

**“ANTI-GOD,  
ANTI-ISLAM AND ANTI-QURAN”:  
EXPANDING THE RANGE OF  
PARTICIPANTS AND PARAMETERS  
IN DISCOURSE OVER WOMEN’S RIGHTS  
AND ISLAM IN MALAYSIA**

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ABSTRACT

This article explores the social-political environment within which Islamic discourse in relation to human rights and duties takes place within Malaysia, with a focus on women’s rights issues. Malaysia, as an acknowledged ‘moderate’ Muslim majority state, provides an instructive case study, particularly with its accession to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1995, with reservations which were partially withdrawn in 1998. In 2001, the constitution was amended to directly prohibit gender discrimination. Despite these advancements, inegalitarian practices remain and are often justified by reference to Islamic values and culture. In recent years, robust public debate about Islam and women’s rights, voiced from multiple perspectives, has surfaced as participants seek to influence the law and policy on women’s issues. There is no uniform perspective on these issues and this article demonstrates the diversity of views expressed within Malaysia, informed by personal interviews the author conducted with various political leaders and representatives of local women’s NGOs.

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\* LLB (Hons) (NUS). This article is a revised version of a research paper undertaken as part of a course on Human Rights Law (2002-2003) at the Faculty of Law, National University of Singapore. The author thanks Associate Professor Thio Li-ann for her comments on an earlier draft; Assistant Professor Tang Hang Wu for his inspirational encouragement; coursemates and peer reviewers for their invaluable advice and input during the preparation of this article; and Ms. Azalina Othman, Ms. Nik Noriani and Dr. Wan Azizah for their time in granting this author an interview and their shared insights. All errors, however, remain my own. *Soli Deo Gloria.*

It also demonstrates how robust internal discourse reveals the ambivalences and divergent views extant within the Muslim community about women's rights issues both on the global and national level. A shared internal consensus, facilitated by a participatory ethos, facilitates cross-cultural dialogue between the Islamic community and the international human rights community. This helps forge a stronger shared basis for human rights, towards the goal of promoting the legitimacy of universal human rights norms to local communities defined by religious affiliation.

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## I. PROLOGUE: THE PARAMETERS OF THE ENQUIRY INTO THE WOMEN'S RIGHTS AND ISLAMIC DISCOURSE WITHIN THE MALAYSIAN CONTEXT

Fifteen years ago, when a domestic women's rights NGO began to engage in public debate over women's rights issues in Malaysia, seeking to promote women's rights within the Islamic framework, it was slammed as anti-God, anti-Islam and anti-Quran<sup>1</sup> by those who saw themselves as the legitimate speakers or defenders of the faith. Within the secular framework of governance, Islam was constitutionally endorsed as the official religion of the Federation of Malaysia.<sup>2</sup> The conventional thinking was that only certain speakers were qualified to enter into public discourse about Islam and the law. This select category consisted of the religiously trained, like the *ulamas* (Islamic scholars and teachers), who, because of Islam's general prohibition on women holding certain religious posts, tended to be almost exclusively male. The Sisters In Islam (SIS),<sup>3</sup> whose members are female professionals, fell outside the bill of privileged interpreters and arbiters with respect to Islamic issues.

However, the range of participants actively engaging in contemporary discussions on the role of Islam in society today has expanded beyond the exclusive domains of the *ulamas*. Lay Malaysian Muslims recognise that they have a stake in the outcome of this discourse and wish to participate in it. A wide range of women's rights issues like polygamy, laws on rape and adultery, and compulsion to wear a *tudung* (Muslim headscarf) or *hijab* (Muslim headdress) have garnered public attention in recent years. The articulation of conflicting views on the true interpretation of Islamic texts and their relevance and applicability in a modern world has become a prominent feature in women's rights discourse within the Muslim majority in Malaysia.<sup>4</sup> The most re-

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1. Salim Osman, *Muslim Women's Rights Group Gaining Respect*, STRAITS TIMES (Singapore), Aug. 14, 2003, at A5.

2. Note that the constitution also guarantees the religious freedom rights of minorities. Article 3 provides: "Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation." This is supplemented by Article 11(1), which provides that "[e]very person has the right to profess and practice his religion and, subject to Clause (4), to propagate it." Article 11(4) restricts "propagation of any religious doctrine or belief among persons professing the religion of Islam." Therefore the constitutionally guaranteed religious freedom does not include the right to convert Muslims. MALAY. CONST., Univ. of Richmond, available at [http://confinder.richmond.edu/local\\_malaysia.html](http://confinder.richmond.edu/local_malaysia.html) (last visited Mar. 20, 2003).

3. See generally Sisters in Islam Official Website, at [http://www.sistersinislam.org.my/home\\_mission.htm](http://www.sistersinislam.org.my/home_mission.htm) (discussing the mission and objectives of the Sisters in Islam) (last visited Mar. 20, 2003).

4. Press Statement, Department of Statistics Malaysia, Population Distribution and Basic Demographic Characteristics Report: Population and Housing Census

cent conflict, whereby the Gombak district *Syariah* declared that the male privilege of pronouncing unilateral divorce upon his wife, conferred by Islamic law, was permissible even if effected by short messaging service, invoked both ire and endorsement.<sup>5</sup>

This issue of the permissibility of divorce through SMS demonstrates the challenge modern philosophies and technology poses towards an ancient religion derived from a divine text (*Quran*), jurisprudential writings and traditions.<sup>6</sup> Islam represents to the believer a holistic worldview and a mode of ordering State-Society relations. Human rights law, whose central ideology is derived from the values associated with secular western liberalism, shares the same universalist aspirations of Islam; it presents an overarching challenge to traditional Islamic tenets, particularly with respect to egalitarianism and the treatment of women. Often, human rights law is perceived as an illegitimate imposition where it contradicts the tenets of a religious faith like Islam or cultural traditions. The tension between human rights law and Islam dates to the early days in the development and codification of human rights norms, as exemplified in the objections of the Saudi Arabian delegation to certain provisions of the 1948 Universal Declaration of Human Rights (hereinafter UDHR).<sup>7</sup>

The participation of Muslim states in the global human rights regime ranges from active support of human rights efforts to accession to human rights treaties with cultural-religious based reservations to outright rejection of human rights norms. The Organization of the Islamic Conference<sup>8</sup> drafted the Cairo Declara-

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2000 (Nov. 6, 2001), available at <http://www.statistics.gov.my/English/pressdemo.htm>. ("Islam is the most widely professed religion in Malaysia; its proportion increasing from 58.6 % in 1991 to 60.4 % in 2000.") (last visited Mar. 20, 2004). Islam was the dominant faith of the Malays and their rulers at the time of independence. Islam arrived in the Malay Archipelago around the 13th century. However, it only gained a footing in the 15th century, beginning with the Malaccan rulers and their subjects who embraced the Islamic faith. For a comprehensive account of the sources of law in Malaysia and the legal institutions available, see AHMED IBRAHIM & AHLEMAH JONED, *THE MALAYSIA LEGAL SYSTEM* 43 (2d ed. 1995).

5. *PM Disapproves of SMS Divorce*, NEW STRAITS TIMES (Malaysia), July 30, 2003, at 7; *SMS Divorce an Immoral Act, Says Nik Aziz*, NEW STRAITS TIMES, July 31, 2003, at 2.

6. Abdullahi An-Na'im, *Islamic Foundations for Women's Human Rights*, in ISLAM, REPRODUCTIVE HEALTH AND WOMEN'S HUMAN RIGHTS 33, 35 (Zainah Anwar & Rashidah Abdullah ed., 2000).

7. See generally, Universal Declaration of Human Rights [UDHR], U.N. GAOR, 3rd Sess., at 71, U.N. Doc. A/810 (1948), at <http://www.unhchr.ch/udhr/lang/eng.htm> (last visited Mar. 20, 2004).

8. Malaysia has been a party to the Organization of the Islamic Conference (OIC) since 1969. See generally OIC, at <http://www.oic-oci.org> (last visited Mar. 20, 2004).

tion on Human Rights in Islam<sup>9</sup> to bridge the gap between human rights and Islamic tenets. Nonetheless, divergent voices within the global Islamic community temper the view that Islam is uniform in relation to standards of human welfare.<sup>10</sup>

In recognising the divergent views between traditionalists and modernists, Muslim jurists like Abdullahi An-Na'im, Abdolkarim Soroush, and Ebrahim Moosa sought to engage Islamic communities in dialogue to show that Islamic tenets may be understood and interpreted in a manner consistent with human rights values and that Muslims may support human rights law.<sup>11</sup> In order to do this, these Muslim jurists advocate a two-pronged reconciliation strategy of internal discourse and cross-cultural dialogue. Internal discourse within the Islamic community promotes convergence on a representative interpretation of Islam, which in turn allows cross-cultural dialogue between the Islamic community and the international human rights community. Such dialogue can foster a stronger shared basis for human rights and narrow the gaps between human rights standards and Islamic law.<sup>12</sup>

This article contributes to this project by exploring the social-political environment within which Islamic discourse on women's rights takes place and by examining the various Muslim voices within an overarching Islamic framework. It demonstrates that there is room for diversity and differences in the Islam and human rights debate within Malaysia, a country identified by its government leaders as a moderate or progressive 'Islamic' state.<sup>13</sup> Reaching an informed consensus through debate can help strengthen the appeal of human rights to non-secularists and pro-

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9. Cairo Declaration on Human Rights in Islam (1990), available at <http://www1.umn.edu/humanrts/instree/cairodeclaration.html> (last visited Mar. 20, 2004).

10. Islam is principally divided into the main Shi'a and Sunni sects. Within these sects there are divisions into various schools of thought. Amongst these sects and schools, the Ahmadis are rejected by many Muslims. Malaysia adopts the Sunni tradition. Abdullahi Ahmed An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives*, 3 HARV. HUM. RTS. J. 13, 20 (1990).

11. FARISH A. NOOR, *NEW VOICES OF ISLAM* 1-2 (2002).

12. *Id.*

13. This statement came in a bid to defend against Partai Islam Semalaysia's main political mandate that is to make Malaysia an Islamic nation. A public debate was sparked off by the Prime Minister's statement where most Muslims welcome the declaration that Malaysia was an Islamic state since it enables them to fend off PAS legitimately. The Prime Minister stated that Malaysia can be an Islamic nation even though *hudud* laws are not implemented. See *Recovery Will Be Smooth*, NEW STRAITS TIMES (Malaysia), Jun. 22, 2001, at 10; *Malaysia Recognised as Islamic Nation*, NEW STRAITS TIMES, Aug. 11, 2001, at 4; *Islamic State Issue Dominates*, NEW STRAITS TIMES, Oct. 27, 2001, at 6; *Still Much Talk Over Country's Islamic Status*, NEW STRAITS TIMES, Oct. 26, 2001, at 8; *Freedom of Religion Will Not Be Curtailed*, NEW STRAITS TIMES, Nov. 25, 2001, at 2. Non-Muslims, however, are worried over the possible intolerance that this declaration could cause in multi-racial Malaysia.

mote the internalisation and institutionalisation of human rights law in Malaysia's legal framework and religious communities.

A thorough examination of women's rights in Malaysia is instructive. Malaysia acceded to the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter CEDAW)<sup>14</sup> in 1995, placing reservations on articles 2(f), 5(a), 7(b), 9 and 16.<sup>15</sup> Some of those reservations were later withdrawn.<sup>16</sup> Among the fallouts of Malaysia's accession to CEDAW is the amendment of the Malaysian Constitution to include gender in the list of prohibited discrimination under the equality clause.<sup>17</sup> Notwithstanding these advancements, Islamic values and culture are still frequently invoked to justify the persistence of inegalitarian practices.

To capture the diversity in the ongoing robust public debate about women's rights and the perceived inequality of women in Islam, this article is informed by personal interviews conducted with women political leaders from United Malay National Organisation (UMNO), the governing Malay party in Malaysia,<sup>18</sup> and from an opposition party, Parti Keadilan Nasional,<sup>19</sup> as well as a representative of a local women's NGO, Sisters in Islam (SIS).<sup>20</sup> Part II of this article examines the broader issues of international human rights and the cultural relativist challenge

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*See Malaysia Moderate Islamic Nation, Says DAP Adviser, NEW STRAITS TIMES, Oct. 24, 2001, at 4.*

14. *See* Convention on the Elimination of All Forms of Discrimination Against Women, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979), at <http://www.un.org/documents/ga/res/34/a34res180.pdf> (last visited Mar. 20, 2004).

15. These reservations were criticised by countries like France, Finland, Germany and Norway for being inconsistent with the object and purpose of the convention: Reservations, Declarations, Objections and Derogations: CEDAW – Malaysia, at [http://www.bayefsky.com/html/malaysia\\_t2\\_cedaw.php](http://www.bayefsky.com/html/malaysia_t2_cedaw.php) (last visited Mar. 20, 2004).

16. *Id.* In 6 February 1998, the reservations to articles 2(f), 9(1), 16(b), 16(d), 16(e) and 16(h) were withdrawn, leaving only articles 5(a), 7(b), 9(2), 16(a), 16(c), 16(f) and 16(g) reserved.

17. *Malaysia Bans Sex Discrimination*, BBC News (World Edition), Aug. 2, 2001, available at <http://news.bbc.co.uk/2/hi/asia-pacific/1470230.stm> (last visited Mar. 20, 2004).

18. Azalina Othman, chief of Puteri UMNO (the youth women's wing of UMNO). A feisty, vocal and tough-talking lawyer, Azalina Othman has served as the head of UMNO's Civil Action Bureau, an organisation which provides assistance for women, and legal advisor to the Women's Affairs Department (HAWA) Selangor. Interview with Azalina Othman, Protom Puteri Chief, UMNO Civil Action Bureau, at Shah Alam, Malay. (Dec. 27, 2002) (on file with author).

19. Dr. Wan Azizah Wan Ismail is a Member of Parliament and the president of the new opposition party, Parti Keadilan Nasional. She is also the wife of ex-Deputy Prime Minister, Datuk Seri Anwar Ibrahim who is currently in prison for corruption and sodomy offences. Cyber interview with Wan Azizah Wan Ismail, President, Parti Keadilan Nasional (Jan. 2003) (on file with author).

20. Nik Noriani is the research manager of SIS. SIS is a non-governmental organisation dedicated to promoting women's rights within the Islamic framework. In-

posed by Islam. There are divergent views as to how to interpret Islamic scriptures and teachings, and a recount of these views demonstrates that there is no uniform “Islamic” perspective on human rights. This section also elaborates and defends the two-prong reconciliatory approach. Part III situates the debate in the domestic social, political, and legal framework. It examines the constitutional status of Islam, the administration of Islamic laws, and the socio-legal status of Malaysian women. The various opposing voices in the Islamic women’s rights debate – the Federal government, the 14 component states of the Federation of Malaysia, the dominant United Malay National Front (UMNO) party, the opposition PAS party, and various local women’s rights NGOs – are identified in this section, and the debate is framed in concrete terms through an examination of three specific areas of controversy between Islam and women’s rights: polygamy, *hudud* laws (Islamic criminal laws) on rape, adultery and testimony, and the obligation to wear the *tudung* (Muslim headscarf) or *hijab* (Muslim headdress). Part III therefore illustrates the multiplicity of views within Malaysia on Islam and women’s rights as well as the comparative authority of these views. Part IV reflects on the parameters of human rights discourse in Malaysia and prospects for promoting domestic compliance with international women’s rights standards. Part V concludes that sustainable protection of women’s rights in Islam is best achieved through local advocacy as opposed to international imposition.

## II. MUSLIM VOICES AND HUMAN RIGHTS DEBATE - A GLOBAL PERSPECTIVE

### A. UNIVERSAL HUMAN RIGHTS VS. ISLAMIC UNIVERSALISM

The Universal Declaration of Human Rights (“UDHR”) claims to embody universal values which are “a common standard of achievement for all peoples and all nation,”<sup>21</sup> a sentiment that is not shared by all. Critics have long accused the UDHR and its standards for ignoring cultural particularities of non-

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interview with Nik Noriani Nik Badli Shah, Research Manager, Sisters in Islam, in Kuala Lumpur, Malay. (Dec. 30, 2002) (on file with author).

21. Universal Declaration of Human Rights, *supra* note 7, preamble (“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms . . . Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge . . .”).

Western communities.<sup>22</sup> Mutua, for one, characterises the foundational document of the human rights movement as an imperialistic attempt to displace "savage" non-Western cultures and replace it with the "universal" culture of human rights, which embodies the particularist values of European-American culture and the secular tenets of Western liberalism.<sup>23</sup>

The relationship between universal human rights and Islamic countries has long been a tenuous one. During the drafting process of the UDHR, representatives from Islamic countries opposed clauses that effectively disregarded Islamic practices, such as polygamy and restrictions on apostasy. The Saudi Arabian delegation abstained from the final vote in protest against articles conferring equal marriage rights and the right to change one's religion.<sup>24</sup> The Saudi Arabian delegate, Jamil Baroody, criticised the declaration for taking into account "only the standards recognised by Western civilisation," and ignoring those from "more ancient civilisations which were past the experimental stage, and the institutions of which, for example marriage had proved their wisdom through the centuries."<sup>25</sup> Consequently, human rights are delegitimized insofar as they are perceived as deriving from Western concepts and values alien to Islam.<sup>26</sup>

#### B. WOMEN'S RIGHTS AND GENDER-BIASED TREATMENT AS THE BROADEST POINT OF DIVERGENCE BETWEEN ISLAM AND HUMAN RIGHTS AS WELL AS WITHIN ISLAM

The egalitarian tenet<sup>27</sup> of international human rights inevitably clashes with the often hierarchical nature of Muslim societies,

22. One of the most popular challenges is the over-emphasis of the Universal Declaration of Human Rights (UDHR) on civil-political rights in comparison to socio-economic rights. See U.N. Commission on Human Rights, *Commission Hears Further Pleas for Increased Development Aid, Debt Relief for World's Poorer Countries*, UN NEWS CENTRE, HR/CN/833, Mar. 27, 1988, at <http://www.un.org/news/Press/docs/1998/19980327.HRCN833.html> (last visited Mar. 20, 2004).

23. Makau Mutua, *Terrorism and Human Rights: Power, Culture and Subordination*, 8 BUFF. HUM. RTS. L. REV. 1 (2002).

24. UDHR, *supra* note 7, art. 16, 18; JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT* 24 (1999).

25. *Id.*

26. Mahathir Mohamad, *Western Modernism v Eastern Thought*, in *THE VOICE OF ASIA: TWO LEADERS DISCUSS THE COMING CENTURY*, 71-86 (Frank Baldwin trans., Kodansha International) (Mahathir Mohamad et al. eds., 1995).

27. Universal Declaration of Human Rights, *supra* note 7, art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.").

and women's rights predictably present the widest rupture between universal human rights and Islam. Women are often designated to the lowest stratum of Muslim society through discriminatory Islamic laws relating to marriage and testamentary disposition, as well as gender discriminatory practices like polygamy. In contrast, the human rights movement, through the subset of women's rights, seeks to equalise the status and rights of women in societies.

With growing emancipation of women on a global level and the overall elevation of their status, women's rights are challenging these traditional Islamic norms. As a result, there is an increasingly sharp division of opinions between the *ulama* (religious scholars), political leaders and ordinary Muslim citizens on the extent to which Islamic practices and teachings conflict with universal women's rights norms.<sup>28</sup> This division is inevitable since Islam does not have a singular voice but is made up of varying sects and creeds.<sup>29</sup> First, there is a sectarian division between the Sunni<sup>30</sup> and Shi'a<sup>31</sup> traditions. Second, within these two traditions, there are various schools of thought. Malaysia adopts the Sunni tradition in which four legal schools of jurisprudence, each offering varying interpretations of Islamic law, have emerged.<sup>32</sup>

One extreme view of Islam effectively perceives women as inferior and therefore excludes women from society and his-

28. Abdullah Ahmad, *It's a Serious Game, Polygamy*, NEW STRAITS TIMES (Malaysia), Jan. 8, 2002, at 10.

29. Mohamed, *supra* note 26 at 81.

30. Sunni and Shi'a share the same prophetic revelatory event described in the Quran and the Sunnah: they each accept as fundamental Allah's unity and the mission and message of Muhammad. The division between the two traditions derives from the question of who is authorised to rule over the community of Muslims (Ummah). For the Sunni, authority to rule was originally in the hands of the community, which appointed a caliph (vice-regent/president) to rule on its behalf. They recognise the first four caliphs as Muhammad's legitimate successors. The Sunni is the largest division encompassing 90 percent of all Muslims.

31. The Shi'a, however, placed authority solely in the hands of the fourth caliph, Ali, who was also the Prophet's cousin and son-in-law, and his descendants. Shi'ism has developed its own system of law and theology; its own clergy; festivals and places of pilgrimage; and a special religious ethos characterised by fervour to suffer for the cause. Shiites are a minority in all Muslim countries except Azerbaijan and Iran, where Shi'ism was adopted as the state religion in the 16th century.

32. The four schools are Hanafi, Maliki, Shafii, and Hanbali: Donna E. Arzt, *The Application of International Human Rights Law in Islamic States*, 12 HUM. RTS. Q. 202, 204 (1990); BARRY DESKER, *ISLAM AND SOCIETY IN SOUTHEAST ASIA AFTER SEPTEMBER 11*, at 2 (Institute of Defense and Strategic Studies: Singapore, Working Paper Series No. 33, 2002), available at <http://www.ntu.edu.sg/idss/WorkingPapers/WP33.pdf> (last visited Mar. 20, 2004).

tory.<sup>33</sup> The infamous Taliban government in Afghanistan subscribed to such a philosophy. During the Taliban regime, women were barred from attending school and holding jobs, and could not move around unless completely covered in a *burqa* (a garment that covers women from head to toe)<sup>34</sup> and accompanied by a male relative.<sup>35</sup> By prohibiting the training of female doctors and, at the same time, prohibiting male doctors from giving medical treatment to women, the Taliban regime effectively denied women any medical help.<sup>36</sup> Furthermore, religious police, part of the "Department for the Propagation of Virtue and the Suppression of Vice," roamed the streets to ensure their dictates were followed.<sup>37</sup> Today, the Taliban symbolises an extremist or false brand of Islam that warrants rejection. Many Islamic countries have also condemned the strict Taliban regime, criticising the withholding of education from females and other violent acts as anti-Islamic. The Organization of the Islamic Conference refused to admit the Taliban regime and only three of the 56 member nations (Pakistan, Saudi Arabia, United Arab Emirates) granted it full diplomatic recognition during its reign in Afghanistan.<sup>38</sup>

Notwithstanding the general consensus in the Muslim world opposing such extremism, some Muslim states and individuals still subscribe to similarly restrictive schools of Islam. Husbands in United Arab Emirates have the legal right to beat their wives in order to discipline them, "provided that the beating is not so severe as to damage her bones or deform her body."<sup>39</sup> In Saudi

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33. For a history of women and the patriarchal strategies leading to their exclusion, see Arvonne S. Fraser, *Becoming Human: The Origins and Development of Women's Human Rights*, 21 HUM. RTS. Q. 853, 853-56 (1999).

34. "The *burqa* . . . [includes] a heavy gauze patch across the eyes that makes it hard [for the women] to see, and completely blocks peripheral vision. Since enforced veiling, a growing number of women have been hit by vehicles because the burqa leaves them unable to walk fast, or see where they are going. Recently in Kabul, a Taliban tank rolled right over a veiled woman. Fortunately, she fell between the tracks. Instead of being crushed to death, she was not seriously hurt, but was severely traumatized." Jan Goodwin, *Buried Alive: Afghan Women Under the Taliban*, ON THE ISSUES (Feb. 27, 1998), at <http://mosaic.echonyc.com/~onissues/su98goodwin.html> (emphasis added) (last visited Mar. 20, 2004).

35. See Kay S. Hymowitz, *Why Feminism is AWOL on Islam*, CITY JOURNAL, Winter 2003, available at <http://www.city-journal.org> (last visited Mar. 20, 2004). For more information on the excesses of the Taliban and the plight of the Afghan women, see The Afghan Women's Mission Website, available at <http://afghanwomen-smission.org/index.php> (last visited Mar. 20, 2004).

36. See PAS Says Taleban's Treatment of Women Was Right, STRAITS TIMES (Singapore), Mar. 7, 2002.

37. Goodwin, *supra* note 34.

38. See Associated Press, *What Manner of Muslims Are Taliban?*, JS ONLINE (Sept. 19, 2001), available at <http://www.jsonline.com/news/nat/sep01/taliban91901.asp> (last visited Mar. 20, 2004).

39. Hymowitz, *supra* note 35.

Arabia,<sup>40</sup> women cannot vote, drive, show their faces in public, or talk to male non-relatives.<sup>41</sup> During the spring of 2002 in Mecca, members of the Commission for the Promotion of Virtue (*mutaween*) pushed fleeing female students back into their burning school, resulting in 15 deaths. All this because the students did not have the opportunity to properly cover themselves in *abaya*<sup>42</sup> in their flight.<sup>43</sup>

Beyond this extreme position, the rights and status of women in Islam vary from country to country. Pakistan, although regarded as a traditional Islamic country, has elected a woman to the post of Prime Minister.<sup>44</sup> Pakistani women are also free to dress in Western clothes.<sup>45</sup> In other officially secular countries such as Turkey, women are adorned in modern Western clothing, including figure-hugging jeans.<sup>46</sup> Significantly, at the Hajj,<sup>47</sup> where Muslims perform their holy pilgrimage, men and women walk and pray together. This is a liberating change from mosques around the world where men and women are generally segregated into sections.<sup>48</sup>

### C. A CAUSE FOR INTERNAL DISCOURSE AND CROSS-CULTURAL DIALOGUE

Given divergent existing views on Islamic practices, the strategy of promoting internal discussion and cross-cultural dialogue is critical to resolve conflicts within Islam as well as be-

40. Article 1 of the Saudi Arabia Constitution (adopted in March 1992 by Royal decree of King Fahd) reads "The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution, Arabic is its language and Riyadh is its capital." SAUDI ARABIA CONST., art. 1. The full constitution can be found online. SAUDI ARABIA CONST., Universität Bern Institut für öffentliches Recht [International Constitutional Law], available at [http://www.oefre.unibe.ch/law/icl/sa00000\\_.html#A001\\_](http://www.oefre.unibe.ch/law/icl/sa00000_.html#A001_) (last visited Mar. 20, 2004).

41. Ahmad, *supra* note 28.

42. An *abaya* is a loose and usually black robe covering the body from head to toe and often worn with a headscarf and veil.

43. See Hymowitz, *supra* note 35.

44. For a statement by Benazir Bhutto, the former Prime Minister of Pakistan, see *Women and Islam: The Prophet Preached Equal Rights; Now the Task Is to Restore Them*, ASIaweek, Aug. 25, 1995, available at <http://www.asiaweek.com/asiaweek/95/0825/feat2.html> (last visited Mar. 20, 2004).

45. See Riz Khan, *The Hajj 2001: At the Pilgrimage, Men, Women Pray Side by Side*, CNN.COM, available at <http://www.cnn.com/SPECIALS/2001/hajj/stories/women/index.html> (last visited Mar. 20, 2004).

46. See *id.*

47. Hajj is a pilgrimage to Mecca, an important event in the religious life of a Muslim. Mecca is a city of western Saudi Arabia near the coast of the Red Sea. It is the birthplace of Prophet Muhammad, and regarded as the holiest city of Islam and a pilgrimage site for all devout believers of the faith.

48. See Khan, *supra* note 45.

tween Islam and human rights. It encourages discussions on controversial issues implicating Islamic values and human rights norms, rejecting notions that dominant views on what Islam requires are absolute or final, or that any one person can claim to have the one true teaching. As internal dialogue frees up space for discussion, Muslims are able to address features of Islam that are negative or hostile to human rights norms with a view to bring about a symbiosis between the two.<sup>49</sup> For women activists, the goal is to articulate a solid Muslim feminist jurisprudential basis that clearly shows that Islam need not oppress Muslim women nor deprive them of their rights.<sup>50</sup>

### 1. *The existence of a penumbra of uncertainty in Islamic texts and law*

Internal discourse in Islam is possible due to the existence of certain ambiguities in its conceptualisation process. Although Muslims accept the Quran as an authentic divine revelation, the Quran does not expressly settle all issues within Islam. It has been supplemented by the *sunnah* and *ijtihad*. The *sunnah* are the sayings, practices and living habits of the Prophet.<sup>51</sup> The *sunnah* also explain revelations (or general Quranic verses), and confirm and frame the scope of interpretation of some Quranic verses.<sup>52</sup> Some Muslims have expressed doubts over the authority of the *sunnah*, as they were written over the course of many decades after the death of the Prophet Muhammad.<sup>53</sup>

*Ijtihad* is the science of interpretation and rule making. *Ijtihad* injects a greater degree of flexibility in contemporary interpretation of Islamic law and practices.<sup>54</sup> In the past, whenever the Quran and *sunnah* left a question unanswered or unresolved, Muslim scholars resorted to *ijtihad*. Scholars from different or even the same societies disagreed in their *ijtihad*. Certain established principles of *ijtihad* cause interpretive problems as they permit interpreters to resort to local customs.<sup>55</sup> This opens Islam

49. See Abdullahi A. An-Na'im, *Human Rights in the Arab World: A Regional Perspective*, 23 HUM. RTS. Q. 701, 703 (2001); see also NOOR, *supra* note 11, at 1.

50. Azizah Al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y 1, 3 (1997); see also Interview with Nik Noriani Nik Badli Shah, *supra* note 20.

51. The *Sunnah* also includes the hadith, which are the sayings and the traditions of Prophet Muhammad. These are the real explanation, interpretation, and the living example of the Prophet which supplements the Quran.

52. See *Islam: A Key to Islamic Concepts*, at <http://www.unn.ac.uk/societies/islamic> (n.d.) (last visited Mar. 20, 2004).

53. Interview with Nik Noriani Nik Badli Shah, *supra* note 20.

54. In fact, early jurists viewed disagreements among them as a sign of God's mercy. See Al-Hibri, *supra* note 50, at 6.

55. See *id.*

up to cultural-historical influences such as the patriarchy of ancient Islamic societies that objectified women and excluded them from intellectual and public life.<sup>56</sup> Other ostensibly religious practices may originate from practical or geographical considerations, such as wearing headscarves or veils to combat the sandy and windy Arabic deserts.<sup>57</sup> The idiosyncratic nature of local customs and their impractical application beyond their locale allows possible flexibility in interpreting Islam. Thus, active discourse among competing schools may promote the universality of Islamic values and teachings.

## 2. *Parochialism and the refusal of traditional Islamic scholars to engage in dialogue*

Internal dialogue and cross-cultural dialogue are increasingly critical within the Islamic world due to rising parochialism and disengagement amongst Islamic scholars. Increasingly, Islamic teachers are rejecting all forms of Western thought, including human rights, and resisting engagement with the human rights community. To isolate themselves from the onslaught of modernity and globalisation, they refuse to read the newspaper, listen to the radio or watch television.<sup>58</sup> These Muslims regard universal human rights as illegitimate and reject both the possibility of divergent interpretations in Islam and potential alignment with international human rights norms. Consequently, scholars and activists must promote discourse addressing women's rights issues within Islam in order to combat this growing climate of parochialism.

## D. PROMOTING INTERNAL DISCOURSE AND CROSS-CULTURAL DIALOGUE IN MALAYSIA

Many Malaysians, including all three prominent women's rights leaders interviewed, support the two-prong approach of internal discourse and cross-cultural dialogue. To Dr. Wan Azizah, matters of Islam and human rights should be the products of public discourse and debate. Nik Noriani points out that the Quran tends to balance rights against duties.<sup>59</sup> Similarly, Azalina Othman strongly advocates a contextual interpretation of Quranic verses to search for the rationale behind the Islamic laws and examine whether these laws should be reviewed to reflect

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56. See Mohamad, *supra* note 29 at 82.

57. Interview with Nik Noriani Nik Badli Shah, *supra* note 20.

58. Husaun Haqqani, *Review: University of Jihad*, STRAITS TIMES (Singapore), Dec. 15, 2002, at 33.

59. Interview with Nik Noriani Nik Badli Shah, *supra* note 20.

contemporary social circumstances.<sup>60</sup> For example, as highlighted by Dr. Wan Azizah, the Quran's instructions that male members of the family should receive more testamentary property are based on defined roles of men and women.<sup>61</sup> This rests on the assumption that men generally take care of women and therefore require more resources to fulfil their roles. This view is also supported by the unequal testamentary inheritance between siblings where the eldest son gets the largest share because he is responsible for the family's welfare. Traditionally, a larger testamentary disposition is necessary to provide for the greater responsibilities devolving upon the male members, a rationale that cuts across both gender and position in the family.<sup>62</sup> However, since men today no longer take full responsibility for supporting female family members (instead women tend to assume equal responsibility in this), it is legitimate for Muslim human rights activists to call for an abrogation of the unequal testamentary rules.<sup>63</sup> Therefore, through open discussion of these matters, it is possible to derive fair, yet accurate, interpretations of Islamic law, which would bridge the perceived gap between Islam and women's rights.

### III. MUSLIM VOICES AND WOMEN'S RIGHTS IN MALAYSIA

#### A. THE LEGAL-CONSTITUTIONAL BACKGROUND OF MALAYSIA

##### 1. *Status of Islam in Malaysia*

##### a) Overriding secularism: A traditional conception of Islam in Malaysian politics

Article 3 of the Malaysian Federal Constitution endorses Islam as the official religion of the Federation. Religion is closely correlated with ethnicity, with almost all Malays in Malaysia being Muslim.<sup>64</sup> The privileged status of Islam is enhanced by the constitutional conferral of special status to Malays and Malay Sultans as indigenous people,<sup>65</sup> along with other "bumiputras"

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60. Interview with Azalina Othman, *supra* note 18.

61. Cyber interview with Wan Azizah Wan Ismail, *supra* note 19.

62. Nik Noriani interview, *supra* note 20.

63. *Id.*

64. Press Statement, Department of Statistics Malaysia, Population Distribution and Basic Demographic Characteristics Report: Population and Housing Census 2000 (Nov. 6, 2001), available at <http://www.statistics.gov.my/English/pressdemo.htm> (last visited Mar. 20, 2004).

65. Malays and the Bumiputras are considered to be the historically prior groups in Malaysia. Amongst the three main races in Malaysia, namely the Malays, Chinese and Indians, the Malays were the earliest settlers, although the aborigines' predate their settlements. See *Malay Peninsula: People*, Encyclopedia.com, available

(sons of the soil).<sup>66</sup> Public land is also reserved for the Malays<sup>67</sup> and the Malay language (Bahasa Melayu) has been elevated to the status of the national language.<sup>68</sup>

Yet at the same time, the Constitution reinforced the secular institutions of governance, which were inherited from the British colonial administration.<sup>69</sup> Islamic law was marginalised to regulate only marriage, divorce and inheritance laws.<sup>70</sup> In *Che Omar bin Che Soh v. Public Prosecutor*<sup>71</sup> (hereinafter *Che Omar*), Lord President Salleh Abas opined that the framers of the Constitution must have understood the restrictive sphere of the influence of Islamic law, co-existing with the dominant common law system, when drafting article 3 of the Constitution.<sup>72</sup> Similarly, most Malaysians have long viewed the provisions as a symbolic acknowledgement of the pre-colonial Islamic status of the Malay sultanate.<sup>73</sup>

Pragmatism also demanded that within Malaysia's multi-racial context, ethnicity and the regulation of ethnic conflict should

at [http://www.encyclopedia.com/html/section/MalayPen\\_People.asp](http://www.encyclopedia.com/html/section/MalayPen_People.asp) (last visited Mar. 20, 2004).

66. MALAY. CONST. art. 153, Univ. of Richmond, available at [http://confinder.richmond.edu/local\\_malaysia.html](http://confinder.richmond.edu/local_malaysia.html) (last visited Mar. 20, 2003) (preserving the special position of Malays and the bumiputra in Sabah and Sarawak).

67. *Id.* art. 89 (preserving reserve land of Malays as forever remaining as the reserves of Malays unless as altered by the laws that are passed with a two-thirds majority).

68. *Id.* art. 152 (stating that Bahasa Melayu is the official language on condition that there are no restrictions on the usage of other languages).

69. In 1957 Malaysia became an independent federation. This federation was an expansion of the former Federated Malay States. Penang and Malacca became members in addition to the nine Malay states. In 1963, Singapore, Sabah, and Sarawak were added to the federation, creating the Federation of Malaysia. Encyclopedia.com, *Malaysia: History*, at [http://www.encyclopedia.com/html/section/Malaysia\\_History.asp](http://www.encyclopedia.com/html/section/Malaysia_History.asp) (last visited Mar. 20, 2004).

70. See Andrew J. Harding, *Islam and Public Law in Malaysia: Some Reflections in the Aftermath of Susie Teoh's Case*, 1 MALAYAN L.J. xci, xciii (1991). "Prior to the arrival of the British, there was no separation between the private and public sphere of Islam. The sultans were the heads of Islam as well as the political leaders in each of their respective states. These states were Islamic in the true sense of the word because, not only were they themselves Muslims, their subjects were also Muslims and the law applicable in the states was Muslim law." *Che Omar bin Che Soh v. Public Prosecutor*, 2 MALAYAN L.J. 55, at 4 (1988).

71. *Che Omar bin Che Soh v. Pub. Prosecutor*, 2 MALAYAN L.J. 55 (1988).

72. *Id.* at 6-8.

73. "Sultan" is the title given to rulers of a Muslim country. The first king of Melaka, Paramesvara, converted to Islam in 1414, adopted the name Iskandar Syah and thereby created the Melaka sultanate. The other royal houses of the Malay states are culturally and politically derived from the Melaka sultanate. These sultanates linked themselves with the Arab mainstream Islamic tradition by attempting to base their laws and governments on Islamic principles and Malay custom (*adat*). Andrew Harding, *The Keris, the Crescent and the Blind Goddess: The State, Islam and the Constitution in Malaysia*, 6 SING. J. INT'L & COMP. L. 154, 159 (2002).

dominate politics, rather than Islam.<sup>74</sup> Mohamed Suffian Hashim, Malaysia's first Chief Justice, wrote: "For many generations, diverse ethnic groups have lived together in peace and harmony and there was no overwhelming desire that the newly independent state should be an Islamic state."<sup>75</sup> Secularism triumphed over Islam as the main framework of governance in Malaysia. As Tunku Abdul Rahman, the first Prime Minister, aptly said: "Unless we are prepared to drown every non-Malay, we can never think of an Islamic Administration."<sup>76</sup>

As a result, for more than the first two decades of independence, Islam remained primarily in the private sphere. As late as 1988, the term "Islam" or "Islamic religion" in article 3 of the Federal Constitution was accepted as referring only to Islamic rituals and ceremonies.<sup>77</sup> Islam was accepted as the official religion in Malaysia for all formal purposes, but Malaysia was not considered to be an Islamic state.<sup>78</sup>

#### b) The decline of secularism and the Islamic revival

A new tide of religious consciousness began to sweep into Malaysia in the early 1970s,<sup>79</sup> challenging the secular nature of the liberal-democratic constitutionalist state.<sup>80</sup> A marked change in judicial attitude can also be detected. In the 2000 case of *Meor Atiqulrahman bin Ishak and others vs. Fatimah bte Sihi and others* (hereinafter *Meor Atiq*),<sup>81</sup> the High Court of Seremban rejected the earlier, more modest judicial pronouncements that Islam only governs rituals and ceremonies<sup>82</sup> by declaring that Is-

74. See Ahmad Fauzi Abdul Hamid, *An Islamicist's View of and Islamic State and Its Relevance to a Multi-racial Society*, in ISLAM IN SOUTHEAST ASIA: ANALYSING RECENT DEVELOPMENT 9, 9 (Institute of Southeast Asian Studies 2002), available at [www.iseas.edu.sg/12002.pdf](http://www.iseas.edu.sg/12002.pdf) (last visited Mar. 20, 2004).

75. Hashim M. Suffian, *The Relationship Between Islam and the State in Malaya*, 1 INTISARI 1, 7-21 (1962).

76. Fred R. von der Mehden, *Religion and Politics in Malaya*, 3 ASIAN SURV. 609, 611 (1963) (quoting STRAITS TIMES, May 1, 1959).

77. See *Che Omar bin Che Soh*, 2 MALAYAN L.J. at 55; cf. Teoh Eng Huat v. Kadhi of Pasir Mas, Kelantan & Anor, 2 MALAYAN L.J. 300 (1990); Minister for Home Affairs v. Jamaluddin bin Othman, 1 MALAYAN L.J. 369 (1989).

78. See Harding, *supra* note 70, at xcvi.

79. See Brendan Pereira, *Secularism No Longer a Safe Bet*, STRAITS TIMES (Singapore), May 18, 2003, at 28.

80. See Harding, *supra* note 73, at 162.

81. *Meor Atiqulrahman bin Ishak v. Fatimah bte Sihi*, 5 MALAYAN L.J. 375 (2000).

82. See *Che Omar bin Che Soh*, 2 MALAYAN L.J. at 55. The court in *Meor Atiq* distinguished *Che Omar* on the basis that both cases dealt with different issues. In *Che Omar*, the issue was whether the mandatory death penalty under the Dangerous Drugs Act or under the Fire Arms (Increased Penalties) Act 1971 – which are not part of the Islamic *hudud* or *qisas* – violates the 'Islam as the religion of the Federation' and therefore the punishment is void and unconstitutional. In contrast, in *Meor*

lam is the dominant religion of Malaysia and stating that it should be construed as an all-encompassing way of life rather than applying only to customary matters:<sup>83</sup>

Islam as the *ad-deen*<sup>84</sup> consists of all activities involved in the human life from birth till death; from the waking of the morning to the sleeping of the night as shown by the Rasulullah who obtained his revelations (*wahyu*) from Allah and recorded them in the Quran. . . It would be an insult to the Malay kings who insisted on including the clauses 'the Muslim or Islamic faith be the established religion of the Federation', 'Islam should be the State religion' if the result of their campaign was relegated to merely 'Islamic rituals and ceremonies' and not '*ad-deen al Islam*' as a complete way of life. I do not think that is the way.<sup>85</sup>

The court further declared all other religions could be practiced peacefully as long as Islam's dominant position remains unthreatened. This latest interpretation of article 3 is controversial as it elevates the status of Islam in Malaysian society beyond the original intent of the constitution's drafters and the country's founding fathers.<sup>86</sup> It imposes a constitutional duty upon the government to not only maintain the status of Islam but to actively promote the religion,<sup>87</sup> thus placing strain upon the present secular framework of governance. In an attempt to diffuse the tension and minimize dissent, Dr. Mahathir Mohamad, the Malaysian Prime Minister, made an unprecedented declaration that Malay-

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*Atiq*, the issue was whether wearing a turban is constitutional even though it does not violate Islam; the decision in *Meor Atiq* may carry less weight than that of *Che Omar* since the former was decided in the High Court while the latter was a Supreme Court judgment.

83. *Meor Atiquerahman bin Ishak*, 5 MALAYAN L.J. at 375. The court reasoned that if Article 3 was not given such an effect, it is otiose. "Islam will not be the religion of the Federation but just another of the many religions embraced in the country and everybody would be equally free to embrace religions, with none better or more than any other." *Id.*

84. *Ad-deen* refers to Islam as a way of life.

85. *Id.* The judge drew support from Sayyid Abul' Ala Maudoodi, who stated that "[t]here can be no doubt that Islam is not just a mere collection of dogmas and rituals but it is a complete way of life covering all fields of human activities, may they be private or public, legal, political, economic, social, cultural, moral or judicial." SAYYID ABUL' ALA MAUDOUDI, *THE ISLAMIC LAW & CONSTITUTION* (1980).

86. However, this assertion is supported by some academics, including Dr. Abdul Aziz Bari as putting religion back on its supposed position. See Abdul Aziz Bari, *Islam in the Federal Constitution: A Commentary on the Decision of Meor Atiquerahman*, 2 MALAYAN L.J. cxxxiii (2002).

87. *Meor Atiquerahman bin Ishak*, 5 MALAYAN L.J. at 375. Note, however, that the current government has been building mosques and religious centres, sponsoring musabaqah al-Quran, reciting the al-Quran, as well as restricting acts forbidden by Islam like banning alcohol, gambling, prostitution and undesirable cultures in an effort to promote Islam.

sia is already an "internationally recognised" and "qualified" Islamic nation.<sup>88</sup>

## 2. *The legal-constitutional status of women*

Against this background of secularism and a growing Islamic consciousness, Malaysia continues to engage the international human rights regime by recognising the contributions of human rights, including women's rights, to human welfare. The newly amended article 8 of the Federal Constitution expressly prohibits gender discrimination. Women can seek legal recourse for alleged violations through judicial review or through complaints to bodies like the National Commission on Human Rights (Suhakam).<sup>89</sup> The integration of women into the development process in order to raise their status and rights in society is also an integral part of the nation's development goals.<sup>90</sup> The Women's Affairs secretariat (HAWA), whose role was to ensure that women's interests and concerns are taken into consideration in development policies, was elevated to a department in the Ministry of National Unity and Social Development in 1997. A National Advisory Council on the Integration of Women in Development (NACIWID) also functions as the national coordinating, consultative and advisory body on women's affairs and provides the platform for greater intensification of efforts towards the integration of women in development.<sup>91</sup>

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88. *Dr. M: Malaysia Recognized the World Over as Model Islamic Nation*, NEW STRAITS TIMES (Malaysia), Sept. 18, 2002, at 2.

89. Suhakam was set up pursuant to the Human Rights Commission of Malaysia Act 1999. It is Malaysia's national mechanism for complaints on the infringement of human rights as enshrined in Part II (Fundamental Liberties) of the Federal Constitution, by an individual or group of individuals. See generally Human Rights Commission of Malaysia Website, at <http://www.suhakam.org.my> (last visited Mar. 20, 2004). For an appraisal on Suhakam and its role in the human rights debate in Malaysia, see Amanda Whiting, *Situating Suhakam: Human Rights Debates and Malaysia's National Human Rights Commission*, 39 STAN. J. INT'L. L. 59 (2003).

90. "Both the Sixth and Seventh Malaysia Plans (1990-1995, 1996-2000) contained special sections on Women and Development, where it is stated: "[T]he Government also recognises that specific strategies must necessarily be formulated to effectively incorporate women in the process of development. Towards this end, concerted efforts will be made to progressively reduce existing constraints and facilitate the assimilation of women into the mainstream social and economic activity.' (Sixth Malaysia Plan)." Women's Aid Organisation, *Women's Equality in Malaysia: Status Report March 2001* (Mar. 15, 2003), at <http://www.wao.org.my/news/20010301statusreport.htm>. (last visited Mar. 20, 2004)

91. For more information on the NACIWID, see the International Labour Organization Website, at <http://www.ilo.org/public/english/employment/gems/eo/law/malaysia/naciwid.htm> ("The Department of Women's Affairs (HAWA) serves as the secretariat for NACIWID. NACIWID, established in June 1976, is a multi-sectoral body comprising representative [sic] from the government and non government sectors.") (last visited Mar. 20, 2004).

A party to CEDAW,<sup>92</sup> Malaysia's initial reservations to articles 2(f), 5(a), 7(b), 9 and 16 of CEDAW, made in light of the Islamic *Syariah* law and the Federal Constitution of Malaysia, were partially withdrawn three years after accession. This is a heartening development for Malaysian women since no reservations now apply to articles like article 2(f), which bears great potential for bringing about change as it requires the government to take appropriate measures to modify or abolish laws, customs, and practices that constitute discrimination against women. Sub-provisions of article 16, which provide for the elimination of discrimination in marriage and family relations, were also withdrawn.<sup>93</sup> Malaysia affirmed its commitment to enhance the national machinery for women's advancement, to increase women's participation in decision-making, to safeguard women's right to health, education and social well-being, and to remove legal obstacles and gender discriminatory practices as provided under the Beijing Platform for Action during the UN Fourth World Conference on Women (1995), Malaysia.<sup>94</sup>

## B. IDENTIFYING THE VOICES IN THE DEBATE

The existence of multiple religious authorities and the related yet unclear capacities of the state and the Federal government in Malaysia, however, complicate the expansion of internal dialogue. Increasingly, vocal NGOs and individual women are seeking to be heard and contributing to the internal debates on Islam and women's rights. This multiplicity of voices and opinions reveal the plurality of views on religious matters. These disparate voices are accorded varying degrees of authority, which this section investigates.

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92. See generally Malaysia Ministry of Foreign Affairs Website, at [www.mfa.gov.my](http://www.mfa.gov.my). Note that Malaysia was due to submit an initial report to the CEDAW Committee in 1996, but has yet to submit it. *United Nations Division for the Advancement of Women, Report of the Secretary General, Committee on the Elimination of Discrimination Against Women, 22nd Sess., Agenda Item 4, at 3, U.N. Doc. CEDAW/C/2000/II/2, (2000)*, available at <http://www.un.org/womenwatch/daw/cedaw/cedaw23/cedawc2000II2.pdf> (last visited Mar. 20, 2004).

93. "To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women." Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 14, art. 2(f).

94. *Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995*, U.N. Doc. A/CONF.177/20/Rev., U.N. Sales No. 96.IV.13 (1996), available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N96/273/01/PDF/N9627301.pdf?OpenElement> (last visited Mar. 20, 2004); see also <http://www.un.org/womenwatch/daw/beijing/platform/index.html> (last visited Mar. 20, 2004).

## 1. Federal vs. state powers

### a) State administration and monitoring of Islam

The official power in the interpretation of Islamic texts and implementation of Islamic laws lies in the state government and religious authorities, due to the separation of powers between state and Federal government. Article 3(2) of the Federal Constitution provides that the ruler of each state is that state's Head of Islam. State law also controls the propagation of any religious doctrine or belief among persons professing the religion of Islam, the administration of Islamic personal and family law, the management of Islamic public places of worship, and the organisation of *Syariah* courts.<sup>95</sup> Under the Administration of Islamic Law Enactment adopted in the various states,<sup>96</sup> three independent state authorities administer Islamic law: the *Majlis Ugama Islam* (Council of the Muslim Religion),<sup>97</sup> the *Mufti*<sup>98</sup> and the *Syariah* courts.<sup>99</sup>

### b) Supervision by the Federal Government and Council of Rulers

The Federal government retains influence over the administration of Islam (and related public policy) through article 75 of the Federal Constitution. Article 75 provides that federal law will prevail over state law where state law contradicts federal law.

95. MALAY. CONST. art. 11(4), Univ. of Richmond, available at [http://confinder.richmond.edu/local\\_malaysia.html](http://confinder.richmond.edu/local_malaysia.html) (last visited Mar. 20, 2003); see also Ninth Schedule List II – State List, Federal Constitution, available at <http://islamic-world.net/islamic-state/malaysia.htm> (last visited Mar. 20, 2004).

96. See Selangor Administration of Islamic Law Enactment (1989) (No. 2 of 1989) (amended 1991); *Enakmen Pentadbiran Hukum Syarak Negeri Melaka* (1991); Administration of Islamic Law ("Federal Territories Act") (1993); Perak Administration of Islamic Law Enactment (1992) (No. 2 of 1992); Sabah Administration of Islamic Law Enactment (1992) (No. 3 of 1992); Penang Administration of Islamic Religions Affairs Enactment (1993) (No. 7 of 1993).

97. The Council of Muslim Religion is the general body responsible for the administration of the Islamic religion. Ahmad Mohamed Ibrahim, *Recent Developments in the Administration of Islamic Law in Malaysia*, in THE ADMINISTRATION OF ISLAMIC LAWS 10 (Ahmad Mohamed Ibrahim, & Abdul Monir Yaacob eds., 1997).

98. A *Mufti* is the appointed chief *ulama* (Islamic scholar who is an interpreter or expounder of Islamic law (*Syariah*) in a state).

99. *Syariah* Courts are state courts and are responsible for the administration of justice within the state only. The jurisdiction of the *Syariah* Court was given constitutional protection in 1988 when a new clause 1A was added to Article 121 of the Federal Constitution of Malaysia. MALAY. CONST. art. 121(1a), Univ. of Richmond, available at [http://confinder.richmond.edu/local\\_malaysia.html](http://confinder.richmond.edu/local_malaysia.html) (last visited Mar. 20, 2003); Federal Constitution (Amendment) Act, Akta A 704 (1988). Under this new clause 1A, High Courts and courts subordinate to it shall have no jurisdiction in any matter that is in the jurisdiction of the *Syariah* Court. The Malaysian Supreme Court affirmed the effect of this clause in *Mohamed Habibullah bin Mahmood v. Faridah bte Dato Talib*, 2 MALAYAN L.J. 793 (1992).

According to article 38(2)(b) of the Federal Constitution, the Conference of Rulers (made up of the rulers of all the states, including the Yang Di-Pertuan Agong<sup>100</sup>) has guardianship over any Islamic acts, observances or ceremonies to the Federation as a whole. In this supervisory role, the Conference of Rulers can significantly influence state attitudes.

In addition, the Federal government has indirect influence through the Department of Islamic Development Malaysia, or Jabatan Kemajuan Islam Malaysia (JAKIM).<sup>101</sup> JAKIM was created under the auspices of the Prime Minister's Office in 1997, and serves as an advisory body to the Council of Rulers, the states, and the religious councils of the states. JAKIM is also responsible for planning the advancement and progress of Islamic affairs in the country.<sup>102</sup> It actively interprets and implements Islam in Malaysia and has been widely accepted as an appropriate authority. In contrast, the *Majlis Ugama* and *Mufti* of the states only have power within each state. Indeed, the Federal government promotes JAKIM as the most appropriate authority to deliberate and decide on matters pertaining to the religion, especially when they involve the core guidelines.<sup>103</sup> Therefore, JAKIM's unofficial influence extends through all Malaysia.

Besides JAKIM, the Federal government also indirectly influences religious policies and attitudes in Malaysia through the National Fatwa Council (NFC), which acts as a reference for religious issues. The NFC generally addresses issues at the request of the Government and its decrees have been regarded as authoritative. The government banned the Al Arqam sect after the NFC declared it a deviant Islamic group in 1994.<sup>104</sup> Therefore, with the combined effect of article 75, JAKIM and NFC, the Federal government is highly influential in the interpretation and

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100. The Yang di-Pertuan Agong is the Supreme Head of the Federation. See MALAY. CONST. art. 32, Univ. of Richmond, available at [http://confinder.richmond.edu/local\\_malaysia.html](http://confinder.richmond.edu/local_malaysia.html) (last visited Mar. 20, 2004).

101. See generally the website for JAKIM, at <http://www.islam.gov.my> (last visited Mar. 20, 2004). JAKIM's predecessor, Bahagian Hal Ehwal Islam (BAHEIS), was formed pursuant to a decision made during a Malaysia Council of Rulers meeting (Majlis Raja-Raja Malaysia) in which there was a need for a body that would concentrate on furthering the advancement of Islamic affairs in Malaysia.

102. This includes formulating policies, aiding the drafting of laws and regulations, implement programmes and streamline the enforcement mechanisms of laws and administrative procedures pertaining to Islamic affairs in the country:

103. Consult *Jakim, Says Abdullah*, NEW STRAITS TIMES (Malaysia), Mar. 19, 2003 at 11.

104. However there is criticism that the NFC acts as a rubber stamp for the Federal government. For example, during a constitutional crisis pertaining to the immunity of the Rulers, the NFC lent legitimacy and religious support to the Government to pursue its objectives of removing the Rulers' immunity. *Changing Mindset of Muslims*, NEW STRAITS TIMES (Malaysia), Mar. 3, 2002, at 10.

implementation of Islam, thus blurring the separation between religion and state in Malaysia. As a result of this overlapping state and federal jurisdiction over Islamic affairs, conflicting and inconsistent interpretations and policies become inevitable.

## 2. *UMNO vs. PAS: Along party lines*

### a) The United Malay National Organization (UMNO)

Two parties representing Malay-Muslim interests dominate the Islamic debate in Malaysia: UMNO, which is part of the ruling coalition, and PAS, which is the primary Islamic opposition party. UMNO, under Mahathir Mohamed's leadership, embraces modernity and views progress as not necessarily un-Islamic.<sup>105</sup> Acknowledging the importance of the participation of women in politics and bureaucracy, Mahathir has given important roles to female ministers, including Datuk Seri Rafidah Aziz, the Minister of International Trade and Industry. He has strongly supported the inception of Puteri UMNO, a youth wing for Malay women in UMNO, and its ultimate accreditation as a full-fledged branch of UMNO in 2001. Puteri UMNO is a crucial addition to the women's rights debate as it works within the Islamic framework to empower women, especially by increasing their political participation.

Mahathir has on various occasions agreed that Islam, like all religions, is subject to divergent interpretations.<sup>106</sup> Fundamentally tolerant teachings can and have been inevitably interpreted differently in certain places, times and historical circumstances.<sup>107</sup> Hence, Islamic faith should not be exclusive and self-righteous, Mahathir argues, but should be tolerant and open to healthy discourse. Mahathir's moderate stance is central in shaping the course of the women's rights debate in Islam. In 1994, he was influential in the banning of Al-Arqam as a religious deviationist sect because of its brand of Islamic mysticism. Coming from a secular background, Mahathir's engagement and influence in interpretations of the Quran as well as religious dialogue reflects his belief that this is not the exclusive prerogative of the *ulama*.

### b) Partai Islam Semalaysia (PAS)

In comparison, PAS supports a more conservative interpretation of Islam. Datuk Nik Abdul Aziz, its spiritual and political

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105. See Abdul Hamid, *supra* note 74.

106. Mohamad, *supra* note 26, at 74; Mahathir Mohamad, *Islam Guarantees Justice for All Citizens*, in *HUDUD IN MALAYSIA: THE ISSUES AT STAKE* 64 (Rose Ismail ed., 2002).

107. Mohamad, *supra* note 26 at 73.

leader, believes that modernity should not pervert the true teachings of Islam. In contrast to Mahathir's ideal of co-existence, the PAS believes that an Islamic state should only have Islamic institutions and governance.<sup>108</sup> For example, Abdul Hadi Awang, the Chief Minister of Terengganu, has criticised the current co-existence of secular and Islamic institutions<sup>109</sup> as a mark of an untrue Islamic state.<sup>110</sup> Nik Aziz has even gone further in stating that those who "declare that there must be separation between religion and politics, and that Malaysia cannot be an Islamic state because it is heterogeneous in composition," are actually "insulting Islam."<sup>111</sup>

PAS also endorses Islamic teachings requiring women to be covered up and restricted in their conduct. PAS discourages women from political participation. Datuk Fadzil Noor, PAS's party president, was quoted for saying that the Taliban forbade women from leaving their homes when they first took over the country in order to protect them from communist agents lurking in Kabul who had been molesting and robbing the women.<sup>112</sup> In a similar paternalistic and chauvinistic vein, PAS has refused since the 1980s to field women electoral candidates, arguing that it wanted to protect women from getting involved in the immoral things that the National Front allegedly conducts during elections.<sup>113</sup> This attitude explains the limited role of the women wing, Dewan Muslimat, within the party.

Although PAS has long been considered a marginal voice in Malaysian politics, there has been a seismic shift in power in recent years. In the last election, PAS managed to wrestle control over the rural north-eastern state of Terengganu by riding on the wave of discontent arising from the controversial trial, conviction and imprisonment of the former Deputy Prime Minister, Anwar Ibrahim in 1998-1999.<sup>114</sup> This marked the first major shift of

108. Kazi Mahmood, *Interview: Abdul Hadi Awang, Terengganu Chief Minister, Malaysia*, ISLAM ONLINE (Jun. 25, 2001), at <http://islamonline.net/english/politics/2001/06/article14.shtml> (last visited Mar. 20, 2004).

109. For example, the civil court and the *Syariah* Court; conventional banks and Bank Islam; national, secular schools and Islamic schools.

110. Mahmood, *supra* note 108.

111. Press Statement, Lim Kit Siang, DAP National Chairman, Escalation of UMNO-PAS Competition to "Out-Islam" Each Other Should Not Be Insensitive or Heedless of the 45-Year "Social Contract" of the Major Communities on Attaining Independence on the Multi-Religious Character of Malaysia or the Human Rights of all Malaysians (Aug. 29, 2002), available at <http://www.dapmalaysia.org/english/lks/aug02/lks1831.htm> (quoting Nik Aziz) (last visited Mar. 20, 2004).

112. See PAS Says Taleban's Treatment of Women Was Right, *supra* note 42.

113. Mahmood, *supra* note 108.

114. See Abdul Hamid, *supra* note 74; see also *The Religion Report: Religious Politics in Malaysia* (Austl. Broad. Co. radio broadcast, May 12, 2001), at <http://www.abc.net.au/rn/talks/8.30/re/rprt/stories/s432828.htm> (last visited Mar. 20, 2004).

power since 1990, when PAS captured Kelantan from the ruling coalition.<sup>115</sup> Since then, PAS has intensified efforts to gain political leverage by branding itself as the true Islamic party, holding out Terengganu and Kelantan as the only true Islamic states in Malaysia and claiming to be more Islamic than UMNO.<sup>116</sup>

PAS's hard-gained political leverage, however, has been undermined by terrorism alerts and the emergence of militant Islamic groups like Jemaah Islamiah in Malaysia after the attacks of September 11, 2001, as well as the UMNO efforts to match PAS's Islamisation programme. PAS's reported support for the Taliban and its call for Jihad (or Holy War) against Americans for their attacks on Afghanistan has not only cost it support among moderate and liberal Malays and Muslims, but has also frightened off those in the Chinese community that considered establishing relationships with PAS.<sup>117</sup> Its unequivocal insistence on pursuing a strict Islamic state agenda has further led to the break-up of the opposition alliance, the Barisan Alternatif (or Alternative Front). The Democratic Action Party (DAP), which primarily serves the Chinese community, withdrew from the coalition due to PAS's doctrinal rigidity.<sup>118</sup> Therefore, although PAS has gained some leverage in recent years, it has largely remained on the fringes of the Islamic debate.

### 3. *Non-state voices – Women's groups in Malaysia*

#### a) Sisters in Islam: Women's rights within the framework of Islam

Increased activism and collaboration amongst women's groups in Malaysia is a further feature of the landscape of Malaysia's public debate. As recent as March 2003, a coalition of twelve Malaysian women's groups rallied together to campaign against polygamy in reaction to the state of Perlis' move to ease restrictions on polygamy.<sup>119</sup> Leading the charge for women's rights in Islam is the 'Sisters in Islam' (SIS), a Muslim women's rights group committed to promoting the rights of women within the framework of Islam through active lobbying, educating Mus-

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115. Anil Netto, *Mahathir's Victory Is Not So Sweet*, ASIA TIMES ONLINE, Dec. 1, 1999 (H.K.), at <http://www.atimes.com/se-asia/AL01Ae01.html> (last visited Mar. 20, 2004).

116. *Waulaupun merdeka Umno lambat fahami perjuangan Islam*, HARAKAHDAILY (Malaysia), Aug. 15, 2002, available at <http://www.harakahdaily.net> (last visited Mar. 20, 2004); Mahmood, *supra* note 108.

117. MICHAEL YEOH, MALAYSIA'S POLITICAL OUTLOOK (2001), available at <http://www.asli.com.my/malaysia.htm> (last visited Mar. 20, 2004).

118. See Abdul Hamid, *supra* note 74.

119. *Coalition of Women's Groups Launches Drive Against Polygamy*, NEW STRAITS TIMES (Malaysia), Mar. 17, 2003 at 1.

lim women on their rights, and providing aid in cases of divorce or domestic violence. SIS rejects the use of Islam to oppress women and deny their basic rights of equality and human dignity. Instead, it seeks to interpret Quranic verses consistently with the just and compassionate spirit of Islam, thereby reviving its status as the religion whose revelation uplifted the status of women 1400 years ago.

#### b) AWAM and WAO: Women's Rights for All

SIS cooperates with non-Islamic women's groups like the All Women Action Society (AWAM) and the Women's Aid Organisation (WAO) to lobby for women's rights, including Muslim women in Malaysia.<sup>120</sup> Unlike SIS, membership and leadership in these organisations are not restricted to Muslim women, and they are not exclusively dedicated to Muslim women's issues.

The role of non-Islamic women's groups in the Islamic women debate is inherently limited because non-Muslims are generally not considered equally eligible to speak on Islamic teachings and practices. Hence, in the subsequent discussion on specific topics of women's rights in Malaysia, SIS will be given the most attention, with limited reference to non-Islamic women's groups as representative of NGO voices in Malaysia. Even then, it must be noted that SIS has often received criticism from opponents and their views are marginalised or discounted by the mainstream Muslim *ummah*.<sup>121</sup>

### C. ILLUMINATING THE DEBATE BETWEEN WOMEN'S RIGHTS AND ISLAM

Having identified the spectrum of voices within the Islamic debate in Malaysia, three areas of conflict between current Islamic teachings and international women's rights will be examined to highlight the competing views and possible routes towards resolving these tensions. Two of these issues are commonly discussed by the CEDAW Committee: polygamy and the *hudud* laws on rape. CEDAW provisions are referenced to show the specific contradictions between Islamic practices and international human rights. The importance of free and participatory internal discourse is highlighted to demonstrate the limits and prospects of this mode of discourse. The third issue, the wearing of the *tudung* (Muslim headscarf) or *hijab* (Muslim headdress) as

120. Indeed, women's groups have often rallied together regardless of whether it is an Islamic issue. Many women's rights, such as rape and domestic violence, are within the domain and concern of all women's groups.

121. Cyber interview with Wan Azizah Wan Ismail, *supra* note 19.

a compulsory religious dress, is also examined, as it the most visible manifestation of discrimination against women.<sup>122</sup>

1. "One System, One Wife = Less Trouble"<sup>123</sup>: Polygamy or Monogamy

In Islam, Muslim men are allowed to take up to four wives. Such endorsement of polygamy clearly violates article 16 of CEDAW. On various occasions, such as the Round Table Workshop on CEDAW and Islam, and the Human Rights of Women,<sup>124</sup> the CEDAW Committee has exhorted Islamic state parties to take immediate steps to eradicate the practice of polygamy.<sup>125</sup> Malaysia has partially reserved its accession on article 16, although it recently withdrew its reservations on provisions (b), (d), (e) and (h). However, none of those provisions directly impinge the ultimate legality of polygamy. Rather, they ensure that women consent marriage and have equal rights over children. The provisions of article 16 that remain reserved do directly affect the legality of marriage. For example, provision (a) ensures that men and women have the same rights with respect to marriage, and provision (c) provides for certain rights and responsibilities during marriage and at its dissolution. The fourteen

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122. It is contended that the Quran makes it compulsory for the women to cover their heads. Quranic verses that are often cited to support this stand include the following: Surah Al-Nur (the Light) (24:31) ("They (the believing women) should draw their head coverings over their bosoms. . ."); Surah Al-Ahzab (33:59) ("O Prophet [PBUH] Tell thy wives and daughters and the believing women that they should put on their outer garments; that is most convenient in order that they may be recognised (as Muslims) and not be molested."); and Al-Nur 31 ("[Tell the believing women] not to reveal their adornments except to their husbands, their fathers, their husband's fathers, their sons, their husband's sons, their brothers or their brother's sons, or their sister's sons, or their (Muslim) women or the (female) slaves, or old male servants who lack vigor, or small children who have no sense of the shame of sex . . ."). These Quranic references have been interpreted as instructing the Muslim woman to cover her head with a *tudung* or even cover herself almost totally with a hijab such that no provocative part of her body will be visible.

123. *One System, One Wife = Less Trouble*, NEW STRAITS TIMES (Malaysia), Jan. 9, 2003, at 9.

124. UNIFEM WESTERN ASIA REGIONAL OFFICE, REPORT OF THE ROUND TABLE WORKSHOP: CEDAW AND ISLAM AND THE HUMAN RIGHTS OF WOMEN (1999), available at [http://www.awc.org.jo/english/western\\_asia/round\\_report.html](http://www.awc.org.jo/english/western_asia/round_report.html).

125. See *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. GAOR, 55th Sess., Supp No. 38, 192, 174, U.N. Doc. A/55/38 (2000), available at <http://www.un.org/documents/ga/docs/55/a5538s.pdf>; *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. GAOR, 54th Sess., Supp. No. 38, ¶ 91, U.N. Doc. A/54/38/Rev.1 (1999), available at <http://www.un.org/womenwatch/daw/cedaw/reports/21report.pdf> (last visited Mar. 20, 2004). Note that Tunisia had banned polygamy, while others such as Egypt, Saudi Arabia, Syria, Morocco and Lebanon allowed marriage contracts, which empowered women to divorce their husbands if they married again. See *Mufti Warns Women Not to Oppose Polygamy; The Practice Is Allowed Under Islam, So 'Hold Your Tongue'*, STRAITS TIMES (Singapore), Jan. 7, 2003.

Malaysian states have differing views towards the correct approach to polygamy laws, ranging from the outright encouragement of polygamy, to apathy (since polygamy is deemed to be sanctioned by the Quran), and finally to indirect dissuasion of polygamy (through the imposition of strict qualifying conditions).

a) Federal vs. State Voices

Under most current state laws in Malaysia, Muslim men need permission from their officially recognised and existing spouses before they can marry again. Generally, before marrying a second or subsequent wife, the husband must also make an application to the *Syariah* Court for permission. The conditions for granting this permission differ in each State, from relatively more demanding to almost negligible.<sup>126</sup> In almost all the States, certain conditions<sup>127</sup> are laid down before a man can marry another wife. One common condition is that the proposed marriage must be just and necessary.<sup>128</sup> On May 4, 2003, the Selangor Family Law Enactment 2003 was amended to tighten requirements for polygamy by requiring that all parties in a marriage must now be present at the *Syariah* Court in an application for a polygamous marriage.<sup>129</sup>

In the Federal Territory, plans are underway to require men who intend to be polygamous to undergo a course prior to marriage to prevent them from shirking responsibilities.<sup>130</sup> Dr.

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126. The problem of multiple versions of the Islamic family laws under fourteen state jurisdictions has led to State-hopping – a cunning practice to circumvent a State's law, such as stricter polygamy conditions, or avoid a State *Syariah* Court's order on maintenance payment. See *Establishing Binding Precedents*, NEW STRAITS TIMES (Malaysia), Jan. 31, 2003, at 10.

127. See, e.g., Islamic Family Law ("Federal Territories") Act (1984), Malaysia Act 303.23 (describing these conditions under Part II, which is entitled Preliminaries to a Marriage).

128. What is deemed as "just and necessary" is debatable and is up to the judge to decide after hearing the application by the man, and in certain occasions where she attends the hearing, the wife's view. Some applicants cite the reason that the second or subsequent marriage was to 'avoid vice' or zina (adultery). The courts in previous cases have rejected this reason. There is no law in Malaysia that supports lust as a reason for polygamy, as there is nothing in the Quran that permits fear of committing zina to be considered as a ground for polygamy. Other conditions are that the husband must have sufficient financial means, that the husband will accord equal treatment to the existing wife/wives, and that the proposed marriage will not cause *darar syarie* (danger or harm) to the existing wife. See Jaclyn Kee, *Know Your Rights: Polygamy* (Mar. 13, 2003), available at [http://www.wao.org.my/news/20030103knowrghs\\_polygamy.htm](http://www.wao.org.my/news/20030103knowrghs_polygamy.htm) (last visited Mar. 20, 2004).

129. See *Selangor's Polygamy Law Lauded*, NEW STRAITS TIMES (Malaysia), May 4, 2003, at 12. However, note that SIS has criticised certain amendments, resulting in discrimination against women instead. See *Selangor's Family Law Enactment Discriminates Against Women*, NEW STRAITS TIMES (Malaysia), May 18, 2003, at 10.

130. See *Courses for Would-Be Polygamous Men*, NEW STRAITS TIMES (Malaysia), June 4, 2003 at 9.

Mohamad Yusof Hussain, the Federal Territory *Mufti* notes that while polygamy is sanctioned by the Quran, it also requires polygamous men to remain responsible and to be fair after taking another wife or wives. The *Mufti*, unsurprisingly, stops short of saying that polygamy should be discouraged, explaining that the proposed course is not aimed at making polygamy rules more stringent but to ensure polygamy does not lead to divorce and other problems.<sup>131</sup>

In contrast, in Perak, the husband need only make a declaration before a *Syariah* Court judge that "he shall be fair to his wives" to obtain a certificate from a *Syariah* Court judge. There are no other conditions. In Kelantan and Terengganu, apart from obtaining permission from the *Syariah* Court, there are also no other specific conditions stipulated. The state of Kelantan is even considering removing the requirement of obtaining the existing wives' consent for state politicians wishing to take another wife.<sup>132</sup> The northernmost state of Perlis also proposed to ease regulations on polygamy by waiving any need for the first wife's consent.<sup>133</sup>

The current formulation of polygamy laws and the proposed changes effectively encourage and facilitate polygamy for Muslim men. Religious authorities have sharply criticised the opposition to proposals to make it easier for Muslim men to take additional wives. Datuk Mat Jahaya Husin, the *Mufti* of Perlis, warned that groups opposed to polygamy may be "wronging" Islam,<sup>134</sup> which recognizes a right to polygamy.<sup>135</sup> Such warnings and derisive exclusions by religious authorities often follow attempts to initiate discourse on Islamic teachings and practices.

As seen above, a diversity of views can be found among the leaders and religious authorities of the 14 Malaysian states. The Federal government, under the multi-racial National Front coalition, protests against the easing of restrictions and asserts that Islam does not allow the indiscriminate practice of polygamy by

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131. *Id.*

132. See *PAS to Relax Polygamy Rules in Kelantan*, STRAITS TIMES (Singapore), Oct. 29, 2002, at A9; see also *Terengganu May Approve Second Wife for Legislators*, STRAITS TIMES (Singapore), Dec. 20, 2002, at A19.

133. This stance supporting polygamy is not new to Perlis. In 1996, the Perlis Menteri Besar Datuk Seri Shahidan Kassim similarly proposed relaxing marriage laws to allow Muslim men to practise polygamy. He created a controversy when he accused women of making a big fuss over polygamy and accused them of forcing their husbands to commit adultery because they did not allow them to practise polygamy. See *MB Rebukes Those Against Polygamy*, NEW STRAITS TIMES (Malaysia), Nov. 28, 1996, at 11.

134. See *Mufti Warns Women Not to Oppose Polygamy*, *supra* note 125.

135. See *id.*

Muslims as a right, given the heavy responsibilities involved.<sup>136</sup> Policymakers like Datuk Abdul Hamid Zainal Abidin, the Minister in charge of Islamic affairs, and Datuk Sharizat Abdul Jalil, Minister of Women and Family Development, emphasize that polygamy is not a right but a privilege, with attendant conditions, the basis of which is that the husband must treat his wives with equal fairness.<sup>137</sup> The need to obtain the consent of the first wife is therefore paramount.

The Islamic Development Department (JAKIM), a body under the auspices of the Prime Minister's Office, also underscores the huge responsibilities men have to fulfil in polygamous marriages. An awareness campaign targeted at Muslim men on the institution of polygamy was recently launched in March 2003 to counter the misconception that polygamy was something "easy."<sup>138</sup> This promised to be a continuing effort as Datuk Shahir Abdullah, the director-general of JAKIM, indicated that the department will implement measures to create greater awareness among Religious Department officials and other agencies under them of the importance of recognising women's rights in Islam.<sup>139</sup>

Despite such cautious efforts from the Federal government, Dr. Ismail Ibrahim, the National Fatwa Council chairman, clarifies that "Islam clearly permits polygamy as long as the man can provide for his family and is fair to his wives and children."<sup>140</sup> The real problem, in Ismail's mind, was the abuse of this privilege by men who solemnised their marriages overseas. He further defended the *Syariah* law as just and fair in its administration of polygamy.<sup>141</sup>

In the face of diverse views and laws both within the states and between the states and the Federal government, the Federal government proposed the streamlining of laws to avoid further division.<sup>142</sup> Such streamlining proposals are not new and have previously failed to achieve the desired uniformity.<sup>143</sup> The propo-

136. See *Terengganu May Approve Second Wife for Legislators*, *supra* note 132.

137. See *One System, One Wife = Less Trouble*, *supra* note 123. See also *Second Wives' Club Proposal Sparks Debate*, STRAITS TIMES (Singapore), Oct. 13, 2002, at 19.

138. See *Jakim to Stress Women's Rights*, NEW STRAITS TIMES (Malaysia), Mar. 25, 2003, at 16.

139. *Id.*

140. *Fatwa Panel Chief Wants Halt to Polygamy Issue*, NEW STRAITS TIMES (Malaysia), Jan. 8, 2003, at 7.

141. See *id.*

142. *CM: Streamline Rules on Polygamy*, NEW STRAITS TIMES (Malaysia), Jan. 6, 2003, at 13.

143. In 1984, the Federal Government had prepared a model statute which was approved by the Conference of Rulers. But the attempt failed because with the exception of Selangor, several State legislatures such as Kelantan, Kedah and Malacca

sal has received some support from the states but without full support and the cooperation of all the states within the Federation, the Federal government will have limited regulatory power on polygamy laws since it is still within the constitutional purview of the states. As yet, the states are unlikely to sacrifice their control in this area, and while most of the population would welcome the clarification, they remain deferential to the decisions of the religious authorities in the states.

#### b) UMNO - PAS divide

Dr. Mahathir, the main voice of UMNO, supports the view that Islam allows polygamy but does not encourage it.<sup>144</sup> Islamic sanction of polygamy, he notes, must be interpreted according to the era in which the Quran was written. During those turbulent times, frequent wars reduced the male population, and many women were without husbands. Hence polygamy was a way of caring for these women.<sup>145</sup> Islam, he reasoned, effectively discouraged polygamy by restricting the number of wives to four (since prior to Islam a man could have any number of wives) and by imposing the condition to be just and fair to all wives, taking into consideration factors such as financial capability, fairness, and the status of the potential wife.<sup>146</sup>

In contrast, PAS openly supports polygamy, drawing support from the Islamic law as it stands. Nik Aziz, PAS's spiritual leader, cautioned women not to challenge polygamy because it is already stipulated in the Quran and hadith,<sup>147</sup> and there is nothing they can do about it.<sup>148</sup> Toh Puan Fatimah Ibrahim, the head of PAS Muslimat (women's wing of PAS), reportedly urged Muslim women to submit to their husbands and accept their husband's desire to practise polygamy as it helps single mothers and orphans.<sup>149</sup>

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made extensive changes to it while some merely copied bits and pieces of it. Another streamlining effort, in which the Attorney General's Chambers provided a comprehensive table of amendments for the State legislatures, also failed. *See In Dire Need of Uniformity*, NEW STRAITS TIMES (Malaysia), Jan. 12, 2003, at 8.

144. *See States Welcome Move from One Islamic Family Law*, NEW STRAITS TIMES (Malaysia), Jan. 16, 2003.

145. *See Dr. Mahathir's World Analysis*, NEW STRAITS TIMES (Malaysia), Apr. 8, 1999, at 12.

146. *See States Asked to Gazette Islamic Family Law Immediately*, MALAY. GEN. NEWS, Jan. 14, 2003.

147. *See supra* note 51.

148. *See Express Anti-War Views to US Citizens, Says Kelantan MB*, NEW STRAITS TIMES (Malaysia), Mar. 20, 2003, at 2.

149. *Hadi: No Need to Amend Constitution*, NEW STRAITS TIMES (Malaysia), Dec. 23, 2002, at 2.

While the views expressed by UMNO are more consistent with current norms in women's rights, PAS retains some leverage, as it portrays itself as more Islamic and therefore more authoritative in Islamic matters. Political clout, however, features much in this fight and since UMNO has the larger number of electoral votes, through their coalition with the Chinese and Indian parties, UMNO has the upper hand for the time being.

c) Non-state voices

A coalition of twelve Malaysian women's groups has launched a campaign against polygamy. The "Monogamy: One Husband, One Wife" campaign is aimed to impress upon Malaysians that polygamy is not the norm in Islam.<sup>150</sup> At the forefront of the protest, SIS has stressed a contextual reading of the Quranic verses, pursuant to upholding the notions of justice and compassion in Islam rather than a selective adherence to Quranic verses.<sup>151</sup> Nik Noriani contends that although Islam codified the practice of polygamy, it effectively discourages polygamy by making unequivocally stringent demands on the husband to treat all wives equally.<sup>152</sup> Since it is almost impossible to be fair to all wives, a careful reading of the entire verse actually shows that Islam discourages polygamy.<sup>153</sup>

Nevertheless, SIS recognises that polygamy has become an entrenched practice that can only be changed through extensive re-education and empowerment of women. SIS educates women on the inclusion of a no-polygamy clause in marriage contracts to help them protect themselves against polygamy, a practice sanctioned by Islam: the Prophet Muhammad's great-grand-daughter, for example, included a no-polygamy clause in her marriage contract.<sup>154</sup> Having been deprived of religious backings, those opposing the no-polygamy clause instead end up resorting to social pressures and manipulation to discourage wives from using such a clause.<sup>155</sup> Therefore, SIS has shown that it is possible to find

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150. See *Coalition of Women's Groups Launches Drive Against Polygamy*, *supra* note 119.

151. Interview with Nik Noriani Nik Badli Shah, *supra* note 20.

152. The Quranic verse states (as translated) the following in 4:3:

If ye fear that ye shall not be able to deal justly with the orphans, Marry women of your choice, Two or three or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess, that will be more suitable, to prevent you from doing injustice.

Qu'ran, *An-Ninsa* 4:3. See also Fatimah Majidi et al., *Misconceptions About Women in Islam*, at <http://www.submission.org/women/mis.html> (last visited Mar. 20, 2004).

153. See Ahmad, *supra* note 28.

154. *Women can include no-polygamy clause*, STRAITS TIMES (Singapore), Jan. 19, 2003, at 21.

155. Nik Noriani candidly relates:

support for women's rights within Islamic texts themselves. Carefully considered, Islamic texts can be consistent with international women's rights standards.

## 2. *Hudud* laws on rape and adultery

In July 2002, the PAS-controlled state of Terengganu passed the Terengganu State *Syariah* Criminal (*Hudud* and *Qisas*) Bill 2002 (hereinafter "Terengganu Bill"), which paved the way for the implementation of *hudud* law in the state.<sup>156</sup> The Terengganu Bill replicates a similar bill passed in Kelantan in 1993.<sup>157</sup> The Terengganu Bill reopened the debate over the treatment of women in the Islamic penal code and caused great concern as it stemmed from the same perspective that gave rise to *Syariah* laws in Pakistan and Nigeria.<sup>158</sup> Women's rights activists have long criticized the implementation of *hudud* laws in Pakistan and a number of states in Nigeria.<sup>159</sup> In particular, the *hudud* laws on *zina* (illicit intercourse or adultery)<sup>160</sup> and *qazaf* (slanderous accusation of *zina*)<sup>161</sup> flagrantly violate CEDAW's model of equality.<sup>162</sup>

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[W]hen something is not specifically sanctioned by Islam, the conservatives attack the women's right as going against Islamic teachings. But when Islam specifically sanctions a right like the right to include a no-polygamy clause, the conservatives appeal to compassion and tolerance in order to block the right; saying that "it is not nice if a wife imposes such a condition on the husband because it shows they do not trust the husband."

Interview with Nik Noriani Nik Badli Shah, *supra* note 20.

156. See *Malaysian State Passes Islamic Law*, BBC NEWS WORLD ED.: ASIA-PAC., July 8, 2002, available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/2116032.stm> (last visited Mar. 20, 2004).

157. Kelantan *Syariah* Criminal Code (II) (1993).

158. See Kasmiah Mustapha & Sadna Saifuddin, *Stoning No Reflection of Islam*, NEW STRAIT TIMES (Malaysia), Sept. 26, 2002, at 21.

159. On Aug. 19, 2002, the Islamic High Court in Kastina, Nigeria upheld the stoning to death sentence meted out last March to Amina Lawal for bearing a child out of wedlock, which was considered proof of adultery. On August 26, 2002, another Islamic court in New Gawu sentenced Ahmadu Ibrahim and Fatima Usman to death for having an affair. *The Spectre of Stoning to Death*, NEW STRAIT TIMES (Malaysia), Sept. 4, 2002 at 9.

160. For a summary of the Terengganu State *Syariah* Criminal Bill, see The Women's Center for Change et al., *Overview of the Terengganu State *Syariah* Criminal (*Hudud* and *Qisas*) Bill 2002*, available at <http://www.wccpenang.org/l/overviewhudud.htm>. Section 12 of the Terengganu Bill defines *zina* in the following manner: (a) illicit intercourse by an unmarried person with another person the punishment for which is whipping of 100 stripes and 1 year imprisonment; and (b) adultery the punishment for which is stoning until death.

161. Terengganu State *Syariah* Criminal Bill § 9 (2002).

162. See Egypt: Committee on Elimination of Discrimination Against Women, A/45/38, art. 401 (1990), available at [http://66.36.242.93/pdf/egypt\\_t4\\_cedaw.pdf](http://66.36.242.93/pdf/egypt_t4_cedaw.pdf) (last visited Mar. 20, 2004).

Under *hudud* laws, an unmarried woman who is pregnant or gives birth to a child is presumed to have committed *zina* unless she brings proof to the contrary. The burden of proof is reversed. This is discriminatory because all other crimes in *hudud* must be proven by the witness testimony of two Muslim adult males. In other words, an unmarried pregnant woman could be convicted of adultery or illicit intercourse even if she has been raped. The Bill classifies rape as “*zina* by force” and regards it as a defense against prosecution for *zina*. Under these provisions, rape is therefore effectively equated with adultery or illicit intercourse, rather than as a violent and serious crime against women.<sup>163</sup>

Furthermore, a victim who reports the rape but fails to prove it shall be deemed to have committed *qazaf* (slander against the accused rapist).<sup>164</sup> To prove rape, section 9 of the original Bill required four Muslim adult male witnesses to testify for the victim. After many protests, section 9 was amended to allow a rape victim to bring *qarinah* (circumstantial evidence) in lieu of four male witnesses to the rape. However, the amendment does not expressly deem circumstantial evidence sufficient. It merely states that circumstantial evidence triggers an investigation of the rape complaint.<sup>165</sup> Given the difficulty of proving rape, the risk of suffering criminal punishment, and the trauma of the original rape, few women bring charges against their rapist under such a criminal system. The practical effect of these laws is that rapists are shielded from punishment.

#### a) Federal vs. state voices

From its inception, the Terengganu Bill and its predecessor received criticism and objections from all sides, especially from leaders and religious authorities of the Federal government. The Federal government has vehemently opposed the implementation of Islamic penal laws in both Kelantan and Terengganu on the ground that the laws passed were not based on authentic Islamic law.<sup>166</sup> In the case of Kelantan, the enforcement of its *hudud* laws has been delayed due to this opposition, despite their passage ten years ago.<sup>167</sup> As for the Terengganu Bill, the Federal

163. See Sofianni Subki, ‘*Hudud*’ Concerns, NEW STRAIT TIMES (Malaysia), May 27, 2002, at 1.

164. The punishment for *qazaf* is 80 lashes of flogging. *Id.*

165. See Press Release, Sisters in Islam, Terengganu Hudud Enactment (July 17, 2002), available at <http://www.sistersinislam.org.my/PressStatement/17072002.htm> (last visited Mar. 20, 2004).

166. See *Lacking in Real Islamic Education Has Led Muslims to Crime*, MALAY. GEN. NEWS, Jan. 16, 2003. “Lacking in real Islamic education has led Muslims to crime – Dr. M” *Malaysia General News*, Jan. 16, 2003, online: LEXIS [www.lexis.com](http://www.lexis.com) (last visited June 7, 2003).

167. See *Malaysian State Passes Islamic Law*, *supra* note 157.

government vowed to block the bill, and was prepared to file an action for a declaration that the bill is unconstitutional in that it encroaches upon federal powers to legislate criminal laws. A pro-tem joint action committee headed by Datuk Dr. Nik Safiah Karim, chairman of the National Advisory Council for the Integration of Women in Development, was also established to formulate strategies to counter the *hudud* bill.<sup>168</sup>

Religious authorities have been less forceful in their criticisms. Tan Sri Dr. Abdul Hamid Othman, Religious Adviser to the Prime Minister, asserted that the *hudud* laws contained in the Bill could be inconsistent with the current legal justice system because they are based on theological books authored in the early days of Islam. However, he did not criticise *hudud* laws, but merely cautioned that the alignment between *hudud* laws and contemporary justice must be studied thoroughly.<sup>169</sup> The Islamic Development Department (JAKIM) was even more non-committal. Although it expressed concern over the potential damage to the image of Islam in the country, it made no criticism on the discriminatory features of the Terengganu Bill.<sup>170</sup>

#### b) UMNO - PAS divide

UMNO has repeatedly rejected the *hudud* laws proposed by PAS, calling the laws unjust and oppressive to women.<sup>171</sup> Prime Minister Mahathir, the UMNO President, draws on the underlying principles of Islam to substantiate his rejection of PAS's *hudud* laws. Islam and all Allah's laws are fair and just, he reasoned,<sup>172</sup> and therefore, the *hudud* laws proposed by PAS cannot be from Allah because they are unfair and unjust. Echoing this sentiment was the women's wing of UMNO, Wanita UMNO, which stressed that they do not oppose *hudud* laws, but rather that those rules advocated by PAS clearly oppressed women and violated God's laws.<sup>173</sup> The movement also accused the Terengganu Bill of tainting the image of Islam by misleading women

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168. See Sofianni Subki, *United We Stand!*, NEW STRAIT TIMES (Malaysia), June 10, 2002, at 7; see also Mangai Balasegaram, *Rape Bill Angers Malaysian Women*, BBC NEWS WORLD ED.: ASIA-PAC., June 17, 2002, available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/2050014.stm> (last visited June 7, 2003).

169. See *PAS Should Rethink Tabling Hudud Laws, Says Religious Advisor to PM*, MALAY. GEN. NEWS, May. 30, 2002.

170. See *JAKIM to Study Implications of Hudud*, MALAY. GEN. NEWS, July. 26, 2002.

171. See *PAS's Hudud Laws Rejected Because They Oppress Women*, MALAY. GEN. NEWS, June. 22, 2002.

172. See *Lacking in Real Islamic Education Has Led Muslims to Crime*, MALAY. GEN. NEWS, Jan. 16, 2003.

173. See *PAS's Hudud Laws Rejected Because They Oppress Women*, *supra* note 171.

into believing that Islam discriminates against them, when in fact Islam honours them.<sup>174</sup>

### c) Non-state voices

The general reaction of women and women's groups in Malaysia towards the Terengganu Bill has been hostile. At the forefront of the Islamic debate, SIS stresses that it does not oppose Islam or Islamic penal laws *per se*, but argues that the current state of *hudud* laws is the result of the manipulation and misuse of Islamic verses to oppress women. Quranic injunction against *qazaf* (the slanderous accusation of illicit intercourse) originally aimed to prohibit a person from accusing chaste women of *zina* (illicit intercourse).<sup>175</sup> The *hadith* of the Prophet makes it very clear that the Islamic authorities must take the women's accusation of rape very seriously. The current formulation of the *hudud* laws on *zina* and *qazaf* shields rapists from conviction and contradicts the high value Islam places on a woman's chastity and virtue.

Amidst all the debate and controversy, a male lawyer from Kelantan filed a petition seeking a declaration that the Kelantan's *hudud* law enacted by the State Assembly in 1993 is unconstitutional and contrary to article 74 of the Federal Constitution.<sup>176</sup> Mohamed Zaid Ibrahim sought a declaration under article 4(4) of the Federal Constitution that Kelantan had no legislative power to enact the *Syariah* Criminal Code 1993 because the *hudud* laws infringe on federal jurisdiction.<sup>177</sup>

### 3. Compulsory Religious Dress

The question of women's attire has always been paramount in any Islamisation programme. Islamic parties, like the Taliban regime in Afghanistan and PAS in Malaysia, tended to focus on the regulation and control of women's dress and public life as their first policy decision to prove their Islamic credentials and establish their political power.<sup>178</sup> This oppressive policy is easy

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174. See Subki, *supra* note 168.

175. Malaysian Sociological Research Institute chairman Dr. Alijah Gordon also rejects such a misinterpretation of the Quran and its *hadith*. See *Institute Head: Absurd for Four to Watch a Rape*, NEW STRAIT TIMES (Malaysia), June 20, 2002, at 9.

176. See *Lawyer Files Petition Challenging Kelantan's Hudud Laws*, MALAY. GEN. NEWS, Aug. 8, 2002.

177. Actions made punishable by the *hudud* law, particularly sections 4 to 40 which deal with the provisions for the theft, robbery, criminal conspiracy, rape and manslaughter, are actions punishable under federal law and subject to federal jurisdiction.

178. Press Release, Sisters in Islam, Terengganu Dress Code (Mar. 21 2000), available at [http://www.sistersinislam.org.my/PressStatement/21032000\\_a.htm](http://www.sistersinislam.org.my/PressStatement/21032000_a.htm) (last visited November 2, 2004).

enough to implement as it targets women, a disempowered sector of society. The female body and its metaphorical extension, the home, are viewed as symbols of honour, loyalty, and purity to be guarded by men. Power therefore becomes linked to men's ability to "guard and protect" these symbols. Recent studies of gender histories in the West (and especially in Latin America<sup>179</sup>) have shown how women and their bodies, systematically excluded from the public sphere during much of the modern period, have served as a crucial medium for the naturalisation of such national power.<sup>180</sup> For Islamic parties, this ideology requires the state to "guard and protect" the Muslim women by regulating their movements and dresses in public.

#### a) Federal v. state voices

Pursuant to its strict Islamic policy, the Kelantan government introduced a by-law imposing a strict dress code on Muslim women employees in 1995. The government views the *tudung* (Muslim headscarf) or *hijab* (Muslim headdress) as a "screen" between the chaste Muslim woman and the evil that exists in the world.<sup>181</sup> Accordingly, the government believes that it has the power to act against any Muslim female employee who does not cover all parts of her body except the hands and face.<sup>182</sup> Those caught uncovered face a maximum fine of RM250. The PAS-led Terengganu government also proposed a similar dress code for its employees.<sup>183</sup>

The Kelantan government also banned movie posters displaying female actresses unless the women are covered up as well as advertisements that show any (not just Muslim) woman without headscarves.<sup>184</sup> As a result, business establishments in the capital of the Kelantan state have been told to pull down posters and advertisements,<sup>185</sup> and replace them with those of men.

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179. See Anna Maria Alonso, *Gender, Power and Historical Memory: Discourses of Serrano Resistance*, in *FEMINISTS THEORIZE THE POLITICAL* 404 (Judith P. Butler & Joan W. Scott eds., 1992).

180. See Prasenjit Duara, *The Regime of Authenticity: Timelessness, Gender and National History in Modern China*, in *HISTORY AND THEORY* 297 (1998).

181. Letter to the Editor of *Sisters in Islam, Dress and Muslim Women* (Nov. 11, 1991), available at [www.muslimtents.com/sistersinislam/letterstoeditors/11111991.htm](http://www.muslimtents.com/sistersinislam/letterstoeditors/11111991.htm) (last visited Mar. 20, 2004).

182. See *Mixed Reaction on Dress Code*, *NEW STRAITS TIMES* (Malaysia), Mar. 22, 2000, at 14.

183. See *Double Standards by Kelantan, Terengganu Governments in Tudung Issue*, *NEW STRAITS TIMES* (Malaysia), Apr. 9, 2000 at 2.

184. See *Kelantan Bans Ads that Show Women Without Headscarves*, *STRAITS TIMES* (Singapore), Jan. 24, 2003, at A7.

185. *Id.*

This patriarchal bias is not shared by religious authorities in other states. In *Hjh Halimatussaadiyah bte Hj Kamaruddin v Public Services Commission, Malaysia & Anor* (hereinafter *Hjh Halimatussaadiyah*),<sup>186</sup> the Malaysian Supreme Court held that the prohibition against the wearing of attire covering the face (commonly known in Malay as a *pardah*) by female civil officers during work does not affect the appellant's constitutional right to practise her religion. Support was drawn from the view of the *Mufti* of the Wilayah Persukutuan (Religious Council of the Federal Territories) and commentaries on the Quran that Islam as a religion does not make it compulsory for women to wear a *pardah*.<sup>187</sup> According to the Court, since Islam does not necessitate the wearing of the *pardah*, the wearing of *pardah* had nothing to do with the appellant's constitutional right to profess and practise her Muslim religion.<sup>188</sup>

#### b) UMNO-PAS divide

Like the Taliban, which it is reported to have supported, the PAS has been obsessed with the dress code as a reflection of one's faith. PAS spiritual leader, Datuk Nik Abdul Nik Aziz Nik Mat, argued that Islam dictates that women must cover up to protect themselves, as a woman not clad in a *hijab* is likely to be harassed by lusty men.<sup>189</sup> The spiritual leader of PAS has been quoted as saying that women, especially young ones fond of

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186. *Hjh Halimatussaadiyah bte Hj Kamaruddin v. Public Services Commission*, 3 MALAYAN L.J. 61 (1994).

187. *See id.* at 71. The court referred to ABDULLAH YUSUF ALI, *THE HOLY QU'RAN – TEXT, TRANSLATION & COMMENTARY (1990)*, with respect to Surah 33 (Al Ahzab), verse 59, which stated that Allah directed the Prophet (saw) to tell his wives and daughters and those of his household, as well as the others to cover themselves with outer garments (jilbab, plural jalabib) when walking abroad to safeguard the position and dignity of the ladies of the Prophet's household and Muslim women generally. However, the object was not to restrict the liberty of women, but to protect them from harm and molestation under the conditions then existing in Medina. Therefore, it is not obligatory for Muslim women to wear the *hijab* in modern times where the conditions are significantly different from ancient Medina.

188. Note that the authority of the court's pronouncement on religious dressing is diluted by the emphasis on the limitation of public order, public health or morality in article 11(5) of the Federal Constitution. MALAY. CONST. art. 11(5), Univ. of Richmond, available at [http://confinder.richmond.edu/local\\_malaysia.html](http://confinder.richmond.edu/local_malaysia.html) (last visited Mar. 20, 2003). This decision could possibly be explained on the basis that the wearing of the *pardah* was against public order and therefore a restriction on the appellant's freedom to practise and profess her religion rather than a blanket assertion that the wearing of the *pardah* is not protected by the constitutional freedom of religion. Even then, this view that wearing the *pardah* is against public order, public health or morality has been criticised. *See* Zainur Zakaria, *Religious Freedom – Right to Wear the Pardah*, 3 MALAYAN L.J. xxv (1993).

189. *See* Islamic Revival, *How Hijab Protects And Benefits Women And Society?*, available at [http://www.geocities.com/islamime001/mw\\_hhpabwas.htm](http://www.geocities.com/islamime001/mw_hhpabwas.htm) (last visited Mar. 20, 2004).

wearing attire that exposes their bodies, are responsible for social ills and moral decadence in the country.<sup>190</sup> Women, he is quoted as saying, were inviting men to rape or molest them by dressing indecently. Their dress apparently weakens even a Tok Guru's (a religious teacher) faith.<sup>191</sup>

In reply, Azalina Othman, who is also an UMNO supreme council member, retorted that even old and unattractive people get raped and that Nik Aziz was "out of date and narrow minded."<sup>192</sup> The rape, sodomy and murder of computer engineer Noor Suzaily Mukhtar, who was a religiously and decently-dressed woman, on October 7, 2000 in Klang, further disproved Nik Aziz's allegations that one's attire determined the fate of one's bodily integrity.<sup>193</sup> Dr. Mahathir further pointed out that Muslims who received real Islamic education, especially self-professed Tok Gurus, would be holy and disciplined enough to control their desires and refrain from forbidden acts.<sup>194</sup> UMNO leaders like Deputy Prime Minister Datuk Seri Abdullah Ahmad Badawi and UMNO vice-president Datuk Seri Najib Tun Razak similarly opposed PAS's irresponsible statements.<sup>195</sup>

PAS and Nik Aziz, however, stuck to their convictions that women's attire is the cause of social ills such as rape. In reply to his critics, Nik Aziz reportedly argued that women who expose their bodies leave a lasting sexual effect on men to the extent that they would rape even women who are decently dressed.<sup>196</sup> Taken to its logical conclusion, the comments made by this spiritual leader of PAS absolve all men from the need to discipline themselves and take responsibility for their actions. Rapists can now blame other women and even the victims themselves for

190. See *Nik Aziz: Women the Cause of Social Ills and Moral Decadence*, NEW STRAITS TIMES (Malaysia), Oct. 7, 2000, at 1.

191. See *id.*

192. See Ong Soh Chin, *A Woman's Review of 2000*, STRAITS TIMES (Singapore), Dec. 29, 2000, available at <http://straitstimes.asia1.com.sg/columnist/0,1886,222-43731,00.html> (last visited Mar. 20, 2004).

193. See *id.*

194. See *Lacking in Real Islamic Education Has Led Muslims to Crime*, *supra* note 166.

195. However, note that there has been tension even within UMNO itself. In 2000, a split emerged within Wanita UMNO when a more conservative section of the women's wing insisted that Muslim women should cover up. This split between supporters of current Wanita leader, Datuk Seri Rafidah Aziz and Datuk Seri Siti Zaharah Sulaiman, came down to a mere margin of 12 votes out of the 671 Wanita delegates who voted during the 2000 Wanita UMNO elections. In a move apparently to placate her opponents, Rafidah Aziz turned up for an UMNO meeting with a scarf. See *Rafidah Relents, Wears Scarf*, STRAITS TIMES (Singapore), May 12, 2000, at 39.

196. See *Nik Aziz Warns Those Who Flaunt Their Aurat*, NEW STRAITS TIMES (Malaysia), Oct. 14, 2000, at 2.

their own crime of violence. Such views demonstrate PAS's commitment to uphold its stand on religious dress code in Malaysia.

c) Non-state voices

SIS executive director Zainah Anwar maintains that leaders should urge men to be responsible for their own actions, instead of forcing women to shroud themselves and live a life of seclusion.<sup>197</sup> Women should not be held responsible for limiting men's lustfulness and for any loss of their self-control. In fact, the Quran and *Sunnah* call for decent and respectful treatment of all women. SIS draws support from the Quranic verse<sup>198</sup> which orders male believers to lower their gaze and guard their own modesty first<sup>199</sup> to show that the prevention of immorality is the responsibility of both men and women.

Statements issued by the Kelantan Government effectively shift the focus of modesty and moral self-constraint away from Muslim men, thus denying the mutual responsibilities of men and women. Men have dominated women politically and socially in many Muslim societies and this control has been falsely equated with legitimate authority. Institutions that were established tend to support and reinforce men's prejudices, enabling them to evade their responsibility toward Allah and other human beings.<sup>200</sup>

Furthermore, SIS contends that the state should not use force in its desire to see women covered up. Religion depends on faith and will. Imposing laws and regulations on dress does not necessarily lead to more piety among the believers, but instead commands compliance based on fear of the state and of Islam.<sup>201</sup> The Quran indicates that modesty arises out of our own God-consciousness and others cannot impose God-consciousness by enforcing or coercing women to wear the *tudung* or to remove the *tudung*. A woman's Islamic propriety and piety should not be judged purely on the basis of how much material she is wearing. Dress should be part of identity and cultural expression, and women should have the right to decide their own form of dress.<sup>202</sup>

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197. See *Nik Aziz Rapped for Saying Women Cause of Social Ills*, NEW STRAITS TIMES (Malaysia), Oct. 8, 2000, at 1.

198. Surah an-Nur 24:30-31.

199. See Letter to the Editor of Sisters in Islam, *supra* note 181.

200. *Id.*

201. See Press Release, Sisters in Islam, Terengganu Dress Code, *supra* note 178.

202. See *id.*

#### IV. EVALUATING THE PARAMETERS OF ISLAM AND HUMAN RIGHTS DISCOURSE

##### A. THE CLIMATE FOR DISCOURSE IN MALAYSIA: LOCUS STANDI AND LIMITS

"When religion is being used to punish me and govern my private and public life, then I have every right to say whether I like such laws or not," says Zainah Anwar, executive director of SIS.<sup>203</sup> Islam affects both the private and public lives of all Muslims, and hence Muslims in Malaysia must be allowed to participate in open, responsible, rational and respectful dialogue on Islam within the limits of a civilised society. Authentic cultural self-determination requires that individual Muslims must be able to choose a vision of Islam for themselves. Excluding critical and diverse voices in the discourse of Islam in Malaysia violates the fundamental liberties of citizens in a democratic society. It also violates the cherished scholarly disagreements among all schools of Islamic thought. Nik Noriani points out that freedom of expression is reflected in Islam by the recording of famous public dialogues between theologians in Islamic history.<sup>204</sup>

There is, however, a risk that freeing up space for dialogue may open the door to irresponsible and disruptive propaganda. Azalina Othman, for one, endorses the need for dialogue in Islam and in Malaysia, but points out that confusion could arise due to the difficulty in ascertaining the authoritative nature of the various opinions. Allowing discourse on Islam could give free rein to so-called Islamic organisations like Jemaah Islamiyah<sup>205</sup> to manipulate Muslims into doing their bidding.<sup>206</sup> Bearing these risks in mind, the Federal government has established the National *Ulama* Consultative Council (MPUM) to render expertise, knowledge, views and proposals on development planning for Muslims.<sup>207</sup> Members include local prominent religious leaders as well as three foreign scholars: Dr. Muhammad M. Abdul Rauf, the first rector of the International Islamic University; Al-Sheikh Mahmoud Abdel Ghani Ashour, the deputy Sheikh of Al-Azhar; and Dr. Sheikh MA Zaki Badawi of United Kingdom.<sup>208</sup> The

203. *Muslim Women Who Stand Up to Ulamas*, STRAITS TIMES (Singapore), Dec. 2, 2002, at A1.

204. Interview with Nik Noriani Nik Badli Shah, *supra* note 20.

205. Jemaah Islamiya is a Southeast Asian terrorist network with links to al-Qaida. The network plotted in secrecy through the late 1990s, following the stated goal of creating an idealized Islamic state comprising Indonesia, Malaysia, Singapore, the southern Philippines, and southern Thailand.

206. Interview with Azalina Othman, *supra* note 18.

207. See *Ulama Consultative Body Holds First Meeting*, NEW STRAITS TIMES (Malaysia), Mar. 21, 2003, at 6.

208. See *id.*

panel seeks to both encourage dialogue on Islamic matters and offer both local and foreign expertise. Increasingly, the Federal government, as well as the states, are acknowledging that internal discourse is necessary and more importantly inevitable, and therefore regulation will be needed to ensure Islam is not misused for political or personal agendas.

#### B. RESISTANCE TOWARDS OPENING SPACE FOR DISCOURSE: THE ASSERTED MONOPOLY OF THE ULAMA

Inevitably, the push for space and dialogue results in open discursive contestation with religious forces who prefer to keep the corpus of Islamic learning confined within exclusive domains.<sup>209</sup> They invoke labels like “traitors”<sup>210</sup> for Islamic human rights advocates and charge them for promoting “false” Western perspectives of Islam. In Malaysia, traditional religious scholars have similarly sought to exclude Muslim human rights activists from dialogue by accusing them of not being “Islamic enough” to question or engage in the dialogue on Islam. In 2002, the *Persatuan Ulama Malaysia* (Association of Islamic Scholars of Malaysia)<sup>211</sup> submitted a memorandum to the Conference of Rulers urging them to act against writers and academicians who are allegedly unqualified to speak on Islam.<sup>212</sup> These writers and academicians, including Zainah Anwar from SIS, were accused of insulting Islam. This was precipitated by Zainah’s letter published in a Malay newspaper arguing that the *ulama* is not the sole *interpreter* of the Quran.<sup>213</sup> In the same year, the Religious Affairs Department (JAKIM) also proposed to ban Muslims with no “in-depth knowledge on Islam” from expressing themselves in public on Islamic issues. At times, these criticisms bordered on nitpicking. For example, the fact that Zainah Anwar does not wear the *tudung* or know Arabic or is American-educated is

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209. NOOR, *supra* note 11, at 2.

210. They are often ostracised or even executed or exiled. The reformist thinker Mahmoud Muhammad Taha was regarded as one of the leading intellectuals of Sudan and he led the movement for reform in his own country. In 1985, he was accused of apostasy and was executed. Taha was Professor Abdullahi An-Na’im’s close associate and teacher. After his execution, Professor An-Na’im chose to leave the country and continue his work overseas. NOOR, *supra* note 11 at 1. In the similar vein, in Indonesia, in December 2002, a group of Muslim clerics issued a fatwa calling for a death sentence on Indonesian Muslim scholar, Ulil Abshar-Abdalla. This was in response to his newspaper article that advocated a refreshing interpretation of Islam and for the differentiation of Arabic practices such as headscarves for women and chopping off the hands of thieves from Islam. See *Execution Fatwa on Liberal Muslim Scholar*, STRAITS TIMES (Singapore), Dec. 9, 2003, at 6.

211. See Suara Persatuan Ulama Malaysia Website, at <http://www.e-ulama.org> (last visited October 5, 2003).

212. See *Changing Mindset of Muslims*, *supra* note 104.

213. See *Muslim Women Who Stand Up to Ulamas*, *supra* note 203.

sometimes used to say she is not qualified to talk about religion.<sup>214</sup>

The bulk of such criticism based on qualifications reveals itself to be self-promoting when it ends up discrediting even religiously-educated human rights proponents. In attacking Zainah Anwar, opponents ignore the fact that other members and supporters of SIS have accepted qualifications in Islamic studies.<sup>215</sup> When Dr. Mohammed Sayed Tantawi, the director of a top Islamic university, declared that Islam does not view apostasy as a capital crime, he was ignored despite his impeccable authority. This selective treatment of viewpoints suggests that the criticisms levelled by traditional religious scholars are strategic and not principled.<sup>216</sup> Those whose dogmatic stance tolerates no dissenting view do not even consider the views of the director of the highest Islamic university in the world as authoritative. Ironically, when someone is unqualified but supports their views, they receive endorsement.<sup>217</sup> This is exacerbated by the problem that in Malaysia many *ulamas* are politically motivated. Mahathir alludes to this when he chides today's "political *ulamas*" who misinterpret and distort Islam to legitimise their political creed.<sup>218</sup> Ultimately, qualifications become merely part of the strategic battle to avoid serious internal debate and to perpetuate oppressive views.

### C. SATISFACTION THROUGH PAST ACHIEVEMENTS: CLOSING SPACE THROUGH DENIALS

Another strategy used to avoid discourse is the denial of any inconsistencies between Islam and women's rights.<sup>219</sup> An essential factor in internal discourse and cross-cultural dialogue is that one must actually recognise that there are contradictions between certain aspects of Islam today and international norms. However, some religious scholars and other Muslims, including

214. *See id.*

215. For example, Nik Noriani, the Research Manager of SIS, holds a Master of Comparative Laws (MCL) from the International Islamic University (Malaysia) and is currently pursuing a Master of Arts in Islamic Civilization.

216. *See* Letter to the Editor of Sisters in Islam, Islam, Apostasy and PAS (July 22, 1999), available at <http://www.sistersinislam.org.my/letterstoeditors/22071999.htm> (last visited Mar. 20, 2004). This letter has also been published in *The New Straits Times*, *The Star*, *Utusan Malaysia* and *Berita Harian*.

217. Interview with Nik Noriani Nik Badli Shah, *supra* note 20.

218. *Islam Can Play Positive Role in a Modern State*, MALAY. GEN. NEWS, Feb. 3, 2002.

219. An online brochure of the Islamic Circle of North America similarly proclaims: "For women, Islam is a special blessing; and the Prophet of Islam is indeed the greatest single benefactor of womenfolk." Islamic Circle of North America, Online brochure, *Mecca: About Islam, The Status of Women in Islam*, available at <http://www.tulane.edu/~MECCA/islam/women.html> (last visited October 7, 2003).

Dr. Wan Azizah,<sup>220</sup> choose to focus on the achievements of early Islam to counter criticism on its current treatment of women. Before Islam, many parts of the world systematically mistreated women: fathers buried female infants alive; female adults were viewed as sex objects that could be bought, sold and inherited.<sup>221</sup> Islam changed the status quo in Arabic society and secured the rights of woman from the moment the baby girl was born.<sup>222</sup> During the Prophet Muhamad's time, Muslim women were actively involved in every aspect of the life of nascent Muslim society.<sup>223</sup> They included businesswomen, poets, jurists, religious leaders and even warriors. The Prophet's wives are often cited as examples of the benevolent treatment of Islam towards Muslim women. Khadijah was a prominent businesswoman while A'isha was a distinguished political and religious leader.<sup>224</sup> Islam granted women rights of inheritance and divorce centuries before Western women were accorded such status.<sup>225</sup> Therefore, it is argued that Islam is in fact more progressive than human rights law.

While it is not denied that Islam may have significantly improved the lot of women during those times, the contemporary situation cannot be said to be the same. Firstly, women's rights have progressed tremendously over the centuries.<sup>226</sup> Women have effectively moved from the private sphere of the home and family into the public sphere of citizens and workers. In the past women's rights were rarely discussed, but today forums on women's rights are regularly held and documents on women's rights are widely recognised in the international arena. Secondly, the current form of Islamic laws and interpretations of Quranic verses no longer give women the status they had during the Prophet's time. As patriarchal forces regained their grip on Muslim countries, they attempted to reduce the status of women to that of inactive and immature dependent beings who are neither full-fledged citizen nor autonomous individuals.<sup>227</sup> These two de-

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220. Dr. Wan Azizah writes, "Islam has protected women's property rights even before the term "human rights" entered Western vocabulary. Women in Islam had played a major role in education. One of the wives of the Prophet is recognized as one of the leading Muslim jurists. In the battles fought by the Prophet, women participated in the battles." Cyber interview with Wan Azizah, *supra* note 19.

221. *Id.*

222. See FATHI OSMAN, *MUSLIM WOMEN IN THE FAMILY AND THE SOCIETY* 8 (1996).

223. See Al-Hibri, *supra* note 50, at 5.

224. See *id.* at 20.

225. See Daniel Shalini, *Islam, A Short History, 2000*, NEW STRAITS TIMES (Malaysia), Jun. 6, 2001, at 5 (book review).

226. Fraser, *supra* note 33.

227. See Azizah Al-Hibri, *A Study of Islamic Her Story or How Did We Get Into This Mess, in WOMEN AND ISLAM*, (Azizah al-Hibri ed., 1982).

velopments – the rise in the status of women in non-Muslim societies and the fall in the status of women in Muslim societies – undermine any pronouncements that modern Islam is a “special blessing” to women.

#### D. HOW SHALL WE LEGISLATE FAITH?

Internal discourse and cross-cultural dialogue are complicated by the fact that Islam concerns individual faith. Faith and religion pervade the innermost reaches of our belief systems and consequently it is not easy to change these beliefs even if they can be objectively proven wrong. This is precisely why “some women allow themselves and their rights to be suppressed, thinking that the less they fight and the more they allow themselves to be dictated, they will be rewarded by Allah.”<sup>228</sup> As Azalina Othman puts it, “you cannot just wake up one day and legislate a bill that talks about women’s equality and tell women not to wear the *hijab* because it is oppressive. Muslim men and women cannot accept such changes if they do not believe in it.”<sup>229</sup> In such circumstances, the believers will view the proclamations by CEDAW states and the United Nations as external interferences.<sup>230</sup> For example, Saudi women have defended compulsory cloaks (*abaya*) as part of their culture and religion. They see covering themselves as obeying God’s rules and relish in the exercise.<sup>231</sup> Therefore it is not realistic to “expect things to change overnight even if that is the most practical thing to do.”<sup>232</sup> Discrimination takes time to overcome. Any change must be organic change.<sup>233</sup>

#### E. THE BROADER DEBATE: ENGAGEMENT BEYOND THE MUSLIM COMMUNITY TO THE COMMUNITY OF HUMANITY

In a culturally and racially diverse country like Malaysia, all Muslims and non-Muslims have a stake in defining the meaning and the role of Islam in Malaysian society.<sup>234</sup> Islam also has to be relevant and better understood by all Malaysians. Religious extremism creates separatism - different zones for different people.

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228. *Id.*

229. Interview with Azalina Othman, *supra* note 18.

230. Interview with Nik Noriani Nik Badli Shah, *supra* note 20.

231. See Nicholas Kristof, *Give Saudi Women the Freedom of Choice*, STRAITS TIMES (Singapore), Oct. 28, 2002, at 14.

232. Interview with Azalina Othman, *supra* note 18.

233. *Id.*

234. See Joint NGO Press Statement, Differences of Opinion in Islam (Feb. 25, 2002), available at <http://www.hakam.org/statements250202.htm> (“All citizens, Muslims and those of other faiths, have a right to engage in a dialogue on issues of national importance that affect our lives, be it religion, economics, politics, education, culture, or social issues.”) (last visited Mar. 20, 2004).

Such a danger reared its head in 2000 when the Selangor Religious Department arrested 25 Muslims at a restaurant for being in a place that serves alcohol and sparked off threats of separatism.<sup>235</sup> Such separatism can amount to religious apartheid. That the Malay race is equated with Islam in Malaysia and the Malays are guaranteed special privileges by the constitution compounds the problem as Islam becomes an issue of race. Dr. Mahathir points out that this is unacceptable, since many references and Quranic verses show that Prophet Muhammad won over the hearts of the Arab Peninsula by preaching tolerance and moderation to members of his family who did not embrace Islam and to his enemies.<sup>236</sup> Hence, if Muslims abide the fundamentals of Islam, then the religion will ensure the development of Muslims and their nations as well as their co-existence with each other and with non-Muslim nations. Non-Muslims and Muslims have rallied against the Terengganu Bill side-by-side. This shows that there can be consistency between Islam and the values of non-Muslims.

#### V. CONCLUSION: SUSTAINABLE PROTECTION OF HUMAN RIGHTS THROUGH LOCAL ADVOCACY

In conclusion, the protection of women's rights in Islam, and particularly in Malaysia, must develop from within the society itself. International advocacy cannot substitute work at the local and regional level. In Ignatieff's words, human rights can only go global by first going local.<sup>237</sup> Greater cooperation in expanding the political and social "space" for local efforts, and enhancing local capacity for the protection of human rights should be attained. At best, the international human rights scheme only provides an independent frame of reference and mechanisms to promote its normative standards.<sup>238</sup> Each society must achieve effective and sustainable protection of human rights on its own. Hence, internal discourse is necessary to promote cross-cultural dialogue with a view to reconciling differences between Islam and international human rights norms. In order to do so, Malaysia must preserve and expand its space for internal dialogue. Through more dialogue and sensitive readings of Islamic texts, Muslim women will be able to find their voice, identity and emancipation within their religious communities. That should be the ultimate goal of women's rights protection.

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235. See Fatimah Abu Bakar, *Battling Our Shadows*, NEW STRAITS TIMES (Malaysia), Jul. 3, 2000, at 1.

236. See Mahathir Tells Muslims To Be Tolerant and Moderate, BERNAMA (Malaysia), May 9, 1998.

237. MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS & IDOLATRY 70 (1999).

238. An-Na'im, *supra* note 10 at 703.