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***ISLAMISATION OR MALAYNISATION?  
A STUDY ON THE ROLE OF ISLAMIC LAW IN THE ECONOMIC  
DEVELOPMENT OF MALAYSIA: 1969-1993***

**Thesis submitted by**

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**in fulfilment of the requirement for the award of the  
Degree of Doctor of Philosophy**

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## **MAP**

British Malaya

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## SUMMARY

The thesis examines the role of Islam and Shariah (Islamic law) in the economic development of Malaysia and it rejects the assumption that Islam and Shariah inhibit economic development. In contemporary Malaysia, there are two 'policies' adopted by the Government. Firstly, 'Islamisation' which is for the advancement of Islamic law and institution building. Secondly, 'Malaynisation' which promotes the socio-economic development of the Malay ethnic group. The study adopts a holistic approach which covers the political economy of law in Malaysia.

The thesis explores the relationship between the two policies considering in particular whether they are essentially the same. The study covers the pre-colonial, colonial and post-colonial periods although the focus is on the post-1969 period which involved the application of the New Economic Policy (NEP).

The NEP was a pro-Malay Policy to rectify the economic imbalance of the Malays *vis-à-vis* other communities. Therefore, the focus of this thesis is on the Malay-Muslim population of Peninsular Malaysia who form the bulk of the *Bumiputera* (indigenous people).

Two *Bumiputera* and Islamic organisations, Bank Islam (BIMB) and Tabung Haji (TH) as well as the *Bumiputera* unit trust scheme, Amanah Saham Nasional (ASN) are used as the case studies. Their establishment, structure and organisation are examined. There is a specific focus on the extent to which they are examples of Islamisation or Malaynisation.

It is clear that in contemporary Malaysia, Islam and Shariah are being used by the Government to promote economic development. Islamic values have been used to further Malay economic participation in the commercial sector. As a consequence, the economic position of many Malay-Muslims has greatly improved. However, the Government position is questioned by the Islamic opposition who say that the Islamisation policy in many respects is either contrary to Islam or merely cosmetic, and want a 'pure' Islamic approach. The thesis therefore involves a critical examination of the perspectives of both the Government and the Islamic opposition.

---

## LIST OF ABBREVIATIONS

AB	Asian Business
ABIM	Angkatan Belia Islam Malaysia (Muslim Youth Movement of Malaysia)
AC	Appeal Case
AGM	Annual General Meeting
AMLE	Administration of Muslim Law Enactment
ASB	Amanah Saham Bumiputera (Bumiputera Unit Trust)
ASN	Amanah Saham Nasional (National Unit Trust)
ASNB	Amanah Saham Nasional Berhad (National Unit Trust Plc.)
BAFIA	Banking and Financial Institution Act
BBMB	Bank Bumiputera Malaysia Berhad
BCIC	<i>Bumiputera Commercial and Industrial Community</i>
BH	Berita Harian
BIF	Bumiputera Investment Fund (Yayasan Pelaburan Bumiputera)
BIMB	Bank Islam Malaysia Berhad (Limited)
Bom. HCR	Bombay High Court
BN	Barisan Nasional (National Front)
BT	Business Times
CBM	Central Bank of Malaysia
CJ	Chief Justice
CJA	Court of Judicature Act
CLA	Civil Law Act
CLE	Civil Law Enactment
CLJ	Current Law Journal
CLO	Civil Law Ordinance
CPI	Consumer Price Index
DAP	Democratic Action Party
Ecc. Rs.	Ecclesiastical Reports

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FMA	Federation of Malaya Agreement
FMP	Fifth Malaysian Plan
FMS	Federated Malay States
FMSLR	Federated Malay States Law Report
GDP	Gross Domestic Product
GIA	Government Investment Act
HAMIM	Hisbul Muslimim
IBA	Islamic Banking Act
IBS	Islamic Banking Scheme
IBRD	International Bank for Reconstruction and Development (World Bank)
ICA	Industrial Co-ordination Act
ID	Investors Digest
IDB	Islamic Development Bank
IHT	International Herald Tribune
IIU	International Islamic University
IMF	International Monetary Fund
INTAN	Institut Tadbiran Awam (National Institute of Public Administration)
IRC	Islamic Representative Council (Majlis Syura Muslimun)
ISA	Internal Security Act
JC	Judicial Commissioner
JMBRAS	Journal of the Malayan Branch of the Royal Asiatic Society
JMCL	Journal of Malaysian Comparative Law
KL	Kuala Lumpur
KLSE	Kuala Lumpur Stock Exchange
Ky.	Kyshe
LP	Lord President
LUTH	Lembaga Urusan dan Tabung Haji (Pilgrimage Management and Fund Board)
MARA	Majlis Amanah Rakyat (Council of Trusts of the Indigenous People)

---

MAS	Malaysian Airline System
MBB	Malayan Banking Berhad
MC	Malayan Cases
MCKK	Malay College Kuala Kangsar
MD	Malaysian Digest
MIC	Malayan Indian Congress
MLJ	Malayan Law Journal
MLR	Malayan Law Report
MP	Member of Parliament
MRE	Malay Reservation Enactment
MSR	Malay Special Rights
MSRI	Malaysian Sociological Research Institute
NCIA	National Council of Islamic Affairs
NDP	National Development Plan
NE	National Echo
NEP	New Economic Policy
NLC	National Land Code
NOC	National Operations Council
NST	New Straits Times
OIC	Organisation of Islamic Conference
OPP	Outline Perspective Plan
PAS/PMIP	Parti Islam SeMalaysia (formerly Pan-Malayan Islamic Party)
PBUH	Peace Be Upon Him
PERKIM	Persatuan Kebajikan Islam Malaysia (Islamic Welfare and Missionary Association of Malaysia)
PERNAS	Perbadanan Nasional (National Corporation)
PETRONAS	Petroleum Nasional
PKPIM	Persatuan Kebajikan Pelajar Islam Malaysia (National Union of Muslim Students)

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PLS	Profit and Loss Sharing
PM	Prime Minister
PMFB	Pilgrims' Management and Fund Board/Tabung Haji
PNB	Perbadanan Nasional Berhad (National Equity Corporation)
PPP	Peoples Progressive Party
QB	Queen's Bench
RIDA	Rural and Industrial Development Authority
RISEAP	Regional Islamic Dakwah Council of South East Asia and the Pacific
RM	Ringgit Malaysia (The basic unit of Malaysian currency. RM1 =£0.26 pound sterling as at 10 June 1994)
SCJ	Supreme Court Judge
SEDCS	State Economic Development Corporations
SMP	Second Malaysia Plan
SRC	Students' Representative Council
SRI	Socially Responsible Investment
SSLR	Straits Settlements Law Report
TMP	Third Malaysian Plan
tr.	Translation is mine unless specifically indicated
TWCs	Third World Countries
UAB	United Asian Banking
UDA	Urban Development Agency
UKM	Universiti Kebangsaan Malaysia (National University of Malaysia)
UM	Utusan Malaysia
UMBC	United Malayan Banking Corporation
UMNO	United Malays National Organisation
UMMS	Union of Malaysian Muslim Students
UMS	Unfederated Malay States
UN	United Nations
UTM	Universiti Teknologi Malaysia (Technology University of Malaysia)

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UUCA	Universities and University Colleges Act
YADIM	Yayasan Dakwah Islamiyyah Malaysia (Malaysian Islamic Missionary Foundation)
YDA	Yang Dipertuan Agung (Paramount Ruler)
YPEIM	Yayasan Pembangunan Ekonomi Islam Malaysia (Malaysian Islamic Economic Development Foundation)

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- In the Goods of Abdullah (1835) 2 Ky. Ecc.Rs. 8
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Charter of Justice, 1807, 1826, 1855

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Civil Law Act, 1956 (Revised 1972)

Civil Law (Extension) Ordinance, 1951

Civil Law Ordinance, 1956

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Court of Judicature Act, 1964

Education Act, 1961

Evidence Ordinance of Straits Settlements (Selangor 1893, Perak 1884)

Federal Constitution, 1957

Government Investment Act, 1983

Guardianship of Infants Act, 1961

Hire Purchase Act, 1967

Horse Racing Act, 1965

Internal Security Act, 1960

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Islamic Insurance Act, 1985

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Muhammedan Law and Malay Custom (Determination) Enactments Revised Laws of Federated Malay States, 1935

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National Land Code, 1965

Pahang Regulation 11, 1902; 10, 1905

Partnership Act, 1961

Pawnbrokers Act, 1972

Pawnshop Act, 1981

Penal Code of the Straits Settlements, 1884

Perak Regulation 11, 1906

Perak Registration of Muhammedan Marriage and Divorce Enactment, 1885

Perlis Muhammedan Marriage and Divorce (Registration) Enactment 9, 1913

Pilgrimage and Management Fund Board Act, 1969

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Rules of High Court, 1980

Sale of Goods (Malay States) Ordinance, 1957

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Terengganu Registration of Muhammedan Marriage and Divorce Enactment 6, 1922

Trustee Act, 1948

Universities and University Colleges Act, 1971

## NOTES ON TRANSLITERATION

The following system has been followed in transliterating Arabic words:

ء a (con.) <sup>1</sup>	ز z	ق q
ا ā (l.v.) <sup>2</sup>	س s	ك k
ب b	ش sh	م m
ت t	ص ṣ	ن n
ث th	ض ḍ	ه هـ h
ج j	ط ṭ	و w
ح ḥ	ظ ḏ	و ū (l.v.)
خ kh	ع ʿ	و au (d.t.) <sup>3</sup>
د d	غ gh	ي y (con.)
ذ dh	ف f	ي ī (l.v.)
ر r	ل l	ي ay (d.t.)

**Key :**<sup>1</sup> Consonant

<sup>2</sup> Long Vocal

<sup>3</sup> Diphthong

Source: Encyclopaedia of Islam (Second Edition)

The thesis uses the following methods:

1. Arabic terms that have been Anglicised, i.e. which have entries in the Oxford English Dictionary (1989) are non-italicised, but they are mentioned in the Glossary. E.g. Shariah, Islam, Allah, Zakat, Mufti, Sunnah, Quran, Ummah, Qadi.
2. Arabic terms retained are italicised and with Arabic transliteration. E.g. *Murābahah, Muḍārabah, Qarḍ al-ḥasan, Mushārahah, Ijtimāʿī*.
3. Malay terms (including those of Arabic origin) are italicised without transliteration. E.g. *Rezeki, Dakwah, Adat, Raja, Bumiputera, Rukunegara, Jual Janji*.
4. All Arabic and Malay words are capitalised.

- 
5. All other foreign words are italicised. E.g. *Pancasila, vis-à-vis, laissez-faire, inter-alia, ibid., jus soli.*
  6. All books and articles mentioned in the main thesis (excluding bibliography) are in bold. E.g. **Sejarah Melayu, Revolusi Mental, The Mythology of Modern Law.**
  7. If they are a phrase which combines English and foreign words, they are non-italicised and without transliteration. E.g. Bumiputera Economic Policy, Family Takaful Business.
  8. Names of people, places, books and institutions are without transliteration. E.g. Ibn Khaldun, Hedjaz, Mishkat al-Masabih.
  9. For Quranic references, the number of the chapter (*Sūrah*) is given first, followed by the verse's (*Āyah*) number. E.g. 2: 275, 3: 129.
  10. All quotations are also subject to the above.

---

## GLOSSARY

<i>Ā dah</i> (Arabic) <i>Adat</i> (Malay)	Custom
<i>Adat Temenggong</i>	Patrilineal custom
<i>Adat Perpatih</i>	Matrilineal custom
<i>Aḥkām</i>	Legal injunctions
<i>Āib</i>	Disgrace
Allah	God (the only one)
<i>Al-dīn</i>	Complete way of life
<i>Al-khuluwwa</i> (Arabic), <i>Khalwat</i> (Malay)	The Islamic prohibition against 'suspicious proximity' between the sexes among those of marriageable age who are not related by blood ties
<i>Al-rahn</i>	Mortgage
Azan	Call for prayer
<i>Bayʿ</i>	Trade or commerce
<i>Bayʿ al-dayn</i>	Debt trading
<i>Bayʿ bi'l-wafā'</i>	See <i>Jual Janji</i>
<i>Bayʿ Bithaman ʿĀjil</i>	The contract in which the bank first determines the requirements of the customer in relation to the duration and manner of repayment. The bank then purchases the asset and subsequently sells the relevant asset to the customer at the agreed price which comprises the actual cost of the asset to the bank; and the bank's margin of profit which varies according to the value and type of the project. It is sometimes called <i>Bayʿ Mu'ajjal</i> and is used interchangeably with <i>Murābahah</i> .
<i>Bayt al-māl</i>	Treasury, exchequer, administration of vacant estate
<i>Bayʿ al-salam</i>	Advance sale
<i>Bangsawan</i>	The elite (pangeran in Javanese)
<i>Bendahara</i>	Prime Minister (in Sanskrit)
<i>Bendahari</i>	Treasurer (in Sanskrit)

---

<i>Bumiputera</i>	Literally means the 'sons of the soil'; the indigenous people
<i>Daulat</i>	Supernatural, mystical authority
<i>Da'wah (Arabic)</i>	Call to Islam, propagation (and also refers to the Islamic resurgence in Malaysia)
<i>Dakwah (Malay)</i>	
<i>Derhaka</i>	Disloyal, treason
<i>Du'ā'</i>	Informal prayer
<i>Dhimmī</i>	Non-Muslims (in an Islamic State)
<i>Fatwā</i>	Legal ruling issued by Mufti
<i>Faqīh (pl. Fuqahā')</i>	Islamic jurist
<i>Fiqh</i>	Jurisprudence
<i>Hadd (pl. Hudūd)</i>	Fixed, unalterable punishment for criminal offence
<i>Hadānah</i>	Right to custody
<i>Hakim</i>	Judge, ruler or governor in Muslim countries
<i>Haji</i>	Returnee from Hajj
<i>Hajj</i>	A pillar of Islamic faith, pilgrimage to Mecca
<i>Halal</i>	Permissible by Islamic law
<i>Hamba Raja</i>	The ruler's slave
<i>Hantu</i>	Ghost
<i>Haram</i>	Forbidden by Islamic law
<i>Hikmah</i>	Wisdom
<i>Hiyal</i>	Ruses, legal trick i.e. religious subterfuge contrived to practice what is forbidden by attempting to give it an appearance of legitimacy
<i>Hulubalang</i>	Warrior
<i>Ijārah</i>	It is an Islamic contract where the bank first purchases the assets required by the customer and subsequently leases the asset to the customer for a fixed period on a lease rental basis



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<i>Ijtimā'ī</i>	Welfare sector
Imam	Prayer leader
Islam	Literally means submission to the will of God, religion, see also <i>Al-dīn</i>
Jihad	Struggle in the cause of Allah, 'Holy war'
<i>Jināyah</i>	Criminal law
<i>Jual Janji</i>	A mortgage by conditional sale
<i>Kebumiputeraan</i>	Bumiputeraism, Malaynisation
<i>Kerabat</i>	Lineage
<i>Kerah</i>	Forced labour
<i>Kerajaan</i>	Government
<i>Khutbah</i>	Sermon
<i>Maḍhhab (pl. Maḍhāhib)</i>	School of law/thought
Mahdi	Saviour, leader
<i>Masuk Jawi</i>	Literally means to be a Malay; circumcision
<i>Masuk Melayu</i>	Literally means to be a Malay; conversion to Islam
<i>Maw'izah ḥasanah</i>	Good advice
<i>Marhūn</i>	Value of the thing
<i>Menteri</i>	Minister
<i>Menteri Besar</i>	Chief minister
<i>Merdeka</i>	Independence
<i>Muallaf</i>	New Muslim, convert
<i>Mu'āmalāt</i>	Public dealing, business relations'
<i>Mudārib</i>	Entrepreneur or a party who works with the money provided by the other party on a sharing basis, fund user
<i>Muḍārabah</i>	Islamic contract in which one party provides money and the other provides work (labour) in order to share the profits on an agreed ratio determined before. In

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	case of loss, provider of capital bears all net loss, combined for all operations, provided that there is no violation of contract or neglect on the part of working partner.
Mufti	Jurisconsult; qualified to issue <i>Fatwā</i>
<i>Munākahāt</i>	Family law
<i>Munkar</i>	Vices
<i>Murābahah</i>	Islamic contract in which the bank will purchase the goods needed by a client and sells them plus the profit-margin which has been agreed upon by both parties which consists of the actual cost of the goods to the bank plus the bank's margin of profit
<i>Mushārakah</i>	Islamic contract of partnership in which partners share the profits in an agreed ratio but share the loss in proportion in which they supply
<i>Pemalas</i>	Indolent
<i>Penghulu</i>	Village headman
<i>Pondok</i>	Religious school
Qadi	Muslim Judge
<i>Qard-al-ḥasan</i>	Benevolent loan in which money is given to the needy without any charge so that borrower may return it at his convenience
<i>Qirād</i>	See <i>Mudārabah</i>
<i>Qiṣās</i>	Literally means retaliation; penalty for homicide
Quran	The Holy Book of Islam and the primary source of Islamic law
<i>Rabb al-māl</i>	Provider of capital on a profit-sharing contract, investor
Raja (Rajah)	Ruler (from Sanskrit)
<i>Rakyat</i>	Masses, commoner, subjects
Ramadan	Fasting month, ninth month of Islamic calendar year
<i>Ribā</i>	Interest/usury prohibited by Islam

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<i>Rizq (Arabic) Rezeki (Malay)</i>	Sustenance
<i>Rukunegara</i>	The National Ideology
<i>Ṣadaqah</i>	Charity
<i>Shahā dah</i>	Declaration of faith (There is no God but Allah and Prophet Muhammad is the last messenger)
Shariah	Islamic law which is intended to cover every aspect of life
<i>Sharīkat al-rahn</i>	Islamic pawnshop
<i>Sharīkat al-takāful</i>	Islamic insurance company
<i>Siyā sah</i>	Politics
<i>Siyā sah al-Sharʿīyyah</i>	<i>Political law</i>
<i>Siyāsī</i>	Public/government sector
<i>Songkok</i>	Malay hat
Sufi	Muslim who emphasises the spiritual side of Islam
Sultan	Ruler
Sunnah	The sayings, actions and approvals of the Prophet Muhammad (PBUH), the second source of Islamic law
<i>Surau</i>	Prayer room
<i>Taʿzīr</i> (pl. <i>Taʿzīrat</i> )	Discretionary punishment; which is not covered by <i>Hadd</i> and <i>Qisās</i> offences
<i>Takāful</i>	Literally means co-operation; Islamic insurance
<i>Tangkal</i>	Talisman
<i>Tauliah</i>	Authority
Temasik	Previous name for Singapore
<i>Temenggong</i>	Among the four Great Malay chiefs; Chief of Police
<i>Tijārī</i>	Commercial/private sector
<i>Tuan</i>	Malay (elite) title
Ummah	Muslim community

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<i>Undang-Undang</i>	Law (in Malay)
<i>Uṣūl al-fiqh</i>	Science of jurisprudence
<i>Wadī'ah</i>	Safe-keeping
<i>Wadiat Wakalat al-Muṭlaqah</i>	Depositors consenting for their deposits to be managed for investment purpose
<i>Wakālah</i>	Agency
<i>Walī' -Allah</i>	Muslim 'saint'
Wan	Malay (elite) title
Waqf	Religious endowment, a thing which the owner has surrendered his power of disposal with stipulation that the yield be used for particular purposes for which the Waqf established or for permitted good purposes generally according to Islamic law
<i>Waqf 'ā m</i>	A dedication in perpetuity of the capital or income of property for religious or charitable purposes recognised by Islamic law
<i>Waqf khā ṣṣ</i>	A dedication in perpetuity of the capital or property for religious or charitable purposes prescribed in the Waqf
<i>Yang Dipertuan Agong</i>	Principal Ruler, King of Federation of Malaysia
Zakat	Religious alms (tithe), welfare due
<i>Zakāt al-ḥijr</i>	Alms payable in fasting month
<i>Zakāt al-māl</i>	Alms payable on wealth
Zinā	Adultery

## CHAPTER ONE

### INTRODUCTION

#### 1.1 Issues, Hypotheses and Organisational Framework

The thesis examines the role of Islam and Shariah<sup>1</sup> in Malaysian economic development. In particular, it challenges the assumption of Western orientalist<sup>2</sup> and modernisation theorists<sup>3</sup> that Islam is an obstacle to the process of modernisation and economic development. Variations of this theme have been stated explicitly by Weber (1963), Turner (1974a and 1974b), Tawney (1926), and Coulson (1964). Weber and Tawney both examined the positive contribution of Protestantism to the economic and legal development of the West. For Weber, Islamic society, civilisation and law as a whole is in sharp contrast to the rational and systematic character of Occidental society. Modernists supported by the Law and Development theory<sup>4</sup> assume that Third World Countries (TWCs) are doomed to underdevelopment unless they adopt a modern Western legal system (Snyder 1980).

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<sup>1</sup> Shariah is often translated as Islamic law which is the nearest English equivalent. Shariah is more than law but refers to the divine guidance as given by Quran and Sunnah which is intended to cover all aspects of human life (see for instance 5.6.1) (For details see M.U.Chapra 1992: 359, A.R.DoI 1984: 2-6, M.Muslehuddin 1986: 55, S.Ramadan 1970: 41-51). In Malaysia, Shariah is currently limited to family and now commercial law, and is considered to be Muslim law because it is purely personal and culturally defined (see for example 5.5.1 and 5.6.2). Shariah in Malaysia is spelt '*Syariah*' but this thesis uses the Anglicised version. Shariah and Islamic law are used interchangeably in this thesis.

<sup>2</sup> Edward Said (1978: 2-3) offers 3 interdependent definitions of Orientalism. The most readily accepted designation for Orientalism is an academic one, i.e. "anyone who teaches, writes about, or researches the Orient, and applies whether the person is an anthropologist, sociologist, historian, or philologist, either in its specific or in its general aspects, is an Orientalist, and what he or she does is Orientalism" (1978: 2). He continued that "in short, Orientalism is a Western style for dominating, restructuring, and having authority over the Orient" and its function was "to understand, in some cases to control, manipulate, even incorporate, what is a manifestly different world" (*ibid*: 2 and 12). In fact, the missionary Orientalists had one objective and that was "to deny and disprove the Prophet's status as such and the Quran as revelation" (Benabound 1982: 7). "In other words, they did not study Islam to understand it but to discredit it" (A.Hussain *et. al* 1984: 7).

<sup>3</sup> Modern social thought arose to explain the causes and impact of industrialisation, nationalism and urbanisation in the West. Like Orientalism, the modernisation theory is also an effort to understand the Third World and its culture. They argued that modernisation is Westernisation and therefore for the TWCs to be developed, they must adopt the Western law and Western values (Trubek 1972).

<sup>4</sup> Law and development theory or what may be loosely called the 'instrumentalist concept' tends to regard Western law as an instrument of change. This concept sees modern Western law as a force which can mould and manipulate human behaviour to achieve development (Seidman 1972 and Dos Santos 1973). Pound (1923: 614) described it as a theory of 'Social Engineering Through Law'.

In Malaysia, Islam has been used to promote modernisation and economic development, especially so under the 'Islamisation Policy' of Dr. Mahathir's Government. Nevertheless, this 'Policy' has been criticised as being part of 'Malaynisation',<sup>5</sup> i.e. merely to promote Malay economic development *vis-à-vis* non-Malays. Therefore, this thesis seeks to examine the above policies<sup>6</sup> within the historical perspective: from pre-colonial to post-Independence Malaysia.

The thesis poses the following questions:

- (1) Can modernisation and economic development of Malay society take place through Islam and Shariah?
- (2) Is 'Islamisation' genuine or merely an adjunct to 'Malaynisation' (for the advancement of the Malays in economic activities *vis-à-vis* non-Malays) or a hybrid of the two?
- (3) Is the objective of Islamisation to create an Islamic State where Shariah is the basis of the legal system?

The reasons why I chose to research on this topic are as follows:

Islamisation is an issue relevant to all Malaysians, especially lawyers involved in development. This is because Islam is the official religion of Malaysia and has been used as an instrument to develop the society. A study on Malayness is also pertinent since the Malays are the most important ethnic group in Malaysia. Not only are they the indigenous people and the largest of the various ethnic groups, but more importantly, they are also politically, socially and legally, though not economically dominant. All Malaysian Prime Ministers and rulers have been Malays.

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<sup>5</sup> 'Malaynisation' means the employment and development of Malays, an indigenous race in Malaysia, and not to confuse with 'Malaysianisation' which is used to include all races (Von der Mehden 1975: 252). The first term has not been firmly adopted. Von der Mehden has used Malaynisation instead. For this purpose, the term Malaynisation shall be used which seems to be more appropriate (see H. Mutalib 1990). Some might refer to this term as '*Bumiputeraism*' or 'Malayism' (C. Muzaffar 1984: 36-38, 1985: 357-360, see also the various Malaysia Plans).

<sup>6</sup> The terms 'Islamisation' and 'Malaynisation' are not formally invoked by the Government, rather they are used mainly in the literature; Islamisation is also verbally used by UMNO leaders. They themselves are not formal policies; but are however manifested by other formal Government policies such as the New Economic Policy (NEP) and Inculcation of Islamic values. This thesis when necessary uses the word 'policy' in a general sense as this word is popularly used along with the above terms. See for instance Means 1991, H. Mutalib 1990, J.K. Sundaram and S Cheek 1988b and G. Basri 1988, 1990.

The real intention of Islamisation will influence the future direction of the country, and its political, economic and legal systems. If it is really a genuine Islamisation policy, it will slowly but surely adopt Shariah as the basis of the legal system. But if it is merely part of a 'Malayanisation policy', it means that the current Western legal system will continue with just cosmetic changes.

It also affects the nature of the relationship between Muslims and non-Muslims and Malays and non-Malays in Malaysia. Will the difference between Malaysians be based on ethnicity or religion?

The hypotheses of the study are as follows:

For the Malays, apart from ethnic communalism, the force of Islam is also relevant. Islam and ethnicity are the two main factors in Malay identity. The latter connotes the tendency to protect, preserve and defend Malay interests as an ethnic or racial group *vis-à-vis* other ethnic and religious groups in Malaysia. Both Islam and Malay ethnicity are ingrained in the Malay consciousness and competed against each other in a kind of 'balance of power'. The Malays seem to be pulled often unconsciously by these two different forces. At times, the Malays may lean towards Islam, while at other times, the ethnic pull is stronger. Similarly, at times the two forces act as integrative mechanisms for Malay unity, while at other times, they divide the Malay community. At times, the Islamisation Policy might be influenced by Islamic consciousness, at other times, it might also contain Malay ethnic reasons.

Under Dr. Mahathir's leadership, it appears that a great attempt is being made to expand the role of Islamic law. Islamic law is treated not only as a religious law, only relevant to the personal life of the Muslims, it is being applied to the development policy of the country. Islamic law has been given its long-awaited opportunity to function in commerce and business in the country, notably in the financial sector.

Nevertheless, there has so far been no attempt on the part of the Government to adopt Shariah as the basis of the legal system and to change the secular nature of the Constitution into an Islamic one. The multi-religious and multi-racial nature of the

country has resulted in Malaysia retaining its secular Constitution although Islam is the official religion of the Federation.

The above issues are discussed in three parts. Part One which includes Chapters One, Two and Three, is the theoretical and historical analysis which is the backdrop to an understanding of the Islamisation and modernisation policies adopted by the post-Independence leaders. It also explains the roots of Islamisation and modernisation, and the lessons that can be learnt from the past.

Chapter Two intends to provide a historical account of the role of Islam in pre-colonial Malaya between 1403 and 1786. It also deals with the colonial period between 1786 and 1956. The chapter examines the legal and political situation in pre-colonial Malaysia and the relevance of Islamic law in various Malay Legal Digests. An important issue raised in this chapter is the contradiction between the teachings of Islam and its practice by the people, especially the ruling class. The Malay States (Tanah Melayu) were controlled by their respective Rulers (Sultans). The Ruler was not only the religious head but also the political leader in his state. The Rulers were regarded as God's representatives on Earth and received absolute loyalty from the people (*Rakyat*). Islamic law was the law of the land which functioned in all aspects of civil and criminal law, as well as public and private laws. Islamic punishments (such as *Hadd* or fixed punishment) for adultery and theft were prescribed in the Malay Legal Digests, the Malaccan one being the most popular which was followed by other states. The Digests also traced the importance of Malay indigenous law (*Adat*)<sup>7</sup> especially in the criminal aspects. In many places, we can see how Islamic law and customary law co-existed. Nevertheless, the remaining unsolved question was the extent to which Islamic rules were applied and enforced by the Ruler. There is evidence of how Islamic teachings were bypassed by the Rulers whose main concern was material gain. The Malays were hardly religious and pre-Islamic practices were still rampant. However, Islam gave the Malays new and positive values. Islam gave content to the definition of

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<sup>7</sup> It derives from the Arabic word *ʿādah*.



a Malay and the basis for the central issue of this thesis, i.e. Islam-Malay relationship.

Chapter Two also deals with British colonial rule which can be divided into two phases. The first began in 1786 when Francis Light took control of Prince of Wales Island (Penang), the beginning of British rule in the Straits Settlements. The second began in 1874 through the Residential System which was extended to all the states in Peninsular Malaysia. British rule witnessed the introduction of the English legal system and restricted the application of Islamic law to personal aspects of Muslim life. Through the 'divide and rule' policy, the British Residents became the real administrators and the Malay rulers were reduced to puppets, responsible only for matters concerning Islam and Malay custom. Even these limited aspects were not free from British interference. This chapter also reveals the exploitative nature of colonial law. Economic laws were introduced simply to preserve the traditional agriculture of the Malays while at the same time excluding them from the capitalist economy. The native Malays were also branded as lazy, justifying British encouragement of non-Malay immigrants, thus creating modern plural Malaysia which is now its most distinct feature. Realising the importance of gaining the support of the native Malays, the British introduced 'Malay Special Rights' (MSR). This was ostensibly intended to give preference to the Malays in three major areas, i.e. land ownership, education and the public sector. Some Malays, mainly from the aristocracy, were selected and trained in special English schools. The purpose was to produce local leaders with Western education who would continue the administration of the country when the British left.

Chapter Three continues with the British policy of the Malayan Union. Such questions as to why the Malayan Union was introduced and how the Plan was attacked by the Malays will be examined. The Malayan Union came in 1946 and was intended to promote common citizenship to all who were born in the Union, and also to abolish the 'MSR' provision. Malay opposition to the plan led to the birth of the United Malays National Organisation (UMNO) which has been the ruling party since Independence. The Union was substituted by the Federation of Malaya Agreement (FMA) 1948 which was regarded as a political compromise. The Independence Constitution was based on

the FMA 1948. The Malays had to recognise the non-Malays, particularly the Chinese, as Malaysian citizens while the non-Malays had to accept 'MSR' and Malay political dominance. Central to this chapter is the Law Commission which was responsible for drafting the Independence Constitution. Initially the Commission did not provide for Islam as the official religion of the Federation. This was later inserted as Article 3 on UMNO's recommendation. Nevertheless, Article 3 is subject to other articles, particularly Article 4 which upholds the supremacy of the Constitution. Article 3 only provides for Islam as the official religion and was never intended to change the secular nature of the country. The Constitution gives legal recognition to the Malays and Islam and the MSR provision is given emphasis. The chapter also reveals how the Independence leaders adopted the Western modernist approach and limited the role of Islamic law.

Part Two deals with the main issues of the study; the Malaynisation and Islamisation policies. Section Two, which contains Chapters Four and Five, begins with the 1969 General election and the subsequent racial riots. The riots were a significant event because they became a springboard for Malays to re-assert their *Bumiputera* (indigenous) status, and enthusiastically fought for and won their demand for a more equitable position in plural Malaysia. Of great relevance to the present study is the fact that, against this background, both aspects of Malay identity; ethnic communalism and Islamic assertiveness, came to the fore. This serves to demonstrate and reinforce the argument that Malay ethnicity and Islam constitute two components which complement and balance each other. The New Economic Policy (NEP) introduced in 1971, was regarded as a Malaynisation policy ostensibly to promote the Malays in economic activities. Through this policy, the Government provided opportunities and facilities to promote Malays in business, as well as creating a Malay capitalist class. Besides the aim of eradicating poverty regardless of race, the underlying goal was to restructure society, i.e. to correct the economic imbalance, thus abolishing the identification of race with economic activity. The Malays were to be encouraged to participate more actively in the economy, so the Plan set a target of 30 per cent Malay

ownership of the economy. The NEP also re-asserts the *Bumiputera* status. The chapter will deal with the legal meaning of *Bumiputera*, and how significant *Bumiputera* was in the Government's economic policy. The early period of the NEP was not concerned with the development of Islamic law. The chapter analyses the role of Islamic law and shows how the Malay ethnic dimension outweighs the Islamic element. The aim of the Government was merely to improve the socio-economic position of the Malays *vis-à-vis* non-Malays. The means for achieving this aim was immaterial, it might be done at the expense of religious values. The force of materialism was seen to be stronger than religious ideals.

Chapter Five continues with the second decade of the NEP. If in the 1970s, the Government failed to encourage more Malays to participate in the economic sector, the 1980s saw a change of strategy. The new Government under the current Prime Minister (PM) introduced an Islamisation Policy which tended to extend the application of Islamic law in the economy (*Mu<sup>6</sup> amatāt*). The chapter will show how Islamic law was used to encourage Malays to participate in economic activities and what Islamic legislation has been introduced. The chapter also considers the real intention of Islamisation, i.e. to what extent Islamic law was really intended to be applied in plural Malaysia, and how Islamic values and principles were interpreted to suit the modern capitalist framework of Malaysia. The response towards the Islamisation policy by Muslim and non-Muslim groups is also examined.

Part Three which contains Chapters Six, Seven and Eight, is a case study of aspects of the 'Islamisation/Malaynisation' policy of the NEP Government. Chapter Six deals with Islamic banking; a manifestation of the Islamic resurgence movement, especially so after the successful pro-Malay education policy which created more intellectual Malays with an Islamic inclination. The need to placate Malays who are sensitive to *Ribā* has been a factor in pressurising the Government to establish Islamic banking. The economic impact of interest is discussed followed by the principles of Islamic banking. The chapter tackles the central issue of Islamic banking, i.e. the contradiction between the theory and practice of Islamic banking with special reference

to Bank Islam Malaysia Berhad (BIMB). The chapter deals with the main problems faced by BIMB and its role in promoting economic development. The chapter concludes by asking what is the future of Islamic banking in Malaysia. Should the whole banking system in Malaysia be Islamised?

Chapter Seven deals with Tabung Haji (TH) or the Pilgrimage Fund and Management Board (PFMB). TH has been selected as a case study to show the relevance of Islam and Malay ethnicity in Malaysian economic development. Since Independence, TH has become a showpiece for modern management operating in accordance with Islamic principles. As a tool of nation-building, Islam in part through TH has come to address the tasks of integrating the economic fringes into national economic development, and integrating the political fringes into the national coalition. It is for creating a Malay-Muslim communal identity based on a universal value system, and also to alter the peoples perception of the Government from a secular nationalist one to one responsive to the Islamic idiom. The NEP has led to modernisation and urbanisation amongst the Malays. For the young urban Malay, this ethnic balance has increased pressure on Malay identity. Removed from Malay cultural life and set adrift in an urban, secular, multiracial world, many have turned to a reaffirmation of Malay cultural identity. In this context, Islam plays a role as the mainstay of Malay communal identity and as a vehicle for nation-building. Therefore, TH has been used by the Government in helping to create a new Malay able to fulfil the aspirations of the Government in nation building. Hajj (pilgrimage to Mecca) has become part of a national power of configuration under the NEP government. Furthermore, there is a growing perception that being a better Muslim is synonymous with being a good Malaysian citizen. Hajj has become a nationalistic as well as a Muslim duty which makes a Hajj (returnee from Hajj) a full-fledged member of the Malaysian Muslim community. Therefore, this chapter will show how TH has combined Islam and Malay ethnic consideration in a single whole. At one and the same time, it is an institution to accommodate and facilitate Hajj; while it mobilises

and invests the savings of the Malays with the purpose of improving their socio-economic position.

Chapter Eight deals with another manifestation of Islam-Malay interlinkage in Malaysian development policy. The unit trust scheme known as Amanah Saham Nasional (ASN) or National Unit Trust (NUT), is now the most successful system for mobilising Malay savings for equity investment. Unlike BIMB and TH, which operate their business in accordance with Shariah, ASN's investments are not free from *Ribā* (interest). Nevertheless, because the relationship between Islam and Malayness is inseparable, ASN has also been associated with the Islamisation policy of the current Government. This chapter will evaluate the operation of ASN from the Shariah perspective to see how the Government has justified the existence of interest-based companies in the ASN's investment portfolio. This chapter will attempt to show that the ethnic force is stronger than the religious force.

Chapter Nine is the concluding chapter which attempts to answer the questions raised in the first chapter. The chapter will also suggest an agenda for future research.

## **1.2 Scope and Methodology of the Study**

The study covers only Malays in Peninsular or West Malaysia and does not include the other indigenous communities (*Bumiputera*) of Sabah and Sarawak (East Malaysia). Therefore, unless otherwise specified, Malaysia in this study refers to Peninsular Malaysia and *Bumiputera* refers to Malays only.

This study seeks to analyse the role and nature of Islam and its law (Shariah) in the economic development of Malaysia under the current 'Islamisation' process. This is compared with the concurrent 'Malaynisation' process. There are numerous studies on Islam and Malay in Malaysia. However, the studies are mainly in relation to socio-political issues and Malay nationalism (Galangher 1966, Winzeler 1970, Kessler 1978, Funston 1980, Gale 1986, Means 1991). There is a great deal of writing on the Islamic resurgence, and its impact in Malaysia which centres on the role of Malay youth and

Islamic Organisations (called Dakwah groups in Malaysia)<sup>8</sup> as well as the need to return to the purity of Islam (Z.Anwar 1987, Nagata 1984, C.Muzaffar 1987, J.K.Sundaram and S.Cheek 1988b). Studies on economic development have been mainly by economists and do not relate to law (T.G.Lim 1975, J.K.Sundaram 1988c, 1990a). There are writings on Islamic law in Malaysia, but they do not however deal with Malay economic development such as Ahmad Ibrahim (1965, 1978, 1984, 1985 1987), M.S.Hashim *et al.* (1978), Hooker (1976, 1984), H.Jusoh (1991). There is one short article written in 1969 by Gordon Means entitled **The Role of Islam in the Political Development of Malaysia**, and one book by Husin Mutalib in 1990 on **Islam and Ethnicity in Malay Politics**. Nevertheless, being political scientists, their emphasis is on politics rather than law.

The specific feature of this study is the inter-linking between Islamic law and Malay ethnicity in relation to economic development. Therefore, the study seeks to combine sociology, economics and law. This is a specific study of Islamic law and Malay ethnicity in relation to economic development in Malaysia. It does not make an effort at comparison with other countries. Nevertheless, when relevant, examples involving other countries are used to illustrate specific points.

The study uses a qualitative method. The techniques used are basically interview, document analysis and narrative account. A series of interviews was carried out in Malaysia between July 1991 and December 1991 with officials from TH and ASN as well as economists and legal experts. Interviews and dialogues were also conducted with Muslim economists and legal experts while attending various seminars and symposia in England in 1992 and 1993. Documents were obtained from various primary sources such as legislation, cases, government and corporate reports and newspapers. The main statistical data for TH and ASN are up to 1990 and 1991 respectively (BIMB is up to 1992), the period when I conducted my field work.

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<sup>8</sup> *Dakwah* is a Malaynised version of *Dafwah* (Arabic) which has two meanings. It firstly refers to Islamic revivalist movements/groups. Secondly it refers to propagation of Islam.

Nevertheless, I have tried to indicate significant developments which have occurred since then whenever necessary.

I have also drawn from a growing body of secondary source materials such as textbooks, theses and articles. Various libraries, especially the Islamic and Oriental libraries, were visited. These include the International Islamic University, Petaling Jaya (IIU), Islamic Centre KL (Pusat Islam), PM's Department Library in Malaysia, the School of Oriental and African Studies (SOAS) in London, the Centre for the Study of Islam Muslim and Christian Relations (CSIC) in Birmingham, Islamic Foundation in Leicester, Islamic Studies libraries in Oxford, Leeds and Edinburgh, State University of New York (SUNY) in Buffalo and Albany, and Cornell University, Ithaca, USA. As for narrative accounts, I have drawn from various Malay folkstories such as **Sejarah Melayu** and **Misa Melayu** and the narration from Munshi Abdullah in his celebrated book **Kesah Pelayaran Abdullah** (The Story of Abdullah's Journey).

### 1.3 The Background to the Study

#### 1.3.1 Orientalist-Modernist Perception of Islam and Shariah

There is a growing body of literature on the role of religion in effecting economic and political change, and Islam has not escaped intensive investigation. Theologians, economists, anthropologists, political scientists and sociologists have analysed the role of Islam and Shariah in the process of modernisation.

Weber, for instance perceives Shariah as irrational as he claims it to be based on the emotional feeling of the Qadi (Shariah Court judge) without reference to any normative principle. The decisions of Qadis are informal judgements rendered in terms of concrete ethical and practical valuations (Turner 1974b: 108). He asserts that Shariah is actually a product of the speculative labours of *Faqih* (legal specialists) who eventually formed four major *Madhhab* (schools of legal thought) (*ibid.*: 110). Therefore, Islamic law has been termed as specifically a 'jurist law' incapable of rational thinking and impeding economic development. Hence, it is claimed that the society and the country will remain underdeveloped until it adopts a 'modern' legal

system. For Weber, the concept of modern law is one that is found in the West and therefore the Western legal system is conducive to the emergence of capitalist development.

He proposed that Islamic society and civilisation as a whole contrasts with the rational and systematic character of Occidental society particularly in the field of law, science and industry (Turner 1972).

It is not the purpose of this study to rebut in detail Weber's propositions. Nevertheless, the idea put forward by Weber categorically shows his ignorance of the nature of Shariah. It is a divine law revealed through the Prophet Muhammad (PBUH) and it is fixed as it is supported by the Quran. The application or enforcement of Shariah is subject to interpretation by Islamic jurists and their role is to expound the law according to the spirit of Islam. This exercise of intellectual reasoning is called *uṣūl al-fiqh* (the science of jurisprudence). The role of the jurist is merely to interpret the law and not to make or change the corpus of law. It merely gives effect to the legal interpretation based on the situation prevailing at the time and must not contradict with the spirit and teaching of Islam (M.Muslehuddin 1986, A.R.DoI 1984: 14-19, S.Ramadan 1970: 84-99). Peter Fitzpatrick in his book **The Mythology of Modern Law** (1992) and elsewhere (1993) has convincingly argued that the classification of Western law as rational and modern, and non-Western law as irrational and savage is a 'modern myth' ( c.f. Said 1993). Adelman and Paliwala (1993: 9) explain Fitzpatrick's thesis as follows:

The myth of modernisation provides cultural contrasts between modern and traditional, rational and irrational, civilised and uncivilised, and progressive and backward which are themselves mythological cultural constructions, words whose meanings have been colonised by the historical dominance of Western capitalism.

The Western denouncement of Oriental civilisation, especially Islam is highlighted by Edward Said in his book, **Orientalism** (1978). He describes the notion of the superiority of Western civilisation (Occidentalism) in relation to non-Western cultures notably Islam. Throughout, Islam, Muslim and Shariah as a whole have been



associated with terrorism, devastation, barbarism, untruthfulness, inaccuracy and have been alleged to be devoid of energy and initiative.

The central point of the Western or Orientalist denigration of Islam relates to the nature and principles of Shariah. Apart from Weber, there are other Orientalists who criticise Shariah for its 'rigidity' and say that is devoid of positivism. Coulson in his book, **History Of Islamic law** (1964: 5-6) remarks:

The classical exposition represents the zenith of a process whereby the specific terms of law came to be expressed as the irrevocable will of God. In contrast with a legal system based upon human reason such a divine law possesses two major characteristics. Firstly, it is a rigid immutable system, which is not susceptible to modification by any legislative authority. Secondly, for the many different people who constitute the World of Islam, the divinely ordained Shariah represents the standard of uniformity as against the variety of legal systems which would be the inevitable result if law were the product of human reason based upon the local circumstances and the particular needs of a given community.

The Shariah according to Coulson, is not a modern law when measured in terms of the two criteria of rigidity and uniformity as stated above. In his concluding chapter, he gives instances of Muslim states which, according to him, were forced to put aside the Shariah and adopt Western laws on social and economic grounds. Islamic jurisprudence, in his opinion, may successfully tackle the problem of law and society only when it is "freed from the notion of religious law expressed in totalitarian and uncompromising terms. For law to be a living force must reflect the soul of society" (Coulson 1964: 225). What he meant by these remarks is that Shariah must cease to be religious law and instead of controlling society, which is its chief purpose, it should be controlled by society and serve its interests, only then will it be considered as law in a real sense.

Kerr, on the other hand, speaks of Shariah as idealistic and deprived of positivism:

The revived interest of modern Muslims in the classical theory of the Caliphate and the effort to find in it the basis for 'progressive' institutions of democracy, popular sovereignty, and the like, have not only been stimulated by the political encounter between East and West over the past century but also encouraged by the publications of Orientalists (Kerr 1966: 9).

Having thus referred to the part played by Orientalists, he says:

Like the traditional doctrine of the Caliphate, traditional jurisprudence was closely tied to its theological foundations. Here, however, we are concerned not so much with a disregard for the positive importance of institutionalising and formally recognising the rules of conduct, as with an

insistence on minimising the influence that human faculties can have on the content of the revealed law in the process of interpretation. Idealism of the kind discussed did in fact exist in the minds of certain pious scholars whose conception of the law was wholly bound up with its religious origins to the exclusion of its modes of application (*ibid.*: 56).

Kerr nevertheless admits that his remarks are from the standpoint of a non-Muslim. Coulson, Kerr and Weber are chiefly concerned with the material interests of society and think of Shariah in human terms. Shariah according to them is religious, not a law in the modern sense. Therefore, the Shariah is incompatible with social and economic development. For Muslim countries to progress and develop, they have to put aside Shariah and Islamic values and adopt Western law and values. In Weber's words, to emulate the 'Protestant ethic'.

The superiority of the West over Islam and other non-Western societies is due to the fact that most parts of the world (the Third World) came under Western colonial rule, resulting in the imposition of their values and systems including their economic and legal structures. The colonised people were regarded as savages, idiots and indolent, and had no right to self-determination since they had not yet found a self to determine (Thornton 1965: 158). This imposition of European law was regarded as a great gift because "they substituted 'civilised' law for the anarchy and fear that they believed gripped the lives of the colonised peoples, freeing them from the scourges of war, witchcraft and tyranny" (Merry 1988: 869). According to Adelman and Paliwala (1993: 11) this "civilising mission of colonialism was transmogrified into the evangelism of modernisation". The creation of Western style institutions was regarded as essentially for economic development. Law and politics were viewed as instruments for the resolution of developmental problems. Progress gained the status of a god, symbolised by Western ideology and institutions (*ibid.*: 3-4).

It has been alleged that Islam in Malaysia impedes the economic development of the Malays. It has been stressed that Malay religious teachers often emphasise that the future life is the abode of ultimate happiness for the real believer as this world is ephemeral and transient (H.Alatas 1972a). It is argued that this inhibited Malay Muslims from vigorous economic pursuit in comparison with their Chinese compatriots.

Von der Mehden (1978) in his study of the role of Islam *vis-à-vis* Malay economic development considers three main categories:

- (a) Islamic belief *per se*;
- (b) Malay Islamic practice;
- (c) Malay vs. Chinese priorities in value.

Islamic Belief *per se*

It has been argued that Islamic practice in Malaysia contains within its tenets various beliefs that are converse to the modern economic capitalist system. Means (1969) in comparing Weber's Protestant ethic, asserted that Islam does not appear to create among its believers "worldly asceticism, the compulsion to save or the release of acquisitive activity in the form of economic competition and hard work and that the traditional Islamic value system is not conducive to economic development and a pragmatic instrumentalist approach to both political and economic problems" (Means 1969: 282).

Another European scholar, Parkinson (1967) observed the nature of the 'pre-destined' concept as contained in Islamic belief:

The Islamic belief that all things are emanations from God is another force affecting the Malays' economic behaviour, for it tends to make them fatalistic in their approach to life. The Malay is very prone, after receiving a setback, to give up striving, and say that he has no luck, that it is the will of God. In economic affairs, this is most clearly seen in the concept of *Rizq* (a person's divinely inspired economic lot).(sic) Such an attitude constitutes a significant drag on economic development. For if the Malays subscribe to this fatalistic view and believe that any individual efforts to improve living standards are not likely to be successful, then they are not likely to attempt to master nature, or to strive for their own economic advancement by initiating the changes necessary for it. And all this forms part of their impotence in the face of the more powerful influences which shape their destiny (Parkinson 1967: 41).

Parkinson also touched on the Malay Muslim's belief in the advent of a Messiah, the Mahdi. This belief in the likelihood of the coming of a 'golden age', into which they would be led and all problems would be solved, means there is a tendency to sit and wait passively for change to occur rather than becoming an active agent of change (*ibid.*: 40-41). He concludes, "In short, there is a tendency to adopt an attitude of resignation rather than innovation" (*ibid.*: 41)

### Malay Islamic Practices

Von der Mehden (1978 and 1986) has asserted that certain special religious practices of the Malay Muslim are economically dysfunctional. He has discussed the relationship of the Hajj *vis-à-vis* modernisation. His claim that Hajj practises among the Malays is a factor leading to their poverty and being economically underdeveloped is based on two grounds:

- (i) The loss of domestic capital which might have enhanced modernisation;
- (ii) The reinforcement of religio-economic elites (Von der Mehden 1986: 62).

He adds that there are some other areas of Islamic practices such as the prohibition of *Ribā* and the closing of offices and business on Friday that are also regarded as factors that impede economic development of the Malay Muslim. The government's efforts to subsidise Hajj, to maintain a heavily religious orientation in education, to protect the people against the 'impurities' of the West and the emphasis on authority and traditions are actually the main factors leading to underdevelopment (*ibid.* 1978: 8-9).

### Malay vs. Chinese Priorities

It has been argued that the Malays and their main competitors, the Chinese, possess a different set of beliefs and attitudes to life that make them far apart. The notion of fatalism and asceticism in Islamic belief along with close identification with the village and traditional values have all been alleged to be conducive to Malay economic backwardness and derogatory to their entrepreneurial aims. By contrast, the Chinese are popularly characterised as a people influenced by both their immigrant status and religious heritage that supposedly orientates them towards entrepreneurial goals and material upliftment. Their own choice of emigration to Southeast Asia, including Malaysia, has forced them to be aggressive, challenging and willing to take risks. All these are conducive to economic and entrepreneurial success. Alatas (1972: 31-32) has boldly summarised the four factors leading to the success of the Chinese in commercial activities; money dominates Chinese religious practices, the obligation to honour ancestors necessitates wealth, public and private events are associated with

money. Lastly many taboos and symbols are associated with wealth and good luck. In summary, Parkinson (1967: 42-43) has vividly described the above as follows:

Modern psychologists and sociologists maintain that a strong motivating force in the lives of most of us is the desire to succeed. This desire to succeed is no more absent from rural Malay society than it is from any other, but to the Malay success means something different from what it does, for example, to the Malaysian Chinese. The Chinese seem to regard success as being the improvement of their economic position even if this requires some fundamental change or innovation. The Malays seem to regard success as doing what their forebears have approved and practised, but doing it as well as they can. Wealth and economic advancement are desired by the Malays, but not at the expense of renouncing utterly the traditions and traditional occupations of their forefathers to which they have grown accustomed, and which offer them a level of satisfaction greater than that offered by the mere pursuit of economic advancement and wealth.

The economist's maximising postulates can be interpreted in a similar way. The Chinese and the Malays, because they possess different cultures, values and motivations, maximise different things. Neither one is necessarily superior to the other, it is simply that the maximising postulates of the Chinese are more likely to lead to economic development in the Western sense than the maximising postulates of the Malays.

Apart from the three categories enunciated by Von der Mehden (1978), there is one aspect that is relevant to the discussion of Malay Muslim economic backwardness and passivity, i.e. the role of Malay *Adat* (custom) (M.D.Ali 1963, Hooker n.d., 1970).

There are some scholars who have made their studies and published bold comments on the fallacy of the Western concept of modernisation and their positive views towards Islam *vis-à-vis* social and economic development (Binder 1988, H.Alatas 1977, Rodinson 1974 and Sami Zubaida 1972). For instance in Binder's view, there is nothing in the Quran that inhibits the development of capitalism:

Islam arose in a commercial culture with commercial values, the merchants were usually closely associated with the ruling elites, that patrimonial bureaucracies were often engaged directly in commerce and of course, that Islam generally guarantees property rights, commercial contracts, and wage labour (Binder 1988: 210).

Rodinson also discusses specific elements of Islamic ideology which in his view do not constitute a barrier to capitalist development:

...magic never diverted men from activity in the technical sphere in the Muslim world any more than elsewhere ...it is clear, secondly, because nothing can be found in Muslim doctrine that could have served as an obstacle to technical activity (Rodinson 1974: 107).

Economic activity, the search for profit, trade and consequently, production for the market, is looked upon with no less favour by Muslim tradition than by the Quran itself. Islam regards the position of traders with full respect and admiration. The Prophet Muhammad (PBUH) has been reported as saying that:

The merchant who is sincere and trustworthy will (at the Judgement Day) be among the prophets, the just and the martyrs or the trustworthy merchant will sit in the shade of God's throne at the Day of Judgement or merchants are the messengers of this world and God's faithful trustees on Earth (*ibid.*: 16).

Umar, the second Caliph (634-644) was reported as saying:

Death can come upon me nowhere more pleasantly than where I am engaged in business in the market, buying and selling on behalf of my family (*ibid.*: 17).

Rodinson criticises both orientalists and Muslim apologists by demonstrating that even the Islamic prohibition of *Ribā* (interest) and of certain kinds of transaction, was no barrier to the continuation and elaboration of pre-Islamic capitalist practices. Similarly, he demonstrates that the Quranic revelation did not bring into being an exemplary moral economic system that was fundamentally different from any other existing system (*ibid.*: 112).

Obviously then, some of the biased writings in the West on Islam were not solely the products of ignorance. Undoubtedly, prejudice has also coloured some Western and Orientalist views as it has always conditioned its thinking on non-Western civilisation as a whole. Why there is an element of prejudice in the dominant Western and orientalist attitude towards Islam is a question carefully examined by Edward Said in his book, **Covering Islam** (1981). Alatas has also contributed to the study of Islam and economic development. He has categorically criticised Weber's thesis on Islam and Capitalism. While Weber attributed the emergence of modern capitalism in contemporary Asia to Western influence, Alatas's main objective is to show that the spirit of capitalism can rise in Asia from within itself. The Islamic ethic demands honesty, hard work, frugality and rational calculation. For Muslim traders and small industrialists, if the capitalist spirit is closely tied up with religious attitudes, we can expect a uniform pattern of expression among Muslims; but in Malaysia, this is not the case. There are important differences between Malay Muslims and Indian Muslims

engaged in business with regard to their capitalist spirit although both belong to the same religion and school of thought. For Alatas, what is decisive here is not religion but other factors such as the emigrant spirit. Therefore, the main actual obstacle to Malay economic development is not Islam, but the lack of proper understanding of Islamic beliefs and teachings. If the Malay Muslim is weak and poor and the non-Malay or non-Muslim is strong it is because, to borrow Hourani's explanation, which is quoted by Turner in his comment on Weber:

Christians (non-Muslims) are strong because they are not really Christian; Muslims are weak because they are not really Muslims (Turner 1972: 240).

Poverty and the negative attitude towards economic activities and entrepreneurship may be due to failure to observe the actual teachings of Islam and the abuse of power by the ruling elites. To this effect, the view put forward by Sami Zubaida (1972: 324 and quoted by Turner 1974b :173) is worth noting. He says:

It was not the attitudes and ideologies inherent in Islam which inhibited the development of a capitalist economy, but the political position of the merchant classes *vis-à-vis* the dominant military-bureaucratic classes in Islamic societies.

Numerous writings by Europeans describe the colonial image of Malay Muslims as lazy and not having an inclination towards capitalist development as introduced by the British. Alatas (1977) in his book, **The Myth of the Lazy Native**, describes the concept of 'capitalist development' as subscribed to by the West:

Assuming that the Malays whom the foreign observers came across were mostly fishermen and rice-farmers or independent small-holders who did not exhibit an acquisitive greed for money, should they have been classified as indolent? If this is the case, the most indolent people should be the European missionaries who laboured without the obsession of making money (H.Alatas 1977: 78)

It was only when the Malays were judged by the criteria of colonial capitalism that they were found wanting. The ideology of the colonial powers evaluated people according to their utility in the production system and the profit level. If a community did not engage in activities directly connected with the colonial venture, that community was spoken of in negative terms (*ibid.*).

Furthermore, Islam may embrace the basic pursuits of capitalism. Nevertheless, there are critical and important differences between Islamic teachings and modern

capitalist practices. For instance, Islam does not emphasise material and physical development alone. Rather, it also emphasises spiritual development and ethical values. The form of capitalism that may be deduced as compatible to Islam is the one that clearly conforms to the dictates of Shariah. Hence, Islamic business and investment activities must be in accordance with Shariah. Therefore such Western capitalist practises such as taking and giving interest is disallowed in Islam. Islam prohibits interest but replaces it with Profit and Loss Sharing (PLS) which is more just and which generates greater progress for the parties involved in doing business (M.N.Siddiqi 1988). In the West, the Ethical Investment Movement or Socially Responsible Investment (SRI) which restricts their investment activities in interest, liquor and immoral business have similarities to the business principles of Islam.

### 1.3.2 Malaysian Development Policy and its Orientalist-Modernist Approach

Malaysia became Independent in August 1957. Independence was achieved by the diplomatic efforts of UMNO led by Tunku Abdul Rahman. Although other political parties such as the Pan Malayan Islamic Party (PMIP/PAS) also played a role in demanding Independence, the British seemed to prefer to deal with UMNO because of the secular outlook of their leaders. It has been argued that the British would not grant Independence until they were certain that the local elites had been trained in Western values and principles. Lord Cromer, the British colonial planner in West Asia stated in his book **Modern Egypt**:

England will only be prepared to give total independence to its colonies after there exists a group of intellectual and politicians, who had been created by English education and willing to uphold English values to take over the new government. In no circumstances would the British Government tolerate the establishment of an Islamic independent country (quoted in MSM 1983: 58: tr.).

Therefore, even though UMNO was established to oppose the British plan for a Malayan Union in 1946, they approved its establishment. This was because UMNO's opposition to the British was taken in terms of a loyal opposition:

Britain could not afford to let the leadership of Malaya (sic) fall from the hands of the traditionally loyal and very much Anglicised leaders of UMNO (who were pro-British and wanted a British system of government to continue) into the hands of such groups as the Hizbul Muslimin (Islamic party banned by the British in 1948) (*ibid.*: 59).



UMNO leaders such as Tunku Abdul Rahman, who had been educated in the Malay College of Kuala Kangsar (MCKK), the English school reserved mainly for the aristocracy, and then pursued their studies in England, were very supportive of their colonial master's policy. When he took control of Malaya, Tunku praised the colonial British for the way:

Malaya had been blessed with a good administration forged and tempered to perfection by successive British administrators (*ibid.*: 60).

Therefore, it was not surprising that Tunku adopted the Western system of administration in every respect including the Westminster model of a parliamentary system and the secular Constitution. Although Islam was made the official religion, Tunku made it clear that Malaysia (Malaya's new name) would remain a secular country. The World Bank was invited by the Government to prepare an economic plan. The Western capitalist economic model that centres on *laissez faire* and interest was the key characteristic of the Malaysian economy. There was no rethinking of the suitability and relevance of classic Western liberalism and capitalism to the Malaysian situation. For UMNO leaders, modernisation or development must in some sense be Westernisation. The Government had practised a policy of accommodation to the extent of downplaying Islam. The Malay leaders stated the desirability of patterning the attitudes of the Malays according to the 'Protestant work ethic'. Islam, therefore, had no role to play in governing the country and remained largely ceremonial and its application confined mainly to the act of worship alone. Islamic law remained a personal law for Muslims in determining family matters only.

During the period of the 1960s and 1970s, the Malay leaders did not suggest religion as the primary motivating factor for their efforts. Their personal outlook made such pronouncements uncharacteristic. The development policy of Tunku Abdul Rahman, the first PM, was merely a continuation of the system left by the colonial power. As he said:

My experience tells me that everybody wants to continue to live the life they have been living (T.A.Rahman 1977: 23).

On the question of an Islamic State and Islamic law, he kept stressing that Malaysia was a secular country with Islam as the official religion and Islamic law merely a religious law, personal only to the Muslims. Some of the Malay elite even made sarcastic remarks about the role of Islam and Islamic law in the modern context. The then Lord President (LP) of the Federal Court of Malaysia, M. Suffian Hashim, was reported as saying:

Indeed there has been no serious discussion of substituting for the present any other system of government. No Malaysian would want the restoration of absolute monarchy or a dictatorship be it of the military or communist kind. Some religious fanatics talk of bringing in a Muslim system of government, but the many Muslim countries of the world themselves practice a wide variety of governmental systems, and it is unrealistic to imagine that a system of government suitable for conditions in the desert five or six centuries ago would be suitable for a country with daily rain, with rivers, grass and trees and of whose population some 45 per cent are non-Muslim .... Malaysia has a fearfully long and elaborate Constitution. But despite all that the Constitution does work and that quite satisfactory too. (M.S. Hashim 1979: xv).

The style of the day was merely a continuation of the legacy of the British colonial regime with a Weberian model of development. This was actually the same as Mustafa Kemal Atatürk adopted for the modernisation of Turkey in the early twentieth century. For Kemal, Islam could contribute to the public rejuvenation of Turkey only by becoming a dynamic personal piety:

Religion had become institutionalised in Turkey making it appear as though the question had implications for the whole social existence. Hence the two facets of Turkish secularism, each inviting a different approach. Under the regime of popular sovereignty the religious question became one of religious enlightenment on the one hand, and, in terms of a national existence, one of moral re-integration on the other (Turner 1974b: 169).

The strong support for Weber's concept of modernisation caused UMNO leaders, such as Tunku Abdul Rahman, to speak of the need to develop the 'Protestant work ethic'. It was during this time that Government officials urged the masses to emulate Western principles in every aspect of life. At this time, all Government officials were geared towards Western values, one minister even extolled the usefulness of alcohol and keeping shops open during Friday prayer (Von der Mehden 1963: 609-615). This was an era of ambiguity as the ruling coalition, the Alliance Party (consisting of UMNO, Malayan Chinese Association (MCA) and Malayan Indian Congress (MIC)) attempted to accommodate the various Malaysian ethnic groups. Their attitude to Islam was one of scepticism when Tunku was reported to have said that "it was impossible to

apply the Islamic religion in every way to the administration of the country" (*ibid.*: 609).

Too much concentration on material growth and free trade without state intervention widened the gap between the haves and have-nots. The non-Malays, especially the Chinese, became dominant in business and occupied the urban centres forcing the Malays to retreat to the rural areas and so concentrate on agriculture. The disparity of income and standard of living between the Malays and non-Malays was one of the main causes of the outbreak of racial riots on 13 May 1969. Tunku Abdul Rahman was forced to resign and Tun Razak replaced him. The Government introduced the NEP in 1971 aimed at the eradication of poverty and the restructuring of Malaysian society so as to abolish the identification of race with economic activity. The new leadership was committed to modernise the Malays and to promote them to at least achieving 30 per cent equity ownership of the corporate sector by 1990. For this, UMNO published a collection of essays directed specifically at the Malays entitled **Revolusi Mental** (Mental Revolution). The book called on the Malays to change their traditional attitudes and accept modernisation. Throughout, the attributes of 'modern man' were repeatedly mentioned: initiative, critical thinking, realism, positivism, self-confidence, rationalism, punctuality, discipline and curiosity; as against this a list of 'negative Malay attitudes' were mentioned that should be discarded: lack of initiative, low priority given to material work, bad work ethics, fatalistic attitude and little concern for worldly life. In conformity with the NEP, which aimed principally to create a Malay capitalist class, the book says:

The principle of accumulating as much wealth as possible is the basis of the progress of an individual, society or country. In their effort to acquire money, they found that it is a fault to be too honest.....The main principle that they practise in their actions or during negotiations is the principle of the survival of the fittest. In this way, they have gained the highest quality, i.e. trickery and swiftness similar to that of animals (S.A.Rahman 1971: 95 and 108; tr.).

**Revolusi Mental** conflicts with Islamic principles. Firstly, it justifies whatever means are employed to achieve it. This has the effect of justifying or rationalising the use of political position and influence for accumulating wealth. Secondly, it also criticises the value of honesty in order to justify its idea of using public office for self-

interest and its lack of consideration of the principles of honesty and integrity. By saying that it is a fault to be too honest, the book thus implies that the honesty of the Malays is a social problem that needs to be resolved. In addition, **Revolusi Mental** undermines religious values by promoting proverbs which are anti-religion in spirit. One such saying is "to have a lot of money can influence the angels (people with money can do as they like)" (*ibid.*: 70; tr.). The term 'money' and 'angels' symbolise materialism and religion. The force of materialism is seen to be stronger than religious ideals. The saying is also a tribute to the power of money.

While it undermines certain religious values which contradict its way of thinking, the book presents certain aspects of religion in a way which justifies its worldly outlook:

The teaching of Islam and unlimited accumulation of wealth are not contradictory. In fact, accumulation of wealth is a part of religion. Chapter *Jāthiah*. Verse 13 reads: "Allah has created all things in the heavens and on earth for your use and comfort." Therefore it is up to us to work, use, acquire and to possess them. Whosoever does so, will be rich and therefore able to attain all his ambitions...Islam does not forbid its followers to seek and own wealth, as much as possible. In fact Muslims are encouraged to acquire wealth as it has been created for us by God (*ibid.* : 108-109; tr.).

This verse is wrongly quoted. It actually runs:

And He has subjected to you, as from Him, all that is in the Heavens, and on Earth: behold in that there are signs indeed for those who reflect (A. Y. Ali 1983).

This verse is often quoted by Muslim thinkers to show that it is legitimate and necessary to harness natural forces for human progress. This verse is also used to advocate the pursuit of knowledge about nature and to emphasise the use of rationality in life. For the authors of **Revolusi Mental**, however, the verse justifies social greed and the hoarding of wealth. Islam does not encourage the accumulation of unlimited wealth by individuals, as alleged by **Revolusi Mental**; instead it is in favour of moderation as a central feature of life. The NEP was also responsible for the promotion of the Western type of hero and the ideal hero was John Paul Getty:

In all traditional societies, the hero was normally a warrior, but in this modern age, the hero is one who dresses neatly, wears a tie, carries a James Bond briefcase, drives a big Jaguar, works in an air-conditioned room, has a salary of more than (RM) 2,000 thousand dollars a month and lives in a big brick house....What are the characteristics of these modern heroes...John Paul Getty, the American billionaire (S.A. Rahman 1971: 172; tr.).

**Revolusi Mental** goes a step further by undermining religious and moral values.

One of the traits of a modern hero listed is:

...a personality pleasant to those who conduct business transaction with him. It need not be good as judged by religious and moral standards (*ibid.*: 174; tr.).

Obviously, the NEP was a pro-Malay policy to promote more Malays in business and to create as large a Malay capitalist class as possible. The way to do business is through Western ways and that is why, in spite of Government efforts to help the Malays by establishing more Bumiputera Trust Agencies and other facilities, the 30 per cent target has not been reached. It was argued that the reason was because there were Malays who refused to involve themselves with un-Islamic activities such as interest and gambling. The NEP Government was sensitive to the Malay affinity with Islam especially to gain political legitimacy. In this context, several distinct developments have occurred, one being an active assertion of Islamic identity. During the 1970s, vigorous missionary activity emerged with the aims of winning converts to Islam and purifying the practice of those already Muslim. This *Dakwah* (propagation) activity resulted in many Muslim groups being formed and also led to the development of Government policies supporting these general goals.

During this decade, most activists combined traditional fundamentalism with radicalism. The largest such group at this time was ABIM (Angkatan Belia Islam Malaysia/Muslim Youth Movement of Malaysia) led by Anwar Ibrahim, currently Finance Minister. The Government position was to adapt to the developing situation, i.e. by recognising the importance of *Dakwah*. It has tried to marginalise militant activism by sponsoring its own *Dakwah* programmes.

There is a wide range of Islamic experience in Malaysia. The Government is under pressure from not only the activist organisations, but also from a general Islamic resurgence; taking a political form in PAS. In their efforts to safeguard their position, Malays found a unifying factor in Islam. This can be seen in two ways: the provision of laws and institutions emphasising their superiority over other faiths and the resort to using Islam as a rallying point during times of perceived threat from non-Muslims.

Malays have been divided by Islam too. This has happened due to different commitments and interpretations regarding Islam and the role Islam and Shariah should play in the development process. This led the authors to divide Malays into different competing groups which include traditionalist, modernist, Islamist, radical and accommodationist (H.Mutalib, 1990, Ahmad Ibrahim, 1981 and Esposito 1980, see also Chapter Eight). The PAS-UMNO ideological divide is an excellent illustration of these contesting perceptions and definitions of Islam. The Malay-Islam relationship regained its height during the leadership of Dr. Mahathir and his Government has adopted the Islamisation strategy to try to resolve these two forces in the Malay search for identity.

### 1.3.3 An Attempt to Depart from Orientalist-Modernist Development Approach

After 1981, when Dr. Mahathir Mohamad took over as PM, the Government's support for Islam seemed to go beyond symbolic and rhetorical gestures such as building mosques, organising Quran recitation competitions and celebrations marking important Islamic events. The Government began to formulate a number of policies and programmes that at least gave the appearance of placing its development plans within an institutional Islamic framework. Beginning with the Third Malaysian Plan (TMP) (1976-1980) when Dr. Mahathir was Deputy PM, Islam was included as a guiding development principle for the nation. Under the Fifth Malaysian Plan (FMP) (1985-1990), Islam and its values were given emphasis. It was stressed that economic development would only take place with spiritual development, i.e. without sacrificing Islamic values.

The Islamisation Policy during Dr. Mahathir's time promoted universal values, such as discipline, hard work, trustworthiness, cleanliness and punctuality in the administration of the country. The Government is trying to prove that Islamic values and principles are capable of effecting change and modernisation of the Malays. The then Deputy PM, Musa Hitam explained in January 1983 that the Government's Islamisation Policy was aimed at proving that Islam was not a backward religion, but

modern, dynamic and adaptable to present-day needs (Mauzy and Milne 1986: 91). The Mahathir Government's ambition is to make Islam synonymous with economic progress and modernisation.

Consequently, since 1983, there has been an attempt to expand the role of Islamic law beyond family matters and into economic affairs. One way is by permitting Islamic law (Shariah) to function in commercial matters which were previously the monopoly of English laws. Beginning in 1983, there have been several Islamic commercial laws, and instruments using Shariah principles enacted such as the Islamic Banking Act, (IBA) 1983, Government Investment Act, (GIA) 1983, Islamic Insurance Act, (*Takāful*) 1985, Islamic Pawn shops, Islamic financing scheme for civil servants buying motor vehicles and most recently an Interest Free Banking Scheme (IBS) in conventional banks.

Another step taken towards upgrading the role of Islamic law in Malaysia was through the amendment to the Constitution of Article 121 in 1988. By virtue of this amendment, the Civil Courts ceased to have any power to interfere with the jurisdiction of the Shariah Courts. Previously, in many cases, the Civil Courts had the power to review a case which was decided by the Shariah Courts. Besides this, the position and status of the Qadi was upgraded so as to be at par with his Civil judge counterpart. The International Islamic University (IIU) was established in 1983 with the objective of training students in both English and Islamic laws to enable them to be Civil judges or Qadi.

The Islamisation Policy has its limits. The Government is not aiming at the total Islamisation of Malaysia. For instance, the present Government appears not to be interested in applying Shariah as the basis of the legal system considering the multi-racial, multi-religious nature of the country. What is important is to improve the Malay Muslim socio-economic position. Islam, which has been the symbol of Malayness, is now promulgated by the present national leaders as the basis for change and modernity. It is asserted by the Government that if the Malays' economic position became strong and stable, Islam could be secured and would gain respect from others. The

Government has emphasised that unless Malay-Muslims could compete successfully against the Chinese and other ethnic groups, the predominant role of the Malay and Islamic influence would decline.



## CHAPTER TWO

### ISLAM, FEUDALISM AND EXPLOITATION IN PRE-COLONIAL AND COLONIAL MALAYA

#### 2.1 Introduction

Islam played a significant role in the administration of justice in traditional Malay society, as evidenced by the various Malay Digests, but its practical implementation is debatable. This chapter will look at the nature of Islam and Shariah as practised in pre-colonial Malay society. Shariah was made the basic law (*lex loci*) in most of the Malay States. There were many contradictions within the society. On the one hand, there are the teachings of Islam that encourage justice, equality and fairness to others. On the other, the teachings were seldom adhered to; the rulers (Sultans) bypassed the rules of Islam, making the application of Islamic law less effective. Their main concern was to accumulate as much wealth as possible and engaged in anti-social and immoral activities. They were involved in civil wars and ruled in oppressive ways. These were their main weaknesses and the British were quick to take advantage of the opportunity. They became involved in the wars and offered help to claimants to the thrones.

By virtue of a series of treaties with the Malay States, the British gained control through the introduction of the Residency System. This was the beginning of an era of structural change in the position of the Sultans and the administration of the states. The chapter focuses on the impact of British rule on the administration of Muslim law. As a result of the colonial capitalist economy, many Chinese and Indian immigrants came to Malaya. They posed a threat to the Malays who were forced into rural areas to make way for the growing capitalist economy. The chapter also discusses the attitude of the native Malays to economic activity and the indolent label that was given to them by the colonial power.

## 2.2 Background to Islam

Before the great wave of Muslim conversions took place in the Malay Archipelago, the people were either animists or believed in a mix of animism, Hinduism and Buddhism. Belief in spirits was marked and continues to be so even today. Folk Hinduism mixed especially well with animism. As a result, Hindu customs and values have influenced Malay society as can be seen in the ceremonies marking the various phases of Malay life.<sup>9</sup>

The influence of Hindu law and custom could be found in the Royal Court, and in the concepts of State and Kingship. Malay criminal law followed the pattern of Hindu law. As a result, Islamic practice had been influenced so much that it would be difficult to say which traditions are of Islamic or Hindu origin.

There is no clear evidence explaining how Islam came to the Malay Archipelago in the fourteenth century. Arnold (1935), Fatimi (1963), and Hussin (1962) suggested that Islam came directly from Arabia by traders also acting as missionaries. Hurgronje (Fatimi 1963) and Harrison (1965) supported by several Western orientalist<sup>10</sup> argued that Islam came through India. Another explanation was that Islam came from the East, that is along the Chinese coast by Chinese traders<sup>11</sup> (Azmi 1980).

The rise of Malacca as a Muslim kingdom marked the end of political control and cultural influence in the Malay Peninsular by the Hindu and Buddhist powers. Islam was welcomed by the Malays probably because Islamic teachings freed them from the oppressive stratification of Hinduism. Consequently Malay society and law

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<sup>9</sup> For examples of various practices connected with the planting storing and cultivating of rice, the wedding ceremonies, the traditions of fishermen, the ceremonies and traditions at the time of birth and circumcision See Wilkinson 1932, Skeat 1900

<sup>10</sup> Such orientalist were Morrison (Fatimi 1963), Van Nievenhuze (Encyclopaedia of Islam 1990) and Ronkel (Encyclopaedia of Islam 1960).

<sup>11</sup> Islam reached China at the time of Prophet Muhammad. Muslim influence in China grew and spread under the Mongol's. During the time of Kublai Khan, Muslims were so powerful that as many as 8 of 12 provinces of China had Muslim governors. Muslims held other important posts too, for instance, the Ministers for War and Finance were Muslims. The Muslims in China must have contributed towards the spread of Islam in the Malay Peninsular during the thirteenth century, because the Mongol rulers of China displayed considerable interest in the affairs of this part of the world. This policy was continued by their successor, the Mings dynasty which bred one prominent diplomat and fleet commander i.e. Admiral Cheng Ho who was responsible for spreading Islam to the Malay rulers, especially the Malacca rulers, through political and commercial connections. For details see Fatimi 1963. 29-30).

were influenced by thoughts and trends from the whole Muslim world; Indian, Arab and Persian influences can be seen in Malay society and law.

The role of Malacca as a centre for Islamic expansion especially from 1403<sup>12</sup> to 1511<sup>13</sup> must not be ignored. It was through Malacca that Islam was spread along the littoral to regions as far as the Sulu Archipelago in the Philippines and provided the Malay Muslims with a sense of belonging to a wider Muslim community (Ummah) (Z.A.Wahid 1970: 23). This spread may have occurred especially so after Sultan Muzaffar Shah's declaration, around 1450, of Islam as the official religion of the kingdom.<sup>14</sup> Malacca became a centre for Islamic study and propagation, and had converted the other neighbouring Malay states of Kedah, Terengganu and Kelantan which were under Siamese suzerainty. Johore was also brought under the expanding Sultanates and these states became fiefs of the Sultan of Malacca (W.Y.Hua 1983: 15-16). Before the impact of the West, Islam was a vital and expanding force in peninsular and insular Southeast Asia. Islam effected substantial change in Malay society while adapting in harmony with most existing institutions, beliefs and practices. Syed Naquib Al-Attas (1970 and 1972) has maintained that Islam marked a crucial stage in the modernisation of the Malays and gave them new universal values. Islam has given content to the definition of Malayness ever since. Thus, in Malay psyche, the process of conversion to Islam is called *Masuk Melayu* which literally means to enter the Malay community. The ceremony marking the entrance to adulthood of the Malay male youth is called *Masuk Jawi* (circumcision) which means to become a Malay-Muslim. Thus, Islam is used as synonymous to being a Malay and as participation in Malay society (Winstead 1932: 63-90). We shall return to this Malay Islam relation later on in the thesis.

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<sup>12</sup> The date when Malacca was established by its founder, Parameswara, upon being exiled from his throne in Temasik, Java. For details of how Malacca was found by Parameswara, see G.Wang, 1968a, K.K.Khoo. 1991 8.

<sup>13</sup> The year when Malacca was invaded by the first Western power, i.e. Portugal. For details of this invasion, see G.Wang 1968b 113-119.

<sup>14</sup> Sultan Muzaffar was the third ruler of Malacca who was actually the first to adopt the Muslim title of Sultan. It was during his time that Islam was declared as a state religion and Muslim scholars were given high status and position in the state.

## **2.3 Development of Law**

### **2.3.1 Islam and Administration of Law**

Islam is often seen as playing a major role in pre-colonial Malay political life. Legal authors such as Ahmad Ibrahim (1978, 1987, 1991, Ahmad Ibrahim and M.S.Awang Othman 1988b), M. Saedon Awang Othman (1992, Ahmad Ibrahim and M.S. Awang Othman 1988b), Muhammad Abu Bakar (1986), Abu Bakar Hamzah (1991) and others have displayed the significance of Islam in the Malay Digests of the various Malay States prior to British rule. There are also authors including Gullick (1965), Means (1969) and Hickling (1987) who present a different scenario about the role of Islamic law.<sup>15</sup> This section of the study intends to look in some detail at the Islamic ingredient as provided in the Malay Legal Digests of the pre-colonial Malay States.

The development of law in pre-colonial Malaya can be classified into two eras: before and after Islam. Before Islam, the law that existed was Malay customary law (*Adat*) which centred on *Adat Temenggong* (patriarlineal law). The law was also influenced by pre-Islamic religions as well. After the arrival of Islam, Islamic law was adopted. As a result, many elements of Islamic law were assimilated into the Malay customary laws, and the mixture of laws continued to be practised in the various Malay States.

#### **(i) Malacca Legal Digest (*Hukum Kanun Melaka*)**

The emergence of Malay laws coincided with the birth of Malacca (1403). The establishment of Malacca as a port also witnessed the spread of Islam by Indian, Arab and possibly Chinese traders as well. Islam was declared a state religion by the Malacca Sultan, and Islamic law was increasingly applied in the administration of justice but pre-existing laws were also allowed to exist:

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<sup>15</sup> Gullick (1965: 139) concluded that, "Islam was not to any significant extent a state religion. There was no priesthood other than the vicars of village mosques (Imams) who were of the community and did not form a caste apart and the chaplains of the more devout Sultans and chiefs who never attained any collective importance in the political system owing to the lack of organisation. There were no major public rituals of Islamic content ... There were no Qadis until the era of British protection. Islamic legal doctrine appears in the Malay legal codes but there is no evidence to show that this doctrine, or any part of the Code, was effective law."

The Malayo-Hindu/Buddhist and newer cultures did not eradicate an earlier cultural root which was entirely indigenous. In fact, there occurred a process of syncretization in which the coming non-indigenous cultures and elements were either adapted, paralleled or rationalised to suit the pre-existing indigenous culture. The process thus led to the further enrichment of the local cultural values and norms (M.A.Wu 1982: 4).

The formal legal text of traditional Malacca consisted of the Laws of Malacca (*Undang Undang Melaka*, variously called the *Hukum Kanun Melaka* or *Risalah Hukum Kanun*), and the Maritime Laws of Malacca (*Undang Undang Laut Melaka*). The laws as written in the Legal Digest went through an evolutionary process. According to the Malay Annals, it was during the reign of Sultan Muzaffar Shah (1446-1459) that orders were given to compile the laws to provide for uniformity of decisions (Shellabear 1961: 88-89, Liaw 1976). The legal rules that eventually evolved were shaped by three main influences, namely, the early non-indigenous Hindu/Buddhist tradition, *Adat* and Islam.

The Malacca Legal Digest covered all aspects of civil and criminal law, as well as public and private laws:

The Malacca Digest exhibits no clear division between constitutional, criminal and civil law. It jumbles regulations for court etiquette, criminal law, the jurisdiction of the ruler and his ministers, the law of fugitive slaves, the law of libel, the law of contract affecting the hire of slaves and animals, the penalties *foe lese* majesty and the breach of betrothal arrangements...and the penalties for stealing the slaves of owners of various ranks (Winstedt 1958: 136).

Hooker (1983: 162) also observes the character of public and private law in the Digest when he writes:

It is essential in understanding the Digests to realise that Islam had a public as well as a private law character. It was the former which prompted the Digests themselves, their production was part of the royal prerogative and indeed, was a part-definer of that prerogative. The private law aspect, however, consisted of incorporating elements of *fiqh*. It is in acknowledging this dual nature of the Digests we come to the essentials of localisation.

The Digests contain traces of Malay indigenous law which occupied an important place in the administration of criminal justice in the country. It is only in criminal law that we can find the indigenous elements predominating. In other areas, Islamic law formed the basic law in the country (Liaw 1976). The Digest contained the elements of Islamic law concerning fornication, adultery or illicit sexual intercourse (Kempe and Winstedt 1948: 1-2, 1952: 5, de Jong 1956: 51-52), penalties for defamation (Kempe and Winstedt 1948: 17), witness (*ibid.*: 1948: 19), penalty for theft (*ibid.*: 17), penalty

for robbery (*ibid.*: 18), penalty for drinking spirits (*ibid.*: 17), penalty for apostasy (*ibid.*: 17), homicides (*ibid.*: 16), fines (*ibid.*: 16), Waqf and gifts (*ibid.*: 14), rents (*ibid.*: 13), trade (*ibid.*: 10), guarantee (*ibid.*: 11-12), land (*ibid.*: 3), lost property (*ibid.*: 14) and family law (*ibid.*). In many places we can find after mentioning the penalty according to custom, also there were various penalties according to the 'law of God' (Milner 1981, 1983, Liaw 1976). The Digest entrenched the special status of the Ruler known as Raja and his lineage (*Kerabat*). He was the head of the government (*Kerajaan*) with virtually absolute power. The Raja enjoyed special rights and privileges including the exclusive use of yellow cloth, royal language and royal command (Liaw 1976, Kempe and Winstedt 1948). This preservation may be due to three reasons:

- (a) The pre-existing laws and customs were already established and deeply rooted in the society;
- (b) The concentration by Muslim missionaries on Sufism (Winstedt 1938: 117);
- (c) The rulers' preference for custom in order to consolidate and preserve their position.

Furthermore, in the Malacca Digest there was a provision on the etiquette of the Qadi and what he should or should not do in exercising his duty (A.B.Hamzah 1991: 26).<sup>16</sup> The institution of Qadi is also mentioned in the Malay Annals (*Sejarah Melayu*) especially during the reign of Sultan Muzaffar Shah.

#### (ii) Other Malay Legal Digests

The Malacca Legal Digest was followed by other Malay States. The Pahang Laws contained less *Adat*. The 65 sections of the State Law (*Undang-Undang Negeri*) were influenced by Islam as evidenced in the provisions relating to criminal, family, evidence and procedure. Even aspects of Civil laws and rules relating to war were also based on Islamic principles (*ibid.*: 29-30).

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<sup>16</sup> Section 38(4) of the Malacca Digest provides that, "The Qadi should not make any decision when he is too full, when he is sleeping, when he is hungry. It is forbidden for him to receive any gift even from the state treasury" A B Hamzah (1991 26)

In Johore at the beginning of the twentieth century, the codification of the Islamic law which had been carried out in Turkey and Egypt was translated into Malay. The Ottoman Civil Code (*Majallah Al-Ahkam Al-Adliyyah*) was enforced in the courts until 1914 (Ahmad Ibrahim 1970: 71). The 1895 Johore Constitution was the first written constitution in Malaya. Drafted by English lawyers, it stated that Islam was the state religion.<sup>17</sup>

In Kelantan, as had happened in other states before British interference, the ruler had played an important role in dealing with jurisdiction.<sup>18</sup> Islamic law was practised by the authority and there existed a group of judicial officials to administer the law:

There is evidence that at least by the 1830s (presumably even much earlier) there resided in Kota Bharu (capital city of Kelantan) both a state Mufti and Hakim, the former exercising judicial (rather than merely consultative) function, assisted by Qadi, in a Shariah Court restricted largely to Muslim personal law and the breaches of the moral law and spiritual observances; while the latter acted as judge in what seems to have been primarily a criminal court, in which a mixture of Islamic and Malay customary law was administered (Roff 1974: 106).

Even Hickling in his book **Malaysian Law** (1987: 164-165) has mentioned that:

Kelantan enjoyed the reputation of being rigorous and strict in its application of Islamic criminal law during 1837 to 1886.....The judicial system was solely, at this time, based on pure Islamic law, and customary law was permitted to be applied in so far as it did not conflict with the principles of the former law.

Nevertheless, he added that the period of Islamic law in Kelantan was short, for by the turn of the century, the laws applied in the courts of Kelantan (except the Shariah Courts) "did not reflect the purely Islamic legal norms but appeared to be a chaotic mixture between Islamic law and customary law" (*ibid.*: 165).

In Terengganu, the influence of Islamic law can be seen in the early part of the nineteenth century, particularly during the reign of Sultan Umar who came to the throne in 1837. Clifford recorded that Sultan Umar was very strict in the implementation of Shariah (Clifford 1961). The Islamic State of Terengganu emerged

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<sup>17</sup> Article LVIII of the Johore Constitution provided: "the religion of the state for this territory and State of Johore is the Muslim Religion and as such being the case, the Muslim religion shall continuously and forever be, and be acknowledged and spoken of as the State Religion: that is to say, on no account may any other religion be made or spoken of as the religion of the country, although all other religions are allowed and are always understood as proper to be allowed, to be practised in peace and harmony by the people professing them in all and every part of the territory and dependencies of the State of Johore" See Constitution of Johore edited by Allen *et al.* 1981.

<sup>18</sup> As recorded by Hsein Ching-Koo, a Chinese traveller who visited Kelantan in 1782, the Sultan's court was attended by *Wans* and *Tuans* (they were referred to as the rulers of Kelantan). See N.M.Mohd Salleh 1974. 23, Clifford 1961. 107.

in the early fourteenth century as proved by an ancient written stone found at Kuala Berang in 1899 (JMBRAS 1924: 252-4). The inscription on the stone, which was meant to be a pillar, records an order to promulgate certain legal provisions bearing the influence of Islam.<sup>19</sup>

The Kedah Laws consisted of Port law, the law of Dato' Sri Paduka and the Law of Dato' Kota Setar (Winstedt 1938: 1). It had 40 sections covering criminal,<sup>20</sup> family,<sup>21</sup> commercial<sup>22</sup> and land laws which were greatly influenced by Islam. Its sources consisted of rules laid down by the Book of God, rules of reason and rules as laid down by jurists (A.B.Hamzah 1991: 36).

In Perak, there were three written laws in existence: the Malay Legal Digest, the Ninety Nine Laws of Perak and the Malay Legal Miscellany which were promulgated as the law of the state (Hooker 1976: 492). They contained provisions on criminal law (penalty for theft, illicit intercourse), civil law, as well as rules relating to war (A.B.Hamzah 1991: 36). The Perak laws bore strong influence of Islam as evidenced in the provision of the laws which expressly laid down as follows:

Unless the rules of Quran are enforced, the person will have no right to govern the state. Until the Quranic rules are applied and enforced, the state will achieve peace (*ibid.*: 37; tr.).

Negeri Sembilan had two written laws in existence: a Digest of Customary Law from Sungai Ujong and an old Legal Digest (Winstedt 1938: 17). They were based on matrilineal *Adat Perpatih* but Islamic influence is strong; various Quranic verses were invoked to stress the just application of the law by the Qadi.<sup>23</sup>

A Qadi's duty was expressly provided for in the Digest, therefore it is a direct rebuttal to those who submitted that there was no institution of Qadi prior to the British

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<sup>19</sup> The stone proclaims rules and governments to expand and uphold the Islamic faith and the teachings of the Prophet (PBUH). It also deals with the relations of creditor and debtor, punishments for illicit intercourse for the married and unmarried person, false evidence and punishment in default of fine (See JMBRAS 1924 and Fatimi 1963: 60-61).

<sup>20</sup> As contained in Sections 3, 5 and 7. The Islamic punishment of *Hudūd* (fixed law), *Qisas* (retaliation) and *Tafzīr* (Court's discretion) were contained in Sections 8, 9, and 10 respectively. See A.B.Hamzah: 1991: 35.

<sup>21</sup> As contained in section 16, see *ibid.*

<sup>22</sup> As contained in sections 10, 13, 14, 15, 23, 24, 26, 27, 32, 33, 34, 35, 36. See *ibid.*

<sup>23</sup> Section 7 of the Sungai Ujong Digest provides: "For Allah's command is: "When you judge among men, judge with righteousness". Section 47 (deals with the function of Qadi) provides that, "To judge with equity, according to Allah's command When you judge among men, judge ye with equity. Whoever does not judge according to what Allah has sent down, is a sinner and Allah knows best" (Winstedt and de Jong, 1954: 9 and 20).



colonial period in the Malay States.<sup>24</sup> The Sungai Ujong Digest (Section 47) provides eight duties of a Qadi namely to "examine witnesses, to make a decision, to bring two opposing parties together, to fear Allah (God) Most High, to give lodging to the Qadi (sic), to keep hold of circumstantial evidence, to order punishment and to judge according to Allah's command" (Winstedt and de Jong 1954: 20).

In three other Malay States: Perlis, Penang and Singapore, the absence of any system of laws was due to the fact that they were previously part of other Malay States. Perlis and Penang were part of old Kedah (before being divided during the time of the British) while Singapore was part of the state of Johore, before it was declared independent by Stamford Raffles in 1819.

Therefore, from the above, three things can be concluded:

- (a) Islam was the basis of law in most of the Malay States;
- (b) There existed Islamic judicial officials such as Qadi and Mufti ;
- (c) Islamic elements were contained in the private as well as public laws of the traditional Malay States prior to British colonial rule. Even though there were also provisions of pre-Islamic and customary elements in the legal system, Islam was given much emphasis and consideration.

Nevertheless, the role of the Qadi as a judge was unclear in the context of the superiority of other prominent officials in the state. According to foreign descriptions of judicial administration in the Malay States, the Qadi was not portrayed as an important functionary. Instead, legal administration was generally described as being in the hands of royal officials (Milner 1981: 47). The *Bendahara* (a Sanskrit title for PM) was described as the chief justice in all civil and criminal affairs in fifteenth century

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<sup>24</sup> Besides J.M. Gullick, there is another Western writer, Gordon Means (1969: 269) who wrote that "No Qadis were employed at the royal courts and no central Muslim institutions were maintained in the capital to act as a center for religious activities or observances within the state. While Islamic jurisprudence influenced legal codes in some states, these laws appear to have been largely ignored in administration and in the settlement of disputes. Even though the Ruler was depicted as God's shadow on earth and was acknowledged to be the highest authority on matters both religious and secular, Muslim institutions were not actively supported by royal power and revenues. Islam was a state religion largely in symbolic form.

Malacca. The *Bendahara* (the most prominent being Tun Perak) was so powerful that he was able to influence the selection of the Sultan.<sup>25</sup>

It is inaccurate to conclude that Islam was not a state religion or that it played an insignificant role in the pre-colonial Malay States. It is also inaccurate to say that there were no Qadis or any legal officials to administer the law. However, whether Islamic legal doctrine was effective law and rightly implemented is still a debatable issue. Islamic penalties were provided for in the Malay Legal Digests. However, one wonders whether these provisions were effectively implemented or were they merely to gain political legitimacy.

Malay over-respect for *Adat* or customary norms sometimes led them to disregard the sanctity of Islam. The popular Malay proverb, "Let the child die but not the Custom" (*Biar mati anak jangan mati Adat*), is still strongly imbued in the psyche of Malays.<sup>26</sup> Being integral to Malay life, *Adat* cannot be neglected without misgivings from the community. Given the strength and persistence of these customary and pre-Islamic elements, it is expected that the role of Islam and Shariah in Malay life would necessarily be limited. According to Winstedt (1961: 107):

The Malays of old instinctively preferred a legal system fixed and humane as their primitive custom had been.

In Terengganu, in 1828, Shariah was unknown and less preferred:

...distinguished by the same laxity that prevails in all the Malay States...Fining, mutilation and capital punishments are a terror to all evil doers, and even of these the former appears to be either unknown or rarely practised (*ibid.*).

Many Arabs in Terengganu had succeeded in the partial introduction of the Mahomedan Code of Laws; and their law of succession, which gives the chief power to the strongest, not to those who have the most right, has occasioned the constant commotion's which take place in this, and every other Malay State. Many of the *Pangerans* (the elite)...are in favour of the *Undang-Undang* and *Adat Melayu* (Malay customary law), the old Malay codes, so that between the two there is no law at all, and every man must be the redresser of his own grievances (Hickling 1987: 162).

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<sup>25</sup> Tun Perak was the most prominent official in the royal court of Malacca. He administered the state of Malacca for many years. He lived under four different Sultans. All the Sultans were under his control and influence. His dedication in rendering his duty as the PM had made Malacca the most successful state in terms of Islam and as a commercial centre in the Malay Archipelago during the fifteenth century. For details of Tun Perak and his role in administering Malacca, see G.Wang 1968a, Fatm 1963 25-38.

<sup>26</sup> For an illustration of *Adat* as practised by the Malays in their daily life, see Hooker n.d., 1970, 1975 and M D Ali 1963

It was also reported that one woman was accused of adultery and the charge was backed by evidence. Shariah prescribes that adulterers should be stoned to death (if married) if all the pre-requisites are fulfilled. However, the punishment was not imposed and nothing more was heard of the matter (Hickling 1987: 164). Therefore, on the one hand, we have the situation where Islamic law doctrine was listed in most Malay Law Digests, on the other, there was a lack of implementation combined with the abuse of power, especially by the ruling elite. Furthermore, the motives for conversion were often for non-genuine purposes. For instance, many Malay Sultans appear to have converted to Islam simply for economic reasons, i.e. to attract more Muslim traders to their ports or for other political reasons. Usually the conversion to Islam was led by the ruling elite, followed by the masses. Usually Islam was spread by Arab or Indian missionaries who at the same time were successful merchants. They were mostly Sufi, more concerned with rituals and spiritual matters, having less regard to political and legal matters. They were busy converting the masses and the rulers and teaching them mainly the fundamental pillars of Islam such as praying, fasting and reading Quran. Since the nature of conversion was doubtful, it is not surprising that the teachings of Islam were ignored. Abdullah Kadir Munshi, often seen as the founder of modern Malay literature, who travelled up the east coast of the Malay Peninsular in the 1830s, described with horror the prevalence of sinful behaviour in Kelantan and judged that only two people in a hundred carried out such fundamental religious obligations as prayer (K.Ahmad 1960: 87). The rulers themselves, even as the head of the Islamic religion, never practised the Faith and frequently relaxed the execution of Islamic laws due to their greed for money and other material gain. The *Hadd* penalties were seldom applied. Capital punishments (for example the amputation of hand and stoning to death for theft and adultery offences) were usually substituted by fines. This was because at this time, the administration of justice had a close link with the revenues of the state:

The King (of Kedah) is a weak man, too fond of money, very relaxed in the execution of the laws, not so much from a principle of clemency, as timidity...He receives a deal in presents and fines: every person who has any demand to make, or suit to prefer first presents a sum of money which he thinks adequate to the demand; if the King approves of the sum, he signs the paper; unless another person comes with a greater sum. Birch, writing of the Perak of the 1870's, records that all the

chiefs, within their respective districts, are Magistrates, and can inflict fines. When the fine is above \$25 it all goes to the Sultan. When below that sum it is appropriated by the chiefs who inflicted it. No accounts or records are kept. The mischievous effect of such a rule cannot be disputed, and even extends to the Sultan himself, who prefers fining a man when a murder is committed to inflicting capital punishment, because he pockets a larger fee (Hickling 1987: 163).

Even though Islam was made the state religion and Islamic law the basis of the legal system, Islamic teachings were not properly understood and implemented. The ruling elite was more interested in accumulation of wealth and other enjoyments of life. Many contradictions were present in them such as engaging in un-Islamic activities as well as economic exploitation of the masses. Corvee labour, debt-bondage and slavery existed widely in Malay society as a result of economic exploitation by the ruling elite.

## **2.4 Contradictions and Economic Exploitation**

The pre-colonial class structure can be divided into two: the ruling class (*Bangsawan*) and the peasantry or subject class (*Rakyat*). The ruling class can be further subdivided into royal and non-royal aristocracy. The former traced descent from a common ancestor while the latter consisted mainly of great and territorial chiefs who assisted the ruler in administering the state.<sup>27</sup> The most important were the Four Great Chiefs which comprised of *Bendahara* (PM), *Bendahari* (Chief Treasurer), *Temenggong* (Chief of Police) and *Menteri* (Minister, sometimes translated as Secretary of State). Day to day administration was on the basis of 'collective government' (Wan Hashim 1988: 51). The Sultan did not have absolute power, he had to consult his Council of Advisers gain their approval before any decision could be made. In practice, the Chiefs became more powerful than the Sultan, they were able to select a particular Sultan who best suited their interests (*ibid.*, Ryan 1976).

As a structural group, the aristocracy was distinct and conspicuous. This was underlined by outward ceremonial and symbols of power; there was also a separate language of the aristocracy to differentiate them from the commoners (subjects). The

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<sup>27</sup> The non-aristocracy comprised of: (a) The Four Great Chiefs (b) The Eight Lesser Chiefs (c) The Sixteen Small Chiefs (d) The Thirty Two Inferior Chiefs. For further details as to their posts and functions, see Wan Hashim 1988: 50-51, Yegar 1979 Tilman 1964, Newbold 1971: 298-300, 312-313.

dominant organising norm in the relationship between the rulers and the commoners was loyalty. As recorded in *Sejarah Melayu* (Malay Annals), the institution of loyalty had its origin in a social contract formulated by Demang Lebar Daun, representing the subjects, and Tan Sri Buana, representing the royalty (JMBRAS 1932, Wan Hashim 1988: 49). Spiritual recognition was granted to Tan Sri Buana and the social contract specified that the ruler should endeavour not to disgrace (*cAib*) his subjects. He also took the role of protector of the people, to ensure the safety of their lives. As the head of Islam in the state, he must also uphold the religion of the Malays. In return, the subjects would remain absolutely loyal to him (JMBRAS 1932).

The political ethic of undivided loyalty is dramatised in the **Hikayat Hang Tuah** (Epic of Hang Tuah) where to demonstrate his loyalty to the ruler, he had to kill his best friend (Hang Jebat) simply to fulfil the ruler's command.<sup>28</sup> His popular legacy left to all the Malays is that "Malays will not disappear from the world" (*Melayu tidak akan hilang didunia*) so long they remain brave and loyal to their rulers. Their future as a community would be assured. In his words, "Malays should never commit treason" (*Melayu tidak akan menderhaka*) (*ibid.*).<sup>29</sup>

The ruler was regarded as the 'shadow of God on Earth' and according to traditional belief, no commoner could touch him without dying (*ibid.*).<sup>30</sup> White blood was believed to be in his veins and his personality could influence crops (Skeat 1900: 36). These elements of *Daulat* (the super natural majesty), heightened the sense of deference among the subjects who would avoid any action which might result in being struck down by his supernatural power.<sup>31</sup>

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<sup>28</sup> The history of Hang Tuah and his absolute loyalty to the Sultan had forced him to murder his best friend, Hang Jebat even though the latter had been protecting Hang Tuah from the tyrant ruler. This tragic history has been widely written (S Maaruf 1984, C.Muzaffar 1979).

<sup>29</sup> Hang Tuah's death remains legendary. It has been said that he never dies. He had gone to live among the people of the jungle and that he would one day return to lead the Malays.

<sup>30</sup> The mystical power of a sultan is termed *Daulat*. According to traditional Malay classics, certain other individuals are said to possess mystic power. A Muslim 'saint' (*Walī Allah*) is said to possess spiritual power, a warrior (*Hulubalang*) is said to possess super-natural power and a village headmen (*Penghulu*) is said to possess luck and magical power. See Wilkinson in JMBRAS 1932: 67-129.

<sup>31</sup> Afraid of what might happen as a result of committing disloyalty to a ruler (*Takut ditimpa daulat*) has been mentioned vividly by Abdullah Munshi in his book, *Kesah Pelayaran Abdullah* (The Story of Abdullah's Journey) (K.Ahmad 1960) Therefore, the

The aristocracy was seen by the subjects as the source of legitimation. They were conscious of status and the desire for recognition meant that wealth must be flaunted in the form of the number of followers, in the elaborateness and costliness of attire and in the formality of court etiquette. The display of pomp and splendour cultivated an awareness among the subjects that such acts were natural and necessary.

Abdullah Munshi was the first Malay writer to criticise the contradictions in the attitude of the aristocracy. His work is the earliest Malay social criticism based on Islamic values. His reformist thinking is in contrast to the dogmatic, feudal life of his time. Apart from being influenced by his religious values, his thinking was partly conditioned by contact with Western liberalism and capitalism. His writings are contained in **Kesah Pelayaran Abdullah** (The Story of Abdullah's Journey) which was based on his sea journey along the East coast from Singapore to Kelantan, where he had to deliver a letter to the ruler from the British (K.Ahmad 1960: 8). Abdullah made many perceptive observations of the conditions of feudal social life. He interacted with members of both the ruling class and the subjects. One of the things that struck him most was the nature and attitude of the ruling class. While declaring themselves Muslim, their daily practice was in sharp contradiction. Examples are given in **Misa Melayu**, where a woman was killed in the belief that an ailing ruler could be cured that way (Raja. Chulan 1966: 50). Cases involving Sultan Mahmud (ruler of Malacca in 1511) are given where rivals in courtship were murdered or executed (Shellabear 1975: 187-188).<sup>32</sup>

When Abdullah Munshi arrived in Kelantan, he was astonished by the prevailing conditions. There was constant civil war, which the subjects were forced to pay for and fight in. There was an institution of forced labour known as *Kerah*, giving the ruler the

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best testimony to the influence of the ethic of loyalty and deference to the ruler in Malay life is the total absence of revolt against the ruler by the subjects with the objective of escaping any kind of disease or misgivings.

<sup>32</sup> The same tyrannical trait was manifested in the episode involving Sultan Mahmud and Tun Fatimah (a daughter of *Bendahara* Tun Mutahir). When the Sultan saw Tun Fatimah for the first time at her wedding, he vowed to have her. He harboured vengeance against *Bendahara* Tun Mutahir for not presenting her to him. The Sultan hastily exploited the situation when a false charge of treason was reported against the *Bendahara*. The Sultan sentenced the *Bendahara*, Tun Fatimah's husband and members of the *Bendahara's* family to death; then he married Tun Fatimah (Shellabear 1975: 246-253).

right to his subjects labour without remuneration. (A.K.Munshi 1965: 85). They had to neglect their families and their economic pursuits because most of the time they had to work for the ruler. Abdullah Munshi observed such practice and recorded one man's complaint:

Everyday we have to do chores for the nobles; my food and that of my family are never provided, but is on me, let it be my boat, crops, or all my poultry, should the nobles want, they would be seized; you cannot resist they simply command that you be stabbed to death (*ibid.* 1965: 86).

On top of this, their property was subject to arbitrary seizure. If the aristocrats found that the subjects possessed some valuable things, they would not hesitate to confiscate it without any compensation. Consequently, the masses lost the incentive in the economic pursuits which resulted in their poverty and backwardness.

There were also other forms of economic exploitation such as slavery and debt-bondage. Included in the former were (i) war captives (ii) criminals, usually involved in capital offences, who could not pay fines or faced with the prospect of execution therefore surrender themselves to the ruling elites as slaves<sup>33</sup> (iii) those in economic difficulties who offered themselves in return for food and shelter (S.Ahmat 1968). As for debt-bondage, the Malay ruling class created the socio-economic conditions by preventing their subjects from accumulating any savings. Therefore, the peasants were very vulnerable to becoming indebted to members of the ruling class by means of loans with very high interest rates which could never be repaid (Gullick 1968: 99).

Abdullah observed that the ruling elite was not interested in improving their society and opposed any changes which might threaten their interests. They were afraid that reformed and rich subjects might overthrow them. Coming from a different socio-political milieu, Abdullah observed the static notion of history as understood by Malay feudalism. The elite justified their opposition to change and reforms in terms of *Adat* and *Daulat*. Their position was this: "the present *Adat* are all based on *Adat* of older days...whoever changes or breaks them will be affected adversely by the *Daulat* of past

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<sup>33</sup> According to A.K.Munshi (1965: 16-17), the ruler's children had many bondsmen who caused havoc in society. Many of these bondsmen, known as *Hamba Raja* (literally means ruler's slave), came from the criminal class. In order to escape punishment, they would declare themselves slaves to the ruler. When accepted by the ruler, the masses dared not touch them. There was a custom that for every *Hamba Raja* killed, the ruler would kill seven subjects in revenge.

rulers"(A.K.Munshi 1965: 18). Such conservatism was such an integral aspect of their thinking that they began to believe that it was in the nature of things not to change.<sup>34</sup> This traditional feudal thinking remains deep rooted in some rural Malays especially so in their attitude towards economic change. This, rather than Islam, is the main reason for their poverty and backwardness. We shall now discuss the economic problem and the cause of poverty in the Malay society.

## **2.5 The Poverty and Economic Backwardness of the Malays**

Abdullah Kadir Munshi was one of the first to consciously reflect on the problems of poverty and economic backwardness of the Malay. He observed that poverty was a common feature of the Malay States. He was concerned about the way the states were being wasted and were becoming a jungle simply because of the "indolence and the indifference of the people"(*ibid.*: 11). The people were economically inactive; "I see that in a hundred, may be only ten work; as for the others they lie idle all day long, wallowing in poverty..." (*ibid.*). Furthermore, those who submitted to the ruling class as *Hamba Raja* (ruler's slave) would be getting royal protection and privileges. Such rights made the *Hamba Raja* lazy and they spent most of their time repairing their weapons, sleeping and eating. Most of the work was left to their womenfolk. They emphasised the importance of martial prowess and regarded manual work as degrading and unmanly (*ibid.*: 33-35).

Having noted the widespread poverty and economic backwardness, he applied himself to its cause. He ruled out the opinion that it was due to piracy, or to poor soil. Interestingly, he distinguished between cause and effect of Malay poverty. Though he was struck by the prevalence of indolence, he ruled it out as a cause, reasoning that:

There has never been a country in the world in which all the subjects are indolent. If they can get the benefits of their own work and effort, and the profits arising thereof and feel secure at heart and if

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<sup>34</sup> In one incident, Abdullah Munshi asked a nobleman why the awkward denomination of the local currency had not been changed, and the nobleman replied: "How many times my father thought about changing this *Adat*. The tigers became aggressive and attacked the people and the crocodiles in the rivers became violent; that's why he had to abandon the idea of changing such an *Adat*" (A.K.Munshi 1965: 13, 35).



just half of the population in the country ...earn their living through hard work...the country is sure to be a rich one (*ibid.*: 23).

Abdullah concluded that the root cause of poverty and economic backwardness was the severance of the link between reward and effort by the oppressive ruling elites. Feudal oppression had killed the incentive of the people and their will to work. The subjects were in constant fear of injustice and greed of the ruling elites. According to Abdullah, they saw only futility in greater striving. "What's the point of working hard, when you get a little bit of money or food...they attract the greed of the nobles who are sure to seize them. That's why they remain in poverty and indolence all their lives" (*ibid.*: 23). Abdullah's observation concurs with Ibn Khaldun's observation on how the rapacity of rulers can kill the people's incentive to work hard. Ibn Khaldun (1967: 103) writes:

It should be known that attacks on people's property remove the incentive to acquire and gain property. People, then, become of the opinion that the purpose and ultimate destiny of (acquiring property) is to have it taken away from them. When the incentive to acquire and obtain property is gone, people no longer make efforts to acquire any. The extent and degree to which property rights are infringed upon determines the extent and degree to which the efforts of the subject to acquire property slackened.

Abdullah's conclusion is supported by a current writer on Malay problems, Syed Husin Alatas. His argument in response to the colonial myth of the lazy Malay (refer to 2.74) found evidence of hardwork in the Malay Digests especially in the Digest of Sungai Ujong. There are at least seven articles dealing with the value of labour and industriousness. Article 99 classified the roots of evil into: cock-fighting, gambling, drinking, smoking, and slothful work (S.H.Alatas 1977: 136). Basically, the values upheld by the Malay Digests were those common in the Malay world. The Malays disapproved of indolence (*Pemalas*). In Malay society, it is a disgrace to be called *Pemalas*. The condemnation of laziness was highlighted by Abdullah Munshi who noted the severe punishment meted out for laziness at his Islamic school. There was a punishment for pupils who were lazy in their studies.<sup>35</sup> Even with the employment of

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<sup>35</sup> Smoke was generated in a heap of dry coconut fibre and the child made to stand astride it. Sometimes dry pepper was put in the fire. The reek of the smoke was most irritating and caused a copious discharge from eyes and nose. See Hills (1955 46)

primitive technology and fear of confiscation by the ruling elites, the Malay peasants were able to produce beyond their immediate subsistence economy.<sup>36</sup>

Besides the above fact, it was argued that the influence of pre-existing religious practices and *Adat* also contributed to their poverty and economic backwardness (Parkinson 1968). Parkinson also suggested that the practices of feudal Malay society, of which some still exist, were greatly influenced by Hindu and animistic practices. This animistic belief in spirits (*Hantu*), shamans and the worship of elements such as trees, mountains and rivers by offering tributes and sacrifices caused economic backwardness amongst the Malays:<sup>37</sup>

For instance, Malay ceremonies are often of Hindu origin, or are greatly influenced by Hindu and/or animistic practices. Also the force exerted on everyday life by the *Hantu* or spirits, although growing less, is still marked and is the result of refusing to give up the beliefs of pre-Muslim ancestors. There is also the conflict between Islam and *Adat* which is seen in sharp relief in Negeri Sembilan, especially in the laws governing marriage, divorce and inheritance (Parkinson 1968: 37).

## **2.6 Islam and Economic Exploitation in Colonial Malaya**

### **2.6.1 The Beginning of British Colonial Rule**

Before the British occupation of Malaya, two other European powers had previously been present: the Portuguese and the Dutch. As they only controlled Malacca, these occupations had far less effect and will not be dealt with in this thesis.<sup>38</sup>

Penang (Prince of Wales Island) was the first territory to be occupied by the British in 1786 by arrangements between Captain Francis Light of the East India Company, and the Sultan of Kedah, the owner of Penang (Allen 1968: 26, Gullick

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<sup>36</sup> The Malay peasant economy can be described as a mixed subsistence type. Peasants relied for their subsistence and simple reproduction on several agricultural and non-agricultural products like rice, vegetables, fruits, domesticated and wild animals and to a lesser extent, production of commodities for sale (Wan Hashim 1988). The traditional peasant economy according to Gullick was not self-sufficient. Besides, all the activities mentioned earlier, the peasants in need of other products which they themselves were not able to produce, such as cloth, sophisticated tools for agricultural production, salt, tobacco and others. To acquire this product, it was necessary for them to produce commodities for exchange in the market to obtain the products which they themselves were not able to produce (*ibid*).

<sup>37</sup> The animistic belief that there was a 'guard', at the sea and in order to avoid from any misfortunes especially the fishermen, a sacrifice had to be offered. The sacrifice was usually in terms of cattle. This practice was forbidden recently in Malaysia after the Malays became more Islamically educated.

<sup>38</sup> For more information about the European influences in the Malay Peninsular, particularly in Malacca see Rubin 1974 29-93, Ryan 1976, Mills 1966: 1-20.

1986: 20, Ahmad Ibrahim 1987: 9, H.Jusoh 1991: 13).<sup>39</sup> This was followed by Singapore in 1819 and Malacca in 1824.<sup>40</sup> These three states were known as the Straits Settlements (*ibid.*).

They survived chiefly through trade and shipping. Singapore turned out to be the most prosperous entrepot. Between 1825 and 1867, Singapore was the centre of British commerce with the East Indies and China. The bulk of its import and export trade was with Great Britain and India (Mills 1966: 198). Singapore and Penang became the export centres for rubber and tin. Many of the mining and plantation companies operating in Malaya were controlled from Singapore, this applied to both Chinese and European companies (Ryan 1976: 206).

The prosperous nature of the Straits Settlements, along with little government involvement in the everyday affairs of the inhabitants, attracted many immigrants. The immigrant population mainly in Singapore, was composed of Europeans, Chinese and Indians. All had come to make money in the fastest way possible, with the intention of returning to their own countries. As the years passed, the decreasing chances of making a fortune forced many of the immigrants to give up any idea of returning, and so they became permanent residents of the Straits Settlements. When this section of the population became substantial, the colonial administration had to concern itself with the general welfare of the people, to further guarantee the *laissez faire* policy adopted by the British.

British policy to the Malay States had been one of non-involvement in their internal affairs. This had been forced on the government of the Straits Settlements by

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<sup>39</sup> In 1785, Francis Light was sent to open negotiations with the Sultan of Kedah. The Sultan eventually agreed to establish a settlement on the island of Penang. The conditions were stipulated by the Sultan which included the annual payment of money as compensation and British protection against internal and external enemies. For details of this arrangement which led to the occupation by the British of Penang, see Ryan 1976, Mills 1966, Gullick 1986, Allen 1968.

<sup>40</sup> The British first occupied Malacca in 1795 during the Napoleon Wars which made the Dutch and the British allies in Europe against the French. In order to forestall French use of Dutch naval bases and possessions around the world, Britain came to an agreement with the Dutch government in exile. The agreement provided that Britain would take over temporarily Dutch possessions for the duration of the war including Malacca. In 1819, after the end of the war, Malacca was given back to the Dutch. However, by virtue of the Anglo-Dutch Treaty in 1824, Malacca was transferred to the British after they agreed to withdraw from Java and Sumatera in exchange for certain rights in West Africa, while the Dutch relinquished all claims to territory on the Malay Peninsular (Rubin 1974: 181-182, Ryan 1976, Mills 1966).

the Indian authorities (Ryan 1976: 144). At the same time, other Western powers such as the Netherlands, France and Spain were also interested to enlarge their territorial possessions and to gain economic influence. History witnessed the conflict of these Western powers in Asia; the Dutch in the East Indies (Indonesia), the French in Indo-China and the Spanish in the Philippines. British merchants in the Straits Settlements felt threatened by this competition and began to see trading opportunities being closed to them. They began to look towards the Malay Peninsular as an area which would provide suitable alternative trading opportunities (*ibid.*).

The Malay States were known to be well resourced in rubber and tin. Small amounts of tin had been mined for centuries and exported mainly to China. Only when the demand for tin-plate became so great as a result of the Industrial Revolution in Europe, did the Malay Peninsular become involved in the complexities of world trade.

A tin-plate industry had been in existence in Britain since the 1740s in South Wales, with tin-ore coming from Cornwall. The use of tin increased with the invention of the sealed tin container. The American civil war of 1861-65 boosted the demand for tin (*ibid.*: 144-145).

From 1860 onwards, it became obvious that Cornish mines could not meet the demand and so new sources of supply were sought. Therefore, the merchants of the Straits Settlements took a close interest in the Malay States. Many public companies were formed at this time mainly in Singapore to invest in the new mines in Selangor, Perak and Sungai Ujong (*ibid.*). The Malay States were in constant disorder, with wars between states and civil wars within them between rival claimants to the throne (*ibid.*: 146, Mills 1966:). This conflict became entangled with Chinese secret societies fighting as the rival groups all struggled to control economic resources, mainly tin. Civil war in Perak had led Raja Abdullah, one of the rival claimants to the throne, to seek help from the British in the Straits Settlements (Ryan 1976: 150-153). He wrote to the Governor of the Straits Settlements asking for British support. The Governor, Sir Andrew Clarke, who had been posted to Singapore that year decided to respond to the letter by intervening. His response was based on the fact that large amounts of British

capital had been invested in the Perak mines, that the public companies based in the Straits Settlements were demanding the restoration of order to safeguard their investments. Also, there had been a change in attitude by many officials in the Colonial Office after 1870, as did members of the British government. It was pointed out that, "this change was not entirely due to pressure from the merchants of the Straits Settlements but was also due to British fear of intervention by other Western powers" (quoted in *ibid.*: 154). The fear was that the business interests of the Straits Settlements would request another Western power to get involved.

Raja Abdullah's letter gave an ideal opportunity for intervention; so Clarke arranged a meeting held at Pangkor Island to which the disputants to the Perak throne, the major chiefs and the leaders of the Chinese factions were invited. In the meeting, the Pangkor Treaty was reached upon on which *inter alia*, Abdullah was recognised as Sultan and most importantly, he had to accept a British Resident to advise him in all matters except Islamic religion and Malay custom. The Pangkor Treaty signed on 29 January 1874 between the Sultan of Perak and the British was a turning point as it marked the beginning of direct British involvement in the affairs of the Malay States.

### 2.6.2 British Residential System

Clause VI of the Pangkor Treaty stated, "the Sultan receives and provides a suitable residence for a British officer, to be called Resident, who shall be accredited to his court, and whose advice must be asked and acted upon in all questions, other than those touching Malay religion and custom" (quoted in Maxwell and Gibson 1924: 28). The same arrangement was also spread to other states; Selangor 1875, Pahang 1888 and Negeri Sembilan 1889 (*ibid.*: 36-64). The essence of this system was that change was supposedly introduced slowly and by means of existing political institutions. The original intention was that the Residents would advise the Sultans who were still the heads of the states and preserve the traditional system of the government (Ryan 1976: 159).

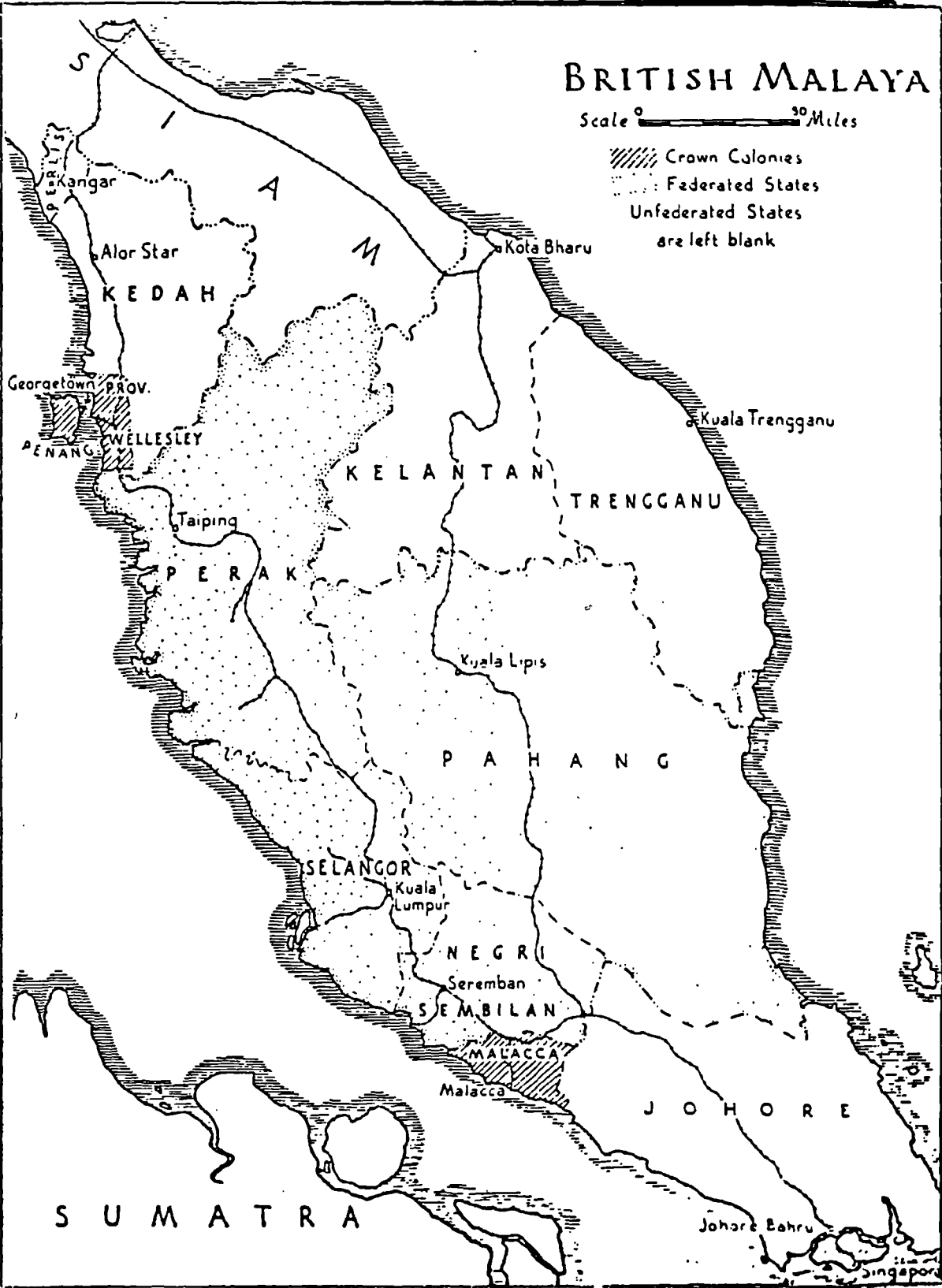
At the beginning of the Residency System, if the Sultans did not take the advice offered, the Residents had no power to compel them; they were warned by the Colonial Office in 1878 that they were merely advisers. This situation did not last. Exactly how things worked out depended on their personalities, but advice turned out to be control. The outward appearance of tendering advice masked the exercise of real power.

A safety valve was devised in the institution of the State Council comprising of the Sultan, the principal chiefs and two or three leading Chinese as well as the Resident and Assistant Resident. The Council discussed and passed all enactments required by the state. It was emphasised that the sovereignty of the Sultan and the royal prerogatives were preserved, meaning government in the name of the Sultan. The early Residents took great pains to confer with the Malay rulers, keep them informed and treat them with royal deference (Gullick 1965: 41). Residents later became very powerful and in reality administered the states (Yegar 1979: 38).

All the British Advisers/Residents had three general aims:

- (a) To restore and maintain peace and to establish regulations for the preservation of law and order;
- (b) To develop the resources of the states so that the wealth could be properly used;
- (c) To set up a sound system of taxation so that the wealth of the state could help further development (Ryan 1976: 159).

To make administration more effective, steps were taken to form a federation. In 1895, Frank Swettenham prepared a detailed scheme for reorganisation and drafted an agreement with the rulers of Perak, Selangor, Negeri Sembilan and Pahang. The four states were joined under a federation called the Federated Malay States (FMS) under British protection. The Resident-General was the representative of the British government and acted under instructions from the Governor of the Straits Settlements. His advice had to be followed in all matters of administration other than those touching Malay religion and custom. Kuala Lumpur (KL) was chosen as the base for the Resident-General and as the capital of the Federation (Gullick 1960: 72-111).



Source: Emerson 1964: 12

This change gave a uniform system of administration by legal unification of the civil services. A legal adviser was appointed to revise and integrate existing legislation; prepare future enactments and review the whole legal and judicial system.

The remaining Malay States, i.e. Perlis, Kedah, Kelantan, Terengganu and Johore comprised the Unfederated Malay States (UMS). Excluding Johore, they were under the influence of Siam for more than a century until the Bangkok Treaty was signed on 9 July 1909 giving Britain control of these states. British advisers were placed in these states but they retained their independent status.

Both the Residents and the Advisers had in practice control over all aspects, including religion and custom of the Malays. In theory, these states were governed by a Sultan in each state and assisted by the Councils with the British acting as advisers. In reality, however, the British officials themselves carried out the administration with fullest authority, with the Sultans as merely titular rulers.

### 2.6.3 The Effect of the Application of British Colonial Rule on the Administration of Muslim law<sup>41</sup>

Four important observations can be made which are supported by Hooker (1983: 170-174).

*(i) English law became the law of the land and the substantive rules of Islamic law came to be formulated in terms of legal concepts and were expressed in judicial precedents.*

The legal system termed Anglo-Muhammadan law was introduced by the British in Malaya. It was based on common law processes and principles. The rules of law

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<sup>41</sup> It is proper to use the concept of Muslim law as opposed to Islamic law. Law is always culturally defined. When laws are transmitted to foreign cultures they often tend to adopt the features of the recipient culture. This has been especially true in those areas of law where religious adherence or fundamental aspects of local culture have come into question. Such has happened to English law in connection with Islam in Africa, South Asia and South East Asia particularly Malaya (Malaysia). Therefore, one must be able to distinguish between the religion of Islam and the law applying to the individual Muslim. The latter is culturally defined and is called Muslim law or what certain Orientalists would call 'Muhammadan law'. Islamic law (Shariah), on the other hand, is derived from Quran and Sunnah. Hooker argued that "to a significant extent, the Islamic law element is included in all cultural manifestations of Muslim law, but the latter is also *sui generis* to an important extent" (Hooker, 1975: 95 and 1983: 161).



were not based totally on Shariah, rather it was a body of rules applied by the courts to persons who were Muslim. Before 1880, the law applicable to Muslims was generally the judicial precedents of India since the British already had experience with the Muslims in India. In other words, Indian precedents were cited in reaching any decision. For instance in the case of Salmah and Fatimah v Soolong (1887 1 Ky. 421) which concerned with the validity of the marriage between an Arab Shafi'i woman and Indian Hanafi man, the Court referred to the Standard Anglo-Muhammadan texts<sup>42</sup> as well as the case of Bombay, Muhammad Ibrahim v. Gulam Ahmad (1864 Bom. HCR 236) (H.Jusoh 1991: 17).

English law was the basic law of the Straits Settlements and was a law of general application by virtue of the Charters of Justice 1807,<sup>43</sup> 1826<sup>44</sup> and 1855<sup>45</sup> granted by King George the Third to the East India Company (Norton Kyshe Report 1786-1885). The Charters set up a system of courts and judiciary, providing that English law should be the law of the land applicable to the native inhabitants in so far as the various religions, manners and customs would permit (Hooker 1975: 100, Yegar 1979: 127-130, Ahmad Ibrahim 1970 and 1987). The application covered all aspects of civil, criminal and ecclesiastical matters.<sup>46</sup>

The Charters also established the Court of Judicature which was to exercise all the jurisdiction of the English Courts of Law and Chancery, as far as circumstances would permit. The court was also to exercise jurisdiction as an Ecclesiastical Court in so far as the several religions, manners and custom of the inhabitants would permit (Ahmad Ibrahim 1987: 76, 1970: 10-17, Yegar 1979:125-131).<sup>47</sup>

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<sup>42</sup> Such texts include Hamilton's translation of *Hedaya* (1791); Braille's, a *Digest of Muhammadan Law* (1869), Amcer Ali's *Mohammadan Law* (1884) and Wilson's *Anglo-Muhammadan Law* (1930).

<sup>43</sup> In 1807, the first Charter of Justice was introduced in Penang requiring the application of English law in the administration of justice.

<sup>44</sup> A Second Charter of Justice was granted when the island of Penang and the town of Malacca were annexed to Penang. In substance, it conferred the same jurisdiction on the court as had the first charter.

<sup>45</sup> The final Charter of Justice was granted merely to co-ordinate the previous laws.

<sup>46</sup> See the position of English law as described in the cases of *Regina v Willan* (1858 3 Ky. 25), *Ong Cheng Neo v Yeap Cheah Neo* (1872 1 Ky. 326) cf. *Fatimah v. Logan* (1871 1 Ky. 225) and *Campbell v. Hall* (1774 1 Comp 204) Yegar 1979 127-131, Ahmad Ibrahim 1970: 10-17, 1989: 75-79.

<sup>47</sup> See the cases of *Yeap Cheah Neo v Ong Cheng Neo* (1875 1 Ky. 343), *Kammoo v Bassett* (1808 1 Ky 1), *In the Goods of Abdullah* (1835 2 Ky. Ecc. 8), *Regina v Willans* (1856 3 Ky. 16), *Fatimah v Logan* (1871 1 Ky. 255).

English law became the basic law of the Straits Settlements which were applicable to all persons staying in the Straits regardless of different religion and custom. In this sense, English law abrogated all the existing laws and superimposed itself on all the subjects. In Daing v. Mongkah (1935 MLJ 147-148) Terrell J said:

It must be remembered that by virtue of the various Charters, the English Common law regulates the right of all persons in the Straits Settlements whatever their religions 'so far as circumstances will admit'. There is no provision in the Straits Settlements Charters, as there is in some of the Indian Charters, that Muhammadan law shall be administered for Muhammadans and Hindu Law for Hindus. Nor is the position the same as it is in the Federated Malay States where by virtue of the religion of the parties Muhammadan law would be applicable.

Therefore, with the passing of these legal Charters in the Straits Settlements, the Malay law and the Islamic law which was the basis of the law of Penang (previously under Kedah), Malacca and Singapore (previously under Johore) was abolished. There was concern raised as to the application of Islamic law and Malay law as administered in Kedah prior to the occupation of Penang. Indeed, in 1830, the Chief Secretary to the Indian Government had sent a letter of instruction to the Lieutenant Governor in which he stated "the laws of the different peoples and tribes of which the inhabitants consist, tempered by such parts of the British law that are of universal application, being founded on the principles of natural justice, shall constitute the rules of decisions in the courts" (Ahmad Ibrahim 1970: 14). The Lieutenant Governor was asked to proceed to frame regulations for the administration of justice for the native inhabitants on the above principles, but in fact, no such regulations were issued.

In 1871, in the case of Fatimah v. Logan (1871 1 Ky. 255), Braddell, A.G., sought to re-open the matter when he argued as follows:

- (a) That previous to the charter of 1807 the Muhammadan law was in force in Penang;
- (b) That the Charter made no difference in this respect.

Nevertheless, it was held that this position was untenable. Penang was a deserted, uncultivated island at the time of the occupation and even if it did not fall under the

general rule as to the settlement of uninhabited countries,<sup>48</sup> there were not any legally constituted courts to administer the laws, if there were any. Whatever doubts there were in this matter had been reconciled by the Charter of Justice 1807 and it must be held that:

Either on the settlement of the island, or if not then, by the Charter of 1807, the law of England was introduced into Penang, and became the law of the land and those who settled here became the subject to that law (*Fatimah v. Logan* (1871 1 Ky. 262)).

In *Ong Cheng Neo v. Yeap Cheah Neo*, the Judicial Committee of the Privy Council settled the matter and held that English law was the governing law in Penang. Sir Montague Smith said:

With reference to this history, it is really immaterial to consider whether the Prince of Wales' Island, or Penang, as it is now called, should be regarded as ceded or settled territory, for there is no trace of any laws having been established there before it was acquired. In either view, the law of England must be taken to be the governing law, so far as it is applicable by these circumstances

While there was unanimity as to the effect of the Charters of Justice in introducing English law into the Straits Settlements, there was uncertainty as to how much English law was to be applied having regard to the different religions and customs of the inhabitants.

It had been stressed that English law was to be the governing law "so far as the several religions, manners and customs of the inhabitants will admit". This phrase gave rise to a series of cases which have been discussed elsewhere (See Braddell 1931a: 62-94, Ahmad Ibrahim 1970).

Nevertheless, on several occasions, the English Court did not show any concern for the different religions, customs and practices of the inhabitants. Thus, we find situations where the Shariah rules were amended or avoided by the courts because of the general nature of English law. For instance, Muslim married women were treated as *femme sole* in some circumstances, Muslim testators have been permitted to dispose of

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<sup>48</sup> There was serious argument as to whether Penang should be regarded as a settled territory or a ceded territory. If Penang should be regarded as a settled territory having trace of inhabitants staying within the state, therefore, the existing law should remain. Nevertheless, if Penang was to be regarded as a ceded territory and having no inhabitants, therefore, English law should be introduced and hence applied (Ahmad Ibrahim 1970, 1987: 77-79, Yegar 1979).

more than one-third of his estate,<sup>49</sup> and the definition of charity (e.g. Waqf)<sup>50</sup> was based on English precedent.<sup>51</sup>

The final step in the reception of English law into the Straits Settlements was the Civil Law Ordinance (CLO) 1878 which provided that in all questions or issues which arise or which had to be decided in the matter of commercial law, generally the law to be administered shall be the same as that administered in England. This provision became section 6 of the CLO 1909 and then section 5 of the CLO (Chapter 42) of the 1936 Revised Edition and so far as the reception of English law was concerned, this position remained until the Straits Settlements was disbanded in 1946 (Ahmad Ibrahim 1970: 17-43, A.M. Yaacob 1989: 89-94).

In the Malay States, by virtue of the Residence System, Islamic religion and Malay custom was excluded from the advisory scope. The English law was not deemed to be introduced into the Malay States. The prevailing law was the Malay law, an amalgam of Muslim law and customary law.

Unlike the Straits Settlements which was a colony, the Malay States were theoretically independent and ruled by their respective Sultans. Their legal status had been accepted and recognised by the English courts as evidenced in a series of cases which the parties involved were the Malay Sultans.<sup>52</sup> In all these cases, the court upheld the independence of the Malay states and recognised the sovereignty of the Malay rulers. They were all entitled to the immunity in respect of litigation which attached to their status. It was held that in the case of Pahang Consolidated Company Ltd. v. State of Pahang (1933 MLJ 247) that the FMS was formed by Treaty between

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<sup>49</sup> Refer to the cases of In the Goods of Abdullah (1835 2 Ky. Ecc. Rs. 8). Also in the case of Muslim gift, Re Syed Alkaff decd. (1923 2 MC 38), the charitable trust case of Re Abdul Guny Abdullasa decd. (1936 MLJ 140). See also charity case In the Goods of Muckdon Nina Merican (1885 Ky. 119).

<sup>50</sup> In Malaysia, Waqf is spelt '*Wakaf*'. The thesis uses the Anglicised form instead.

<sup>51</sup> See the articles written by Ahmad Ibrahim on Waqf cases that has been decided according to English principles in MLJ (1969) 110, (1970) MLJ 222 and (1971) 2 MLJ vii.

<sup>52</sup> Such cases are Mighel v. The Sultan of Johore (1894 1 QB 149), Duff Development Company v. Kelantan Government (1924 AC 797), Anchom v. Public Prosecutor (1940 MLJ 22) and Sultan of Johore v. Tengku Abubakar (1952 MLJ 115). See Ahmad Ibrahim 1970: 45-48, Yegar 1979.

the states, but that treaty did not curtail any of the powers of the rulers (in this case the ruler of Pahang).

Although no Charter of Justice was introduced in the Malay States, nevertheless through the Residential System, English law was gradually introduced and applied. The introduction of English law could be effected in two ways:

- (a) On the advice of the British administrators, a number of statutes were enacted and the model followed was English based legislation. Thus, the Indian law and procedure were applied as amended by Selangor Regulation 11 of 1893, stating that the Straits Settlements Penal Code and Evidence Ordinance, the Indian Civil Procedure Code, Specific Relief Act and Court fees were all adopted by the Malay States.<sup>53</sup> Therefore, in Ainan v. Syed Abu Bakar (1939 8 MLJ 209), it was held that the Evidence Enactment was a statute of general application and therefore, Section 112 of the said Enactment applied to Muslims to the exclusion of the rule of Muslim law.<sup>54</sup>
- (b) Through judicial decisions. Since most of the judges were English or English trained, they naturally resorted to English law as the only law they were familiar with, to fill in the lacuna in the law. In this way the principles of law of torts and equity were introduced into the Malay States.<sup>55</sup>

Even though there was no formal reception of English law (until 1937) in the Malay States, English law and principles were already significant in the legal system. English law in most cases had replaced the application of Islamic and customary laws. The former was found to be the dominant law of the Malay States while the application

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<sup>53</sup> Each state had their own law such as Perak, No. 11 of 1906, Selangor, No. 13 of 1902 and No. 10 of 1905, Pahang, No. 11 of 1902 and No. 10 of 1905 (Ahmad Ibrahim 1970, 1987, Yegar 1979, H.Jusoh 1991: 14-15).

<sup>54</sup> Under Islamic law, in a case of a child born within six months of a marriage, the paternity would not be so established unless the man asserts that the child is his and does not say that the child is the result of adultery (*Zinā*) (A.Fyze 1955: 164, Howard 1914: 367). It has been held that up to now, Section 112 of the Evidence Enactment (later Act) overrides Islamic law on this point. The Section provides that "the fact that any person was born during the continuance of a valid marriage between his mother and any man or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of the man". In Ainan's case, the child was born less than 6 months after the marriage was regarded as legitimate by the Colonial Court.

<sup>55</sup> See the case of Government of Perak v Adams (1914 2 FMSLR 144) and the case of Mohamed Guny v. Vadwang Kutu (1930 7 FMSLR 170).

of the latter was restricted to the sphere of family and personal matters only. The judicial decisions which obviously adopted the English precedents and English statutes were two indirect ways of introducing English laws into the States. Only in 1937, was there a formal reception of English law in the Malay States affected by virtue of the Civil Law Enactment, (CLE) 1937 which provided for the introduction of English common law and equity to the Federated Malay States. It did not bring any great changes to the practice of the Courts since they had been applying English principles prior to this Enactment. The UMS became part of the Federation of Malaya in 1948 and the CLO (Extension) 1951, extended the application of the enactment to these states as well (Ahmad Ibrahim 1987: 91, H.Jusoh 1991: 15-16, M.A.Wu 1990: 23). Both Enactment and Ordinance were replaced by the CLO 1956, which applied to all eleven states of the Federation of Malaya. When Malaysia was established in 1963, it became necessary to harmonise the law to take in Sabah and Sarawak (the Borneo States). The CLO 1956 was then embodied in the present Civil Law Act, (CLA) 1956 (Revised 1972) (*ibid.*).

***(ii) The gradual tendency to formalise substantive rules into statute***

This process began with the Straits Mohammedan Marriage Ordinance of 1880. The Ordinance was introduced in the Straits Settlements to define how much Islamic law was to be recognised by the Courts.<sup>56</sup> This Ordinance provided for the voluntary registration of Muslim marriages and divorces, the recognition of the Qadi and the regulation of married women's property. The Ordinance and later the amendments (Muhammadan Marriage Amendment Ordinances 1894, 1902, 1909 and 1917) were re-enacted as Ordinance No. 26 (Mohammedans) of 1920, amended in 1923 and 1934 and finally as Chapter 57 in the Revised Laws of the Straits Settlements under the title of Mohammedans Ordinance which remained in force in Malacca and Penang until 1959 (Ahmad Ibrahim 1970, 1987, H. Jusoh 1991, Yegar 1979).<sup>57</sup>

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<sup>56</sup> The Mohammedan Marriage Ordinance, No. 5 1880. For details see Yegar 1979, Ahmad Ibrahim 1970, 1984 and 1987

<sup>57</sup> Note the different spelling of 'Muhammadan' which varies according to state.

In the Malay States, after the British intervention, the British authority introduced the Registration of Muhammadan Marriage and Divorce Enactment in each of the Malay States.<sup>58</sup> The legislation was almost entirely regulatory in nature, concentrating on the registration of marriages and divorces and punishment for breaches of Muslim religious and moral duties. The Muslim Court (Qadi Court) was established to deal with these matters. Jurisdiction was limited to Muslims and subject to revision by the Civil Courts. The subject matter of the Muslim court was also limited. In the Straits Settlements, the only substantive Muslim principle dealt with was 'offences against religion', i.e. attendance at mosques for prayers, fasting, teaching religion without authority (*Tauliah*) and unlawful proximity (*al-khuluwwa*).<sup>59</sup> Matters involving public order were dealt with by the Civil Courts. Property and inheritance matters were also reserved for the Civil Court. In the Malay States, when inheritance involved land, Islamic principles were excluded by recourse to custom. In matters of religious observance, Islam was followed and special legislation was enacted namely Muhammadan Law and Malay Custom (Determination) Enactment, Chapter 196 Revised Laws of FMS 1935. In marriage, divorce, custody and guardianship where religious and state interest merged, a judicial compromise was established. Thus, the Muslim rules on betrothal, wills and gifts were recognised subject to the provision of statute. The rule of equity was enacted in the CLO 1878. Before 1893, the law of evidence applicable in the Straits Settlements was English law modified by a number of Indian Statutes. In 1870, legislation modelled on the Indian Penal Code was introduced and the Criminal Procedure Code then enacted. It is essential to note that such laws were implemented during the period of the first charter until the CLO 1878 and before the disbandment of the Straits Settlements in 1946. In the Malay States,

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<sup>58</sup> Registration of Muhammadan Marriage and Divorce Enactment of 1885 in Perak, and Muhammadan Marriage and Divorce Registration Enactments in Selangor, Negeri Sembilan and Pahang. In the UMS, these enactments were also introduced

(i) Johore: Muhammadan Marriage Enactment, 1914 and Offences by Muhammadan Enactment, 1919.

(ii) Perlis: Muhammadan Marriage and Divorce (Registration) Enactment, No. 9/1913.

(iii) Kedah: Shariah Courts Enactment, No. 109 of 1934.

(iv) Terengganu: Registration of Muhammadan Marriage and Divorce Enactment, No. 6 of 1922

(v) Kelantan: Moslem Marriage and Divorce Enactment, No. 22 of 1938. (H.Jusoh 1991:18).

<sup>59</sup> In Malaysia, it is known as '*Khalwat*'.

under the guise of the advisory policy (Residential System), English law managed to replace the local law. With experience from other colonies, British officials introduced and developed Muslim law into a system of rules similar to that in the Straits Settlements. The rules of Muslim law that developed thus did not represent the provisions of Shariah. Rather, they were mainly referring to the Standard Anglo-Muhammadan texts as interpreted by the British including MacNaghten (1825) and Hamilton (1791) as well as the precedents set by Indian courts (H.Jusoh 1991: 17 and 28f). The usual topics developed by precedents included marriage, divorce, custody, guardianship, inheritance and succession. In some instances, the Muslim rules proved in evidence were amended or avoided by the courts.<sup>60</sup>

*(iii) The public law aspect of Islam was disregarded and the role of Islamic law was reduced to the private sphere of the Muslims*

As indicated in the first part of this chapter, before British intervention in the Malay States, there was already a legal system prevalent. The influence of Islamic law in public and private spheres is obvious in the Malay Legal Digests. Nevertheless, the Residency System was actually the beginning of a secularisation process in the Malay States. The State Council which included the British Resident discussed and passed all laws on a wide variety of Muslim matters including registration of marriage and divorce, offences against the religion of Islam and the collection of Zakat. This legislation was secular in origin and the objective for its introduction was to drive a wedge between religious and secular matters. This was achieved by assigning the task of administration of religious matters to the ruler and the State Council and the non-religious matters to the British, thus introducing the dichotomy between personal (Islamic) law and public (English) law.

Law has been described as the cutting edge of colonialism (Cannock 1985: 4). It was central to the 'civilising' mission of imperialism, particularly the British. It was

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<sup>60</sup> For example, as mentioned earlier, a Muslim was permitted to dispose of more than one third of his estate in his will, and the definition of charity or endowment (Waqf) was based on English precedent. Refer to the case of *In the Goods of Abdullah* (1835 2 Ky. Ecc. Rs. 8) and *Commissioner for Religious Affairs v. Tengku Mariam* (1970 1 MLJ 222) on the issue of Waqf



claimed that English law "represented to the colonisers a substantial advance over savage customs of the colonised" (Merry 1991: 890). For the colonial British, the introduction of English law was the 'gift' they gave to the colonised people (Fitzpatrick 1983 and quoted in Merry 1991: 890). Therefore, Islamic law and other native law were regarded as uncivilised, unsystematic, inefficient and unreliable. "The bloodiness of the Islamic sanctions was propagandised by the British as a reason for discarding it" (Norrie 1993: 84).

The British also portrayed Islamic criminal law's penalties as inhuman. Winstedt said "the Malays of old instinctively preferred a legal system fixed and humane...a fact facilitating the adoption of the Indian Penal Code of 1860" (1961: 107).

The implementation of English law in the FMS started when the Penal Code of the Straits Settlements (based on the Indian Penal Code) was adopted in Perak in 1884, followed by the other three states. This legislation was eventually incorporated into the Revised Edition of the laws of the Federated Malay States 1936 as Chapter 45 (Ahmad Ibrahim 1981: 25). Similarly, the Evidence Ordinance of the Straits Settlements was adopted in Selangor in 1893 and Perak in 1894. This law was eventually incorporated in the Revised Edition of 1936 as Chapter 10 (H.Jusoh 1991: 15). The Contract Act of India, the Criminal Procedure Code of India and the Land Enactment were also adopted in the Malay states. This legislation had completed the formal process in replacing the former Malay-Islamic law (*ibid.*).

Muslim law has been portrayed as purely religious and outmoded. In the case of Ong Cheng Neo v. Yap Kwan Seng (1897 1 SSLR Supp. 1) it was stated "as to the Muhammedan law, the entire Muhammedan law is a personal law. Founded in religion it gives rights only to those who acknowledge Islamism."<sup>61</sup> The closest the courts ever came was to say (*obiter dictum*) "that *prima facie* Muhammadan law should determine the incidents affecting immovables (sic) within a Muslim state" (Hooker 1983: 172). Nevertheless, Muslim law was admitted as local law and thus not foreign law. This was

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<sup>61</sup> See also the case of Shaik Abdul Latif v. Shaik Lhas Bux (1915 1 FMSLR 204) where the Court held that "Muhammadan law was a personal religious law."

in fact confirmed by a majority of the Court of Appeal in the case of Ramah v. Laton (1927 6 FMSLR 128) which held that "Mohamedan law is not foreign law but local law and the law of the land of which the Court must take judicial notice. The Court must propound the law and it is not competent for the Court to allow evidence to be led as to what is the local law."

***(iv) The British colonialists limited the scope of Islamic law and interfered in its administration.***

Despite the clauses in the treaties excepting matters relating to religion and custom from the advisory scope, the British did interfere in the administration of Muslim law. British officials were responsible for the organisation and supervision of the Qadis who administered the Muslim law of marriage and divorce and punished matrimonial offences and breaches of religious observances. The appointments, salaries, suspension and dismissal of Qadis were decided by the State Council which was directed by British officials. Even the State Council minute needed the approval of the British Governor before it became effective (Ahmad Ibrahim 1981).<sup>62</sup>

In every Malay State, the independent jurisdiction of the Qadi was minimised. The more serious cases were transferred to the magistrates and the work of the Qadis was supervised in other ways. No adequate provision was made for an independent system of courts and appeals. No provision was made for the training and status of the Qadis. There were no powers given for investigation and the procedures laid down for the courts and the Qadis were an amalgam of English and Islamic law (Ahmad Ibrahim *ibid.*). This treatment of the administration of Muslim law made the position of Shariah

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<sup>62</sup> Another institution which the establishment of the Federation brought with it was the Residents Conference. This was held once a year. It handled legislation for the states and discussed states budgets. It reviewed reports of the Federal Departments and sanctioned federal and state projects. In the 1905 Conference, for instance, the Resident of Negeri Sembilan presented the issues of Qadi and their position as well as jurisdiction- a matter which fell under the exclusion of the Residents' function. Therefrom, it was decided that the form of authority (which involved letter of nomination, description of authority and commission) in use in the Malay States for Qadi and their assistants should be adopted. On the same occasion, the Residents considered a subject which was outside their competence; the right of the Sultan and State Council to make order, for fine or imprisonment, for example, in any Malay case brought before him (Yegar 1979: 41). They decided that any such action would be subject to review by the Resident-General, an agent and representative of the British government under the Governor of the Straits Settlements (Yegar 1979).

Courts and Qadis inferior to that of the Magistrates and Civil Courts. This situation continued in post-independence Malaysia.

The introduction of English law and the circumscription of Islamic law was not because, as has been claimed, the latter was uncivilised, unsystematic or inhuman, but mainly on economic grounds. The colonial law served two specific aims. Besides providing a means for administering the colony, avoiding conflict and disruption, colonial law was meant to provide for the needs of the colonial power. The needs were mainly commercial or economic in nature (Hooker 1968: 47). Indeed, the purpose of the establishment of British administration in the Malay States was mainly to protect the British and the Straits Settlements Chinese commercial interests. The legal system then reflected the needs of the growing commercial framework of the Malay States. Therefore, the limiting of Islamic law had to do with the belief that it only hindered the economic development of the Malay States. Hence, English law was meant to serve the 'civilising mission' of colonialism, by transforming Malayan society into the Western form.

Since colonial relations were predominantly economic, colonial practice was conditioned by economic laws. Therefore laws were used to effect colonial interests and needs. Because the economic objective was exploitative, the political thrust of colonialism was oppressive, authoritarian and dictatorial. The British sought to impose their economic goals, plans and strategies on the native population. The next section will deal with the economic exploitation by the colonial British and how the native Malays were given the indolent label.

## **2.7 Malay Special Rights and Economic Exploitation**

The British, when they colonised Malaya, were aware of the fact that the Malays were the natives of the country and that their co-operation especially that of the ruling elite, was necessary. Disguised rule under the pretext of the Residence System

purported to preserve the sovereignty of the rulers and the Malay States.<sup>63</sup> Therefore, colonial rule appeared to placate the Malays and assured them that their traditional way of life and administration were not being affected. If in traditional Malay society, the rulers were regarded as trustees and protectors, in the colonial time, the British sought to assume that role. Therefore, there was a serious need to legitimise colonial rule by adopting the idea of 'Malay Special Rights' (MSR). The legal basis of Malay special rights and privileges can be traced to the original treaties providing for British protection over the Malay States (Means 1972: 31).

One aspect of MSR was in the policies of public administration and education. British rule in the various Malay States involved the creation of bureaucratic structures to promote law and order and provide a minimum level of public services as well as to regulate the systematic collection of taxes. As the civil service grew, the administrative positions were filled by Europeans, most of whom were recruited in England. The early British administrators saw no anachronism in such a development, believing as they did that Malays were incapable of providing for themselves an administration as efficient and fair as the one established by the British. Yet in due course, it became increasingly difficult and uneconomic to fill the lower administrative positions with Europeans, and became apparent that local people were needed for the lower levels of the public service. The rulers were also expressing concern about their loss of power. As a consequence, the initial scheme for local recruitment had as its primary objective the selection of Malays from the aristocratic class for training and eventual recruitment into public service, to be administrators in the British style.

In 1905, a Malay College was established in Kuala Kangsar (MCKK) for that purpose. The MCKK was the first boarding school established in Malaya. It was called 'the germ of Oxford'. The students were regarded as first-class boarders and were treated with luxuries, and given British aristocratic values (N.Selat 1976: 125). They

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<sup>63</sup> The philosophy of rule accepted by the colonial power can be divided into two: (a) indirect rule is preferred where the goal of policy is to allow the native to attain along his own lines (b) direct rule is where the objective is to find a place for the native in a society in which the principal institutions are European in character (Furnival quoted in Ghai *et al.* 1987: 118).

were taught the same as in public schools in Britain. They had to emulate the British style of living, even to include the manner of speaking and writing. Therefore, it was not surprising that the graduates from this college, which included the first PM, Tunku Abdul Rahman, were proud of the British and their administration. Later, after some pressure from the masses, the College opened its entry to commoners although with less priority.

When the British came, the traditional Quranic school was the principal educational establishment, with emphasis on reading Quran and on standard religious practices. At the beginning of the twentieth century, Malay vernacular schools were started by the British. These were elementary institutions, usually converted Quranic schools employing the religious teacher as an ordinary instructor and dispensing the rudiments of language, arithmetic and one or two other subjects (Yegar 1979: 258, Means 1972: 35). The graduates of these schools were barely literate and had little opportunity to progress further. The British were more interested to help and support the elite than the commoners. The vernacular schools for the Malays were merely to train them to be slightly better than their fathers and forefathers:

To improve the bulk of the people and to make the son of the fisherman or the peasant a more intelligent fisherman than his father had been a man whose education will enable him to understand how his life fits in with the scheme of life around him (N.Selat 1976: 137).

Therefore, those who wished to get better education for better employment opportunities had to enter English-medium schools under Christian mission administration. Most of the English-medium schools were centred in urban areas. They were mostly attended by the members of the aristocracy who usually gained admission with a monthly bursary. The traditional apathetic attitude of ordinary Malays towards Government secular schools was evidenced by their reluctance to attend the schools. The parents were afraid that their children would convert to Christianity and would prefer their children to be like them, or slightly better than them. This was claimed to be one of the reasons for the educational backwardness of the Malays, putting them at a serious disadvantage in competing with the more advanced immigrants (Yegar 1979: 260). The deep social and economic impact that this left on Malays is evident today. In

short, this education policy was mainly to preserve Malay traditions and the traditional structure of Malay society, with the exception of the Malay aristocracy (Means 1972: 36).

Another important aspect of the so called 'MSR' was that involving land ownership. The Malay Reservation Enactment, (MRE) 1913 tended to artificially protect the Malays from the economic dislocation that resulted from the influx of Chinese and Indian immigrants to the Malay Peninsular (Means 1972, J.K.Sundaram 1988c). The passing of this Enactment was due to the development of the colonial capitalist economy. The growth of capitalist enterprises under colonialism led to a rapid increase in the immigrant population and a corresponding growth in rice consumption which affected paddy (*padi*) production in several ways. The dramatic corresponding increase in rice consumption was largely met by increasing imports of cheap rice from Thailand and Burma. By 1890, rice imports constituted more than 35 per cent of total imports; this exceeded government revenue and amounted to 31 per cent of export receipts (J.K.Sundaram 1988c: 16). In order to minimise the loss of foreign exchange and to curb the Malay peasants from diverting away from the traditional into the capitalist economy, the British promoted paddy production amongst them.

T.G.Lim (1976) has pointed out that the colonial agricultural policy had two aims:

- (a) To encourage the increase of peasant food production for consumption by the growing labour force engaged in the cash economy, thereby minimising the loss of foreign exchange in payment for rice imports;
- (b) To preserve export-oriented cash-crop cultivation for capitalist interests.

Though there was much rhetorical encouragement of both plantation and peasant agriculture,<sup>64</sup> colonial policies and practices discriminated against peasant interests in favour of plantation interests. There were more facilities: drainage, better soil quality,

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<sup>64</sup> Rubber for instance, cultivation of less than 100 acres were categorised as smallholdings and belonged to the predominant Malays, while over 100 acres qualified as plantations and belonged to the Europeans (J.K.Sundaram 1988c: 64)

accessibility and so on, in plantation agriculture as compared to that of peasant agriculture.

Therefore, through the period of colonial rule, Malay peasants were forced into producing a surplus rice crop that could be sold through the market and used to feed the new immigrant workers on plantations and in tin mines. In most areas, Malays were discouraged from cultivating other cash crops, such as rubber, to reinforce the role of the Malays as food producers and to discourage competition with the British capitalist plantations. This was also to reduce the import of rice, thus minimising the loss of foreign exchange in payment for rice imports (J.K.Sundaram 1988c: 56-57).

Frustrated by the poor response of local Malays to cash paddy production, the colonial administration branded the Malays as being indolent, ignorant, shiftless and irrational. The British always claimed that the native Malays were savages and their states were lawless with no organised system of government. Therefore, in the name of reform and to restore peace and stability, they had to rule the country:

...the non-Europeans had to make the adjustment; the coloniser was the agent of change (Worsley 1971: 35).

The Malay was generally described as:

...dull, heavy and listless, fond of a life of slothful ease, and takes a good deal of coaxing to make an effort for the improvement of his state or to do anything conducing to his profit or advantage-even, it may be said, for his amusement (McNair, quoted in N.Selat 1976: 86).

Syed Husin Alatas in his book, **The Myth of the Lazy Native** (1977) has analysed the reasons why the natives were branded as indolent by the colonialists. It is the hypothesis of his book that the image of the indolent native was a product of the nineteenth century when the domination of colonies reached a peak and when colonial capitalist exploitation required extensive control of the area. The image of the native had a function in the exploitation complex of colonial times. This was a time when the capitalist conception of labour gained supremacy. Any type of labour which did not conform to this conception was rejected as a deviation. A community which did not

enthusiastically and willingly adopt this conception of labour was regarded as indolent.<sup>65</sup>

Frustrated by the peasant reluctance to comply with the colonial demand for paddy production, the British criticised the unwillingness of Malays to be involved in the capitalist economy as an ethnic shortcoming. For Husin Alatas, supported by Edward Said (1993: 297-309) and others,<sup>66</sup> the accusation against the Malays was not due to their indolence *per se* but rather due to their refusal to work as plantation workers or miners. This attitude of the Malays posed a serious problem for the colonial British in searching for labour. The Sungai Ujong Report of 1882 said:

Nothing is wanted but Tamil labour. A great deal has been done by the British towards utilising Malay labour and large numbers of coolies come from the adjacent small estates to procure work, both at *Pantai* (coast) and *Rantau* (remote area). But this labour is too expensive, and is very uncertain, as frequently at a time when the planter wants as much labour as he can get, he finds himself without a man to do the necessary work on the estate (quoted in H.Alatas 1977: 79).

Alatas argued that the British purposely created the myth of the lazy Malay in order to bring in labour from outside. Therefore, the British began to encourage immigrant agricultural settlers particularly from other parts of the Malay Archipelago, who were believed to be favourably predisposed to tropical subsistence agriculture (*ibid*: 79-80) The conditions under British rule were relatively attractive compared to those prevailing in the neighbouring islands under Dutch administration. On the other hand, the non-Malay immigrants were reluctant to commit themselves to a peasant life. The wealthier non-Malay immigrants found it more profitable to engage in other occupations, while the poorer ones were generally discouraged from going into peasant agriculture. They were instead expected to gain employment in a rapidly growing capitalist sector (*ibid.*, J.K.Sundaram 1988c).

The influx of non-Malays soon revolutionised the demographic pattern, making the Malays a minority in their own country. The influx of immigrants was a direct result of growing British investment in rubber plantations and tin mining.<sup>67</sup> The new

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<sup>65</sup> Alatas's hypothesis can be regarded as partly true in the sense that this situation has its roots in the Malay feudal system (refer 2.4 and 2.5). This situation was further exploited by the colonial power.

<sup>66</sup> See also Guha (1963) as quoted in Said (1993).

<sup>67</sup> For accounts of why the Chinese migrated to Malaya, see Mills 1966: 205, Ryan 1976: 137-141.



immigrant population and the rapidly expanding economy pushed the Malays into the inferior rural areas. In 1931 the total population of Malaya was 4,385,346; out of which 44.7 per cent were Malay, the Chinese 39 per cent and the Indians 14.2 per cent (Emerson 1964: 20). The corresponding Malay percentages in 1911 and 1921 were 53 per cent and 49.2 per cent respectively. This decline in percentage was despite Malay immigration from East India (Indonesia) (*ibid.*).

It was decided that the Chinese preponderance in Selangor and the Straits Settlements had to be balanced by an increase in Indian immigration. As well as gaining cheap labour on the British rubber plantation, this was a shrewd political measure to counterbalance the Chinese in Malaya, in line with the colonial communalist strategy:

For political reasons that the great preponderance of the Chinese over any one race in some of the native states under Our Administration should be counterbalanced as much as possible by the influx of Indian and other nationalities (T.G.Lim 1977: 101).

The Chinese developed along capitalistic lines with an upper, middle and lower class, in contrast to the Europeans who formed only an upper class while the Indians formed only a lower class. A small group of Chinese fought their way up to head banks and large mercantile houses, some of them also owned mines and plantations (W.Y.Hua 1983:42-43). They carved out a major part of the new economy for themselves, second only to Europeans.

The rapid alienation of land to the capitalist economy as well as the growing number of non-Malays had pressurised the British to pass the MRE in 1913. Under the law, the Residents were empowered to declare any land within their state as reservation land, which could not be sold, leased or otherwise disposed of to non-Malays (Means 1972, J.K.Sundaram 1988c). Limitations on the disposal of reservation lands were also imposed on the owners and land dealings contrary to the MRE were declared void.

Nevertheless the MRE was mainly a colonial legal device to prevent the Malays from interfering with their policy of advancement of capitalism in the Malay Peninsular. This was evidence of how colonial law was used mainly for economic exploitation in the colonised states (cf. Norrie 1993: 82). There were other

disadvantages of the MRE.<sup>68</sup> The Malays were prevented from coming into the centres of commerce and industry.<sup>69</sup> The colonial authority imposed crop cultivation conditions on these lands ostensibly to make them less attractive and discourage their sale to non-Malays. At the same time, one of the objectives had been the protection of the traditional paddy-village land and as a result, the encouragement of traditional forms of cultivation on the newly alienated reservation lands (T.G.Lim 1976: 158).

The passing of the MRE 1913 was due to the 'Great Rice Shortage' which struck Malaya from 1913 to 1931. In this context, the MRE can be viewed as the first of various legislative and other colonial efforts to deal with the rice supply problem (J.K.Sundaram 1988c: 61); as the problem worsened towards the end of the decade, such efforts were intensified. In 1921, the Rice Lands Enactment was introduced, its primary aim was to prevent the cultivation of crops (particularly rubber) other than paddy, in the Reservation lands (*ibid.*, W.Y.Hua 1983: 36).

Most of the reservation areas were unoccupied land in the interior where "not only were there few conflicting interests to be considered but also the absence of a Malay population to take advantage of them" (T.G.Lim 1977: 129). Kept within the limitation of this reservation land, many Malay peasants violated these cultivation restrictions. They also petitioned for their lands to be excluded from Reservation because their land could no longer be used as collateral for credit (*ibid.*: 129).<sup>70</sup> This Policy also caused the price of the reserved land to fall by as much as 50 per cent (*ibid.*: 206, J.K. Sundaram: 60, W.Y.Hua 1983: 36, D.Wong 1974). Since reservation land could no longer be given as security for the purpose of getting credit from non-Malays, the participation by wealthier Malays was encouraged considerably. This

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<sup>68</sup> Many writings have been made on the flaws created by the MRE, refer to T.G.Lim 1974, J.K.Sundaram 1988c and W.Y.Hua 1983.

<sup>69</sup> The spread of non-Malay commerce consequent upon the imposition of colonial rule was simply an extension of the activities of non-Malay merchant capital based in the Straits Settlements, which concentrated on the import and export of raw materials and the import of British-manufactured goods. This tended to be the preserve of English-educated comprador bourgeoisie, while a parallel stratum of (usually vernacular-educated) commercial bourgeoisie carried on the import of foodstuffs from China for the rapidly growing Chinese population (W.Y.Hua 1983: 42).

<sup>70</sup> At a later stage, only a Malay agency could hold Malay Reserve land as collateral such as Bank Bumiputera (Indigenous Bank) and Bank Pertanian (Agricultural Bank).

meant that wealthy Malay landowners were in the best position to purchase land free from outside competition, at prices below market level. They could also charge higher interest rates and impose stiffer conditions on loans, and accept Malay debtors' land as collateral.<sup>71</sup>

Although to a certain extent, Land Reservation laws affected the non-Malays, particularly the Chinese, they did not disadvantage the European capitalists:

In some areas, non-Malay land applicants were rejected by officers although there were no Malay applicants for the land, and reservations were wilfully created to deny them of it...In 1928, for example, in the midst of a lot of breast-beating about the protection of Malay land interests from the onslaught of Chinese intruders, the government reserved 75,000 acres of land for the Western oil palm industry (T.G.Lim 1976: 209).

To boost rice production, the colonial state was forced to allocate funds for irrigating paddy land in Krian (the rice bowl area) for the first time. In 1906, the Krian Irrigation Scheme was completed. As a result, the Krian peasantry had to pay increased tax as it was said that "the natives are more appreciative of what is done for them by the government when they have to pay for it (*ibid.*: 60).

Likewise, in the case of rubber, the British discriminated against peasant production as compared to their large estates. Between 1926 and 1930, only 55,000 acres were granted to the peasantry as compared to 174,000 acres granted to the estates (W.Y.Hua 1983: 38). Credit facilities were also accessible to the latter while peasant smallholdings were regarded as risky. In the early 1920s, the declining rubber price moved the British to place severe constraints on peasant rubber production. Ostensibly to boost paddy production<sup>72</sup> and to raise the market price of rubber, the Stevenson Restriction Scheme was introduced in 1922. The basic principle of the Scheme was to limit rubber output in response to, and in anticipation of rubber price trends. The actual operation of the Scheme revealed its class bias: to perpetuate the dominance of

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<sup>71</sup> Clive Kessler (1978: 69) found that village land in Kelantan, was being amassed by four main categories of Malays: the aristocracy, salaried government servants, merchants and rich peasants. Raymond Firth (1964: 296) also noted that by 1940, landlordism in the form of a rentier class in the countryside had increased considerably as a result of colonial land policy.

<sup>72</sup> The peasantry had taken up smallholding rubber production from the industry's inception. In the rice growing areas, rubber constituted a peripheral occupation while elsewhere it was the main activity; rubber rapidly became the single most cultivated crop among the peasantry. Compared to rice, rubber had its attraction, especially during the rubber boom in the early twentieth century. The labour processes involved for rubber is lesser than that of paddy, while an average gross earnings per acre are higher than that of rice growing (W.Y.Hua 1983: 38).

capitalist estate interests. Rubber holdings with production records (mainly estates) had quotas allocated on the basis of their production performance during a common base year. Those without records (the peasant cultivators) received a small allocation (J.K.Sundaram 1988c: 68, W.Y.Hua 1983: 38). Because of opposition from the peasantry, the Scheme was terminated in 1928. Nevertheless, this favouring of the big capitalist estates *vis-à-vis* small peasant cultivation was repeated in 1934 when the British introduced the International Rubber Regulation Scheme (*ibid.*).

## **CHAPTER THREE**

### **ISLAM IN THE FEDERAL CONSTITUTION**

#### **3.1 Introduction**

The occupation by Britain beginning in 1786 led to intensive capitalist expansion. The Malayan economy was exposed to the international market and Malaya became a rich source of income for the British.<sup>73</sup> British rule in Malaya was interrupted in 1942 by the Second World War during which the Japanese took control of Malaya. During the war, the British Colonial Office concluded that the pre-war political system would be unsuited to the conditions likely to prevail at the end of the war. It was argued that Malaya needed another system of government. The division of Malaya into three separate entities; Straits Settlements, FMS and UMS, was considered to be ineffective and hindered the development of a uniform system of law and administration. The legal fiction of the sovereignty of Malay rulers and their constitutional position was seen to undermine democratic reforms, i.e. rejection of the rights of non-Malays (Means 1970: 51).

Therefore, the Colonial Office proposed a new systematic form of government to suit the interests of the British in Malaya. In September 1945, the Japanese surrendered to Admiral Mountbatten at Singapore. The initial post-war period was followed by the passing of Malayan Union Agreement in 1946 which was a setback to the Malay majority.

This chapter considers the formation of UMNO as an opposition to the Malayan Union proposal, the Independence Constitution drafted by the Law Commission and the position of Islam in the Constitution.

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<sup>73</sup> For instance, between 1851 and 1860, 23 per cent of the total British tin consumption was met by Malayan exports. Over the following decade, total Peninsular exports more than doubled in tonnage to 40 per cent of British consumption. In the face of the decreasing percentage of Britain's tin consumption being produced in Cornwall, the importance of Malayan production to British interests could not but have grown with expanding world tin consumption (J.K.Sundaram 1988c: 142).

### **3.2 Political Development**

The Malayan Union 1946 had two main aspects:

- (a) It proposed the establishment of a Union comprising the nine Malay States and Pulau Pinang and Malacca, with the exception of Singapore. The formal sovereignty of the Malay rulers would come to an end since they were to be subordinated to a central government headed by the Governor assisted by the Executive and Legislative Councils. State and local government would operate through powers delegated by the central government to administrative officers and local councils. The Sultans would have to be content with legislative powers on matters involving Muslim religious questions (except collection of tithes and taxes) and presided over by a Malay Advisory Council, even the selected members of which needed approval by the Governor.
- (b) Common citizenship rights for all for which the qualification would be birth in Malaya, or residence in Malaya for a minimum of 10 out of 15 years before 1942. By these terms, about 83 per cent of the Chinese and 75 per cent of the Indians would be eligible for citizenship (Ongkili 1985, Means 1970: 52, Von Vorys 1975: 66, Purcell 1946: 28, Ratnam 1965 and Malayan Union and Singapore 1946).

Therefore, for the Malays, this proposal was a threat to their special position. The Malays saw their rulers as puppets of the British administrators and their territories came under British possession (Hawkins 1946: 283). With the Malayan Union, the old treaty relations would be invalidated and discarded in favour of the new Scheme. The general character of the Union, which intended to extend citizenship rights to non-Malays, seemed to scare the Malays. They realised that with flexible citizenship rights, non-Malay immigrants with adequate residential qualification and artificial loyalties towards the country, would be free to exercise their electoral rights. This would enable them to hold the country politically, especially as they were economically dominant

and in some states numerically dominant. The Sultans were upset at not being consulted about this proposal, so giving impetus to the rise of Malay nationalism.<sup>74</sup>

As a first step towards their objection to the new policy, a Pan-Malayan Congress was held in KL on 1 to 4 March 1946 with forty Malay organisations sending delegations. The aim was to deliberate on the possibility of forming a central body of all Malay organisations. Dato Onn, an English educated adviser to the Sultan of Johore was installed as Chairman of the Congress (Means 1970: 99). He invited all Malay groups to join the Congress and fight against the Malayan Union. At this time, the question of whether Islam would be relegated to a secondary position in favour of Malay ethnicity did not arise. Thus, the struggle against the Malayan Union brought together the divergent strains in the Malay nationalist movement by including Islamic reformers, the Malay educated intelligentsia and the Malay civil servants (Abu Bakar 1987: 157).<sup>75</sup>

At the Pan Malayan Congress, UMNO was formally launched and Dato Onn Jaafar was elected as the first President (Means 1970: 100, Vasil 1980: 64). The tactics used by UMNO to fight the Malayan Union were effective. Evidence of serious Malay discontent so disturbed the British Government, that a two-man Parliamentary delegation was sent to Malaya to investigate the situation and explore possible means for resolving the crisis. They witnessed Malay mass demonstrations, addressed meetings, heard representations by the Malay rulers and UMNO and were surprised by the intensity of Malay feelings.<sup>76</sup>

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<sup>74</sup> The Sultans were asked to sign the Malayan Union Agreement with very little time to consider the proposal or consult their Malay Advisors. They were made under duress with a threat that those who failed to sign would be thrown from their throne and those who were willing to sign will be substituted as successors. For a full account of the measures taken by the British Representative, MacMichael in compelling the Malay rulers to sign the agreement Refer to Ongkili 1985 42-44

<sup>75</sup> The religious groups were basically those who graduated from religious schools (*Pondok*) and those who furthered their studies in Middle Eastern universities, such as Al-Azhar, Cairo. While the secular group were those who graduated from English-medium schools. There is a wide body of literature on the role of religious groups in Malaya For instance see K K Khoo 1990

<sup>76</sup> An emergency meeting of the Pan-Malayan Congress was held to organise a mass boycott of the Malayan Union. None of the Sultans appeared at the inauguration ceremony of the Malayan Union and Malays refused to serve on the Advisory Council. Rallies were held throughout Malaya and for a week politically active Malays wore white mourning bands on their *Songkok* (hat) to symbolise the loss of their birthright and liberty (Ongkili 1985)

The Malayan Union was later withdrawn. For the purpose of revising the new agreement, a Working Committee was formed. Representatives of UMNO and the Malay rulers were called and they produced a new agreement called the Federation of Malaya Agreement (FMA) 1948. The Constitution of this FMA was the basis of Malaysia's present Constitution. It was actually the product of Anglo-Malay compromise in two important aspects: Malay Special Rights (MSR) and common citizenship (*jus soli*).

The principle of *jus soli* under which a non-Malay born in the country would automatically become a citizen was replaced by a rule that a non-Malay born in the country could only apply after a certain period of residence and if other conditions were met (FMA 1948). Only those whose fathers were born and resident in the country would automatically become citizens by the operation of law. The Malays appeared to have succeeded in restricting the potential 'threat' which the non-Malays were capable of posing. The total number of non-Malays who were eligible for citizenship under the FMA 1948 was drastically reduced from that proposed by the 1946 Malayan Union Scheme as can be seen in the figures below:

**TABLE 3.1**  
**ETHNIC BREAKDOWN OF POTENTIAL VOTERS (1946 AND 1948)**

	The Malayan Union Plan (1946)	Federation of Malaya (1948)
Chinese	2,150,450	500,000
Indians	455,000	230,000
Malays	2,544,000	2,500,000

Source: K.J.Ratnam 1965: 74-84 (Approximate figures)

The restriction of citizenship rights for non-Malays prevented the vast majority of them from participating in elections. When the first general election was held in 1955, the Malays formed 84.2 per cent of the voters as compared to a mere 11.2 per cent and 3.9 per cent for the Chinese and the Indians respectively (Tilman 1979: 20). The Malays became citizens by the operation of law and continued to get special privileges. The Special Rights of the Malays were once again given due recognition. Along with the Federation of Malaya Agreement, the same provisions were also provided for at



State level. The State governments were entrusted to provide and encourage education and training for the Malay inhabitants in the state so as to encourage their full participation in the Federation (FMA 1948: 5). The Malay privileges clause comprised four main areas:

- (a) Reserving certain lands for the Malays;
- (b) The operation of employment quotas within the public sector;
- (c) The operation of quotas for licences and permits for business;
- (d) Special quotas for scholarships and educational grants.

It is interesting to note that the adoption of a religious basis for the Malay ethnic boundary was provided for in this 1948 Agreement. Both the British and UMNO wanted to ensure that the MSR was safeguarded and this called for a clear and unambiguous definition of a 'Malay'. A 'Malay' has been defined as one "who professes the Muslim religion, habitually speaks the Malay language and conforms to Malay customs". This definition has remained unaltered in the present Constitution (Article 160b). This was merely to give a legal recognition to the position that existed before, that is to equate Malay with Muslim. This definition is constantly criticised by the Islamically orientated academics as portraying the ethnic nature of Islam. For them, Islam has to be universalised so that it could be what it should be; a universal religion. Islamic propagation had to be carried beyond the frontiers of Malay society (M.Abu Bakar 1986: 170). They added that the definition of Malay excludes the non-Malay Muslims who do not conform to Malay culture or speak Malay, whereas Islam recognises no other affinity except Islamic faith. The problems caused by this definition of Malay have been analysed by S.Husin Ali (1981: 1-7). For him, there were a lot of loopholes and injustices were created. For instance, a Malay Muslim may not necessarily adopt an Islamic outlook and may even subscribe to un-Islamic ideologies but be accorded with special privileges. In contrast to a non-Malay Muslim, a Chinese or Indian who is a good Muslim but does not practise Malay custom and does not speak the language (*ibid.*: 2-3, M. Abu Bakar 1987: 170). Equally important is the position of opportunists who find security and gain by becoming Malay or *Bumiputera*. The

relationship between Malay and *Bumiputera* especially in post-Independence Malaysia is important. Therefore, it is useful to discuss the evolution of such terminology.<sup>77</sup>

The term *Bumiputera* was used to distinguish between indigenous and non-indigenous members of society, and was popularised during the 1920s and 1930s (Siddique and Suryadinata 1981/1982: 666).<sup>78</sup> It was also fostered by colonial policies. The British conception of Malays as the 'sons of the soil' (literal meaning of *Bumiputera*) served to reinforce the application of this label. For instance, the Malay Reservation Enactments (MRE) in every Malay State (now State Malay Reservations Act) defined a Malay as "a person belonging to a Malay language and professing the Muslim religion", similar to that of FMA 1948. This identification of the Malays as 'sons of the soil' was further reinforced by the official British policy of non-interference in matters pertaining to Malay religion and custom. As indicated in Chapter Two, this separation was never free from British intervention. Nevertheless it left "the spiritual and cultural Malay ethos intact and was an integral part of the larger British picture of the role of the "sons of the soil" in the colonial system" (*ibid.*).

The indigenous/non-indigenous dichotomy was exacerbated by the rise of nationalist independence movements. Nationalism was used to promote a sense of indigenous homogeneity and identity which tended to exclude the participation of non-indigenous communities. Malay nationalism in pre-war Malaya also served as a rallying point for Malays who felt threatened by the increasing numbers of Chinese and Indian immigrants to the country, a threat which was heightened by the Malayan Union proposal.

Besides the issue of indigenous/non-indigenous, the Malays were also sensitive to religion; Islam. After 1950, Malay politicians became more sensitive to the religious

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<sup>77</sup> The three terms: *Bumiputera*, Malay and Muslim overlap. Generally, all Malays are Muslim as well as being *Bumiputera*. But not all *Bumiputera* are Malay or Muslim and not all Muslims are Malay or *Bumiputera*. *Bumiputera* make up 55 per cent of the population, Muslims 51 per cent and Malays 49 per cent (Means 1991: 123, Malaysia 1991: 29-30). The literature on Malay and *Bumiputera* is extensive. Refer to Means 1972: 29-61, 1991, Siddique and Suryanita 1981/1982: 662-687, H Ali 1981).

<sup>78</sup> An early reference to the term *Bumiputera* appeared in the June 1927 issue of *Seruan Azhar* in an article by Lufti entitled "Mereksa Darihal Bumiputera Dengan Bangsa Asing" ("Examining the Relationship Between *Bumiputera* and Foreigners") (Siddique and Suryadinata 1981/82: 664).

aspects of politics. That was the year in which Muslims rioted in Singapore to protest at the Maria Hertogh case (1951 MLJ 164). This incident centred on Maria Hertogh, a Dutch girl who was given to a Malay family to look after by her parents when they were imprisoned by the Japanese. The girl was brought up as a Malay and renamed Natrah. When she was 13, she got married to a Malay man. Later, her natural parents claimed custody before the Singapore High Court. Maria refused to return to her natural parents. The Court was asked to decide on the validity of the marriage. The conflict between Islamic and English law caused disturbance amongst the Malays, especially those in Singapore. They argued that the natural parents custody rights had ceased since she was already married to a Malay man according to Muslim law and therefore English law did not apply to her. It was decided both at first instance and on appeal that the marriage was invalid. The Court applied the principle of private international law, i.e. the capacity to marry is determined by the law of the domicile at the time of marriage. In this case as Maria was only a minor, therefore her domicile was that of the father, i.e. the Netherlands.

The result of the application of this Western principle was a violent political confrontation between the Muslims and the Singapore authorities. The schism which had existed between the Malays began to give way to a new solidarity. They jointly opposed the Court's decision. For them, the judgement was an unwarranted interference in what was a perfectly valid arrangement under Muslim law. To add insult to injury, the Court had also found as a fact that Maria was Muslim and therefore by right her personal law should have been applied. When Maria was taken out of Singapore to the Netherlands to join her real parents, the tension increased. This exploded in the form of an anti-European, anti-colonial riot by Malay-Muslims which resulted in 18 people killed and 180 injured (Means 1969: 277).

To most Muslims, the decision in this case appeared to violate the fundamental tenets of their faith and was taken as a direct attack by an infidel court on Islam (*ibid.*). More importantly, the intense feelings aroused by this case provided a lesson to Malay politicians that religion might be utilised to tap "the primordial sentiments of the bulk

of Malay society" (*ibid.*). Malay politics therefore became more openly involved with religious questions. UMNO, for the purpose of securing its legitimacy with the Malay-Muslim masses and realising the integral nature of Islam to Malay identity, included Islam as one of its primary objectives.<sup>79</sup> By 1959, UMNO had organised an Ulama (Muslim Scholars) section to represent Muslim religious leaders. The intensity of UMNO's religious appeal was muted primarily because of its participation in the multi-communal Alliance coalition with the MCA and the MIC.<sup>80</sup>

The nature of UMNO and its leaders who were more Malay centric and secular in nature caused tension amongst its members. Within UMNO, there were a number of Islamically inclined figures who felt dissatisfaction towards the party. They were mainly from religious schools and were the leaders of the Ulama section in UMNO. They decided to establish the Hizbul Muslimin (HAMIM) in 1948. Under the chairmanship of Sheikh Abubakar al-Baqir, HAMIM became the first Islamic party in the country. Its motto was "to fight for Malayan independence, build a Muslim society based on Islamic principles and to have Malaya as an Islamic State" (M.Marican 1976: 31). The British colonial government was quick to act against Malay leaders whom they considered 'extremist'. Hence, HAMIM's leaders were arrested and the party disbanded before it was proscribed. Its spirit however was reborn in 1951 when the *Pertubuhan Islam Setanah Melayu* (PAS/Islamic Party of Malaya) came into being. PAS became the second largest Malay party and the most formidable opposition party in the country. PAS constantly attacked UMNO's cosmetic Islamic policies.

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<sup>79</sup> Article 3 of the Constitution of UMNO provides *inter alia*, "To promote, uphold and safeguard Islam in Malaysia" This is among the other main objectives of UMNO which are otherwise more national and ethnic in nature.

<sup>80</sup> The first election was held in Malaya in 1955. The main parties were UMNO (under the leadership of Tunku Abdul Rahman), Independence of Malaya Party (IMP) and MCA. UMNO could not expect to win in non-Malay areas and so it concentrated in Malay areas. Similarly, the MCA in the Chinese dominated areas. The IMP because of its non-communal platform, contested in all areas. Both UMNO and MCA were faced with a common opponent, IMP and this brought them closer together. A temporary alliance was formed for the purpose of the elections which led to their success. The ethnic cleavages were clearly present in the elections as the Malays voted for UMNO, the Chinese for MCA and the Indians for IMP, who did not have their own communal party. When IMP was dissolved, the Indians formed their own political party known as the MIC. The success of the brief coalition led the leaders of UMNO and MCA to discuss the possibility of having a permanent coalition. The Alliance Party was formed in 1953 which consisted of UMNO and MCA. In 1955 the inter-ethnic coalition was completed when the MIC joined as well. This inter-ethnic coalition is still intact in the form of National Front (Barisan Nasional (BN)), i.e. the renamed Alliance Party.

In the meantime, UMNO was faced with the difficult task of having to please its Malay members and voters on the one hand, and on the other (especially after its alliance with the MCA and MIC), to secure support from the non-Malays. UMNO leaders, especially Tunku Abdul Rahman had to compromise with the increasing demands of the non-Malays while at the same time continuing to struggle for the sovereignty of the Malays. The party's main motto was 'Long Live the Malays' and in anticipation of Independence the slogan changed to '*Merdeka*' (Independence).

### **3.3 The Development of Islam and the Law**

#### **3.3.1 The Constitutional Commission**

When UMNO won Independence for Malaya on 31 August 1957, Islam was not granted a prominent role in the governance of the country. The need to address the more pressing issue of nation-building also resulted in government policies which did not pay much attention to Islamic principles, nor to the development of Islamic socio-economic infrastructure and institutions. This is evident from the extent to which Islamic principles were incorporated in the Federal Constitution. The Constitution was given its realisation on the part of British officials of the plural composition of the country, and was not meant to be guided by Islamic principles.

When the Constitutional Commission<sup>81</sup> was drafting the Federal Constitution, they considered whether there should be any Article providing that Islam should be the official religion of the Federation. There was universal agreement that if any such provision were inserted it must be clear that it would not in any way affect the civil rights of non-Muslims. The Commission in its report said:

The religion of the Federation of Malaya shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religions and shall not imply that the State is not a secular State. There is nothing in the draft Constitution to affect the continuance of the present position in the States with regard to the recognition of Islam in the Federation by legislation or otherwise in any respect which does not prejudice the civil rights of

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<sup>81</sup> The Commission was chaired by Lord Reid and its members consisted of representatives from Pakistan, India, Australia and the United Kingdom. The foreign members were taken on to avoid bias and partiality. This membership was severely criticised by the Malaysian intelligentsia because they were foreigners and did not know the background and interest of the people and the country.

non-Muslim individuals. The majority of us think that it is best to leave the matter on this basis, in view of the fact that Counsel for the Rulers said to us It is their Highnesses' considered view that it would not be desirable to insert some declaration such as has been suggested that the Muslim faith be the established religion of the Federation. Their Highnesses are not in favour of such declaration being inserted and that is a matter of specified instruction in which I myself have played very little part (Report of the Federation of Malaya Constitutional Commission 1957: 73).

Mr Justice Abdul Hamid, the Pakistani member of the Commission relied upon the suggestion made by the Alliance party. He said that on this matter, the recommendation of the Alliance was unanimous. Their recommendation should be accepted in the Constitution either after Article 2 in Part 1 or at the beginning of Part XIII:

Islam shall be the religion of the state of Malaya, but nothing in this article shall prevent any citizen professing any religion other than Islam to profess, practise and propagate that religion, nor shall any citizen be under any disability by reason of his not being a Muslim (*ibid.*: 99).<sup>82</sup>

Abdul Hamid in his minority report added that:

No less than fifteen countries of the world have a provision of this type inserted in their Constitution. Among the Christian countries which have such a provision in their constitution are Ireland (Article 6), Norway (Article 1), Denmark (Article 3), Spain (Article 6), Argentina (Article 3), Bolivia (Article 3), Panama (Article 36) and Paraguay (Article 3). Among the Muslim countries are Afghanistan (Article 1), Iran (Article 1), Iraq (Article 3), Jordan (Article 2), Saudi Arabia (Article 7) and Syria (Article 8). Thailand is an instance in which Buddhism has been enjoined to be the religion of the King, who is required by the Constitution to uphold that religion (Article 7). If in these countries, a religion has been declared to be the religion of the state and that declaration is included in the constitution of Malaya States a provision of this type already exists. All that is required to be done is to transplant it from the State Constitution and to embed it in the Federal (*ibid.*).

The Rulers of the Malay States at first opposed the enactment of such a provision in the new Federal Constitution because they were told by their constitutional advisers that if the Federation had an official religion, the proposed Head of the Federation would logically become the Head of the official religion throughout the Federation. It was thought that this would be in conflict with the position of each of the Rulers as Head of the official religion in his own state. However, it was explained by the Alliance Party that it did not intend to interfere with the position of the Rulers as Head of Islam in their own States and that the intention in making Islam the official religion of the Federation was primarily for ceremonial purposes, for instance reciting Islamic prayers (*Duā'ā'*) at the opening and closing of official Government functions.

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<sup>82</sup> This recommendation has been embodied in Article 3 of the Federal Constitution with variations. Article 3 says "Islam is the religion of the Federation: but other religions may be practised in peace and harmony in any part of the Federation."

### 3.3.2 Islam in the Federal Constitution

As indicated earlier, Article 3 of the Federal Constitution enacts that Islam is the religion of the Federation. In conformity with previous practice, the Article goes on to say that other religions may be practised in peace and harmony in any part of the Federation. In recognition of representations made by the rulers, the Article also provides that in every State, the position of the Ruler as the Head of the Muslim religion in the manner and to the extent acknowledged and declared by the Constitution of that State should be unchanged. Subject to that Constitution, all rights, privileges, prerogatives and powers enjoyed by him as Head of that religion should be unaffected and unimpaired.

Before Independence, it was found necessary in practice for the States to act in concert regarding certain religious matters. For example, in determining the first and last day of the fasting month. In theory it is open to each Ruler to act separately for his own State in such a matter, but it was felt that the authority should be conferred on the Yang di-Pertuan Agung (YDA) to represent each Ruler in certain federal acts, observances and ceremonies.<sup>83</sup> Accordingly, it is now provided by clause (2) of Article 3 of the new Constitution that if the Conference of Rulers has agreed that certain acts, observances or ceremonies should extend to the Federation as a whole, each of the Rulers shall in his capacity of Head of the Muslim religion, in his State, authorise the YDA to represent him (M.S.Hashim n.d.: 9).

Nevertheless, neither the Federal nor State Constitutions provide that Islam is the religion of either Malacca or Penang. The position is therefore that Article 3 does not apply to Penang and Malacca.<sup>84</sup> Moreover, the various State Constitutions provide that the Ruler may act in his discretion in the performance of any functions as Head of the Muslim religion, but it would appear that the YDA may only act on advice in

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<sup>83</sup> YDA is the Principal Ruler of the Federation appointed from amongst the Malay rulers for a period of 5 years

<sup>84</sup> In Sabah, Islam has been formally declared as the religion of the state by a 1971 amendment to the State Constitution (Constitution of Sabah, Article 5A by the Constitution (Amendment) Act, 1973). There is no similar provision in Sarawak

performing his functions as Head of the Muslim religion in Malacca, Penang, the Federal Territory, Sabah and Sarawak.<sup>85</sup>

Apart from clause (1) of Article 3 of the Federal Constitution which provides that religions other than Islam may be practised in peace and harmony in any part of the Federation, there are other provisions in the Constitution which give voice to the spirit of religious tolerance which exists in the country. For instance, clause (2) of Article 8 provides:

Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the grounds only of religion...in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

Most of the State Constitutions contain provisions that require that only a person of the Malay race who professes the religion of Islam can be appointed to be a Chief Minister (*Menteri Besar*). After Independence, these provisions have been amended to enable a Ruler to appoint a non-Muslim Chief Minister provided that in the Ruler's judgement he is likely to command the confidence of the majority of the members of the State Legislative Assembly.<sup>86</sup> The Constitutions of the Malay States still provide that the State Secretary shall be of the Malay race and profess the Muslim religion as permitted by Article 8(5)(e) of the Federal Constitution.<sup>87</sup> However there is nothing in the Federal Constitution providing that the PM or any Minister or Federal high official must be a Muslim (Ahmad Ibrahim 1978: 51, M.S.Hashim n.d.: 10).

The Constitution provides for freedom of others to practise their religion and propagate them and also some rights relevant to their own religions,<sup>88</sup> but subject to the following:

- (a) Any general law relating to public order, public health or morality (Article 11(5));

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<sup>85</sup> Note that these are the States, except the Federal Territory, which were crown-colonies of the British and not ruled by a Sultan, but instead by a Governor.

<sup>86</sup> See for example Constitution of Selangor, 1959, Part II. Articles LII and LIII.

<sup>87</sup> See *ibid.*, Part II, Article LII.

<sup>88</sup> Such rights include (a) to manage its own religious affairs (b) to establish and maintain institutions for religious group or charitable purpose (c) to acquire, own property and hold and administer it in accordance with law (Article 11).



(b) Clause 4 which states that "State law and in respect of the Federal Territories of Kuala Lumpur and Labuan, Federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam".

The effect of Article 3 is to enable a State or the Federal Government to establish or maintain or assist in establishing or maintaining, Islamic institutions and to provide, or assist in providing instruction in the religion of Islam and to incur the necessary expenditure for these purposes (Article 12(2)).

It was in pursuance of this constitutional power that sections 36 and 37 of the Education Act, 1961 were enacted, compelling any school in receipt of grant aid from the Government to provide Islamic religious instruction to Muslim pupils provided that the number of such pupils in that school is not less than fifteen. The cost of such instructions is met by funds given by the Federal Government. These two sections of the Education Act should not be considered *ultra-vires* the Constitution since they are authorised by the Constitution itself. Their implementation should not be regarded as discriminatory to other religions. This discrimination issue was raised in 1963 when Sabah and Sarawak joined Malaysia. They insisted that these sections were not to be applicable to them. Rather, they sought a similar sum allocated for Islamic religious instruction to be given for their social and welfare purposes. Nevertheless, in 1976, these two states asked the Federal Government to repeal this provision in their State Constitutions (S.Abas 1986: 8).

Another consequence of Article 3 is that the Federal and State Governments through annual Supply Acts and Enactments are authorised to spend money on the administration of Islamic religion and Islamic law (*ibid.*). It was argued that "these laws and their implementation should not be regarded as unconstitutional or in anyway discriminatory in respect of other religion" (*ibid.*). Islam and Malay have been given special status since pre-colonial times and were even preserved by the colonial British. The equation of Malay and Islam has been endorsed in Article 160 of the Federal Constitution. Article 3 and its special treatment for the Islamic religion can be linked to

Article 153 which gives special rights to the Malays (MSR). These articles enable the Government to promote Islamically related activities: social and economic, for the development of the Malays. This special position of Islam is also justified by virtue of the solemn Islamic oath taken by the YDA.<sup>89</sup> The YDA declares that:

We solemnly and truly declare that we shall at all times protect the religion of Islam and uphold the rule of law and order in this country (quoted in Ahmad Ibrahim 1989b: 11).

Therefore, protection for the religion of Islam can be extended to provide necessary funds to the development of Islam in all aspects, especially in the economic sector. Malays as the indigenous people have been left behind as compared to other races. Therefore any Government effort in establishing Islamic/Malay (*Bumiputera*) institutions are simply to improve the socio-economic position of the Malay Muslims and should not be regarded as unconstitutional. In fact these Malay-Islam issues are regarded as sensitive and cannot be questioned (refer to 4.3). We shall deal with these institutions in succeeding chapters.

In order to facilitate the administration of Islam in each state, the Council of Muslim Religion (*Majlis Agama Islam*) was established.<sup>90</sup> Its role is to aid and advise the Ruler on all matters relating to the religion of the State and Malay custom. In such matters it is the chief authority in the State but it is required to take notice of and to act in accordance with the Islamic law, Malay custom, and the written laws of the State. The power of the Council varies from state to state but generally it may issue *Fatwā* (legal ruling) on any matters referred to it, it has power to administer Waqf, to act as the executor of wills or be the administrator of the estate of a deceased Muslim and it may hear appeals from Muslim courts (Ahmad Ibrahim 1978: 53).

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<sup>89</sup> The YDA must firstly begin with the name of Allah (God) and in front of the Quran.

<sup>90</sup> A further step to co-ordinate the administration of Islamic affairs was taken on 17 October 1968 by the establishment by the Conference of Rulers of the National Council for Islamic Affairs (NCIA). The functions of the NCIA are (a) to advise and make recommendations on any matter referred to it by the Conference of the Rulers, by any State Government or State Religious Council (b) to advise the Conference of Rulers, State Governments and State Religious Councils on matters concerning Islamic law or the administration of Islam and Islamic education with a view to imposing, standardising or encouraging uniformity in Islamic law and administration. It is expressly provided that the council may not touch on the position, rights, privileges and sovereignty, and other powers of the Ruler as head of Islam in his state. For fuller account, see Ahmad Ibrahim 1978: 60

There also exists in each state a Department of Religious Affairs (*Jabatan Agama Islam*) responsible for the day-to-day administration of matters relating to the Muslim religion headed in each case by an administrator. Some members of the Department are also members of the Council and there is a close relationship between the two. There is legislation in each state for the administration of Muslim law and these provide for the setting up of Muslim Courts, for the adjudication of disputes relating to Muslim family law and the trial of Muslim offences. They also provide for the registration of Muslim marriages, divorces and revocations of divorce (*ibid.*).

### 3.3.3 Islamic law and the Supremacy of the Constitution

The Constitution declares itself to be the supreme law of the Federation and legislation passed after it came into effect which is inconsistent with the Federal Constitution is also void (Article 4). State laws which are inconsistent with the Federal law are also void (Article 75).

There is an argument that Article 3 gives full effect to Islamic law as the superior law and any law which is passed contrary to Shariah would be void.<sup>91</sup> Professor Sheridan (1988: xiii) in refuting this argument suggest that giving effect to this principle would require:

provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void. Far from making such provision, Article 162, on the other hand, purposely preserves the continuity of secular law prior to the Constitution, unless such law is contrary to the latter.<sup>92</sup>

Hence, all colonial secular legislation which run counter to Shariah such as the Evidence Act, Penal Code, Guardianship of Infants Act, Contract Act are still effective. Therefore, we have cases where the Malay Muslim judge has ignored the application of Islamic principles. For instance, in the case of Myriam v. Mohamed Ariff (1971 1 MLJ

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<sup>91</sup> It was raised in the later case of Che Omar bin Che Soh v. Public Prosecutor (1988) 2 MLJ 55. But it is relevant to bring the issue in this chapter and will be discussed again when we discuss the position of Islamic law under the leadership of Dr. Mahathir (see 5.6.2).

<sup>92</sup> Article 162 (1) says "subject to the following provisions of this Article and Article 163, the existing laws shall, until repealed by the authority having power to do so under the Constitution, continue in force on and after *Merdeka* day, with such modifications as may be made therein under this Article and subject to any amendments made by Federal or State law "

110), Abdul Hamid J. following the English principal of the welfare of the child, decided to give custody to the mother. This was in spite the fact that she had consented to give her children to the father and she had remarried a stranger having no relationship with the child.<sup>93</sup>

The Guardianship of Infants Act, 1961 provides that "nothing in the Act which is contrary to the Muslim religion or custom of the Malays shall apply to any Muslim", but it has been disregarded. The learned judge in his judgement said:

In my endeavour to do justice, I propose to exercise my discretion and have regard primary to the welfare of the children. In so doing, it is not the intention to disregard the religion and custom of the parties concerned or the rules under the Muslim religion, but that does not necessarily mean that the court must adhere strictly to the rules laid down under the Muslim religion. The Court has not, I think, been deprived of its discretionary power.

Likewise, in the case of Commissioner of Religious Affairs, Terengganu & Ors. v. Tengku Mariam (1969 I MLJ 110), the High Court rejected the authority of a *Fatwā* (legal ruling) issued by the Mufti (Muslim scholar) declaring a Waqf to be valid and held instead that the Waqf was void on the authority of the decisions of the Privy Council from India and Africa. Although the actual decision was reversed by the Federal Court on a principle of estoppel, nevertheless the Federal Court judges stated that if they were free to decide on the validity of the Waqf, they would also have held its as void in reliance to the English law.<sup>94</sup> In Nafsiah v. Abdul Majid (1969) 2 MLJ 174, the High Court held that by virtue of the Contract Act, 1956, a woman could sue for breach of promise to get married, although such action would not come under the Islamic law. In England, such an action has been abolished. "While the law in England seems to comply with the Islamic law in Malaysia, the law in Malaysia is still at variance with the Islamic law" (Ahmad Ibrahim 1981: 38).

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<sup>93</sup> Under Islamic law, custody (*Haqānah*) is regarded as a right of the child and the parents. The child needs someone to look after it and its needs. If the child is of tender years, the mother is the best person to look after the child. However, if the mother has remarried to a stranger, having no relationship with the child, she ceases her right. The custody therefore passes to the father. For details, see Ahmad Ibrahim 1984: 287-292.

<sup>94</sup> English law would only validate a Waqf which is dedicated to the public. Nevertheless in Islam, any Waqf which is private (*Haqf khāṣṣ*) i.e. for the members of the family (as in this present case) is also valid. See Ahmad Ibrahim in an article on this issue in MLJ 1977 vii.

The above are a few examples where Islamic law has been displaced and ignored in the Civil Courts. In fact, conflicts between the decisions of Shariah Courts and Civil Courts have frequently occurred. In addition, in the Selangor Administration of Islamic Law Enactment (AMLE), 1952 and followed in other states, provided that in the event of a conflict between the Shariah and Civil Court, the latter has an overriding jurisdiction.<sup>95</sup> The same provision also remains in the Court of Judicature Act, (CJA) 1964.<sup>96</sup> (refer 4.6 and 5.5.2).

The Constitution puts the preservation of Islam into the hands of the rulers under their respective states. The Ninth Schedule of the Constitution sets out the division of powers under Federal, State and Concurrent list (Sheridan 1988: 50, Ahmad Ibrahim 1981: 34). Since Islamic law and Malay custom are under the administration of each state, they therefore fall under the Ninth Schedule, List Two which sets out the division of powers under State list. Jurisdiction of Islamic law is limited in its scope to the family law and Muslims religious offences and the Shariah Courts which are given jurisdiction to deal with such cases have a limited jurisdiction.<sup>97</sup> It has jurisdiction only over persons professing the religion of Islam and its criminal jurisdiction is limited by Federal law.

Islamic law is not included in the definition of law in the Federal Constitution<sup>98</sup> as it is not the Federal law, instead it is only applies to Muslims by virtue of being adherents to that religion. Islamic law in this regard is personal to Muslims only. Even in regard to the subjects included in the items in the State list, there are many Federal laws which limit the scope and application of State laws (refer to Chapter Five).

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<sup>95</sup> See the Administration of Muslim Law Enactment (AMLE): Selangor Section 45(h), Terengganu Section 25(4) and Malacca Section 40(3)(b).

<sup>96</sup> Section 4 provides that "In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provision of this Act shall prevail "

<sup>97</sup> The Ninth Schedule, List Two sets out the details of the Islamic matters "Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate, intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions, and non-charitable trust in relations to Waqf, Zakat mosque or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of the religion, except in regard to matters included in the Federal list, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine"

<sup>98</sup> Article 160 of the Federal Constitution defines law to include "written law, the common law in so far as it is in operation in the Federation of any part thereof, and any custom or usage having the force of law in the Federation or any part thereof "

The position of Shariah Courts and their judges were low compared to their civil counterparts. They only have jurisdiction over Muslims and therefore a non-Muslim who is the party or an abettor with the Muslim party will be outside their jurisdiction. The Muslim Courts (Criminal Jurisdiction) Act, 1965 (Repealed in 1984) provided that such criminal jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding six months or any fine exceeding RM1,000 or with both. This in effect means that none of the *Hadd* offences<sup>99</sup> can be dealt with in the Shariah Court even if the parties should want it.<sup>100</sup> There was a need to upgrade the position of the Shariah Court. In the 1980s during the Mahathir administration, there was an amendment to the Federal Constitution and other legislation which seemed to give the Shariah Courts a better position (see 5.5.2).

From the above, the secular-ethnic nationalist tilt of the Constitution is significant in the present discussion of the influence of Islam and ethnicity in Malay identity and Malaysian society in general. Although Malays are Muslims, they have tended to bend towards this secular ethnic nationalist approach in deciding the course of their actions. The Islamic law and its scope have always been misunderstood. In the case of *Ong Cheng Neo v. Yap Kwan Seng* (1897 1 SSLR 1), it was stated "as to Muhammedan law, the entire Muhammadan law is a personal law. Founded in religion, it gives rights only to those who acknowledge Islamism" (quoted in Ahmad Ibrahim 1981: 30). While it is understandable that English jurists should misunderstand the nature and scope of Islamic law, it is surprising that many Muslims also misunderstand Islamic law.<sup>101</sup> The reason may be the secular and Western type of education that they had undergone and that was the only knowledge they were familiar with.<sup>102</sup> We shall now concentrate on the secular policy adopted by the first PM, Tunku Abdul Rahman.

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<sup>99</sup> Offences fixed by Quran, for details see 5.6.1.

<sup>100</sup> In the 1970s, there was a case where the parties who had committed adultery requested the Shariah Court to apply *Hadd* punishment to them was rejected. The Court had no power and jurisdiction to exercise such a sentence.

<sup>101</sup> For instance, Tunku Abdul Rahman always claimed that Islamic law was inapplicable to the modern era and Islamic punishment if applicable would cause problems (H.Mutalib 1983). See also the former Lord President (LP), Tun Suffian Hashim's remarks on Islamic law on page 22.

<sup>102</sup> Those who misunderstood and condemned Islam and Islamic law were those who came mainly from an English educated background and had pursued their studies in England. They were a product of colonial schools which had trained them to adopt

### 3.4 Tunku and the Continuance of Secular Policy

Tunku Abdul Rahman was born in 1903 of an aristocratic background. His thinking, therefore reflected many elements of traditional Malay elite thought. While the masses had to contend with the vernacular education designed by the colonial government, Tunku received the best of English education. He attended an English school in Penang after which he was given a scholarship to study in England. Tunku's account of his life in England as a student furnishes valuable material for study of the Malay elite. He described vividly the Western lifestyle of his contemporaries which he described as "frivolity and imitative living" (quoted in S.Maaruf 1986: 114). Many of them were later to rise to become leaders in post-Independent Malaya. "It was a comfortable life of parties, celebrations, booze, driving around and football pools" (*ibid.*).

There was no antagonism against non-Malay capitalism as the Malay elite did not face any competition from them. There was also no radical anti-colonial attitude because they were basically taken care of by the British in order to gain their support. The Western education and background that Tunku and his contemporaries experienced made them praise colonial rule. They later adopted the colonial system when they were given the opportunity to administer the country. Haji Majid, a graduate from the MCKK (the best English sponsored school during the colonial period) wrote in 1928:

No one will hesitate to say that are far better off in all respects under British rule than under the old Malay regime, and to be sure, not one of them dare deny that there is no necessity to recall the old order of things when there was practically no justice worth the name that could be got out of the lawless Malay rulers and to compare it with present orderly state of affair (quoted in N.Selat 1976. 133).

Therefore, it was not surprising that when the British left the country to be ruled by Tunku and his allies, there was basically a continuation of British colonial rule. As Geertz writes:

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a Western style of living and ideology. They were mostly members of the aristocracy. For a detailed explanation on the nature of these English schools and how the students were taught to adopt a Western style of living and ideology, see N Selat 1976

The bureaucrats who took over from the colonialists resembled them in practically everything, except the colour of their skin (quoted in H.Mutalib: 34).

The Westminster model of a parliamentary system and a secular Constitution were adopted for newly independent Malaysia. The capitalist economy was to be retained. In 1955, the World Bank was invited by the British to "make a survey of the Malayan economy and to make recommendations for practical measures to further economic and social development" (W.Y.Hua 1983: 114). It subsequently recommended a free market economy which linked Malaya to the global capitalist economy. Equally, when the country achieved independence in 1957, the World Bank was once again invited to recommend concrete steps for the economy (IBRD 1963). The World Bank simply re-emphasised the importance of adopting a free market economy which relied on foreign investment (*ibid.*). There was no rethinking of the suitability and relevance of classical Western liberalism and capitalism to the Malayan situation. There was no search for alternative models or a serious attempt at reform and reconstruction. Tunku believed in and felt content with the Western policy as he said:

My experience tells me that everybody wants to continue to live the life they have been living (T.A.Rahman 1983: 23).

Tunku and the post-Independence elite continued the dualistic economy of the colonial government. They assumed that the Malays preferred to be in the traditional, agrarian and subsistence rural economy. The non-Malays, on the other hand, particularly the Chinese were considered the nation's capitalists. The dualistic approach was implicit in Tunku's approach:

With Independence, we had to plan afresh for the well-being and happiness of the people. We had promised to preserve Malay rights in the rural areas and give all the help they deserved to improve their living standards and conditions, while at the same time encouraging commerce, trade and industry in every way to boost up our national economy (*ibid.*: 32).

The continuance of this dualism, i.e. the dominance of non-Malays in the economy and in the urban areas while leaving Malays behind in agriculture and rural areas was instrumental to the outbreak of the racial riots of 13 May 1969 (refer to 4.2).

In the UMNO Constitution of 1960, the party vowed to promote the advancement of Islam as the *modus vivendi* for all Muslims in Malaysia. Probably as an extension to this 'vow', various Islamic projects were carried out, for instance the establishment of



Persatuan Kebajikan Islam (PERKIM) in August 1960. PERKIM aimed to spread Islamic teachings and to be involved in social and welfare activities in the country. Its activities concentrated on conversion and the welfare of converts (H.Mutalib 1990: 89-98). In the same year, the first National Quran Reading Competition was held. In 1961, the first national mosque was built along with the holding of the first International Quran Reading Competition. Nevertheless, it seemed that Islam was still regarded as ritualistic and Shariah as purely religious law. Thus, the general outlook of the UMNO leaders remained secular and preferred a secular policy which separated religion from politics. Tunku stressed that PERKIM must not get involved in politics:

There cannot be any politics in PERKIM. PERKIM is only interested in religion and fulfilling its responsibility to Allah. Politics is in the hands of politicians and religion is in the hands of religious people (T.A. Rahman, quoted in NST 15 May 1979, c.f. UM 27-29 April 1980).

Tunku Abdul Rahman also doubted the validity and applicability of certain Islamic teachings in the modern world. Tunku on several occasions publicly stated his lack of confidence in the ability of Islam and Shariah. He stated in 1962:

I would like to make it clear that this country is a secular country and Islam is merely the official religion of the State (the country) (Ahmad Ibrahim 1978: 55).

In 1983 on his eightieth birthday, he repeated the same, and reminded the present leadership not to change the secular nature of the country (H. Mutalib 1983: 32). In the application of Islamic law, references have often been made to the punishment for theft (cutting of hand) and adultery (whipping and stoning). Tunku stated that the traditional punishment for adultery (*Zinā*) should not be applied in modern times as it is outdated. He criticised those people who still championed such punishment (T.A.Rahman 1978: 174-187). Although the Tunku expressed his views when he was no longer PM and UMNO leader, his views were always the same and represented those of others who have been Western-trained and Western-influenced.

Zainal Abidin bin Ahmad (Za'ba), a vocal Malay intellectual, described these groups of Malay elites who developed such a mentality through receiving a high standard of English education as follows:

Their attitude towards religion is specifically that of the average Europeans-which, if my reading of indications is correct, is one of scientific doubt and broad-minded indifference. It is the extremist

attitude of those in Turkey today (Under Kemal Ataturk)....failing to understand the arguments on the original language which is Arabic failing that they become indifferent to systematic religion, at least in their heart adopt a sort of 'non-conformist' or free thinking attitude, taking nothing for guidance except their own Conscience. (quoted in K.K.Khoo, 1980: 110).

The UMNO leaders as led by Tunku Abdul Rahman spoke of the need to develop the 'Protestant work ethic':

It was during this time that government officials stated the desirability of staying open on Friday because of the international tin markets, and the necessity to pattern attitudes more after the 'Protestant work ethic' one minister even extolled the usefulness of alcohol (Von der Mehden 1980: 167).

This was an era of ambiguity as UMNO attempted to accommodate their Chinese and Indian compatriots.

From the foregoing, the early post-Independence elites as represented by the first PM were great supporters of Western secular ideology. Their attitude may be due to what Syed Hussein Alatas has branded as a 'captive mind':

A captive mind is the product of higher institutions of learning either at home or abroad, whose way of thinking is dominated by Western thought in an imitative and uncritical manner....It is incapable of devising an analytical method independent of current stereotypes.....It is a result of the Western dominance over the rest of the world (S.H.Alatas 1974: 670).

Hence, Tunku Abdul Rahman and the Alliance Party were committed to defending the British legacy and interest in Malaysia, while enabling the predominant local Chinese capitalists to consolidate and strengthen their position. Consistent with this compromise, the Government pursued a basically *laissez-faire* development strategy with minimum state involvement.<sup>103</sup> This was actually the leading cause of the communal riots in May 1969. As a result, Tunku was forced to resign. The new Government was forced to institute the NEP which gave more emphasis to Malay economic development and Islam.

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<sup>103</sup> The economic policy prior to the NEP has been discussed extensively and need not be dealt with in this thesis. Sufficient to refer to J.K.Sundaram 1990a.

## CHAPTER FOUR

### ISLAM AND PRO-MALAY POLICY (1969-1980)

#### 4.1 Introduction

The period between 1957 and 1969 was a volatile one. During this time, Malaysia was formed by the union of Singapore, Sabah and Sarawak with Malaya in 1963. Two years later, Singapore decided to withdraw from Malaysia. It was also a period of confrontation with Indonesia<sup>104</sup> and a Communist insurgency resulting in the proclamation of a State of Emergency.<sup>105</sup>

During this time, the non-Malays pressed for an end to the MSR as provided for under the Constitution. They began to question this pro-Malay Policy and this caused tension among the races, particularly between the Malays and Chinese. At the same time, the Malays realised that their economic position had hardly improved.<sup>106</sup>

1967 was the deadline set in 1957 for Malay to be the official language of Peninsular Malaysia. The Chinese also asked for their language to be an official language. The Malays counter-argued by asking the Government to review the citizenship status of the Chinese. There was a compromise over the issue by adopting Malay as the official language but with English continuing to be used for some official purposes. The compromise did not please anybody and the tensions between ethnic groups climaxed in the racial riots of 13 May 1969. These riots following the General Election were a turning point in development planning by the Government. In the post-1969 period, the Government reviewed its MSR policy. This pro-Malay policy was part of the NEP between 1971 and 1990. The central pillar of the NEP was to create a

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<sup>104</sup> The confrontation was due to Indonesia's refusal to recognise the establishment of Malaysia in 1963. A great deal of literature covers this period, see for instance Means 1970: Chapter 17.

<sup>105</sup> This was the period when the Communist Party of Malaysia began to intensify its role. The Party gained support from Communist China and posed a serious threat to the peace and security of Malaysia. See Means 1970: Chapters 6 and 15.

<sup>106</sup> For instance, the Gross National Product (GNP) rose from RM9,652 million in 1967 to RM12,155 million in 1970 (Phillips 1992: 350).

strong Malay capitalist class and the means to achieve it was at the expense of Islamic values and principles.

#### **4.2 Racial Riots May 1969**

The racial riots of May 1969 are regarded as the most violent event in post-Independent Malaysian history killing nearly 200 people, injuring more than 400 and leading to 9,000 arrests which lasted intermittently for 2 months (Means 1991: 89, S.H.Ahmad 1988: 123, Funston 1981: 165, Von Vorys 1975). In the 1969 General Election campaign, the non-Malay opposition parties<sup>107</sup> agitated for the removal of the special position of the Malays that was entrenched in Article 153 of the 1957 Independence Constitution (The May 13 Tragedy 1969, J.K.Sundaram 1990b). When the election result was announced, it was found that the non-Malay opposition parties had successfully gained more votes than before. The Alliance Party only obtained 49 per cent of the vote as compared to 80 per cent in the 1955 election. The non-Malay supporters of the opposition parties held street parades in KL on 11 and 12 May. In their zeal to celebrate, some shouted taunting slogans ("KL is ours", "Death to the Malays", "Malays go back to the villages") and indulged in obscene gestures directed almost exclusively at the Malays (Comber 1983: 69; C.T.Goh 1971: 16-17). There were reports that some of the demonstrators threw pieces of pork, the single most important symbol of religio-cultural insult to the Malay Muslims (S.H.Ahmad 1988: 128). A Malay counter-demonstration was soon in the making. The non-Malay provocation was seen as a declaration of 'war' and the cry was that Islam and Muslims were in danger, and thus a necessity of Jihad ('holy war') against the 'belligerent infidels'. There was once again a crisis situation, the Malays opted (as they did in the 1950 Natrah affair) for a clear Islamic identification. The primary meeting place during the clashes was the mosque where the Azan (call to prayer) was repeatedly sounded. Virtually all movements were preceded by the Azan and accompanied by the 'Allahu-Akbar' (God is

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<sup>107</sup> Among the non-Malay parties were the Democratic Action Party (DAP), The Peoples Progressive Party (PPP) and the Malaysian Peoples Movement (Gerakan). The most popular opposition party was PAS (S.H.Ahmad 1988: 124).

Great) cry. Most wore *Tangkal* (talisman) with religious verses written on them. Religious teachers were immediately available to teach Quranic verses and to inspire ideological leadership (S.A. Hussein 1988: 129).

The 'pep-talks' given in the meeting places revolved around the great Islamic warriors of the past and Islamic ethics of war and strategies employed by the Prophet. The 'war' itself was called as a Jihad. The 'official-flag' that suddenly emerged at that time was green with the *Shahā dah* (article of faith) across it. The larger ethno-religious fusion notwithstanding, the 13 May incident from a Malay point of view was largely religious. Malay solidarity was also to be restored via religious faith. It was from this general Islamic atmosphere that the organised revivalist movement, or what is better known as the *Dakwah* movement, came into existence. This movement was important for the more serious Islamisation Policy of the Government especially in Dr. Mahathir's administration.

### 4.3 Aftermath of the Riots

Immediately after the riots, a State of Emergency was proclaimed. Parliament was suspended for the next two years during which the country was governed under Emergency laws by the National Operations Council (NOC) headed by Tun Abdul Razak, the deputy PM (Vasil 1980: 187, Comber 1983).

The promise of change produced expectation. The Islamically orientated, encouraged in part by the new identity in religiousness, harboured hopes for a new emphasis in the development of Islam.

An early action of the new order was the defining of a 'National Ideology' to reflect a wider national consensus. The National Ideology called *Rukunegara*,<sup>108</sup> was proclaimed in August 1970. The principles of *Rukunegara* enunciated the wish to establish a Malaysia "dedicated to achieving a greater unity of all her peoples, to maintaining a democratic way of life; to creating a just society in which the wealth of

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<sup>108</sup> *Rukun* derived from the Arabic word *Rukn* meaning fundamental doctrine, commandment or essential part of the religion. *Negara* is a Malay word for nation.

the nation shall be equitably shared; to ensure a liberal approach to her rich and diverse traditions; to building a progressive society which shall be oriented to modern science and technology" (Malaysia 1970, Comber 1983: 80).

In the circumstances, the non-Malays could take heart that the *Rukunegara* steered a middle path through the tangled skein of Sino-Malay relations. A clear hint was given in it to racial extremists that they were not going to have things entirely their own way and that Parliamentary democracy was to continue. The Chinese were reassured that there would be no threat to their culture. The third principle of *Rukunegara*,<sup>109</sup> "Upholding the Constitution," made it clear that the Chinese would have to accept the Constitutional recognition of the MSR clause and Malay as the National language. Equally, the Malays had to accept the citizenship clause which extended citizenship to non-Malays. This document not only declares the need to achieve justice and democracy, it also seeks to achieve a greater unity of the people. In fact, as pointed out by S.H. Alatas (1971: 800-808), it includes a number of items which have not been stated clearly in the Constitution. It has been suggested that the principles of *Rukunegara* should be incorporated in the Constitution:

Rukunegara is a unique piece of document (sic) which outlines the basic beliefs and principles that should guide the Malaysian nation...Indeed, the basic beliefs and principles of the Rukunegara should be incorporated into the Constitution (C.B. Tan 1987: 264).

For the Islamists, *Rukunegara* was considered not to reflect a commitment to Islam. It reasserted the secular basis of state and society; reminiscent of Indonesia's *Pancasila* policy over which debate between Islamists and nationalists is still raging. It complemented the Constitution to say that Islam remained largely symbolic and at a private level (S.H. Ahmad 1988: 133). For the Islamically-orientated, it was a message that rejected the possibility of defining the nation in Islamic terms.

When Parliament was reconvened in February 1971, the Government passed amendments to the Constitution (Constitution (Amendment) Act, 1971) and Sedition Act, 1948 to make it seditious to question "any matter, right, status, position, privilege,

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<sup>109</sup> The other 4 principles are belief in God, loyalty to King, rule of law and good behaviour and morality (Malaysia 1970, Comber 1983: 80).

sovereignty or prerogatives established or protected by the provisions of Part III (provisions relating to Citizenship), Article 152 (the National language and the languages of other communities), Article 153 (special position of the Malays and the legitimate interest of other communities) and Article 181 (sovereignty of rulers)"(Article 10 Federal Constitution, see also Hickling 1986: 12).

The above are regarded as sensitive issues and protected under Article 10 of the Federal Constitution. This prohibition on public discussion was to apply to all, including members of parliament. Amendments to them can only be made with the consent of the Conference of Rulers (Article 159(5)) (M.S.Hashim Trindade and Lee 1978: 12, Phillips 1992: 351).

The amendments neutralised the perceived threat by the non-Malays to the critical aspects of Malay supremacy and have been upheld by the courts. In Fan Yew Teng v. Public Prosecutor (1971 2 MLJ 271),<sup>110</sup> the Federal Court upheld a conviction for seditious publication of an article which criticises the Alliance government for their alleged partiality towards Malays. The Court held:

These provisions cannot be questioned and are necessary to assist the less advanced or fortunate in the light of the circumstances prevailing in the country at the time of Independence.

As a result of the amendments, a major part of Malay nationalist aspirations were fulfilled. The struggle for Malay privileges and language which had dominated Malay politics since Independence had succeeded. Malay cultural and political predominance was now beyond question. The fact that the Malays suddenly became 'more Islamic' during and after the riots obviously has an ethnic dimension. This serves to demonstrate the point that Malay communalism and Islam constituted two dialectical strands which consciously or otherwise complement each other. After Tunku Abdul Rahman stepped down from the post of PM in September 1970 after being pressurised by the 'young-Turks',<sup>111</sup> he was succeeded by Tun Abdul Razak. It became increasingly

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<sup>110</sup> See also Melan bin. Abdullah v. P.P. (1971 2 MLJ 281).

<sup>111</sup> He was forced to resign by the 'young-Turks' led by Dr. Mahathir Mohamad, a defeated UMNO Member of Parliament (MP) from Kedah who sent a letter to Tunku calling for his retirement as PM and accused him of giving into the Chinese and creating the riots: "giving the Chinese what they demand...The Malays, whom you thought will not revolt, have lost their minds and ran (sic) amok, sacrificing their lives and killing those whom they hate, because you have given them (the Chinese) too much face.

obvious that the new Federal Cabinet was directing its energy to redress the 'unfulfilled part of the bargain'. That is how the Malays and other *Bumiputera* were to be uplifted to achieve economic parity with the non-indigenous community in Malaysia. It was after the riots that the Government began to realise the importance of its intervention in the socio-economy of the people. To this effect, then position of Islam could not be easily be ignored since history shown how in times of crisis, Islam was the dominant force for Malay identity.

#### 4.4 Pro-Malay/Bumiputera Economic Policy

##### 4.4.1 The Legal Meaning of Bumiputera

The creation of Malaysia in August 1963 had effects on the development of the indigenous/non-indigenous dichotomy (see Chapter Two). Debates concerning MSR and Malay indigenous status were revived. Because of the large population of Chinese in Singapore and indigenous groups in Sabah and Sarawak, the term '*Bumiputera*' was no longer synonymous with Malay. The Malays did not form a majority in the new Malaysia. Therefore, the Constitution was altered to include the following indigenous groups:

- (a) Malays (Article 160.2);
- (b) Aborigines (Article 160.2);
- (c) Natives of Sabah and Sarawak (Article 161.6).

The 1971 Constitutional amendment, as dealt with earlier, served to clarify the relationship between indigenous status and MSR. Those parts of clause 161A which referred to the special rights of natives of Borneo were incorporated into Article 153 by the inclusion of the term 'natives of any Borneo States' after the word 'Malay' whenever it appears in that Article (Siddiqui and Suryadinata 1981/82: 672).

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The responsibility for the deaths of these people, Muslims and infidels, must be shouldered by a leader who was under a misconception" (quoted in Means 1991: 9). This letter was widely and openly circulated, fuelling the campaign against Tunku. For details see *ibid.*: 9-10 and S.Maaruf 1988.



The fact that Singapore was part of Malaysia posed a serious threat to the superiority of Malays. Singapore's PM, Lee Kuan Yew was campaigning for a 'Malaysian Malaysia' in which "the nation and the state is not identified with the supremacy, well being and the interests of any one particular community or race" (*ibid.*: 673). This helped to expedite the separation of Singapore from Malaysia in August 1965.

In November 1965, there was a parliamentary question about the legal meaning of Bumiputera and who was qualified to invoke that label. The PM, Tunku Abdul Rahman replied that:

*Bumiputera* has no legal meaning except in so far as to denote the natives of the mainland of Malaya and the natives of the Borneo States (*ibid.*: 673).

With reference to who should use the label, Tunku explained that since it had no legal meaning, anyone is entitled to call himself Bumiputera, but they could not benefit from the MSR provisions as contained in Article 153. Article 153 is reserved for the natives of Malaysia who are less advanced and less able to compete with other Malaysians (*ibid.*). In June 1968, the same parliamentary question was raised again and Tunku qualified his earlier statement by saying that the term *Bumiputera* refers only to the Malays and natives in Peninsular Malaysia and Borneo (*ibid.* 674, Pereira: n.d.: 49).

The legal ambiguity was reflected in the fact that *Bumiputera* was not used in official Government documents as a collective term to refer to both Malays and the indigenous people of Sabah and Sarawak. Government documents always differentiate between the Malays and other natives, the phrase "Malays and other indigenous people" is used in the Second and Third Malaysia Plans (*ibid.*). Beginning in the 1960s, the term *Bumiputera* began to be used with economic connotations. There arose some complaints that the *Bumiputera* groups were not given an equal share of the national economy in proportion to their population. The first Bumiputera Congress was held in KL in June 1965. The Congress sought to identify the areas of Malay economic

participation and to formulate resolutions for their eventual promulgation.<sup>112</sup> As a result, the first Malay bank, Bank Bumiputera Malaysia Berhad (BBMB) was established, followed by Majlis Amanah Rakyat (MARA/Council of Trust for the Indigenous People)<sup>113</sup> to promote greater Malay participation in the economy (BEC 1968).

There was a tendency to use the indigenous/non-indigenous dichotomy to refer both to inequalities in the economic sector and the Government's efforts in redressing them. This tendency achieved its climax on 13 May 1969. The UMNO leaders believed that the leading factor of the riots was the anger of the Malays towards inequality in the national economy (Milne and Mauzy 1980: 108). As a result, the NEP was launched in order to rectify the economic imbalance between races through its two objectives, namely eradication of poverty and restructuring of society. The *Bumiputera* and non-*Bumiputera* cleavage was obvious in the Government's plan. For instance, in the NEP via its various Malaysian Plans, the *Bumiputera* was expected to own at least 30 per cent of the corporate stock while non-*Bumiputera* was expected to own 40 per cent. In the Third Bumiputera Congress held in June 1980, the Congress passed a series of recommendations, one of which asked the Government to raise the official target of 30 per cent share to 51 per cent by 1991. In fact, one minister has emphasised that "for the future the politics of this country must be based on *Kebumiputeraan* (Bumiputeraism) (quoted in S.A. Hussein 1988: 136).

In the 1980s especially after the launching of ASN, there was a tendency to enlarge the scope of *Bumiputera* to include others as well. These other groups include those of Portuguese and Siamese origin and converted Muslims (*Muallaf*) of whatever racial background.

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<sup>112</sup> Writings on this first Congress are extensive. They include details on the papers presented which covered 5 areas of economic activities (a) provision of capital (b) participation in trade and commerce (c) participation in the service sector (d) entrepreneurship training (e) provisions of marketing facilities (BEC 1968 and S.C.Tham 1973: 46-48).

<sup>113</sup> MARA was set up in place of the Rural and Industrial Authority (RIDA) which was established by the colonial British in 1950 largely as a response to the UMNO leadership towards helping the Malays in trade and business (Means 1970: 16, 130f; J.K Sundaram 1988c, 1990a: 247-248, 255).

#### 4.4.2 The New Economic Policy (NEP)

The development policies and strategies adopted during the period of 1957 to 1970 failed to rectify the economic position of the Malays. While a small group of the ruling elite had benefited from the positive discrimination schemes, the overall economic position of the Malays (the majority of whom were concentrated in the rural areas) was adverse. For instance, 44.2 per cent of rural households in 1957 earned a monthly income below the poverty line. By 1970 even after 13 years of continuous and vigorous economic growth, 41.7 per cent were still in this category (Philips 1992: 350). The mean monthly income of Malay households in 1970 was RM179, while that of Chinese and Indians was RM387 and RM310 respectively (Malaysia 1971). There was also a serious imbalance in the structure of employment and ownership in the corporate sectors between the Malays and the non-Malays.<sup>114</sup> Despite Malay domination in politics and governmental decision-making, there was little tangible evidence of improvement to the Malay economic position. Ironically, they had further aggravated the inequality and poverty problems along racial lines. The outbreak of racial riots in May 1969 was a tragedy that reflected the urgent need to formulate a new economic strategy that would narrow the inequality gap between the races and "...the growing fissures in a Malaysian society that can threaten to undermine the very foundation of a harmonious and secure nation" (Malaysia 1985).

The objectives of the NEP were set out in the Second Malaysia Plan (SMP), which was presented to Parliament on 11 July 1971:

- (a) To eradicate poverty among all Malaysians irrespective of race;
- (b) To restructure Malaysian society so that the identification of race with economic function and geographical location would be reduced and eventually eliminated. This involves the modernisation of rural life, a rapid and balanced growth of urban activities and above all, the creation of a Malay

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<sup>114</sup> For more detailed information about the economic position of the Malays such as their income level type of agriculture they were involved in, and what the nature of Malay poverty in rural areas looked like, refer to S.H.Ali 1988, S.Ahmat 1980, S.Anand 1973 and Malaysia 1971.

Bumiputera Commercial and Industrial Community (BCIC). The Government would participate more directly in the establishment and operation of a wide range of productive enterprises, to be controlled and managed by Malays. The Industrial Co-ordination Act, (ICA) 1976 required large manufacturing companies to take out licences from the Ministry of Trade and Finance so that there could be 'orderly development' of industry in the country. The licence's rules specify that the firms must structure their work-force to reflect the racial composition of the country. This involves all levels of employment (Milne 1976).

- (c) It was hoped that by 1990, Malays would own and manage at least 30 per cent of total commercial and industrial activities in all categories and scales of operation (Malaysia 1971: 1-9, Malaysia 1973: 6-94).<sup>115</sup>

These objectives were set out by the First Outline Perspective Plan (OPP1) covering the period 1971-90. Under it, the Government implemented four development plans from the Second Malaysia Plan (SMP) (1971-75) to the Fifth Malaysia Plan (FMP) (1986-90). The NEP was the main reference point for Malaysia's economic development policies. It was designed to give effect to the special rights and privileges of the Malays under the Constitution by initiating a variety of protective policies. These include subsidies, quotas, scholarships and licensing and trade concessions, in order to offset the Malays' historical disadvantage in relation to other races.

#### 4.4.3 Implementation of the NEP: Use of Large Government Organisations

The methods used to implement the NEP were so various that a long analysis would be required. Such analysis would distinguish between short-term measures such as finding premises, credit or suppliers and long-term measures, such as education, training and provision for experience.

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<sup>115</sup> The NEP was replaced by the Second Outline Perspective Plan (OPP2) covering the period 1991-2000 under a policy called the National Development Plan (NDP). The NDP is a continuation of the NEP since the objectives set out by the latter were not fulfilled.

Development policy in the 1970s after the declaration of the NEP saw the partial abandonment of *laissez-faire* policies in favour of greater state intervention in public resource allocation as well as public-sector ownership and control of business enterprises. Since the 1960s and especially in the 1970s, the state has established a large number of public enterprises in all sectors, sometimes in collaboration with private capital.

Since the NEP's inception, the Government has increasingly shifted emphasis in terms of allocation of funds from poverty eradication to restructuring of society.<sup>116</sup> The ratio of allocations for restructuring compared to poverty eradication rose with each Malaysia Plan. Likewise, the ratio for poverty eradication reduced tremendously.<sup>117</sup> Therefore, the overriding aim of the NEP was to restructure the Malaysian society in order to correct the economic imbalance. This would eventually eliminate the identification of race with economic function.

Trusteeship was the chosen policy instrument of wealth restructuring under the NEP. A small group of political leaders, inspired by Tun Abdul Razak, simply assumed the role of political trustees (i.e. guardians) of the Malay community.<sup>118</sup>

To accomplish the objective of 30 per cent equity ownership, the leadership conceived of the institution of Bumiputera Trust Agencies,<sup>119</sup> as special-purpose public

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<sup>116</sup> This has caused severe criticism from many quarters especially that of the non-Malays. This was due to the fact that the first prong of the NEP i.e. eradication of poverty concerned all citizens regardless of ethnic group, while restructuring mainly affects the Malays and other *Bumiputera*. See C.Muzaffar 1977.

<sup>117</sup> The ratio of allocations for restructuring compared to poverty eradication rose from 21.6 per cent during 1971-1975 to 37.3 per cent during 1976-1980. The ratio of the original allocations under the Fourth Malaysia Plan (1981-1985) rose to 47.2 per cent and rising again to 62.7 per cent under the Mid-Term Review. The allocation directed towards poverty eradication was 4.7 times that for restructuring the society during the Second Malaysia Plan. This ratio declined to 2.7 per cent for the Third Malaysia Plan period. It further declined to 2.1 per cent for 1985 by the Fourth Malaysia Plan (J.K.Sundaram 1988c).

<sup>118</sup> Historically, the Malays always looked to their rulers and government as the protector. The masses gave their rulers loyalty and obedience and they expected wardship in return (refer Chapter Two). Colonial rule did little to change this feudal, patron-client relationship. In the first dozen years after Independence, it increasingly appeared to the masses that their historical protection was being eroded by the policy of gradual accommodation (refer Chapters 2 and 3). The communal riots of May 1969 effectively arrested this trend of accommodation. The NEP, which directly followed these riots, restored the historical role of the state as the protector of the masses providing a political as well as economic security. For a lucid account of the concept and practice of loyalty in leader-led relationships within Malay society, see C.Muzaffar 1979 and H.Ali 1981.

<sup>119</sup> Thus after 1970, more public agencies were established including (a) PERNAS (National Corporation) in charge with construction projects, tin-mining, urban property development, wholesaling to Malay retailers (b) Credit Guarantee Corporation (CGC) which approves small business loans (c) PETRONAS (National Oil Company) which monopolises the extraction of oil in the country (d) UDA (Urban Development Authority) (e) National Equity Corporation (NEC/PNB) which is responsible for selecting and operating the portfolio of shares of limited companies to be held in trust for subsequent sale to individual

enterprises, acquiring equity in the name of and on behalf of the subjects. Under this formula, there was and still is an expanding role of the state in the economy. The public enterprises include banks and financial institutions, e.g. BBMB, Bank Rakyat and *Bumiputera* companies in every major sector of the economy (such as PERNAS, PETRONAS, MAS) as well as various joint-ventures.

Increased state activism was justified on behalf of the Malays. The assets of many of the state companies were quoted in official documents as representing 'Malay interests'. The stated policy suggested a future transfer of some of these enterprises to Malay individuals or to sell their shares to the Malay public (Malaysia 1971). The ASN scheme is an example of how the Government is trying to mobilise Malay savings for equity restructuring (see Chapter Eight). These Government companies were mainly controlled by selected people, usually the political elite and they decided the direction of the companies. This trusteeship policy was criticised by many economists as attempting to give power and privilege to a selected few Malays at the expense of the majority. Syed Husin Alatas has criticised it as:

...transferring to a group of Malay capitalists, a business which is thriving, and which they did not create, is the height of absurdity which has never entered the imagination of even the most fanatical capitalists in the entire history of mankind (1972b: 9).<sup>120</sup>

#### 4.4.4 Impact of the NEP: Growth, Inequality and Moral Decay

The NEP was launched against a background of commendable economic performance. The 1970s saw impressive growth of the Malay economy outside the

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*Bumiputera*. Other existing agencies which were established before 1970 such as MARA were given a greater role by the NEP Government. MARA is responsible for providing education, training, technical and financial assistance to the *Bumiputera*. Likewise, Tabung Haji (TH) which was initially a Government institution to facilitate going on pilgrimage, had its role expanded under the NEP (refer Chapter Seven). See J.K.Sundaram 1990b: 155, Snogross 1980: 232, O.Mehmet 1988: 108-109).

<sup>120</sup> The expanding economic role of the state under the pretext of trusteeship on behalf of the Malays instigated further distinction and cleavage in the Malay community. It contributed to intense competition among the Malays. The Malay owned businesses have to compete with state own businesses. The role of the state as a capitalist in the open market gave stiff competition to individual small Malay businesses. In addition increased government participation in marketing, construction, financing and retailing increased direct and conflictive relationship between it and the Malay community. More than ever before, public agencies became consumers of Malay agricultural products and suppliers of their consumer needs. This partly transferred the many problems Malay peasants had with private non-Malay middle-men to these agencies. Credit and banking institution redirect Malay borrowers from private lenders to the state. For more criticism of this Policy, refer to C. Muzaffar n d, J.K.Sundaram 1990b.

traditional agricultural sector. Between 1971 and 1990, the GDP recorded a rate of growth of 7.8 per cent per annum (Malaysia 1981). In 1990, the per capita GDP was increased to RM4,392 from RM3,599 in 1985 and RM3,205 in 1979 (Malaysia 1991: 38, Malaysia 1981). For the Malays, the mean monthly income increased from RM172 in 1970 to RM309 in 1979 and up to RM1,163 in 1990 (*ibid.*). Malay or *Bumiputera* employment in all sectors and in all categories showed impressive increases.

In education, the number and percentage of Malay students in higher education increased dramatically, especially in the scientific and technical fields. As far as higher education is concerned, the *Bumiputera* population in government local universities and colleges was 67 per cent in 1985 (Malaysia 1986: 490-491), up from 40 per cent in 1970 (Malaysia 1973: 193). In 1985, there were 28,422 diploma and degree students abroad, involving a massive drain of foreign exchange; 71 per cent of whom were non-*Bumiputera*. However, most of the 8,134 *Bumiputera* students abroad then are widely believed to have been state-funded, compared to only a small proportion of the non-*Bumiputeras* (J.K. Sundaram 1990b: 165).

The equity ownership of other Malaysians has increased to 46.2 per cent, so exceeding the target.<sup>121</sup> In the case of foreigners, their equity ownership has declined from 63.3 per cent in 1970 to 25.1 per cent in 1990, thus more than fulfilling the NEP target of reducing their control of the economy. On the other hand, the equity ownership of the *Bumiputera* has only increased to 20.3 per cent (Malaysia 1991: 12). Although below target, the increase in the equity ownership of the *Bumiputera* is a significant achievement. In absolute value, the equity ownership of the *Bumiputera* increased from RM125.6 million in 1970 to RM22,298 million in 1990. The process of creating a BCIC also showed comparable success. The number of Malay businesses increased from 21,763 in 1970 to 78,961 in 1980 (Malaysia 1981).

However, 'growth' had its costs. Although the decade saw a decline in absolute poverty, the problem remained big in the context of relative abundance. The incidence

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<sup>121</sup> Within this group, the Chinese have increased to 44.9 per cent, the Indians remained constant at 1 per cent and others 0.3 per cent (Malaysia 1991: 12).

of poverty declined from 49.3 per cent in 1970 to 29.2 per cent in 1980, but that still translated into 3.5 million people living below the decent subsistence level (Malaysia 1981). In the rural sector generally, the incidence of absolute poverty fell from 58 per cent in 1970 to 37.3 per cent in 1980 (*ibid.*); but the decline also meant a transfer of Malay poverty to the urban areas. This is because:

...there will be continuing flow of labour from rural to urban areas...rural to urban migration will make possible much of the reduction in poverty targeted for rural areas (Young 1980: 62).

Growth and development in the 1970s and 1980s were accompanied by unprecedented inflation. From a rate of increase of less than 1 per cent per annum in the 1960s, the consumer price index (CPI) rose to 17.4 per cent in 1974 (S.H.Ahmad 1988: 164). During the first 10 months of 1973, the price of food items, which constituted 47 per cent of the weighting in the CPI, increased by 13.6 per cent. Between February 1973 and January 1974, the cost of living rose by nearly 22 per cent for the average family and for the poorest had risen by 37 per cent (*ibid.*). However in 1990, the CPI considerably decreased to 3.1 per cent, amongst the lowest in the world (CBM Annual Report 1991:4).

The objective of restructuring society had a number of weaknesses. Generally, the idea was to encourage Malays to enter the modern economic sector which was dominated by non-Malays. The underlying motive was actually to increase the number of Malay businessmen and to enlarge their share in the ownership of the country's wealth. In short, to create a new Malay capitalist class, especially from the upper and middle classes who benefited from the opportunities opened to them either by their expertise or contacts. Under the free-market economy, there is always serious competition for facilities, aid, loans and profits. In such stiff competition, only the strong are the winners. Therefore, the NEP has been seen as widening the gap between rich and poor. It also created conflict amongst the Malays themselves, separating a selected few rich Malays from the majority of their fellow Malays (Kessler 1980: 8, C.Muzaffar n.d.: 17, S.H. Ali 1981: 98-99). The rich Malays were regarded as the



representatives of the 'successful Malay' propounded by the NEP. As Dr. Mahathir Mohamad once put it:

In trying to redress the imbalance it will be necessary to concentrate your (sic) effort on the Malays, to bring out more Malay entrepreneurs and to bring out, and make Malay millionaires, if you like, so that the number of Malays who are rich equals the number of Chinese who are rich and the number of Malays who are poor equals the number of Chinese who are poor (quoted in C.Muzaffar n.d.: 17).

Therefore, the NEP was directed more towards creating Malay capitalists than eradicating poverty among the majority Malays themselves. This was evident in the allocation for restructuring which was bigger than that of eradicating poverty (see fn. 117)

As cities expanded in size and wealth, Malays became a conspicuous part of them. Malays could now be seen with expensive cars and expensive bungalows. A subculture of specialised luxury shops emerged to serve their customers. Into these cities also came a stream of poor Malay migrants in search of the new promise. Lines of distinctions within the urban Malay community grew sharp; the rich and the poor, the privileged and the underprivileged, residents of suburbs and the illegal squatters, the sophisticated urbanite and the rural 'hilly-billy' (Milne 1976, S.H.Ahmad 1988: 164-165). The poverty and inequalities amidst abundance and extravaganza manifested themselves in everyday social behaviour and lifestyle. They became the main ingredients for social division and animosity.

The urban environment epitomised by big cities such as KL, Penang and Ipoh provided the best setting for such urbanisation and 'growth'. 'Growth' became associated with 'unbridled materialism' and 'unscrupulous competition' in the mad scramble for material wealth. New luxury shops, hotels, casinos and nightclubs proliferated, and those who could afford to indulge in socially and religiously forbidden practices. Commercials for luxurious Japanese electronics and French cosmetics or for American hamburgers and fried chicken persuaded the public, mainly the Malays to taste what a modern society should. Crime, drugs, Western culture and alien behaviour contrary to the religion are becoming common.

Growth also accorded massive opportunities for self-aggrandisement, corruption and the misuse of influence. Reports and allegations of such practices emerged persistently. There were reports of the Malay royalty and aristocracy abusing their positions to acquire lands, licences, mining rights and business opportunities (S.H.Ahmad 1988: 166). There were reports of the distribution of government-purchased Malay ownership shares to UMNO personalities and branches, and complaints of the misappropriation by those close to power of the modest savings of the Malays which had been deposited in Bank Rakyat (People's Bank) involving RM150 million (Kessler 1980: 8, M.H.Lim 1980: 257-268, Means 1991: 120-123):

Scandals such as these go against any acceptable political standards and fundamentally contravene Islam's well-developed communitarian political ideas, in whose terms they may be, and are readily and authoritatively denounced (Kessler 1980: 8).

The biggest scandal to date involved Bank Bumiputera Finance (BMF), a subsidiary of BBMB, which involved RM2.5 billion in 1982. There were allegedly some Government officials involved but there is no hard evidence to implicate them.<sup>122</sup> Dr. Mahathir admitted that:

A heinous crime had been committed, and what they did was morally wrong, although legally it was within the law, we cannot take them to court (FEER 3 November 1983, NST 12 October 1983).

The desire to compete in wealth accumulation and to be rich was great amongst the Malays, even the Selangor State Religious Affairs Department was under investigation for allegedly misappropriating some RM35,000 of paddy tithes (Zakat) meant for distribution to the poor (NST 24 June 1980).

In sum, the new order growth was adversely affecting the Malay community. It amplified inequalities and class distinctions. In the largely free market economy and patronage system (beneficiaries have often been chosen by reference to political criteria rather than economic), 'growth' had contributed to much discontent and animosity. The suddenness of the changes that the Malays were experiencing only added to the intensity of their anxieties, pressures and dislocations created by the regime's vision of transforming them. Put into an Islamic idiom, these fit well into the

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<sup>122</sup> The scandal is still on going. For details, see Means 1991: 120-123, H.Abdul Karim n.d., 1988: 90-118.

argument that society was moving further away from a comparable set of Islamic ideals.

The development of trusteeship would create a danger of wealth accumulation in the hands of the privileged and powerful elite who acted as 'trustees' for the Malay community. This is because the control over resources and public enterprises are vested in the hands of a small group of political decision-makers assisted by the officials and public service staff who act as intermediaries implementing, executing and monitoring the various programmes and projects designated under the trusteeship. It was suggested that the licences, concessions, loans, quotas or subsidies to be distributed are allocated unequally on the basis of influence, nepotism and corruption (S.H. Alatas 1968). Interest-free or subsidised government loans are not made available to every prospective investor, public scholarships or land are not awarded to all those qualified, and licences and franchises are not granted openly or competitively. Instead, these benefits are typically distributed in secrecy and are monopolised by networks of coalitions and alliances having access to vital information and power to influence the appropriate decision-making process. Indeed, a question was raised as to the distinction between '*UMNOputera*' and *Bumiputera*. Since these state agencies are usually controlled by UMNO political leaders,<sup>123</sup> therefore the benefits are deemed to go to the UMNO supporters as well (S.H. Ahmad 1988: 171).

The emphasis of the government in adopting the Western concept of modernisation through its published book entitled **Revolusi Mental** (Mental Revolution) was severely criticised. In this book, the Malays are asked to emulate the achievement of Paul Getty and other American, British and Chinese Malaysian millionaires. Furthermore, the book also permits any means of accumulating wealth even to the extent of contradicting Islamic principles and moral values (refer 1.3.2).

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<sup>123</sup> For instance, MARA has always been controlled by the UMNO leader. In 1975, MARA's chairman was Ghaffar Baba, a key Government minister, succeeded by his son and presently an active Government senator. Likewise PETRONAS was previously chaired by Tengku Razaleigh Hamzah, Finance Minister and now by ex-Premier Tun Hussein Onn. PERNAS was previously led by Tun Razak, the second PM. For details of the politics of NEP, see Milne 1976, S.Ahmad 1988.

## 4.5 Development of Islam after the Riots

The year 1969 was a turning point which led to a shifting of the balance between Government emphasis on Malay-Muslim goals and pluralism. An immediate aftermath of the riots was the start of an era when the *Bumiputera*, especially Malays, zealously fought for and won their demands for a more equitable life in plural Malaysia. The centre piece for this effort was the NEP.

The government response to the Riots had several important implications for the subsequent Islamic revival in Malaysia. In order to entrench their own and UMNO's position within the Malay community, Government leaders adopted a number of policies which placed greater stress on Islam and took steps to expand the religious bureaucracy under the PM's Department

According to Husin Mutalib (1990) and Funston (1981), the 1969 communal riots had an impact in relation to Islam and Malay ethnicity as follows:

- (a) It led to a crystallisation of the Malay crisis, as Malays began to search for solutions to their plural society problems;
- (b) State intervention took place to uplift the Malays from poverty and backwardness through the NEP, as has already been dealt with above;
- (c) The pro-Malay policy through the NEP, which accorded Malays educational and economic advantages, in a sense backfired on the Government. The new educated middle-class Malays have become more Islamic and thereby forced the Government to adopt an Islamisation policy later (refer Chapter Five);
- (d) It led to entrenchment and legitimisation of the Government's position within the Malay community. In order to match the rigour of PAS, it had adopted a more supportive stance towards Islam in the country (M.Ayoob 1981: 165-187));
- (e) I should add a fifth point, i.e. the short entry of PAS into the Government Coalition (National Front) in 1974. The entry was for the purpose of Malay-Muslim unity but PAS decided to withdraw in 1977 as a result of a clash in orientation between UMNO and PAS policies (refer 5.3).

Tun Razak was unlucky enough to substitute for Tunku Abdul Rahman in 1971 at a time when the country had been completely affected by the riots. Alongside the emphasis on modernisation and development mainly through the NEP, Tun Razak spoke of the need to strengthen Islam. He asserted that the party championed the accumulation of wealth, power and knowledge because those were necessary for the defence of Islam and therefore argued that the NEP was in conformity with Islam (S.H.Ahmad 1988). Nevertheless, the communal approach of the NEP was consistently criticised by PAS and other Islamic organisations. They disagreed with the Government's Malay-centric approach to the socio-economic problem. For them, Islam should be the guiding principle in solving the problems of plural society as well as the socio-economic crisis. The Western approach towards life has been under severe criticism. The Islamists argued that the NEP's over-emphasis on materialism was injurious to Islamic principles; that it created class differences among the Malays, thus weakening the unity of the Malay-Muslim community. PAS for instance considered the NEP, although of noble aim has not achieved its objectives and will never do so, unless the Government changes its attitude. They asserted that the policy only advantages certain sections of the population, the bulk of the people have not gained benefit from it. They preferred the Islamic approach which emphasises Islamic universalism and downplays Malay ethnic sentiment. For Islam, they argued has no ethnic bias and is non-discriminatory in matters of social-justice (C.Muzaffar 1987). For them, the concentration on material development at the expense of spiritual values will lead to a failure of the NEP. Nevertheless, The Government denied the claim and stated that the NEP was Islamic since it alleged that "the NEP was guided by the Quran" (MD 4 September 1972, NST 26 October 1972). It further claimed that "Islam had guided the actions of the government both in domestic and international affairs" (*ibid.*). It was argued that the failure of the NEP to achieve its 30 per cent target of equity ownership was due to the un-Islamic practices and principles which many Muslims hesitated to be involved in. One of those is the element of *Ribā* (interest) which is forbidden to Muslims (M.A.Baharum 1992). All conventional banks have been urged by the

Government to give more loans to Malay businessmen. Nevertheless those loans were not taken up by the Malays who were afraid of paying interest. It was not until 1983 when Bank Islam (BIMB) was established under the leadership of Dr. Mahathir, that the Muslims had the opportunity to engage in interest free transactions (refer 6.6).

The Government was sensitive to the Malay affinity with Islam and was keen to placate the Malay voters. It denounced those who judged the NEP as un-Islamic as those who were attempting to pit Malays against Malays and those persons were regarded as 'trouble-making Malays'.

During the first half of the NEP period (1971-1980), it appeared that Islam was mainly used to control other ideologies especially Communism which could threaten the security of the nation. This was evident in the Third Malaysia Plan (TMP) (1976-1980) which says:

An additional source of strength is that Islam and other religions practised in this country continue to provide a strong bulwark against insidious communist propaganda. The youths in rural and urban areas of the country have an important role in this regard (Malaysia 1976: 101).

The Government adopted a flexible position, with an increasing recognition of Islam in order to prevent Communism as well as Islamic 'fundamentalism' or 'radicalism'. This was evident in the statement by the third PM, Datuk Hussein Onn when announcing the National Dakwah Month in September 1978:

We need missionaries, but not fanaticism. Islam can counter communism. If it fails, then don't talk about religion any more. Hinduism, Buddhism, Christianity they will all finished. But the extremists can also finish them off (quoted in Voll 1982: 332).

Therefore, Islam was propagated to blunt the effects of militant Islamic activism as a result of growing Islamic revivalism in Malaysia (refer 5.2). As early as 1972, Tun Razak had begun to speak of the necessity of *Dakwah*. He called for a 'religious revolution' to check declining morals. The Government began to launch its own *Dakwah* activities. The building of mosques and *Surau* (prayer room) was intensified. The Quran reading competition<sup>124</sup> expanded in scale and media coverage; radio and

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<sup>124</sup> Malaysia was the country which initiated the Annual International Quran Reading Competition under the influence of Tunku Abdul Rahman when he was PM. Each year, participants came from all Muslim countries as well as from Muslim minority countries. Malaysia has gained popularity amongst the countries who send their representatives since the competition was telecast (T.A.Rahman 1978:168, H.Mutalib 1990).

television programmes were stopped to give way to Azan and more Islamic programmes were broadcast. A much sterner attitude was also taken towards programmes which were considered as lowering the morals of Malaysian society. All government departments were instructed to provide space for prayers and Islamic courses were made compulsory at the National Institute of Public Administration (INTAN) (S.H.Ahmad 1988: 610-611).

The Government established new Federal Islamic institutions and strengthened the existing ones. In 1971, the Islamic Research Centre was established to study current problems faced by Muslims and to find ways to solve their problems. By 1974, the secretariat for the National Council of Islamic Affairs had been elevated to the status of a full-fledged Division of Islamic Affairs in the PM's Department and a Deputy Minister was appointed to oversee its activities. In 1976, the Malaysian Islamic Economic Development Foundation (Yayasan Pembangunan Ekonomi Islam Malaysia (YPEIM)) aimed at elevating the economic welfare of Muslims was established (S.H. Ahmad 1988: 611-612, Funston 1981: 180).

In order to intensify *Dakwah* activities, the Malaysian Islamic Missionary Foundation (Yayasan Dakwah Islamiyyah Malaysia (YADIM)) was established in 1974. It also aimed at increasing Islamic propagation and to work towards upholding virtue and forbidding evil. It was also supposed to strengthen and intensify the activities of existing *Dakwah* bodies. This meant it functioned as the representative of the government to co-ordinate *Dakwah* groups (*ibid.*).

Such *Dakwah* activities extended also to the state level where *Dakwah* has become an established part of the religious bureaucracy. The Sabah state government was one of the first to act, establishing a *Dakwah* organisation which claimed to have converted some 100,000 non-Muslims in the early 1970s (Ayoub, 1981: 180). *Dakwah* departments in other states, however had focused on Muslims rather than non-Muslims.

Government *Dakwah* agencies differed from the non-government *Dakwah* institutions in stressing largely the moral and spiritual teachings of Islam. They seldom showed a critical attitude towards Government policies. Rather, they raised aspects of

Islam in a general manner, such as emphasising that it endorsed progress, or that it was suitable for all times, or that it was the religion of Allah (God). A few government missionaries who went beyond these limitations were considered unsuitable or too radical and were eventually shifted to other positions or forbidden to teach (M.Ayoub 1981: 181).

Government leaders repeatedly warned the nation of dangers from the non-Government *Dakwah* groups. The government stressed the need for a moderate approach towards Islam. It went to the extent of launching a National *Dakwah* Month in 1978 which was expected to be an annual event, but did not take place again.

As part of the post-May 1969 efforts to mobilise people through ideology, the Government sought to define and foster the emergence of a new national identity. There were several initiatives directed towards this goal, including *Rukunegara* (refer 4.3), which was criticised by Islamists as similar to *Pancasila* in Indonesia,<sup>125</sup> and a five day National Cultural Congress in 1971. One of the major conclusions was that Islam should be recognised as an important part of Malaysian national culture.

Another area of the Government's increased concern for Islam was education. In 1971, a Faculty of Islamic Studies was established at the National University of Malaysia (UKM). In 1974, the Ministry of Education (the Minister was Dr. Mahathir Mohamad) established a Federal Islamic Advisory Council. In 1979, Islamic religion lessons were made compulsory for all Muslim students in schools. In at least one university, the Technology University (University Teknologi Malaysia (UTM)), Islam became a compulsory subject for Muslim students (S.H.Ahmad 1988: 612, M.Ayoub 1981: 182).

The Government further described the real reasons behind the Government's support for Islam:

You may wonder why we spent so much money on Islam...If we don't, we face two major problems. First, Party Islam will get at us. The party will, and does, claim we are not religious and the people will lose faith. Second we are to strengthen the faith of the people, which is another way to fight communist ideology (Hussein Onn quoted in Voll 1982: 332).

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<sup>125</sup> For a critique of *Pancasila*, refer to article entitled "Islam abolished in Indonesia" in K.Siddiqi 1986: 376-378.



#### 4.6 The Development of Islamic Law

Despite Government efforts towards Islamic related activities, Islamic law remained static and undeveloped. In the state enactment such as in the Selangor Administration of Muslim Law Enactment (AMLE), 1952, Section 45 (6) provided that: "Nothing in this Enactment contained shall affect the jurisdiction of any Civil Court and, in the event of any difference or conflict arising between a decision of a Civil Court acting within its jurisdiction, the decision of the Civil Court shall prevail."<sup>126</sup> Thus, in the Selangor case of Myriam v. Mohammed Ariff (1971 1 MLJ 265), it was held a party may bring the case to the High Court for custody of children despite the fact that the case had been decided by the Shariah Court. The High Court had reversed the decision of the Shariah Court. In Ali Mat bin Khamis v. Jamaliah binti Kassim, (1974 1 MLJ 18), the magistrate decided that he had no jurisdiction over *Harta Sepencarian* (jointly acquired property).<sup>127</sup> He held that the case should be brought under the Shariah Court. The party appealed and the High Court decided that the Civil Court had jurisdiction to hear the case and therefore the action should be transferred to the High Court.

By virtue of the constitutional restrictions, the state authorities remain with little power to act on their own. Despite Islam being declared as the official religion of the Federation, Islamic law is not the Federal law; it comes under the jurisdiction of each state. This administration of Islamic law was provided for by state enactments which were slightly different in each state. There was a need to unify these enactments to create a uniform law in the country. As early as 1972, the National Council of Islamic Affairs (NCIA) had begun work on a uniform corpus of Islamic family law. In August 1978, the draft Islamic Family Law Enactment covering Muslim marriage, divorce, maintenance, guardianship and penalties for non-compliance, was sent to the state religious activities for their consideration. The states were receptive; in April 1983, the

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<sup>126</sup> This provision was however amended in 1989, refer to 5.5.2.

<sup>127</sup> *Harta Sepencarian* comes under the jurisdiction of the Shariah Court as provided for under Ninth Schedule List Two of the Constitution. Refer to fn. 97.

Kelantan State Assembly formally approved the new enactment. By 1984, Kedah, The Federal Territory, Malacca and Negeri Sembilan had followed suit (NST 17 April 1983, UM 12 April 1983).

As indicated earlier and to be discussed in detail in the next chapter, an effect of Malay/*Bumiputera* policy was the rise of Islamic organisations. The young educated Malays who were the majority of students in the local institutes of higher education, became more Islamically orientated and began to ask for a greater Islamic commitment from the Government. Sometimes, they posed a severe threat to the Government. Legislation was one of the favoured methods used to curb dissent. Two representative examples were the 1975 amendments to the Universities and University Colleges Act (UUCA) and the 1981 amendments to the Societies Act.

In April 1975, Parliament passed amendments to the UUCA 1971. Briefly, the amendment put all student activities under the complete control of the university authorities, which in turn were directly controlled by the Education Ministry. Membership of the University councils was to be composed of a majority of senior civil servants. The structure of the Student Union was completely overhauled; even its name was change to Student Representative Council (SRC). Practically, every student activity had to receive prior consent of the university's Student Affairs Department.

The amendment was directed at ABIM and other student organisations. It was well known that the campuses had been ABIM's major source of recruitment. ABIM too had a great influence over student groups. The amendments must have been partly meant to disrupt this relationship, thus prohibiting students from joining outside organisations and student bodies from having formal links with them.

Hardly had ABIM and other Islamic organisations felt the full consequence of the UUCA when it was jolted by another piece of legislation, the amendments to the Societies Act passed by Parliament in April 1981. The amendment called for every non-partisan association to declare whether it wanted to be a political society or a friendly society, failing which the Registrar of Societies would do the classifying as he deemed fit. A political society was defined as:

...one whose objects or rules provide it to influence in any matter the policies, activities, functioning, management or operation of the government...and whose activities on the whole have a tendency to urge the adoption of its principles or objectives as the policy of the government (NST 3 April 1981).

The aim of the distinction, according to the Government, was to ensure that:

Politicians will no longer be able to hide themselves in friendly societies...and to masquerade as ordinary citizens in non-political societies to perpetrate their nefarious activities (The Star 8 April 1981).

When an association had opted to be friendly, it would be an offence for it to obtain assistance of any kind from foreign sources or to support, express sympathy or oppose any political party or election candidates. The amendments also forbade all associations from any form of affiliation with those outside the country without the express permission of the Registrar. The Registrar was also given powers to "cancel the registration of any society which violates, derogates, militates against or shows disregard for the system of democratic government (NST 3 April 1981). The amendments also barred those who had been sentenced to a year's jail or more—including those detained under the Internal Security Act (ISA), as was the case with ABIM's first President and the current Minister of Finance, Anwar Ibrahim, from holding office.<sup>128</sup> Despite official denials, the amendments were particularly directed towards ABIM.

In spite of Government concern for the socio-economy of the Malays and devotional nature of Islam, the Government was still wary about the implementation of Shariah and Islamic punishments. In a seminar held in 1978, the resolutions called for the implementation of Shariah. Tunku Abdul Rahman condemned the resolutions as dangerous. The former LP, M.Suffian Hashim argued that such laws would hurt the feelings of Muslims and non-Muslims alike. The main Government supporting Malay newspaper, Utusan Malaysia (UM) stressed that Malaysia follows a legal system based on political wisdom and not a legal system based on Shariah. It invited all Malaysians to defend this system which has been blessed and legitimised by the people through the medium of elections every five years (UM 1 January 1978, 1 July 1979). In line with

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<sup>128</sup> Anwar Ibrahim was sentenced under the ISA for demonstrating against the Government over the issue of poverty in the early 1970s when he was a student at the University of Malaya. See J.K.Sundaram and S.Cheek 1988b.

the Government's policies, this newspaper condemned and criticised such a call as leading to underdevelopment and backwardness of the Malays (*ibid.*). Tun Suffian Hashim, in a public speech in Manila upon an invitation by the Philippines Bar, upheld the secular nature of the Constitution and rejected the possibility of applying Shariah (refer to 1.3.2):

## **CHAPTER FIVE**

### **ISLAMISATION UNDER DR. MAHATHIR (1981-1993)**

#### **5.1 Introduction**

Chapter Four dealt with the impact of the riots and the introduction of a 'Malaynisation Policy'. It showed the Government's efforts to eradicate Malay poverty and restructure society in order to abolish the identification of race with economic activity. More Malays have successfully become businessmen via Government sponsored policies. The education policy which emphasises Malay as the national language and quotas in higher education are all intended to benefit the Malays.

Nevertheless, the rapid progress and modernisation as a result of capitalist development has not advanced the Malays as far as expected. They came to realise that lost identity was the price paid for modernisation and progress. The Government's emphasis on material development at the expense of spiritual development has worsened the situation. The Malays who form the majority middle class group in Malaysia found Islam as an impetus of change, and also as an alternative to capitalist development. Beginning in the 1970s and intensifying in the 1980s, the Islamic revival movement swept the Muslim world. The Muslims realised the need to revive the glory of Islam and to re-assert their lost Islamic identity resulting from the long subjugation to Western civilisation. This Islamic revival started to demand more Islamic commitment from the Government. Islam is seen as not merely a religion, but encompassing all aspects of human life. Thus, Islamic revivalists began the process of establishing Islamic values, practices, institutions, laws; indeed Islam in its entirety, in the lives of Muslims as guided by the Quran and Sunnah.

The intensification of the Islamic resurgence<sup>129</sup> among the Malays has to some extent pressurised the present Government to give more attention to Islam. It is an attempt by Mahathir's Government to renew the role of Islam and its law in the economic development of Malaysia. Islam has been seen as synonymous with economic development, so the Government has geared its developmental policies towards Islamic values and principles. More Islamic economic legislation and instruments were introduced under its 'Islamisation Policy' to encourage more Malay participation in economy. Nevertheless, this Policy has its limits which will be examined in this chapter.

## **5.2 Islamic Resurgence Movement**

One product of the NEP was the expansion of higher education for Malays; thousands more students were enrolled including many in foreign universities. Islamic revivalism began at the University of Malaya in KL. Student activism, instigated by the 1969 riots, focused on issues such as Malay poverty and the use of Malay in the education system. This activity took on an Islamic hue. As recalled by an activist at the University of Malaya:

It was an explosive time. There were lots of issues...Malay poverty, language, corruption. After May 13, you just got hooked on immediately. It was all a question of the survival of the Ummah, of the Malay race. Previously, we had been thinking about all these problems outside Islam, when actually we could have solved them through Islam (quoted in Z.Anwar 1987: 11).

The then President of the National Union of Malaysian Muslim Students (PKPIM), Anwar Ibrahim, was in the forefront of the on-campus anti-Tunku Abdul-Rahman campaign. He rationalised the theme of the struggle for socio-economic justice with the ideals of Islam, using this philosophy to organise the students behind him in the campaign against the pro-Western leaders. He said:

The leaders were condemning corruption, but they were enriching themselves. They talked about Malay nationalism but they were alienated from the Malay masses. They were obsessed by the West. They were too accommodating to non-Malay sentiments. They were extremely slow in implementing

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<sup>129</sup> The words 'resurgence' and 'revivalism' have been used interchangeably in most of the literature. They seem to carry the same meaning. However Chandra Muzaffar (1986: 149, 1987: 2) has tried to differentiate the meaning of these words. He preferred to use resurgence rather than revivalism.

national policies in education and language. We were impatient and angry about the plight of the Malays, their education, rural development, rural health.....There seemed to be no moral foundation and no spiritual guidance. We turned to Islam to fill this vacuum and to look for solutions (quoted in *ibid.*: 12-13).

Under his leadership, the students began to study Islam seriously; discussing its teachings in study groups and reading the works of revivalists such as al-Banna and al-Maududi. They sought to turn the belief that Islam is a 'Way of Life' (*Al-dīn*) into daily practice (C.Muzaffar 1977: 2).

Their main task was to prove that Islam was a viable moral-social movement, not just rituals. A platform for off-campus activity was required for when these activists graduated; so as a result of a PKPIM meeting, ABIM was launched in 1971 with Anwar as its President.

ABIM claimed ideological and organisational affinity with other movements such as Jamaat-i-Islami in Pakistan and Egypt's Ikhwan-al-Muslimun which emphasised the creation of an Islamic State. ABIM initially supported PAS in its criticism of UMNO policy, arguing that they perpetuated secular practices which separate religion from politics.

ABIM took the view that Islam's status as the official religion was insufficient, and that the Constitution should be changed to state that Malaysia is an Islamic country and Shariah is its law. They also wanted the Government to create an interest-free economy and criticised the NEP's emphasis on Malay ethnicity rather than Islam:

We don't accept the position of the Chinese chauvinists or that of the Malay extremists. We are more moderate. To us, the important thing is that national policies must be based on the ethical consideration, principles of Islamic social justice (quoted in S.H. Ali 1984: 151).

To achieve this end, ABIM declared "Islam as the panacea to the problems of a plural society" as the theme of its annual convention in 1979 and was invited to address its stance to the DAP and therefore to the wider Chinese community (S.H.Ali 1984: 150-151, J.K.Sundaram and S.Cheek 1988b: 854).

Until 1981, ABIM was indirectly involved in party politics by supporting PAS in elections. Although ABIM was not specifically mentioned, the Societies Act, 1961 was

amended to prevent a non-political organisation engaging in any political activity or having international relations (see 4.6).

Other *Dakwah* groups also exist such as Darul Arqam and Tabligh Jammah. As these groups are not politically motivated, they do not pose a threat to the Government. Nevertheless, their existence was also a factor in the Islamisation Policy.

Equally important to the revival process were students studying in Britain, America and Middle-Eastern countries. These students tended to be more radical as they had contact with activists from other Muslim countries. In the United Kingdom groups such as the Islamic Representative Council (IRC) and Voice of Malaysia (Suara Malaysia) were formed in the seventies to propagate the concept of Malaysia as an Islamic state. Also to prepare themselves for the struggle on their return (Z.Anwar 1987, Muzaffar 1987).

Besides internal factors, there were also some external ones:

- (a) The 1967 Middle-East war changed Muslim perceptions of themselves. Many became intellectually and emotionally involved with the Palestinians; if not politically. In Malaysia, this was seen by Malays as an issue of cultural survival; one which they felt that they also faced.<sup>130</sup> This was partly due to the economic dominance of the non-Malay population and also to the fact that the rapid development intended to redress this imbalance was eroding the traditional Malay/Muslim way of life. Modernisation *via* the NEP has not brought Malays as far as intended and Islam came to bring a new impetus to the Malay-Muslim's identity (Kessler 1980);
- (b) Some Muslim countries which were members of OPEC found that after the steep oil price rises of 1973-74 that they had large amounts of money to spend on the promotion of Islam, particularly Saudi Arabia, Kuwait and Libya. Malaysian Muslim organisations benefited from this infusion of oil money (Kessler 1980: 4, C.Muzaffar 1986: 164);

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<sup>130</sup> For a rural Malaysian example of the making of such a connection between local events and the larger Middle Eastern developments, see Kessler 1980: 154-155.



- (c) The Iranian revolution in 1979 was an example of a secular regime being overthrown and replaced by an Islamic form of government. PAS, ABIM and other Islamic groups learnt from this historic event. Anwar Ibrahim visited Iran and met its leaders when he was ABIM president (J.K.Sundaram and S.Cheek 1988b, Kessler 1980).

### 5.3 PAS-UMNO Coalition

Another significant development which related to Islam and Malay in the post 1969 period was PAS's membership of the Government from June 1974 until November 1977 (H.Mutalib 1990: 109-110, Means 1991: 30 and 63). They were invited to join by Tun Razak in the interests of Malay-Muslim unity as well as to promote the NEP. Although it was condemned by a minority of PAS members; it was argued that despite their Islamic ideals they could not be totally devoid of their Malay identity (H.Mutalib 1990: 110). This was not too hard for PAS which had been formed by UMNO members (Refer 3.2). As an early President (1956-1965), Dr. Burhanuddin Helmi put it:

PAS and I are in content, character and orientation, Malay nationalists with Islamic aspirations  
(quoted in C.Muzaffar 1987: 9).

While in coalition, PAS gained many concessions, such as its leaders being appointed to senior posts. UMNO also saw that PAS's Islamic views were represented in Government and quasi-Government bodies. Visible achievements were:

- (a) The idea for the creation of Bank Islam;
- (b) Banning television advertisements for alcohol, gambling and downgrading promotion of government lotteries;
- (c) Removal of alcohol from Government functions;
- (d) Boosting *Dakwah* work, for example, the 1978 National *Dakwah* Month;
- (e) The Government was also pressurised to establish Islamic education institutes such as the Islamic Teachers Training College;

(f) Azan called on Government controlled radio and television (Mustafa Ali n.d., J.K.Sundaram and S.Cheek 1988b, Means 1991).

The then Law Minister also said that he would have the Constitution amended to make it compatible with Islam (Mustafa Ali n.d.: 6). But this was never done as UMNO had no real intention of implementing full Shariah. Although the changes which occurred were not significant, PAS did gain in that its membership grew greatly and it was also making inroads into traditional UMNO areas. The UMNO leadership was getting worried by these developments as they were determined to keep a secular system. They were becoming unsettled by the pressure being put on them by PAS which was feeling betrayed because it felt that UMNO had reneged on a promise to make major structural changes. Under heavy pressure in turn from UMNO to leave, PAS withdrew from the Government coalition (Barisan Nasional). UMNO could now concentrate on attacking PAS which was now in opposition, but had a serious dilemma in how to attack the PAS policies which UMNO had been seen to be associated with for four years. PAS also had a problem in explaining that its Islamic experiment from within had failed. The effort was not wasted as they had gained valuable experiences, which included having two cabinet ministers.

The 26th and 27th PAS Congresses in 1980 and 1981 produced heavy criticism of the party's ethnic chauvinism and heard calls for 'real Islam'. In 1982, PAS underwent a structural change. Its constitution was changed to create a powerful Ulama Section which would decide party policy (S.H.Ahmad 1988). As PAS become more 'radical', UMNO also tilted more towards Islam, so competition between the two parties became intense.

#### **5.4 Dr. Mahathir and Islamisation Policy**

After Dr. Mahathir took office as PM in July 1981, he apparently decided that the only way to meet the Islamic challenge was for the Government to become more Islamic, and so appeared to be attempting to 'out-Islam' PAS while also wooing ABIM. This was in fact a continuation of former premier Hussein Onn's policy. He

immediately embarked on accelerating the Islamisation process. UMNO leaders began working on upgrading the party's Islamic credentials. Previously viewed as a secular Malay party dedicated to improving Malay economic development, the official line now was to make its *Bumiputera* policy along Islamic lines. In the series of Malaysian Plans, commencing with the TMP, Islam was included to be a guiding development principle of the nation. For instance, in the TMP, the inclusion of the clause, "Islam continues to be a source of strength for the nation" was translated into real terms in the form of increased Government funding and moral encouragement in areas such as the teaching of Islam in schools as well as the building of mosques and other Islamic institutions (MD 30 April 1976). The importance of balancing the material and spiritual aspects of development was stressed. Under the FMP (1985-90), Islam and its universal values were given emphasis. It was stressed that economic development could not be devoid of a spiritual regeneration, that it was necessary to have a disciplined and morally upright society, modernising without sacrificing its Islamic values. The inculcation of Islamic values was emphasised in the Government machinery to prevent corruption and other moral evils:

Material development alone at the expense of the spiritual needs of man will be detrimental to the well-being of Malaysian society. The universal values of Islam, together with similar values that are necessary for maintaining and furthering stability in the country. It is in recognition of this that the government has taken the lead in inculcating the values of clean, efficient and trustworthy into government administration with a view of raising the level of efficiency and productivity among civil servants at all levels (Malaysia 1986: 30).

Dr. Mahathir appeared to want to use Islam in every aspect of life. He was reported as having said that "...to use all resources to strengthen Islam or to do anything in the name of Islam" (UM 4 and 30 July 1980, NST 10 December 1982). He also declared that Malaysia now had a national administration guided by Islam, albeit with some qualifications which he promised to correct in due time. Malaysian laws too, he declared were compatible with Islam "given the reality" (S.H.Ahmad 1988: 632). The Government claimed that UMNO was the third largest 'Islamic party' in the Muslim

world<sup>131</sup> and its struggle was based on Islam. Its objectives have been for "protecting Malay rights, Islam and the country" (C.Muzaffar 1986: 90).

Since the Islamic 'fundamentalists' were determinedly anti-Western, the Government had to face the contradiction that while it was promoting more Islamic content in society, it still wanted to maintain a healthy pace of economic modernisation which had always been based on the Western model. Partly as a substitute for the 'Protestant work ethic' propagated by the earlier leaders, and partly because Muslim countries did not offer promising alternative models, the Government proclaimed a 'Look East' Policy.<sup>132</sup> The Government justified this Policy by referring to the Prophet's well-known exhortation to his people to seek knowledge even in China (C.Muzaffar 1986: 91). Chandra Muzaffar, a leading Malaysian political scientist, has regarded this Policy and the Islamisation Policy as the best combination. It is possible that they are designed simply to balance each other; the first being a means to material development, the second, a path to spiritual development (*ibid.*: 100). Nevertheless, some, especially the Islamists, regard this Look East Policy as clear evidence of UMNO's rejection of Islam. For them, the development policy should not look West or East but to Islam, for Islam already prepared a set of rules to develop the nation and the people (MSM 1983: 48-50).

Another significant event that took place during Mahathir's administration was in persuading Anwar Ibrahim, ABIM leader and Islamic activist to join UMNO. Upon winning a seat on UMNO's ticket in the 1982 General Election, he was assigned the post of Deputy Minister in charge of the Islamic Religious Affairs Section of the PM's Department. At the UMNO General Assembly in September 1982, Anwar was backed by Dr. Mahathir in the election for the President of UMNO Youth which he won. This

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<sup>131</sup> Apparently, the other two 'Islamic parties' as claimed by UMNO are GOLKAR of Indonesia and the People's Progressive Party of Pakistan.

<sup>132</sup> This Policy looks at Japan and South Korea which have been presented as models of how development could be achieved while retaining moral values. Although to what extent this is true, it was stated that the essence was to promote the attitude of hardwork and discipline as well as technological skills for which the Japanese and the South Koreans are known for. For a series of papers providing a critical evaluation of the Policy, see J.K.Sundaram 1985: 312-36 and Means 1991: 92-94.

victory would enable him to press UMNO to play a major role in the further advancement of the Islamisation process.

Anwar is clearly a rapidly rising star, he is now Finance Minister, and seems set to become a future PM.<sup>133</sup> Anwar's development policy is similar to that of Mahathir. He believes that Islam has something to offer towards development and progress. He certainly rejects those who argue that Islam is the cause of maldevelopment and backwardness:

Islam has never been and will never be an obstacle to change. Thus, to accuse Islam of failure in development projects is inappropriate and shows a lack of knowledge and understanding of the people concerned.....Islam provides an ideological alternative to the dominant paradigm. Islamisation is a recurrent phenomenon and continues to present itself in the light of the realities of contemporary society. It is modern, fresh and vigorous, possessing the power to challenge the thinking of the world establishment and the ability to provide a viable alternative.....Islamisation is also a process of change. Often it has to do away with elements of the past that are not desirable, that obstructs its path of progress (Anwar Ibrahim 1986: 5).

Under the present Government, it appears that many Islamic reforms have taken place. Also the symbolic and devotional aspects of Islam have increased, the most notable ones are in the area of legal reform. Under this Government, the scope of Islamic law is to be extended beyond family matters, i.e. to commercial matters as well. This is because of the inclination of the Government to relate Islam and economic development. To this effect, some have defined the present Islamisation Policy as synonymous to the 'Islamisation of the Malaysian Economy'.

## 5.5 Islamic Law Reform

### 5.5.1 Islamic Commercial Law

After Dr. Mahathir took office in 1981, his main concern was to promote Malay capitalism and development. After May 1969, Dr. Mahathir presented his ideas on Malays and economic development in his book **Malay Dilemma**, in which he put

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<sup>133</sup> In the latest development which took place at the UMNO party election in November 1993, Anwar was elected as a Deputy President, and a few months later was appointed as Deputy PM. He was actually invited to join UMNO in the 1970s by Tun Abdul Razak and was offered a cabinet post but he refused. When Mahathir invited him, he accepted the offer based on his admiration on Mahathir's personality and promises about Islam. Anwar's entry into the Government was a serious blow to his former friends in ABIM and PAS. For them, it was a betrayal of his struggle for Islam. But on the part of the Government, it was regarded as a victory which gives support and popularity. For Anwar himself, it was perhaps an attempt to struggle for Islam from within the Government. For details, see J.K.Sundaram and S.Cheek 1988b, H.Mutalib 1990, Means 1991 100)

forward his theory of racial (Malay) inferiority and argued for Malay capitalism to be given patronage and preferential treatment. For him, capitalism is imperative for the Malays because they need to improve their strain or racial stock. Pure and open competition, however, is rejected because of racial inequality between the Malays and the Chinese:

Whatever the Malays could do, the Chinese could do better and more cheaply...Removal of all protection would subject the Malays to the primitive laws that enable only the fittest to survive (M.Mohamad 1970: 25).

Dr. Mahathir had the vision that Islam could probably help to find a solution to the problem and point a better way to the future. He favoured policy reform which was aimed at making Islam more attractive. Even the non-Malays might be persuaded to see Islam as a stimulating, protective and useful ideological force and not just the religion of their political and racial opponents (Schumann 1991: 246).

Immediately he came to power, Dr. Mahathir emphasised the importance of the Malay entering the commercial sector and competing with other communities. Malay business investment has been presented as both patriotic and religiously sanctioned. It was suggested that unless the Malays could compete successfully with the Chinese, the predominant role of the Malay would deteriorate and ultimately vanish. Dr. Mahathir's ambition was "to make Islam in Malaysia synonymous with economic progress and modernisation" (quoted in IHT 6 May 1991). Therefore, the main concern of his Government is to emphasise social and economic issues rather than making Shariah the basic law. One of the Government's ministers has criticised the growing demand for the application of Shariah as follows:

Many Muslims around the world are marginalised, self-deluded and living with the outmoded bogeymen of the West and the United States. Instead of talking about hunger and poverty, there are Muslim countries talking about the application of Shariah law when people are dying of hunger. This is not Islam. This is one way of escapism so that people don't talk about social and economic issues, hunger, poverty, corruption and mismanagement (*ibid.*).

The Government's main struggle is to change the attitude of the Malays in relation to economic development. Since Islam is very close to the Malays, Islamic values and principles should be used in this process:

Today we face the biggest struggle—the struggle to change the attitude of the Malays in line with the requirements of Islam in this modern age.....UMNO's task now is to enhance Islamic practices and ensure that the Malay community truly adheres to Islamic teachings...Naturally this cause is not easy to succeed. But UMNO must pursue it, whatever the obstacle, for this is our real cause (M.Mohamad, quoted in C.Muzaffar 1986: 97).

In order to encourage the Malays to be involved in commercial matters without involving themselves with interest, the Government has introduced Islamic commercial legislation and institutions. The first was the introduction of the Islamic Banking Act, (IBA) in 1983 to enable the establishment of BIMB. The establishment of BIMB provided an opportunity for Malaysians to gauge whether the Islamic financial system was practical and whether it was able to fulfil the needs of Malaysians in the context of a changing environment. In launching the Bank, Dr. Mahathir described it, in an idiom favoured by revivalists, as "an alternative to the Western banking system" (quoted in S.H.Ahmad 1988: 632). Although the establishment of BIMB was the result of the aspirations of the Muslims, it is not restricted to Muslims alone. The role of BIMB is much wider. It provides an alternative to all Malaysians in choosing interest free banking which centres on the Profit and Loss Sharing (PLS) principle (refer to 6.4).

According to Islamic law, an Islamic bank is not allowed to trade in Treasury Bills and other papers such as bonds and Government Securities since these are interest-bearing instruments. However, it is important for the Bank to transact in these papers for short-term investment and to enable the Bank to play its part in the developmental activities of the country. Therefore, the Government Investment Act (GIA) was also enacted in 1983. This Act confers powers on the Minister to receive investment of money for a fixed period and to issue non-interest bearing investment certificates. The Act further specifies that no interest shall be paid on investments but there shall instead be paid dividends based on the *Qard al-hasan* (benevolent loan).<sup>134</sup>

To supplement the banking sector, and in view of the necessity to provide cover against disasters to the Muslims in conformity with Shariah, the Government has also

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<sup>134</sup> It is the principle where the purchase of the investment certificates by the BIMB would be considered as a benevolent loan to the Government and as such, the BIMB would not expect any return in full at maturity. Nevertheless, in real practice, it is expected that it should provide some form of return after taking into account the economic and financial conditions of the country. See Z. Man 1988: 73.

enacted the Takaful (Islamic Insurance) Act, 1985. The Islamic Insurance Company (*Sharīkat al-takāful*) which is a subsidiary of Bank Islam conducts its activities based on the principles of *Takāful* and *Mudārabah*. *Takāful* refers to the act of a group of people reciprocally guaranteeing each other, while *Mudārabah* is a commercial profit-sharing contract between the providers of the funds for a business venture and the entrepreneur who conducts the business. The Company operates both Family (*Takaful Keluarga*) and General Takaful Business (*Takaful Am*). Under the Family Takaful Business, the company offers various family *Takāful* plans which provide investment returns to the participants as well as cover or protection in the form of mutual finance assistance in the case of their death. The General Takaful Business, on the other hand, operates in line with co-operative principles, i.e. shared responsibility and mutual help. The participants have agreed at the outset that the company shall pay from the General Takaful Fund (*Dana Takaful Am*), compensation or indemnity to fellow participants who have suffered a defined loss, consequent upon the occurrence of a catastrophe or disaster. Any surplus (profits) derived, after deducting compensation or indemnity to fellow participants and other operational costs, will be shared between the participants and the company, provided the participants have not incurred any claims and that no *Takāful* benefits have been paid to them (CBM 1989: 291, Gambling and Abdul Karim 1991: 75).

Another Islamic financial institution which was established to promote economic development among the Malay-Muslims is the Malaysian Islamic Economic Development Foundation (Yayasan Pembangunan Ekonomi Islam (YPEIM)). The main aim of YPEIM is to collect donations and contributions from any lawful (Halal) source and to invest them in useful and profitable ways. The profits will be channelled to upgrade the socio-economy of the Muslims. One of the most significant projects undertaken by YPEIM is its Ikhtiar Project which works on the basis of the Islamic concept of *Qard al-ḥasan*. In one of its early projects, an amount of RM420,000 was given as loans to 448 hard-core poor families in Selangor, whose average monthly income was RM173. From the interest free loan granted, each family was supposed to



start a small business. Thanks to this Project, the average monthly income of the families increased 42 per cent to RM246 a month (BT 30 March 1990: 36). In March 1993, this Project was given official recognition and was launched by the Finance Minister. The Ikhtiar Project Fund 1993 was jointly organised by YPEIM and other Government bodies. This project will give interest free loans to any eligible person to undertake any small business regardless of ethnic group as long as their monthly income is less than RM350 (UM 6 March 1993). This Project proves that poverty in the country can be reduced through Islamic financial concepts. All the poor need is the opportunity, a little encouragement and some assistance<sup>135</sup> (S.Gibbons and S.Kassim 1990).

There is also an Islamic Hire Purchase Bill which was prepared by the Shariah Advisory Board and is awaiting presentation to Parliament. If this Bill is passed, it will enable Muslims to avoid being subject to the existing Hire Purchase Act, 1967 which contains some provisions which run counter to Shariah (refer 6.12.1).

In 1990, corporate bonds amounting to RM125 million were issued by a multinational company on the basis of the principles of *Bay' Bithaman Ājil* (deferred payment). This was followed by another bond issued by a joint-venture company under the same principle. The Central Bank (Bank Negara) also gave its approval to the principle of *Mushārahah* (joint-venture) for a multinational company amounting to RM560 million. In the 1990s, more Islamic principles and instruments have been introduced including Islamic Accepted Bills (equivalent of Bankers Acceptance) and Islamic Export Credit Refinancing Scheme. These two main instruments would promote and encourage both domestic and foreign trade by providing Malaysian traders with attractive Islamic financing products. Both instruments were developed on the basis of *Bay' al-dayn* (debt trading) and *Murābahah* (Sale with Mark-Up) (CBM 1991, 1993).

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<sup>135</sup> As at March 1993, this Project has successfully increased the monthly income of the hard-core poor families from RM250 to RM540. According to the President of YPEIM, Dr. Syed Othman al-Habshi, this increment was based on the survey done on 205 hard-core families in 13 branches. See UM 6 March 1993.

In early 1992, the Government announced its first Islamic vehicle financing scheme for all civil servants as an alternative to the existing conventional loan. The Government is also proposing to extend this scheme to include financing property. Previously, Government employees were forced to accept a conventional loan to buy a car but with this Scheme, they would be able to avoid involving themselves with interest (Treasury Department Circular Vol. 5 1992).

The Government also proposed to introduce an Islamic pawnshop (*Sharīkat al-rahm*). This will provide another Islamic scheme for loans and financing to avoid exploitation of the poor. The clients of Malaysian pawnshops are mostly poor Muslims, while the owners of the pawnshops are non-Muslim. It is appropriate that the problems of poor Muslims are solved by the Muslims themselves based on Shariah principles, i.e. *Qarḍ al-ḥasan* and *Wadī'ah* (safe keeping fees on the goods).<sup>136</sup> Islamic pawnshops are a step to free the Muslim from interest while at the same time breaking the pawnshop monopoly of the non-Muslims. It was proposed that YPEIM handle this project since it has shown remarkable success in helping the lowest income group via its Project Ikhtiar. The two predominantly Malay states in Malaysia, Kelantan and Terengganu, have already introduced their own pawnshops to help the poor Malays in accordance with Shariah concepts. In Kelantan, the Islamic pawnshop was financed by the State Government.

According to the Pawnbrokers Act, 1972, the Minister will decide the areas and number of licences. Issuing of licences will depend on the tender. Tenderers that offer the highest bid will be issued a licence for a period of three years. For the establishment of pawnshops, there was no need to enact a separate act but it was

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<sup>136</sup> There are two suitable principles as follows:

- (a) Based on the principle of *Bay' Bithaman Ajil*: pawnner sells and promises to buy back the article of collateral. Usually the buy back price would be based on the duration of the agreement agreed upon.
- (b) Based on the principle of *Qarḍ al-ḥasan*: pawnner borrows without interest and deposits article as collateral. The pawnbroker will charge the safe custody fee on the collateral. During the duration of the agreement, the pawnner can redeem the loan and pay the safe custody on the agreed amount. *Qarḍ al-ḥasan* is a 'benevolent loan' to those in need. *Wadī'ah* is an agreement (*'Aqd*) between the pawnner and the pawnbroker for the safe-keeping of the particular article. The purpose of the agreement is to safeguard the collateral from being, destroyed, stolen etc. Based on these reasons, the safe custody fee is charged. The fee imposed in the *Al-rahm* concept is based on the value of the collateral (*Marḥūn*) and not on the loan given.

sufficient to amend the 1972 Act to suit the Islamic pawnshop. An additional clause is necessary in the Exemption clause in the 1972 Act so that Islamic pawnshops do not have to tender and charge interest to the customer.<sup>137</sup>

Another recent development is the introduction of an Interest-free Banking System (IBS) by conventional banks launched by the Finance Minister in March 1993 (see also 6.13). In this pilot project, three large commercial banks were selected, i.e. BBMB, Malayan Banking Berhad (MBB) and United Malayan Banking Corporation (UMBC). This Scheme offers banking facilities in line with Islamic principles. According to the Minister:

The introduction of the Scheme does not mean that the conventional banks are de-emphasising their conventional operations. It is to allow them to cater for the needs of customers who may not be satisfied with the conventional banking system (NST 6 March 1993).

Other conventional banks have applied to the Central Bank for permission to offer the same Scheme. This Scheme was launched without amending any existing law. It merely added another product to conventional banking facilities. All they have to do is to apply for written permission from the Treasury to trade under Islamic principles.

Muslim scholars who have been consulted confirmed that a conventional bank, whose operations are conducted on the basis of interest, is not prohibited from operating Islamic counters. According to *Uṣūl al-fiqh* (science of jurisprudence), even if it is not possible to achieve the ultimate objective immediately (i.e. a full Islamic financial system), Muslims are duty-bound to expand their effort to bring the reality closer to the ultimate objective, albeit by incremental steps. The setting up of Islamic counters by these conventional banks would therefore, be a desirable move from the Islamic point of view (CBM 1991: 15).

As these banks do not wholly belong to the Muslims (mostly belonging to non-Muslim Chinese), a number of Shariah questions relating to the participation of non-Muslims may be raised, namely:

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<sup>137</sup> This information is taken from an interview and unpublished hand-out from Haji Sabidi Abdullah, an officer at the Central Bank of Malaysia. The interview was done in September 1991 in KL.

- (a) Are non-Muslim owned financial institutions allowed to set up Islamic counters?
- (b) Can non-Muslims work on the Islamic counters?
- (c) Can non-Muslims become clients of Islamic counters?

The Muslim scholars have explained that Islam does not prohibit non-Muslims from participating in any of the Islamic financial activities. Financial institutions owned by non-Muslims can set up Islamic counters, non-Muslims can work on the Islamic counters and non-Muslims can be clients of the Islamic counters (CBM 1991: 16).

As the Islamic counter would be a division of a non-Islamic legal entity, a number of issues relating to Zakat<sup>138</sup> (religious alms) would also have to be resolved, as follows:

- (a) Whether the Islamic counters are subject to Zakat;
- (b) If the Islamic counters are subject to Zakat, what would be the mechanism to compute it; especially where the ownership of the financial institution consists of both Muslims and non-Muslims;
- (c) Whether there is a need to streamline corporation tax and Zakat to avoid double taxation.

One of the conditions for Zakat is that the person who pays it must be a Muslim.

Business entities, be they sole proprietorships, partnerships, private or public companies, do not fall under the category of Muslim. The payment of Zakat by a business entity is, therefore not automatic, but is dependent on the extent of Muslim ownership of the entity. A company must fulfil two conditions before it is subject to Zakat namely:

- (a) The business must be lawful (Halal);
- (b) It must have Muslim shareholders.<sup>139</sup>

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<sup>138</sup> Zakat is divided into two types. Firstly *Zakā al-fitr* which is payable during the fasting month of Ramadan. Secondly is *Zakat al-māl* which is imposed on wealth. The wealth could be in terms of cattle, jewellery not used for personal adornment, agricultural products and business profits. It is obligatory on the individual as well as institution at 2.5 per cent a year. The State is supposed to collect it and manage it for the welfare and development purposes of the Muslims. For details, see ICE 1979.

### 5.5.2 Upgrading the Status and Jurisdiction of Shariah Courts

A major target of revivalist dissent was the provision of the Muslim Court (Criminal Jurisdiction) Act, 1965. This limited the maximum penalty which a Shariah Court could impose to six months imprisonment and RM1,000 fine. In 1980, the Federal Government and state religious authorities began discussing the possibility of amending the Act to give more powers to Shariah Courts. By virtue of the Muslim Courts (Criminal Jurisdiction) (Amendment) Act, 1984,<sup>140</sup> the jurisdiction has slightly increased to "any offence punishable with imprisonment for a term not exceeding 3 years or with any fine not exceeding RM5,000 or with whipping not exceeding 6 strokes or with any combination thereof." However, this amendment was of no significance:

This jurisdiction is much less than given to the first class magistrate who can normally deal with offences punishable with imprisonment up to five years or a fine up to \$10,000 or whipping up to 12 strokes or any combination thereof (Ahmad Ibrahim 1989a: xxi).

Another significant effort to upgrade the status of the Shariah Courts was made in 1988 by virtue of an amendment to Article 121 of the Federal Constitution. Article 121(1A) provides that the Civil courts shall have no jurisdiction over any matter within the jurisdiction of Shariah Courts. This was probably to avoid future conflict between the decisions of the Civil Courts and the Shariah Courts as dealt with in Chapter Four.

The amendment seems to take away the jurisdiction of the Civil Courts in respect of any matter within the jurisdiction of the Shariah Courts when the parties involved are Muslim. Nevertheless, even with this amendment, the Civil Courts entertained the application of the Muslim party in matters which should otherwise be heard by the Shariah Courts. For example, in Shahamin Faizul Kung bin Abdullah v. Asma bt. Haji Yunus (1991 3 MLJ 327), the High Court decided that it has jurisdiction to hear the application of a Muslim father claiming custody of the child from the grandmother.

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<sup>139</sup> For more details of how the calculation of Zakat could be made between institutions entirely owned by Muslims and jointly owned by non-Muslims, see CBM 1991: 17-21.

<sup>140</sup> Act A612, with effect from January 1986.

Similarly in Ng Wan Chan v. Majlis Ugama Islam Wilayah Persekutuan & Anor (Federal Territory Religious Council) (1991 3 MLJ 487), the High Court of KL was called to determine whether a person who had converted to Islam had died as a Muslim. A preliminary question was raised by challenging the jurisdiction of the High Court to decide the said issue. It was argued that the matter fell under the jurisdiction of the Shariah Court. Nevertheless, it was held that the High Court had jurisdiction to decide on the issue. The Court ruled that Article 121(1A) did not affect the jurisdiction of the High Court because the effect of Section 4 of the CJA (refer fn. 96) was to render ineffective amendments to the Constitution pertaining to the jurisdiction of the High Court. Paradoxically, in another case, Dalip Kaur v. Pegawai Polis Daerah (District Police Officer) (1992 1 MLJ 1), the Supreme Court had to deal on the same issue and held that the Civil Court has no jurisdiction to deal with the case. Hashim Yeop Sani, C.J. also stated that Article 121(1A) has prevented the Civil Courts from interfering in respect of matters within the jurisdiction of the Shariah Courts.

While this was the position, the question of jurisdiction over matters resting with Shariah Courts once again came for resolution before the Supreme Court of Malaya in Mohd. Habibullah b. Mahmood v. Faridah bt. Dato Talib.<sup>141</sup> The Supreme Court ruled that the Civil Court has no jurisdiction to adjudicate on cases pertaining to matrimonial disputes affecting Muslims in the country. The Court, in handing down three separate judgements held that only the Shariah Court had exclusive jurisdiction to deal with such matters. Harun, S.C.J said:

It is obvious that the intention of Parliament by Article 121(1A) is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Shariah Court.

It was obvious that the makers of the Constitution clearly intended that the Muslims in Malaysia be governed by Islamic family law. His Lordship added:

Indeed that Muslims in this country are governed by Islamic personal and family law has been in existence with the coming of Islam to this country in the 15th century. Such laws have been administered not only by the Shariah Courts but also the Civil Courts. What Article 121(A) has done is to grant exclusive jurisdiction to the Shariah Courts in the administration of such Islamic laws.

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<sup>141</sup> Civil Court Appeal No. 02-441 of 1989 delivered on 15 December 1992.

In rejecting the decision held by the High Court in Shahamin's case the Lordships held that:

Section 4 of the Courts of Judicature Act, 1964 which prevail over the provisions of any written law, cannot prevail over Article 121(1A) of the Constitution. And it is clear from the provisions of Article 121(1A) of the Constitution that Parliament had declared and intended that as from 10 June 1988, the Civil Courts should have no jurisdiction in respect of any matter within the jurisdiction of the Shariah Courts.

Therefore, this Supreme Court case has successfully solved the conflict raised by the CJA 1964 and restrained the High Court from overruling decisions made by the Shariah Courts in matters falling under their jurisdiction. The same conflict which existed in Section 45(6) of the Selangor AMLE 1952 (refer to 3.3.3 and 4.6) also came to an end when this provision was amended under its new AMLE 1989 which was effective from September 1991.

It is hoped that the decision will be maintained and not be overruled in the future with a change of judge or circumstance. Nevertheless, this Constitutional amendment does not purport to oust the jurisdiction of the High Court to review decisions of the Shariah Courts. There are still some limitations and obstacles to this which have been dealt with extensively elsewhere (See H.Jusoh 1991: 55-56, Ahmad Ibrahim 1989a, S.Abdullah 1991 and S.Ahmad 1991).

Along with the above reforms, the Government also elevated the status of Qadis to equal that of Civil Court judges. The Constitutional Amendment 1988 also amended Article 5 which provides " in the case of an arrest for an offence which is triable by a Shariah Court, references in clause 4 to a magistrate shall be construed as including references to the judge of a Shariah Court" (Ahmad Ibrahim 1989a: xxi-xxii). The effect is that if such a person is arrested and not released he shall, without unreasonable delay and in any case within 24 hours, be produced before a magistrate or a Qadi and shall not be further detained in custody without a court order.

Nevertheless, it is unfortunate that the Shariah Courts have been neglected and looked down upon compared to the Civil Courts. The position in Malaysia is in sharp contrast to that of Indonesia, where the judges of the Civil Courts and the Islamic Religious Courts have the same status, emoluments and position, as they are appointed

by the President and both belong to the same service. The Civil Courts and the Islamic Religious Courts are branches of the legal system. In Malaysia, Shariah Courts are not part of the Federal legal system but derived from the state jurisdiction.

### 5.5.3 Committee to Revise the Laws

Steps have been taken to follow the path of Pakistan's Advisory Council of Islamic Ideology. In June 1988, the Shariah and Civil Technical Committee was established under the PM's Department. The members consist of scholars in Islamic law as well as Civil law experts. The objectives of this Committee are as follows:

- (a) To make laws, rules and regulations, procedures towards co-ordinating and unifying laws and rules relating to Islamic affairs throughout the country;
- (b) To create a new draft law and procedure for the Shariah Courts and uniform methods accepted by all states in Malaysia;
- (c) To study any provisions of the Civil laws that are contrary to Islamic law and to make them conform with Islam;
- (d) To help the Government in inculcating Islamic values in all areas, including the legal system.<sup>142</sup>

As Islamic law is under the jurisdiction of the state government, there are slight variations in each of their Islamic law enactments. There is an urgent need for uniformity in the administration of Islamic law in the states of Malaysia and this is actually the main task of the Committee. The Committee has also prepared the law which provides for the service and enforcement of the Process and orders of the Shariah Court throughout Malaysia.<sup>143</sup>

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<sup>142</sup> Since 1988, the Committee has revised some laws relating to administration of Islamic law and prepared a new draft law. They are, *inter alia*: Islamic Family law Enactments, Administration of Islamic law by the Department of Religious Affairs, Islamic Criminal Procedure, Islamic Evidence, ethics concerning Islamic lawyers, enforcement of summons and warrants in the Shariah Court, Islamic Probate and Succession law and Islamic Nominees Law. The Committee has also studied the provisions in Civil laws which contradict with Islamic law. Those are Law Reform Act, 1956, Married Women and Children (Enforcement of Maintenance) Act, 1968, Subordinate Court Act, 1948, Guardianship of Infants Act, 1961 and Trustee Act 1948 (Act 208). Information derived from Ustaz Hussein Ahmad, the officer in the PM's Department who is the ex-officio of the Committee. Series of interviews were conducted with him in 1991 in KL.

<sup>143</sup> For example a summons issued by a Qadi in Selangor can be enforced in Kelantan and authenticated by a Qadi in Kelantan and *vice versa*.



To help improve the standards of the Shariah Courts, a number of laws have been drafted by the Committee to be adopted and implemented in each State. These include the Shariah Criminal Procedure Enactment and the Shariah Civil Procedure Enactment. The Shariah Criminal Procedure Enactment is based on the Criminal Procedure Code applicable in the Civil Courts but has been amended to be in line with the criminal jurisdiction of the Shariah Courts to make it compatible with Islamic law. The Shariah Court has been given power to impose public caning according to Islamic law. The Shariah Civil Procedure Code is adapted from the Civil procedure applicable in the Civil Courts. Recently the reports of the Shariah Courts have been issued in the form of *Jurnal Hukum* (Law Journal) and this has helped to encourage the Qadis to give reasons of judgements.

Therefore, it is hoped that with the existence of the Technical Committee, the administration of Islamic law will be more efficient and all laws in Malaysia will be in conformity with Islam. Only some Civil laws which go against Shariah need to be amended.

### **5.6 The Meaning of Islamisation**

Mahathir began to talk about Islamic values long before he became PM and after appointment as PM in 1981, he openly declared it as party policy. He used his key address at the 1982 UMNO Annual General Meeting (AGM) to urge party members to "ensure that the Malay community truly adheres to Islamic teachings" (NST 11 September 1982). Among other things he promised to create an Islamic banking system and establish an Islamic university (*ibid.*). This marked a major acceleration of the pace of UMNO's Islamisation Policy. What this 'Policy' actually meant in real terms was not clear. Whether it is intended to change the secular status of Malaysia into an Islamic State by implementing fully comprehensive Islamic law or merely the inculcation of Islamic values which are beneficial for economic development will be discussed in this section.

### 5.6.1 Demands for Full Islamic Law

In the 1980s, there was a growing demand to change the Western legal structure of the country and replace it with Islamic law. This demand came not only from Islamic revivalists, but also from UMNO members. In the 1980 UMNO AGM, some UMNO divisions urged the Federal and State Governments to implement Islamic law fully in the administration of justice in the country as spelt out by the UMNO constitution. (S.H.Ahmad 1988: 514-517). Some of the resolutions requesting more Islamic law and also for imposing these laws on non-Muslims were more radical than those publicly expressed by revivalist organisations. In August 1980, when Dr. Mahathir was Deputy PM, he made a statement about the universal application of Islamic principles in Malaysia. For him, if the Muslims in Malaysia were united and exercised tolerance to all other ethnic groups, Islam would probably gain acceptance from other communities. He could see that one day in the future, Islamic law would be implemented fully in Malaysia (M.Abu Bakar 1984: 162).

Lately, there has been a growing demand to abolish Sections 3 and 5 of the CLA 1956 and to develop a Malaysian Common Law. With the abolition of the CLA, the monopoly of English law could be avoided and the judges could consider other systems of law more suitable to the local circumstances of the inhabitants and the country (Ahmad Ibrahim 1988a: 17). In the case of Panicker v. Public Prosecutor (1915 FMSLR 169), Braddell J.C. stated that the common Law of England should be used as a reference in civil cases in order to reach a just decision. The issue is whether justice could only be achieved through the principles of English law. The learned judge posed a question:

Is there any other legal system which could also achieve justice even more than the English legal principles?

In the case of Re Yap Kwan Sang's Will (1924 4 FMSLR), Sproule J. said that

The question that should be posed is why do we reject a good law just because it is an English principle?

For the proponents of Islamic law, they asserted that the same question should be posed:

Why do we reject a good law simply because it is based on Islam? (quoted in A.M Yaacob 1992: 28; tr.)

They further argued that:

If the Government cannot implement Shariah because Muslims do not form an overwhelming majority, why then do they implement English laws? The English people do not form the majority in Malaysia...If Islamic law is not implemented fully in multi-racial Malaysia, indirectly the Government is giving exceptions to some people from not adopting the principles revealed by God. For them, Islam is a complete way of life and a universal religion. Islamic law is applicable to all times and people, regardless of different creeds and races (quoted in Z.Anwar 1987: 75 and M.Abu Bakar 1984: 152).

There is a demand from some Muslims to make Islamic law as a basic or public law in the sense of extending its scope beyond current competence in personal family and religious matters into other aspects such as criminal, administrative and constitutional. law. In November 1993, the Kelantan State Assembly (led by PAS) passed an Enactment on *Hudūd* which seeks to apply to all Muslims, excluding non-Muslims. The Enactment covers *Hudūd* offences (including theft, robbery, unlawful sex, false accusation, drinking and apostasy), *Qiṣāṣ* (covering homicide and injury) and *Ta'zīr* (plural *Ta'zirāt*) applicable when evidence in *Hudūd* or *Qiṣāṣ* is inadequate or other conditions are not met. The law would have to be approved by the Federal Parliament in KL and the Constitution amended. This puts Dr. Mahathir on the spot. Like anyone who wants to be a good Muslim, he cannot oppose Islamic law but neither does he seem to want Shariah to be implemented in multi-ethnic Malaysia (see 5.6.3). Dr. Mahathir has not said whether he will support the law as he indicated that he would in 1992.<sup>144</sup> It was argued that Constitutional amendments need a two-thirds majority in Parliament, making it necessary for UMNO to enlist the support of its non-Muslim coalition partners (MCA and MIC) which it would never get.<sup>145</sup>

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<sup>144</sup> In April 1992, Dr. Mahathir said the Government would make the amendments to the Constitution sought by Kelantan: "If Nik Aziz (Kelantan's Chief Minister) feels that cutting off people's hands would make him a more complete Muslim, the Federal government will not stop him (quoted in FEER 27 November 1993). Postscript: Dr Mahathir has recently proposed a body to study the *Hudūd* laws passed by the Kelantan State Government (NST 5 March 1994).

<sup>145</sup> The MCA could never agree on their perception of Islam or their willingness to let Islam play a certain role in the affairs of the country (H.Mutalib 1990). Research undertaken at the University of Malaya in 1993, on the reaction of the non-Muslims over the application of Shariah in Malaysia depicts that almost all of them disagree with the application of Shariah and prefer the existing English law (information obtained from an interview with the researchers' supervisor in December 1993).

The protagonists of Shariah have argued that Shariah should be a source of common law for Muslims and non-Muslims in Malaysia, if not there would be dualism and discrimination:

Shariah has been misconceived historically to mean only the personal and religious law of Muslims. Therefore, this misunderstanding is deep rooted in the mind of the Muslims and the non-Muslims alike. If this is the case, there will be a dualism in the realm of public law, i.e. Shariah for the Muslims and the Civil law for others. It might create discrimination amongst the offenders of different faiths. For instance, the Muslims will be subjected to *Hadd* law, while others will only be subjected to imprisonment (H.Mehat 1992: 9-10; tr.).

In Pakistan, steps have been taken to Islamise the Penal Code by repealing the existing provisions relating to offences of theft, robbery, abduction, rape, fornication, adultery, false accusation of adultery, drunkenness, etc. and replacing them with *Hudūd* and *Ta'zirāt* laws. In this process the entire Penal Code has not been recast but it has been amended through the promulgation of several orders and ordinances which came into force in 1979 (Iqbal 1985: 43).<sup>146</sup>

The Shariah protagonists argued that if the Muslims can convince the non-Muslims that Shariah is a good law and justice is done to all, there would be no reason why it should not be accepted by them. PAS has always promoted the idea of Islamic justice and equality to all. The peace and safety of life for the Christians in Egypt, the Jews in Arab lands and the Europeans in Andalusia under the early Islamic administration have been seen as examples of the successful universal application of Islam (M.Abu Bakar 1984: 157-159). Although Islamic law is based on the fundamental teachings of Quran and Sunnah, it has been and is capable of adaptation to the needs of society:

The foundation of the Shariah is wisdom and the safeguarding of the people's interests in this world and the next. In its entirety it is justice, mercy and wisdom. Every rule which sacrifices justice to tyranny, mercy to its opposite, the good to the evil, and wisdom to triviality does not belong to the Shariah although it might have been introduced therein by implication. The Shariah is God's justice and blessing among His people. Life, nutrition, medicine, light, recuperation and virtue are made possible by it. Every good that exists is derived from it and every deficiency in being results from its loss and dissipation: for the Shariah, which God entrusted his Prophet to transmit, is the pillar of the world and the key to success and happiness in this world and the next (Ibn Qayyim, quoted in Ahmad Ibrahim 1991: 12).

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<sup>146</sup> These are Prohibition (Enforcement of Hadd) Order, 1979, Offences Against Property (Enforcement of Hudood) Ordinance, 1979, The Enforcement of Zina (Enforcement of Hudood) Ordinance, 1979 and Offence of Qazf (Enforcement of Hadd) Ordinance, 1979. See Iqbal 1985: 43-47, Kennedy 1990-1991.

The position of the non-Muslim (*Dhimmīs*) under an Islamic administration is a popular issue in seminars, conferences and legal literature.<sup>147</sup>

### 5.6.2 Islamic Law is not Public Law<sup>148</sup>

Islamic law, from colonial times has been limited to personal matters of the Muslims. This position has been confirmed by the Supreme Court in the case of Che Omar bin Che Soh v. Public Prosecutor (1988 2 MLJ 55). The appellants were charged under the Firearms (Increased Penalties) Act, 1971 with the offence of trafficking in dangerous drugs. It carries a mandatory death sentence upon conviction. Counsel argued that the mandatory nature of the sentence is against the injunctions of Islam and therefore void.<sup>149</sup> Counsel supported the argument by relying on Article 3 of the Constitution which states that Islam is the official religion of the Federation, and since the Constitution is the supreme law of the Federation (Article 4(1)), the imposition of a mandatory sentence is contrary to Islamic injunctions and is thus unconstitutional.

Salleh Abas, L.P. in delivering the decision, traced out the history of Islam and Islamic law from pre-colonial to post-colonial Malaysia. He held that Islamic law which was the basis of law in pre-colonial Malaya was replaced by the English law under British colonialism. The British had separated Islamic law into private and public aspects. The public aspect was merely an adjunct of the ruler's power and sovereignty while the private aspect was confined to family matters. Only the latter was left to be administered and was personal to Muslims only.

In rejecting the counsel's submission, the judge said that it would be contrary to the Constitution and legal history of the Federation and also to the CLA 1956 which provides for the reception of English common law in Malaysia. The position of Islam

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<sup>147</sup> See the writings on the special position of non-Muslims (*Dhimmīs*) in Awang Othman 1991, A.R. Doi 1979 and 1984, Chapters 19 and 24.

<sup>148</sup> What is meant by public law is twofold: (a) the law of general application, applicable to all Malaysians regardless of religious affiliation (b) the law of the land, applicable to every aspect as opposed to family law only.

<sup>149</sup> In Islamic jurisprudence, only offences prescribed in the Quran attract the mandatory sentence once the case is proved. All other offences not specifically prescribed lie under the category of *Tā' zīr*.

in Article 3 was never intended to extend the application of Shariah. As the Lordship said:

If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunctions of Islam will be void.

The judge was impressed with the efforts made by the counsel, who was a non-Muslim, in presenting the actual position of Islamic law. Nevertheless, his Lordship could not do anything since he was merely exercising the principles of law in Malaysia. His Lordship said:

We thank counsel for the efforts in making research into the subject, which enabled them to put submission before us. We are particularly impressed in view of the fact that they are not Muslims. However, we have to set aside our personal feelings because the law in this country is still what it is today, secular law, where morality is not accepted by the law is not enjoying the status of law. Perhaps that argument should be addressed at other forums or at seminars and perhaps, to politicians and Parliament.

There are fears among the non-Muslims as to the possibility that some of the moral laws of the Muslims would be applicable to them, but the Che Omar and Susie Teoh cases do indicate that such a policy will not be followed by the courts (Harding 1991a). In Susie Teoh's case (Teoh Eng Huat v. Kadhi of Pasir Mas, Kelantan & Anor) (1986 2 MLJ 228), the Supreme Court held that a non-Muslim parent or guardian has the right to decide the religion of a child below 18. The law applicable to a minor is civil law. Therefore, if the person converts to Islam before the age of 18 by his/her own will, the conversion is invalid since a person of under 18 years does not have a constitutional right to choose his/her own religion.

In spite of the apparent primacy of Islam under the Constitution, the Supreme Court has drawn a sharp distinction between public law and private law in holding that Article 3 does not mean that Islamic law acts as a general clog or fetter on the legislative power, because Islamic law is historically confined to private or personal law in Malaysia.

The Government always invokes the multi-racial, multi-religious nature of society for not being able to implement full Shariah. Dr. Mahathir said:

We practise Islam within our means and it is not possible to practise it to the extent of 100% when the country has a sizeable non-Malay population (quoted in S.H.Ahmad 1988: 587).

His stance is supported by many who argue that:

The multi-racial reality would inevitably make this struggle (for a truly Islamic nation) take a long time and must be done very cautiously. The most important thing is to introduce the beauty of Islam and Muslims to society so that it will understand and accept it. To this struggle, we cannot act wildly (*ibid.*).

This brings us to the apparent meaning of the Islamisation policy.

### 5.6.3 Islamisation as Mainly Inculcation of Islamic Values

The following is a statement made by Anwar Ibrahim, about the meaning of the Islamisation policy:

Islamisation process should be seen from (sic) the Malaysian context. Although it is more of the reaffirmation of faith and the reaffirmation that the Islamic religious and moral values are comprehensive, measures are being taken for national development, politics and administration, but in so doing we must acknowledge the Malaysian reality of a multi-religious, multi-racial society. Therefore Malaysian Islamisation process must take into consideration the views of both Muslims and non-Muslims. If Islamisation should bring about action which should be reflected in the development of the nation, then it is imperative that this Islamisation should be shared by all the various religious groups in the betterment of a strong society based on good values such as upholding higher morality standards, eradication of poverty and corruption. When we talk about 'Universal Values' why label them Islamic as these values are values that are good for mankind. Islamisation will not compromise with any form of narrow religious fanaticism and chauvinism such as over politicising of Islam by some quarter (sic) of Muslim populace (quoted in G. Basri 1988: 111 and 1990: 30).

Since Malaysia is a multi-religious and multi-racial country, the Islamisation policy becomes a national issue. Therefore, it must be shared by both Muslims and non-Muslims for the betterment of Malaysian society. It has been stressed frequently that the Policy is not meant to convert non-Muslims into Muslims but simply to inculcate good universal values<sup>150</sup> into the society and the Government machinery with a view to raising the level of efficiency and productivity of the country. This is why, despite all the support that the Mahathir Government has extended to Islam, his Government does not intend to make Islam into a common law or to change the personal nature of Islamic law into a public law. A non-Muslim cabinet minister reassured the non-Muslims about the non-application of Islamic law on them as follows:

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<sup>150</sup> The eleven main values that have been promoted are: Trustworthiness (*Amanah*), Responsibility (*Bertanggungjawab*), Sincerity (*Ikhlas*), Dedication (*Dedikasi*), Moderation (*Bersederhana*), Hardwork (*Tekun*), Cleanliness (*Bersih*), Discipline (*Berdisiplin*), Co-operation (*Kerjasama*), Good behaviour (*Berbudi mulia*) and Gratefulness (*Bersyukur*) (See INTAN 1991: vi).

On behalf of my Ministry, I would like to clarify the meaning of Islamic values. Since we achieved independence in 1957, Islam was declared the official religion of the country, but other religions may be practised in peace and harmony in any part of the Federation. This provision has caused the Government to reject any form of political pressure from certain quarters to impose Islamic laws on their own society. It is their prerogative to do so. However, the Government of Malaysia has no wish to impose Islamic law on non-Muslims, Islamic values, however, are different from Islamic rules and laws. In actual fact, Islamic values are similar to the concept of universal values of good and evil. What are regarded as good values by other religions are considered desirable in Islam too. This means that absorption of Islamic values will not destroy other values in Malaysia (*ibid.*).

Dr. Mahathir himself clarified what he meant by Islamisation:

What we mean by Islamisation is the inculcation of Islamic values in government administration. Such an inculcation is not the same as implementation of Islamic laws in the country. Islamic laws are for Muslims and meant for their personal laws. But laws of the nation, although not Islamically-based can be used as long as they do not come into conflict with Islamic principles. Islamic laws can be implemented if all the people agree to them. We cannot therefore force them because there is no compulsion in Islam (quoted in H.Mutalib 1990: 143).

The main concern of the present UMNO leadership is to emphasise social and economic issues rather than Shariah or applying *Hadd* law. The Government would like to ensure the socio-economic development of the Malay Muslims, and to gain respect from others for their achievement. Dr. Mahathir has constantly reminded the Malays about the past glory of Islam. The early Muslims were the most successful people in the world. They were good in their worship as well as in their professions. They were then well respected for their success and more people became interested in Islam (M. Mohamad 1990: 11-12). Dr. Mahathir then reasoned why Malays who were previously Hindus became interested in Islam in the following words:

In Malaysia, the reason why the Malays who believed in Hinduism or animism were attracted to Islam was due to the knowledge and efficiency of the Arabs and Indians who came to do trade in the Malay States. If these Arabs and Indians were passive and poor, even though they were good Muslims, the Malays would not be interested with them and Islam. Because of their good Islamic values and success, they were respected by the Malays and the Malays became interested in their religion, i.e. Islam (M. Mohamad 1990: 12, tr.).

On this premise, the Government called for moderation. It called for wise and basic preparations and for slow and rational methods. The Government made it clear that UMNO would not become a 'fanatical' party but would act in moderation and pragmatism on the religion (The Straits Times Weekly Overseas Edition 7 November 1992). An article in the Government supporting Utusan Malaysia (UM) said:

Does not Islam teach its followers to call in wisdom? Does not religion, give priority to reason and logic? Socio-political realities, made it imperative for Muslims to prove Islam's perfection through wisdom (*Hikmah*) and good advice (*Maw'izah hasanah*) by inviting mankind to Islam through ways benefiting the conditions, place, time and target audience (UM 1 April 1990; tr.).



For the Government, the present reality had caused an emergency situation, and therefore, Islam provides for the forbidden to become allowable.<sup>151</sup> The rule of Necessity and Need occupies a very important place in Shariah. It takes cognisance of the genuine needs of the society and provides facilities to those who are confronted with hardship.<sup>152</sup> In relation to Shariah and *Hadd*, one ex-cabinet minister cited the Hadith that calls for the implementation of Islamic law "only wherever possible". He argued:

In this country the laws of Islam have to be suspended because conditions do not allow for it (UM 12 March 1983).

After all, reasoned one editorial, the Prophet himself took more than half his adult life to build up Islam because the socio-political conditions in Mecca and Medina did not allow him to push ahead with a full Islamic system. Change, it concluded, must be made step by step (UM 10 December 1982).

The Government leaders condemned those who they claimed were the 'Islamic fundamentalists' who instead of talking about poverty and development, talked about the application of Shariah when people are dying from hunger (IHT 6 May 1993). Anwar Ibrahim in rejecting this view said that:

This is not Islam, this is just one way of escapism so that people don't talk about social and economic issues, hunger, poverty, corruption or mismanagement (*ibid.*).

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<sup>151</sup> This opinion is based on the Quranic verses relating to certain specified items which have been prohibited but the use of which has been allowed in extremely dire circumstances. "He has forbidden carrion, blood, pork and that which has been slaughtered in the name of other gods. However, if one is forced by dire necessity without wilful disobedience or transgression of the limit, no sin shall be on him. Certainly God is forgiving and Kind" (Chapter 2: Verse 173). Refer to other verses as well i.e. 5: 3, 6: 145, 16: 115, 6: 119. This principle is applied by way to analogy to others as well to include *Ribā* if there is a dire need for funds and no alternative arrangement is possible, provided that the borrowing is resorted to only to the extent absolutely necessary. (M.U.Chapra 1992: fn. 322).

<sup>152</sup> There are two legal maxims in Islam dealing with the subject:

- (a) "Necessity permits prohibited things" which is the general maxim incorporated in Article 21 of the Ottoman Civil Code. Shariah is considerate enough to take notice of particular occasions where its severity has to be mitigated in order to provide facilities to those who are subject to hardship. We read in the Quran: "God desireth for you ease; He desireth not hardship to you" (2: 185). "He has chosen you and hath not laid upon you in religion any hardship" (22: 78). This is further supported by the saying of the Prophet: "Religion is facility. The most beloved religion to God is tolerant orthodoxy" (quoted in M. Muslehuddin 1986 :182).
- (b) "Hardship begets facility" is the principle laid down in Article 17 of the Ottoman Civil Code. Hardship refers to necessity and need and not to a non-essential interest (luxury). This principle means that "difficulty is the cause for easiness and in time of urgency, latitude must be allowed". Many legal rules such as loans, transfer of debts and incapacity are derived from this principle. Other examples in this regards are payment by instalments allowed to the debtor if he is in straitened circumstances. The most outstanding example is the transaction of *Bay' bi'l-wafā'* (redeemable sale/*Jual Janji*) which came into existence to meet the needs of the heavily indebted people of Bukhara. This is an example of sanctioning a certain transaction for which people are in need in their economic life (M.Muslehuddin 1986: 183) (refer 6.6).

Dr. Mahathir has criticised those who "place more importance on form rather than substance" (quoted in Esposito 1987: 197). He claimed these groups were:

extremists who want to impose their power on others, to force people to accept their teachings, and in Islam you can preach or persuade, not force (quoted in The Times, 26 July 1991).

He appears to find an Islamic justification for not applying *Hadd* law in multi-religious Malaysia:

Islam provides rules and regulations for everything. Islam gives latitude to certain rules. Take the case of prayer, where in certain situations, a prayer could be forwarded or even postponed. In case of sickness, a prayer could be substituted by reducing the action as could be afforded by the person. What is more in the case of *Hadd*, not all the Muslims live in a country where they have full power or are in control. In a country where they are the minority, they are not able to implement Islamic rules, so are they then regarded to be trespassing the rules of Islam. The Muslims would dislike if other religious rules were imposed on them. Therefore, they too should not compel others to accept Shariah, especially in circumstances where it might lead to insecurity....Islam gives a special position to politics. Muslims have been given laxity since Islam is not a religion which imposes difficulty on Muslims. If in a multi-racial country like Malaysia, the Muslims have to have their hands amputated (in case of theft) and the non-Muslims are not. Therefore, a lot of Muslims won't have hands and won't be able to compete with the non-Muslims. We have to realise the fact that in the process of the Government's attempt to inculcate Islamic values in the administration, it should not result in the Government becoming weak, passive and creating chaos. If it happens, Islam will get a bad image and will be seen as counter-development (M.Mohamad 1991: 10-13; tr.).

It should be clear that Islamisation is not implementing Shariah (refer 5.6.1), but it is currently mainly inculcation of Islamic values. Values which are universal, including cleanliness, trustworthiness, honesty, punctuality, hardwork, dedication, and discipline are essential for efficient and successful Government to enable it to carry out its economic programme:

Inculcation of Islamic values is not necessarily doing a particular act of worship to reserve a place in the Hereafter. It is not also meant by applying *Hudud* law without looking at the political situation. The Islamic values which are to be absorbed are those which can create an efficient government able to administer efficiently in terms of peace, security and development. The government which uses Islamic values will always achieve success. Therefore, Islam and the Muslims will be respected and more good things would be created to all. But if Islam has been interpreted narrowly or incorrectly, therefore, the administration will fail (*ibid.*: 13; tr.).

Dr. Mahathir's Government is attempting to blend spiritual and material values in a multi-cultural society experiencing rapid economic growth, a recipe he considers makes for a model Islamic country:

This is an argument Malaysia wants to propound, a Southeast Asian Islamic ethic that is not opposed to development and progress (M.Mohamad, quoted in FEER 14 October 1993).

The Government and its supporting media emphasised that when Muslims are poor and disrespected, so also would Islam:

Promoting economic growth is as Islamic as it can be. How can we eradicate poverty and raise the livelihood of the people if there was no growth (Anwar Ibrahim, quoted in NST 9 December 1992).

It was on this premise that the NEP and NDP were termed a Jihad (struggle). Dr. Mahathir when presenting his economic plan, Vision 2020 in February 1991, reflected his wishes to create Malaysia as a fully developed country by the year 2020.

## 5.7 The Response to the Islamisation Policy

### 5.7.1 ABIM's Response

Although it supported Mahathir's Islamic programmes, ABIM still questioned the inconsistent utilisation of the terms 'Inculcation of Islamic Values' and 'Process of Islamisation' as both are employed by UMNO leaders. ABIM cautioned that it is vital to understand properly the difference in meaning between the terms, since both have unique implications. An ABIM leader noted:

'Infusion of Islamic values' is not the same as 'Islamisation'. This is because Islamisation means a process of changing something un-Islamic into purely Islamic. In fact, Islamisation is an established term frequently used by Muslim scholars whether in the context of explaining historical stages of development and resurgence of Islam or in the context of the expression of idealism, schemes and the returning process (sic) to Islam as it is happening today (quoted in M. Manutty 1990: 305).

From the above statement, ABIM leaders seem to question the sincerity of the Mahathir administration in embarking on Islamic policies. For ABIM, therefore, the real meaning of Islamisation is a holistic process which is comprehensive in nature. ABIM seems to demand that total structural change be made a precondition to the process of Islamisation:

In infusing of (sic) certain values into the administration, it implies that no structural change is attempted. For the Islamicists who love Islam such a process of Islamisation is not sufficient. What is needed, therefore, is the total implementation of the Islamic Shariah whereby totality of Islam must be strictly implemented. It must not be as it is now where only some fringe changes were introduced in the present system which remains alien to Islam (*ibid.*: 306).

ABIM admitted the need to practise certain Islamic values such as trust, sincerity, discipline, dedication, etc. as a fulfilment of the Islamic ethics of behaviour. Nonetheless, these values alone are not sufficient since they do not fulfil the requirements of the Islamic world-view. Therefore, these ethical values do not guarantee the Islamicity of a Muslim (*ibid.*). In spite of the call by the Mahathir administration to inculcate Islamic values in the Government's administrative

machinery, ABIM raised the issue of the unhealthy immoral activities which are rampant in the country. ABIM offered its formula to abolish these vices as a precondition to the success of the Islamisation process.

The so-called 'Islamisation' has no permanent value if all vices (*Munkar*) are not wiped out but continue to be protected by law such as usury, gambling, liquor and others. There are many acts and ordinances which are contrary to texts in the Quran and Sunnah, e.g. Pawnshops Acts (1981), Horse Racing Act (1965), Gambling Ordinance (1952), Lottery Ordinance (1952) and others, and there are many provisions in Enactment of the Administration of Islamic Law which are contradictory to the real Islamic injunctions, such as the law of adultery which contradicts the law of *Hudūd* (*ibid*: 108).

ABIM considers Islamisation of the present law as *sine qua non* to the meaningful implementation of Islamisation. In other words, Islamisation is incomplete without the enactment of the Shariah. However, ABIM's approach to the implementation of Islamisation particularly in the field of law seems to be more moderate and cautious than before. This changing attitude is mainly attributed to two factors:

- (a) Some ABIM members including its first President, Anwar Ibrahim, have joined and are presently working in the Government and they are more aware of the difficulties in fulfilling the Malaysian government's Islamic policy;
- (b) ABIM has examined the difficulties faced by other predominantly Muslim countries, such as Pakistan and Sudan, in implementing Shariah.

In the light of this situation, ABIM cautioned its members that the demand for exercising the Shariah does not mean everyone must become so legalistically oriented that Shariah becomes a mere arbiter of Halal (permitted) and Haram (forbidden). In other words, apart from the consistent demand for Islamising the present secular legal system, it is vital that other aspects of Islamic teachings such as justice, peace, freedom, equality and so forth which are enshrined in the Shariah be included. Given the social system in which it is set, ABIM has reminded its followers that living in a pluralistic society such as Malaysia, it is imperative for ABIM intellectuals to convince all groups, Muslim and non-Muslim alike, to comprehend systematically the applicability of the Shariah in modern Malaysia since the "demand for the Islamisation of laws must not be viewed as the demand of a fanatical group" (*ibid*: 309).

### 5.7.2 PAS's Response

PAS traditionally found its supporters mainly from among the urban-working class and the peasantry. Recently support has also grown within the Malay middle class and among intellectuals as a result of the *Dakwah* movement. PAS also lays stress on the universal validity of the Islamic principles laid down in Shariah. It is also attractive to non-Malay Muslims. One of its aims is to abolish the constitutional provisions and distinctions between *Bumiputera* and non-*Bumiputera*. PAS saw the NEP (and now the NDP) as discriminating against the poor Malaysians. PAS regarded the NEP as only benefiting certain sections of the community. The NEP widened the gap not only between ethnic groups but also between social classes. For PAS, the NEP merely served the interests of the *Bumiputera* middle and upper classes (Harakah 24 June 1991).<sup>153</sup>

PAS is against the general idea of 'Islamic values'. It demands the concrete creation of an Islamic civilisation, which can only grow in an Islamic state based on Shariah as the Law of God, because God's Law is righteous and beyond the reach of human manipulation (S.Latif 1984: 1-5). PAS is convinced that the non-Muslims would also benefit in the end if Shariah was implemented and they would be sheltered under the Islamic legal system:

This is the Islamic position, as carried out by the Prophet (PBUH) himself. It becomes a duty of the Islamic movement not to confine its activities among Muslims (and we are aware of the importance of raising the Islamic consciousness among Muslims) but also to disseminate Islam among the non-Muslims, not just in the context of conversion but also as regards the establishment of an Islamic State. And secondly we explain the status of non-Muslims to allay their fears with the establishment of the Islamic State, where Islamic justice is far more just than the prevailing condition. And this has been proven throughout history - whence in Egypt, Persia and India the populace welcomed Muslim rule because they were convinced that it would be more just than those of their own. This we expound to them (non-Muslims) (Haji Abdul Hadi Awang, as quoted by Inquiry February 1988).

The PAS Vice President, Haji Abdul Hadi Awang expressed his views on the Government's Islamisation policy. He claimed that what was being done was not an effort towards Islam but rather a political issue to avoid opposition. PAS therefore rejected this policy as insignificant, not comprehensive, merely cosmetic and not

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<sup>153</sup> For details of PAS's criticism of the NEP as well as its philosophy and economic strategy after 1990, see PAS working paper submitted to the National Economic Consultative Council (NECC).

sincere enough in implementation of Islam (NST 12 April 1984, UM 30 August 1984). PAS rejected the secular nature of the Constitution and demanded total Islamisation which leads to an Islamic State:

An Islamic party must be based on pure Islamic principles, the Quran and Hadith, and its leadership must believe that only Islamic principles can be the basis of an Islamic State. Islam is a complete way of life. Tunku Abdul Rahman repeatedly stressed that Malaysia was a secular country and Dr. Mahathir has followed his steps by reaffirming that Malaysia will continue to be secular. Dr. Mahathir himself has emphasised that the Government's Islamisation programme is limited in scope. On the other hand, PAS is an Islamic Party fighting for the implementation of Islamic laws. We believe in Islam as a way of life and our struggle is not limited to just one aspect of Islamic laws. (Haji Abdul Hadi Awang, as quoted by Asiaweek, 24 August 1984, see also Inquiry 1988, Harakah 1 July 1991, Harakah 25 June 1993).<sup>154</sup>

### 5.7.3 Response from non-Muslims

Non-Muslim groups have repeatedly objected to any kind of Islamisation. The constitutional provisions for the Malays were accepted on the basis that they might result in a hegemony of the Malays in the life of the country, but they were not meant to justify a dominance of Malay culture and *Adat* including Islam (Schumann 1991: 252). Malaysia is not Malaya, they claim. Malaysia was established from its very beginning as a pluralistic state in which all the different ethnic and religious groups would enjoy the same respect and freedom and contribute to the national culture. They stress that the move towards Islamisation undermines the national consensus as laid down in the original text of the Constitution (*ibid.*; 253).

Strong criticism has come from the Christians. The Catholic Reverend Dr. Paul Tan contended that Islamisation was doing more than injecting 'Islamic values' into Government, as non-Muslims are led to believe. It was really to infuse Islamic principles into every aspect of life. He questioned the sincerity of the Government in using the term 'Universal Values'. He remarked:

If the Government really means that Islamic values are universal values are also (sic) found in other religions, why cannot it use the term 'universal values' since the Government is the Government for everyone and not just for the Muslims who make up half of the population being ignored? (sic) (quoted in K.S.Lim n.d.: 105f).

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<sup>154</sup> Even though this statement was made ten years ago, PAS's position is unchanged. This was confirmed in a lecture given by Haji Hadi in Birmingham, UK on 1 January 1994.

Another critic is the Anglican Reverend Dr. Batumalai who said that Islamisation within the confines of the Muslim community is healthy, but was sceptical as to the safety of other peoples' values. He warned that the moment people ascribed all good values to Islam alone, then problems would arise (G.Basri 1988: 113, 1990: 32).

A Spanish cleric, S. Francis Xavier, in an open letter challenged Dr. Mahathir to hold a referendum on Islamisation in order to find out the views of the non-Muslims. Although sympathetic, he contended that it was difficult for Muslims to accept the values of other religions however similar. He further cautioned the PM not to abuse the position of Islam as the official religion of the country in pushing these values on others. However, by citing the example of *Rukunegara*, he went on to suggest that it would be better if the Government adopted common ideals and values that are found in all religions and presented them as a national concept (*ibid.* 1988: 114, 1990: 13). This suggestion seems to adopt the same principle as the Indonesian *Pancasila*.

Bishop A. Selvanayagam in an address to Christians in Malaysia to mark the decade-old *aggiornamento* (renewal) programme urged all priests in Malaysia to jolt the laity from complacency. This address purports to respond to the regional and national crises of the mid-1970s especially in what he termed 'rampant government-sponsored Islamisation'. For he warned that:

The clock may be turned back on the Christians progress in Malaysia if Christians do not become more active in the secular life of their country (*ibid.*: 1988: 115, 1990: 33).

Regarding the possible implementation of Shariah, the non-Muslims especially Christians, ask why force non-Muslims to follow the provisions of Shariah when they prefer the existing Civil laws. They say that it would result in the non-Muslims, almost 50 per cent of the population, becoming 'second-class citizens'. Christians took the view that it is impossible for fallible man to justly implement the laws of God on earth and pointed to the success of secular Muslim countries such as Jordan, Egypt and Indonesia. Indonesia is often quoted as an example in relation to its *Pancasila* policy *vis-à-vis Rukunegara* (*ibid.* 1990: 33).

## CHAPTER SIX

### ISLAMIC BANKING IN MALAYSIA

#### 6.1 Introduction

A significant development in the Muslim World in the seventies and eighties was the pan-Islamic movement. As mentioned in Chapter Five, this movement aimed to revive the glory of Islam and began to demand the application of Shariah in all aspects of life. The effort to establish Islamic banking is one manifestation of this movement. The Muslim countries began to rediscover Islam and wanted to mould their economic and financial activities in accordance with Islamic values:

The seventies and eighties of the present century has witnessed the emergence of a number of Islamic banks and financial institutions whose modes of operation are distinct from those of conventional banks. The establishment of these institutions is one of the several manifestations of the 'back to religion' movement which is fast gaining strength in present day Muslim societies (quoted in Abulhasan *et al.* 1991: 155).

The Muslim World has been over-burdened for too long by Western modes of social and economic thought. A large portion of the Muslim World had been subjugated culturally, economically and politically by the colonial powers. Even though they have achieved independence from their colonial masters, the colonial principles are still deep rooted in the social, economic, political and cultural life of Muslim communities. Thus, the emergence and expansion of an Islamic banking system is the starting point of a new path-breaking change in the Muslim world. It is a process of liberating the Muslims from the yoke of domination by Western thought, values and institutions and remodelling their social and economic life in accordance with Shariah.

The issue of *Ribā* has long been a problem for Muslims. Even what constituted *Ribā* itself has been a subject under serious discussion. The existence of *Ribā* has been argued to be a major factor for the low-participation of the Malays in the economic activities of Malaysia. The establishment of BIMB is a major step towards an interest-free financial system in Malaysia. This marked the establishment of more



Islamic commercial institutions under the new mode of the Islamisation Policy of Dr. Mahathir Mohamad. This chapter will look into the theory and practice of Islamic banking with reference to BIMB. Major problems facing BIMB, its identity crisis and survivability within the capitalist climate of Malaysia as well as the prospects of Islamising the entire banking sector in Malaysia will be among the main issues discussed.

## **6.2 The Emergence of Islamic Banks**

The elementary concepts of modern Islamic banking date back to the mid 1940s (M.N. Siddiqi 1981: 29). Models for Islamic banking appeared in the mid-1950s, but comprehensive and detailed concepts for interest-free banking only appeared in the late 1960s (*ibid.*: 31).

The political environment during that time in almost all Muslim countries was hardly favourable for a change in the entire system of banking and finance. In fact, the first experiment in Islamic banking was set up undercover in Mit Ghamr, Egypt in 1963. The model for the experiment was the German Savings bank modified to comply with Islamic principles, i.e. it was barred from charging and paying interest. Nevertheless, the charter of the Bank did not refer to Shariah.<sup>155</sup> (N.A.Salleh 1986: 87, M.Anwar 1987: 13-14).

The Second Islamic Conference of Foreign Ministers in 1973 adopted a document on the "Institution of an Islamic Bank, Economics and Islamic Doctrines" (*ibid.*). In 1974, the IDB (Islamic Development Bank) was established as a result of this Conference. The member states of the OIC became members of the IDB. The IDB helped to establish a number of Islamic banks in various countries (M.N.Siddiqi 1988 and Presley 1988).<sup>156</sup>

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<sup>155</sup> The project was closed for political reasons in 1967, although the capital mobilisation effects had been remarkable. Though this experiment in Islamic banking was undertaken on a very limited scale, it provided a basis for similar efforts elsewhere.

<sup>156</sup> To know the role of the IDB in promoting Islamic banking and economic growth of member countries, particularly in Malaysia, see N.M. Yasin (1989: 82-94) and IDB (1989).

Beginning in 1974, several Islamic banks have been established which include: Dubai Islamic Bank in 1975, Faisal Islamic Bank of Sudan in 1977, Faisal Islamic Egyptian Bank and Islamic Bank of Jordan in 1978, Islamic Bank of Bahrain in 1979, the International Islamic Bank of Investment and Development, Luxembourg in 1980 and BIMB in 1983 (Z.Man 1988: 69). Today, they are more than a hundred financial institutions which claim to be operating partially or fully on an interest-free basis in 34 countries (Muazzam Ali 1992: 16).

Islamic banking has been adopted at the national level in Pakistan, Sudan and Iran, and they have decided to Islamise the whole banking system. Iran enacted a new banking law in August 1983 requiring complete abolition of interest by March 1985 (M.N.Siddiqi 1988: 48). Sudan opted for a total change when a presidential decree was issued in 1984, directing all banks to stop dealing with interest. The Central Bank of Sudan, on 10 December 1984, directed all commercial banks to stop dealing with interest with immediate effect, and to negotiate conversion of existing deposit into investment deposits or any other kind of deposits in accordance with Shariah. All outstanding interest bearing advances were either to be settled through repayment or they had to be converted into one of the Islamic modes of financing. Foreign transactions were to continue on the basis of interest till an alternative way was available (*ibid.*: 49).

### **6.3 The Theory of Islamic Banking**

#### **6.3.1 Economic Impact of Interest**

At the outset, the most important departure of Islamic banking from conventional banking is the prohibition of *Ribā*, and promoting Profit and Loss Sharing (PLS) as an alternative to *Ribā*. The prohibition of interest is obvious in the Quran as well as in the Sunnah.<sup>157</sup> *Ribā* originally meant 'increase and growth'. This meaning is taken from the Quran (22: 5). Increase means the increase over capital or nominal amount, the

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<sup>157</sup> Refer to verses of Quran Chapter 2: 275-279, Chapter 3: 129.

increase being either large or small.<sup>158</sup> According to Islamic law, *Ribā* technically refers to the premium that must be paid by the borrower to the lender along with the principal amount as a condition for an extension in its maturity (M.U.Chapra 1985: 56-57). In 1992, the Pakistan Federal Shariah Court ruled that:

It makes no difference whether the loan is for consumption purpose or for commercial purposes. It does not matter if the rate of interest is low or high, simple or compound for short or long times, between the two Muslims or between a Muslim and a non-Muslim or between a citizen and a state or between two states. Any excess which is pre-determined over the principal sum in a loan transaction will constitute *Ribā* in all circumstances (quoted in K.Zaheed 1994: 83).

This immediately leads us to the essence of Islamic banking; an Islamic bank is a financial institution that conducts its operations in accordance with Shariah principles. If we have to contrast the Islamic bank to an existing conventional bank, we may say that while the latter earns the major portion of its revenues and expenses on the basis of interest, the former earns the same on the profits. In the operation of an Islamic bank, profits therefore assume the place of interest in a conventional bank.

'Usury', the original name for modern interest was also condemned by other religions and civilisations for having a negative effect on social and economic growth.<sup>159</sup> The following are some of the negative impacts of interest and the rationale of its prohibition (M.N.Siddiqui 1983a and 1983b, M.U.Chapra 1985, A.A.Maududi 1984).

#### ***(i) Injustice of Debt Finance***

Transactions based on interest violate the equity aspect of economic organisation. The borrower is obliged to pay a pre-determined rate of interest on the sum borrowed even though he may have incurred a loss. Even when a profit is made, the fixed rate of interest can prove an onerous burden if the rate of profit earned is less than the rate of interest undertaken. To insist on a fixed return irrespective of the

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<sup>158</sup> Most Muslim scholars such as Ibn Tamuyah have made no difference between usury and interest. Describing the range of connotations of *Ribā*, Ibn Tamuyah writes that the term includes all types of interest resulting from late payment or due to unequal exchange of the same commodity and it also includes every loan carrying benefits (A A Islahī 1988: 129).

<sup>159</sup> Judaism and Christianity also prohibit usury. Western philosophers such as Aristotle and Plato considered interest whatever the rate may be, as an unnatural income because the lender gains without performing any work. According to Aristotle money cannot beget money (BIMB n.d).

economic circumstances of the borrower of money militates against the Islamic norm of justice.

***(ii) Discourages Innovation***

The interest based system discourages innovation, particularly on the part of small scale enterprises. Large industrial firms and large landlords can afford to experiment with new techniques of production as they have reserves of their own to repay the borrowed funds, in case adoption of new practices does not yield good profits. Small scale enterprises hesitate to take up new methods of production with the help of money borrowed from banks as the liability of the banks for the principal sum and interest has to be met regardless of the results while they have very little reserves of their own. In agriculture particularly, small farmers are deterred from adopting new cultivation practices on account of this factor. This acts as an impediment to growth and economic development.

***(iii) Inefficiency of Debt Finance***

Under the interest based system, banks are only interested in recovering their capital along with the interest. Their interest in the venture they finance is therefore strictly limited to satisfying themselves about the viability and profitability of such ventures from the point of view of the safety of their capital and the ability of the venture to generate a cash flow which can meet the interest liability. Debt finance generally goes to the most creditworthy parties, not to those with the most promising development projects. Since the return the bank gets on the capital sum lent by them is fixed and does not vary with the actual profits of the ventures for which funds are lent, there is no incentive on the part of the banks to give priority to ventures with the highest profit potential. Efficiency in resource allocation is most often judged by the profitability of a productive undertaking. Lack of sufficient attention to the profit potential of various projects and preference in lending to well established parties leads to misallocation of resources in the interest based system. Economic growth, based on increased productive capability, requires more and better equipment as well as a skilled labour force which will not materialise unless resources are made available for these

purposes. On the other hand, none of the resources in the world will contribute anything to economic growth if they are not used productively (Coats and Khatkate 1979: 1881-1900).

**(iv) Making the Rich Richer and the Poor Poorer**

The institution of fixed-interest payment ensures a continuous flow of resources from debtors to creditors. The debtors who were in need of loans for consumption or production purposes are forced to pay the fixed interest regardless of the outcome or the economic circumstances, while the creditors are doing nothing but accepting a guaranteed and fixed payment of interest. Loans channelled through the World Bank and IMF and the various aid agencies are serving the same purpose. In this respect, the payment of interest transfers resources from the poor countries to the rich countries, thereby the poorer countries become poorer and the rich countries become richer (Adelman and Espiritu 1993: 172-191). This would be inconceivable under a system where the returns are tied to actual additions to wealth and not predetermined as in the case of interest.

Most of the evils of the interest-based system arise from the fact that the lender is accorded a highly privileged position under this system while the user of the funds is left alone to face all the uncertainties and risks of business. It is for this reason that Islamic jurists (*Fuqahā'*) have developed two specific forms of business finance arrangements, called *Mudārabah* and *Mushārahah* as substitutes for interest based creditor-debtor relationships.

#### **6.4 Principles of Mudārabah and Mushārahah**

In legal terms, *Mudārabah* is a contract in profit-sharing, with one party providing funds and the other the work or effort. In other words, *Mudārabah* or *Qirād* is a contract between two parties: an Islamic bank as an investor (*Rabb al-māl*) who provides a second party, the entrepreneur or fund-user (*Mudārib*) with financial resources to finance in a proportion agreed in advance, for example 60 per cent for the entrepreneur and 40 per cent for the bank. Losses, if any, are the liability of both

parties. The bank will lose its money while the entrepreneur will lose his time and effort. This contractual relationship between the Islamic bank and depositors on one hand and between the bank and entrepreneur on the other varies with respect to the source of funds utilised:

- (a) If the bank uses its own funds, the bank is regarded as an investor or financier (*Rabb al-māl*);
- (b) If the bank employs the depositors' funds without committing any of its own, the bank would be acting as an agent for the depositors from the time the deposits are accepted to the time when the money is invested in a *Muḍārabah* contract. At this stage, the bank becomes an entrepreneur (*Muḍārib*) with respect to the depositors, and a *Rabb al-māl* with respect to the entrepreneur. This is what is called a two tier *Muḍārabah* (M.N.Siddiqui, 1988: 37).

Another way of PLS in the context of Islamic banking is *Mushārahah* (Partnership). In distinction to *Muḍārabah*, the two partners in *Mushārahah* participate in the capital of the venture. Profits are allocated according to the agreed proportion. However, if losses occur, they are borne by the partners in proportion to their contribution to the capital. For instance, the bank may participate in 60 per cent of the capital though its share in profits might not exceed 50 per cent. Whilst in the case of losses, the bank's liability must not be less than 60 per cent.

Debt finance carries an obligation to repay the sum borrowed plus a determined return irrespective of the actual outcome of the project in which the funds are employed. The shift to profit-sharing relieves the fund user of this obligation, replacing it by an obligation to surrender an agreed per cent of realised profits to the bank along with the funds acquired from it. Should there be no profit, the fund user repays only what he has obtained. In the case of a loss, both parties suffer it jointly. The financier or the bank will bear the monetary loss whilst the fund user will bear the entrepreneurial loss.

This change in the financial obligation of fund users towards the bank, from a fixed amount, i.e. principal plus interest, to an amount varying with the actual results of

the enterprise has a deep impact on the behaviour of the fund users. They are likely to be more keen to take risks and embark upon promising innovative ventures, unfettered by fixed obligations. All they have to do is convince the lender of the soundness of the proposed venture. Unlike debt finance through interest, *Mudārabah* and *Mushārah* finance would be available only after the financier has satisfied himself about the finance.<sup>160</sup>

## 6.5 The Practice of Islamic Banking

Theoretical works on Islamic banking sought a change in the entire system from interest to profit sharing and equity participation. *Mudārabah* and *Mushārah* were supposedly the main activities of Islamic banks as envisaged in the theoretical literature on Islamic banking, besides the common banking services<sup>161</sup>. However, the practice of Islamic banks show that they have begun to adopt some modes of business with predetermined returns. They are:

- (a) *Murābahah* (Sale with Mark-Up): Under this mode the bank purchases the goods and subsequently sells the relevant asset to the customer at the agreed price which consists of the actual cost of the asset plus the margin of profit. The customer will then pay by cash or on a deferred term.
- (b) *Bay' Bithaman Ājil* (Deferred Sale): It is similar to *Murābahah* in which the bank purchases the goods needed by the customer and sells them to the customer with a mark-up (cost plus an agreed profit margin). The payment will be made in instalments over a specified period of time. Both *Murābahah* and *Bay' Bithaman Ājil* are used synonymously in Pakistan (K.Zaheer 1994: 145).<sup>162</sup> They are purely business and not financial intermediation as the bank actually buys the goods and sells them to the customer. The two acts of buying and selling may be done simultaneously so that, in effect, it amounts

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<sup>160</sup> For more advantages of PLS principles, see M.N.Siddiqi 1983.

<sup>161</sup> Such as safekeeping, transfer, agency functions, consultancy services etc.

<sup>162</sup> M.N.Siddiqi (1988) also states that there is no difference between the two terms.

to the bank financing the clients' acquisition of goods against a predetermined 'profit' (M.N.Siddiqi 1988: 39).

- (c) *Ijārah* is the Shariah concept of leasing finance, whereby the bank purchases the asset required by the customer, and then leases the asset to the customer for a given period, the lease rental and other terms and conditions being agreed by both parties.

Islamic banks face an identity crisis as to whether they are true Islamic banks which run and operate according to Shariah. Some people accuse the Islamic banks of charging interest like ordinary banks but with a different name (refer to 6.10.3). There is a tendency among Islamic economists to distinguish between interest-free or Halal (permissible) banks and true Islamic banks. Accordingly, for them, BIMB and most other Islamic banks should only be referred to as Halal banks.

This problem arises due to excessive reliance by the Islamic banks on second-line techniques of operation (*Murābahah*, *Bay' Bithaman Ājil* and *Ijārah*) in the disbursement of funds. Theoretically, some Islamic economists argue that the basis for the establishment of an Islamic bank was due to the objection to interest which would be replaced by the idea of PLS (*Mudārabah* and *Mushārahah*) (M.U.Chapra 1985, Z.Man 1988, M.N.Siddiqi 1988). There are extensive writings on the superiority of the PLS over a fixed interest rate.<sup>163</sup> If in practice, the Islamic bank adopts alternatives which are free of interest but are not based on PLS, it was contended that the Islamic bank cannot be said to fulfil its main objective of its existence. What is worse, if the alternative is built around predetermined rates of return to investible funds, it would be exposed to the same criticism as directed against interest as a fixed charge on capital. It so happens that the returns on Islamic bank finance based on *Bay' Bithaman Ājil*, *Murābahah* and *Ijārah* are all predetermined and may deteriorate into purely financing

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<sup>163</sup> M.N.Siddiqi (1983) has comprehensively discussed on the advantages of the PLS principles *vis-à-vis* a fixed rate of interest. Among others, it includes:

- (a) Increase in the volume of investment;
- (b) PLS System is more Entrepreneur Oriented;
- (c) Justice and Equity in Distribution.

Other Muslim economists have also discussed the issue thoroughly, see A.Ahmad 1987; S.N.Ahmad 1979, A.A.Islahi 1988.



arrangements with an agreed profit margin, it therefore being no more than a camouflage for interest (Z.Man 1988: 91, M.N.Siddiqi 1988 :52) (refer also 6.12.3).

## 6.6 The Origin of Bank Islam (BIMB)

The Malays have always been cautious about involving themselves in *Ribā* transactions. They had developed their own transaction system which avoided *Ribā*. Such a customary transaction which was prevalent amongst the Malays in pre-colonial times, and has survived until now, is *Jual Janji*.<sup>164</sup> The origin of *Jual Janji* has been attributed to the objection that Malays (as Muslims) have towards *Ribā*, which is the economic basis on which the modern system of charge or mortgage functions. The answer to this objection, which proceeds from Islamic injunctions against *Ribā*, is the transaction known as *Bay' bi'l wafā'*, which is a sale with an option to repurchase (S.Buang 1989a: 98).<sup>165</sup>

The identification of *Jual Janji* as being a local customary transaction peculiar to the Malays because of religious consideration received judicial notice from the British judge in the case of Tengku Zahara v. Che Yusuf (1951 17 MLJ 1), in which Briggs held that:

The whole purpose of *Jual Janji* transactions is to provide a procedure for securing loans and giving the lender adequate recompense therefore without infringing the prohibition of usury which is binding on the conscience of all good Muslims.

In Mohamed Isa v. Haji Ibrahim (1968 1 MLJ. 186), Azmi C.J. (Malaya) made a similar observation regarding this religious element when he said that amongst the Kedah Malays, the transaction of *Jual Janji* was in fact, "a conditional transfer with a

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<sup>164</sup> The customary practice of *Jual Janji* is recognised in the National Land Code (NLC), Section 4 (2).

<sup>165</sup> Under this practice, if a land owner would like to obtain a credit facility without involving *Ribā*, he could sell his land to another person at an agreed price. Usually, the price is not the market price but far cheaper. In the agreement, a condition was stipulated that within a certain period of time (say 2 or 3 years), the seller would re-purchase the land at the same price. The buyer was given a right to occupy the land as well as have usufructuary right. If the time stated has expired and the seller failed to re-purchase the land, the ownership of the land is therefore transferred to the buyer. This transaction was considered acceptable by Islam as no *Ribā* was involved. For details see S.Buang, 1988: 175-176, 1989a: 97-98, 1989b: 87-88. However, some criticised *Jual Janji* as one way to circumvent the prohibition of interest. Gordon 1963: 30-32 and J.K.Sundaram 1988c have pointed out the contradictions amongst the Malays.

right to repurchase and so made in order to enable the lender to benefit from the transaction lawfully according to Muslim law".

As early as the 1930s in Malaya, attempts had been made to distinguish between 'usury' and 'interest'. The difference between the two was that usury signified the practice of taking exorbitant or excessive interest, while 'ordinary' or what is called legal premium, is denoted by the word interest. The Colonial British had introduced a co-operative concept amongst the Malay peasantry. There was opposition from a section of the Malays who argued that a profit from a co-operative was *Ribā*. In opposition to this interpretation Muslim leaders issued *Fatwās*, holding that profits gained from the co-op was not *Ribā* since the object was the safeguarding the interests of the people and their protection from the moneylenders. They concluded that the payment and receipt of interest as required by the laws of Co-operative Credit Societies was not contrary to the tenets of Islamic law. Likewise, the interest allotted to depositors in the Post Office Savings Bank was regarded as legally acceptable and reference was made to a *Fatwā* issued by the Grand Mufti of Egypt (K.K.Khoo 1990: 20).

Nevertheless, Muslim objections to the above stance had been published in the Malay Tribune, a Singapore based newspaper:

Had the Holy Quran made any difference between usury and interest, it would have allowed a reasonable interest on the capital. Thus the prohibition of *Ribā* includes usury as well as interest (*ibid.*: 21).

Realising the prohibition of *Ribā* for Muslims, led to growing demands for the establishment of an Islamic bank in Malaysia. The demand intensified with the emergence in the 1970s of the Islamic resurgence movement. In the early 1960s, the first major move towards establishing an interest-free institution was the setting up of the Pilgrims Management and Fund Board/Tabung Haji (TH). The success of TH in mobilising the funds of the depositors in accordance with Islamic principles put pressure on the Government to establish an Islamic bank.

A more formal demand for the establishment of such a bank was first made in 1980 when the Bumiputera Economic Congress passed a resolution urging the

Government to allow TH to establish an Islamic bank in Malaysia to mobilise the savings of the Muslims and to invest in a productive manner. Implementation of such a resolution began in 1981 under Dr. Mahathir. He invited prominent international Muslim scholars to Malaysia and accepted their recommendations on how the Government could Islamise the administrative machinery of the country by setting up Islamic institutions such as banks and universities. In the same year, a National Seminar on the "Concept of Development in Islam" was held. Another resolution was passed urging the Government to take immediate steps to pass legislation as a first step toward establishing Islamic banks and other financial institutions. On the same occasion, Dr. Mahathir announced the setting up of an Islamic Resource Group and a Special Enforcement Group with the task of conducting research on all issues relating to an Islamic economic system, as well as assisting the Government's development projects by ensuring that they conform to Islamic principles (H.Mutalib 1990: 138).

Finally the Islamic Banking Act, (IBA) 1983 was enacted which permitted the establishment of the first Islamic bank in Malaysia. BIMB, with a paid up capital of RM100 million and an authorised capital of RM500 million is carrying out its activities on an interest free basis. Tengku Razaleigh, the then Finance Minister described the Islamic bank as the:

first step in the Government's efforts to instil Islamic values into the country's economic and financial systems as a replacement for the current Western-based economic system (NST 6 July 1982.)

He repeated this five months later with even greater conviction when he said that:

In the near future, the Government would create as many as 100 Islamic banks throughout the country (quoted in H.Mutalib 1990: 138).

In launching the Bank, Dr. Mahathir described it in an idiom favoured by the Islamists as "an alternative to the Western banking system" and emphasised that:

The first step in the larger concept of an Islamic economy...the beginning of the efforts to assimilate Islam in the system of finance and economy in the country (NST 25 May 1981, UM 1 May 1983 (edi.)).

## 6.7 Legal and Regulatory Framework of BIMB

BIMB has been incorporated as a public limited company under the Companies Act, 1965. It was hoped that incorporation of the Bank under the Act would enable the Bank to conduct its activities freely without being constrained by regulations imposed on statutory bodies. Even though BIMB is a private body, the Government holds a substantial portion of its paid-up capital. Therefore, the Government is actually backing the Bank and this is crucial for public confidence.<sup>166</sup>

The IBA 1983 is basically a variation of the former Banking Act, 1973 (now amended by Banking and Financial Institution Act, (BAFIA) 1989, with some necessary modifications to make it conform with the Shariah. The Banking Act 1973 (and now BAFIA 1989) required the rate of interest to be a central pillar for banking operations and prohibits the bank from engaging in trade.<sup>167</sup> Since the Quran (2: 275) enjoins that "God permits *Bay'* (trade) and forbids *Ribā'*" (interest), therefore, banks and financial institutions in a truly Islamic economy cannot operate on the basis of interest. This divergence between the Banking Act, 1973 and Quranic injunctions brings to the fore an irreconcilable legal position of the most fundamental nature which implied that the initial legal environment in Malaysia did not allow the establishment of an Islamic bank. Therefore, the Islamic Banking Act (IBA) was legislated on 10 March 1983.

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<sup>166</sup> The actual paid up capital of the Bank was subscribed as follows:

RM million	
Government of Malaysia	30
Tabung Haji	10
PERKIM	5
State Religious Bodies	25
State Religious Agencies	10
Federal Agencies	10
Other qualified bodies	10

See, BIMB: n.d: 26

<sup>167</sup> Section 31 of the Banking Act 1973 stated, "No licensed bank shall engage whether on its own account or on a commission basis and whether alone or with others, in the wholesale or retail trade including import and export except in the course of satisfaction of debts due to it for the purposes of carrying on its banking business." This has been replaced by Section 32 of the BAFIA 1989 (Act 372) which carries the same effect.

### 6.7.1 Salient Features of the IBA 1983

The following are the major provisions of the IBA 1983 as compared with the BAFIA 1989:

(a) Definition section (IBA Section 2) defines the Islamic bank as "any company which carries on Islamic banking business."

(b) Definition of 'Islamic banking business'.

'Islamic banking business' means "banking business whose aims and operations do not involve any element which is not approved by the Religion of Islam" (Section 2). This definition surely poses the question; what is Islamic banking business? It has been clarified through various lectures given by BIMB's officials and its handbook that the banking mechanism of BIMB is as stated earlier, i.e. *Muḍārabah*, *Mushārah*, *Murābahah*, *Bay' Bithaman Ājil*, *Bay' al-salam*, *Ijārah*, *Wadī'ah* and *Wakālah*.<sup>168</sup>

However, these concepts and principles are not laid out in detail in the Act. Having a first glance at the Act, one could feel that there is nothing Islamic about the whole Act except for where it states "...aims and operation not contrary to the religion of Islam.

However, Section 2 of BAFIA 1989 defines 'banking (and finance) business' as:

The business of receiving money in any currency or deposit accounts; paying and collecting cheques drawn by or paid in by customers and provision of finance; which include the lending of money; leasing business; factoring business; the purchase of bills of exchange, promissory notes, certificates of deposits, debentures or other negotiable instruments; and the acceptance or guarantee of any liability, obligation or duty of any person and includes such other business as the Central Bank, with the approval of the Minister may prescribe.

In the absence of a statutory definition of 'banking business' in the IBA 1983, it is the practice and in fact the law,<sup>169</sup> to have regard to the Common

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<sup>168</sup> The last 3 have not been mentioned earlier. *Wadī'ah* is an agreement to deposit assets, excluding immovable fixed assets, in the custody of another party who is not the owner or any such asset deposited with a non-owner for custody. *Wakālah* defined as an agreement between a customer and his bank in which the former appoints the latter as his agent in undertaking a certain transaction on his behalf. While *Bay' al-salam* is a sale contract in which the price is paid at the time of contracting whereas the delivery of the goods sold takes place at a future date. There are various literature dealing with all these principles in a detailed and comprehensive manner. Refer to M.N.Siddiqi 1985, M.Ariff 1988, A.Ahmad 1987.

<sup>169</sup> By virtue of Section 3 and 5 of the CLA 1956. Refer to earlier discussion on this aspect in Chapter Five.

law to determine its meaning. It would appear therefore that the IBA 1983 intends to define 'Islamic banking business' in similar term carried on by conventional banks in Common law jurisdiction. The only exception is that the aims and operations of such banking business should not involve any element which is not approved by the religion of Islam;

(c) Engaging in Trade and Commerce

The fundamental principle of Islamic finance is trading and profit/loss sharing. Islamic banks have to trade to earn an income since the Quran expressly forbids *Ribā* but allows profit-making by trading. However, in conventional banking, wholesale or retail trading by banks and financial institutions is prohibited (Section 31 BAFIA 1989). Therefore, this provision is absent in the IBA 1983 which enables the Islamic bank to engage in such trade and commerce and is in line with Shariah.

#### 6.7.2 Supervision by the Central Bank (Bank Negara)

In order to ensure that BIMB operates according to good banking practices, it has been placed under the supervision, investigation, regulation and control of the Central Bank (Sections 31-43 Part VI IBA 1983). BIMB has to maintain statutory reserves with the Central Bank. The Central Bank has to ensure that the aims and operations of BIMB and its operations do not involve any element which is not approved by Shariah (Section 3(5)(a)). The Minister may on the recommendation of the Central Bank revoke the licence issued to BIMB if it is not pursuing the aims or not carrying out operations according to the principles approved by Shariah (Section 11 IBA 1983). Thus, in order to ensure that the activities of BIMB are in line with and approved by Shariah, the Shariah Supervisory Council has been set up (Section 3(5) IBA 1983, Article 3 BIMB Articles of Association). The Council is important in instilling

confidence in the Muslims that the activities carried out by BIMB conform to Islamic teachings and there is no reason not to support it.<sup>170</sup>

The supervisory role by the Central Bank has however been criticised:

Although the Shariah Advisory Body has the power to advise, it is questionable as to how far it is able to perform such a function. It must be remembered that the Central Bank supervises the whole banking system and therefore the ultimate power rests with the Central Bank. I could understand the government's position in protecting its interest of the Bank paid up capital but it is quite pointless to set up an Islamic institution but to have it supervised by a non-Islamic organisation (quoted in N.Mohd Awal 1989: 28).

Nevertheless, it is crucial that BIMB be supervised by the Central Bank in order to protect the interests of millions of depositors and investors. Even though the Central Bank is not an Islamic organisation as in Pakistan, Iran and Sudan, efforts have been done to ensure that all the operations of BIMB are in accordance with Shariah. We shall discuss later whether the entire Malaysian banking sector should be Islamised (see 6.11).

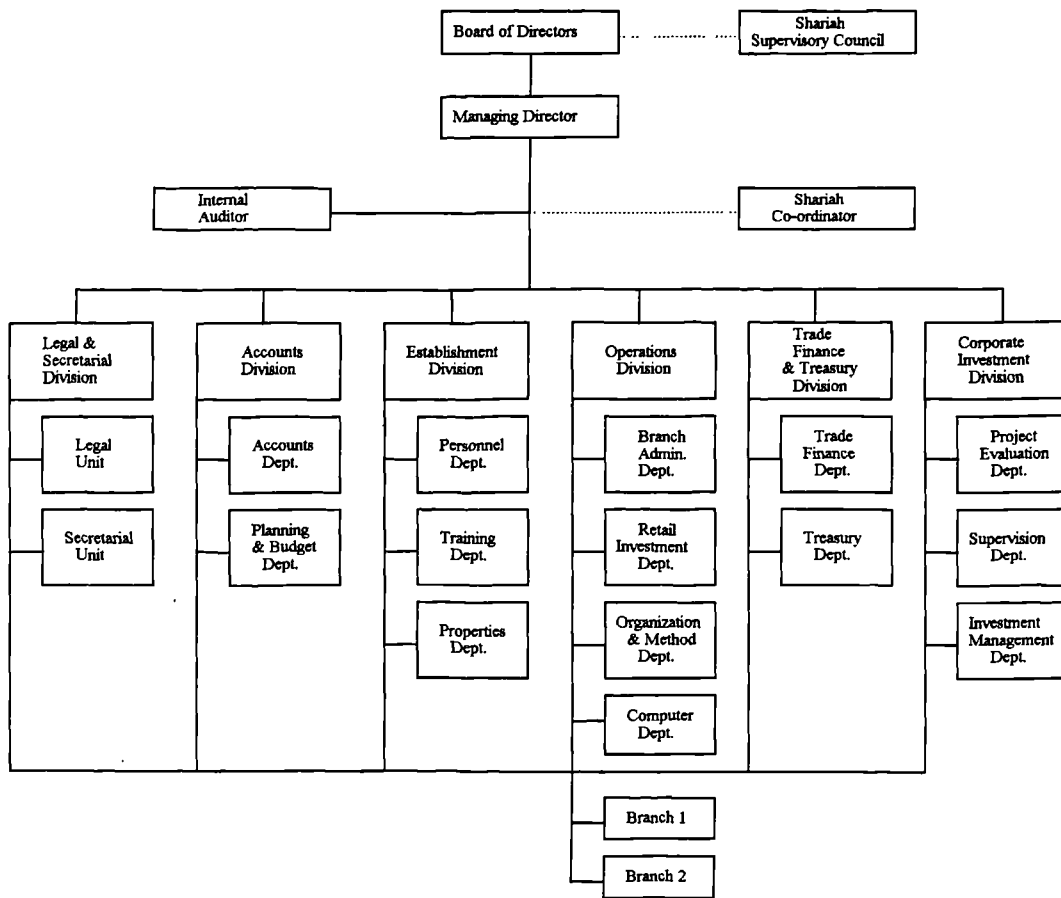
## 6.8 BIMB: Organisational Structure

The organisational structure of BIMB is shown in Figure 6.1. At the apex of the organisation is the Board of Directors. The Managing Director and the Internal Auditor report to the Board of Directors. The Religious (Shariah) Supervisory Council advises the Board of Directors on all areas of operation related to religious affairs (BIMB n.d. : 39). The Bank has three divisions with line functions of operations (trade finance, treasury and corporate investment) and three other divisions with staff functions (establishment, accounts, and legal and secretarial). Each division is divided into departments and further subdivided into units as deemed necessary (Z.Man 1988: 74, BIMB n.d.: 39-41).

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<sup>170</sup> The Council is made up of Muslim scholars and is chaired by Prof. Ahmad Ibrahim, the country's leading Shariah and Common law expert. However, the IBA 1983 did not specify the qualification of the members and the duration of their appointment.

FIGURE 6.1  
BIMB: ORGANISATION CHART



Source: BIMB

Presently, BIMB has 31 branches all over Malaysia. It has 3 subsidiaries:

- (a) Syarikat Takaful Malaysia Sdn. Bhd.: the country's first Islamic insurance company;
- (b) Al-Wakalah Nominees Sdn. Bhd.: which provides nominee and investment fund services;
- (c) Syarikat Al-Ijarah Sdn. Bhd.: a leasing company (BIMB Annual Report 1992).

## 6.9 BIMB and Economic Development

### 6.9.1 In the Field of Mobilisation of Savings and Promoting Investment

In spite of the fact that only a short time has passed since the BIMB experiment began, and in spite of strong competition by interest-banks, the results indicate that

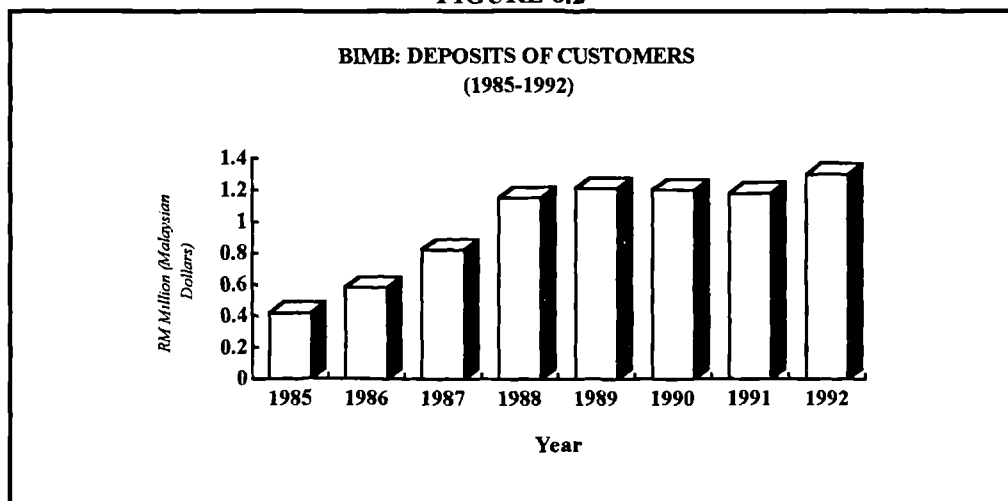


BIMB has achieved the desired goal. Its goal is to offer an interest-free banking system to the Muslims in Malaysia and to mobilise their savings in accordance with Shariah.

The deposits of customers increased steadily from RM405 million in 1985 to RM1229 million in 1989 (BIMB Annual Reports 1985-1989). Nevertheless, there was a slight decrease in deposits in 1990 and 1991, i.e. RM1220 million and RM1175 million respectively (BIMB Annual Reports 1990-1991). This may be due to the huge dividends offered by other investment institutions especially by the most popular Government backed institutions such as ASN and TH. Nevertheless, deposits grew again to RM1321 million in 1992 (BIMB Annual Report 1992).

Between 30 June 1988 and 30 June 1989, the size of saving accounts increased from RM53 million to RM181 million. Investment accounts increased from RM729 million to RM918 million and the overall total from RM1000 million to RM1230 million (BIMB: Annual Reports 1988-89). This can be considered remarkable progress in terms of the role of BIMB in mobilising the funds and savings of the Muslims in a relatively short span of time.

FIGURE 6.2



Source: BIMB: Annual Reports 1985-1992

All Muslims in Malaysia until 1983 were forced to carry on their financial business with interest-based banks, or as devout Muslims did, avoid banks all together. This attitude was probably responsible for the accumulation of huge idle balances in

the Muslim World. According to some estimates in 1983, "US\$80 billion were sitting idle in Muslim countries" (Wohler-Scharf 1983: 76).

From the above, it can be seen that the role of BIMB in encouraging and mobilising the savings of the Malay Muslims is crucial. Prior to the establishment of TH and BIMB, the Malays preferred to hold their wealth in the form of cattle, land and jewellery. In spite of the *Fatwā* issued by the colonial government about the permissibility of accepting interest from the Post Office and the Co-operative, the most favoured methods of holding savings were still the traditional ones (Swift 1957, 1964). This attitude, as claimed by Parkinson, was the cause of economic retardation amongst the Malays (c.f. Von der Mehden 1978: 8, see also 1.3.1 and 7.1). William Wilder who seemed to understand the dilemma of the Malays and in response to Parkinson's criticism, writes:

In the handling of money too, Malays have according to Parkinson, adhered to tradition rather than adopt modern methods. Malays prefer to hold their wealth in the form of cattle, land and jewellery, the rather barren forms handed down through the centuries. This is a strange statement from an economist.....The principle alternatives for holding money are jewellery and banks. Yet Islam forbids the taking of profits from interest, a ruling well known to all Malays and observed by many, and jewellery is saving in a very specific context, namely for a wife...as a measure of security against financial need. Cattle and land are productive wealth (savings) in the same way as cash is. Nor are cattle and land intrinsically 'barren' in the institutional sense; they are perfectly understandable as part of - indeed they are necessary to-the village economy (Wilder 1968: 158 and quoted in T.G. Lim 1975: 342).

It was also argued by some observers that the failure to reach the NEP goal of 30 per cent ownership amongst the mainly Muslim *Bumiputera* was due to the existence of interest (refer 4.4.5). Any *Bumiputera* who wanted to be involved in business, let alone in a large commercial activity, had to obtain a loan from a finance company. This inevitably would bring them into contact with interest especially before the creation of BIMB. Although the Government urged financial institutions to allocate more loans to *Bumiputera* and reduce the rate of interest, nevertheless these measures failed to persuade committed Malays to engage in *Ribā*. The failure on the part of Government in solving this problem had contributed to the failure of the NEP. It was also a cause of the non-existence of a reasonable number of Malay/*Bumiputera* businessmen:

In fact, the capitalist system where interest is a main pillar has caused conflict and dilemma amongst the committed Malays. They are forced to choose between the two, i.e. to involve in a

Government project which inevitably involved *Ribā* which certainly affects their Islamic conviction, or to stay away and uphold the Islamic principles. This situation has created a dilemma for them, between their religious commitment and the need to improve their economic position (M.A. Baharum 1992: 36; tr.).

There are some Muslims in Malaysia who have tried to validate the interest imposed on production loans and asserted that the prohibition of *Ribā* is mainly for consumption purposes. As such, it is claimed that the production loans prevalent in the present financial system cannot be treated as involving *Ribā*. Among the reasons given is that unlike consumption loans, the lender in the case of a production loan is economically weak and the borrower (investor) is economically the stronger party. As such there is no possibility of exploitation. This group claims that debt financing for business capital is the outgrowth of industrialisation and as such it was non-existent during the Prophet's time. It was also argued that, in the modern capitalist economy, one also has to take cognisance of inflation. In an inflationary economy, those who save are the losers, while those who borrow for investment would gain (A. Ali 1993: 123). Accordingly, it was argued that production loans should be excluded from the Quranic prohibition on *Ribā*. In response to this view, Muslim thinkers have reasoned that if there were any substantial difference, the Quran would have differentiated between them as it was revealed to a people (a nation) who were traders and their borrowing included borrowing for business purposes (A. A. Islahi 1988: 130).

Therefore, the existence of BIMB at least managed to solve the problem of the Malay businessmen having to finance their economic activities by *Ribā* based loans.

Above all, Islamic banking is expected to play an important role in attaining the economic objectives of restructuring the *Bumiputera* community and Vision 2020 (see 5.6.3). A restructured *Bumiputera* (Muslim) community which depends on the manufacturing and services sectors will need the full array of Islamic financial instruments.

### 6.9.2 In the Field of Financing Projects

BIMB believes that the success of the economic development process in Malaysia depends mainly on the gradual change towards the creation of a production

sector. For this purpose, the total disbursement of customers increased every year. In 1992 it was at RM1048.4 million as compared to RM828.3 million in 1991. It is the main concern of BIMB's management to exert all efforts to help to realise this demand by providing local development potentialities through:

- (a) Participating in production projects, particularly those that have an effect on the processes of social and economic development. BIMB has not only participated in financing small projects with small traders but has also financed big and multinational corporations such as Petronas, Shell and BP;<sup>171</sup>
- (b) Participating in housing projects. BIMB allocated almost RM46 million in 1989 for construction projects. It is a policy of BIMB to lay emphasis on financing the purchase of low-cost houses by its customers from low and middle-income groups.<sup>172</sup>

### 6.9.3 In the Field of Commercial Transactions

The chief concern of the bank from the beginning has been the import of commodities and services required by local production companies. Therefore, BIMB provides spare parts for machines, new materials necessary for production, cars, buses, building materials, etc, that are necessary for development. In the agricultural field, BIMB is involved in importing chemicals, vertical water pumps, seeds, fertilisers, etc. It is noteworthy that these commercial activities whether by equity-participation or debt-financing were carried out mainly with the private sector. The aim was to help the Malays, especially those in the low income group who have skills to engage in business without involving *Ribā*.

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<sup>171</sup> BIMB has financed a RM63.5 million Islamic financing facility (*Ijārah*) to Petronas Penapisan (Terengganu), a wholly owned subsidiary of Petronas, to part finance the installation of a catalytic reformer unit (CRU) at its refinery plant in Kertih, Terengganu (BT 20 March 1990, NST 20 March 1990). Shell Malaysia has become the first company in the world to raise funds through an Islamic financing facility (*Bay' Bithaman Ajil*). The facility was Shell's RM1.1 billion credit-raising programme for its middle distillate synthesis (MDS) project in Sarawak (BT 14 June 1990, NST 14 June 1990).

<sup>172</sup> For example, the total number of accounts in customer financing increased to 4,070 in 1989 from 3,215 previously. Around 83 per cent of these accounts were for less than RM100,000 (BIMB Annual Report 1989).

#### 6.9.4 In the Field of Social Welfare

As a commercial institution (*Tijārī*) which operates for profit, BIMB is also involved in social and welfare activities. An example is the *Qard-al-ḥasan* facility to be granted to eligible Muslims who are engaged in viable and productive economic activities (see 5.5.1). The biggest contribution by BIMB is through its Zakat payment. Zakat is an obligatory financial levy on all surplus wealth and agricultural income of the Muslims. Its objective is to provide financial support to specified categories of people such as the poor and the needy. Conceptually, Zakat is supposed to be a milestone in providing social security, eradicating poverty and stimulating the economy. Therefore, the Zakat contributed by BIMB and its subsidiaries can be channelled to promote economic development of the Muslims in Malaysia.<sup>173</sup>

### 6.10 BIMB: Problems and Challenges

#### 6.10.1 Legal Impediments to Islamic Banking

As stated earlier, Islamic law is only applicable in a very limited field: family law and religious offences. Therefore the law relating to commerce and business (*Mu' amalat*) in Malaysia is either the statute law or the English law.

Section 5 of the CLA 1956 provides that "in the absence of any written law, the law generally applicable to commercial matters and any matters incidental thereto is the English law". In other words, English principles are inapplicable if there are other provisions in any law covering the question or issues which have been decided. If however, there is no provision dealing with the issue in question, though there may be a general act covering certain aspects of the law, the issue shall be settled by reference to English law on the matter not covered by the Act (Section 5 CLA 1956). Even though the IBA 1983 and others were enacted, they were merely Acts to provide for licensing

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<sup>173</sup> The Zakat contributed by the Bank and its subsidiaries increased every year. In 1990, Zakat given amounted to RM971,000 and increased to RM1,451,000 in 1991 (BIMB Annual Report 1991-1992). Section 44(6) of the Income Tax Act 1967 provides that contribution of Zakat is allowed as credit against the income (Corporation) tax payable by the claimant. Nevertheless, the Act does not allow the balance of Zakat to be carried forward for set off against future income.

and regulating Islamic commercial institutions and did not include any provision of the substantive law.

Therefore, Islamic financial institutions have to work in the context of the Islamic contracts such as *Muḍārabah*, *Bay' Bithaman Ājil*, *Murābahah*, *Ijārah* etc. which have to be interpreted in line with the equivalent of the relevant legislation and the English principles applicable to interpret or supplement the legislation. Thus in the case of BIMB v. Tinta Press Sdn. Bhd. (1986 MLJ 256, 1987 1 CLJ 474), a dispute relating to lease (*Ijārah*) of printing equipment by BIMB to the Defendants had to be dealt with in the High Court according to English legal principles. The Defendants argued that the transaction was not a lease but a loan. There is no reference to Shariah principles. The only reference to Islamic law in the judgement was when the judge held that:

The Bank in its affidavit denied that the Bank had granted loan facilities to the first defendant. Indeed in that affidavit the deposit stated that the Bank operating under Islamic law, does not and has not granted loans to anybody or to any corporate body, except on *Qard al-hasan* which is not applicable in the present case.

The question arises whether such legislation and legal principles are in line with Shariah. The relevant legislation already existing includes Contract Act, 1950, Bankruptcy Act, 1967, Companies Act, 1965, Partnership Act, 1961 and Sale of Goods (Malay States) Ordinance 1957. There is an urgent need to examine these statutes and to bring them into line with the requirement of Shariah, or to make them inapplicable to Muslims (Ahmad Ibrahim 1985a).

There are some other legal hindrances to the smooth running of Islamic banking in Malaysia *vis-à-vis* customer financing:

**(i) National Land Code (NLC) 1965**

Section 205(3) of the NLC 1965<sup>174</sup> which prohibits the transfer of an undivided share of agricultural land of less than 2/5 hectare (1 acre) has created a disadvantage

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<sup>174</sup> Section 205(3) states "subject to sub-section (4), no dealing in respect of any alienated land or any interest therein subject to the category 'agriculture' or to any condition requiring its use for any agricultural purpose shall be effected if such dealing would have the effect of creating any undivided share of such size that, if the land is to be partitioned in proportion to the several shares the area of any resulting individual portion would be less than two-fifths of a hectare."

for BIMB. This is because the nature of the operation of BIMB involves buying the property on behalf of customers, not merely as an intermediate agent between the buyer and the seller as practised by conventional banks. For instance, if there is a piece of land of half an acre which belongs to A and B. The customers C and D go to BIMB to ask the latter to finance the buying of the said property. BIMB will buy the property and it will have difficulty if it is going to sell the property to C and D because the NLC 1965 prohibits the transfer of that land to another party. Therefore, this provision should be abolished or made inapplicable to BIMB since unlike other commercial banks, it is involved in trade, not merely financing transactions.

**(ii) The Charge's Form**

The charge's form in the NLC 1965 which states 'interest' should be supplemented by the word 'profit'.

**(iii) Hire Purchase Act, 1967**

BIMB is presently involved in financing its customers in acquiring fixed assets such as land, property, equipment, etc. under the Islamic concept of *Bay' Bithaman Ajil* and *Ijarah*. Nevertheless, this Islamic method of *Bay' Bithaman Ajil* is not covered by the Hire Purchase Act, 1967 since the Act is outside the principle of Shariah. According to Shariah, there should not be two transactions in one contract (*'Aqd*). It must be two separate transactions, i.e. hire followed by purchase.

The Hire Purchase Act has given complete protection both to the financier and the debtor in terms of legal documentation and enforcement of such an agreement. Thus, it will not be difficult for a financial institution to conduct its operations especially in cases involving repossession, unlike the agreements entered into under *Bay' Bithaman Ajil* which need approval from the Civil Court before they can be enforced (N.M. Yasin 1989: fn 80). Therefore, it is hoped that this Act be modified in order to make it consistent with Shariah. There is already a draft Islamic Hire Purchase Bill awaiting enactment by the Parliament.

### 6.10.2 Islamic Banking in a Capitalistic World: Competition

The theoretical concept of Islamic banking on the basis of PLS was originally developed under the explicit assumption of a general prohibition of interest. Today, BIMB has to carry on its business in a capitalist economy where interest persists and BIMB exists side by side with interest-based banks. This will create problems for a newly established Islamic bank in competing with the established and world-wide influence of the conventional banks.

Normally, depositors in Islamic banks can be classified into two categories:

- (a) Those motivated mainly by Islamic commitment and conviction. These depositors will put their money in an Islamic bank regardless of the rate of profit as it is the only institution devoid of interest. This group is increasing in number especially in the wake of Islamic revivalism in Malaysia and elsewhere.
- (b) Those who are concerned purely with maximisation of profits.

An entrepreneur who is considering an investment project will only decide in favour of an Islamic bank on the basis of PLS, if the expected profit is larger than that of interest from conventional banks. Since both the entrepreneur and the Islamic bank strive for maximum profit, they will bargain for the desired ratio of their profit. If an Islamic bank claims a higher ratio of profit than the entrepreneur, this will lead the latter to turn to a capitalist bank. Therefore, the Islamic bank has to adapt its claims for a given investment project to the market rate of interest. If the interest rate of commercial banks is high, the Islamic bank cannot claim a higher ratio of profit sharing since it will be less attractive to customers who have the option to invest in interest-based banks.

In the capitalistic environment of Malaysia, where an Islamic bank and commercial banks co-exist, the investors may only deposit or invest their money in BIMB if they are confident that they will gain higher profits and their money is secure. For instance, for 1991/92, BIMB's deposits from customers rose but the balances in general investment accounts continued to decline (as in the previous two years) as its



rates of profit were less attractive against rates of interest on fixed deposits paid by conventional banks (Z.Phoon 1993: 13). Furthermore, BIMB is competing not only with the commercial banks, but also other Government supported investment institutions such as TH and ASN Scheme (see Chapters 7 and 8). Both these institutions have managed to offer an attractive rate of return to their depositors.

### 6.10.3 Identity Crisis

BIMB, like other Islamic banks, faces an identity crisis as to its true Islamic status. Some people accused the Islamic banks of charging interest in "a disguised form and they are mainly similar to other commercial banks albeit without the interest label" (Z.Man 1988: 91). BIMB since the early days of its inception has concentrated on the second line techniques, i.e. *Murābahah* and *Bay' Bithaman Ājil*. In 1984, out of the total new financing and investment granted, 77.6 per cent were granted under the principle of *Bay' Bithaman Ājil* and 9.7 per cent under *Murābahah*. Thus, both *Bay' Bithaman Ājil* and *Murābahah* constituted 87.3 per cent of the financing and investment granted. This figure increased to about 95 per cent in 1985 (BIMB Annual Report 1986). The concentration on 'mark-up' or 'profit-margin' techniques remained steady each year. In 1992, 97.5 per cent of BIMB finance was based on this method, while only 0.22 per cent was based on *Muḍārabah* and *Mushārahah* (BIMB Annual Report 1992).

Therefore, *Murābahah* and *Bay' Bithaman Ājil* have proven to be the most popular methods, although technically correct and permissible, in effect they operate very much like interest-based lending.<sup>175</sup> Theorists of Islamic banking are disturbed at this phenomenon:

There is a genuine concern among Islamic scholars that if interest is largely substituted by devices like 'mark up' it would represent a change just in name rather than in substance. and the new system would not be rid of the iniquitous nature of the interest-based system. It is also emphasised that, apart from equity consideration, the prohibition of interest in Islam is meant to stimulate overall productive activity, generate maximum employment and encourage innovation which is the

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<sup>175</sup> This is the view of an overwhelming majority of scholars (M.U.Chapra 1985, M.N.Siddiqi 1988, Z.Man 1988, K.Zaheed 1994, Kazarian 1987).

mainspring of growth. These blessings can only be reaped if the interest system is completely uprooted in the real sense of the term and replaced by a fundamentally different system like profit/loss sharing) (M.N.Siddiqi 1988: 56).

The bank has been accused of being only concerned with making profits and neglecting the welfare element in its operations. This allegation was due to the tendency of the people to equate BIMB with *Bayt al-māl* (welfare institution).<sup>176</sup> BIMB belongs to the *Tijārī* (commercial) sector. As a commercial organisation, it was argued that BIMB operates on profit because it needs to protect the interests of the depositors and shareholders by maintaining a reasonable rate of return on their investment (H.Ismail 1986).

The aim of every commercial institution is to make a profit. Zakaria Man (1988: 92) has been critical of the nature of BIMB in operating its business. He does not accept the concentration on the second line techniques. He strongly urged BIMB to concentrate on *Muḍārabah* and *Mushārahah*, which he claimed to be more just and in line with Islamic principles:

The fact that the bank needs to make profits cannot justify its over-dependence on the second-line techniques of operation because possibilities for making even more profits through the first line techniques such as *Muḍārabah* and *Mushārahah* are not absent. Besides, the bank's over-dependence on the second-line techniques may also lead to inequitable distribution of gains between the users and the providers of capital. Otherwise, the bank cannot contribute significant changes in the distribution of income as encouraged by Islam. In this context, it is relevant to note that many customers of the bank prefer to get *Murābahah* rather than *Mushārahah* finance, as they make more profits after paying a fixed sum of mark-ups as agreed in the contract. Clearly, the first-line techniques of *Muḍārabah* and *Mushārahah* will be more just in terms of profit distribution between the users and the providers of capital (Z.Man 1988: 92).

There are several arguments which support the BIMB stance:

- (a) There is no Quranic prohibition on these types of finance. Therefore, to equate the practice of trade financing under the scheme of *Bay' Bithaman Ajil* and *Murābahah* with interest amounts to rejecting the permissibility of trade as expounded by Quran and the rulings of Muslim jurists (H.Ismail 1985, J.Hussein 1990: 36). In fact, BIMB has a Shariah

<sup>176</sup> Muslim jurists have categorised the Islamic economic system into three sectors:

a) *Siyāsī* or government sector which should encompass all public sector commercial activities;  
b) *Tijārī* or commercial sector which should encompass all private sector commercial activities;  
c) *Ijtimā'ī* or welfare sector which should encompass the administration of *Bayt al-māl*, Zakat and *Ṣadaqah*.

Advisory Council to oversee the Islamic validity of its operations and therefore should have advised BIMB if this method was Haram;

- (b) The requirements of members of the community in this modern age are highly varied. There are various types of financing required by customers such as for house purchase or for business. These various modes of financing would have to be met to the satisfaction of both financier and the party financed (H.Ismail 1985). To restrict all the requirements to or give priority to the PLS transactions will have the effect of undermining the criteria of meeting the viability of both parties, i.e. the Bank and the customers;
- (c) Such methods are considered less risky in view of the capitalist climate of Malaysia. The possibility of getting an unscrupulous partner in such PLS transactions might cause loss to BIMB. It has to monitor the project and more personnel have to be employed (M.N.Siddiqi 1988: 51-55, A.Ahmad 1987).

The resolution over the debate concerning the first and second line techniques is fundamental to the continued success of Islamic banking in Malaysia. There exists a real danger that an element of doubt may exist in the minds of depositors that BIMB is failing to be truly Islamic:

The Islamic bank is but another bank. It may abolish interest, but given the capitalist structure of the economy, the Bank like other commercial banks, will continue to mobilise the savings of the ordinary people for investments that will earn profits, which will almost always benefit those in the middle and upper echelons of society. The abolition of interest in a capitalist economy without other fundamental changes can only lead to greater injustice and inequalities (C.Muzaffar 1987: 82).

### **6.11 The Future of Islamic Banking in Malaysia**

Islamic banking is widely recognised by Muslim scholars as one of the approaches to be adopted in the process of Islamising an economy. This approach is based on the premise that under the existing political, social and technical constraints, Islamisation should be phased in, so as to avoid any abrupt changes which might cause unpredictable chaos in the economy. Accordingly, Islamisation of the banking sector is to be implemented by first establishing a model Islamic bank side by side with the existing interest-based banks. The nature of co-existence between Islamic and

conventional banking is going to be a significant issue for the Malaysian economy.<sup>177</sup>

The Governor of the Central Bank, Tan Sri Jaafar Hussein <sup>178</sup> said:

I have a dream, and my dream is that I will be able to see, in my life time, a fully fledged Islamic financial system in Malaysia, functioning side by side....both equally sophisticated and modern (quoted in the Star 4 November 1991).

Therefore, the Muslims in Malaysia would have to accept the fact that the whole banking system in Malaysia is not going to be Islamised. Multi-religious and multi-racial Malaysia would not allow such a thing to happen. Jaafar Hussein added that: Our aim during the 1990s is to establish a comprehensive financial system which runs parallel with the conventional system. We should not aim at least for the present to completely replace the conventional system in Malaysia with the Islamic financial system. The Islamic financial system should be implemented gradually, so as not to create disruptions. This is important considering that Malaysia has a multi-religious population (quoted in BT 30 March 1990).

Dr. Halim Ismail, managing director of BIMB who is the initiator of Islamic banking in Malaysia has been interviewed on the possibility of the Islamisation of banking in Malaysia. Dr Halim does not believe in universal Islamisation, rather he upholds the system of co-existence which he claims to be more suitable to multi-racial Malaysia:

In the first place, I would raise a question, why must the total banking system in Malaysia be Islamised? I am not clear myself but I believe we cannot generalise. Malaysia has 50 per cent of her population who are not Muslims. Suppose we want to implement Islamic law in Malaysia. Nobody has ever discussed what is the stand of Islamic law relating to the freedom of the non-Muslims. The 50 per cent population consisting of non-Muslims have their right to make decisions for themselves. Suppose they do not want to conduct banking the Islamic way but on the basis of interest. I would like to raise a question, what is the true stand of the Islamic state? If I recall at the time of the Prophet in Medina, there were Muslims and there were also non-Muslims- the Jews. However, the Jews had never been forced to follow Islamic rules, hence they conducted their financial system in their own way through *Ribā* and the Prophet did not prevent them. The Prophet prevented only the Muslims.....So what I'm aiming at this (sic) is that perhaps the true teachings of Islam is that for a country with a mixed population like Malaysia, there can exist two systems to cater for Muslims as well as non-Muslims who choose to adopt the Islamic way, and the non-Islamic system to cater for the needs of non-Muslims so long as the non-Islamic system does not bring in immediate and direct injury to the Muslims (H.Ismail 1989: 13).

BIMB remains the sole Islamic bank in Malaysia, surrounded by hundreds of conventional banks. As indicated earlier, in 1982 the former Finance Minister said that the Islamic bank was "a first step in the Government's efforts to instil Islamic values into the country's economic and financial system as a "replacement for the current

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<sup>177</sup> Postscript: In January 1994, the Islamic Money Market was launched aimed at creating a comprehensive Islamic Financial System. Malaysia is thus the first country to implement a dual banking system, that is an Islamic banking system on a parallel basis with the conventional system (MD January/February 1994).

<sup>178</sup> Postscript: He has recently tendered his resignation and his replacement is Ahmad Mohammad Don (Impact International May 1994: 27)

Western-based economic system" (quoted in H.Mutalib 1990: 138). He further added that "in the near future, there would be as many as 100 such banks throughout the country" (*ibid.*). Presently, BIMB is still monopolising the Islamic banking sector in Malaysia and Muslims have no choice but to turn to this Bank to avoid involving themselves in *Ribā*.<sup>179</sup> In many instances, BIMB has been criticised for imposing a higher rate of mark-up in financing their customers as compared to interest-based banks. For the critics, this is tantamount to exploitation which is equally forbidden in Islam.

Instead of establishing more Islamic banks, the Government has recently embarked upon establishing interest free banking facilities within existing conventional banks. In March 1993, three major commercial banks in Malaysia were given permission to offer interest-free banking to customers side by side with their conventional banking (refer 5.5.1). In future, more commercial banks will be given permission by the Minister to offer the same. As Malaysia's thirteenth biggest bank, BIMB returned a pre-tax profit of around RM13 Million in 1990 which has increased each year (BIMB Annual Report 1991). In 1992 it was about RM20 million (*ibid.*). This profitability and viability of Islamic banking in Malaysia has inspired more conventional banks to offer the same. As said by Mr. Loy Hean Hong, chief executive officer of MBF Finance:

By offering non-interest based loan packages, it hopes to attract more Malays who might be fussy about financial ethics (The Banker August 1991: 57).

On the future role of Islamic banking and finance in Malaysia, Abdul Halim offers a bright prospect:

The market can be big, but it has to be nurtured and developed in an orderly manner....The success of Islamic banking will also depend on the political stability, economic growth and a visionary leadership which we're enjoying now. And assuming that it's as efficient (as conventional banking), it should attract non-Muslim customers too, which means the market should grow. Above all, the Islamic banking and financial system is expected to play an important role - which is to attain the economic objectives of restructuring the *Bumiputera* community and Vision 2020 (when Malaysia is expected to be an industrialised nation (ID KLSE April 1993: 11).

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<sup>179</sup> Postscript: Bank Rakyat (Peoples' Bank) is likely to become the second Islamic bank. This Bank has started implementing Islamic instruments and intends to fully convert its operations from conventional to Islamic banking within the next two years (New Horizon March 1994).

A restructured Muslim *Bumiputera* community which depends on the manufacturing and service sectors will need the full array of financial facilities and services, but some *Bumiputera* may not use conventional banks for mobilising and disbursing funds. So, if the number of *Bumiputera* who do this is large, he reasons, this may jeopardise the restructuring objectives. Therefore, there is a crucial role for Islamic banking to provide Shariah-based facilities to such sections of the *Bumiputera* population.

As for Dr. Mahathir, the establishment of Islamic banking in Malaysia is a test of the suitability or non-suitability of Islam for progress. It is also a test of whether Islamic banks would be able to compete with the rest of the capitalist banks:

What is needed is not a symbolic gesture, but an effort that the Islamic banking system can play a role in a modern economy. But if the Bank fails, the belief that Islam is suitable for all ages and all civilisations will be undermined (M.Mohamad as quoted in K.Siddiqui 1985: 311)

## CHAPTER SEVEN

### TABUNG HAJI (TH)

#### 7.1 Introduction

The development of Tabung Haji (TH) shows the relevance of Islam and Malay ethnicity in Malaysian economic development. Since Independence, TH has become a model of modern management operating in accordance with Shariah. The NEP has led to modernisation and urbanisation amongst the Malays. Set adrift in an urban, secular, multi-racial society; many of them have turned to a real affirmation of cultural identity. In this context, Islam has played a role as a vital component of Malay community identity and as a vehicle for nation-building. TH has been used to create a new Malay able to fulfil the aspirations of the Government; to alter the people's perception of the Government from secular nationalist to one responsive to Islam. There is a growing perception that being a better Muslim is comparable to being a good Malaysian citizen.

This chapter will show how TH has combined Islam and Malay ethnicity into a single whole. It is an institution to accommodate and facilitate Hajj, while mobilising and investing the savings of the Malays in accordance with Shariah with the purpose of improving their socio-economic position.

#### 7.2 Origin and Establishment

Incorporated in 1962, TH is a result of the Government's concern for the welfare of its Muslim populace in relation to their pilgrimage to Mecca. To perform Hajj is compulsory for eligible Muslims since it is one of the pillars of Islam. The journey to Mecca could mean spending a lifetimes savings with a lot of sacrifice and hardship. In order to meet the expenses, Malays traditionally used to save their money in pillows, under mattresses, in cupboards, even in earthen jars buried for safety. Otherwise they had to sell their land or livestock to raise the money. The reason for their recourse to traditional ways of saving was due to their desire to be absolutely sure that the money to be spent on Hajj was clean and untainted by *Ribā*. Savings in any bank or financial

institution at that time (before the formation of BIMB) would involve *Ribā*. The economic plight of Muslims in general and particularly after performing Hajj was very distressing and had adverse implications for economic development and national growth. This led to the allegation that Hajj practices among the Malays were economically dysfunctional. While some argue that saving for the pilgrimage develops habits of frugality, others complain that the relatively large sums spent on such an 'economically dysfunctional activity' drains away funds that might otherwise be employed in commercial pursuit (Von der Mehden 1978: 8):

The pilgrim saves, borrows, or uses ready capital for a purpose which has little or no positive developmental role, and possibly major negative aspects. For not only is this capital not 'usefully' employed, but its proceeds are spent in large part outside the country. The view rests on a number of assumption: that these funds would not be used for other 'non development' purposes; that during the period when savings were being accumulated the funds were not being employed to achieve developmental goals: and that there are no other modernising ends being achieved through the Hajj (*ibid.*: 62).

Realising the above problem, Ungku Abdul Aziz, a reputed academician and an authority on the rural economy submitted a paper to the Government in 1959 entitled "A Plan to Improve the Economic Position of Future Pilgrims" suggesting the formation of the Pilgrims Saving Corporation. Ungku Aziz recommended that future pilgrims could save in the Corporation which would be interest-free but yield profits. Profits derived from investments would be returned in the form of profit sharing or dividends to depositors thus not only avoiding *Ribā* but also assisting them financially in meeting their expenses for Hajj.

This recommendation could only be implemented in 1962 when Syeikh Mahmoud Al-Shaultut, Rector of Al-Azhar University, Cairo visited Malaysia. After studying the paper, he was fully convinced of the soundness of the recommendation. He praised the plan as one that would greatly benefit the Muslims in Malaysia and urged its implementation. Thus, the Pilgrims Savings Corporation was incorporated in August 1962 and launched in September 1963. In 1969, the Corporation was merged with the Pilgrims Affairs Office which had been in operation since 1951 to give birth to the Pilgrims Management and Fund Board (PMFB or Lembaga Urusan dan Tabung Haji (LUTH) and later known as Tabung Haji).



The objectives of TH are as follows:

- (a) To enable the Muslim community in Malaysia to save in investments for the expenditure in performing the Hajj;
- (b) To enable the Muslims, through their savings, to participate in investments in accordance with Shariah;
- (c) To provide for protection, control and welfare of Muslims while on Hajj through the various facilities and services of TH (TH Annual Reports, TH 1991: 4, Wan Hussain 1990: 2).

### 7.3 Legislative and Organisational Framework

The establishment of TH has been provided for by the Lembaga Urusan dan Tabung Haji (LUTH /Pilgrimage and Management Fund Board) Act, 1969 (Act 8). The Preamble of the Act specifies that the main function of TH is to manage a:

fund for the maintenance and utilisation of savings in connection with the protection, control and general well-being of the pilgrimage to the Hedjaz (Mecca) and matters ancillary thereto.

Even though initially TH had been created solely to facilitate going on Hajj, the Act does not prohibit it from engaging in investment activities. Section 4 provides:

It shall be the function of the Lembaga (TH) to administer the Fund and all matters concerning the welfare of the pilgrims and to formulate policies in connection therewith and to do such other things as may be done under this Act.

This provision has been translated into the aims and objectives of TH at the operational level namely:

- (a) The collection and management of the pilgrimage fund;
- (b) The administration and management of pilgrims.

Thus, the Act permits TH to invest the depositors' money in order to generate profits. In implementing its function, TH adheres to the Shariah principle of *Wadīat Wakalāt al-Muṭlaqah*, i.e. the depositors give consent to TH to manage their deposits for the purpose of investment. The profits derived from investment are then distributed among the depositors in the form of bonus. This is done after TH has determined the net distributable profit for the year after the payment of Zakat.

Section 23(1) provides for the assets of the Fund to be invested in such manner as the TH management thinks fit. However, TH is not free to invest in all types of business. The main guiding principle for equity investment, although not mentioned in the Act, is that it should be invested in companies which conduct businesses in accordance with Shariah. Therefore, TH will not invest in any interest-based institutions and companies which deal in, liquor, prostitution and gambling. As indicated by its then Director General:

Our policy on investment is that we go to companies whose operations are allowed by Shariah. We therefore do not participate in companies operating un-Islamic businesses such as finance and liquor. When the companies in which Tabung Haji has equity stakes branch out to other activities which are non-Halal, then we will back out (quoted in BT 9 January 1989).

Therefore, divergence from the Shariah principles should result in the withdrawal of shares or participation by TH. There have been occasions in the past when such actions were deemed necessary and were taken by TH.<sup>180</sup>

The prohibition on investing in non-Shariah investment activities is similar to that of the Socially Responsible Investment (SRI) or Ethical Investment Movement in the West. The principle of SRI is essentially similar to that of an Islamic investment institution. Besides profits, they also define other criteria to select companies or institutions in which to invest so that people may invest in a manner consistent with their principles (cf. Miller 1991, Ward 1991).

Another limitation on TH's investment as specified by the Act is that TH can only invest in securities issued or registered in Malaysia or property situated outside the country after obtaining approval from the Treasury (Section. 23(1))

Section 4A provides for the establishment of an Advisory Council (*Majlis Penasihat*) whose functions shall be:

- (a) To advise the Minister on matters pertaining to the welfare of the pilgrims;
- (b) To advise the Minister on any matter referred to him.

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<sup>180</sup> In the 1970s, TH withdrew its investment in business involving liquor and hoteling. This attitude continued into the 1980s when two companies namely Rasa Sayang Hotel and Bousted Holdings Limited were withdrawn from the TH investment portfolio since they had later diversified into activities not according to Shariah (BH 17 January 1986).

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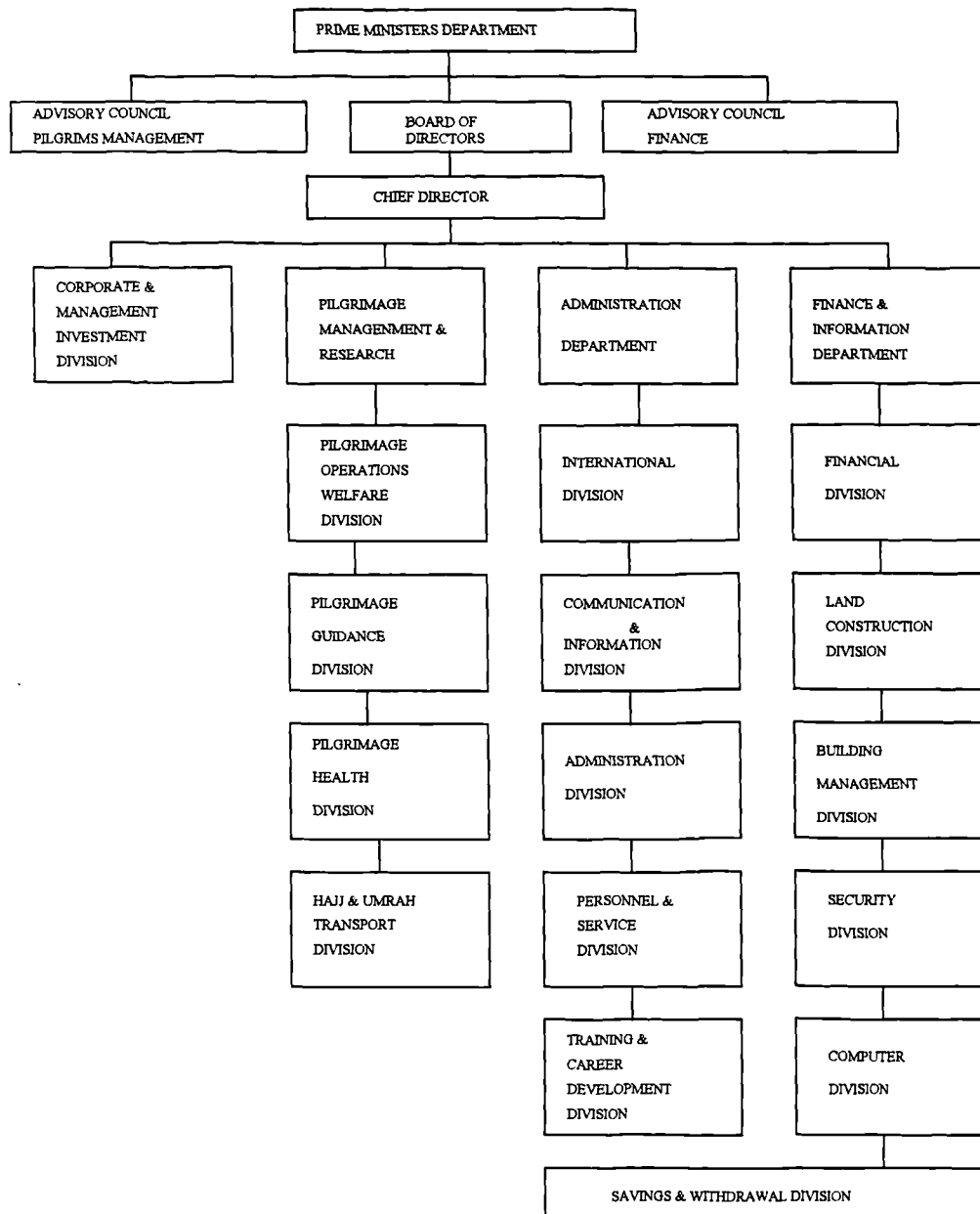
Besides that, TH also uses the expertise from the Shariah Advisory Council of BIMB relating to any Shariah matters for which they have to make a decision. For instance, if they are doubtful as to whether such businesses conducted by the companies are in accordance with Shariah (Wan Hussain 1991: 32).

The Act defines 'Pilgrims' as "any person other than a non-resident of Malaysia" (Section 2). Therefore, the Act is only applicable to residents of Malaysia and this provision should be amended to include other non-residents and non-citizens as well, especially after 1981 when TH extended its services. Before 1981, TH was only responsible for handling intending pilgrims from Malaysia. However, the Regional Islamic Dakwah Council of Southeast Asia and the Pacific (RISEAP) made a special request to TH to extend its facilities to Muslims from elsewhere in the region. Aware of the difficulties faced by other Muslims, especially from Muslim minority countries, in making the pilgrimage, the government of Malaysia gave permission for the commencement of the Scheme. Therefore, three parties: TH, Malaysian Airline System (MAS) and RISEAP got together to work out the necessary arrangements. In the first two years of the Scheme, nearly 200 Muslims, mainly from Australia and Fiji were able to perform Hajj to Mecca (Al-Nahdah 1983).

TH's structure, as shown below is headed by the PM's Department. Directly below it is the Executive Board Council which is assisted by the Advisory Council on Pilgrimage Management and the Advisory Council on Finance. Three members of the Executive Board Council are appointed by the YDA, namely the Chairman, Deputy Chairman and the Chief Director and Executive. There are ex-officio members representing the government, namely representatives from the PM's Department, the Treasury and the Ministry of Health. In addition there are five members of the Board who are politicians appointed by the PM. The Government has almost total control of TH. There is no provision for elected or nominated members from the contributors to the fund or representatives from neutral parties, such as businesses or institutions of higher learning, although a few such individuals do sit on the Advisory Councils.

FIGURE 7.1

## TH: ORGANISATIONAL STRUCTURE



Source: TH

The two main functions of TH are to organise Hajj for the Muslims and to invest their savings so as to give the depositors maximum returns. These two functions are reflected in the organisational structure of TH which has the Advisory Council on Finance and Advisory Council on Pilgrimage Management. These two Councils are to advise TH in their respective areas. While members of the finance council are made up of government economic advisors as well as established financiers from the private

of government economic advisors as well as established financiers from the private sector, the members of the Pilgrimage Council are largely made up of representatives of relevant government departments and ministries, representatives of state governments and 10 others appointed by the minister as experts on pilgrimage affairs or its related fields. It is interesting to note that while the Pilgrimage Council has numerous members who could be called experts on the Shariah aspects of the Hajj, most of the Finance Council could not be called experts in the Shariah aspects of economics and financing. In these matters, as in the case of determining the payment of Zakat, the Authority has to get the advice of the National Fatwa Council or has to seek assistance from the Shariah Advisory Committee of BIMB.

As shown above, the day to day administration and management of TH is headed by the Chief Director and Executive. Under him are four departments, each headed by a Deputy Chief Director:

- (a) Corporate Management and Research Department;
- (b) Pilgrimage Department;
- (c) Administration and Information Department;
- (d) Finance and Investment Department.

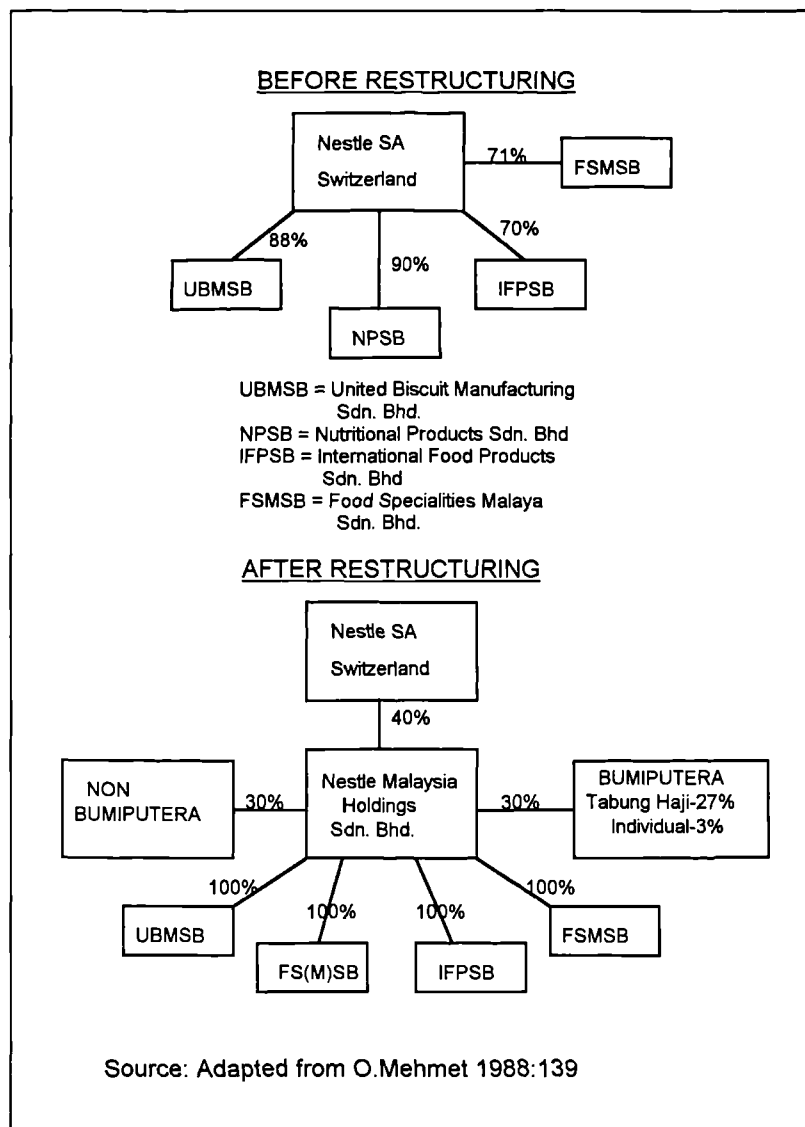
Each department, apart from than Corporate Management, has several divisions. The organisational structure of TH does not differ much from public and other corporate structures except that it has Advisory Councils to advise it on matters relating to its main functions namely pilgrimage and investment. It is primarily a quasi-government organisation because most of its senior executive members as well as the members of the Advisory Councils are appointed by the Government. As an authority created by the Government, the staff can also be considered as civil servants. The Government undertakes a major role in TH because the performance of the Hajj is one of the pillars of Islam, furthermore Islam is the official religion of Malaysia. In addition, there are apparent advantages in being a governmental organisation (see 7.4). In general, there is nothing un-Islamic about the structure of TH except for some minor issues involving its membership.

#### 7.4 TH as Government Investment Institution

Initially, TH was merely an institution facilitating pilgrimage. But later, as a manifestation of the NEP and the Islamic resurgence, TH has been selected as an approved Government institution. Since then, TH has taken advantage of its privileged status as a Bumiputera Trust Agency (as stated in 4.4.3). As a result, it acquired a highly diversified corporate portfolio and has become one of the largest holding companies in Malaysia. It controls a large network of interlocking directorships through its majority stockholding interest in manufacturing, plantation and real estate sectors (O.Mehmet 1988: 107-108, 1990:157). Under the NEP, all companies were required to restructure their equity ownership to reflect local participation in holding a certain percentage of equity of the company. Therefore, as an approved Government investment institution, TH has been invited by the companies to participate in their restructuring process. For example, 17.15 million shares in five companies at an issued price of RM30.87 million were allotted to TH in 1988 as listed on the KLSE. This compared with the allocation of only 2 million shares at issue price of RM2 million in 1987 (BT 13 February 1990). Again in 1989, TH was allotted shares in another five newly formed companies. TH has become the largest shareholder in Computer Firms (Malaysia) Limited with 4.1 million shares (25 per cent) of its enlarged capital of RM164.4 million (The Star 25 January 1990). TH and BIMB have jointly taken up 51 per cent equity in the General Electric Company of Malaysia (GEC) and have already held discussions with GEC in the United Kingdom with a view to diverting manufacture of some of their products to Malaysia (NST 27 October 1986).

In the case of Nestle SA Switzerland (see Figure 7.2), a holding company was established for the 40:30:30 arrangement. TH has taken up 27 per cent of Nestle Malaysia Holdings. Before the restructuring process, local participation ranged from 12 per cent to 30 per cent. Afterwards, local ownership increased to 60 per cent in each company, of which *Bumiputera* own 30 per cent.

**FIGURE 7.2**  
**THE NESTLE RESTRUCTURING CASE**



Thus, TH emerged as a successful Islamic institution which combines Malay capitalism and religion in a uniquely Malaysian way. On the one hand, it is an institution which facilitates Hajj, on the other, it channels savings thus generated into a highly accelerating corporate growth aiming at the maximisation of profits (see also 7.5b). This is evident by the fact that despite heavy criticism of the role of Nestle in the Third World over its baby milk policy for instance, TH seems to have overlooked this ethical aspect of its investment policy.

Broadly, there are four types of investment made by TH:

- (a) Investment in shares (equity participation);
- (b) Investment in subsidiary companies;



- (c) Investment in land and building;
- (d) Short-term investment (TH Annual Report 1989).

As an Islamic institution which operates its activities in accordance with Shariah, TH also uses the same Islamic types of instruments. Such instruments include *Muḍārabah*, *Mushārah*, *Ijārah* and *Murābahah* (refer 6.4).

### 7.5 TH Performance: An Evaluation

The operation of TH can be divided into two: Hajj Management and Investment. Our interest will be in the latter category.

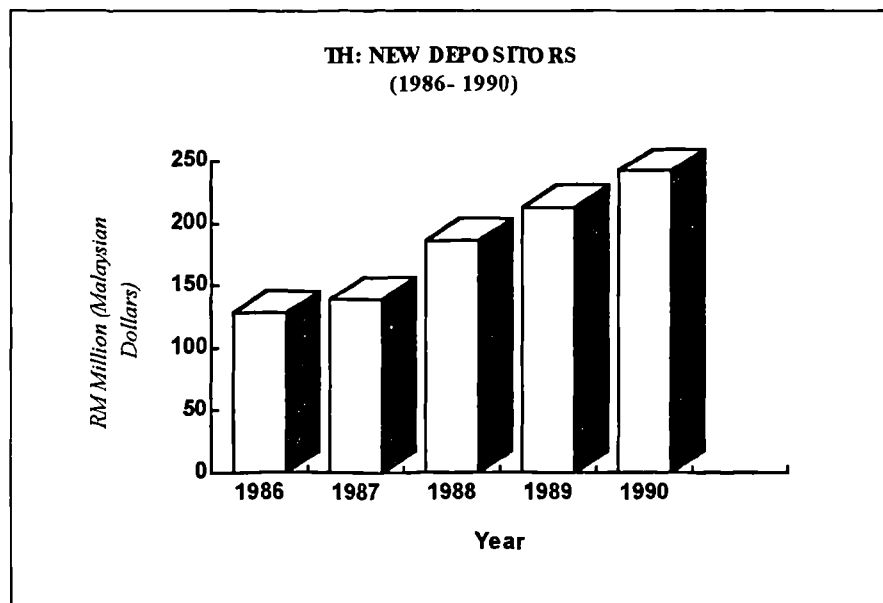
The number of depositors in TH as of 30 December 1990 amounted to 21 per cent of the eligible Muslims in Malaysia (TH Annual Report 1990: 67). This was regarded as small compared to the ASN Scheme covering 44 per cent of the eligible *Bumiputera* in the same year. Although TH was introduced earlier than ASN, the number of depositors is smaller. Even though ASN covers Muslims and non-Muslims (*Bumiputera*),<sup>181</sup> the majority are Muslims.

Nevertheless, there was a steady increase in deposits each year. Taking 1987 as the base, there was a 41 per cent increase in deposits the following year and an increase of a total of RM466.9 million or 19 per cent in 1989. In 1990, the increase was 0.7 per cent to RM557.3 million (The Star 23 July 1991). The target for the year 2000 is to achieve at least 50 per cent of the Muslim population to be members of TH and to increase the average deposit balance from RM750 to RM1000 per year (*ibid.*).

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<sup>181</sup> Bumiputera includes non Muslim natives of Sabah and Sarawak. ASN membership is also open to other minority groups such as the Siamese and Portuguese due to historical and political grounds

FIGURE 7.3

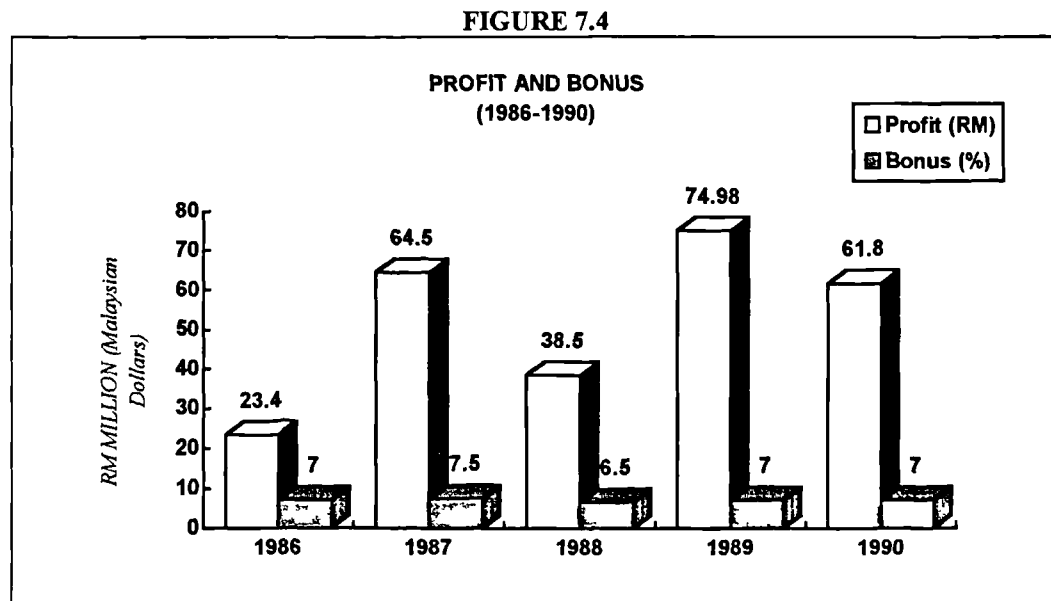


Source: TH Annual Reports 1986-1990

For this purpose, TH has to improve its promotional strategy so as to attract more Muslims to participate. The withdrawal facility must be improved so as to enable depositors to withdraw money at any time like other financial institutions. Currently, withdrawals are limited to twice a year, and withdrawals of more than RM1000 can be made only at the head-quarters in KL. TH ought to issue evidence of participation and ownership to its depositors (ASN has a certificate whereas BIMB has a savings book for its savings account and a certificate for the investment account). Currently, TH does not issue any type of savings book or certificate. In addition, as part of its promotion strategy, starting from 1 January 1986, bonus paid to depositors was exempted from income tax. The depositors do not have to declare it on the income tax form. Previously, only a bonus less than RM10,000 was tax-exempt (Wan Hussain 1991: 22).

Investment in TH will grow if the Muslims are assured that they will get a reasonable return on their savings, that their money is safe, and that TH is well managed. As shown in Figure 7.4 below, the pre-tax profit trend over the last five years was relatively good. In 1986, it was RM23.40 million, 1987 RM64.50 million, 1988 RM38.54 million, 1989 RM74.98 million and 1990 RM61.80. The trend of profits was

inconsistent. There was no steady increase of profits as has been the case of BIMB and ASN (refer 6.9.1 and 8.3)



Source: TH Annual Reports 1986-1990

Nevertheless, the rate of return in terms of bonus offered to depositors has remained relatively constant at an average 7 per cent since 1986 (see Figure 7.4). This is due mainly to two reasons:

- (a) As a Government Investment Institution, TH undertakes to guarantee every *Ringgit* (Malaysian currency) deposited in TH (Wan Hussain 1991: 44, TH n.d., 1991: 24). The Government's support to ensure that the depositors in TH obtain a certain rate of profit regardless of the outcome of TH is crucial in attracting investment. This raises a very interesting point from the Islamic perspective, i.e. the relationship of bonus paid to investors and the profits earned by TH. "The desire to maintain a reasonable rate of dividend without considering the returns on profits is much closer to conventional capitalist practices than to that of Islam, especially the profit sharing methods of *Mudārabah* and *Mushārahah*" (Abdul Malik 1987: 25). This has led some quarters to criticise TH as un-Islamic because it does not really adopt to the PLS principle (*ibid.*);

(b) TH, in spite of its religious nature, does not escape from maximising its profits. TH with a similar organisational structure to Bumiputera Trust Agencies, has therefore been criticised as similar to other capitalist institutions which are obsessed with corporate growth and self-enrichment:

Despite its Islamic character, LUTH (TH) has not shied away from taking advantage of profitable opportunities made available under the NEP trusteeship to become a capitalist holding company.....It is in fact a typical example of the basic inequity of the NEP trusteeship system: the fact that it has institutionalised post-colonial upper class living of quasi-rents, speculation and corruption.....The LUTH trustees are a component of the larger NEP trusteeship obsessed with corporate growth and self-enrichment (O.Mehmet 1990: 160).

As a part of its development and commercial policy, TH will only enter into an investment that give it a return of at least 10 per cent provided that the business is not against the tenets of Islam. In determining whether the investment is Halal or not, TH has to refer to the Shariah Supervisory Council of BIMB. It has no Shariah Council of its own. This process sometimes takes a long time and as a commercial institution, this can lead TH to miss certain profitable investment opportunities. Even if the businesses in its investment portfolio are yielding profits each year, as an Islamic institution which is a trust on behalf of the Muslims, TH is supposed to withdraw its investments if the companies have diversified into activities which contradict with Shariah. Despite the limitation of being a saving institution which conducts business devoid of *Ribā*, TH has managed to emerge as one of the country's largest corporate entities.

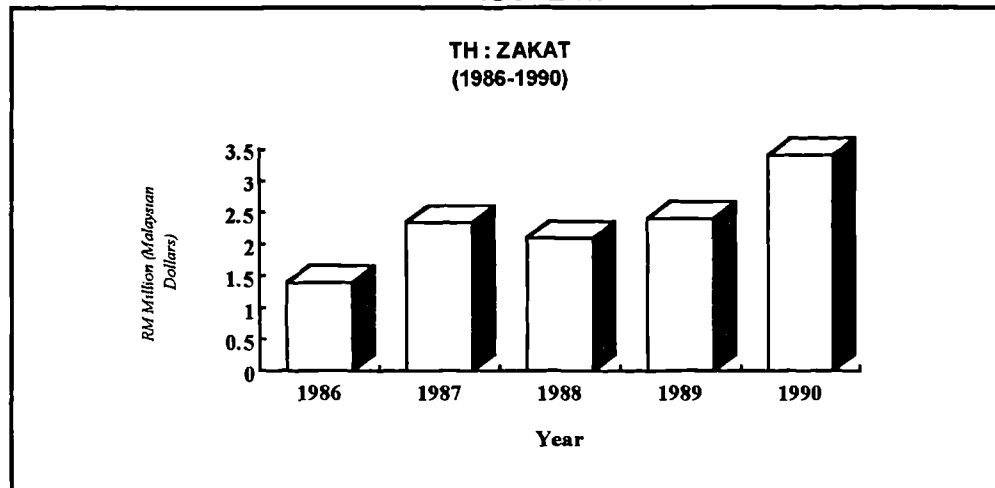
The contribution of TH to the economic development of Muslims in Malaysia is obvious. It has promoted and mobilised Muslim resources in an Islamic way for which in 1990, TH won a prize for Islamic banking.<sup>182</sup> TH also managed to contribute to the economic development of Malaysia by increasing payment of Zakat<sup>183</sup> each year (See Figure 7.5). The Zakat paid by TH as a religious obligation can be used to help poor Muslims in Malaysia, as well as to carry out the economic projects aimed at improving the socio-economic condition of Muslims in Malaysia.

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<sup>182</sup> As an incentive for Islamic commercial institutions, the IDB based in Jeddah, has provided a prize for the most outstanding Islamic commercial institution. In 1990 the award went to TH in a recognition of its successful investment activities.

<sup>183</sup> The payment of Zakat is allocated to every State Islamic Religious Council according to the proportion of total deposits. It means that more Zakat is given to a state with the highest deposits (Wan Hussain 1991: 24).

FIGURE 7.5



Source: TH Annual Reports 1986-1990

The success story of TH and BIMB must be taken as an example for other commercial institutions. Likewise, ASN and others should free themselves from any *Ribā* element if they are really sincere in establishing an Islamic environment in Malaysia and in offering an alternative to devoted Muslims to utilise their savings for profitable investment according to Shariah.

As an institution established and operated to conform to Islam, the investment activities of TH are carried out according to Islamic principles, its rules and practices are similar to Islamic banks and other Islamic investment institutions. Nevertheless, TH is not allowed to engage in *Murābahah* since it is not a banking institution. This is why despite the fact that TH has been involved in constructing houses and other residential property for its depositors, it does not provide any facilities to finance the buying of such property. TH, along with BIMB, have to play the main role in financing the purchase of property for Muslims without having resort to interest-based institutions for loans.<sup>184</sup>

Presently, TH only provides financial facilities to buy property (houses and motor vehicles) to its staff only using the method of *Bay' Bithaman Ājil*. TH finances the purchase of the property and later sells it to the applicant with a profit margin. The

<sup>184</sup> It was said that TH would only provide financial facilities to buy property (e.g. house) for its depositors when the total deposits amount to RM5000 million (UM March 1988). As at 1990, deposits stood at only RM557 million (The Star 23 July 1991).

applicant (staff) pays the price of the property through instalments within a specified period. In the agreement, there is a buying and selling price stated and the mark-up made by TH, and the number of instalments to be paid.

As indicated earlier, the Islamic method of *Bay' Bithaman 'Ajil* is not protected by the Hire-Purchase Act, 1967 since the Act is outside the principle of Shariah (refer 6.12.1). It means that if the buyer defaults in paying the instalments, TH Haji has no right to repossess the property. Pending implementation of an Islamic Hire Purchase Act, in order to ensure instalments, TH management has ruled that all applicants must provide two guarantors. In the case of default, the guarantors will be required to pay on behalf of the applicant.

## 7.6 The Prospects for TH

TH policies and the increasing involvement of Malays in Hajj has had a major impact on the economy. With rising religiousness especially under the trend of Islamic revivalism, more Muslims especially Malays have joined TH. Previously, elderly rural people were the main depositors in TH, but lately an increasing number of younger, middle class urban Malays have started depositing their money. As well as these urban Malay Muslims who have deposited mainly out of Islamic conviction, secular urban upper class Malays have also tended to join TH. This group may have looked on Hajj as a fashionable symbol of Malayness and see Islam and status going hand in hand.<sup>185</sup> In the climate of Islamisation in Malaysia, Islam has replaced the West as a prerequisite for advancement and has come to be an asset in political terms. Therefore, with the increased Government supported Islamisation project combined with the Islamic resurgence, the aim of TH to increase the number of depositors is achievable.

So far, most investments carried out by TH have only been in Malaysia. As explained earlier, TH Act, 1969 (Act 8) restricts its investment to Malaysia except with permission from the Treasury (Section 23). In spite of this legal constraint, TH has invested RM2.7 Million with the Unit Investment Fund managed by the IDB in Saudi

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<sup>185</sup> According to its Chairman, professional people are the biggest group of TH's depositors (*ibid.*).

Arabia. The decision to invest in this fund is mainly for commercial reasons, that is to obtain attractive returns from a carefully selected range of investments conforming to the principles of Shariah. The Fund also enabled TH to take part in investment opportunities in IDB member countries (The Star 23 July 1991).

TH is negotiating with the Government to buy 17.4 per cent of its 30 per cent stake in BIMB. In an interview, its chairman stated that they hoped to be the biggest shareholder with 30.5 per cent equity in BIMB (*ibid.*). When asked about TH's role in helping the Government to realise the vision of a developed country by the year 2020, Datuk Hanafiah said:

We will be sitting down to discuss what TH can do to help realise the Prime Minister's Vision 2020. One thing is clear, we want to help enlarge the economic cake for the benefit of all Malaysians (*ibid.*).

TH will continue to invest in viable projects which can give a good return with *Bumiputera* or non-*Bumiputera* as well as foreign investors. At the same time, TH also hopes to build up a core of *Bumiputera* executives and professionals to support the Government's objective of creating a viable *Bumiputera* commercial and industrial community (*ibid.*).

In summary, TH's policies and the increasing involvement of Malays in Hajj has had a major impact on the economy. TH is likely to continue to be a highly successful Malay/Muslim financial institution in mobilising the savings of the Muslims as long as it remains within its Shariah guidelines.

## CHAPTER EIGHT

### AMANAH SAHAM NASIONAL (ASN)

#### 8.1 Introduction

The unit trust scheme known as Amanah Saham Nasional (ASN) is a scheme for mobilising Malay savings for equity investment. It was launched in 1981 as a major vehicle for implementing the transfer of corporate assets held under trusteeship to the *Bumiputera*. Unlike BIMB and TH, ASN is aimed mainly at improving the economic conditions of the *Bumiputera*, especially the Malays and therefore, the ethnic aspects overshadow the religious ones. Nevertheless, as the relationship between Islam and Malayness are so intertwined, ASN has also been associated with the Islamisation package of Dr. Mahathir.

As discussed in the previous chapters, the Government adopted the NEP to restructure society so that the economically backward Malays would be able to own at least 30 per cent equity in the corporate sector. Previous experience shows that the Malays were more interested in capital appreciation than in equity ownership. In other words, the shares allocated to the Malays were sold when the price went up, thus defeating the objective of the NEP. Research also indicated that when Malay shareholders sold their shares, the proceeds were used for consumption and not for investment purposes (PNB 1989: 3).

In order to find a more effective way of achieving the aims and aspirations of the NEP, the Government established a Working Committee in 1977 under the chairmanship of Tun Ismail Mohamed Ali. The Committee drew up policies for the establishment of a Bumiputera Investment Fund. Among these were:

- (a) The formation of a fund as a business entity with the authority to invest in all forms of investment and the authority to obtain loans;
- (b) The establishment of a unit trust fund to distribute these investment to the *Bumiputera* community (*ibid.*: 4).

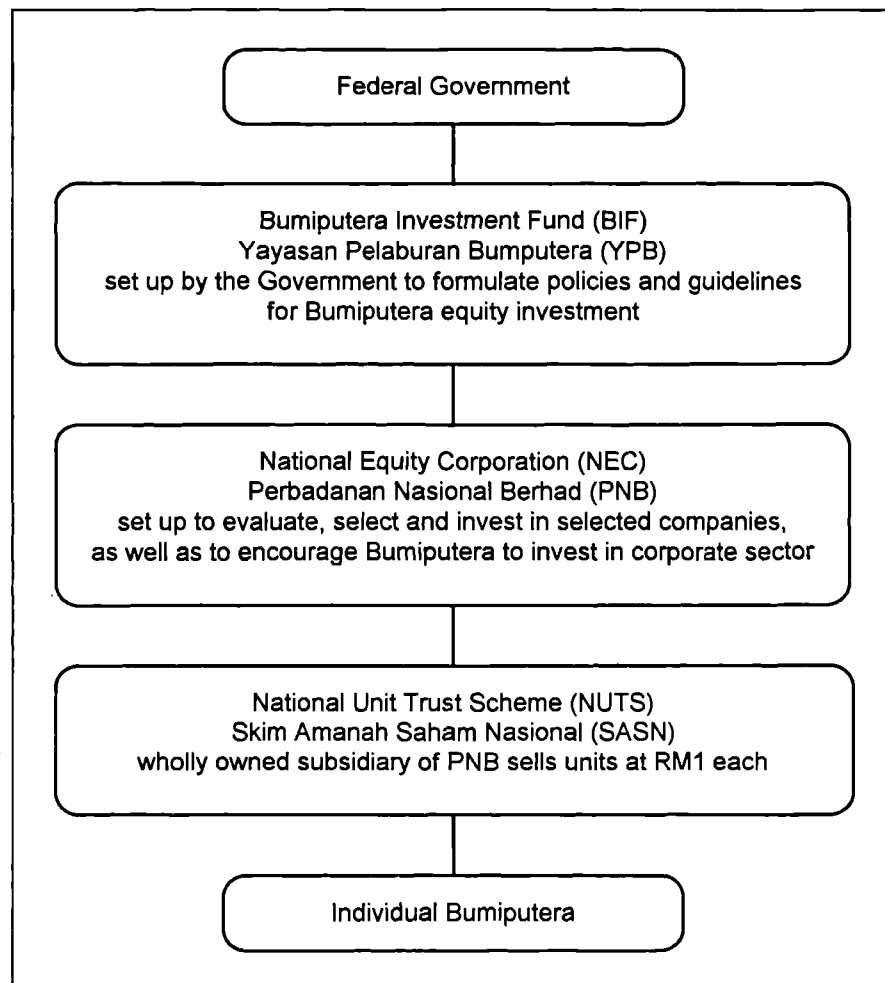


As a result, the Bumiputera Investment Foundation (BIF or Yayasan Pelaburan Bumiputera (YPB)) was set up on 9 January 1978 under the Companies Act, 1965, as a company limited by guarantee (PNB 1989: 4). The YPB provides funds for the purpose of subscribing to shares in companies which wish to issue their shares to the *Bumiputera* community in compliance with the NEP. It also formulates policies and guidelines for *Bumiputera* equity investment participation. It has acted as a catalyst in encouraging the savings habit, developing entrepreneurship and investment skills among the *Bumiputera* community.

To further the YPB's objectives, in March 1978, the National Equity Corporation (NEC or Permodalan Nasional Berhad (PNB)) was incorporated as a wholly owned subsidiary of the Foundation. PNB is a commercial organisation, managed by professionals who are responsible for selecting and operating the portfolio of shares of limited companies in Malaysia to be held in trust for subsequent sale to individual *Bumiputera* investors. In May 1979, National Unit Trust Limited (Amanah Saham Nasional Berhad (ASNB)) was then incorporated as a wholly owned subsidiary of PNB to establish and manage a National Unit Trust (NUT or Amanah Saham Nasional (ASN)) scheme as an intermediary for the channelling of shares to the *Bumiputera* community (R.Amin 1987: 27, O.Mehmet 1988: 109).

To launch ASN, the Government instructed the *Bumiputera* companies (e.g. PERNAS) and statutory bodies (e.g. SEDCS) to sell part of their equity portfolios to the PNB at book value. Thus, it was reported that PERNAS had to suffer a substantial loss for the year 1982 because it had been forced to transfer more than RM1 billion of assets to PNB (O.Mehmet 1988: 109). This government-imposed sale of assets resulted in serious opposition from PERNAS and other affected *Bumiputera* Companies (*ibid.*).

**FIGURE 8.1**  
**INTERMEDIATION FOR THE CHANNELLING OF SHARES TO BUMIPUTERA**  
**(THE ORIGIN OF ASN)**



Source: Adapted from The Star 10 January 1981

## 8.2 ASN Scheme: Some Salient Features

The main features of the Scheme have been carefully devised to encourage the widest possible individual participation based on PNB's preparatory research to ascertain the socio-economic profile of the typical *Bumiputera* unit holder. At the same time, incentives are provided in the Scheme, as a form of savings and investment. Therefore, the Scheme does not have exactly the same features as other ordinary shares. In ordinary shares, the buying and selling prices of each unit are quoted on a daily or weekly basis. The unit-holder, as a risk-taker, can expect to make capital gains in addition to a certain level of investment yield as dividend. It is the prospect of

capital gains rather than investment which is the typical motivation behind participation of in such shares. Unlike ASN, until 1991, the scheme holder could only resell their units to ASNB at the original par value of RM1.<sup>186</sup> This condition was designed to build a strong *Bumiputera* equity ownership.

The ASN scheme is based on a clear separation of equity ownership from corporate control. Ownership is controlled by its unit holders, but they do not have the right to appoint or change the managers. Immediate control, as distinct from ultimate control, including decisions regarding the investment portfolio, rests with a management team appointed by PNB and the YPB. By way of compensation for this separation of ownership and control, unit-holders were guaranteed a minimum annual dividend of 10 per cent until 1990. In addition, the first RM4000 of investment income is tax-exempt resulting in an earlier yield of up to 15 per cent (O.Mehmet 1988: 111).

### 8.3 Progress and Development

The year 1990 marked the passing of an important phase in the operation of PNB. During the past decade, the operations of PNB have been expanded and its original objectives have been achieved. PNB started the decade as an investment organisation and by 1990, it had grown to become an important institution for the mobilisation of *Bumiputera* savings.

In December 1990, ASN had a total of 2,460,977 unit holders as compared with only 841,200 on 31 December 1981, the year which ASN was launched (PNB Annual Reports 1981 and 1990). Net investment of ASN unit holders rose from RM299.1 million as of 31 December 1981, to RM8,511.4 million as of 31 December 1990 (*ibid.*). Through prudent investment of the portfolio of ASN, the unit holders been rewarded with satisfactory returns. During the decade, the return on investment ranged from 13 per cent to 20 per cent a year comprising dividends and bonus units provided by PNB. The total dividends and bonuses paid out to unit holders rose from RM75 4

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<sup>186</sup> Each unit of ASN was priced at RM1, available in RM100 denominations or more and each unit holder could purchase up to a maximum of RM50,000. Participation in ASN was restricted to *Bumiputera* aged 18 years or over (PNB Annual Reports)

million in 1981 to a cumulative amount of RM4,135 on 31 December 1990 (PNB Annual Report 1990: 62).

In December 1990, PNB appointed an independent actuary to survey the investment return of pooled funds and savings institutions in Malaysia over the previous 10 years. The results of the survey showed that ASN provided the highest annualised rate of return on investment. As an example, an annual investment of RM1,000 a year in ASN from 1981 would have accumulated to RM31,762.67 on 1 January 1991 (*ibid.*).

In view of the growth of PNB during the last decade up to 1990, it undertook a strategic review of its operations. As a result, various programmes were implemented which would provide the necessary preparations to position PNB and to enhance its expected role in the decade of the nineties.

A major work programme was to enable transactions in ASN to be conducted at variable unit prices from 2 January 1991 as specified by its Deed of Trust. Another project was the launching of a new scheme called Bumiputera Trust Scheme (Amanah Saham Bumiputera (ASB)) on 2 January 1991 with a fixed transaction price. This was to enable *Bumiputera* unit holders to continue investing in a scheme with similar features to that of ASN before the latter commenced operations based on market prices on 2 January 1991.

In 1991, PNB faced a new challenge, that of managing two unit trusts with different characteristics. The challenge included transforming ASN, the original scheme, into a conventional unit trust scheme while at the same time promoting ASB, a new scheme with guaranteed buying and selling prices similar to the old pre-1990 ASN.

On 2 January 1991, ASN began transactions at variable unit prices. ASN's pricing is subject to the market performance of the shares of companies quoted on the KLSE. The new pricing system thus requires unit holders to follow the movements of share prices on the KLSE and the various factors affecting them. The new pricing was well received by unit holders as reflected by the overall performance of ASN in 1991. As of

31 December 1991, the total number of unit holders in ASN was 1,310,499 with a total investment of 1,666.82 million units (PNB Annual Report 1991: 11). ASN unit holders have also begun to adapt themselves as investors to the new pricing arrangement and have been able to take advantage of the capital appreciation of ASN units as indicated by the large number of units sold, when they considered the prices to be attractive.

To ensure separate management of ASN's investments, a new company, Pengurusan Pelaburan ASN Berhad (ASN Management Investment Limited) was incorporated on 20 June 1991 (*ibid.*). This separate structure enables the investment managers of ASN and ASB to concentrate entirely on their respective portfolios.

PNB's main investment is in four main sectors, i.e. industry, plantation, mining, property and finance (PNB Annual Reports). Its sources of investment can be divided into four:

- (a) Purchases from stock-market and institutions;<sup>187</sup>
- (b) Allocation of shares through companies;<sup>188</sup>
- (c) Restructuring from the Ministry of Trade and Industry;<sup>189</sup>
- (d) Transfer Scheme from Government to *Bumiputera* (R. Amin 1987).<sup>190</sup>

#### 8.4 ASN: Connection with Islamisation

As stated in the previous chapter, Dr. Mahathir seems to show much concern in promoting Malay capitalism and development. He is seen as a champion of Malay rights and has tried very hard to convince the Malays that their economic condition can be uplifted if they possess the right attitude and get proper opportunities. Compared

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<sup>187</sup> This is a normal operation that takes place where shares are brought from the stock market on a long-term basis where the yield, strength of the companies and the real net tangible asset value of the investment are taken into careful consideration. In other instances, shares may also be purchased through discussions with the institutions involved.

<sup>188</sup> This normally takes place when listed companies issue additional shares through the Ministry of Trade and Industry to increase their share capital. The Ministry will allocate a certain amount of these shares to PNB which were given the first priority during its initial stage of establishment. At present, however, the allocation of shares is no longer based on this priority.

<sup>189</sup> In this instance, regardless of whether the companies are quoted or unquoted, the issuance of share capital through the Ministry will be given priority of selection to PNB in the allocation procedure. This is done with the aim of restructuring Malaysian society to fulfil the objectives of the NEP.

<sup>190</sup> This transfer scheme of Government equity was launched on 9 January 1981, involving as many as 21 companies of excellent performance. One of the motives of this Transfer Scheme is to sell the transferred Government shares to *Bumiputera* individuals through ASN. This measure has acted as a major stepping stone for the initiation of ASN (The Star 10 January 1986. AB June 1981, Watan 13 June 1981).

with other PMs, it could be stated that Dr. Mahathir has a strong interest in Islam and has always associated Islam with Malay economic development. Islam has been seen as the basis for change and modernity. Therefore, ASN (along with BIMB and TH) is a tool to develop Malay Muslims especially in fulfilling the aspiration of the NEP, i.e. 30 per cent Malay equity ownership of the corporate sector:

If we fail to achieve the 30 per cent target by 1990, we will not be able to effectively influence the economy, much less evolve an Islamic economic system. It was because of this that the Government launched the ASN as a tool to achieve this aim. It was due to the role played by ASN, Pernas, SEDCS, etc, that the *Bumiputera* had acquired an 18 per cent stake in the economy. If these agencies were disallowed, it would be possible that the *Bumiputera* might not even hold a 1 per cent stake in the national economy, more so if Bank Islam (BIMB) was not accepted, then Muslims would degenerate from their present position (M.Mohamad, quoted in BT 26 May 1984).

Dr Mahathir stressed that unless Malay Muslims support the Government's projects such as ASN and BIMB, the predominant political role of the Malay would deteriorate. Therefore, paradoxically, even though ASN is meant for *Bumiputera* (including natives of Sabah and Sarawak and other special community groups such as those of Portuguese and Siamese origin), ASN has also been connected with Dr. Mahathir's Islamisation package.

Realising the close connection between the ASN/ASB Scheme and Islam/Muslim, therefore it is crucial to analyse it from a Shariah perspective and consider any contradictions. There has been a controversy about the Islamic legality (Halal) of ASN/ASB which needs to be highlighted.

### 8.5 ASN: Evaluation of its Operations According to Shariah

The initial share transfer by the Government to PNB had itself been the starting point of the controversy. From the list presented below, we find that finance and insurance companies were also involved in the 'Big Share Transfer'. In 1991, there were fourteen companies of this type in the Scheme, excluding BIMB<sup>191</sup> compared to only

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<sup>191</sup> Information obtained from the handout given by Cik Norhapisah Ahmad, PNB officer during an interview in September 1991 in KL.

six initially (see Table 8.1) and twelve in 1986 (PNB Annual Report 1987). This clearly indicates that despite the awareness of the existence of such companies in the Scheme which were operating on the basis of *Ribā*, the number has still kept on increasing.

TABLE 8.1

**FINANCIAL COMPANIES INVOLVED IN THE FIRST SHARE TRANSFER (1981)**

- (a) Komplek Kewangan Malaysia Bhd.
- (b) Malaysia National Reinsurance Bhd.
- (c) Malaysia National Insurance Sdn. Bhd.
- (d) Malayan Banking Bhd.
- (e) Bank Bumiputera (M) Bhd.
- (f) Malaysia Industrial Development Finance Bhd.

Source: The Star 10 January 1981.

The policy guidelines on investment adopted by PNB has caused some criticism from Muslims. PNB's efforts in applying rigorous standards of evaluation as to the security, yield, liquidity and growth potential of the companies in which shares are selected, reflects the conscience of the management as to their responsibility in ensuring high returns for the shares transferred to the unit holders of the Scheme. However, one important aspect is missing, i.e. the criterion of the activities of the selected companies according to Shariah. Since the basic objective of the Scheme is to promote *Bumiputera* investment in the corporate sector, so all efforts should be geared to obtain as much investment from the *Bumiputera* community as possible. One very effective measure is to eliminate all elements of doubt concerning investment in the Scheme from the minds of every *Bumiputera* Muslim. Therefore, the Government has to be sensitive about the feelings of the Muslims towards the elimination of all prohibited activities particularly the obvious *Ribā* element so as to ensure the purity of returns obtained.

We shall now highlight the controversial investment by the ASN management in financial institutions.

TABLE 8.2

ASN INVESTMENT IN FINANCIAL SECTOR			
Year ( 1986-1990)	% of investment in Financial Sector	Dividends (excluding bonus & free unit)	% of the eligible <i>Bumiputera</i> Investors
1986	22.0	10.0	44.3
1987	33.5	10.0	44.8
1988	27.0	9.3	45.0
1989	24.5	9.5	45.0
1990	27.7	9.5	44.0

Source: Rounded figures from PNB Annual Reports 1986-1990.

From the above, investment in the financial sectors which operate on interest ranges from 22 and 34 per cent which is significant. The total participation of interested *Bumiputera* is between 36 and 45 per cent, which is less than half of the total eligible *Bumiputera*. At this juncture, the question may arise as to the reasons which prevent the remaining half from investing? If we look at the dividends given, it was an attractive 10 per cent. This dividend excluded the bonus and other free unit allocated to the shareholders. Other promotions include low-interest loans to eligible ASN investors, monthly payroll deductions and even interest-free loans for ASB.<sup>192</sup> Could the roughly 30 per cent of interest-based investments be the cause of this retreat? If this is the case, it is strange that the Scheme should retain the 30 per cent investment level at the expense of the 50 per cent of potential investors who would have invested but for this particular factor.

The Marketing Department of ASNB conducted a survey in 1981 with the following objectives (see R.Amin 1987: 63-66):

- (a) To know the problems faced by investors before and after investing;

<sup>192</sup> Commercial banks such as Bank Rakyat, MBB, BBMB, UMBC and UAB have been offering loans to enable *Bumiputera* to invest in ASN. The potential investors who are deemed capable of repaying the loans can each borrow up to RM40,000. The amount must go towards 90 per cent of the investment made and should be within 10 years (NST 21 June 1983, NE 22 June 1983).



(b) To know the reason of those who have not invested, the motivations for investment and the views of the *Bumiputera* community towards the Scheme.

ASNB interviewed 1097 respondents in 100 urban and rural areas mostly in Peninsular Malaysia. The results of the survey can be illustrated as follows:

REASONS FOR NOT INVESTING IN ASN

Percentage (54% of the total)	Reasons
17.9	will invest later
15.3	do not have the time
13.4	do not understand the Scheme
4.0	save/invest in other places
3.5	live far from ASN agents

The survey revealed other reasons as follows:

- (a) Old age;
- (b) Lack of motivation;
- (c) Unsatisfactory services;
- (d) Lack of confidence;
- (e) *Fatwā* reasons;
- (f) Lack of interest;

At a glance, it can be noticed that 'other reasons' constituted 46 per cent not stated in the above data, almost half of those who did not invest. From this 46 per cent, the precise percentage of each reason has not been provided. Could there have been a reason as to why this information should be left obscured from the masses, so much so that it has been omitted from the rest of the data to look insignificant? Could *Fatwā* reasons have constituted a large portion of the percentage? Even if the research found otherwise, the sample used in the survey is still questionable, when the ratio of urban to rural respondents has not been specified. This may have a significant influence on the results obtained since the degree of religious consciousness between the urban and rural population and among the states generally varies (*ibid.*) In 1991, evidence shows that the Malay dominant states with a strong PAS influence such as Kelantan,

Terengganu and Kedah have a relatively small number of depositors as compared to other states with 15.5 per cent, 17.4 per cent and 15.7 per cent respectively.<sup>193</sup> A PAS official has said:

The Party was prepared to campaign to attract more *Bumiputera* to invest in the Scheme if the Scheme withdrew its capital invested in companies involved in business contrary to Islam (The Star 6 December 1985).

The problem is that there is a clash over how Halal ASN is. The Secretary to the Minister of Trade and Industry once said:

The business and industries involved in the ASN is different from such business activities as alcoholic drinks, lottery, etc. All the business involved in ASN are permissible (Halal) industries such as the palm oil industry, tin industry, etc. (BH 10 March 1981).

Perhaps the above statement is justified if he referred only to the industrial sector of the investment portfolio. If however, he meant all business in general, then this clearly shows a lack of understanding of the full operation of the Scheme even among those in high authority. The same expression was echoed by one ex-Chief Minister of Johore who criticised those who said the Scheme was Haram and invited all the Muslims to participate in the Scheme (The Star 4 April 1981).

The same happened when the National Islamic Religious Affairs Department, West Malaysia (Jabatan Hal Ehwal Kebangsaan Agama Islam) issued a *Fatwā* that the Scheme was Halal (BH 10 March 1981). The late-Mufti of Kelantan, Dato' Haji Ismail had also declared ASN and even other conventional banks as Halal. He had made the following observations:

- (a) It was not certain whether ASN had invested in sectors that are contrary to Shariah;
- (b) The aim of ASN is to help the *Bumiputera*. Therefore in a period of urgency where there is a need to help the Malay Muslims, Islam permits what is otherwise prohibited.<sup>194</sup>

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<sup>193</sup> The information obtained by Cik Norhapisah Ahmad, PNB officer during an interview with her in September 1991 in KL.

<sup>194</sup> This information is based on an unpublished hand-out issued by the Committee to review the legality of ASN according to Shariah.

The Federal Government has declared the Scheme Halal and has invoked the economic development factor which transcends the religious considerations, and has used all its machinery including the civil service to promote ASN widely. It went to the extent of holding a special sermon (*Khutbah*) in Friday congregational prayers to inform that ASN is Halal (BH 26 May 1984). TH's chairman, Dato Hanafiah also supported ASN and declared that ASN is Halal, when he said that:

The question of *Ribā* should not be an issue (Bintang Timur 30 April 1981; tr.).

Hussein Onn, the former PM regards ASN:

as a tool towards building of a new and united society and a vital tool for ensuring at least the 30 per cent *Bumiputera* equity ownership in the corporate sector by 1990. ASN has been planned after taking into consideration all important aspects. From the economic angle; a concrete measure in line with the objective to remedy the economic imbalance among various communities. Social angle; an instrument for restructuring society and raise the people's living standards. Political angle; aimed at bringing about stability and laying a strong foundation for justice and equity. From the religious angle; attention was given so that it would not be against Islamic values (NE 21 April 1981).

Dr. Mahathir has consistently reminded the Malays about the need to participate in the country's national economy and to achieve the 30 per cent target. Therefore the question of rejecting ASN is unjustified:

Do Muslims in the country really want their shares in the national economy? If Muslims (*Bumiputera*) waited until an Islamic system was totally entrenched in the economy, then the 30 per cent target would not be achieved by 1990. It is possible that we have to wait 100 years or 200 years or more. If we fail to achieve the 30 per cent target by 1990, we will not be able to effectively influence the economy, much less evolve an Islamic economic system. It was because of this the Government launched the ASN as a tool to achieve the aim ( BT 26 May 1984).

The above statements could confuse the Muslims in Malaysia. These different interpretations of Islam, based on their background and exposure to Islam may promote divisiveness among Muslims. Furthermore, according to Prof. Ahmad Ibrahim, colonialism and modernisation have divided Muslims in Malaysia into two camps, i.e. traditional and modern (Ahmad Ibrahim 1981: 4). Some have further divided Muslims into four categories, i.e. 'radical', 'traditional', 'fundamentalist' and 'accommodationist' (Esposito 1987: 183). Some Western authors have suggested that Islam is also a cause of disunity amongst the Malays:

Islam in Malaysia therefore is many things to many people, and this is nowhere more striking than in the heady religious atmosphere *Dakwah*. To return for a moment to its role as an ethnic boundary-marker, as a symbol of Malayness, it is apparent that Islam simultaneously unites and divides. On one level it strives to exclude non-Muslims from access to Malay status even by conversion, while

on another level, even within the Malay-Muslim community, the diverse interpretations of Islam by different *Dakwah* and other elements have a divisive effect (Nagata 1984: xvi).

Therefore, while most Government officials seemed to support and declare the Scheme to be Halal, we have Malay Muslims especially PAS members who criticise it as un-Islamic. PAS has stated categorically that it would not support the Scheme unless the Scheme withdraws its capital investment in the companies involved in business contrary to Shariah (The Star 6 December 1985).

The existence of interest-based institutions is obvious and is in fact admitted to by the ASN management. In this regard, Dr. Mahathir once stated that:

The Scheme could be regarded as part of the exigency measure taken by the Government to encourage the Malays to own shares in the corporate sector.....Islam allows certain acts during emergency situations which otherwise were forbidden (quoted in NST 26 May 1984).

From Dr. Mahathir's statement, it could be interpreted that in a normal situation, the Scheme would not be allowed. Dr. Mahathir found the question of *Ribā* inescapable in this capitalist world and appeared to conclude that there is no way that Muslims could avoid coming into contact with it:

Sometimes, we are not able to separate things which are contrary to Islam from those which are not. This actually happens in our daily life to the extent that Halal-Haram mixed together. For instance, the clothes that we wear to pray in, the plane we use to perform Hajj are but examples where we can not totally free ourselves from the conventional banking system ( M.Mohamad, quoted in BH 26 May 1984; tr.)

The above statement seemed to pave the way for criticism of the ideological precepts of Islam and its practical aspects. This has been highlighted by Maxime Rodinson in his **Islam and Capitalism** (1974: 73) who said:

Now....a theoretical question arises which it is impossible to avoid answering. It would have been easy to interpret in very narrow fashion the prohibition of *Ribā* that is found in the Quran, the only unchallengeable source of doctrine. Why, then, did medieval Muslim society provide itself with ideological precepts that conflicted with its practice?

The year 1990 had expired and the 30 per cent target of the NEP was not achieved, thus, there is a serious need to reappraise Government's policy especially in relation to the ASN Scheme if it is truly sincere in encouraging the 50 per cent who refused to join the Scheme. For the committed Muslim, *Ribā* in whichever form and in whatever circumstance is Haram. Therefore any project which involves *Ribā*, even though profitable, is still Haram. As suggested above, one factor which contributed to

the failure to reach the 30 per cent target may have been due to this *Ribā* issue (see 6.9.1).

The National Fatwa Committee and Religious Development Affairs Committee have been trying since 1985 to persuade the ASN management to withdraw its investment from the financial sector.<sup>195</sup> Instead, the number of these institutions has increased each year.

In 1991, the Islamic Affairs Division in the PM's Department formed a Committee to review and Islamise the operation of the Scheme. The Revision Committee was formed as a result of a resolution passed by the National Fatwa Committee on 7-8 March 1990. The Committee consists of seven members who are experts on Islamic as well as conventional economics. A series of meetings between them and ASN management have since been held and the following are some of their decisions and feedback given by the ASN/ASB management:

- (a) ASN and ASB are still investing in the following interest-based financial institutions:
  - i) British-American Life General Insurance Bhd.
  - ii) Bank of Commerce Bhd.
  - iii) Development and Commercial Bank Bhd.
  - iv) Malayan Banking Bhd.
  - v) Malaysia British Assurance Bhd.
  - vi) Malaysia Building Society Bhd.
  - vii) Pacific Bank
  - viii) South East Asia Development Bank;
- (b) PNB and the Government will consider the suggestion made by the Islamic Affairs Development Committee and the National Fatwa Committee on the question of withdrawal of investments from financial institutions. But nothing has been done so far;

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<sup>195</sup> Information from the hand-out issued by the ASN Revision Committee.

- (c) This Committee agreed with the earlier decisions made and considers the investment of the Scheme in the financial sector as Haram and suggests that it be withdrawn;
- (d) Profit gained by ASN in 1990 was RM2.7 billion of which 27.7 per cent came from the financial sector. The profit gained by ASB was RM8.5 billion with 31 per cent coming from the financial sector. This is a large percentage and is the main reason given by the management as to why they have to retain the companies from this sector.

No effort has been made by PNB and the Government to follow the above suggestions. Instead, the Government is concentrating on promoting Malay participation in the Scheme. In January 1992, the Finance Minister announced a RM500 million revolving fund to enable the 'hard-core poor' *Bumiputera* to invest in ASB shares. The Government would identify those who fell under the very poor category and give them interest free loans of RM5,000 per family (NST 6 January 1992, NST 14 June 1993, UM 14 June 1993).

In summary, the Scheme continues to invest in financial institutions in spite of some opposition to it. The question of *Ribā* is being ignored since quite a large percentage of profits accrued is from these Riba-based institutions. The committed Malay Muslims will continue not to invest, even though the returns are lucrative until they are totally confident as to the Islamic legality (Halal) of the Scheme. However, others will always support and invest in the Scheme and try to legitimise their decision on the basis of their own interpretation of Shariah principles.

## CHAPTER NINE

### CONCLUSION

As observed in the thesis, there have been three phases of Islam and Shariah in Malaysia; pre-colonial, colonial and post-colonial.

There has never been a perfect Islamic society in Malaysia even though Islam has existed since pre-colonial times. The theory of Shariah and its practice in Malaysia has always been contradictory. Thus, what has happened in the development of Islam and Shariah from the pre-colonial period until the present, should be seen in this context. In the pre-colonial period, Islamic law was made the basis of the legal system; practised in both public and private aspects. Nevertheless, *Adat* and pre-Islamic beliefs remained strong even when Shariah was introduced. This gave rise to a dual legal system, especially in criminal law. This was exploited by the ruling class as they could use whichever aspect of law suited them. The ruling class applied Islamic law in a manner that facilitated economic exploitation and social control.

Colonial law restricted the application of both Islamic and *Adat* laws by introducing English legal principles. The legal system termed Anglo-Muhammadan law was introduced which was Shariah modified by English principles. This can be regarded as 'Muslim law', that is the law for the Muslims in personal aspects only. The Residential System was the beginning of a secularisation process which separated the state from religion. Islamic law became purely religious law, deprived of any influence in administering the state. 'Modern' English law was used as the law of general application in all non-religious aspects of life and was portrayed as the only system capable of effecting change and economic development.

Post-colonial Malaysia witnessed three different strategies about the role of Islam and Shariah in relation to economic development. The first as led by Tunku Abdul Rahman was a mere continuation of the colonial system. A typical Western modernist theory of development was followed which had little place for Islam except in rituals

and symbolic form. The second as adopted by the current Government regards Islam and Shariah as a tool for economic development. It intends to demonstrate that Islam is a moderate religion capable of effecting change. It is an attempt to restore the position of Shariah as a Government policy, as existed in pre-colonial times. The Government appears to be also using Islam to assist Malaynisation as manifested by the NEP. The third view of Islam is promoted by the 'fundamentalists' who advocate development using the Islamic paradigm, with Islam and Shariah, according to this view interpreted in its 'purest' or 'totalist' sense.

The above 'Islamisation' and 'Malaynisation' policies of the Government in relation to development will be examined in the light of the three questions raised in the first chapter.

### **(1) Islamic Law and Economic Development?**

The co-existence of legal systems has been a feature of Malaysia since pre-colonial times. Before the British came to Malaysia, the Sultans in each of their respective states were the heads not only of the religion but also the political leaders. It is possible to conclude that Islam was the state religion and played a significant role in this period as observed in the Malay Legal Digests. Although there were legal officials such as Qadis and Muftis, it is questionable as to whether Islamic law was effectively implemented, since it seems that legal administration was in the hands of the royal officials. It is therefore likely that Islamic law was used merely for political legitimacy.

The Digests contain traces of Malay indigenous law which occupied an important place in the administration of criminal justice in the country. In many places, the Digests after mentioning the penalty according to custom, also mention penalty according to Shariah. In other words, it was essentially a dual legal system; Islamic law and customary law co-existed. Even though Islam was made the state religion and Islamic law as the *lex loci*, Islamic teachings were not properly understood and implemented. There are several reasons for this: customary practices from other religions were deep rooted in society; the type of Islam introduced was Sufism which



emphasises spiritual matters only; also the Rulers preference was for material gain and in many cases conversion was not genuine but only to attract Muslim merchants.

Chapter Two has shown how Shariah penalties which are fixed (*Hadd*) by the Quran were seldom applied. The rulers seldom practised the religion and frequently relaxed Shariah due to their greed. Therefore, capital punishment was usually substituted by fines. The application of the law was only enforced at the discretion of the ruling class. Sometimes, the law would be implemented correctly, at other times, it served their vested interests. A similar situation seems to exist today where the ruling political class can legislate to suit its needs. It is understood that the ruling class managed to bypass Shariah due to their ignorance of Islam. Furthermore, the feudal concept of blind loyalty to the ruling class by the masses justified the abuse of power. The fact that under Islam, the rulers were regarded as the representatives of God on Earth, had been wrongly interpreted as meaning that they were above the law; and they could commit no wrong. The mythical character of Hang Tuah represents this concept which is still current in Malay society. The masses will accept this (corruption etc.) if the leaders 'deliver the goods', be it protection or services. Malay society at present is still basically feudal in that blind loyalty is given to a political party or the Malay political leaders. Syed Hussein Alatas in his study on historical feudal continuity writes:

Suffice it to say that the institutional and judicial system of feudalism in Malaysia had gradually disappeared ever since (sic) the beginning of modernisation during the latter part of the 19th century. Despite this, however, the psychological traits remain. It is these traits that constitute psychological feudalism (1964: 580)

According to Ibn Khaldun (1967: 401-402), God made Caliphs his representatives to handle the affairs of his servants. They are supposed to safeguard the welfare of the people. Prophet (PBUH) said: "If anyone is put by God in authority over any matter concerning the Muslims and turns away from dealing with their need, destitution and poverty, God will turn away from dealing with his need, destitution and poverty" (quoted in Mishkat al-Masabih, tr. Robson 1973: 792).

The distribution of social product was determined by class relations and by different forms of exploitation. *Ribā* was practised in various forms by Muslims in both pre-colonial and colonial Malaysia. Evidence shows that at least some Islamic economic doctrines were generally not observed. Some writers suggest that Islam had not deeply penetrated the social fabric of the Malay society, rather traditional custom appears to have been a stronger force than Islam. The strength of *Adat* over Islam is parallel to the phenomena of ethnicity over religion in the contemporary situation.

Some Western observers, especially Parkinson, insisted that the influence of Islam, particularly the attitude of 'fatalism', is responsible for the economic retardation of rural Malays. If previously, Malays depended on God for their economic sustenance, nowadays their dependency has shifted to the Government. Malays are regarded as a 'subsidy race'; being a Malay Muslim/*Bumiputera* is an advantage in contemporary Malaysia.

Chandra Muzaffar's study (1977) of the values of traditional Malay society concluded that although the ruling class had a notion of justice, the aim was the preservation of its power. Their interest in wealth and power made them ignore the true teachings of Islam. This weakness was exploited by the British with the rulers surrendering the administration of the country in return for salaries and grand palaces.

When the British came, Islamic law was displaced by English law. Until the passing of the CLE 1937, English law was indirectly introduced into the Malay States in two ways: through Judicial Precedents and Statutes. Islamic law became applicable in family matters only. It was portrayed as barbaric, uncivilised and unsuitable for the modern situation. For the colonial British, the introduction of English law was a 'gift' they gave to the colonised people (Fitzpatrick 1983). The first influence of the common law or English legal system on Malay-Muslim society was found in the field of public law including constitutional and criminal law as well as civil and commercial transactions. Islamic penalties were portrayed as inhumane and uncivilised and propagandised by the British as a reason for discarding it. The British were clever enough not to bring about changes in the personal law of the Muslims. Nevertheless

even in this limited area, the British introduced a legal system termed Anglo-Muhammadan law. It was based on common law principles. The rules of law were not totally based on Shariah, rather it was the body of rules applied by the courts to persons who were Muslims (Hooker 1983). 'Muslim law' is still the main feature of Malaysian law today. The 'Shariah Court' in Malaysia is in fact only a 'Muslim Court', and should only be regarded as such.

The aim of colonialism was always structured by a set of common economic and political goals. Chapter Two explains the specific aim behind the introduction of English law. It was to provide for the needs of the colonial power and also to provide a means of administering the colony. The main motivation of the colonial power was commercial in nature. The MRE for instance, supposedly introduced to protect them from being swamped, was actually intended to keep the Malays on their agriculture land and out of the capitalist economy. Therefore English law was used for colonial development as it was regarded as 'modern', 'rational' and 'civilised'. For that reason, the existing Islamic and customary laws were displaced and circumscribed in their operation. Colonial law was actually the manifestation of the exploitative nature of colonialism in Peninsular Malaysia.

Ethnicity was made an issue by the colonial power. As Malays were regarded as lazy, this was used as an excuse to bring in Chinese and Indian immigrants so as to enable the operation of a 'divide and rule' policy. The different communities were set against each other in economic competition. The Malays had been left behind in this race and their position only came to be rectified after the 1969 riots.

The limited role of Islamic law continued even after the British left the country. The struggle for Independence was championed by UMNO, led by secularist Malays such as Tunku Abdul Rahman. Chapter Three shows that this period was very Anglicised. The creation of Western style institutions such as the MCKK was regarded as essential for economic development. Development was regarded as necessary and was defined in economic terms demanding legal, political and cultural change, involving abandoning tradition to achieve economic growth. Therefore, the new

Malaysia in its search for development, had adopted a modernist theory which centred on material economic growth.

As observed in Chapters Three and Four, Islam is only relevant in Federal ceremony and mainly for ritualistic purposes. Initially, there was no provision making Islam as the Federal religion. Nevertheless with the recommendation of UMNO, Article 3 came into being. Islam had to be inserted in the Constitution because it is the religion of the Malay.

As a result of the 13 May 1969 riots, the Government launched the NEP. The NEP had managed to create a group of Malay capitalists as well as a Malay middle class. During the first decade of the NEP, Western capitalist principles were used to gear the society towards modernisation and development. The means for achieving these aims was immaterial even at the expense of religious and moral considerations.

Later, the fact that more Malays became academically educated, locally or abroad through the NEP had in a way, backfired on the Government. They later formed the Islamic revival movement (*Dakwah*) and sought more Islamic reforms including the application of full Shariah. The Government began to be more 'Islamic' by launching some Islamically related institutions and activities. The Government promoted Islam as evidenced in the TMP. Islam has also been used to counter the Islamic resurgence as well as other ideologies particularly Communism. The consistent attack by PAS on un-Islamic Government policies was also a reason why the Government began to show interest in the promotion of Islam. Realising the importance of Islam to Malay identity, many changes have been created under the 'Islamic reform programme'. Nevertheless, Islamic law remained confined to personal matters.

Dr. Mahathir took office in 1981 when this *Dakwah* movement was making its influence felt. His Government has expanded the role of Islamic law because of the belief that Islam and Shariah can be used to promote Malay economic development. Islam is now seen as synonymous with modernisation and development. The leadership seemed to reject the modernist theory that Islam and Shariah is the cause of

maldevelopment and backwardness of the Malay Muslims. The Government claims that Islam provides an ideological alternative to the dominant paradigm:

Islam is modern, fresh and vigorous, possessing the power to challenge the thinking of the world establishment and the ability to provide a viable alternative (Anwar Ibrahim 1986: 5).

Partly due to pressure from the Muslims, the Government increased the pace of Islamisation by enacting Islamic commercial legislation. The first being the IBA in 1983 which allowed the establishment of BIMB, and has been followed by further Islamic commercial legislation. As observed in 6.9, BIMB has managed to contribute to economic development in the country by encouraging saving, promoting investment, financing projects as well as improving social welfare of Muslim society. This concentration on the economic aspect of Islam and Shariah has led some to suggest that Islamisation means the policy to 'Islamise the Malaysian economy.' Others have argued that Islamisation is nothing but an extension of the NEP, i.e. to encourage Malays to participate in economic activities. The IBA 1983 is an example of an abstract piece of legislation which has an Islamic label. It does not provide the substantive rules of how Islamic banks should operate. It merely gives permission for such an institution to be established. Therefore, in the absence of these details, BIMB has to use the modalities of the conventional banking business. The only exception is the removal of the *Ribā* elements which are substituted with PLS. This is reminiscent of the way the colonial government used the law to achieve its own political-economic objectives. Consequently, we have a situation where a piece of Shariah legislation has to be enacted by using the colonial statutory process. The result is that Shariah is introduced as an ordinary piece of legislation which could be repealed as easily as it was enacted. The Government should be aware of this loophole and take steps to remedy the situation by giving details of how an Islamic bank should be operated in accordance with Shariah.

Another important feature of current Government policy is its representation of Islam and Shariah as capable of promoting capitalistic development. Throughout the NEP period, there was an emphasis on creating a BCIC. The first decade of the NEP

urged Malays to participate in the capitalist economy by whatever means as long as they managed to succeed. In the later stages of the NEP, especially under the Islamisation policy, Islamic principles are being interpreted to fit into the requirements of modern capitalistic development. Dr. Mahathir Mohamad and Anwar Ibrahim are among the present leaders who would like to show that Islam is modern, pragmatic and flexible, capable of suiting modern capitalistic needs. They reject those who interpret Islam in a 'rigid' manner by making Islam not susceptible to modern change. The manner in which Islam has been interpreted to fit into the general mainstream economy is evidenced in Islamic institutions. BIMB for instance, in its operation has used all the instruments and mechanisms which are devoid of *Ribā*; nevertheless, the main alternatives used are similar to interest. It so happens that the returns on the modes of finance based on *Murābahah*, *Bay' Bithaman 'Ajil* and *Ijārah* are all pre-determined as in the case of interest. Some of these modes are said to contain some risk, but all these risks are insurable. The concentration on these second line techniques as opposed to PLS which has been regarded by Islamic economists as the most appropriate, has created an identity crisis as to whether BIMB is a "true Islamic bank or a Halal bank". The defence for these modes is that they are all Halal, and if they are Haram, the Shariah Advisory Council would have advised the Bank. Secondly, the Bank has argued that its customers financing needs are varied and the Bank has to cater for them. Furthermore, the mark-up charged by the Bank is often higher than the prevailing interest rate. This might create exploitation of the customers which is equally un-Islamic in nature. The ultimate criteria for judging the success of the Bank should not be confined to the degree to which *Ribā* is eliminated from its operation. Doubts have been expressed as to the sincerity of the Government's aim in the establishment of BIMB. Some commentators suggest that the initiative is political opportunism, i.e. it is a response to continuous pressure from Muslims and is not based on true Islamic grounds. The Government can claim to have been successful in raising

the economic position of Malay-Muslims which could be said to be Islamic; they argue that helping the Malays is the same as helping Islam.<sup>196</sup>

The operation of BIMB, which concentrates on second line techniques, could be considered as an example of following the 'letter of the law' rather than the 'spirit'. Even though there is no clear evidence to disapprove of these techniques, it defeats the spirit of equity and justice as propounded by the Shariah principles of PLS (refer 6.4).

Likewise, in spite of the Government's portrayal of TH as a successful Islamic investment institution, its interpretation of Islam to fit into the existing economic structure is also apparent. TH's main objective when it was formed in 1962 was mainly welfare in nature: to provide a safe-keeping facility for small savers especially of the rural poor. When the equity restructuring opportunities of the NEP were set up, TH management decided to embark on the capitalist road. It invested its deposits in stock acquisition, taking advantage of its privileged status as a Bumiputera Trust Agency. It was ranked as the 22nd largest stockholder with equity participation in 27 companies listed on the KLSE (O.Mehmet 1988). Although there is nothing un-Islamic about this, one might wonder whether the proper balance has been maintained between the Islamic welfare objective and the capitalist economic objective. The fact that TH is now becoming a big investor in the property and stock markets while at the same time one hears of numerous complaints of the management of pilgrims, its capitalist side appears to be dominant. In addition, the average 7 per cent yearly bonus given irrespective of the outcome of the business is argued to have similarities with conventional capitalist practices as opposed to that of Islam.

Islamic 'purists' are not interested in this method of advancing Islam. For them, 'Islamic Capitalism' is unacceptable. Islam is a pure system which should not be 'contaminated' by other methodologies or ideologies. 'Islamic Socialism' is just as unacceptable a concept.

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<sup>196</sup> See the second question posed in the thesis which is dealt with on this inter-connection between Malay and Islam.

The Government's response to this is that Islam is pragmatic and flexible and can accommodate any new concept within the ambit of Shariah. Also the Government takes the view that in case of 'urgency' as defined by it, the normal rules of Shariah can be suspended. Furthermore, given the fact that UMNO was established as a 'Malay nationalist' party as opposed to an Islamic party such as PAS, it can hardly be expected to have been promoting a 'pure' Islamic system. In any case, the fact that nearly half of the population of Malaysia is non-Muslim creates complications when promotion of Islam is involved.

As the Islamic financial sector is in its infancy in Malaysia, it is faced with the major problem of competition with the established conventional sector. However, as this sector gains maturity and experience the identity problem of the Islamic institutions should be solved; the socio-economic justice behind their establishment would be fulfilled. BIMB and TH need to evaluate their mode of operation and goals to have a balance between profit-motivation and service provision.

Conventional banking has been in existence for many centuries and is still far from perfect. Therefore, an Islamic alternative must not be expected to work wonders within a short span of time.

## **(2) Islamisation or Malaynisation?**

'Islamisation' and 'Malaynisation' have never been formally invoked by the Government, but are labels used mainly by academics. Nevertheless, these 'policies' have been promoted by the Government since Independence. Islamisation could be said to have started with the establishment of PERKIM in 1960 to assist converts to Islam, followed by TH in 1962 to facilitate going on Hajj. This coincides with Tunku Abdul Rahman's version of Islam as being purely personal, ritualistic and symbolic. An early example of a Government-sponsored Islamic event was the National Quran Recitation Competition in 1960 (H.Mutalib 1990: 96). This was followed by the International Competition in 1961 which has continued since then and has made Malaysia well



known in other Muslim countries. In 1968, the NCIA was set up by the Federal Government as an official body to co-ordinate Islamic affairs between each state.

In June 1974, PAS became part of the BN and many Islamic reforms were implemented although most were symbolic (H.Mutalib 1990: 109). The coalition was in fact mainly for reasons of Malay unity in the aftermath of the 1969 riots. Islam was first introduced into Government economic policy in the TMP. Before and during this period, it was used only for organisation building and symbolic purposes. When Dr. Mahathir became PM, he accelerated the process of Islamisation and extended its scope to the economic sphere by introducing Islamic commercial legislation.

'Malaynisation' was promoted even during the colonial period by means of the Malay Reservation Enactment and was formally endorsed in the FMA 1948 under the MSR provisions. This was later embodied in Article 153 of the Federal Constitution 1957. Malaynisation became formal Government policy in 1971 as manifested by the NEP.

Islamisation and Malaynisation overlap to such a significant extent that they might have a common aim. This would be due to the close relationship between Malay ethnicity and Islamic belief. Islam has always been the major source of Malay identity. In traditional and contemporary Malay society, to be a Malay means to be a Muslim. For Malays, the process of conversion to Islam is called *Masuk Melayu*. Islam was acknowledged to be a pre-condition for political and social participation in Malay society.

Islam had been the uniting force among the Malays in the struggle for Independence. On Independence, the complete identification of religion with ethnicity was so fundamental to Malay thought that Islam became an important constituent element in the legal and constitutional definition of a Malay (S.Abas 1978). The Independence Constitution defines a Malay as one who "professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom." Islam is an important criterion in the ethnic relationship, especially in a situation that demands the unity of the community. In the case of the need for protection against the outside world

or the non-Malays, they saw Islam as a basis for identity and assurance. Islam became a means so that the Malays could differentiate themselves from non-Malay/non-Muslims. An idealised Islam was also proclaimed as an alternative philosophy to the mundane, immediate material interest values proposed by the West (Von der Mehden 1978 : 4). To the Malays, Islam has become "a principal means of defining ethnic loyalty" (A. Bakar 1984: 139), "the foundation of communal identity" (Enloe 1970: 27) and an "ethnic boundary-marker" (Nagata 1978: 102).

The Government always criticises groups that it terms as 'extremist' or 'fundamentalist' whom it considers to be wrecking Malay-Muslim unity. In 1980, PM Hussein Onn cautioned against "those dangerous elements who were attempting to disrupt Malay unity". His deputy Dr. Mahathir, urged Malays to avoid hair-splitting over details and pointed to the disunity among the Arabs. PAS considered that the NEP would not achieve its objectives unless the Government changed its materialist and ethnic approach. They asserted that the NEP was un-Islamic and only advantaged a select few and widened the gap between the haves and have nots by the Government's emphasis on a capitalist model of development.

The Government denounced those "who judged the NEP as anti-Islamic as those who were attempting to pit Malays against Malays" and these persons were regarded as "trouble-making Malays" or "groups out to destroy Malay unity."

The Government was trying to prove that even though the Islamisation Policy has been regarded as Malayisation Policy, it is itself Islamic because all Malays are Muslim and Malay nationalism never denied Islam's universal objectives. As one minister asked:

Is it wrong to strengthen the Malays who are Muslims? Strengthening the Malays is itself strengthening Islam too. All the action and resolutions of UMNO and the Government are based on the love for the Malay race which simultaneously means love for Islam (Utusan Melayu 12 March 1981; tr.).

He concluded that those who attempted to separate the Malay from his Islam and his nationalism would be defying both the national Constitution and the spirit of Islam. Therefore helping the Malays in their economic activities is considered similar to

promoting Islam; so that when Malay Muslims are successful, Islam will equally gain respect.

Through the examples of institutions like BIMB and TH, the Government can show how the Malays have been helped in mobilising their savings to be used for profitable investment in accordance with Shariah. These institutions have been able to raise profits and gain an increasing number of depositors each year, in spite of competition from non-Islamic counterparts. Because of the increasing number of depositors and profits gained by BIMB, conventional banks have applied to operate interest-free counters and have used BIMB as their model.

Likewise, TH which was established mainly for welfare purposes has gained a greater role under the NEP restructuring programme. It has managed to appear as one of the largest holding companies in Malaysia.

These institutions are examples that have been used to reject the assumption that Islam inhibits economic development and equally that Malay Muslims are backward and anti-progress. For the Government, the pro-Malay policy is legitimate and Islamic in intent, if not always in practice.

While Islam has always been a major source of Malay identity as legally recognised in the Federal Constitution, Malay itself is an exclusive, ethnic term which is contrary to the universal and non-ethnic foundations of Islam. Although Malays are Muslim, they sometimes have tended to bend towards a secular-ethnic approach in deciding their course of action. There have been numerous studies which have confirmed that ethnicity does not disappear despite the modernisation process of societies. Enloe, Le Vine, Said, Connor and Nagata state that ethnic consciousness and conflict cannot be treated superficially as transient problems that will disappear with modernisation, since other loyalties, like class, do not surpass ethnic ones (Connor 1972: 319-355, Nagata 1976). Improvements in socio-economic infrastructure, Western education, and the resultant increase in social and economic interaction do not lead to the fading of inter-ethnic tension. At times, the Malay may lean towards Islam, at other times, their ethnic sentiment outweighs their Islamic commitment. In a struggle for a

balance of power, the ethnic force would sometimes outweigh the religious pull. Therefore, we have the situation where slogans such as '*Hidup Melayu*' (Long live the Malay) were used as opposed to '*Hidup Islam*' (Long live Islam), or 'Born Again Malay' as opposed to 'Born Again Muslim'. The table below gives examples of tensions and contradictions in the Malay-Islam relationship which still persist in contradiction to the Islamisation policy.

**TABLE 9.1**  
**MALAYNESS VS. ISLAMICITY**

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1. Adat vs. Shariah.
  2. Shariah as personal and religious law vs. Shariah as a public law.
  3. Communal identity vs. universalism.
  4. Malay special rights vs. protection and justice for all.
  5. Blind loyalty to leaders vs. qualified loyalty as long as leaders acted in accordance with Shariah.
  6. Malay territorial individual state boundaries vs. Ummah an ideological community transcending political and geographical boundaries.
  7. '*Masuk Melayu*' (enter into Malay community on conversion to Islam) vs. '*Masuk Islam*' (enter into Islam).
  8. Religion and Politics are separate vs. Islam is a way of life, it covers every aspect of human life.
  9. Malay extremist, chauvinistic, communal tendencies vs. fairness to all, regardless of race and religion.
  10. NEP's philosophy is founded on the unity of the multiracial society where race is an underlying factor in the formulation of development plan vs. philosophy based on the unity of God and man's subservience to Him.
  11. NEP reflected only the quantitative aspects of development (30-40-30 per cent policy) vs. multi-dimensional activity encompassing both the qualitative and quantitative aspects.
  12. NEP focused on the material well-being of the society vs. material and spiritual development of the society.
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Source: Adapted from A.Ghazali 1990: 128 and H.Mutalib 1990: 159

The importance for the Malay to compete with the non-Malay in business has sometimes outweighed Islamic practice. The political leaders advised the Malays that unless they could compete successfully with the non-Malays, their predominant role

would decline. In other situations, the leaders consistently stressed the Malay ethnic policy at the expense of the universalism of Islamic socio-economic justice. For instance, official statements such as "the Malays are the basis of the nation" and the "politics of this country must be based on *Kebumiputeraan*" (Malaynisation) are frequently declared.

To fulfil the aspirations of the NEP, Bumiputera Trust Agencies were created, such as YPB. It provides funds for the purpose of buying shares in companies which wish to issue their shares to the *Bumiputera*. For this purpose, PNB was incorporated as a wholly owned subsidiary of YPB. PNB is responsible for the specific purpose of acquiring equity in restructured companies as required by NEP regulations. ASNB was created to manage ASN for the channelling of shares to the *Bumiputera* community.

ASN is a clear case of Malay ethnic priority being given emphasis at the expense of Shariah guidelines. ASN was not designed to be 'Islamic', so the issue of *Ribā* was overlooked. ASN is only open to *Bumiputera*; the majority of whom are Malays, and the investment portfolio includes interest-based institutions. As regards the first point, the non-Malays who are Muslim have difficulties in participating in ASN although the Portuguese and Siamese have been allowed. The fact that almost 30 per cent of ASN's portfolio investment has been in interest-based financial institutions has been regarded as a set-back to Malays who are sensitive to the *Ribā* issue. This is probably among the reasons why less than half of the eligible *Bumiputera* have participated in the Scheme in spite of lucrative dividends and bonuses. The Government justified this 'problem' as inevitable and for the socio-economic betterment of the Malays and therefore not un-Islamic. The Government supporting religious leaders have interpreted this as 'urgency' and therefore Shariah validates what is otherwise not allowed. The diverse interpretations of Shariah according to commitment and knowledge has apparently divided the Malay community into various groups such as 'secularists', 'fundamentalists' and 'modernists'. This conforms with the hypothesis made earlier that at times, Islam acts as a uniting force for Malay identity and for Malay struggle against the West and non-Malay/non-Muslims. At other times, the religion acts as a dividing factor. This is

due to the type of Islam being practised by Malays, their knowledge and interpretation of Shariah, *Adat* and the power of the ethnic idiom in Malay tradition and culture. It may be due to this practice and approach to Islam that separates Malay society into two camps as represented by UMNO and PAS. Like their political leaders, the Malay masses could not come to a consensus as to how and to what extent they were prepared to adopt Islam and its law under the Malaysian capitalistic economy.

Behind the Islamic gesture of TH, Malayness was also pronounced. TH is lucid evidence of the two main ingredients which complete the Malay identity *vis-à-vis* non-Malay/non-Muslim: religion and ethnicity. TH has been used by the Government to create a 'new Malay'. The 'new Malay' would support the policies of the Government without difficulty, i.e. Malay Muslims who are liberal and modernist as opposed to 'fundamentalist' or 'extremist'. Furthermore, there is a growing perception that to be a better Muslim is synonymous with being a good Malaysian citizen. Therefore, Hajj has been propagated as a nationalistic as well as religious duty and so makes a Hajj a full-fledged member of the Malay community. In other words, Hajj has become a prerequisite for full acceptance into Malay Muslim society. TH has been portrayed as evidence of a successful Malay commercial institution. A more Muslim society is being created through Hajj, a society with a strong communal identity and an economic stake in national development and a predisposition to perceive development and Government as Islamic.

On the one hand, the existence of TH and BIMB have brought all the Malays under the banner of the faith. On the other, ASN has caused disunity amongst the Malays and put the Malays into two camps, i.e. the group which consistently supports and has confidence in the Government, and the group which opposes the Government.

Thus, Islam and Malay ethnicity are two main factors in Malay identity. Both are ingrained in the Malay psyche and involved in a balancing act. Sometimes, the Malays lean towards Islam as in the case of BIMB and TH. While at other times the ethnic pull, i.e. the need to compete with the non-Malays in economic development, becomes a stronger factor.

On the Government's part, the Malay-Islam relationship has become the main consideration of its development policy. Islamic institutions operating according to Shariah will always be supported when they can bring benefit to the people as well as to the Government's. If strict adherence to Shariah might create difficulty in the implementation of Government's policy, ethnic considerations are likely to be given more emphasis

Thus, in spite of the overlap, Islamisation and Malaynisation are distinct in their nature. Malaynisation is a formal Government policy which was presented to Parliament in July 1971, in the form of the OPP 1, documented in the SMP and manifested in the NEP. This Policy has been continued by the NDP which is covered by the OPP 2. This Policy is authorised by Article 153 of the Federal Constitution which as an entrenched provision cannot be challenged. It has been consistent since its inception with defined objectives and targets, such as the 30:40:30 corporate ownership. It is comprehensive as its ultimate objectives are to restructure society and eradicate poverty. It is actually producing major change in the socio-economic structure of Malay society.

By comparison, Islamisation is not a formal policy. It has no defined start date and is undocumented except for brief mentions in the Third and subsequent Malaysia Plans. Its content has been mostly made known by verbal statements of UMNO leaders such as Dr. Mahathir and Anwar Ibrahim. It is non-consistent with undefined objectives, and is therefore non-comprehensive. The fact that the objectives are undefined has led to various views on what the real objective may be. The 'purist/fundamentalist' view is the possibility that the ultimate objective could be the total Islamisation of the legal system therefore leading to an 'Islamic State'. The logical outcome of current trends would suggest the Islamisation of the Malaysian economy. The Government seems to be suggesting at the present time that Islamisation is mainly inculcation of Islamic values in the Government administration. As this Policy is totally undocumented, it can be easily adjusted to suit any particular Government objective, particularly Malay economic development. Therefore, Islamisation could be seen as an

adjunct to Malaynisation. This also means that it can be made to fit into the existing capitalistic framework. Islamisation is more symbolic than Malaynisation and has a greater dependency on 'visual achievements' which include the series of Islamic legislation and major institutions such as BIMB, TH and IIU. Perhaps the Government should clarify the aims and objectives of Islamisation in documentary form, as has been done with the Malaynisation policy through its various Malaysia Plans.

### **(3) The Limits of Islamisation?**

The Islamisation trends in the 1980s have led some Malaysians to feel that they are witnessing the beginnings of an Islamic State in Malaysia with Shariah as the basis of the legal system. Muslims today wish to exercise their legitimate right to an Islamic identity, including the application of Islamic law. Nevertheless, the Islamisation Policy does not seem to change the personal and private nature of Islamic law. It appears that the core of current Islamisation is what Dr. Mahathir has described as 'Inculcation of Islamic Values'. Unlike previous Governments, the current leadership seems to want to extend Islamisation to cover its public administration; i.e. application of Islamic values in the actual machinery of the Government. However this 'Islamic Values' is not always clear as the Government qualifies this by saying that:

Islamic values are similar to the concept of Universal values of good and evil. What are regarded as good values by other religions are considered desirable in Islam too. This means that absorption of Islamic values will not destroy other values in Malaysia (quoted in G.Basri 1990: 30-31).

This aspect of Islamisation is as vague as the rest of the process, in that the values the Government has decided to promote are equally applicable to any religion in Malaysia. Non-Muslims have raised the question: why call them Islamic values if they are universal values, why not just say universal values? This would then not worry those who are afraid of a hidden agenda. Similarly the Muslims ask: why use the term 'Universal Values' if they are really meant to be Islamic values?

The values being promoted (see 5.6.3) which are meant to be absorbed:

are those which can create an efficient government able to administer efficiently in terms of peace, security and development (M.Mohamad 1991: 135; tr.).



These values are all related to the Government's concept of economic development. However, these values can be 'exploited' for capitalist purposes. Sammy Adelman (1993: 204-208) observed about the exploitation of female workers in Malaysian Export Processing Zones (EPZs):

Patriarchal and religious control inclines Malaysian women to be respectful and obedient to male authority and means that they are less likely to involve themselves in labour unrest. These factors mean that women continue to be exploited both domestically and in the workplace, rendering them far less likely to resist in the latter sphere for fear of being divorced from the former - a factor which employers are not slow to exploit (1993: 206).

The Government's emphasis on rules of good behaviour such as obedience to the husband and loyalty to the leaders could be used by employers to justify economic exploitation (such as low wages in EPZs). This recalls the 'loyalty to leaders' and 'Malays would not commit treason' legacy of the pre-colonial feudal period. This could be used to justify their economic and political aims:

By 'Islamisation', the present rulers (leaders) mean the transformation of society according to the basic teachings of Quranic Islam. In actual practice, such ruling elites are usually appealing to the historical categories of feudal Islam, that is pre-Quranic medieval form (Z. Haque 1993: 112).

However, as Islamisation is being implemented piecemeal, Islamic values are lacking in most of the existing private sector. The Government has to ensure that Islamic socio-economic justice is practically implemented in this sector which is mainly dominated by Multi-national companies.

The limits of the Islamisation Policy are unclear. Nevertheless, it seems that implementation of Shariah is not currently on the agenda. Dr. Mahathir has stated:

Such an inculcation (of Islamic values) is not the same as implementation of Islamic laws in the country. Islamic laws are for Muslims and meant for their personal law. But laws of the nation, although not Islamically based, can be used as long as they do not come into conflict with Islamic principles (quoted in H. Mutalib 1990: 143).

The Government has neither explicitly rejected nor advocated the possibility of implementing Shariah. However, they criticise those who only want to impose Shariah on others without referring to circumstance (e.g. plural society) as 'extremist' or 'fundamentalist'. They have been claimed to place more importance on form rather than substance. The main concern of the Government is to emphasise social and economic issues rather than Shariah. The socio-economic development of the society is the

number one priority and is itself Islamic as far as the Government is concerned. "The application of Shariah while people are dying of hunger, this is not Islamic" (Anwar Ibrahim, quoted in IHT 6 June 1991).

The Government has stressed that the application of Shariah as the basis of the legal system must take into consideration the multi-religious and multi-racial nature of the country since Muslims do not form an over-whelming majority. This reason is criticised by the 'fundamentalists' who argue that by not applying Shariah, the Muslims have been denied their fundamental rights.

If implementation of Shariah did become Government policy, this would require changes in the Constitution which would be difficult to achieve. The required two thirds majority in Parliament could not be achieved by Muslim MPs alone, even assuming that all of them would want Shariah.

Article 3 provides for Islam as the religion of the Federation, however as argued by L.A.Sheridan:

It does not seem that 'Islam is the religion of the Federation' has any legal effect. Possibly these words impose an obligation on the participants in any Federal ceremony to regulate any religious parts of the ceremony according to Muslim rites. Beyond that, it is difficult to see how a federation, as opposed to the people living in it, can have any religion (quoted in H. Jusoh 1991: 101).

Islamisation, as opposed to Malaynisation, can be argued not to have any Constitutional authorisation. Although it has yet to be challenged, it could easily be placed under the MSR clauses considering the close linkage between the two (refer to 3.3.2). Article 153 categorically provides "the responsibility of the YDA to safeguard the special position of the Malays and other *Bumiputera*" in respects to MSR. In addition, Article 4 restricts Article 3 and this means that this justifies Islam's purely symbolic position. In relation to Islamic law, Article 160 excludes it from the definition of Federal law. Thus in such phrases as the 'rule of law' and 'save in accordance with law', the emphasis is on compliance with the English law. Nevertheless, one could argue that since the definition of law uses the word 'include', it could be extended to include Islamic law as well. Islamic law is only recognised by the

Constitution as a state law as mentioned in List Two of the Ninth Schedule (Ahmad Ibrahim 1989b, Harding 1991a: xciv, 1993: 199).

Legal cases (e.g. Che Omar Che Soh and Susie Teoh (*infra*)) and public statements by Government ministers have shown that Article 3 merely defines 'religion of Islam' as religious ceremonies and does not make Malaysia an Islamic state with Shariah as the basis of law (Harding 1992, 1993):

Article 3 was never intended to extend the application of Shariah. If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunctions of Islam will be void (S.Abas., quoted in 1988 MLJ 56).

### **Agenda for Future Research**

Islamisation is a national issue because it naturally affects all Malaysians, Muslims and non-Muslims alike. From the non-Muslim point of view, Islam could not help in minimising their sense of anxiety and sensitivity posed by the Islamisation/Malaynisation of the country. This further increases tension between the Malays and Chinese, and also within each community. In all these cleavages, Islam has always been considered a major issue of debate. The Chinese-based political parties, the MCA and the DAP could never agree on their perception of Islam or their willingness to let Islam play a certain role in the affairs of the country (H.Mutalib 1990).<sup>197</sup> Recent research shows that nearly all non-Muslims disagree with the application of Shariah and prefer the existing English law. Lim Kit Siang (1982), the DAP leader has stated that for him more Islam means more trouble. After experiencing the 1969 riots, Malaysia could not afford to allow any tension between Malay-Muslims and non-Malay/non-Muslims to recur. There is therefore a need to examine the tension between Muslims and non-Muslims in contemporary Malaysia and its affect on potential transition from a conventional to an Islamic system.

For the Muslim community, the application of Shariah has to be exercised carefully, bearing in mind the nature of Malaysian society. Ummah in Islam does not

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<sup>197</sup> Postscript: The DAP recently called on the Government to reiterate the fundamental commitment made by the three previous premiers that Malaysia would never be turned into an Islamic State (NST 5 March 1994).

imply merely the community of all who profess to be Muslim. The single most important implication is that it is a moral conception of how Muslims should become a community in relation to one another, other communities and the world. The Ummah must see its social structure as an interactive model, as a means of relating to others in dialogue. The contemporary meaning would necessitate that Muslims engage with other people, nations, religions and ideas to reach a set of moral objectives that can be defined together (Anwar Ibrahim 1991: 306-309). Merrl Wyn Davies (1991) has defined Islamisation as a process of rethinking and the discovery of the new paradigm for the betterment of all human beings.

In the area of the economy, the Islamic model will not be implemented without difficulty. Malaysia's economic infrastructure is dependent on a free enterprise capitalist framework which is incompatible with Islam. Can an Islamic domestic economy co-exist with the global economy which operates on different principles? There is a need to study the possible effect of international constraints on an alternative Islamic system in Malaysia. As Malaysia is part of the world economy, it may be difficult to disentangle its society from the world framework. However, the Communist economies were able to work within the capitalist global economy. The Saudi Arabian and Iranian economies have not been affected by implementation of Islamic law. What is important for the business community (foreign and local) is political stability and economic freedom. Presley (1988: 61) shows " how a complete Islamic system can function internationally, more securely and beneficially to all savers and investors in Muslim countries." This is quite possible within the definition of Islamisation favoured by the current leadership, under which Islamic practices fit seamlessly into non-Islamic structures. Perhaps research should be undertaken on the consequence of adopting the 'pure' Islamic principles in the development policy and whether they would viably fit into the global capitalist economy.

The study does not analyse the different interpretations of Islamic law by the Malays which divides them into various groups. Islamic law is divided into two categories. The first consists of *Aḥkām* (legal injunctions) set down for religious and

spiritual purposes. The second category comprises the rules and laws for administering and organising a country. Islam combines the secular and the spiritual. The spiritual aspects are mainly derived from the revealed textual sources (Quran and Hadith) while the secular is mainly the product of reason and precedent. Because the nature of Shariah falls under the second category, it tends to use the technique of *Siyāṣah al-Sharʿīyyah* (political law). *Siyāṣah al-Sharʿīyyah* is a doctrine which authorises the leader to determine the manner in which Islamic law is to be administered. Because of this, it is possible to have differing interpretations as to what constitutes an Islamisation policy. Some assert that Islamisation means to Islamise the country regardless of circumstance; while others, including the current leadership, concentrate on the socio-economic situation of society. The study also does not deal with the concept of *Ḥiyal* (ruses or legal tricks). There are various interpretations of this concept depending on *Madhhab* which equally lead to different interpretations of Islamic teachings. These two principles have not been covered in this thesis and should be the subject of future research.

Finally, this thesis has demonstrated that the Government's Islamisation Programme is not designed to implement Shariah as the main legal system considering the plural nature of Malaysian society. However, Islamisation is being used selectively to promote Islamic values which are useful for economic development. Islamisation and Malaynisation are formally separate programmes but Islamisation is so flexible that these two become difficult to disentangle. Islam which is a symbol of Malayness has been promoted as the basis for change and modernity. While this approach has been strongly challenged by the Islamic opposition, it is unlikely that they will prevail in the current circumstances of Malaysia.

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### **Newspapers and Periodicals**

- Al-Nahdah: Kuala Lumpur, official journal of RISEAP, monthly.
- Aliran: Penang, official Aliran Magazine, monthly.
- Arabia: London, monthly (ceased publication in 1989).
- Asia Week: Hong Kong, Asia Week Ltd., weekly
- Asian Business (AB): Hong Kong, Far East Trade Press Ltd., monthly.
- Berita Harian (BN): Kuala Lumpur, Times Publishers, daily Malay newspaper.
- Business Times:(BT): Kuala Lumpur, Financial Publications Sdn. Bhd., daily.
- Far Eastern Economic Review (FEER): Hong Kong, Review Publication Co., weekly.
- Harakah: Kuala Lumpur, PAS official newspaper, biweekly.
- Impact International: London, News and Media Ltd., fortnightly.
- Inquiry: London, monthly (ceased publication in 1989).
- International Herald Tribune (IHT): New York Times and Washington Post, daily.
- Malaysian Digest (MD): Kuala Lumpur, Ministry of Foreign Affairs, monthly.
- National Echo: Kuala Lumpur, daily.
- New Horizon: London, Institute of Islamic Banking and Insurance publication, ICIS House, monthly.
- New Straits Times (NST): Kuala Lumpur, Times Publishers, daily English newspaper.

The Banker: London, Financial Times Magazines, monthly.

The Star: Petaling Jaya, English daily newspaper.

The Straits Times: Weekly Overseas Edition: Singapore, Singapore Press Holdings Ltd.

The Times: London, Times Newspapers Ltd., daily.

Utusan Malaysia (UM): Kuala Lumpur, Utusan Melayu Press, daily newspaper.

Utusan Melayu: Kuala Lumpur, daily Malay newspaper in Jawi script.

Watan: Kuala Lumpur, daily Malay newspaper.

## APPENDIX

### REPORT ON FIELD RESEARCH

The field research took place in Malaysia from July to December 1991. Most of the research was done in Kuala Lumpur. The purpose of the field work was to conduct interviews and consultation with various people representing every aspect of the subject under study. The field work also enabled the researcher to collect primary information which is unpublished and has restricted circulation especially for the three chosen case studies. There is no questionnaire involved in the field research. The interviews were conducted in an informal and friendly atmosphere with two variations:

(i) There were written questions prepared and given to the interviewees in advance;

(ii) Open discussion.

The following are the written questions prepared and given to the interviewees in advance:

#### Bank Islam Malaysia (BIMB)

- (1) Can you explain the development of Islamic banking which gave rise to the establishment of BIMB?
- (2) BIMB like other Islamic banks in the Muslim World faces an identity crisis as to whether it is a true Islamic bank or merely a 'Halal' bank. This is because the practice of Islamic banking contradicts the theoretical foundation as to its existence. Can you comment on this claim?
- (3) Why do you think that BIMB concentrates on the second line techniques as opposed to the first line techniques?
- (4) What do you say to the claim that these second-line techniques are actually a 'back-door to interest'?
- (5) What are the legal impediments towards Islamic banking in Malaysia?

- (6) What are the other major problems facing BIMB?
- (7) How can BIMB contribute to the economic development of the Muslims in Malaysia?
- (8) What is the future of Islamic banking in Malaysia and how can it contribute towards achieving Vision 2020.

#### Tabung Haji

- (1) Would you highlight on the origin of TH and the objectives of its establishment?
- (2) What is the legislative and organisational framework of TH?
- (3) What are the legal constraints of TH?
- (4) TH has been selected as an approved Government Institution and is therefore regarded as a Bumiputera Trust Agency. What are the advantages of becoming a Government Institution which will be subject to Government rules and regulations?
- (5) How does TH contribute towards the development of the Muslims in Malaysia?
- (6) The two main aims of TH are to facilitate going on Hajj and mobilising deposits for investment purposes. How does TH function without these two objectives conflicting?
- (7) How do you react to the allegation that TH gives more emphasis on profit making at the expense of the welfare of the depositors?

#### Amanah Saham Nasional (ASN)

- (1) Can I get the list of the states of Malaysia with the number of the investors in these schemes. Which state is on the top of the list and which is at the bottom and the probable reasons for this.
- (2) The list of the investment portfolio of ASN and ASB. Are there any more additions to the previous list of 153 as of 30 June 1991. Is there a difference between the lists of ASN, ASB and PNB.

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- (3) What are the major problems or constraints faced by the Scheme? From my research, one of these is the problem of attracting more people to invest in the scheme. On 30 April 1991, the number of eligible Bumiputera who have invested is only 36.6% and 22.5% for ASB and ASN respectively. The percentage is low in spite of very attractive dividends and bonus. Can you give any reasons why?
- (4) Is there any intention for ASNB to form a Shariah Department or Advisory Council such as in BIMB to ensure that the scheme does not conflict with Shariah? We have had unofficial Fatwas that the scheme was *Halal* as the activities were free from any kind of gambling and no fixed return would be given without being informed about the presence of Riba-based institutions on the list of companies. Then there was the statement by our Honourable Prime Minister acknowledging that these institutions were permitted due to 'exigency'. What is the current position?
- (5) Has there been any consideration as to whether to remove the 5-10% of Riba-based institutions to encourage more of the 70% of eligible Muslim Bumiputera who have not participated to join the scheme?
- (6) I would like to get the necessary empirical evidence on the progress of these schemes in terms of the number of investors, rate of dividend, amount of investment and category of investors.

#### LIST OF INTERVIEWS

The list does not include the names of everyone interviewed since many preferred to remain anonymous.

Assoc. Prof. Shad Faruqi, expert on Malaysian Constitutional Law, in July 1991 at IIU, PJ. Discussion centred on Article 153 of the Federal Constitution providing for the special rights and privileges of Malays. The definition of Malay was also discussed.

Assoc. Prof. Alias Othman, lecturer at Islamic Academy (Akademi Islam) University of Malaya in December 1993 in Coventry, UK. Discussion on his students' research on the non-Muslim response towards the application of Shariah in Malaysia.

Che Gayah Bt. Salleh, Investment Officer, TH in August 1991 at TH Headquarters, KL. Discussion on investment and managed to obtain statistical data.

Cik Norhapisah Ahmad, Corporate and General Affairs Manager, ASN in August-September 1991 at PNB headquarters, KL. From the discussion, I gained details of its operation, including statistical data on the investment portfolios; such as investor numbers and state percentage. The main theme was the Shariah legality of the Scheme.

Cik Rusnah Hashim, economic and political journalist, Utusan Malaysia in December 1991 at Utusan Malaysia Berhad Main Office, KL. The interview shed some light on the political and economic thoughts of our policy makers, and the policies governing Malaysian external affairs.

Dr. Ghazali Atan, Economic Planning Unit (EPU) in October 1991 at EPU main office, KL. As a person in charge of development planning, he is fully aware of how these policies were formulated.

Dr. Halim Ismail, Managing Director Bank Islam (BIMB) in September 1991 in BIMB Head Office, KL. Discussion centred on the identity issues faced by BIMB.

Dr. Rais Kassim, Director-General, National Institute of Public Administration. (INTAN) in October 1991 at INTAN, KL. Discussed Government policies such as 'Inculcation of Islamic Values' and its implementation.

Dr. Rosli, Chief Officer, Economic Department, Central Bank of Malaysia (CBM) in November 1991 at CBM Headquarters, KL. The interview sought his comments on the National economy and the prospects for its Islamisation.

Dr. Yusuf Ismail, Director-General of Socio-economic Research Unit (SERU) in September 1991 at SERU office. I was able to gain a valuable insight into the

- development policies and their implementation, and also the impact of Government development plans on 'nation building' and the people's prosperity.
- Encik Ahmad Tajuddin, Manager (Retail Banking) BIMB during August/September 1991 in Bank Islam main office, KL. Discussion mainly on the role of BIMB in Malaysian economic development and its main challenges.
- Encik Haji Zabidi Haji Abdullah, Senior Banker, Central Bank of Malaysia (CBM) during September-October 1991, CBM Headquarters. He is one of the few involved directly in the formulation of Islamic values in the financial sector. I was informed of the efforts being taken to create a parallel Islamic financial system. I was given unpublished papers on the plans and Islamic mechanisms towards modern Islamic banking in Malaysia.
- Encik Hassan, officer from the Ministry of Trade and Industry in July 1991 at his office, KL. He is responsible for granting licences to those wishing to do business in Malaysia. He gave information on regulations which are meant to encourage Malays in the economy especially the corporate sector.
- Encik Mahyuddin Ahmad, Debt Department, CBM in October 1991 at CBM, KL. I obtained statistics of Government expenditure, public debt and information on the World Bank and IMF.
- Encik Rosli Hasan, ASN officer in September 1991 in PNB Headquarters, KL. Issues related to ASN were discussed.
- Haji Ahmad Awang, President, Association of Islamic Scholars of Malaysia (PUM)/ ex-Director Islamic Research Centre (PPI) in July 1991 in his office, PJ. I managed to gain valuable information about the Islamisation process and some of the constraints on its implementation on the multi-religious and multi-racial nature of the country.
- Haji Fatmi, Director, PPI in October 1991 in Pusat Islam, KL. He authorised contact with personnel directly involved in the administration of subjects under study.

Haji Hassan Ahmad, Deputy Director of TH in October 1991 in TH Headquarters, KL. Discussion centred on TH investment policy.

Haji Hussain Ahmad, senior officer at PPI and ex-officio member of the Shariah Committee, in September 1991, Pusat Islam, KL. He is responsible for research on the Islamisation of the legal system. Discussion on the Shariah and Civil Technical Committee which has been formed to study the possibility of amending any civil laws that conflict with Shariah. The Committee is also drawing up a common code for the Islamic Enactments of the various states.

Haji Zainal Abidin Abd. Kadir, Director-General, Islamic Centre of Malaysia (Pusat Islam) in September 1991, Pusat Islam, KL. Discussion on the role of Pusat Islam in the administration and co-ordination of the country's Islamic affairs.

Hajjah Zawiah Hassan, officer at Pusat Islam during October/November 1991, Pusat Islam, KL. I managed to obtain unpublished documents issued by the Committee to review the Shariah legality of ASN.

Prof. (Emeritus) Ahmad Ibrahim, Dean of Department of Law, IIU in November 1991 at IIU, PJ. I was informed of the latest information on the nature and position of Islamic law in relation to the Constitutional Amendment to Article 121.

Prof. Syed Othman al-Habshi, Professor of Economics in August 1991, IIU, PJ. Discussion touched on various issues i.e., the ruling (Fatwa) on the legality of ASN; the prospects for the Islamisation of the Malaysian economy; the Second Outline Perspective Plan (OPP2) launched in July 1991 and the Six Malaysia Plans.

Tuan Sheikh Abdul Rahman, Chief Kadhi (Qadi), Federal Territory in October at his office, KL. Discussion mainly on the latest developments on Islamic law and Shariah courts as a result of the amendment to Article 121.