

Introduction

In the 1990s, the Government of Malaysia introduced new Islamic laws or amended existing ones as part of its effort to upgrade the status of Islam in Malaysia, and to prove its Islamic credentials *vis-à-vis* the Islamic party, PAS (Parti Islam Se Malaysia).

New *shari'a* criminal laws were passed, designed to ensure that the Muslim lifestyle does not transgress Islamic teachings. New offences were created, and moral surveillance, strict enforcement and more severe punishment of Muslims were introduced. The Islamic Family Law, one of the most enlightened personal status laws in the Muslim world, was amended to make divorce and polygamy easier for men, and reduce men's financial responsibilities towards women.

The Administration of Islamic Law was amended to give any *fatwa* (a non-binding legal opinion issued in response to a legal problem) issued by the state *Mufti* the automatic force of law - once it had been gazetted - without going through the legislative process. Only the *Mufti* has the power to revoke or amend a *fatwa*. This was accompanied by amendments to the *Shari'a* Criminal Offences Act which provide that any violation of the *fatwa*, any effort to dispute it, or give an opinion contrary to it, constitutes a criminal offence. Even to possess books on Islam that are contrary to a *fatwa* currently in force is an offence.

In Kelantan and Terengganu, the *hudud* laws (criminal law which prescribes fixed punishment) were passed by the state governments under PAS control. They contain contentious provisions for *hudud* punishments such as flogging, amputation of limbs, stoning to death and crucifixion, and they discriminate against Muslim women and non-Muslims.

The race to measure one's piety and Islamic credentials based on one's style of dress, the status and control of women in one's society, the severity of punishment one imposes on those who supposedly transgress the teachings of the religion, is the reality in many Muslim societies when religion is transformed into an ideology for political struggle and a source of legitimacy.

The impact on the law making process, the contents of the laws and their implications for democratic governance, women's rights and human rights, cannot be underestimated.

Implications for democratic governance

Shroud of silence

Until recently, what has been remarkable about the making of Islamic laws in Malaysia is the *silence* that shrouds the whole process, both at the drafting and legislative levels.

The absence of any kind of consultation and public debate in the law making process is striking, because such personal laws have a widespread impact on the private and public lives of some 60 per cent of the Malaysian population who are Muslim, and implications for

the society at large. Very often laws are made and passed without any public knowledge that they even exist - until they are enforced by the religious authorities, when there is a public outcry.

For example, most Malaysians did not know that the Administration of Islamic Law provides that, upon publication in the Government Gazette, a *fatwa* is binding on all Muslims as a dictate of their religion. Most Malaysians were also not aware that the *Shari'a* Criminal Offences Law was amended to provide that it is an offence to dress indecently, until 1997, when three Muslim girls taking part in a beauty contest were arrested and charged. Very few Malaysians were aware that there existed a gazetted *fatwa* banning Muslim women from taking part in beauty contests. The humiliating arrest of the three beauty contestants in the full glare of television cameras and the stunned audience caused a public outcry.

There is no substantive debate in the legislative bodies when Islamic laws are tabled. Most elected representatives are too fearful to speak out, question, debate, let alone criticise Islamic bills, on constitutional, theological or Islamic jurisprudential grounds. The non-Muslim opposition MPs are either cautious about commenting on any Islamic matters, or are silenced by their fellow Muslim MPs because the latter do not recognise the right of non-Muslims to speak on Islam.

When there is no debate in the legislative assemblies, there is no press coverage. At most, there might be a news report that such and such a bill was tabled and passed by the legislative body. It is then up to concerned NGOs to scramble to find copies of the bill and scrutinise it and then take the initiative to generate a public debate on the issue. If there has been total silence, civil society will find out about the existence of such a law only when it is enforced.

Fear and ignorance

Major reasons for the silence that surrounds law making in the name of Islam are fear and ignorance. The bifurcation of the modern education system means that those trained in secular schools have little knowledge of religion, and those trained in religion have little understanding of the world outside. As Islam increasingly shapes and redefines our lives today, many Muslims who are concerned about intolerant and extremist trends are too fearful to speak out because they feel they do not know enough about Islam. Their tentative attempts to raise questions and express concern are often silenced by the pronouncement that they should desist, lest their faith be undermined.

Moreover, those who are knowledgeable about Islam are reluctant to speak out if their views do not coincide with the mainstream orthodox view. They fear they will get into a controversy, or be labelled as anti-Islam and accused of questioning the word of God by the extremists. It is not that they do not have the knowledge to defend themselves, but they would rather hide in the safety of their ivory tower than be embroiled in any kind of controversy, especially when they exist in a working and social environment dominated by orthodoxy.

The authority to speak on Islam

The issue of who has a right to speak on Islam is a deeply contentious issue in Malaysia today. Traditionally, most Muslims believe that only the *ulama* (religious scholars) have the right to speak on Islam. Those not traditionally educated in religion do not have the right to engage publicly with religion.

Therefore, very few Muslims have the courage to question, challenge or even discuss matters of religion, even when they are concerned about unjust teachings and practices. They have been socialised to accept that those in religious authority know best what is Islamic and what is not.

Thus, when women's groups and lay intellectuals speak about Islam, their credentials and their right and authority to speak publicly are questioned. To me, the attempt in early 2002 by the *Ulama* Association of Malaysia to charge six writers, including myself, for insulting Islam, is an attempt to monopolise the meaning and content of Islam to serve the political agenda of those who use Islam to mobilise popular support.

The real issue is not about who has the right to speak on Islam. It is about one's position on various issues in Islam. If one supports the death penalty for apostasy, the *hudud* law, and the Islamic state, then one will enjoy the freedom and space to speak on Islam, even if one is only a third class engineering graduate from a third rate American university.

Sisters in Islam, an NGO in Malaysia that works on women's rights within the Islamic framework, takes the position that when Islam is used as a source of law and public policy, with widespread impact on the lives of the citizens of a democratic country, then any attempt to limit writing, talking and debate about Islam only to the *ulama* or those with supposedly 'in-depth knowledge' of Islam is really tantamount to rule by theocratic dictatorship. Why is it that all citizens have the right to speak on political, economic and social issues that impinge on their well-being and rights, but when it comes to matters of religion, we must be silent and defer to the *ulama*?

The conservatives like to argue that religion is like medicine: it needs an expert to dispense opinion. This is really a misguided analogy for many reasons. If the client does not like the opinion and treatment of one doctor, he or she is free to go to another, and will not be declared an apostate or accused of insulting the professional expertise of the doctor, to be at best incarcerated, at worst sentenced to death. To earn the respect and continued patronage of their patients, top doctors keep abreast of the latest developments in their specialisation, but the same cannot be said of many of those who monopolise the decision making process in religion.

The misogynistic bent

Muslim countries today remain patriarchal and unjust to women. While civil laws are being repealed or amended to recognise equality between men and women, Islamic laws remain discriminatory against women. When the Islamic Family Law was amended in the 1990s

in Malaysia, to discriminate further against Muslim women, at the very same time the government, in response to long standing demands from women's groups, was taking steps to amend laws that discriminated against women in the civil sphere. In the name of Islam, Muslim women were denied the privilege of enjoying the same legal rights and protection granted to women of other faiths.

For example, in early 1999, the Guardianship of Infants Act was amended to give non-Muslim mothers equal right to guardianship of their children, but no similar amendment was made to the Islamic Family Law to accord the same right to Muslim mothers.

This reflects the propensity among many in government to declare any matter which bears on religion as sensitive and therefore untouchable. Are Muslim women expected to turn over and play dead while their non-Muslim sisters are accorded greater rights to be treated equally with men?

The negotiations for a Domestic Violence Act in the early 1990s also saw attempts to exclude Muslims from the jurisdiction of the Act because of the belief that Muslim men have a right to beat their wives. Again, women's groups had to lobby the government for several years to make domestic violence a crime whether it is committed by a Malay, a Chinese or an Indian man. Even after the law was passed by Parliament, we had to go through two more years of pressure and lobbying to get it implemented. This time those opposed to the application of the law to Muslims shifted their argument by pointing out that domestic violence was a family matter and therefore should come under the *shari'a* jurisdiction of the states, rather than be treated as a criminal matter under federal jurisdiction.

The *hudud* law of Kelantan and Terengganu grossly discriminates against women by disqualifying women (and all non-Muslims - which means three-quarters of Malaysia's population) as eyewitnesses in *hudud* crimes and by assuming that an unmarried woman who is pregnant or has delivered a baby has committed *zina* (adultery/illicit sex). If she claims she has been raped, the burden of proof lies with her to substantiate the claim.

The original draft of the Terengganu law, which provided that a woman who reported rape would be charged for *qazaf* (slandering accusation) and flogged with eighty lashes if she was unable to prove the rape (and only the testimony of four male Muslim eyewitnesses would be accepted as proof), caused such outrage that the PAS government was forced to amend the law to allow for circumstantial evidence.

The obsession with introducing the *hudud* law by the Islamist party in control of the two states displays a mindset frozen in medieval jurisprudence, without the ability or the willingness to consider that the application of Islamic teachings in the twenty-first century has necessarily to change.

Amendments to the Islamic Family Law since the early 1990s are a major area of discrimination against Muslim women. The amendments include:

- allowing a polygamous marriage contracted without the permission of the court to be registered upon payment of a fine or jail sentence. This has led to a proliferation of illegal polygamous marriages contracted in southern Thailand or by illegal marriage syndicates operating in Malaysia;
- deleting the 'fifth condition' before permission for polygamy can be granted. The fifth condition requires that the proposed polygamous marriage should not directly or indirectly lower the standard of living enjoyed by the existing wife and dependants. Its deletion makes it easier for a man to be given permission to take a second wife;
- allowing for a court to approve a divorce pronounced by a man without permission of the court if it is satisfied that the *talaq* (repudiation) is valid. Research shows that, as a result of this amendment, in some states the number of men who unilaterally divorce their wives outside the court is almost three times the number of those who apply for divorce through the courts.

All these new laws, and amendments to existing laws, reflect the misogynistic bent of those in religious authority, be they in government or in PAS. At a time when the Malaysian government, at least at the leadership level, recognises equality between men and women in this country and is responding to calls by women's groups to amend all laws that discriminate against women, other arms of that very same government do not share this egalitarian vision.

However, the recent amendment to Article 8 of the Federal Constitution - to prohibit discrimination on the basis of gender - challenges the *shari'a* court and the Islamic religious authorities in Malaysia to take steps to end all forms of discrimination against Muslim women, in law and in practice, committed in the name of Islam.

The tendency to codify the most conservative opinion

Be it in the area of fundamental liberties or women's rights, the tendency displayed by the religious authorities is to codify the most conservative opinion into law. For example, traditionally there are three juristic positions on apostasy. First is the orthodox view: death to all apostates. The second view prescribes the death penalty only if apostasy is accompanied by rebellion against the community and its legitimate leadership. The third view holds that even though apostasy is a great sin, it is not a capital offence in Islam. Therefore a personal change of faith merits no punishment.

And yet PAS has chosen the most extreme juristic opinion to codify into law: death for apostasy. The religious authorities of the government have adopted a compromise position: one-year compulsory rehabilitation instead of death. If, at the end of the detention period, the person still refuses to repent, then the judge will declare the person no longer a Muslim, and order his release. But the person's rights and fundamental liberties have been violated. If he is married, his marriage will be dissolved, and the judge will determine his obligations or liabilities under Islamic Family Law.

Yet the *Qur'an* is explicit in its recognition of freedom of religion, and there exists within the Islamic juristic heritage a position that supports freedom of religion. This position is further strengthened by al-Azhar (the focal point of Islamic teaching for Sunni Muslims), under its current progressive sheikh, Dr. Mohammed Sayed Tantawi. Yet when the religious authorities codify Islamic teachings into law, they seldom choose the most enlightened opinion.

This is even more the case in the area of women's rights. For example, the provision in the PAS *hudud* law that women cannot be witnesses is only a juristic opinion, with no explicit support in the *Qur'an* or the Traditions of the Prophet Muhammad. Pregnancy as evidence for *zina* is a minority position of the Maliki school of law. The majority *shari'a* opinion is that pregnancy is not admissible as proof of *zina* because circumstantial evidence cannot be accepted to secure a *hudud* punishment. And yet the PAS ideologues in Malaysia, who belong to the Shafie school, choose to ignore the more enlightened Shafie opinion and instead codify a harsher Maliki opinion. But when a Maliki or Hanbali opinion is more advantageous to women, certain jurists will proclaim that this cannot be accepted as 'we are Shafies and we must follow Shafie rulings'.

A holier-than-thou competition

When Islam is used as a political ideology in the contestation for power, rival parties sink into a holier-than-thou battle for the hearts and minds of Muslim voters. In Malaysia, PAS and UMNO (United Malays National Organisation, the dominant party in the ruling coalition government) are engaged in a game of one-upmanship to challenge each other's religious credentials. This is dangerous to democratic governance. In giving in to the demands of the religious ideologues, the government continually legitimises them, and becomes hostage to the PAS agenda.

For example, in 2000, attempts were made to introduce the Islamic *Aqidah* (Faith) Protection Bill, which provides for one year mandatory detention in a Faith Rehabilitation Centre for those who attempt to leave Islam. This was in response to pressure to provide a specific punishment for apostasy, not just from PAS and its supporters, but also from UMNO members and leaders, who could not answer the PAS charge that the UMNO-led Government provided no punishment for those who leave Islam, and yet would fine a citizen RM500 (US\$132) just for throwing a cigarette butt on the market floor. PAS, as the 'true' Islamic party, had already introduced the death penalty for apostasy in its *hudud* law at the state level, while at the federal level its chief ideologue, Hadi Awang, had for years been trying to introduce a private member's bill in Parliament for a federal law to impose the death penalty for apostasy.

Conclusion

If Islam is to be used as a source of law and public policy to govern the public and private lives of citizens, then the question of *who* decides what is Islamic and what is not is of paramount importance. What are the implications for democratic governance when only a small, exclusive group of people is accorded the right to interpret the Text and codify it? Particularly when they do so very often in a manner that isolates the Text from the socio-

historical context in which it was revealed, isolates classical juristic opinion from the socio-historical context of the lives of the founding jurists of Islam, and isolates the Text from the context of contemporary society.

How can a modernising democratic society search for solutions to the multitude of problems facing the *ummah* (community of Muslims) when that search is conducted in ways that are so exclusive, restrictive, intimidating, and sometimes even life-threatening? The world is far more complex today than it ever was. No one group can have the exclusive monopoly on knowledge. In a modern democratic nation-state, *ijtihad* (juristic effort to deduce law from its sources) must therefore be exercised in concert and through democratic engagement with the *ummah*. The experience of others who have been traditionally excluded from the process of interpreting, defining and implementing Islam must be included. The role of women, who constitute half the *ummah*, must be acknowledged, and included in this process of dialogue, of policy making and law making.