Competing Imperatives: Conflicts and Convergences in State and Islam in Pluralist Malaysia

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ABSTRACT

This article examines the evolution of state–religion relations in Malaysia from a secular-constitutional democracy with Islamic symbols to one where Islam as the religion of the federation is becoming a public doctrine, influencing norm-creation and norm-critique. It identifies a normative convergence between the Syariah and the secular courts on the content of religious freedom and the imperative to maintain a closed community. In this regard, this paper locates this development within a wider movement to reverse the priority of secular norms over Islamic ones. It analyses the attendant social, legal, and political factors influencing these developments and considers their implications for the equal rights of non-Muslim citizens and the ideal of a democratic Malaysian state.

1. INTRODUCTION

Malaysia has a pluralistic legal system, what is sometimes termed weak legal pluralism.\(^1\) It has a general system of courts that accommodates a system of state Islamic or Syariah courts. These Syariah courts have jurisdiction over persons professing Islam with respect to a limited range of personal laws. Muslims make up 61.3% of the population in Malaysia. The remaining 40% of the population profess Buddhism (about 20%), Christianity (about 9%), Hinduism (about 6%), Confucianism/Taoism/other traditional Chinese religions (about 1.3%), and Sikhism and other beliefs (about 2.1%).\(^2\) It has been observed that there is a significant overlap between ethnicity and religion in Malaysia, such that most persons of Chinese origins profess Buddhism, while persons of Indian origins tend also to profess Hinduism. This overlap is most marked with respect to Islam and Malay ethnicity, with almost all persons

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of Malay origins professing Islam in Malaysia. In comparison to the High Courts (i.e., non-religious / civil) courts, which have inherent and unlimited jurisdiction, the Syariah courts are state courts with limited jurisdiction. This establishes a hierarchy of courts with the High Courts having supervisory jurisdiction over the Syariah state courts.

A constitutional amendment in 1988, however, has thrown this hierarchical relationship into disarray. The new article 121(1A) sought to delineate the jurisdictions of the Syariah courts from the High Courts. It stated that the High Courts of Malaysia and courts subordinate to it ‘shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts’. The clause purportedly serves to preserve the autonomy of the Syariah courts to determine matters of Islamic law. However, the full impact of this constitutional amendment is still unraveling. In theory, this new constitutional arrangement envisages the two systems of law functioning separately and independently of each other, each governing a different sphere of legal life. The secular legal system continues to exercise territorial jurisdiction over all matters of social, legal, and political life. The religious system exercises personal jurisdiction over all Muslims in respect of a narrow range of Islamic law. In reality, however, there is considerable overlap between the two legal systems and how this jurisdictional overlap is resolved has significant bearing on the rights and statuses of individuals in Malaysia. One important area of overlap addresses the religious freedom of Muslims to convert out of Islam. It demonstrates a conflict between the constitutional guarantee of individual religious liberty and the enforcement by the Syariah courts of internal Islamic norms.

Another area of overlap has arisen in family cases involving litigants of mixed religious affiliations, specifically Muslims and non-Muslims, in the context of divorce and custody disputes. A common scenario involves the estranged spouse (usually the husband) converting to Islam and unilaterally converting his children to Islam, which allows him to bring the matter before the Syariah courts. The non-Muslim wife is placed in an implacable position because she has no right of audience before the Syariah court. In these circumstances, she can only seek redress before the secular courts. There is clearly an overlap of jurisdiction in these circumstances. Not only has article 121(1A) not provided any clarity on this jurisdictional conflict, it has led to the development of highly confused and unsatisfactory jurisprudence on this issue.

That there would be overlap between the secular and the Islamic legal systems is unsurprising. The ‘contribution’ of article 121(1A) is that it has judicialized the competing claims to authority between the secular and religious courts and recast it as a jurisdictional conflict. It has become the focal point of competition between

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3 In recent times, this sociological phenomenon has been buttressed by the legal condition, specifically through the effect of Article 160 of the Federal Constitution of Malaysia which defines a Malay person as, among others, professing the Muslim religion.

 secularists in defense of a secular Malaysian state (albeit with Islamic symbols) and those who want Malaysia to be recognized as an Islamic state and to supposedly reinstate Islam as the basic and higher law of the country. This judicialization could be said to have contributed to the aggravation of the secular-religious divide as the cases tend to be heavily publicized and thereby open to media inflammation and politicization.

This article examines these developments and investigates the consequences of article 121(1A)’s attempt to insulate the Islamic legal system from perceived interference by secular courts. It shows that what appears as accommodation of religious autonomy have become challenges to the initial consensus on the nature of the state. This undermines the capacity of the Malaysian state to accommodate different racial and religious groups on the basis of equal citizenship. The incapacity of the legal system to resolve competing claims in a satisfactory manner has contributed to increasing social fragmentation.

Part II identifies the first generation consensus of Malaysia as a democratic constitutional state with Islamic symbols. Part III identifies the deconstruction of this political consensus and the corresponding social-political fissures through the lenses of article 121(1A) cases. Part IV identifies the seeming convergence between the secular and religious courts’ conception of religious freedom. Part V contends that such jurisprudential convergence responds to a wider movement to reverse the priority of secular constitutional norms over Islamic ones. It highlights that such priority reversal would seriously undermine the equal rights of non-Muslim citizens. Part VI offers some concluding reflections.

2. MALAYSIA, A DEMOCRATIC CONSTITUTIONAL STATE WITH ISLAMIC SYMBOLS

Despite including a declaration that ‘Islam is the religion of the Federation’ in article 3(1) of the Federal Constitution, the founders/drafters did not intend for Malaysia to be an Islamic state. The original (historical) understanding of article 3 is that it affirms the symbolic value of Islam as an important part of Malaysian history, but that its inclusion would not detract from the secular foundation of Malaysia as a democratic constitutionalist state. Malaysia was not envisaged or designed as a theocracy where political and religious leadership is fused. Neither did it derive its general legal system from religious or divine law. In fact, sub-provision (4) of article 3 clarifies that ‘Nothing in this Article derogates from any other provision of this Constitution.’ Since the rest of the constitution affirms a democratic form of constitutional government, and even sets out a bill of rights affirming a range of fundamental liberties borrowed from non-Islamic liberal constitutions, it was clear that article 3(1) was not meant to replace the contractualist foundation of the state with a

5 In comparison, Arts 1 and 2, Islamic Republic of Iran Constitution (1979), expressly refer to the Quran. Furthermore, Art 1 of Saudi Arabia’s 1993 Basic Law of Government states ‘God’s Book and the Sunnah’ are the substantive constitution.

6 The section of fundamental rights in the Malaysian constitution was based on similar provisions in the Indian Constitution which itself was influenced by the Bill of Rights in the American Constitution. Joseph M Fernando, The Making of the Malayan Constitution, MBRAS Monograph No 31 (Academe Art & Printing Services And Bhd 2002) at 212. The Indian Constituent Assembly expressly modelled parts of
religious one. This original intent was widely accepted by constitutional scholars, judges, and politicians until the last decade or so. Harding, a long-time scholar on Malaysian constitutional law, noted in 2002 that it was ‘until recently always been agreed that this provision does not in any sense establish an Islamic state, but merely provides for the religious nature of state ceremony’.7

This understanding of article 3(1) was manifest in the judgment of Supreme Court of Malaysia (the highest court of Malaysia at that time) in the 1988 case of Che Omar bin Che Soh v PP.8 There, the Supreme Court held that article 3(1) was meant to affirm the use of Islamic ‘rituals and ceremonies’ in public affairs, in particular during official state events.9 While the court recognized that Islam, as a religion, was not constrained to merely rituals and ceremonies, it also held that the internal religious perspective did not determine constitutional interpretation. On the contrary, it held that the Federal Constitution was drafted with a view to preserve legal continuity at independence where the common law was the general system of law, and Islamic laws only applied as a matter of personal laws in limited areas such as marriage, divorce, and inheritance.10 Thus, the Court reasoned:

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\ldots \text{it is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word ‘Islam’ in the context of Article 3. If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void. Far from making such provision, Article 162, on the other hand, purposely preserves the continuity of secular law prior to the Constitution, unless such law is contrary to the latter.} \]

There is strong historical evidence that the political elites involved in the founding of the Malaysian state were in agreement that the democratic parliamentary system based on a secular constitution was considered to be the most appropriate political arrangement for the multi-racial, multi-religious society. Former Chief Justice, Tun Mohammed Suffian, wrote in 1962: ‘For many generations, diverse ethnic groups have lived together in peace and harmony and there was no overwhelming desire that the newly independent state should be an Islamic state.’12 Barisan Nasional, which won the first federal elections in 1955 and has formed the federal government after every general elections since then, was formed as a coalition of the United Malay National
Organization/UMNO, the Malaysian Chinese Association/MCA, and the Malaysian Indian Congress/MIC.\textsuperscript{13} There was explicit agreement among them during negotiations on the independence constitution that in spite of article 3, there was ‘no intention of creating a Muslim theocracy and that Malaya would be a secular state’\textsuperscript{14} Furthermore, the common understanding was that the inclusion of article 3 (and other constitutional provisions affirming the historical importance of the Malay culture) would not undermine the equal civil rights of non-Muslims. In fact, Malaysia’s first Prime Minister declared (somewhat dramatically) in 1959: ‘Unless we are prepared to drown every non-Malay, we can never think of an Islamic Administration.’\textsuperscript{15}

\textbf{A. Formalization as Legal Centralization}

The post-colonial creation of a multi-racial, multi-religious Malaysia had two pressing requirements: first, to construct a viable government, and secondly to legitimize the state. The former required the aggregation of authority to enable the new government to govern the newly independent state,\textsuperscript{16} while the latter entailed the entrenchment of a secular contractualist state foundation. Constitutionalization\textsuperscript{17} has a centralizing effect as it tends to unify normative orders into an internally coherent system (monist) system that is both statist and positivist.\textsuperscript{18} This is consistent with the ideology of legal centralism which sees law as the ‘law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions’.\textsuperscript{19} Other normative orderings such as the church, the family, the voluntary association, and the economic organization are often seen as ‘ought to be and in fact are hierarchically subordinate to the law and institutions of the state’.\textsuperscript{20} The formalization of the Islamic legal system took place in this context. One might view the formalizing of the Islamic legal system in Malaysia as serving the purpose of integrating and subsuming this competing claim to authority under the state structure.

The adoption of an independence constitution—the Federal Constitution of Malaysia—as the supreme law of the land formalizes a legal hierarchy. It assumed legal authority to codify Islamic law and create administrative bodies to implement such codified law. Codification makes state law the source of Islamic law that is administered within the state, and of Islamic bodies (including courts) administering those laws. Furthermore, in assuming the powers to formalize Islamic law and

\textsuperscript{13} The Alliance won a landslide victory, sweeping 51 seats out of the contested 52. HP Lee, ‘Constitutional Amendments in Malaysia’ (1976) 18 Mal LR 59, 62.

\textsuperscript{14} Fernando (n 3) 162–63; see also J Norman Farmer, ‘Constitutional Change in Malaya’s Plural Society’ (1957) 26(10) Far East Sur 145–52, 149.

\textsuperscript{15} See Fred R von der Mehden, ‘Religion and Politics in Malaya’ (1963) 3 Asian Surv 609, 611 (quoting Straits Times, 1 May 1959).

\textsuperscript{16} Notably, James Madison stated in The Federalist Papers No 51 (1788): ‘In framing a government which is to be administered by men over men . . . you must first enable the government to control the governed; and in the next place oblige it to control itself.’

\textsuperscript{17} Interestingly, it has been argued that constitutionalization was designed to maintain maximum British influence over the colonies after independence. Melvin Eugene Page and Penny M Sonnenburg, Colonialism: An International, Social, Cultural, and Political Encyclopedia (ABC-CLIO 2003) 144–46.

\textsuperscript{18} See William Twining, Globalisation and Legal Theory (Butterworths 2000) 232.

\textsuperscript{19} John Griffiths, What is Legal Pluralism? (1986) 24 J Legal Pluralism 1, 2.

\textsuperscript{20} ibid.
bodies, the state disconnects religious law from its religious source, and circum-
scribes the scope of the law and the powers of the bodies administering it. Codification of Islamic law means that Syariah law as applied in religious courts is embodied in positive state legislation (fiqh), rather than derived from ad hoc judicial enquiries into religious texts. These codes are promulgated by each constituent state within the Federation of Malaysia as part of the state’s legislative powers. This is sanctioned by article 74 of the Federal Constitution read with List II (the State List) in the Ninth Schedule, which specifically provides for the power of the states to legislate upon ‘Islamic law and personal and family law of persons professing the religion of Islam’. These include:

[T]he Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public 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, organization and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.

Thus, the Federal Constitution locates the legal source of the Syariah laws administered in Malaysia to state law. Even though Islamic jurists in Malaysia may supplement legislation with fatwas (formal legal opinions on religious questions submitted for their consideration), these also need state sanction in order to be binding and enforceable; they have to be published in the government gazette. These media of legal change exist in considerable tension with the revealed quality and restricted sources of Islamic law.

Islamic bodies in Malaysia are creatures of statute, whose powers are circumscribed by those statutes. List II of the Federal Constitution, by their reference to

22 Shuaib (n 28) 43.
23 See, for example, Administration of Islamic Law (Federal Territories) Act 1993 s 34(2); Administration of Islamic Law Enactment 1989 (Selangor) s 31(2). See also Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications [2009] 6 Malayan Law Journal 354.
Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions’, ‘mosques or any Islamic public places of worship’ and ‘Syariah courts’, locates within the constitution the legal source for the administrative organs for Islamic law in Malaysia. Each constituent state in the federation administers its own system of Islamic law through three major statutory bodies: the Majlis Ugama Islam (Council of the Muslim Religion), the Mufti (the chief ulama or religious scholar), and the Syariah courts. List II limits the jurisdiction of the Syariah courts only to ‘offences by persons professing the religion of Islam against precepts of that religion’. In addition, federal law expressly limits the jurisdiction of the Syariah courts in terms of the subject matter and object of the law, as well as the range of punishment. The Syariah Courts (Criminal Jurisdiction) Act 1965 provides that Syariah courts only have jurisdiction over offences against the precepts of the religion of Islam. Such offences are applicable only to persons professing Islam and the maximum punishment for these offences are three year imprisonment, a fine not exceeding RM 5000 and/or six strokes of the cane.

B. Competing Authorities: Religious and Traditional Resistance to State Formalization

Resistance to this centralizing force of the Federal Constitution has come from various segments of the Malaysian society. This resistance today takes the form of a claim for priority reversal as those opposing the secular constitution claims the higher authority of Islam. Here, I identify four overlapping interest groups that are the motivating force behind the claim for priority reversal: Islamists, state governments, the Malay sultans, and Malay nationalists. Islamists deny the priority of constitutional norms, rejecting the claim that secular norms can and should control religious laws. The argument is that the secular state does not have the authority to legislate upon Islamic laws, which is given by Allah and thereby above the state. Some argue that only a truly Islamic state would be able to legislate Islamic laws, though the question of what would constitute an Islamic state is unclear. Others are stricter, arguing that no state authority could ever legislate Islamic laws, which falls within the purview of religious jurists. Muslims challenging the legitimacy of a secular state reject the idea that secular norms as embodied within


26 The Council of Muslim Religion is the general body responsible for the administration of the Islamic religion. Ahmad Mohamed Ibrahim, 'Recent Developments in the Administration of Islamic Law in Malaysia’ in Ahmad Mohamed Ibrahim and Abdul Monir Yaacob (eds), The Administration of Islamic Laws (Institute of Islamic Understanding 1997) 10.

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

28 Syariah Courts are state courts and are responsible for the administration of justice within the state only.


30 Mohammed Hafez defines Islamists as ‘Muslims who feel compelled to act on the belief that Islam demands social and political activism ... to create a separate union for Muslim communities’. Mohammed Hafez, Why Muslims Rebel (Lynne Rienner Publishers 2003) 5.
the Federal Constitution can govern religious norms. Thus, they reject the secular courts’ jurisdiction to review Syariah court decisions (as a lower court) as an interference with the religious autonomy of Muslims. Jurisdictional boundaries imposed by a secular legislator are likely to be considered ‘illegal’ for being contrary to religious doctrine.

Resistance have also come from state governments. Since Islam is a state (rather than a federal) matter, there is some rivalry between the state and federal governments in trying to influence the content and administration of Islamic law. This contestation becomes most acute when the federal and state governments are controlled by different political parties. For instance, the state governments of Terengganu and Kelantan have challenged the power of the Federal Constitution to limit the scope of Islamic laws in Malaysia while under opposition control, ie the Islamic party (Parti Islam Se-Malaysia or PAS). One of the initiatives the PAS government implemented when it took over control of the state government in 1990 was to enact Islamic criminal laws (hudud laws), which clearly exceed state powers under List II and contravene the limits on punishments set out in the Syariah Courts (Criminal Jurisdiction) Act 1965. The Kelantan Shari’a Criminal Code (II) 1993 seeks to govern crimes such as theft and rape, prescribing archaic punishments such as cutting off one’s hand and whipping.31 These are not strictly speaking crimes pertaining to the precepts of Islam. While the laws were passed by the state legislature, they remain in abeyance. The Criminal Code could be challenged for being unconstitutional, and invalidated under article 4(1) of the Federal Constitution which states: ‘This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.’32 A senior lawyer filed suit in 2002 to invalidate the Kelantan Criminal Code and a similar enactment, the Terengganu Shari’a Criminal Offense (Hudud and Qisas) Enactment 2002 passed when PAS controlled the Terengganu state legislature. The matter has not been resolved.33

The third sector of resistance is a complex manifestation of traditional Malay authority resisting the centralizing force of a colonial and later post-colonial state. The British colonized the loosely organized Malay sultanates in today’s Peninsula or West Malaysia through a system of indirect rule,34 where the Malay sultans agreed to appoint a British Resident or Advisor who would advise them on all matters of law and government except Malay customs and the Muslim religion.35 This

32 Furthermore, art 75 of the Federal Constitution states: ‘If any 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.’
33 The challenge was on the basis that that the state legislatures had acted unconstitutionally in trespassing on the powers of the federal legislature. ‘Lawyer Withdraws Suit Against T’ganu hudud bill, Kelantan Case To Go On’ Malaysiaikini (Malaysia, 25 June 2002) <http://malaysiaikini.com/news/11938> accessed 10 May 2011.
34 See generally Rupert Emerson, Malaysia, A Study in Direct and Indirect Rule (Macmillan 1937) 203.
35 For example the Pangkor Treaty of 1874. The Malay sultans ‘invited’ British intervention with the objective of reinforcing their political position, through recognition of their claim to the sultanate, over competing claims by family members, and for protection against threats of war from other sultanates and...
system depended on preserving the appearance of the sovereignty of the Malay sultans as a symbolic matter, while the British effectively governed Malaysia and instituted the common law as the general law of the land. In this colonial process of aggregating effective authority from symbolic authority, religion (as one of the two areas reserved to the Malay sultans) was and continues to be identified with the internal sovereignty claims of the Malay-Muslim sultans, and their subjects (mostly identified with the Malay-Muslim community). This complex history intertwining Islam with Malay sovereignty claims should be understood as one contributing factor motivating demands for religious autonomy and defiance to legal centralization.

A third group are Malay nationalists. In recent times, Malay nationalism has become increasingly intertwined with claims for an Islamic state, understood as the prioritization of Islam over other religions and legal systems. As Gordon Means observed about the relationship between Islam and Malay political claims, ‘[t]o the Malays, the special position of Islam, recognized under British rule, symbolized that the country was [still] legitimately theirs.’ To protect the superior position of the Malay ethnic group therefore requires also the superordination of Islam in the constitutional order. Indeed, there has been proliferation of ethno-religious civil society organizations such as the Angkatan Belia Islam Malaysia (Malaysian Islamic Youth Movement or ABIM) and later Pertubuhan Pribumi Perkasa Malaysia (Malaysian Body for the Strengthening of the Pribumi, or simply Perkasa) in recent times. They have been extremely vocal in asserting the superiority of Islam (as part of the Malay identity) in Malaysia.

3. FROM WEAK PLURALISM TO FRAGMENTATION? ARTICLE 121(1A) AND APOSTASY

A. Delineation and Disagreements: Religious Autonomy under Article 121(1A)

The constitutional amendment to include article 121(1A) in the Federal Constitution was intended to supposedly clarify the relationship between the secular

36 The British variously affirmed the sovereignty of the Malay sultans through executive declarations, treaty assertions and even in judicial decisions See for example, the case of Mighell v Sultan of Johor [1894] 1 QB 149 which affirmed the status of the Johor sultan as an independent sovereign clothed with immunity from the English court’s jurisdiction. The case involved a breach of promise of marriage. Similarly, see also Duff Development Co v Government of Kelantan [1924] AC 797. See also Simon C Smith, “Moving a Little with the Tide”: Malay Monarchy and the Development of Modern Malay Nationalism’ (2006) 34(1) J Imp Commonwealth History 123, 124–25.

37 Bagehot explored a similarly dualist notion of authority where he distinguishes between the dignified parts of the constitution and the efficient parts. See generally Walter Bagehot, The English Constitution (Oxford World’s Classics reprint 2001).

and the Islamic legal system by affirming that matters of Islamic law are within the jurisdiction of the Syariah courts. The article reads:

The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

(Courts referred to in clause (1) are the High Courts of Malaysia.)

The amendment thus served to assert the legal autonomy of the Syariah courts from secular court intervention. It however fails to address fundamental areas of overlap. As mentioned, one area of significant overlap arises in disputes involving both Muslim and non-Muslim litigants, and which would fall within the concurrent jurisdiction of both the secular and the Islamic courts. It has been observed that it was not within the intention of the Malaysian Parliament when it amended the constitution to exclude the jurisdiction of the secular courts in cases of mixed litigants. Former Attorney-General, Tan Sri Abu Talib, who was responsible for drafting and introducing clause 1A, have publicly stated that the clause was meant only to resolve jurisdictional conflicts in cases affecting Muslims, and not to abrogate the constitutional rights of non-Muslims.39 It has thus been suggested that article 121(1A) only seeks to confirm that the secular courts should not interfere with a Syariah court decision that was properly reached within its jurisdiction in cases involving personal law disputes between Muslims.40 In other words, the secular courts do not act as appellate courts to the Syariah courts. This was the position even before article 121(1A) and should be fairly uncontroversial.41

The other controversial area of overlap arises when Muslim adherents seek the vindication of their constitutionally guaranteed rights against certain impositions of Islamic law. This has arisen most notably in cases involving conversion out of Islam. Here, the primary objection is not that the rights of non-Muslims are directly implicated and ignored in cases before the Syariah courts. Instead, the concern is that secular courts fail to protect the constitutionally guaranteed rights of litigants by declining jurisdiction in favour of the Syariah courts.


40 ‘If two Muslims have a problem involving their personal law (for example, a divorce between a Muslim couple), then this is a matter within the jurisdiction of the syariah courts. The civil courts should not interfere when one party comes to the civil court after losing a case in the syariah courts.’ Shanmuga Kanesalingam, ‘Article 121(1A) - What Does it Really Mean?’ The Sun (Malaysia, 11 December 2006) <http://www.malaysianbar.org.my/members_opinions_and_comments/article_1211a_what_does_it_really_mean_html> accessed 10 May 2011.

41 Note however that there were cases where the secular courts may be accused of overstepping their jurisdictional boundaries in setting aside Syariah court judgments which involved exclusively Islamic law and Muslim parties. See for example Commissioner for Religious Affairs v Tengku Mariam (1970) 1 MLJ 220; Myriam v Mohamed Ariff (1971) 1 MLJ 265.
B. Individual Religious Liberty and Group Autonomy: The Intersection Between Article 121(1A) and Article 11(1A)

As the jurisprudence now stands, Malaysia’s highest court has given a broad interpretation to article 121(1A) in favour of internal autonomy for Syariah courts, to the detriment of the individual’s religious liberty rights. In the 1999 case of Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah, the Supreme Court effectively held that as long as a matter involves Islamic law, the secular courts would have no jurisdiction over the matter. This is the case even where there are no express statutory provisions vesting the matter within Syariah jurisdiction. Jurisdiction can be impliedly conferred. The Court reasoned, since Syariah courts are expressly vested with jurisdiction over matters of conversion to Islam, by ‘necessary implication’ matters concerning conversion out of Islam (apostasy) would also fall within their jurisdiction.42

The effect of Soon Singh is that secular courts would not grant a declaration that a person is no longer a Muslim despite his express declaration to the court in person. In this case, Soon Singh who was brought up a Sikh had converted to Islam when he was 17 years old (still a minor). His conversion was duly registered at the Syariah Court as was required under the state’s administration of Muslim Law enactment. At the age of 21 years, he went through a baptism ceremony into the Sikh faith. He then executed a deed poll declaring unequivocally that he was no longer a Muslim, and applied for a declaration from the High Court of Kuala Lumpur confirming that he was no longer a Muslim. The Islamic Religious Department of Kedah objected to his application. The case was appealed to Malaysia’s highest court, which declined to exercise jurisdiction on the basis of article 121(1A).

The Federal Court rejected the argument that a refusal to affirm Singh’s personal election would violate article 11(1) which guarantees that ‘[e]very person has the right to profess and practice his religion and, subject to Clause (4), to propagate it.’43 Its reasoning was rather ingenuous; the Court stated that since the High Court did not make any ruling as to whether Singh was still a Muslim despite his renunciation of Islam, the Court did not infringe upon his religious liberty.44

Many have severely criticized this position favouring group autonomy over individual liberty as being unsupported by article 121(1A) of the Federal Constitution. Harding for example argues that article 121(1A) did not intend to oust the jurisdiction of the High Court to review decisions of the Syariah courts.45 Similarly, Thio contends that article 121(1A) is inconclusive: ‘Whether article 121(1A) effectively bars the civil court from exercising inherent, concurrent jurisdiction in apostasy cases remain unclear.’46 These scholars view individual choice as being an intrinsic part of

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42 The Court did say that it was desirable that that jurisdiction be expressly conferred but that it was not absolutely necessary. Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor [1999] 1 MLJ 489, 501–2.
44 Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor [1999] 1 MLJ 489, 496.
45 Harding (n 13) 172–73.
religion. Thus, for example, Nurjaanah Abdullah argues that ‘[w]hether or not a person has converted or renounced is a question of fact that is to be determined on the basis of the person’s declaration and evidence of his religious practices’. Mohamed Azam similarly states, ‘There is no basis from the constitutional point of view to deny the right of individuals, including Muslims to change a religion’. On the other hand, scholars like Abdul Aziz Bari argue that not only is it constitutional to restrict conversions out of Islam, it is necessary to ensure social stability. Here, what Bari appears to have in mind is the numerical stability (and thereby dominance) of the Malay-Muslim community.

The current state of the law strongly prioritizes group autonomy over individual liberty. Now, it is conceivable for group autonomy to be consistent with guarantees of individual religious liberty. After all, religious faith entails both the internal dimension of belief (forum internum) and the external manifestation of practice (forum externum). The latter is usually premised upon and requires the existence of a community of believers with whom individuals can form meaningful relationships and worship together. As a group, believers seek the ability to regulate their internal affairs according to the doctrines and dictates of their religious belief, preferably without the interference of the state. A judicial approach that fails to take into account the internal aspirations of religious communities, often characterized as lacking plurality consciousness or that is too monist, statist, and positivist, is obviously inappropriate in a religiously, racially, and culturally diverse country like Malaysia. The apostasy cases, however, raise particular difficulties because they concern the individual’s right to choose her religion, which conflicts with the interest of the religious community for group preservation. There is a perspective within Islamic doctrines that apostasy is a threat to the solidarity and unity of the Islamic polity. It is akin to treason, a crime of disloyalty to the community, and one that is critically justified on the basis of the security of the Islamic state. What article 121(1A) has done is to

50 See generally Werner Menski, Comparative Law in a Global Context: The Legal Systems of Asia and Africa, (CUP 2006).
51 Twining criticized Western legal theory for focusing on conceptions of law that tend to be monist (one internally coherent system), statist (the state has a monopoly of law within its territory), and positivist (what is not created or recognized as law by the state is not law). Twining (n 25) 232.
52 Sarakhsi (a famous Hanafi jurist) has argued that the death penalty for apostates is necessary because apostates would help strengthen the enemies of Islam (ie the unbelievers). See Abdullah Saeed and Hassan Saeed, Freedom of Religion, Apostasy and Islam (Ashgate 2004) 68. Hageel argues that it serves to deter those who embrace Islam for a certain period of time in order to corrupt the state, and also ‘to purify society from any hypocrites and religion traders’: Sulieman Abdul Rahman Al Hageel, Human Rights in Islam and Rebuttal of the Misconceived Allegations Associated with These Rights (2nd edn, King Fahad National Library Index 1999) 158.
abstract the question of individual religious choice into one of jurisdictional conflict. This contest between the religious and the secular involves the competing notions of ‘symbolic’ and effective authority, indigenous and supposedly foreign norms.

C. Mixing Religious Autonomy with Racial-Religious Nationalism: ‘As a Malay, the plaintiff remains in the Islamic faith until her dying days’53

Indeed, religious liberty claims in Malaysia are often further complicated by racial nationalist sentiments. Those who claim that Malaysia is an Islamic state also have a tendency to accuse their critics of being traitors to Islam (and the Malay race), and worse, agents of Western neo-colonialism.54 Some even claim that human rights are un-Asian55 or un-Islamic.

Such intertwining of racial-nationalist sentiment and Islam has meant that conversion cases involving Malays born into Islam have attracted especially hostile opposition. Proponents of individual liberty find egregious the current lack of individual freedom for persons born to Malay-Muslim parents and raised as Muslims, who in adulthood decide to adopt a religion of their choice. Here, no individual election was ever really made to embrace Islam in the first place such that one may even dispute if the applicant is in fact apostatizing. However, these cases attract vehement opposition in Malaysia as the convert is seen not merely as leaving Islam but also as betraying the Malay community. The case of Lina Joy, of Malay descent and raised as a Muslim by Malay-Muslim parents, highlighted this.56 Joy converted to Catholicism in her twenties and was engaged to marry a Catholic man. She was, however, thwarted in her marriage plans because she was still registered as a Muslim, and thus could only marry under Islamic marriage laws and by an Islamic cleric (the kadi). Her fiancé would also have to convert to Islam in order to marry her.

Joy’s attempt to seek recognition of her religious status as a Catholic was rejected by the High Court, the Court of Appeal and finally the Federal Court (the latter two in split decisions). She had sought an order for the National Registration Department to remove ‘Islam’ as her stated religion in her identification card. Her application put article 11(1) in question as part of her claim was for the invalidation of parts of the Administration of Islamic Law (Federal Territories) Act 1993, other related State Enactments and all other state or federal legislation which forbid or imposed restrictions on conversion out of Islam for being inconsistent with article

53 Lina Joy v Majlis Agama Islam Wilayah, 2 MLJ 119 (High Court, 2004).
54 Ahmad Ibrahim, Ke Arahan Islamisasi Undang-Undang di Malaysia, Masalah dan Kemungkinan, in Ke Arahan Islamisasi Undang-Undang di Malaysia (Yayasan Dakwah Islamiah Malaysia 1988) 1.
55 This is similar to the rhetoric of ‘Asian values’ Malaysia’s fourth Prime Minister, Mahathir Mohammad, employed to delegitimize human rights concerns and even to justify his government’s illiberal actions. For example, he says: ‘As we all know the pressure to democratise and respect human rights is not due to concern for the well-being of people, but for the benefit of those rich people wishing to reap more profits for themselves in more countries.’ Dr Mahathir bin Mohamad, Agenda for a New Asia, Address to the Asia Society, Hong Kong (28 October 2000) <http://www.aseansec.org/2805.htm> accessed 12 May 2011.
56 See Lina Joy v Majlis Agama Islam Wilayah, 2 MLJ 119 (High Court, 2004); Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors 6 MLJ 193 (Court of Appeal, 2005); Lina Joy v Majlis Agama Islam Wilayah Persekutuan 4 MLJ 585 (Federal Court, 2007).
In rejecting her application, the civil courts declined to rule that restrictions under Syariah laws on conversion out of Islam violate religious liberty guarantees under article 11(1) of the Federal Constitution. The Court of Appeal and the Federal Court upheld the autonomy of the religious legal system in stating that the National Registration Department was right to insist on receiving a confirmation from the Syariah court that Joy was no longer a Muslim before granting her request.

Like in Soon Singh, this raises difficult issues about the role of the secular courts, both in terms of their place in the Malaysian legal-political system, and in terms of judicial self-perception. What makes the Lina Joy case a greater incursion into individual liberty is the infiltration into judicial opinion of theological views inclined towards preservation of faith and community, and nationalist ideology inclined towards preservation of Malay dominance. Thus, the Court of Appeal, in its majority judgment joined by two Muslim judges, declared:

Renunciation of Islam is generally regarded by the Muslim community as a very grave matter. . . . The Muslim community regards it as a grave matter not only for the person concerned, in terms of afterlife, but also for Muslims generally, as they regard it to be their responsibility to save another Muslim from the damnation of apostasy.58

Before that, in a similar vein, the High Court had stated:

. . . 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.59

These declarations were obiter, and not necessary for the courts’ decisions. However, it seems that the judges felt compelled to comment directly on the undesirability of apostasy and even endorse its close association with the need to defend the Malay identity.60

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57 She also applied for declarations that the Syariah Criminal Offences (Federal Territories) Act 1997 and other related State Enactments were not applicable to her as she was no longer a Muslim.
59 Lina Joy v Majlis Agama Islam Wilayah [2004] 2 MLJ 119, ¶ 59. The High Court judge based this on art 160(2) of the Federal Constitution, an interpretation clause, which states: ‘“Malay” means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom.’ This argument is flawed. Art 160(2) is merely an interpretation clause. It provides the legal definition for terms used in the constitution. It was not meant to have substantive effect. Specifically, it cannot be said that definitions create permanent rights and obligations. For example, art 160(2) defines a ‘Member of the administration’ as a person holding an office in a State or holding office as a member of the Executive Council. Art 160(2) does not determine how a person becomes a Member of the administration, but simply if a person ceases to hold office as a Minister, Deputy Minister, etc, it merely means that the person ceases to be a Member of the administration as defined in art 160(2). As such, renouncing Islam merely means that Lina Joy is not de jure Malay, for legal purposes, even though she is de facto Malay (as an empirical fact).
60 The case attracted widespread national and international attention and debate. Joy, her fiancé, and her lawyers received death threats. For local news reports, see for example, ‘Lawyers Trade Barbs in Lina Joy Apostasy Case’ New Straits Times (Malaysia, 4 July 2006) <http://www.malaysianbar.org.my/bar_news/
4. NORMATIVE CONVERGENCE: THE SUBORDINATION OF RELIGIOUS FREEDOM TO THE PRESERVATION OF FAITH AND COMMUNITY

These cases concerning the right to choose one’s religion highlight a critical judicial convergence between the secular courts and the Syariah courts on the content and scope of religious freedom for Malay-Muslims in Malaysia. This idea of convergence was highlighted in a 1994 article *The Qur'an and the Common Law*, where Donald Horowitz argued that Islamic law reform in Malaysia is producing a system that is ‘simultaneously more Islamic and more Western than the system it is in the process of displacing.’ He argues that the boundaries between the two systems are ‘highly porous’ and therefore ‘ideas can and do move from one to the other’. His position is that convergence in substance of the common law and Islamic law is inevitable, even if the two systems differentiates in form.

The increasingly restrictive reading of religious freedom in Malaysia is one such convergence. The judgments in *Lina Joy* adopt a view of religious freedom that echoes the concerns and reasoning of a religious court constituted to serve religious functions and advance religious purposes, including to preserve souls and the community. For example, in a case rejecting the application of a convert to leave Islam and to revert to Hinduism, the Syariah High Court of Kuantan reasoned that the applicant wanted to leave Islam only because he was confused, lonely, and that his life is uncertain. The court also questioned the soundness of the applicant’s choice to embrace Hinduism: ‘In his testimony to the court, the application stated that he wanted to return to his original religion, even though he himself did not understand the doctrines of the Hindu religion. The applicant converted to Islam at the age of 20 years and before that he did not practice Hinduism. By leaving the religion, it must be hard for someone to recall the religion that has been long abandoned. Although he did not fully practice the teachings of Islam, the applicant has remained in Islam for 12 years.’

applicant by providing ‘religious education on a continuous basis’ and to ‘find a suitable match for him [so that] he would have a helper or wife in his household’. In response to the argument that refusing to grant the declaration would violate article 11(1) of the Federal Constitution, the Syariah High Court took the position that it guarantees a person the freedom to choose Islam, but not to leave it:

The religious freedom guaranteed under article 11 of the Federal Constitution gives the applicant the right as a citizen to choose his religion. ... However although article 11 guarantees religious freedom, this is not a ticket to change one’s religion as and when one desires.

The Syariah court understandably sees itself as justified in encouraging conversions to Islam and prohibiting conversions out. To the Court, it would indeed be remiss to allow Muslims to damn their eternal souls by apostatizing. This is manifest in the Court’s interpretation of surah al-Baqarah 256: ‘There shall be no compulsion in religion for it is entirely manifest the truth of Islam from the lost’:

This sentence does not mean permission to choose to leave the Islamic religion after one has chosen to adopt Islam. This sentence is the freedom to choose Islam and that there shall not be any compulsion for someone to adopt Islam.

Such a restrictive interpretation of religious freedom in the secular and religious courts is further exacerbated by two developments. First, since 1988, several constituent states in the federation have made it harder to leave Islam by removing laws addressing conversion out of the religion. For example, in the state of Pahang, the Enactment on the Administration of Islam and Malay customs No. 8/82 previously required a person who had previously converted to Islam and wishes to leave the religion to ‘report to the Syariah court as to his decision and the Yang di-Pertua must register the matter’. This section was, however, abolished by the Administration of Islamic Law Enactment No. 3/91 without substitution. This means that there is no law allowing for conversion out. This creates an untenable lacuna in the law.

Second, Syariah laws in many states have been changed to allow Syariah courts to impose penalties on persons who come before it to express a desire to convert out of Islam. For example, Pahang amended its 1982 Administration of the Religion of

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65 In the Matter of Conversion out of Islam, Muhamad Ramzan Maniarason, Case No 06100-099-0161-2005, High Court of Syariah Kuantan, Pahang, JH XXII/II 1427H (6 December 2005) 181, 188–89.
68 Emphasis added. This section 103(2) of the Enactment stated: ‘Whoever embraces the Islamic religion according to this section [dealing with conversion into Islam] and leaves the religion, must report to the Syariah court as to his decision and the Yang di-Pertua must register the matter. Before the decision is reported and registered, the person must be regarded as being of the Islamic religion.’ See also In the Matter of Conversion out of Islam, Muhamad Ramzan Maniarason, Case No 06100-099-0161-2005, JH XXII / II 1427H (6 December 2005) 184.
Islam and the Malay Custom Enactment in 1989 to provide in section 185 that it is an offence for any Muslim to declare that he has ceased to be a Muslim (whether orally, in writing or any other manner). The offence is punishable with a fine not exceeding RM 5000 and/or imprisonment for a term not exceeding three years, and six strokes of the whip. Similarly, the 1995 Islamic Criminal Law Enactment in Sabah makes it an offence for a Muslim to ‘claim[] that he is not a Muslim’, and upon conviction, he/she would be liable to a fine not exceeding RM 2000 and/or imprisonment not exceeding one year.69 Other states criminalizing apostasy include Perak,70 Melaka,71 and Terengganu.72 In some of these constituent states, the Syariah courts may order detention for rehabilitation as a precursor to conviction.73 In the state of Kelantan for example, section 102(3) of Enactment 4/1994 (Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan) provides that if a Muslim shows by his speech or conduct his intention 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 for rehabilitation and to require the person to repent according to Hukum Syarak (Islamic law).74

This increasingly restrictive climate for religious freedom could also be understood as an adverse effect of codification and bureaucratization in the modern state. Statist codification limits the discretionary power of Islamic judges to permit or at least ignore conversions out. The bureaucratic state, in seeking to categorize and classify its citizens/residents, assume broad powers to regulate religious affiliation,

69 See s 55(2), read with s 55(1): ‘whoever by words spoken or written or by visible representation or in any other manner which insults or brings into contempt or ridicule the religion of Islam or the tenets of any lawful school or any lawfully appointed religious officer, religious teacher, Imam, any lawfully issued fatwa by the Majlis or the Mufti under the provisions of any law or this Enactment shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding one year or both.’ See s 55(2) states: ‘A Muslim who claims that he is not a Muslim shall be guilty of an offence under subsection (1) and shall, on conviction, be liable to the punishment thereof provided.’

70 See s 13 of the Perak Islamic Criminal Law Enactment of 1992 provides ‘Any Muslim who by his word or conduct whatsoever intentionally claims to cease to profess the religion of Islam or declares himself to be non-Muslim, shall be considered as insulting the religion of Islam, 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 both.’ Although s 13 refers to blasphemy, it has been regarded as including apostasy as a form of blasphemy.

71 See s 209(1) of the Melaka Administration of Islamic Law Enactment of 1986 makes it a crime to insult Islam. Any Muslim convicted of this offence shall on conviction be liable to a fine not exceeding RM3000 or to imprisonment for a term not exceeding one year or both. Under s 209(2), the Enactment reiterates that a Muslim who declares himself to be out of the religion of Islam, and shall also be regarded as insulting the religion of Islam, and upon conviction is subject to a fine and imprisonment as provided under clause (1).

72 See s 29 of the Terengganu Administration of Islamic Law Enactment of 1996 provides ‘Any Muslim who attempts to renounce the religion of Islam or declares himself to be non-Muslim, shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding one year or both.’

73 See for example, s 66 of the Melaka Shari’a Offences Enactment of 1991.

74 See s 102 (3) of the Council of Religion of Islam and Malay Custom Enactment of Kelantan 1994. The applicants in Daud bin Mamat & Ors v Majlis Agama Islam & Anor [2001] 2 Malayan Law Journal 390 were convicted under this provision. See also s 63(1) of the Enactment of Islamic Criminal Law of Sabah, 1995.
whether deliberately or otherwise. In comparison, in the early days of independence, and indeed even prior to that, the Malay sultans did not have the bureaucratic reach of the state to supervise the number of Muslims within their jurisdictions or to prevent them from changing their names and their religious affiliation. If a Muslim seeks to leave Islam, they could petition to the sultan as the religious head to be exempted from Islamic law. At least one scholar has noted that Malays were known to have petitioned to the sultans to endorse their conversion. Although their petitions were not officially approved, understandably since the sultans would not want to appear to be sanctioning apostasy, the converts were unofficially treated as exempt from prosecution in Muslim courts. Thus, the situation before legal centralization and state bureaucratization was more fluid and allowed greater liberty.

5. POLITICAL CONTESTATION AND CLAIMS FOR PRIORITY REVERSAL: ARTICLE 3(1)

A. Convergence and Priority Reversal

The judicial convergence and corresponding Syariah developments is part of a larger movement within Malaysia to reverse the priority of secular (non-Islamic) over Islamic norms. This clearly manifests itself in attempts to reinterpret article 3(1) of the Federal Constitution into a repugnancy clause for Islamic norms. Notably, this argument had been previously rejected in the 1988 Supreme Court case of Che Omar discussed above. There, counsel had argued that article 3(1), by referring to Islam as the religion of the Federation, effectively imported into the Federal Constitution Islamic law and norms such that all laws must be based upon and be consistent with Islamic laws. It was contended then that the mandatory death penalty was null and void because it was ‘not part of the Islamic hudud or qisas (syarak or Islamic law)’. The Supreme Court did not accept this argument and stated that the constitutional system envisaged that secular laws would have priority over religious ones.

The movement to reverse the priority of Islamic norms over secular ones, and to employ Islamic norms to critique and invalidate secular laws is part of the Islamization agenda most prominently reflected in the writings of Ahmad Ibrahim, who was also former dean of the International Islamic University of Malaysia’s Faculty of Law. In a book written in Malay in 1988, Ibrahim set out a clear three step agenda aimed at reversing the priority of secular laws over Islamic laws. He stated:

As the law stands in Malaysia at this point in time, whenever there is a conflict, priority is given to the laws of Malaysia and the decisions of the general Courts

75 Notably, this attempt to record and categorize by stating Islam as the religion of Muslims in their identification card contributed to Lina Joy’s difficulties in Malaysia.

76 Gordon P Means, ‘The Role of Islam in the Political Development of Malaysia’ (1969) 1(2) Comp Politics 264, 280. He also noted that Islam during this time was more fluid, and contained Hindu influences. 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 were a mix of Hindu rituals and Muslim prayers. Thus, even post-independence, Islam was a state religion largely in symbolic form.

77 ibid.
[over Islamic laws]. In order to prevent such a situation and to restore the supremacy of Islamic law, a few steps must be taken:

First: Abolish the Civil Law Act, 1956. Abolishing this Act would mean that we would no longer be bound solely by English common law. At this point in time, we are required to refer to English law if there exists an issue. We should not be so bound, and should be free to seek guidance from other sources of law, particularly Islamic law.

Second: There should be an article in the Federal Constitution of Malaysia which states:

‘Laws which are inconsistent with Islamic laws must be voided and regarded as invalid to the extent of such inconsistency.’

With such a provision that already exists in the Pakistani Constitution, we can ensure that all laws in force in Malaysia are not inconsistent with but are compatible with Islamic laws.

Third: We should recommend including a provision in all laws and regulations that if there is a gap in the law or regulation, the courts should refer to Islamic law.

This claim for priority reversal denies the aspirations of Malays and non-Malays for a common citizenship based on a Malaysian identity. It purports to capitalize on what it sees as a lack of commitment among the non-Malays to their cultures and laws, and trivializes their preference for the secular legal system as allowing themselves to continue to be colonized by the West. Ahmad Ibrahim states candidly that:

Once Muslims in Malaysia, including ministers and judges are confident about Islamic laws, thereafter it would not be difficult for us to persuade the non-Muslims to continue to accept Islamic laws as the basic laws of Malaysia. In any case, they are not strongly committed to their own cultures and laws, and their choice is between Western laws and Islamic laws.

This clearly downplays the founding consensus for a secular democratic state based on the rule of law and equal citizenship.

The demand that Islam and its legal norms superordinate the common law and the constitution is in effect a claim for religious imposition. It would subject non-Muslims to the laws of a religion other than their own, with deleterious effect on their fundamental liberties. Priority reversal, placing the Islamic legal system above the secular constitutionalist system of law, could seriously undermine the rights of non-Muslim groups, and result in the imposition of religious norms against their religious conscience, segregation, and/or unequal citizenship. In countries such as Pakistan for example, blasphemy laws criminalizing the making of derogatory remarks against or representations of Muslim holy personages and more

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78 Ibrahim (n 62) 14.
79 Ibrahim (n 62) 24.
80 The s 298A of the Pakistan Criminal Code (inserted in 1980) carries a maximum punishment of three years imprisonment.
specifically in respect of the Holy Prophet have seriously undermined the rights of religious minorities (as well as Muslims themselves) to religious freedom and freedom of speech. Defenders of the law claim its immutability because 'it's a divine law and nobody can change it'. In Brunei, the new Syariah Penal Code Order 2013 intends to apply a list of religiously-inspired laws, including blasphemy laws, on non-Muslims as well as Muslims. In the alternative, priority reversal may result in a different kind of divided legal system where the general Islamic legal system applies to Muslims and non-Muslims are granted some internal autonomy over their legal affairs. One such model is that of the Ottoman millet system. Under this system, some religious minorities were granted official recognition and the general freedom to govern themselves in purely internal matters, with their own legal codes and courts. Their collective freedom of worship was guaranteed to some extent, together with their possession of churches and monasteries, and they could run their own schools. However, this internal autonomy was significantly limited. For example, non-Muslims could not proselytize, and they could only build new churches with permission. There were limits on intermarriage, and non-Muslims had to pay special taxes, in lieu of military service. Furthermore, in disputes involving both Muslims and non-Muslims, Islamic laws (being the general) would apply. More importantly, while the millet system seems generally humane, tolerant of group differences and stable for its time, it does not recognize any principle of individual freedom of conscience, or of equal citizenship.

81) The s 295C of the Pakistan Criminal Code (inserted 1986) criminalizes 'derogatory remarks, etc., in respect of the Holy Prophet . . . either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly . . . shall be punished with death, or imprisonment for life, and shall also be liable to fine'. The Federal Shariat Court ruled in 1990 that this clause must be revised to provide only for the death penalty as punishment for blaspheming the Prophet. The Pakistan Supreme Court affirmed this. 'Pak SC Rejects Petition-Challenging Death as the Only Punishment for Blasphemy' Pakistan News.net (Pakistan, 22 April 2009) <http://www.pakistannews.net/story/492878> accessed 22 May 2011.

82) The Human Rights Commission of Pakistan (HCRP), a voluntary organization, says that hundreds of Christians have been accused of blasphemy since the laws were amended and at least 12 were given the death sentence. The blasphemy laws were also used against Muslims under provisions for criminalizing desecration of the Quran, and against the Ahmadi community for just being. 'Q&A: Pakistan’s Controversial Blasphemy Laws' BBC South Asia (UK, 22 March 2011) <http://www.bbc.co.uk/news/world-south-asia-12621225> accessed 22 May 2011.


84) In reality, only the Greek Orthodox, Armenian Orthodox and the Jews were recognized minorities.


86) Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (Clarendon Press 1995) 156–57. Since each religious community was self-governing, there was no external obstacle to basing this self-government on religious principles, including the enforcement of religious orthodoxy, ibid 157.

87) Even though historical records suggest that the Christian and Jewish population did not suffer persecution, they were discriminated against as an implicit outcome of the Islamic legal system which embodied the principle of inequality among various groups. ‘For example in 923/1517, Christians and Jews were commanded not to ride horses, donkeys, or any other animal in the city or in its suburbs whenever there was an assembly of people.’ Muhammad Adnan Bakhit, ‘The Christian Population of Damascus in the
B. Religious Minorities: Inequality of Rights and Citizenship Status

This disturbing vision of unequal citizenship where Islam and its adherents would predominate over other religions and their believers has been proposed by some segments of the Malaysian society, including legal scholars and even judges. For instance, in the case of *Meor Atiqulrahman bin Ishak v Fatimah bte Sihi*, the High Court ruled that article 3 essentially meant that Islam must dominate over other religions, and that the government has the responsibility to safeguard its dominance. *Meor* arose out of the expulsion of three schoolboys for wearing a serban to school, in contravention of a state regulation restricting the wearing of some headgears such as caps and veils. Other forms of headgears like the songkok (a Malay hat) and the tudung (a cloth covering the head) were allowed. The High Court declared their expulsion null and void on the basis that the regulation violated their religious freedom rights under article 11(1). Article 3 was employed to support the High Court’s reasoning that as long as a practice was exhorted under Islam, the legislature has no right to abridge those rights. While the result vindicates the applicants’ religious freedom, this was not based on a liberal interpretation of the right to freedom of religion, but based on a reading of the constitution as giving primacy to Islam. Thus, in a judgment written entirely in Malay, the judge asserted:

Islam is not of equal status with the other religions; it does not sit alongside or stand together. Islam sits above, it walks first, and is placed in an open space with a loud voice. Islam is like the teak tree – tall, firm and able. Otherwise, Islam will not be the religion of the Federation but just another of the few religions professed in the country and everybody would be equally free to practice any religion, with none better than any other.

This, according to the High Court, means that the government is not only authorized to spend public resources on Islamic matters, but also obligated to actively propagate the religion. This includes ‘building mosques and religious centers’ and sponsoring religious event such as Quran recitations. The government, under this interpretation, would also be obligated to restrict the religious activity of


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88 *Meor Atiqulrahman bin Ishak v Fatimah bte Sihi* [2000] 5 MLJ 375, decision of 6 August 1999 (High Court, Seremban) (author’s translation, on file).

89 For a critical analysis of the High Court judgment which was reported in Malay, see Thio Li-ann and Jaclyn Ling-Chien Neo, ‘Religious Dress in Schools: The Serban Controversy in Malaysia’ (2006) 55 Int & Comp L Quart 671.

90 Regulation 3(i)(i) of the 1997 school regulations (Peraturan Sekolah Kebangsaan Serting (FELDA)), authorized under a Ministry of Education circular (Surat Pekeliling Ikhtisas Bil. 9/1975) Regulation 3 of the School Regulations 1997 stipulates, inter alia, that the uniform for male pupils comprises of blue black long pants, white short-sleeved shirt, white rubber shoes, and socks. Regulation 3(f)(v) provides that black or blue black songkok is allowed to be worn.

91 *Meor Atiqulrahman bin Ishak v Fatimah bte Sihi* [2000] 5 MLJ 375, decision of 6 August 1999 (High Court, Seremban) (author’s translation) 382B-D.

92 *Meor Atiqulrahman bin Ishak v Fatimah bte Sihi* [2000] 5 MLJ 375, decision of 6 August 1999 (High Court, Seremban) (author’s translation) 386A-D.
non-Muslims so that they will always be subject to Islam. This includes ‘making laws to ensure that other religions do not have places of worship that exceed or compete with National / State Mosques in terms of location, prominence and size, or have overly-majestic architecture, or are too many and everywhere without control’.

The Court of Appeal overruled the High Court, and held that article 11(1) only protects ‘essential and integral parts of the religion’, which is determined by the secular court based on evidence adduced by religious scholars. The Federal Court affirmed the Court of Appeal decision, but preferred and proposed a proportionality type test, whereby the scope and objective of the legislation would be balanced against imperativeness of the religious practice. In both the Court of Appeal and the Federal Court judgments, Islamic norms were not determinative of the constitutional question.

However, neither court directly addressed the High Court s reasoning prioritizing Islam over other religions. A recent Court of Appeal judgment appears to have adopted the view of unequal citizenship expounded by the High Court in with respect to the priority of Islam in the constitutional order. The judgment addressed the issue of whether the government could restrict the Titular Roman Catholic Archbishop of Kuala Lumpur from using the word ‘Allah’ in its Malay language newsletter. This was in addition to another condition that the publication is to be restricted to circulation within churches and to Christians only, which the applicant did not challenge. According to the government, it was necessary to prohibit the use of the word ‘Allah’ because it would cause confusion and misunderstanding among Muslims. This, according to the government, could prejudice public order.

The government argued that the ministerial order is tied to a larger statutory scheme that controls and restricts the propagation of non-Islamic doctrine or belief among Muslims, which is constitutionally permitted. The constitutional basis for such statutes, which have been enacted in ten out of Malaysia’s 13 states, is article 11(4) of the Federal Constitution. This declares that the states ‘may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam’. Sections 9 of the various state enactments provide for an offence relating to the use of certain words and expressions commonly associated

93 ibid 386A-D.
94 ibid 386A-D.
96 This includes whether the law or regulation absolutely prohibits or merely regulates a religious practice for specific or limited periods of time and at specific places. Meor Atiqulrahman bin Ishak & Ors v Fatimah bte Sihi & Ors [2006] 4 MLJ 605.
97 For example, here the Federal Court examined the evidence adduced and concluded that while the Prophet Muhammad and other early Islamic jurists wore the serban, and one hadith recommended the wearing of the serban (supposedly so that one becomes more patient), the evidence did not show that this was compulsory or even highly recommended. Less weight should be given to the practice, and the public interests of having standardizing uniforms for schoolchildren were more important. Meor Atiqulrahman bin Ishak & Ors v Fatimah bte Sihi & Ors [2006] 4 MLJ 605.
98 Menteri Dalam Negeri & Anor v Titular Roman Catholic Archbishop of Kuala Lumpur [2013] 8 CLJ 890 (hereafter "‘Allah’ case, CA").
with Islam, and which includes the word ‘Allah’. The High Court decided in favour of the applicants, vindicating their right to religious freedom. It rejected the government’s argument that the use of the word ‘Allah’ by the Catholic Herald would result in a threat to public order or to national security, opining that there was no material evidence that that was the case. The High Court accepted uncontroversed evidence that there was a historically well-established practice for the use of ‘Allah’ among the Malay-speaking community of the Catholic faith in the geographic region that now makes up Malaysia. It was also judicially noted that Muslims and Christian communities in other Muslim countries, including those in the Middle East, use the word ‘Allah’ without any confusion. Thus, the High Court it concluded:

... the court has to consider the question ‘avoidance of confusion’ as a ground very cautiously so as to obviate a situation where a mere confusion of certain persons within a religious group can strip the constitutional right of another religious group to practice and propagate their religion under art 11(1) and to render such guaranteed right as illusory.

In contrast, the Court of Appeal unanimously found against the Catholic Church. It agreed with the Minister’s determination that the prohibition of the use of the word ‘Allah’ by the Catholic Herald posed a public order and security issue. The court held that such usage ‘will inevitably cause confusion within the community’ and has the ‘potential to disrupt the even tempo of the life of the Malaysian community’, accepting the government’s evidence that the ministerial order was rightly based on national security and public order concerns. In rejecting the religious freedom challenge, the Court of Appeal decided that the prohibition did not violate the Catholic Church’s constitutional right to freedom of religion because using the term ‘Allah’ was not an essential part of their religion. Like in Meor discussed above, the essential practice test was used to restrict religious freedom since it only extends constitutional protection to religious practices that can be shown to be essential or integral to the religion. The test is problematic not least because it gives it the power to determine from an outside perspective what is essential and not to a religion.

99 See eg the Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactment 1988 (Selangor Enactment No 1/1988).
100 Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor [2010] 2 MLJ 78, especially at ¶¶30 and 38. Note that the court also determined that the ministerial order constituted an unreasonable restriction on the freedom of speech and expression under art 10(1)(c) of the Federal Constitution and is an unreasonable administrative act which impinges on the first limb of art 8(1)’s guarantee of equal protection before the law.
101 ibid ¶65.
102 Although the judgment was unanimous, each judge issued his own judgments, which were essentially in agreement. The Court also issued a Summary of Decision reproduced at Loyarburok: <http://www.loyarburok.com/wp-content/uploads/2013/10/Allah-W-01-1-2010_SUMMARY.pdf> (hereafter ‘Summary of CA Decision’).
103 Summary of Decision, ¶ 5.
104 ‘Allah’ case, CA, at ¶42.
105 The essential practice test was borrowed from Indian authorities. For an excellent discussion on this doctrine in the Indian context, see Ronojoy Sen, ‘The Doctrine of Essential Practices’ in Articles of
However, the most worrisome aspect of the Court of Appeal judgment for religious minorities is its interpretation of article 3(1). The Court of Appeal held that the reference to peace and harmony should be interpreted to subject ‘the welfare of an individual or group . . . to that of the community.’ In his written judgment, Justice Mohamed Apandi further opined that article 3(1) is aimed at protecting the ‘sanctity of Islam as the religion of the country and also to insulate [it] against any threat faced or any possible and probable threat to the religion of Islam’. He further added, that in his opinion, ‘the most possible and probable threat to Islam, in the context of [Malaysia], is the propagation of other religion to the followers of Islam.’ This reading turns article 3(1) on its head; the injunction to practice in peace and harmony is now directed at the non-Muslims, rather than at the government and the Muslims to ensure that religious minorities may practice their religion in peace and harmony. According to this reading article 3(1), it is the non-Muslims who have the responsibility of ensuring that the practice of their religion does not affect the peace and harmony of the country. This subordinates religious freedom of minorities to the religious claims of the majority. It is a serious departure from original meaning of article 3(1) and undermines the rights and status of religious minorities as equal citizens.

6. CONCLUSION: WHITHER MALAYSIA?
The religious freedom cases discussed above are just some of the cases that highlight the persisting competing secular-religious claims for authority in the Malaysian state. The legal and normative conflicts precipitated by article 121(1A) as well as article 3(1) of the Federal Constitution in Malaysia must be understood as a more fundamental contest to shape the identity of the country and its multiracial and multireligious society. Despite the lack of a shared nationality, social-political cohesion can be found in a shared commitment to diversity, which can be constituted through participation in the political process. Constitutional patriotism, for instance, is one counter to nationalism, which is based on the idea that ‘[a] democratic order does not inherently need to be mentally rooted in “the nation” as a pre-political community of shared destiny.’ Instead, the state can foster social integration by focusing on the present, and that is by ensuring the political participation of its citizens. Thus, democracy is not only a process for choosing a government, but also process by

Faith: Religion, Secularism, and the Indian Supreme Court (2010) 40. This test has been criticized in India. For example, Dhavan and Nariman write: ‘With a power greater than that of a high priest, maulvi or dhamashastry, judges [in India] have virtually assumed the theological authority to determine which tenets of a faith are “essential” to any faith and emphatically underscored their constitutional power to strike down those essential tenets of a faith that conflict with the dispensation of the Constitution. Few religious pontiffs possess this kind of power and authority.’ Rajeev Dhavan and Fali Nariman, ‘The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities’ in BN Kirpal and others (eds), Supreme But Not Infallible: Essays in Honour of the Supreme Court of India (2000) 256, 259.

106 Summary of CA Decision, ¶6.
107 ‘Allah’ case, CA, at ¶33.
which citizens are bounded together in the formation of deliberative opinion and ‘popular will’. Political attachment and civic solidarity can be founded upon the norms, values, and procedures of the democratic constitution.

There needs to be increasing recognition in Malaysia that rejecting continuing ‘Western’ colonization of the legal system does not necessarily equate the jettisoning of the existing system and calling for a return to pre-colonial times. The force of globalization and rising aspirations among citizens for democratic participation show that a return to the past is not only impossible, but also against popular sentiment. As such, even Islamists like Bari, seem to be realizing that many indigenous elements in the Federal Constitution, which he characterizes as primarily Islamic and Malay, may be anachronistic. Thus, while retaining indigenous elements may be important for the indigenization of the constitution, elements that are ‘inimical to the democratic essence of the Constitution’ concedes Bari, ‘might just have to go’. So should the claim for priority reversal.

110 ibid.
112 Thus, as an illustration, he says, ‘there is no question of inserting a provision in the Constitution that only Malays and Muslims can be appointed as Prime Minister’. Abdul Aziz Bari, ‘The Indigenous Roots of the Malaysian Constitution – The Provisions and the Implications’ (2008) 6 Current Law Journal xxxii.
113 ibid.