

# Watanic Jurisprudence: Governing Principles in Legislative Powers Under the Federal Constitution

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## Abstract

Before 1948, all legislative powers were vested in Malay rulers in their respective states. The Malay Rulers were the makers of the Federal Constitution through a constitutional development process, even though many parties drafted it. This paper applies the legal methodology of watanic jurisprudence. The position of Malay rulers is essential because they were sovereign authorities that legitimized the Federation of Malaya Agreement, 1948, the Federation of Malaya Agreement, 1957, and the Federal Constitution of Malaya, 1957. Previous research on this subject had ignored the principle of sovereignty as stipulated in Article 181(1) when discussing the issue of legislative powers. As a result, many parties viewed parliamentary democracy as the Malaysian principle of sovereignty. Hence, this paper intends to explain the influence of Islam and Malay customs as the governing principles of legislative powers under the Federal Constitution. This paper is important because members of the legislative, executive, and judiciary take the oath under the Sixth Schedule before discharging their respective constitutional responsibilities. This paper would assist in understanding the essence of the oath under the Sixth Schedule vis-à-vis the duty to uphold the rule of law and the supremacy of our Constitution.

**Keywords:** The Maker of the Federal Constitution, Watanic Jurisprudence, Malay Customs, Article 181(1), The Rule of Law

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## Introduction

The Federal and State Constitutions provide legislative powers to their respective authorities. The Parliament is the federal legislative authority in which the legislative powers are vested, subject to the supremacy of the Federal Constitution. Part VI of the Federal Constitution stipulates the relations between the Federation and the States in distributing legislative powers.<sup>1</sup> On the other premise, the state legislative council is the authority to legislate laws as conferred by the state constitution and further guaranteed by the Federal Constitution.<sup>2</sup>

Before the British intervention in the internal affairs of the Malay states, Malay rulers exercised all legislative power with their counselors in their respective states. After the Malay rulers entered into various treaties with the British in the 19th century, the British advisors were appointed to assist the administration but not rule the Malay states.<sup>3</sup> By the Federation of Malaya Agreement, 1948, the Malay rulers, being the sovereigns of their respective states, had agreed to form an interim federal authority together with the settlements of Penang and Malacca.<sup>4</sup> The Malay states under the Federation of Malaya Agreement, 1948 means the states of Johore, Pahang, Negri Sembilan, Selangor, Perak, Kedah, Perlis, Kelantan, and Terengganu and all dependencies, islands, and places which, on 1 December 1941, were administered as part thereof, and the territorial waters adjacent thereto.

The Federation of Malaya Agreement, 1948, introduced the distribution of legislative, executive, and judicial powers between the Federal and State authorities in preparation for self and strong central government

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1 Article 73 of the Federal Constitution provides, *"In exercising the legislative powers conferred on it by this Constitution- (a) Parliament may make laws for the whole or any part of the Federation and laws having effect outside as well as within the Federation; (b) the Legislature of a State may make laws for the whole or any part of that State."*

2 Article 74(2) of the Federal Constitution provides, *"Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List."* Section 11(1), Part I, Eight Schedule (Provisions to be inserted in State Constitutions) provides the exercise of legislative power, *"The power of the Legislature to make laws shall be exercised by Bills passed by the Legislative Assembly and assented to by the Ruler."*

3 Reid Commission, *Report of the Federation of Malaya Constitutional Commission 1957* (Her Majesty's Stationery Office, 1957) 7-8.

4 See The Federation of Malaya Agreement, 1948.

in Malaya.<sup>5</sup> Later, the Federation of Malaya Agreement, 1957, was signed by the Malay rulers for their respective states and Sir Donald Charles MacGillivray on behalf of the British Queen as a legal process for the self-government of Malaya named Persekutuan Tanah Melayu, leading to the birth of the Federal Constitution of Malaya, 1957. The Federal Constitution bestowed legislative powers on the Federation as enumerated in the Ninth Schedule of the Federal Constitution and other matters stipulated in the constitutional provisions. By the Federation of Malaya Agreement, 1957, the British surrendered their sovereignty over Penang and Malacca to the Yang di-Pertuan Agong.<sup>6</sup>

This paper applies the legal methodology of watanic jurisprudence to interpret Malaysia's relevant constitutional provisions and legal principles. Watanic jurisprudence is more indigenous for arguing the constitutional system of a sovereign nation because it first determines the legal framework applicable therein, either continuum or dichotomy, before attempting further analysis.<sup>7</sup> It then analyzes legal issues based

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5 "AND WHEREAS it seems expedient to His Majesty and to Their Highnesses that the Malay states, the Settlement of Penang and the Settlement of Malacca should be formed into a Federation with a strong central government..." The preamble of the Federation Agreement of Malaya, 1948. See also Part VII and the Second Schedule of the Federation of Malaya Agreement, 1948.

6 "3. As from the thirty-first day of August, nineteen hundred and fifty-seven, the Malay states and Settlement shall be formed into a federation of states by the name of Persekutuan Tanah Melayu, or in English, the Federation of Malaya, under the Federal Constitutional set out in the First Schedule to this Agreement; and thereupon the said Settlement shall cease to form part of Her Majesty's dominions and Her Majesty shall cease to exercise any sovereignty over them, and all power and jurisdiction of Her Majesty or the Parliament of the United Kingdom in or in respect of the Settlement or the Malay States or the Federation as a whole shall come to an end." The preamble of the Federation Agreement of Malaya, 1957. The sovereignty of the Yang di-Pertuan Agong in the Federation could be construed from inter alia Articles 181(1), 32(1), 38, 39, 3(3), 41, 42, 44, 66 and 121 of the Federal Constitution. It is worthy to note here that Yang di-Pertua Negeri Penang and Malacca are not sovereign, and they are appointed by the Yang di-Pertuan Agong. Read W.A.F. Wan Husain, *Kedaulatan Malaysia Governan Utama Negara* (Selangor, Abad Sinergi Sdn. Bhd. & Penerbit UMP, 2022).

7 According to F. Venter, *Constitutional Comparison: Japan, Germany, Canada & South Africa as Constitutional States* (South Africa, Kluwer Law International, 2000) 1, "The phenomenon of law is universal. It is associated with order, authority and the state. Despite the universality of the notion, the variation of its content reminds one of the variation within humanity itself, of the diversity of cultures, languages and religions." For further reading on continuum and dichotomous legal framework, read W.A.F. Wan Husain, *Yang di-Pertuan Agong: Kedaulatan, Prerogatif dan Amalan* (Kuala Lumpur, Dewan Bahasa dan Pustaka, 2021).

on the constitutional text, statutes, and accepted legal principles within its legal framework. In doing so, local laws and customs are analyzed to determine the principles of sovereignty and the constitutional system based on a broad and purposive manner in the correct linguistic, philosophy, and local historical context. The relevant philosophical framework will be taken as the governing principle to analyze the constitutional provisions, legal documents, and other legal issues.<sup>8</sup> This method is in line with the rules of constitutional interpretation outlined in the Federal Court's case of *Indira Gandhi A/P. Mutho v. Pengarah Jabatan Agama Islam Perak & Ors and other appeals*.<sup>9</sup>

The Federal Court in *Indira Gandhi* adopted the rules of constitutional interpretation by the Supreme Court of Canada<sup>10</sup> as follows:

*The rules of constitutional interpretation require that constitutional documents be interpreted in a broad and purposive manner and placed in their proper linguistic, philosophic, and historical contexts.... Generally, a constitutional interpretation must be informed by the foundational principles of the Constitution, which include principles such as federalism, democracy, the protection of minorities, as well as constitutionalism, and the rule of law ....*

*These rules and principles of interpretation have led this Court to conclude that the Constitution should be viewed as having an 'internal architecture' or 'basic constitutional structure' ... The notion of architecture expresses the principles that the individual elements of the Constitutional are linked to the others and must be interpreted by reference to the structure of the Constitution as a whole' ... In other words; the Constitution must be interpreted to discern the structure of Government that it seeks to implement.*

Based on the method of watanic jurisprudence, Wan Ahmad Fauzi<sup>11</sup> concluded that Malaysia upholds the continuum legal framework. The continuum legal framework means that the legal principles and political system adhere to religious teachings that prevail over the doctrine of

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8 W.A.F. Wan Husain, 'Watanic Jurisprudence: Articulating the Legitimate Elements of the Basic Structure of the Federal Constitution' (2021) 29(1) *IJUM Law Journal* 1-2.

9 [2018] MLJU 69.

10 *Re: Reference re Senate Reform* (2014: 25-26).

11 Read Wan Husain (n 7); W.A.F. Wan Husain, *Kedaulatan Raja-Raja Melayu: Jurisprudens, Governan & Prinsip Perlembagaan Persekutuan* (Selangor, Abad Sinergi Sdn. Bhd., 2018).

human creation. The principle of the continuum legal framework is based upon the verses of al-Qur'an. One of the Quranic verses that underpins the said legal framework is as follows:

*He has ordained for you of religion what He enjoined upon Noah and that which We have revealed to you, [O Muhammad], and what We enjoined upon Abraham and Moses and Jesus – to establish the religion and not be divided therein. Difficult for those who associate others with Allah is that to which you invite them. Allah chooses for Himself whom He wills and guides to Himself whoever turns back [to Him].*<sup>12</sup>

The principle of the continuum legal framework is well explained by Ibn Kathir when he was interpreting the above verse. According to Ibn Kathir:<sup>13</sup>

*The religion of the messengers is one. Allah says to this Ummah (Muslim community throughout the world); He (Allah) has ordained for you the same religion which He ordained for Nuh, and that which We have revealed to you; Allah mentions the first Messenger who was sent after Adam, that is, Nuh, peace be upon them, and the last of them is Muhammad, and that which We ordained for Ibrahim, Musa and Isa, Then He mentions those who came in between them who were the Messengers of strong will, namely Ibrahim, Musa and Isa bin Maryam. This Ayah (verse) mentions all five, just as they are also mentioned in the Ayah (verse) in Surah Al-Ahzab, where Allah says; And (remember) when We took from the Prophets their covenant, and from you, and from Nuh, Ibrahim, Musa, and Isa, son of Maryam. (33;7) The Message which all the Messengers brought was to worship Allah Alone, with no partner or associate, as Allah says; And We did not send any Messenger before you, but We revealed to him (saying); None has the right to be worshipped but I, so worship Me. (21;25). And according to a Hadith (the Prophet said), We Prophets are brothers, and our religion is one. In other words, the common bond between them is that Allah Alone is to be worshipped, with no partner or associate, even though their laws and ways may differ, as Allah says. To each among you, We have prescribed a law and a clear way. (5;48) Allah says here, saying you should establish religion and make no divisions in it, meaning Allah enjoined all the Prophets (peace and blessings of Allah be upon them all) to be as one, and He forbade them to differ and be divided. Intolerable for the idolators*

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12 Ash-Shuraa [42]: 13.

13 See <<https://qurano.com/en/42-ash-shura/verse-13/>> accessed 30 May 2022.

*is that to which you call them. means, 'it is too much for them to bear, and they hate that to which you call them, O Muhammad, i.e., Tawhid.' Allah chooses for Himself whom He wills and guides unto Himself who turns to Him in repentance. This means that He is the One Who decrees guidance for those who deserve it and decrees misguidance for those who prefer it to the right path.*

In Malaysia, as discussed in depth in the book entitled *Yang di-Pertuan Agong: Sovereignty, Prerogative and Practice*,<sup>14</sup> our constitutional system recognizes the sovereignty of the Malay rulers as trustees of the Almighty Allah<sup>15</sup> and the supremacy of the Constitution.<sup>16</sup> Our democratic system is not absolute, and it is, in fact, a constitutional democracy as opposed to the Westminster parliamentary democracy; hence the word 'democracy' is not stipulated in our Federal Constitution.<sup>17</sup>

Article 181(1) of the Federal Constitution,<sup>18</sup> the oath of the Yang di-Pertuan Agong under the Fourth Schedule,<sup>19</sup> and other constitutional provisions envisage the reception of the continuum legal framework. In the premises, the principles of the Malay customs become essential because they define the sovereignty of Malay Rulers.<sup>20</sup> The position of Malay rulers is essential because they were the source of authority that legitimized the Federation of Malaya Agreement, 1957, and our Federal Constitution, 1957.

Previous research on this subject had ignored the principle of sovereignty as stipulated in Article 181(1) when discussing legislative

14 Wan Husain (n 7).

15 Federal Constitution of Malaysia, art 181(1) and fourth sch.

16 Federal Constitution of Malaysia, art 4(1).

17 See the text of Federal Constitution.

18 181. (1) *Subject to the provisions of this Constitution, the sovereignty, prerogatives, powers and jurisdiction of the Rulers and the prerogatives, powers and jurisdiction of the Ruling Chiefs of Negeri Sembilan within their respective territories as hitherto had and enjoyed shall remain unaffected.*

19 We ..... ibni ..... Yang di-Pertuan Agong of Malaysia do hereby swear: Wallahi; Wabillahi; Watallahi; and by virtue of that oath do solemnly and truly declare that We shall justly and faithfully perform (carry out) our duties in the administration of Malaysia in accordance with its laws and Constitution which have been promulgated or which may be promulgated from time to time in the future. Further We do solemnly and truly declare that We shall at all time protect the Religion of Islam and uphold the rules of law and order in the Country.

20 The Constitutional Working Committee Report, dated 18 November, 1946.



powers and other related issues.<sup>21</sup> The closest discussion on the sovereignty of Malay rulers was attempted in the Supreme Court's case of *Che Omar bin Che Soh vs Public Prosecutor*.<sup>22</sup> However, Salleh Abas, CJ relied on M.B. Hooker without examining primary sources, thus misleading himself to conclude that the Malay rulers ascribed the sovereignty to themselves, no longer in the position as the trustee of the Almighty Allah.<sup>23</sup>

Hence, this paper intends to explain the influence of Islam and Malay customs as the governing principles of legislative powers under the Federal Constitution. This paper is important because members of the legislative, executive, and judiciary take the oath under the Sixth Schedule before discharging their respective constitutional responsibilities.<sup>24</sup> This paper would assist in understanding the essence of the oath under the Sixth Schedule vis-à-vis the duty to uphold the rule of law and the supremacy of our Constitution.

## Islam and Malay Customs Viewed from Watanic Jurisprudence

Islam as the religion of the Federation is a constitutional provision with its legal position, not just a political slogan.<sup>25</sup> The position of Islam in our Federal Constitution was related to its position before the independence day.<sup>26</sup> Islam has been the law of the land and placed the position of Malay Rulers as the shadow of the Almighty Allah.<sup>27</sup> The above position continues until today because it has been entrenched by Articles 181(1), 3(1), the oath of the Yang di-Pertuan Agong, and many other provisions

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21 See C.N. Mustafa, 'The 1993 Royal Immunity Crisis: The Kerajaan, the Constitution and the dilemma of a new bangsa' (PhD thesis, University of Kent 2000); A. Bidin, 'The Historical and Tradition Features of the Malaysian Constitution' (1993) 21 *Jebat* 3-20; S.S. Faruqi, *Document of Destiny: The Constitution of the Federation of Malaysia* (Petaling Jaya, Star Publications, 2007).

22 (1988) 2 MLJ 55.

23 For further discussion, read W.A.F. Wan Husain, *Kenegaraan Malaysia: Sejarah, Kedaulatan dan Kebangsaan* (Perlis, Penerbit Universiti Malaysia Perlis, 2020) 82-96.

24 Federal Constitution of Malaysia, arts 43(6), 43B(4), 57(1A)(a), 59(1), 124 & 142(6).

25 Federal Constitution of Malaysia, art 3.

26 W.A.F. Wan Husain, 'Insight: The Interpretation of Islam Within the Legal Framework of the Indigenous Malaya' (2021) 4(2) *Journal of Governance and Integrity* 64-72.

27 *Ramah binti Taat v Laton binti Malim Sutan* [1927] 6 FMSLR 128; Read written laws such as Hukum Kanun Melaka, Hukum Kanun Johor, Hukum Kanun Pahang, Hukum Kanun Perak, and Undang-Undang Kedah.

of the Federal Constitution and the Malay rulers' position in their respective states. There is no legal basis to rely on Article 3(4), as argued by some scholars and politicians, to negate the position of Islam if the purpose of the said provision is viewed from its historical context and proper perspective.<sup>28</sup>

The interpretation of Islam within its constitutional framework must be placed in its proper linguistic, philosophical, and historical context. The shadow of the Almighty Allah connotes the position of Malay Rulers as a caliph, the trustee of sovereign authority held by HIM alone.<sup>29</sup> Thus, Malay rulers' sovereignty needs to be clearly understood because they were the maker of the Federal Constitution through a process from 1946 until 1957. They are the maker of the Federal Constitution because, without their assent to the state enactments and federal ordinances as required by the Federation of Malaya Agreement, 1957, there would not be a federation as it exists today.<sup>30</sup> They are the maker due to their position as sovereign rulers.<sup>31</sup> The maker means the final authority vested in them to execute the above agreements and pass the laws legitimizing the Federal Constitution of Malaya, 1957. This term is different for a drafter or a framer who is not sovereign. According to Western scholars and Muslims, sovereignty is the highest governing principle of a country.<sup>32</sup> Hence, the principle of sovereignty governs values, ethics, and doctrine adopted by a government in regulating its law and regulation.<sup>33</sup>

Apart from the position of Islam, the Malay customs play a significant role in retaining the Islamic legal principle in Malaya until today, both in practice and constitutional law. Malay customs are manners, culture, and law other than commandments revealed in al-Quran and al-Sunnah; it includes the systems, rules, ethics, and values that do not conflict with the principles of Islam as inherited from the practices of

28 For a detailed argument on Articles 181(1) and 3(4) of the Federal Constitution, read W.A.F. Wan Husain, *Kedaulatan Malaysia Governan Utama Negara* (Selangor, Abad Sinergi Sdn. Bhd. & Penerbit UMP, 2022) 186-242, 249-266.

29 S.A.A. Maududi, *Islamic Law and Constitution* (12th edn, Lahore, Islamic Publication Pvt. Ltd, 1997) 166.

30 Federation of Malaya Agreement 1957, cl 6.

31 See The Federation of Malaya Agreement, 1948; and The Federation of Malaya Agreement, 1957.

32 D. Philpott, 'Sovereignty: An Introduction and Brief History' (1995) 48(2) *Journal of International Affairs* 353-368; Maududi (n 29).

33 *ibid.*



society recognized by the Malay sultanates in the past. Malay customs also include traditional political and legal systems.<sup>34</sup>

The traditional Malay system had a legislative authority known by various names, the Royal Council.<sup>35</sup> The Royal Council, headed by a Malay ruler, acted as the legislative authority in the traditional Malay system. Some legislative powers were delegated to his nobles, and such practice could be traced in various written laws before 1948, such as *Hukum Kanun Melaka*, *Hukum Kanun Johor*, *Hukum Kanun Pahang*, *Undang-undang 99 Perak*. The *Hukum Kanun* sources were al-Qur'an, al-Sunnah, *ijma'*, and customs. The word "laws" is widely used today to replace *hukum kanun*. *Hukum Kanun* consists of Syariah law and customs.<sup>36</sup> Customs bearing legal enforcement known as *adat muhakkamah* was legislated through *shura* and accepted practice.<sup>37</sup> *Adat muhakkamah* is a form of Malay customs.<sup>38</sup>

Various written laws pre-independence day stipulates the principle of Malay customs, among others, as laid in the *Preface to the Pahang Code of Laws*,<sup>39</sup> as follows:

*And after that, I have thanked Him for His past Grace and that which is to come. That He may make me from the people of His beloved and the people of the Leader of all His messengers whom He commanded He brought all His words and canons of the previous Prophet by doing justice and doing Amar bil-ma'ruf wa nahiya al-Munkar then so enlighten all these worlds with the light of their religion. Peace be upon him and all his family and all his friends and all his people. Thereafter, then He made some among all His creatures, kings; as His Glorious Word says: Inni jaa'ilun fi al-ardzi Khalifah. Haza fi ar-risalatil yahkumu al-qanun fil-Burhani - fa al-Malki al-Kabir wa al-wazir. Amma ba'd (translated by the author).*

34 See M.Y. Hashim, 'Daulat dalam Tradisi Budaya dan Politik Kesultanan Melayu Abad ke-15 dan Awal Abad ke-16: Antara Mitos dan Realiti' (1995) 3(3) *SEJARAH: Journal of the Department of History*; W.A.F. Wan Husain (n 23) 1-24; M.A. Zaini (ed), *Siri Titah Sultan Nazrin Muizzuddin Shah* (Kuala Lumpur, Dewan Bahasa dan Pustaka, 2021) 70-71.

35 See C.C. Brown (translated from MS Raffles), 'Malay Annals' (2010) *Journal of the Malayan Branch of the Royal Asiatic Society*; W.A.F. Wan Husain, *Kedaulatan Raja-Raja Melayu: Jurisprudens, Governan & Prinsip Perlembagaan Persekutuan* (Selangor, Abad Sinergi Sdn. Bhd., 2018) 121-148.

36 See Y. Isa (ed), *Hukum Kanun Pahang* (Pahang Museum Manuscript version, Kuala Lumpur, MacroCity Resources, 2003).

37 A.K. Zaydan, *Al-wajiz fi usul al-fiqh* (Kaherah, Dar al-Tawzi' wa al-Nasyr al-Islami, 1993).

38 Isa (n 36) 106-107, 118-121, 152-158.

39 *ibid.* 3-4; Read Wan Husain (n 7) for further detailed explanation.

The principle of Malay customs dictates their forms, which could evolve over time. Malay customs are the existing laws duly recognized by Article 162 of the Federal Constitution. Their principle is perpetual and vital in defining our constitutional system. Article 162 read:

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

Malay customs are valid legal sources as the custom is an element assigned to the law under Article 160(2) of the Federal Constitution. Article 160(2) provides that "Law" includes *written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof*;

From an epistemological point of view, Malay customs generally include the appreciation of the Malayan local community to the laws of nature, community life, ethics, regulations, and the customary practices that are still acceptable in the daily lives of Malays. From a broader perspective, Malay customs are the cultural and legal practices that exist today apart from the religious laws revealed in the Qur'an and Sunnah; they encompass systems, regulations, ethos, and values that do not contradict the principles of Islamic teachings as inherited from the practices of society recognized by the Malay Sultanates in the past.<sup>40</sup>

Malay customs from the ancient Malay Sultanates dictated written laws according to their forms, ethics, and practices suitable to the community. The laws of the Malacca Code and the laws of the Malay States after that, such as the Pahang Code, Johor Law, Perak Code, and Kedah Law, are among the written laws that assembled not only the constitutional law but also the various laws that were in force at the time.

The Constitutional Working Committee Report 1946 states that the sovereignty in each Malay State shall rest as heretofore in His Highness the Ruler of that State according to Malay customs.<sup>41</sup> In every pre-independence day agreement, the doctrine of advice introduced by

40 Wan Husain (n 23) 1-24.

41 C.O 537/1530 No. 50823 Part III (Colonies, General: Supplementary and Secret Original Correspondence, 18 November 1946).

the British in Malaya does not apply to the Islamic religion and Malay customs affairs.<sup>42</sup>

There are two excerpts in the Reid Commission Report, 1956-1957, which testify to advisory practices in the Malay States, namely:

21. ... *In these States, the executive authority rested with the local State Government and was exercised by Malay officials of whom the Mentri Besar was the head, and there was a friendly co-operation between the State administration and the British Advisor, which made it unnecessary for the ultimate power of "advice" to be exercised. It was the policy of these States to preserve the Malay way of life and to develop their administrations based on the considerable degree of self-government which they enjoyed.*

26. ... *The Rulers had reserved powers in respect of State affairs similar to those of the High commissioner in respect of Federal affairs. State administrations under Mentri Besar were set up in each of the former Federated Malay States and were continued in each of the former Unfederated Malay States. There was provision for the establishment of State Executive Councils at meetings of which the ruler of the State concerned would normally preside. Each ruler was empowered to act in opposition to the advice given to him by members of the Council if, in any case, it should, in his judgment, be right so to do. The State Agreements provided that the prerogatives, powers, and jurisdiction of the Rulers would be those which they possessed on 1 December 1941, subject to the provisions of the Federation Agreement and the State Agreements. The Rulers undertook to govern their States according to written constitutions and accepted the responsibility of encouraging the education and training of the Malay inhabitants of the States to fit them to take a full share in the economic progress, social welfare, and government of the States and of the Federation. A British Advisor was appointed in each State, and the Rulers undertook to accept the advice of their Advisors on all state affairs other than those relating to the Muslim religion and Malay custom. ...*

The above report shows the British advice only in implementing the executive function of a Malay Ruler. The powers given are limited, and the advice does not mean changing the teachings of Islam and the essence of Malay customs.

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42 See Pangkor Treaty 1874, and other agreements entered by the Malay Rulers with the British Government before 1948.

Today, Malay customs fall under the State Legislature's jurisdiction.<sup>43</sup> Hence, Item 1 List II of the Ninth Schedule empowers the State Legislature to legislate Malay customs in statutes.<sup>44</sup> Item 9 List II of the Ninth Schedule retains the jurisdiction of the State Legislature to create offences relating to Malay customs.

The Federal Constitution further entrenches the legal position of Malay customs, and article 150(6A) prevents the extension of Parliament's legislative powers on any matter of Islamic law or Malay custom, even during the emergency period. Such special protection is also enjoyed by the laws or customs of natives in Sabah and Sarawak.

Malay customs have been the practices of the States of Malaya and their local inhabitants; they are local circumstances as stipulated in section 3 of the Civil Law Act 1956 (Revised 1972). The principle of Malay customs as aforesaid shall take precedence over the common law of England and the rules of equity in the judicial system as envisaged by section 3 of the Civil Law Act 1956 (Revised 1972). Section 3 provides:

3. (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaya, the Court shall:
  - (a) in Malaya or any part thereof, apply the common law of England and the rules of equity as administered in England on 7 April 1956;
  - (b) ...
  - (c) ...

Provided always that the said common law, rules of equity, and statutes of general application shall be applied so far only as the circumstances of the States of Malaya and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

Constitutionally speaking, the judiciary of Malaysia must recognize the principle of Malay customs as a source of law over the English common law and rules of equity. Article 181(1) and other constitutional provisions, together with Section 3 of the Civil Law Act 1956 (Revised 1972), legitimize the Malay customs as the prevailing conditions. The

43 Federal Constitution of Malaysia, item 1 list II of the Ninth Schedule.

44 Parliament may legislate Malay customs for the Federal Territories of Kuala Lumpur, Putrajaya and Labuan.

position of Malay customs embedded in Article 150(6A) also guarantees the continuity of the monarchy institution and limits the legislative acts made via ordinances and laws passed under Clauses (2B) and (5) of Article 150. Malay customs recognize Malay Rulers in the highest hierarchy of the traditional political system. The monarchical system is further entrenched by Article 38(4) and becomes one of the elements of the basic structure of our Constitution.<sup>45</sup> Therefore, our constitutional system upholds the sovereignty of the Malay rulers and the supremacy of the Constitution; both are the governance of our parliamentary system, government and judiciary.

### **Implications of Islam as the Principle of Sovereignty**

Islam as the religion of the Federation is still interpreted independently from its position as the principle of Malaysian sovereignty. Articles 181(1), 3(1), 37(1), 11, and 150(6A) primarily address Islam's position within our legal framework. Yang di-Pertuan Agong and the Malay Rulers took the oaths to protect the sanctity of Islam, which is the faith of the supreme leaders and the majority of the Malaysians.

Article 181(1) retains the sovereignty of the Malay Rulers according to Malay customs. Malay customs acknowledge Almighty Allah as the ultimate sovereign, with Malay rulers serving as His trustees. Hence, Islam has become the principle of sovereignty long before independence day. The British advisors had never touched on the position of Islam during their intervention in the internal affairs of the Malay states, and the British continued to recognize the position of Islam and Malay customs as being part of their Agreement. The principle of Malay customs itself places Islam as the law of the land and Malay Rulers as the head of religion. Malay customs have developed practice following the Islamic legal principles since the Malay Sultanate of Malacca.<sup>46</sup> One could not deny that the way Malays understand Islam contrasts with the numerical creed embraced by British officials in Malaya.

Islamic laws are the rules in the Qur'an and al-Sunnah, including the legal principles stated by the two primary sources above. Islamic legislation is the law passed in the form of constitutions, acts, enactments, or the like, as well as customs adopted based on the legal principles of the Qur'an and al-Sunnah, and supported by qiyas and ijma'.

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45 Wan Husain (n 8) 1-28.

46 Read C. Lopez, 'The British Presence in the Malay World: A Meeting of Civilizational Traditions' (2001) 19 *SARI: Jurnal Alam dan Tamadun Melayu* 3-33.

Ahmad Fairuz, CJ in the case of *Lina Joy vs the Federal Islamic Religious Council & Ors*<sup>47</sup> adopted the definition of Islam by Maududi when his lordship articulates in his judgment as follows:

*Islam is not only a gathering of dogmas and rituals, but it is also a complete way of life including all fields of activities of humans, private or public, laws, politics, economy, social, culture, moral or judiciary. And if studied, Articles 11(1), 74(2), and item 1 in list 2 in Schedule 9 of the Federal Constitution are clear that Islam includes, among other things, Islamic laws.*

As sanctioned in the al-Qur'an and al-Sunnah, such as compulsory acts, Islamic law is obligatory even if the government does not legislate it. However, the government must properly enact a legal ecosystem, including legislation. Such legislation is required as Islam emphasizes justice in law enforcement and its administration. Islamic law and legislation have a similar position as both need to be upheld for justice and well-being and to avoid harm to people's lives.<sup>48</sup> The above principles also underlie the principle of executive and judiciary powers within the ambit of our constitutional system.

According to Ahmad Fairuz, CJ in *Lina Joy*,<sup>49</sup> Islam is not only a gathering of dogmas and rituals, but it is also a complete way of life, including all fields of activities of humans, private or public, laws, politics, economy, social, culture, morals or judiciary. Thus, the same principle applies within the context of the Federal Constitution that recognizes Islam as the religion of the Federation, while the same position has been in the Malay states for hundreds of years.

It was a constitutional development process that finally, the Malay Rulers passed the Federal Constitution with the advice of their respective Council of States.<sup>50</sup> Such an exercise was required by the Federation of Malaya Agreement, 1957. Clause 6 of the Federation of Malaya Agreement, signed by the Malay Rulers, stipulates as follows:

The foregoing provisions of this Agreement are conditional upon the approval of the said Federal Constitution by Federal Ordinance and by an Enactment of each of the Malay States.

47 [2004] 2 MLJ 119.

48 W.A.F. Wan Husain, 'Insight: The Conceptual Framework For Buiding The World-Class Good Governance Ethics' (2020) 4(1) *Journal of Governance and Integrity* 1-5.

49 [2004] 2 MLJ 119.

50 Read *Constitutions of The States of Malaysia* (2nd edn, Kuala Lumpur, International Book Services, 1998).



The First Schedule of the above Federation of Malaya Agreement, dated 5 August 1957, contains the Federal Constitution of Malaya 1957. The process to approve the Federal Constitution by the Federal Ordinance and Enactment of each Malay State took place in August 1957. More importantly, the above process proved that the Federal Constitution had been legitimized by the sovereign power of the Malay Rulers. Without their approval, the Federal Constitution could not extend its powers over the State within limits set by the constitutional law. In other words, the source of the Federal Constitution's authority and powers is the sovereignty that recognizes Almighty Allah as the ultimate sovereign and where Malay rulers reside as His trustees. The Ninth Schedule of the Constitution contains the Federal List, State List, and Concurrent List to determine the distribution of legislative powers between the Federation and States. Item 1 List II (State List) of the Ninth Schedule stipulates as follows:

1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public place of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the Constitution, organization and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay customs.

In addition, Article 77 of the Federal Constitution retains the power of the State legislature to make laws concerning any matter not enumerated in any of the Lists set out in the Ninth Schedule, not being a matter on

which Parliament has the power to make laws. The State legislature can also continue to create certain offences where Item 9, List II (State List), Ninth Schedule provides:

9. Creation of offences in respect of any of the matters included in the State List or dealt with by State law, proofs of State law and of things done thereunder, and proof of any matter for purposes of State law.

The State legislature's powers are not limited to matters that can only be tried in the Syariah Court. The Syariah Court is the Muslim Court. The Muslim courts are not new but existed before 1948 with other courts under the authority of the States. As a result of the Federation of Malaya Agreement, 1948, the Malay Rulers delegated their highest judicial review powers in aspects other than the personal laws of Muslims to the Supreme Court, today known as the Federal Court. On the other hand, the Yang di-Pertuan Agong and the Malay rulers retain their authority to pardon according to their respective jurisdictions.<sup>51</sup>

State legislatures within their jurisdiction may also enact laws triable by the judicial power of the Federation, that is, courts under Article 121 of the Federal Constitution. Article 121 read:

*The judicial power of the Federation*

121. (1) Subject to Clause (2), the judicial power of the Federation shall be vested into High Courts of co-ordinate jurisdiction and status, namely-
- (a) one of the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and
  - (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Borneo and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di- Pertaun Agong may determine;
  - (c) (Repealed);
- and in such inferior courts as may be provided by federal law.

There are Items 2 until 12A in the State List within the State's legislative powers but placed under the purview of the judicial courts of the

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<sup>51</sup> Federal Constitution of Malaysia, art 42.

Federation.<sup>52</sup> For example, Article 11(4) allows the State legislature to enact laws to control or restrict the propagation of any religious doctrine or belief among persons who follow the religion of Islam. This law is enforceable against non-Muslims; therefore, its forum is within the judicial courts of the Federation.

Although criminal jurisdiction falls under the Federal List, that does not mean that State legislatures are no longer allowed to enact laws affecting the personal offences of Muslims vis-à-vis shariah criminal offences. Criminal law and offences are public law, and public law is part of the law governing the relationship between the State and a person or persons, the internal organs and institutions, the branches of government, and the relationship between a person or persons in society.

Public law includes constitutional law, administrative law, and criminal law.<sup>53</sup> Personal law applies only to certain groups or classes of society or specific people based on religion, beliefs, and culture.<sup>54</sup> Private law is a branch of law that is not public and relates to persons or institutions bound by contract or principle of accountability.<sup>55</sup> Thus, violation of personal or private laws is not a crime but an offence. The above is the category of laws used to differentiate between crime and offence.

The list I of the Ninth Schedule outlines the jurisdiction of Federal law, which includes civil and criminal laws and procedures as stipulated in Item 4. Criminal laws and procedures are listed in Federal law, neither List III nor the Concurrent List. That means only Parliament has the power to enact criminal laws and procedures. However, that does not mean that State legislatures cannot enact offences within the scope of Muslim personal law. Item 1 of List II provides *the creation and punishment of offences by persons professing the religion of Islam against the precepts of that religion, except concerning matters included in the Federal List*;

Hence, offences against the precepts of Islam that apply only to Muslims are offences under Item 1, List II of the Ninth Schedule, which is the power of State legislatures. Despite being named Syariah criminal offences by the State Enactment, such offences are not crimes

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52 Except Item 9 when dealing with the matters to be dealt with Syariah Court

53 L.B. Curzon, *Dictionary of Law* (Sixth edn, Kuala Lumpur, International Law Book Services, 2007) 343; 'Public law' *Merriam-Webster Dictionary* <<https://www.merriam-webster.com/dictionary/public%20law>> accessed 25 November 2021.

54 'Personal law' *Merriam-Webster Dictionary* <<https://www.merriam-webster.com/dictionary/personal%20law>> accessed 25 November 2021.

55 Curzon (n 53) 332; 'Private law' *Merriam-Webster Dictionary* <<https://www.merriam-webster.com/dictionary/private%20law>> accessed 25 November 2021.

or criminal law under the Federal Constitution. Strictly speaking, the criminal offences of shariah are included in the State List because they are still personal laws of Muslims and not applicable to non-Muslims.

Summarily, Islam and Malay customs are the sources of legislative powers embedded in the Federal Constitution. It is a fundamental duty of the members of Parliament to uphold the position of Islam and Malay customs as enshrined since the supremacy of the Federal Constitution has become the pillar of Malaysia. The oath under the Sixth Schedule taken by every member of Parliament imposes a sacred obligation to protect the Federal Constitution vis-à-vis the source of the legislative powers. The Sixth Schedule reads as follows:

I, ....., having been elected (or appointed) as a member of the House of Representatives (or the Senate), do solemnly swear (or affirm) that I will faithfully discharge my duties as such to the best of my ability, that I will bear true faith and allegiance to Malaysia, and will preserve, protect and defend its Constitution.

## Conclusion

The traditional Malay system did have a legislative authority of its own. The function of the Malaysian Parliament as a legislative authority is not peculiar to the traditional Malay system of the Royal Council based on shura, and it has been developed over time and later modelled after some features of Westminster. Our Parliament does not have absolute power as in Britain because many amendments under the Federal Constitution require the Conference of Rulers' consent. The principle of sovereignty and the supremacy of the Constitution become a yardstick for the validity of laws passed by legislative authorities.

The position of Islam and Malay customs in the Federal Constitution becomes clearer if viewed from watanic jurisprudence. The position of the precepts of Islam in the Federal and State Lists explains the ambit of Article 3(1), and Article 3(4) guarantees the jurisdiction of the State over the religion of Islam as enshrined in List II. The judicial courts of the Federation and Syariah courts are forums to implement and equally enforce Islamic law and its legal principles according to their respective jurisdictions. As envisaged in Section 3, Civil Law Act 1956 (Revised 1972), Malay customs are our local circumstances. The principle of Malay customs legitimizes Islam as the principle of Malaysian sovereignty. Islamic injunctions within the Federal legal framework cover the aspects

of public and private laws. In addition, List III of the Ninth Schedule provides a Concurrent List for the Federation and States. On the other hand, personal law and those not included in List I and III fall within the state legal framework. The above interpretational approach could resolve the jurisdictional clashes between the Federation and the State constitutionally.

Finally, Article 181(1) retains Islam as the law of the land and clarifies its position as the religion of the Federation. In short, all branches under the Federal Constitution should uphold the principle of sovereignty, as explained. Hence, ultimately Shariah-compliant is the primary governing principle of legislative powers under the Federal Constitution.

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