



Islam and Human Rights in a Culturally-Embedded Malaysia

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ABSTRAK

Perbincangan tentang Hak Asasi Manusia di Malaysia amat menarik memandangkan rakyat Malaysia merangkumi pelbagai etnik yang masing-masing mempunyai budaya tersendiri di samping nilai-nilai sejagat yang dikongsi bersama. Kesan-kesan budaya penjajah dan amalan keagamaan seperti Hindu, Buddha dan Islam juga sedikit sebanyak telah mencorakkan pelbagai interaksi dan gaya hidup setiap kaum. Dalam makalah ini penulis menganalisis rasional perbincangan di antara Islam dengan persoalan Hak Asasi yang berkaitan dengan orang Melayu khususnya dengan mengambil kira realiti latar belakang budaya kepelbagaian etnik rakyat Malaysia.

INTRODUCTION

The US- or Europe-based world media, often being the self-appointed, political and moral judge of postcolonial societies' ruling elites, have played a major role, in the last three decades, in portraying and reinforcing the 'authoritarian' image of mostly non-Western leaders, some justified while others were actually backed by Western-based interests. This has been done through a construction as well as the peddling of news and images of all sorts, in packages of 60 seconds, in the form of 'world news'.¹ Reactions of these non-Western leaders against such a charge are often simplistic and equally emotive.

The most recent target of both the Western mass media, indeed governments, has been the Muslim majority countries, in particular, after the tragic 9/11 event that took place in the USA. Charges that these countries are harboring terrorists, encouraging terrorism or involved in grave abuse of human rights have been plenty that, in turn, brought about equally negative responses from the countries being so charged, some from the Middle East and others from the African and Asian regions.

As a consequence, within the said countries, an animated debate and discourse has emerged about the relationship between Islam and Human Rights that reveals, as a response, three major clusters of differing opinions, namely, the 'rejectionists', the 'modernizers' and the 'reformists'.²



The 'rejectionists' argue that Allah's law is above all made-made laws. Therefore, the man-made Human Rights Law is only relevant if and when it is in conformity with the Shari'a, otherwise it should be rejected outright. The 'modernizers' accept the fact of the supremacy of Allah's law, mainly, in theoretical terms. But, however, for political expediency and economic functionality, they chose the secular Western model of governance as the most suitable for their 'modernization project' aim at uplifting the quality of life within their societies. In this context, the rejectionist's viewpoint becomes a minority opinion acceptable, in theory, to the 'modernizers.' The 'reformists', on the other hand, are solidarity-makers and quite pragmatic in their approach. They prefer to highlight the importance of the shared concern for human dignity, justice and fairness expressed clearly both in Islamic and Western values. It is the compatibility between Islamic principles and Western rules, especially those that they felt strongly would serve for the greater benefit of human kind, is of utmost importance to the 'reformists' who put matters of the 'here&now' as equally important as those of the 'hereafter.'

The schematic outline on the variety of Muslim responses to the issue of Islam and Human Rights is only helpful in so far as it provides us a useful analytical entry into our effort to pursue further discourse, debate and elaboration on the specific empirical cases. Even so, it has its limitation too because not only the scheme is derived from an extrapolation of a plurality of experiences across the Muslim majority countries around the world, it also includes debate and discussion in the Muslim minority countries, especially, in the West (New Zealand included).³ There is a qualitative difference in the historical-structural as well as in the contemporary context between the experience of those Muslim majority and that of the Muslim minority countries. It is the experience of the former that this brief paper intends to elaborate, namely, the experience in the Malay-speaking world of a Muslim majority region of Southeast Asia. Indeed, it is the largest single linguistic community of Muslims in the world, even surpassing the Arabic-speaking Muslims in the Middle East and some parts of Africa.

It is imperative, however, to locate our understanding on the debate and discourse on Islam and Human Rights in the Southeast Asian region in its own *longue-duree* historical context because within this region there exist competing domains of control based upon different legal systems, each of which defines its own notion of human dignity, justice and fairness within its own constituency. Based on the Malaysian experience, the paper begins with an account of how the different legal systems came to be embedded in the region and had managed to co-exist until today thus creating the fragmented 'domains of control' within social life in Malaysia, both in the public and private sphere. It is followed by a commentary on how these different sets of law, as a

broad framework, have contributed to and became the parameters within which the protracted contest regarding the 'domains of control' have taken place in postcolonial Malaysia, in particular, its impact on issues such as democracy and civil society, Islam and Human rights and the like, each of which has often been articulated and idiomized in terms of the cultural politics of ethnic identity.

EMBEDDING OF THE 'DOMAINS OF CONTROL': ONE STATE, THREE LEGAL SYSTEMS

Historians have divided the formation of the Malaysia state into three convenient chronological periods, namely, the pre-colonial (before 1791), colonial (1791-1957) and postcolonial (after 1957) periods.⁴ Each period is characterized by a 'pluralistic' legal system, in which a number of sets of rules and sanctions, relating to politics, economic, moral standards and social intercourse, co-existed and were practiced as frameworks of social organization and control. In other words, Malaysia's legal system has been determined by events and circumstances spanning a period of some 600 years.⁵ Of these, three major historical events-cum-periods were largely responsible for shaping the current system. The first was the founding of the Malacca Sultanate at the beginning of the 15th century; second was the spread of Islam to Southeast Asia and its subsequent entrenchment in the indigenous culture; and finally, and probably the most significant in modern Malaysia, was British colonial rule.

For more than a millennium, before the Malacca Sultanate was established (circa 1400), *adat*, or an indigenous justice system which is based upon a complex set of customary practices guided mostly by oral traditions, was the major framework within which the Malay feudal societies and numerous isolated indigenous social groups existed. However, since the literal meaning of the Malay word *adat* is "the accepted way", its scope of social meaning covers beyond the legal sphere and often used to mean "the indigenous way of life" thus Malay culture. After the arrival of Hinduism (circa 1st AD) and Buddhism (circa 7th AD), Hindu and Buddhist tenets were fused with *adat* and absorbed into the local cultures. So strong was the impact of both of these religions, especially amongst the ruling elites, that some of the Malay kingdoms, in fact, became 'Malay-Hindu' or 'Malay-Buddhist' kingdoms. This inevitably led to formation of a syncretic belief system, hence justice system too, amongst the indigenous populace.

Probably the most profound and lasting of the non-indigenous influence was the introduction of Islam in the Malay world from around the 14th century. It left a significant impact on indigenous *adat*. The establishment of the Malacca Sultanate and later its demise is critical in our understanding of the

historical origins of the plurality of legal systems in present-day Malaysia. However, the adoption of the new religion did not result in the complete elimination of the pre-Islamic *adat*. On the contrary, the more prevalent Hindu customs and animistic traditions continued unabated. Islam was merely grafted onto the existing culture. Today, the Hindu elements are still observed in the practice of indigenous cultures, such as in the celebration of marriages amongst the rural Malay folks as well as in the pompous traditional-style coronation of rulers in a highly Westernised urban context.

As Islam took a firm hold in Malacca and eventually became the state religion, Muslim laws were increasingly applied alongside *adat*. In other words, through a process of syncretization, the Hindu-Buddhist-Islamic elements were either adapted, paralalled or rationalised to suit the pre-existing indigenous *adat*. However, since the feudal ruler became a Muslim and so was his court, the organisation of his kingdom was dominated by Islam. The maintenance of law and order in Malacca was crucial to its prosperity as a trading port. The formal legal text of the Malacca Sultanate consisted of *Undang-Undang Melaka* (Laws of Malacca), or sometimes also known as *Undang-Undang Laut Melaka* (Maritime Laws of Malacca). The laws as written in the legal digests went through an evolutionary process and were improved and expanded by the different Malacca sultans. The legal rules that eventually evolved were shaped by three main influences, namely, the indigenous *adat*, Hindu-Buddhist tradition and Islam. The extent to which these laws were actually applied is unclear. However, some accounts of the administration of criminal justice can also be found in Portuguese and British accounts.

When Malacca was conquered and ruled by the Portuguese (1511-1641), then by the Dutch (1641-1824) and, finally, by the British (1824-1957), another non-indigenous system, namely, the Western legal system was introduced and applied in Malaysia, on top of the three traditions mentioned above. However, historians and legal scholars have argued that during the Portuguese and Dutch eras the Western laws applied by them made relatively little impact on the pre-existing pluralistic legal system as a whole other than upon the narrow realm of administrative structures. The local people continued to practice Islamic law and Malay *adat* because both the Portuguese and the Dutch did not interfere with local *adat* and belief system. This perhaps was true in view of the fact that the Malays remained Muslims and not converted to Christianity, either by the Portuguese or the Dutch during their rule of Malacca and other parts of Malaysia, for more than three centuries (1511-1824).

However, the British colonial rule (1824-1957) transformed the pattern of domains of social control in Malaysia forever, because, unlike the Portuguese and the Dutch, British control was not localised to Malacca. British colonialism affected the whole of the Malay peninsula and the North Borneo — a physical

area nearly 50 times bigger than the then Portuguese and Dutch colonial territories in Malaysia — which includes at least 10 Malay sultanates, rich mining areas (tin, gold, bauxite, etc.), millions of hectares of primary tropical forest, cash crop plantations and traditional rice fields, hundreds of towns, ports and market centres (big and small), and, most importantly, the large pool of multi-ethnic and multi-religious human resource. This inevitably demanded a systematic and more effective social organisation and control system which could hold the political, economic and social diversity together.

The British, like in Africa, applied the 'indirect rule' system of governance in Malaya whereby, for instance, the indigenous legal system was maintained but subsumed under the more dominant English common law. Therefore, matters pertaining to religion and *adat* was put under the jurisdiction of the Malay sultans, who headed each *kerajaan negeri*, or provincial government, and their chiefs. Even in *negeri* without sultans, the British instituted Native Courts run mostly by local chiefs under the guidance of British officers.⁶ The legal rules that eventually evolved in British colonial Malaya were shaped by four main influences, namely, the indigenous *adat*, Hindu-Buddhist tradition, Islam and English common law.

In practice, however, the legal system during the British rule was divided into three. Firstly, there was the 'English common law' system which was accepted as the general legal system and was responsible to deal with all matters in the sphere of criminal justice affecting all citizens. In the sphere of personal laws it is only applied to immigrant non-Muslims (for instance, European, Chinese, Indian, etc). The Muslims, largely Malays, were subjected to the Islamic laws, or *Syariah*, particularly, in matters relating to marriage, divorce and inheritance. Therefore, the *Syariah* laws formed the second legal system in British Malaya. The third legal system operating then was the *Adat* system, or the Customary or Native legal system, applied mainly in the areas of personal laws and, in a very limited context, in the sphere of criminal justice, too, of some groups of native peoples in the Peninsula Malaysia, Sabah and Sarawak.⁷ The *Adat* legal system was a heterogenous one because there were many distinct and large 'native' or 'tribal' groups, mostly non-Muslims, especially, in Sabah and Sarawak, each having their own tribal-specific *adat* codes, mostly in the form of oral traditions, applied in a localised context.

The only Muslim indigenous community that has its own *Adat* laws, based on *perbilangan* (memorised oral codes), and claimed that the communal *adat* land as its core, was the community of the so-called 'Minangkabau Malay's (a contested anthropological term) whose matrilineal society practised *Adat Perpatih*. The British recognised and accepted this claim. Members of this community were located in parts of Malacca and Negeri Sembilan.¹² This is the only community in British Malaya (even to this day) which was affected by the

three legal systems that existed then, namely, the English common laws, the Islamic/Syariah law and the *Adat* law. As a member of *Adat Perpatih* community, I still remember how this situation was best summarised anectdotaly by my elders. They said, “if you commit a crime you go to the *orang putih*’s (lit. white man’s) court, if you want to marry you go the Kadi (local Islamic official), and if you want your mother’s *tanah pesaka* (lit. adat communal land) after her demise, sorry, you can’t its’ your sister’s, so says our *adat perpatih*.”

During the postcolonial period, this three-tier legal systems continues to rule the social lives of Malaysians, especially, that of the indigenous Malay-Muslim as well as non-Muslim population. In summary, it could be said that, sociologically, for them no single cultural strain is pervasive; each has contributed its individual piquancy to create a singular if syncretic fusion. Therefore, this process is critical to the understanding of the indigenous cultures, for present-day indigenous values are compounded of a sometimes contradictory admixture of pre-Islamic custom, the purer precepts of Islam, and Western influences. The shaping of the indigenous people’s values and to a great extent the rest of the Malaysian populace too, has been profoundly affected by these conflicting impulses.

Viewed in this context, particularly against the theme ‘Islam and Human Rights,’ Malaysia provides an interesting singular example as to how laws under radically different cultures and religions have co-existed for at least a millennium, found expression and shaped a particular society. In the Malaysian case, it is a society, which is a new entrant in the groups of world NICs, that has been the subject of focus for international mass media, not only because of its impressive economic growth record but also owing to the vocal, assertive, self-imposed world statesman style which its former Prime Minister, Dr. Mahathir Mohamed, has adopted. For some countries of the South, Malaysia is an example they wish to emulate. For these reasons, Malaysian domestic affairs have been closely scrutinised by both local and international interests, be they investors, NGOs, regional and international organizations. The main criticism leveled at Malaysia relates, mainly, to its “human rights” and “ecological” records, for the former it has been labeled as having an ‘authoritarian government’ and for the latter as a ‘destroyer of nature.’⁸ While it is not my intention here to defend or attack Malaysia, it is useful to examine these criticisms in the context of the present workshop theme to allow us to analyse the situation from an alternative analytical perspective, one which perhaps could privilege cultural variations, on the issue of Islam and Human Rights, perhaps for a wider application, beyond Malaysia.

THE CONTEMPORARY DISCOURSE ON ISLAM AND HUMAN RIGHTS IN MALAYSIA: CONTRADICTIONS AND CONTESTATIONS

In the context of my above presentation, I would like to argue that contemporary discourse on Islam and Human Rights in Malaysia has been, for all intent and purpose, about the interaction between two of the three 'domains of control' discussed, namely, between, on the one hand, rules from the 'Syariah domain,' as applied by the different 13 Syariah provincial-level courts in Malaysia, and, on the other, those instituted within the 'modern legal domain,' particularly, the Malaysian Constitution and the Common Law courts. There has been hardly any discussion on the interaction between the 'Adat domain' and the 'Syariah domain,' or between the 'Adat domain' and the 'modern legal domain.'

The main focus of the mainstream discourse within the 'Syariah domain' vs. 'modern legal domain' has on the constitutional and legal implications of Islam in Malaysia with respect to fundamental liberties and particular reference to freedom of religion, conversion of non-Muslim minors to Islam, Hudud law, 'Islamis dress', offenses against precepts of Islam, 'fatwa-making', on women, and Heads of State and Islam. These areas are highlighted because they involved cases in civil courts contesting fundamental liberties, and also debates in public domain, such as the recent one on a fatwa issued related to *kongsiraya*.

The problems revolved around the following themes: subjecting non-Muslims to Islamic law and principles; the problems of a dual legal system (Syariah vs. modern legal system) with attempts to demarcate jurisdiction but at the cost of fundamental liberties; the relevance of the 'Islamic state' vs. 'secular state' issue in rights adjudication. The courts appear to be in great confusion when dealing with the said cases which, in turn, suggest a conflict of application of Islamic laws and civil laws. However, it must be noted that these issues are not new. Many similar ones had appeared during the colonial period, especially, around the 1920s and 1930s, discussed and analysed in great detail by such legal minds as the late Prof. Ahmad Ibrahim, who was an internationally recognized Islamic legal scholar and, subsequently, appointed as the founding Dean, Faculty of Law, University of Malaya, Kuala Lumpur.

In the last decade or so, court decisions relating to the above-mentioned issues have aroused a public perception the problem is one of Islam versus the non-Muslims. In a plural society such as Malaysia, these decisions tend to be perceived in ethnic terms as well, in particular, as a contest between Malays, who are constitutionally Muslims, and other ethnic groups. The fact that all Malays are Muslims, as stated by Article 160 of the Malaysian Federal Constitution, and not all Muslims are Malays (some Chinese and Indians) has also become a point of contestation, but mainly related to the special privileges

enjoyed by the Malays and other indigenous groups. The non-Malays are unhappy over the special rights provision because they see it as contradictory to another provision in the same constitution on fundamental liberties, namely, of Article 8 on Equality.

What is pertinent in the whole discourse on Islam and Human Rights in Malaysia is that each of the 'domains of control' has its own notion of human dignity, justice and fairness. It is obvious thus far that the focus and emphasis in the discourse in Malaysia has been between what is perceived as a sociologically homogenized Islam versus equally homogenized modern legal system. In that process very little attention has been given on the interaction between the *Adat* domain and the other two major/mainstream domains. It is so because the whole discussion is embedded in the cultural politics of ethnic identity that overwhelms both structural and phenomenological existence of social life in the country. By implication, there is little concern or effort to highlight about intra-ethnic differences, especially, in the realm human rights issues, in spite of the fact that the indigenous groups are made up of Muslim and non-Muslims. Once a while we hear the problem of overzealous Muslim proselytizers who tried to convert a particular Orang Asli community, who have already been converted to Christianity or Bahaism, who, in turn, resisted with the support of proselytizers and sympathizers from the latter religious organizations.

As a conclusion, it could be argued that in Malaysia the debate and discourse which has emerged on the relationship between Islam and Human Rights reveals a strong reformist tendency as result of the cultural variations that exist in the community. The reformist route seems to be the most appropriate one to be taken in Malaysia because the multi-religious and multiethnic groups of leaders are essentially solidarity-makers and quite pragmatic in their approach. They prefer to highlight the importance of the shared concern for human dignity, justice and fairness expressed clearly both in Islamic and non-Islamic (read) Western values. It is the compatibility between Islamic principles and Western rules, especially those that they felt strongly would serve for the greater benefit of human kind, is of utmost importance to the reformists in Malaysia.

However, this doesn't mean that 'rejectionists' and 'modernizers' do not exist in Malaysia. We hear their voices quite often, mostly in the non-mainstream Malay press, or in the form of booklets, pamphlets and CDs sold publicly in night markets. They, however, remain at the margin of Malaysian cultural politics, located within the Malay-Muslim group. There has been evidence that the 'rejectionists' have had transnational connections or networking within a regional network of the Southeast Asian region. But such network has existed in Southeast Asia before even the formation of modern nation-states in the region. What is more certain at present is the clear presence

of such transnational network in the cyberspace which anyone at anytime could access through the Internet. In Malaysia there is no censorship of the Internet. The reality is, generally, most of the Internet users don't subscribe to such websites, even if do, with the present technological advancement in the ICT it is not too difficult to trace who is doing what and accessing which website.

ENDNOTES

- ¹ Of course, the classic example of how the Western mass-media, in collaboration with some advanced nations, could construct and peddle news purely for propagandistic sake comes from the Gulf War scenario; see, for instance, D. Kellner, *The Persian Gulf TV War*, Oxford: Westview Press, 1992 and John Fialka, *Hotel Warriors, Covering the Gulf War*, Washington: Woodrow Wilson Press, 1992. The classic work of Edward Said is relevant, too, see, *Covering Islam, How the Media and the Experts Determine How We See the Rest of the World*, Revised edition, New York, Vintage, 1997.
- ² The debate also took place in the West, see, for instance, Louis Henkin, "Islam and human rights: Beyond the universality debate", in *American Society of International Law. Proceedings of the Annual Meeting*, New York: American Society of International Law, 2000, pp. 95-103 and an interesting article by John Strawson, "A western question to the Middle East: 'Is there a human rights discourse in Islam?'" *Arab Studies Quarterly*, Vol. 19(1), Winter 1997 that rebuts the arguments of Ann Mayer in her book *Islam and Human Rights: Traditions and Politics*, Boulder, Colorado: Westview Press, 1996. For a useful general account on Islamic activism see, "Understanding Islamism" Middle East/North Africa Report No.37, 2 March 2005, produced by the International Crisis Group
- ³ See, Tariq Ramadan, *Western Muslims and the Future of Islam*, New York: Oxford University Press, 2005 and Yvonne Haddad (ed.). *Muslims in the West: From Sojourners to Citizens*. New York: Oxford University Press, 2002.
- ⁴ The standard text on Malaysian history is by Barbara and Leonard Andaya, *A History of Malaysia*, London: Macmillan, 1982.
- ⁵ See, Wu Min Aun, *The Malaysian Legal System*, Kuala Lumpur: Longman 1990, for a brief but excellent general introduction to the evolution of rules and laws in Malaysia. See, also, Mohamed Suffian, *An Introduction to the Legal System of Malaysia*, 2nd Edition, Kuala Lumpur: Fajar Bakti. For a more 'technical' introduction see, R.H. Hickling, *Malaysia Law*, Kuala Lumpur: Professional Law Book Publishers, 1987.

- ⁶ See the important contributions of the legal historian M.B. Hooker, namely, his following publications, *Adat Laws in Modern Malaya*, Kuala Lumpur: Oxford University Press, 1972; *A Concise Legal History of South-East Asia*, Oxford: The Clarendon Press, 1978; and Hooker (ed.), *Islam in Southeast Asia*, Leiden: E.J.Brill, 1988.
- ⁷ The experience of Sarawak and Sabah under British rule provide ample examples on this, see, for example, Richards, A.J. (compiler), *Sarawak: Dayak Adat Law in the First Division, Adat Bidayuh*, Kuching: Government Printing Office, 1964, Benedict Sandin, *Iban and Adat Augury*, Penang: Universiti Sains Malaysia, 1980. See, also Hooker, *Native Law in Sabah and Sarawak*, ibid.
- ⁸ The most recent and comprehensive account on the social history of the *Adat Perpatih* in Negeri Sembilan is the contribution by Norhalim Haji Ibrahim, *Negeri Yang Sembilan*, Shah Alam: Fajar Bakti, 1995. For anthropological accounts on the practice of *Adat Perpatih* see, M.G. Swift, *Malay Peasant Society in Jelebu*, London: Athlone Press, 1965, and the two volumes of M.G. Peletz's, *A Share of the Harvest: Kinship, Property, and Social History Among the Malays of Rembau*, Berkeley: University of California Press, 1988 and *Reason and Passion: Representations of Gender in a Malay Society*, Berkeley: University of California Press, 1996.
- ⁹ See, for example, recent books on Malaysia, namely, Saw Swee-Hock & K.Kesavapany (eds), *Malaysia: Recent Trends and Challenges*, Singapore: ISEAS, 2006 and that of Amity A. Doolittle, *Property & Politics in Sabah, Malaysia: Native Struggles over Land Rights*, Seattle: University of Washington Press, 2005.

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