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THE BEDROCK

OF OUR NATION : OUR CONSTITUTION

SHAD SALEEM FARUQI

PERDANA LEADERSHIP FOUNDATION
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THE BEDROCK OF OUR NATION : OUR CONSTITUTION

by

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Dedicated to my loving children

SHIRAZ, SHAREEZA, SHURAIFA, SHAFEEQ, SAMEERA

and

To my wonderful grandchildren

MIRZA, OMAR, HAMZAH, SAMER

With this prayer:

"Where the mind is without fear
and the head is held high;
Where knowledge is free;
Where the world has not been broken up
into fragments by narrow domestic walls;
Where the clear stream of reason has not lost
its way into the dreary desert sound of dead habit;
Where the mind is led forward by Thee
into ever-widening thought and action -

Into that heaven of freedom, my (Lord)
let my country awake."

Adapted from Gitanjali
by Rabindranath Tagore

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Emeritus Professor Datuk Dr. Shad Saleem Faruqi is a Malaysian Senior Professor of Law at the Universiti Teknologi Mara (UiTM), Shah Alam, and variously, a Visiting Professor, Honorary Legal Adviser, Holder of the Tun Sambanthan Chair and Legal Consultant to Universiti Sains Malaysia. He has been involved in promoting constitutional literacy since the 80s. Dr. Shad Faruqi has acted as consultant for the constitutional documents of the governments of Maldives, Fiji, Timor Leste, Afghanistan, Sudan and Iraq. He is a Distinguished Fellow of the Institute of Strategic Studies; one-time member of the Human Rights Commission's Education Sub-Committee; a judge on the Kuala Lumpur War Crimes Tribunal; and an Executive Committee member of the International Council on Law and Legal Studies. Professor Shad has authored periodic articles, editorials and legal columns for the New Straits Times, the Sunday Star and The Sun since the 80s.

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PREFACE

As we approach 55 years of independence it is time to reflect on our triumphs and travails, our successes and failures and to renew our resolve to overcome many unmet challenges.

In the area of constitutionalism, most will agree that though the cup is not full to the brim, it is not empty. There is enough in it to relish and cherish and protect and preserve.

The Constitution has survived the vicissitudes of race and religious politics. Despite many political and economic crises that could have torn other societies asunder, our Constitution has endured. It has provided a rock-solid foundation for our political stability, social harmony and economic prosperity.

One can count ten sterling achievements of the socio-legal system ushered in by the 1957 document of destiny.

First is the wondrous durability of political cooperation amongst the country's racial and religious groups. The coalition of 14 disparate political parties under a sometimes shaky but nevertheless enduring political alliance is perhaps the world's longest surviving political arrangement. The rainbow coalition of political and ethnic parties that has ruled the country for 54 (plus two pre-Merdeka) years is built on an overwhelming spirit of accommodation, a moderateness of spirit, an absence of the kind of passions, zeal and ideological convictions that

in other plural societies have left a heritage of bitterness and violence. The existence of such a power-sharing arrangement has done much to weld politically incompatible elements together. In a country of autonomous and widely divergent cultural worlds, each in its own orbit, the 14-party Barisan Nasional is the sun that keeps the various planets from colliding with the others.

Second is the success of the economy which was achieved by giving protection to the right to property and to trade and commerce. An open economy and vigorous development plans made Malaysia one of the economic success stories of the region. A dynamic economy has implications for the realisation of many of the fundamental rights guaranteed by the Constitution. Many constitutional rights have socio-economic pre-requisites for their flowering. Only then can they find expression in reality. It is not an exaggeration to say that food is as important as freedom and bread as important as the ballot box. Five decades of enlightened policies on foreign trade and investment opened up the global economic gateway for Malaysia long before globalisation came in vogue.

The economic successes of the country had significant implications for social justice. They helped the progressive elimination of poverty and the securing of the basic necessities of life for the population. The country's social welfare policies including price controls, subsidies for essential goods and services, highly subsidised medical services for the poor, free primary and secondary education, educational loans and scholarships, credit facilities for small scale businesses, low cost housing, FELDA schemes, legal protection for workers, and the provision of social security have done much to secure dignity for the lower and middle income groups.

Third, Malaysia used the economy to unite its disparate racial groups. By encouraging entrepreneurship and allowing the minority communities to provide leader-

ship in the economic area and permitting them to soar to the heights of their abilities, the government achieved twin objectives. It succeeded in developing the country. It gave to every community a stake in the country.

The fourth sterling achievement is that despite periodic tensions and racist rhetoric, the country's enduring and endearing inter-ethnic harmony has few parallels in the world. Citizens not only tolerate, they celebrate each others' religious and cultural festivals. Instead of creating a melting pot, Malaysia painstakingly weaved a rich cultural mosaic. The plurality of lifestyles this engenders has given rise to an extraordinarily multi-faceted society. The various people of Malaysia are like the colours of a rainbow - separate but not apart. No race, religion or region is in a state of war with the government. Except for the racial riots of 1969 and some other instances of communal disorder, ethnic, tribal or religious violence is unknown. For 54 years Malaysia has provided the world with an example of how a fragmented multi-ethnic and multi-religious polity can be welded together in a common nationality.

The fifth outstanding feature of Malaysia is the peaceful and cooperative manner in which social engineering is being accomplished. Unlike some other societies like Fiji, Indonesia, Kenya, Uganda and Zambia (with a similar problem of identification of race with economic function and the concentration of wealth in the hands of powerful minorities), the Government in Malaysia did not expropriate the wealth of one community to bestow it on another as happened in Kenya, Uganda and Zimbabwe. It embarked on a pragmatic expansion of opportunities to give to each community its share of the pie. The country's efforts at social restructuring have had a clear impact. The success of welfare policies has brought human dignity and the graces of life to many who were living on the fringes of existence at the time of independence.

Ameliorative programmes have positive human rights implications because formal rights are not enough; rights must find correspondence in social reality.

A sixth remarkable feature of the country is the emancipation of women. In the work place, in schools and in universities, women are easily outnumbering men. In the professions they are making their mark and increasingly moving into leadership positions. Recently the Constitution was amended to outlaw gender discrimination in the public sector.

Seventh, Malaysia as a Muslim country is an exemplar of a moderate, enlightened, progressive and tolerant society that embraces modernity and democracy and yet accommodates the spiritual view of life. The imperatives of modernity and the aspirations of religion mingle together. Secularism and Islam co-exist in harmony and symbiosis. Malaysia preserves the best of its religious, cultural and moral traditions and yet keeps the portals of its mind open to the world. It is a nation in which the past, the present and the future blend together beautifully.

Eighth, Malaysia has successfully kept the armed forces under civilian control. There has been no attempted coup d'etat and no "stern warnings" from military generals to the political executive. Even in 1969 when law and order broke down in the Klang Valley, the National Operations Council was headed by Deputy Prime Minister Tun Abdul Razak who called the shots with the army and police representatives in attendance. If army personnel commit criminal transgressions, they are arrested by the police and prosecuted in the ordinary courts. Malaysia has kept the armed forces out of politics by creating a subtle check and balance between the armed force and the police force. The numerical strength of the two forces, their equipment and the rank of their top officers are

nearly equal. Another remarkable phenomenon is that the extra-constitutional military-industrial complex that, behind the scenes, dictates policy in many democratic countries like the USA has not been able to displace civilian control over military and industrial decisions in Malaysia.

Ninth, Malaysia has very successfully used education as a tool of social engineering and upward social mobility. Primary and secondary education is free and open to all irrespective of race or religion. Tertiary education is highly subsidised. Though the number of public universities has risen to 20 from only one after Merdeka, the government is unable to meet the aspiration of all who seek higher education. Nevertheless, the 90% literacy rate is high on any standards. The opportunities for upward mobility through higher education are almost unmatched in this part of the world.

Tenth, our law and order situation is relatively satisfactory. The recent Bersih 2.0 rally, though criticised by the security establishment, was largely peaceful and proves that, by far and large, in this country liberty does not degenerate into a licence for anarchy. Street violence is not our way of solving problems.

The blessings of Allah on Malaysia are many. There is much in Malaysia's struggles and successes that is worthy of emulation by friends and foes alike. But despite our successes we cannot be complacent. As we approach fifty-four years of independence, our laws and institutions, our values and our views cannot remain impervious to the changes and challenges all around us. We cannot operate the way we operated when Malaya began its tryst with destiny in 1957. One must remember Woodrow Wilson's observation that the Constitution is not a mere lawyer's document. It is a vehicle of life and its spirit is always the spirit of the age. In the realm of constitutionalism there are always new challenges and opportunities that beckon the human spirit.

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THE CONSTITUTION – ITS MEANING AND SIGNIFICANCE

A Constitution is the fundamental, foundational and basic law of the land. It is the law on which all other laws are based. It is the foundation on which the law, politics and economy of the state rests.

The Constitution's provisions are rooted in the soil

Constitutional law is linked with many other fields of knowledge including history, politics, economics, culture and philosophy. The glittering generalities of the Constitution are silhouetted against the panorama of all these fields. More than other areas of law, the Constitution is rooted in the soil. It reflects the dreams, demands, values and vulnerabilities of the body-politic.

The Constitution provides the state's structural design

At the structural level, a Constitution supplies the political architect's master plan for the nation. It describes the manner in which the state is organised, governmen carried on and justice administered. The Constitution sets out the basic framework or organisational structure of the state. As the nation's foundational law, the Constitution creates the basic organs or branches of the state.

The Constitution defines & limits state powers

The Constitution defines and limits the powers and functions of the various branches of government. At the political level it concerns itself with the location of authority in the state. It lays down the basic rules about who may exercise the various powers of the state and subject to what limits. It tells us who has the power to appoint the government, to make laws, to adjudicate disputes, to impose taxes, to enforce the criminal law and to impose restrictions on citizens' rights.

The Constitution regulates inter-governmental relationships

The Constitution describes and prescribes rules about the relationship of the branches of government with each other. It provides rules about the sharing and division of powers. It provides a system of checks and balances.

The Constitution entrenches inter-ethnic compromises

In the context of Malaysia an important function of the Constitution is that it contains the negotiated compromises and consensual arrangements (often referred to as the 'social contract') among the various ethnic, religious and regional communities.

The Constitution describes the nature of the state

A Constitution tells us whether the legal, political and economic set-up is democratic or totalitarian; whether the country is a monarchy or a republic; whether there is a federal separation of government powers or a unitary concentration of powers in one central authority; whether we have a parliamentary or a presidential style of government; and whether the basic rules are divine (as

in a theocracy) or are of human creation (as in a secular state).

Each type of organisation has its own peculiar pre-requisites and characteristics and the Constitution may reflect one or the other form. In some cases Constitutions are 'hybrid' and exhibit a mixture of characteristics e.g. the Sri Lankan Constitution has an elected President as well as an appointed Prime Minister.

If the Constitution is 'democratic' it must honour some fundamental rights; it must provide for some limits on government powers because absolute powers are incompatible with democracy; it must have an elected and representative Parliament in whose hands the highest law-making power of the land must reside; it must confer independence on the judiciary; and it must provide effective remedies for violation of rights.

If the Constitution is monarchial it must indicate whether the monarch is hereditary (as in Brunei) or indirectly elected (as in Malaysia); and whether he/she is a constitutional monarch as in Malaysia where the Yang di-Pertuan Agong is the formal head of state but not the operational head of government or whether he is the real seat of executive power as in Brunei.

In a republic the elected head (a President) may be directly elected by the people as in the Philippines (and therefore the head of state as well as head of government) or indirectly elected by the legislature as in India (and therefore vested with limited symbolic powers).

In a federal set up, there is a political, legal and economic union between the central (federal) government and the governments of the various states, (also called regions, cantons or provinces). The two-tiers of government (the federal and state governments) are separate from and

independent of each other. The Constitution prescribes for the division of executive, legislative, judicial and financial powers between them.

In a unitary set up as in Singapore, there is one central government vested with the entire power of the state in the legislative, executive, judicial and financial fields. It may, however, at will delegate its powers in limited areas to local or other authorities or may recall this delegation.

In a 'parliamentary government', the political executive (the Prime Minister and the Cabinet) is part of Parliament and is answerable and accountable to Parliament and can be removed from office by a vote of no-confidence.

In the US or Philippine-style presidential system, the President is elected by the people for a fixed term. He is separate from and independent of the legislature and is not dependent on a parliamentary majority. He cannot be removed from office on a vote of no-confidence though there are other extraordinary ways like impeachment whereby he can be stripped of his office.

Theocracy literally means 'rule by God'. A theocratic state grants supremacy to the divine law and grants overriding powers to the religious establishment to govern in the name of God. In secular states, on the other hand, constitutions and laws crafted by chosen mortals provide the framework for the civil and criminal legal system. Divine law applies only in limited areas subject to the authority of the supreme Constitution.

The Constitution provides core values

At the ideological level, the Constitution supplies the philosophical, fundamental or core values on which society is founded. It tells us whether the state is democratic or totalitarian, capitalist or socialist, theocratic or secular.

The values of the Constitution may be explicitly mentioned in a preamble or may be implicit in the provisions of the Constitution. In the case of the Malaysian Constitution, there is no introductory, inspiring Preamble to the Constitution. One has, therefore, to turn to the much later Rukunegara to extract the cherished ideals of the nation.

The Constitution prescribes procedures

Besides providing for matters of substance (i.e. who has the power to do what) the Constitution also describes the basic procedure for the exercise of constitutional powers, e.g. how a law is to be 'passed', how the Constitution is to be amended, how a person must be arrested.

The Constitution defines the state's relationship with citizens

The Constitution describes the position of the individual *vis-à-vis* the state. It seeks to achieve a fair balance between the might of the state and the rights of the citizens. It confers on the citizens some basic rights and provides the perimeters within which these rights may be exercised. In some Constitutions like India's along with a chapter on fundamental rights, a chapter on fundamental duties is also included. The Constitution grants power to the organs of the state to regulate or restrict human rights. At the same time it seeks to prevent tyranny by imposing some limits on state power to restrict the rights of citizens. Ultimately every Constitution must address the issue of how to manage power and secure liberty.

CONSTITUTIONAL FORMS

Constitutions are classifiable in many ways: evolved or enacted, legal or real, written or unwritten, flexible or rigid, dignified or efficient. The most important classification is 'written' or 'unwritten'.

Written Constitution

A written Constitution is enacted and codified. It exists in a concrete form as for example the Constitutions of Malaysia, India, Iran and the USA. Unlike evolved constitutions that bear the mark of centuries of development, a written and enacted Constitution is a product of deliberate creation at a particular moment in the nation's history.

- A written Constitution is contained in a specially formulated document.

- The persons or authorities who draft the basic law and the procedures that are followed are not dependent on law but on politics.

- A Constitution precedes the legal order it creates and regulates. Its formulation is, therefore, not regulated by the rules that apply to the making of ordinary laws. In some countries the political dictator or the military
- leader who seizes power after a *coup d'etat* orders the drafting of the basic law. In others like India a representative Constituent Assembly drafted the nation's document of destiny. In Malaysia the colonial government appointed a Commission and gave it the responsibility to draft the principles of the Constitution. In other countries like the Philippines, the Constitutional Commission's recommendations were submitted to the people at a Referendum.

- A written Constitution is the supreme and highest law of the land, the law of laws, the *grundnorm*. It is the law on which all other laws rest. It has a special, higher legal status. It is the highest rule in the legal pyramid, the apex of the hierarchy of norms. It is the law to which all other laws must conform and from which all other laws are ultimately derived. It is the ultimate source of

all legal authority. It provides the yardstick for testing the validity of all other laws.

- In most countries, a Constitution's supremacy is protected by 'judicial review' i.e. by the power of the courts to invalidate executive and legislative actions on the ground of unconstitutionality. In case of conflict between an ordinary law and the Constitution, the courts declare the ordinary law to be null and void.

- A Constitution's principles are 'entrenched' i.e. difficult to enact, amend or repeal. The Constitution is 'rigid'.

Unwritten Constitution

The UK has an unwritten Constitution that differs significantly from Malaysia's basic charter.

- The Constitution is not reduced to a single, comprehensive document. Instead, it is seen as the *whole body* of fundamental rules derived from many sources and evolved over many centuries. Unlike a codified Constitution, the unwritten Constitution exists in an abstract sense.

- An unwritten Constitution bears the mark of many centuries of development.

- Its sources are written as well as unwritten, legal as well as non-legal, formal as well as informal. The multiplicity of sources results in a Constitution that is "scattered, heterogenous and elusive". In the United Kingdom the sources of the Constitution are many, among them historical documents like the *Magna Carta,* parliamentary legislation, judicial decisions and constitutional practices referred to as conventions.

- In the UK, there is no distinction between constitutional law and ordinary law for the purpose of enactment, amendment and repeal.

- There is no judicial review of statutes/Acts of Parliament.

- If a country has an unwritten Constitution, as is the position in the UK, then there is absence of constitutional supremacy and the presence of parliamentary sovereignty. Parliament, and not the Constitution, is supreme. This has a distinct political advantage: there are no hurdles in the way of the elected and representative legislature to enact, amend and repeal laws. Many Constitutions are notoriously rigid and stand in the way of change even when the felt necessities of the times demand reform. Hurdles in the path of an elected and representative legislature are seen by some as 'undemocratic'.

- In an unwritten Constitution there is no judicial review of parliamentary laws on constitutional grounds. The much-celebrated power of the courts to adjudicate on the legality of parliamentary enactments is, actually, a double-edged sword. It pits the courts against Parliament. It encourages the temptation on the part of the executive to pack the courts with executive-minded jurists. In many countries including Malaysia, headlong clashes between the executive and judicial branches of the state, as in 1988, left the judiciary deeply wounded. The UK system of a supreme Parliament with absence of judicial review of parliamentary enactments avoids clashes between Parliament and the courts. In the long range this is conducive to the preservation of judicial independence.

- The Constitution is 'flexible', i.e. easy to amend. Note for example His Majesty's Declaration of Abdication Act 1936 that deprived Edward VIII and his descendents of the throne and settled the lineage on a new monarch. The law was passed by a simple majority. A change of this sort in Malaysia will attract the special procedures of Articles 38(4) and 159(5) and will require the consent of the Conference of Rulers.

Comparison between written and unwritten constitutions

The dangers of an unwritten Constitution and supreme parliament are many.

First, there are no safeguards against "legislative despotism" except public opinion. Second, there are no constitutionally entrenched and judicially protected human rights. Rights of individuals rest on ordinary law and are capable of amendment and repeal by ordinary legislative process.

Third, constitutional institutions and structures are subject to the will of the transient parliamentary majority. There is a flexibility and uncertainty about constitutional arrangements. Change and growth are easily possible unlike a written Constitution which provides legal and political hurdles in the way of those who wish to destroy the constitutional arc or to tamper with basic legal structures. This is a matter of great significance to a plural state like Malaysia where the constitutional compact represented a "social contract" and a series of painstakingly worked out compromises between the Rulers and the *rakyat*, the majority community and the minority communities. Articles 38(4), 159(5) and 161E of Malaysia's basic charter entrench these solemn pacts and impose hurdles in the path of any parliamentary majority that wishes to play fast and loose with the basic law.

Fourth, in an unwritten Constitution, limitations on government power can be removed easily by the parliamentary majority. Without doubt the ideal of 'limited government' is more difficult to enforce in a country with an unwritten Constitution. But much depends on the way the Constitution is drafted. If a written and 'rigid' Constitution provides elaborate guarantees to the citizens but also arms the government with special powers against subversion and emergency, without any enforceable limits on these extraordinary powers, then the difference between a written and unwritten Constitution fades into insignificance.

Fifth, it is often said that in the absence of a codified document, the constitutional law of the UK is "scattered, heterogenous and elusive". It lacks certainty and accessibility. This criticism has no substance. The difference between a written and an unwritten Constitution is merely one of degree. Even in a country with a written and elaborate Constitution, the constitutional text is surrounded by legislation, judicial precedents and conventions that "supply the flesh to clothe the dry bones" of the written Charter. Every Constitution is to some extent unwritten because its sources are many. In Malaysia e.g. the law of the Constitution is not contained in the basic charter alone. Many streams contribute to the constitutional main. Amongst the sources of constitutional law are: historical documents like the Reid Commission Report, the Rukun Negara; the Federal Constitution; the Constitutions of the various States of the Federation; federal legislation; state legislation; federal and state subsidiary legislation; decisions of the superior courts; constitutional conventions; syariah law for Muslims in areas prescribed by Schedule 9, List II, Paragraph 1; Malay *adat*; customs of the natives of Sabah and Sarawak; and ratified and non-ratified international treaties and covenants.

2

DRAFTING OF THE FEDERAL CONSTITUTION

Constitutions are born to mark stages in progression towards self-government, to establish the foundations of a newly independent state, or to start afresh after a revolutionary or ideological upheaval. In British Malaya, Datuk Onn's opposition to the Malayan Union proposal of 1946 galvanized Malay nationalism. The multi-racial alliance that was forged to struggle for independence earned a massive victory at the 1955 Election to the Federal Legislative Council. It demanded early removal of the yoke of colonialism.

London Conference 1956

In January 1956 a Conference was held in London to agree to the principles on which independence was to be granted and to appoint a Constitutional Commission to draft independent Malaya's first constitution.

Reid Commission 1956

The Commission was headed by Lord Reid, a British judge; Sir Ivor Jennings, a British expert on Commonwealth constitutional law; Sir William McKell, former Governor General of Australia; Mr. B. Malik, a former High Court Chief Justice from India; and Justice Abdul Hamid of the West Pakistan High Court. The Commission's terms of reference were to make recommendations for:

- A federal constitution
- A Westminster (British) style of parliamentary democracy
- A bicameral legislature
- A strong central government
- Safeguards for the position of the Malay Rulers
- Common nationality, and
- Safeguards for the special position of the Malays and the legitimate interests of other communities.

The Alliance drew up a 20-page Memorandum for the Reid Constitutional Commission. Half of the Memorandum dealt with communal issues and with the need to cater to Malaya's dazzling diversity. On most issues the Reid Commission showed deference to the "social contract" negotiated by the communities.

The Commission held 118 public and private hearings between June and October 1956. It made its recommendations on 20th. February 1957 and submitted a draft constitution by way of the *Report of the Federation of Malaya Constitutional Commission, 1957.*

The draft master plan provided for:

- A supreme Constitution
- An independent judiciary with powers of judicial review
- A federal system of government with a heavy central bias
- A Westminster (British) style of parliamentary democracy
- A constitutional monarchy at both state and federal levels
- A chapter on partially entrenched fundamental rights
- Extensive power to Parliament to suspend basic rights during times of subversion and emergency
- Special protection for the rights of Malay Rulers

- Continuation of the historical provisions relating to Malay special position
- Liberal rights of citizenship for all persons born in the Federation
- Linguistic, cultural and religious rights for non-Malays.

Ethnic bargaining

The Commission's proposals in some areas caused tremendous consternation amongst various ethnic groups.

- Reid proposals on citizenship were criticised by Malay organisations as so liberal that the country would be swamped by non-Malays. It was felt that citizenship by registration or naturalisation should be discretionary and people not born in the country should not have an automatic right to be registered as citizens. In contrast, the Chinese groups were unhappy that the principle of *jus soli* (citizenship by place of birth) was not backdated as they had demanded.

- The provisions relating to dual citizenship were criticized as a violation of the principle of undivided allegiance. The Alliance felt that a person with foreign or colonial citizenship should renounce his foreign nationality before he is registered as a citizen.

- UMNO rejected the proposal that Malay privileges would be a temporary measure for fifteen years. In turn, some Chinese groups criticized Malay privileges as creating two grades of citizenship.

- In respect of Malay Reservations, the Reid Report had placed restrictions on the creation of new reservations and made it compulsory that an equivalent amount of land was set aside for non-Malays. UMNO demanded more flexibility in the matter of creating more Malay

reservations. It also demanded extension of Malay Reservation Law to Penang and Malacca.

- The provision for multilingualism in the legislatures was viewed as an unjustified rejection of the Alliance proposal. In contrast, the Chinese were unhappy that their language was not given official status.

- UMNO was unhappy that no official religion was prescribed at the federal level. The Commission had rejected the Alliance proposal and conceded the request of the Rulers to leave religion as a State matter.

- UMNO objected to matters of Islam being totally allocated to the States.

- The Malay Sultans were displeased that the role of the Conference of Rulers was merely symbolic.

- The Rulers felt that the powers of the States, especially in the area of finance were most inadequate compared to the federal government.

Tripartite Working Party 1957

As a result of the uproar that some Reid proposals caused, a tripartite Working Party was appointed to examine the Reid Commission Report. The Tripartite Working Committee comprised of four members of the colonial government (High Commissioner MacGillivray as Chairman, the Chief Secretary to the Government Sir David Watherston, the Attorney General T.V.A. Brodie and E.O. Laird, the Secretary). There were four representatives of the Malay Rulers (Keeper of the Rulers' Seal, Haji Mustapha Albakri Haji Hassan; Shamsuddin Nain; Tunku Ismail; and Neil Lawson, Q.C.). The Alliance was represented by four members (Chief Minister Tunku Abdul Rahman, Dato Abdul Razak, Ong Yoke Lin and V.T. Sambanthan.

With the clock ticking against it because the date for Merdeka had already been set, the Working Party held 23 meetings between 23 February and 27 April 1957. It made significant amendments both in substance and form to the Reid Commission proposals. Many constitutional lawyers show insufficient understanding of the far-reaching legal, political and substantive changes inserted into the Reid proposals by the Working Party.

- The 15-year time limit on Malay special position was removed. Malay special position was made an integral and entrenched part of the Constitution. But clear provisions were added that existing non-Malay rights will not be extinguished in order to create quotas for Malays.

- Islam was adopted as the religion of the Federation. But no alteration was made to the position of the Rulers as head of the religion of Islam in their territories. Also, there would be full freedom to other communities to practise their own faiths in peace and harmony. The British members of the Working Party were concerned that adoption of Islam as the religion of the Federation would convert the country into a 'theocratic state'. Documents connected with this issue indicate that members of the group suffered from many misconceptions. First, they used terms like 'secular' and 'theocracy' in a very loose and inaccurate way. Second, they sought to depict Malaya as a secular state even though the Constitution was to permit the official adoption and promotion of Islam. A country that adopts and promotes an official religion cannot, by definition, be described as secular. Third, the fear of creating an Islamic theocracy was misplaced because the country was adopting a supreme written Constitution. Fourth, there was a wrong assumption that adoption of an official religion would be destructive of the religious rights of others. This has no factual or religious basis. Many

countries including the UK and Philippines have official religious establishments. Yet freedom of conscience is not compromised. Fifth, there was an understandable lack of knowledge of Islamic jurisprudence on freedom of conscience. The Holy Qur'an is full of exquisite passages that declare that "in matters of religion there is no compulsion". "To you be your religion, to me mine". Islam is perfectly compatible with freedom of religion for all. Refer to Surah 2:256; 109: 1-6; and 10:99.

To confirm the absence of theocratic intentions, documents were exchanged that despite the adoption of Islam as the religion of the federation, the country was not meant to be an Islamic theocracy. The White Paper explaining changes to the Reid Report states: "There has been included in the proposed Federation Constitution a declaration that Islam is the religion of the Federation. This will in no way affect the present position of the Federation as a secular State, and every person will have the right to profess and practise his own religion and the right to propagate his religion..." A good discussion of this issue is found in M Fernando, *The Making Of The Malayan Constitution,* 2002, p. 163.

- The role of the Conference of Rulers was enhanced. In addition to electing the King, the Conference would have such powers as advising the King on important appointments under the Constitution. It would have the right to be consulted on matters of national importance, territorial changes affecting the States and constitutional amendments adversely affecting the prerogatives of the Rulers.

- The permission to use Tamil and Chinese in the legislatures was substituted with the provision that these languages could be used for non-official purposes and that their teaching and learning would be

allowed. UMNO dropped its proposal that candidates for parliamentary and state elections must be proficient in Malay or English.

- Article 15(1) on citizenship by registration was reworded to confer on the Government some discretion to grant or refuse citizenship.

- The thorny issue of double citizenship was resolved by permitting people with double nationality a period of one year to decide which nationality to choose. The concept of Commonwealth citizenship was recognised by permitting Commonwealth countries to accord special rights to each others' citizens on a reciprocal basis.

- No agreement was reached between the Rulers and the Alliance on sharing of national revenues between the Centre and the States. This led to a boycott by the Rulers' representatives of the Working Party meeting on 9 April 1957. Ultimately the Alliance agreed to allocate to the States some prescribed grants and sources of revenue as of right.

All in all, changes made by the Working Party augmented the 'Malay features' of the Constitution. But there still was in the basic character enough for everyone to relish and cherish. Malay privileges were balanced by safeguards for other communities. The spirit that animated the Constitution was one of tolerance, compassion and compromise. The master plan that was finally adopted bore the mark of idealism and realism; the old and the new; the indigenous and the imported. Constitutional ideas from UK, India, Ceylon, Australia and USA were blended with Malayan traditions.

London Conference 1957

At the end of the Working Party Negotiations, some issues remained unresolved. Among them: dual citizenship, extension of Malay Reservations to Penang and Malacca and the appointment of the first Governors of Penang and Malacca.

The dual citizenship issue was resolved by agreeing that those who hold two citizenships would be able to continue to do so but must choose one or the other within one year. The issue of Malay reserve land for Penang and Malacca was handled by proposing that the Governments of these States may set up trusts to buy land for the settlement of Malays. It was agreed that the first Governors shall be appointed by the Queen with the concurrence of the Conference of Rulers after consultation with the Chief Ministers.

An additional significant amendment at the London Conference was the curtailment of the Reid provision for judicial review of executive and legislative actions. The Commission had proposed judicial review on constitutional grounds as well as on the principles of natural justice. The reference to "natural justice" was dropped. A new provision, Article 4(3), was inserted that was in clear contrast to the spirit of constitutional supremacy. The provision barred judicial review of some breaches by Parliament of the fundamental rights of citizens. Lord Reid and Sir Ivor Jennings furiously criticized the changes but to no avail.

Ratification

After the acceptance of the Tripartite Working Party Report there followed a lengthy and extraordinary process of ratification of the Merdeka Constitution by the Federal

Legislative Council, the Assemblies of the Malay States, the United Kingdom Parliament and the British Crown. The debate from 9-29 July, 1957 was stormy and deeply critical of the Alliance compromises on ethnic issues. Criticisms came not only from the other communities but from within. But the leaders of the Alliance stood firm and united by their negotiated settlement.

At the stroke of midnight on August 31, 1957, at the Stadium Merdeka, the Duke of Gloucester, acting on behalf of the British Queen, handed over to the Tunku the constitutional documents signifying the independence of the federation of Malaya. With the cries of "Merdeka", "Merdeka" (seven times) Malaysia's tryst with destiny had begun. A new nation was born, "founded upon the principle of liberty and justice and ever seeking the welfare and happiness of its people". A new Constitution was adopted to act as the chart and compass and sail and anchor for the emerging political system.

Fifty-four years down the road as one looks at the legal, political and social landscape, it is possible to say that, by far and large, the Constitution has worked well. It has provided the foundation on which Malaysia's rock-solid political stability, its spectacular economic prosperity and its near-exemplary record of racial, religious and regional harmony have been built. Most Malaysians take these blessings for granted. But it must be remembered that the country's communal harmony is founded on the courage, conviction, sacrifices and compromises of the leaders of the Alliance who had to grapple not only with the inter-ethnic rivalries but also with the demands of the radicals within their own communities. They debated, negotiated, pleaded and chiseled out painstaking compromises.

For fifty-four years, Malaysia has provided the world with an example of how a fragmented, multi-ethnic and multi-religious polity can be welded together in a common nationality. Malaysia achieved this by abjuring extremism, rejecting ideological purity and weaving a rich cultural mosaic.

But dark clouds loom across the horizon. There are those who would do the Constitution in because it does not fit in with their vision of the ideal society. They need to be reminded that though imperfect, this Constitution has served us well. Our chieftains too should send the same message. "As leaders of substance, they should not follow opinion polls. They should mould opinion. Not with guns or dollars or position, but with the power of their souls".

3

FROM MALAYA TO MALAYSIA

Before World War Two, Sabah and Sarawak were under the loose suzerainty of the Sultan of Brunei who gave trader James Brooke and the British Chartered Company administrative rights over these territories. After the War, as part of their de-colonisation process, the British intended to give up Singapore, North Borneo and Sarawak. In 1961, negotiations were commenced with the Government of the Federation of Malaya and representatives of the three territories plus Brunei with a view to the creation of an enlarged federation. Events moved fairly quickly.

- In April 1962, a joint British-Malayan commission known as the Cobbold Commission was formed and reported that the people of the Borneo States wished to join Malaya and that the new federation would be in the best interests of North Borneo and Sarawak.

- The Report of the Cobbold Commission was considered in detail in a series of meetings in London in July 1962 between British and Malayan Ministers.

- The two Governments decided to establish an Inter-Governmental Committee on which the British, Malayan, North Borneo and Sarawak Governments would be represented. "Its task was to work out the future constitutional arrangements including safeguards for the special interests of North Borneo and Sarawak to cover such matters as religious freedom, education,

representation in the Federal Parliament, the position of the indigenous races, control of immigration, citizenship and the State Constitution" (*Report of the Inter-Governmental Committee*, p.1). Lord Lansdowne (Minister of State for Colonial Affairs) chaired the Committee and Tun Abdul Razak was the Deputy Chairman. The Committee examined the Constitution of the Federation of Malaya and set out the amendments which would be necessary to meet the requirements of the Borneo States. The relationship of Singapore with the Federation was not within the Committee's terms of reference.

- General Elections were held in North Borneo in December 1962 and in Sarawak in 1963.

- The Philippines and Indonesia opposed the formation of the new federation and rejected the legitimacy of the self-determination process. A Tripartite Summit was, therefore, held in Manila in 1963 to bring the parties together. It was agreed to invite the UN Secretary-General to ascertain the wishes of the people of Sabah and Sarawak and to determine the democratic legitimacy of the electoral processes in North Borneo in 1962 and in Sarawak in 1963. The Secretary-General's mission spent three weeks in Borneo to conduct a survey. It reported that the Malaysia proposal had the wide backing of the people of these territories. The Secretary-General made the findings public on 15 September 1963.

- But the Indonesian and Philippines governments were not persuaded. Indonesia eventually resorted to an undeclared war (the "Confrontation") with Malaysia. Philippines laid an international law claim to Sabah.

- In relation to Singapore, the underlying reasons for closer association with Malaya were economic security

and the fear that an independent Singapore would succumb to communism[1]. A merger referendum was conducted in Singapore and its results were affirmative.

- Brunei backed out from the merger negotiations at the closing stages. H.P. Lee reports that the major reasons could the unresolved question of precedence of the Sultan of Brunei and the financial arrangements relating to Brunei's rich oil reserves[2]. Brunei remained a British protectorate until its independence in 1985.

- In September 1963, the Malaysian Parliament enacted Act No. 26 of 1963. This "Malaysia Act" rewrote the Merdeka Constitution and substantially restructured the constitutional framework of Malaya. In many respects, the amendments created a totally new Constitution to accommodate the realities of a new, enlarged and more diverse nation.

Special position for the new States

The special provisions for Sabah and Sarawak in the enlarged federation were based on a number of historical events, among them the Resolution of the Malaysia Solidarity Consultative Committee (1961), Resolution of the Legislative Council of North Borneo (1962), the Report of the Cobbold Commission (1962) and the Twenty-Point Manifesto of Sabah Alliance (1962).

The Report of the Inter-Governmental Committee (Landsowne Committee, 1963), the Malaysia Agreement (1963) and Malaysia Act 1963 were all inspired by the belief that in the new Federation of Malaysia, Sabah and Sarawak should retain their individuality, enjoy greater autonomy and be vested with safeguards for the special interests of their peoples. Fifty years down the road, that conviction remains strong that due to their cultural, religious, linguistic and ethnic diversity, Sabah and Sarawak should

continue to enjoy greater autonomy than the Peninsular Malaysian states. Sabah and Sarawak's special position in the federation is seen as justifiable due to a number of socio-political, economic, geographical and legal factors. Among them are:

- Sabah and Sarawak's cultural and religious distinctiveness from Peninsular Malaysia.

- The huge territories and massive resources they contribute to the federation. Their combined area is 198,069 sq km, exceeding Peninsular Malaysia's 131,681 sq km. The coastline of the two States is 2,607 km compared to the Peninsular's 2,068 km.

- Problems of poverty and underdevelopment in these states.

- The 1963 pact between the Federation of Malaya, United Kingdom, North Borneo, Sarawak and Singapore.

- International law basis to the guarantees for Sabah and Sarawak.

Legal challenges

On September 16, 1963, the Federation of Malaya was transformed into the Federation of Malaysia but not without opposition internationally from the Philippines and Indonesia.

There were also grumbles within. On September 10, 1963, the State Government of Kelantan challenged the impending Malaysia Day Agreement and the Malaysia Act on a number of grounds. First, that the proposed changes required the consent of each of the constituent states,

including Kelantan, and this had not been obtained. Second, that the Ruler of Kelantan should have been a party to the Malaysia Agreement and he was not. Third, that there is a constitutional convention that the Rulers of the individual states should be consulted before any significant modifications to the Merdeka Constitution are legislated.

In a historic judgment, the High Court ruled that Article 159 nowhere requires consultation with the states prior to the admission of new provinces into the federation. As to the alleged constitutional convention, the court observed correctly that conventions are informal political practices not enforceable in a court of law.

And so, the Federation of Malaya expanded to 14 states. A new name (Malaysia) was emblazoned on the political firmament. Significant new rules were established to regulate the special relationship of the new entrants with the Federal Government. The consequent amendments to the Constitution departed from the cardinal principle of equality of status amongst the members of the Federation. In many respects, the new federation resembled a union of five unequal entities. First, the powerful Federal Government. Second, the eleven West Malaysian States with limited autonomy. Third, fourth and fifth, the specially privileged States of Sabah, Sarawak and Singapore with considerable freedom from federal control in areas specially designated by the Supplementary State List and the Supplementary Concurrent List in the Ninth Schedule.

Endnotes

1 H.P. Lee, *Constitutional Conflicts in Contemporary Malaysia,* Oxford, 1995, p. 8-9
2 H.P. Lee, supra, f.n. 34

PERDANA
LEADERSHIP
FOUNDATION

YAYASAN
KEPIMPINAN
PERDANA

4

MILESTONES & MEMORIES: CONSTITUTIONAL DEVELOPMENTS SINCE 1957

As we approach the 55th milestone of our independence, there is much to celebrate and commemorate. The Constitution has survived the vicissitudes of politics. Despite many political and economic crises that could have torn other societies asunder, our Constitution has endured and has provided a rock-solid foundation for our political stability, social harmony and economic prosperity.

A Constitution mirrors the nation's political, social and economic life and can never be free of change and growth. Crises and conflicts are inherent in the life of a nation and these invariably leave their marks on constitutional development.

Over the last fifty-four and a half years, Malaya and Malaysia have been buffeted by many storms. On the positive side, it can be said that it is no mean achievement that the Merdeka Constitution has survived several momentous events - among them the conversion of Malaya into Malaysia, the expulsion of Singapore, the 'confrontation' with Indonesia, the racial riots of 1969 and the significant social restructuring through the New Economic Policy that followed in the wake of the riots.

Looking back, one can reminisce about a number of monumental events that tested the relevance and the resilience of the 1957 Merdeka Constitution.

In 1963, the Federation of Malaya evolved into the Federation of Malaysia by the incorporation of the largely non-Malay territories of Sabah, Sarawak and Singapore. This led Indonesia to initiate a military confrontation from which we emerged unscathed.

In 1965, relations with Singapore broke down and the territory was expelled from the Federation. All existing pacts with the island state were, however, honoured but relations remain tense.

Over the last fifty-four and a half years, significant territorial realignments have taken place. On September 16, 1963, the federation more than doubled its size by merging with Sabah, Sarawak and Singapore. On August 9, 1965, Singapore ceased to be part of Malaysia. In later years, the State of Selangor agreed to give up Kuala Lumpur and Putrajaya to federal jurisdiction. Labuan was carved out of Sabah as a federal territory.

Malaysia has been fortunate to have had almost uninterrupted peace since independence with two exceptions - the Indonesian-initiated confrontation from 1964-1967 and the communist insurgency which ended officially in 1989.

However, there have been four official proclamations of emergency - in 1964 because of the conflict with Indonesia; in 1969 because of racial riots; in 1966 because of the political deadlock in Sarawak; and in 1977 because of the political crisis in Kelantan. In 1966, deteriorating relations between the Government of Sarawak and the Federal Government led to the dismissal of Chief Minister Stephen Kalong Ningkan and the proclamation of an emergency in Sarawak. Federal relations with the Borneo states, especially Sabah, remain tense and require new approaches.

On May 13, 1969 racial tensions erupted into serious riots in the Klang Valley, causing loss of hundreds of lives. A national emergency was declared. Parliament and the State Assemblies were prorogued and democracy was suspended for about 21 months. The breakdown of ethnic relations triggered massive re-adjustments to the political, economic, educational and inter-ethnic life of the country. The civil service was 'Malaynised'. Virtually all aspects of life became 'racialised'. However, it is to the credit of the national leadership that constitutional arrangements and the 'social contract' between the communities largely remained intact. Since 1969, ethnic quotas and considerations have permeated every aspect of life. The 'Malaynisation' of most public services is quite marked and the government's efforts to recruit more non-Malays into the police and armed forces have had limited success.

It is noteworthy that the emergency proclamations of 1964 and 1969 were not withdrawn till 2011. Officially the country was in a state of emergency for more than 47 years!

On the political front, the Alliance expanded into the Barisan Nasional in 1974. The remarkable formula for sharing power between the races has worked successfully since 1955. But race-based politics now competes with religion-inspired political and social ideas. A debate is raging whether the country is an Islamic or a secular state.

Religious extremism is on the rise. This has manifested itself in many ways over the last few decades: series of attacks on Hindu temples culminating in the Kerling killings; the Memali incident involving confrontation between the police and Muslim extremist groups; a similar attack on an armory by a Muslim-fringe group; the 'cow-

head protest' by Muslims in Shah Alam over the planned re-location of a Hindu temple to a Muslim area; the rise of Hindraf (an extremist Hindu group); Christian insistence on use of the term 'Allah' in their sermons; persistent attempts at proselytisation of Muslims despite the constitutional provision in Article 11(4); vigorous moral policing by the syariah authorities; detention of Muslim apostates; prosecution of Muslim deviants; ex-communication of thousands of Muslims who do not observe the approved version of the faith.

On the human rights front, a civil society is slowly but surely emerging. A Human Rights Commission has been established and though its Reports are habitually ignored by Parliament, it is helping to create a positive dialogue on human rights issues. Gender rights have received a boost in amendments to Article 8. Many crippling legislative controls on the media are now losing their sting because of the triumphs of technology in areas like the internet. Many laws like the Internal Security Act, Restricted Residence Act, Banishment Act, Police Act, Printing Presses & Publication Act and Universities and University Colleges Act, conferring nearly unfettered discretion on the executive have been repealed or amended.

The constitutional amendment process has been used to augment governmental powers. Fifty-four Amendment Acts covering nearly 700 alterations to the basic charter have been accomplished. The most controversial amendments have related to curtailment of procedural rights of preventive detainees and arrestees; withdrawal of the principle of *jus soli* (right to citizenship by place of birth) in citizenship cases; and the application of sedition law to parliamentary proceedings.

The autonomy of the Election Commission in the matter of constituency delineation has been compromised. The statutory guideline on determining weightage in

favour of rural districts has been removed. Reid had recommended a maximum variation of up to 15% of the electors.

Parliamentary controls over emergency powers have been removed. Extension of the Yang di-Pertuan Agong's power to promulgate Emergency Ordinances whenever the two Houses are not in session concurrently, means that during an emergency the country operates more like a diarchy than a country with separation of powers. The two Houses of Parliament rarely sit concurrently. If there is an emergency in operation, even if one House is in session, the Yang di-Pertuan Agong can seize the legislative initiative.

The royal houses suffered serious set backs in the 80s and 90s. The Yang di-Pertuan Agong and the Rulers can now be bypassed in the legislative process. Royal immunities were withdrawn in 1993. In Kelantan an internal royal battle succeeded in deposing the Sultan of Kelantan in 2010.

The federal state division of power is facing pressures for change in such areas as management of water, petrol and garbage collection and elections for local government.

Since the early eighties Islamisation has proceeded at a fairly vigorous pace. Political Islam has been in resurgence. Besides the political significance of this phenomenon, many difficult issues have surged up against the Constitution - among them the conflicting jurisdiction of the civil and syariah Courts, the interface between Article 3 (Islam as the religion of the Federation) and Article 4 (Constitution as the supreme law of the land).

Due to the growing sentiment towards an Islamic state, State Assemblies are enacting more and more legi-

slation on Islamic matters. Some of the State laws trespass both on federal jurisdiction and on the rights of citizens under Part II of the Federal Constitution that deals with fundamental liberties.

Acute problems of jurisdictional conflicts between syariah and civil courts have come to light. Due to the insertion of Article 121(1A) giving jurisdictional independence to syariah courts, the civil courts wring their hands in despair whenever a syariah principle is invoked, even if significant constitutional issues are pleaded. Article 121(1A) is gloriously silent on which court has jurisdiction to hear the case if one party is a Muslim and the other a non-Muslim; if the issue is a mixed issue of syariah and civil law; and if the remedy that is sought is outside the jurisdiction of the syariah court.

There are also a large number of unresolved dilemmas about the conflict between State enacted syariah legislation and fundamental rights guaranteed by Articles 5 to 13 of the supreme Federal Constitution. In addition, embarrassing and heart rending disputes continue to haunt our legal system about the religion and custody of infant children when one party to a non-Muslim marriage converts to Islam. The Government's commendable initiative to resolve this issue by legislative changes was fiercely opposed by some quarters that used the Conference of Rulers to scuttle the legislative initiative.

Royal powers were significantly curtailed in the eighties and nineties. In 1983, 1984, 1993 and 1994, the country reeled under the confrontation between the political executive and the Malay Rulers over the then government's attempt to amend and curtail the entrenched rights of the Yang di-Pertuan Agong and the Sultans. In 1983/84 a constitutional amendment allowed the bypassing of the Yang di-Pertuan Agong in the federal legislative process. In 1993 the immunity of the King

and the State Rulers from criminal and civil process was abolished. In 1994 the bypassing of the Sultans in the state legislative process was accomplished. Despite the great controversies surrounding these amendments, ultimately compromises were worked out and the Constitution as well as the institution of the monarchy proved their resilience.

There has been an upsurge in opposition politics since the General Election of 2008.

After the results of the 2008 General Election, the political and legal dramas surrounding the appointment of the Mentris Besar of Terengganu, Perlis, Perak, Kedah and Selangor stoked the embers of controversy about the role and function of the Malay Rulers in the politics and administration of the country. The spirals of history appear to be in motion. After a decline of power and influence since 1983, there is a discernible assertiveness by the Conference of Rulers and individual Sultans in many areas including the selection, promotion and extension of judges, the appointment and dismissal of Mentris Besar, appointment of State Secretaries and the formulation of policies and legislation relating to matters that touch on Islam. Part of this assertiveness is inspired by the popular perception that the Rulers constitute a vital check and balance mechanism and can supply a much-needed corrective to the absolute powers of the political executive.

In 2009 an ugly crisis broke out in Perak due to the defection by three Assemblymen from the ruling party to the opposition. The Mentri Besar advised dissolution of the Assembly but the Sultan used his constitutional powers to refuse that advice. The Mentri Besar refused to resign as he contested the loss of confidence. The Sultan, therefore, dismissed him. What ensued was a whole series of court cases and ugly disputes, often played out with violence, about who is the rightful Mentri Besar and the

Speaker of the State Assembly. The dust has not settled as yet and many constitutional and legal institutions have had their reputations sullied because of the Perak constitutional crisis.

In the political arena, regional sentiment has increased in several states. The ruling party, UMNO, suffered serious internecine disputes twice in the last two decades.

In the eighties, the judiciary came under siege. The Lord President and five other Supreme Court judges were suspended. The Lord President and two judges were dismissed. In the decade that followed, the judiciary suffered a terrible loss of reputation. The dismissals were severely criticised by most independent observers but what is significant is that constitutional procedures were, at least outwardly, complied with.

The Constitution survived these momentous events and, by far and large, constitutional processes guided these crises. But it is also arguable that many parts of the Constitution have largely remained at the outskirts of society. Many of its gilt-ended provisions have not yet become the chart and compass, the sail and anchor of the nation's endeavours.

In the decades ahead the Constitution will have to accommodate the incoming tides of globalisation and Islamisation. There is every reason to believe that the spirit of tolerance, moderation and compromise that animated the drafting of the basic charter in 1957 can be summoned again.

In sum, our journey as a nation has not always been easy or pain-free. However, despite the many challenges over the last 54 years, one can still say that the Constitution has worked but its continued survival and success demands eternal vigilance.

5

FEDERAL CONSTITUTION: PROMINENT CHARACTERISTICS

The 183 Articles and 13 Schedules on which the constitutional edifice rests embody the following basic characteristics.

A supreme Constitution

Unlike the United Kingdom where there is no written Constitution, Malaya in 1957 adopted a written and supreme charter. Articles 4(1) and 162(6) affirm the supremacy of the basic law over all pre and post Merdeka legislation. These Articles imply that Parliament is not supreme. There are procedural and substantive limits on Parliament's powers. State Assemblies are, likewise, limited in their legislative competence. Courts have the power to nullify federal and state legislation if there is inconsistency with the supreme Constitution. On 18 occasions since Merdeka, this power was exercised with telling effect. Likewise, executive actions can be tested in the courts for their constitutionality.

Federal system

Unlike the unitary system in the UK and Singapore, Malaysia has a federal form of government. There is division of legislative, executive, judicial and financial powers between the Centre and the States though the weightage is heavily in favour of the Centre. This division is protected

by the Constitution and judicial review is available if federal or state agencies exceed their powers.

Fundamental rights

In response to the humanitarianism of the era, the Constitution, in Articles 5 to 13 and elsewhere, protects a large number of political, civil, cultural and economic rights. However, these rights are not absolute and are subject to such extensive regulation by Parliament that their description as "fundamental" poses problems in political philosophy.

Emergency powers

The communist insurgency cast a dark shadow on constitutional development. The forefathers of the Constitution, through Articles 149 and 150, armed Parliament and the executive with overriding powers to combat subversion and emergency. These special powers have been employed extensively to restrict many fundamental rights.

Constitutional monarchy

The Yang di-Pertuan Agong and the State Rulers are required by federal and State Constitutions to act on the advice of the elected government in the whole range of their constitutional functions except in a small area where personal discretion has been conferred. Even in this area, constitutional conventions limit royal discretion. In the overall scheme of the Constitution, the monarchs are required to reign, not to rule.

Conference of rulers

The primary function of this unique institution is to elect and remove the Yang di Pertuan Agong, elect the

Timbalan Yang di-Pertuan Agong, consent or refuse to consent to some constitutional amendments, and to offer advice on some appointments.

Affirmative action

One of the unique features of the Constitution is that affirmative action policies in favour of the majority Malays and the native of Sabah and Sarawak are entrenched in the basic law.

Special amendment procedures

Unlike ordinary laws which can be amended or repealed by simple majorities of legislators present and voting, most constitutional provisions are entrenched against easy repeal. Under the Federal Constitution one or more of the following procedures apply:

- Special two-thirds majorities of the total membership of the two Houses in the federal Parliament are required.
- In respect of some provisions, the consent of five out of nine Malay Rulers in the Conference of Rulers is needed.
- If the amendment affects the special rights of Sabah or Sarawak, the consent of the Governors of the States is also mandated.
- Any amendment to the territorial boundaries of a State requires the consent of the State Assembly concerned as well as the concurrence of the Conference of Rulers.

However, unlike Australia the amendment procedure does not require the consent of the people at a referendum.

Parliamentary government

Unlike the system of independent government in the USA which is built on a rigid, institutional separation between the executive and the legislature, in Malaysia the government is part of parliament, is answerable, accountable and responsible to it and can be dismissed on a vote of no-confidence by the lower House.

Electoral democracy

The Constitution provides for periodic elections, universal adult suffrage and an independent Election Commission. A unique feature of the electoral landscape is that rural constituencies may have less than half of the population of urban constituencies.

Elected parliaments

Elected Parliaments exist at both the federal and state levels. At the federal level, Parliament is bicameral with preponderance of power in the Dewan Rakyat over the Dewan Negara. State Assemblies are unicameral.

Islam

Islam is the religion of the federation but there is freedom to other communities to practise their own religions in peace and harmony. The adoption of Islam as the religion of the federation does not convert Malaysia into an Islamic state. The Constitution and not the Syariah is the supreme law of the land.

Independent judiciary

Judges enjoy many special safeguards in matters of appointment and dismissal. Their terms and conditions of service cannot be altered to their detriment. They are

insulated from politics. They have power to punish for contempt of court. In the performance of their functions, they enjoy absolute immunity.

Impartial public service

Civil servants are required to maintain a reserve in politics. Their term in office is unaffected by the rise and fall of governments. They enjoy many procedural safeguards against arbitrary dismissal or reduction in rank.

Indigenous features

For hundreds of years, Malaya has been the homeland of the Malays. It is understandable, therefore, that when the Merdeka Constitution was drafted it reflected a number of features indigenous to the Malay archipelago, among them the Malay Sultanate, Islam as the religion of the nation, Malay special position, Malay reservation land, Bahasa Melayu as the official language of the federation and special protection for the customary laws of the Malays.

In sum, the document of destiny that was adopted as the Constitution bore the mark of idealism as well as realism. It blended the old and the new, the indigenous and the imported. According to Hickling the ideas of Westminster and the experience of India mingled with those of Malaya to produce a unique form of government. The Malay-Muslim features of the Constitution are balanced by other provisions suitable for a multi-racial and multi-religious society. Malay privileges are offset by safeguards for the interest of other communities. The spirit that animates the Constitution is one of moderation, compassion and compromise.

Fifty-four years into independence, the Federal Constitution, though amended significantly in many parts,

is still the apex of the legal hierarchy. It has endured. It has preserved public order and social stability. It has provided the framework for Malaysia's spectacular economic prosperity. It has reconciled the seemingly irreconcilable conflict of interest between ethnic and religious groups in a way that has few parallels in the modern world.

But all this has entailed a price in terms of curtailed liberties, the persistence of emergency and subversion laws; lack of openness and transparency in many aspects of government; and the strengthening of the apparatus of the state at the cost of individual freedoms.

Some lament that the price is too high. Others accept the sacrifices for peace, prosperity and stability. Only time will tell who is right.

6

NATION-BUILDING IN A PLURAL AND "DIVIDED" SOCIETY

Nation-building in a plural and "divided" society poses special challenges everywhere.

In some countries the "melting pot" ideology is employed. This involves the effort, either by force or through encouragement, for people of diverse backgrounds to come together, submerge their distinct identities in something bigger and evolve a new personality for at least some purposes. In many Southeast societies like Thailand and Indonesia this "melting pot" technique has brought diverse people together to build a united nation with a distinct personality. For instance in Indonesia there is a strong emphasis on a common language, a common ideology (the *pancasila*) and the adoption of indigenous, "Indonesian" names by people of various ethnicities.

The other model is that of a mosaic or a rainbow. This involves the recognition that the law cannot by force extinguish the special regard that a substantial number of people in every country have towards their religion, race, region, culture, language or tribe. Efforts to promote a national identity should involve the recognition that unity cannot mean sameness. It has to be a unity in diversity. We can all be friends - but only in spots. In other areas where we do not see eye to eye, we have to live and let live, to permit diversity and differences and to tolerate these differences if not to appreciate and accept them.

The leaders of our independence settled for the second approach. The various communities were allowed to maintain their distinct ethnic identities, cultures, religions, languages, lifestyles, dresses, foods, music, vernacular schools etc. Political parties and business and cultural associations were allowed to be organized on ethnic lines. Vernacular schools were allowed. Malaya (later Malaysia) began its tryst with destiny looking a little bit like a rainbow in which the colours are, of course, separate but not apart.

Barring a short period after 1969 where ethnic practices like lion dances were not permitted, and forced integration was experimented with, the overall effort of the last 54 + 2 pre-Merdeka years has been to find some areas of cooperation and to allow distinctiveness in other spheres of existence.

Some success has indeed been achieved to discover that which unites us and to tolerate that which divides us. Recently we scored fairly well on the World Peace Index, being ranked 19 out of 153 states evaluated.

Legal basis for inter-communal harmony and moderation

The Merdeka Constitution was a masterpiece of compromise, compassion and moderation.

In recognition of the fact that Malaya was historically the land of the Malays, the Merdeka Constitution incorporated a number of features indigenous to the Malay archipelago, among them:

- the Malay Sultanate,
- Islam as the religion of the Federation,

- the grant of a "special position" to the Malays and the natives of Sabah and Sarawak,
- Malay reservation land,
- Bahasa Melayu as the official language,
- special protection for the customary laws of the Malays and the natives of Sabah and Sarawak,
- weightage for rural areas (which are predominantly Malay) in the drawing up of electoral boundaries, and
- reservation of some top posts in the State executive for Malays,
- legal restrictions on preaching of other faiths to Muslims and apostasy by Muslims

However, the Malay-Muslim features are balanced by other provisions suitable for a multi-racial and multi-religious society. The Constitution is replete with safe-guards for the interest of other communities. Notable features are as follows:

- Citizenship rights are granted on a non-ethnic and non-religious basis. The concept of *jus soli* was part of the Constitution in 1957 and was used to grant citizenship to hundreds of thousands of non-Malays. However *jus soli* was removed from the Constitution in 1963.
- The electoral process permits all communities an equal right to vote and to seek elective office at both federal and state levels. Race and religion are irrelevant in the operation of the electoral process.
- The chapter on fundamental rights grants personal liberty, protection against slavery and forced labor,

protection against retrospective criminal laws and repeated trials, right to equality, freedom of movement, protection against banishment, right to speech, assembly and association, freedom of religion, rights in respect of education and right to property to all citizens irrespective of race or religion.

- At the federal level, membership of the judiciary, the Cabinet of Ministers, Parliament, the federal public services and the special Commissions under the Constitution are open to all irrespective of race or religion.

- Education is free at the primary and secondary levels and is open to all irrespective of race or religion. University education is subjected to strict quotas. However to open up educational opportunities for non-Malays, private schools, colleges and universities are allowed. Foreign education is available to whoever wishes to seek it. Government education scholarships are given to many non-Malays though this is an area where a large discontent has developed over the proportions allocated.

- Even during a state of emergency under Article 150, some rights like citizenship, religion and language are protected by Article 150(6A) against easy repeal.

- The spirit of give and take between the races, regions and religions is especially applicable in relation to Sabah and Sarawak.

- Even where the law confers special rights or privileges on the Malays and the natives of Sabah and Sarawak, there is concomitant protection for the interests of other communities. For example though Islam is the religion of the Federation, Malaysia is not an Islamic state. The Syariah does not apply to non-Muslims.

All religious communities are allowed to profess and practice their faiths in peace and harmony. State support by way of funds and grant of land is often given to other religions. Missionaries and foreign priests are allowed entry into the country. Every religious group has the right to establish and maintain religious institutions for the education of its children.

- Though Bahasa Melayu is the national language for all official purposes there is protection for the formal study in all schools of other languages if 15 or more pupils so desire, legal protection for the existence of vernacular schools and legal permission to use other languages for non-official purposes.

- Though Article 89 reserves some lands for Malays, it is also provided that no non-Malay land shall be appropriated for Malay reserves and that if any land is reserved for Malay reservations, an equivalent amount of land shall be opened up for non-Malays. Alienation of or grant of Temporary Occupation Licenses over state land to non-Malays is not uncommon.

- Article 153 on the special position of Malays is hedged in by limitations. First, along with his duty to protect the Malays, the King is also enjoined to safeguard the legitimate interests of other communities. Second, the special position of the Malays applies only in the public sector and in only four prescribed sectors and services. Third, in the operation of Article 153, no non-Malay or his heir should be deprived of what he already has. Fourth, no business or profession can be exclusively assigned to any race. No ethnic monopoly is permitted. Fifth, Article 153 does not override Article 136. Quotas and reservations are permitted at entry point but once a person is in the public service he should be treated equally.

In addition to the above legal provisions, the rainbow coalition that has ruled the country for the last 54 years is built on an overwhelming spirit of accommodation between the races, a moderateness of spirit and an absence of the kind of passions and zeal and ideological convictions that in other plural societies have left a heritage of bitterness.

In the commercial and economic area, there is right to property, freedom of trade and commerce, a relatively open, globalised economy, encouragement to the non-Malay dominated private sector to invest in the economy, freedom to import and export, to transfer funds to and from abroad.

In general, economic opportunities have given to everyone a stake in the country. The non-Malay contribution to the building of the economic infrastructure of the country has given the country prosperity as well as stability.

Culturally the country is a rich cultural mosaic. Secularism and religion live side by side. Mosques and temples and churches dot the landscape. Despite the prohibitions for Muslims, non-Muslims are not forbidden to take alcohol, have gambling permits, rear pigs and dress in their own or the permissive ways of the West.

Sadly dark clouds loom over the horizon. There are problems about planning permissions for places of worship; forced relocation of some religious sites, many of them without proper licenses; disputes about the custody, guardianship and the religion of the child in a non-Muslim marriage when one party converts to Islam; the ban (now lifted) on Bibles in the Malay language; the use of the term 'Allah' in Christian sermons; missionary work of evangelists from abroad; the infrequent but highly explosive issue of Muslim conversions out of

Islam; the contentious issue about the Islamic state; the overzealousness of some public servants in the enforcement of Article 153 quotas and proportions; and recently constant acts of incitement to religious and racial hatred in public speeches and internet discussions.

However, the spirit of accommodation that has lasted 54 years can overcome the present problems. We need leadership, patience, moderation and tolerance.

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7

UNITY IN DIVERSITY: THE CONSTITUTIONAL DREAM

The Merdeka Constitution was a masterpiece of moderation, compassion and compromise. The spirit that animated it was one of accommodation between the Malay majority and the non-Malay minorities on their mutual rights and privileges in a democratic, federal, monarchial and non-theocratic system of government.

During the pre-Merdeka era, there were negotiations between the Malays and non-Malays, the Rulers and the rakyat as well as the British and the Malayans on the shape of the nation's document of destiny. The spirit of this era was that of give and take, compromises, moderation and compassion. There was an absence of ideological, religious and racial extremism.

The forefathers of the Constitution were guided by the belief that there was place for everyone under the Malaysian sun; that everyone must have a stake in the country; that everyone must get something and no one must get everything.

The pressures on the Malay leaders must have been considerable but they resisted the temptation to carve out a system in which they could single-handedly control the existing political and economic systems. A middle path

of moderation is evident if we examine the Constitution in relation to the following:

Citizenship

This was granted without consideration of race or religion. Though there are several categories of citizenship, they are not based on ethnicity or religious faith.

Article 153

In its formulation Article 153 is a fairly moderate provision that balances the special position of the Malays and natives of Sabah and Sarawak with the legitimate interests of other communities. The Article calls on the federal government to protect the "special position" of the Malays and the natives by establishing quotas and reservations in four areas: entry into the public services; scholarships and educational facilities; post-secondary education; and licenses and permits.

Article 153 applies primarily to the public sector. It does not call for special treatment in all areas of life. It does not override Article 136. It does not permit monopolies in favour of the "Bumiputras". It requires the Yang di-Pertuan Agong to safeguard the legitimate interests of other communities.

Definition of a Malay

A mast fascinating aspect of the Constitution is that the ethnic category of a 'Malay' is defined in Article 160(2) in a non-ethnic manner. A person is a 'Malay' if he is a Muslim, follows Malay adat, speaks Bahasa Melayu habitually and has roots in Malaya/Singapore by either birth in Malaya or descent from one parent who was born in Malaya/Singapore before Merdeka Day. Fascinatingly

an ethnic category is defined without any ethnic requirement! The definition permits persons of non-Malay stock to qualify as Malays. Conversely persons of Malay stock who fail the four requirements will not qualify as Malays.

Freedom of religion

Though Islam is the religion of the Federation, all other religions are allowed to be practised in peace and harmony. The right includes the right to profess, practise and, subject to Article 11(4), to propagate it. Government support is given to all religions though most of it is allocated for Islamic purposes.

Malay reserve lands

Though these exist, it is provided that if new reserves are created, an equivalent amount must be opened up for general alienation.

Indigenous features

The "social contract" involved a quid pro quo. The Constitution embraced the indigenous features of the Malay Archipelago – Malay Sultans, Malay language, Malay privileges, Malay reserve land, Malay custom, Islam and weightage for Malay dominated rural constituencies at election time. At the same time the social contract gave to non-Malays equal citizenship rights, religious, cultural, educational and economic freedoms far beyond what other plural societies give to their minorities. Malay political dominance and Chinese economic power went hand in hand. The social contract envisaged a dazzlingly plural and diverse society. Its races, religions, cultures and regions were like the colours of a rainbow – separate but not apart.

This bold experiment of retaining separate cultures, languages, ways of life, separate political and economic associations, separate marriage and interpersonal laws has preserved the various communities' uniqueness. Regrettably it has also kept the walls of separation and exclusiveness standing high.

Pluralism is Malaysia's greatest assets as well as greatest challenge. Instead of a melting pot, Malaysia is a rich cultural mosaic. The plurality of lifestyles this engendered gave rise to an extraordinary multifaceted society that supplied a model to many other diverse regions of the world.

Right to education for all

Education at primary and secondary levels is free and available to all irrespective of race or religion. Private schools and universities are allowed.

Minority languages

Except for official purposes no person shall be prohibited or prevented from using, teaching or learning any non-Malay languages.

Vernacular schools

These were part of the pre-Merdeka social bargain. Their existence is vehemently supported by the non-Malay minorities of West Malaysia. However, lately questions have been asked, how can we have national unity with a segregated school system? How can our children live together if they do not learn together? The figures are quite stark. 94% of Chinese attend a Chinese vernacular school for their primary education. About 75% of Indians attend a Tamil vernacular school and 99% of Malays attend a national school. Most Chinese and Indians however

end up in national secondary schools while the best and brightest Malays are shipped off to boarding schools meant exclusively for Malays (exceptions are the MARA Junior Science Colleges, which have a 10% non-Bumiputera quota).

Article 150(6A)

Even in times of emergency, some rights are sacred and cannot be violated: Islam, Malay custom, Malay language, customs of Sabah and Sarawak, citizenship rights, language.

Special position of Sabah & Sarawak

In 1963 the special position of Sabah and Sarawak in the federal set-up gave to pluralism a territorial dimension.

Politics of accommodation

In addition to these legal features was the remarkable and magnanimous agreement between the races to share political power. The resulting political coalition has survived the vicissitudes of politics for the last 56 years and has perpetuated a spirit of accommodation between the races.

Social contract

All of the above features may compendiously be referred to as the 'social contract' which guaranteed the pre-eminent position of the Malays by embedding into the Constitution many indigenous features of the Malay Archipelago. Among these were Malay privileges, Malay reservations, the Malay language, the Malay Rulers, Malay *adat*, Islam as the official religion and weightage for rural constituencies in the electoral system.

In return, the non-Malays received citizenship rights. On the night of Merdeka, the population of the non-Malays doubled overnight. There were iron-clad guarantees for their freedom of religion, religious and vernacular education and cultural, linguistic and economic freedoms. Some rights like citizenship, religion and language cannot be violated even in times of emergency.

Instead of creating a melting pot, Malaysia painstakingly weaved a rich cultural mosaic. The plurality of lifestyles engendered gave rise to an extraordinary multifaceted society that supplied a model to many other diverse regions of the world.

The post-Merdeka generation & the 'social contract'

Regrettably, as is the fate of all social bargains, once the original authors pass from the scene, the descendants do not always appreciate the rationale behind the original compromises. Later governments have to walk the tight rope between the need to honour the pacts of the past and to accommodate new demands and expectations.

The Malaysian Constitution is undergoing such a process of readjustment and reinterpretation. There is a lively and inconclusive debate about what the document of destiny actually ordained and how far the imperatives of the Constitution should be modified to meet the new aspirations of the electorate. The problem is made worse by a general lack of constitutional literacy within the population and within the political and administrative elite.

In many areas, the spirit of moderation seems to have evaporated. We seem to be obsessed with what divides us and not what unites us. Accommodation and tolerance are giving way to extremism.

High level of race-consciousness

Many aspects of the social system constantly remind us of our differences. For example in all government forms, there is always an unnecessary column for race and religion. Our educational system violates the belief that if people must live together they must learn together. Our national schools are shunned by the minorities. The vernacular and religious schools emphasise differences and not commonalities. How to resolve this problem requires statesmanship and foresight.

Challenges to the 'social contract'

Many people who are unable or unwilling to see the Constitution as a whole, and who are unable to see the woods along with the trees, are denying the existence of the 'social contract'. Their argument is that no such words as 'social contract' are found in the Constitution. Indeed, that is correct: these significant words are nowhere mentioned explicitly in the Constitution. Neither are 'democracy', 'rule of law', 'separation of powers' and 'independence of the judiciary'. Are these principles of constitutionalism also not part of the heart and soul of our document of destiny? A Constitution is always more than its black-letter words. It personifies some values and assumptions. It consists of some implied, unenumerated, non-textual ideals. In the special context of Malaysia, any denial of the 'social contract' would involve denial of the Memorandum on inter-ethnic issues that was submitted by the Alliance to the Reid Commission.

Some commentators take a different approach than of denial of the ethnic compact. They argue that the so-called social contract was a flawed understanding 54 years ago. Times have changed and contemporary ideals of good government require a new thinking of our constitutional arrangements.

There is always merit in the submission that the law must never stand still and must always respond to the felt necessities of the times. However, it must be noted that if radical new thinking is required, if fundamental departures from the framework assumptions of 1957 are contemplated, then this is a game that many can play. There are extremists within all communities and if they have a chance, they will challenge many fundamental features of the basic document and question the wisdom of many significant compromises. This challenge may tear society apart. Ideal templates, often borrowed from the West, generally do not work. A Constitution must reflect the peculiarities, the vulnerabilities and the social necessities of each society in a way no foreign template can contemplate.

Constitutions do not exist to support abstract ideals. Ultimately the basic law must work. It must keep society together. It must solve problems. The experience of divided societies like Lebanon, Cyprus, India (in relation to Kashmir), Philippines (in relation to Mindanao), Canada in relation to Quebec) indicates that in certain circumstances pragmatic solutions work better than ideal solutions. Malaya (later, Malaysia) is one such case. A flawed but workable document containing a meticulously worked out *quid pro quo* was accepted as the chart and compass for the nation.

The solution to the present uncertainties and dissatisfactions is to improve our constitutional literacy, sit down together at the table of fellowship to devise a plan to restore the 1957 constitutional scheme of things, to bridge the wide gap between theory and practice and the promise of 1957 and the performance of 2012. Radical changes must be shunned. Evolution is always better than revolution.

Rise of extremism

Regrettably there is some evidence that departure from the fundamental features of the pre-Merdeka ethnic compromises is already taking place.

- Foremost amongst the emerging demands is the call by some groups for an Islamic state with hudud laws. Neither the Alliance in 1957 nor the components of the ruling Barisan Nasional have agreement on this significant new direction. The opposition coalition is also deeply divided on this issue. On this matter, politics and administrative policy have trumped and displaced the Constitution. Whether Malaysia is an Islamic or secular state is a political shadow-play. No one familiar with the original constitutional papers will deny that a theocratic state was never in contemplation. Nor was American style secularism desired or considered desirable. Malaya, later Malaysia, sought to walk the middle path. The state should not be indifferent to, or hostile towards, religions. It must promote a tolerance that comes not from the absence of faith but from its living presence.

- The spirit of the Constitution that the special position of the Malays and the natives of Sabah and Sarawak was to be offset by safeguards for the legitimate interests of other communities has not been properly understood and enforced. Perhaps the Sedition Act hampers open scrutiny of affirmative action policies and actions even when these policies sometimes go overzealously beyond the permitted borders. There is considerable overzealousness in the enforcement of Article 153 reservations and quotas. The spirit of Article 153 (special position of Malays and the natives of Sabah and Sarawak) was one of moderation. Article 153 does not contemplate monopolies for the Bumiputras or total

exclusion of other communities. It requires the Yang di-Pertuan Agong to safeguard the legitimate interests of other communities. It states that reservations and quotas for Bumiputras in the public services do not override the requirement in Article 136 to treat all public sector employees equally. The late Tun Suffian told us how Article 153 and 136 can be reconciled. At entry point, Article 153 prevails. Such quotas and reservations as the Yang di-Pertuan Agong deems necessary are allowed. But once a person is already in government employment, Article 136 applies and there is a constitutional obligation to treat everyone equally. The 1-Malaysia quest must, obviously, deal with the need for a delicate balance between Articles 153 and 136.

- After the 1969 racial riots, the Malay features of the Constitution were enhanced. Since the 1990s the Islamic dimension of the Constitution has gained great prominence.

- A very painful issue is the conversion of infants to Islam when one party to the marriage converts to Islam. In a spate of family law disputes between couples, one of whom converted to Islam, the courts seem to be motivated by religious allegiance rather than the Constitution.

- On the other side, the demand for Chinese and Tamil medium schools is an extra-constitutional demand.

- The constitutional ban on preaching of other religions to Muslims in Article 11(4) is often surreptitiously flouted.

- The demand for use of the word 'Allah' in Christian sermons is an unnecessary provocation given the Article 11(4) ban on proselytisation.

- Well-intentioned social and charitable work by Christian missionaries amongst Muslims arouses suspicion here as in many other corners of the globe and could well be handled differently. There are many ways of doing God's work and help can be extended either discretely or through representative organisations.

- The severe competition between Christian evangelists and Muslim missionaries is also raising the social barometer in this country.

- There are incidents, isolated though they are, of church bombings, arson at mosques, throwing of pig parts near *suraus* and proposals to remove all crosses, statues and Christian images from missionary schools. The bigots in all communities are relying on fears to fan hatred. Fortunately, the Government has taken a firm stand against such extremism.

- Since 1969, racialism and religious bigotry have become mainstream. Moderates are maligned as traitors to their race or religion. Most of them prefer to remain quiet and live in the shadows. Whether it is an enlightened former Mufti or a Cabinet Minister who transcends race and religion, his loyalty to his race, religion and country is questioned. Same is the case when someone seeks to build bridges rather than barricades towards other races and religions. However, those who spew hatred, denigrate other races and religions seem to enjoy wide latitude.

- Difficult issues are unresolved in conflicts between Syariah and civil courts.

All in all, ethnic and religious relations are clearly under strain. However, it must be noted that this is not entirely new. Prime Minister Najib Razak faces the same

kind of ethnic discontent that UMNO leaders faced in 1956-57 and Najib's father Tun Razak had to confront in 1969.

1-MALAYSIA

It is in this troubled context that since 3rd April 2009 the Prime Minister installed a new star on the Malaysian firmament - the 1-Malaysia concept. The concept has many dimensions - political, legal, economic, cultural, educational, and even recreational. The Prime Minister has said that the concept has a "strategic ambiguity". As a student of constitutional law, I see a close link between 1-Malaysia and the spirit of 1955-57. Tun Abdul Razak, the father of Dato' Seri Najib, was then in the thick of things. Perhaps history is repeating itself.

A sympathetic reading would indicate that 1-Malaysia is a vision of justice for all. It is a guiding principle to build a united nation inculcating the spirit and values of unity, togetherness and a sense of belonging among Malaysians regardless of race, religion and creed.

1-Malaysia is recognition that Malaysia is a plural society and that its diversity is an asset and can be an impetus for further progress. It is a guiding principle to build a progressive nation with stability, high growth and development.

Some positive developments since the announcement of 1-Malaysia are that the government has lifted the 30% Bumiputera equity requirement from 27 service sub-sectors. A new economic model has been announced that seeks to tackle poverty irrespective of race.

The Home Ministry has done significant work to clear the citizenship applications of hundreds of aspirants

who had waited for years or decades to obtain Malaysian nationality.

Many UMNO leaders including the PM and DPM have acknowledged that the hard work and entrepreneurship of the non-Malay communities have contributed significantly to the country's success.

There is recognition in public by many Ministers that we have to go beyond tolerance of each other to a more positive acceptance and respect.

The announcement has been made that the armed forces will recruit at least 15% non-Malays. The government is seeking the help of non-Malay NGO's to recruit more non-Malays into the public services. A limited number of JPA scholarships will be on pure merit and not on ethnic quotas.

As of September 16th this year, Malaysia Day will be a national holiday. There is greater awareness that the rights of Sabah and Sarawak are as much part of constitutional entrenchment as the rights of the Malays under Article 153.

PERKASA has been criticized by some UMNO leaders though a large number of them remain non-committal.

On the religious front, the Cabinet announced sometime ago that a child must follow the religious practices of the parents at the time of the marriage in the event one of them opts to convert. The Federal Court has held that a marriage solemnized under Civil Law can be dissolved only under Civil Law. Unfortunately the Conference of Rulers has ordered the policy to be shelved.

On the negative side, skepticism is rife that 1-Malaysia is not really new. It is a repackaging of the

NEP, of the *Bersih, Cekap, Amanah* slogan, of the *Bangsa Malaysia* concept, of *Wawasan 2020*, of the *Malaysia Boleh*! admonition and of the *Cemerlang, Gemilang, Terbilang* slogan.

Many national leaders have thrown cold water on the 1-Malaysia quest by declaring that their first allegiance is to their race.

Racial and religious extremist continue to draw wide support. Their rhetoric has become mainstream. Moderates within all communities are maligned as traitors to their race and prefer to remain in the background.

The use of English for Science and Maths was abandoned.

Many journalists in the vernacular press continue to pour forth racial and religious poison and they seem to enjoy immunity from prosecution.

The Conference of Rulers and some religious leaders have teamed up to derail some much needed measures to resolve conversion issues.

CONCLUSION

A middle path of moderation is evident if we examine the Constitution in relation to the granting of citizenship without consideration of race or religion; the balancing of the special position of the Malays with the legitimate interests of the other communities; recognition of religious, cultural and linguistic pluralism; and a right to education for all. Unfortunately we seem to have regressed.

The Prime Minister has tried to counter the trend by introducing his concept of 1-Malaysia. The concept is full of promise but it is too early to evaluate it. Ultimately

its success will depend on whether future economic, educational, social, cultural, legal and administrative policies will honour its spirit; whether the tide of racial and religious extremism that was tolerated for so many years will now be contained. There is a general skepticism about slogans and the government has to walk the talk and tackle the obvious ferment in Malaysian society. There is no reason to believe that it cannot succeed. Despite the many challenges to national unity, we have decades of experience in living together in peace and harmony. We may have regressed, but we can recapture what our forefathers so painstakingly helped to establish.

If 1-Malaysia is to succeed we need to improve knowledge of the Constitution and of the social contract.

We need to restore the spirit of moderation that animated the early years. The magic formula of power sharing must be continued.

The deeply divisive debate about whether we are an Islamic or secular state must be conducted without emotions and in a historical perspective.

On the economic front, we must continue to use the economy to unite the people. We must freely acknowledge that the country's phenomenal success is owed to the spirit of accommodation and enterprise of all ethnic groups.

We must take a stand against extremists and reward and honour the moderates who transcend race and religion. It should be part of the 1-Malaysia quest to acknowledge that due to the genius of our founding fathers, we have had and we will continue to have a winning formula for success. Those who seek to abandon our tested and tried political and economical policies for their own utopias need to be engaged and educated.

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8

THE ISLAMIC STATE DEBATE: MIDDLE PATH BETWEEN SECULARISM & THEOCRACY

The Constitution of Malaysia in Article 3(1) provides that Islam is the religion of the Federation but all other religions may be practised in peace and harmony. The word "Islam" is mentioned at least twenty-four times in the Federal Constitution. The words "Mufti", "Kadi Besar" and "Kadi" at least once each.

In the Federal Constitution's Schedule 9, List II, Paragraph 1, State legislatures are permitted to legislate for the application of Islamic laws to persons professing the religion of Islam in a variety of areas including personal and family law, succession, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions, trusts, *zakat, fitrah, baitulmal*, similar Islamic religious revenue and mosques.

The State legislatures are also authorised to create and punish offences by Muslims against the precepts of Islam except in relation to matters within the jurisdiction of the federal Parliament. Syariah courts may be established by State law and it is declared that they shall have jurisdiction only over persons professing the religion of Islam. In the exercise of powers within their jurisdiction, Syariah Courts are independent of the civil courts: Article 121(1A).

What are the legal, political, moral, social and economic implications of Article 3(1), Article 121(1A)

and List II of Schedule 9? During the last two decades an engaging debate has been raging about whether Malaysia is an Islamic or secular state.

The non-Muslims of the country are adamant in their assertion that Malaysia's Constitution is, and was from the beginning, meant to provide a secular foundation. The opposition Muslim party, Parti Islam Se-Malaysia (PAS) agrees with them that the Constitution is secular. But it says this in an accusatory tone and has made it clear that once in power it will amend the basic law to convert Malaysia into an Islamic state.

The ruling Muslim party, United Malay National Organisation (UMNO), during the premiership of Tun Mahathir dismissed the proposal by PAS on the ground that Malaysia is already an Islamic state and, therefore, no constitutional amendments are needed. It rested its case on the fact that Muslims constitute the majority of the population. The constitutional monarchs at the federal and state levels are Muslims. The political executive, the civil service, the police, the army, the judiciary and the legislatures, while multi-racial, are under the control of Muslims. The Federal and State Constitutions are replete with Islamic features. Islamic practices are gaining ground. Islamic economic and religious institutions thrive with state support.

The Islamic state discussion is riddled with the error that a state must be either theocratic or secular. In fact, many hybrid versions exist and ideological purity – even if desirable – is not easily possible. Whether the Malaysian polity is "Islamic" or not depends also on whether one views things in a purely *de jure* (legal) way or whether one brushes into the legal canvas the *de facto* realities.

It is submitted that the differences of opinion over whether Malaysia is an Islamic or secular state are attributable partly to semantics – the assignment of different meanings to the same word by participants in a discourse. Opinions are clashing because there is no litmus test or universally agreed list of criteria to typify a social or legal system as theocratic or temporal. The problem is compounded by the fact that there is no ideal or prototype secular or Islamic state that one could hold up as a shining model or paradigm of one or the other. As in other religious, political and economic systems, diversity and differences are part of Islamic ideology and of the practice of 57 or so Muslim majority countries. The Shias and the Sunnis (and within the Sunnis the Hanafi, Shafei, Maliki and Hambali schools), are not always in agreement over details. As in every other system that depends on human endeavor for realisation, there is a massive gap between theory and reality and promise and performance. A theoretical discussion of the fundamentals of secularism and theocracy may help to understand the constitutional position in Malaysia.

SECULAR STATE

A secular constitution separates the state from the church and law from religion. The functions of the state are confined to mundane matters and religion is left entirely to religious establishments. There is no legally prescribed official or state religion and no state aid is given to any religion or for any religious purposes. Freedom of religion is, however, generally guaranteed and private religious activities by individuals, groups and associations are not interfered with except on grounds of public order, national security, public health or public morality. Well-known examples of secular states are India, the United States, Singapore and Turkey.

India

In India, the Preamble to the Constitution declares India to be a secular state. There is no official, state religion in India. The Constitution has neither established a religion of its own nor conferred any special patronage upon any particular religion. Of course, a wide gap exists between theory and practice. Under Article 27 of the Indian Constitution, the state cannot compel any citizen to pay any taxes for the promotion or maintenance of any particular religion or religious institution. No religious instruction can be provided in any educational institution wholly provided by state funds. Denominational institutions receiving aid from the state can impart religious instruction but cannot compel anyone to receive such instruction without his or his parent's consent. The attitude of the law towards religions is one of neutrality and impartiality though actual practices diverge from theory. Personal laws are allowed but no one can be compelled to observe them. In addition, the state exercises an overriding power to regulate or suppress religious practices that offend morality and public order.

United States

Like India, the United States does not have a state religion. However, many laws of the United States are grounded in Protestant Christianity. Most State Constitutions in the USA pay deference to God in their Preambles. However, in the area of public education, the separation between the church and the state is very pronounced. In 1963 the US Supreme Court in *Abington v Schempp* (1963) held that Bible reading exercises in public schools were unconstitutional. Public funds cannot be used to support any sectarian activity. In *Engel v Vitale* (1962) state sponsored prayer in public schools was held to violate the constitutional clause that forbade the state from establishing any religion. A high school principal

who allowed a group of students to conduct a prayer meeting in his office was prohibited by the state court from using a public premise for a sectarian purpose. In *McCollum* v *Board of Education* (1948) releasing students for a short time to enable them to pray constituted unconstitutional use of tax supported property for religious instruction. In the U.S., distributing religious literature in public schools is not allowed. The wearing of a distinctive religious garb by a public school teacher while engaged in the performance of duties can be prohibited. In the interest of maintaining the changing values of a pluralist society, American courts have taken secularism to extremes by trying to remove God from the classroom. A few years ago the University of North Carolina prescribed a book *Approaching the Quran: The Early Revelations* by Michael Sells. A Christian organisation immediately challenged this as a violation of the First Amendment to religious freedom.

Turkey and Singapore

As in the United States, Turkey maintains a strict divide between religion and politics. In 1998, the Turkish Supreme Constitutional Court banned the electorally popular Islamic Welfare Party. A woman MP who chose to wear a scarf to Parliament was dismissed from Parliament. School girls who defy the ban on head-covering are expelled from schools. Similar attitudes exist in Singapore. In the guise of neutrality, many secular states adopt an attitude of hostility towards organised religions.

FEDERAL CONSTITUTION'S SECULAR FEATURES

Secular history

Malaysia's document of destiny does not contain a preamble. The word 'secular' does not appear anywhere in the Constitution. However, there is historical evidence in the Reid Commission papers that the country was

meant to be secular and the intention in making Islam the official religion of the Federation was primarily for ceremonial purposes. In the White Paper dealing with the 1957 constitutional proposals it is stated: "There has been included in the proposed Federal Constitution a declaration that Islam is the religion of the Federation. This will in no way affect the present position of the Federation as a secular state..."[1] This view of a secular history is strongly challenged by those who argue that before the coming of the British, Islamic law was the law of the land.[2] With all due respect, such a picture oversimplifies an immensely complex situation. A look at the legal system prior to Merdeka indicates the presence of a myriad of competing and conflicting streams of legal pluralism.

The Neolithic people who lived in the alluvial flood plains of Malaya between 2500 BC and 1500 BC possessed their own animistic traditions. Likewise the Mesolithic culture (encompassing the Senois of Central Malaya, the Bataks of Sumatra and the Dayaks of Borneo), the Proto-Malays and the Deutero-Malays had their own tribal customs.

Hinduism from India and Buddhism from India and China held sway in South East Asia between the first to the thirteenth centuries and left an indelible imprint on Malay political and social institutions, court hierarchy, prerogatives and ceremonials, marriage customary rites and Malay criminal law. The incorporation of the patriarchal and monarchical aspects of law are said to have been influenced by Hindu culture. Some of these influences linger until today.

In Peninsular Malaysia, Chinese traders brought with them their own way of life and the close relationship between Malacca and China during the days of the Malacca Sultanate opened the door to Chinese influence on Malay life.

Before 1963, Sabah and Sarawak were guided by their native customs and by British laws. The influence of Islam was marginal.

Islam came to Malacca only in the 14th century from various regions in Arabia, India and China. But it gained a legal footing in Malaya only in the 15th century. Since then the legal system of the Malays shows a fascinating action and reaction between Hindu law, Muslim law and Malay indigenous traditions. In some Malay states like Malacca, Pahang, Johore and Terengganu, vigorous attempts were made to modify Malay customs and to make them conform to Islamic law. But these attempts were thwarted by the British who relegated Islamic law primarily to personal matters. R.J. Wilkinson says that "there can be no doubt that Muslim law would have ended by becoming the law of Malaya had not British law stepped in to check it".[3] There is very little doubt that at the time of Merdeka the "Islamic law" that existed in Malaya was "an Islamic law which (had) absorbed portions of the Malay adat and, therefore, not (the) pure Islamic law".[4]

Case law

It was held in *Che Omar Che Soh v PP* (1988) that though Islam is the religion of the federation, it is not the basic law of the land and Article 3 (on Islam) imposes no limits on the power of Parliament to legislate. Islamic law is not and never was the general law of the land either at the federal or state level. It applies only to Muslims and only in areas outlined in Item 1 of List II of the Ninth Schedule. In the law of evidence, for example, the Evidence Act applies to the exclusion of Islamic law: *Ainan v Syed Abubakar* (1939). Under Schedule 9, List II the Syariah Courts have limited jurisdiction only over persons professing the religion of Islam. It must be noted; however, that the High Court in

Meor Atiqulrahman Ishak v Fatimah bte Sihi (2000) did not follow the *Che Omar Che Soh* decision. It held that Islam is *ad-deen* – a way of life. Regulations violating Article 3 can be invalidated. However, the High Court was overruled by the Court of Appeal and the Federal Court.

Adat

One must also note the very significant influence of Malay *adat* (custom) on Malay-Muslim personal laws. In some states like Negeri Sembilan, *adat* (custom) displaces *agama* (religion) in some areas of family law.

Article 4(1) and constitutional supremacy

Under Article 4(1) the Constitution and not the syariah is the supreme law of the federation. Any law passed after Merdeka Day which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void. Despite the process of Islamisation since the early eighties, no constitutional change has been made to weaken Article 4(1) or to put the syariah on a higher pedestal than the law of the Constitution.

Article 162(6)

Under Article 162(6) and (7) any pre-Merdeka law which is inconsistent with the Constitution, may be amended, adapted or repealed by the courts to make it fall in line with the Constitution.

Definition of 'law'

Article 160(2) of the Constitution, which defines "law", does not mention the *syariah* as part of the definition of law. The term "law" includes written law, common law and custom or usage having the force of law.

Article 3(4)

Though Islam is adopted as the religion of the federation, it is clearly stated in Article 3(4) that nothing in this Article derogates from any other provision of the Constitution. This means that no right or prohibition, no law or institution is extinguished or abolished as a result of Article 3's adoption of Islam as the religion of the Federation. This is what was held in *Che Omar Che Soh.* A controversial parliamentary law on drug trafficking which provided for mandatory death sentences and a presumption of guilt cannot be invalidated on the sole ground that it is un-Islamic.

Higher status of secular authorities

If by a theocratic state is meant a state in which the temporal ruler is subjected to the final direction of the theological head and in which the law of God is the supreme law of the land, then clearly Malaysia is nowhere near a theocratic, Islamic state. Syariah authorities are appointed by State governments and can be dismissed by them. Temporal authorities are higher than religious authorities. Except for those areas in which the syariah is allowed to operate, the law of the land is enacted, expounded and administered by secular officials.

Senior federal posts

The Yang di-Pertuan Agong must, of course, be a Muslim. But Islam is not a prerequisite for citizenship or for occupying the post of the Prime Minister. Members of the cabinet, legislature, judiciary, public services (including the police and the armed forces) and the Commissions under the Constitution are not required to be of the Muslim

faith. In the Sixth Schedule, the oath of office for cabinet ministers, parliamentary secretaries, Speaker of the Dewan Rakyat, Members of the Dewan Rakyat and Senators, judges and members of Constitutional Commissions is quite non-religious in its wording and does not require allegiance to a divine being or to Islam.

THEOCRACY

In contrast with secular states, in theocracies religion is interwoven into the fabric of government. "Theocracy" literally means rule by God. In political science the term has come to mean either one of two things. First, the temporal ruler is subjected to the final direction of the theological head because the spiritual power is deemed to be higher than the temporal and the temporal is to be judged by the spiritual. Iran has such a constitutional rule. Second, the law of God is the supreme law of the land. The divine law is expounded and administered by pious men as God's agents on earth. Saudi Arabia and the Vatican are theocracies of this kind.

ISLAMIC FEATURES IN THE CONSTITUTION

The Constitution of Malaysia in Article 3(1) provides that Islam is the religion of the federation but all other religions may be practised in peace and harmony. The word "Islam" is mentioned at least twenty-four times in the Constitution. The words "Mufti", "Kadi Besar" and "Kadi" at least once each.

There are many significant implications of the declaration of faith in Article 3(1).

Secularism rejected

The implication of adopting Islam as the religion of the federation is that Malaysia is not a full-fledged secular

state. Government support for the religion of Islam is permitted. The government is not required to maintain neutrality as between religions.

Education

Islamic education and way of life can be promoted by the state for the uplifting of Muslims. Article 12(2) provides that it shall be lawful for the Federation or a State to establish or maintain Islamic institutions, provide instruction in the religion of Islam to Muslims and incur expenditure for the above purposes.

Religious institutions

Taxpayers' money can be utilised to promote Islamic institutions and to build mosques and other Islamic places of worship and to keep them under the control of state authorities.

Syariah Courts & Article 121(1A)

The Constitution permits Islamic courts to be established and *syariah* officials to be hired. The jurisdiction of the syariah Courts is protected by Article 121(1A) against interference by ordinary courts.

Preaching to Muslims regulated

Propagation of one's religion to others is part of the constitutional right to freedom of religion under Article 11. However, this right is subject to one important limitation. Missionary activity amongst Muslims may be regulated. Under Article 11(4) state law and (for federal territories) federal law may control or restrict the propagation of any religious doctrine amongst Muslims. This Article is directed not only at non-Muslim attempts to convert

Muslims but also at propagation to Muslims by unauthorised Muslims. Application of such laws, however, poses a serious constitutional dilemma. Syariah Courts cannot have jurisdiction over non-Muslims and it appears that a federal criminal court will have to try a non-Muslim whose proselytizing zeal violates a state law that was enacted to shield Muslims against missionary activities.

Islamic morality

State enactments can seek vigorously to enforce Islamic morality amongst Muslims. For example, beauty and body building contests are forbidden to Muslims in many States. In areas permitted by the Federal Constitution's Ninth Schedule, List II, paragraph 1, Islamic civil and criminal laws are applied to all Muslims.

Islamic offences

Paragraph 1 of List II of the Ninth Schedule permits State legislation to create and punish offences by persons professing the religion of Islam against the precepts of that religion. However, the power of the state to enforce Islamic criminal law is severely circumscribed by Lists I and II of the Ninth Schedule. The power of State Assemblies in Schedule 9, List II, Item 1 to create and punish offences against the precepts of Islam is a residual power and not an unlimited or sovereign power. It is subject to a number of constitutional limitations discussed in chapter 15.

State Constitutions

All State Constitutions in the Malay states prescribe that the Ruler of the state must be a person of the Islamic faith. All state Constitutions other than in Melaka, Penang, Sabah and Sarawak require that the Menteri Besar and state officials like the State Secretary shall profess Islam. Except for Sarawak, Islam is the official religion in all states.

Concept of a 'Malay'

The concept of a 'Malay' in Article 160(2) is inextricably tied up with observance of the religion of Islam.

Islamic institutions

Government-supported Islamic institutions abound. There is a National Council for Islamic Affairs, State Councils of Muslim Religion, Fatwa Committees, the Islamic Research Centre, the Department of Religious Affairs, Universiti Islam Antarabangsa Malaysia, Tabung Haji and Institute of Islamic Understanding Malaysia (IKIM).

Islamic practices

Qur'an competitions are held; the *azan* (call for prayers) and Islamic programmes are aired over radio and television. TV1 and TV2 devote at least 15 hours a week to Islamic programmes. Islamic salutations and prayers are offered at most government functions; Islamic form of dressing is becoming increasingly mainstream. In many government departments, Qur'anic verses are recited over the public address system at the beginning of the day.

Islamic economy

In the financial field Islamic monetary institutions are being vigorously promoted. Among them are Bank Islam, *Takaful* (Islamic insurance), Tabung Haji, Pilgrims Management and Fund Board, Amanah Ikhtiar Malaysia, Qarad Hasan (interest free loans), *jual janji, wakafs, Bait-ul-mal, zakat* and *fitrah*.

Islamisation

The Islamisation and Islam Hadhari policies of the government have won Malaysia many admirers abroad. At the world stage, Malaysia is recognised as a model Muslim country, if not an Islamic state. If there is aspiration of giving centrality to the syariah, then it must be noted that on the existing provisions of the Constitution, Malaysia is not a theocratic, Islamic state. If it is the intention of the Government to convert Malaysia into a full-fledged Islamic state, the following provisions of the Constitution need re-examination.

- **Article 4(1):** This Article declares the supremacy of the Constitution. It must be re-worded as follows: "The syariah shall be the supreme law of the Federation and any law passed after the coming into force of this amendment which is inconsistent with the syariah shall, to the extent of the inconsistency, be void". Alternatively, Article 4(1) could be amended to provide: "Except in relation to matters covered by Schedule 9, List II, Item 1, 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".

- **Article 3(4):** The provision that "Nothing in this Article derogates from any other provision of this Constitution" should be deleted.

- **Article 160(2):** In the Constitution's definitional clause, the term "law" should be redefined to include the 'syariah' as part of the definition of law.

- **Article 11(1):** This Article on freedom of religion should be amended as follows: "Except as to persons subject to the syariah, every person has the right to profess

and practice his religion and, subject to Clause (4), to propagate it".

- **Schedule 9, List II, Item 1:** In this paragraph, Muslim apostasy should be mentioned explicitly as a criminal offence.

- **Schedule 9, List II, Item I:** Instead of specifying the topics on which the States can pass law, the States should be given general power to pass laws on "all matters covered by the syariah".

- Ordinary courts will handle cases involving non-Muslims only. There will be two legal systems - one for the Muslim majority based totally on the syariah and the other for the non-Muslim minority based on secular provisions - a sort of a one country, two-systems approach.

The implications of the above changes will be that legislation and administrative decisions inconsistent with the syariah will be open to judicial review. All issues involving Muslims - whether criminal, civil, constitutional or commercial - will be heard by the syariah courts. The federal executive and legislature will have no jurisdiction over Islamic matters. Islam will be the sole prerogative of the States. This will be a return to the pre-Merdeka position in the Malay States. In the negotiations leading to the Reid Commission Report, the Alliance representatives had objected to the proposal of the Rulers that Islam should be solely in the hands of the State governments. The final draft of the Merdeka Constitution divided jurisdiction over Islamic matters between the federal and state governments.

CONCLUSION

On the issue of an Islamic versus a secular state, it can be stated categorically that on the existing law, the Malaysian legal system is neither fully secular nor fully theocratic. It is hybrid. It permits legal pluralism. It avoids the extremes of American style secularism or Saudi, Iranian and Taliban type of religious control over all aspects of life. It mirrors the rich diversity and pluralism of its population. It prefers pragmatism over ideological purity; moderation over extremism. It walks the middle path. It promotes piety but does not insist on ideological purity. Muslims are governed by divinely ordained laws in a number of chosen fields. In other fields their life is regulated by Malay *adat* and by non-ecclesiastical provisions enacted by democratically elected legislatures. Non-Muslims, in turn, are entirely regulated by secular laws.

This milieu of increasing Islamisation arouses great antipathy among the non-Muslim communities. But many Muslim scholars see the resurgence of Islam as the correction of an imbalance; as a counter to the hegemonic influence of the dominant Western civilisation with its massively successful appeal to hedonism, consumerism and capitalism. It is not wrong to suggest that the rise of Islamic influences has added to and not subtracted from the pluralism of Malaysian society. For whatever it is worth, Islam offers an alternative world-view of economics, politics and culture. This world-view has to be tested in the fires of scrutiny. It has to compete with a whole range of powerful and deeply entrenched forces from the past and the present. At the world-stage Islam has just emerged from the shadows of the last few centuries to claim a right to compete for a place in our hearts and minds. In Malaysia the future is likely to see action and reaction, pull and push and a symbiosis among the many factors and forces that have shaped and are shaping the political, social and moral landscape in Malaysia.

Given the multi-racial, multi-cultural and multi-religious composition of Malaysian society, the imperatives of coalition politics, the demands of a federal polity, the power of the non-Malay electorate, the 54-year old political tradition of compromise and consensus, the increasing democratisation of life, the greater sensitivity to human rights, the emergence of many powerful NGOs including those espousing women's issues, the juggernaut of globalisation, the pulls of secularism and modernism, the glitter of a capitalistic, hedonistic and consumer-based economy, the power of the international media to shape our values, and the overwhelming control that Western institutions wield over our economic, cultural and educational life, it is unlikely that Islam will have a "walk-over" in Malaysia and will sweep away everything in its path. Malaysian society is, and is likely to remain, a cultural mosaic. Islam in Malaysia will continue to co-exist with modernity, with Malay *adat* and with the dominant American and European culture that shapes our world-view, our thinking processes and our framework assumptions.

Endnotes

1 M.Sufian Hashim, 'The Relationship between Islam and the State in Malaya', *Intisari*, Vol 1, No 1, p. 8.
2 Ahmad Ibrahim & Ahilemah Joned, *The Malaysian Legal System* (Dewan Bahasa dan Pustaka, Kuala Lumpur, 1987) p 54.
3 R.J. Wilkinson, "Papers on Malay Subjects", *Law* (Kuala Lumpur, 1971).
4 Ahmad Ibrahim & Ahilemah Joned, supra, p. 3

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9

SPECIAL POSITION OF THE MALAYS

Equality amongst unequals favours the strong over the weak and acts powerfully to maintain the status quo.

Equality before the law is one of the greatest of all constitutional ideals. However, in a world of inherent disparities between the rich and the poor, the educated and the illiterate, the privileged and the powerless, the conferment of formal equality does not secure functional parity.

Equality amongst unequals favours the strong over the weak and acts powerfully to maintain the status quo. In an untrammeled market economy, wealth, power and position tend to gravitate towards the privileged few. The declaration of formal, legal equality becomes an empty legal formula in the face of massive economic, social and educational disparities.

Affirmative action

Many Constitutions empower schemes of preferential treatment in order to elevate the status of economic, social or culturally backward communities or sections of society like women, children, aborigines, 'untouchables', minorities or other marginalised groups. Obligations are placed upon the State to take affirmative action to ameliorate group disparities.

Such schemes are referred to by many names – positive discrimination, affirmative action and reverse discrimination. India, Cyprus, America and Malaysia are prominent examples of countries with such schemes.

United States

In the USA affirmative action policies were designed in the Kennedy era to incorporate racial and ethnic minority groups and women into political, social and economic institutions. The initial thrust was to ensure recruitment of workers on a non-discriminatory basis through equal employment opportunities.

In the seventies judicial decisions transformed these policies from merely encouraging equal opportunity for all individuals to mandating quotas, equality of results and statistical parity among selected minority groups. Affirmative action became a compensating as well as a remedial measure to undo the effects of past discrimination. Positive discrimination was seen as necessary because of the failure of neutral criteria to achieve minority representation in various sectors.

In the Reagan and George Bush eras these policies suffered sharp reversals.

Cyprus and India

In Cyprus, affirmative action policies are meant to give fair representation to Greek and Turkish sectors of the population on the nation's institutions.

In India the atrocities of the caste system had put the 'untouchables' beyond the pale of human society. The constitutional system of reservations, quotas and preferences is meant to ameliorate the plight of 'scheduled castes and tribes'.

Malaysia

In Malaysia affirmative action policies operate at three levels. Firstly, they protect minorities like the *Orang Asli* and the natives of Sabah and Sarawak. Secondly, at the territorial level they give to the regions of Sabah and Sarawak special privileges in relation to the other states of the federation. Thirdly, and most importantly, they mandate special privileges for the politically dominant but economically depressed Malay majority.

HISTORICAL BASIS FOR SPECIAL POSITION

In Malaysia constitutional protection for Malay privileges was part of the ethnic bargaining and accommodation that preceded Merdeka. But Malay privileges were by no means a novelty of the 1957 Reid Commission Constitution. The treaties between the British and the Malay Sultans and also clause 19(i) (d) of the Federation of Malaya Agreement 1948 required the British High Commissioner "to safeguard the special position of the Malays and the legitimate interests of the other communities".

Article 153 special position

Article 153 provides a scheme of preferential treatment for Malays (and the natives of Sabah and Sarawak) in a number of specified areas. The Yang di-Pertuan Agong may, in order to promote the purposes of Article 153, reserve such proportion as he deems reasonable of -

- positions in the public service;
- scholarships, educational or training privileges or special facilities;

- permits or licences for the operation of any trade or business required by federal law; and

- places in institutions of higher learning providing education after MCE.

Malay special position is entrenched against repeal in two ways. First, any Bill to abolish or curtail it may be caught by the law of sedition. Second, under Article 159(5), any amendment to Article 153 will require a special two-thirds majority of the total membership of each House of Parliament plus the consent of the Conference of Rulers.

Malay Reserve Land

Historically speaking the demand for legislative measures to create Malay reserve land was heard as early as 1907. In 1913 the then Federated Malay States Legislative Council enacted the first Malay Reservations Enactment (1913) to apply to Pahang, Perak, Negeri Sembilan and Selangor. The purpose of this law was to prevent market forces from divesting Malays of their ancestral holdings. Malay holdings could not be transferred, charged, leased or otherwise disposed off to any person not being a Malay. To complement the law of the Federated Malay States, other Malay states followed suit to enact their own legislation - Kedah and Kelantan in 1930, Perlis in 1934, Johor in 1936 and Terengganu in 1941.

Article 89 of the Merdeka Constitution provides for Malay reservation lands. Such lands cannot be de-reserved except by a state law that has been approved by special majorities in both the State Assembly and the Federal Parliament.

Article 90 confers special protection on customary lands in Negeri Sembilan and Malacca and Malay holdings in Terengganu. Under Article 8(5)(f) it is permissible to restrict enlistment in the Malay Regiment to Malays.

State leadership positions

Under the Constitution of all States except Melaka, Penang, Sabah and Sarawak, the Menteri Besar of the State must be a Malay and a Muslim. Similar requirement applies to the State Secretary except in Melaka, Penang, Perak, Sabah and Sarawak.

Aborigines

The Aborigines are not within the definition of a 'Malay' or a 'Bumiputra'. They are not protected by Article 153. However, Article 8(5)(c) permits any provision for the protection, well-being or advancement of the aboriginal peoples of Malaya including the reservation of land or of a reasonable proportion of suitable positions in the public service.

Natives of Sabah & Sarawak

Article 153 was extended to Sabah and Sarawak in 1971. As of 10 March 1971, natives of Sabah and Sarawak acquired the same special status as peninsular Malays for purposes of reservations and quotas.

In addition, the Constitution is replete with provisions to confer special rights on Sabah and Sarawak in a host of areas. Under Article 161 use of English and of native languages is allowed. Article 161A(5) allows reservation of land for natives. Article 161B restricts non-residents from practicing law in courts in Sabah and Sarawak.

Limits

The scope and extent of Article 153 privileges has never been litigated. It is arguable that the subjective and political nature of the Yang di-Pertuan Agong's functions under Article 153 (e.g. that he may reserve such proportion of seats as he deems reasonable) is such that courts are unlikely to substitute their views for the judgment of the King acting on advice.

Nevertheless, Article 153(2) does not give a *carte blanche* (total freedom) to the executive to prefer Malays over non-Malays.

- Affirmative action is allowed only in areas permitted by the Constitution. Many practices like "10% discount for Bumiputras" on houses sold by State Economic Development Corporations may well be unconstitutional. The Bar Council has objected to the practice in some statutory bodies of assigning legal work to Bumiputra legal firms only. Administrative instructions in some public sector organizations of granting commercial contracts to Bumiputra firms only poses constitutional problems because it goes beyond the permissible limits of Article 153 protection.

- Article 153(1) enjoins the King to safeguard "the legitimate interests of other communities".

- Article 153 clauses (4), (7) and (8) expressly state that in safeguarding the special position of Malays and natives, no person can be deprived of any office, scholarship, educational or training privilege, right, permit or licence (including the renewal of licence) that was already held by him. The economic cake can be expanded and quotas set-up. But no one can be deprived of what he already has. It would be unconstitutional to revoke the licence of a Malay simply for the purpose of giving it to

a Malay. However this rule does not prevent the federal government from terminating a lease in accordance with its terms even if the effect of bringing the lease to an end would be to render a hotel licence useless: *Station Hotels v Malayan Railway* (1977).

- Nothing in Article 153 permits Parliament to restrict business or trade solely to Malays or natives.

- Article 153 does not override Article 136 which requires that all persons of whatever race in the public service shall be treated impartially. Tun Suffian believes that quotas and reservations are permitted by Article 153 at entry point. But in the post-entry milieu ethnicity must give way to merit because of Article 136.

- Article 89(2) requires that when any land is reserved for Malays, an equal area shall be made available for general alienation. Article 89(4) forbids non-Malay held land from being declared a Malay reserve. Clearly, ameliorative measures for Malays and natives are not meant to extinguish vested rights and interests of the non-Malays.

What is significant about Malaysia's scheme of affirmative action is that Article 153 privileges are not subject to any time limit as was recommended by the Reid Commission. The constitutional privileges are not entirely motivated by economic considerations but are partly inspired by ethnicity. But the ethnic factor is mitigated by a broad-based and non-ethnic definition of who is a Malay and a native.

FEDERAL DEFINITION OF A 'MALAY'

Article 153(1) of the Federal Constitution enjoins affirmative action in favour of 'Malays' and the 'natives of Sabah and Sarawak'. It states 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 and the legitimate interests of other communities..."

Many economic, social and educational programmes since Merdeka, and especially since 1971, are structured along ethnic lines. The status of a 'Malay' or 'native' is the key to innumerable doors of opportunities both in the public and private sectors. Posts in the public sector, promotions, licenses, scholarships, loans, places in institutions of higher learning and allocation of many privileges are influenced by the "Bumiputra factor". It is, therefore, necessary that the legal concept of a 'Malay' and 'native' be subjected to a thorough analysis.

Under Article 160(2) of the Federal Constitution the term 'Malay' refers to persons who meet the following four criteria: First, the person must profess the religion of Islam. The Federal Constitution does not specify which sect of Islam the Muslim must belong to. This is in contrast with some state syariah enactments that identify Islam with the Shafei school of Sunni Islam. Second, the person must habitually speak the Malay language. Third, the person must conform to Malay custom. Fourth, the person must have roots in the country by way of birth or descent in Peninsular Malaysia or Singapore in one of the following four ways:

- he was before August 31, 1957 born in the Federation (of Malaya) or in Singapore; or
- born of parents one of whom was born in the Federation (of Malaya) or in Singapore; or
- was on August 31, 1957 domiciled in the Federation (of Malaya) or in Singapore; or

- is the issue of any of the above persons.

It is noteworthy that Article 160(2) uses the term "the Federation". This term refers to the Federation established under the Federation of Malaya Agreement 1957. As Sabah and Sarawak were not part of the Federation of Malaya, it follows that under Article 160(2) a Malay is defined by reference to Peninsular Malaysia only. Persons born in Sabah and Sarawak or having descent from persons in the East Malaysian states are not included in the federal concept of a Malay! From the strict legal point of view, Sabah and Sarawak Malays are 'natives' of their states.

Non-ethnic definition

A remarkable aspect of the constitutional definition of a Malay is that an essentially ethnic category is defined in a liberal, broad and non-ethnic way. Nowhere is it prescribed that a Malay must be of Malay ethnic stock! A person is a Malay if he is a Muslim, speaks the Malay language habitually, observes Malay *adat*, and has links with the soil through birth or descent. The concept of a Malay is a combination of ancestral roots, Islamic religion, *adat* and language. Tun Suffian puts it succinctly. "To be a Malay for the purpose of the Constitution you need not be of Malay ethnic origin. An Indian is a Malay if he professes the Muslim religion, habitually speaks Malay and conforms to Malay custom. Conversely even a genuine Malay is not a Malay... if... he does not profess the Muslim religion".[1]

The requirement of having roots in Peninsular Malaysia or Singapore implies that to be a Malay it is not enough to be of Malay ethnic stock. One must also be born in Malaya or Singapore before Merdeka Day or be descended from parents *one of whom* was born in Malaya or in Singapore or domiciled in these territories on Merdeka Day. The words "one of whom" implies that

persons of mixed parentage can qualify as Malays as long as either the father or mother was born or domiciled in Malaya or Singapore. The law is commendably gender free and does not favour male descent as is the case with some citizenship laws.

Those who qualify: On the basis of the constitutional criteria in Article 160(2), the following categories of persons can qualify as Malays under the Constitution:

- All persons of Malay ethnic stock who satisfy the four requirements of Article 160(2).

- Persons of mixed parentage provided one parent satisfies the four requirements of Article 160(2).

- Muslims of non-Malay races provided they satisfy all requirements of Article 160(2). Thus, Arab, Pakistani, Indian, Chinese, Siamese, Philippine and Kampuchean Muslims who speak Malay, observe Malay custom and have roots in the country by way of birth or descent can be deemed to be Malays for the purpose of the Constitution.

- Children of non-Malay extract who were adopted by Malay parents and have assimilated into the Malay way of life.

- Converts to Islam, provided they satisfy all four requirements of Article 160(2).

Those who are excluded: The following fail to qualify as Malays under the federal definition:

- Persons of ethnic Malay origin who have no roots in Peninsular Malaysia or Singapore. Thus if an Indonesian or Thai Malay who has no ancestral links with Peninsular

Malaysia migrates to this country, he does not, and he cannot ever, satisfy the constitutional definition of a Malay.

- Persons of the Malay race, who for whatever reason, do not profess the religion of Islam. For instance, a Malay who converts out of Islam automatically forfeits his status as a Malay. In the words of Tun Suffian "an Indonesian who habitually speaks Malay and conforms to Malay custom, is not a Malay for the purpose of the Constitution if for instance he does not profess the Muslim religion".[2]

- Sabah and Sarawak Malays are not within the federal definition of a Malay. This should be rectified by amending Article 160(2) to change the words 'born in the Federation' to 'born in the Federation of Malaya or Malaysia'.

- The *orang asli* are not within the definition of a Malay unless they satisfy all four requirements of Article 160(2). Nor are they 'natives' as that term is confined to the indigenous races of Sabah and Sarawak. Article 153 is not applicable to the *orang asli*. However under Article 8(5)(c) the Constitution permits measures for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula. An example of such a law is the Aboriginal Peoples Act 1954 that establishes *orang asli* areas and *orang asli* reserves.

Bumiputera: The Constitution speaks of Malays and natives of Sabah and Sarawak. The term Bumiputera has no legal basis and is of political coinage. There is no known authoritative definition of it anywhere. Perhaps its usefulness lies in uniting under one head the Malays of Peninsular Malaysia and the natives of Sabah and Sarawak. Additionally it gives to the executive some discretion to

grant privileges to those like Indonesian Malays and *orang asli* who do not qualify as Malays or natives under Article 160(2).

Singapore Malays: To be a Malay one must have links with Peninsular Malaysia or Singapore by birth or descent. The reference to Singapore was inserted in September 1963 when Singapore joined Malaysia but has not been removed after Singapore's separation.

Corporate bodies: Does the concept of a Malay refer only to natural persons or can it encompass corporate entities? There is conflicting evidence.

In the Majlis Amanah Rakyat Act 1966, MARA has been deemed to be a Malay for the purpose of land and share ownership. In the Malay Reservations Enactment No. 1 of 1936 (Johor) the definition of a Malay under section 2 includes authorities, boards, bodies, societies, associations and companies described in the Second Schedule to the Enactment. The (Kelantan) Malay Reservations Enactment No. 18/1930 in section 3 defines a Malay to include the Majlis Ugama Islam and the official administrator. Under the Malay Reservation Enactments of Kuala Lumpur, Negeri Sembilan, Pahang, Perak, Selangor, Johor and Terengganu the concept of a 'Malay holding' is employed to enable corporate bodies to hold or own Malay reservation land.

In contrast the Supreme Court in the Sarawak case of *Manang Lim Native Sdn. Bhd. v Manang Selaman* (1986) held that the word 'native' must be confined to natural persons and should not include artificial legal entities.

DEFINITION OF 'MALAY' IN STATE CONSTITUTIONS

The thirteen states of the Federation have in their Constitutions adopted the federal definition of a Malay contained in Article 160(2). This voluntary act of

harmonisation between federal and state Constitutions has profound and possibly adverse implications for the constitutionality of some state laws.

DEFINITION OF 'MALAY' IN MALAY RESERVATIONS ENACTMENTS

All states (other than Penang, Melaka, Sabah and Sarawak) have their own Malay Reservations Enactments that define who is a Malay for the purpose of the Enactments. Except for Melaka, the state definitions are significantly at odds with the federal definition and with each other. In the various state definitions a person is deemed to be a Malay if he satisfies the following requirements:

- He professes Islam.
- He habitually uses Malay (as required in Kedah and Melaka) or any "Malayan language" (as provided in Kuala Lumpur, Negeri Sembilan, Pahang, Perak, Selangor, Perlis, Terengganu and Kelantan). In Johor use of a "Malaysian language" is accepted.
- He observes Malay custom (as is required in Melaka).
- He satisfies the ethnicity requirement. In Kedah he must be descended from parents at least one of whom is of the "Malayan race" or of Arab descent. Arab descent is also accepted in Perlis. The words "Malayan race" occur in the Enactments of Kuala Lumpur, Negeri Sembilan, Pahang, Perak, Selangor, Kelantan, Terengganu and Perlis. In Johor one may be of Malay or "Malaysian race". Melaka, in line with the federal definition, has no race requirement.

In no law (other than the law applicable to Melaka) is there a requirement of birth in Peninsular Malaysia or

Singapore or descent from parents at least one of whom must have been born or domiciled in Peninsular Malaysia or Singapore. This emphasis on ethnicity but not on links with the Peninsula has led to the situation whereby Malay reserve lands in several states have been sold to non-citizens of Malay extract who do not qualify as 'Malay' under the federal definition but may come within the definition of a Malay under Malay Reservations Enactments.

Conflicting definitions

The conflict between federal and state definitions of a Malay raises a constitutional dilemma. A State Enactment must comply with the State Constitution. Once a State Constitution adopts a federal law, a State Enactment (like the Malay Reservations Enactment) cannot violate the adopted federal law. If it does, it can be declared null and void by the courts. It does appear that the definition of a Malay in each Malay Reservations Enactment violates the adopted federal definition and is, therefore, in direct clash with its own State Constitution. However, the situation is complicated by Article 89(6) which gives wide powers to the states to define a Malay. "In this article ... "Malay" includes any person who, *under the law of the state* in which he is resident, is treated as a Malay for the purposes of the reservation of land." It is submitted that the highest law of the state is the State Constitution and the State Constitution must prevail over the Malay Reservations Enactments. Perhaps a future judicial decision will settle the law in this field.

Definitions always pose problems. In the conceptual analysis of the term `Malay', the nuances are rich and the implications far-reaching. It is therefore understandable that history, culture, economics and politics swirl around the law and blur its contours. A wide gap exists between theory and practice, and between the law in the book and the law in action.

Resolving the conflicts: The theory of constitutional supremacy supplies a clear solution to the legal mischief that has been discovered. In the federal set-up of the country, state laws on matters within the state jurisdiction must prevail over federal laws, Article 75 notwithstanding. The topic of Malay reservation is in item 2(b) of the State List and, in normal circumstances, the state provision should override the federal provision. But the situation is complicated by two conflicting and competing factors.

First, all state Constitutions have adopted Article 160 of the Federal Constitution as part of their law. Article 160 is the interpretation clause in the Federal Constitution and it supplies a clear definition of who is a 'Malay'. This means that the federal definition of a 'Malay' is part of all state constitutions. All Malay Reservation Enactments must conform with it. To the extent that a Malay Reservation Enactment violates (the adopted) Article 160(2) of the Federal Constitution, it violates its own Constitution, and is, therefore, null and void to the extent of the inconsistency. A second complicating factor is that Article 89(6) of the Federal Constitution seems to give to the states the power to adopt their own definition of a 'Malay'. Article 89(6) states that "Malay" includes any person who, under the law of the State in which he is resident, is treated as a Malay for the purposes of the "reservation of land". It is submitted that the words "the law of the State in which he is resident" refer, foremost, to the State Constitution and, then, to the Reservation Enactment. A State Malay Reservation Enactment cannot override the State Constitution and once a State Constitution adopts the federal definition, a Malay Reservation Enactment cannot transgress the federal prescription.

Modality of change: The definition of a Malay in all Malay Reservation Enactments is, therefore, in need of amendment. How should this readjustment be accomplished?

A court declaration may be sought that the definition of a Malay in the various Malay Reservation Enactments is inconsistent with the State Constitutions and, therefore, null and void. The court could issue its ruling with prospective effect in order not to disturb rights and duties that have already accrued between buyers and sellers of Malay reserve land.

Alternatively, the court could rely on Article 162(6) of the Federal Constitution to modify the pre-Merdeka Malay Land Reservation Enactments to bring them into accord with State Constitutions and Article 160(2) of the Federal Constitution. The applicability of Article 162(6) is, however, open to doubt because this provision was inserted in order to maintain the supremacy of the Federal Constitution over pre-Merdeka laws. In the situation at hand the issue is that the Malay Land Reservation Enactments are violating their own state Constitutions.

Another way is to get each State Assembly to make a request to the federal Parliament under Article 76(1)(c) of the Federal Constitution to make a uniform law for all the States on this matter. The federally enacted law may add to state definitions the fourth requirement of birth (in Malaya or Singapore) or descent from a parent who was on Merdeka Day domiciled in Malaya or Singapore. The definition could at the same time allow some flexibility to states like Perlis and Kedah that wish to permit Arabs and persons of Thai origin to acquire Malay reservations.

A fourth alternative is for Parliament to act on its own initiative under Article 76(1)(b) to enact a uniform Malay Reservation Enactment for all the states. Under Article 76(4) such a law shall not require the consent or adoption of the legislatures of the states.

Finally, all State Assemblies may amend their Malay Reservation Enactments to make them fall in line with the federal definition that has been adopted by their Constitutions.

Endnotes

1 Tun Suffian, *An Introduction to the Constitution of Malaysia*, 2nd, ed. p. 291.
2 Suffian, supra.

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10

SPECIAL POSITION OF SABAH AND SARAWAK

The natives of the States of Sabah and Sarawak as well as these two States as constituent units of the Federation enjoy many special privileges under the Federal Constitution.

Article 153

As with the Malays of Peninsular Malaysia, the natives of Sabah and Sarawak are entitled to special rights and privileges under Article 153 of the Federal Constitution. Article 153 clauses (3) and (8A) allow reservation, for the natives of Sabah and Sarawak, of such proportion as the Yang di-Pertuan Agong may deem reasonable of -

- positions in the public service,
- scholarships, exhibitions and other similar educational or training privileges or special facilities,
- permits or licenses for the operation of any trade or business, and
- places in any University, college and other educational institutions providing education after MCE.

Article 161A(4) states that "the Constitutions of the States of Sabah and Sarawak may make provisions corresponding to Article 153". Further, Article 161A(5) provides that the law relating to Malay reservations shall

not apply to Sabah and Sarawak. State law in these states may provide for the reservation of land for natives or for giving them preferential treatment as regards the alienation of land by the State.

Land Rights

In Sabah and Sarawak the Land Code, 1958 in sections 2, 5, 15 and 41 and the Land Ordinance in sections 15, 78 and 79 provide for "Native Customary Land" and "Native Area Land". The former type of land is held under customary land tenure; the latter is held under a registered title. A special link with their "ancestral lands" is of paramount importance to the natives of Sabah and Sarawak and seems to be the basis of their identity. The law gives partial recognition to their claims over native land. In *Kajing Tubek v Ekran Bhd.* [1996] there were strong judicial statements to the effect that tribal land and forest were not just a source of livelihood but constituted life itself fundamental to the natives' social, cultural and spiritual survival. Unfortunately, on appeal it was held that though the Bakun project would deprive the natives of their livelihood and their way of life, since it was done in accordance with the law, no remedy was available: *Ketua Pengarah Jabatan Alam Sekitar v Kajing Tubek* [1997].

Customs

The customs of Sabah and Sarawak are recognised and enforced by special native courts and scholars can find much depth and diversity in the many recorded decisions of these courts.

Natives of Sarawak

Under Article 161A clauses (6) and (7) of the Federal Constitution a person is to be regarded as a "native" of Sarawak if he/she is a citizen and belongs to one of

the following indigenous races: the Bukitans, Bisayahs, Dusuns, Sea Dayaks, Land Dayaks, Kadayans, Kalabits, Kayans, Kenyahs (including Sabups and Sipengs), Kajangs (including Sekapans, Kejamans, Lahanans, Punans, Tanjongs and Kanowits), Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagals, Tabuns and Ukits. If a person is of mixed blood, he is still regarded as a native if his parents derive exclusively from these races.

It is noteworthy that "Malays" are included in Article 161A's list of natives. This means that under the Federal Constitution the word "Malay" has two different meanings – one under Article 160(2) to refer to the indigenous majority group in Peninsular Malaysia and the other to refer to one of the minority native groups in Sarawak.

Whether the Federal Constitution's list of native groups in Sarawak is truly reflective of the demographic and cultural picture in the state has been subjected to critical academic discussion. The problem is complicated by use of more than one term to describe a native community. Ramy Bulan informs us that some indigenous groups like the Melanau, Kayan, Kelabit, Lun Bawang, Punans and Selaku are missing from the Article 161A(7) enumeration. Besides the above omissions there are some incorrect insertions. For example the Dusun tribe of Sabah is included in the Sarawak list of natives. Some labels that are employed reflect colonial usage and not the characterisation preferred by the people themselves. Thus, the Muruts prefer to be known as Lun Bawang. The Ibans, who are the largest ethnic group, are referred to as Sea Dayaks in Article 161A. The Bidayuh are referred to as Land Dayaks. It is believed by some scholars that these groups do not prefer such characterisation.

Perhaps, for this reason the General Report of the Population Census, Vol. 1, issued by the Department of Statistics, Kuala Lumpur, 1995 does not conform to the

constitutional characterisation. This Report lists the tribes in Sarawak as follows: Iban (29.8%); Chinese (28%); Malay (21.2%); Bidayuh (8.3%); Melanu (5.7%); other indigenous groups (6.1%); others (0.9%).

Natives of Sabah

Article 161A(6) states that a "native" in relation to Sabah means a person who satisfies three requirements. First, he is a citizen of Malaysia. Second, he/she is the child or grandchild of a person of a "race indigenous to Sabah". Third, he/she was born on or after Malaysia Day either in Sabah or to a father domiciled in Sabah at the time of the birth of the child.

Presumably the words "child" and "grandchild" refer to both legitimate or illegitimate children. The reference to "a father domiciled in Sabah" indicates that the law suffers from gender bias in that it attaches no value to descent from a Sabah female. The terms "of a race indigenous to Sabah" are nowhere defined in the Federal Constitution and one has to turn to Sabah laws like the Sabah Interpretation (Definition of Native) Ordinance 1952 to give life and meaning to these terms. It is believed that there are 39 different indigenous ethnic communities in Sabah. The Kadazans form the single largest group representing nine linguistic sub-groups. Other important groups include the Abai, Bajau, Baukan, Bisaya, Dumpas, Dusun, Gana, Coastal Kadazan, Kalakaban, Kimarangang, Kolod/Okolo, Kujian, Lingkabau, Lotud, Murut, Nabay, Rumanau, Rungus, Sebangkung, Serudung, Sinabu, Sumambu, Tatana, Tambanua, Tagal, Tengara and Timogun. These groups were, at one time, described by the much disliked term "Pribumis". The preferred terms seem to be "Bumiputra", "anak Negeri" or "native" to refer to the indigenous people of Sabah and Sarawak and to contrast them with the later migrant communities that settled in the former Borneo states.

The Sabah Interpretation (Definition of Native) Ordinance (1952) details the categories of persons who may be regarded as natives. In the first category are persons both of whose parents are members of an "indigenous community". However the indigenous communities are not specified. The second category refers to residents of Sabah who are living as members of a native community and are descended from parents or ancestors at least one of whom is or was a native. The third category includes persons who are resident in Sabah; are members of Suluk, Kagayan, Simonol, Sibutu or Ubian communities or indigenous groups in Sarawak and Brunei; are living as members of a native community for a continuous period of three years; are of good character; and are not subject to any restriction by immigration laws. The fourth category refers to persons who are resident in Sabah; are members of people indigenous to Indonesia, Sulu group of islands, Federation of Malaya or Singapore; have lived as a member of a native community for five years; are of good character; and are not subject to immigration control.

Role of the Courts

In both Sabah and Sarawak issues relating to native status are assigned to Native Courts. In Sabah in 1958 the law was amended to provide that any person claiming to be a native must apply to the Native Court for a declaration of his status. In *Liew Siew Yin & D.O. Jesselton* (1959) the offspring of a Chinese father and Dusun mother failed in his claim because he could not prove that he was living as a member of a native community in Sabah. In *Ong Seng Kee v D.O. Inanam* (1959) a Sino-Kadazan who lived in a native area was regarded as sufficiently assimilated to satisfy the status of a native. In *Datuk Syed Kechik Syed Mohd v Government of Malaysia* [1979] it was held that the ordinary courts ought not to interfere with the declaration of the Native Court that a person is an "anak Negeri" under

the laws of Sabah. It must be noted however that after this case the law was amended to allow a Native Court decision to be reviewed by the District Officer or a Board of Officers appointed by the Yang di-Pertua Negeri.

In Sarawak the Native Courts Ordinance 1992 gives power to the District Native Court to determine whether a native has, by conduct or way of life, lost or acquired the status of a native.

Constitutionality of the definitions

In a country with a supreme Constitution, the validity of all laws can be tested by reference to the supreme Constitution. The definition of a native in the Sabah Interpretation (Definition of Native) Ordinance 1952 does not fully dovetail with the Federal Constitution's Article 161A clause 6(b). The Sabah law's validity may, therefore, be in doubt. The issue is as yet untested in a court. Another engaging issue, fit for judicial determination, is whether the privileges for the Natives of Sabah and Sarawak apply throughout the Federation or whether these are confined to their own states? Peninsular Malays qualify as natives of Sarawak under Article 161A(7) and as natives of Sabah under the Sabah Interpretation (Definition of Native) Ordinance 1952. But there appear some legal and political difficulties about enforcing privileges for Sabah natives in Sarawak, Sarawak natives in Sabah and natives from both these states in Peninsular Malaysia.

Special position of Sabah & Sarawak under Malaysian federalism

- The legislative competence of the States is defined in Schedule 9 List II of the Federal Constitution. Sabah and Sarawak have a Supplementary State List and a Supplementary Concurrent List. Within these Lists there are some variations for the two East Malaysian

States. Under Articles 95B to 95E, there is modification for States of Sabah and Sarawak of the distribution of legislative power.

- Sabah and Sarawak are excluded from Parliament's power to pass uniform laws about land and local government: Article 95D.

- Sabah and Sarawak are excluded from national plans for land utilization, local government and development: Article 95E.

- The power of amending the Constitution which belongs to the federal parliament is not as extensive in relation to Sabah and Sarawak as it is in relation to the West Malaysian States: Article 161E.

- The financial arrangements of the States with the Centre differ from State to State. The financial provisions of the Constitution apply with many exceptions to Sabah and Sarawak. There are special rules about state audits (Article 112A), wider borrowing power of these States (Article 112B), and special grants and assignment of special revenues to these States (Articles 112C–112D).

- Representation of the States of the Federation in the Dewan Rakyat is not proportionate to their population. Sabah and Sarawak are heavily represented in the Dewan Rakyat.

- The mobility of the population is restricted between some States but not between others. Sabah and Sarawak have special rights over immigration.

- Sabah and Sarawak enjoy special protection in relation to the use of English and native languages (Article 161); non-application of Malay Reserves to these States

(Article 161A(5)); restriction on non-resident lawyers in the matter of practicing before the courts of Sabah and Sarawak.

Special fiscal position of Sabah & Sarawak

Under the Constitution, federal dominance of revenues is less pronounced in relation to Sabah and Sarawak. This is partly due to the special needs of these States and partly due to the size and potential resources of these regions. In three areas Sabah and Sarawak enjoy fiscal privileges that are not available to the Peninsular States:

- Under article 112B, these States are allowed to raise loans for their purposes with the consent of Bank Negara.

- These States are allocated special grants to meet their needs above and beyond what other States receive: Article 112 C & 112 D.

- Sabah and Sarawak are assigned eight sources of revenue not permitted to other States. These include import and excise duty on petroleum products, export duty on timber and forest produce and, subject to a ceiling, export duty on minerals. Sabah and Sarawak are also entitled to earnings from ports and harbours and state sales tax: Article 112C & Schedule 10, Pt. V.

CONCLUSION

Ideally all component units of a federation must have equal powers in their relationship with the federal government. However, Sabah and Sarawak have many special attributes. Their combined area is 198,069 sq km, exceeding Peninsular Malaysia's 131,681 sq km. The coastline of the two States is 2,607 km compared to the

peninsula's 2,068 km. Bearing in mind the favourable geographical size, wealth and the different religious and racial composition of the people of Sabah and Sarawak, a pragmatic solution was adopted: the two Borneo states were given special powers not granted to the West Malaysian states. This special model may well be of relevance to countries like Afghanistan and Iraq where some of the restless regions are demanding more autonomy from the centre.

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11

FREEDOM OF RELIGION

"Let there be no compulsion in religion":
Holy Qur'an 2:256.

"The truth is from your Lord. Let him who will believe, and let him who will, reject it":
Holy Qur'an 18:29.

At the very outset it needs to be stated that Malaysia has a record of religious tolerance that should be the envy of all plural societies. Muslim mosques, a variety of Chinese places of worship, Hindu temples, Christian churches and Sikh *gurdwaras* dot the landscape. Citizens celebrate each others' religious festivals. Unlike in some democracies where religious riots erupt with painful regularity; where holy places of minority religions are often razed to the ground; and where religious minorities are constantly caricatured in the media, in Malaysia there is much inter-religious friendship and tolerance. The demonstration in KL in late 2007 by the Hindu group HINDRAF and its leaders' incredible allegation that Malaysia practices ethnic cleansing of the Hindus is a rare exception to a generally harmonious relationship amongst religious groups.

Financial allocations and tax exemptions are granted to all religions. Foreign priests and missionaries are allowed to work in the country. Muslim, Christian and Hindu festivals are marked by national holidays.

Missionary schools abound. Christian missionary teachers are often retained until age 65[1] – a privilege not enjoyed by other religious teachers. Though Islam is the religion of the federation, several laws provide for non-Muslim religious institutions. Among them are the Superior of the Institute of the Franciscan Missionaries of Mary (Incorporation) Ordinance 1957, Daughters of Charity of the Canossian Institute (Incorporation) Ordinance 1957, Synod of the Diocese of West Malaysia (Incorporation) Act 1971 (Act 36), Muslim and Hindu Endowments Ordinance (cap 175), Cheng Hoong Teng Temple (Incorporation) Act 1949 (Act 519), Pure Life Society (Suddha Samajam) (Incorporation) Ordinance 1957, Superior of the Institute of the Congregation of the Brothers of Mercy (Incorporation) Act 1972.

SCOPE OF THE PROTECTION

In general, the Constitution shows great tenderness for religious liberty. Various aspects of it are protected by Articles 3, 8, 11 and 12. Even in times of emergency, Article 150(6A) forbids Parliament from encroaching on religious freedom. The scope of the constitutional right covers the following areas:

There are three dimensions to Article 11(1)

The Constitution of Malaysia in Articles 11(1) grants to all individuals protection in matters of conscience. "Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it". Under this Clause citizens as well as non-citizens have the right to three things:

- to profess
- to practise, and

- subject to Article 11(4), to propagate their religion: Article 11(1).

The first refers to beliefs and doctrines. The second refers to exhibition of these beliefs through acts, practices and rituals. The third is about attempts at propagation and transmission of one's beliefs to others in order to convert them to one's faith.

The law distinguishes between inner beliefs and overt acts. The right to beliefs and doctrines is generally regarded as absolute, at least for non Muslims. It is Muslims that suffer some restrictions in this area. With Islamisation in full swing since the 80s (and the claim since 2001 that Malaysia is an Islamic state) a number of laws have been enacted that criminalise apostasy and other beliefs or conducts that are regarded as sinful under the syariah. In *Kamariah bt Ali v Kerajaan Negeri Kelantan* [2002] the judge implied that Article 11 (on freedom of religion) should not be interpreted so broadly as to vitiate legislation in the name of Islam that imposes duties and prohibitions on Muslims.

In contrast with 'belief', practice and propagation are allowed by Article 11(4) and (5) to be regulated on the ground of public order, public health or morality.

Freedom of religion is available to citizens as well as to non-citizens: Article 11(1).

Religious taxes apply only to adherents: Article 11(2)

There is to be no compulsion to support a religion other than our own. "No person shall be compelled to pay any tax the proceeds of which are specially allocated to a religion *other than his own*": Article 11(2). This means that a non-Muslim is constitutionally entitled to refuse to contribute to the funds of *zakat*, *fitrah* and *baitulmal* as

these are specially allocated for Islamic purposes. But a non-Muslim cannot refuse to pay a general tax (like income tax) even if part of the revenue is utilized to support Islam, the official religion of Malaysia. Also, the imposition of tax to support a person's own religion is perfectly constitutional. Thus, a Muslim can be compelled to pay *zakat* and *fitrah*.

There is a right to manage one's religious affairs: Article 11(3)

Every religious group has the right to manage its own affairs; to establish and maintain institutions for religious or charitable purposes; and to acquire and own property and hold and administer it in accordance with law.

There shall be no discrimination on grounds of religion in education: Article 12(1) & 8(2)

There is to be no discrimination on the ground of religion in relation to the rights of students to education or in public support for educational institutions: Article 12(1) and 8(2).

There is a right to religious education: Article 12(2)

Every religious group has the right to establish and maintain institutions for religious education.

There is no duty to learn other religions: Article 12(3)

"No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own": Article 12(3). The language of Article 12(3) requires a few comments.

First, the provision forbids compulsion but a person is not prevented from voluntarily participating in other people's religious activities.

Second, the term "religion" in Article 12(3) and elsewhere in the Constitution seems, at least in the case of Muslims, to refer to "the formal religion one is born into". Individuals born into a religion seem to have no choice to choose cults or systems of belief other than those approved by the official religious authorities. That is why there is punishment for "deviants".[2]

Third, the protection of the Constitution applies against instruction in a religion other than one's own. There is no right to refuse instruction in one's own religion. In *Noorliyana Yasira Mohd Noor lwn Menteri Pendidikan Malaysia* [2007] the applicant's father had, on conscientious grounds, requested that the applicant be exempted from attending the Islamic religious class in school. The teachings in the Islamic religious class clashed with the beliefs and understanding of the applicant's father and family. The applicant failed to attend the Islamic religion class; failed to take the Perkara Asas Fardhu Ain for her UPSR examination; and was awarded a failing grade. She applied for certiorari to delete the failing grade from her statement of result and for a mandamus to obtain a new statement of result. In refusing her application, the court largely avoided the constitutional issue of what constitutes "religion" and what constitutes "freedom of religion". The court based its decision on the premises that (i) any one professing the religion of Islam had to study the Islamic studies subject, and (ii) a student in a state-run school, like the applicant, could not dictate what subject or core subjects she wished to learn. This decision has far reaching implications for those who are born into a faith but who wish to renounce it or who have developed allegiance towards a non-official (often called "deviant") version of the faith.

Fourth, this Article forbids compulsory religious instruction in a religion other than one's own for worship or ceremonial purposes. But if a religious doctrine is taught as a historical or civilisational study, that may be permissible under the Constitution. For example a course on `Humanities' or on `Great Books of the Middle East' may prescribe the holy books of various religions as compulsory reading in the syllabus.

There is a right to equality: Article 8(2)

There can be no discrimination on the ground of religion against employees in the public sector; in the acquisition, holding or disposition of property; and in any trade, business or profession: Article 8(2).

Limits on Article 149's laws against subversion

A preventive detention order cannot be issued on the ground that a convert out of Islam is involved in a programme for propagation of Christianity amongst Malays: *Minister v Jamaluddin bin Othman* (1989). This is because the Internal Security Act is derived from Article 149. Under Article 149 Parliament is authorized to violate Article 5 (personal liberty), Article 9 (freedom of movement), Article 10 (freedom of speech, assembly and association) and Article 13 (right to property). Freedom of religion in Article 11 is not subject to the special powers under Article 149. The *Jamaluddin Othman* decision is a stirring affirmation of the limits of Article 149 powers and the sanctity of religious freedom.

Limits on Article 150's emergency powers

Even in times of emergency when Parliament's powers are greatly enhanced, Article 150(6A) provides that freedom of religion cannot be restricted by an emergency law under Article 150.

Belief in God

In an international perspective it must be noted that belief in God is not an essential aspect of all religions. Our thinking on this point must be global. Not all religions, among them Buddhism and Sikhism, are centred around God. The Constitution protects all religions whether theistic or not.

Article 3 on Islam does not override the rest of the Constitution

Though Islam is the religion of the federation, Article 3(4) states that nothing in Article 3 derogates from any other provision of this Constitution. This means that the right to religion guaranteed by Article 11(1) of the Constitution is not extinguished as a result of Article 3(1).

RESTRICTIONS

Like all freedoms, the right to follow one's conscience cannot be absolute. It is subject to the following direct and indirect restraints:

Peace and harmony: Article 3(1)

Under Article 3(1) the practice of religion must not disturb peace and harmony.

Restrictions on free speech: Articles 10

The restrictions on freedom of speech, assembly and association in Articles 10(2), (3) and (4) are also relevant because religious freedom is a bundle of many attributes.

Propagation to Muslims: Article 11(4)

Propagation of one's religion to others is part of the constitutional right under Article 11. However this right is subject to one important limitation. Missionary activity amongst Muslims may be regulated. Under the authority of Article 11(4), State law may restrict the propagation of any religious doctrine among Muslims. Nine State Legislatures have passed such laws.

Article 11(4) is so broadly worded that it covers all proselytising activities that are directed at Muslims whether by non-Muslims or unauthorised Muslims. Malays belong to the Shafie school of Sunni thought. If the Shias seek to proselytize the Shafies or if Muslim groups like the Al-Arqam or Sky Kingdom seek to propagate their beliefs to the Malays, this could be subject to regulation under Article 11(4). All mosques are controlled by the State. Only officially appointed Imams are authorised to deliver sermons.

The primary purpose of the law in Article 11(4) is to protect Muslims against well-organised and well-funded international missionary activities. Harding in *Law, Government and the Constitution in Malaysia*, MLJ, 1996, p. 202 believes that the restriction on proselytism has more to do with the preservation of public order and social harmony than with religious priority. To this one may add that in the Malay mind the words `Islam' and `Malay' are often used interchangeably. In Malay society there is a fascinating and unique connection between race and religion. The defining characteristic of a Malay is that he is a Muslim. Any attempt to weaken a Malay's religious faith is, therefore, perceived as an indirect attempt to erode Malay power. Conversion out of Islam would automatically mean deserting the Malay community due to the legal fact that the definition of a `Malay' in Article 160(2) contains

four elements. Professing the religion of Islam is the first, and perhaps the most important, element.

In the years after the decision in *Jamaluddin Othman,* State after State enacted laws under Article 11(4) to ban or regulate propagation to Muslims. However, enforcement of these laws poses one constitutional difficulty. The law is a State law but cannot be enforced by the State syariah courts because under the Constitution's Schedule 9, List II, Paragraph 1, syariah courts do not have any jurisdiction over non-Muslims. The matter has to be tried by a Magistrates Court should a non-Muslim's proselytizing zeal violate a State law.[3]

Public order, health and morality: Article 11(5)

Under Article 11(5) all religious freedom is subject to public order, public health, and morality. The exact scope of these permitted limitations has not been adequately examined. It is arguable that if on religious grounds a Jehovah's Witness refuses to take required inoculations or blood transfusions, or the Shia Muslims at Muharram or Hindus at Thaipusam indulge in self-flagellation, these practices can be regulated by law. It is to the credit of the government that it has extended tolerance to these practices.

What needs to be emphasised is that any legislative or administrative regulation of religious freedom is reviewable by a court of law. A law enacted under Article 11(5) must have a real and not fanciful or remote nexus with the permissible grounds.

Non-mandatory practices

Does freedom of religion extend only to those practices and rituals that are essential and mandatory or does it also cover practices that are optional? In *Halima-*

tussaadiah v PSC [1992] a Muslim lady in government employment insisted on wearing *purdah* to office. The court distinguished between mandatory and optional religious practices. It held that a non-mandatory practice (like wearing *purdah*) is not protected by Article 11. The case also distinguished between beliefs and practices. Beliefs are personal but practices may be regulated in the interest of society. The court went on to hold that the conduct of a public servant can be regulated in order to safeguard and protect government secrets and government interests (which concepts the court broadly equated with public order). In *Zakaria Abdul Rahman v Ketua Polis* [2001] it was affirmed that freedom of religion extends to only those practices and rituals that are essential, mandatory and integral to the religion and does not cover practices that are non-essential and optional. A police regulation requiring a member of the force to obtain prior permission before contracting a polygamous marriage was held not to be in violation of Article 11(1) because a polygamous marriage is merely permissive and not obligatory in Islam. In *Meor Atiqulrahman Ishak v Fatimah bte Sihi* [2005] some secondary students insisted on wearing the *serban* (headgear) to school. In rejecting their claim of religious freedom, Chief Justice Abdul Hamid Mohamad of the Federal Court clarified that:

- The integral part of the religion test is important but cannot be relied on exclusively. In some circumstances what is merely commendable and not mandated may, nevertheless, be protected. In other circumstances what may be mandatory, may have to be restricted.

- Other factors that are equally important are whether the prohibition is total or partial, temporary or permanent; and what the circumstances are under which the prohibition was made.

- All factors should be considered.

- The power to make the ultimate decision rests with the court.

- The learned judge disapproved of the appellant's view "that anybody has a right to do anything, any time, any where which he considers to be a practice of his religion, no matter how trivial. The only limit is clause (5)".

By rejecting a strict construction of Article 11(5), the learned judge left the scope of freedom under Article 11(1) and the reasonableness of the restriction to judicial discretion. In the end he ruled that the impugned School Regulation 1997 was not unconstitutional.

State power over Muslims

In addition to the restrictions permitted by Article 11(5), all Muslims are subjected to additional restraints under Schedule 9 List II Paragraph 1. This paragraph permits State Assemblies to create and punish offences by persons professing the religion of Islam against the precepts of that religion. In the religious milieu prevailing in Malaysia today and with the claim that Malaysia is an Islamic state, State Assemblies have become emboldened to enact more and more laws to criminalise words, actions and beliefs that the Assemblies regard as sinful or criminal in Islam. Apostasy, deviationist conduct and any words or actions that insult Islam have become the subject of legislation. Doubts have grown about whether freedom of religious belief in Article 11(1) is available to Muslims. To many people, Article 11(1), in the case of Muslims, is subject to Article 3(1) which proclaims Islam as the religion of the Federation and to the power of the States to punish Islamic crimes. In *Kamariah bt Ali v Kerajaan Negeri Kelantan* [2002] the judge ruled that Article 11 should not be interpreted so broadly as to vitiate legislation that imposes duties and prohibitions on Muslims. In

other words the judge implies that the fundamental right in Article 11 is subordinate to the legislative power of the States in Schedule 9, List II Paragraph 1. This is an exceptional view. Around the world legislative lists are subject to fundamental rights. It is not fundamental rights that are subject to the legislative lists.

Planning permissions

There is a right in Article 11(3)(c) to acquire and own property and to hold and administer it. However, this is subject to local authority laws on planning permission. It is alleged that local authorities often drag their feet in granting planning permissions for religious buildings if the area is heavily populated by religious communities different from the applicant's community or if the applicant's community does not have large numbers in the area. This works to the detriment of minority religious sects.

There is also the world-wide phenomenon of places of worship constructed without the requisite planning permission or in trespass of state rights over its land. This often leads to orders for relocation and, on some occasions, to controversial moves to demolish the illegally built shrines.

Establishing a place of worship is not only of spiritual but also of tremendous economic significance to the owners. Hence the temptation to side-step the law on trespass and planning permission. To tackle the incidence of illegal places of worship and the uproar that their demolition invariably causes, the following legal and political moves are needed:

- All places of non-Muslim worship should register with a National Registry.

- Muslim places should continue to register with their State authorities.

- An impartial and multi-religious adjudicatory mechanism should be established to resolve disputes over registration.

- Illegally constructed religious sites should be given the option to move to alternative sites. Those who flouted the law on town and country planning should, however, be brought to book.

- Land reservations should be made in all townships for places of worship of all major religions in addition to the constitutional guarantees of Articles 11(3) and 12(2).

- No demolition should take place without a proper public enquiry and consultation with the affected community.

- Before any registered places of worship are relocated suitable alternative sites should be allocated and the community affected should be heard. Decisions in which people participate are decisions they are likely to accept.

Deviationists

From time to time there are criminal prosecutions of 'deviationists'. These cases stoke the embers of controversy about the nature and scope of religious freedom in this country. It appears that in Malaysia the concept of 'religion' refers to established and ancient religions and excludes cults and sects with distinct philosophies and rituals of their own. Religious groups, whether Muslim or non-Muslim, that are not mainstream face severe scrutiny for 'deviationist activities'. The law is particularly severe on Muslims who violate the officially declared precepts of

their faith. As Islam is the religion of the federation and Malays are, by constitutional definition, required to be of the Muslim faith, they are liable to prosecution if their conduct is violative of Islamic precepts. No Muslim can lay a claim to opt out of syariah laws – the constitutional guarantee of freedom of religion notwithstanding. The notion that freedom to believe includes the freedom not to believe is not accepted in Malay society and in national courts. Despite international norms to the contrary, the impact of local culture and beliefs is very considerable.

A few observations are in order. First, history is replete with instances of innocent people being condemned as heretics and hounded to death. For this reason it is submitted that criminalisation of religious beliefs should be a matter of last resort. But it is understandable if a religious establishment, in order to safeguard the purity of its doctrine, resorts to ex-communication of people it regards as violators of the fundamental precepts of the faith. Such ex-communication should, however be resorted to after giving to the accused a full and fair opportunity to explain his beliefs and behaviour.

Second, it is conceivable that any law that criminalises "deviationist activities" may be challenged as violative of Article 11 of the Constitution which gives to every person, including a Muslim, the right to profess and practise his religion save to the extent that he/she does not endanger public order, public health or morality.

Third, in the case of Muslims, however, the difficulty is that the freedom in Article 11 seems to be qualified by Paragraph 1 of the State List in the Ninth Schedule. State Enactments are permitted to create and punish offences by persons professing the religion of Islam against precepts of that religion. This power is not unlimited. It is subject to the federal-state division of powers and cannot be

exercised in regard to matters included in the Federal List or dealt with by federal law. It is subordinate to the chapter on fundamental rights.

Atheism

Does the right to believe include the right to disbelieve and to adopt atheism? Does 'religion' include non-theistic creeds such as agnosticism, free thought, atheism and rationalism? Western theory and international norms support a broad view of 'religion'. But in a traditional society like Malaysia with an official religion and a Rukun Negara (*"Kepercayaan kepada Tuhan"*), which affirms a commitment to belief in God, atheistic practices may not receive much sympathy in the courts. It is noteworthy that the protection offered to a person by Articles 11(2) and 12(3) is only against "a religion other than his own". In relation to his own religion a person can be compelled to pay taxes and to receive religious instruction. Article 12(3) implies that a person *can* be required to receive instruction in or to take part in any ceremony or act of worship of his own religion. Article 11(2) implies that we may be required to pay taxes to support our own religion. These provisions pose problems for the constitutional rights of non-believers, atheists, agnostics, free thinkers and rationalists.

In most democratic countries, the right not to believe is constitutionally protected. But in the light of the Rukun Negara and the language of Article 11(2) (no tax to support a religion other than one's own); Article 12(3) (no instruction in a religion other than one's own); and the existence of *syariah* laws for Muslims, it is possible to argue that atheism is not protected by Article 11 - at least not for Muslims.

Patriotic activities

Freedom of religion does not confer a right to refuse to take part in patriotic activities. In a Singapore case a policy requiring teachers to take a national pledge and sing the national anthem is not violative of freedom of religion: *Nappali Peter Williams v Institute of Technical Education* [1999].

Minors

Under Article 12(3) the religion of a person under 18 years is to be decided by his parent or guardian: *Teoh Eng Huat* [1990]. This position is in accordance with international law as contained in Article 18(4) of the International Covenant on Civil and Political Rights 1966. American jurisprudence is, however, more tolerant of a minor's right of conscience if the minor has arrived 'at the age of discretion'.[4] In the USA the parent's right of control has to yield to the child's constitutional right.

Inter-religious marriages

As Muslims are not allowed to marry under the civil law of marriages, and must marry under syariah law, non-Muslims seeking to marry Muslims have to convert to Islam if the marriage is to be allowed to be registered. This has caused pain to the parents of many converts. Likewise, it has led to several troublesome cases of apostasy by Muslims, who for reasons of the heart, wish to marry their non-Muslim counterparts.

Conversion and apostasy

For non-Muslims the right to opt out of one's faith and choose another has been regarded as an implicit part of religious liberty guaranteed by the Constitution. In

relation to Muslims, the issue of conversion or apostasy raises significant religious and political considerations. As Islam is the religion of the federation and Malays are, by constitutional definition, required to be of the Muslim faith, all Muslims are liable to prosecution if their conduct is violative of Islamic precepts. No Muslim can lay a claim to opt out of syariah laws – the constitutional guarantee of freedom of religion notwithstanding.

In response to Muslim public opinion a number of states have, in the last few decades, enacted rehabilitation laws that permit detention and re-education of converts out of Islam. Variously referred to as 'Restoration of *Aqidah*' or apostasy or *murtad* laws, these enactments shake constitutional theory to its roots. They pit state law on apostasy against the Federal Constitution's guarantee of religious liberty. They pit national law against international law. They put Article 11 of the Constitution (on freedom of religion) on a collision course with the conservative interpretation of religious freedom in Islam.

A fuller discussion of Muslim apostasy is contained in chapter 15 below.

From a constitutional law point of view, apostasy laws raise difficult constitutional issues relating to:

- Whether freedom of religion in Article 11(1) includes the right to leave one's faith and adopt another or none at all, and whether this provision applies only to non-Muslims?

- Whether a detention order against an apostate or an order of rehabilitation is a violation of personal liberty contrary to Article 5(1)?

- Whether the running of rehabilitation centres by state syariah authorities is a violation of the federal power to build, manage and maintain all prisons and rehabilitation centres?

- Whether Article 4(1) which states that the Constitution is the supreme law of the Federation is subordinated to Article 3(1) which provides that Islam is the religion of the Federation but all other religions may be practised in peace and harmony?

- How to reconcile the conflict between Article 3(1) on Islam as the religion of the Federation and Article 11(1) on freedom of religion for all persons?

- How to resolve the tension between Article 3(1) which gives Islam the pre-eminent position as the religion of the Federation and Article 3(4) which explicitly states that nothing in Article 3(1) derogates from any other provision of the Constitution. In simple language, the provision for Islam as the religion of the Federation does not repeal, suspend or displace any other Article of the Constitution. This means that despite Article 3(1), the rest of the Constitution stays in place.

- Are apostates entitled to freedom of speech and expression under Article 10(1) and is this right violated if they are punished for their faith, lack of faith or change of faith?

- Does freedom of association in Article 10(1)(c) include a right to disassociate from a religion and associate with another religion?

- Do rehabilitation centres amount to forced education in a religion other than one's own contrary to Article 12(3)?

Answers to the above questions need working out. The frail hope that these issues will go away by themselves is naïve.

Endnotes

1 Ministry of Education Circular KP PP0129/210 dated Feb. 5, 1969

2 In relation to Muslims the power to punish deviants can be derived from Schedule 9 List II Item 1 – "creation and punishment of offences by persons professing the religion of Islam against precepts of that religion..." In the case of both Muslims and non- Muslims the Penal Code in sections 298, 504, 505, 508 may be employed to punish words or behaviour that offends religious dogma. Section 298A is applicable to federal territories only.

3 See e.g. *PP v Krishnan a/l Muthu,* Magistrate's Court Case No MA-83-146-2002

4 *In re Guertin* 5 Alaska 1


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12

BAHASA MALAYSIA & OTHER LANGUAGES - OUR WINDOWS TO THE WORLD

A few months weeks ago Prof. Dr Ghauth Jasmon, Vice-Chancellor of the University of Malaya, exhorted his students to improve their English language proficiency. His reasons were as sound as can be. Their employability would be assisted. The University's standing as a premier institution would be enhanced. There would be better recognition for the university's research and publications.

Some chauvinists used this opportunity to churn up a storm of protest that any increased emphasis on the English language would undermine the status of our national language. In some quarters it was alleged that his advice was contrary to Article 152 of the Federal Constitution. A few words on the constitutional position are therefore necessary.

Article 152 prescribes that the national language shall be the Malay language for all 'official purposes'. Official purpose means any purpose of the federal or state governments or of a public authority. In the controversial case of *Merdeka University* v *Government of Malaysia* (1981) it was held that all universities, whether public or private, have a 'public element' and must use Malay as their medium of instruction.

Despite Article 152, the country's multilingual character is safeguarded by the law. The Constitution and the laws permit tremendous linguistic diversity.

- No person shall be prohibited or prevented from using, teaching or learning, any other language otherwise than for 'official purposes': Article 152(1).

- In line with the spirit of Article 152, the Education Act 1996 in section 2 admirably provides that the Chinese or Tamil language shall be made available if the parents of at least 15 pupils in the school so request.

- Likewise, indigenous languages, Arabic, Japanese, German or French or any other foreign languages may be made available if it is reasonable and practicable so to do.

- Federal and state governments have the right to preserve and sustain the use and study of the languages of any other community: Article 152(1)(b).

- Article 152(2) provides that for a period of ten years after Merdeka and thereafter until Parliament provides, English may be used for all official purposes. In line with this the National Language Act 1967 authorizes the Yang di-Pertuan Agong to permit the use of English for such official purposes as may be deemed fit. Thus, national TV and radio use the whole spectrum of languages spoken in the country. Universiti Islam Antarabangsa, Universiti Teknologi MARA (both supported by the tax payer) and many private universities and colleges use English as the main language. In tertiary institutions, all twinning programmes and external courses use English. Many continuing education programmes in government departments employ English.

- The National Language Act allows the Speakers in Parliament and the State Assemblies to permit members to speak in English. Court proceedings and drafts of legislation may employ both BM and English.

- Article 161(5) makes exceptions for use of native languages in Sabah and Sarawak.

- Section 28 of the Education Act 1996 allows vernacular, "national type schools" to exist and section 17(1) authorises the Minister to exempt such schools or any other educational institution from use of Malay as the main medium of instruction.

- Section 73 of the Education Act 1996 allows private schools to exist and gives them considerable autonomy.

- The Private Higher Educational Institutions Act 1996 permits private universities to flourish and gives them considerable autonomy.

It is clear therefore that the use of languages other than BM in our universities is neither illegal nor against national policy. The laws require us to honour and promote the national language but to keep the windows of our mind open to the world by learning and using many foreign languages.


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13

THE FEDERAL CONSTITUTION AND THE SOCIAL CONTRACT

In political philosophy, the term 'social contract' refers to the bargain between the state and civil society for an exchange of obligations in return for protection and privileges. The Ruler must protect the people. The people must give him obedience. This theory is as old as political thought and has support in both Eastern and Western writings. For example, Kautilya, the Minister of Chandragupta Maurya in ancient India elaborated in his *Arthasastra* that "People suffering from anarchy ... first elected Manu to be their King and allotted one-sixth of the grains grown and one-tenth of their merchandise as sovereign's dues. Supported by this payment, Kings took upon themselves the responsibility of maintaining the safety and security of their subjects." (Arthasastra, BK 1, Chapter XIII). In Western political thought, the idea of social contract was developed in the writings of Plato, Hooker, Grotius, Hobbes, Locke and Rousseau.

In Malaysia, the term 'social contract' has a different and unique meaning. It refers to the painstaking compromises between the ethnic Malays, Chinese and Indians on their mutual rights and privileges and their bargains with the Malay Rulers and the British for the creation of a democratic, monarchial, federal and non-theocratic system of government.

When the Merdeka Constitution was to be drafted, an entirely neutral and external Commission of five distinguished foreigners was appointed to translate the ethnic compromises into entrenched rules of law. The Commission did not act in isolation. It was guided closely by the 20-page memorandum drawn up by the Alliance, half of which dealt with the inter-ethnic bargains. The Commission held 118 public and private hearings between June and October 1956 and submitted a draft Constitution. Its recommendations were scrutinised by a Tripartite Working Party consisting of four members of the colonial government, four representatives of the Malay Rulers and four leaders of the Alliance. Significant changes were made to the Reid proposals on Malay privileges, Islam as religion of the Federation, the role of the Conference of Rulers, the use of Tamil and Chinese languages, citizenship provisions, and sharing of revenues between the Centre and the States.

In 1963, when Sabah, Sarawak and Singapore were admitted into the Federation, the 'social contract' acquired a significant territorial dimension. After the 1969 racial riots, the 'Malay features' of the Constitution were enhanced. Since the 1990's, the Islamic dimension of the Constitution has gained great prominence.

As is the fate of all social bargains, once the original authors pass from the scene, the descendants do not always appreciate the rationale behind the original compromises. The government of the day has to walk the tight rope between the need to honour the pacts of the past and to accommodate new demands and expectations. The Malayan (later Malaysian) Constitution is undergoing a process of readjustment and reinterpretation. There is a lively and inconclusive debate about what the document of destiny actually ordained and how far the imperatives of the Constitution should be modified to meet the new aspirations of the electorate.

Despite the obvious ferment and despite the many challenges to national unity, it can be stated that Malaysia has an exemplary record of racial, cultural and religious harmony that should be the envy of all plural societies. Malay privileges are offset by safeguards for the interest of other communities. The spirit that animates the Constitution is one of moderation, compassion and compromise. A middle path of accommodation and moderation is evident if we examine the Constitution in relation to the following features:

- Citizenship provisions
- Freedom of religion
- Provisions relating to education
- Provisions relating to language
- Cultural diversity
- Politics of accommodation
- Special rights of Sabah and Sarawak
- Islamisation
- Article 153

CITIZENSHIP AND THE SOCIAL CONTRACT

As a result of the 'social contract' between the various races, hundreds of thousands of migrants to British Malaya were bestowed with citizenship by the Merdeka Constitution. It is believed that the number of citizens in Malaya doubled at the stroke of midnight on August 31 1957 due to the constitutional grant. However, in 1962, the law was considerably tightened by the removal of the *jus soli* provision that birth in the country entitled a person to citizenship.

Citizenship provisions are so deeply entrenched that under Articles 159(5) and 161E of the Federal Constitution, any amendment to these provisions requires a special two-thirds majority in Parliament plus the consent of the

Conference of Rulers and of the Governors of Sabah and Sarawak. Even in times of emergency, Article 150(6A) bars any tampering with citizenship rights.

Under the Federal Constitution, there are four avenues through which citizenship can be acquired:

- by birth and descent (referred to in Malaysia as citizenship by operation of law) : Article 14
- by registration : Articles 15–18
- by naturalization : Article 19; and
- by incorporation of new territory into the Federation : Article 22

FREEDOM OF RELIGION AND THE SOCIAL CONTRACT

Malaysia has a record of racial, cultural and religious tolerance that should be the envy of all plural societies. Mosques, temples, churches and Sikh *gurdwaras* dot the landscape. Citizens celebrate each other's religious festivals. Cultural and religious pluralism is not only tolerated; it is celebrated. Religious extremism and attempts to disrupt religious harmony are severely dealt with.

Legislation has been introduced to provide for Muslim and non-Muslim religious institutions. Financial allocations, gifts of land and tax exemptions are granted to all religions. Foreign priests and missionaries are allowed permits to enter and work in the country. Muslim, Christian and Hindu festivals are marked by national holidays. Missionary hospitals, schools, bookshops and hostels abound. Christian missionary teachers are often retained until age 65, a privilege not enjoyed by other religious teachers. Most international hotel rooms carry the King James Version of the Bible. At the same time the direction of the Muslim *qiblat* is required to be indicated in every hotel room.

The Malaysian approach is that the state should not be indifferent to or hostile towards religions. It must promote tolerance. Tolerance comes not from the absence of faith but from its living presence.

Islam

The Malaysian Constitution in Article 3(1) provides that Islam is the religion of the federation. But all other religions may be practiced in peace and harmony. Article 3(1) did not intend to create a theocratic state. For this reason Article 3(4) clarifies that "nothing in this Article derogates from any other provision of this Constitution". The case of *Che Omar Che Soh* [1988] affirmed that despite Article 3(1), the Constitution remained the supreme law of the Federation and the general principles of the syariah cannot be employed to test the validity of laws enacted under the Constitution by elected assemblies.

Scope of freedom of religion

In respect of religion, every person has the right to three manifestations of his religion:

- the right to profess
- to practise; and
- subject to Article 11(4), to propagate his religion: Article 11(1)

The right to religion is available not only to individuals but also to groups and associations: Article 11(3) and 12(2). Every religious group has the right to:

- manage its own affairs.
- establish and maintain institutions for religious purposes.
- acquire and own property and administer it: Article 11(3).

- establish and maintain institutions for religious education: Article 12(2).
- public support for educational institutions: Articles 12(1) and 8(2).

In relation to individuals, the following rights are protected:

- There is no compulsion on anyone to support a religion other than his own.

- No person shall be compelled to pay any tax the proceeds of which are specially allocated to a religion other than his own: Article 11(2). The implication is that imposition of tax to support one's own religion is constitutional. For example, a Muslim cannot refuse to pay *zakat* and *fitrah*.

- There is to be no discrimination on the ground of religion in relation to the rights of students to education: Article 12(1) and 8(2).

- There can be no discrimination on the ground of religion against employees in the public sector; in the acquisition, holding or disposition of property; and in any trade, business or profession: Article 8(2).

Religious education

Under Article 12(2) every religious group has the right to establish and maintain institutions for the education of children in its own religion. Law relating to such institutions shall not discriminate on the ground of religion.

Article 12(3) provides that no person shall be required to receive instruction or to take part in any ceremony or act of worship of a religion other than his own. Article 12(4)

clarifies that for the purpose of religious instruction, the religion of a person under the age of 18 years shall be decided by his parent or guardian. It was established in *Teoh Eng Huat v Kadhi Pasir Mas* [1990] that infants have no constitutional right to receive instruction in any religion other than their own or to convert to another faith without the permission of a parent or guardian.

Article 12(4) uses the words "parent or guardian" in the singular. This has led to problems when one parent converts to Islam and takes the children with him into his new religion without the consent of the non-converting spouse. Actually the Eleventh schedule of the Constitution in Section 2(95) provides guidance on construction of singular or plural. "Words in the singular include the plural, and words in the plural include the singular".

Areas of concern

Despite the above there is no denying that there are areas of concern to Muslims and non-Muslims alike. These have been covered in chapter 11 above.

EDUCATION AND SOCIAL CHANGE

Since Merdeka, primary and secondary education has been absolutely free. Tertiary education is highly subsidised. In the year 2000, student enrolment in public institutions from pre-school to university topped 5,701,5765. This has obvious, positive implications for the upward mobility of the disadvantaged.

Non-discrimination

Article 12(1) provides that there shall be no discrimination against any citizen on the ground only of religion, race, descent or place of birth in the administra-

tion of any educational institution maintained by a public authority or in the admission of pupils or in the payment of fees. The Article also forbids discrimination on the above grounds in providing out of the funds of public authority, financial aid for students in any institution whether maintained by a public or private authority.

Article 153

Article 153(8A) provides that it shall be lawful for the King to give such directions to any university, college or institution providing education after MCE to ensure the reservation of such proportion of places for Malays and natives as the Yang di-Pertuan Agong may deem reasonable.

Two engaging issues of law and politics gallop around the outskirts of Article 153. First, what proportion of places can be allocated on an ethnic basis? Second, whether quotas apply to specific courses or to the university as a whole or to all universities combined.

MINORITY LANGUAGES AND THE SOCIAL CONTRACT

Under Article 152(1), the Malay language has been declared to be the national language. However, it is also provided that except for official purposes, no person shall be prohibited or prevented from using, teaching, or learning any other language. Barring one exception, the Constitution's accommodative sentiment has received favourable reaction from the authorities.

- In the 80s a private company unsuccessfully sought to obtain the Yang di-Pertuan Agong's permission for registration of a university that would employ Chinese as the main medium of instruction: *Merdeka University Bhd v Government* [1982].

- Section 2 of the Education Act furthers a multi-cultural approach by requiring that in all national schools, Chinese or Tamil languages shall be made available if parents of 15 pupils in the school so request.

- The rule that Malay must be the language for all official purposes is subject to some exceptions. Under the National Language Act, the Yang di-Pertuan Agong may permit the continued use of English for such official purposes as may be deemed fit.

- In addition, the Minister of Education under section 17(1) of the Education Act may exempt any educational institution from use of Malay as the main language.

- The educational landscape in this country has, since colonial days, been dotted with vernacular schools conducting instruction in Malay, Chinese or Tamil. Some of these schools have a fine reputation. They are open to all races and many Malays and Indians are known to enroll their children in Chinese vernacular institutions.

CULTURAL MOSAIC

Malaysia is an excellent example of cultural and religious tolerance. Minority cultures, languages, modes of dress, foods, festivals, films and music are allowed. Chinese and Tamil schools exist with government support. Chinese and Tamil programmes are broadcast on national TV and Radio. Hari Raya, Chinese New Year, Christmas, Deepavali and Thaipusam are celebrated as national or state holidays. On these occasions, there is a great deal of cross-cultural intermingling.

Instead of creating a "melting pot", Malaysia has painstakingly weaved a rich cultural mosaic. The plurality of lifestyles this engenders has given rise to an extraordinary multi-faceted society. Though there are fears that cultural

and religious exclusiveness and intolerance are growing, the nation's communities are, by far and large, like the colours of a rainbow - separate but not apart.

POLITICS OF ACCOMMODATION

The rainbow coalition that has ruled the country for the last 54 (plus two pre-Merdeka) years is built on an overwhelming spirit of an accommodation between the races, a moderateness of spirit, and an absence of the kind of passion, zeal and ideological convictions that in other multi-religious and multi-racial countries have left a heritage of bitterness. Except for 1969, there has been no serious racial or religious violence.

SPECIAL RIGHTS OF SABAH AND SARAWAK

The special position of Sabah and Sarawak in the federal set-up of the country has given to pluralism a territorial dimension.

It is arguable, of course, that some provisions like immigration control by the East Malaysian states over West Malaysians are a hindrance to national integration. But it would be equally true to assert that going back on the solemn promises made to the former Borneo States would cause a distrust and bitterness that may tear the federation asunder.

ISLAMISATION AND ITS IMPACT ON NATIONAL UNITY

At the political front, an engaging debate has been going on since 2001 about whether Malaysia is a secular or Islamic state. The terms secularism and theocracy do not have fixed or self-evident meaning and differences of perception are not surprising. The problem of semantics is complicated by the fact that in other legal systems wedded

to a secular or religious way of life, political practices show wide variance.

Islamic features

The Constitution of Malaysia in Article 3(1) provides that Islam is the religion of the Federation but all other religions may be practised in peace and harmony. The implications of adopting Islam as the religion of the Federation is that Islamic education and way of life can be promoted by the state for the uplifting of Muslims. Taxpayers' money can be utilised to promote Islamic institutions. Islamic courts can be established and syariah officials can be hired.

Middle path

These features do not, however, convert Malaysia into a theocratic or Islamic state. Malaysia has a written Constitution that under Article 4(1) is the supreme law of the federation.

It was held in *Che Omar Che Soh v PP* (1988) that though Islam is the religion of the federation, it is not the basic law of the land, and Article 3 (on Islam) imposes no limits on the power of Parliament to legislate.

All in, it can be said that Malaysia is neither a fully-fledged Islamic state nor wholly secular. Former Prime Minister, Tun Abdullah Ahmad Badawi, also expressed the same view. He called for a "stop to the polemic of whether Malaysia was an Islamic or secular country. He said that Malaysia was not a secular or theocratic country but one which was based on parliamentary democracy. He said that the government never marginalised any minority group or religion and that religious diversity in the country had never been a problem. This diversity is not a liability but is actually what makes us strong ... This is what made

Malaysia a unique country" (*New Sunday Times*, August 5, 2007, p. 2).

The overall position is that, on the one hand, the legal system maintains Islam as the state religion and is deeply committed to the promotion of the religion in the life of the nation. On the other, it adopts supremacy of the Constitution as the basic rule of the legal system. As a multi-racial society, it walks the middle path of tolerance and accommodation. This is not a bad way of doing things.

Lately, however, the delicate compromises in this area are under severe pressure. The bigots in all communities are fanning fears for political popularity.

Islamic state

The opposition party, PAS, till mid-2011, used to openly campaign for the conversion of Malaysia into an Islamic state. In 2001 the then Prime Minister, Dr. Mahathir, succumbed to this politically appealing agenda by declaring that Malaysia is already an Islamic state. This declaration has fuelled non-Muslim fears that the country may be heading down the theocratic path of Pakistan, Sudan and Saudi Arabia. A deeply divisive and emotional debate has been triggered about whether Malaysia is a secular or an Islamic state. Religious assertiveness and extremism on both sides of the divide are apparent. There are incidents - isolated though they are - of people declaring that those citizens who have objections to the Islamic state, can leave the country.

Proselytization to Muslims

It is alleged that despite the pre-Merdeka compromise in Article 11(4), missionary groups, some from abroad, are actively trying to proselytize Muslims to other faiths.

Murtads and apostasy

Some high profile conversions out of Islam have become highly politicised. The law against Muslim apostasy has been tightened. Detention orders and rehabilitation programmes are now prescribed against Muslims seeking to abandon their faith. False and malicious rumours of mass exodus from Islam are often circulated. Apostasy cases are summarily referred to the syariah courts even though constitutional law issues are involved. In this milieu, doubts are emerging about judicial commitment to constitutional supremacy.

Everest climber Moorthi, born and married as a Hindu, was alleged to have converted to Islam before his death and was buried as a Muslim despite his wife's vehement objections.

Public service neutrality

Some members of the civil service have abandoned their neutrality on religious issues. Enlightened federal policies on official support for all religions are often not implemented or delayed. A few years ago, then MP for Parit Sulong, Syed Hood Syed Edros proposed in Parliament that the Education Ministry should remove all crosses, statues and Christian images from missionary schools. Fortunately, the Deputy Education Minister rejected the proposal right away (*The Star,* 5 December 2007, N27).

Civil vs syariah courts

Due to the existence of Article 121(1A), civil courts are refusing jurisdiction in all cases in which any issue of Islamic law is involved even if the matter falls within federal jurisdiction; even if it raises constitutional issues; and even if one of the parties is a non-Muslim.

At least one civil court, in a family law dispute involving a non Muslim woman whose husband had converted to Islam, advised the lady to appear before the syariah Court even though Schedule 9, List II, Paragraph 1 is crystal clear that syariah Courts "shall have jurisdiction only over persons professing the religion of Islam".

Some syariah Courts are issuing summons to non-Muslims.

Family law disputes

In a spate of family law disputes between couples one of whom converted to Islam, the courts seem to be motivated by religious allegiance rather than the Constitution and the law. A spate of cases has gone to the courts in which a party to a non-Muslim marriage converted to Islam and obtained the help of the syariah Courts to change the religion of infant children to Islam over the objection of the non-converting spouse.

Assertiveness by state legislatures

Many state legislatures are interpreting their law making powers expansively. The Federal Constitution in Schedule Nine, List II, Paragraph 1 confers on them limited power to enact legislation on enumerated syariah matters. The prevailing attitude seems to be that any matter of Islamic law, whether civil, commercial or criminal, falls in State hands. *Hudud* laws are being enacted. Penalties far beyond their competence are being legislated. The Federal courts are silently cooperating with this silent rewriting of the Constitution.

Places of worship

In 2007–8 in the State of Selangor several Hindu temples, some of them built illegally, were demolished or relocated.

A group of Muslims in Shah Alam, in protesting against the plan to re-locate a Hindu temple to a Malay majority area, carried the severed head of a cow (or a bullock, on some accounts) and trampled on it.

Bibles in BM

There are long standing disputes (only partially resolved) about publication or importation of the Bible in Bahasa Melayu.

Use of the term Allah by Christians

The use by Christians of the term 'Allah' to describe the Christian God in Christian publications was banned by the Home Ministry. This led to a famous court case in which it was held that Christians have a right to use the word Allah in their publications. In the aftermath of this case, several churches were torched, and *suraus* and mosques were desecrated. There are, now and then, isolated incidents of pig-heads thrown near *suraus*.

It does appear that inter-ethnic and inter-religious relationships are under stress. The beautiful mosaic built by the forefathers of the Constitution needs to be strengthened.

ARTICLE 153 AND THE SOCIAL CONTRACT

Article 153(1) of the Federal Constitution enjoins affirmative action in favour of 'Malays' and the 'natives of Sabah and Sarawak'. It states that "it shall be the

responsibility of the Yang di-Pertuan Agong to safeguard the special position of the Malays and native of any of the states of Sabah and Sarawak and the legitimate interest of other communities".

Many economic, social and educational programmes since Merdeka, and especially after 1971, are structured along ethnic lines. The status of "Malay" or "native" is the key to innumerable doors of opportunities both in the public and private sectors. Posts in the public sector, promotions, licences, scholarships, loans, place in institutions of higher learning and allocation of many privileges are influenced by the "Bumiputera" factor.

It must be noted, however, that the concept of "Malay" in Article 160(2) is quite unique. An ethnic category is defined non-ethnically. The definition emphasizes religion, language, custom and roots in the Malayan soil but no requirement that the recipient of the status must be of Malay stock! Malay status can be gained by non-Malays and forfeited by the Malays!

Limits on Article 153 protection

Article 153 does not give a total freedom to the executive to prefer Malays over non-Malays in each and every area of life.

- Affirmative action is allowed only in the four sectors, services and facilities explicitly mentioned in the Federal and State Constitutions.

- Article 153(1) enjoins the King to safeguard "the legitimate interests of other communities".

- Article 153, clauses (4), (7) and (8) expressly state that in safeguarding the special position of Malays and natives, no person can be deprived of any public office,

scholarship, educational or training privilege, special facility or of any right, privilege, permit or license (including the renewal of permit or license) that was already held by him/her.

- The heirs, successors or assigns of a licensee or permit-holder cannot be refused renewal if the renewal might reasonably be expected in the ordinary course of events: Article 153(7).

- Nothing in Article 153 permits Parliament to restrict business or trade solely to Malays or natives: Article 153(9).

- Article 153(5) states that this Article does not override Article 136. Article 136 requires that "all persons of whatever race in the same grade in the service of the Federation shall, subject to the terms and conditions of their employment, be treated impartially". The reality in the public service is, however, quite different.

- Article 89(2) requires that when any land is reserved for Malays, an equal area shall be made available for general alienation.

- Article 89(4) forbids non-Malay held land from being declared as Malay reserve.

- Except in the area of education [Article 153(8A)], the reservations and quotas permitted by the Constitution are directed primarily at public sector activities. In actual practice however, the agencies of the state use their licensing powers to pressurise private sector enterprises in some fields to observe ethnic quotas. This may be unconstitutional.

- Affirmative action policies are permissible within the agencies of the federal and state governments. The

Constitution has a lacuna in that statutory bodies, government-linked companies (GLCs), quasi-national non-governmental organizations (quangos) and local authorities have not been expressly authorized to participate in such policies.

- Article 12(1) provides that there shall be no discrimination against any citizen on the ground only of religion, race, descent or place of birth in the administration of any educational institution maintained by a public authority or in the admission of pupils or in the payment of fees.

The spirit of the Constitution is that Malay privileges are offset by safeguards for the interest of other communities. Unfortunately, many of the above restrictions and qualifications are not well known. Perhaps the Sedition Act hampers open scrutiny of affirmative action policies and actions of the Government even when these policies sometimes go overzealously beyond the permitted borders.

There is also the problem of bureaucrats showing reluctance to translate enlightened policies into concrete actions. Many administrative practices, though not based on the law, have direct implications for or against national unity. The most glaring is the ever-present requirement on official documents of stating our race or religion.

Police personnel are often insensitive in making racially biased comments when people go in to file police reports. The requirement of headscarves and *songkoks* on many formal occasions arouses resentment. Schools have many narrow-minded and over-zealous teachers who show scant sensitivity to the need for tolerance and respect for diverse values.

CONCLUSION

The spirit that animates the Constitution is one of moderation, compassion and compromise. The Constitution has reconciled the seemingly irreconcilable conflict of interest between ethnic and religious groups in a way that has few parallels in the modern world. What is needed is greater constitutional literacy and a revival of the spirit of 1955–57.

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14

FEDERAL SYSTEM OF GOVERNMENT

Federal systems are a form of territorial division of powers. They are a clear recognition of pluralism, diversity and the need to find commonalities in the midst of differences.

Many modern states like Canada, United States, India, Australia and Malaysia adopt the federal model of government. This form of territorial political organisation is normally chosen by states that have large territories and a desire to accommodate unity and regional autonomy within a single political system. The basic federal idea is to combine effective central powers for handling common problems with preservation of regional distinctiveness.

Smaller states like Singapore with a need for a centralised, unified administrative structure normally opt for a unitary system of government.

Malaya in 1957 could have gone either way. It chose a federal polity largely because of the need to preserve the sovereignty of Malay Sultans in their separate territories. A second factor was familiarity with federal ideas in Malaya's constitutional history. The nine original States of Negeri Sembilan possessed many federal features. The four 'Protected States' of Selangor, Negeri Sembilan, Pahang and Perak were amalgamated as a federation in 1895. The nine Malay States and the Settlements of Penang and Melaka

were brought together as the Federation of Malaya in 1948. The federation exhibited a distinct division of legislative, executive, judicial and financial powers between central and regional governments.

The Merdeka Constitution largely followed the 1948 model of a federal system with a strong central bias. However, in 1963 Sabah, Sarawak and Singapore joined the federation with substantially larger guarantees of state autonomy than given to the Peninsular States in 1957.

FEDERAL FEATURES: THEORY & PRACTICE

How truly does Malaysia conform to a federal model? What is the nature of federal-state relationships in this country? Any inquiry into these questions must begin, of necessity, with a discussion of the meaning of the term 'federalism'.

There is no prototype federation and the many federal systems operating in the world today exist in diverse forms. However, some generalisations about the essential attributes of federal governments may be made.

Association of States

When a number of States, previously independent or semi-independent, unite to form a central government for the administration of certain affairs, but retain independence of action in other matters, they are said to form a federation. In addition to a structural arrangement for organising and sharing powers, federalism requires a special mode of political and social behaviour, involving a commitment to partnership and to active cooperation on the part of individuals and institutions that at the same time take pride in preserving their own respective individualities.

Duality of government

In a federation there is a common central government charged with the administration of affairs of general concern. There are also a number of States, Provinces or Cantons each with their own elected government that has near-complete authority over certain affairs. This means that central and regional governments both operate directly upon the people and each citizen is subject to two governments. This could be called the principle of "non-centralisation". It requires a constitutionally guaranteed diffusion of power among a number of substantially self-sustaining centres.

Non-centralisation is distinguishable from de-centralisation or devolution. In the latter, there is conditional diffusion of specific powers by a central government to local governments subject to recall by unilateral decision of the central government. Some degree of de-centralisation exists in the most unitary of states. But what characterises federal diffusion of power is that the division of competence between the centre and the States is constitutionally entrenched and cannot be disturbed unilaterally.

The Constitution has provided meticulously for separate executive, legislative and judicial branches at both the federal and state levels.

Semi-autonomous units

Federalism links people and institutions in lasting yet limited union by mutual consent, without the sacrifice of their respective individualities. State governments are not legally or politically subordinate to the central government in respect of matters assigned to them. The States that form the federal union do not sacrifice their authority in all matters to the federal government. While

retaining their individuality, they seek the advantage of a common government in matters of general interest.

Separate State Constitutions: All States have been allowed to retain their own Constitutions subject to the requirement that all State Constitutions must contain certain "essential provisions" provided for by Part I of the Eighth Schedule of the Federal Constitution. These provisions (to be inserted in State Constitutions) provide for the following matters:

- Ruler to act on advice;
- proceedings against the Ruler;
- existence of the Executive Council;
- the Legislature of the State;
- composition of the State Assembly;
- qualification of members;
- disqualification for membership of Legislative Assembly;
- provision against double membership;
- decision as to disqualification;
- summoning, prorogation and dissolution of Legislative Assembly;
- Speaker of the Legislative Assembly;
- exercise of legislative power;
- financial provisions;
- impartial treatment of State employees;
- amendment of the State Constitution; and
- provisions in respect of the Yang di-Pertua Negeri for the States of Malacca, Penang, Sabah and Sarawak.

Separate State executive: Article 71(1) guarantees the right of a State Ruler to succeed and hold and enjoy and exercise the constitutional rights and privileges of Ruler of that State in accordance with the Constitution of that State.

The States have their Menteri Besar/Chief Minister and their own State Executive Council. They also have

their own administrative services and, except for Malacca, Negeri Sembilan, Penang and Perlis, appoint their own subordinate officers.

Separate State legislature: Each State has been given a wholly elected one-chamber legislature from amongst whose members are appointed the Chief Minister (Menteri Besar/Ketua Menteri).

Separate State judiciary: All states of the federation have their own syariah courts which under Article 121(1A) of the Federal Constitution are independent of the federal courts and not subject to federal court supervision. A unique feature of the syariah courts in West Malaysia is that they also operate as customary courts and enforce Malay *adat* (custom) in Muslim family law matters.

In addition to syariah courts, Sabah and Sarawak also has Native Courts enforcing the native law of the people of Sabah and Sarawak.

Demarcation of powers

In all federal systems there is a constitutionally defined division of legislative, executive, judicial and fiscal powers between central and regional authorities. It is not enough that central and regional governments are independent in their own spheres; the spheres must be marked out in a particular way. The powers of federal and provincial governments must be well defined. The federal relationship must be established or confirmed through a perpetual covenant of union that outlines the terms by which power is divided or shared in the political system.

On the face of it, the Federal Constitution has clearly provided for a division of legislative, executive and judicial powers between the centre and the States and has

enabled the States to exercise some autonomy in matters specifically assigned to them.

Division of legislative powers

The legislative powers of the federal parliament and the State legislative assemblies are specified in five legislative lists in the Ninth Schedule. The Federal list containing 27 paragraphs covers most of the important matters such as external affairs, defence, internal security, citizenship, finance, trade, commerce, shipping, navigation and fisheries on the high seas.

The State List containing 13 paragraphs includes Muslim law, land tenure, Malay reservation, agriculture, forestry, local government, turtles and riverine fishing. It needs to be clarified that the popular belief that "Islamic matters" are exclusively in state hands is an exaggeration. Jurisdiction over Islamic matters is shared between federal and state authorities. The power of the States is enumerated in Schedule 9 List II, Paragraph 1. The power of the federal Parliament to legislate for Islamic matters is mentioned in several paragraphs of List I. Notable areas of Islamic law and religion in federal hands are Islamic pilgrimage, Islamic banking and *takaful*. Consequently, a Muamalat Division of the High Court was established by Practice Direction on 6 February 2003.

The Supplementary State List for Sabah and Sarawak confers additional powers on these States in six matters including native law and custom, ports and harbours and, in Sabah, the Sabah Railway.

The Concurrent List having 14 items covers such matters as welfare, scholarships and drainage. The Supplementary Concurrent List for Sabah and Sarawak extends the legislative competence of these states to cover

nine matters including shipping less than fifteen tons, charities and theatres.

Division of judicial power

Though the courts are primarily federal in nature, the states in Peninsular Malaysia are allowed to have their own Syariah Courts that administer Malay custom as well as syariah principles in areas assigned by Schedule 9, List II, Paragraph 1. In Sabah and Sarawak, besides Syariah Courts there is a system of Native Law and Courts. The federal High Court has two wings – one in Malaya and the other in the States of Sabah and Sarawak. Appointment of the Chief Judge of the Sabah and Sarawak High Court requires consultation with the Chief Minister of these States.

Equitable sharing of finances

No country can claim to be a true federation unless it practises fiscal federalism i.e. an equitable division of earnings and expenditure between the federal government and the States.

In Malaysia the law and practice is to the contrary. In the financial field, the central government's preponderance of power is very evident. The Constitution has been so devised that almost all the important direct and indirect taxes belong to the Centre. However, in Articles 109 and 110, the Constitution guarantees some money reimbursements to the States in the form of Capitation Grants and State Road Grants. The States are also entitled to the proceeds from some taxes, fees and other sources of revenue specified in the Constitution. Prominent among the sources for the States are lands, mines, forests, toddy shops, entertainment, zakat and fitrah. But revenues from these are insufficient to solve the chronic shortage of funds experienced by some states. The federal government allocates further conditional grants to supplement the

States' own domestic revenue. These conditional grants are discretionary and are as much influenced by fiscal policies as by political considerations. States under the control of opposition parties may find it difficult to obtain sufficient financial aid for the implementation of their programmes and policies. Kelantan (under the PMIP from 1959–1974 and then again from 1982 to now), Terengganu (with a PMIP government from 1959–1964 and 1998–2003), Penang under Gerakan Ra'ayat Malaysia (from 1969–1974) and Sabah under PBS experienced such financial frustrations.

Malaysia is a typical example of a federation with a high degree of tax concentration. This enables efficiency because it guarantees the highest degree of coordination of federal finance and fiscal policy with a view to the nation's development effort. It also enables a more equitable sharing of the nation's wealth among the regions. But it also makes the States, especially poorer states like Kedah, Malacca, Terengganu and Kelantan heavily dependent on federal aid for their development plan and therefore indirectly subservient to the federal government. The scheme of allocation of resources is such that the combined revenue of all states, including federal transfers, amounts to only about one quarter of the total revenue collected by the federation.

Less than ten per cent of the nation's total development expenditure originates from State sources. The "fiscal gap" i.e. the difference between the States' owns domestic revenue and their expenditure, ranges between 15% to 75% of their total expenditure. In many other federations, municipal councils have as much or more powers than State governments in Malaysia.

The Constitution subjects the West Malaysian states to fiscal control by the centre in another way. A state is not allowed to raise or borrow money except from the federation or a federally approved bank: Article 111(2) & (3).

A significant case, *Government of Malaysia v Government of the State of Kelantan* (1968) 1MLJ 129 arose on this point. The Pan-Malayan Islamic Party after its victory in the 1959 State Election in Kelantan sought to fulfill an election pledge to build a bridge on the Kelantan river. But it was financially in no position to do so. It negotiated a clever financial arrangement with a private company that advanced M$2.5 million to it in return for mining and forest concessions. The sum was to be refunded or forfeited depending on the stated conditions. The federal government contended that the arrangement constituted "borrowing" in violation of Article 111(2).

The Federal Court, upon considering the agreement as a whole, found that the legal relationship between lender and borrower was lacking. This case highlights the severely restricted nature of "fiscal federalism" in Malaysia. States have a relatively minor impact on choices affecting the welfare of local residents. Even if political and legalistic factors allow local decisions to be made in defiance of the central authority, adequate funds to implement these decisions are not easy to find.

It must be noted, however, that federal predominance in respect of functions and resources is less pronounced vis-à-vis the East Malaysian States of Sabah and Sarawak which control a number of additional sources of income along with additional functions: Articles 112B, 112C, 112D.

Supreme Constitution

The federal-state allocation of powers is safeguarded by adopting a written Constitution which is accepted as the highest law of the land and which demarcates in an authoritative manner the spheres allocated to both the central and regional governments.

Judicial review

The superior courts are given the power under Article 128(1) to rule upon disputes and to declare null and void any legislative or executive action that violates the constitutional division of competence. In Malaysia the federal–state division of power has occasionally been tested in the courts and decisions have gone both ways. Since Merdeka one federal Act of Parliament has been declared to be a trespass on matters within the exclusive competence of the States. Four State laws have been held to encroach on federal powers.

Administrative decisions and policies have also been the subject of legal disputes. In *Government of Kelantan v Government of Malaya* [1963], Kelantan objected to the admission of Sabah, Sarawak and Singapore into the federation. Kelantan argued that the proposed constitutional changes needed the consent of all constituent States and that this had not been obtained. Thomson CJ, in an historic judgment, held that amending the Constitution to admit a new State was solely within federal jurisdiction and the consent of the States was nowhere prescribed[1]. In *Government of Malaysia v Government of the State of Kelantan* [1968] 1 MLJ 129 a federal challenge to the government of Kelantan's executive act of raising a "loan" without federal permission failed in the Federal Court. The federal government had tried to enforce the law in Article 111(2) that a state is not to borrow money except from the federation or a federally approved bank. Kelantan had made a clever financial arrangement with a private company to raise RM2.5 million that was to be refunded or forfeited depending on stated conditions. The Federal Court held that the arrangement did not constitute "borrowing" in violation of Article 111(2).

In *City Council of Georgetown v Government of Penang* [1967], two State laws were invalidated because of

inconsistency with the federal Local Government Elections Act 1960. In *Mamat Daud v Government of Malaysia* [1988], an amendment to the federal penal code had inserted a Section 298A to punish anyone who causes religious disharmony or ill will. The plaintiff's had acted as Bilal, Khatib, and Imam at Friday prayers in disregard of those officially appointed to perform the tasks. The plaintiff successfully argued before the Supreme Court that in its pith and substance, Section 298A was a law about Islamic criminal offences and therefore within the jurisdiction of State assemblies and not a law on public order as claimed by the federal government. It is submitted that the majority decision exaggerated and over-extended the jurisdiction of the states over Islamic offences. Not all Islamic crimes are in State jurisdiction. Schedule 9 provides that State Assemblies can punish offences by persons professing the religion of Islam against precepts of that religion, "except in regard to matters included in the Federal List" or "covered by federal law". Crimes against the precepts of Islam that have public order or security implications are surely within federal jurisdiction.

In *Dewan Undangan Negeri Kelantan v Nordin Salleh* [1993], a Kelantan state law against party-hopping was declared to violate Article 10(2)(c) of the Federal Constitution which permits Parliament (and not State legislatures) to regulate freedom of association. In *Ketua Pengarah Jabatan Alam Sekitar v Kajing Tubek* [1997], it was held that the Bakun Dam project fell under State legislation and the Enviromental Quality Act, while valid, had no application. The above cases on federal-state division of powers create the semblance of a federal polity. But the reality is different. A closer look at the Constitution reveals a massive preponderance of powers in federal hands.

Equality amongst all constituent units

In a federal system there is equality of status amongst the constituent states of the federation. The regional authorities are not subordinate one to another but coordinate with each other. Within their spheres the States are co-equally supreme, equally represented in the upper house of the Federal legislature and proportionately represented in the lower house.

DEPARTURES FROM FEDERAL MODEL

A closer and deeper look at the Constitution as a whole provides the strong impression that there is a tremendous preponderance of power in the central government. In comparison with the federal government, the powers of the States are exceedingly limited and the competence of the centre extends to most of the vital areas of life. The partnership between the federal and regional governments is an unequal one. In the following ways the centre can encroach on State rights without much difficulty:

Constitutional amendments

A federal Constitution should be difficult to amend. It should not be amenable to alteration except by extraordinary procedures. In a truly federal system the constituent polities must have substantial influence over the formal and informal constitutional amending process. In the United States, for example, the Federal Congress cannot make constitutional amendments without the consent of the Assemblies in three-fourth of the fifty constituent states of the federation. In two hundred and eight years of constitutional history in the USA since 1789, less than thirty amendments have met the rigid requirements of the amendatory process. In Malaysia this figure of 30 amendments was achieved in by 1985 i.e. in 28 years.

The permanence of the internal boundaries of each State and of their executive and legislative powers must be constitutionally guaranteed and no changes should be possible except with the consent of the polities involved. This principle is well secured in Malaysia by Article 2(b) which provides that "Parliament may by law alter the boundaries to any State but a law altering the boundaries of a State shall not be passed without the consent of that State (expressed by a law made by the Legislature of that State) and of the Conference of Rulers".

The power of amending the Constitution belongs largely to the federal parliament, which can exercise this power subject to procedures provided in Articles 2(b), 159 and 161E. Armed with the two-thirds majority that the government has enjoyed after every election except the one in 1969, the federal government has, at will, curtailed or amended the rights originally granted to the states by the forefathers of the Constitution. It is noteworthy that except in relation to two matters - territorial changes to the boundaries of the States under Article 2(b) and the rights of Sabah and Sarawak - the West Malaysian States have absolutely no power to prevent a constitutional amendment from going through. Except for these two matters the Constitution does not require consultation with or consent of the States in the amendatory process.

The point was dramatically illustrated in the case of *Government of Kelantan v Government of the Federation of Malaya and Tunku Abdul Rahman* (1963) MLJ 355. The case arose as a result of the admission of Sabah, Sarawak and Singapore into the federation on much more favourable terms than were applicable to the original States. The State of Kelantan commenced proceedings for a declaration that the Malaysia Act was null and void on the ground that it would abolish the Federation of Malaya Agreement 1957; that the proposed changes needed the consent of each of the constituent States and this had not

been obtained; that the Ruler of Kelantan should have been a party to the Malaysia Agreement; and that constitutional convention called for consultation with the Rulers as to substantial amendments to the Constitution. Thompson CJ. in a historic judgment rejected all these contentions. After studying the procedures for amendment contained in Article 159 he found that "there is nothing whatsoever in the Constitution requiring consultation with any State Government or the Ruler of any State" as far as amending Article 1(1) and (2) are concerned. These provisions describe the name and territories of the Federation.

In the Dewan Negara there are two Senators from each State: Article 45(1)(a). Theoretically speaking, they can block any constitutional amendment that affects adversely the rights or interests of the States. The initial safeguard built into the 1957 Constitution was that State Senators outnumbered the federally appointed Senators by a margin of 22:16.

This proportion gave some semblance of a restraining safeguard against constitutional amendments. But with subsequent constitutional modifications in 1963, 1964, 1965, 1973, 1978, 1984 and 2001 which were necessitated due to the enlargement of the territories of the federation, the separation of Singapore and the creation of the Federal Territories of Kuala Lumpur, Labuan and Putra Jaya, the proportion of elected Senators to appointed Senators now stands at 26:44. Appointed Senators easily outnumber elected Senators. If three State Senators join hands with the 44 appointed Senators, the two-thirds majority is reached and the federal government can cross the constitutional rubicon in the amendment process.

The consent of the Governors of Sabah and Sarawak to a constitutional amendment under Article 161E affecting the special position of these states may pose some

difficulty. But the Governors are federal appointees and are unlikely to side with the States against the federal government despite a constitutional obligation to follow the advice of the Chief Ministers.

It is clear, therefore, that the role of the States in the amendment of the basic covenant is negligible or non-existing.

Weak provisions for fiscal federalism

According to Prof R H Hickling "money represents power, and is at the heart of government". An equitable distribution of financial resources between the federation and the states is the ultimate test of a true federation. As Harding says: "Finance is obviously crucial to a federal system, since both the federal and state governments are only able to do that which their resources permit them" (Andrew Harding).

Under the Malaysian Constitution there is a clear demarcation of financial powers between central and regional governments though the balance is tilted heavily in favour of the former.

Federal revenues:

Most of the lucrative sources of income like income tax, customs and excise duties, sales tax, licenses for motor vehicles, banking, foreign exchange, capital issues, passports, visas and other immigration charges are assigned to the federal exchequer.

Federal expenditure:

Equally, most of the onerous items of expenditure are placed on the laps of the federal government. Thus, national defence, internal security, the armed forces, the police, prisons, education, diplomatic and consular representation, pensions and gratuities, ports and

harbours, communication and transport, medicine, health and social security are the exclusive responsibility of the federal government.

The general principle is that the central government pays for all 27 items in the Federal List and the States bear the burden of all 13 items in the State List. Items in the Concurrent List are paid for by whoever exercises the power in question.

State revenues:

Even though there is a heavy preponderance of financial power in the hands of the federal government, the Constitution guarantees certain sources of revenue to the States. Among them are the following:

Capitation grants:

This is an annual grant by the federal government to each State based on the State's population: Article 109 and the Tenth Schedule Part I. The amount is RM72 per person for the first 100,000 persons; RM10.20 for the next 500,000; RM10.80 for the next 500,000 and RM11.40 for the remainder. Under Article 109, this is a mandatory payment and the federal government has no discretion to withhold payment.

State road grant:

The federation is required to pay to each State a compulsory road grant to cover the average cost per mile of maintaining State roads: Tenth Schedule Part II.

Taxes and fees:

Article 110 and the Tenth Schedule allocate to the States 14 sources of revenue. The most lucrative of these is the income derived from natural resources like land, mines and forests.

Each State receives ten percent or more of the export duty on tin produced in the state: Article 110(3). Likewise, Parliament may provide that each state shall receive on such terms and conditions as may be laid down, a proportion of the export duty on mineral ores, metal and mineral oils produced *in the state*. The Constitution is silent about offshore prospecting and this legal lacuna works to the benefit of the federal government.

Under Paragraph 2(c) of the Ninth Schedule, permits and licenses for prospecting for mines and mining leases are exclusively within the competence of the States. Presumably, the regulatory power of the States is confined to explorations within the territorial boundaries of each State. Extra-territorial explorations are not under State control. This fact complicates the relationship between Kuala Lumpur and Kuala Terengganu on the contentious issue of petroleum royalties. The Petroleum Development Act 1974 is also not entirely clear on whether royalty is payable for offshore drilling.

In addition to the above sources of revenue, states are entitled to receive all taxes and fees from toddy shops, entertainment places, water supplies, rents on State property, fines and forfeitures in State courts, *zakat, fitrah, Baitulmal* and other Islamic religious revenue.

State Reserve Fund:

Each year the federal government, after consultation with the National Finance Council, deposits into the above fund, certain amounts to be allocated to the States for purposes of development: Article 109(6).

Conditional grants:

The federal government allocates further conditional grants to supplement the States' own domestic revenue: Article 109(3). These grants are discretionary and are as much influenced by fiscal policies as by political considerations.

Loans:

A State is not allowed to raise or borrow money except from the federation or a federally approved bank: Article 111 (2) & (3). In *Government of Malaysia v Government of the State of Kelantan* [1968] 1 MLJ 129 the Pan-Malayan Islamic Party after its victory in the 1959 State Election in Kelantan sought to fulfill an election pledge to build a bridge on the Kelantan river but it was financially in no position to do so. It negotiated a clever financial arrangement with a private company which advanced M$2.5 million to it in return for mining and forest concessions. The sum was to be refunded or forfeited depending on the stated conditions. The federal government contended that the arrangement constituted "borrowing" in violation of Article 111(2). The Federal Court, upon considering the agreement as a whole, found that the legal relationship between lender and borrower was lacking. This position has now been reversed by a constitutional amendment to the term "Borrow" in Article 160(2) so that pre-payment of royalties will now constitute lending.

Except for Sabah and Sarawak, the 'federal features of the Constitution' are overshadowed by the demands of unity, effective government and economic development.

Emergency

On a Proclamation of Emergency, the legislative authority of Parliament (or the Yang di-Pertuan Agong, if the two Houses are not sitting concurrently) becomes greatly widened: Article 150(2B), (5) & (6). In the enactment of emergency legislation, constitutional provisions requiring consultation with the States or the consent of any authority outside of Parliament do not apply. Judicial review on constitutional grounds becomes difficult if not impossible because of Article 150(6) which permits the federal parliament, during a period of emergency, to

make laws with respect to any matter (except six matters in Article 150(6A) viz. Muslim law, custom of the Malays, matters of religion, citizenship, language and native law or custom in Sabah and Sarawak). While the proclamation of emergency is in force, the executive authority of the federation may extend to any matter within the legislative authority of a State: Article 150(4). The federal system can operate as a unitary system. Parliament can enter the State List. It can amend the State Constitution as for example the Emergency (Federal Constitution and Constitution of Sarawak) Act 1966.

It is under emergency provisions that Kelantan was brought under federal rule in 1977 and the removal of Dato' Ningkan as Chief Minister of Sarawak was accomplished in 1966. Dato' Ningkan's challenge of the proclamation of emergency on grounds of mala fide failed in the courts: *Stephen Kalong Ningkan v Govt. of Malaysia* [1968] 2 MLJ 238.

International treaties

Under article 76(I)(a) Parliament may make laws with respect to any matter enumerated in the State List for the purpose of implementing any treaty with a foreign nation, or any decision of an international organisation. If the law affects Islamic law or the custom of the Malays or native law and custom in Sabah and Sarawak, then there is a duty to consult with the States concerned: Article 76(2). But the duty to "consult" does not impose a duty to obey.

Uniformity of laws

Parliament may legislate on state matters for the purpose of promoting uniformity of laws of two or more states: Article 76(1)(b). This provision is subject to some exceptions:

- Such a law does not operate in any State unless it has been adopted by the legislature of that State: Article 76(3).

- This power of the federal Parliament is not applicable to Sabah and Sarawak: Article 95D.

- The requirement of adoption by the West Malaysian states is waived in the matter of land and local government. Federal laws on these matters can operate irrespective of the consent of the states. For all practical purposes, land and local government, while in the domain of state legislatures, are effectively within federal competence: Article 76(4).

At the initiative of the Federal Government, the States may be invited to get together to implement uniform policies on any particular matter. For instance, all State governments have agreed to implement a uniform scheme of service for officers in the Syariah Courts and Religious Affairs Councils and a coordinating committee has been set up to study the position of Syariah Courts and *Kadis.*

Non-compliance with Constitution

If a State habitually disregards a provision of the Federal Constitution or of its Constitution, Parliament may make law to secure compliance with that provision: Article 71(3).

Policy-making bodies

There are many national policy-making bodies whose expert advice is binding on State governments. For example, though land and local governments are two of most substantial subjects in the State List, it is the power and duty of the National Land Council under Article 91 to

formulate a national policy for the promotion and control of the utilisation of land for mining, agriculture and forestry. Similarly, it is the duty of the National Council for Local Government under Article 95A to formulate a national policy for local government. The advice and directions of National Finance Council (Article 108) and the Public Service Commission (Article 139) are similarly binding on some or all of the States. The existence of statutory bodies like FELDA which is responsible for a matter in the State List is further indication of inroads into State matters. The statement that the federal government loves the States too much but trusts them too little is not without justification. One is tempted to conclude that the traditional view of federal institutions in which "the functions of the public sector are clearly divided among different levels of government that then proceed more or less independently to fulfill their responsibilities" does not apply in our country. Federalism in Malaysia, if it can be said to exist at all, is of the nature of a "cooperative federalism" in which the typical case is the joint provision of a public service by several cooperating levels of government under the overall control of the centre. As Holzhausen states: "In Malaysia, uniformity of development planning is ensured not only by the constitutionally established predominance of the Federation in almost all aspects of the social and economic life of the nation, but also by special constitutional powers which empower the Federal Government to coordinate the development-effort of the nation. Moreover, since the States depend largely on federal grants and loans for the implementation of their own development schemes, they have little option but to cooperate with the central planning authority".

Development plans

In relation to national development plans, Article 92(1) empowers the Yang di-Pertuan Agong to proclaim an area of a State as a "development area". Thereupon

Parliament has power to give effect to the development plan notwithstanding State powers on the matter. The term "development plan" in Article 92(3) is defined to mean "... a plan for the development, improvement, or conservation of the natural resources of a development area, the exploitation of such resources, or the increase of means of employment in the area." It seems, therefore, that if a State is acting irresponsibly in a matter like logging, the central government can interfere under the authority of Article 92(I) by declaring the affected area to be a "development area" or by means of giving directions through the National Land Council.

It is noteworthy that under Article 95E(3) Sabah and Sarawak are excluded from the provisions of Article 92(1) unless the consent of the Yang di-Pertua Negeri is obtained.

Public servants

Though the States are free to choose their own civil servants, many important posts in the States - the "designated posts" - are filled by federal officers on secondment to the States. The power to second a federal officer to the States and vice versa is provided by Article 134. In the former Federated Malay States of Negeri Sembilan, Pahang, Perak and Selangor and the Straits Settlements of Penang and Malacca all posts of District Officers and Assistant District Officers are held by federal officers on secondment to the States. The States have no say even in the appointment of the State Secretary, State Financial Officer and the State Legal Adviser. These are federal appointments. The recent controversy about the appointment of the Selangor State Secretary proves the power of the federal government in the area of critical state civil service appointments.

Except in Penang, District Officers are ex-officio members of State Executive Councils. In the case of Malacca, Negeri Sembilan, Penang and Perlis there are no State Service Commissions and in these States, appointments are made by the Federal Public Service Commission. Moves are afoot to integrate federal and State government services. Several processes of integration are now being carried out and a complete integration is the goal.

Article 75

Though the legislative competence of the federal parliament and the State assemblies are marked out by the Constitution, Article 75 provides that "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." Article 75 has been broadly interpreted by the courts in favour of the federal Parliament though it was probably meant to apply only to matters in the concurrent list or to such areas as land and local government on which the federation has been given competence by Article 76(4). Scholarly opinions and judicial precedents on Article 75 (*City Council of George Town v Govt. of Penang* [1967]; *Re Estate of Yong Wai Man* [1994]) seem to imply that in any case of conflict between a federal and a State law, the federal law ought to prevail. The author finds this opinion totally bewildering and out of tune with the overall scheme of the Federal Constitution. It is submitted that Article 75 should be read in the background of Articles 73, 74 and the Ninth Schedule which clearly demarcate the areas of competence of the Federal Parliament and State Assemblies. In Malaysia the federal parliament is not supreme and except in times of emergency or where expressly authorised by the Constitution, Parliament cannot encroach on matters within the States' competence. It is submitted that Article 75 should be read as follows: "If any State law is inconsistent with a (valid) federal law,

the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void". Except under Articles 76, 79 and 150, a federal law on a matter within the competence of the States cannot be a valid law and as such, it cannot be made to prevail over an inconsistent State law on a matter within the state's jurisdiction. To argue otherwise is to defeat the purpose of having separate and elaborate legislative lists in the Ninth Schedule. In sum Article 75 should apply only to matters covered by Article 76 (power of Parliament to legislate for States in certain cases), Article 79 (concurrent legislative power) and Article 150 (emergency legislation).

Cooperative federalism

The Constitution-makers, in providing for a division of powers, were aware of the need for some flexibility of arrangements between the Federation and the States. This flexibility is achieved in a number of ways:

- Article 76 grants power to Parliament to legislate for the States for the purpose of implementing any treaty or the decision of an international organisation or for the purpose of promoting uniformity of the laws of two or more States or if so requested by the Assembly of any State.

- Article 76A enables Parliament to extend the powers of the States in certain cases.

- Article 79 grants concurrent legislative power to the Federation and the States subject to the rule in Article 75 that in case both governments exercise jurisdiction on the same matter, the federal law will prevail.

- Article 83 permits acquisition of state land for federal purposes.

- Article 92 provides for national development plans and allows the federal government to intervene for the development, improvement or conservation of the natural resources of a development area.

- Article 93 permits the federal government to conduct inquiries and surveys and collect statistics on matters within State jurisdiction.

- Article 95 permits the Federation to inspect any department or work of a State with a view to making a report thereon to the Federal Government. The Federal Government may direct that the report be communicated to the State Government and be laid before the Legislative Assembly of the State.

- The Federal Constitution contains various provisions relating to appointments of members of constitutional bodies like the National Land Council (Article 91), National Council for Local Government (Article 95A) and National Finance Council (Article 108). The purpose of these bodies is to facilitate and institutionalise consultations between the two tiers of governments.

- The Conference of Rulers is required to be consulted by the Yang di-Pertuan Agong in relation to some critical appointments to the judiciary, Public Services Commission, Election Commission, Police Commission and the Education Commission.

- Under Article 38(2) the Conference may deliberate on questions of national policy and any other matter that it thinks fit. This provision contains within it tremendous potential to harmonise and unify the policies and perspectives of the two tiers of government and to promote cooperation and coordination.

Political and economic factors

The above were some of the legal factors which have contributed a unitary tendency in Malaysia's federal set-up. Other political and economic considerations tilt the balance of power further in favour of the central government. The powerful alliance of parties which rules the centre also controls State governments in twelve out of thirteen states of the federation. Such political integration has done the nation immense good. But it has further strengthened the hands of the federal government to impose its will on the constituent units of the federation.

The tight control that the federal leadership exercises over the choice of every Menteri Besar and Ketua Menteri and over the nomination of candidates for Assembly seats makes it politically unwise for a Chief Minister to try too aggressively to champion State rights or to act too independently of the centre. The relative ease with which some popular as well as powerful Menteri Besar are retired from their office after General Elections goes on to show a very unique aspect of the Malaysian political set-up. Almost all political power is concentrated at the centre. There are very few state leaders with a national following. The power of most political chiefs in the States is derived from and dependent on central patronage and not from their own charisma.

The increasing importance of foreign relations and foreign trade has further augmented the authority and power of the central government. The threat to the security of the nation in the early years made an increase in the powers of the central government unavoidable. War and economic crises are the enemies of federal arrangements. Problems on the security front demand a large measure of unitary control and impose financial strains, which only the federal government can successfully bear.

The imperatives of globalisation and the steady expansion of the economy are generating new financial resources for the federal government. Despite some privatization, the importance of the public sector in the economic life of the nation continues to grow. The fiscal policies of the federal government retain their centrality. The poor performance by many State Development Corporations has further weakened the argument for greater State autonomy in financial matters. The growth of social services with its accompanying welfare politics has led to increased control especially on the financial side by the central government over the regional governments. The defect in our federal system is that the states lack the financial resources necessary to carry out the social services which have been committed to their jurisdiction. This can be remedied by reallocation of financial powers to make the States more financially independent and less dependent on the goodwill of the general government. But only the federal parliament can make such constitutional changes and it is unlikely that the centre will be willing to surrender or return its financial resources to the regions. That being so it is obvious that in return for federal aid, the states have to concede greater or lesser degree of control by the centre. State autonomy in their respective jurisdictions has, in practice, become unreal to some degree.

CONCLUSION

How truly are the above federal features reflected in the constitutional scheme of things in Malaysia? On the answer to this question will depend the veracity of the claim that Malaysia is not a true federation and is merely a 'quasi-federation', a 'federation with a heavy central bias' or 'a largely unitary state with some federal features'.

All in all, it is quite clear that despite a federal form, the Constitution provides the central government with

many avenues to make inroads into matters assigned to the States. This scenario is strengthened once we examine the allocation of financial powers between federal and State governments. The fiscal balance is very much tilted in favour of the central government.

The overall picture that emerges is that neither in the letter of the law, nor in its working, is the Malaysian federation a true federation in the sense in which this term is understood in the U.S.A., Canada and Australia.

This, however, is not meant to be a criticism of the way things are working in Malaysia. Federalism is not an end in itself. It is not synonymous with good or effective government. Depending on the needs of the times it changes in one direction or the other. It may become looser or even break up. In Malaysia it has moved towards a unitary structure. From an ordinary citizen's point view, labels or descriptions of Malaysia as a "federation with a central bias", or a "quasi-federation", or a "unitary state with some federal features" are not of much consequence. To the ordinary citizen, "all is well that works well" and this much can surely be said that on the whole federal government has worked with minimum friction and with considerable cooperation between the centre and the States.

In the area of fiscal imbalance, however, corrective measures have not caused an impact. This imbalance has two aspects: vertical imbalances between the centre and the States, and horizontal imbalances between the States inter se. Vertical imbalance arises from the fact that resources are not distributed among the two layers of government according to their needs. Horizontal imbalance exists because of the extreme disparity in the revenue positions among the States.

The heavy central bias which was always present in the federal set-up has become further accentuated. Over the years the federal government has grown stronger at the expense of the States. This tendency for the central government to increase in strength is, however, not unique to Malaysia. In most federations power is gravitating towards the centre. It is fairly certain that this trend is bound to continue.

Some tensions and conflicts between the centre and the States and between the States themselves are inevitable in any federal set-up. The conflict between local autonomy and the need for a strong central government is not easily reconcilable. But Malaysia has been fortunate that these tensions have rarely erupted in open conflict. It is to everybody's credit that with consultation and consent most of the sources of friction have been removed and workable solutions achieved. But in one area more than others, constant vigilance, tact and shrewd diplomacy will be needed and that is the federation's relationship with Sabah and Sarawak. Because of their size and wealth and due to their different cultural, religious and racial backgrounds the people of Sabah and Sarawak consider themselves entitled to greater autonomy within the federation than the other States.

Despite the growth of Malaysian nationalism, and considerable progress in bringing about political unity throughout the federation, there has also been a strong increase in the sense of importance, self-consciousness and self-assertiveness among the peoples of Sabah and Sarawak. The sense of common nationality binding the people of Sabah and Sarawak with the rest of th Malaysian state is still very tenuous. In the years ahead, leaders in Sabah, Sarawak and Kuala Lumpur will have to act with vision, goodwill and a spirit of accommodation and compromise so that this federal union remains strong and enduring.

In sum, though there are no prototype federations, a federal state must exhibit, in various degrees, some well-acknowledged characteristics. In Malaysia the Federal Constitution embodies many of the traditional features of a federal system. But there is a very heavy preponderance of legislative, executive and financial powers with the centre. In addition to this, the Constitution permits the federal government to encroach on matters within the States' jurisdiction in times of emergency and on other specified grounds.

Political economic and security considerations have further tilted the balance of power in favour of the central government at the expense of the States. Except in relation to Sabah and Sarawak, the system of government is operating as a unitary set-up with some federal constraints. Despite many federal features in the Constitution of Malaysia, the partnership between the federal and regional governments is an unequal one. The central government can encroach on State rights without much difficulty in many ways.

From a pragmatic point of view, the concentration of power, especially financial power, in the hands of the centre, may be said to be serving the nation well despite the obvious eclipse of most of the federal features of the Constitution.

Whether a heavy central bias in our federal system is a good or bad thing is a matter of perspective. Alexander Pope's cynical comment comes to mind. "For forms of government let fools contest. Whate'er is best administered is best."

Endnotes

1 Note that altering the boundaries of a state requires the consent of the State Assembly and the consent of the Conference of Rulers. If the boundaries of Sabah and Sarawak are involved, the consent of the Yang di-Pertua Negeri will also be required.

15

INTER-ETHNIC FAMILY LAW RELATIONS

The federal executive is enlightened, tolerant and accommodative on inter-religious relationships. It is some judges who are disregarding the Constitution's gilt-edged provisions on moderation, tolerance and accommodation.

The overall situation of inter-religious relations in Malaysia was exemplary till the early 90s. Since then the calm has been broken by a number of legal, political and moral dilemmas that defy easy solution.

The last 15 years have witnessed many cases on apostasy, conversion of infants and jurisdictional conflicts between the syariah and civil courts. These disputes pit constitutional values against religious and racial considerations.

The response of the judiciary has been mixed. Some judges hear the call of justice and give decisions that transcend narrow considerations.

There are heartening rulings in a number of cases, among them -

- *Jamaluddin Othman* (1989)
- *Teoh Eng Huat* (1990)
- *Shaikh Zolkaply* (1999)
- *Ng Wan Chan* (1991)
- *Tan Sung Mooi* (1994)

- *Lim Chan Seng* (1996)
- *Nyonya Tahir* (2007)
- the minority opinion in *Lina Joy,* and
- *Subashini* (2007).

In other cases, however, judges have deserted constitutional values for higher considerations. Foremost among these one-sided decisions are -

- *Dalip Kaur* (1992)
- *Hakim Lee* (1998)
- *Soon Singh* (1999)
- *Daud Mamat* (2000)
- *Kamariah bte Ali* (2002)
- *Priyathaseny* (2003)
- *Tongiah Jumali* (2004)
- *Shamala* (2004)
- *Nadunchelian v Norshafiqah* (2005)
- *Kaliammal* (2006)
- *Lina Joy* (2007), and
- the majority view on conversion of infants in *Subashini* (2007).

We have a High Court decision telling an aggrieved non-Muslim spouse that though she has rights, she has no remedy in the High Court. This is despite her plaintive cry that being a non-Muslim, she has no recourse to the syariah courts.

We have a superior court judge advising an aggrieved non-Muslim spouse that because civil courts have no jurisdiction, she must be open about going to the Syariah Court. This judicial advice is irreconcilable with the Constitution's clear provision in Schedule 9, List II, Paragraph 1 that Syariah Courts "shall have jurisdiction only over persons professing the religion of Islam."

We have heart-wrenching stories of infants separated from pining parents, converts sent to rehabilitation centres, and disputes between wailing relatives and religious authorities over dead bodies.

There is a case of a lawyer charged with the criminal offence of abetment because he refused to divulge the whereabouts of a convert out of Islam who had retained him as her counsel.

The irony of the situation is that on inter-religious relationships the federal executive is enlightened, tolerant and accommodative. It is some judges who are disregarding the Constitution's gilt-edged provisions on moderation, tolerance and accommodation.

One cannot, therefore, sit idly by as the ideologues tear the Constitution apart and unravel the beautiful and unique mosaic that took five decades to build. Despite the constitutional basis for moderation and interethnic harmony, there are areas where our social fabric is under stress. In relation to all of these areas, we need to put our heads and hearts together to find workable, mutually acceptable solutions that show respect for each other's sensitivities and basic rights.

THE SAD SAGA OF SUBASHINI & SARAVAN

By far and large Malaysia's plural legal system has, with admirable success, walked the middle path between private weal and public interest, and between the competing demands of various ethnic, religious, linguisti and regional associations that constitute the majestic network of our society. However, in the last decade and a half, a number of deeply divisive and unresolved issues have come to the fore, among them the issue of religious conversion of children and the conflicting jurisdiction between the Syariah and Civil Courts.

In the recent case of *Subashini v Saravan* these issues came to the fore. The husband in a non-Muslim marriage renounced his religion to become a Muslim. He converted his four-year old boy to Islam without the knowledge and consent of his Hindu spouse. He sought the Syariah Court's help to dissolve his non-Muslim marriage and to obtain custody of and/or guardianship over two infant children.

The non-converting spouse unsuccessfully sought the High Court's and Court of Appeal's help to dissolve her marriage, to restrain the conversion of her two-year old child and to get both children back to her care.

On December 27, 2007 in a landmark judgment the Federal Court ruled on the issue of child conversion and on the engaging issue of which court has jurisdiction in a matrimonial dispute involving a couple one of whom has converted to Islam. The apex court's majority 2-1 judgment contains much that will give solace to non-Muslims but there are also elements that will cause despair.

JURISDICTION OF CIVIL COURTS

The majority ruled that questions of jurisdiction are for the Civil Courts to determine. The High Court has jurisdiction even if the husband has converted to Islam and even if he had commenced proceedings in the Syariah Courts. See also *Tan Sung Mooi v Too Miew Kim* (1994). The status of the parties at the time of the non-Muslim marriage is the material consideration for purpose of jurisdiction.

A Syariah Court order relating to a civil marriage has no legal effect in the High Court other than as evidence of Islamic law. The converting husband whose civil marriage is still subsisting is subject to the jurisdiction of the High Court, but the Syariah Court has no authority over the Hindu wife.

DISSOLUTION OF NON-MUSLIM MARRIAGE

A non-Muslim marriage does not automatically dissolve upon one party's conversion to Islam. It remains valid till dissolved by the High Court under civil law. Provisions of Islamic law apply only to those marriages where both parties are Muslims. A converting spouse cannot shield himself behind freedom of religion in Article 11(1) to avoid prior obligations under the 1976 civil law. By contracting a civil marriage the couple is bound by the 1976 Act in respect of divorce and custody.

Despite the above exhilarating opinions, the Federal Court majority failed to resolve decisively the issue of jurisdiction. Datuk Nik Hashim Nik Ab. Rahman, FCJ for the majority held that both civil and syariah courts have concurrent jurisdiction over the matter.

Sadly, this paves the way for conflicting custody and guardianship orders from the civil and Syariah Courts, possible complaints of contempt of court for non-obedience of judicial commands, and continuing gladiatorial battles in the courts.

The dissenting judge Datuk Abdul Aziz Mohamad must have foreseen all this. He ruled wisely that as the marriage at its inception was a non-Muslim marriage, the High Court has exclusive jurisdiction.

The majority also ruled that it is not an abuse of the process of the courts for a spouse in a "Law Reform marriage" to move the Syariah Court. The majority gave to the husband the unilateral right to convert the religion of his minor child to Islam and refused an injunction against him. The dissenting judge, with courage and compassion, broke ranks with the majority on all these issues.

The judgment also revealed a disturbing unequal legal position in the matter of one's right to go to the courts to seek redress. The non-converting spouse could move the High Court for divorce only after three months of her husband's conversion. But the converting husband could get going in the Syariah Court right away and have a head-start in matters of obtaining judgments over issues of custody, guardianship, property and maintenance. This state of affairs is hardly going to arouse confidence in non-Muslim minds. It is for this reason, perhaps, that the learned dissenting judge asked for the status quo to be preserved till the civil court determined the issues authoritatively.

FORCED CONVERSION OF INFANTS

The religion of an infant is understandably the religion of the parents. However, when one party to a marriage converts to another religion and seeks to take his infant children with him into the new faith, there are deeply difficult issues of constitutional and family law that require deep reflection as well as compassion.

To begin with, children of very young age do not understand the differences between one religion and another. To force them to convert or to choose the faith of one parent over another is deeply problematic and the legal system must devise safeguards. As far as I know, the various syariah enactments have provisions that no child's conversion is valid unless he is of the age where he can understand the meaning and implications of the Islamic declaration *La Ilaha Illallah Muhammadur Rasulullah* (There is only one God and Muhammad is His Messenger).

Article 12(4) of the Constitution provides that for the purpose of instruction in or taking part in a ceremony or act of worship, "the religion of a person under the age

of 18 years shall be decided by his parent or guardian". All three judges in the *Subashini* case ruled that the word 'parent' in Article 12(4) of the Constitution is in the singular and refers to one parent only. A converted partner could unilaterally and without the consent of the other spouse change the religion of his children to Islam. The other parent cannot prevent the conversion. See also *Nedunchelian v Norshafiqah* (2005). However, one judge, Datuk Abdul Aziz Mohamad, FCJ admirably ruled that the non-converting spouse is entitled to a hearing and to object to the conversion.

With all due respect to the apex court, its decision on this point is flawed in law. The term 'parent' in Article 12(4) is indeed in the singular but it is clarified in the Eleventh Schedule in section 2(95) that "words in the singular include the plural".

The Constitution in Article 8(2) bans gender discrimination. It is, therefore, reasonable to assume that Article 12(4) intended to give both parents equal rights to determine their children's religion. The learned judges overlooked or were not alerted to the interpretation clause in the Eleventh Schedule.

From the point of view of justice and constitutionalism what was required was a ruling on two points. First, that both parents have equal rights. Second, a creative interpretation was needed to cover situations when the parents do not see eye to eye on their child's religion. As the glittering generalities of the Constitution fail to provide any guide, it is submitted that in such a situation, as a matter of practicality, the parent to whom custody is granted by the court of competent jurisdiction should have the right to choose a child's religion till he reaches the age of 18.

The open-ended court ruling in the *Subashini* case could result in continuing court battles if each parent uses his right to convert and re-convert a bewildered child.

The *Subashini* decision, therefore, leaves much to be desired. A legislative initiative is needed to restore the spirit of tolerance, compassion and moderation that animated our Merdeka Constitution. The following proposals may be worthy of consideration:

- All proselytising activities, whether covert or overt, among minors should be subject to the prior approval of parents and with full regard for Article 11(4) which limits religious propagation among Muslims.

- Conversions of minors should not be allowed without the consent of both parents. In the Constitution in Article 12(4) it is stated that "the religion of a person under the age of eighteen years shall be decided by his parent or guardian". This provision has been abused by some parents who, in the midst of divorce proceedings, pre-empt the judicial verdict by converting their infant children without the consent of the other spouse. The majority decision in *Subashini* notwithstanding, the word "parent" in the singular should be interpreted as a plural. Authority for this is found in the Eleventh Schedule of the Constitution, paragraph 2(95), that "words in the singular include the plural".

- Before any conversion application is approved all affected parties must be notified and must have a legal right to be heard. To implement this proposal, some hurdles will have to be overcome about the appropriate judicial forum because syariah courts have no jurisdiction over non-Muslims.

- Before any conversion of a partner in a non-Muslim marriage is allowed to be registered, the syariah authorities should direct the converting spouse to go to the civil court to seek a resolution of the status of the marriage, the division of property and the custody and guardianship of children.

- The law applicable to all such matters should be the pre-conversion law i.e. the law under which the relationship was subsisting before the unilateral decision to convert disturbed the status quo. Authority for this can be found in the recent decision in *Subashini* where the majority gave an admirable ruling that a marriage contracted under civil law must be dissolved under civil law.

- It does not arouse non-Muslim confidence in our courts if civil judges close their hearts and minds to the personal tragedies that underlined the cases of *Priyathaseny, Kaliammal, Subashini, Shamala, Hakim Lee, Dalip Kaur* and *Soon Singh*.

- It is an incredible act of unconstitutionality as well as insensitivity to ask people to seek recourse in the ecclesiastical courts of a faith to which they (or their families) claim they do not belong. An adjudicatory machinery that is impartial and is seen to be so should be employed. For example in *Ng Wan Chan v Majlis Ugama Islam* (1991) where there was a dispute about whether a Buddhist man who had converted to Islam, had renounced it later on, the High Court accepted jurisdiction and made an objective decision.

- In cases in which one of the parties to a family law dispute is a Muslim and the other a non-Muslim, the matter should be committed to a special division of the High Court similar to the Mu'amallat Division. This proposal does not require any amendment to Article 121(1A) of the Federal Constitution as the exclusive

jurisdiction of the syariah courts must be confined to those cases where both parties are Muslims.

- Alternatively a newly created Special Court or a Judicial Committee of the Conference of Rulers could be created to handle family law disputes between Muslims and non-Muslims. This proposal will require an amendment to Article 121(1A).

In a multi-racial, multi-religious society conflicting interests cannot be avoided. The political executive knows this and has done a good job reconciling the irreconcilable. It is some judges who have let us down. On inter-religious issues the social fabric is clearly under stress. Looking the other way will not make the problems disappear. On these issues, either we climb up the slippery slopes or we fall. The ground is slipping beneath us.

It is time for the executive, the Attorney-General and Parliament to seize the initiative, and to chisel out workable compromises that preserve the social fabric and restore the balance of the Constitution.

ROLE OF SYARIAH COURTS IN ADMITTING MU'ALLAFS (CONVERTS) TO THE FAITH

Where the intending convert is a party to a non-Muslim marriage, the Syariah Courts should be vigilant to ensure that justice is done to both parties - the Muslim and the non-Muslim alike. While recognising the constitutional right of the spouse who is seeking to enter Islam, the Syariah Courts should ensure that there is no improper motive e.g. trying to evade the obligations of a civil law marriage or seeking licenses and permits and other benefits under Article 153.

In order to safeguard the integrity and good name of Islam, the Syariah Courts should not be blind to the

plight of the non-converting spouse. The intending convert should be received into the fold, and yet be required to go to the Civil Courts to fulfill all proprietary and other obligations towards his non-converting spouse. That would prove that the syariah stands for justice for all. In verse after verse the Holy Qur'an enjoins the believers to observe their duty to do justice. "Be just; that is next to piety and fear of God" (Holy Qur'an 5:9). "O you who believe! Stand out firmly for justice, as witnesses to Allah, even as against yourselves or your parents or your kin... Follow not the lusts of your heart) lest you swerve..." (Surah 4: 135).

The convert-to-be should be enlightened on the full legal, social and economic implications of his/her adoption of the new faith of Islam; of all his new obligations and prohibitions. He must be informed that converting out again may be impossible.

Regrettably up to now, the judiciary, both civil and syariah, with honourable exceptions, fails to arouse confidence. The Government and Parliament must step in to restore the balance of things and to chisel out the necessary solutions and compromises.

INTER-RELIGIOUS MARRIAGES

As Muslims are not allowed to marry under the civil law of marriages, and must marry under syariah law, non-Muslims seeking to marry Muslims have to convert to Islam if the marriage is to be allowed to be registered. This has caused pain to the parents of many converts.

Likewise, it has led to several troublesome cases of apostasy by Muslims who, for reasons of the heart, wish to marry their non-Muslim counterparts. The *Lina Joy* case is the most divisive one.

There are also painful dilemmas when a Malaysian Muslim marries a non-Muslim abroad under the civil law of that country and then returns to Malaysia with his/her spouse and children. The marriage is not recognised locally and the children's legitimacy is in doubt. To regularise the situation, the non-Muslim party must convert to Islam and the couple must solemnise their marriage according to Islamic rites.

Sadly, in some cases the non-Muslim party refuses to convert and many harmful consequences ensue. The couple are forced to separate otherwise there will be prosecution for *zina* and *khalwa*t. The children may be declared illegitimate unless a compassionate syariah officer is prepared to apply the concept of *wata al-shubaha.* Under this concept if the parties genuinely believe that they are lawfully married and not *haram* to each other, then even if their marriage is declared illegal, the benefit of doubt (*shubaha)* will be given on the issue of the legitimacy of the children.

There was once a case of a Singapore Malay-Muslim girl married to a Singaporean non-Muslim under Singapore's civil law. They came to the idyllic hill-resort of Cameron Highlands for a holiday. However, the lady was arrested and charged by the syariah authorities for living in sin.

There is no simple pain-free solution to such cases. In a globalised age we have to accept that the marriages of many Malaysians will be solemnised abroad. We have no choice but to extend reciprocal recognition to them even if they do not satisfy our strict requirements. Otherwise there may be situations in which Malaysian marriages that are valid locally may be regarded as crimes abroad. Among these would be polygamous marriages and marriages of girls below the age of majority. Of course such reciprocal protection will have its problems. In some countries same-

sex marriages are permitted and that poses problems for Malaysian morality. There is no need, however, to adopt an all or nothing attitude towards foreign unions.

SYARIAH COURTS

Syariah Courts were till 10.06.1988 regarded as subordinate to the High Court. But by Act A704 it was provided that the High Courts and the inferior courts referred to in Article 121(1) "shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts". This watershed amendment catapulted the Islamic religious courts to equal constitutional status with the civil courts. Sadly, the amendment did not clarify a number of things.

First, who has the power to determine whether a matter is within or outside the jurisdiction of the Syariah Courts? Cases involving jurisdictional conflicts between Syariah and Civil Courts have been meticulously laid out in the learned judgment by Abdul Hamid Mohamed, FCJ in *Latifah bte Mat Zin v Rosmawati & Another* (2006).

If there is a difference of opinion between the civil and the Syariah Courts whose decision will prevail? The answer is by no means clear. In *Tongiah Jumali v Kerajaan Johor* [2004] the plaintiff, a Muslim at birth, had converted to Christianity and married the second plaintiff, a non-Muslim. She claimed that her marriage was valid under Malaysian law. A contentious issue was whether her conversion out of Islam was valid and who should determine that issue? The Johor State Enactment had provisions regarding conversion into Islam but the Enactment was silent on the issue of conversion out of Islam. The High Court, adopting the 'implied power approach', held that the jurisdiction of the syariah court to deal with conversions out of Islam although not expressly provided for in the State Enactments may be read into them by implication derived from the provisions

concerning conversion into Islam. But a different attitude was adopted in *Norlela Mohamad Habibullah v Yusuf Maldoner* [2004]. The parties had contracted a Muslim marriage abroad and divorced under civil law abroad. Neither the marriage nor the divorce was registered under the Muslim laws of Selangor. When the issue of custody of the infant child came up, the plaintiff obtained a civil High Court order.

The respondent challenged the right of the High Court to issue such an order in the light of Article 121(1A). It was held by Faiza Tamby Chik J that the Selangor Islamic Family Law Enactment did not apply to the unregistered marriage and the unregistered divorce. Syariah courts have no inherent jurisdiction unlike civil courts that are courts of general jurisdiction and have inherent powers.

In *PP v Mohd Noor Jaafar* [2005] it was held that an offence under s. 5(1) of the Islamic Religious Schools (Malacca) Enactment 2002 was not an offence against the precepts of Islam and was therefore excluded from the jurisdiction of the syariah courts. The court admirably clarified that Article 121(1A) was attracted only if a particular matter comes within the exclusive jurisdiction of the syariah courts.

A second unresolved issue is about where a case should go if one party is a Muslim and the other a non-Muslim? In *Saravanan a/l Thangathoray v Subashini a/p Rajasingham* [2007] the couple was married under civil law in 2001 and had two infant children. In 2006 the husband converted himself and his infant son to Islam. The wife complained that the son's conversion was carried out without her knowledge and consent and she sought an ex parte injunction to restrain the husband from converting either child and commencing or continuing with any proceeding in any Syariah Court with regard to the marriage or the children. The learned Judicial Commissioner held

that she had no jurisdiction to grant an injunction against a court not subordinate to the High Court. On appeal to the Court of Appeal, the majority expressed inability to grant the injunction sought because the matter was within the jurisdiction of the Syariah Court. The court expressed sympathy for the wife's plight and took note that the wife's remedy in the civil court was preempted by the husband's petition in the Syariah Court. But the court was unable to grant any relief. Hassan Lah JCA, however, recommended that the aggrieved non-Muslim wife should apply to the Syariah Appeal Court against the judgment of the Syariah Court. The learned JCA's opinion is out of line with Schedule 9 List II Paragraph 1 which confines the jurisdiction of the syariah courts to persons professing the religion of Islam.

A third problem is about where the case should go to if the issue is mixed and involves elements of both syariah and civil law? In Islamic banking cases vigorous arguments have been submitted that the High Court should not exercise jurisdiction.

Fourth, what if a syariah related law or decision involves a grave constitutional law question about fundamental rights or federal-state division of power? In *Priyathaseny v Pegawai Penguatkuasa Agama* [2003] the first plaintiff was born a Malay and a Muslim. She renounced Islam, adopted Hinduism, changed her name, married the second plaintiff (an ethnic Indian and a Hindu), and gave birth to two children. She was arrested and charged for two offences - first of insulting Islam by her act of conversion and second, of cohabitation outside of lawful Muslim wedlock with a non-Muslim. Sometime after her arrest, her Hindu husband converted to Islam.

The first plaintiff sought a declaration that she was a Hindu and that her constitutional rights were being violated. The second plaintiff, her Hindu husband, also sought a declaration that he was not subject to Islamic law.

because he had been coerced into converting into Islam in order to save his wife from jail. The High Court denied both declarations and refused to answer the constitutional issues. While admitting that interpretation of the constitutional word "profess" was involved, the court held that the core issue was whether the first plaintiff was still a Muslim despite her alleged conversion and whether the second plaintiff remained a Muslim despite his allegation that he was coerced into conversion. The court held that both issues were for the Syariah Courts. The decision is problematic because the High Court should not abdicate its responsibility to interpret the Federal Constitution.

A fifth problem relating to Article 121(1A) is that sometimes the remedy being prayed for is unavailable in the Syariah Courts. This issue was resolved by *Soon Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM)* [1999] which adopted the 'subject matter' approach rather than the 'remedy prayed for' approach. The fact that the remedy prayed for is not available in the Syariah Court does not deprive the Syariah Court of jurisdiction if the subject matter is within its competence. In *Azizah bte Shaik Ismail v Fatimah Shaik Ismail* [2004], there was a custody dispute between the natural mother and her sister over an infant child. The natural mother applied to the civil High Court for the writ of habeas corpus. The Federal Court, in following the subject matter approach, refused habeas corpus. The subject matter was in the exclusive jurisdiction of the Syariah Court even if the remedy was not.

Since 1988, the civil courts have generally shown great reluctance and restraint in any matter where there is the slightest whiff of an Islamic religious issue. Barring some exceptions they have generally hidden behind Article 121(1A) to give way to the Syariah Courts and to adroitly evade or avoid constitutional issues. Article 121(1A), added by Act A704 in 1988, insulates the Syariah Courts from interference by the civil courts *in matters within*

the jurisdiction of the Syariah Courts. In actual practice, however, what has happened is that on any issue that is connected with Islamic law, whether it is within or outside the jurisdiction of the Syariah Courts, the civil courts are extremely reluctant to pronounce a judgment even if issues of jurisdiction, constitutionality and human rights are involve. Article 121(1A) was not meant to give superiority to Syariah Courts over the civil courts. But with the active cooperation of the civil courts this is what has happened.

It is submitted that conversions of minors should not be allowed without the consent of both parents. In the Constitution in Article 12(4) it is stated that "the religion of a person under the age of eighteen years shall be decided by his parent or guardian". This provision has been abused by some parents who, in the midst of divorce proceedings, convert their infant children without the consent of the other parent. The word `parent' in the singular should be interpreted as a plural. Authority for this is found in the Eleventh Schedule of the Constitution, section 2(95), that "words in the singular include the plural..."

Before any conversion application is approved all affected parties must be notified and must have a legal right to be heard. To implement this proposal some hurdles will have to be overcome about the appropriate judicial forum and the jurisdiction of the courts. Syariah courts have no jurisdiction over non-Muslims. Therefore, either the matter must be committed to a civil court or to a newly created Special Court.

In any system with legal pluralism, overlaps are bound to occur and jurisdictional conflicts are unavoidable. The conflicts can be resolved either through judicial interpretation or through legislative guidance. The civil courts have singularly failed in this area. A legislative initiative is, therefore, necessary to clarify issues arising under Article 121(1A).

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16

MUSLIM APOSTASY

The right to convert out of one's faith is not mentioned explicitly in the Malaysian Constitution though it is enshrined in Article 18 of the International Covenant on Civil and Political Rights 1966 and in Article 18 of the Universal Declaration of Human Rights 1948.

For non-Muslims the right to opt out of one's faith and choose another has been regarded as an implicit part of religious liberty guaranteed by Article 11 of the Constitution. However, because of its implications for child-parent relationships, the court in the case of *Teoh Eng Huat* [1986] held that a child below 18 must conform to the wishes of his/her parents in the matter of religious faith. Thus, a Buddhist girl of seventeen had no constitutional right to abandon her religion and embrace Islam.

In relation to Muslims, the issue of apostasy is regarded as taboo, as absolutely abhorrent and as a politically explosive proposition. In the nineties the issue gained notoriety and ended up polarising the citizenry, the bureaucracy, the judiciary and the political leadership. Several types of deeply disturbing cases, many of them unresolved, have landed in the courts.

- There is a small number of cases of Muslims who wish to renounce Islam because of their disillusionment with the administration of justice in the Syariah Courts[1] or for other reasons. According to Mohamed Azam Adil,

the number of such applications from those who were born Muslims is very small. Most applications before the syariah authorities involve former non-Muslims who had converted to Islam and wish to go back.[2]

- Some Muslims wish to convert to other religions for reasons of the heart. They wish to marry non-Muslims and are unable to do so because Muslim law in Malaysia does not allow a Muslim to marry a non-Muslim.[3]

- There are a few cases of children who were born Muslims but were raised as non-Muslims and on attaining maturity wish to join the religion of their adoptive parents.[4] UiTM scholar Dr Mohamed Azam Mohamed Adil points to precedents from Prophet Muhammad's time when Muslim children fostered by Jews were allowed to choose their religion. The learned author quotes the unsuccessful application of *Rashidah bt Mohamad Myodin* Application No. 14200-043-002-2003.

- There are many people who were born into other faiths but voluntarily converted to Islam. For various reasons, they wish to revert to their former faith.[5] Prominent in this category are people who, in order to take a Muslim spouse, had entered Islam, but who, on the dissolution of their marriage wish to return to their former faith.

- Some natives and *orang asli* who converted to Islam and who find Islam's prohibitions not to their liking, wish to return to their former status.

- There are many non-Muslims who challenge the alleged conversion of their dead children or spouses to Islam by claiming that their loved ones had lived all along as non-Muslims. Some of these cases could have been avoided if the conversion process was more open and the family was informed and consulted. In the present

state of affairs, there are many undignified court tussles between Muslim authorities and the deceased's family over who has the right to bury the deceased and according to what rites?[6]

- In a number of cases a husband in a non-Muslim marriage renounced his religion to become a Muslim. The *mu'allaf* (convert) sought and obtained the help of the Syariah Court to dissolve his non-Muslim marriage. He also got the infant children converted to Islam and obtained custody and/or guardianship over the children without the consent of the other spouse. The non-converting spouse sought the civil court's help to get her children back.[7]

- There is one recent case of a young man accidentally switched at birth in the hospital. He was brought up by Muslim parents, but wishes to return to his biological parents.

- In one case a Muslim girl converted to Hinduism and married a Hindu under Hindu rites. After she gave birth to her second child, her unauthorised conversion came to light. She was arrested and sent to a rehabilitation centre. Her child was taken away from her husband and put in the care of her mother. Some time before the girl's detention, the Hindu husband also converted to Islam. Later he alleged that his conversion to Islam was under undue influence because he was trying to save his wife from being jailed for syariah offences. It was held by the civil court that the genuineness of the husband's conversion was within the jurisdiction of the Syariah Court.[8]

Some of the above cases involve heart-wrenching stories of broken homes, dissolved marriages, converts out of Islam sent to rehabilitation centres and infant children separated from them pining parents. There have

been ugly cases of disputes between families and religious authorities on the religion of a deceased. In consequence, police, including the Federal Reserve Unit (FRU), are called in to help religious officials to take corpses away for "proper" burial and to keep wailing and angry relatives in check.

Apostasy out of Islam is not just a simple issue of freedom of conscience. In the special context of Malaysia it is complicated by political, social, economic, historical and constitutional dimensions.

POLITICAL DIMENSION

To the Malays of this country, there is an inseparable link between race and religion. Note, however, that in neighbouring Indonesia, the world's most populous Muslim state, the connection between race and religion is not made.

Under Article 160(2) of the Federal Constitution as well as in popular perception, Islam is the defining feature of a Malay's ethnic identity. Exodus of Malays from Islam would reduce the numbers of Malays and thereby weaken Malay political power.

In recent years, rumours have circulated that despite the Federal Constitution's Article 11(4) that prohibits unauthorised preaching to Muslims, many internationally funded proselytizers are trying to lure Muslims away from the Islamic faith. How widespread is the problem of apostasy amongst Muslims is the subject of wild speculation. The government must supply statistics to put rumours to rest. What is certain is that despite the international campaign of vilification against Islam, more converts are entering Islam's fold than leaving it.

Due to the fascinating connection between race and religion among the Malays, a conversion out of Islam automatically means deserting the Malay community. Decline in the number of Muslims means decline in the number of Malays. This has obvious political connotations.

SOCIO-ECONOMIC DIMENSION

A Muslim apostate will lose his 'Malay' status. His marriage will be dissolved. He will not be eligible for inheritance under Islamic law. His "Islamic heirs" may lose their right to succeed. Questions of custody and guardianship of his children, if any, will arise. If the apostate is the holder of a Malay reserve title, his title may have to be revoked or compulsory acquisition of land may have to be resorted to.

The adoption of Islam as the religion of the federation and the compulsory subjection of Muslims to the syariah in a number of matters are other reasons why the conversion of a Muslim out of Islam arouses deep revulsion and anger among the Malay/Muslim citizens.

APOSTASY & STATE ENACTMENTS: A HISTORICAL NOTE

How many murtad (apostates) there are in the country is not known. Some Muslim religious leaders have made wild allegations of hundreds of thousands. But data gathered by UiTM scholar Dr Azam Adil gives some indication. He found that from 1994 to 2003, Syariah Courts in Negri Sembilan granted renunciation certificates to 16 applicants, most of whom were former converts to Islam.

Till the early 1980's, Muslim Law Enactments in several states recognised apostasy by imposing a simple registration requirement on all who entered the

faith and all who exited from it. But in the eighties with Islamisation catching on, the unilateral right to register a renunciation was repealed. In response to the Muslim *volksgeist,* a number of states have, in the last few years, enacted "rehabilitation laws" that permit detention and re-education of converts out of Islam. Variously referred to as Restoration of Aqidah or apostasy or *murtad* laws, these enactments shake constitutional theory to its roots. Four approaches emerged.

First, in some States like Perlis, Kedah, Penang, Selangor, Federal Territories, Johor and Sarawak, the syariah enactments remain silent on the question of apostasy. This poses problems about the venue where the application should be filed. The civil courts are reluctant to handle the matter because it relates to Islamic law from which subject they are banned by Article 121(1A). The syariah courts do not wish to adjudicate because they have no jurisdiction and, more importantly, they do not wish to be involved in this greatest of all sins.

Second, in States like Sabah, Melaka and Kelantan, an intending apostate can be detained in a rehabilitation centre for a period provided by the law (six months in Melaka, 36 months in Sabah and Kelantan).

Third, in Negeri Sembilan legislation was enacted to require any one seeking to convert out of Islam to be subjected to compulsory counseling and other procedures for prescribed durations but without detention. It is provided that an intending apostate should make an ex parte application to the Syariah High Court with reasons and facts. A counseling period of 90 days will follow. If the applicant still does not repent, further counseling can take place up to a period of one year after which the certificate of renunciation will be issued.

The fourth approach is that a Muslim's membership of the *ummah* is irrevocable. Any attempt at apostasy is an insult to Islam, to be punished with fine, imprisonment and whipping. Under section 13 of the Administration of Islamic Law Enactment, Perak, Muslim apostasy is punishable with RM2000 fine or two years imprisonment. Among the States that have enacted such punitive laws are Kelantan, Perak, Pahang, Terengganu and Malacca. See *Mad Yaacob Ismail v Kerajaan Negeri Kelantan* [2001]; *Daud Mamat v Majlis Agama Islam* [2001]. Four apostates in Kelantan repeatedly failed to have their conversion officially recognised. Instead they suffered imprisonment and rehabilitation in1992.

This penal approach violates the freedom of conscience clause in the Constitution. The civil courts are near unanimous that under our basic charter, a Muslim does have a right to convert. But he cannot do it unilaterally. He must first obtain a Syariah Court certificate of renunciation. The problem is that most Syariah Courts fail to act on such applications and would-be converts spend years in legal limbo.

The penal approach does not harmonise with other rules and realities of the legal system. In all States, the syariah authorities possess a power to ex-communicate Muslims from the fold. From time to time, State religious authorities have brought down the axe on the Qadiyanis, the Ismailis, the Ahmadiyas and the Ithna Asharis. Obviously, one's status as a Muslim is not eternal. It can be taken away, thereby creating the ironic situation that some Muslims who desire fervently to stay within the fold are ex-communicated because they subscribe to views which the authorities have adjudged to be 'deviant'. But other who wish to exit the religion are prevented and punished!

ISLAMIC JURISPRUDENCE

Holy Qur'an:

The Holy Qur'an is replete with passages condemning apostasy. In 20 or so passages it states that becoming a renegade is a sin and will be punished severely in the hereafter. "How shall God guide those who reject Faith after they accepted it...?" asks Surah 3:86. In several passages it is stated that the wrath of God shall visit the apostates. "On them (rests) the curse of God, of His angels and of all mankind" (Surah 3:87). "... For the wrongdoers We have prepared a Fire whose smoke and flames like the walls and roof of a tent will hem them in..." (Surah 18:29).

However, nowhere is there a requirement of a worldly punishment unless the apostate wages war or indulges in defamation. Surahs 4:89 and 4:91 are often cited as evidence of the divine commandment to "seize them and slay them". Actually both verses are qualified by a call to peace with the non-belligerent convert. Surah 4:89's command to seize them and slay them is immediately qualified by the words of Surah 4:90: "Except those who join a group between whom and you there is a treaty of peace or those who approach you with hearts restraining them from fighting you". In Surah 4:91 the command to seize and kill applies only if "they withdraw not from you nor give you (guarantees) of peace besides restraining their hands".

Surah 4:137 talks of repeated acts of apostasy. "Those who believe and then disbelieve and then again disbelieve and then increase in disbelief, Allah will never pardon them..." S A Rahman, former Chief Justice of Pakistan, points out that this verse is conclusive evidence that the Qur'an could not have contemplated the killing of the apostate for his act of defection. Otherwise there would not be a history of repeated conversions.[9] Surah 3:91 talks of "those who reject faith and die rejecting". Surah 2:217

talks of those who "die in unbelief". This is evidence that Allah envisages the natural death of the apostate without state intervention to kill him. Surah 3:89 speaks of the mercy and forgiveness of God for those who repent and make amends.

Add to these verses other exquisite passages like "Let there be no compulsion in religion" (Surah 2:256). "Unto you your religion, unto me mine" (Surah 109:6). "If it had been thy Lord's will, they would all have believed, all who are on earth! Will thou then compel mankind against their will to believe!" (Surah10:99).

In innumerable passages the Holy Qur'an reminded Prophet Muhammad that he was only a warner (Surah 27:92). His duty was to draw people's attention to Allah. But it was not the Prophet's duty to use force to make people believe or to manage their affairs (Surahs 39:41; 88:21&22; 27:92). "Thy duty is to make the message reach them. It is our part to call them to account" (Surah 13:40).

It is clear, therefore, that in the Holy Qur'an apostasy is a sin (punishable in the hereafter) and not a crime (punishable by the state). Islam is a religion of persuasion, not force. The proposal to criminalise apostasy runs counter to the spirit of the Qur'an which is one of tolerance for the disbeliever.

Hadith:

Despite the absence of a worldly punishment for *murtads* (apostates) in the Holy Qur'an, many Muslim jurists rely on two known *hadith* (sayings of the Holy Prophet) that apostates should be advised, imprisoned and if they still persist, then beheaded.

Prophet Muhammad's words and deeds, of course, deserve the highest veneration. But a very large number

of scholars have pointed out that there is incontrovertible evidence of many instances when the Prophet allowed apostates to go without punishing them.[10]

Some scholars assert that Prophet Muhammad never put anyone to death for apostasy per se. Al-Zayla'i says that "the reference in the *hadith* is to one who fights against us".[11] Only the belligerent *murtad* who is involved in warring against the Muslims is to be killed.[12] "Mere change of faith, if peaceful, cannot be visited with any punishment".[13] "The delinquents contemplated in the *hadith* are those who were not merely renegades from the faith but also in active opposition to the Muslims, having joined the warring disbelievers' camp. Their case would fall within the purview of verse 33 of Surah al-Ma'idah[14] (which prescribes the death penalty for those who wage war against God).

If there still are some doubts about the Noble Prophet's attitude towards apostasy, reference may be made to the Treaty of Hudaybiyah signed by the Prophet to permit converts to depart freely to join the non-Muslim community. The Treaty also contained a clause that if someone from Madinah defects from Islam and seeks protection in Makkah, the Quraish would not return him.[15]

Juristic opinions:

In the era after the demise of the Noble Prophet, new interpretations took hold. The Caliphs and the jurists interpreted the Qur'anic verses and the *hadith* to imply that punishment for apostasy was mandatory in Islam. They made no distinction between peaceful conversions and violent defections. However, they disagreed on whether the punishment for apostasy was death or a lesser penalty. Some jurists also distinguished between male and female apostates, reserving the harsher penalty for males. Three lines of argument exist:

First, apostasy is a *hudud* offence punishable with death. There are Hadith to support this view. (Muslim, 3:506-507). "Apostates should be advised, imprisoned, and if they still persist, then beheaded". But some Muslim scholars like Prof. Hashim Kamali are of the view that the Hadith must be read in the context in which it was made - in times of war, emergency and grave threat to the Islamic community. They also point out that the Prophet never ordered the execution of an apostate.[16] The Noble Prophet is also known to have signed the *Treaty of Hudaibiya* to permit apostates peaceful passage from Muslim lands to join their new communities.

Second, it is a *tazir* offence with a discretionary punishment. (Ibn Taimiyyah, Ibrahim al-Nakhai and al-Biji). This approach is generally accepted in Malaysia. Malaysian Muslim scholars argue that though there are repeated references in the Holy Qur'an to the need for tolerance and non-compulsion[17] these refer only to freedom of conscience for non-Muslims. Muslims themselves have an absolute duty to uphold their faith. This view may be correct but it is interpretive and not based on explicit passages in the Qur'an. It is argued by Malaysian scholars that in the context of Malaysia as Islam is the religion of the Federation and as Malays are, by constitutional definition, required to be of the Muslim faith, all Muslims are liable to prosecution if their conduct violates Islamic precepts. No Muslim can lay a claim to opt out of syariah laws - the constitutional guarantee of freedom of religion notwithstanding. The notion that freedom to believe includes the freedom not to believe is rejected by the bulk of Malay society and has been rejected in national courts.[18] Despite international norms to the contrary in Article 18 of the Universal Declaration of Human Rights and Article 18 of the International Covenant on Civil and Political Rights (that freedom of religion includes freedom to change one's religious belief), the impact of local culture and beliefs cannot be discounted.

The third view is that apostasy is a serious sin and will be punished in the hereafter but there is no requirement to impose a worldly punishment. In support of this view, which I find most acceptable, it can be argued that Islam is a religion of persuasion, not force. The proposal to detain apostates runs counter to the spirit of Islam, which is one of tolerance for the disbeliever. It is noteworthy that the Holy Qur'an nowhere prescribes a worldly punishment for apostates even though it is stated repeatedly that their conduct shall incur the wrath of Allah (SWT) in the hereafter.[19] In fact Surah Ali 'Imran[20] recognises the possibility of repentance and reminds us that Allah is all-forgiving. Only if the apostate turns against the Muslim community is he to be seized and killed[21]. The late Grand Imam of Al-Azhar, Sheikh Muhammad Sayyed Tantawi is of the view that as long as the apostates do not insult or attack Islam or the Muslims, they should be left alone. "Action should not be taken against them on the basis that they renounced Islam. Only when they insult Islam or try to destroy the religion, one should act (against them)."[22] Perhaps Sheikh Tantawi bases his opinion on Surah An-Nisa[23]. "Those who believe, then disbelieve, again believe and again disbelieve, then increase in disbelief, Allah will not forgive them nor guide them in the right path".

A few Muslim governments like Saudi and Afghanistan have legislated death for apostasy. But the majority of Muslim nations leave the matter at advising and counseling. They rest their laws on the view of scholars who interpret Prophet Muhammad's *hadith* to refer to situations when apostasy was combined with rebellion against the state. A belligerent *murtad* is punishable but not one that defects peacefully.

In sum, Islamic jurisprudence is unanimous that apostasy is abhorrent. There is, however, difference in opinion on whether apostasy is a sin or a punishable crime;

and if a crime then whether it is punishable with death or a lesser penalty.

It is humbly submitted that juristic views holding apostasy to be a hudud or ta'azir offence must be reviewed. These juristic views are difficult to reconcile with the Holy Qur'an's exquisite message of religious tolerance. A stream cannot be higher than its source. The *fiqh* (juristic opinion) cannot override the syariah (revealed law). The syariah is revealed, sacred, eternal and universal. The *fiqh* is mundane, temporal, based on social norms and subject to change.

Muslim jurists in Malaysia have choices and one hopes that they will exercise their *ijtihad* (independent reasoning) in such a way as to paint Islam in the best light.

CONSTITUTIONAL PERSPECTIVE

Since the 90's the conservative view on apostasy has prevailed in Malaysia. Several states have enacted laws that permit the arrest and rehabilitation of apostates. Variously referred to as Restoration of *Aqidah* or apostasy or *murtad* laws, these enactments shake constitutional theory to its roots. They pit state law on apostasy against the Federal Constitution's guarantee of religious liberty. They pit state law against international law. They put the conservative interpretation of religious freedom in Islam on a collision course with Article 11. From a constitutional law point of view, apostasy laws raise difficult constitutional issues under Articles 3, 5, 10, 11 and 12.

Article 3(1): Islam is the religion of the Federation, but other religions may be practised in peace and harmony. The implication of Article 3 is that unlike in secular states, Federal and State governments in Malaysia may

promote Islamic education, set up Islamic institutions and incorporate Islamic policies in the administration. However, though Islam is the religion of the Federation, Malaysia is not an Islamic state. The syariah is not the basic law of the land. The Constitution is supreme. The syariah applies only to Muslims and that, too, in areas demarcated by the Constitution in Schedule 9, List II, Item 1.

Article 3(4): Further, Article 3 (on Islam) does not extinguish anything else in the Constitution. Article 3(4) provides that "Nothing in this Article derogates from any other provision of this Constitution". This means that constitutional rights in Articles 10, 11 and 12 are not extinguished despite the adoption of Islam as the religion of the Federation. The *aqidah* (basic faith) laws cannot be immune from challenge because of the explicit language of Article 3(4). Article 3(1) does not override Article 11(1).

This also means that Article 3 cannot be employed to challenge the validity of a drug trafficking law on the ground that some of its provisions were un-Islamic. See for example the case of *Che Omar Che Soh* (1988). Nor can Article 3 be relied on to trump any other constitutional provision - whether on fundamental rights or the system of parliamentary government or Malay privileges or the position of the Sultans or the special rights of the people of Sabah and Sarawak. The Constitution is its own justification for being and does not need validation from any other source.

Article 4: When our document of destiny was being drafted, no consideration was given to the idea of a theocracy (supremacy of God's law). Instead, a supreme Constitution was adopted by Article 4(1).

Article 5(1): Forced rehabilitation will be an interference with personal liberty guaranteed by Article 5(1). The validity of the *aqidah* law may, therefore, be

challenged. Habeas corpus may be applied for. But a difficult jurisdictional issue will arise whether due to the existence of Article 121(1A) a High Court can interfere with a detention order arising out of the judgment of a syariah court. Article 121(1A) states that the ordinary courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the *Syariah* Courts". This leaves open the possibility of habeas corpus if the state law is unconstitutional or if the syariah court is acting outside its jurisdiction.

Article 10(1)(a): This provision guarantees speech and expression. A *murtad* (convert out of Islam) may claim that the rehabilitation law violates his rights under Article 10 unless aspects of public order can be used to defend the *murtad* law.

Article 10(1)(c): This provision guarantees the right to associate. Inherent in this right is the right to disassociate. See *Dewan Undangan Negeri Kelantan v Nordin b. Salleh* [1992] about the right to leave a political party and join another.

Article 11(1): According to Article 11(1) "Every person has the right to profess and practise his religion and, subject to clause (4), to propagate it." The guarantee of Article 11(1) applies to all persons including Muslims. In *Minister v Jamaluddin Othman* (1989), a preventive detention order on the ground that a convert out of Islam was involved in propagating Christianity among Muslims was held to be illegal.

The freedom in Article 11(1) is broad enough t permit change of faith. Though Article 11(4) restricts propagation of any religion to Muslims, the law nowhere forbids voluntary conversion of a Muslim to another faith. Any attempt to keep a person within the fold by compulsion is both unconstitutional and contrary to the spirit of tole-

rance that the Holy Qur'an mandates in Surahs 2:256, 10:99 and 109: 1–6. In the cases of *Minister v Jamaluddin Othman* [1989] and *Kamariah bte Ali* [2002], the courts implicitly acknowledged the right of a Muslim to convert to another religion.

Article 11(5): Freedom of religion is, of course, not absolute. All religious freedom is subject to general laws relating to "public order, public health or morality" (Article 11(5)). Who may enact these laws?

Laws on public order and public health must be enacted by the Federal Parliament because these topics are in the Federal List. But laws on morality may be enacted by State Assemblies as well.

Schedule 9 List II: What about State laws criminalising apostasy? They are not protected by Article 11(5) because apostasy per se is not condemned anywhere in the Constitution. Perhaps Schedule 9 List II Item 1 could envelop these *aqida* (articles of faith) laws? This Schedule permits State Assemblies to create and punish "offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List".

In relation to State powers under Schedule 9 the following factors must be taken note of:

- The Legislative Lists in Schedule 9 are subject to the chapter on fundamental rights and cannot violate Article 11;

- State powers to legislate on Islam are limited and derived and cannot violate the supreme Constitution. One must remember that Article 3(4) clearly indicates that the provision on Islam does not derogate from any other provision of the Constitution;

- The criminal law power of the states applies against persons professing the religion of Islam. If a person of sane mind and legal capacity formally declares that he no longer professes a faith, it is constitutionally difficult to subject him to the religion he has renounced. All that can be required is a formal procedural requirement of renunciation; and

- The power of the states to enact criminal laws cannot apply to matters included in the Federal List. Public order is in the Federal List and acts of belligerency by murtad must be punished under the Federal Penal Code and not under State *aqida* laws.

Article 12(3): This provision says that no person shall be forced to receive instruction or take part in any ceremony or act of worship of a religion other than his own. The forced rehabilitation laws will fall foul of this guarantee.

In sum, the *aqidah* laws have triggered a massive constitutional debate that has pitted religion against the Constitution and has disturbed the delicate social fabric that held us all together for 54 years.

A wide gap has developed between constitutional theory and the realities on the ground. Nevertheless, one must not lose sight of constitutional fundamentals.

INTERNATIONAL DIMENSION

The right to convert out of one's faith is not mentioned explicitly in the Malaysian Constitution though it is alluded to in Article 18 of the Universal Declaration of Human Rights 1948 (UDHR) and Article 18 of the International Covenant on Civil and Political Rights 1966 (ICCPR). Article 18 of the UDHR declares that "Everyone

has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance". It is noteworthy that the UDHR has been given partial recognition by section 4(4) of Malaysia's Human Rights Commission Act 1999.

Many Muslims feel considerable disquiet about Article 18 of the UDHR and ICCPR. Article 18 of the International Covenant on Civil and Political Rights 1966 was adopted at the behest of a Christian delegate from Lebanon despite strong opposition from the Muslim delegates who were in attendance.

Christianity's link with the merchants, missionaries and military of the colonial era is still fresh in many minds. The disproportionately strong support that Christian missionary activities receive from abroad arouses fear and resentment.

The adoption of Islam as the religion of the federation and the compulsory subjection of Muslims to the syariah in a number of matters are other reasons why the conversion of a Muslim out of Islam arouses deep revulsion and anger among the Malay/Muslim citizens.

EVADING SYARIAH LAW

It is argued that if unilateral conversions were allowed, a Muslim, who is facing prosecution in a Syariah Court, could defeat or avoid the application of Islamic law to him by a simple act of renunciation. This fear is unjustified. The law applicable to a case is the law at the time of the alleged commission of an offence, not the law at the time of the trial or the sentence. It has been held by the courts that a Muslim cannot escape the jurisdiction

of the Syariah Court by a unilateral act of renunciation. The Syariah Court continues to have jurisdiction till the issue of status is determined at law. The issue whether an individual is an apostate or not was one of Islamic law and not civil law. In the case of Kamariah the appellants had committed some syariah law offences before August 1998. At the time of sentencing in October 2000 they produced a statutory declaration that in August 1998 they had ceased to be Muslims. The Federal Court held that "the appellants were not automatically excused from the charge in the Syariah Court just because they had made the statutory declaration declaring they were no longer embracing the religion of Islam". "The material time to determine whether the appellants were embracing Islam was the time when the appellants committed the offence under the (relevant law). Therefore, even if the appellants had already declared themselves as apostates in 1998, they should be brought to the Syariah Court in 2000 for the offence which was committed when they were still embracing Islam".

JUDICIAL APPROACHES

Litigation involving apostates has dragged our superior court judges into legally difficult, politically controversial and religiously painful dilemmas.

Some civil judges are cognisant of Article 4(1) that the Constitution is supreme; of Article 11(1) that everyone, including a Muslim, has freedom "to profess and practise his religion"; and of Article 3(4) that nothing in Article 3 "derogates from any other provision of this Constitution". In *Minister v Jamaluddin Othman* [1989] the freedom of a convert from Islam was indirectly recognized as part of his freedom of religion by the Supreme Court. In *Ng Wan Chan v Majlis Ugama Islam* [1991] a Buddhist had converted to Islam but renounced his new religion later. On the evidence of the wife, the civil court ruled that her husband was a Buddhist at the time of his death. In *Che*

Omar Che Soh, Teoh Eng Huat, Lim Chan Seng, Shaikh Zolkaply and Nyona Tahir the judges upheld the delicate balance between Article 3 (on Islam) and other provisions of the 1957 Constitution.

On the other hand many Muslim judges are uncomfortable with the restrictive interpretation of the term `Islam' in Article 3(1) by Tun Salleh LP in *Che Omar Che Soh v PP* [1988] and the ruling that Article 3(1) ascribes a mere ritualistic and ceremonial role to Islam. Since the early nineties many judges have ignored *Che Omar Che Soh* and responded enthusiastically to the Muslim *volksgeist*. They have acted creatively to rewrite the Constitution in order to strengthen and broaden the Islamic features of the basic charter. The spirit of tolerance and accommodation that animated the Merdeka Constitution and was painstakingly preserved by the federal political executive for nearly four decades has been seriously undermined by many judicial decisions since the nineties. Foremost among these one-sided, ideological decisions are *Dalip Kaur* (1992), *Hakim Lee* (1998), *Soon Singh* (1999), *Daud Mamat* (2000), *Priyathaseny* (2003), *Tongiah Jumali* (2004), *Shamala* (2004), *Kaliammal* (2006), and *Saravanann* (2007).

In these decisions the courts have moved away from *Che Omar Che Soh's* restrictive interpretation of the term "Islam" in Article 3(1). The courts have shifted towards a view which is fully in accord with Islamic theory but which was explicitly rejected by the drafters of the Constitution that the term `Islam' in Article 3(1) refers to a complete way of life and a holistic system of values and morals.

The courts are interpreting the power of the States t legislate on Islam in a very expansive way even in disregard of the constitutional division of power between the states and the federation. They are rewriting the federal-state division of power in favour of the States on any matter touching on Islamic religion.

They are giving to Syariah Courts virtually absolute power over any issue involving syariah law even though some matters of Islamic jurisprudence are assigned by the Constitution to the civil courts.

In some cases even though the State legislature has not conferred a power on the Syariah Court, the Civil Courts are stating that the powers of the Syariah Courts are inherent. Whatever powers the State legislature has, are impliedly being vested in the Syariah Courts even in the absence of any explicit legislation: *Hakim Lee v Majlis Agama Islam Kuala Lumpur* [1998].[24] *Hakim Lee* is in direct contrast with the earlier and much admired decision in *Ng Wan Chan v Majlis Agama* [1991] that "if state law does not confer on the *Shari'a* Court any jurisdiction to deal with (a) matter stated in the State List, the *Shari'a* Court is precluded from dealing with the matter. Jurisdiction cannot be derived by implication".[25]

With some exceptions, the superior courts are generally refusing jurisdiction in cases involving mixed questions of civil and syariah law.[26]

They are subordinating human rights in Articles 5 to 13 to the power of the States to legislate on Islam under Schedule 9 List II Paragraph 1: *Kamariah bte Ali lwn Kerajaan Kelantan* [2002].

On issues of conversion out of Islam the civil courts are trying to carve out a middle path. They are near unanimous that under our basic charter, a Muslim does have a right to convert.[27] But he cannot do it unilaterally.[28] He must first obtain a syariah court certificate of renunciation: *Kamariah bte Ali lwn Kerajaan Negeri Kelantan* [2002]. Strict affirmative proof is required to show that a Muslim had renounced Islam. Merely showing that he drank alcohol or ate pork did not indicate renunciation: *Dalip Kaur v Pegawai Polis* [1992] J; *Re Mohamad Said Nabi Decd*

[1965]. All matters of apostasy are within the jurisdiction of the syariah court: *Soon Singh v Perkim* [1999]; *Dalip Kaur v Pegawai Polis* [1992].[29]

In one case, the Federal Court expressed a tolerant and multi-religious approach that the way a person renounced a religion should be in accordance with the regulations or law or practice determined or stipulated by the religion itself: *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan* [2007]. There is no evidence, however, that conversions out of other religions are subject to any procedures dictated by that religion.

Many of the above judicial decisions have created deep resentment and misgiving among non-Muslims and have contributed immensely to the polarization of society. There is little doubt that inter-religious relationships are under strain. New thinking about this part of our Constitution is, therefore, necessary.

CONCLUSIONS & RECOMMENDATIONS

Like the life it mirrors, the constitution is swathed in contradictory principles. Nowhere is this better evidenced than in the law relating to freedom of religion especially as it relates to deviationists and apostates.

In relation to Muslims the issue of conversion or apostasy raises significant constitutional, religious, economic and political considerations. International law is also relevant. The situation is exceedingly complex due to the intermingling of politics, law and religion.

The constitutional perspective

Looking at the Constitution as a whole, it is clear that Article 3(1) on Islam does not displace constitutional

supremacy. Article 3(4) itself declares that nothing in this Article derogates from anything in this Constitution.

The power of the States to legislate on Islam in Schedule 9 cannot be exercised in disregard of fundamental rights or in transgression of Federal legislative power on public order. It is a flagrant violation of the Constitution as drafted in 1957 to imprison someone for his religious belief. Any argument to the contrary is a radical, revisionist and medieval re-interpretation of our cherished basic charter.

Anyone who stands in the shade of the Constitution has to concede that under the present constitutional order apostasy per se cannot be criminalised. But prosecution of belligerent apostates who disturb the peace or cause offence under section 298 of the Penal Code is perfectly constitutional.

From the constitutional perspective, if constitutional supremacy is to have any meaning then Schedule 9, List II, Paragraph 1 should not be allowed to trump fundamental rights.

If Article 11(1) is to have any meaning, then criminalisation of apostasy *simpliciter* should be regarded as unconstitutional. But if a belligerent apostate, by overt actions (and not just silent beliefs), breaches public order, then a federal prosecution under section 298 of the Penal Code should be mounted.

Procedural requirements

It is submitted that if the exercise of a human right, no matter how sacrosanct, hurts other people or affects society adversely, then some substantive and procedural limits on the exercise of this right are reasonable. The

right to convert out of one's faith is one such right that needs re-examination. If one could draw an analogy: marriages including Muslim marriages cannot be dissolved unilaterally. One has to go to court and submit himself/herself to questioning, mediation, delays and ancillary orders. Similarly, conversions should also be subjected to such procedural limitations as they impact seriously on Muslim community life. The marriage will be dissolved. Painful disputes about child custody and guardianship will arise. Right to inheritance under Islamic law of inheritance will be affected. Just as Muslim law of marriage has progressively moved away from the male's unilateral right of divorce, similarly the constitutional right to apostate must be subject to open and fair procedures involving all who are likely to be affected by the conversion.

In the special circumstances of Malaysia, all conversions out of Islam should be subject to an impartial judicial or quasi-judicial scrutiny to ensure that there is no undue influence or improper inducement and that the convert-to-be understands the full legal, social and moral implications of his/her adoption of a new faith. This "judicial filter" approach is justifiable because status is generally other-determined, not self-determined.[30] Further, in the case of a Muslim leaving his religion, the legal and social implications for his family, marriage, children and property are immense.

It is reasonable, therefore, that in the case of Muslim apostasy, a unilateral act of renunciation should not be enough. A formal application for change of status must be made followed by a mandatory procedure for investigation, counselling and consultation (but not adjudication). This "judicial filter" approach is justifiable due to the devastating effects of apostasy on the family.

There should be no detention for purpose of counselling. This is similar to the procedure for seeking dissolution of marriage.

The fear must be allayed that a Muslim who is facing criminal or civil proceeding in a Syariah Court may use apostasy as a ground for immunity from the process of the religious courts. The judicial decision in *Kamariah bte Ali lwn Kerajaan Negeri Kelantan* [2005] 1 MLJ 197 has laid such fears to rest.

Proselytisation

In a multi-ethnic and multi-religious society, the freedom of religion of overzealous missionaries and proselytizers of all shades has raised inter-communal tensions. If the fear or suspicion that Muslim apostasy has assumed alarming proportions continues to grow, this will have serious implications for social order in a society in which race and religion are inextricably intertwined. Some ground rules are, therefore, needed for Muslim as well as non-Muslim conduct relating to proselytisation and apostasy.

All proselytising activities, whether covert or overt, among minors should be subject to the prior approval of parents and, of course, in accordance with Article 11(4).

Proselytising activities in hospitals, critical care centres and other places where the inmates and their families are in an emotionally vulnerable state should be forbidden.

Cheque-book conversions and other forms of improper inducements should be prohibited and should be punishable.

Role of Syariah Courts

Applications to the Syariah Courts of aspiring apostates are usually left unattended. Statutory time limits should, therefore, be imposed on the Syariah Courts for determination of the applications of *murtads*. The syariah authorities must be required to complete the investigation and counseling within statutory time frames so that the applicant can get on with his life and not remain suspended in a legal limbo. Judicial remedies should not be allowed to be defeated through delays. The Negeri Sembilan model of clear time schedules is worthy of emulation. In Sarawak, if the syariah judges, for understandable religious reasons, do not wish to get involved in facilitating apostasy, the matter can be referred to the Religious Department.

Before any conversion into Islam is allowed to be registered, there should be a Syariah Court order to the intending *mu'allaf*, if he was already married, to go to the civil court to resolve the status of his marriage, the division of property and assets, the issue of custody and guardianship of children and any other ancillary reliefs.

If the family law dispute involves one Muslim and one non-Muslim, the Syariah Court should decline jurisdiction and be required by law to do so. The matter should be committed either to the civil courts[31] or to a newly created Special Court or a Judicial Committee of the Conference of Rulers. The creation of a Special Court will require a constitutional amendment to harmonise the position of the Special Court with the existing Article 121(1A).

If the intending apostate cannot be won over through love, then the apostate should be ex-communicated and this should be recorded and registered.

In matters of religion, the naked, criminal power of the state should not be employed.

In dealing with apostates, the Muslim community must look within. It must seek to understand causes and work out preventive strategies. Faith cannot be ingrained through penal sanctions. Muslims must seek to win back lost souls through love and persuasion. In verse after verse, that is the exquisite message of the Al-Qur'an.

Endnotes

1 *Daud Mamat v Majlis Agama Islam* [2001] 2 MLJ 390; *Mohamaed Habibullah Mahmood v Faridah Dato Talib* [1992] 2 MLJ 793; *Kamariah Ali lwn Kerajaan Negeri Kelantan* [2002] 3 MLJ 657

2 Mohamed Azam Mohamed Adil, "Law of Apostasy and Freedom of Religion in Malaysia", *Asian Journal of Comparative Law*, vol. 2 Issue 1

3 *Tongiah Jumali v Kerajaan Negeri Johor* [2004] 5 MLJ 40; *Priyathaseny v Pegawai Penguatkuasa Agama* [2003] 2 MLJ 302; *Lina Joy v Majlis Agama Islam* [2007] 4 MLJ 585

4 Refer to Mohamed Azam Mohamed Adil, "Law of Apostasy and Freedom of Religion in Malaysia", *Asian Journal of Comparative Law*, vol. 2 Issue 1, 2007, 1.

5 For useful illustrations and statistics refer to Azam Adil, *supra,* p. 25ff. Many applications are turned down on technicalities.

6 *Kaliammal a/p Sinnasamy lwn Pengarah Jabatan Agama Islam* [2006] 1 MLJ 685. In 2005 a Hindu soldier who had converted to Islam and who had, according to his wife, re-converted to Hinduism was, on his death, forcibly buried as a Muslim. Refer to "Moorthy buried as a Muslim. Judge: We have no jurisdiction", *New Straits Times*, 29 Dec 2005, 4. There was a different outcome in the case of a Muslim woman, Nyona Tahir @ Wong Ah Kiew, who had lived and practised Buddhism since her youth. She was allowed to be buried as a Buddhist with the permission of the syariah court. Refer to Patrick Sennyah, "Nyonya not a Muslim", *New Straits Times*, 24 January 2006

7 Saravanan a/l Thangathoray v Subashini [2007] 2 MLJ 705; *Shamala Sathiyaseelan v Dr Jeyaganesh* [2004] 2 MLJ 648

8 See *Priyathaseny v Pegawai Penguatkuasa Agama* [2003] 2 CLJ 221

9 S A Rahman, *Punishment of Apostasy in Islam*, The Other Press, KL, 2006, pp. 57-58

10 S A Rahman, *supra*, 54, 55, 61, 65, 66, 67, 71, 72, 73, 76. Professor Heffening in his article on "Murtadd" in the *Encyclopaedia of Islam* (1932) says that "there are traditions according to which even the Prophet forgave apostates," and he cites al-Nasai (*Tahrim al-Dam*, Bab 14, 15), Abu Dawud (*Al-Hudud*, Bab 1), Ibn Hanbal (I, 247) and *Tafsir al-Tabari* (III, 223).

11 *Sharh al-Zayla'i ala Kanz al-Daqa'iq*, 111, 285. Quoted in S A Rahman, *supra*, 55
12 Mohamed S El-Ewa, *Punishment in Islamic Law*, American Trust Publication, 1982, pp. 51-53
13 S A Rahman, *supra*, 77
14 S A Rahman, *supra*, 61
15 S A Rahman, supra, 72
16 For a view of the jurists see Mohammad Hashim Kamali, *Punishments in Islamic Law – an Enquiry into the Hudud Bill of Kelantan* (Institut Kajian Dasar, Kuala Lumpur, 1995) pp. 33-37.
17 Holy Qur'an Surah 2 Ayat 256; Surah 109 Ayats 1-6; Surah 10 Ayat 99.
18 *Daud Mamat v Majlis Agama Islam* [2002] 2 MLJ 390.
19 Surahs Muhammad 47:25, 27-28; Ali 'Imran 3:86-89; Baqarah 2:217; Nahl 16:106.
20 3:86-89
21 Surah An-Nisa 4:89
22 *The Star*, 29.8.98, p 22.
23 4:137
24 See also *Soon Singh v PERKIM* [1994] 1 MLJ 690
25 Similar admirable sentiments were expressed in *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang* [1996] 3 CLJ 231 *and Shaik Zolkafly Shaik Natar v Majlis Agama* [1997] 3 MLJ 281
26 But see the Supreme Court view in *Dalip Kaur v Pegawai Polis* [1992] 1 MLJ 1 that Article 121(1A) does not take away the jurisdiction of the civil court to interpret any written laws of the states enacted for the administration of Muslim laws. See also *Mohamaed Habibullah Mahmood v Faridah Dato Talib* [1992] 2 MLJ 793. In *Lim Chan Seng v Pengarah Jabatan Agama* [1996] 3 CLJ 231 Justice Abdul Hamid Mohamed acknowledged courageously that Article 121(1A) has not resolved jurisdictional conflicts in two areas: firstly, where the issue concerns Islamic law but not all parties are Muslims and the syariah court has no jurisdiction over the non-Muslims; second where the issue involves both Islamic law and civil law and the latter belongs to the realm of the civil courts e.g. disputes over *wakaf* lands.
27 However in one case the High Court held that the act of exiting from a religion is not part of freedom of religion – at least not in the case of Muslims: *Daud Mamat v Majlis Agama* [2002].
28 For a learned critique of this judicial attitude see Dr Thio Li-Ann, "Apostasy and Religious Freedom: Constitutional Issues Arising from the *Lina Joy* Litigation" [2006] 2 MLJ i. For a strong rebuttal from the Malay perspective see Shamrahayu A Aziz, Apostasy and religious Freedom: A Response to the Thio Li-Ann", [2007] 2 MLJ i
29 See also *Tongiah Jumali v Kerajaan Johor* [2004] 5 MLJ 41; *Priyathaseny v Pegawai Penguatkuasa Agama* [2003] 2 MLJ 302; *Shamala Sathiyaseelan v Dr Jeyaganesh Mogarajah* [2004] 2 MLJ 648; *Kaliammal a/p Sinnasamy lwn Pengarah Jabatan Agama Islam* [2006] 1 MLJ 685; *Saravan a/l Thangathoray v Subashini a/p Rajasingam* [2007] 2 MLJ 705

30 As an analogy one can note that marital relationships are not allowed to be dissolved unilaterally. Conciliation proceedings and court intervention are required by the law. Likewise, any move to dissolve communal relationships should be subject to some regulation.

31 Schedule 9 List II Paragraph 1 does not allow the syariah courts to have jurisdiction over non-Muslims.

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17

FINDING THE MIDDLE PATH IN THE KALIMAH ALLAH ISSUE

In 2009 the Catholic publication *The Herald* was granted a permit under the Printing Presses & Publications Act on the condition that it should not use the term 'Allah' to describe the Christian God in any of its publications. *The Herald* challenged the imposition of this condition in the High Court on the ground that its constitutional right to freedom of religion was involved. Further, as the publication openly expressed itself to be "For Christians only" there was no violation of Article 11(4) which permits regulation by state law of any propagation of religion to Muslims.

The High Court granted the application of *The Herald* on constitutional grounds. Subsequent to the judicial decision, Muslim rage exploded in some parts of the country. Some churches were firebombed and suffered significant damage due to arson and vandalism. At least one *surau* was likewise damaged.

This desecration of places of worship must be condemned as a shameless and mindless atrocity. A democratic society does not resolve disputes through violence. It is obvious that we have in our midst a lunatic fringe that has no understanding of religion or of the Constitution or of the traditions of tolerance and multi-culturalism that made Malaysia an exemplar for all other plural societies.

In the midst of gloom it is heartening to note that a large number of Muslims, including the Prime Minister, joined grieving Christians to condemn this outrage.

Church leaders showed exceptional restraint and were true to their faith by condemning the sin but forgiving the sinners.

We have to put this national shame behind us and to move on to resolve the "Kalimah Allah issue" in a spirit of compassion, moderation and accommodation.

Through the looking glass of the Christians, I can clearly see that although the word 'Allah' has obvious reverence for Muslims, no one can deny that 'Allah' is also a term of language. For centuries, in the whole of Arabia, followers of all semitic religions have used the word Allah to refer to their own God. Arab-speaking Christians use Allah *al-ab* (God the father), Allah *al-ibn* (God the son), Allah *al-quds* (God the Holy Spirit).

When people of one culture, religion or nationality adopt the symbols and vocabulary of another people, such transcendence must be viewed positively and must be commended, not condemned.

In any case the Muslim belief in one and only one God necessitates acceptance that Allah is for everyone and not just for Muslims.

There is also the constitutional dimension of freedom of religion in Article 11(1) and the right to free speech in Article 10(1)(a). These Articles are broad enough to permit any one to invoke whatever language or sentiment he wishes to invoke in order to open his heart and soul to God.

Muslim leaders must also acknowledge their role in this imbroglio. They banned local translations of the Bible into Malay. This forced Malay-speaking Christians, especially in Sabah and Sarawak, to import Bibles from Indonesia. Bibles in Bahasa Indonesia use the word 'Allah' to refer to the Christian God.

The Muslim argument that use of the word Allah by non-Muslims will confuse the Muslim population and may mislead them is demeaning. It paints the Muslims as an extremely ignorant and gullible lot. It ignores the fact that Islam took deep roots in Malaya hundreds of years ago and became the identifying feature of the Malay persona.

The Islamic faith was not shattered during the hundreds of years of colonial rule by Christian military, merchants and missionaries. Why should it be so easily shaken now after 54 years of Muslim rule, 54 years of Islamic education and a vigorous *dakwah* movement? Unless it is the case that we have no confidence in our own Islamic education system and we know that we are producing automatons and not people with *aqidah* (faith) in their religion!

However, looking at the issue through Muslim lenses, many issues tug at my conscience.

First, the constitutional right to freedom of religion is subjected by Article 11(4) to restrictions on proselytization. The plaintiffs in *the Herald* case must take note that there is suspicion, unjustified though it may be, that the use of the word Allah is an indirect attempt to proselytize Muslims contrary to Article 11(4).

Second, Article 11(5) subordinates religion to public order, public health or morality. A relevant law on public order is section 298 of the Penal Code which punishes the offence of wounding religious feelings. These feelings are

likely to be wounded if there is a claim that Allah was born in the manger; that Allah was born of Mary; that Allah was crucified on the cross! The Muslim doctrine is that Allah does not beget and cannot be begotten. He cannot be depicted in any physical form. He cannot be part of the Trinity of Father, Son and Holy Ghost.

Third, to argue that the word Allah is central to the Christian faith and that any restriction on its usage would hinder freedom of conscience of the Christians requires a willing suspension of disbelief. I have attended Christian ceremonies in about ten countries to commemorate births, deaths and marriages of close friends. I have a copy of the King James version of the Holy Bible. Hundreds of times I have heard the recital of the Lord's Prayer, the rendering of hymns in the churches and the singing of beautiful carols at Christmas. I never heard the word 'Allah' in Christian prayers till recently at a seminar at a Church on Jalan Gasing in Petaling Jaya. Other than in the Arab Peninsula where Arabic is the lingua franca, and in Sabah and Sarawak where the Church conducts sermons in Bahasa Melayu, the word Allah has never been part of Christian discourse in the English language – at least not in West Malaysia.

Fourth, the *Herald's* new found love for Arabic words is indeed very touching but one cannot fail to note that the import of Arabic words is rather selective.

Tan Sri Professor Dzulkifli Razak of USM has pointed out that in the Malay translation of the Bible, the word Allah is used to refer to the Lord God, but Mary, Abraham, Moses, Joseph, Michael and other revered figures are not given their Arabic names.

Fifth, one must also remember that Malaysia is not Arab-speaking and Christian sermons in Malay could just as well use words like *Tuhan, Dewa, Dewata* and *Betara* without any diminution of freedom of conscience.

Sixth, the argument that the Church will be using the word Allah only privately is credible but we all know that it does not take much to put a private publication in the public domain. It is noteworthy that the *Herald* is available on the net. So it is not an entirely privately circulated publication.

All in all it can be said that in relation to the *Kalimah Allah* case, the general Muslim reaction is too emotional and is based on lack of knowledge.

The *Herald*, on the other hand, has lots of facts but no tact. Its arguments rely on cold logic, history and rationality but there is total disregard of local context and of religious sensitivities.

It is submitted that in matters of religion, it is not adequate or wise to rely entirely on history, logic and reason. Emotions must be regarded. Sometimes rights must give way to the need for social harmony. We need to find a middle path.

It is my belief that it is not always right to use our rights. Freedom per se has no value. It is what freedom is for. It is the use to which it is put. It is the sense of responsibility and restraint with which it is exercised. Take the one hundred million Muslims in India for example. Despite their right in secular India's Constitution, they refrain from butchering the cow for food because the cow is regarded as sacred by the majority Hindus.

In the British case of *Humphries v Connors* (1864), a Protestant lady was marching in a predominantly Catholic area with an orange lily in her buttonhole. For historical reasons that evoked painful memories for the Catholics. Jeering and catcalls took place. A police constable asked the lady to remove the flower from her dress. She refused at which the officer gently plucked the lily away. In an

action against the officer for assault, the court held that the officer was within his duty to prevent breaches of the peace.

Similar considerations apply in West Malaysia. If in the process of using the word Allah in Christian sermons, there are also references to Allah as the son or father or Holy Ghost or as having been crucified or resurrected, that may mislead some simple folks to believe that Islamic doctrine is being perverted. However, in Sabah and Sarawak, where Malay-speaking Christians have a long tradition of using the word Allah without any inter-religious problems, there should be non-interference with the rights of the natives.

In the long range, encouragement must be given to replace Indonesian translations of the Bible with Malaysian renditions. All restrictions on the printing of Bibles in the Malay language must be lifted.

In relation to West Malaysian Christians, there is no need to use the sledgehammer of the Printing Presses Act to impose prior restraints. A Home Ministry advice on the consequences of violating Articles 11(4), 11(5) and section 298 of the Penal Code will be sufficient. If this advice is not followed, prosecutions can be commenced and the judicial process should be allowed to continue without any intimidation.

However neither judicial decisions nor executive proclamations can make this difficult, divisive and emotional problem go away. We need inter-faith dialogues to find comprehensive political and administrative solutions for our tattered fabric of inter-religious relationships. There are many painful issues and piece-meal solutions will not be enough. We require moderate leadership and a willingness to make some sacrifices for the broader interest of the multi-hued nation.

Many such arrangements are already in place. For example, Muslims have a revulsion against the swine. Yet pig farms are allowed; pork, ham and bacon are freely available in supermarkets but in *non-halal* sections. Muslims regard the dog as dirty; yet neighbourhoods are full of dogs, licenced and unlicensed. Wine, gambling and *riba* (usury) are forbidden by Islam; yet they are part of the consumer culture in Malaysia and non-Muslims are not forced to comply with Islamic values in these areas. Only Muslims are forbidden from wine and gambling. As to *riba*, the banking, hire-purchase, housing, and insurance industries offer a choice between Islamic and conventional commercial transactions. No one is forced to opt for one or the other. Many Muslims go for conventional banking. Many non-Muslims prefer the Islamic system of usury-free banking and commercial transactions.

A spirit of accommodation and moderation prevails. This spirit can be re-summoned to solve some of the thorny issues in inter-religious relationships.

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18

RECAPTURING THE SPIRIT OF 1957 FOR A SHARED DESTINY

All constitutions are meant to achieve a myriad of goals: to provide a workable blue print for good governance; to address real national problems that may have deep historical, social, economic or religious roots; and to work towards some beautiful, towering ideals. In every basic charter the need for public order and national security is sought to be balanced with the need to allow freedoms to flower and liberties to soar. There is always an attempt to straddle the divide between stability of the social order and the need for evolutionary social change.

In the context of Malaya, the biggest challenge was to accommodate the conflicting demands and expectations of the multi-racial, multi-religious, multi-lingual and multi-cultural population. At the same time there was a need to transform a deeply traditional, feudal and agrarian society into a modern, vibrant, industrialised, twentieth century state.

By far and large the forefathers of the Constitution were animated by a remarkable vision and optimism of shared destiny among the various peoples of the Peninsula. "Out of Many, One" was perhaps their creed. Their life was enlightened by a spirit of accommodation, compassion and tolerance. They abjured ideological purity of the political, economic and religious type. They walked the middle path

of moderation. They gave to every community a stake in the nation. No group got an absolute monopoly over power or over the nation's wealth. Every community received something to relish and cherish. Pluralism was accepted as a way of life and the unity that was sought was a unity in diversity.

Though nobody nominated the forefathers of our Constitution for the Nobel Peace Prize, actually they deserved one - not for ending a war but for creating the conditions in which a dazzlingly diverse people could live together in peace and harmony.

From 1957 till today except for a period in 1969, the Malays and the non-Malays did indeed live together harmoniously. Social welfare policies for the economically depressed Malay majority community did not stand in the way of sound economic development and economic freedoms for all. Despite a communist insurgency, many democratic institutions including periodic elections survived and thrived. Islam co-existed with a largely secular legal, economic, political and social system.

Regrettably the election results of March 1969 resulted in serious ethnic clashes in the Klang Valley. Many assumptions of good governance were shattered and many planks of the "social contract" came under serious questioning. Tunku Abdul Rahman, the father of the nation, whose compassionate handling of inter-ethnic affairs had steered the nation into stability and prosperity for more than a dozen years was heart-broken and gave up his premiership. After Tunku's resignation, the then prevailing identification of race with function was severely criticised. Inequitable economic relations of society were strongly questioned. Consequently many ground rules were modified and constitutional and legal provisions and administrative, social, educational and economic policies

were significantly altered and given a strong ethnic dimension.

Many blame the 1969-1971 changes for the polarization of Malaysian society. It is alleged that the New Economic Policy (NEP) led to the creation of an "ethnocracy" that has marginalized substantial sections of the population, combined political and economic power in a small section of the ruling political elite and worsened the deep fissures in an already divided society.

These allegations need scrutiny elsewhere. What can be said with certainty is that while the intention of the NEP was to provide vigorous affirmative help to the economically marginalised Malays, there was no intention to expropriate the wealth of those who had earned it by their own labour under the existing order. The NEP had many transcendental goals, among them to help all poor, and to extinguish the identification of race with profession. A White Paper published by the federal government in 1971 entitled *"Towards National Harmony"* clarifies that Article 153 is not based on race per se or on ethnic supremacy but on the desire for affirmative action necessitated by economic realities and social disparities. The Paper clarifies that the purpose behind Article 153 is to "provide leverage to the Malays to advance and progress more rapidly, since it is generally recognised that the Malays and the non-Malays have not advanced at the same rate of progress".[1] Very tellingly Para 16 affirms that awarding scholarships to all Malay students regardless of their family's financial background would be inequitious since a means test must be applied[2]. Para 16 also warns about the danger of abuses of affirmative action policies by the elites within the recipient community[3].

To strengthen affirmative action policies, Article 153 (that deals with the special position of the Malays and the natives of Sabah and Sarawak) was amended in 1971

However despite the alterations, this core provision on the special position of the Malays and the natives of Sabah and Sarawak still provides many safeguards for non-Bumiputra communities. Among them are the following:

- It shall be the duty of the Yang di-Pertuan Agong to safeguard the legitimate interests of other communities

- In exercising his function (to safeguard the special position of the Malays and the natives of Sabah and Sarawak) the King shall not deprive any person of any public office held by him

- In exercising his Article 153 function, the King shall not deprive any person of the continuance of any scholarship, exhibition or other educational or training privileges or special facilities enjoyed by him

- Article 153 does not derogate from the provisions of Article 136 on fair and equal treatment of all public servants irrespective of race

- Nothing in Article 153 authorises the deprivation of any right, privilege, permit or licence accrued or enjoyed or held by a person

- Nor can such licence etc. be unreasonably refused to the heirs, successors or assigns of a person who was in possession of a right, privilege, permit or licence, and

- No business or trade can be reserved solely for the Malays and the natives of Sabah and Sarawak.

From the above it should be clear that the Constitution, even in its "ethnic provisions" sought to avoid extreme measures and provided for a balance between

the interests of the "Bumiputera" and "non-Bumiputera" communities.

Regrettably, a wide gap has developed between theory and practice. The crux of the problem is that since 1969 actual political and administrative practices in the public sector have departed from the painstaking compromises and the gilt-edged provisions of the Constitution. The judicial and legislative branches, the federal and state civil services, the police and the army pay less heed to the imperatives of the Constitution and more to the post-1969 political ideology.

In the private sector as in the public sector ethnicity reigns supreme. The absence of a Civil Rights Act or a Race Relations Act prevents sanctions against public and private sector racism. Racial and religious preferences in the private sector feed similar conduct in the public sector and the vicious circle continues to blight the nation. The delicate compromises and the beautiful mosaic of the Merdeka Constitution are largely ignored.

Lack of legal literacy about the Constitution contributes to the eclipsing of the basic law. This permits the demagogues, the racists and extremists of all communities to preach their own sectarian interpretation of our "document of destiny" and to fan fears and suspicions. Extremism has become mainstream and moderation is seen as capitulation to other races and religions and as a betrayal of one's own community. Fortunately the bulk of the population is mature enough to reject these baits, ignore the baiters, haters and spivs.

As we approach 55 years of political freedom what can we do to restore moderation, to recapture the spirit of 1957 and to reintroduce our winning formula for living together?

We need to improve knowledge of the Constitution's glittering generalities, especially its provisions on inter-ethnic relations. The lack of familiarity with the basic charter's provisions is glaring even within the top echelons of the civil service, the police and parliamentarians.

Our secondary schools and universities must have a familiarisation course on the basic features of the Constitution and the reasons for the many delicate compromises contained therein. Knowledge of the Constitution is a prerequisite to good citizenship. Such knowledge will also help to moderate extremism and to give appreciation of one of the world's most unique and hitherto successful experiments in peaceful co-existence in a nation of dazzling diversity.

At another level, the education system needs to bring kids together, not to separate them on grounds of race, religion or language. If young people do not learn together, how will they live together? In schools, colleges and universities, interfaith studies should be encouraged as a step towards understanding, tolerance and unity. Most prejudices are born out of ignorance. With greater knowledge and understanding we learn that it is not differences that cause disunity. It is intolerance of differences that leads to disunity and violence.

Inter-racial and inter-religious marriages should be facilitated and ground rules need to be worked out to solve the many difficult issues that lurk below the surface of interfaith unions.

We have to teach people that the primitive ethic of tribalism, racism or religious exclusiveness has no place in modern society. The circle of life has expanded. We are all brothers and sisters on this big blue marble.

In our homes, classrooms and workplaces we have to teach our wards and brethren that justice is the highest virtue. Justice is impossible unless we shun self-interest and unless we try to be objective. Objectivity is impossible unless we are prepared to be subjective from the other person's point of view - to view the world through his or her lenses, to step into the shoes of the other, to feel his or her pain. Before we make a decision or express a view, we should ask: how would I feel if I were at the receiving end? In sum we should do unto others as we wish to be done unto us.

Hate speech polarises communities and often leads to violence. Existing provisions in the Penal Code and the Sedition Act need to be buttressed by a Race and Religious Relations Act. The dominant purpose of this law should be to bring parties together through conciliation. Sanctions should be a matter of last resort.

Our major political parties are organized along narrow racial and religious lines. They have illiberal tendencies that prevent the development of a social and cultural nexus between different groups thus leading to disrespect and intolerance. Instead of connecting people on issues that transcend race and religion, they build walls to separate, hurt and humiliate. Their right to organise on sectarian grounds is, of course protected by the freedom of association provision of the Constitution. Nevertheless they can reduce polarisation by permitting a category of associate members from all cross-sections of society. This may lay the foundation for a common road to a shared destiny.

As a nation we are farther apart today than we were 54 years ago. Knowledge of the Constitution's delicate provisions dealing with inter-ethnic relations can help to provide some understanding of the give and take that lay

at the basis of our supreme law. If we have to go forward as a united nation, we need to go back to the spirit of moderation, accommodation and compassion that animated the body politic in 1957.

Endnotes

1 Mohd Nazim Ganti Shaari, "Malaysia's Constitutional Identity: A Chimera?" Unpublished paper for the 9th ASLI Conference, 2012 Kuala Lumpur.
2 ibid
3 ibid

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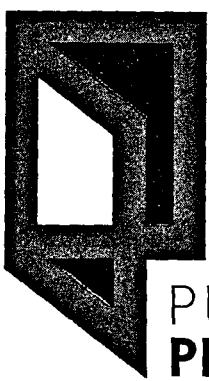

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"The Constitution is a vehicle of life and its spirit is always the spirit of the age. In the realm of constitutionalism there are always new challenges and opportunities that beckon the human spirit."

"All persons of whatever race in the same grade in the service of the Federation shall, subject to the terms and conditions of their employment, be treated impartially"
(Federal Constitution, Article 136)

"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 and the legitimate interests of other communities in accordance with the provisions of this Article"
(Federal Constitution, Article 153(1))

The BEDROCK of our Nation: Our Constitution is a look at the spirit of moderation and accommodation that animated the Basic Law of the Malaysian Federal Constitution. Starting with the larger framework of how it was drafted and its deeper meanings; we zoom in to a micro view of how it serves our nation through issues like social contract; the special position of the Malays, the natives of Sabah and Sarawak and the legitimate interests of other communities; the position of Bahasa Malaysia in relation to other languages; freedom of religion; emerging issues in interethnic relations; and the issue of Muslim apostasy and 'kalimah Allah'. With the Constitution as our reference point, we discover its beauty as document of unity and bedrock of our nation in the face of new developments and challenges.

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