Malay Nationalism, Islamic Supremacy and the Constitutional Bargain in the Multi-ethnic Composition of Malaysia

JACLYN LING-CHIEN NEO*

1. Introduction

In the 30 years since independence, Islam has become increasingly prominent in the public domain of Malaysia, which is a multi-ethnic and multi-religious federation. This may be attributed to the influence of a worldwide Islamic revival and the consequent politicization of Islam by Malaysian opposition political parties, particularly Partai Islam Semalaysia (PAS). The Federal and state governments, under the leadership of the ruling United Malay National Organisation (UMNO)-led government responded by adopting policies designed to out-Islamicise PAS, to retain Malay support and UMNO’s role as the champion of the Malay cause. Most notably, this included a declaration in 2002 that Malaysia was already an Islamic state (since it had a dominantly Muslim population). This alienated the non-Malays, as this push towards increased Islamicization at the governmental level betrays the government’s commitment to multi-culturalism and multi-ethnicity as part of the constitutional bargain.

There are three major ethnic groups in Malaysia. The Malays, who are considered indigenous to Malaysia, constitute about 54 percent of the population. The Chinese and the Indians, who were economic migrants under British colonial rule, constitute 25 and eight percent of the population respectively. Other non-Malay indigenous groups constitute 12 percent of the population.1

Malaysian politics is dominated by three ethno-nationalist parties which existed prior to independence on 31 August 1957. Although formed to champion ethnic

* LLB (Hons) (National University of Singapore); Advocate and Solicitor (Singapore); Tutor (Part-time, 2006), National University of Singapore.

1 This breakdown was stated by the Abdullah Badawi in keynote address ‘The Challenges of Multireligious, Multiethnic and Multicultural Societies’, at the Asia Media Summit held at Hotel Nikko, Kuala Lumpur on 19 April 2004. The full speech is available on the Prime Minister’s Office website: <www.pmo.gov.my>, visited on 18 June 2005; typically, statistics from the Department of Statistics present the figures classified under Bumiputra, combining the figures for the Malays and other indigenous people. See Press Statement: Population Distribution and Basic Demographic Characteristics Report: Population and Housing Census 2000, Putrajaya, 6 November 2001, Department of Statistics Malaysia, <www.statistics.gov.my/English/frameset_pressdemo.php>, visited on 17 June 2005: Of the total population of Malaysia in Census 2000, about 21,890 thousand or 94.1 percent were Malaysian citizens. Of the total Malaysian citizens, Bumiputera comprised 65.1 percent, Chinese 26.0 percent and Indians 7.7 percent, the ethnic composition being 60.6 percent, 28.1 percent and 7.9 percent respectively in 1991.
causes, inter-ethnic co-operation took place, as a matter of political expediency, in response to the threats of communist insurgency and British influence. This inter-ethnic co-operation took the form of the National Front Alliance. The three components of the Alliance were the UMNO, the Malaysian Chinese Association (MCA) and the Malaysian Indian Congress (MIC). Pragmatic partnership allowed each component party to retain their individual mandates of safeguarding ethnic rights and reflected the ethnic-based nature of Malaysian politics and the need to sustain inter-ethnic cooperation.

The process of constitution-making in Malaysia is marked by this pragmatic partnership and compromise. The Federal Constitution of Malaysia (FC) reflects a “tortuous forging of acceptable terms and compromises among the various racial components of the Malaysian society”. It embodies inter-communal consensus on the character of the national polity and the respective rights, privileges and obligations of the various ethnic communities. In return for grants of citizenship to the Chinese and Indian immigrant communities, the Malays received special economic privileges flowing from their status as bumiputera or indigenous ‘sons of the soil’ as well as special language rights. Islam was designated as the religion of the Federation in Article 3 of the FC. This originated from a proposal by Malay nationalists and was accepted by the British and non-Muslims on the basis that Islam in Article 3 would be limited to the sphere of Muslim personal and customary law. The non-Malays, who constituted 60 percent of the population at that time received assurances that the character of the nation would be multi-ethnic and secular.

Today, almost all Malays in Malaysia are Muslims, a status reinforced by strict apostasy laws prohibiting conversion out of Islam. In addition, Article 160 of the FC defines Malay as a person who professes the Muslim religion, habitually speaks the Malay language and conforms to Malay customs. Ethnic and religious identity is thus legally merged for Malay-Muslims, irrespective of personal choice.

As Islam increasingly become a major symbol of Malay-ness in that faith is inseparable from the Malay ethno-cultural heritage, the division between the Malays and non-Malays is widened by the religious divide between Muslims and non-Muslims, creating a distinct, acute awareness of the ‘Other’. The effect has been to aggravate the inter-ethnic fracture in Malaysian society.

This article examines the legal and political developments fuelled by Malay nationalism (Ketuanan Melayu) and demands for Islamic supremacy, which has caused inter-ethnic distrust. Part 1 examines the constitutional history and process of inter-communal bargaining which produced the independence FC. Part 2 examines

---

the scope of Islam as the religion of the Federation of Malaysia and the push for Islamic supremacy by Muslims within the judicial arena. Part 3 discusses the adverse effect of Malay nationalism and demands for religious supremacy which constitutes a betrayal of the constitutional bargain and threatens the rights of minority communities. Part 4 offers concluding observations.

2. Background: The Communal Bargain and Constitutional Arrangement

2.1. Malay Nationalism and Inter-ethnic Distrust

The existing distrust between the ethnic groups and their nationalist orientations posed a significant problem which an independent Malaya had to deal with. In the aftermath of the Second World War (during which the Japanese occupied Malaya), the British proposed the establishment of a Malayan Union, a confederation of Malay states which created Malayan citizenship available to all Malayan residents regardless of ethnicity. This provoked contention and crystallised Malay nationalism as this equal provision of citizenship does not give regard to the status of the Malays as indigenous peoples. There were also fears that equal citizenship would lead to Chinese domination in both economic and political spheres. This largely stemmed from the attempt by the Malayan Communist Party to take over Malaya with the support of the Chinese after the Japanese occupiers withdrew in 1945. The attempted takeover
led to serious clashes between the Malays and the Chinese. Upon the return of the British to Peninsula Malaya, a British Military Administration was established to restore order and proposed the Malayan Union.

Malay opposition to the Malayan Union further deteriorated Chinese-Malay relations. At least one violent clash in the state Kelantan between the Chinese and Malays was reported. The Malay nationalists’ successfully pressured the British to replace the Malayan Union with a Federation of Malaya. The stillborn Malayan Union, which came into being in 1946, was replaced by the 1948 Federation of Malaya Agreement. The 1948 Agreement (the Constitution of the Federation) blatantly favoured the Malays. The Agreement preserved the special position of Malays as indigenous peoples and accorded them privileges in business, jobs, education and in the reservation of land in order to improve their economic position. Citizenship qualifications marginalised the non-Malays; while Malays were given automatic citizenship, a large number of domiciled non-Malays were denied citizenship. The Chinese and the Indians condemned the Federation of Malaya as a reunion of “British imperialism and Malay feudalism”.

2.2. Communist Insurgency and the Necessity of Inter-ethnic Co-operation

Malay nationalism was curbed by the rising communist threat and the consequent necessity for inter-ethnic co-operation to combat this threat. The insurgency of the Malayan Communist Party in 1948 led to a proclamation of a state of Emergency during which martial law was imposed in the Federation. The communist revolt, while not driven by ethnic imperatives, depended on gaining Chinese support, as the Chinese were generally more sympathetic to the communists than the Malays due to their links with the Communist Party in China. Furthermore, communist propaganda was influential in Chinese schools and communities. With this heightened tension and distrust between the communities, it became clear that Chinese (and Indian) support was required to defeat communism and communal differences were temporarily set aside during the five years of Emergency (1948–1953). Thus, the threat of a common enemy brought the communities together to act jointly.

---

11 See ‘Note on Citizenship’ by A. S. Melville, 3 June 1952, CO1022/174 (25) cited in J. M. Fernando, The Making of the Malayan Constitution, MBRAS Monograph No. 31, (Academe Art and Printing Services Sdn Bhd, Malaysia, 2002) p. 73. Malays, who were the subjects of any of the nine sultans and British subjects in the Penang and Melaka, automatically became Federal citizens, while the other communities could acquire Federal citizenship by application if they were born in the Federation and resident there for eight years. Those born outside the Federation needed to fulfil a residential requirement of 15 years.
12 Parmert, supra note 7, p. 146.
13 The MCP organised a series of killings and economic sabotage.
14 Abdullah Badawi, supra note 1.
The British also insisted that an inter-ethnic partnership be forged before it would relinquish its control over Malaya. This spurred pragmatic co-operation between the three ethnic groups. To the British, a sufficient degree of common loyalty, of harmony, of outlook and unity of purpose between the different ethnic groups was necessary to defeat communism and for long-term peace and prosperity. It was necessary to achieve this through a political solution that took into account ethnic considerations, given that non-ethnic political groups had failed to gain popular local support. Ethnic consciousness was very acute in the 1950s. The first successful inter-ethnic co-operation came in the form of a loose alliance between UMNO and MCA in the Municipal Council elections for Kuala Lumpur in 1952. This UMNO-MCA pact allowed these organisations to retain their communal structure and sustain communal support, while enabling them to co-operate at a higher level and to collectively achieve political success by appealing to the mixed electorate. The success of this coalition paved the way for the formation of the National Front Alliance through co-opting the MIC. The Alliance in embodying a partnership between all ethnic communities managed to garner widespread popular support to an overwhelming degree. The Alliance won a landslide victory in the first federal elections for seats on the new Federal Legislative Council.

2.3. The Constitutional Bargain: Demands, Negotiation and Compromise

The process leading up to the full attainment of independence was marked by serious inter-communal negotiations and compromise. The drafting process of the FC reflects this. An Independent Constitutional Commission was convened, with Lord Reid as chairman, to draft a constitution providing for full self-government and independence of the Federation of Malaya. The twin objectives of this proposed constitutional framework were to allow the fullest opportunity for the growth of a “united, free and democratic” nation and to ensure there was “every facility for the development of the resources of the country and the maintenance and improvement of the standards of living of the people”.

---

17 Fernando, *supra* note 11, p. 29.
18 The UMNO-MCA alliance won nine out of the 12 seats in the February 1952 Municipal Council elections.
20 The Alliance had insisted that Malaysia’s post-independence constitution be drawn up by an independent commission consisting of members drawn entirely from outside Malaysia. The rulers, however, were opposed to this and this caused a further rift between the rulers and UMNO. The Alliance’s electoral success however necessitated a new willingness to reach compromise on the part of the rulers and the rulers agreed to accept the appointment of an independent constitutional commission drawn from outside Malaya, on the condition that one of the commission’s terms of reference would make provision for the “safeguarding of the position and prestige of Their Highnesses as Constitutional Rulers of their respective States”: see S. C. Smith, *British Relations with the Malay Rulers from Decentralization to Malayan Independence 1930–1957* (Oxford University Press, Kuala Lumpur, 1995) pp. 185–191.
Issues relating to the rights of ethnic groups dominated the constitutional drafting process. While there was general agreement on the constitutional arrangements relating to government structure and function, the distribution of federal and state powers, the position of the rulers and the judiciary, the Alliance leaders engaged in extensive debate in relation to communal issues like citizenship, special economic privileges for the Malays, language and religion. Protracted negotiations were also carried out between the Reid Commission, the British government, the Malay sultans and the Alliance. On ethnic group rights, the Chinese and Indians made compromises on issues of privileges, language and religion in exchange for Malay concessions on citizenship laws. For example, they abandoned their demand for the use of Chinese and Tamil in the legislature in exchange for UMNO abandoning its demand that election candidates must be able to speak in Malay or English. Provisos safeguarding the use and learning of Chinese and Tamil language were also included in the Constitution.

The Chinese and Indian leaders agreed to accord the Malays economic privileges, on the understanding this would not impair the economic interests, rights and opportunities of the other communities, and that such privileges would eventually be phased out. The designation of Islam as the religion of the Federation was also understood by the negotiating parties to be only of symbolic effect. The FC of Malaysia therefore embodies a very delicate inter-communal bargain, forming the foundation of the social compact of the nation.

3. The Scope of Islam in the Public Domain

The FC provides, in Article 3(1), that “Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation”. The FC provides for a dual system of civil and religious or Syariah courts. Civil courts exercise general jurisdiction over all civil and criminal matters as well as non-Islamic customary laws where applicable. Syariah courts are state courts created by statute and apply syariah law to Muslims only, with respect to a limited range of matters relating to marriage, inheritance and other personal laws. This dual system was further entrenched by the adoption of Article 121(1A), FC in 1988, which reads:

---

22 Fernando, supra note 11, p. 68.
23 Fernando, supra note 11, pp. 87–88 and 165: Although there was pressure from the Chinese guilds and associations as well as radicals within the party on the MCA leaders to seek official status for Mandarin, this was eventually abandoned as this would have jeopardised the partnership with UMNO, whose moderate leadership themselves were constrained by radical nationalistic elements within the organisation.
24 A protective clause which states “[n]othing in this article shall empower the Parliament to restrict or control any trade or business just for the sake of creating quotas for Malays” was added to the Constitution.
25 An initial agreement within the Alliance for the privileges to be removed 15 years from independence was scuttled by protests from the Malays and changed to the ambiguous provision that the privileges would be reviewed from time to time.
“The [High Courts] shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.”

The scope of Article 3 must be examined in the context of the constitutionally embodied communal bargain. An appreciation of what the status of Islam was at independence is important insofar as it provides evidence of the state of mind of those involved in negotiating and drafting the Constitution, particularly that of the non-Muslims.

3.1. The Scope of Islam in the Constitutional Order

At the time of independence, Malaya (including the Straits Settlement) was largely secular and its legal systems were based on the common law. Islam governed only personal and customary matters, i.e. in marital, family and inheritance laws, and applied only to the Malay community.

Prior to the arrival of the British and the transplanting of the common law into Malaysia, the Malay sultans were both political and religious leaders within their sultanates. Islamic laws and the local adat laws which comprised animist-Hindu-Buddhist elements were the governing laws in the Malay states. This means that although the Muslim system of worship and religious practices were followed, the worship of a host of local spirits, ghosts, saints and holy places continued in a slightly altered form. During this period, adat and Islamic laws were so intricately intertwined that they were never considered separate or different.

During British colonialism, the Malay sultans were no longer de facto political leaders. The Malay rulers acceded to a series of treaties with the British to “receive and provide a suitable residence for a British Officer . . . whose advice must be asked and acted upon on all questions other than those touching Malay Religion and Custom”. Deprived of substantial power in their sultanates, the role of the sultans as religious leaders and protectors of Islam increased in significance. Islamic religious courts were established to create a more centralised administrative structure and were

---


28 Local customary laws which predate Islamic laws in the country.

29 G. P. Means, ‘The Role of Islam in the Political Development of Malaysia’, 1:2 Comparative Politics (1969) pp. 267–269: Each village had an imam to perform Muslim rites but also continued to employ other spiritual functionaries like the bomoh and pawang who practised magical-religious mysteries and spells to control spirits that brought health and fortune or illness and calamity to the villagers. Royal ceremonies reveal Hindu influences although Muslim prayers were conducted in some rituals. Islam was a state religion largely in symbolic form.


31 The text of the first of such treaty, The Pangkor Engagement, cited in Means, supra note 29, p. 274.
presided over by a kadi or a naib-kadi (assistant kadi) in each state to implement both Muslim and adat law. It was during this period that institutions such as the Majlis Ugama (Council of Theologians) and the Syariah Committee were formed.32

However, the implementation of Islamic laws during this time was mostly on an ad hoc basis. Means observed that “[a]lthough Islam enjoyed state support in the Malay states and was recognised as the official state religion, it remained in a backwash for most of the colonial period”. Muslim courts had “few powers and very narrow jurisdiction” and the Muslim administration was “haphazard and lethargic”.34 Furthermore, Islam was not the official religion in the Straits Settlements of Penang, Melaka and Singapore, which were Crown Colonies directly under the British flag. Instead, the Church of England was the established church these Straits Settlements.35 The British common law was applied in both the Malay states and the Straits Settlement. It was only in the 1950s and in tandem with the British aim to standardise the administration of laws in all Malay states that Syariah courts were established to administer Islamic laws. Islamic laws were placed under the jurisdiction of individual state’s Religious Departments.36 Even then, their application was limited to Muslim citizens and restricted to family and personal Islamic laws.

The British were anxious to preserve this status quo. The Reid Commission37 initially rejected the controversial recommendation of the Alliance to entrench Islam as the official religion of the Federation of Malaya.38 What became Article 3 of the FC was accepted only after the Alliance leaders gave assurances to the Colonial Office during a London Conference in May 1957 that they “had no intention of creating a Muslim theocracy and that Malaya would be a secular state”.39 The non-Malay parties within the Alliance agreed, as part of inter-party bargaining, to include such a clause in the Alliance proposal on the understanding that the Article would have symbolic significance rather than practical effect and that the character of the nation would remain secular. The non-Muslims were assured that their civil rights would not be affected by a confessional Article 3 designating Islam as the Federation’s religion.40 This preserved the status quo, being consistent with the limited form of legal pluralism that was already practised in Malaysia. This was the orthodox view in Malaysia (until recently), as reflected by the judgment of the Supreme Court of Malaysia in Che Omar Bin Che Soh v. PP. In this case the

32 This committee was charged with interpreting Islamic law.
33 Means, supra note 29, p. 274.
34 Ibid., p. 275.
35 Ibid.
36 Haji Salleh, supra note 30, p. 16.
37 Parmer, supra note 7, p. 148.
38 Parmer, supra note 7, p. 148; officially, the Commission cited the request of the Malay rulers to retain religion as a State matter, in not acceding to the Alliance’s proposal: Fernando, supra note 11, pp. 129–130.
39 Fernando, supra note 11, pp. 162–163; see also Parmer, supra note 7, p. 149.
40 Fernando, supra note 11, p. 162.
Supreme Court held that parties negotiating the Constitution must have had continuity in mind rather than contemplating an enlarged role for Islam in public law and life at the time of drafting. In fact, Tunku Abdul Rahman, the first Prime Minister, stated: “Unless we are prepared to drown every non-Malay, we can never think of an Islamic Administration.”

Despite the compromise and the assurances given by the Malay leaders at independence with regards to the symbolic nature of Article 3, there has been continuing pressure exerted by Malay nationalists to establish Malaysia as an Islamic state or a state run on an Islamic mandate since independence. This is because Islam has become a major symbol of Malay-ness in that faith has become inseparable from the Malay ethno-cultural heritage. The former Pan-Malayan Islamic Party (PMIP) (now the opposition Partai Islam SeMalaysia or PAS) called for an Islamic state where “Islamic principles” would be adopted by Malays and applied “in the life of the individual, the society and the state”. The more traditional UMNO backbenchers and the local divisions of UMNO have also been prone to putting pressure on their leadership to promote more purely Islamic policies.

3.2. Islamic Revivalism and Political Islam: The Push for an Enlarged Role for Islam in Public Life

The heightened religious consciousness in Malaysia was brought about through the global phenomenon of Islamic revivalism which dates back to the 1970s. This stemmed largely from nationalist and reformist movements in the early part of the 20th century where Muslim reformers impressed upon the masses that the preservation of Islamic identity could only be achieved through the independence of the country and an appreciation of the past grandeur of the Muslim people and civilization. Such sentimental evocation to Islam’s past grandeur led to the rebirth of Islamic

---

42 Che Omar Bin Che Soh v. PP, supra note 27.
44 Der Mehden, supra note 43, pp. 610 and 612.
45 Mutalib, supra note 5, pp. 17–19.
46 PMIP changed its name in 1971 to PAS.
47 Der Mehden, supra note 43, pp. 610 and 612.
48 Ibid.
49 Scholars have attributed Muslim revulsion against the West consequent to the Arab-Israel wars of 1967 and 1973, and the Islamic revolution in Iran in 1979, amongst others. To be sure, this movement in the 1970s was not unprecedented, since Muslims have gone through different forms and phases of Islamic revivalism since its inception. Mutalib, supra note 5, pp. 6–7.
50 Mutalib, supra note 5, pp. 6–7: Muslim reformers impressed upon the masses that the preservation of Islamic identity could only be achieved through independence of the country and an appreciation of the past grandeur of the Muslim people and civilization. Such a sentiment invariably leads to the rebirth of Islamic consciousness particularly amongst the Muslim intelligentsia, a consciousness which endured through the post-war emergence of a host of newly independent Muslim states in Asia and Africa.
consciousness and pride amongst the Malays in Malaysia, flaming Malay nationalism which seeks to enlarge the role of Islam in the public square.

Malaysia’s economic and educational progress created a favourable environment for the cultivation of an increasingly religiously conscious citizenry. The New Economic Policy (NEP), the programme which actively implemented the special economic privileges to the bumiputera in Malaysia, and its major offshoot, the New Education Policy (NEDP) also led to the emergence of a more Islamised Malay elite. The NEDP opened the door for a sizeable number of Malay youths and students to attend local and overseas tertiary institutions, where they were drawn to Muslim student groups which provided them social support and placed them in contact with Islamic scholars and personalities who visited Muslim student groups on the campuses.51 A large number of these Malay Muslim overseas students, particularly those educated in the Middle Eastern universities like Al-Azhar in Cairo,52 were exposed to radical views of Islam. In 1982, the Mahathir administration launched the International Islamic University in Kuala Lumpur, which contributed to the growth of an educated, Islamically-minded constituency.53 Muslim organisations in Malaysia have also effectively acted as de facto pressure groups in Malaysia in their call for ‘more Islam’ in the country.54

Politicisation of Islam, particularly by the PAS opposition group,55 challenges UMNO’s commitment to protect multi-ethnicity in Malaysia and cohesion within the multi-communal Alliance. Islam occupies an increasingly overt place in Malaysian politics and Islamic invocations have become common at political rallies as there is a need to couch messages in ‘religious imagery’ to elicit popular creditability and votes.56 This is mainly caused by PAS’s political strategy to gain political clout by appealing to the Islamic duties of the electorate, promising that those who vote for PAS would receive rewards in the afterlife.57 For example, during the 2004 elections, PAS spiritual leader, Nik Aziz Nik Mat, reportedly said “naturally, they will go to heaven for choosing an Islamic party, while those who support unIslamic parties will logically go to hell”.58 PAS seeks to supplant UMNO as the champion of the Malay-Muslim cause. This political strategy seems to have attained some success when it

51 Mutalib, supra note 5, pp. 27–29.
52 Many key leaders in Partai Islam Se-malaysia (PAS) were educated in Middle Eastern universities, in particular Al-Azhar University.
54 Mutalib, supra note 5, pp. 34–36.
55 The Malay acronym PAS, reflects the ‘Jawi’ or Arabic-script letters Pa-Alif-Sin.
57 PAS was previously Pan-Malayan Islamic Party or PMIP which had previously advocated an Islamic state during independence.
won control of the Malay majority state of Terengganu in the 1999 elections. This marked the first major shift of power since 1990, when PAS captured Kelantan from the ruling coalition. Buoyed by this success, PAS intensified efforts to gain political leverage by branding itself 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.

In 2002, PAS passed a Syariah Criminal Offences (Hudud and Qisas) Bill in Terengganu to pave the way for implementing *hudud* laws (Islamic criminal laws which prescribe punishments such as amputation of limbs for theft and stoning for adultery). The laws applied only to Muslims but the PAS state government has declared that it planned to eventually extend the application of the laws to all non-Muslims. This was aimed at persuading voters that PAS could bring about social and political change towards a purer strain of Islam, reminiscent of the glorious days of Islam in the 7th century. A similar enactment was passed in Kelantan in 1993, but was never implemented. These *hudud* enactments raise federalism issues, since under Article 74, read with the First and Second Lists of the Ninth Schedule of the FC, only Parliament may legislate on criminal laws. The legislative powers of individual states are limited to “creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to

59 PAS managed to wrestle control over the rural north-eastern state of Terengganu by riding the wave of discontent arising from the controversial trial, conviction and imprisonment of the former Deputy Prime Minister, Anwar Ibrahim in 1998–1999: see ‘The Religion Report: Religious Politics in Malaysia’ (Transcript of radio broadcast), Australian Broadcasting Corporation, 12 May 2001, <www.abc.net.au/rn/talks/8.30/relrpt/stories/s432828.htm>, visited on 20 March 2004. However, its Islamicisation programme appears to have backfired as it lost Terengganu in the 2004 elections and received a lower percentage of the votes in Kelantan.

60 A. Netto, ‘Mahathir’s Victory is not so Sweet’, Asia Times Online (Hong Kong), 1 December 1999, at <www.atimes.com/se—asia/AL01Ae01.html>, visited on 20 March 2004.


63 PAS claims that it will impose the *hudud* and *qisas* laws to non-Muslims in the state “when every citizen understands them”. The Mentri Besar Datuk Seri Abdul Hadi Awang said when winding up the two-day debate on the Bill, “[f]or now, it will apply to only Muslims but when the time comes, the *hudud* and *qisas* laws will be extended to all non-Muslims” from Mustafa Kamal Basri, ‘Terengganu says Islamic laws will eventually cover non-Muslims’, National Human Rights Society, 9 July 2002, <www.hakam.org/news090702.htm>, visited on 25 November 2005.


matters included in the Federal List”. The Kelantan hudud law is currently being judicially challenged as unconstitutional and contrary to Article 74 of the FC.\(^{66}\) The plaintiff is seeking a declaration under Article 4(4) of the FC that Kelantan had no legislative power to enact the Syariah\(^{67}\) Criminal Code 1993 because it prescribes hudud punishments for crimes like theft, robbery, criminal conspiracy, rape and manslaughter, which are actions punishable under federal law. Furthermore, according to Article 75, where state law is inconsistent with a federal law, “the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void”.

PAS accuses UMNO of sacrificing the nation’s spiritual well-being (notably Islamic spirituality) for the capitalistic pursuit of economic development,\(^{68}\) and opposes popular culture which it considers un-Islamic. For example, it criticised the popular television show, ‘Malaysian Idol’, a local version of an international show which is wildly popular in the United States\(^{69}\) as the use of the word ‘Idol’ contradicted Islamic teachings and would create a culture where Malaysians would be seduced by ‘hunger for fame and glamour’, revering entertainers rather than God. To counter and undercut PAS’s purported Islamic mandate and religious politicking for an Islamic state of Malaysia, former Prime Minister Mahathir Mohamad declared in 2002 that Malaysia was already an Islamic state,\(^{70}\) asserting that UMNO had achieved the right balance between modernity and the positioning of Islam within a successful formula built on ethnic bargains and state-driven capitalist development.\(^{71}\)

One consequence of the growing tide of Islamic religious consciousness and religious politicking in the country is the increase of state sanctioned religious policing, in states controlled by both PAS and the Alliance. The FC provides that Islamic laws are administered by the state.\(^{72}\) Article 74(2) provides that state legislatures may make


\(^{67}\) Islamic laws.

\(^{68}\) PAS accuses UMNO of emphasising materialism in pursuing economic development, and this would lead to the destruction of human spirituality: Rasul, supra note 61.


\(^{70}\) A public debate was created by the Prime Minister’s statement and most Muslims welcomed the declaration that Malaysia was an Islamic state since it enabled them to fend off PAS. 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)*, 22 June 2001, p. 10; ‘Malaysia Recognised as Islamic Nation’, *New Straits Times (Malaysia)*, 11 August 2001, p. 4; ‘Islamic State Issue Dominates’, *New Straits Times (Malaysia)*, 27 October 2001, p. 6; ‘Still Much Talk Over Country’s Islamic Status’, *New Straits Times (Malaysia)*, 26 October 2001, p. 8; ‘Freedom of Religion Will Not Be Curtailed’, *New Straits Times (Singapore)*, 25 November 2001, p. 2.

\(^{71}\) Hussin Mutalib notes that besides attempting to outwit PAS in their legitimacy quest for Malay-Muslim votes, Mahathir’s policies in favour of Islam are also due to his desire to identify Malaysia with the Muslim bloc, particularly through the Organisation of Islamic Countries (OIC), and solidarity with Muslims worldwide and there was a major shift in Malaysia’s foreign policy under Mahathir, from alignment with the West to the Islamic Middle East and Asia: Mutalib, supra note 5, p. 32.

\(^{72}\) This is due to the separation of powers between state and Federal government under the Federal structure.
laws regarding any of the matters enumerated in the State List (Second List, Ninth Schedule) or the Concurrent List. This includes “Islamic Law and personal and family law of persons professing the religion of Islam”. Islamic law or syariah law was previously derived from judicial enquiries by the Syariah courts into religious texts and this may give rise to confusion due to differing interpretations of Islamic law. The Sunni, rather than the Shi’a tradition, is followed in Malaysia. Currently, there are efforts to embody syariah laws in positive state legislation (fiqh). However, general Islamic laws would still apply where there is a lacuna or ambiguity and this is expressly provided for in state legislation. Each state has its own system of Islamic religious administration and through statutes providing that their provisions, where inconsistent with Islamic law, may be challenged and voided. Islamic laws are also published by religious decrees or fatwas, formal legal opinions issued by Islamic jurists on religious questions submitted for their consideration. Once published in the government gazette, fatwas are binding and enforceable. Under the Administration of Islamic Law Enactment adopted in the various states, three state authorities, the Majlis Ugama Islam (Council of the Muslim

---

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


76 E.g., Section 130(2) of the Syariah Court Evidence (Federal Territories) Act 1997 (Act 561).

77 E.g., Section 245(1), Syariah Court Civil Procedure 1999 (Selangor) provides: “Any provisions or interpretation of the provisions under this Enactment which are inconsistent with Islamic Law shall, to the extent of the inconsistency be void.”

78 Shuaib, supra note 75, p. 43.

79 E.g., Administration of Islamic Law (Federal Territories) Act 1993 Section 34(2); Administration of Islamic Law Enactment 1989 (Selangor) Section 31(2).

80 See the Selangor Administration of Islamic Law Enactment, 1989 (No. 2 of 1989), as amended by enactment 2 of 1991; Enakmen Pentadbiran Hukum Syarak Melaka 1991 (No. 2 of 1991); Administration of Islamic Law (Federal Territories Act), 1993 (Act 505); 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 Religious Affairs Enactment, 1993 (No. 7 of 1993).
Religion), the Mufti and the Syariah courts administer syariah laws in the states. Religious Enforcement Officers are appointed by the Majlis Ugama Islam to investigate and enforce syariah offences within the state. Islamic laws seeking to regulate the activities of Muslims as well as their clothing have been more actively enforced in recent years. For example, in 1997, three ethnic Malay women taking part in Miss Malaysia Petite were arrested on stage, dragged out of the ballroom and bundled into a jeep in front of stunned guests by Jabatan Agama Islam Selangor (JAIS) (Selangor Islamic Religious Department) officers. In June 2005 two Muslims were convicted by a Syariah court for drinking alcohol, which Islam prohibits. This is the first known conviction for alcohol consumption in Malaysia. This religious policing has been condemned by some Muslims for being repressive, hypocritical and over-sanctimonious, but have won the approval of other constituencies.

4. Religious Supremacy, Malay Nationalism and Alienation of the Non-Malay Communities

These contemporary political developments threaten the delicate balance of accommodation between the ethnic communities and national unity. Non-Muslims are concerned about these movements towards Islamic supremacy which threaten their

81 The Council of Muslim Religion is the general body responsible for the administration of the Islamic religion: Ahmad Mohamed Ibrahim and Abdul Monir Yaacob (eds.), The Administration of Islamic Laws, (Institute of Islamic Understanding Malaysia, Kuala Lumpur, 1997) p. 10.
82 The Mufti is the chief authority in Islamic law, after the Head of the Religion of Islam in a state or the Federal Territories. His function is to aid and advise the ruler in respect of all matters of Islamic law. He is also empowered to issue fatwas, which is a formal legal opinion on Islamic matters: see Shuaib, supra note 75, pp. 43-44.
83 Shuaib, supra note 75, p. 50.
84 The religious officers took them to a nearby police station where the trio became the first Malaysians to be charged with indecent exposure for taking part in a beauty contest. Two weeks later they were found guilty and fined 400 ringgit each: R. Mitton, ‘Islam Calling: A compulsory course and a beauty contest ban worry non-Muslim’, Asiaweek, 18 July 1997 <www.asiaweek.com/asiaweek/97/0718/nat4.html>, visited on 18 August 2005.
85 ‘Muslim brothers to be caned for drinking alcohol’, 15 June 2005, Malaysiakini (Malaysia) <www.malaysiakini.com/news/37011>, visited on 17 June 2005. In June 2005, the Kuantan Syariah Court reportedly sentenced two Muslim brothers, who were arrested by Pahang Islamic Religious Department officers for drinking stout at a restaurant, to six strokes of the cane and fined them RM 5,000 each for drinking alcohol. Pahang is normally seen as a moderate state compared to its more conservative northern neighbours. Syariah Court judge Abdul Rahman Yunus said his ruling was intended to remind Muslims not to drink alcohol, which is forbidden by Islam. This is believed to be the first time a penalty was ordered against Muslims caught drinking.
87 Mitton, supra note 84: A ministerial aide was quoted on the arrests, saying “[y]ou know how some leading figures behave in this town – the mistresses, the nightlife, the drinking. Then they go after these girls. The double standard is appalling.”
rights, worsening grievances of treatment as second class citizens in their own country. The FC, by granting special privileges and status to the bumiputera, created an ethnic division between bumiputera and non-bumiputera. Article 153 provides that it “shall be the responsibility of the Yang di-Pertuan Agong to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak”. This translates to reserving a proportion of positions in the public service, scholarships, educational or training privileges, special facilities, permits, licences and university places for the bumiputera. Huang-Thio points out that these special privileges helped to “engender in the Malay mind that Malaysia belongs to the Malays and therefore they are entitled ipso facto to special treatment”. The implementation of the controversial New Economic Policy (NEP) further entrenched this Malay attitude of entitlement. Under the NEP, licences, permits, government contracts, shops, forest reserves, commercial areas, capital and various funds were set up to benefit Malays and shares in listed companies and new companies were distributed to Bumiputera to increase their share in trade and industry. Special educational programmes, the bulk of government scholarships and 55 percent of college/university places were also reserved for the bumiputera/Malays. The bumiputera varsity quota remains a major source of Chinese-Malay distrust and resentment. The quota system has resulted in the sacrifice of academic quality and engendered more inter-ethnic polarisation.

Religion remains the last barrier to surmount in the nationalist agenda to protect Malay ethnic identity since earlier Malay demands relating to the Malay language,

---

88 Article 153(2), (6) and (8A).
89 Huang-Thio, supra note 10, p. 13.
90 Dr M. Mohamad, Malays Forget Easily (Pelanduk Publications, Malaysia, 2001) p. 20.
91 Note that in May 2001, there was even a suggestion by a leading Malay newspaper, Berita Harian, pursuant to suggestions by various parties including academics, that the Bumiputera varsity intake quota be increased from the current 55 percent to 66.1 percent to reflect the current population demographic. In response, the then Education Minister, Tan Sri Musa Mohamad agreed that such a suggestion may be implemented but that the idea needed to have the input and views of all parties, especially non-Bumiputera who stand to lose out if such a system was implemented: A. R. Ahmad, 'Musa on idea to raise Bumi intake quota', New Straits Times (Malaysia), 11 May 2001, <www.highbeam.com>, visited on 15 June 2005.
92 One Malay journalist wrote, “[w]ith the university population said to be increasingly polarised along ethnic lines and partisan stances in politics among the Malay students becoming the rule rather than the exception, one wonders if the pursuit of academic excellence and the intellectual tradition in our universities are as good as dead”: A. Kadir Jasin, 'Of quotas and the hornets' nest', New Straits Times (Malaysia), 13 May 2001 <www.highbeam.com>, visited on 15 June 2005. In one incident, the Ministry of Education was compelled by the Prime Minister to release unfilled university places reserved for bumiputera to the non-bumiputera. The Ministry later recanted and claimed that there was an accounting error and those places were actually filled. Chinese columnists accused officials of racism, bitterly charging that it was “absurd that the Education Ministry has ‘given birth’ to extra students overnight to fill the quota. We all know in our hearts where their motivation lies.” One columnist wrote in a news analysis in Sin Chew Jit Poh, “[t]heir mentality is: We just will not give it to you, so what can you do?”, L. Lau, 'Controversy over unfilled quotas', The Straits Times (Singapore), 10 May 2001, <www.lexis.com>, visited on 26 November 2005.
status/privilege and education have been constitutionally recognised. The twin towers of Malay nationalism and religious supremacy therefore pose serious difficulties to long-term unity and integration in Malaysia, as non-Muslims/non-Malays fear their civil rights as citizens are increasingly eroded.

4.1. Betrayal of the Constitutional Bargain

Mahathir’s declaration that Malaysia is an Islamic state contravenes the constitutional bargain that founded the Federation as a secular state, albeit with the symbolic recognition of Islam under Article 3.

The case law reveals two contrasting approaches towards determining the scope of Islam as the religion of the Federation. In the Supreme Court decision of Che Omar Bin Che Soh v. PP, the term “Islam” or “Islamic religion” in Article 3 refers to only such acts as relate to rituals and ceremonies. This is because the British colonial authorities through their system of indirect rule and the establishment of secular institutions had confined the application of Islamic law to the narrow sphere of the law of marriage, divorce and inheritance. The Supreme Court adopted a contextual approach in interpreting Article 3; holding that the framers of the FC must have understood Islam in this limited sense otherwise there would have been another constitutional provision providing that any law contrary to the injunction of Islam would be void. The court pointed out that Article 162 of the FC purposely and expressly preserves the continuity of secular law prior to the Constitution, unless such law is contrary to the Constitution. This is consistent with the status of Islam at the time of independence whereby Islamic laws were applied on an ad-hoc basis to Muslims and restricted to family and personal Islamic laws.

In recent years, certain civil courts have manifested judicial opinions which evidently slant towards favouring Islamic laws and an aggrandized role of Islam in the public arena. In 1999, the Seremban High Court in Meor Atiqulrahman bin Ishak & Ors v. Fatimah bte Sihi & Ors took the questionable view that “Islam is the dominant religion amidst other religions which are practised in the country”. Mohd Noor J took the view that Islam does not share the same status as the other religions, because if that were so, “Islam will not be the religion of the Federation but just another of the many religions embraced in the country and everybody would be

93 Mutalib, supra note 5, p. 33. Note however that there is criticism that the Malays are abandoning their Malay culture, which contained non-Muslim influences like Hinduism, in favour of copying all things Arabic: J. Kent, ‘Malaysian Malays cast adrift by clash of cultures’, Straits Times (Singapore), 13 August 2005, p. S16.

94 For an interesting overview of key civil rights challenges in 1980s Malaysia, see K. S. Kua, The Malaysian Civil Rights Movement (SIRD, Petaling Jaya, Malaysia, 2005).

95 Che Omar, supra note 27.

96 Che Omar, supra note 27.

equally free to embrace religions, with none better than the other”. In his view, Article 3 imposed an obligation upon the supposedly secular government to promote Islam, including “building mosques and religious centres, sponsoring musabaqah al-Quran, reciting the al-Quran, restricting acts forbidden by Islam like banning alcohol, gambling, prostitution and undesirable cultures”. The judge paid lip service to the assurance to the non-Malays that their civil rights would not be affected and that the nature of the country would be secular. He asserted:

“I do not guess or presume that Malays and Malay rulers of the past would have been willing to agree to grant and recognise citizenship of the non-Malays based on birth, in return for Islam becoming the religion of the Federation and being limited to only ‘rituals’ and ‘ceremonies’.”

This assertion is incorrect as the drafting history of the Constitution shows that language and economic privileges were the dominant concerns and Islam was understood at that time to be confined to rituals, ceremonies and personal laws applicable to Muslims. This decision was overturned on the substantive issues in 2004 but the Court of Appeal did not directly address the High Court’s pronouncements on Article 3.

Existing laws against apostasy not only effectively preserve the conflation of ethnicity and religion, but also reflect the increasing legislative and judicial bias towards Islam. Typically, state law provides that a Muslim cannot become a non-Muslim at law until a Syariah court so confirms, e.g. Section 102(1), 1994 Kelantan Enactment. Article 121(1A) of the FC was introduced in 1988 to provide that civil courts “shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts”. As a result of this, there has been an increased abdication to Syariah courts in apostasy cases giving Syariah courts wide powers to prevent persons from converting out of Islam. Current Syariah enactments provide that Syariah courts may place apostates under detention or probation during which they are required to report to the office of the Kadi (Islamic court official) to utter repentance.

---

98 Meor Atiqulrahman, ibid., p. 382. English translation by the author; this judgment was written solely in Malay and only the headnote was translated to English. The headnote did not sufficiently show the judge’s views on Article 3.

99 Meor Atiqulrahman, ibid., p. 386. English translation by the author.

100 Meor, ibid., at p. 384H.

101 Fatimah binti Siti & Ors v. Meor Atiqulrahman & Ors [2004] Malayan Law Journal. The case involves the plaintiffs’ expulsion from school for wearing serbans in school. The plaintiffs, three schoolchildren aged eight to 11, sought a court order declaring that their expulsion from school was void, null and of no effect and they should be accepted back to the school. The defendants contended that the plaintiffs were properly dismissed from school for contravening school rules prohibiting the wearing of serban in school. The High Court held, inter alia, that to forbid Muslims to wear the serban is contrary to Articles 3 and 11 of the Constitution and the expulsion was therefore null and void.

102 Section 102(1): Tiada seorangpun yang telah diakui beragama Islam boleh mengaku bahawa dia bukan Islam melainkan setelah Mahkamah memberi pengesahan sedemikian. (translated as “no person who professes the Islamic religion can declare that he is no longer a Muslim unless the Syariah Court gives such approval”).
and attend repentance classes, or sentence them to a fine or imprisonment. A recent application by a Muslim convert to revert to his original religion was rejected by the Syariah court of Pahang. The court ordered that the applicant be placed under religious counselling.

These restrictions on Muslim renunciation of faith appear to run contrary to Article 11 of the FC which guarantees religious freedom, Article 11(1) reads “[e]very person has the right to profess and practice his religion and, subject to Clause (4), to propagate it”. However, Malaysian courts have held that Article 11 does not extend to freedom to convert out of Islam. In Daud bin Mamat, the High Court of Kota Bahru held that leaving a religion “is certainly not a religion” and that for the right to renounce a religion to exist, Article 11 must expressly state “everyone has the right to renounce or profess and practise his religion, and subject to cl (4), to propagate it”. According to the judge, to infer that Article 11(1) protected the right to renounce a religion “would stretch the scope of art 11(1) of the Federal Constitution to ridiculous heights, and rebel against the canon of construction”. In Kamariah bte Ali dan lain-lain v. Kerajaan Negeri Kelantan, Malaysia dan satu lagi, the court justified the court’s refusal to allow conversion out of Islam on the basis that Islam, being the religion of the Federation under Article 3, must be given special status. The court also cited Article 11(4) which provides that state legislatures may enact anti-propagation laws in relation to “any religious doctrine or belief among persons professing the religion of Islam” to support a restrictive view of religious freedom for Muslims.

Judicial bias towards Islam resulted in a dubious constitutional interpretation in the recent case of Lina Joy v. Majlis Agama Islam Wilayah. The High Court of Kuala Lumpur held that by virtue of Article 160 of the FC, “the plaintiff is a Malay and therefore as along as she is a Malay by that definition she cannot renounce her Islamic religion at all. As a Malay, the plaintiff remains in the Islamic faith until her dying days.” This reasoning is suspect as Article 160(2) of the FC is merely an interpretative clause; the Article defines a Malay as “a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom”. According to the judge’s reasoning, Islam is part of a constitutionally sanctioned

103 See for example, Section 102(3) of Enactment 4/1994 of the state of Kelantan (Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan) which provides that if a Muslim intentionally attempts by his speech or conduct to convert out of Islam, the Syariah Court may order the detention of that person at the Islamic Education Centre for a period of not more than 36 months with the aim of education and that person is required to repent according to Hukum Syarak (Islamic law) see Daud bin Mamat & Ors v. Majlis Agama Islam & Anor [2001] 2 Malayan Law Journal 390.

104 Section 13, Administration of Islamic Law Enactment Perak provides that the offence of Muslim apostasy is punishable with either a RM 2000 fine or up to two years imprisonment: see Mad Yaacob bin Ismail v. Kerajaan Negeri Kelantan [2001] 6 Malayan Law Journal 179.


106 Daud bin Mamat, supra note 103.


108 [2004] 2 Malayan Law Journal 119; this judgment of 18 April 2001 was only reported in 2004.
group identity such that religion becomes an immutable trait rather than a consequence of individual choice.

These contemporary judicial and legislative approaches towards renunciation of Islam show a distinct movement to entrench Islam as the dominant and majority religion, beyond the consensus forged during the making of the FC. In contrast, while there was previously no formal procedure by which a Muslim could renounce or change his religion, it was possible for a Muslim to be freed from the legal obligations of Islam and exempted from the jurisdiction of the Muslim courts (which only deals with Muslims) by means of petition to the Sultan as a religious head. Gordon Means’ records in 1969 demonstrate that four or five Malays were known to have sought to renounce their religion but their petitions were not approved since the ruler would appear to be sanctioning apostasy. Nonetheless, they were unofficially treated as exempt from prosecution in Muslim courts.\textsuperscript{109}

4.2. Segregation and Social Fracture

The segregationist effect of Malay nationalism has been a divisive social force in Malaysia. For example, units in a proposed condominium project in Kampung Baru, Kuala Lumpur can only be sold to Malays, regardless of nationality, as the land is gazetted as a Malay reserve.\textsuperscript{110} This compromises the civil rights of the non-Malay citizens. The aggressive form of Islam which focuses on external piousness also threatens social cohesion and ethnic harmony. Zainah Anwar, the executive director of Sisters in Islam, a Muslim women’s rights group, said that the emphasis on external piousness is not only about religion, but also about Muslims’ sense of identity. She says, “[r]ight now, how we measure up as a good Muslim is being based on external factors, like who we mix with, how we dress, and what we eat. This has already affected race relations. I know a Chinese history professor whose students no longer come to his house because they don’t want to drink from cups touched by lips that have tasted pork.”\textsuperscript{111}

This religious extremism indirectly necessitates and promotes segregation on the basis of religion. For example, in 2000 the Selangor Religious Department arrested 25 Muslims at a restaurant for being in a place that serves alcohol\textsuperscript{112} and sought to charge a female pub singer for insulting Islam by being in premises where alcohol was served.\textsuperscript{113} The religious department’s notions of propriety would require Muslims not to share premises with non-Muslims, where the latter do not adhere to Islamic prohibitions, such as banning alcohol. Mahathir blamed certain interpretations of Islam for causing this separatism. He said “in the past, we had no problems

\textsuperscript{109} Means, \textit{supra} note 29, p. 280.
\textsuperscript{110} C. Hong, ‘Condo in KL for Malays only’, \textit{Straits Times (Singapore)}, 9 May 2005, p. 11.
\textsuperscript{111} A. Anadarajah \textit{et al}., ‘Hijacked by Religious Bigots!’, \textit{New Straits Times: Life and Times (Malaysia)} 22 January 2003, p. 5.
\textsuperscript{113} These charges were later dropped.
with girls wearing skirts and boys wearing shorts, especially for games. Now boys are forbidden from wearing shorts, even for games, and even games are discouraged. These are individual interpretations of what Islam is all about, and eventually of course, this puts off the non-Malays and they go back to their own schools."

4.3. A Divided Nation: PAS’s Proposed Dual System of Laws

PAS’s aggressive push for radical Islamic rule in Malaysia is a matter of great concern for non-Malays. PAS declared it would change the Constitution and impose Islamic rule in Malaysia should it become the elected Federal government. According to its “Islamic State Document”, a PAS-inspired Islamic state would mean the full implementation of the syariah law (Islamic laws), including the controversial hudud penal code. Non-Muslims would be able to choose between syariah law and the English-based secular laws.115

Despite promises of fair treatment, non-Muslims are wary of PAS’s agenda given its poor track record. During its short partnership with non-Islamic opposition parties in the Alternative Front Alliance, PAS initially promised that it had no intention to create an Islamic state in Malaysia. However, after winning Terengganu in the 1999 elections with the support of the other opposition parties, it recanted, causing the Alternative Front Alliance to break up. Recently in 2004, PAS’s sanctimonious control over women’s dressing, usually confined to Muslims, threatened to affect non-Muslims. PAS announced a plan to ban non-Muslim women from wearing mini-skirts or figure-hugging dresses to work as part of its drive against indecency, creating great indignation and alarm amongst non-Muslims. PAS also restricted the sale of alcohol to non-Muslims (sale to Muslims is forbidden) and banned gambling. Carnival rides, theatre shows, dances, beauty pageants and song festivals are taboo unless prior special permission was obtained. Discos, karaoke lounges and unisex hair salons are curtailed. Pictures of unscarved women, even ethnic Chinese, on billboards are covered up. PAS also mandated gender-based checkout counters in supermarkets.117

Currently, having separate systems of law for Muslims and non-Muslims in marriage and family law, and the separation of adjudicatory powers between the civil and

Syariah courts under Article 121(1A) have raised practical difficulties and led to unsatisfactory results. For example, in Shamala Sathiaseelan v. Dr Jeyaganesh C Mogarajah & Anor,\footnote{Shamala a/p Sathiaseelan v. Dr Jeyaganesh a/l C Mogarajah [2004] 2 Malayan Law Journal 241.} the plaintiff (wife) sought a declaration that the conversion of her two children to Islam by the defendant (husband) without her consent were null and void. The High Court held that only a Syariah court can determine whether the conversions were null and void. The plaintiff was not a Muslim and therefore the Syariah Court had no jurisdiction to hear her. Although the plaintiff would be without a remedy, the High Court held that that “would not make the jurisdiction exercisable by the civil court”. The court opined that it was “for Parliament to provide the remedy”. The plaintiff was advised by the court to seek informal help from the relevant religious department. Similarly, in a related action by the plaintiff involving the custody of the children, the High Court said as dicta, that since the defendant (husband) was now a Muslim, he cannot file a petition for divorce against his Hindu wife. However, as a Muslim, the defendant can practice polygamy and take another wife – a Muslim wife.\footnote{Meor Atiqulrahman, supra note 97, p. 386 (translation from Malay by author).} Having a comprehensive dual system of laws can only serve to further fragment the cohesion of this multi-ethnic state.

4.4. Religious Supremacy and the Aversion towards Inter-faith Dialogue

The freedom of those professing other religious faith to practice their faith is also threatened by the proponents of the view that Islam should assume a more dominant place such that other religions would be subordinate to it. The High Court in Meor Atiqulrahman opined that the government should rightly make laws to “ensure that religious places of other religions do not exceed or are comparable with National/State Mosques in terms of location and prominence, size and overly-majestic architecture, or are too many in numbers and exist everywhere without control”. Other religions, according to the judge, “must be arranged and directed to ensure that they are practiced peacefully and do not threaten the dominant position of Islam, not just at the present but more importantly in the future and beyond.”\footnote{‘Muslims Fight Plan to Build Church in their Estate’, Straits Times, 5 March 2005, p. 26: a thousand Muslim residents of Bukit Mewah in Kajang submitted a petition to the Kajang Municipal Council to stop plans to relocate St. Katherine’s Anglican Church in their estate. Approvals to build mosques in Kepong, Selangor have also been withdrawn after protests by residents that the place has few Muslims. UMNO Youth’s Religious Affairs Bureau chief Shamsul Najmi was quoted as saying, “[p]rotests to build a place of worship should not be seen as stepping on the rights of others. It should be seen as part of the process of give-and-take in our country.”}

Such an attitude was manifested in Selangor where Muslims opposed plans to relocate an Anglican church in a residential area.\footnote{[2004] 2 Malayan Law Journal 648.} Various restrictive measures have been adopted to accommodate for Muslim sensitivities. For example, the screening of the Mel Gibson directed movie The Passion of the Christ was banned. On appeal to the
Prime Minister, limited screening was permitted for Christians only. Additionally, in relation to public celebrations of Christmas, representations of the nativity scene were prohibited to avoid offending Muslim sensibilities. Further, the singing of Christmas carols honouring Jesus during public celebrations was prohibited in the presence of the Malaysian King (Agong) who is the constitutional head of Islam.

Efforts to promote interfaith dialogues have also been scuttled by the Muslims’ refusal to participate. For example, only two Muslim organisations participated in the ‘National Conference on the Initiative Towards the Formation of the Interfaith Commission’: the Kelantan Islamic Affairs Department and Sisters in Islam. Muslim organisations boycotted the conference and accused its proposal for an interfaith commission as being a threat to the “purity of Islam” in diluting the special position given to Islam in the country. A Minister in the Prime Minister’s Department, Datuk Dr Abdullah Md Zin even argued, without elaboration, that the proposed interfaith commission contravened the FC. The proposed functions of the interfaith commission include identifying values and ethical standards universal to all religions, faiths, beliefs and ways of life with a view of promoting the same, and identifying and recommending ways in which harmonious co-existence in the larger society can be promoted and achieved with a view to national harmony and unity. The Muslim aversion to dialogue on equal terms is engendered by the sense that Islam is superior in the constitutional and political order, which has a propensity to create further division.

5. Concluding Observations

The trend favouring an expanded role for Islam in the public order has aggravated inter-ethnic relations. It is clear that the inter-ethnic hostilities and suspicions that existed in 1957 persist today in the twenty-first century. Malay nationalistic sentiments

122 Non-Christians were apparently rooted out of ticket line by checking identification cards which identify whether a person is a Muslim: J. Sadiq, “‘The Passion’ premieres in Malaysia, Piracy Thrives”, Reuters, 12 August 2004, archived at <www.reuters.org>, visited on 12 August 2005.
126 The proposal for the Interfaith Commission was made by the Bar Council in 2000. Earlier attempts to include Islamic groups were not well received: ‘Discussion begins on interfaith commission’, 24 February 2005, New Straits Times (Malaysia), <www.nst.com.my>, visited on 1 March 2005.
127 Note for example the attitude of the judge in Meor Atiqulrahman, supra note 97, who sees Islam as superior to all other religions.
are inflamed by Islamic supremacy to the detriment of non-Malays. Criticism of Malay privileges and Islamic prominence is viewed as a personal attack on Malays. The attitude of Malay politicians against the non-Malays is aggressive. In the 2005 UMNO General Assembly, its youth wing leader and Education Minister, Hishammuddin Hussein, waved a the traditional Malay dagger, the *keris*, in defense of *Ketuanan Melayu*. Supporters at the meeting applauded his aggressive stance and chanted “*Long Live Malays!*”

State endorsement of Malay nationalism and Islamic supremacy through its pro-Malay and pro-Islam programmes, is translated into law and policy and this adversely affects citizenship rights of the non-Malays. National unity is threatened as inter-ethnic segregation and hostility is exacerbated by Malay demands for increased political and economic dominance. At the grassroots level, there are signs that the common Malaysian is weary of aggravation by Malay supremacy and Islamic supremacy. A 2004 poll on Malaysian youths revealed that more than half of the respondents wanted the removal of ethnic-based political parties and for the focus to shift from ethnicity to unity and integration through the creation *Bangsa Malaysia* (Malaysia race).

The contradictory stances of the Alliance government, in particular UMNO, are disillusioning to the non-Malays. On one hand, the government expressly rejected the *apartheid*-like PAS proposal to have a dual system of laws for Malays and non-Malays in multi-racial Malaysia, which PAS has implemented on a micro-scale on a gendered basis in relation to its edict to have separate supermarket check-out counters to prevent the inter-mingling of the sexes. In its 2004 Alliance manifesto, UMNO reiterated its commitment to Malaysia’s “one system of government for all people”. However, UMNO members have taken an increasingly aggressive stance in defending Malay nationalism and Islamic supremacy.

The delicate inter-ethnic compromises struck during the drafting of the FC must be read in context and in light of the today’s circumstances where Malaysian Chinese and Indians (and other non-Malay citizens) have been born in Malaysia and have lived there for a number of generations, and therefore, should be as entitled to equal treatment and privileges as the Malaysian Malays. A solution is required which strikes

---


129 R. Ismail and R. Pakiam, ‘Values of our youth’, *New Straits Times (Malaysia)*, 31 January 2005 <www.highbeam.com>, visited on 28 June 2005. The poll was conducted by Merdeka Centre for Opinion Research, which tracks public opinions regularly. It also showed that youths were split down the middle on quotas in universities and privileges for Malays.

130 PAS revealed their plans for an Islamic state of Malaysia in a document ‘Islamic State Document’ which explained that a PAS-inspired Islamic state would mean the full implementation of the sharia law, including the controversial ‘hudud’ penal code which allows amputation of limbs for theft, although non-Muslims would be given a choice to choose between sharia law or the English-based secular laws: ‘Malaysian Opposition Faces Brickbats over Islamic State Plan’, *supra* note 115.

and maintains the delicate balance between nation-building and ethnic aspirations in order to prevent the ethnic fallout which dominated the early days of Malaysian history. In any event, changes to the delicate balance of ethnic interests embodied in the FC must not be a product of unilateral imposition by the politically and numerically dominant Malay community; but achieved through genuine consultation and participation, consonant with the tenets of democratic pluralism and respect for minority rights.

132 The bloodiest ethnic clash between the Chinese and Malays in the history of Malaysia was in 1969.