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**‘Criminalising Religious Pluralism: The Legal Treatment of Shiites in Malaysia’**

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**Abstract**

Shia teachings and doctrine are currently being socially-constructed as a new threat to the survival of Sunni Islam, followed by the majority of Muslims in Malaysia. The Government has taken action by using legal mechanisms to control the influence of Shia teachings and to prevent its widespread proliferation. The Islamic legal provisions concerning *aqidah* (Islamic creed)-related offences and *fatwas* are potentially regarded as tools to monitor the lives of Shia individuals and communities in Malaysia. This article critically evaluates the formal consequences for Shia communities in Malaysia stemming from a legal framework, which is based on Sunni Islam. Furthermore, this article evaluates the extent to which Islamic law and *fatwas* in Malaysia can control the practice and promulgation of Shia teachings. The significance of this article is in its depiction of how Islamic law in a Sunni Islamic state may impact the religious practices of individuals and communities who make up a Muslim minority, with Shiites being the prime example.

**Keywords:** Faith-related crime; Sharia law in Malaysia; Minority religious group right; Sunni-Shiite relationship; Islam in Malaysia;

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## INTRODUCTION

In Sunni Muslim majority Malaysia, the conversion of Islamic tenets to statutory laws that govern the lives of Muslims in private and in the public sphere is arguably undertaken rather aggressively and quite regularly. One of the unique traits of Islamic law in Malaysia is the provision for offences related to *aqidah* (Islamic creed) that can be found in each respective state's Sharia criminal law enactment. These provisions are aimed to, among other things, control the promulgation, practice and belief in doctrines and teachings other than Sunni Islam in Malaysia. Additionally, these laws also serve as a means to govern individual Muslims so that they practice their religion according to the Sunni interpretation of Islam, particularly from the aspect of *aqidah*.

In the late 1970s, Malaysia experienced a well-documented process of 'Islamisation', which permeated down from state policies to personal commitments in religious practice (Camroux 1996; Roff 2005; Mohamad 2010; Lee 2010; Abbott & Gregorios-Pippas 2010; Barr & Govindasamy 2010). Ghoshal (2010) dubbed this process as '*Arabization*' and argued that the *Salafiyyah-Wahabiyyah* interpretation, one of the schools in Sunni Islam, has notably changed the religious aspect of peoples' lives in Asian Muslim communities, including those in Malaysia. Despite Ghosal never having expressed this, we are of the view that the effect of this change may be viewed in the Islamic legal provisions related to *aqidah* found in each state. Although the Muslim communities in Malaysia embraced the Shafie School of thought and are consistent in their control over the influence of *Salafiyyah-Wahabiyyah* (Yaakop & Idris 2010), the impact of the latter is still evident in the landscape of Islamic law in Malaysia, especially in *aqidah*-related offences.

The majority of these provisions came into force around 1995, after the Government of Malaysia immobilized the Al-Arqam organization, whereby state Islamic criminal law enactments and acts were renewed and updated. While this move was not motivated exclusively by Anti-Shiism, the consequence of it was to discriminate against Shiism. By using the pretext of enforcing legal action against 'heretics' more effectively,

these laws were enacted in every state, with Pahang being the last state to pass them in 2013. Despite the media's obsession with threats from what are deemed 'heretic' interpretations of Islam, there have been very few formal prosecutions of individuals or groups. Nevertheless, some well-publicised recent reprimands include Al-Arqaam (presently going by the name Global Ikhwan), the followers of Ayah Pin and Abdul Kahar Rasul Melayu. The latest to emerge are the local followers of Shia, which is the main subject of discussion in this article.

Local Shia groups in Malaysia have found their religious interpretation of Islam the subject of punitive action (Saeed & Saeed 2004; Hamed Shah & Mohd Sani 2011; Musa 2013). In the same way, to the certain extent that Sunnism is often construed in homogenous term, the diversity among Shia is not fully comprehended by Sunni States like Malaysia. This omission may have permitted foreign minorities Shia sects which not involving local Muslims to currently have gone undetected by Malaysian State. Malaysian Islamic authorities may only take an action based on public complain or report on any allegedly 'suspicious' religious activities. Malaysia is one of the few countries in the world, in addition to The Maldives, Morocco and Brunei, to adopt a discriminatory punitive stance by restricting Shia followers and defining their belief as illegal (Zweiri & Konig 2008). Notwithstanding with politic, economic, and social discrimination experienced by Shiite in other countries like Saudi Arabia and Bahrain (al-Rasheed & al-Rasheed 1996; al-Rasheed 1998; Ismail 2012; Bahry 2000; Husayn 2015). In 2013, two people were charged at the Lower Sharia Court for possessing books and documents relating to Shia teachings in Perak (New Straits Times 2013a). Months later, six people have been detained for their alleged involvement in Shia teachings in Perak and five of them have been charged with disobeying a fatwa by the state Mufti Department (New Straits Times 2013b). In order to enforce the law comprehensively, former Prime Minister, Dr. Mahathir Mohamad urged the Malaysian States 'to gazette an anti-Shia fatwa to check the Shia belief from spreading as it will bring negative consequences and divide Muslims' (Bernama 2013). However, subsequently the Syrian war prompted Mahathir altered his stance on this issues. Later, Badawi international relationship did not affected local Sharia implementation as it fall to Malaysian states jurisdiction. During Najib Razak, The Arab Uprising and Syrian war has brought sectarian differences in sharp relief. Effectively international trade and Economic interest had little impact on domestic sharia system as its jurisdiction falls under Sultan power in states level. After all, prime minister is executive and not a legislative. At the end of 2013, the Malaysian Inspector-General of Police reportedly stated that police will work with the Department of Islamic Development Malaysia (Jakim) to curb the influence of Shia among Muslims in the country, which 'if allowed to spread, could cause instability and violence' (New Straits Times 2013c). This kind of prohibitive treatment towards a

religious group is not unique to Malaysia; for example Angola in southern Africa has recently been criticised by human rights activists for an alleged attempt to ban Islam and close the country's mosques (Cabeche & Smith, 2013). Department of Islamic Development Malaysia (Jakim) and states' religious authorities have been criticised by various parties for their condemnation of Islamic groups deemed 'heretical' (Hamid 2000; Hamid 2003). Gee (2013) posited that the legal pressure put on the Shia community in Malaysia may be a reaction to the conflict between Sunni and Shia populations in Syria, although not to the extent witnessed in neighbouring Indonesia, where series of violence acts such as murder and arson targeted at Shias have occurred (Indira & Vltchek 2012).

In relation to the above, this article will discuss the extent to which Islamic law in Malaysia controls the religious aspect of peoples' lives in Shia communities, and the legal implications that are likely to follow. To date, this discussion has yet to be explored by any local or international researchers, who have instead been more focused on the re-creation of Shia history in the Malay world and the right to freedom of religion (Mukherjee 2005; Marcinkowski 2008; Marcinkowski 2009; Musa 2013). This article will first discuss the recognition of Sunni Islam in Malaysia via legal mechanisms. The article will critically evaluate the Islamic legal provisions that may potentially be used against Shia followers, followed by an analysis of the *fatwas* that prohibit Shia teachings. This article will also discuss the extent to which Islamic law governs the personal laws of Shia individuals and communities. We feel the issues presented in this paper have a relevance far beyond Malaysian shores given that the historical schism between Sunni and Shia Muslims resonates amongst a wide range of contemporary sectarian conflicts in many Muslim countries and communities around the world.

### **Legal Recognition of School of Thought**

Malaysia has employed legal mechanisms to recognize and acknowledge the Sunni school of thought as the 'official' jurisprudence of Islam, which simultaneously

has its own implications on the acceptance of other schools of thought including the Shia. Article 3(1) of the Federal Constitution provides that Islam is the religion of the Federation, but that other religions may be practiced peacefully in any part of the Federation. This illustrates that Islam is of the utmost significance as it is the only religion that is expressly mentioned by name in the Constitution. However, the concept of Islam as the official religion of the State was just recently challenged in the case of *Muhamad Juzaili Bin Mohd Khamis & Ors. v State Government of Negeri Sembilan & Ors.* [2014] MLJU 1063. In this case, three Muslim men disputed section 66 Syariah Criminal Enactment 1992 (Negeri Sembilan) that prohibited cross-dressing by reason of the act being in contradiction with the Federal Constitution. The decision of the Court of Appeal shocked the nation when it determined that Article 3(1) is subject to, among others, the fundamental liberties provisions as enshrined in Part II of the Federal Constitution. The Judge decided that “section 66 is inconsistent with Art. 5(1) of the Federal Constitution in that the section deprives the appellants of their right to live with dignity. Therefore, section 66 is unconstitutional and void.” This most recent case not only challenges the perception of Islam’s status in the Constitution and in Malaysian law, but also sheds new light in understanding the extent of the effect that implementation of Islamic law has on society.

Furthermore, the question arises as to which ‘version’ or interpretation of Islam is actually referred to by the Constitution? Does it signify one specific school of thought, or does it include any or all sects within the Islamic world? Mohammed Imam (1994) opined that the definition of Islam in Malaysia is the *Ahli al-Sunnah Wa al-Jamaah* school of thought, also known as Sunni Islam. This statement is based on the authority of most of the Malaysian states’ constitutions that have included the term ‘*Ahli al-Sunnah wal-Jamaah*’ as the official school of thought. Nonetheless, Mohammed Imam’s opinion is somewhat questionable as not all Malaysian states acknowledge Sunni Islam as the official school or even as the definition of Islam. To clarify, only the three Northern-most states in Malaysia, Kedah, Kelantan and Perlis, constitutionally declare the “Islam of *Ahli al-Sunnah Wa al-Jamaah* as the official religion of the State, and the Sultan must also be a practitioner of this religion.” The state of Perak is even more detailed in their choice of words, where the state religion Islam is defined as being “of the Shafie School”, one of

the branches of *fiqh* within Sunni Islam. As such, only four out of the 14 Malaysian states expressly and clearly denote the version of Islam in their respective constitutions. Other states such as Johor, Negeri Sembilan, Pahang, Selangor and Terengganu simply proclaim Islam as the religion of the state.

Despite this not being expressly stated in many of the state constitutions, the Sunni School of thought is upheld by state Islamic law as the primary resource for legal authority. All of the written state laws relating to Islam in Malaysia define '*hukum sharak*' (a Malay term for Islamic law) as 'Islamic law according to any officially acknowledged school of thought', specifically, 'the Shafie or Hanafi, Maliki, or Hanbali Schools.' Reference to the authority of Sunni Islam is included in statutes relating to Islamic administration, Islamic family law, Islamic criminal law, civil and criminal procedure, and the law of evidence in Sharia courts. Provisions such as these would surely narrow the number of acceptable sources and references in Islamic law. This is because there are schools that are authoritative and recognized, for example Zahiri (Goldziher & Behn 2008), but are not mentioned in any written law in Malaysia.

There are two fundamental angles from which discussion is required regarding the status of Sunni Islam as an authoritative resource. Firstly, all *fatwas* from each state must refer to a definitive opinion or judgment within Sunni Islamic interpretation. However, the existing provisions are only for *fiqh*-related matters, which refer to the 'final legal opinion' (*qawl muktamad*) according to the Shafie school of thought. If there is conflict with public interest, the views and conclusions found in the other major Sunni Schools (Maliki, Hanbali and Hanafi) are consulted. If the Mufti or the *Fatwa* Commission decides that none of the 'final legal opinion' (*qawl muktamad*) from the four Schools can be implemented without conflicting with public interest, the Mufti or the *Fatwa* Commission may issue a *fatwa* by exercising *ijtihad* (independent reasoning) and not be bound by the 'final legal opinion' of any of these four Schools. Such provisions are found in all the states except for Perlis, which utilizes slightly different terminology but maintains the same meaning. According to Section 54 of the Perlis's Administration of the Religion of Islam Enactment 2006, the *Fatwa* commission must abide by the Quran

and the Sunnah in their proclamation of *fatwas*. The same legal provisions define '*hukum sharak*' as *Ahli al-Sunnah wal Jamaah*.

Secondly, all respective state Islamic legal provisions must abide by '*Hukum Sharak*' according to the Sunni interpretation, and are deemed null and void in the event of conflict with the above. Moreover, should there be any lacunae present in Islamic state law reference must be made to the Sunni view as found in the classic *fiqh* texts. This therefore further strengthens the sovereignty of Sunni Islam in Malaysia. Take for instance Section 245 of the Sharia Court Civil Procedure (Federal Territories) Act 1998 and Section 130 of the Sharia Court Evidence (Federal Territories) Act 1997, which provides:

(1) Any and all provisions or interpretation of such provisions found in this Act that are inconsistent with Islamic law are null and void to the extent of the inconsistency.

(2) If there are any matters not provided or not clearly stated in this Act, the Court must therefore refer to Islamic law.

In addition, there are a few states that have included provisions regarding the Sunni School of thought concerning posts in several Islamic institutes, both in the public and private sectors. This may be clearly construed as to mean that the purpose of these provisions is to ensure that no individuals who practice anything other than Sunni Islam may enter any Islamic administrative institutions in Malaysia. For example, it is compulsory in the states of Perlis and Johor for all Sharia lawyers practicing in the Sharia courts to profess *aqidah* according to the *Ahli al-Sunnah wa al-Jamaah*, which is prescribed via Section 25 of the State of Perlis Sharia Court Administration Enactment and Rules 9, Sharia Lawyers (Johore) Rules 1982. These abovementioned states conduct interviews and assessments to verify that the future Sharia counsel is a Sunni Muslim. However, there is some variation between states on this issue, for example, in the Federal Territory of Kuala Lumpur, it is enough for the person in question to be a Muslim. Furthermore, in Selangor, there is no mention at all of any such prerequisite regarding a Sharia counsel's religion.

Besides the abovementioned examples, in Perlis the seven members of the Sharia Court of Appeal must also be Sunni Muslims elected by the Official Ruler as mentioned in Section 10, Administration of Sharia Court Enactment (1991) Perlis. The state of Kelantan has also determined that, to be a member of the Islamic Religious Council and Malay Traditions Kelantan, the said member must be a Sunni Muslim as stated in Section 14 of the Council of The Religion of Islam and Malay Custom, Kelantan Enactment 1994. Furthermore, Section 26, Administration of Islamic Law (Federal Territories) (Permit to Teach the Religion of Islam) Rules 2006, provides that every teacher who has been conferred the authority to teach religion is bound by the condition to not teach or preach anything that conflicts with Sunni Islam. This means that any individuals who are not Sunni Muslims will not be authorized to lecture, conduct intellectual programmes or give sermons. Besides this, teachers are also prohibited from criticizing the diversity of legal opinions amongst the four main Sunni Schools of thought.

Based on all of these regulations and enactments, only three of the Northern Malaysian states (Perlis, Kelantan dan Kedah) consistently include provisions relating to Sunni Islam in the three components of the Islamic legal system in Malaysia; the state constitution, Islamic law and Islamic institutions. This may be attributed to the stronger influence of Islamic education and Islamic practice in these three states (Roff 2005; Zain & Abu Bakar 2012) and their impact on the formation of the law. The other states merely provide a 'blanket provision' to govern all aspects of Islamic law therein. These provisions appear to be extensive and result in serious implications for Shiites and related branches.

Islamic legal provisions that are 'Sunni-centric' in nature often consequently influence the views of the government, bureaucracy and the Muslim community towards minority Muslim groups such as the Shia in Malaysia. The issue of how far Islamic law in Malaysian states controls and impacts upon Shiite individuals and communities will now be evaluated.

## **The Jurisdiction of Islamic Law over Shia Followers**

Legal control over minority religious groups in any given country is nothing new, especially since conflicts concerning freedom of religion arise not only between different faiths, but also between the fundamentalists and modernists or reformists within a given faith. The more dominant religious group will more often than not insist on imposing the laws of its religion on the minority, the alternative usually being to eliminate them entirely (Cooray 2000). Islamic countries are no exception to this type of conflict as freedom of religion is not given absolutely to their people (Stahnke & Blitt 2007). In Malaysia, legal actions against religious minority groups tend to court controversy (Fauzi 2005; Musa 2013), whilst prompting questions about the jurisdictional capacity of the law to govern them.

There are no specific legal provisions that expressly outlaw Shia beliefs and practices in any state in Malaysia. However, there are several legal provisions in the state Sharia criminal enactments that may be potentially wielded against Shia followers as an ‘umbrella’ provision, applying to all teachings that are categorised as heresy in Sunni Islam. Presently, a number of states are in the process of trying cases involving Shia followers under particular state Islamic legal provisions discussed in this article.

The first provision that may potentially be used is the commission of a false doctrine offence. Provisions that contain ‘false doctrine offences’ are found in only five states in Malaysia, namely, Selangor, Federal Territory Kuala Lumpur, Penang, Sarawak, Terengganu and Pahang. Conversely, the states of Malacca, Perlis, Perak, Sabah and Negeri Sembilan use the equally emotive term ‘deviant teachings.’ These provisions were enacted in stages respectively starting from 1995 until 2013, all utilising the same texts.

(1) Any person who teaches or expounds in any place, whether private or public, any doctrine or performs any ceremony or act relating to the religion of Islam shall, if such doctrine or ceremony or act is contrary to Islamic Law or any fatwa for the time being in force in the Federal Territories, be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to

imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.

(2) The Court may order that any document or thing used in the commission of or related to the offence referred to in subsection (1) be forfeited and destroyed, notwithstanding that no person may have been convicted of such offence.

Based on the aforementioned provision, there are three offences that, if committed by Shia followers, may be charged by the Sharia court. The first is teaching Shia doctrines to members of the public. Secondly, explaining Shia doctrines and teachings to people. The third is performing ceremonies or practices on private or public property that are the norm for Shia followers and are related to Islam. This provision proves that Shia followers are not only prohibited from practicing their faith, but are also forbidden from promulgating it to any Muslims in these states.

Furthermore, the provision states that in order for the charge to succeed, the doctrine, ceremony or practice in question must oppose Islamic law or any *fatwas* currently in force in the Federal Territory of Kuala Lumpur. It is thus the responsibility of the Sharia prosecutor to provide evidence to the court that the doctrine, ceremony or action in question conflicts with Islamic law according to Sunni Islamic interpretation. This provision also shows that individuals who are not Sunni practitioners will be sentenced and tried from the perspective of Sunni Islam. If there is no Sunni Islam opinion available concerning the doctrine or teaching in question, the Sharia prosecutor must refer to the *fatwa* issued in relation to it.

One of the impressions given by this provision is that the *fatwa* is the most important 'weapon' used to control any teachings and ideologies that contradict Sunni Islam. All states in Malaysia have, therefore, issued *fatwas* to forbid the practice, belief in and propagation of Shia teachings, which we discuss more fully below. When the law enables the prosecution to refer to mere *fatwas* to charge non-Sunni Muslim believers, it provides ample opportunity to the Sharia Court to legally curb the proliferation of religious groups such as Shia followers. This is because the process of issuing *fatwas* in

Malaysia does not take a very long time and does not entail any complex legal procedures as compared to statutory laws.

In addition, there is another provision that may apply, which is the offence of expressing opinions that go against *fatwas*. Section 12, Sharia Criminal Offences (Federal Territories) Act 1997 states that:

Any person who gives, propagates or disseminates any opinion concerning Islamic teachings, Islamic Law or any issue, contrary to any fatwa for the time being in force in the Federal Territories shall be guilty of an offence and shall on conviction be liable to a fine not exceeding three thousand ringgit (£600) or to imprisonment for a term not exceeding two years or to both.

Such provisions present a considerable challenge to any Muslim individuals who are not Sunni Muslims since their right to speak freely, give opinions and practice their religion fully is consequently limited. It may therefore be understood that the abovementioned provision is aimed at preventing any form of propagation of teachings other than the principles of Sunni Islam in Malaysia. This also illustrates that *fatwas* have become the primary authority which influence and inform any legal action against individuals who are followers of non-Sunni religious sects. All personal opinions must be consistent with the requirements of Islamic law and *fatwas* and difference of opinion may result in legal action being taken.

A further provision, which may be potentially used against Shia followers, is the offence of printing, broadcasting, publication, recording, distribution and possession of Shia reading material or text books. For instance, Section 13 of the Sharia Criminal Offences (Federal Territories) Act 1997 provides:

(1) Any person who:

(a) prints, publishes, produces, records, distributes or in any other manner disseminates any book, pamphlet, document or any form of recording containing anything which is contrary to Islamic Law; or

(b) has in his possession any such book, pamphlet, document or recording,

shall be guilty of an offence and shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(2) The Court may order that any book, pamphlet, document or recording referred to in subsection (1) be forfeited and destroyed, notwithstanding that no person may have been convicted of an offence connected therewith.

Interestingly, the provision above does not mention that a *fatwa* must have been issued concerning the reading material in question being opposed to Islam; it is sufficient to merely prove that the books and reading material are in conflict with Malaysian Islamic law. If the Sharia prosecutors successfully proves that the contents of the book in question oppose Islamic principles according to Sunni interpretation, the court may charge the accused with the offence. This provision is unique in that it enables the court authorities to seize and destroy any books that deviate from Sunni doctrines and teachings.

### **An Analysis of the *Fatwa* to Ban Shia Worship**

The *fatwa* is the prerequisite for legal enforcement in relation to offences involving Islamic creed (*aqidah*). If a particular teaching has not been forbidden by the State *Fatwa* Commission, any attempt to initiate legal proceedings against it in the Sharia Court is likely to fail. This was strongly emphasized in the case of *Nor A'shedah Jamaludin @ Yusof & Anor v. Datuk Zainul Arifin Mohammed Isa & Anor* [2012] 1 LNS 926:

To label a Muslim a deviant, heretic or apostate without cogent evidence is a very serious matter. In the State of Selangor, where the Defendants reside and where Darul Saka is located it is only the Fatwa Commission of Selangor which has the power to declare anyone or a group as deviant. Defendant Witness 1 is an officer from Jabatan Agama Islam Selangor (Jais) had testified that the Jawantankuasa Fatwa Negeri Selangor had not declared the Plaintiffs as being involved in or propagating deviant Islamic teachings. In fact, Defendant Witness 1 had stated in his evidence that Jais had conducted investigations on the activities, practices and teachings of the Plaintiffs one year prior to the publication of the said impugned articles and had not found its teachings to be contrary to Islam and its law.

Therefore, a *fatwa* must be issued declaring the teachings illegal before initiating legal action against them. As mentioned in Section 34(1) of the Administration of Islamic Law (Federal Territories) Act 1993, the basis of the *fatwa* may stem from the Mufti's own request or an application from any party with any inquiry regarding the status of a particular teaching from the perspective of Sunni tradition. Next, the *fatwa* must be gazetted via Parliament (or States Legislative Bodies for states other than the Federal Territory of Kuala Lumpur) to bear legal effect. No legal action may therefore be taken against any individuals who follow non-Sunni sects if there is no *fatwa* declaring that sect to be illegal beforehand. Once a *fatwa* has been gazetted, it is automatically binding upon every Muslim in that particular State. The law also states that the Sharia court is required to accept and treat each gazetted *fatwa* as authoritative.

There were three 'waves' of *fatwas* relating to the ban of Shia teachings in Malaysia. The first *fatwa* was issued in 1984, which defined several Shia ideologies and acknowledged them as Shia teachings. The second wave of *fatwas* declared all Shia sects and teachings illegal, and were issued around 1996-1998, involving several states. The third wave took place between 2010 to 2014 and represented a series of reiterations of previous *fatwas* to ban Shia teachings in the states that had not yet issued their respective *fatwas*. The states that had issued *fatwas* during the second wave did not re-issue any during the third wave. There were also a few states that had issued *fatwas* in the first wave but did not Gazette them until the second wave; for instance, the state of Pahang only gazetted the *fatwa* in question in 2011. This meant that no legal action could have been taken against any Shia followers in the state of Pahang for that period of time before the *fatwa* was gazetted.

During the first wave (24 and 25 September 1984 [No. 2/8/84, Item 4.2. (2)]), The Conference of the Fatwa Committee issued a *fatwa* that acknowledged the position of certain sects in the Shia School, which were the *al-Zaidiyah* and *Jaafariyah*. The pronouncement of the *fatwa* was:

“After discussing and considering this working paper, the Committee has decided that the Shia schools from the *al-Zaidiyah* and *Jaafariah* sects, and only these, may be practiced in Malaysia.”

This *fatwa* was issued four years after the 1979 Revolution in Iran, which had subsequently influenced the socio-politics of many Muslim countries. In his study, Bakar (1981: 1048 & 1053) argued that the Islamic Revolution in Iran had left a lasting impression on Muslims in Malaysia, the effect of which was seen in both their political and religious conduct. The proclamation of the aforementioned *fatwa* and its ilk may have been caused by the Malaysian religious bureaucrats' predisposition at the time, which had a favourable view of Shiite ideology. How far *fatwas* in Malaysia are influenced by geo-political factors across the globe would certainly make for significant research.

However, this *fatwa* was only enforced for about a decade, during which Shiites in Malaysia could practice and propagate their faith freely. After the second wave of *fatwas* occurred, the landscape of Islamic law in Malaysia was irrevocably changed. It is highly probable that this second wave was part of a Government initiative at the time to curtail Shia teachings in the name of national security (Liow, 2009: 163). The first action taken was to render the decision of the The Conference of the Fatwa Committee that acknowledged the Shia sects *Zaidiyyah* and *Jaafariah*, obsolete. In other words, all Shia Schools, doctrines and sects were presumed conflicting with Sunni teachings, and could no longer be believed in, practiced and propagated in any state in Malaysia that had gazetted this *fatwa*.

To add to this, The 40th Special Muzakarah (Conference) of the Fatwa Committee of the National Council for Islamic Religious Affairs Malaysia, Malaysia, which convened on 5 May 1996, made the following four decisions that influenced the renewal of Islamic law enactments in each state:

A provision to amend all State Legislation and Islamic law to standardise the definition of '*Islamic law*' in Malaysia as thus: “Islamic Law means Islamic Law based on the principles of the *Ahli Sunnah Wal Jamaah* from the aspects of *aqidah*, *sharia* and *akhlaq* (*Islamic etiquette*).”

1. To declare that Islamic teachings that differ from the principles of the *Ahli al-Sunnah Wal Jamaah* are in contravention with Islamic Law, and thus the propagation of any teachings beside that of the *Ahli al-Sunnah Wal Jamaah* is prohibited.
2. To confirm that all Muslim *ummah* in this nation are subject to Islamic laws based on the principles and teachings of the *Ahli al-Sunnah Wal Jamaah* only.
3. To determine that the publication, broadcast and propagation of any books, pamphlets, films, videos and other materials related to Islam that oppose the principles of the *Ahli al-Sunnah Wal Jamaah* is strictly forbidden.

This *fatwa* does not explain in detail the ‘deviance’ in Shia teachings, nor does it discuss the discrepancies and contentions between the Sunni and Shia Schools. However, the legalistic nature of this *fatwa* is what enables legal action to be taken against non-Sunni Muslim practitioners. This *fatwa* not only states which schools of thought are recognized by Islamic law, but also prohibits the promulgation of any teachings besides Sunni Islam. As a result, each state took the aspirations of this original *fatwa* to issue *fatwas* of their own which were similar in terms of their legal effect, but different in their explanation of Shia’s deviance. It is worth noting that given the exponential rise of the internet, any practical policing and enforcement of such prohibited materials become extremely difficult.

The second wave (from 1996-98) involved the following states - Kedah, Melaka, Pulau Pinang, Kelantan, Negeri Sembilan, Sarawak, Selangor, Terengganu, Sabah and Federal Territory Kuala Lumpur. The third wave (from 2010-2013) on the other hand involved these states - Pahang, Johor, Perlis and Perak. Sarawak, Pahang and Sabah are the states that have yet to gazette the *fatwas* concerning the illegal status of Shia Muslims. The focus of the *fatwas* issued during the second and third wave was to empower the states concerned to provide statutory laws with regard to:

- a. The affirmation of Sunni Islam as the only recognized school of thought in state Islamic law.
- b. The authority conferred to judicial bodies to take legal action against any individuals who believe in the teachings of Shia.

The *fatwas* issued in the states of Kelantan, Selangor and Perak are the only ones that comprehensively clarify why Shiite Islam is viewed to be in conflict with the principles of Sunni Islam. The *fatwas* from these three states mention that the source of the ban on Shiite Islam stems from certain matters related to *aqidah*, *sharia* and *akhlak* within Shia teachings which contradict Sunni doctrine. These *fatwas* also list Shia references as authority proving that the matters mentioned in the *fatwas* are truly part of Shia practice and belief. Interestingly, there is no uniformity between the states in determining the Shia beliefs and practices that oppose Sunni Islam. For instance, specific areas that are mentioned in the Perak state *fatwa* are not present in the Selangor and Kelantan *fatwas*. This means that representatives of each state conducted their own research and held their own discussions on the teachings of Shia, and therefore did not influence one another. The *fatwas* from the remaining 11 states are almost exactly the same in that they focus more on the aspect of legal enforcement. These *fatwas* merely follow the text issued at state level without any addenda clarifying the *fatwa*. The *fatwas* were composed using legal language, and took into account legal technicalities to enable any state to take legal action against Shia followers based on these *fatwas*. This explains why states such as Penang amended the first *fatwa* by rearranging the terminology to be more legalistic in the second wave.

The *fatwa* to ban Shia Islam issued by the state of Perlis is quite unique as it contains two elements which are absent from the other states. As discussed previously, Perlis is one of the three states that clearly included a provision regarding Ahli Sunnah wal Jamaah being the state's official school of Islam, which consequently predisposed the state's *fatwa* on Shia Islam. This state is also recognized for being the one and only state in Malaysia that regularly refers to the *Salaḥiyah* School of thought in matters of *aqidah* and Islamic law (Othman & Rahmat 1996). The first aspect of this uniqueness is the controversial statement that Shia teachings are allegedly 'a branch of knowledge that contradict and oppose the true teachings of Islam. The followers of Shia could be considered to be deviants and apostates from Islam.' Other states merely state that Shia teachings conflict with and veer away from Sunni principles. The second aspect is that the *fatwa* from this state also notes the possibility of marriage between a Sunni Muslim

and a Shiite. Although such inter-marriage is not considered illegal *per se*, the fatwa nevertheless uses the term ‘not encouraged (to marry),’ and does not mention the penalty for individuals who do proceed to wed. Importantly, however, the *fatwa* concerning marriage was not gazetted, thus rendering it legally ineffective.

It is example where the authorities for the state to prosecute Shia, however the prosecution was unsuccessful owing to technical factor on evidence rather than judicial support on freedom of religion. If they attempt to challenge or influence Malaysians nationals such invisible individuals will become visible and subject to legal prosecution like Ramard case. If they do not engage with local community, they might not be prosecuted.

### **Shia Followers in Sharia Court**

How far are Shia followers subject to the jurisdiction of the Sharia Court? If there is indeed jurisdiction over them, does the Sharia Court preside specifically over local Shia followers, or are foreigners also included? Several provisions and cases must be discussed when addressing these questions. The Sharia Court in Malaysia has at its foundation a rather limited jurisdiction, whereby it may only try cases involving Muslims relating to matters stated in the Federal Constitution. However, the decisions and orders of the Sharia Court may indirectly affect non-Muslim parties in cases such as determining the religion of the deceased and the right to custody when only one parent is a Muslim. Sharia criminal cases, on the other hand, only have legal consequences for Muslims (Shuaib 2008a; 2008b). The primary legislative source on Sharia Court jurisdiction is Table 9, List II State List, Federal Constitution, which provides that Sharia Courts shall have jurisdiction over matters wherein all parties are persons professing the religion of Islam. This is further reinforced by the Federal Law provision of the Sharia Courts (Criminal Jurisdiction) Act 1965 that states:

The Syariah Courts duly constituted under any law in a State and invested with jurisdiction over persons professing the religion of Islam and in respect of any of the matters enumerated in List II of the State List of the Ninth Schedule to the Federal Constitution are hereby conferred jurisdiction in respect of offences

against precepts of the religion of Islam by persons professing that religion which may be prescribed under any written law.

All laws relating to Administration of The Religion of Islam at State level clearly state that the jurisdiction of the Sharia court extends over Muslims only for civil and criminal cases. However, each State's enactment uses the term 'Muslim' and not 'persons professing the religion of Islam'. Although the word 'persons' is not defined, the word 'Muslim' is defined in section 2 of The Administration of Islamic Law (Federal Territory) Act 1993 (Act 505) as (a) a person who professes the religion of Islam; (b) a person either or both of whose parents were, at the time of the person's birth, Muslims; (c) a person whose upbringing was conducted on the basis that he was a Muslim; (d) a person who has converted to Islam in accordance with the requirements of section 85; (e) a person who is commonly reputed to be a Muslim; or (f) a person who is shown to have stated, in circumstances in which he was bound by law to state the truth, that he was a Muslim, whether the statement be verbal or written.

Therefore, 'persons professing the religion of Islam' or 'Muslim' should mean to include all believers in Islam from any school or sect unless and until there is a national or state *fatwa* declaring them as non-Muslims or apostates. This may be derived based on the case involving Ahmadiyah followers, *Abdul Rahim Bin Haji Bahaudin v. Chief Kadi, Kedah* [1983] 2 MLJ 370. In that case, the Applicant was arrested by the officials of the Religious Department on charges of distributing religious pamphlets relating to the Ahmadiyyah sect which was an offence under section 163(1) and (2) of the Administration of Muslim Law Enactment. The Applicant's argument was the State's fatwa dated 10 April 1972 declares that whosoever believes in the teachings of the Ahmadiyyah sect is an apostate. Since the applicant is a follower of the Ahmadiyyah sect and that the Islamic Council stipulate that he is not a Muslim, the Islamic Council and its Sharia Courts therefore have no jurisdiction to try him. The Civil High Court accepted his argument and mentioned that the applicant is not a Muslim as declared by the Islamic Council itself and therefore is not subject to the jurisdiction of Sharia Courts. Furthermore, the courts in Malaysia have expanded the construction of 'persons professing the religion of Islam' to individuals that were initially Muslims but left Islam

while court proceedings were still taking place. For example, in the case of *Kamariah Bte Ali Ors. v. Kerajaan Negeri Kelantan and another* [2005] 1 MLJ 197, followers of Ayah Pin and his teachings declared that they had left Islam just prior to sentencing by the Sharia Court. The Federal Court decided that the determining factor was whether the appellants were Muslims at the time they committed the offence or otherwise.

Based on the above, it is clear that all Shia followers in Malaysia fall under the jurisdiction of the Sharia Court for all civil proceedings and criminal actions. This is because presently, there is no *fatwa* in any state that has declared Shia followers in Malaysia as apostates, unlike the circumstances surrounding the Ahmadiyyah sect case. The jurisdiction of the Sharia Court extends to all Muslims in Malaysia, regardless of their individual background or school of thought. Indeed, the Sharia court is in fact unable to accept the argument that a person is not a Sunni Muslim so as to avoid any legal action.

The next question raised is: does the Sharia Court have jurisdiction over a Muslim who is not a Malaysian citizen, or is the Court's jurisdiction limited only to Malaysian Muslims? For example, could a foreigner who delivered a lecture on Shia teachings in Malaysia be arrested and tried in a Sharia Court for the offence of contradicting a *fatwa* as previously discussed? Considering that the law states 'Muslims' and there are no legal provisions that limit Sharia criminal prosecution and civil proceedings to non-citizens, the Sharia Court therefore indeed has jurisdiction to try any case involving Muslim foreign nationals. In fact, the Sharia prosecution of foreign nationals has long been practiced by Sharia Courts in Malaysia as reported by the media (Utusan Online 2003; The Malaysian Insider 2014a). The reason for this is that the Sharia Court has local jurisdiction toward all Muslims living in or temporarily residing in Malaysia with no limitation to Malaysians only, a concept similar to that of the Civil Court's local jurisdiction. Legal provisions such as this should therefore be paid heed to by any individuals or Shia groups who wish to conduct any religious activities or deliver lectures on Shia teachings within local Shia communities. If they do not, they run the potential risk of arrest, prosecution and punishment by the Malaysian Sharia Court for the

previously discussed offences. Until now, religious authorities in a few Malaysian states have actively engaged in the legal harassment of local Shia followers and foreigners conducting their religious ceremonies (PressTV 2010; PressTV 2011; The Malaysian Insider 2013; The Malaysian Insider 2014b).

Another important question raised is: to what extent can Shia followers use authorities such as laws or *fatwas* according to the Shia School in matrimonial cases in the Sharia court? There are currently no explicit provisions to explain which references or source material may be used during Sharia court proceedings. The Islamic Religious Administration statutes in every states only mentions references for issuing *fatwas*, but is silent on references for parties to court proceedings. Acts concerning civil procedure and evidence also do not mention which schools of thought may be used as authority during Sharia court proceedings. Section 245(2) Sharia Court Criminal Procedure (Federal Territories) Act 1998 states:

In the event of matters which are not provided or clearly mentioned in this Act, the Court is bound to refer to Islamic law.

Seeing how the law is silent on the matter of authority for parties to court proceedings, the abovementioned provision therefore applies. This means that, in all aspects of evidence and civil procedure in the Sharia court, final reference may only be made to the Sunni interpretation of Islamic law. Therefore, any and all authorities from Shia sources may not be presented as valid reference in the Sharia court.

Regardless of the fact that this issue has yet to be debated in any Sharia court in Malaysia, there are examples of civil court cases that illustrate the limit of acceptance or rejection of Shia authorities in Malaysian courts. In the case of *Saeda Binti Abubakar & Malek Bin Haji Mohamed Yusup v. Haji Abdul Rahman Bin Haji Mohamed Yusup & Usman Bin Haji Mohamed Yusup* ([1982] 1 LNS 60) which involved sunni Muslims, The High Court [Selangor] rejected counsel's argument that cited cases from India, where the judgments were based on Shia principles. In this case, the civil court denied the authority of *Banoo Begum v. Mir Abed Ali* (ILR 32 Bom 172) as it was decided according to Shia legal doctrine. The court determined that this case may bear effect if the writer of the will

in this case was a Shiite, but there is no such effect on a Malay *Shafie* Sunni. The significance of this case lies in the impression that if the parties to the case were Shiites, the court may actually accept Shia authorities in court. However, since Saeda's case was tried in civil court, the Sharia court is not bound by the decision in that case. Moreover, the Sharia Courts in Malaysia do not subscribe to the doctrine of judicial precedent, which is observed by the civil courts (Mikail & Arifin 2013).

### **Shia Mosque in Malaysia?**

Finally, to what extent is the local Shia minority community permitted and able to build mosques or premises to worship and conduct religious ceremonies in Malaysia? According to the laws of each state in Malaysia, the construction of mosques must receive prior authorisation from the State Islamic Religious Council. For example, in section 73, Administration of Islamic Law (Federal Territories) Act 1993 provides:

- (1) No person shall, without permission in writing of the Council, erect any building to be used as a mosque, or otherwise apply any building for the purposes of a mosque, or cause or permit any building to be used as a mosque.
- (2) The Council shall not give its permission under subsection (1) unless the site of the building for the proposed mosque has been made a *wakaf* in perpetuity.

In Malaysia, the mosque is a ubiquitous and influential religious symbol in the Muslim community. Naturally, the government keenly observes mosque-related activities, and their administration is used as a platform for the government to disseminate its own construction of Islam (Ismail & Rasdi 2010; Najafi & Mohd Shariff 2014). This government control also extends to the appointment of the imams and mosque officials, financial administration and mosque real estate, the preparation of the weekly Friday prayers khutbah text, and close monitoring of teachers' credentials in mosques. The justification for this level of control was stated by the Civil High Court in the case of *Abdul Rahman Bin Mamat v. Zakaria Bin Senik and Ors.* [2002] 7 MLJ 34:

It is important for all parties to constantly obey the rules and laws of administration of mosques, as by simply obeying them, the sanctity and peace of the mosque and the harmony of its worshipers may always be preserved.

The local Shia community may not have any intention of building mosques as a result of legal prohibitions such as the one mentioned above, but how far does the law permit them to use a particular premise as a community or learning centre, *musalla* (place for prayer), and library, as they currently do now? If they register their activity centres as companies or NGO's, any legal action taken against them would consequently have to be according to the relevant civil law, and not under the jurisdiction of Islamic law. Furthermore, there are no civil legal provisions that may prevent any individual or group from assembling, establishing organizations, moving, operating and owning premises. This legal lacuna have been benefited foreign Shiite community to run their community services. This lacuna is surely looked upon unfavourably by the religious authorities because legal action cannot be taken against those who assemble for business or social purposes without any involvement of religious activities. However, on the same note, the owner or tenant of such premises may be prosecuted for owning Shia religious texts that contradict *fatwas* as was dicussed earlier.

## **Conclusion**

This article has debated the issue of how far Islamic law in Malaysia may affect the religious way of life of Shia individuals or communities. The existing laws would surely present a significant challenge to Shia followers, as not only are they forbidden from promulgating their teachings, but they are also prohibited from believing and practicing them freely. This is in spite of the matter being a basic right guaranteed by the Federal Constitution, and such prohibition is in direct contravention of international human rights conventions such as Article 18 and 19 of the Universal Declaration of Human Rights. The whole situation is seemingly paradoxical as freedom of religion is granted to any religious group other than Islam via Article 3(1) of the Federal Constitution, but for the sake of protecting the sovereignty of Sunni Islam, Shiites

residing in Malaysia are legally pressured to limit the practice and expansion of their faith and jurisprudence.

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