

MALAYSIA

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I. OVERVIEW

The current Federation of Malaysia is now comprised of the former British colonies of Penang and Malacca (the Straits Settlements), nine former British protectorates previously ruled by Malay sultans (the Federated and Unfederated Malay States of Selangor, Negri Sembilan, Pahang, Perak, Johor, Kedah, Kelantan, Perlis and Terengganu) and the two Borneo states of Sabah and Sarawak (also former British possessions). The Borneo States are referred to as East Malaysia, and the rest as Peninsular (or, sometimes, West) Malaysia. The Federation also includes three Federal Territories: the wealthy capital city of Kuala Lumpur, the new purpose-built administrative capital of Putrajaya, and the small island of Labuan located near the coast of Sabah.³

English law was introduced gradually from 1807 via direct colonization of the Straits Settlements and the more indirect method of “advice” offered to the Malay sultans by British “Residents” or “Advisors”. It was imposed over the top of Malay *adat* (customary laws) – a mixture of local and mostly unwritten customs strongly inflected by Islamic law – and Islamic law (*syariah*) which had been introduced gradually from the fifteenth century and became associated with Malay princely rule. Older accretions of Buddhist and Hindu law and ritual continued, but in a minor way, and were mostly incorporated into *adat*.⁴ During the era of British tutelage, immigration – from India and China, in particular – was encouraged to supply labor for colonial economic projects. Populations of Indians and Chinese had been resident in the Malay archipelago prior to the arrival of the British, but their numbers clearly increased because of colonial policy.

By 1895, four of the Malay princely states formed a Federation (the Federated Malay States, FMS) and agreed that their affairs would be coordinated by a Resident-General appointed by the British. In retrospect, this process can be seen as preparing the way for the larger post-independence Federation.⁵ After World War II and the defeat of the occupying Japanese forces, the returning British authorities recognized the eventuality of independence for Malaya. The first step was a proposal for a unitary state, the Malayan Union, but this was opposed passionately by the newly formed Malay nationalist party, the United Malays National Organization (UMNO) because, amongst other things, it ceded too much of the former sovereignty of the Malay states and their traditional rulers. Another basis for opposing the Union was its equal conferral of citizenship upon migrants from India and China. Leaders of the newly emerging Indian and Chinese political parties also opposed the Union, in part because it was profoundly undemocratic. Hence the British abandoned the plan after a year, and instead set about establishing the Federation of Malaya, which lasted from 1948 until full independence (Merdeka) in 1957.

The constitutional arrangements for Merdeka and the Federal Constitution were drafted in London by a commission (the Reid Commission) which had consulted widely amongst the political elite in Malaya. It was particularly guided by the wishes of the Alliance, a coalition of UMNO, the Malayan Indian

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³ For a standard history, see Virginia Matheson Hooker, *A Short History of Malaysia: Linking East and West* (Sydney: Allen & Unwin, 2003).

⁴ Andrew Harding, “Global Doctrine and Local Knowledge: Law in Southeast Asia” (2002) 51 (1)*International and Comparative Law Quarterly* 35.

⁵ Andrew Harding, *Law, Government and the Constitution in Malaysia* (Leiden, Brill, 1996), 17-18.

Congress (MIC) and the Malaysian Chinese Association (MCA) which had struck a multi-cultural political bargain for power-sharing after independence.⁶ The Malay rulers (Sultans) in each state were also consulted and separately represented at the Commission's hearings. A significant aspect of that elite consociational bargain was the grant of full citizenship for ethnic minorities in return for the recognition of the "special place" of the Malays in the Federation and continuation of pre-federation special protective measures for them, such as land reservations and preferential access to the civil service, as well as recognition of Malay (Bahasa Malaysia or Bahasa Melayu) as the national language. Some of the "traditional" privileges of the Malay sultans in the states were also recognized and preserved in this arrangement, as was the place of Islam as the "religion of the federation".⁷

The Federation was extended by the admission of the Crown Colony of Singapore and of the British protectorates of Sabah and Sarawak in 1963, thus forming the Federation of Malaysia (previously Malaya).⁸ Singapore was expelled in 1965. Sabah and Sarawak negotiated special treatment as the price of their admission, and so they are in a relatively more powerful position *vis à vis* the central government than are the other states.⁹

It is impossible to understand the dynamics and complexity of federal-state relations in Malaysia without appreciation of the political control exerted by UMNO since independence. UMNO has dominated the coalition National Front (Barisan Nasional, BN, the successor to the Alliance from 1974) since 1957, and it has retained power by being returned with strong majorities at each federal election between 1957 and 2008. Furthermore, most of the component states have been governed by UMNO-led coalitions for most of the period since 1957. Kelantan, which was ruled by the Islamic party, Parti Islam se-Malaysia (PAS), between 1959-1977, and 1990 to the present, is the notable exception.¹⁰ The UMNO party-political machine has been able to use party discipline – and financial incentives – to align state and national political and legislative priorities.¹¹ The picture in the Borneo states of Sabah and Sarawak is more complex, as both states have been able to assert greater *de jure* and *de facto* autonomy from the centre; nonetheless, the influence of UMNO is apparent.¹² Malaysian political scientist Mohammad Agus Yusoff concludes "Thus, it seems clear that a fundamental dimension of centre-state relations is the basically political nature of the constitutional framework within which they operate in the Malaysian context; the federal government has always actively sought to ensure that the governments in the states are formed from the same party or from a member of the coalition of parties ruling at the centre".¹³

⁶ See the lengthy treatment in *id. passim*, but esp 24-40, and Joseph M Fernando, *The Making of the Malayan Constitution* (Kuala Lumpur: Malaysian Branch of the Royal Asiatic Society, 2002). The Reid Commission report is appended to Kevin Tan and Thio Li-ann, eds., *Constitutional Law in Malaysia and Singapore* (Singapore, Butterworths, 1997) and J.C. Fong, *Constitutional Federalism in Malaysia* (Kuala Lumpur: Thompson/Sweet & Maxwell Asia, 2008).

⁷ There is much written about this, but see especially Harding, *Law, Government and the Constitution*, *supra* note 5, at pp. 24-40; and Joseph M Fernando, "The Position of Islam in the Constitution of Malaysia" (2006) 37(2) *Journal of Southeast Asian Studies* 249.

⁸ There is an extensive literature; two useful recent treatments are Tan Tai Yong, *Creating "Greater Malaysia: Decolonization and the Political Merger* (Singapore: ISEAS, 2007) and Regina Lim, *Federal-State Relations in Sabah, Malaysia: The Berjaya Administration, 1976-85* (Singapore: ISEAS, 2008). Despite the more limited scope promised in the title, the latter in fact provides a useful coverage of the 1963 merger.

⁹ B.H. Shafruddin, *The Federal Factor in Government and Politics of Peninsular Malaysia* (1987), 38 characterizes the federation as a "two-tier federation system: the Federation of Malaya which federated the original eleven States and the Federation of Malaysia which federated these States with the three new States".

¹⁰ The neighboring state of Terengganu was briefly governed by PAS from 1999-2004, and Penang, on the opposite side of the peninsula, was briefly governed by the opposition liberal party Gerakan following the 1969 elections; however Gerakan subsequently joined the UMNO-led coalition in 1973.

¹¹ Mohammad Agus Yusoff, *Malaysian Federalism: Conflict of Consensus* (Bangi: Penerbit Universiti Kebangsaan Malaysia, 2006), 27, 323-347, especially pp 325, 335, 340; and Lim, *Federal-State Relations*, *supra* note 8, p. 53.

¹² See, generally, Mohammad Agus Yusoff, *Malaysian Federalism*, *supra* note 11, chapters 5 and 6; Lim, *Federal-State Relations*, *supra* note 8, chapters 3-6.

¹³ Mohammad Agus Yusoff, *supra* note 11, at p. 330.

However, at the most recent general election in March 2008, while the ruling BN coalition retained power, it suffered massive losses (including the loss of several component state governments). At the time of writing, the BN coalition no longer retains the two-thirds majority needed to push through constitutional amendments.¹⁴ The political effect of this is that federal-state relations, particularly on the peninsula, are now more fractious and unpredictable than they have been for most of Malaysia's history. Some of the states have begun to use their legislative power to enact laws, such as the Freedom of Information enactments of Selangor and Penang, which markedly depart from national policies.¹⁵

Race and religion are constant factors in Malaysian political life; indeed, one well known public intellectual refers to his country as "multi-racist" rather than "multi-racial".¹⁶ The race riots that occurred in Peninsular Malaysia in the context of a federal election in May 1969 are a kind of national trauma. The episode is not well understood and indeed public discussion is discouraged.¹⁷ A state of emergency was declared and parliamentary rule was suspended for two years. The episode, which was represented by politicians such as future Prime Minister Mahathir Mohamad¹⁸ as being justifiably caused by the anger of the Malays at their poverty relative to the more prosperous immigrant Chinese community, was answered by the New Economic Policy (NEP), a government plan for radical social engineering based on affirmative action for the Malay ethnic majority. This state planning instrument has formally come to an end. Nevertheless, similar policies continue, although they are also not given legal form. They are not evident from the architecture of the constitution or the formal laws, which only express the bare bones of the consociational bargain of 1957, with its recognition of the place of Islam and the special position of the Malay rulers in the federation, and recognition in article 153 of Malay land reservations and Malay quotas in business licences, educational institutions, scholarship places and public service appointments. Racial preference for ethnic Malays in education and business (including government-linked business and tendering) is thus achieved more by policy than law. Nevertheless, the social and political reality of race-based politics must be understood to appreciate the Malaysian legal system.

The Federation that was established in 1957 was already strongly central. Nothing has changed over the years to make it less so, and Malaysia's peculiar cocktail of race, religion and politics contributes, in complex ways, to maintain the strength of the center and the weakness of the states. Southeast Asian constitutional law expert Andrew Harding concludes that Malaysia is "not a true federation but rather a quasi-federation" because of the strong centripetal forces at work.¹⁹

¹⁴The PAS government was returned in Kelantan, and in addition component parties of the newly formed opposition coalition Pakatan Rakyat (composed of the Democratic Action Party (DAP), PAS and the National Justice Party (Keadilan Rakyat)) gained control of the states of Penang, Selangor, Perak and Kedah. Political developments and by-elections since 2008 have resulted in a shift of power away from the opposition in several parliamentary and state constituencies. The most dramatic instance is Perak, where several Pakatan Rakyat members defected to the Barisan Nasional, triggering a constitutional crisis: see Audrey Quay (ed) *Perak: A State of Crisis: Rants, Reviews and Reflections on the Overthrow of Democracy and the Rule of Law in Malaysia* (Petaling Jaya: LoyarBurok Publications, 2010). Despite these electoral shifts, BN has not regained the crucial two-thirds majority: as of 21 May 2011, BN held 137 out of 222 federal constituencies.

¹⁵ *The Freedom of Information (State of Selangor) Enactment 2010* received bipartisan support in the Selangor Legislative Assembly and was enacted in early 2011: R Nadeswaran, "A Step Forward for Transparency" *The Sun* 6 April 2011; tabling of Penang's Freedom of Information bill has been postponed to allow for further community consultation, "Tabling of Info Bill put off" *The New Straits Times*, 4 May 2011.

¹⁶ Farish Noor, "Malaysia and the Myth of Tanah Melayu" Part 1, 22 August 2007; Part 2, 29 August 2007 www.othermalaysia.org.

¹⁷ In a recent book, human rights activist and historian Kua Kia Soong challenges the official version of May 13. See Kua Kia Soong, *May 13: Declassified Documents on the Malaysian Riots of 1969* (Petaling Jaya, Selangor: Suaram, 2007).

¹⁸ Mahathir bin Mohamad, *The Malay Dilemma* (Singapore: D. Moore for the Asia Pacific Press, 1970).

¹⁹ Harding, *Law, Government and the Constitution*, *supra* note 5, at p. 182. See also the view of Malaysian political scientist Mohammad Agus Yusoff, *supra* note 11, at p. 325, that "the Malaysian federal constitution was established on a basis favouring a distinct gravitational pull of power towards the centre, providing the states with only a circumscribed autonomy".

II. THE FEDERAL DISTRIBUTION AND EXERCISE OF LAWMAKING POWER

1. *Central Legislative Jurisdiction*

The legislative domain of the Federal Parliament in Malaysia (the central authority) is expressly set out in the Ninth Schedule of the Federal Constitution in two lists. The Federal List (List I), enumerates matters with respect to which the Parliament may make laws, and the Concurrent List (List III), itemizes matters within the legislative competence of both the Federal Parliament and State Legislative Assemblies. The Federal List is extensive. It includes all major aspects of government and public functions. In comparison, the matters in the Concurrent List are relatively less significant. List II of the Ninth Schedule enumerates those matters which fall within the jurisdiction of the component States. By virtue of article 77, residual legislative power resides with the component states, i.e., if a matter is not enumerated in any of the Ninth Schedule Lists, then it falls within the competence of a State Legislature. Below is a table setting out the constitutional distribution of legislative jurisdiction.

DISTRIBUTION OF LEGISLATIVE JURISDICTION

(Ninth Schedule, Federal Constitution)

Federal List (List I)	State List (List II)	Concurrent List (List III)
1. External affairs	1. Malay custom and the religion of Islam	1. Social welfare
2. Defence	2. Land	2. Scholarships
3. Internal security	3. Agriculture and forestry	3. Protection of wild animals and wild birds
4. Civil and criminal law and procedure and the administration of justice	4. Local Government	4. Animal husbandry, prevention of animal cruelty
5. Federal citizenship, naturalization and aliens	5. Services of a local character	5. Town and country planning
6. Federal government machinery; and elections to Federal Parliament and State the Legislative Assemblies	6. State public works and water	6. Vagrancy and itinerant hawkers
7. Finance (including currency, banking and tax)	7. State government machinery	7. Public health, sanitation and the prevention of diseases
8. Trade, commerce and industry (including insurance, intellectual property)	8. State holidays	8. Drainage and irrigation
9. Shipping, navigation and fisheries	9. Creation of offences related to state matters	9. Rehabilitation of mining land and soil eroded land
10. Communication and transport	10. Inquiries for state purposes	9A. Fire safety measures
11. Federal works and power; water supplies except those wholly within one state	11. Indemnity related to state matters	9B. Culture and sports
12. Surveys, inquiries and research	12. Turtles and riverine fishing	9C. Housing and provisions for housing accommodation
13. Education	12A. Libraries, museums and historical sites other than those declared federal	9D. Water supplies and services
14. Medicine and health		9E. Preservation of heritage
15. Labour and social security	<i>Supplementary matters for Sabah and Sarawak (List IIA)</i>	<i>Supplementary matters for Sabah and Sarawak (List IIIA)</i>
16. Welfare of the aborigines	13. Native law and custom	10. Personal law
17. Professional occupations	14. Incorporation of state authorities and bodies	11. Adulteration of foodstuffs and other goods
18. Federal holidays	15. Ports and harbours other than those declared federal	12. Shipping under fifteen tons
19. Unincorporated societies	16. Cadastral land surveys	13. Water power
20. Control of agricultural pests	17 (repealed)	14. Agricultural and forestry research
21. Newspapers, publications, publishers, printing and printing presses	18. In Sabah, the Sabah Railway	15. Charities and charitable trusts operating wholly within the State
22. Censorship	19 (repealed)	16. Theatres, cinemas and places of amusement
23. Theatres and cinemas and places of public amusement	20 water supplies and services (subject to federal list)	17. Elections to the State Assembly during the period of indirect elections
25. Co-operative societies		18. In Sabah, until 1970, medicine and health
25A. Tourism		
26. Prevention and extinguishment of fire		
27 Matters relating to Federal Territories		

Matters in the State List (List II) may also be legislatively exercised by the Parliament for purposes of implementing an international obligation, or promoting uniformity of the laws of two or more component States, or upon the request of a component State's Legislative Assembly.²⁰ Federal laws made to meet an international obligation may only be introduced into Parliament after consultation with the government of any State concerned, yet it seems that the States do not have a constitutional capacity to veto such laws.²¹ However, a Federal law made for purposes of uniformity or upon a State's request must be legislatively adopted by a particular State before coming into operation in that State. According to article 76(3) such a law will be considered as State, rather than Federal law, and as such may be amended or repealed by a subsequent State law. Additional exceptions apply in relation to certain subject matter. In implementing the Federation's international obligations, the Parliament may not legislate in relation to Islamic law matters, Malay custom, or the native law and customs of Sabah and Sarawak: thus "sensitive issues" are immune from amendment in this manner.²² With regard to the matters of land and local government (concerning which there are also constitutionally established consultative bodies), express adoption and incorporation of the Federal laws into State enactments by the State Legislative Assemblies is not required if the Federal law is made for the purpose only of ensuring uniformity of law and policy.²³ This allows the central government much more legislative power to harmonize the laws in these two areas.

Constitutional provision for the proclamation of a state of emergency can also profoundly affect the Federal-State distribution of legislative (and executive) power. Once a state of emergency has been proclaimed under article 150 - where the executive "is satisfied that a grave emergency exists whereby the security, or the economic life, or public order of the Federation or any part thereof is threatened"²⁴ - then the Federal Parliament may make laws on any matter, regardless of the Ninth Schedule division of legislative competence, and indeed "notwithstanding anything in this constitution".²⁵ While a state of emergency is in force, no Ordinance issued by the executive and no Parliamentary statute can be declared invalid for inconsistency with *any* provision of the Constitution.²⁶ Furthermore, during a declared state of emergency, Federal executive authority extends "to any matter within the legislative authority of a State and to the giving of directions to the Government of a State".²⁷ The only constitutional limit on this "breathhtakingly wide power"²⁸ is provided by clause 6A which provides that Parliament's legislative power under article 150 does not extend to matters of Islam or Malay custom or the native laws and customs of Sabah and Sarawak, nor may it be used to pass laws inconsistent with existing constitutional provisions regarding religion, citizenship or language. Of the four states of emergency proclaimed since Merdeka in 1957,²⁹ two were directed to resolving political disputes *within* a State. On both occasions the Federal government intervened directly in the States of Sabah³⁰ and Kelantan³¹ to ensure that the political outcome favored the central government. Malaysian constitutional expert Professor Andrew Harding concludes that these powers are "alarming from the point of view of the States" since they indicate that

²⁰ Federal Constitution, art 76 (1) (a), (b), (c).

²¹ Federal Constitution, art 76(2).

²² Federal Constitution, art 76(2).

²³ Federal Constitution, art 76(4).

²⁴ Federal Constitution, art 150(1).

²⁵ Federal Constitution, art 150(5). This means that the constitutional requirement to consult with the Conference of Rulers (the council of hereditary Malay sultans accompanied by and acting on the advice of their elected advisors) before certain kinds of laws are presented to parliament does not apply.

²⁶ Federal Constitution, art 150(6).

²⁷ Federal Constitution, art 150(4).

²⁸ Harding, *Law, Government and the Constitution*, *supra* note 5, at p. 155.

²⁹ In 1964, 1966, 1969 and 1977: *see generally*, Harding, *Law, Government and the Constitution*, *supra* note 5, at pp 159-163; Wu Min Aun, *The Malaysian Legal System* (3rd edition) (Kuala Lumpur, Longmans, 2005), 307-324.

³⁰ *Emergency (Federal Constitution and the Constitution of Sarawak) Act 1966*; *see* Harding, *Law, Government and the Constitution*, *supra* note 5, at pp. 160-61.

³¹ *Emergency Powers (Kelantan) Act 1977*; *see* Harding, *Law, Government and the Constitution*, *supra* note 5, at pp. 162-3.

“there are no legal or political limitations, during the currency of an emergency proclamation, on the power of the Federation to interfere with the division of legislative and executive powers between the Federation and the States, or even to violate a State constitution.”³² The fact that such intervention has not occurred more often perhaps owes more to political self-restraint on the part of the ruling coalition government (the Barisan Nasional) than to legal impediment.

Articles 73 and 74 of the Federal Constitution permit the Federal Parliament to make laws for the whole or any part of the Federation, and to legislate extra-territorially. Furthermore, the Federal Parliament may legislate for the States for the purposes set out in article 76: to implement an international obligation; to promote uniformity between two or more States; when requested to do so by a State Legislative Assembly; and, for the purpose of ensuring uniformity of law and policy, in relation to land and local government. Examples of Federal legislation enacted pursuant to article 76 include the *National Land Code* 1966, the *Local Government Act* 1976, the *Land Conservation Act* 1960, and the *National Forestry Act* 1984.

Amendments to the Federal Constitution are made by federal law.³³ As such, the Federal Parliament is empowered to amend the Federal Constitution. Apart from the threshold requirement of an affirmative vote of two-thirds majority in both houses of Parliament, there is no requirement of consent from each component state to amend the constitution even on matters such as admitting new state or territory into the federation.³⁴ Special safeguards are provided, however, for Sabah and Sarawak in relation to specific matters such as citizenship, appointment of judges in Sabah and Sarawak,³⁵ religion, language and the special treatment of natives of Sabah and Sarawak.³⁶ Otherwise, component states have an indirect safeguard over amendment of the Federal Constitution through the Conference of Rulers, whose consent is required in respect of certain matters such as the special privileges of the Malays, the National Language, and the natives of Sabah and Sarawak. The consent of the Conference of Rulers is also required for any constitutional amendment touching restrictions on freedom of expression, citizenship, the privileges of Federal Parliament and the State Legislative Assemblies, federal guarantees regarding the state constitutions, and the Rulers themselves.³⁷

Of the items in the Federal List, the most significant in terms of impact upon the nation are internal security (including police and preventive detention); civil and criminal law and procedure (which involves the entire administration of justice with the exception of state-based Islamic law (*syariah*), courts of limited jurisdiction, and the native courts of the East Malaysia States of Sabah and Sarawak (discussed below)); finance (including banking and taxation);³⁸ trade, commerce and industry; communications and transport; education; health; labor and social security; the press and censorship. Considering the importance of tourism to the Malaysian economy, that subject of legislative power may be deemed significant also.³⁹ Finally, while land is itemized as a State matter in List II of the 9th Schedule, the

³² Harding, *Law, Government and the Constitution*, *supra* note 5, at p. 161. See also B.H. Shafruddin, *supra* note 9, at pp 30-33.

³³ Federal Constitution, art 159(1).

³⁴ *The Government of the State of Kelantan v. The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* [1963] MLJ 355; Johan Shamsuddin Sabaruddin, “The Kelantan Challenge” in Andrew Harding and H.P. Lee (eds.) *Constitutional Landmarks in Malaysia: The First 50 years 1957-2007* (Kuala Lumpur: LexisNexis 2007).

³⁵ *Robert Linggi v. The Government of Malaysia* Kota Kinabalu High Court Suit No. K21-07-2009 (unreported).

³⁶ Federal Constitution, article 161E.

³⁷ Federal Constitution, article 159 (5).

³⁸ Note that taxation as a federal matter is also authorized by Federal Constitution, article 96.

³⁹ In relation to tourism, it should be noted that prior to 1994, this was a residual matter and hence the subject of state laws and policies. In that year the Federal Parliament amended the federal legislative list to include Tourism as a federal matter – a step that plainly still rankles with the former Attorney General of Sarawak, who tartly observes that the states were not consulted even though the amendment plainly affected them in significant ways: Fong, *Constitutional Federalism*, *supra* note 6, at p 56.

Federal Parliament has used its powers under article 76(4) to enact a *National Land Code* (1966), which applies to all of Peninsular Malaysia (but not East Malaysia⁴⁰).

In light of the extensive matters with respect to which the Parliament may make laws, which include almost all significant aspects of private and public laws (and see also the overview to this part, above), most of these areas are significant in practice-based terms, and very few areas are less significant than the others. Federal law is disproportionately more significant than State law. As noted in the Overview, international and Malaysian commentators consider that Malaysia may best be classified as a quasi-federation rather than a true federation, or at least that the centralizing forces are remarkably strong.⁴¹ Indeed, the former Chief Minister of the state of Melaka complained in 1979 that “in many other federations municipal councils have much more powers than State Governments in Malaysia.”⁴²

2. State Legislative Jurisdiction

Peninsular Malaysian States have a limited legislative jurisdiction expressly conferred by Federal Constitution Articles 73 and 72 and enumerated in List II of the 9th Schedule (discussed above): Islamic law and personal law (these are narrowly defined, see below); land; agriculture; local government; services of a local character (for example, burial grounds, markets and fairs); public works for a state purpose, state roads, water and riparian rights (but not water supply); the machinery of state government; state holidays; creation of offences in respect of State List matters; inquiries for State purposes; indemnity in respect of State List matters; turtles and riverine fishing; libraries, museums and historical monuments and archives. (Of course, the Federal Parliament may legislate on these matters with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya.) Two of these State items, land and local government, may be subjected to central control by laws made “for the purpose only of ensuring uniformity of law and policy”⁴³ and this has been achieved through the enactment by the Federal Parliament of *National Land Code* 1966 and the *Local Government Act* 1976. Furthermore, the National Land Council and the National Council for Local Government (established under articles 91 and 95A respectively, and discussed briefly below) coordinate national policy in these two areas.

As part of the political bargain exacted at the time of their accession to the Federation in 1963,⁴⁴ the East Malaysia states of Sabah and Sarawak enjoy comparatively more autonomy than the original States: the national codes governing land and local government do not apply to them,⁴⁵ and they have control over immigration, which is elsewhere a federal matter.⁴⁶ Their enlarged jurisdiction includes the basic State List and is supplemented by List IIA, which itemizes: native law and custom (more broadly defined than in the original State List); incorporation of authorities and bodies set up under State law; ports and harbours (other than those declared to be federal); cadastral land surveys; the railway (only for Sabah);

⁴⁰ Federal Constitution, article 95D expressly precludes the extension to Sabah and Sarawak of uniform federal legislation with respect to land or local government which might otherwise be made pursuant to article 76(4).

⁴¹ Harding, *Law, Government and the Constitution*, *supra* note 5, at p. 182. For a contrasting, but much earlier view, see Salleh Abas, “Federalism in Malaysia: Changes in the First Twenty Years”, in Tun Mohamad Hashim, H.P. Lee and F.A. Trindade (eds.) *The Constitution of Malaysia: Its Development 1957-1977* (Kuala Lumpur, Oxford University Press, 1978), chapter 8.

⁴² Adib Hj Mohd Adam, as reported in the *New Straits Times*, 22 July 1979, cited in Fong, *Constitutional Federalism*, *supra* note 6, at p. 65, note 48.

⁴³ Federal Constitution, art 76(4).

⁴⁴ See Harding, *Law, Government and the Constitution*, *supra* note 5, at pp. 40, 173-176; Wu Min Aun, *supra* note 29, at p. 47.

⁴⁵ Federal Constitution, art 95D.

⁴⁶ *Immigration Act 1959/63* (Revised 1974) (Act 155)), Part VII Special Provisions for East Malaysia. This is actually a conferral of federal *executive* power upon the East Malaysian state governments. The power includes the right to refuse entry of West Malaysians into East Malaysia, and to require West Malaysians to obtain a work permit in order to obtain gainful employment in East Malaysia. Originally intended to protect the natives of East Malaysia from being outnumbered by internal migration from the comparatively more developed peninsular states, these provisions have been used also to prevent scrutiny of East Malaysian governance and the conduct of elections, see ‘Denied Entry, Bersih Chief Sues Sarawak Government’ *The Malaysian Insider* June 14, 2011.

and, subject to the Federal List, water supplies and services. Apart from the supplementary legislative list, Sabah and Sarawak are granted additional legislative powers by other provisions of the Federal Constitution in relation to: sales tax (Article 95B(3));⁴⁷ borrowing powers (Article 112B); export duty on minerals produced in Sabah and Sarawak (Article 112C(3)); royalties on minerals produced in Sabah and Sarawak (Article 112C(4)); and the right to practice before courts in Sabah and Sarawak (Article 161B).

While these supplementary powers grant more legislative authority and independence to Sabah and Sarawak than to the other component States, the additional powers are relatively less significant as most important areas of legislation remain with the Federal Parliament.

The Federal Constitution permits federal legislative power to be conferred upon the States by a valid Federal Statute: article 76A. Thus the States' legislative powers can be extended by the Federal Parliament to include any of the matters in the Federal legislative list (List I). One instance of this is the *Incorporation (State Legislatures Competency) Act 1962* (Revised 1989) (Act 380) which allows State Legislative Assemblies to pass enactments relating to the incorporation of State bodies corporate, a subject which otherwise falls under the legislative jurisdiction of the Federal Parliament. Sabah and Sarawak also enjoy greater legislative power indirectly.

Component States may continue to exercise any concurrent legislative power, but any state law inconsistent with a federal law shall be void to the extent of the inconsistency.⁴⁸ Procedurally, the Federal Constitution mandates a four week period between the publication of a bill dealing with a concurrent matter and further legislative action, apparently to allow time for federal-state consultation to avoid possible conflict.⁴⁹ An exception is where there is ground of urgency.⁵⁰ It is questionable whether four weeks is sufficient time to enable meaningful consultation.⁵¹

Federal laws are much more significant than State laws, but the most important areas of component States' regulation in practice are land, Islamic law, Sabah and Sarawak's native law and custom, and local government-related matters.

State jurisdiction over Islamic law (*syariah*) is increasingly important and the topic of *syariah* jurisdiction is increasingly contentious, as rival religious and political forces tussle over the jurisdictional boundary between the two systems, a line which is imperfectly demarcated by Federal Constitution Article 121(1A) and the tangled mess of case law interpreting and applying it.⁵² In Malaysia, the *syariah* jurisdiction of the States is enumerated – and thereby confined – in item 1 of List II of the 9th Schedule, where it is defined as Islamic law relating to family law (betrothal, marriage, divorce, maintenance, adoption, legitimacy and guardianship), inheritance and gifts, charitable and religious trusts; Malay customs; Islamic religious revenue, the regulation of mosques; and the “creation and punishment of offences by persons professing the religion of Islam against the precepts of that religion”; the organization of *syariah* courts; and the determination of matters of Islamic law and doctrine and Malay custom. Because this item includes the family law and personal faith of more than half the population of Malaysia, it is of great importance. Since Islamic law is a matter for the States (but of course for the Federal Parliament in relation to Federal

⁴⁷ Although it was inserted in the constitution when the East Malaysian states joined in 1963, it has not been enlivened until recently, with the *State Sales Tax Enactment 1998* (Sabah).

⁴⁸ Federal Constitution, art 74(4).

⁴⁹ Federal Constitution, art 79(2); Fong, *supra* note 6, at p. 75-76.

⁵⁰ Federal Constitution, art 79(2).

⁵¹ Fong, *supra* note 6, at p. 75.

⁵² See further Thio Li-ann, “Jurisdictional Imbroglia: Civil and Religious Courts, Turf Wars and Article 121(1A) of the Federal Constitution” in Andrew Harding and H.P. Lee (eds.) *Constitutional Landmarks in Malaysia: The First 50 years 1957-2007* (Kuala Lumpur: LexisNexis 2007) and Amanda Whiting, “Desecularizing Malaysian Law?” in Sarah Biddulph and Pip Nicholson (eds.) *Examining Practice, Interrogating Theory: Comparative Law in Asia* (Leiden, Martinus Nijhoff, 2008).

Territories) whereas law, justice and the courts are matters for the Federation, the growing tensions between the secular, common-law based legal system and Islamic law are also a manifestation of dissonance between the secular Federal Constitution and State and Federal Territory *syariah* statutes and subordinate rules, as well as the rival jurisdictions of the secular national court system and the state-based *syariah* courts.⁵³

With respect to the peninsular States, land and local government are the most important areas where central and component State regulation coexist. In essence, the federal laws – *National Land Code* 1966 and *Local Government Act* 1976 - set out the operational framework and general principles, and the State and State agencies make the detailed enactments, rules and regulations.

Control over water is emerging as an area of great importance because of the trend to privatization of water resources as well as concern about water quality and security.⁵⁴ The constitutional provisions are complex and overlapping. The Federal Parliament has responsibility for water supplies, rivers and canals except those wholly within one State, and the production, distribution and supply of water power.⁵⁵ The States have responsibility for water, including rivers and canals but excluding water supplies and services, and for riparian rights,⁵⁶ as well as over turtles and riverine fishing.⁵⁷ Drainage and irrigation are concurrently shared, and, confusingly, item 9D of the Concurrent List also specifies concurrent responsibility for water supplies and services “subject to the Federal list”. In addition, the East Malaysian States share concurrent power with the Federal Parliament over production, distribution and supply of water power and hydro-electricity.⁵⁸ The States appear to have the larger share in this distribution of power and responsibility over water. Nevertheless, the recent establishment of a Water Services Commission⁵⁹ and the passage of the federal *Water Services Industry Act* 2006 point to increased federal regulation.⁶⁰ Additionally, various federal laws have an indirect impact upon water management.⁶¹

Similarly, practical enforcement of environmental standards involves the coexistence of Federal and State laws.⁶² The various federal laws on environment including the framework *Environmental Quality Act* 1974 (Act 127) and the subsidiary rules made thereunder have to be read in conjunction with various State laws and local ordinances dealing with such environmental matters as land, planning, local government, water (including water supplies), forestry and mining. The system is complex and confusing and of little obvious benefit to the environment.⁶³

⁵³ See further Whiting, “Desecularising Malaysian Law?,” *supra*, at pp. 223-266; Amanda Whiting, “Secularism, The Islamic State and the Malaysian Legal Profession,” *Asian Journal of Comparative Law* 5.1 (2010): Article 10, pp 21–23. <http://www.bepress.com/asjcl/vol5/iss1/art10>.

⁵⁴ See Sharifah Zubaidah Bt. Abdul Kader Al Junid, “Towards Good Water Governance in Malaysia: Establishing an Enabling Legal Environment” [2004] 3 *Malayan Law Journal* civ.

⁵⁵ Federal Constitution, 9th Schedule, List I, item 11(b).

⁵⁶ Federal Constitution, 9th Schedule, List II, item 6(c).

⁵⁷ Federal Constitution, 9th Schedule, List II, item 12.

⁵⁸ Federal Constitution, 9th Schedule, List IIIA, item 13.

⁵⁹ Through enactment of the Federal *Suruhanjaya Perkhidmatan Air Negara Act* [National Water Services Commission Act] 2006.

⁶⁰ The *Water Services Industry Act* 2006 recites that it was enacted to “ensure uniformity of law and policy” throughout Peninsular Malaysia.

⁶¹ Such laws include *Street, Drainage and Building Act* 1974; *Irrigation Areas Act* 1953; *Fisheries Act* 1985; *Food Act* 1983; *Environmental Quality Act* 1974; *Sewerage Services Act*, 1993; *Road Transport Act* 1987; *Exclusive Economic Zone Act*, 1984; *Land Conservation Act* 1960; *Land Acquisition Act* 1960; *National Forestry Act* 1984. See the discussion in Sharifah Zubaidah bt. Abdul Kader Al Junid, *supra* note 54, at notes 19-31.

⁶² See generally Azmi Sharom, “Malaysian Environmental Law: Ten Years After Rio” (2002) 6 *Singapore Journal of International & Comparative Law* 855-890.

⁶³ Alan Tan, *Preliminary Assessment of Malaysia’s Environmental Law* (Asia Pacific Centre for Environmental Law, National University of Singapore) available at <http://www.law.nus.edu.sg/apcel/dbase/malaysia/reportma.html#sec3>.

3. Residual Powers

The constitution, in Article 77, expressly allocates residual legislative power to the component States. However, in view of the comprehensiveness of the Ninth Schedule Lists, there is in reality little residual power.⁶⁴ The Federal Parliament can further reduce the extent of the residual power by amending the legislative lists to expressly bring certain items not previously provided for (and therefore arguably residual in nature) under the Federal List. There is also a perceived reluctance on the part of the courts to consider a matter which is not enumerated in any of the legislative lists as a residual matter.⁶⁵ This was certainly the approach adopted by the Court of Appeal in the *Bakun Dam case*, which concerned a conflict between the Federal *Environmental Quality Act* and a state development plan.⁶⁶

4. Conflicts between Central and State Law

Federal law takes precedence over State law in areas where component States may also legislate. Article 75 of the Federal Constitution invalidates any State law inconsistent with a Federal law to the extent of the inconsistency.⁶⁷

However, such a situation of conflict arises only in relation to matters falling within the Concurrent List, or laws made by the Parliament relating to matters under the State List for purposes of implementing Malaysia's international obligations or of promoting uniformity of the laws of two or more component states pursuant to Federal Constitution article 76. If either the Federal Parliament or a State Legislative Assembly made "conflicting" laws pertaining to matters for which it lacked jurisdiction pursuant to the Ninth Schedule Lists or any other constitutional provisions, such a "conflict" would be a question of jurisdiction rather than of conflict.

5. Municipal Law-Making Power

The municipalities – city councils, municipal councils and district councils – do not have any significant law-making power, but do make subsidiary laws in relation to the administration of local authority areas and services rendered locally.⁶⁸ However, these subsidiary laws must be approved by the component State legislature.

At independence in 1957, local government bodies were democratically elected; however local government elections were suspended in 1965 (at the time of confrontation with Indonesia)⁶⁹ and elected local authorities were finally and totally abolished by federal law in 1974.⁷⁰ Municipalities and local bodies are now appointed by State governments and hence their political orientation tends to coincide with that of the appointing State.⁷¹

III. THE MEANS AND METHODS OF LEGAL UNIFICATION

1. Exercise of Central Power (Top Down)

⁶⁴ Tan Poh Ling, "Malaysia" in Tan Poh Ling, *Asian Legal Systems: Law, Society and Pluralism in East Asia* (1997) 263, 271.

⁶⁵ Fong, *supra* note 6, at p. 56 and 57.

⁶⁶ *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors* [1997] 3 MLJ 23; [1997] 4 CLJ 253 ("The Bakun Dam case").

⁶⁷ For example, *City Council of Georgetown & Anor v. The Government of the State of Penang & Anor* [1967] 1 MLJ 169, invalidating the *Municipal (Amendment) (Penang) Enactment 1966* (Penang); and see the discussion in Wu Min Aun, *supra* note 29, at p. 51.

⁶⁸ See, e.g., sections 73, 78 and Part XIII of the *Local Government Act 1976* (Act 171)).

⁶⁹ Emergency (Suspension of Local Government Elections) Regulations 1965.

⁷⁰ Through the *Local Government (Temporary Provisions) Act 1973*.

⁷¹ See generally Harding, *Law, Government and the Constitution*, *supra* note 5, at p. 122.

The exercise of central power (top down) has been the most effective method in creating uniform law with respect to matters under the State and Concurrent Lists. Most uniform laws are made in accordance with the Federal Constitution. And occasionally, where the Parliament is not expressly granted legislative jurisdiction to enact uniform laws, it adopts the direct route of amending the Federal Constitution to have its legislative jurisdiction enabled.

The Federal Constitution as the supreme law of the land has a direct impact on State laws. All laws, including State laws, must be consistent with the Federal Constitution, and any inconsistent laws are to the extent of the inconsistency void.⁷² In that regard, the provisions of the Federal Constitution such as those in Part II concerning fundamental liberties⁷³ contribute towards legal unification and harmonization of State laws, or at least towards preventing inconsistent State laws. For instance, the constitutional guarantee of freedom of association was invoked to invalidate a State law disqualifying a member of the State legislative assembly purely on the basis that he ceased to be part of a political party after he was elected.⁷⁴ On the other hand, there has been litigation impugning State Islamic laws on the basis that they have violated constitutional guarantees of freedom of religion and equality of the sexes. So far, these court cases have been unsuccessful, as the Federal civil courts have become increasingly reluctant to assert the supremacy of the secular constitution and its rights and guarantees or to claim federal jurisdiction when faced with rival claims from state *syariah* courts.⁷⁵

A method of creating unified law, not expressly provided for but constitutionally viable, is to amend the legislative lists in the Federal Constitution in order to widen the Federal Parliament's legislative jurisdiction and narrow that of the States. Except in relation to certain more heavily entrenched topics, provisions of the Federal Constitution can be amended by a Federal law passed by a two-thirds majority of the members present in each house of the Federal Parliament.⁷⁶ As the same political coalition has held power by a significant majority at federal level (and in most of the States) from independence in 1957 until March 2008, the government of the day has always had the requisite votes and there have been many constitutional amendments.⁷⁷ If the legislative lists are amended in this way, the process could bypass the need for component State legislatures' separate and express consent, as would be otherwise required under article 76 of the Federal Constitution. Yet consultation with the States did precede the 2005 amendment to the legislative lists, removing "water supplies and services" from the State List and inserting it in the Concurrent List.⁷⁸ Following the amendment, the Parliament duly enacted the *Water Services Industry Act 2006* (Act 655), an act to provide for and regulate water supply services throughout peninsular states and federal territories.

Apart from the written provisions of the Federal Constitution, there are in Malaysia not really any recognized constitutional norms that relate to legal unification or harmonization. There are two primary and practical reasons for this. The first is the extensive legislative power granted to the Federal Parliament. The second is the low level of litigation involving the constitutionality of State laws.

⁷² Federal Constitution, article 4.

⁷³ *Faridah Begum Bte Abdullah v. Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al Mu'adzam Shah* [1996] 1 MLJ 617, [1996] 2 MLJ 159 is an instance where the Federal Court remarked that even if the Parliament were to enact a law conferring a right on a foreign Commonwealth citizen to sue the Ruler, it would be void for illegality and unconstitutionality because the Federal Constitution, art 155(1) requires such a right to be reciprocally effective in both countries.

⁷⁴ *Dewan Undangan Negeri Kelantan & Anor v Nordin Salleh & Anor* [1992] 1 CLJ 72 (Rep).

⁷⁵ See above, part II, section 2 and more generally: Thio Li-ann, "Jurisdictional Imbroglia" *supra* n 52 discussing leading cases, and Whiting, "Desecularizing Malaysian Law?," *supra* note 52, examining three recent cases in detail.

⁷⁶ Federal Constitution, article 159.

⁷⁷ See generally, Harding, *Law, Government and the Constitution*, *supra* note 5; see, e.g., *id.*, at p. 54.

⁷⁸ Consultation with the state governments was apparently undertaken: Fong, *Constitutional Federalism*, *supra* note 6, at p. 86.

Nonetheless, the constitutional principle that a Federal legislature is presumed not to intend to make laws that conflict with the basic fabric of the constitution (including its federal nature) is recognized in Malaysia. That presumption entails a further principle of interpretation for courts to follow: when construing constitutionally valid but potentially conflicting State and Federal laws, “a harmonious result should, as far as possible, be aimed at.”⁷⁹ These principles of harmonious construction were applied in a landmark environmental law case (*Bakun Dam case*) concerning the development of a huge hydro-electric dam in Sabah. In that case, the Court of Appeal’s harmonious interpretation of the Federal and State laws favored the State development proposal over the national environmental regime. While the approach of the Court of Appeal in construing the Federal environmental law is considered controversial and has been challenged in subsequent litigation,⁸⁰ nevertheless the principle of constitutional law it applied is considered well settled.⁸¹

Central legislation is the most often used, and most effective, means to unify and harmonize State laws, particularly with respect to the peninsular States.

The Parliament may also make laws for other matters in the State List for the purpose of promoting uniformity of the laws of two or more component States, or if so requested by the State legislatures, but the component States would have the final say as such federal laws would not come into operation in the States concerned until they have been adopted by a law made by the State legislatures.⁸² Unlike federal laws concerning land and local government made under cognate provisions, the applicable law made by this process would be State law, not Federal law, and accordingly could be amended or repealed by the respective State legislatures. An example is the *National Forestry Act 1984* (Act 313), a Federal law which was adopted by peninsular States passing separate State Enactments to the same effect.⁸³

There is no general scheme by which the central government could use legislation to require the component States to pass conforming or implementing legislation in relation to any matter. However there are *constitutional* requirements for a certain level of uniformity across the State constitutions. Article 71 of the Federal Constitution requires that the component State constitutions have certain common and essential provisions (contained in the Eighth Schedule of the Federal Constitution), such as that the hereditary ruler (or appointed Yang di-Pertua Negri) must act on advice, failing which the Parliament may by law make provisions for the same or for removing inconsistent provisions. Additionally, article 3(3) requires the states of Malacca, Penang, Sabah and Sarawak (i.e., those States without hereditary Malay rulers) to provide in the State constitutions that the Yang di-Pertuan Agong is the head of the religion of Islam in the respective State.

Both the Federal Government and the component peninsular State governments (but not Sabah and Sarawak) are required to follow policy formulated by the National Land Council (NLC), a consultative body created by article 91 of the Federal Constitution to formulate national policies relating to land utilization in agriculture, forestry and mining.⁸⁴ By contrast, the provision relating to consultation

⁷⁹ *The Bakun Dam case*, supra note 66, at p 274.

⁸⁰ For example: See *PP v Ta Hsin Enterprise Sdn Bhd* [1998] 4 CLJ Supp 241; *Malaysian Vermicelli Manufacturers (Melaka) Sdn Bhd v PP* [2001] 7 CLJ 74.

⁸¹ This constitutional principle of harmonious construction is not to be confused with the “basic structure” doctrine enunciated by the Indian Supreme Court, which acts as an implied restriction upon parliament’s legislative power to enact constitutional amendments that alter the framework and foundational principles of the constitution: *Kesavananda v. State of Kerala ARI 1973 SC 1461*. This principle has been considered, but rejected, by Malaysian courts in a succession of cases. See Fong, *Constitutional Federalism* supra note 6, at p. 200-202, discussing *Phang Chin Hock v. Public Prosecutor* [1980] MLJ 70, *Mark Koding v. Public Prosecutor* [1982] 2 MLJ 120, *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187.

⁸² Federal Constitution, article 76 (1) (b),(c).

⁸³ Another example is the *Wood-Based Industries (State Legislatures Competency) Act 1984*. See generally Rozanah Abd Rahman “Deforestation in Malaysia: A Legal Framework for Ecosystem Protection” [1996] 4 CLJ (Articles).

⁸⁴ Federal Constitution, article 91(5).

between the components of the Federation and the NLC in relation to proposed legislation is directory or discretionary rather than mandatory.⁸⁵

The other national council established under the Federal Constitution with similar provisions, is the National Council for Local Government,⁸⁶ empowered to formulate national policies relating to local government. It operates in a similar fashion to the NLC.

Though the central government may impose terms and conditions when making specific-purpose grants to any component States (such as grants for the maintenance of local authorities⁸⁷) we have not been able to discover whether such conditions in practice relate to the state *enacting* laws that comply with central standards, and if so, in what areas of law. There is otherwise no known State inducement hinging upon compliance with central standards. Grants from the central (and much wealthier) government to the component States are otherwise constitutionally guaranteed and awarded pursuant to formulae provided for in article 109 and detailed in the 10th Schedule of the Federal Constitution.

The central government has stepped in and taken over in situations where it feels that the matter could best be governed by the centre as opposed to the States.⁸⁸ For instance, the Parliament amended the Legislative Lists in the Federal Constitution to remove water supplies from the State List (excluding Sabah and Sarawak) and to insert the same in the Concurrent List, and proceeded to enact the *Water Services Industry Act 2006* (Act 655). Water supply services throughout peninsular States and Federal Territories may now be federally regulated. Through the *Sewerage Services Act 1993* (Act 508) the Federal Government has similarly curtailed component States' legislative and executive powers in relation to sewerage services, a subject matter that falls within the Concurrent List.⁸⁹ Pursuant to the statute, sewerage services responsibilities which had previously been provided by local and state authorities other than a few States and one local authority⁹⁰ have been transferred to the Federal Government and subsequently privatized.⁹¹ The success of the Federal Government in persuading most State and local authorities to transfer these responsibilities is attributable to the political control by the Federal Government over most State Governments.⁹²

It is unclear exactly what role the central courts play in unification of norms. Malaysia has a plural legal system of English-introduced common law (called "civil law" when it is contrasted with Islamic law), *adat* (Malay and indigenous customary laws) and Islamic law.

⁸⁵ Federal Constitution, article 91(6). There is an interesting discussion in Choo Chin Thye and Lucy Chang Ngee Weng, "Constitutional Procedure of Consultation in Malaysia's Federal System" [2005] 4 MLJ xiii. The National Land Council, in turn, established the National Forestry Council in 1971. That body focuses on forestry matters leading to the issuance of the National Forest Policy and consequently, the National Forestry Act 1984 (Act 313). The Act has been adopted by all peninsular states by way of laws enacted by the respective state legislatures resulting in uniformity throughout these states. The governments of Sabah and Sarawak continue to maintain their own forestry policies and laws.

⁸⁶ Federal Constitution article 95A.

⁸⁷ *State Grants (Maintenance of Local Authorities) Act 1981*, section 3.

⁸⁸ These situations should be distinguished from Barisan Nasional's political interference in the government of a component state, as occurred in the constitutional crises in Sarawak (1966), Kelantan (1977) and Perak (2008-2009), referred to above.

⁸⁹ *Sewerage Services Act 1993*, Preamble and Section 3.

⁹⁰ Kelantan, Sabah, Sarawak and the local authority of Johor Bahru city.

⁹¹ See Abdul-Rashid Abdul Aziz, "Unraveling of BOT Scheme: Malaysia's Indah Water Konsortium" (2001) *Journal of Construction Engineering and Management* November/December 457-460; "Up to IWK to Expand its Services, says Deputy Minister" *BERNAMA Malaysian National News Agency* 7 September 1998; Mimi Syed Yusof, "Nod by Kelantan to IWK takeover" *The New Straits Times* (Malaysia) 23 June 1997; Ho Wah Foon, "Sewerage Services is Trying to Keep its Head Above Water" *The Straits Times* (Singapore) 30 June 1996; Ho Wah Foon, "Indah Water Finalises New Sewerage Rates" *The Straits Times* (Singapore) 26 June 2006.

⁹² In relation to the East Malaysian State of Sabah, see further Regina Lim, *Federal-State Relations*, *supra* note 8, at p. 70.

The civil law courts come under Federal, not State, jurisdiction and so there is a single, national and uniform court system throughout Malaysia in relation to matters arising under general law: public law (constitutional and administrative law), private law (contracts, property, tort) and commercial matters (including Islamic banking), most criminal law and procedure (except for offences against the precepts of Islam), and family law (except for the family law of Muslims). The apex court – the Federal Court – is thus able to create uniform general (or civil) law norms, via precedent, for the whole nation.

In relation to customary law or *adat*, there are significant differences between the peninsular States and East Malaysia. There are no longer separate *adat* courts in the peninsula, and *adat* has mostly been incorporated into the administration of Islamic law (discussed below), a process made inevitable by the juridical identification of Malay ethnicity with Islam in the constitution.⁹³ For the natives of East Malaysia, there are separate courts to handle matters arising under Malay customary law and the customary laws applicable to non-Malay indigenous peoples (who may not be Muslims). These are State courts, not Federal courts, and there is no appeal from the native system to the Federal courts. They exercise a limited jurisdiction over matters conferred by State enactments (typically land and succession, family law, sexual relations, and offences against customary law).⁹⁴

Islamic law and the *syariah* courts are matters for the 13 component States, and the Federal Parliament only has jurisdiction over Islamic law in relation to the Federal Territories (most significantly, the capital city of Kuala Lumpur). This means that there are 14 separate *syariah* jurisdictions, each drawing upon separate enabling laws and diverse *syariah* statutes (covering areas such as *syariah* criminal law, *syariah* criminal procedure, *syariah* evidence, *syariah* family law, and administration of *syariah* law) but no national and apex *syariah* court of appeal to provide unification or harmonization of doctrine. Furthermore, since 1988 there can no longer be any appeal from a State *syariah* court to the apex, secular Federal Court. There is thus no possibility of that national court exerting any judicial pressure for uniformity within *syariah* jurisprudence or for harmony with the secular, general law.⁹⁵

While there are great similarities across all *syariah* jurisdictions, there are significant differences as well – for example discrepancies in the provisions enabling or discouraging a husband from entering into a polygamous union, or the (unenforceable⁹⁶) enactment in the State of Kelantan of full *hudud* offences and punishments, such as amputation for theft, and the death penalty for apostasy⁹⁷ – and modernizing Islamic groups have pointed to these divergences as evidence of the need for a uniform, national (and

⁹³ Federal Constitution, art 160 “ ‘Malay’ means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom...”

⁹⁴ See Wu Min Aun, *supra* note 29, at pp 227-258.

⁹⁵ This is because of the insertion of article 121(1A) into the Federal Constitution in 1988- its subsequent history is examined in Thio Li-ann, “Jurisdictional Imbroglia” *supra* note 52. Recent suggestions that the general law ought to be Islamized or brought more into harmony with Islam have generated heated debate- discussed in Whiting, “Desecularising Malaysian Law?” *supra* note 52 – yet there is little prospect of this happening, at least in the short term, despite the fact that it is the expressed aim of one of the units of the Federal Attorney-General’s Chambers: see www.agc.gov.my/agc/agc/adv/adv.htm for the mission statement: “conduct studies on the federal laws to determine whether the implementation of the laws would be in conflict with Islamic laws and to propose any amendment or reform to the laws to bring it in line with Islamic laws”.

⁹⁶ The Kelantan *hudud* laws are unenforceable because the punishments mandated by the state enactment are in direct conflict with a federal law, *Federal Syariah Courts (Criminal Jurisdiction) Act 1965* (rev 1988), section 2, which limits punishments for offences against Islam. As criminal law is a federal matter, and state legislative competency over Islam is narrowly circumscribed in 9th Schedule, List II, item 1, the federal law prevails over the inconsistent state enactment by virtue of Federal Constitution article 75. See further M.B. Hooker, “Submission to Allah: The Kelantan Syariah Criminal Code (II) 1993” in Virginia Hooker and Norani Othman, ed, *Malaysia: Islam, Society and Politics* (Singapore: ISEAS 2003), 80-100.

⁹⁷ See generally Jaclyn Ling-chien Neo, “‘Anti-God, anti-Islam and Anti-Qur’an’: Expanding the Range of Participants and Parameters in Discourse over Women’s Rights and Islam in Malaysia” (2003) 21 *UCLA Pacific Basin Law Review* 29; Shad Saleem Faruqi (2005) “The Malaysian Constitution, The Islamic State and Hudud Laws” in K.S. Nathan and Mohamad Hashim Kamali (eds.) *Islam in Southeast Asia: Political, Social and Strategic Challenges for the 21st Century* (Singapore: Institute of Southeast Asian Studies); and Virginia Hooker and Norani Othman (eds.) *Malaysian Islam, Society and Politics: Essays in Honour of Clive Kessler* (Singapore, Institute of Southeast Asian Studies).

progressive) *syariah* system.⁹⁸ The use of model laws and advice from the Federal religious affairs bureaucracy to encourage uniformity in the *syariah* system is also briefly examined immediately below.

Well-funded and resourced Islamic Federal bureaucracies, such as JAKIM (the Islamic Development Department) and the Department of Syariah Judiciary (JKSM) exert a powerful central influence upon local, State-based *syariah* institutions and practices, and JAKIM drafts model *syariah* laws for the States to adopt.⁹⁹ While this may seem to exemplify central and top-down influence rather than a coordinated approach initiated by the component States, it is clear that the States do have the capacity to resist or mitigate central pressure and that unification of *syariah* proceeds in a consultative manner. In part this is because the division of legislative competence in the federation requires that the model law must be expressly adopted by each of the State legislatures. It is during this process that States may and do amend and vary the model law.¹⁰⁰ Although a greater extent of uniformity in *syariah* law has been achieved recently (especially with regard to procedure), there remain significant differences amongst component State laws, occasionally resulting in different outcomes of similar fact-situations in different component States.¹⁰¹ The differences also reflect the different level of tolerance in each State's population towards specific provisions of *syariah*, such as polygamy or female-initiated divorce.

Back in the secular realm, the constitutionally mandated national consultative councils for land and local government, discussed above, also perform the role of disseminating information between the components of the federation and fostering uniformity of law.

A federal bureaucracy, the Law Revision and Reform Division of the Attorney-General's Chambers, contributes to legal modification and unification through the following functions: translation of laws from English into Bahasa Malaysia, the national language; investigation of the need to revise (consolidate and modernize) older State and Federal laws and preparation of revised texts;¹⁰² extension of peninsular Malaysian laws to East Malaysia or to the Federal Territories (after consultation and approval with the relevant state and federal authorities, as the case may be). Since 2002, this division of the AG's chambers has also conducted law reform activities. Its mandate includes overcoming obsolete laws, removing overlapping and anomalous laws, achieving uniformity in the law, and modernizing Malaysian laws in tandem with globalization.¹⁰³ Such law reform activities are to be conducted through consultation with government departments, the legal profession, academics, non-government organizations and industry (as appropriate) in relation to law reform proposals. The revision work has been conducted consistently since

⁹⁸ Examined in Amanda Whiting "In the Shadow of Developmentalism: The Human Rights Commission of Malaysia at the Intersection of State and Civil Society Priorities" in C. Raj Kumar, and D.K. Srivastava (ed.), *Human Rights and Development: Law, Policy and Governance* (Hong Kong, LexisNexis, 2006). See further Norani Othman, "Grounding Human Rights Arguments in Non-Western Culture: Shari'a and Citizenship Rights of Women in a Modern Islamic State", in Joanne Bauer and Daniel Bell (eds.) *The East Asian Challenge for Human Rights* (Cambridge: CUP, 1999).

⁹⁹ Kikue Hamayotsu, "Politics of Syariah Reform: The Making of the State Religio-Legal Apparatus" in Virginia Hooker and Norani Othman (eds.) *Malaysia: Islam, Society and Politics* (Singapore: ISEAS, 2003), 55-79. A detailed evaluation of the modernization of *syariah* is in Donald Horowitz, "The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change" (1994) 42 *American Journal of Comparative Law* 233 (Part 1) and 543 (Part 2).

¹⁰⁰ See generally Neo, "Anti-God" *supra* note 97.

¹⁰¹ These diverse and conflicting outcomes are frequently reported critically in the mass media and are also the subject of a modernizing *syariah* law reform campaign by the women's advocacy group Sisters In Islam. For typical news commentary, see: "In dire need of uniformity" *New Sunday Times* 12 January 2003; "States asked to gazette Islamic Family Law Immediately" *Bernama Daily Malaysian News* 14 January 2003; "Malaysian Gov't Mulls Standardisation Of Syariah Laws" *Bernama Daily Malaysian News* 11 January 2003; "Amended Islamic Family Law Can Be Model For All States" *Bernama Daily Malaysian News* 14 January 2006; "PM to chair special meeting on Syariah Law" *Bernama Daily Malaysian News* 13 January 2003; "Perlis's Move On Polygamy Is In The Interest Of Children, Says Shahidan" *Bernama Daily Malaysian News* 6 January 2003; "Cabinet Approves Six Draft Bills To Streamline Islamic Laws" *Bernama Daily Malaysian News* 11 February 2000; "Sarawak State Assembly Passes Six Syariah Bills" *Bernama Daily Malaysian News* 6 November 2001.

¹⁰² This must be done in accordance with *Revision of Laws Act* 1968, s 6(1).

¹⁰³ Law reform was added to the Law Revision Division's functions in 2002: see the website of the Attorney General's Chambers at www.agc.gov.my/agc/agc/rev/act1.htm.

the late 1960s, with considerable success. From 2003, 11 State law revision divisions have been established for the peninsular Malaysian States, and the two East Malaysian States have also established their own law revision and law reform units with their respective State bureaucracies. The State enactments under which they conduct their revision work are themselves instances of legal uniformity, as they are based upon a model Federal law, drafted by the federal Attorney-General. These State agencies are supported and guided by the central bureaucracy.¹⁰⁴ Moreover the extension project has also proceeded apace: since 1963, according to the Attorney-General's chambers, 281 Federal laws have been extended (sometimes with modification) to East Malaysia or the federal territories, and it is proposed to extend a further 117 laws.¹⁰⁵ It is, however, too soon to give an accurate assessment of the new law reform program.¹⁰⁶

The federal Attorney-General's Chambers has recently established a division to further the harmonization of civil law (common law) with *syariah*, with the apparent assumption that the former ought to be brought into line with the latter. So far it has sponsored conferences and seminars but not achieved any legislative changes.¹⁰⁷

2. Formal or Informal Voluntary Coordination among the States (Bottom Up)

Model laws have been used to achieve a high degree of uniformity in Islamic law, as discussed above. However, this process is generally initiated by the central body rather than the component States.

All Federal and State matters are within the jurisdiction of a single hierarchy of civil courts, centrally governed at the Federal level. There is no component State judiciary with similar jurisdiction. In relation to the State based Islamic courts, there is only a very limited cross-vesting scheme and published reports of *syariah* decisions are still not plentiful.¹⁰⁸ However the powerful and well-funded federal Department of Syariah Judiciary (Jabatan Kehakiman Syariah Malaysia, JKSM) attempts to coordinate State *syariah* institutions and practices.¹⁰⁹

Other than through the National Land Council and the National Local Government Council and other similar initiatives organised by the central government, there seems to be little coordination among the component State executive branches.

Nonetheless, the traditional State rulers – the hereditary Malay rulers and the appointed Yang di-Pertua Negri in those States without Malay rulers – do meet regularly in the Conference of Rulers to deliberate on national policy from the perspective of their own privileges as well as the interests of their States. In conference they are accompanied by the elected political executive of their respective States. Since the Conference of Rulers must be consulted before any changes can be made to certain constitutional

¹⁰⁴ Attorney-General's Chambers Malaysia Annual Report 2005/2006, "Law Revision and Reform Division" p 170-1.

¹⁰⁵ See the website of the Law Revision and Reform Division at www.agc.gov.my/agc/agc/rev/rev.htm and the Attorney-General's Chambers Malaysia Annual Report 2005/2006, "Law Revision and Reform Division" page 158.

¹⁰⁶ The Attorney-General's Chambers Malaysia Annual Report 2005/2006, "Law Revision and Reform Division" pp 159-160 itemises 9 law reform references for 2005 and 10 for 2006, on the topics of: private agencies; copyright; the secular family law; community service as a sentencing alternative; compensation for victims of crime; limitation of actions; the revision of laws scheme; human trafficking; no fault liability insurance for motor vehicles; regulation of the legal profession; banking; child care; investment; road transport; offshore companies; cooperative societies; care centres; financial services in the federal territories; and Malaysian standards.

¹⁰⁷ The harmonization project (Projek Harmonisasi) was officially launched in December 2007, but has apparently been longer in the making. See the Attorney-General's Chambers website: www.agc.gov.my/agc/agc/adv/adv.htm.

¹⁰⁸ The Federal Department of Syariah Judiciary has begun to publish case reports prospectively, but there does not seem to be much effort to publish older decisions.

¹⁰⁹ See the official website of the JKSM: www.jksm.gov.my, where the official mission statement includes standardizing the Islamic legal system in the nation and streamlining Islamic legal processes throughout the country.

provisions affecting the “sensitive issues” as well as certain provisions affecting the States, it acts as a form of safeguard for the federal nature of the Constitution.¹¹⁰ However, as already mentioned, the BN coalition has governed the nation and most states since independence, so it is unlikely that the political advice given to the Rulers at the Conference will depart far from central government policies.

3. *The Role of other State and Non-State Actors*

Most legislation, whether involving unification or not, is initiated by the governments and there is minimal contribution from or consultation with non-state actors. There is no independent Law Commission, for example, and such law reform or legal revision work as takes place is initiated from within government bureaucracies.

Yet Malaysian civil society organizations, the statutory National Human Rights Commission and the Bar Council (the executive arm of the peninsular Malaysian Bar) regularly comment on law reform issues, including the desirability of legal uniformity or harmonization within the federation or with international legal standards.¹¹¹ The women’s advocacy organization Sisters in Islam has been persistent in campaigning for uniformity of *syariah* law across the Federation, using the comparatively more progressive Federal Islamic law statutes as models for the States to follow. Since 1988 it has pushed for further reforms, and through its popular publications, legal clinics and campaigns it draws public and government attention to the shortcomings of the current *syariah* system and the need for uniformity throughout Malaysia and conformity with human rights standards.¹¹² Coalitions of women’s rights groups can claim responsibility for persuading the federal government to include gender in the equal rights clause of the Constitution (article 8), as part of its campaign to bring Malaysian laws into harmony with international human rights standards.¹¹³ They can also claim responsibility for the *Domestic Violence Act* 1994,¹¹⁴ which took a decade to negotiate because, although criminal law is a Federal matter, State *syariah* authorities had to be persuaded that the law contained nothing inimical to Islamic law. Civil society influence for legal change or unification of law in the areas of environmental law or the rights of indigenous peoples have been markedly less successful.

4. *The Role of Legal Education and Training in the Unification of Law*

Generally, law schools in Malaysia at the undergraduate level focus on Federal laws and do not have enough materials and demand to teach courses on State laws. Furthermore, there is a peninsula-centric attitude towards legal education and the legal systems of Sabah and Sarawak receive minimal attention. This is probably explained by the fact that civil courts are federal courts, that most of the laws are federal laws, and the highly centralized nature of public governance and administration in Malaysia. Legal education and training, therefore, have very little impact in the unification of the general law in Malaysia, although it does acknowledge and thereby reinforce the centralizing tendency in the Federation.

¹¹⁰ See further Harding, *Law, Government and the Constitution*, *supra* note 5, at p. 72 ff.

¹¹¹ See Amanda Whiting “Situating Suhakam: Human Rights Debates and Malaysia’s National Human Rights Commission” (2003) 39 (1) *Stanford Journal of International Law* 59; Andrew Harding and Amanda Whiting, “‘Custodians of Civil Liberties and Justice in Malaysia’: The Malaysian Bar and the Moderate State” in Terence C. Halliday, Lucien Karpik and Malcolm M. Feeley (eds.) *Fates of Political Freedom: The Legal Complex in the British Post-Colony* (Cambridge: Cambridge University Press, forthcoming), chapter 7.

¹¹² The official website is <http://www.sistersinislam.org.my/>.

¹¹³ Malaysia is a state party to the International Convention to Eliminate All Forms of Discrimination Against Women, and has submitted its first and second periodic reports - Malaysia, *Combined Initial and Second Periodic Report to the Committee on the Elimination of Discrimination against Women* (UN Doc CEDAW/C/MYS/1-2, 12 April 2004).

¹¹⁴ Information about the campaign is at http://www.awam.org.my/networks/jag_vaw_activities.htm ; see further Cecilia Ng, Maznah Mohamad and Tan beng hui, *Feminism and the Women’s Movement in Malaysia: An Unsung (R)evolution* (Abingdon: Routledge, 2006), pp 41-62.

Awareness of State laws is mostly attained after graduation, in the workplace or through ad-hoc training conducted by State bar committees (in the case of Sabah and Sarawak, the State Law Associations).

Furthermore, the compulsory legal education subjects dealing with Islamic law in both the general law universities and the International Islamic University of Malaysia do not venture deeply into the specific differences between the peninsular States, but focus more on questions of underlying principle and common doctrine. In this they would seem to contribute to a general movement towards harmonization of Islamic legal doctrine within the Federation, but this is perhaps achieved through under-emphasizing the small but significant differences in substance and procedure mentioned above, although particular courses on Islamic Family law may address these issues.¹¹⁵

There are several law schools in Malaysia, all situated in peninsular Malaysia.¹¹⁶ Because of ethnic Malay students having long received preferential access to tertiary educational institutions in Malaysia under the NEP and successor plans, many Malaysian students of non-Malay ethnicity are obliged – if they can afford it – to obtain legal qualifications from overseas law schools, typically in Singapore, the United Kingdom, Ireland, Australia and New Zealand. This differential experience must affect law graduates' exposure to legal training and law reform ideas, although the authors are not aware of any recent qualitative or quantitative study of this issue.

Testing for bar admission is uniform nationwide for Malaysian nationals who have completed legal education in Malaysia or Singapore. Admission to practice in Peninsular Malaysia is controlled by the *Legal Profession Act 1976*, which deems all admitted advocates and solicitors to be members of the Malaysian Bar.¹¹⁷ Yet admission to practice in the East Malaysia states is regulated by the *Advocates Ordinance (Sabah)* and *Advocates Ordinance (Sarawak)*. These are protectionist measures, restricting the right to practice in the East Malaysian States to lawyers who can demonstrate a “connection” with the state by birth or residence, unless an ad hoc admission licence has been approved.¹¹⁸ Such ad hoc applications may be, and apparently frequently are, challenged by the State guilds, the Sabah Law Association and the Advocates' Association of Sarawak.¹¹⁹ This restriction has been judicially extended to apply to arbitration proceedings, and any other forum of dispute resolution in Sabah and Sarawak.¹²⁰

Malaysian nationals who have obtained their legal qualifications outside of Malaysia (unless at one of the English Inns of Court) must also pass the Certificate of Legal Practice (CLP) examination administered by the Qualifying Board established by the *Legal Profession Act 1976* under Part II of the Act. Pass rates are not high and the exam itself has been the subject of scandal and criticism in the recent past.¹²¹ Due to widespread concern at the falling standard of new entrants to the profession, the Malaysian Bar is currently devising a Common Bar Course, based upon vocational education courses in the United Kingdom and other common law jurisdictions, as a single point of entry to the profession for both private practitioners and public sector lawyers.¹²²

¹¹⁵ We are indebted to Dr. Maizatun Mustafa of the law faculty at the International Islamic University of Malaysia for this information.

¹¹⁶ University of Malaya; National University of Malaysia (Universiti Kebangsaan Malaysia); the International Islamic University Malaysia; University of Technology MARA (Universiti Teknologi MARA), University of Northern Malaysia (Universiti Utara Malaysia); Multimedia University; the Islamic University College Malaysia. Overseas universities also offer legal education in Malaysia and several private colleges offer the University of London External LLB.

¹¹⁷ *Legal Profession Act 1976*, s 43.

¹¹⁸ For example, under s 10(c) of the Sabah *Ordinance*.

¹¹⁹ Note further that even with an ad hoc practicing licence, a peninsular Malaysia lawyer must also apply for and receive a work permit from the Immigration Department of the relevant East Malaysian State.

¹²⁰ *In Re Mohamed Azahari Matiasin (Applicant)* [2011] 2 CLJ 630.

¹²¹ A typical example of hostile media commentary is Julian Puvanaswaran, “Purpose of CLP exam – you tell me”, letter to the editor, *Malaysiakini*, 20 October 2006 www.malaysiakini.com.

¹²² Malaysian Bar, Ad Hoc Committee on the Common Bar Course, Report 2010-2011, available at http://www.malaysianbar.org.my/ad_hoc_committee_on_the_common_bar_course/ad_hoc_committee_on_the_common_bar_co

In relation to the State *Syariah* Courts, the admission of *syarie* lawyers is subject to each component state's law, the rules of which are not uniform.¹²³ Lawyers admitted to practice according to the provisions of the *Legal Profession Act 1976* may practice in *syariah* courts if they also fulfil the requirements to be *peguam syarie* (*syariah* lawyers), typically a requirement to demonstrate to the state Majlis (religious affairs council) a "sufficient knowledge of Islamic Law".¹²⁴ With the professionalization of *syariah* instruction via the Faculty of Law at the well-regarded International Islamic University of Malaysia, and now also the Islamic University College Malaysia, a degree in *syariah* is likely to be accepted as evidence of sufficient knowledge. There is a further requirement in Rules made pursuant to the Federal Territories and some of the state *syariah* statutes, but not present in the governing statutes themselves, that a *peguam syarie* must profess the religion of Islam, as well as demonstrate knowledge of Islamic law. This faith requirement is currently being tested in the courts.¹²⁵ Hence Muslim members of the Malaysian Bar who also demonstrate knowledge of Islam, for example by obtaining a *syariah* diploma or passing sufficient *syariah* subjects in their LLB studies at other universities, may qualify to practice in *syariah* courts, subject to any additional requirements set by the state Majlis. However a *peguam syarie* will not necessarily meet the requirements of admission to practice set out in the *Legal Practice Act 1976* for admission to practice in the secular system. The result is that some members of the Malaysian Bar are also practitioners in *syariah* courts, and the Malaysian Bar also has a subcommittee for *syariah* law. In addition there is a professional association for *Pegum Syarie*, the *Pegum Syarie Association of Malaysia (Persatuan Pegum Syarie Malaysia, PGSM)*.¹²⁶

Graduates with appropriate LLB qualifications may set up practice in any of the states of peninsular Malaysia, as advocates and solicitors are admitted to the High Court of Malaya for the peninsula, not to only a particular state within the federation. As stated above, however, admission to practice in either of the Borneo States of Sabah and Sarawak requires a demonstrated "connection" to that state by birth or residence, although ad hoc admissions of peninsular lawyers can be arranged.

As at the end of 2009, official Bar statistics show that there were 13,196 registered practitioners. Of these, 72.15% were "junior lawyers", i.e. of less than 7 years standing. Based on these figures, majority of lawyers were sole practitioners (51.12%), a further 43.01% practiced in small (2-5 person) firms, and only 0.3% practiced in firms with over 31 members.¹²⁷ The overwhelming majority of lawyers practice in the larger cities. Slightly more recent statistics for 2010 show that more than half of all practicing lawyers are concentrated in Kuala Lumpur, the capital city, and the surrounding (and wealthiest) state of Selangor, whereas the smaller states have less than 400 lawyers each.¹²⁸ There are currently 1157 lawyers on the

urse.html; see further Roger Tan, "High Time for a New Bar" *Sunday Star*, 6 February 2011, and posted to Malaysian Bar at http://www.malaysianbar.org.my/members_opinions_and_comments/high_time_for_a_new_bar.html.

¹²³ Sharifah Zubaidah bt. Syed Abdul Kader, "How To Become A Syarie Lawyer" (1995) 1 CLJ cxlix.

¹²⁴ As provided for in *Administration of Islamic Law (Federal Territories) Act 1993*, s59 (1).

¹²⁵ Victoria Martin, for several decades a practicing member of the Malaysian Bar, subsequently obtained a Diploma of Syariah Law and Practice from the International Islamic University and sought admission to practice as a *peguam syarie* from the Federal Territories Islamic Affairs Council. Her application was refused because she is not a Muslim. Her High Court challenge to the validity of the faith stipulation in the Rules argued that the parent act was *ultra vires* and in violation of Federal Constitutional guarantees of equality before the law and freedom of association. The judicial review challenge on the High Court was unsuccessful, and an appeal is pending: see further Whiting, "Secularism," *supra* note 53, pp 21–23. Hafiz Yatim, "Non-Muslim loses bid to practice in Syariah courts", *Malaysiakini* 17 March 2011.

¹²⁶ See further Amanda Whiting, "The Training and Practice of 'Islamic Lawyers' in the Federal Territories of Malaysia" in R. Michael Feener, Mark E. Cammack and Clark B. Lombardi (eds.), *Islamic Legal Professionals in Contemporary Southeast Asia*, (forthcoming).

¹²⁷ See http://www.malaysianbar.org.my/general_notices/bc_general_statistics_2009.html.

¹²⁸ As at the end of 2010, there were 13358 lawyers, and 6008 legal firms in peninsular Malaysia and the distribution by state or territory is as follows: Federal Territory of Kuala Lumpur, 5459 lawyers, 1724 firms; Selangor, 2863 lawyers, 1522 firms; Johor, 1028 lawyers, 584 firms; Penang, 1057 lawyers, 531 firms; Perak, 655 lawyers, 391 firms; Kedah, 373 lawyers, 229 firms; Negri Sembilan, 362 lawyers, 230 firms; Pahang, 330 lawyers, 190 firms; Melaka, 328 lawyers, 173 firms; Kelantan, 314 lawyers, 185 firms; Perlis, 32 lawyers, 221 firms; Federal Territory of Labuan, 12 lawyers and 7 firms; "others" (presumably including the

Bar roll of Sarawak, although these figures may include non-practicing lawyers. There are also approximately 260 firms.¹²⁹ The Sabah Law Association records the presence of 209 firms in that state (including branch offices), but does not presently list the total number of practitioners.¹³⁰

Currently 2,114 *peguam syarie* are recorded as practising throughout the federation by federal Department of Syariah Judiciary, although note that they must be separately accredited and registered in each of the fourteen jurisdictions of the Federation (i.e., the 13 states and the Federal Territories) where they wish to practice. Because some *peguam syarie* are certified to practice in several jurisdictions, the total number for Malaysia will be less than the combined totals for each separate jurisdiction. Currently, there are approximately 263 accredited *peguam syarie* in the Federal Territories (Kuala Lumpur, Putrajaya and Labuan), and 205 registered *peguam syarie* in the surrounding state of Selangor. Other states with more than 200 *peguam syarie* are Kelantan (258), Penang (249) and Terengganu (226). Pahang had 174 Islamic lawyers, but all the other states had fewer than 150.¹³¹

It seems that the percentage of graduates setting up their own practice immediately following admission to practice is relatively low, but we have no hard data. A recent proposal mooted in the media by the *de facto* Law Minister to prevent inexperienced lawyers from setting up their own firms seem to imply that some are doing so and this is perceived as a problem,¹³² but such comments by the government should be treated with caution as government politicians routinely criticize standards and ethics of the Bar in retaliation for Bar condemnation of state breaches of human rights.¹³³

There are no institutions of legal education and training that play such a unifying role. However, in respect of specific areas of law, there are institutions that push for unification of laws of those specific areas. For instance, the Institute of Islamic Understanding (Institut Kefahaman Islam Malaysia, IKIM) – which is in fact a semi-autonomous government department¹³⁴ – has been advocating a uniform and harmonised Islamic law in the component states. The federal department of *syariah* judiciary (Jabatan Kehakiman Syariah Malaysia, JKSM) organizes the rotation of state *syariah* judges throughout the federation so that they can gain wider experience, and this practice can be assumed to contribute in some as yet unmeasured way towards uniformity of decision making in the *syariah* system.¹³⁵ Furthermore, as noted above, an express mission of JKSM is to promote uniformity of Islamic law in the nation.

To the extent that the Malaysian Bar is a national body,¹³⁶ it can be assumed to play such a unifying role in a practical sense. It conducts many continuing legal education seminars and workshops, and all new

new federal administrative capital of Putrajaya), 105 lawyers, but no firm statistics available. Source: http://www.malaysianbar.org.my/legal_directory_statistics.html. This total does not include those admitted to practice in Sabah or Sarawak. There are around 1575 *syariah* lawyers.

¹²⁹ Advocates' Association of Sarawak, <http://sarawak-advocates.org.my/index.php/rolls-a-directories/rolls> (list of lawyers) and <http://sarawak-advocates.org.my/index.php/rolls-a-directories/legal-firms> (list of firms).

¹³⁰ Sabah Law Association: <http://www.sabahbar.org.my/firms.aspx>.

¹³¹ All figures are taken from the official list on the Federal Department of Syariah Judiciary website www.jksm.gov.my, carian *peguam syarie* (*syariah* lawyer search) http://www.jksm.gov.my/jksmv2/index.php?option=com_wrapper&view=wrapper&Itemid=187&lang=bm. For completeness, the remaining figures are as follows: Johor, 128; Kedah, 86; Melaka, 145; Negri Sembilan, 139; Perak, 56; Perlis, 49, Sabah, 61, Sarawak, 75. Analysis of gender breakdown, based on different statistics, is made in Amanda Whiting, "The Training and Practice of 'Islamic Lawyers,'" *supra* note 126.

¹³² "Peguam kurang pengalaman tidak dibenar buka firma sendiri" *Utusan Malaysia* 23 July 2008 <http://www.malaysianbar.org.my/berita/komen_undang_undang/peguam_kurang_pengalaman_tidak_dibenar_buka_firma_sendiri.html>

¹³³ See Harding and Whiting, *supra* note 111.

¹³⁴ For this reason it was not mentioned in the discussion non-state actors, above. Its website, clearly showing close connections with the government, is <http://www.ikim.gov.my/v5/index.php>.

¹³⁵ Kikue Hamayotsu, *supra* note 99, at p. 61.

¹³⁶ As noted above, the Malaysian Bar technically covers West Malaysia only; the two East Malaysian States each have a separate bar association: the Advocates' Association of Sarawak and Sabah Law Association.

graduates are required to attend, and pass, the Bar's Legal Ethics course as a precondition for admission to practice. However continuing legal education is not (yet) compulsory in Malaysia. Additionally, State Bar Committees conduct regular seminars and workshops for members, and sometimes interested members of the public.

5. *External Influences on Legal Unification*

As noted above, although it is expressly provided in the Federal Constitution that the Federal Parliament may make laws for the component states for purposes of implementing an international obligation (Article 76(1)(a)), to the best of our knowledge, no such laws have been made under this mechanism. The statutory National Human Rights Commission (SUHAKAM) has a mandate to advise the government regarding accession to international human rights treaties and in relation to the formulation of legislation.¹³⁷ It has interpreted this mandate broadly, and uses the occasion of its annual reports to Parliament to recommend that Malaysia participate in the principal international human rights covenants and, on a more modest scale, that it amend security and censorship laws to bring them closer to international human rights standards. These recommendations have so far been ignored, and the annual reports are never given serious consideration by the Federal Parliament or Executive.¹³⁸ Nevertheless the central government has made some efforts to bring Malaysian law into conformity with Malaysia's state party obligations under the *Convention on the Elimination of All Forms of Discrimination Against Women*. In 2001, the equality clause of the Federal Constitution was amended to prohibit discrimination on the basis of gender, and some other laws have been amended, too (see above, section 3). In March 2011, Malaysia announced that it would become a state party to the Rome Statute establishing the International Criminal Court. Yet it is not clear what, if any, changes to domestic law will flow from this, as the Law Minister stated that membership in the International Criminal Court would not require Malaysia to abolish detention without trial under the *Internal Security Act*.¹³⁹

IV. INSTITUTIONAL AND SOCIAL BACKGROUND

1. *The Judicial Branch*

The apex court, the Federal Court is conferred with exclusive jurisdiction to determine whether central legislation has exceeded lawmaking powers allocated to the central government. This is expressly set out in the Federal Constitution, in Article 128(1) (a). Generally speaking, the apex court in Malaysia has been reluctant to interpret the constitution robustly so as to invalidate Acts of Parliament, or subordinate instruments made under them; instead, judges have tended to defer to the government of the day.¹⁴⁰

Legal determinations of the validity of Federal or State law on the basis that the respective legislature exceeded its lawmaking powers are rare. There is nonetheless a constitutionally prescribed mechanism to have such determinations judicially made.¹⁴¹ The jurisdiction to make such determinations lies exclusively with the Federal Court, and may be invoked particularly in proceedings between the Federation and any component States. In other proceedings, however, permission of the Federal Court

¹³⁷ *Human Rights Commission of Malaysia Act 1999*, sections 4(1) (b), (c).

¹³⁸ See generally Amanda Whiting, "Situating Suhakam: Human Rights Debates and Malaysia's National Human Rights Commission" (2003) 39 *Stanford Journal of International Law* 59-98; and "In the Shadow of Developmentalism" *supra* note 98, at p. 550

¹³⁹ "Nazri: Malaysia to join ICC" *The Star Online*, 22 March 2011.

¹⁴⁰ Malaysian constitutional scholar Shad Saleem Faruqi proposes that this is because Malaysian judges are still "steeped in the British tradition of parliamentary supremacy", *Document of Destiny: The Constitution of the Federation of Malaysia* (Malaysia: Star Publications, 2008), p 83; see further *Sheridan and Groves, The Constitution of Malaysia 5th edition*, edited by Dato' V.C. Vorah, Philip T.N. Koh and Peter S.W. Ling (Kuala Lumpur: Malayan Law Journal, 2004), p 38.

¹⁴¹ Federal Constitution, article 4(3), (4).

must be sought before it will hear any determination for a declaration of invalidity on the basis of legislative incompetency. The threshold is reasonably low, so as to allow most challenges to commence, i.e., the applicant must show an arguable case.

To date, there is only one reported case in which a Federal Law was successfully challenged on the basis that it exceeded the Parliament's lawmaking powers by trespassing into the States' legislative domain. In that case,¹⁴² the law at issue was a federal provision making it a penal offence for any person to cause disharmony, disunity or feelings of enmity, hatred or ill-will, on grounds of religion, between persons or groups of persons professing the same or different religions. In a 3-2 majority decision, the Supreme Court (then the apex court) found the penal provision to be "in pith and substance" a law on the subject of the religion of Islam, a legislative item under the State List, with respect to which only the component States have power to legislate, and not a law for public security, as the federal government had contended. Hence the impugned section of the Federal penal code was declared constitutionally invalid. There have also been only a few cases where state laws have been declared invalid for trespass into the federal legislative list. One example of a successful challenge is *City Council of Georgetown v. Government of Penang* [1967] 1 MLJ 169, which invalidated state laws for inconsistency with the federal *Local Government Elections Act 1960*.

On the other hand, Malaysian courts are more willing to entertain challenges to the lawfulness of executive and administrative action based on the well-accepted principles of judicial review: illegality, irrationality, procedural impropriety and proportionality. Judicial review of the executive is available under section 25(2) of the *Courts of Judicature Act 1964* and Order 53 of the *Rules of the High Court 1980*, and there are hundreds of reported decisions.¹⁴³

The superior courts (the High Court, the Court of Appeal and the Federal Court) are empowered to construe all laws including State constitutions and laws and rule on their constitutionality. However, with regard to a challenge to the validity of a State law on the ground that it exceeded the lawmaking powers of the State legislature, the same mechanism applies as set out above in relation to challenges to Federal law. Leave before the Federal Court must be sought before specific declarations on invalidity can commence.

It is widely accepted that the Federation's judicial power vests with the two High Courts co-ordinate jurisdiction (the High Court of Malaya and the High Court of Sabah and Sarawak), the appellate Court of Appeal and the Federal Court as the apex court. These (three-tiered) courts are centrally governed at the federal level, having jurisdiction over both the Federal and State Lists matters. There is no component State judiciary with similar jurisdiction.

A separate *syariah* court system exists within each component state, having jurisdiction only in that state over matters specified in Item 1 of the State List, i.e., matters of Islamic personal and family law, and only over persons professing the religion of Islam. There are also Federal *syariah* courts, but their jurisdiction is confined to the Federal territories of Kuala Lumpur, Putrajaya and Labuan. Like the civil courts, the *syariah* courts have both trial and appellate courts (in certain states, two-tiered, others three-tiered). Each State's (and the federal territories') *syariah* appellate procedure terminates within the State's (or the federal territories') hierarchical court system, as there is no national court of appeals for Islamic Law. Appeals from the *syariah* system to the apex court in the civil system (i.e., to the Federal Court) were terminated in 1988 through constitutional amendment (the insertion of article 121(1A) into the Federal Constitution). The effect of this amendment is that *syariah* courts have exclusive jurisdiction over

¹⁴² *Daud bin Mamat & Ors v. Government of Malaysia* [1988] 1 MLJ 119.

¹⁴³ Kamal Halili Hassan, "Development of Judicial Review in Malaysian Industrial Law" 8(1) (2006) *Australian Journal of Asian Law* 25-67; Shad Saleem Faruqi, *Document of Destiny*, *supra* note 140, at p. 75-76.

Islamic law matters bestowed upon them by constitutionally valid state (or federal territories) *syariah* enactments.

Hence a frequent area of conflict is between Federal law, especially the civil and political rights guaranteed in the Federal Constitution, and provisions in State or Federal Islamic statutes. These are construed as jurisdictional conflicts, and most often arise in the context of conversion into or out of Islam (including instances where Muslims have voluntarily renounced Islam and may thereby become liable for the offence of apostasy under Islamic law). Generally speaking, the civil courts have deferred to the *syariah* courts and declined to exercise federal jurisdiction. The effect has been in most cases that the non-Muslim applicant (or the person claiming to have left Islam, as the case may be) is not able to obtain redress in the secular system, because that system has refused to seize jurisdiction; yet the applicant may have no access to the *syariah* courts (which only have personal jurisdiction over Muslims) or may not wish to recognize the jurisdiction of the *syariah* courts (because the applicant contests being, or any longer being, a Muslim). These cases have been extremely controversial and divisive in Malaysian society, and are the subject of much academic and civil society commentary.¹⁴⁴

In addition to the civil (national) and *syariah* (State and Federal territories) systems just examined, there are separate native court systems in the two States of East Malaysia, exercising both trial and appellate jurisdiction in each instance. They are of very limited jurisdiction, and may not hear and determine matters already governed by state *syariah* laws, the laws of the States and most Federal Laws. In Sarawak there is a six-tier hierarchy, from Headman's Court through Chief's Court, Chief's Superior Court, District Native Court, Resident's Native Court to the apex Native Court of Appeal. The system is established under the *Native Courts Ordinance 1992* (Sarawak) (replacing the *Native Courts Ordinance 1955*).¹⁴⁵ The native courts in Sabah have a less complex hierarchy of only three tiers: Native Court, District Native Court, and Native Court of Appeal. Sabah native courts exercise jurisdiction bestowed by the *Native Courts Enactment 1992* (Sabah).¹⁴⁶ Native courts exercise exclusive jurisdiction over matters conferred by their respective enabling statutes, and there is no appeal to the civil High Court of Sabah and Sarawak (one of the two national High Courts of co-ordinate jurisdiction).

2. *The Relationship between the Central and State Governments*

There is no direct method by which the central government can force component States to legislate, although there is a constitutional provision mandating essential common elements in the State constitutions (contained in the 8th schedule to the Federal Constitution), failing which the Parliament may by law make provisions for the same or for removing inconsistent provisions.

Instances where the Federal parliament may legislate on State List matters, pursuant to Federal Constitution article 76, have been discussed above in Part II, as have instances where the central government and Federal Parliament may, in times of a declared state of emergency, make laws for a State or even suspend the State constitution,¹⁴⁷ or advise the ruler of a State to pass regulations.¹⁴⁸

¹⁴⁴ For some academic commentary, see: Thio Li-ann, "Jurisdictional Imbroglia" *supra* note 52; Salbiah Ahmad, "The Freedom of Religion Impasse and Powers of the High Court" (2003) XXII (no 3) INSAF (The Journal of the Malaysian Bar) 60; Whiting, "Desecularizing Malaysian Law?," *supra* note 52; Thio Li-ann "Apostasy and Religious Freedom: Constitutional Issues Arising from the Lina Joy Litigation" [2006] 2 MLJ 1; Whiting, "Secularism," *supra* note 53

¹⁴⁵ See the description in Wu Min Aun, *supra* note 29, at pp. 244-249.

¹⁴⁶ See *Ibid*, 249 – 258.

¹⁴⁷ Federal Constitution, articles 148, 158; and see *Stephen Kalong Ningkan v. Government of Malaysia* [1968] 1 MLJ 119.

¹⁴⁸ See the discussion of the 1977 Kelantan Emergency and the *Emergency Powers (Kelantan) Act 1977 (Act 192)*, above, Part II, section 1, overview.

The central government executes central government law. The police and public service are central government matters.¹⁴⁹ Of course component States have smaller public service bodies to execute their own functions. If the central government does require the assistance of the State government to execute central government law, then it must provide the necessary funding for this purpose.¹⁵⁰

Each component State is allowed two representatives in the upper chamber of the bicameral Federal Parliament (the Dewan Negara, or Senate).¹⁵¹ These State senators are chosen by their respective State legislative assemblies, not directly elected by popular vote, and so the political complexion of the upper house is a direct mirror of state politics. There are also a total of four senators representing the three Federal Territories.¹⁵² Additional senators are appointed by the Yang di-Pertuan Agong because of their distinguished public record or achievements in the professions, commerce, industry, agriculture, culture or social service, or because they are representatives of racial minorities or are capable or representing the interests of aborigines.¹⁵³ (The term “aborigine” means an indigenous person of the Peninsula, not one of the more numerous native peoples of Sabah or Sarawak.¹⁵⁴) Pursuant to this provision, two senators each representing the aborigines and the Siamese community in Malaysia (mostly in northern parts bordering Thailand) have been appointed.

The senators representative of the States and the minority communities do not have a very influential role in the legislative process, as they are always in the minority in the Senate, since 26 are elected, but 44 appointed. Although article 45(4) of the Federal Constitution allows the Parliament by federal law to increase the number of members to be elected for each component state to three from two and to provide for the state senators to be elected by the direct vote, and to decrease the number of appointed members, there has not been any political will for the same. Likewise, no political will exists to realize the constitutional drafters’ recommendations that the centre-nominated senators be reduced or abolished completely.¹⁵⁵ It is very rare for the senators to engage in a meaningful debate of bills approved by the House of Representatives, and even rarer to have bills rejected.¹⁵⁶

Malaysia practices fiscal centralization. While both central and component State governments have the power to tax, the Federal Constitution in Part III of the 10th Schedule limits what the States may collect. The central government is empowered to impose and collect a wide-range of taxes including such important taxes as individual income and corporate taxes, sales tax and taxes arising from exports and imports.

State governments have comparatively less capacity to collect taxes, and rely upon sources such as fees and receipts in respect of specific services rendered by departments of the State governments, licenses, assessment rates, and revenue from lands, mines and forests. The East Malaysia States of Sabah and Sarawak are allowed more sources of revenue.¹⁵⁷ For instance, these states are allowed to collect state sales taxes and import duty and excise duty on petroleum products.

Generally, as the States are allowed to tax items enumerated in Part III, Tenth Schedule (and also Part V for Sabah and Sarawak), and a few items representing minor revenues, the issue of multiple taxation is not as relevant as in other federations.

¹⁴⁹ Federal Constitution, 9th Schedule, List I, item 3 (a) (police) and item 6 (machinery of government).

¹⁵⁰ Federal Constitution, art 80(4) (6). See, for instance: *Printing of Qur’anic Texts Act 1986* (Act 326)).

¹⁵¹ Federal Constitution, article 45 (1) (a).

¹⁵² Federal Constitution, art 45 (1) (aa).

¹⁵³ Federal Constitution art 45(1) (b), 45 (2).

¹⁵⁴ Federal Constitution, art 160.

¹⁵⁵ See Shafruddin, *Federal Factor supra* note 9, at p. 18.

¹⁵⁶ See further Harding, *Law, Government and the Constitution, supra* note 5, at pp. 30-31, 79, 96.

¹⁵⁷ Federal Constitution, article 112 C and Tenth Schedule, Part V.

The component States have taxing power only over minor items, the largest sources being receipts from land sales, revenue from lands, mines and forests, entertainment duty and Islamic religious revenue. For Sabah and Sarawak, additional sources of revenue include import and excise duties on petroleum products and export duty on timber and other forest produce.

Revenues collected by the Federal Government are shared with the component State governments through capitation grants that are calculated by reference to State population. The formula is constitutionally mandated.¹⁵⁸ The Federal Government also issues special grants for development projects in component States on an ad hoc basis.¹⁵⁹

3. *Other Formal and Informal Institutions for Resolving Intergovernmental Conflicts*

All constitutional disputes can be resolved through the jurisdiction of the ordinary courts. Yet, the constitution assigns the Federal Court as the proper forum to determine whether a law is valid or whether a lawmaking body was competent to enact a law.¹⁶⁰

The Federal Constitution further provides for resolution of specific cases of disputes between governments by way of a tribunal. This involves disputes of three types. The first concerns disputes about the value of land transacted between the central and State governments. The tribunal set up is called the Land Tribunal.¹⁶¹ The second relates to disputes with regard to the monetary valuation of payments due to the State government by reason of its rendering executive duties at the request of the central government that are otherwise the responsibility of the central government.¹⁶² The third relates to contribution over use of lands and buildings owned by either governments in lieu of local rates which would otherwise be payable.¹⁶³

The institution of the Conference of Rulers¹⁶⁴ can be seen as another forum to resolve intergovernmental disputes. It has the constitutional function of deliberating on national policy, and when it performs this function the Rulers are accompanied by the political heads of their respective governments and must act on their advice.¹⁶⁵ Although the hereditary royalty have lost most of their former personal political power and now seem to enjoy a purely iconic function as symbols of traditional Malay culture and modern Malay national pride, nevertheless when convened in the Conference of Rulers along with the political executive, they can provide a less politicized (and more discrete) forum for the discussion of central-state matters.¹⁶⁶ The Conference of Rulers is also a consultative body: The federal constitution requires consultation with it on appointments to the Public Service Commission, the Education Service Commission, the Election Commission and the Auditor General.¹⁶⁷ Judicial appointments are made in this way too, but since 2009, a statutory Judicial Appointments Commission makes recommendations regarding appointment and promotion of judges to the Prime Minister, who then consults with the Conference of Rulers before making his recommendation to the Agong.¹⁶⁸

¹⁵⁸ Federal Constitution, art 109 and schedule 10.

¹⁵⁹ See generally Harding, *Law, Government and the Constitution*, supra note 5, at p. 176ff.

¹⁶⁰ See supra section 1.

¹⁶¹ Federal Constitution, art 87.

¹⁶² Federal Constitution, art 80(6).

¹⁶³ Federal Constitution art 156.

¹⁶⁴ Federal Constitution, art 38 and 5th Schedule.

¹⁶⁵ Federal Constitution, art 38 (3).

¹⁶⁶ See in this regard the comments of Harding, *Law, Government and the Constitution*, supra note 5, at p. 72.

¹⁶⁷ Fong, supra note. 6, at p 236-241.

¹⁶⁸ Established by *Judicial Appointments Commission Act 2009* (Act 695); appointment provisions in sections 22-28, read with Federal Constitution article 122B.

There are other constitutionally established consultative bodies. When making financial decisions affecting the States, the federal government must consult the National Finance Council, composed of representatives of each of the states;¹⁶⁹ according to the former Sarawak Attorney General J.C. Fong, consultation in this manner “ensures that the financial or economic affairs of the Federal Government and those of the States are discussed within the Council and both Federal and State Governments have a forum to consult each other, on all financial issues affecting them”.¹⁷⁰ The National Council for Local Government was established by constitutional amendment to coordinate the overlap of local government functions which straddle federal and state responsibilities.¹⁷¹ It formulates national policy, and the federal and state governments must consult it in respect of proposed legislation affecting local government matters.¹⁷² The National Land Council, established by article 91, has similar powers and functions.

4. *The Bureaucracy*

For the most part, the civil service of the central government is separate from the civil services of the component States. The civil service of the central government is administered by the Public Services Commission Malaysia, while the majority of the States have their separate public service commissions. Yet the civil service of four States (Malacca, Penang, Negeri Sembilan and Perlis) comes under the jurisdiction of the federal Public Services Commission.¹⁷³

Joint services, common to the central government and one or more of the component States (or at the request of the States concerned, to two or more States), may be established by federal law.¹⁷⁴ Pursuant to this, *Joint Service (Islamic Affairs Officers) Act 1997 (Act 573)* has been enacted to establish a joint service for Islamic Affairs Officers in the Federal Territories, and the states of Malacca, Negeri Sembilan, Penang, Selangor, Perlis and Terengganu. The power to appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer and exercise disciplinary control over these joint services officers are vested in the federal Public Services Commission.¹⁷⁵

In four States where public service is governed by the Federal Public Service Commission – Malacca, Penang, Negeri Sembilan and Perlis - lateral mobility exists between these States’ civil system and the central government’s civil system.¹⁷⁶ For instance, the post of Perlis Secretary of State was recently filled by a former deputy secretary-general of a federal ministry who has served at both the State and Federal level.¹⁷⁷ Mobility is also provided under joint services such as the Joint Service for Islamic Affairs Officers.¹⁷⁸ Although component States may have their separate civil service, the States may yet turn to the central Public Services Commission and other central commissions for appointments. State constitutions may provide, as the Perak Constitution does, that the appointments of the State Secretary, State Legal Adviser and State Financial Officer be made by the appropriate service commissions,¹⁷⁹

¹⁶⁹ The National Finance Council is established by article 108 of the Federal Constitution.

¹⁷⁰ Fong, *supra* note. 6, at p 243.

¹⁷¹ Fong, *supra* note. 6, at p 243-4. Sabah and Sarawak participate in the Council but are not voting members.

¹⁷² Federal Constitution, article 95A (5), (6), (7).

¹⁷³ See Article 139 of the Federal Constitution for Penang and Malacca; for Perlis and Negeri Sembilan: *Public Services Commission (Extension of Jurisdiction) Enactment, 1958 (Perlis)*, *Public Services Commission (Extended Jurisdiction) Order, 1960 (Perlis)*, *Public Services Commission (Extension of Jurisdiction) Enactment, 1959 (Negeri Sembilan)* and *Public Services Commission (Extension of Jurisdiction) Order, 1959 (Negeri Sembilan)*. See further Shafruddin, *The Federal Factor supra* note 9, chapter 4.

¹⁷⁴ Federal Constitution, art 133.

¹⁷⁵ *Joint Service (Islamic Affairs Officers) Act 1997 (Act 573)*, s 4.

¹⁷⁶ See Public Service Commission Circular No. 1 of 2005 http://www.spa.gov.my/pls/portal/docs/PAGE/SPA_CONTENT/MAKLUMAT_KORPORAT/MK_PROFIL/MK_PEKELILING/MKP_PANDUAN_TUKAR/PEK105.PDF.

¹⁷⁷ “Perlis gets new State Secretary”, *New Straits Times*, http://www.nst.com.my/Current_News/NST/Wednesday/NewsBreak/20080326150355/Article/index.html.

¹⁷⁸ *Joint Service (Islamic Affairs Officers) Act 1997 (Act 573)*, section 5.

¹⁷⁹ *Constitution of the State of Perak*, article 36C.

which appears to be the commissions at the central level, namely the Public Services Commission and the Judicial and Legal Service Commission provided under the Federal Constitution. If so, it may be the case that once appointed, the State government through its Menteri Besar (Chief Minister) may not be able to unilaterally suspend or fire these officers.¹⁸⁰ There is clearly potential for political interference and centre-state conflict if the federal appointee takes a different view of matters from that adopted by the state, as recently occurred in constitutional crisis in Perak, when the UMNO appointed State Secretary frustrated the decisions of the Pakatan Rakyat members of the State Legislative Assembly.¹⁸¹

5. Social Factors

The question of whether there are important social cleavages in the federation is at once a very straightforward and an extremely complex question to ask about Malaysia. Politics and law are saturated with both religion and race, and it is impossible to explain the course of post-colonial history without reference to them.

Malaysia is a multicultural polity – a government census records a population of 66.1% Malay (including other indigenous peoples, many of whom are not Muslims), 25.3% Chinese, 7.4% Indian and 1.2% “other”.¹⁸² Ethnic Malays enjoy constitutionally entrenched privileges in relation to land, licenses and public office,¹⁸³ as well as politically entrenched policy objectives (under the New Economic Policy (NEP) and its successors), that deliver to them preferential access to social and economic benefits, particularly government contracts, housing and places in higher education.¹⁸⁴ Openly questioning these privileges and policies is discouraged, and indeed might be viewed as sedition¹⁸⁵ according to the logic that challenging Malay hegemony (“Ketuanan Melayu”) will provoke communal violence on the scale of “May 13”, the post-election “race riots” in 1969. Politicians frequently conjure the memory of the May 13 riots to justify preferential treatment for ethnic Malays as a solution to the social and economic “backwardness” of the Malays and the “dominance” of the Chinese.¹⁸⁶ Electoral politics is conducted by race-based political parties¹⁸⁷ continuing the “consociational bargain” of the Merdeka constitutional negotiations in 1957, when communal political leaders agreed amongst themselves to grant citizenship to non-Malays as long as Malay-Muslim privileges were retained and entrenched.¹⁸⁸ An aspect of this bargain is the special position of Islam in the Federation, which is declared in article 3 of the constitution to be the religion of the Federation. Nevertheless, the Supreme Court has ruled that this provision did not establish a state religion or a theocracy,¹⁸⁹ and religious freedom for other faiths is constitutionally guaranteed in articles 3 and 11.

¹⁸⁰ “Suspensions not valid, says Chief Secretary to Govt”, *New Straits Times*, 13 May 2009.

¹⁸¹ See Quay, *Perak: A State of Crisis*, *supra* note 14.

¹⁸² Economic and Planning Unit, *Third Outline Perspective Plan 2001-2010* (Putrajaya: Economic and Planning Unit, Prime Minister’s Office, 2001), table 6.1, “Population Structure 1990-2010”.

¹⁸³ Federal Constitution articles 89 (Reservation of Land for Malays), 152 (National Language) and 153 (Reservation of quotas in respect of services, permits, etc. for Malays and Natives of any of the States of Sabah and Sarawak).

¹⁸⁴ There is a huge literature on this topic. Key recent studies include: Lee Hock Guan, “Affirmative Action in Malaysia” *Southeast Asian Affairs 2005* (Singapore: ISEAS, 2005), 211-228 and Edmund Terence Gomez, “Governance, Affirmative Action and Enterprise Development: Ownership and Control of Corporate Malaysia” in Gomez, *The State of Malaysia: Ethnicity, Equity and Reform* (London: RoutledgeCurzon, 2004), chapter six.

¹⁸⁵ *Sedition Act 1948* (Act 15), s 3(1)(f) criminalizes advocating change to the constitutionally expressed Malay privileges; and the Malay-controlled government periodically threatens its critics with punishment under s 3(1)(e).

¹⁸⁶ This is the infamous analysis of former Prime Minister Mahathir bin Mohamad in *The Malay Dilemma* *supra* note 18. For a different view of the May 13 riots, see Kua Kia Soong, *May 13*, *supra* note 17.

¹⁸⁷ Mavis Puthuchery and Norani Othman (eds.) *Elections and Democracy in Malaysia* (Kuala Lumpur, Universiti Kebangsaan Malaysia, 2005), chapter 1.

¹⁸⁸ Fernando, “The Position of Islam” *supra* note 7; and more generally *The Making of the Malayan Constitution*, *supra* note 6.

¹⁸⁹ That is, according to the Supreme Court in *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ 55. The meaning of article 3 and the place of religion in the federation are now important political and legal questions: see Whiting, “Secularism,” *supra* note 53.

Generally, all major ethnic groups (Malay, Indian and Chinese) are found in every state in significant numbers, although some more than the others. As a leading Malaysian federalism scholar has observed, the Federation “was established essentially not because of ethnic or communal demands but rather to accommodate the legacy of the Malay States and the accompanying institution of the Sultanate.”¹⁹⁰ Malays are mostly concentrated in the northern and eastern States of the peninsula. There are more Chinese present in the cities and towns than in rural areas. City-states such as Penang and Malacca have a significant Chinese population. The current demography is also a product of history, as Penang and Malacca were previously colonies of the British, and Chinese immigration was encouraged to suit colonial purposes. Other states remained British protectorates with the Sultans (traditional Rulers) remaining the heads of the State, and heads of Islam in the respective States. The special position of the Sultans is constitutionally preserved, and every five years, one of the Sultans takes his turn to occupy a unique constitutional position of the Yang di-Pertuan Agong (the King), acting as the Head of the Federation and Head of Islam for the Federal Territories and for those states not having a Sultan to fulfill that religious role. A Yang di-Pertua Negeri (a Governor), is appointed as the Head of the State in states that do not have Sultans. All Sultans and Yang di-Pertua Negeri occupy seats in the Conference of Rulers, a constitutional body that is empowered to elect future Kings from the pool of Sultans,¹⁹¹ and that has to be consulted in such appointment as civil court judges, the auditor general, and members of election, public services and education service commissions. The consent of the Conference of Rulers must also be sought in such matters affecting the federation as alterations of boundaries of a state, and Islamic matters.¹⁹² Federal initiatives towards a unified set of Islamic laws must have the consent of the Conference of Rulers.

Compared with the peninsular States, Sabah and Sarawak have a majority indigenous population comprising various ethnic groups. As part of the entry arrangement into the federation of Malaysia, the natives of Sabah and Sarawak are accorded special privileges similar to those enjoyed by the Malays.¹⁹³ No other communities, not even the aborigines in the peninsular States, are accorded such special privileges. Notwithstanding this, recent statements issued by Sabah and Sarawak politicians indicate an increased demand for a more prominent role in the central government as well as more autonomous powers to the state governments.

The minority Malaysian Indian community (comprising Hindus, Sikhs, Muslims and Christians) has the least political influence (that is, apart from the dire position of the *orang asli* of peninsular Malaysia¹⁹⁴). Yet robust public discussion of this fact can be seen as divisive and a challenge to Malay privileges, and recent Indian political leaders have been incarcerated for raising these issues.¹⁹⁵ Last but not least, as with

¹⁹⁰ Shafruddin, *supra* note 9, at p. xxiv.

¹⁹¹ Only the rulers take part in the election and removal of the King to the exclusion of all the Yang di-Pertua Negeri. See paragraph 7, Fifth Schedule, Federal Constitution.

¹⁹² Not being the head of Islam in their respective states, the Yang di-Pertua Negeri do not have say in the aspect of Islamic matters. See paragraph 7, Fifth Schedule, Federal Constitution.

¹⁹³ See Federal Constitution, articles 16A, 95B-95E, 112A-112D, and, in particular, Part XIIA, comprising arts 161-161H: “Additional Protections for States of Sabah and Sarawak” as well as 10th Schedule, part IV, “Special Grants to states of Sabah and Sarawak”.

¹⁹⁴ Regarding which, see R.D.L. Jumper, *Orang Asli Now: the Orang Asli in the Malaysian Political World* (Lanham, NY: American University Press, 1999).

¹⁹⁵ For recent threatened use of the Sedition Act against a leader of the Hindu Rights Action Force (HINDRAF), see Fauwaz Abdul Aziz, “HINDRAF Leader faces fresh sedition charge” *malaysiakini*, 11 December 2007 – the charge is in relation to a letter sent to the British PM on 15 November (and currently accessible on the government run news service, Bernama, at www.bernama.com/bernama/v3/news.php?id=300857) accusing the Malaysian government of ethnic cleansing policies against Indians in Malaysia.

any other economically vibrant country, there is a growing immigrant population (legal and illegal) that serves to meet the labor requirements in Malaysia.¹⁹⁶

There are significant asymmetries in natural resources, development, wealth, education, and economic strength in Malaysia. Timber, plantation, oil and gas and mineral resources are concentrated in comparatively less developed East Malaysian States, and East Coast States in West Malaysia, whereas the dynamic capital Kuala Lumpur attracts wealth and financial investment. The different ethnic communities that comprise multi-cultural Malaysia will experience different levels of economic progress, education and so on. However tabulating such differences is a political exercise, for some a dangerous one, since public presentation of figures that challenge the official view of economic progress (and the race preference policies) can lead to censure.

The federal structure of fiscal and legal centralization makes it extremely difficult for a component State to address these asymmetries by itself, independent of assistance from the central government. This state of affairs partly explains the lack of economic development in Kelantan, a State that has since 1990 been under the control of PAS, a Malay-Muslim political party which vies with the ruling UMNO for the Malay vote by presenting itself as more Islamic, and the inability of rich States such as Selangor and Penang - also governed at the state level by political parties that are in opposition federally - to move forward alone without central assistance. Since the opposition parties won control of the State legislature following the general election in March 2008, the federal government has decided to defer several significant federal projects in Penang that had been previously approved.¹⁹⁷ The Penang government will not be able to implement these deferred projects without the federal government's financial assistance.

In what is perhaps a reflection of federal politics, royalties arising out of oil and gas resources occasionally become an issue between the federal government and the states within the boundaries of which the resources are mined.¹⁹⁸ These occasions usually coincide with the opposition being in power in these component states. Following the opposition's gaining control of the state of Terengganu in 1999, the national petroleum company stopped paying royalties to the state for petroleum exploited in the state. This led to legal action by the state against the company and the federal government which controlled the company.¹⁹⁹ After the federal government re-captured Terengganu in 2004, the royalties were subsequently re-instated.²⁰⁰

V. CONCLUSION

Amongst federal systems of the world, Malaysia is no doubt at the extreme end of the central-federal spectrum. There are many conclusions one can draw from this picture, but perhaps three broad ones will suffice to characterize the situation. First, in terms of social and economic development, it seems clear that the high degree of legal uniformity and centralized governance, including fiscal centralism and a national justice system, have been successfully deployed since independence by successive Malaysian Governments in their macroeconomic policies and state planning instruments to achieve rapid and

¹⁹⁶ Sajad Hussein, "70,000 More Bangladeshi Workers Coming To Malaysia", *Bernama Daily Malaysian News*, 8 March 2009; "Declining Birth Rate Affects 70 Mln Population Target". *Bernama Daily Malaysian News*, 4 July 2007 (this report states that as at March 2006, there was a total of 1.85 million registered foreign workers in Malaysia); Farrah Naz Karim and Patrick Sennyah, "Two-week amnesty for 1.2m illegal immigrants", *New Straits Times*, 22 October 2004.

¹⁹⁷ Pauline Puah, "Guan Eng meets Abdullah on deferred projects" *The Edge* 16 July 2008. http://www.theedgedaily.com/cms/content.jsp?id=com.tms.cms.article.Article_2a6bf920-cb73c03a-11151520-d4fddb32.

¹⁹⁸ In current litigation over oil royalties mounted by the State Government of Kelantan against Petroleum Nasional Bhd, a federal government corporation, the Federal Government has asserted that it should be joined as a party on the basis that petroleum in the continental shelf off the coast of Kelantan belonged to the Federal, and not the State, government. See "Kelantan Government loses appeal to stop Federal Government from Intervening Suit," *Bernama*, 26 May 2011.

¹⁹⁹ *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337.

²⁰⁰ Andrew Ong, "T'ganu to withdraw oil royalty suit," *Malaysiakini*, 8 January 2009.

sustained social and economic growth. Second, in terms of politics, the weakened position of the states *vis à vis* the centre in this federal arrangement has contributed to the dominance of the UMNO-led Barisan Nasional governing coalition over the opposition parties at all levels of government, thus perpetuating the semi-democratic nature of Malaysia's politics and governance and discouraging the kind of political and legal diversity and experimentation that might otherwise have flourished in a true federation.²⁰¹ Third, weakened as the states are, they have been able to retain some key areas of executive and legislative power: Sabah and Sarawak continue to enjoy greater administrative autonomy than the other constituent states through the special deals they struck when they joined the Federation; and, in the peninsular states, the special position of the Malay Rulers, and their constitutional role in safeguarding Islam (as religion and as *syariah*) is jealously guarded and considered beyond critical public scrutiny and comment. These combined factors (which are constitutionally, politically and socially entrenched) of East Malaysian distinctiveness and the "traditional" authority of the state monarchies and their association with Islam, will continue to shape the nature of Malaysia's federal system and any proposed changes to it.

²⁰¹ William Case, 'Semi-democracy and minimalist federalism in Malaysia' in Baogang He, Brian Gilligan, Takashi Honugochi (eds), *Federalism in Asia* (Cornwall, UK: Edward Elgar Publishing, 2007).