

THE CONSTITUTION OF A MUSLIM MAJORITY STATE: THE EXAMPLE OF MALAYSIA

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I: INTRODUCTION & OVERVIEW

History: In early history Malaya (now Malaysia) consisted of several, independent, sovereign Malay kingdoms. From 1511 to 1640 the Portugal colonized parts of Malaya. From 1641 to 1824 the Dutch ruled many parts of the Malay kingdoms. In 1786 there was advent of British colonialism which lasted till Malaya's independence in 1957.

When Merdeka (independence) came in 1957, the new nation was called the Federation of Malaya. In 1963 the British territories of Singapore, Sabah and Sarawak joined the Federation of Malaya and the new expanded nation was re-named the Federation of Malaysia. In 1965 Singapore was expelled from the Federation and became a separate independent state.

Topography: Malaysia is a lush, green, tropical land with a vast coastline. The land mass is approximately 358,977 sq. km and the population is approximately 26 million. Geographically it is made up of two distinct regions. To the West is Peninsular Malaysia (consisting of 11 federated states). To the East are the two former Borneo states of Sabah and Sarawak. The Peninsular and East Malaysian regions are separated by approximately 1,000 km of the South China Sea.

Culture & Religion: Malaysia is a deeply diverse and heterogenous society with many cultures, religions and languages contributing to the rich cultural mosaic. For most of its 54 years there has been acceptance of diversity and no official attempt to create cultural homogeneity. Instead of a melting pot, Malaysia built a cultural mosaic, a sort of cultural rainbow in which the various components are separate but not apart.

Islam is the religion of the Federation but all other religions are allowed to be practised in peace and harmony. Nearly 60% to 65% of the overall population is Malay and Muslim.

Muslims are compulsorily subjected to the Shariah and to the jurisdiction of the Shariah courts in personal law and a few other enumerated matters. However, the Shariah is not applied to non-Muslims and no non-Muslim is subject to the jurisdiction of the Shariah courts.

Within their jurisdiction, the Shariah courts are independent of the civil courts.

The 35% to 40% non-Malay/non-Muslim population is concentrated in the peninsular regions of Penang, Perak, Selangor and Kuala Lumpur and in the East Malaysian states of Sabah and Sarawak.

The prominent non-Muslim religions are Buddhism, Hinduism, Christianity and Sikhism.

The Malay language is the official language but all other languages are allowed for non-official purposes. Vernacular schools are permitted at primary and secondary levels. English is widely used both in the public and private sectors for commercial and educational purposes.

Legal and political system: Malaysia is a Muslim majority democratic state fashioned on the constitutional monarchy and parliamentary government model of the UK. Its main differences with the UK are that unlike parliamentary supremacy in the UK, Malaysia has a written and supreme Constitution which is enforceable through judicial review. Unlike the unitary system in the UK, Malaysia has a quasi-federal system of government.

The supreme Constitution seeks to establish a popularly elected government, an elected and representative Parliament, an independent judiciary with power of judicial review, an accountable government under the rule of law and a federal-state division of power.

Economy: The country is economically blessed. It has a large coastline. Its soil is fertile. There is rainfall throughout the year. Though in close proximity to earthquake and tsunami-prone zones, it is spared these calamities most of the time. There are vast reserves of oil, gas, minerals and forest timber. The overall economy is open, market-oriented, and globally linked. There are, however, significant controls over prices of essential commodities and state regulation of licences and permits to ensure Bumiputra (indigenous) participation in trade and commerce.

Pre-independence inter-ethnic bargaining: Divided societies have special challenges in the drafting of their basic law. Malaya did well to forge middle paths and to achieve broad consensus. To build unity in the midst of diversity, the leaders of the various ethnic groups (the Malays, the Chinese and the Indians) forged a multi-ethnic political partnership called the “Alliance” in 1955. Together the “Alliance” drew up the basic principles for the emerging new nation. The coalition agreed to draw up a new Constitution that would ensure the political dominance of the majority Malays and affirm the indigenous features of the Malay Peninsula but at the same time give to the non-Malays citizenship entitlements and other guarantees of their rights. The inter-ethnic bargaining among the ethnic groups in 1956 and 1957 revolved around the following:

- Affirmative action policies in favour of the politically dominant but economically weak Malay community. This would encompass reservations and quotas of such proportion as the federal King deems necessary in four areas: positions in the public services; scholarships, educational or training privileges; permits or licences for the operation of any trade or business; and places in tertiary educational institutions;
- Malay Reserve Lands to ensure that gazetted lands could not be transferred to other communities;

- The setting up of a Malay regiment;
- Top positions in the States of the Federation to be reserved for Malays.

In return for the privileges to the Malays, the Chinese, the Indians, the Ceylonese and other non-Malays would receive the following rights either in the Constitution or through ordinary laws:

- Right of full citizenship on the principle of jus soli;
- Freedom of religion to profess, practice and (subject to some limitations) to propagate their religions;
- Equal rights in respect of primary and secondary education;
- Protection of minority languages, right to teach and learn these languages in schools; right to set up vernacular schools;
- Protection for cultural practices;
- Freedom of trade and commerce;
- Power sharing arrangement in the distribution of cabinet portfolios.

The drafting of the new Malayan Constitution: At the London Conference of 1956 the principles on which independence was to be granted and the manner of drafting the new Constitution were agreed upon. There was also broad consensus on the terms of reference for the new Constitutional Commission. However, the Malay Rulers, the leaders of the political Alliance and the British had some differences on the composition of the proposed new Commission. For this reason a totally independent group of five outsiders was given the delicate task of drafting Malaya's new document of destiny.

- The Commission consisted of five legal luminaries - two British, one Australian, one Indian and one Pakistani. The Chairman was Lord Reid, a distinguished English judge.
- The Commission held 118 public and private hearings between June and October 1956 and submitted its recommendations in February 1957.
- A Tripartite Working Party of the Rulers, the Alliance and the British made some significant changes to the Reid Draft.
- The Tripartite Working Party's report was considered and approved with some modifications at the London Conference in 1957.
- There then flowed a lengthy process of ratification by the Federal Legislative Council, the Assemblies of the Malay States, the United Kingdom Parliament and the British Crown.
- At the stroke of midnight on August 31, 1957, Malaya began its tryst with destiny.

Developments since 1957: No Constitution can stand still. The Malayan Constitution has survived the vicissitudes of war, four emergencies, incorporation of new territories and expulsion of one state.

- On September 16, 1963 Malaya transformed to Malaysia by admitting on very special terms the British possessions of Singapore, Sabah and Sarawak into the Federation.
- Due to fundamental differences between the Prime Minister of Malaya and the leaders of Singapore, the island was expelled from Malaya in 1965.
- The Constitution of the Federation of Malaysia has survived since then though it has been amended significantly in many ways to enlarge executive powers and to strengthen the federal government vis-à-vis the States.

II: PROMINENT CHARACTERISTICS OF MALAYSIA'S CONSTITUTION

Constitutional law is linked with philosophy at one end and politics at the other. It is silhouetted against the panorama of history, economics and culture. More than other fields of law, it reflects the dreams, demands, values and vulnerabilities of the body-politic. A Constitution is like a political architect's master plan for the nation. It is a body of fundamental law that describes the manner in which the state is organised; government carried on and justice administered.

At the organisational level, it creates the various organs of the state; describes and limits their powers and functions; prescribes rules about their relationship with each other and with the citizen. At the political level it concerns itself with the location of authority in the state. It tells us how to manage power and secure liberty. At the philosophical level it supplies the fundamental or core values on which society is founded.

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 independence 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 1957, this power was exercised with telling effect. Likewise, executive actions can be tested in the courts for their constitutionality.

A 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.

Constitutional Guarantee of 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.

Special Powers to Combat Subversion & Emergency

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 (the federal King) and the State Sultans 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.

The Conference of Rulers

The primary function of this unique, august institution is to elect and remove the Yang di Pertuan Agong (federal King), elect the Deputy Yang di-Pertuan Agong, consent or refuse to consent to some constitutional amendments, and to offer advice on some appointments.

Inter-ethnic bargains - Affirmative Action in Favour of Malays and the Natives of Sabah & Sarawak but with safeguards for the rights of other communities

One of the unique features of the Constitution is that affirmative action policies in favour of the majority Malays and the natives of Sabah and Sarawak are entrenched in the basic law. These special privileges are offset by safeguards for the other communities.

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. Special two-thirds majorities are required. In respect of some provisions, the consent of the Conference of Rulers or of the Governors of Sabah and Sarawak or of the State Assemblies is also mandated. However, unlike Australia the amendment procedure does not require the consent of the people at a referendum.

Westminster System of 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.

Universal Adult Franchise

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 (House of the People) over the mostly appointed Dewan Negara (the Senate). State Assemblies are unicameral.

Islam as Religion of the Federation

Islam arrived in Malaya in the 14th century and gradually became the defining feature of the Malay persona. In Article 3 of the Federal Constitution, Islam is made the religion of the federation but there is freedom to other communities to practise their own faiths in peace and harmony. Though the word "Islam" is mentioned in the Constitution nearly 24 times, the adoption of Islam as the religion of the federation does not convert Malaysia into an Islamic state. The Constitution and not the shariah is the supreme law of the land.

Independent Judiciary

Superior court 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.

Legal Pluralism & Multiple Court System – Ordinary Courts, Shariah Courts, Native Courts & Administrative Tribunals

An elaborate system of civil and criminal courts exists. The hierarchies of the ordinary courts, the constitutional position of superior court judges, safeguards for their security of tenure, the jurisdiction of the various courts and the immunities of judges are provided for by the law.

In addition, the Constitution permits Islamic courts to be established and Shariah officials to be hired. The jurisdiction of the Shariah Courts is protected by Article 121(1A) against interference by ordinary courts. Shariah 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”. The jurisdiction of the Shariah courts is defined and limited by the law and covers mostly personal law matters though in the last two decades the Shariah authorities have interpreted their powers rather broadly.

In the East Malaysian states of Sabah and Sarawak, Native Courts exist to administer native law in a limited jurisdiction.

Parallel to the ordinary courts there exist hundreds of administrative tribunals known by many names. In general, most of them are subordinate to the High Court and are amenable to the supervisory jurisdiction of the High Court through remedies like certiorari, mandamus etc..

A Non-Political 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 (independence) 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 privileges, 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.

III: ISLAM AS RELIGION OF THE FEDERATION

1. INTRODUCTION

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.¹

In 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 authorized to create and punish offences by Muslims against the precepts of Islam except in relation to matters within the jurisdiction of the federal Parliament. Shariah 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, Shariah Courts are independent of the civil courts: Article 121(1A).

2. THE ISLAMIC STATE DEBATE: COMPETITION BETWEEN SECULARISM AND THEOCRACY

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 ten years an engaging debate has been raging about whether Malaysia is an Islamic or secular state. The non-Muslims of the country are adamant that Malaysia's Constitution is, and was from the beginning, meant to provide a secular foundation. The opposition Muslim party, Parti Islam SeMalaysia (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), dismisses the proposal by PAS on the ground that Malaysia is already an Islamic state and, therefore, no constitutional amendments are needed. It rests 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

¹ The word "Islam" is mentioned at least twenty-four times in the Constitution. The words "Mufti", "Kadi Besar" and "Kadi" at least once each.

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* 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.² 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.

Concept of a 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

² John Donohoue & John Esposito (eds), *Islam in Transition – Muslim Perspectives* (Oxford University Press, New York, 1982); John L. Esposito, *Voices of Resurgent Islam* (Oxford University Press, New York, 1983).

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*³ held that Bible reading exercises in public schools were unconstitutional. Public funds cannot be used to support any sectarian activity. In *Engel v Vitale*⁴ 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 *McCullum v Board of Education*⁵ 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.

³ 374 U.S. 203 (1963)

⁴ 8 L.Ed. 2d 601 (1962)

⁵ 333 U.S. 203 (1948)

Concept of a theocratic state

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.

3. MALAYSIAN 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..."⁶ 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.⁷ 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

⁶ M.Sufian Hashim, 'The Relationship between Islam and the State in Malaya', *Intisari*, Vol 1, No 1, p 8.

⁷ Ahmad Ibrahim & Ahilemah Joned, *The Malaysian Legal System* (Dewan Bahasa dan Pustaka, Kuala Lumpur, 1987) p 54.

the patriarchal and monarchical aspects of law are said to have been influenced by Hindu culture. Some of these influences linger until today.⁸

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”.⁹ There is very little doubt that at the time of Merdeka (independence) 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”.¹⁰

Case law affirms the non-theocratic nature of the state

It was held in *Che Omar Che Soh v PP*¹¹ 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*¹². The Shariah Courts have limited jurisdiction only over persons professing the religion of Islam.¹³ It must be noted; however, that the High Court in *Meor Atiqulrahman Ishak v Fatimah bte Sihi*¹⁴ 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.

⁸ ibid, p 8.

⁹ R.J. Wilkinson, “Papers on Malay Subjects”, *Law* (Kuala Lumpur, 1971).

¹⁰ Ahmad Ibrahim & Ahilemah Joned, *supra*, p 3

¹¹ [1988] 2 MLJ 55

¹² [1939] MLJ 209

¹³ Refer to Schedule 9, List II, Paragraph 1 of the Federal Constitution

¹⁴ [2000] 5 MLJ 375

Adat (custom) applies side by side with Islam

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.

The Constitution is supreme: Article 4(1)

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.

Pre-independence law must be reconciled with constitutional supremacy: Article 162(6)

Under Article 162(6) and (7) any pre-independence 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.

Secular definition of 'law'

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

Provision for Islam as the religion of the Federation does not derogate from other constitutional provisions

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.

Shariah courts have limited authority

Shariah courts have no jurisdiction over non-Muslims. Even as to Muslims the power of the Shariah courts is confined by the Constitution to mostly personal law matters. Crime, tort, commerce, contract, banking are all in the hands

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. *Shariah* 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 *shariah* is allowed to operate, the law of the land is enacted, expounded and administered by secular officials.

Islam is not a pre-requisite for federal posts and positions

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.

4. MALAYSIAN CONSTITUTION'S 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.¹⁵ There are many significant implications of the declaration of faith in Article 3(1).

American-style secularism is 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.

Islamic education is compulsory for Muslims: 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.

State support for Islamic 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.

Shariah Courts are independent of civil 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. *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

¹⁵ The word "Islam" is mentioned at least twenty-four times in the Constitution. The words "Mufti", "Kadi Besar" and "Kadi" at least once each.

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?¹⁶ 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] 5 MLJ 41 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] 2 MLJ 629. 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] 6 MLJ 745 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 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] 2 MLJ 705 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

¹⁶ Cases involving jurisdictional conflicts between syariah and civil courts have been meticulously laid out in a recent learned judgment by Abdul Hamid Mohamed, FCJ. The learned FCJ listed 46 such judgments. Refer to *Latifah bte Mat Zin v Rosmawati & Another*, Rayuan Civil No. 02-39-2006(W).

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 jurisdiction¹⁷. Fourth, what if a syariah related law or decision involves a grave constitutional law question about fundamental rights or federal-state division of power?¹⁸ In *Priyathaseny v Pegawai Penguatkuasa Agama* [2003] 2 MLJ 302 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 violated¹⁹. 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] 1 MLJ 489 which

¹⁷ See Mohamed Ismail Mohamed Shariff, “The Legislative Jurisdiction of the Federal Parliament in Matters Involving Islamic Law”, [2005] 3 MLJ cv

¹⁸ A recent learned judgment by Abdul Hamid Mohamed, FCJ clarified that constitutional issues are the exclusive preserve of the civil courts: *Latifah bte Mat Zin v Rosmawati & Another*, Rayuan Civil No. 02-39-2006(W).

¹⁹ A similar case on point is the as yet unreported Federal Court decision in *Lina Joy*. By a majority the court decided that whether Lina Joy was a Muslim or had converted out of Islam was an issue for the Syariah Court and not the civil authorities.

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 competence²⁰. In *Azizah bte Shaik Ismail v Fatimah Shaik Ismail* [2004] 2 MLJ 529, 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 issues²¹. 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 involved.²² 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.

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).

All Muslims are subject to Shariah laws in areas enumerated in the Constitution

All Muslims are subjected to Islamic law in a number of areas. First, in personal law matters such as succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy and guardianship. Second, in relation to issues such as Islamic gifts, *wakafs*²³, *zakat*, *fitrah*, *baitulmal* or similar Islamic religious revenue. Third, a limited number of Islamic crimes like drinking liquor, unlawful sexual relations and not fasting during the month of Ramadhan are in the

²⁰ See also *Majlis Ugama Islam Pulau Pinang v Shaik Zolkaffly Shaik Natar* [2003] 3 MLJ 705; *Abdul Shaik Md Ibrahim v Hussein Ibrahim* [1999] 5 MLJ 618

²¹ Refer e.g. to *Lina Joy v Majlis Agama Islam Wilayah Persekutuan*, Mahkamah Persekutuan Rayuan Civil No. 01-2-2006(W).

²² In a recent unreported judgment, *Latifah Binti Mat Zain v Rosmawati Binti Sharibun* (Rayuan Civil No. 02-39-2006(W)), Abdul Hamid Mohamad, FCJ lists out 46 cases in which jurisdictional issues between syariah and civil courts came to light.

²³ In the matter of trusts, Muslims have the option to create Muslim wakafs or create ordinary trusts under the Trustees Act.

hands of the Shariah courts.²⁴ A Muslim cannot opt out of Islamic law.²⁵ He/she can be compelled to pay *zakat* and *fitra* and can be tried and punished by the Shariah courts for minor Islamic offences.

Preaching of any religion to Muslims is 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 is enforced on Muslims

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.

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.

First, Shariah courts have jurisdiction "only over person professing the religion of Islam". There is no jurisdiction over non-Muslims. Schedule 9, List II, Item 1 is quite clear that non-Muslims cannot be subjected to the *shariah*. They cannot be compelled to appear before the *Shariah* Courts.²⁶ Even if they consent, the *Shariah* Courts have no jurisdiction over them. Jurisdiction is a matter of law, not of consent or acquiescence.

²⁴ Almost all of criminal law is in federal hands and is administered by the ordinary courts over all citizens irrespective of religion.

²⁵ However in many areas Muslims are allowed to have a choice between *shariah* provisions and ordinary civil laws. Among these areas are banking, trusts, adoption and a whole range of commercial transactions.

²⁶ See also Articles 12(3) and 11(2). However under Article 11(4) of the Federal Constitution, state law and in respect of the federal territories, federal law, may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam. This permits the States to punish attempts by non-Muslims to proselytize Muslims. The prosecution will, however, have to be initiated in ordinary courts. For an illustration of such a law, see Control and Restriction of the Propagation of Non-Islamic Religious Enactment 1991, sections 4-9 (Johor).

Second, the power to punish transgressors of the precepts of Islam applies only to the believers - to those who "profess" the religion of Islam. In its dictionary sense, the word "profess" means to affirm one's faith or belief in or allegiance to a religion. It also means to feign, allege, assert, aver, openly declare, state, pronounce, announce, annunciate, enunciate, maintain, acknowledge, avow, claim to a quality or feeling, pretend to be or do, or to make a vow on entering an order or calling. Professing is a matter of inner feeling. It is not something that can be imposed from outside. This means that those who deny the religion or voluntarily renounce it and become *murtads* or apostates are no more in a state of professing the religion of Islam. It could be argued that they should, therefore, be no more subject to the criminal jurisdiction of the *Shariah* Courts. The civil and *Shariah* Courts have both rejected this line of reasoning, and for two understandable reasons. First, it is not exceptional to hold that status cannot be self determined. Status is almost always other-determined. Second, if during the pendency of *Shariah* Court proceedings, a person is allowed to renounce Islam, that would amount to a clever attempt to escape prosecution by depriving the court of its jurisdiction. Perhaps the second argument is unnecessary because the law applicable to a charge is always the law at the time of the alleged commission of the offence and not by what happens afterwards.

Some judges have gone so far as to hold that Muslims cannot renounce their religion at all. This point of view is difficult to reconcile with Article 11's protection of freedom of religion. Article 3 on Islam declares in its clause (4) that "nothing in this Article derogates from any other provision of this Constitution". Note must also be taken that in most Constitutions and under international law, the right to believe includes the right not to believe. The right to convert from one religion to another is a well-established aspect of freedom of religion. In Malaysia this right was unquestioned till the late 80s.

A majority of judges handling apostasy cases have tried to walk the middle path. They have stated that renunciation is legally permissible. But they have ruled that renunciation must be done through the *Shariah* Courts. Till the *Shariah* Court determines the issue according to Islamic law, the apostate remains a Muslim and can be subjected to the *Shariah* Court's criminal jurisdiction. The problem with this point of view is that *Syariah* Courts often fail to adjudicate on a renunciation application despite an unconscionable passage of time. No remedy seems to be available if a *shariah* judge indefinitely postpones the determination of an apostate's status. The administrative law remedy of Mandamus (Order under section 44 Specific Relief Act) is unlikely to lie because of the existence of Article 121(1A) of the Federal Constitution.

Third, State Assemblies have jurisdiction "in respect only of any matters included in ... paragraph (one of List II)" and not over the entire field of Islamic law. The power of the States to pass laws on Islam is a residual power. Contrary to what is believed, not everything connected with Islam is in the hands of the State Assemblies. Some

matters of Islamic civil law are assigned by the Constitution to federal jurisdiction. For example, administration of the *Hajj* falls under the Federal List, Item 1(h). Islamic banking and insurance, Islamic commercial and contractual agreements are within the jurisdiction of the civil courts.

Fourth, state legislative authority to create and punish offences against precepts of Islam is limited by the words "except in regard to matters included in the Federal List".²⁷ Under Schedule 9, List II, Item 1, States have authority relating to "creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, *except in regard to matters included in the Federal List*". Among matters included in the Federal List are "civil and criminal law and procedure" (List I, Item 4).

Fifth, state authority to legislate on Islamic crimes is further qualified by the words "or dealt with by federal law".²⁸ List I, Item 4(h) states that "creation of offences in respect of any of the matters included in the Federal List of *dealt with by federal law*" are in the hands of the federal Parliament. Betting and lotteries, murder, theft, robbery, rape, incest and unnatural sex²⁹ are all offences in Islamic law but they are clearly in federal hands because of Schedule 9, List I, Items 4(l), 4(h) and the federal Penal Code. This means that the criminal law powers of State assemblies are purely residual. Many State laws are, however, in disregard of this constitutional limitation. It is humbly submitted that State criminal laws dealing with matters such as homosexuality, incest, betting and lotteries (which matters are already dealt with by federal laws) are ultra vires the powers of the States.

Sixth, the jurisdiction of the *Shariah* Courts is derived and not inherent. Schedule 9, List II, paragraph 1 states that *Shariah* Courts "shall not have jurisdiction in respect of offences except in so far as conferred by federal law". The relevant federal law is the *Shariah* Courts (Criminal Jurisdiction) Act 1965. It confines jurisdiction to such offences as are punishable with maximum three years jail, RM 5,000 fine and six lashes. Any state law imposing larger penalties would be ultra vires and unconstitutional.

Seventh, federal and state legislative powers in Schedule 9, Lists I, II and III are all subject to the gilt-edged provisions of the chapter on fundamental rights. Schedule 9 does not give to Parliament or to the State Assemblies a *carte blanche* to pass laws on Islam irrespective of the constitutional guarantees in Articles 5 to 13. Schedule 9 does not and cannot override the rest of the Constitution. It does not authorize punishments for acts which are protected by the guarantees of Part 2. For example, many state enactments penalize any criticism or challenge to a *fatwa*³⁰. This appears to be a violation of Article 10(1)(a) and 10(2)(a) because free speech can be

²⁷ See Schedule 9, List II, paragraph 1.

²⁸ Schedule 9, List I, paragraph 4(h).

²⁹ Section 53, Enactment 3/1992 (Perak)

³⁰ Section 21, Crimes (Syariah) Enactment 3/1992 (Perak); Section 12 Enactment 3/1996 (Penang); Section 12, Act 559 (Federal Territories)

restricted only on the grounds explicitly permitted by Article 10(2)(a). Further, it has been held in *Dewan Undangan Negeri Kelantan v Nordin Salleh* [1992] 1MLJ 343 that the power to restrict Article 10 rights belongs to the Federal Parliament and not to the State Assemblies.

Eighth, state power to create and punish crimes is applicable to violation of the “precepts of Islam”. What amounts to “precepts of Islam” has not been authoritatively defined but probably refers to the beliefs, tenets, dogmas, principles, articles of faith, canons, maxims, rules, doctrines and teachings of Islam. In *PP v Mohd Noor Jaafar* [2005] 6 MLJ 745, violation of s. 5(1) of the Islamic Religious Schools (Malacca) Enactment 2002 was held not to relate to “precepts of Islam” and therefore not in the jurisdiction of the Shariah Courts. An untested issue is that if there is over-exuberance in the exercise of this power to punish crimes against the precepts of Islam for example if acts are made punishable that are not punishable in Islamic theory, is there scope for constitutional review? It is arguable, e.g., that Islam does not mandate criminal sanctions against those who skip Friday prayers or who in honest disagreement, question the desirability of a *fatwa*.

Ninth, Article 75 is a useful guide to every situation in which a state law comes into conflict with a federal law. In every federation jurisdictional conflicts between regional governments and the central government are common. There is also the possibility that on topics in the Concurrent List, both tiers of government may have enacted laws. To resolve conflicts where legal multiplicity exists, Article 75 provides that “if any State law is inconsistent with Federal Law, then the Federal Law shall prevail and the State Law shall, to the extent of the inconsistency, be void”. Despite the provision of Article 75, in actual practice State laws on Islamic matters seem to have administrative ascendancy over conflicting federal laws. For example, social security, workmen’s compensation, insurance, pensions and provident funds are part of item 15 of the Federal List. But if a Muslim dies leaving any of the above funds, federal law seems to give way to the power of the *Syariah* Courts over Islamic succession. In recent years, several States are requiring mandatory HIV testing before Muslim marriages can be solemnized. This may well be in clash with the federal power over prevention of diseases in List III, Item 7 and long standing federal laws over disease control.

The above points to the legal reality that not all Islamic crimes are in the hands of *Shariah* Courts; only those like *khalwat* and *zina* that are not dealt with by federal law are assigned to the *Shariah* Courts. In actual practice, however, the States are interpreting their powers over Islamic law expansively and are trespassing into many civil and criminal areas assigned by the Federal Constitution to the central government.

Most State Constitutions require top state posts to belong to Muslims

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 (Chief Minister) and state

officials like the State Secretary shall profess Islam. Except for Sarawak, Islam is the official religion in all states.

Race & religion are intertwined in the concept of Malay: The status of a 'Malay' carries with it many advantages. The constitutional concept of 'Malay' is inextricably tied up with observance of the religion of Islam.³¹

Islamic institutions abound

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 are becoming mainstream

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 is expanding

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 of the legal and economic system is in full swing

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.

5. TENSIONS IN MALAYSIA'S BODY POLITIC

Despite Malaysia's exemplary record of overall religious tolerance, there is no denying that there are areas of concern to Muslims and non-Muslims alike.

Delay in the grant of planning permissions for places of worship

It is alleged that local authorities often drag their feet in granting planning permission for religious buildings if the area is heavily populated by religious communities other than the applicant's community.³²

³¹ See definition of a 'Malay' in Article 160(2) of the Federal Constitution.

³² "Where Religious Worship Centres Can Be Located", *New Straits Times*, Dec. 22, 2000, p 10.

Ban on Inter-religious marriages between Muslims and non-Muslims

Muslims are not allowed to marry under the civil law of marriages and must marry under Shariah law. As such, 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.

No right to atheism

Does the right to believe include the right to disbelieve and to adopt atheism, agnosticism and rationalism? In most democratic countries the right not to believe is constitutionally protected. But not so in Malaysia. The Rukun Negara declares belief in God (“*Kepercayaan kepada Tuhan*”) as a cardinal part of national ideology. The language of Article 11(2) - no tax to support a religion other than one’s own - and Article 12(3) - no instruction in a religion other than one’s own - implies that there is no right to reject tax for or instruction in one’s own religion. The mandatory application of *shariah* laws to Muslims in many areas makes it possible to argue that atheism is not protected by Article 11 – at least not for Muslims.

Strict regulation of propagation of any religion to Muslims

Under Article 11(4) of the Federal Constitution, non-Muslims may be forbidden by state law from preaching their religion to Muslims. Many Muslims complain that this part of the social contract is not being observed by some evangelical groups, some of whom are from abroad. On many occasions in recent years news has spread like wild fire that thousands of Muslims have converted or are waiting to convert to Christianity. Invariably this raises tensions³³.

In turn, many non-Muslims complain that Article 11(4) amounts to unequal treatment under the law because Muslims are allowed to propagate their religion to non-Muslims. It is respectfully submitted that Article 11(4) is part of the pre-Merdeka social contract. Its aim is to insulate Muslims against a clearly unequal and disadvantageous situation. During the colonial era, many non-indigenous religions were vigorously promoted by the merchants, the military and the missionaries of the colonial countries. Even today, the proselytising activities of many Western-dominated religious movements that are internationally organised and funded have aroused resentment in many Asian and African societies. Some aspects of their activities, like seeking deathbed conversions, generous grant of funds to potential converts and vigorous proselytising activities amongst minors have distinct implications for social harmony. Prof. Harding³⁴ is of the view that Article 11(4) was inserted because of public order considerations. According to him the restriction on proselytism has more to do with the preservation of public order than with religious priority. To his view, one may add that Malays see an inseparable connection

The overzealousness of proselytizing groups is known to have caused tensions and even violence in many Asian societies like India. The State of Gujrat has legislated administrative controls over the work of missionaries.

³⁴ Andrew Harding, *Law, Government and the Constitution in Malaysia* (1996), p 201

between their race and their religion. Any attempt to weaken a Malay's religious faith may be 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) of the Federal Constitution contains four ingredients. Professing the religion of Islam is one of them. A pre-Merdeka compromise between the Malays and the non-Malays was, therefore, sought and obtained that any preaching to Muslims will be conducted only by authorised *syariah* authorities. Missionary work amongst Muslims – whether by non-Muslims or Muslims – may be regulated by state law under the authority of Article 11(4) of the Federal Constitution.

Constitutional restraints on freedom of religion: Under Article 11(5) the religious conduct of non-Muslims can be regulated on the grounds only of public order, public health and morality. But Muslims are subjected to many more religious restraints due to the power of the states to punish Muslims for offences against the precepts of Islam in accordance with Schedule 9, List II, Paragraph 1. The power of the states to punish Muslims for Islamic crimes was recently confirmed by the Court of Appeal in *Kamariah bte Ali lwn Kerajaan Kelantan*³⁵. The Court held that:

Article 11 of the Federal Constitution (in relation to Islam) cannot be interpreted so widely as to revoke all legislation requiring a person of the Muslim faith to perform a requirement under Islam or prohibit them from committing an act forbidden by Islam or that prescribes a system of committing an act related to Islam. This was because the standing of Islam in the Federal Constitution was different from that of other religions. First, only Islam, as a religion, is mentioned by name in the Federal Constitution as the religion of the Federation and secondly, the Constitution itself empowers State Legislative Bodies (for States) to codify Islamic law in matters mentioned in List II, State List, Schedule Nine of the Federal Constitution ('List II').

Persons of the Islamic faith and Muslim religious groups that are not mainstream are subject to severe restraints in relation to what are deemed to be "deviationist activities". From a constitutional law point of view laws that punish "deviationist activities" raise difficult legal issues. For example, section 69 of the (Perlis) State Islamic and Malay Customs Enactment criminalises "deviationist activities". This section may be constitutionally permissible under Paragraph 1, List II of the 9th Schedule. But any one punished under it may put up a vigorous challenge that the law goes far beyond the permissible restrictions of Article 11(5). Article 11(5) of the Constitution gives to every person including a Muslim a right to profess and practise his religion save to the extent that he/she does not endanger public order, public health or morality. The difficulty is that the freedom in Article 11 seems to be, in the case of Muslims, qualified by Item 1 of the State List in the Ninth Schedule. State Enactments are permitted to create and punish offences by persons professing the

³⁵ [2002] 3 MLJ 657

religion of Islam against precepts of that religion. It is submitted, however, that despite the undoubted grant of power to the States to punish Muslims for offences against Islamic precepts, some limits need to be drawn on this power so that the guarantee in Article 11 is not extinguished. Further, the proper recourse against deviationist activities is to resort to ex-communication and not to criminalisation. Ex-communication should be resorted to after the parties concerned have been given a full and fair opportunity to defend themselves and to explain their conduct.

Apostasy by Muslims is criminalized in most Malaysian States

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 the Constitution. But because of its implications for child-parent relationships, the court in the case of *Teoh Eng Huat*³⁶ 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 conversion or apostasy raises significant religious and political considerations. Many Muslims feel considerable disquiet about Article 18 of the International Covenant on Civil and Political Rights 1966 which 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 also 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. The situation is exceedingly complex due to the intermingling of politics, law and religion.

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.

A Muslim apostate will lose his 'Malay' status. His marriage will be dissolved. Questions of inheritance, custody and guardianship will arise. Posers over Malay reserve land will arise. If he is holder of a Malay reserve title, will the title be revoked?

³⁶ [1986] 2 MLJ 228.

If unilateral conversions were allowed, a Muslim, who is facing prosecution in a *Syariah* Court, could defeat or avoid the *syariah's* application to him by a simple act of renunciation.

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. 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.³⁷ 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 repeated references in the Holy Qur'an to the need for tolerance and non-compulsion³⁸ refer only to freedom of conscience for non-Muslims. Muslims themselves have an absolute duty to uphold their faith. In the context of Malaysia it is argued that 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 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.³⁹ 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.
- Third, it 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 it is 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

³⁷ 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.

³⁸ Holy Qur'an Surah 2 Ayat 256; Surah 109 Ayats 1-6; Surah 10 Ayat 99.

³⁹ *Daud Mamat v Majlis Agama Islam* [2002] 2 MLJ 390.

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.⁴⁰ In fact Surah Ali 'Imran⁴¹ 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 killed⁴². The 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)."⁴³ Tantawi bases his opinion on Surah An-Nisa⁴⁴. "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".

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. Various 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 in Article 11(1) of religious liberty. They pit national law against international law. They put Article 11 of the Constitution on a collision course with the conservative interpretation of religious freedom in Islam. From a constitutional law point of view, apostasy laws raise difficult constitutional issues under Articles 11, 5, 3, 10 and 12.

Article 11: Freedom of religion in Article 11(1) is broad enough to 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. In the case of *Minister v Jamaluddin Othman*⁴⁵ the Supreme Court implicitly acknowledged the right of a Muslim to convert to another religion. A similar sentiment was expressed in *Kamariah bte Ali*⁴⁶.

Article 5: Forced rehabilitation will be an interference with personal liberty guaranteed by Article 5(1). 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

⁴⁰ Surahs Muhammad 47:25, 27-28; Ali 'Imran 3:86-89; Baqarah 2:217; Nahl 16:106.

⁴¹ 3:86-89

⁴² Surah An-Nisa 4:89

⁴³ *The Star*, 29.8.98, p 22.

⁴⁴ 4:137

⁴⁵ [1989] 1 MLJ 369

⁴⁶ [2002] 3 MLJ 657

the possibility of habeas corpus if the state law is unconstitutional or if the *Syariah* Court is acting outside its jurisdiction.

Article 3: The *aqidah* (basic faith) laws cannot be saved by Article 3's declaration that Islam is the religion of the federation because Article 3(4) clearly provides that "nothing in this article derogates from any other provision of this Constitution". This means that Article 3 cannot override Article 11.

Article 10(1)(a): Article 10(1)(a) 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): Article 10(1)(c) guarantees the right to associate. Inherent in this right is the right to disassociate. See *Dewan Undangan Negeri Kelantan v Nordin b. Salleh*⁴⁷ about the right to leave a political party and join another.

Article 12: Article 12(3) 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.

The *aqidah* laws are triggering a massive constitutional debate that pits religion against the Constitution and disturbs the delicate social fabric that has held all Malaysians together for 50 years. At the moment the following judicial attitudes and conflicts have emerged.

According to one High Court 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*⁴⁸. A contrary view was expressed by the Court of Appeal in an appeal from a Kelantan High Court decision. It was held that a Muslim is not forbidden from renouncing Islam: *Kamariah bte Ali lwn Kerajaan Negeri Kelantan*.⁴⁹ But this renunciation cannot be done unilaterally. A Muslim who wishes to declare apostasy must first get the *syariah* court to confirm that he/she has left the religion. A statutory declaration of apostasy is not enough. The matter has to be determined by the *syariah* courts using Islamic law: *Daud Mamat*⁵⁰ and *Mad Yaacob Ismail*⁵¹. Until the act of renunciation is validated by the *syariah* court, a Muslim is deemed to be a person of the Muslim faith: *Kamariah bte Ali*⁵². 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 of whether an individual is an apostate or not was one of Islamic law and not civil law. The Federal Court affirmed this view in the recent *Lina Joy* case. In the absence of an inquiry by

⁴⁷ [1992] 1 MLJ 343

⁴⁸ [2002] 2 MLJ 390

⁴⁹ [002] 3 MLJ 657.

⁵⁰ [2002] 2 MLJ 390

⁵¹ [2002] 6 MLJ 179

⁵² [2002] 3 MLJ 657

the *syariah* court, the civil court must accept a Muslim to be still a Muslim till the *syariah* court has made a pronouncement. Civil courts should not interfere with decisions of the *syariah* courts because of Article 121(1A).

Widespread demand for *Hudud* laws

In the last few years a number of State Assemblies, as part of their quest for an Islamic state, are enacting “hudud laws” – i.e., laws relating to crime, punishments and rights and duties that are mentioned in the Holy Qur’an.⁵³ The States are claiming to exercise this jurisdiction on the ground that under the Federal Constitution Islamic penal law is in State hands. This is an overstatement for a number of legal reasons.

First, under Schedule 9, List II, Paragraph 1, States have authority relating to “creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, *except in regard to matters included in the Federal List*” (emphasis added). This means that any matter assigned to the federal Parliament is outside the legislative competence of the States. In Schedule 9, List I, Paragraph 4, sub-paragraphs (b) and (h) criminal law and procedure, administration of justice, jurisdiction and powers of all courts, creation of offences in respect of any of the matters included in the Federal List *or dealt with by federal law* are in federal hands. It is well known that theft, robbery, rape, murder, incest, and unnatural sex are all dealt with by the federal Penal Code. Therefore, the States are not permitted to enact *hudud* laws on these criminal matters even though these crimes are also crimes against Islam.

Second, Schedule 9, List II, Paragraph 1 clearly provides that *shariah* courts “shall have jurisdiction only over persons professing the religion of Islam”. This means that *shariah* courts have no power to apply the *hudud* laws to non-Muslims.

Third, the jurisdiction of the *shariah* courts is not inherent but must be derived from federal law. The Constitution, in Schedule 9, List II, Paragraph 1 says that *shariah* courts “shall not have jurisdiction in respect of offences except in so far as conferred by federal law”. The relevant federal law is the *Shariah Courts (Criminal Jurisdiction) Act 1965*. It imposes limits on jail terms and fines that the *shariah* courts can impose. The limit is three years jail, five thousand ringgit fine and six lashes. Any penalty other than these permitted penalties are unconstitutional.

The implication of the above is that the States and the State *Shariah* Courts have jurisdiction only over such Islamic criminal offences as are *not* dealt with by federal law viz, offences like consuming alcohol, not fasting during *bulan puasa*, *zina*, *khalwat* and missing Friday prayers.

⁵³ Mohammad Hashim Kamali, *Punishment in Islamic Law – an Enquiry into the Hudud Bill of Kelantan* (Institut Kajian Dasar, Kuala Lumpur, 1995)

Fourth, in addition to the question as to who has the jurisdiction to enact *hudud* laws, there is the further constitutional problem of enforcement of *hudud* laws and the arrest and detention of *shariah* offenders. The State authorities are entitled to set-up their own enforcement units. But if they wish to seek the help of the federal police, there are legal dilemmas.

Under the Constitution's Ninth Schedule, List 1, Item 3(a) the police force is a federal force. Its powers and functions are derived from the Federal Constitution and from federal laws like the Police Act 1967 (Act 344). Under section 3(3) of Act 344, the Force shall be employed for "the prevention and detection of crime and the apprehension and prosecution of offenders". The control of the Force in any area or State is in the hands of the Commissioner, Chief Police Officer or such police officer as the Inspector General of Police may specify: section 6. Section 19 states that every police officer shall perform the duties and exercise the powers granted to him under Act 344 *or any other law at any place in Malaysia where he may be doing duty* (emphasis added). It is arguable that the words in italics could cover state *shariah* laws. This could mean that police officers are obliged under section 19 to enforce State laws. It must be remembered, however, that section 20(1) and (2) clarify that in the performance of his duties, a police officer is subject to the orders and directions of his superiors in the Force and not the order of the State executive. In any case, sections 3(3), 19 and 20 of the Police Act must be read subject to the Constitution which identifies the Police as a federal force and confers on it powers and functions which are entirely in relation to the Federal List. Any general powers or duties in sections (3), 19 and 20 should be read *ejus dem generis* with the specific duties enumerated in section 20(3) subparagraphs (a) to (m). The doctrine of *ejus dem generis* teaches us that if in a statute general words are followed by specific words, then the general words should be interpreted narrowly to make them fall into the genera to which the specific words belong. All the duties in sub-paragraphs (a) to (m) are federal duties. The general duties in sections 3, 19 and 20 must be confined to matters within federal jurisdiction.

Fifth, as with the police, prisons, reformatories, remand homes and places of detention are in the Federal List: Ninth Schedule List I, Paragraph 3(b). It is, therefore, submitted that state-run rehabilitation centres for "*aqidah* offenders" or *murtads* are outside the powers of the state authorities.

IV: CONCLUSION

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 *shariah* 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 *shariah* 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 re-defined to include the “*shariah*” 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 *shariah*, 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 *shariah*.”

The implications of the above changes will be that legislation and administrative decisions inconsistent with the *shariah* will be open to judicial review. All issues involving Muslims – whether criminal, civil, constitutional or commercial – will be heard by the *shariah* courts. The federal executive and legislature will have no jurisdiction over Islamic matters. Islam will be the sole prerogative of the States.⁵⁴ Ordinary courts will handle cases involving non-Muslims only. There will be two legal systems – one for the Muslim majority based totally on the *shariah* and the other for the non-Muslim minority based on secular provisions. .

How many Muslims support such a fundamental change is open to debate. No independent public opinion poll has been conducted. Needless to say that not all Muslims are in support of moving away from the moderate, eclectic and all-embracing policies of the past.

On the issue of an Islamic versus a secular state, it can be stated categorically that 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* (custom) and by non-ecclesiastical provisions enacted by

⁵⁴ 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.

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* (custom) and with the dominant American and European culture that shapes our world-view, our thinking processes and our framework assumptions.