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Law and the Judiciary: Divides and Dissent in Malaysia

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Malaysia is a common law country, and as such the decisions of its courts have a binding and law-making force. This means that the Malaysian judiciary is highly influential in setting the tenor of governance. In this article I examine and analyze some key decisions that had an influence on divisiveness and dissent in the country. I point out that the courts have been poor in ensuring that the legal system protects the nation from divisive elements, and the legal system does not do enough to guarantee the fundamental rights and democratic principles that were envisioned by the founding fathers for the citizenry. The article closes with an attempt to understand why this is the case.

Keywords: judiciary, equality, freedom of religion, race relations, freedom of expression, democracy, constitutionalism

Introduction

The history of the modern Malaysian judiciary¹⁾ begins with the purchase of Penang Island from the Sultan of Kedah by Captain Francis Light in 1786. The initial years of British rule over the island saw a rather ad hoc method of settling conflicts, with each of the numerous communities having a head known as a kapitan appointed by Light to settle disputes. The island prospered, and the population as well as commercial activities grew to the point that a more formal legal system was required. In 1807 a Royal Charter was decreed and Penang had its first Supreme Court, which fundamentally enforced British law.²⁾

At this time there was no such thing as a single Malaysian nation-state. What we now know as Malaysia was a collection of sultanates and British-governed territories. The sultanates were Perlis, Kedah, Perak, Selangor, Negeri Sembilan, Johor, Pahang, Terengganu, and Kelantan. The British territories were Penang and Melaka on Peninsular Malaysia and Sabah (North Borneo) and Sarawak on the island of Borneo.

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1) The Malaysian judiciary is divided into two: the civil court and the sharia court. In this paper I shall only examine the civil court.

2) For an interesting history of the development of the Malaysian judiciary, see Foong (1994).

From Penang the British judicial system gradually spread across the peninsula, starting with the other area directly under British control, Melaka. Eventually the various sultanates also acquired British courts and British law. Through a system of Residents and Advisers the British spread their influence into the sultanates, taking over the system of justice from the traditional rulers and leaving only the governance of religion (Islam) and Malay customs in the hands of the Sultans. Sabah (then North Borneo) and Sarawak became British protectorates in 1888, respectively under the administration of the North Borneo Company and the “White Rajah” James Brooke and his family.

By the time independence was achieved for Malaya (the peninsula) in 1957, and later when Sabah and Sarawak merged with the nine peninsular states to form Malaysia in 1963, the British system was firmly entrenched. The nation has two sources of civil law. The first is legislation passed by the Federal Parliament and in the various state legislatures, depending on their own legislative jurisdictions as determined by the Federal Constitution. Another source of law is the common law—laws made by judges by deriving principles of law from the reasoning of their cases.³⁾ This being the case, the Malaysian judiciary practices *stare decisis*. This means the decisions of the higher courts are binding upon the lower courts.⁴⁾ The entire legal system is based on the Federal Constitution.⁵⁾ According to Article 4 of the constitution, the constitution is the highest law in the land: all legislation has to be in line with its provisions. Any law that contradicts the constitution is deemed invalid.

The Malaysian courts are divided generally into two: the lower courts and the high courts. The lower courts are the magistrates’ courts and the sessions courts. Most cases begin at either of these, and the jurisdictions of these courts depend on the severity of the subject matter and the size of the claim (depending on whether the issue is a criminal or civil one). The high courts consist of the High Courts of Malaya and the High Courts of Borneo.⁶⁾ Above them is the Court of Appeal, and finally the highest court in the country is called the Federal Court.

3) Civil Law Act 1956, Laws of Malaysia Act 67.

4) British court decisions before independence are binding, whereas court decisions made after independence are influential.

5) FGN (NS) 885/1957.

6) A slight clarification ought to be made here. The two high courts are the same in terms of their powers; it is simply that cases originating in either Sabah or Sarawak have to go up the hierarchy via their own high court. This was a provision made in the Federal Constitution in order to provide a degree of legal autonomy to the Borneo states when they merged with Malaya to create Malaysia. At the time there was a concern on the parts of Sabah and Sarawak that because the peninsular states had a head start in terms of independence from the British, their more advanced state may lead them to overwhelm the civil and legal service in East Malaysia. Therefore, today there are separate high courts, and only lawyers called to the Borneo Bar are able to practice there.

Since Malaysia is a common law country, the decisions of the courts have a profound effect. Legal decisions and interpretations of statutes—and especially the Federal Constitution—have repercussions on the way laws are enforced and ultimately on the way the country is governed. In this way the courts play an important role in how dissent and potentially divisive actions are handled in Malaysia.

This paper proposes that the main causes of divisiveness in Malaysian society are ethnicity and religion. In this matter the courts can play a role by ensuring a degree of equity when faced with cases dealing with such issues. Decision making based on equality as determined by the constitution is effective in ensuring that there is no question of racial or religious superiority seeping into the ethos of the nation's governance. Conversely, if decisions are made without such an aspiration, then the possibility arises where a judicial decision can create greater divisiveness by placing a particular community and faith above others, creating a sense that the country is divided into separate classes of citizens.

Dissent can occur freely only if there is freedom of expression. And peaceful dissent can occur only if there is a strong democratic system that the people have faith in. The role of the judiciary is in how far they protect the freedom of expression when used for dissent and how far they protect the principles that hold a democracy together. These three themes will be explored in this paper.

The Federal Constitution

At the outset, it would be prudent to briefly discuss the Federal Constitution. As mentioned above, it is the highest law in the land. It was drafted by the Reid Commission, a group of men appointed by the British, and is based on an earlier document called the Federation of Malaya Agreement 1948. The Federal Constitution is a detailed document consisting of 15 parts, 183 articles, and 13 schedules. Reading it, one gets the impression that it is a pragmatic constitution without the usual preamble to establish some sort of national aspiration. This can be problematic as there is no clear overarching principle or principles that the courts can rely on when making decisions regarding the constitution and its interpretation.

Therefore, it is possible to get different reasonings by the courts on certain provisions. One example is Article 3, which states that Islam is the religion of the federation but all other religions are allowed to be practiced freely. In the case of *Che Omar Che Soh v Public Prosecutor* (1988)⁷⁾ it was held by the Supreme Court (as the highest court

7) 2 MLJ 12.

was called at the time) that the provision simply meant that where official functions and the like were concerned, Islamic traditions were to be followed. Islamic laws are limited by the constitution in Schedule 9 to matters dealing fundamentally with family, inheritance, and some property issues. This provision, however, was given vastly different interpretations in later cases, which moves the very nature of the country away from a secular nation to one that appears to float on the fringes of what may be described as an Islamic state. This shall be discussed below.

The constitution places a degree of importance on human rights, although that term is not used. Instead, what we have is Part 2, titled “Fundamental Liberties.” This covers the liberty of the person (commonly known as the right to life); the banning of slavery; protection from retrospective laws; freedom of movement; freedom of speech, assembly, and association; freedom of religion; rights in respect to education (although not a blanket right to education); and the right to property.

Unlike the First Amendment to the US Constitution, Malaysia’s “Fundamental Liberties” comes with detailed legal provisos. For example, freedom of religion may be restricted on the grounds of public order, health, and morality. There is also the potential for laws to be passed restricting proselytization to Muslims.

Article 10(1) on the freedom of expression has heavy provisos in the constitution allowing for parliament to make laws restricting those rights on the general grounds of national security, the maintenance of good international relations, public order, the protection of parliamentary privileges, contempt of court, and defamation and to prevent incitement to commit any offense.⁸⁾ Specifically, parliament can also pass laws restricting expression on matters concerning the sovereignty of Sultans, citizenship, the national language, and the special position of Malays and natives of Sabah and Sarawak.

This brings us to an interesting point regarding the constitution. It specifically allows for affirmative action to conserve the “special position” of Malays and natives of Sabah and Sarawak. Even though Article 8 guarantees the equality of citizens, there is a proviso that allows for specific laws to be passed that may breach equality. Article 153 is one of those. What Article 153 basically does is allow for quotas to be set in education (placements and scholarships), posts in government service, as well as business permits for Malays and natives of Sabah and Sarawak. In other words, it provides for the possibility of affirmative action.

Article 153 was included in the constitution because at the time of independence these communities were deemed so far behind other ethnic groups economically and educationally that such measures were necessary in order to achieve some sort of soci-

8) Articles 10(2) and 10(3).

etal equilibrium. It does not take much imagination to see that it could also be a cause of divisiveness.

One final point regarding the constitution is Part 8, which deals with elections. It is clear that this country is meant to be a democratic one. Part 8 is a technical section that deals with the conduct of elections, the role of the Election Commission, and the drawing of constituencies. What it does not deal with is the meaning of democracy and what being a democratic system truly entails. It is these sorts of philosophical questions that the courts ought to take heed of as they would color their decision making. Without such considerations the constitution can be interpreted in such a manner that the protections, values, and ideals it is supposed to provide become meaningless.

Division by Way of Ethnicity and Religion

As mentioned above, the constitution allows for affirmative action primarily by virtue of Article 153. This provision has led to many governmental policies favoring Malays and natives of Sabah and Sarawak (collectively known as Bumiputera, a political term not found in the constitution). Although Article 153 has existed since 1957, it was used in earnest only from 1970. In 1969 there were racial riots that led to many deaths. These riots were deemed to have been fueled by a feeling of insecurity on the part of Malays that their position in the nation was precarious. The general election of 1969 saw the opposition parties take away the two-thirds majority of parliamentary seats from the ruling party. Since many of the opposition parties were *de facto* non-Malay, this created an unstable situation. Already far behind in economic terms, Malays felt that their political power was being eroded too, which led to the riots.⁹⁾

In order to speed up economic equity, the government devised the New Economic Plan, which was ostensibly intended to reduce poverty in general but ended up being a method to provide affirmative action almost exclusively for Malays. Places in universities had quotas set aside for Bumiputera. At its highest, the ratio was 9:1 places in favor of Bumiputera (Harding 1996). Some educational establishments, such as the MARA Junior Colleges and the MARA Institute of Technology, later to become the MARA University of Technology, were open only to Bumiputera.

Economically, too, Bumiputera received tremendous help. Loans were made easily available to them for businesses, and government policy was such that government proj-

9) There are many theories regarding these riots, known as the May 13 Riots. What I have described are merely broad brushstrokes. For the latest analysis of the racial riots, see Kua (2007).

ects favored Bumiputera contractors. Special trust funds were created by the government that were open only to Bumiputera. Government service saw the shrinking of non-Malay staff to the point that today government servants are overwhelmingly Malay. It is not the place of this paper to provide a detailed list of the pro-Bumiputera policies and actions taken by the government of Malaysia. Needless to say, despite the seemingly good intentions of such policies, this skewed state of affairs led to resentment amongst non-Bumiputera.

The feeling was made worse by the attitude of politicians and Malay nationalist groups who took the privileges provided for by the constitution as a right and as an indication that they were somehow a different, higher class of citizen from non-Malays. Concepts such as “ketuanan Melayu,” a term coined by the late politician Abdullah Ahmad, suggested that Malay leadership of the nation was something that was unchallengeable. All this led to a particularly strange sort of racism in the country, where a sign of weakness (the need for special governmental help) was deemed to be a right and a source of pride that had to be protected.

Any criticism of the situation was made difficult by the Sedition Act 1948,¹⁰⁾ which was amended to make it seditious to question any matter, right, status, position, privilege, sovereignty, or prerogative established by Article 153. It has been suggested that this means Article 153 cannot be discussed, although theoretically this ought not to be the case. The Sedition Act, it can be argued, prevents questioning the existence of Article 153; it does not forbid the criticism of its implementation.

The first legal question is whether Article 153 is a right, equivalent, say, to the right to property. I do not believe this is so. The constitution does not have a preamble; however, one can examine the *travaux préparatoires* of the constitution, which is the *Report of the Federation of Malaya Constitutional Commission*,¹¹⁾ commonly known as the Reid Commission Report. The Reid Commission Report is the document prepared by the Reid Commission discussing the nascent constitution and its provisions. In it there are comments on the draft constitution by the key stakeholders at the time, including the main political coalition consisting of United Malay National Organisation (UMNO), Malayan Chinese Association (MCA), and Malayan Indian Congress (MIC), collectively known as the Alliance; and the rulers. The Alliance made this comment on the report: “. . . in an independent Malaya all nationals should be accorded equal rights, privileges and opportunities and there must not be discrimination on grounds of race and creed” Therefore, the advantages given to Malays (Borneo natives were included only in 1963,

10) Laws of Malaysia Act 15.

11) *Report of the Federation of Malaya Constitutional Commission*, 1957.

when Malaya, Sabah, Sarawak, and Singapore created Malaysia) were meant to be a stopgap measure to aid the economically disadvantaged Malays. This was further confirmed by the rulers themselves, who said that they “look forward to a time not too remote when it will become possible to eliminate Communalism as a force in the political and economic life of the country.”

In addition, Ooi Kee Beng asserts that Tun Dr. Ismail, one of the nation’s founding fathers, in his journals likened the special privileges of Malays to a golf handicap, to be used only until such time as a crutch was no longer needed (Ooi 2006). It is clear, therefore, that the political elites and the traditional rulers of the country did not envision “special privileges” to be permanent, nor did they envision them to be some sort of special right. In this light, to treat special privileges as though they are an inalienable right is utterly wrong.

The aspiration of the founders of the country, that is, their wish to see a nation where all were treated equally, is reflected in Article 8 of the constitution. The basic premise is one of equality; the only exceptions are those specifically provided for by the constitution. Therefore, Article 153 is in fact merely one of those express situations where the constitution provides the government permission to take action that treats people in a way that is not equal. It is not a right.

Furthermore, Article 153 makes clear that any such affirmative action must be reasonable in nature. Reasonableness is a factor that requires open discussion and data upon which to base a judgment. It is also a principle that can be adjudicated upon by the judiciary. What all this points to is that it is indeed possible for the implementation of Article 153 to be challenged in court. This would give the court the opportunity to determine definitively the nature of Article 153, as to whether it is a right or not, as well as to determine whether the government’s actions in implementing affirmative action have gone beyond the boundaries of reasonableness.

Unfortunately, this has never occurred; and the judiciary has not been able to play a role in helping to define and refine a constitutional provision that has contributed to interethnic divisiveness in the country. Yet, when examining how the courts have dealt with another divisive matter, religion, it is perhaps just as well that they have not been given the opportunity to judge on Article 153.

There has been a growing Islamization of Malaysia, which impinges on the freedoms guaranteed in the constitution and leads to decisions by the court that are fundamentally unjust. One of the problems is the assertion that Malaysia is an Islamic state. There is no clarity as to what exactly an “Islamic state” means, but what has happened is that so-called Islamic values have been imposed on the reasoning, or lack thereof, behind legal judgments. Before we discuss some of those judgments, it would be prudent to briefly

discuss the nature of Malaysia: Is it an Islamic state or a secular one?

The root of the issue is Article 3 of the constitution, which reads: "Islam is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation." Does this phrase mean that Malaysia is an Islamic state? The answer is clearly in the negative, for two main reasons. First, the Reid Commission Report states that the Alliance, upon examining the draft constitution, had this to say about Article 3: "The observance of this principle . . . shall not imply that the State is not a secular state."¹²⁾

It is very clear, therefore, that Malaya was not to be an Islamic state. This is not an assertion made by the Reid Commission; it is an assertion made by the very people who were to become the government of the newly independent nation. This statement combined with Article 4, which places all laws in the country under the overarching principles of the constitution, means that to claim Malaya was meant to be theocratic in any way is disingenuous. The contention that Malaysia is a secular country is further strengthened by the decision of the Supreme Court in the case of *Che Omar Che Soh v Public Prosecutor* (1988), where it was held that secular law governed the nation and Islamic law was confined only to the personal law of Muslims. Article 3 was taken to mean that as far as official ceremonial matters were concerned, Islamic form and rituals were to be used.

What about the freedom of religion? Article 11 is explicit: "Every person has the right to profess and practice his religion and subject to clause 4 to propagate it." Clause 4 allows the state governments (and the federal government in the case of the federal territories) to control proselytization to Muslims. This is not limited to non-Muslims proselytizing to Muslims; it includes Muslim-to-Muslim proselytization as well.

A. J. Harding (1996) suggests that ". . . the restriction of proselytism has more to do with the preservation of public order than with religious priority." He argues that even states like Penang, which do not have Islam as their official religion, have laws regarding proselytization to Muslims. Therefore, it cannot be assumed that Islam is deemed superior in some way. If we were to work on this premise, then it would appear that this limitation, as restrictive as it is, does not actually stop individuals of any faith from choosing their religion.

This can be seen in the Supreme Court decision of *Minister of Home Affairs v Jamaluddin Othman* (1989).¹³⁾ In this case a Muslim convert to Christianity was detained under the Internal Security Act 1960.¹⁴⁾ It was held that such a detention had to be made for the purpose of national security. The conversion of this individual did not breach

12) See Reid Commission Report, p. 73n13.

13) 1 MLJ 369.

14) Laws of Malaysia Act 82.

national security, and his detention was in breach of his freedom to choose his religion as enshrined in Article 11. Thus, although proselytizing to Muslims is restricted, Muslims' freedom to choose their religion would appear not to be.

In recent years, however, the courts have moved away from the decisions of *Che Omar* and *Jamaluddin* and have made decisions that appear to be contradictory to the constitution. The controversy involving the Catholic Church and the Malaysian government is an example of this. The Catholic Church in Malaysia publishes a newsletter titled *The Herald*. In compliance with the law regarding proselytizing, it is clearly printed on each copy that the publication is meant for non-Muslims only. This newsletter is bilingual, in English and Malay. In the Malay section of the *Herald* the word for God is "tuhan" while the word for Lord is "Allah."

Like all publications, the *Herald* requires a license according to the Printing Presses and Publications Act 1984. This license was withdrawn by the government on the grounds that it was an offense for the *Herald* to use the word "Allah." The government contended that the word could be used only by Muslims. This caused great consternation in the Catholic community as they had used "Allah" to mean "Lord" for a long time, probably since the nineteenth century. Furthermore, until this point there had been no untoward incidents or complaints. In the high court the Church won.¹⁵⁾ The judge held that Article 3 guaranteed that everyone had a right to practice their religion peacefully. Furthermore, the only specific restriction on this right was the limitation placed on proselytizing to Muslims; there was no evidence of the Catholic Church doing this via the newsletter.

This decision was overturned in the Court of Appeal.¹⁶⁾ Apandi Ali, the lead judge in the Court of Appeal, held that Article 3 had greater meaning than any ordinary understanding of the words. He said:

It is my judgment that the purpose of and intention of the insertion of the words: 'in peace and harmony' in Article 3(1) is to protect the sanctity of Islam as the religion of the country and also to insulate against any threat faced or any possible and probable threat to Islam, in the context of this country, in the propagation of other religion to the followers of Islam.¹⁷⁾

He went on to say that the *Herald's* use of the word "Allah" was a threat to public order, reasoning

15) *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* (2010) 2 MLJ 78.

16) *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* (2013) 6 MLJ 468.

17) *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* (2013) 6 MLJ 468.

that based on the facts and circumstances of the case, the use of the word “Allah” particularly in the Malay version of the *Herald* without doubt do [sic] have the potential to disrupt the even tempo of the life of the Malaysian community. Such publication will surely have an adverse effect upon the sanctity as envisaged under Article 3(1) . . .¹⁸⁾

When the Catholic Church tried to appeal the decision in the Federal Court, its application was disallowed.

If we examine the reasoning of the judge in the Court of Appeal, it appears to be disturbing. The judge ascribed greater meaning to Article 3 without having any evidence. As stated earlier, in the Reid Commission Report the comments made regarding Article 3 were pithy and made clear that despite this provision, the constitution was a secular one. Nowhere is it stated that Article 3 was intended to protect the sanctity of Islam. This is an interpretation without any foundation. Furthermore, the use of the public order argument is unsatisfactory. It is true that there were protests against the *Herald*, but there were no untoward incidents regarding this publication until the government made it an issue. In other words, the *Herald* captured the public imagination due to government action rather than any Church activity.

Article 3 had been interpreted in such a way as to go beyond its ordinary meaning, and the right of a community to peacefully practice their religion had been taken away on the unjustifiable pretext of “protecting the sanctity of Islam.” Furthermore, a group that had done no wrong according to the law (in the sense that there was no proof that they were proselytizing to Muslims) were deprived of their rights using the angry protests of a few as an excuse. It would appear that if Muslims do not like something, and if they were to make an issue of the matter, the rights of other people can be taken away. This judgment is an example of disrespecting the freedom of religion, and it is also the type of judgment that normalizes and justifies divisive behavior.

Whereas this case was about an entire community, there have also been cases regarding individuals that serve to strengthen the impression that in matters involving Islam, the protections of the constitution can be disregarded. In the Lina Joy case¹⁹⁾ a woman who was born into a Muslim family converted to Catholicism. Her attempts to change her religious status on her identity card were rejected by the National Registration Department. Her case went all the way to the Federal Court, where in a majority decision it was held that the power to declare whether a Muslim was no longer a Muslim rested with the sharia courts. Her application was therefore rejected. In effect, what the Federal Court did was to abdicate its responsibility and instead transfer it to the sharia

18) *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* (2013) 6 MLJ 468.

19) *Lina Joy v The Federal Territory Islamic Council & Ors* (2007) 3 AMR 693.

court. What the majority judgment did not decide on was the fundamental issue that Lina Joy had a right to choose whatever religion she wanted according to Article 11, which is clear and unambiguous.

If one goes through the sharia system to convert out of Islam, there can be repercussions. In some states it is a crime. For example, Kelantan makes apostasy an offense punishable with two years' imprisonment. In other states those converting out of Islam can be sent to a "rehabilitation camp," which is what occurred with M. Revathi, a woman of Indian descent (see Sharom 2009, 133–134). Her parents were Hindu, but they converted to Islam. Revathi, however, did not grow up with her parents and was instead raised by her Hindu grandmother. Revathi was raised as a Hindu and believed herself to be one.

In 2004 she was married to a Hindu man in a Hindu customary ceremony, and the couple subsequently had a daughter. The marriage, however, was not registered, as she was legally deemed a Muslim and in Malaysia a Muslim cannot marry a non-Muslim. When Revathi tried to change her religious status in the Melaka Sharia Court she was detained and sent to a rehabilitation camp, where she was held for six months. During this time she was not allowed to see her husband, and her daughter was seized from her husband and sent to live with Revathi's Muslim parents. Upon her release Revathi was ordered by the court to live with her parents. If she attempted to live with her husband she could be charged in the sharia court with the offense of *khalwat*, or close proximity,²⁰⁾ for she would be living with a man who was not legally recognized as her husband.

The courts failed in their responsibility to enforce Article 11. In cases such as Lina Joy's, they chose not to confront the issue head on even when given the opportunity. Any law that is in contradiction to the constitution is void per Article 4. Yet there are various Islamic laws that clearly contradict the constitution but continue to operate. The argument of those who support such laws is that under the constitution it is permissible for Islamic laws to be made in order to create offenses that go against the "precepts of Islam." Just what these precepts are is not defined. And surely such offenses cannot be those that are in contradiction to the constitution.

Another case with disturbing implications is that of Subashini Rajasingam. In 2001 Subashini married Saravanam Thangatoray in a civil ceremony. They were both Hindus at the time of their marriage, and they had two sons. In 2006, without informing his wife, Saravanan converted himself and his sons to Islam. He then began divorce proceedings in the sharia court. Subashini objected because the sharia court was accessible only to

20) It is an offense under Malaysian sharia law to be alone in a private place with a person of the opposite gender who is neither a spouse nor a close relative.

Muslims, and thus she would have no standing in the proceedings. She brought her case to the civil court requesting an order that any divorce proceedings should be in the civil court as well as objecting to the conversion of her sons.

The case went all the way to the Federal Court,²¹ where it was decided that indeed both the sharia court and the civil court had jurisdiction and that Saravanan as a parent had the right to convert his children. This decision is unsatisfactory on many levels. First, it is confusing to state that two courts have jurisdiction over the same case. This is bound to lead to an unnecessary conflict of jurisdiction. Furthermore, it is illogical to state that the sharia court has jurisdiction when it is clear that it does not have jurisdiction over one of the parties. It is akin to saying that a military court can hear cases involving civilians. Subashini was married under the Law Reform (Marriage and Divorce) Act 1976,²² and if her case had been heard in the sharia court, which could not apply that law, whatever protection she may have had under the Act would be unavailable. As it happened, the case did not go to the sharia court and the civil case is over, leaving things in limbo.

The decision regarding the conversion of the children also leaves much to be desired. The court made the decision based on Article 12(4) of the constitution, which states: “. . . the religion of a person under the age of eighteen years shall be decided by his **parent or guardian.**” Because the term “parent or guardian” is in the singular, the court took this to mean that any one parent could convert a child. This is irrational because if it is taken to its logical conclusion a child’s religion could change on the whim of either parent, leading to a strange situation. The court also did not take into account Schedule 11 of the constitution, which says that in the construction of singular or plural, words in the singular include the plural and vice versa. Therefore, Article 12(4) was wrongly interpreted.

All these cases are extremely divisive in nature. They disregard legal reasoning as well as constitutional provisions in what appears to be a bias toward Islamic authorities and Muslim individuals. Malaysia’s multireligious demographic requires a court that is able to fairly balance the rights of all people of all faiths. When there is seeming prejudice even in the highest court of the country, the idea that the court is impartial becomes illusory and can only lead to dissatisfaction and greater societal divisions.

21) *Subashini Rajasingam v Saravanan Thangatoray* (2007) 3 CLJ 209.

22) Laws of Malaysia Act 164.

The Freedom to Dissent

When discussing dissent, the key question is whether people have the right to dissent, which is best reflected in their right to expression. In the section above we saw how the courts have moved away from ensuring the secular status of the nation and the freedom of religion, toward giving Islam more influence than was intended in the constitution as well as showing an unwillingness to protect religious freedom. This paper contends that this movement is a negative one and is a cause of divisiveness. With regard to freedom of expression there has not been such a backward slide, but then neither has there been much forward movement.

In Malaysia publications are administered by the Printing Presses and Publications Act 1984.²³⁾ According to this law, periodicals—such as newspapers—require a license to operate. Although the law was amended to remove the requirement of an annual license renewal, the minister still has the power to revoke a newspaper’s license at any time. Apart from this power the minister may also ban books deemed “undesirable.” Past cases—such as the *Aliran Monthly* case (1990)—have shown the court to be reluctant to declare the minister’s action as unlawful.²⁴⁾ The bilingual English and Malay publication *Aliran Monthly* was not granted a license to publish. Although the minister’s decision was deemed unreasonable by the high court, the Supreme Court reversed that decision and upheld the minister’s decision.

More recent cases have seen the court upholding ban orders on books by the minister. In the case of *Arumugam a/l Kalimuthu v Menteri Keselamatan Dalam Negeri & Ors* (2010),²⁵⁾ a book named *Mac 8*—about racial riots in Kampung Medan—was deemed to be a threat to public order by the minister and banned. This may have been because the book portrayed the Indian community as victims of the riots and Malays as the perpetrators. In the Court of Appeal it was held that the test to determine the validity of a ban was whether the decision was reasonable or not. In this case “reasonableness” was based on whether the minister, based on facts available to him, could conclude that there was indeed a threat to public order. There need not be an actual threat; the minister merely needs to think that there could be one. The court said, “. . . this court should not supplant the Minister’s subjective satisfaction with its own unless the bounds of legality, in the sense explained above, are clearly transgressed.”

In the case of *Yong They Chong @ Kim Quek & Oriengroup Sdn Bhd v Menteri Dalam*

23) Laws of Malaysia Act 58.

24) 1 MLJ 351.

25) 3 MLJ 412.

Negeri & Ors (2014)²⁶⁾ a book critical of the ruling party was banned, this time on the grounds of upholding the reputation of the people criticized in the book. Once again the ban was upheld by the Court of Appeal, which held that the “high octane” language of the book would be an “impetus to further fuel” those who were opposed to the government. This is an odd value judgment. It is subjective whether language is “high octane” or not, and a book written by someone who is with the opposition political party would naturally be written in order to fuel opposition to the government.

These cases contrast with the case of *Sepakat Efektif Sdn Bhd v Menteri Dalam Negeri & Timbalan Menteri Dalam Negeri* (2014),²⁷⁾ where the court overturned a ban on two books of cartoons. However, the judgment makes clear that the decision was based partly on the fact that the books contained cartoons and thus were by their nature meant to be satirical and mocking; but no *ratio decidendi* can be found supporting the freedom of expression generally, and so any future case can easily be distinguishable by a court based on a difference of facts. Neither can such a *ratio* be found in another encouraging case where the high court quashed the minister’s order revoking the license of the newspaper *The Edge* on the grounds that the show cause letter delivered to the paper was vague and unclear, making it difficult for the paper to respond properly and thus creating a breach of natural justice.

It is evident that the courts are pragmatic in their approach toward the banning of books and publications, with each case being dealt with on an individual basis. There is a lack of underlying support for an aspiration to freedom and its importance. To have a healthy system that provides the necessary democratic space for dissent, such an ideological slant is necessary. Yet it does not exist. This can be seen also in the manner with which the courts deal with cases of sedition.

One of the tools that the government has been using to quell dissent is the Sedition Act 1948. According to Amnesty International, the period 2013–16 saw 170 people being investigated for, charged with, or tried on sedition in Malaysia. In 2015 alone there were 90 such cases (Amnesty International 2016). This is in stark contrast with the period 1948–98, when there were approximately 20 sedition cases.

In the case of *Public Prosecutor v Azmi Sharom* (2015)²⁸⁾ the Federal Court had an opportunity to declare the entire constitution void. The argument for this was based on the fact that Article 10 of the constitution states that only parliament can make laws restricting freedom of expression. The Sedition Act, which makes it a crime to raise discontent against the government, the rulers, or the administration of justice, is a law

26) 1 LNS 1459.

27) Civil Appeals No: W-01-500-2011 & W-01-501-2011.

28) 6 MLJ 751.

restricting freedom of expression, yet it was not made by parliament. It was passed during the time of the British, and therefore, Azmi Sharom's lawyers argued, it ought to be void. In response, the government argued that the Sedition Act was existing law. Existing laws are laws that existed at the time of independence, and these laws, according to Article 162 of the constitution, are valid even if they contradict the constitution.

A literal reading of the constitution says that this is so, and that was the line the Federal Court took. However, surely existing laws were not meant to continue in contradiction to the constitution *ad infinitum*. The reason why it is only parliament that can make laws restricting speech is that such an important right should be in the hands of the highest legislative body in the land. Unfortunately, this line of thinking was not followed by the court in this case or the case of *ZI Publications Sdn Bhd v Kerajaan Negeri Selangor, Kerajaan Malaysia and Anor* (2015).²⁹⁾

In this case, the Malay translation of Irshad Manji's book *Allah, Liberty and Love* was banned by the Selangor Islamic Religion Department using the state's Islamic criminal law. This was clearly against the constitution, because the law that was used was made by the state legislature and not parliament. The Federal Court held that the law was not about freedom of expression but had been made on the premise that Islamic laws could be made to punish offenses that went against the precepts of Islam, and that the contents of the book went against the precepts of Islam. This argument is weak because the English version of the book was available without any problems. Furthermore, the provision in Article 10 of the constitution is unambiguous: only parliament can restrict freedom of expression. The law used to ban the book—regardless of what its intention may have been—was in fact restricting freedom of expression.

Surely one of the reasons for making sure that only parliament can restrict freedom of expression is because the fundamental liberties of the citizens of Malaysia ought to be uniform throughout the nation and not differ from state to state. It is this kind of deeper thought that seems to evade the Malaysian judiciary, and instead what we have is a literalist interpretation of legislation that may be correct according to the letter of the law but hardly the spirit; and thus the protection that is supposed to be provided by the constitution is lost.

Supporting and Protecting Democracy

In a democracy the will of the people has to be treated with care and respect. One way

29) 8 CLJ 621.

of doing this is by respecting their choice of government. Because Malaysia practices the British Westminster style of government, the party or coalition with the most seats gets to choose the head of government. Therefore, according to Article 43(2)(a) of the Federal Constitution and the various state constitutions, the head of state (the King for parliament and the various Sultans and governors for the state legislative assemblies) has to select the person they believe has the confidence of the house to be prime minister or chief minister. What happens if that person loses the support of the house? The court's approach when dealing with this issue has changed over the years, and it has not been an improvement.

Stephen Kalong Ningkan was the first chief minister of Sarawak after the creation of Malaysia in 1963. There was no single ruling party in Sarawak; instead, Ningkan headed a coalition of several parties, and they were all allies with the federal government. However, it was not a solid coalition, with infighting and power struggles among the different parties.

Despite these problems, Ningkan ruled as chief minister for a relatively stable three years with the support of the federal government. However, as time went on he started to alienate Kuala Lumpur as well as his own allies in Sarawak. It is reported that he had a penchant for working largely with expatriates in his civil service (Lee 2007, 79). This galled the federal government, which thought it was done dealing with the British. Ningkan was also sympathetic with Singapore, which despite being a party to the Malaysia Agreement had left the Federation in 1965 and was now a sovereign nation in its own right. This sympathy hinted at a similar desire for Sarawak and did not sit well with the central government.

The above complaints were given the added color of Ningkan's own behavior, which became progressively more and more embarrassing. He publicly threatened Sarawak parliamentary MPs as well as state legislative assemblypersons whom he did not like. The threats included bodily harm, expulsion from Sarawak, and secession—peppered with references to his own strength and virility (Ross-Larson 1976).

The dissatisfaction with Ningkan reached a point where 21 (of the 42) state legislative assemblypersons signed a letter stating that they no longer had any confidence in Ningkan to be chief minister. This letter was handed to the governor of Sarawak with the assertion that since Ningkan had lost the confidence of the state legislative assembly he should resign, along with his entire cabinet. The governor, being the head of state, should then prepare to appoint a new chief minister.

The governor wrote a letter to Ningkan stating that he had received this complaint and requested Ningkan to appear before him. Ningkan refused, saying that he was indisposed. Instead, he requested that a sitting of the state legislative assembly be called and

the question as to whether he had the confidence of the house be put to the test by a vote in the house. The governor did not do this. He dismissed Ningkan and the members of his executive. Ningkan challenged this decision in court and in so doing started a series of cases with serious implications for constitutional law in Malaysia.

Ningkan's dismissal was dealt with in the case of *Stephen Kalong Ningkan v Tun Abang Haji Openg* (1966).³⁰ The key issues were Articles 6(3) and 7(1) of the Sarawak Constitution, which respectively state that the governor is to appoint a person who has the confidence of the majority of the state legislative assembly and that if the chief minister loses that confidence then he should resign unless he requests the governor to dissolve the assembly in order to have fresh elections.

Ningkan asked for a dissolution of the assembly, a request that was denied. Could the governor then dismiss him? It was held by the Supreme Court that the wording of the Sarawak Constitution did not give the governor that power. Furthermore, the "confidence" of the house was a term of art and could be determined only by a specific vote of no confidence in the house or a vote on some other crucial matter, which went against the desires of the chief minister. Therefore, Ningkan's firing was deemed void and he was reinstated as chief minister.

Contrast this case with what occurred in Perak in 2009. The 2008 Malaysian general election produced some incredible results. Barisan Nasional (BN), the ruling coalition, lost its two-thirds majority in the Dewan Rakyat (the elected lower house of parliament) and at the state level; and four states fell to the opposition alliance (Kelantan remained with the Malaysian Islamic Party [PAS], the brief period of BN rule in the east coast state having long been over). The four states were Kedah, Penang, Perak, and Selangor.

Of these four states, the Perak state legislative assembly was in the most tenuous situation. A government was formed with Nizar Jamaluddin from PAS chosen as the Menteri Besar (chief minister). The opposition won 31 of the state seats, and BN won 28. The majority was only three seats, and it would soon prove to be too narrow. In January and February 2009 three state legislative assemblypersons from the opposition alliance (two from the People's Justice Party and one from the Democratic Action Party) left their respective parties and declared themselves independent.

There is some controversy as to whether they actually resigned from their seats in the legislative assembly, but ultimately they declared that they did not. All three wrote to the Sultan of Perak stating that they no longer supported the Menteri Besar. On February 4, Nizar requested that the Sultan dissolve the state legislative assembly in order for fresh elections to be held. The Sultan did not accede to this request, reportedly

30) 2 MLJ 197.

needing some time to think about the matter.³¹⁾

On February 5, Deputy Prime Minister Najib Razak had an audience with the Sultan in which he stated that the BN had the majority support in the house. Later that day Najib brought the 29 BN legislative assemblypersons plus the newly independent trio for an audience with the Sultan to say that they no longer supported Nizar and wanted Zambry Abdul Kadir (from BN) to be the new Menteri Besar. The Sultan appointed Zambry and thus effectively dismissed Nizar.

Nizar challenged the decision, and in the high court he won.³²⁾ The court held that his dismissal was unlawful.³³⁾ One of the issues that decided the judge was that whether Nizar had the support of the house or not had to be determined by a vote of no confidence in the house itself, as laid down in the Ningkan case. This clearly did not occur. It is this point that is going to be examined here.

The Court of Appeal reversed the high court decision,³⁴⁾ based on a few reasons. First, the Sultan had absolute discretion on whether he wanted to dissolve the assembly or not. Second, the court held that a vote of no confidence was not necessary to determine whether the Menteri Besar had the support of the house. Therefore, the Sultan was acting within his powers to appoint someone who he thought had the confidence of the house through other means: in this case the meeting with the 31 state assemblypersons.

It was disappointing that the Court of Appeal (which was later supported by the highest court in Malaysia, the Federal Court)³⁵⁾ chose not to follow the Ningkan case. Instead it followed *Datuk Amir Kahar bin Tun Dato' Haji Mustapha v Tun Mohd Said bin Keruak Yang Di-Pertua Sabah & Ors* (1995),³⁶⁾ which on the face of it was similar but was actually significantly different. In the Amir Kahar case the chief minister of Sabah had resigned, having lost the confidence of the state legislative assembly—although in a manner that was not through a vote of no confidence, which the judge held as acceptable.

31) As stated in the Court of Appeal case *Dato' Dr Zambry bin Abd Kadir v Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin* (2009) 5 MLJ 464.

32) Judicial Review No R6(R3)-25-25 of 2009 (High Court, Kuala Lumpur).

33) For an analysis of this decision, see Harding (2009).

34) For a critique of the Court of Appeal's decision, see A.J. Harding, *Gobbledegook and Regurgitation Galore* in the Two Written Judgments of the Court of Appeal in *Zambry v Nizar*, parts 1 and 2, Malaysian Bar, http://www.malaysianbar.org.my/general_opinions/comments/gobbledegook_and_regurgitation_galore_in_the_2_written_judgments_of_the_court_of_appeal_in_zambry_v_nizar.html and http://www.malaysianbar.org.my/general_opinions/comments/part_2_gobbledegook_and_regurgitation_in_the_written_judgments_of_the_court_of_appeal_in_zambry_v_nizar_postscript_zainun_ali_jcas_judgment.html respectively, accessed January 1, 2017.

35) *Dato' Seri Ir Hj Mohammad Nizar bi Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir* (2010) 2 MLJ 285.

36) 1 MLJ 169.

This is different from the Perak situation because the Sabah chief minister resigned voluntarily while Nizar did not. The opinion of the judge in Amir Kahar regarding the manner in which no confidence could be expressed was therefore merely *obiter dicta*. In the Ningkan case the issue was fundamental, and thus the judge's decision was clearly *ratio decidendi*.

The Court of Appeal also supported its decision by pointing out that the Perak Constitution did not specifically spell out the manner in which confidence was to be determined. Therefore, any method would do. Once again we see a literalist approach in reading a constitution. This may be factually correct, but it is seriously flawed because by taking this approach the Court of Appeal (and later the Federal Court) did not take into consideration the principle behind the importance of a vote of no confidence in the house.

In a parliamentary democracy the executive is created from and by the legislature. The will of the citizens is reflected in that legislature, and therefore any changes in the executive ought to be made through the legislature. This is especially true when considering the situation in Perak. The people of the state voted in favor of the opposition. The balance of power shifted not through any democratic means but through the defection of three state assemblypersons. This can be said to be contrary to what the electorate wanted. It would seem that ideally fresh elections should have been called, but failing that at the very least there should have been an open debate in the house with a vote of no confidence as its climax. The people have a right to see how their elected representatives argue and act in a transparent forum. In the words of Harding:

It is of course usual in Westminster type constitutions to judge a chief minister's own assessment of his political viability by his willingness to test it on the floor of the legislature. There is indeed no reason to suppose that he should not have the right to do so. There was in this case no obstacle, such as a threat of violence, to prevent the assembly meeting. Clearly in a confused political environment the only definitive opinion is that of the assembly. Members have the right to express their views, consider whether they are persuaded by anything they hear in the debate which would follow a motion of no confidence, and finally to cast their vote on the motion. Anything else is surely a denial of democratic process. (Harding 2009)

The Perak crisis ultimately resulted in the will of the people being overlooked via a literalist court that had overlooked underlying principles of democracy that the state and federal constitutions support.

Conclusion

In any country it is important for divisiveness as a result of partial and imbalanced decision making to be minimized, in order to prevent conflict. In a democratic country one would hope that there is enough space for dissent to be heard. In a common law system like Malaysia's, the judiciary has an important role to play in this. Yet from this paper we can see that the judiciary, especially in recent times, has failed to minimize division and to allow democratic space for dissent.

With regard to religious divisiveness, the courts have made decisions that have exacerbated the problem. They have done this by ignoring clear constitutional provisions such as the freedom of religion or by interpreting the constitution in a manner that was disingenuous in its lack of sound legal reasoning or historical foundation. Dissent is treated with suspicion, and the laws that exist to quell dissent are not rigorously tested against the principles of democracy. Indeed, democracy itself is given short shrift with the court passing judgments that undermine the importance of the elected legislature and the need for transparency in decision making.

The reason for the court's behavior may be partly that the constitution of Malaysia lacks any overarching principle or ethos, for example in the form of a preamble. However, there are sufficient historical documents to suggest what the ethos might be. Equality, for example, was clearly an aspiration for the founders of the nation. Yet, time and again the courts have made decisions that are literalist in their interpretation of the constitution without taking heed of the reasoning and the purpose of the provisions that they use in coming to their decisions. It would appear that they have not had the will or the capacity to tread into the realm of philosophy to examine the law in the light of some sort of higher ideal and ethos.

A more disturbing possibility for this lack of will may be linked to the question of the impartiality and independence of the Malaysian judiciary. In 1988 the Lord President (as the head of the judiciary was then called) was sacked. The grounds for his sacking were tenuous, and the panel appointed to conduct the investigation into his alleged misconduct was headed by a man who would replace him as Lord President if he was found guilty.³⁷ The result of this sacking was a strong perception that the executive was interfering with the judiciary and thus diminishing its independence. This perception was due to the fact that the creation of the panel was at the behest of the prime minister at the time.

As it is, the executive has tremendous powers in the appointment of the head of the

37) Analysis of this episode can be found in Abas and Das (1989), Wu (1999), and V. Sinnadurai (2007).

judiciary. It used to be that the sole prerogative was in the hands of the prime minister. Today there is the Judicial Appointments Commission Act 2009, although the prime minister still has the final say.³⁸⁾ The Judicial Appointments Commission, however, does not put to rest any concerns about executive influence. The commission consists of the heads of the Federal Court, the Court of Appeal, and the two high courts along with five other persons appointed by the prime minister. And although the commission now provides suggestions for the appointment of the head of the judiciary, the prime minister still has the final say.

Ultimately the prime minister has the power to hire and fire the top judge of the country. And the head of the judiciary naturally has an influence on the tenor of the judiciary as a whole. This sense that the executive has too much influence over the judiciary has been given credence by some recent developments. The “Lingam Tapes” scandal of 2011 hinges on a secretly recorded video showing a senior lawyer apparently brokering the promotion of a judge. Federal ministers were implicated in the tape. A royal commission was convened, and it found that indeed a serious wrong had occurred. And yet the attorney general’s chambers did not see fit to take action (see Sharom 2011).

More recently, the current chief justice was involved in a scandal regarding appointments. He was due for retirement, but through an unorthodox use of an appointment procedure he was appointed as an “additional judge” and his tenure was extended. This appointment was made by the chief justice previous to the current one. It was unusual because conventionally appointments are made on an ad hoc basis for recalling a retired judge in order to fill a needed quorum or to exploit his or her expertise in a particular case (*Star* 2017). The strange manner in which the chief justice has managed to hold on to his post, along with his record of giving judgments in favor of the government, raises questions as to the real reasons for his unorthodox appointment.

There is no hard evidence of the executive giving orders to the judiciary. Yet it cannot be denied that the separation of powers appears to be very fragile. Furthermore, in all the cases analyzed above the government was the initiator. One could hypothesize that since Malaysia is a “pseudo-democracy” (Case 2001) it serves its government to keep the citizenry divided, dissent repressed, and democratic principles to a minimum. It is also helpful if the judiciary is pliable to such demands.

Whatever the real reasons behind the decisions of the courts, it is clear that these decisions have had a negative consequence on the country by adding to an atmosphere of divisiveness and at the same time undermining the right to dissent via either the freedom of expression or the most basic of democratic manifestations, respecting the

38) Laws of Malaysia, Act 695.

electoral choice of the people. The irony is that in a nation that has schisms based on ethnicity and religion, there is an even greater need to have a method with which to counter such divisions in a meaningful and intelligent manner by proffering alternative viewpoints. The ability to give alternative viewpoints in turn needs a safe democratic space, and it also needs a sound democratic system that citizens can believe in so as to enable the peaceful transition of power which may be necessary to elicit change. Although it has the potential to be an agent to protect such spaces and to limit ideas and policies that are supremacist in nature, the Malaysian judiciary has failed to do so.

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