following process all four conditions of polygamous marriage are investigated. SIS asks the court to evaluate this process further in order to make sure that the wife's consent is real (not forced), that the financial situation of the family is actually healthy and that nobody will suffer due to new marriage. In cases where there is any doubt, the court should not permit the new marriage or should allow the first woman to leave the marriage under appropriate terms (divorce on good terms – *cerai cara baik*).⁶³ The Sisters in Islam provide evidence that in many actual cases, polygamy is allowed after the fulfilment of just one condition, instead of all four.⁶⁴ Special seminars linked to the support of women in cases of polygamy were realized in the State of Selangor in 1996 under the name "My Husband, Your Husband." They were quickly cancelled because of the negative feed-back from the public.⁶⁵ In response, the Sisters in Islam started a campaign in 2003 under the name "Monogamy, My Choice" (*Monogami Pilihanku*), which presented monogamy as an ideal state of marriage in Islam and informed women about their rights concerning polygamy. SIS, in cooperation with the universities, started a new research project focusing on relationships and the psychological impact of polygamy.⁶⁶

The contemporary family laws enable the easier procedure of *talaq* divorce (compared to the 1984 Family Law version) and courts are lenient in cases of the extrajudicial proclamation of *talaq*. By contrast, divorces stemming from a woman's side are judged very strictly and the whole process is excessively prolonged. Consensus about the term "cruel treatment" does not exist. There are cases in which the cruel treatment is defined as "common injury"⁶⁷ and *fasakh* divorce is not permissible for women.⁶⁸ Sometimes, various means are used in relation to the avoidance of a financial settlement on the part of the man – the accusation of *nusyuz* (inappropriate behaviour) on the part of the wife or the groundless extension of *fasakh* divorce to men (in such a case it is not necessary to pay maintenance during *'iddah* as in a conventional *talaq* divorce). SIS identifies the following problems within divorce cases that must be resolved: the rules associated with the duration of the divorce process initiated by a woman should be determined, the requirements

⁶³ Sisters in Islam, "Chronology of a Struggle for Equal Rights," 201–2.

⁶⁴ Zainah Anwar, "What Islam, Whose Islam? Sisters in Islam and the Struggle for Women's Rights," 237.

⁶⁵ Zainah Anwar, "Sisters in Islam and the Struggle for Women's Rights," 245.

⁶⁶ Azza Basarudin, "In Search of Faithful Citizens in Postcolonial Malaysia," 108–9.

⁶⁷ The Malaysian Domestic Violence Act is valid only for non-Muslims. Muslim men have the right to punish their wives in cases of disobedience according to Shari'a. See Zainah Anwar, "Law-Making in the Name of Islam: Implications for Democratic Governance," 128.

⁶⁸ Raihanah Haji Abdullah, "Reasons to Dissolve a Marriage through Fasakh."

of a husband during a *khul'* divorce must be limited, "cruel treatment" and the term *nusyuz* must be reinterpreted, and *fasakh* divorce should not be used by men (as suggested in the gender-neutral family law bill).⁶⁹

SIS insists that the entitlement to maintenance during *'iddah* and *muta'ah* should be clearly set out by law and that the court must secure the rights and protection of women and children (who suffer in new marriage situations). SIS asks that monthly maintenance payments due to the woman and her children should be sent directly to the divorced woman (in agreement with the man's employer) to ensure financial security for her and the children.⁷⁰

SIS points out that the law makes no provision for the loss of custody rights in situations where there is cruel or negligent behaviour towards the child or due to acts of irresponsibility regarding the child's maintenance. SIS further denotes that the loss of custody rights due to a the new marriage of the woman (based on the hadith of the Prophet) should be reinterpreted as equalizing the rights of the father and mother after her marriage; it means every case should be judged individually.⁷¹

The Sisters in Islam, together with academics and other activists, are preparing a Model Islamic Family Law code for Malaysia that includes the principles of equality, justice, international human rights and the realities of the lives of Muslim women.⁷²

Attention is paid to discrimination against women. Malaysia officially ratified the international Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in July 1995. However, five of the thirty articles were excluded as part of the ratification process, since they were in conflict with Shari'a law and the federal constitution – articles concerning a woman's participation in public life, full consent in marriage agreements, the right to choose a spouse, the right to own property.⁷³

Islamic Penal Law in Malaysia

Particular states have partial power to enforce Islamic criminal law, but only within the framework of circumscribed offences against Islam. According to the *Syariah Criminal Offences for Federal Territories Act of 1997* (including all amendments

⁶⁹ Sisters in Islam, "Violation of Muslim Women's Human Rights: Further Discrimination Against Muslim Women Under the Selangor Islamic Family Law Bill 2003 Through Selective Gender Neutral Provisions."

⁷⁰ Sisters in Islam, "Chronology of a Struggle for Equal Rights," 201–2.

⁷¹ Sisters in Islam, "Violation of Muslim Women's Human Rights: Further Discrimination Against Muslim Women Under the Selangor Islamic Family Law Bill 2003 Through Selective Gender Neutral Provisions."

⁷² Sisters in Islam webpages, <http://www.sistersinislam.org.my/BM/research.htm>

⁷³ Zainah Anwar, "What Islam, Whose Islam? Sisters in Islam and the Struggle for Women's Rights," 238.

up to January 1, 2006), offences against Islam which fall under the jurisdiction of *Syariah* Courts are:

1. offences relating to the sanctity of Islam and its institutions: insulting, or bringing into contempt the religion of Islam, deriding Quranic verses or *Hadith*, contempt or defiance of religious authorities, defiance of a court order, religious teaching without *tauliah*, expressing an opinion contrary to a *fatwa*, issuing a religious publication contrary to Islamic Law, failure to perform Friday prayers, disrespect for *Ramadhan*, non-payment of *zakat* or *fitrah*, instigating the neglect of a religious duty, gambling, indulging in intoxicating drinks;
2. offences relating to decency: incest, prostitution, *muncikari*, sexual intercourse out of wedlock, an act preparatory to sexual intercourse out of wedlock, *liwat* (sexual relations between male persons), *musahaqah* (sexual relations between female persons), *khalwat*, a male person posing as woman, indecent acts in a public place;
3. miscellaneous offences.

Any person found guilty of offences relating to the sanctity of Islam and its institutions, shall on conviction be liable to a fine not exceeding 1,000 / 2,000 / 3,000 / 5,000 ringitt (depends on the type of offence) or to imprisonment for a term not exceeding 6 months / 1 year / 2 years / 3 years (depends on the type of offence) or to both. Any person found guilty of offences relating to decency, shall on conviction be liable to a fine not exceeding 1,000 / 3,000 / 5,000 ringitt or to imprisonment for a term not exceeding 6 months / 1 year / 2 years / 3 years (depends on the type of offence) or to a whipping not exceeding 6 strokes or to any combination thereof.⁷⁴

All other criminal offences fall under the jurisdiction of the federal government. They are listed in the Penal Code Act 574, valid throughout the territory of Malaysia. This includes, among other things, offences of culpable homicide, murder, injury, theft, robbery, and gang-robbery.⁷⁵

PAS believes that the establishment of Shari'a law to the full extent is the next step on the way to the Islamic state. That is the reason why PAS has tried to enforce the Islamic penal law as well as Islamic family law. The first proposals regarding penal codes (*hukum hudud*) came as early as the 1980s but they were turned down by the government because the Malaysian Federal Constitution states that crime is a federal matter. PAS presented its draft penal code again after winning in 1990 in Kelantan. The Kelantan *Syariah* Penal (Criminal) Code Enactment was issued in 1993. On the basis of this, the Terengganu *Syariah* Penal Code was approved in 2002 as well. Nevertheless, these two codes have not yet been implemented in its entirety.

⁷⁴ The *Syariah Criminal Offences Act 1997* for Federal Territories, with following amendments up to 2006, available on <http://www.agc.gov.my/Akta/Vol.%2012/Act%20559.pdf>

⁷⁵ Penal Code Act 574, incorporating all amendments up to January 1, 2006, available on <http://www.agc.gov.my/Akta/Vol.%2012/Act%20574.pdf>

The Kelantan Penal Code Enactment includes *hudud* and *qisas* offences and sets out the following punishments:

- *syurb* (consuming alcohol and drinks) – between 40 and 80 lashes of the whip;
- *qazaf* (an accusation of prohibited intercourse which cannot be proven by four witnesses) – 80 lashes;
- *zina* (unlawful carnal intercourse) – stoning to death with medium-sized stones for married people, 100 lashes and one year's imprisonment for unmarried people;
- false accusation of *zina* (and of alcohol consumption) – up to 80 lashes;
- sodomy (anal or homosexual sex) – stoning to death using medium-sized stones;
- incest – stoning to death with medium-sized stones;
- *sariqah* (theft) – amputation (first the right hand, then the left foot);
- *hirabah* (robbery) – imprisonment in cases involving only threats, in cases where the victim is injured, the accused should pay *diya* or *irsy* (compensation) and in cases where the death of the victim occurs, the punishment is death, followed by crucifixion;
- *irtidad* (apostasy) – death and property forfeiting, but it could be cancelled if the offender repents, in which case he could be imprisoned for 5 years;
- *qisas* (compensation for death or injuring a person) is set by the Shari'a court; penalties include death, financial compensation to the victim or victim's family, or the implementation of a similar bodily injury.⁷⁶

The penal laws of Kelantan and Terengganu are obviously unconstitutional because they include offences that are within the jurisdiction of the federal government and its Penal Code – especially theft, robbery, death of a person, the injuring of a person, and incest. Moreover, there is a difference between punishments set down by *Syariah* Penal Codes and the official Malaysian Penal Code (for example punishment for theft is amputation according to *Syariah* Penal Code and according to the official Penal Code it is imprisonment for up to 7 years or a fine or both, with whipping in special cases; in the case of incest, the *Syariah* Penal Code determines the punishment as stoning to death in contrast to the official Penal Code that sets down imprisonment from 6 to 20 years and / or a whipping). Although offences such as *syurb*, *qazaf*, *zina*, *liwat* or *musahaqah* fall under the jurisdiction of the *Syariah* Penal Code, the Kelantan and Terengganu Codes set down the punishments in accordance with Shari'a and do not limit it according to the *Syariah* Courts (Criminal Jurisdiction) Act 355⁷⁷ that states the upper limit of punishments for the *Syariah* Courts as 3 years imprisonment, a fine of 5,000 ringgit, and 6 lashes of the whip or any combination thereof.

⁷⁶ National Evangelical Christian Fellowship Malaysia, "Terengganu Hudud." and National Evangelical Christian Fellowship Malaysia, "Implications of the Hudud Bill – Why Should You be Concerned?"

⁷⁷ *Syariah* Courts (Criminal Jurisdiction) Act 355, 1965, incorporating all amendments up to January 1, 2006, available on <http://www.agc.gov.my/Akta/Vol.%208/Act%20355.pdf>

Moreover, the Sisters in Islam object to them because they discriminate against women and non-Muslim groups – especially in terms of *zina* presumption, the disqualification of women as eye-witnesses, the disadvantages for non-Muslims as witnesses, the termination of marriage through an accusation of *zina*, gender discrimination in cases of *diyat* or *qisas*. SIS emphasizes the wrongful concentration of these laws on penalties and punishments instead of on repentance, reform and forgiveness.⁷⁸

For women the situation is crucial, especially in terms of *zina* presumption and the disqualification of women in the eyes of the law. The Qur'an (Surah al-Nur 24:13) sets out that there is a requirement of testimony from four direct male witnesses in cases of an accusation of *zina*. According to the Kelantan *Syariah* Penal Enactment, it is established that merely the pregnancy and childbirth of an unmarried woman is considered as unequivocal evidence of *zina* (unless the woman can prove the contrary) and four other witnesses are not necessary. In similar *zina* accusation cases involving men, the requirement of four witnesses remains.⁷⁹ If a woman becomes pregnant due to rape, she has to prove the fact of the rape; this means that she needs eyewitness accounts from four trustworthy males in order for her not to be accused of additional slander.⁸⁰

The *irtidad* (apostasy) poses a big problem. In 2000 PAS and UMNO attempted to introduce the Islamic *Aqidah* (Faith) Protection Law, legalizing the punishment of one year's detention in a Faith Rehabilitation Centre for people accused of *irtidad*.⁸¹ Every state has a different provision concerning apostasy. The state of Sabah, for example, sets out in its *Syariah* Criminal Offence Act 1995, that "a Muslim who claims that he is not a Muslim shall be guilty of an offence... of contempt of religion of Islam and is liable to a fine not exceeding 2,000 ringgit or to imprisonment for a term not exceeding one year or to both" (section 55).⁸² PAS still calls for the traditional punishment of death, as suggested in the Kelantan Penal Enactment. However, the definition of apostasy in section 23 of the Kelantan Penal Enactment is vague and there are other obscurities concerning the term of *mukallaf* and the suggested punishment.⁸³ In the spring of 2010, Anwar Ibrahim said that no

⁷⁸ Sisters in Islam webpages, http://www.sistersinislam.org.my/index.php?option=com_content&task=view&id=759&Itemid=302 and http://www.sistersinislam.org.my/index.php?option=com_content&task=view&id=466&Itemid=197

⁷⁹ Such implementation of Shari'a used *zina* without the support of Qur'an and Sunna; such tradition are not mentioned even in the secondary sources of Islamic law. This provision seems to rely only on borrowing from the Maliki madhab. See Hjh Nik Noriani bte Dato Nik Badli Shah, "Hudud Laws and its Implications on Women," 4–5.

⁸⁰ Zainah Anwar, "Law-Making in the Name of Islam: Implications for Democratic Governance," 128.

⁸¹ Ibid., 131.

⁸² Sabah *Syariah* Criminal offence Act No. 3 of 1995, available on http://www.sabahlaw.com/Syariah_Criminal_Offences_Enactment_1995.html

⁸³ Abdullah Saeed, and Hassan Saeed, "Freedom of Religion, Apostasy and Islam," 134–35.

person would be compelled to remain a Muslim without having a real faith because it leads to hypocrisy.⁸⁴ However, he has changed his opinion recently and now supports the whole of the Islamic penal code without any exceptions.

As it has been emphasized above several times, these penal laws have not yet been implemented. But the situation could change soon. As was mentioned above, even UMNO with its current pro-Islamic tendency is agreeable in principle to *hudud* laws. But it points out that there is still long way to go before its widespread implementation in Malaysia.⁸⁵ In the case of a victory for the opposition coalition of *Pakatan Rakyat* in the forthcoming elections, the PAS party would obviously urge the full implementation of Islamic penal laws.⁸⁶ In addition, the PKR leader, Anwar Ibrahim, has expressed his support for Islamic law in recent months. The PKR party states that *hudud* criminal offences must be punished without any exception, in accordance with Shari‘a. PKR notes that these strict laws are to be applied only to Muslims who must accept Islam as a complete way of their life, including the penalties.⁸⁷ The least important party, the Democratic Action Party (DAP)⁸⁸ is a strictly secular party and as the only such member of the coalition it clearly refuses to endorse the implementation of an Islamic penal law. A meeting of representatives from all three major parties of the *Pakatan Rakyat* was held in the autumn of 2011. The main topic of this meeting was the Islamic penal code and its implementation. All leaders agreed that for the full implementation of the Shari‘a penal Code in particular states such as Kelantan it is essential for there to be complete consensus across all the three state-government partners, i.e. PAS, DAP and PKR, and this is still pending. In the case of a victory in the national elections, it would be necessary to set out a constitutional amendment in Parliament as the first step. At the same time, it has been recommended that PAS should adhere to a more moderate line on this issue.⁸⁹ The whole question has now been postponed in order to keep the whole coalition strong for the upcoming elections. But this issue is certainly not resolved. The implementation of the Islamic penal code presents the *Pakatan Rakyat* with a very sensitive topic, which may cause its collapse in the future.

⁸⁴ Farouk A. Peru, “Anwar In the Flesh.”

⁸⁵ Teo Cheng Wee, “Anwar ‘backs Kelantan’s bid to enforce hudud laws’.”

⁸⁶ Jaafar Sulaiman, “Kelantan to go ahead with hudud.”

⁸⁷ At the same time Keadilan says that they accept other religions and different ways of life to which these laws are not applied. Official webpages of Keadilan <http://wanitakeadilan.wordpress.com/category/undang-undang-syariah/>

⁸⁸ DAP – Democratic Action Party (Parti Tindakan Demokratik), founded in 1966. Its goal is: ...“free, democratic socialist Malaysian Malaysia, based on the principles of human rights, equality, social and economic justice, and founded on the institution of parliamentary democracy.” Its objective is the democratic unity of disparate races and diverse religions and cultures. Official webpages http://dapmalaysia.org/newenglish/au_theparty.htm

⁸⁹ Patrick Lee, and Tarani Palani, “Hudud held back by lack of consensus.”

Conclusion

One important issue occurs in relation to contemporary Islamic law – is it necessary to transform Islamic law? Some of the *fugaha* agree with this position and support the idea of the transformation (but not modernization or even westernization) of Islamic law in order to be in concordance with actual practices in contemporary Muslim societies.⁹⁰ Such *fugaha* and other intellectuals in the Muslim world specifically require the wider *ijtihad* right that is marked out as a basis for the transformation of Islamic law. In Malaysia this attitude was presented in the first UMNO proposals for modern Islamic Family law and nowadays by organizations such as the Sisters in Islam. Their efforts in the field of new Qur’anic interpretations is supported by an increasing number of intellectuals and progressive *ulama*. The Sisters in Islam believe that *ijtihad* cannot be concentrated in the hands of the *ulama* only in the current multicultural society and that new interpretations of the Qur’an must be considered as part of mutual discussions in which all Muslims have their own responsibilities in relation to the additional development of Muslim societies.⁹¹ These ideas and such an open moderate approach to Islam do not have any expression within the top political strata in modern-day Malaysia; that is the reason why they have only a marginal, advisory influence on actual law making at a federal or state level. UMNO could represent such a moderate Islamic party but it is currently in a defensive position, having opted for a more Islamic-oriented position and hoping that such a direction will attract new voters. UMNO is not in a position where it can afford to promote or support transformational innovations in Islamic law; just the opposite.

The other *fugaha* contend that medieval Islamic law is still alive, valid and functional even in a modern world, as it has been shown to be during the last two centuries (despite some changes).⁹² This attitude is presented in Malaysia mainly by the PAS political party. Leading *ulama* of PAS support the rigid interpretation of Islam and the more traditional form of Islamic family law. The continual efforts of PAS in relation to penal law enforcement indicate its ultimate objective – building an Islamic state. The increase of Islamization in society and politics helps the tendency towards a more rigid interpretation of Islamic law; many modern or gender-balanced details were left out of the laws. Nowadays, the next Islamization process in the country is expected if there is an electoral victory for the opposition (consisting of the Islamic parties of PAS and PKR). After such an event, the more rigid proposals or versions would be applied to Islamic family law. The Islamic

⁹⁰ Abdullahi Ahmad An-Na’im, *Islamic Family Law in a Changing World: A Global Resource Book*, 16–17.

⁹¹ Zainah Anwar, “What Islam, Whose Islam? Sisters in Islam and the Struggle for Women’s Rights,” 236, 237, 248, 249; Zainah Anwar, “When Silence is Not Golden. Muslim Women Speak Out,” 107.

⁹² Oussama Arabi, *Studies in Modern Islamic Law and Jurisprudence*, 189.

penal codes could be finally implemented as well; not only in the States of Kelantan and Terengganu.

It is obvious that Malaysia continues to lack the type of significant moderate-Islamic political force that is evident, for example, in Indonesia. And it would be very difficult to build such a position in the contemporary political spectrum. Such a party must be clearly Islamic, be endorsed by a number of respected Islamic authorities, have broad support and the confidence of the public and, simultaneously, be frank about the concept of moderate Islam and the gradual transformation of Islamic law. This position had been expected from Anwar Ibrahim and his PKR party. Another great expectation concerns the “Erdogans” faction within PAS. Unfortunately, the current political situation leads them both towards a political certainty – support for the traditional Islamic position.

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