LEGAL IMPEDIMENTS TOWARDS THE UNIFICATION OF ISLAMIC FAMILY LAW IN MALAYSIA

Noor Aziah Mohd Awal,* University Kebangsaan, Malaysia

Malaysia is a Federation consisting 13 states and 3 Federal Territories. It has a written constitution with three lists namely: Federal Lists, State Lists and Concurrent Lists. Matters relating to Islam including Islamic family law, which falls within the State Legislature. Since there are 13 states and 3 Federal Territories, there exist in each states its own Syariah Courts and Syariah statutes to govern the implementation of Islamic laws in these states. Thus, a syariah court order in state A may not be enforceable in state B as the laws passed by each state is only binding upon the citizen within its own boundaries, unless an application for an enforcement order out of jurisdiction is made. Furthermore, a defendant may avoid a Syariah Court order by moving to another state. This has caused great harm to many Muslim in particular Muslim women in Malaysia, which has prompted the government to take various actions to unify the Islamic laws in all the states including Islamic Family law so as to avoid any unnecessary conflicts and complications. This paper intends to look at the unification of such laws and to highlights the various legal impediments towards the implementation of a unified Islamic Family Laws in Malaysia.

Introduction.
Malaysia is a multi-racial society which consists of three main races namely Malay, Chinese and Indian. It is unique in that each particular race is connected to a particular religion. It is a Federation of 13 states and three Federal territories with a written constitution. It is clearly stated that all matters relating to Muslims and the religion of Islam shall be under the jurisdiction of the State Legislature and other matters are within the jurisdiction of the Federal Government. Hence matters relating to family law of persons professing the religion of Islam is within the jurisdiction of a state. The Syariah Courts and the Civil Common Law courts stands side by side whereby matters involving Muslims and Islamic law will be heard in the Syariah Court and other matters shall be heard in the Civil court. This was further enhanced by the amendment to the Federal Constitution in 1988 whereby according to Art 121(1A), any matters within the Syariah Court’s jurisdiction, the Civil High Court shall have no jurisdiction.

The historical development of Islamic laws in Malaysia

Before the coming of the Western Colonial powers, the laws which was enforced in the Malay states was Islamic law which was modified to a certain extent by the Malay adapt or customs. However, during the British administration era, English law was introduced to replace Islamic laws and the Malay customs. The British introduced laws such as the Penal Code, the Contact Act, The Evidence Act, the Criminal Procedure Code and the Civil Procedure Code, which was enacted in India. The Land Code was based on the Torren System brought from Australia. Mostly significantly, judges that were appointed are either trained or brought directly from England. It was through this method that English law of torts and the principles of equity was introduced and applied in the Malay states. Finally the Civil law Enactments of 1937 and 1951 were introduced to confirm the application of English law and rules of equity in the absence of any written law. This Enactment later became the Civil Law Act 1956 which was extended to Sabah in 1951 and Sarawak in 1949. In area of mercantile law, the laws applicable in the absence of any written law is English law in the Peninsula Malaysia as at 7 April 1956 whereas in Penang, Malacca, Sabah and Sarawak the law applicable is the law of England at the corresponding period. Even though it is accepted that Islamic law was the law of the land, the application of Islamic law in Malaysia up until its independence in 1957 was very limited and restrictive.

When Malaysia obtained its independence on 31 August 1957 and later became Malaysia in 1963, the
position of Islamic laws when through a number of changes, even though the Federal Constitution when defining ‘law’ omitted Islamic law from the definition, although common law, custom and usage are defined. The major change that was made was to place Islamic law, Syariah courts and all matters relating to the religion of Islam, including Islamic family law under the jurisdiction and control of State government. From detailed analysis of 9th Schedule, List 11(1) it can be seen that Islamic law that can be applied are very limited. The Syariah Courts’ jurisdiction cover only persons professing the religion of Islam and it has only such jurisdiction in respect of offences as is conferred by the Federal Laws. Until 1984, the Syariah Court (Criminal Jurisdiction) Act 1965 had provided that such jurisdiction only is exercised in respect of any offence punishable with imprisonment for a term not exceeding six months or any fine exceeding RM1, 000.00 or with both. The Act was amended in 1984 and the jurisdiction of the Syariah Court has been extended (in criminal matters) up to three years imprisonment or fine up to RM5, 000.00 or whipping up to six strokes or the combination of all three. However, in conflicting decision between the Syariah Courts and the Civil Courts, the decision of the Civil Court shall prevail. This can be seen in a number of cases which have caused uneasiness amongst the Muslims community. Hence in 1988 the Federal Constitution was amended where clause 1A was inserted into Article 121 where it provides that the Civil High Court and courts subordinate to it shall have no jurisdiction in any matter which comes within the jurisdiction of the Syariah Courts.

With the amendment there is clear demarcation between syariah courts and civil courts jurisdiction. However, there a number of grey areas which have caused conflict and raised public concerned. One of the areas is in the field of succession, testate and intestate where the Probate and Administration Act 1959 and the Small Estate (Distribution) Act 1955 have to application in the Syariah Courts. Hence upon the death of a Muslim, all matters relating to administration of estate, testate or intestate shall be governed by the two statutes and is within the jurisdiction of the Civil Courts. The Syariah Court merely certify the shares allotted to the beneficiaries under Islamic law and issue ‘Farid Certificate’. It’s a rubber-stamping job.

Since matters relating to persons professing the religion of Islam and Islamic laws are within the jurisdiction of the State Legislature, there exists two sets of family laws, namely the Law Reform (Marriage and Divorce) Act 1976 (Act 164) which applies to all non-Muslims in Malaysia and Islamic Family laws which applies to all Muslims in Malaysia. Act 164 not only applies to non-Muslims but
specifically states that it does not apply to Muslims or persons who are married under the Islamic law. Marriage contracted under Act 164 is monogamous and must be registered under the Act. The Act is modeled after the Matrimonial Causes Act 1973 of England with certain modifications to suit local customs and religion. All matters relating to marriage, divorce, custody, adoption, legitimacy and maintenance shall be heard in the High Court of Malaya, a civil court which is based on the common law system. Appeal from the High Court decision may be taken to Court of Appeal and the Federal Court. It must be pointed out that

As for Muslims, since there are 13 states and 3 Federal Territories, there exists 14 Islamic Family Law Enactments, one for each state and the 3 Federal territories share one enactment. Each state has to establish its own Syariah Court where all its judges, prosecutors, registrar and officers of the courts are employed by the State Government. At present the hierarchy of the Syariah Court in each state is as follows:

Syariah Appeal Board (3 to 5 judges)

| Syariah High Court (one judge sitting alone) |
| Syariah Subordinate Court (one judge) |

**Jurisdictions:**

In relation to the jurisdictions of the syariah courts of each state, it is governed by the Administration of Islamic law enactments or Administration of the Religion of Islam. Hence there are 14 such enactments. The jurisdictions are as follows:

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<tr>
<th>Syariah Subordinate Court</th>
<th>Syariah High Court</th>
<th>Syariah Appeal Court</th>
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| **Criminal Jurisdiction** All offences committed by a Muslim under Islamic Family Law (Negeri Sembilan) Enactment 2003 or any other written law which prescribes offences against the precepts of the religion of Islam which the maximum punishment provided by such Enactments or other written law does not exceed 3 thousand or imprisonment for a term of two years or both and may impose punishment provided for such offences. Civil Jurisdiction Hear and determine all actions and proceedings as a Syariah High Court is authorized to hear and determine, if amount or value of the subject matter in dispute does not exceed RM100,000 or not capable of estimation in terms of moneys (not including custody or matrimonial property) **Criminal Jurisdiction** Try any offences committed by a Muslim and punishable under Islamic Family Law (Negeri Sembilan) Enactment 2003 or under any other written law prescribing offences against the precepts of the Religion of Islam for the time being in force and my
impose any punishment provided for the offences. **Civil Jurisdiction** Hear and determine all actions and proceedings if all the parties to the actions or proceedings are Muslims and the action or proceedings relate to:-(i) betrothal, marriage, rujuk, divorce, annulment of marriage, nuzyus or judicial separation in any other matter relating to the relationship of husband and wife; (ii) any disposition of claim to property arising out of any matters set out in subparagraph (i); (iii) maintenance, legitimacy and guardianship or custody of infants; (iv) division of, or claims to harta sepencarian; (v) wills or gift made while in a state of marad-al-maut; (vi) gifts inter vivos, or settlements made without adequate consideration in money or money’s worth by a Muslim; (vii) wakaf or nazr; (viii) inheritance of intestate; (ix) determination of a person’s share to his or her entitlement; (x) a declaration that a person is no longer a Muslim; (xi) a declaration that a deceased person was a Muslim or otherwise at the time of his death; (xii) Other matters in respect of which jurisdiction is conferred by any written law. **To hear appeals from Subordinate Courts** Syariah High Court may hear appeal from any decision of the Subordinate Courts in its criminal jurisdiction, by the prosecutor or by the person convicted, and such appeal may be against an acquittal, a conviction or sentence or any of them; and in its civil jurisdiction: (i) by any person aggrieved by the decision, if the amount claimed is not less than one thousand ringgit; (ii) in all cases involving any decision as to the personal status, by any person aggrieved by the decision; and (iii) in all cases relating to maintenance of dependents, by any person aggrieved by the decision, But no appeal shall lie against a decision made by consent, and in any other case, if the Syariah High Court gives leave to appeal. **Other Jurisdictions:** a. Inheritance certificates b. Supervisory and reversionary jurisdiction. This Court has the jurisdiction to hear and determine any appeal from the Syariah High Court in the exercise of its original jurisdiction. It may grant leave to hear appeal from the High Court where the case was an appeal from the Subordinate Court. It has also a supervisory and reversionary jurisdiction.

Apart from the amendment of the article 121 of the Federal Constitution, since 1983 all states in Malaysia had taken the move to pass the Islamic Family Law Enactment of their own. Later the Administration of Islamic law Enactment, the Islamic Evidence Enactment, The Islamic Civil Procedure Enactment, the Islamic Criminal Procedure Enactments and the Islamic Criminal Law Enactment were passed and enforced in all of the states in Malaysia. As much as the drafter wishes it to be uniformed, these enactments differ slightly from state to state. Some state allowed very restrictive practice of polygamy but some are so relax on its application. Furthermore, since each state is sovereign state of its own but do not have power against the citizen of another state.

With the amendment of Article 121(1A) a problem arises when a Muslim change his or her religion or when a non-Muslim converts to Islam. The strict application of Article 121(1A) has caused injustices to many as the Civil Court has no jurisdiction to hear cases which involved Muslims and Islamic law. The Syariah Courts cannot hear and determine cases which involve non-Muslim and the civil law. For example, the non-Muslim marriages is governed by Law Reform (Marriage & Divorce) Act 1976 (to be
referred to as LRA) where it provides that every marriage, unless void under the law, religion, custom or usage under which it was solemnized, shall continue until dissolved-

(a) by death of one of the parties; or
(b) by order of a court of competent jurisdiction; or
(c) By a decree of nullity made by a court of competent jurisdiction.

Thus if parties have been married under this Act, they can only dissolve their marriage if they satisfy one of the above requirements. Conversion to Islam is a special ground of divorce under this Act which is provided by section 51 where it states that “where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce: Provided that no petition under this section shall be presented before the expiration of the period of three months from the date of the conversion”.

The effect of s51 is that after years of marriage, which was solemnized in accordance with LRA, one of the party to the marriage converts to Islam, the following questions arise:

(a) If the non-converting party did not apply for divorce. The question that arises out of this is whether the non-Muslim marriage is still in existence or has it been dissolved by conversion to Islam by one of the party to that marriage?

(b) If the party that has converted to Islam marries a Muslim woman. What is the status of the second marriage and is she entitled to his estate upon the death of her husband?

(c) Who has the right to custody of the children from the non-Muslim marriage and in which court should the case be heard?

(d) What happens if after many years living as Muslim and married to a Muslim woman, the man decided to convert back to his old religion?

Section 51 has also been used by the converted spouse as an excuse not to pay maintenance. In Letchumy v Ramadason10, petitioner obtained a divorce from the respondent on the ground of desertion. After the decree was made she applied for maintenance and the matter came before the Judicial Commissioner after the decree became absolute. The Judicial Commissioner ordered the respondent to pay the petitioner $200 a month as her maintenance. The respondent subsequently applied for the order
to be set-aside on the ground that he had become a Muslim and under Islamic law the petitioner has no right to claim maintenance because she has not converted to Islam with her husband during the *eddah* period. The High Court held that since section 3(1) of LRA precludes the operation of the Act to a Muslim, and as the respondent had become a Muslim, the Act cannot be made to apply to him.

This certainly creates what conflict of law term as ‘limping marriages’. On one hand, a non-Muslim couple was married according to the civil laws where the marriage is monogamous. Some years later one of the party converted to Islam. According to Islamic law the marriage is terminated after the expiration of three months if the other party does not convert to Islam as well. Thus the party that has converted is free to marry according to his or her personal law, i.e. Islamic law. In Malaysia this is what has happened. If the party that has converted is the husband, he then married another woman in accordance with Islamic law. Now, there are two marriages in existence. According to the Penal Code, he shall be guilty of bigamy because he is still married under the LRA. However, this law on bigamy is not applicable to Muslims. Thus no action has been taken on the many occasions where non-Muslim men who have converted married according to Islamic law even though his first marriage under the LRA has not been terminated because the non-Muslim wife did not petition for divorce. The conflict continues when the husband died as in the case on *Eeswari*. Had he been married under Islamic law, his Muslims wife is entitled to his estate including his pension. Is she not a dependent too? Had they had any children, these children are also entitled to the estate of the deceased. What is their legal status? Who would be more entitled to his estate: his first wife and children from the civil marriage or his Muslims wife and children? These are common problems that have arisen out of the application of section 51 of the LRA. Unfortunately, neither the court nor the legislature has been able to address them adequately. The common excuse was to avoid the issue because of it is too sensitive.

The saga finally comes to a climax in the case of *Sharmala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah* where the couple were married in 1998 in accordance with Hindu rites. They have two children aged 4 and 2 years old. On the 19 November 2002, the husband (defendant) converted to Islam and later on the 25 November converted the two children with him the plaintiff wife has left the defendant and when back to Kedah. On the 31st December 2002 she applied for custody of children. Trial was fixed on the 16 of January but the defendant applied for postponements as he needed time appoint a lawyer. Trial was fixed on the 25 February 2003. Meanwhile on the 7 January 2003, the defendant through his
lawyer made an *exparte* application to the Shah Alam Syariah Court for a custody order and this was not related to the High Court. On 12 April 2003 the High Court heard arguments on the issue of jurisdiction and the high Court held that it has jurisdiction to hear the application and fix trial on the 17 April 2003. Meanwhile the Shah Alam Syariah Court, based on the husband’s exparte application issued a warrant of arrest on the plaintiff wife for her failure to attend the trial at the Syariah Court. On the 14 April 2003, the High Court in Kuala Lumpur turn down the application of plaintiff to revoke the conversion of the two children to Islam as the matter is within the jurisdiction of the Jabatan Agama Islam and the Syariah Courts.

On the 17th April 2003 the high Court heard the custody application made by the plaintiff (wife) and on the 8 May 2003 the Shah Alam Syariah Court made an order giving custody to the defendant (husband). The defendant did not observe the interim order made by the Kuala Lumpur high Court and took the children out of Alor Star. The plaintiff applied for committal order. At the trial Dato Faiza Thamby Chik J held that according to section 51 the defendant cannot apply for divorce as he has converted to Islam and he cannot apply for divorce in the Syariah Court as his wife is not a Muslim, and therefore Syariah Court has no jurisdiction. He also held that the plaintiff was not bound by the Syariah Court order and in fact the order has no effect on the interim order given by the High Court in Kuala Lumpur. This is due to the fact that the jurisdictions of the Syariah Court are within state jurisdiction. That is not the end of the case. Shamala having obtained the interim custody order took the children to Australia which is a clear act of contempt. Hence the High Court on the 20 July 2004 when it convened to finally decide the issue of custody only decide for academic purposes as the children are no longer within jurisdiction. The High Court held that the non-Muslim mother who is the plaintiff was entitle to care and control of the two Muslim children and as plaintiff and defendant are parents of the children, appoint them as joint custodian of the child. The decision raised eyebrows and concerned amongst Muslims and it is believed that the defendant has applied for an appeal to the court of Appeal.

These cases above illustrate that freedom of religion is exercised but to a certain extend abused. Conversion to Islam does not means that one can escape from one’s own obligations and responsibilities created before the conversion. It is also not a way to take away a child from his or her mother or father as in Islam; difference of religion does not severed relationship and responsibilities. Amendment to the LRA has been suggested, and it is Parliament that has the power to resolve these problems.
Apart from the above there are many other areas of conflict between Islamic laws and Syariah laws and these conflicts have to a certain extended caused injustices and unfairness.

In the area of Islamic family laws, internal conflicts have arisen due to jurisdictional problem. This is because Islam and Islamic law are state matter and each state is sovereign, and therefore has no authority over the citizen of the other state. Worst, an order from a Syariah Court in one state cannot be enforced in another state unless a special application for enforcement of an order is made. Application to enforce an order from another state may take time and also costly. An example of the conflict can be shown by the case of Aishah bt Abdul Rauf v Wan Mohd Yusuf. In this case the defendant applied to the Syariah High Court of Selangor to marry X. The Syariah High Court allowed the application on the basis that the defendant was able to support his present and future wives. The plaintiff wife appealed to the Syariah Appeal Board of Selangor. The Appeal Board held that the High Court Judge had overemphasized the requirements of financial ability to support both present and future wives (s23(b)) and ignored or overlooked the other requirements of section 23(a), (c), and (d). All these requirements need to be proved and this was not done. The Board of Appeal therefore allowed the appeal.

That was not the end of the matter. Wan Mohd Yusuf was born and brought up in another state in Malaysia, Trengganu. He decided to go back to his home state and applied for the permission to practice polygamy in his own state. The Syariah High Court of Trengganu allowed his application and he finally married X.

The decision made in Trengganu certainly made Syariah Court in the State of Selangor order of no value. A man from the State of Johor may leave his wife in Kuala Lumpur without any news and money. His wife applied and obtained a maintenance order from the Kuala Lumpur Syariah Court. She found out that her husband lived in Kedah and if she wants him to be responsible, she will have to get the order enforced in Kedah. However, most women who faced such a situation are unemployed and single mother. Usually she never tries to apply and left the maintenance order as it was granted, beautiful on paper.

A very recent case is where a man who lived in Selangor applied to practice polygamy in the State of Negeri Sembilan while his wife applied for a divorce in the State of Melaka, her home town. The couple
had been married for more than 10 years. They have 4 children and the youngest is only 5 months old. The petitioner wife could no longer tolerate the husband’s behaviors. She left the matrimonial home with the 4 children and returned to her parents’ house. She is a full time house wife. She filed for maintenance and custody order in Melaka and her husband refused to negotiate. He later, used an old address in Negeri Sembilan and applied to marry another woman in that State while his marriage to his first wife is still subsisting.

Unifications of Islamic laws in Malaysia
Cases cited above are some of the examples of the problems faced by Muslims in Malaysia as the Islamic law are not unified. Efforts have been made to harmonize Islamic law. This has begun since 1988 with the setting up of the Syariah and Civil Law Review Committee. Later the Technical Committee was set up by the Prime Minister Department. This committee is responsible in looking in reviewing all Islamic laws in Malaysia and to make recommendations to unify them. The National Council for Religion of Islam met for the 39th time on the 10 October 1997 and agreed that all Islamic law in all the states in Malaysia to be harmonized coordinated and unified. The draft Bills that were looked at were:

a. Islamic Family Law Bill;
b. Syariah Court Evidence Bill;
c. Syariah Court Civil Procedure Bill;
d. Syariah Court Criminal Procedure Bill;
e. Administration of Islamic Law Bill;
f. Syariah Criminal Law Bill.

All these bills were modeled after the Federal Territory of Kuala Lumpur except the Civil Procedure Bill which was modeled after the laws enforceable in the State of Perak. All these Bills were tabled before the Kings’ Council of Malaysia on the 22 Mac 2001 and the Kings’ Council accepted all the Bills except the Syariah Criminal Law Bill. From that date the Bills have been taken to all states to be approved by the State Legislative Body. It has approved by in Trengganu and Sarawak. To date three other states namely Negeri Sembilan, Selangor and Pahang have approved and enforced the five Bills that was accepted by the Kings’ Council.
Legal Impediments towards Unification of Islamic Laws in Malaysia

Harmonization and unification of Islamic laws in all states in Malaysia has taken a long time and the process has actually begun immediately after Malaysia became an independent nation. One of the main obstacles towards unification and harmonization of Islamic law is the Federal Constitution itself. Malaysia is a Federation consisting of 13 states and 3 Federal Territories. Each of the state has its own written constitution and 7 of the states have its own King or Sultan as the head of State. The 7 Kings take turn every 5 years to become the Yang di Pertuan Agung of Malaysia. It is also provided in the Federal Constitution that all matters relating to Islam and Islamic law, shall be under the jurisdiction of State Legislature. Article 76 of the Federal Constitution provides that the Federal Parliament has the power to legislate in matters that falls under the State List but this power is limited in the following circumstances:

a. for the purpose of enforcing an international treaty or treaty made with another nation;

b. to encourage unification of laws between two states or more;

c. Being asked to do so by the State Legislature.

However, in relation to (a) such law can only be made after consultation with the State Government concerned. In relation to (b) such laws can only be enforceable if after being passed by the Federal Parliament, it is being adopted by State Legislature as if it is a state law and shall remain so and may be amended or repealed by the State Legislature.

Hence, the unification of Islamic laws in Malaysia comes under heading (b) of Article 76 of the Federal Constitution. So long as this Article and Article 74 remained as part and parcel of the Constitution no real unification can take place. The insertion of (1A) into Article 121 further enhanced the demarcation of Civil and Islamic law and its jurisdiction. To amend these Articles in order to pave way for unification of states laws will lead towards other legal and social implications. It must be pointed out that the Federal Constitution was drafted based on negotiation made by Malaysian leader’s way back in 1956/57. The multi-racial and multi-religious backgrounds of its inhabitants have a lot to do with the division between the Federal and State Lists.

The establishment of the Department of the Syariah Judiciary under the Prime Minister Department is
intended to act as a coordinator of all the Syariah Courts in all the states as the Chief Judge of the Syariah Judiciary has no real power towards judges in all the states as these judges are appointed by the King or Sultan of each states. At present the 5 states which has adopted the new draft Bills in their states are able to be transferred from one state to another and the Chief Judge’s directive is binding in all these 3 states. But that is all it can do. Thus, it is still being looked at as not performing its functions and expectations as the public would like it to do but not allowed by the Constitution.

Apart from the Federal Constitution, the jurisdictions of the Syariah Courts need to be increased. Otherwise, Syariah Courts can only adjudicate small and unimportant matters. All matters relating to probate and succession, land matters, contract, Islamic banking and Insurance are still within the jurisdiction of the Civil High Court.

Other laws that need to be amended in order to enhance the position of Islamic laws are:

a. Probate and Administration Act
b. Evidence Act 1956
c. Guardianship of Infants Acts
d. Section 51 of the Law Reform (Marriage & Divorce) Act 1976
e. National Land Code
f. Civil Law Act 1956
g. Married Women and Children (Enforcement of Maintenance) Act 1968.

All these laws conflicted with Syariah laws passed in each states and conflict between States and Federal laws, Federal laws shall prevail.

**Conclusion**

The unification of Islamic laws in Malaysia is a very noble idea and it has raised the position of Islamic law to a level that is far from what is expected by many Malaysian. In fact the Islamization of knowledge and law are still taking place in Malaysia. However, these hard works often forget real background of Malaysian Constitution itself. It’s a vicious circle that goes on and on but for how long?