Examining the Compatibility of the Malaysian Legal Framework with International Standards: Studying the Federal and Syariah Laws

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Introduction

Malaysia is a country which is culturally, ethnically and religiously rich. Unfortunately, after 61 years of independence and 55 years of the formation of the Federation of Malaysia, the true spirit of "unity in diversity" where all Malaysians live together harmoniously by respecting and accepting the differences of each other's cultures is hardly embraced. In fact, Malaysians today are seen more divided based on their ethnicity on many fronts, be it education, health care, finance, workforce and welfare. The consciousness of an ethnic identity is deep seated and is felt very strongly in both the public and private sectors. Such preferences may pose to be destructive and harmful to nation building. The current situation experienced today is a direct result of British colonization. The method of consociationalism had created widespread race-based politics in the country where political parties were formed according to racial composition in order to protect the interest of specific race groups. Over the years, political parties have leveraged on the pre-existing documents such as the social contract and Article 153 of the Federal Constitution to further strengthen their position in the country. Race-based policies such as the New Economic Policy were drafted to protect the social and economic interest of a particular ethnic group and this has systematically created discomfort among minority groups as they felt that their interests are not protected by the government

Pusat KOMAS' Malaysia Racial Discrimination Report 2018 had highlighted that the incidences of racial discrimination in Malaysia continues to be quite high. Racism has become more pronounced and has been increasingly used as a tool to divide and rule. 10 trends of racial discrimination in Malaysia were identified which includes discrimination in the education sector, business sector and other industries, racializing criminality, hate speech and the use of provocative racial sentiments. Racial discrimination was also prominent during the 14th General Election. There is also a rise in the number of individuals and right-wing groups which plays up racial sentiments. Despite the differences of opinions, Pusat KOMAS intends to engage with these groups with the hope to find a parameter of agreement in order to promote social cohesion and national unity in the country.

The new government of Malaysia, in realising the severity of the issue of racial discrimination, have drafted their election manifesto with the aim to curb this issue. The manifesto clearly spelled out promises to promote inclusiveness and no discrimination. In fact, it clearly states that the Pakatan Harapan Government will be the government of the Malaysian people, regardless of race, religion and social background. Although the new government is faced with many challenges to realise the promises of the manifesto, the government has employed a strategical approach by having more engagements with the civil societies.

It is undeniable that the previous Barisan Nasional government had attempted to overcome the growing issue of racial discrimination by establishing the National Unity Consultative Council (NUCC) on 11th September 2013. However, the full report and the recommendations from the NUCC were not released to the public at all. It was only in October 2018 that the Pakatan Harapan Government released the findings of the NUCC publicly after continuous pressure from the civil society.

Among the many recommendations proposed by the NUCC, one of the major recommendations is to ratify the International Convention on the Elimination of Racial Discrimination. This is in line with the Prime Minister's speech at the latest United Nations General Assembly, which states that Malaysia is committed to ratifying all remaining six conventions in Malaysia. This call is also supported by some of his cabinet ministers and was publicly reiterated at Pusat KOMAS's 8th National Conference on Non-Discrimination themed, "Malaysia Closer Towards ICERD Ratification". The Minister in the Prime Minister Department in charge of National Unity and Social Wellbeing had stated that ICERD could be ratified with several reservations. Such actions would not contravene the Federal Constitution of Malaysia. However, the statement had created dissatisfaction among some right-wing NGOs, claiming otherwise.

Furthermore, an online petition was created to call the public to oppose towards the ratification. Despite the changes in the political scenario, much more work is needed to push for the promotion of national unity and social cohesion in Malaysia. It is now timely for the civil society organizations to advocate for change as the current federal government is open for engagement with all relevant stakeholders.

Hence, Pusat KOMAS with the support of the Australian High Commission then embarked on a law research paper that will bring light to the issues of the compatibility of the Federal Constitution and Syariah Law with ICERD to be used as an advocacy tool in championing to educate the public about ICERD and to debunk any myths with regards to its effect if it is ratified and adopted by Malaysia.

About Pusat KOMAS

Pusat KOMAS is a human rights organisation in Malaysia which was established in 1993. KOMAS actively promotes equality and the elimination of all forms of racial discrimination in Malaysia. #akubangsamalaysia

Since its inception, KOMAS has conducted human rights workshops, forums and conferences to promote social cohesion and national unity in Malaysia. In addition, KOMAS leads the national campaign to ratify the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) in Malaysia. As part of its advocacy to ratify ICERD, KOMAS has been engaging the federal, state and local government and conducted dialogues with the grassroots to increase the knowledge and awareness on the issue of Racial Discrimination in Malaysia and the importance of the ratification of ICERD.

Pusat KOMAS has been working in close collaboration with Jaringan Kampung Orang Asli Semenanjung Malaysia (JKOASM) since 1993. JKOASM is a network of indigenous villages in Peninsular Malaysia, that advocates the issues of the Orang Asli and empowers the communities on their ancestral rights and basic human rights.

KOMAS has always felt proud to be at the forefront along other civil society movements in the promotion and enhancement of democracy, equality and human rights in Malaysia. KOMAS has been working in collaboration with several NGO coalitions in Malaysia such as BERSIH 2.0, the Coalition of Malaysian NGO's (COMANGO) for the UPR process, Malaysian Civil Society Organizations on Sustainable Development Goals (CSO-SDG Alliance), the Ratify ICERD Working Group and Gabungan Bertindak Malaysia (GBM). Furthermore, KOMAS is also an active participant at the regional level. KOMAS is an accredited member of Asian Forum for Human Rights and Development (Forum Asia) and the ASEAN Intergovernmental Commission on Human Rights (AICHR). In addition, KOMAS is a voting member of the World Alliance for Citizen Participation (CIVICUS). KOMAS is also an active participant of the ASEAN Civil Society Conference/ ASEAN's Peoples Forum (ACSC/APF) and had played the secretariat and co-secretariat role in Malaysia and Timor Leste in 2015 and 2016 respectively.

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

PART I

Article 1

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.
4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to en sure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

    (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

    (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case en tail as a con sequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 3

States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit;

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

(ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

(ii) The right to form and join trade unions;

(iii) The right to housing;

(iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;

(vi) The right to equal participation in cultural activities;

(f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

PART II

Article 8

1. There shall be established a Committee on the Elimination of Racial Discrimination (hereinafter referred to as the Committee) consisting of eighteen experts of high moral standing and acknowledged impartiality elected by States Parties from among their nationals, who shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as of the principal legal systems.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties. Each State Party may nominate one person from among its own nationals.

3. The initial election shall be held six months after the date of the entry into force of this Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5. (a) The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee;

   (b) For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.

6. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Article 9

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention:

    (a) within one year after the entry into force of the Convention for the State concerned; and

    (b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties.

2. The Committee shall report annually, through the Secretary General, to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of the reports and information received from the States Parties. Such suggestions and general recommendations shall be reported to the General Assembly together with comments, if any, from States Parties.

Article 10

1. The Committee shall adopt its own rules of procedure.
2. The Committee shall elect its officers for a term of two years.
3. The secretariat of the Committee shall be provided by the Secretary General of the United Nations.
4. The meetings of the Committee shall normally be held at United Nations Headquarters.

Article 11

1. If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.\
2. If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter again to the Committee by notifying the Committee and also the other State.
3. The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.
4. In any matter referred to it, the Committee may call upon the States Parties concerned to supply any other relevant information.

5. When any matter arising out of this article is being considered by the Committee, the States Parties concerned shall be entitled to send a representative to take part in the proceedings of the Committee, without voting rights, while the matter is under consideration.

Article 12

1. (a) After the Committee has obtained and collated all the information it deems necessary, the Chairman shall appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission) comprising five persons who may or may not be members of the Committee. The members of the Commission shall be appointed with the unanimous consent of the parties to the dispute, and its good offices shall be made available to the States concerned with a view to an amicable solution of the matter on the basis of respect for this Convention;

   (b) If the States parties to the dispute fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission not agreed upon by the States parties to the dispute shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its own members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States parties to the dispute or of a State not Party to this Convention.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Commission.

5. The secretariat provided in accordance with article 10, paragraph 3, of this Convention shall also service the Commission whenever a dispute among States Parties brings the Commission into being.

6. The States parties to the dispute shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

7. The Secretary-General shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States parties to the dispute in accordance with paragraph 6 of this article.

8. The information obtained and collated by the Committee shall be made available to the Commission, and the Commission may call upon the States concerned to supply any other relevant information.

Article 13

1. When the Commission has fully considered the matter, it shall prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute.

2. The Chairman of the Committee shall communicate the report of the Commission to each of the States parties to the dispute. These States shall, within three months, inform the Chairman of the Committee whether or not they accept the recommendations contained in the report of the Commission.

3. After the period provided for in paragraph 2 of this article, the Chairman of the Committee shall communicate the report of the Commission and the declarations of the States Parties concerned to the other States Parties to this Convention.

Article 14

1. A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. Any State Party which makes a declaration as provided for in paragraph I of this article may establish or indicate a body within its national legal order which shall be competent to receive and consider petitions from individuals and groups of individuals within its jurisdiction who claim to be victims of a violation of any of the rights set forth in this Convention and who have exhausted other available local remedies.

3. A declaration made in accordance with paragraph 1 of this article and the name of any body established or indicated in accordance with paragraph 2 of this article shall be deposited by the State Party concerned with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General, but such a withdrawal shall not affect communications pending before the Committee.

4. A register of petitions shall be kept by the body established or indicated in accordance with paragraph 2 of this article, and certified copies of the register shall be filed annually through appropriate channels with the Secretary-General on the understanding that the contents shall not be publicly disclosed.

5. In the event of failure to obtain satisfaction from the body established or indicated in accordance with paragraph 2 of this article, the petitioner shall have the right to communicate the matter to the Committee within six months.

6. (a) The Committee shall confidentially bring any communication referred to it to the attention of the State Party alleged to be violating any provision of this Convention, but the identity of the individual or groups of individuals concerned shall not be revealed without his or their express consent. The Committee shall not receive anonymous communications;

   (b) Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

7. (a) The Committee shall consider communications in the light of all information made available to it by the State Party concerned and by the petitioner. The Committee shall not consider any communication from a petitioner unless it has ascertained that the petitioner has exhausted all available domestic remedies. However, this shall not be the rule where the application of the remedies is unreasonably prolonged;

   (b) The Committee shall forward its suggestions and recommendations, if any, to the State Party concerned and to the petitioner.

8. The Committee shall include in its annual report a summary of such communications and, where appropriate, a summary of the explanations and statements of the States Parties concerned and of its own suggestions and recommendations.

9. The Committee shall be competent to exercise the functions provided for in this article only when at least ten States Parties to this Convention are bound by declarations in accordance with paragraph I of this article.

Article 15

1. Pending the achievement of the objectives of the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in General Assembly resolution 1514 (XV) of 14 December 1960, the provisions of this Convention shall in no way limit the right of petition granted to these peoples by other international instruments or by the United Nations and its specialized agencies.

2. (a) The Committee established under article 8, paragraph 1, of this Convention shall receive copies of the petitions from, and submit expressions of opinion and recommendations on these petitions to, the bodies of the United Nations which deal with matters directly related to the principles and objectives of this Convention in their consideration of petitions from the inhabitants of Trust and Non-Self-Governing Territories and all other territories to which General Assembly resolution 1514 (XV) applies, relating to matters covered by this Convention which are before these bodies;

   (b) The Committee shall receive from the competent bodies of the United Nations copies of the reports concerning the legislative, judicial, administrative or other measures directly related to the principles and objectives of this Convention applied by the administering Powers within the Territories mentioned in subparagraph (a) of this paragraph, and shall express opinions and make recommendations to these bodies.

3. The Committee shall include in its report to the General Assembly a summary of the petitions and reports it has received from United Nations bodies, and the expressions of opinion and recommendations of the Committee relating to the said petitions and reports.

4. The Committee shall request from the Secretary-General of the United Nations all information relevant to the objectives of this Convention and available to him regarding the Territories mentioned in paragraph 2 (a) of this article.

Article 16

The provisions of this Convention concerning the settlement of disputes or complaints shall be applied without prejudice to other procedures for settling disputes or complaints in the field of discrimination laid down in the constituent instruments of, or conventions adopted by, the United Nations and its specialized agencies, and shall not prevent the States Parties from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

PART III

Article 17

1. This Convention is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to this Convention.
2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 18

1. This Convention shall be open to accession by any State referred to in article 17, paragraph 1, of the Convention. 2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 19

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twenty-seventh instrument of ratification or instrument of accession.
2. For each State ratifying this Convention or acceding to it after the deposit of the twenty-seventh instrument of ratification or instrument of accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 20

1. The Secretary-General of the United Nations shall receive and circulate to all States which are or may become Parties to this Convention reservations made by States at the time of ratification or accession. Any State which objects to the reservation shall, within a period of ninety days from the date of the said communication, notify the Secretary-General that it does not accept it.
2. A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of

the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General. Such notification shall take effect on the date on which it is received.

Article 21

A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary General.

Article 22

Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

Article 23

1. A request for the revision of this Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.
2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 24

The Secretary-General of the United Nations shall inform all States referred to in article 17, paragraph 1, of this Convention of the following particulars:

(a) Signatures, ratifications and accessions under articles 17 and 18;

(b) The date of entry into force of this Convention under article 19;

(c) Communications and declarations received under articles 14, 20 and 23;

(d) Denunciations under article 21.

Article 25

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States belonging to any of the categories mentioned in article 17, paragraph 1, of the Convention.

Non-Discrimination - Comparative Studies on the Federal Constitution

ANDREW KHOO

ABSTRACT

The International Convention on the Elimination of All Forms of Racial Discrimination defines 'racial discrimination' as, "... any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." However, the Malaysian Federal Constitution does contain certain provisions for some form of racial preference in certain circumstances. This research paper looks at the extent to which such provisions of the Malaysian Federal Constitution do in fact entrench or institutionalise 'racial discrimination' or whether such provisions fall within the accepted exceptions to the international understanding of that term. This research paper will also identify and analyse certain laws and policies that have operated in Malaysia that have had the effect also of entrenching or institutionalising 'racial discrimination' in Malaysia. This research paper will also make recommendations on ways forward to address the situation of 'racial discrimination' in the Federal Constitution, laws and policies that obtain in Malaysia to either reduce or remove situations of 'racial discrimination'.

Keywords: *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Federal Constitution, Malaysia, law and policies*.

INTRODUCTION

Malaysia celebrated its 62nd anniversary of Merdeka (independence for peninsular Malaysia) on 31 August 2019. In the Proclamation of Independence, reference was made to the Federal Constitution safeguarding "the fundamental rights and liberties of the people and to provide for the peaceful and orderly advancement of the Persekutuan Tanah Melayu as a constitutional monarchy based on Parliamentary democracy" and for Malaya to "be for ever a sovereign democratic and independent State founded upon the principles of liberty and justice and ever seeking the welfare and happiness of its people and the maintenance of a just peace among all nations".[1]

Having said that, from the very beginning of nationhood Malaya (from 31 August 1957 to 15 September 1963) and thereafter Malaysia (from 16 September 1963 onwards) has always been premised on a certain degree of racial (and, by definition as we shall see later, religious) preference. Whilst couched in the very fine, sensitively balanced and acutely nuanced language of the law, the provisions of the Federal Constitution of Malaya/Malaysia have nonetheless institutionalised a distinction between groups and communities within the country.

The question for our consideration is the extent to which this distinction has introduced or made permanent a systemic framework of racial discrimination. And if such a systemic framework does exist, to what extent is it possible or desirable to dismantle it.

THE FEDERAL CONSTITUTION

The main provision in the Federal Constitution in relation to non-discrimination is Article 8. Article 8(1) states:

> *"All persons are equal before the law and entitled to the equal protection of the law."*[2]

This is further elaborated in Article 8(2), which states:

> *"Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment."*[3]
>
> *Several important observations need to be made here.*
>
> a. *Article 8(1) begins with the phrase, "Except as expressly authorized by this Constitution," which presupposes that there are indeed provisions of the Federal Constitution that expressly authorise discrimination of one form or another, even with respect to the categories mentioned here.*
>
> b. *The provision of non-discrimination applies only in relation to citizens.*
>
> c. *Only 5 categories are mentioned here: religion, race, descent, place of birth or gender. No others are provided for.*[4]

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1 Federation of Malaya, Proclamation of Independence, 31 August 1957.

2 Federal Constitution of Malaysia, Article 8(1).

3 Federal Constitution of Malaysia, Article 8(2).

4 In fact, prior to 28 September 2001, there were only four categories. The fifth, "gender", was added into the Federal Constitution with effect from 28 September 2001, as a consequence of Malaysia's accession to the International

d. The prohibition against discrimination is only with respect to "any law", or "in the appointment to any office or employment under a public authority" or "in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment". These appear to limit the scope of the exact areas covered by the prohibition against discrimination.

Article 8 itself contains exceptions to the prohibition against discrimination. Article 8(5) states: "This Article does not invalidate or prohibit –

a. any provision regulating personal law;

b. any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion;

c. any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;

d. any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election;

e. any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day;

f. any provision restricting enlistment in the Malay Regiment to Malays."[5]

In effect, what Article 8(5) of the Federal Constitution does is to declare these six areas or acts of discrimination not to be prohibited by the provisions of Article 8(2) of the Federal Constitution. The provisions of Articles 8(5)(a), (b) and (f) in relation to personal law, the office or employment connected with a religion, and membership of a specific military regiment, reflect areas of discrimination based on religion and/or race. The provisions of Article 8(5)(c) reflect an area of discrimination based on race and/or descent, in that it allows for measures to protect the minority community of indigenous peoples of Peninsular Malaysia. The provisions of Article 8(5)(d) do not strictly reflect discrimination based on descent or place of birth as it covers a wider issue of place of residence. However, as we will see, a person's place of birth can affect her/his ability to participate in voting in an election. Finally, the provisions of Article 8(5)(e) are broad and permit/entrench areas or acts of discrimination provided in the constitutions of the states within Peninsular Malaysia that predate the independence of Malaya on 31 August 1957.

Article 12 of the Federal Constitution also deals with the issue of non-discrimination, but in the context of rights in respect of education. Article 12(1) states:

> "Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth –

a. in the administration of any educational institution maintained by a public authority,

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Convention on the Elimination of All Forms of Discrimination Against Women, which had been made on 5 July 1995.

5 Federal Constitution of Malaysia, Article 8(5).

and, in particular, the admission of pupils or students or the payment of fees; or

b. in providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation).”[6]

As can be seen above, the grounds for non-discrimination are the same as those set out in Article 8(2) of the Federal Constitution, save for “gender”. Article 12(1) ensures that there cannot be any discrimination amongst citizens in the provision of and access to education which is maintained out of public funds by a public authority.

Article 12(2) of the Federal Constitution goes on to provide that:

> *“Every religious group has the right to establish and maintain institutions for the education of children in its own religion, and there shall be no discrimination on the ground only of religion in any law relating to such institutions or in the administration of any such law; but it shall be lawful for the Federation or a State to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or assist in providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose.”*[7]

What the first part of Article 12(2) of the Federal Constitution provides for is the right for religious groups to set up and operate educational institutions to educate children in the religion of that group. In respect of those institutions, the government of the Federation or of a State cannot discriminate between them on the ground only of religion; they have to be treated equally.

However, the second part of Article 12(2) legitimises a form of discrimination. This second part of Article 12(2) permits the government of the Federation or of a State to support out of public funds only Islamic institutions or the provision of instruction in the religion of Islam. In other words, there is no similar commitment in relation to institutions of and instruction in a religion other than Islam. The right to discriminate in favour of the religion of Islam in terms of educational institutions and instruction is entrenched by virtue of this provision.

Arguably the most significant provision in the Federal Constitution which appears to permit racial preference or discrimination is Article 153. Article 153(1) states:

> *“It shall be the responsibility of the Yang di-Pertuan Agong to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this Article.”*[8]

There has been much discussion and debate with respect to the purport of the provision of Article 153(1) of the Federal Constitution. They have been used as the constitutional justification for a government policy, launched in 1971, known as the New Economic Policy (or ‘NEP’). The NEP had as its twin goals the eradication of poverty and an end to the identification of race with particular types of employment. It sought to promote and encourage the educational and socio-economic uplifting and participation within the economy of three distinct groups of people, namely the Malays, the natives of the State of Sabah and the natives of the State of Sarawak. Together, they

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6 Federal Constitution of Malaysia, Article 12(1).
7 Federal Constitution of Malaysia, Article 12(2).
8 Federal Constitution of Malaysia, Article 153(1).

were collectively referred to as the 'Bumiputra', or 'sons of the soil'.[9] These three groups were to be accorded a 'special position' within Malaysian society, vis-à-vis other communities within Malaysian society. However it should be noted that there is no constitutional provision or law in Malaysia that defines the term "Bumiputra". It is a purely political construct.

Article 153 works to create a right to reservation in respect of three areas or activities, namely: employment in the public service of the Federation; "scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government,"[10] and permits and licences for the operation of any trade or business as required by Federal law. It has been argued that the provisions of Article 153 of the Federal Constitution are discriminatory on the face of the words[11] used because they accord to these three distinct and named groups of people a "special position" in contra-distinction to the "legitimate interests" of an amorphous group of "other communities". There is no equality between these two groups since a "special position" is seen to be different from and more superior to a set of "legitimate interest".

For the purposes of the provisions of Article 153(1) of the Federal Constitution, the three terms "Malays", "natives of the State of Sabah" and "natives of the State of Sarawak" are specifically defined in Article 160 of the Federal Constitution. There is no definition of "other communities" anywhere in the Federal Constitution.

The definition of "Malays" reads as follows:

> "Malay" means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and –
>
> *a. was before Merdeka Day born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or*
>
> *b. is the issue of such a person".*[12]

The definition of Malay, a form of racial or ethnic identity, is of significance since it conflates and incorporates a compulsory element of religion, namely the religion of Islam. This gives rise to the phenomenon that when discussing racial discrimination in Malaysia, the element of religion is unavoidably included. An appreciation of the race or ethnicity of "Malay" cannot be separated from the religion of Islam.

The definition of a "native of the State of Sabah" is set out in Article 161A(6)(b) as follows:

> *"....a person who is a citizen, is the child or grandchild of a person of a race indigenous to Sabah, and was born (whether on or after Malaysia Day or not) either in Sabah or to a father domiciled in Sabah at the time of the birth."*[13]

The phrase "race indigenous to Sabah" is not further defined in the Federal Constitution.

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9 In some formulations of the term 'Bumiputra', the indigenous peoples of Peninsular Malaysia are also included. This is because the principle of racial preference is tied to the concept of ethnicity or national origin, and the indigenous people are seen to have an aboriginal connection with the land. Again, whether or not the indigenous peoples are included in the definition of "Bumiputra" is not consistently applied, depending very much on the context and occasion. The non-Bumiputra are viewed largely, and at times derogatorily, as 'immigrants'.

10 Federal Constitution of Malaysia, Article 153(2).

11 The Malaysian Prime Minister himself has acknowledged that Article 153 is seen as discriminatory, but that it cannot be removed. See https://www.thestar.com.my/news/nation/2018/11/24/govt-not-ratifying-icerd-we-will-continue-to-defend-federal-constitution-says-pms-office, accessed on 19 September 2019.

12 Federal Constitution of Malaysia, Article 160(2).

13 Federal Constitution of Malaysia, Article 161A(6)(b).

The definition of a "native of the State of Sarawak" is set out in Article 161A(6)(a) and (7) as follows:

> *"....a person who is a citizen and either belongs to one of the races specified in Clause (7) as indigenous to the State or is of mixed blood deriving exclusively from those races;....the races to be treated for the purposes of the definition of "native" in Clause (6) as indigenous to Sarawak are the Bukitans, Bisayahs, Dusuns, Sea Dayaks, Land Dayaks, Kadayans, Kalabits, Kayans, Kenyahs (including Sabups and Sipengs), Kajangs (including Sekapans, Kejamans, Lahanans, Punans, Tanjongs and Kanowits), Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagals, Tabuns and Ukits."*[14]

Notwithstanding paras. 14 and 15 above, a reading of the Parliamentary Hansard for 12 July 1971, the day on which the then Prime Minister Tun Abdul Razak introduced in the sitting of the Dewan Rakyat of the Parliament of Malaysia the NEP, within the context of the 2nd Malaysia Plan 1971-1975, shows that no mention of or connection with the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") was ever made. It was simply never mentioned.[15] Likewise, the write-up of the 2nd Malaysia Plan itself[16] also does not mention ICERD. The attempt to justify the NEP using ICERD appears to have been an afterthought.

However, it may still be argued that the underlying intention of the NEP was very much in line with the principles of ICERD. The write-up states:

> *"The second prong of the New Economic Policy is aimed at restructuring the society so that the present identification of race with particular forms of economic activity will eventually be eliminated. The Plan outlines policies and programmes to modernise rural life, encourage a rapid and balanced growth of urban activities, provide improved education and training programmes at all levels, and above all, ensure the creation of a Malay commercial and industrial community in all categories and at all levels of operation, in order that within one generation Malays and other indigenous people can be full partners in the economic life of the nation. These policies and programmes will be implemented in such a manner that no one will be deprived of his rights, privileges, income, job or opportunity. Accordingly, to afford the necessary opportunities for more education, better jobs and higher incomes to the disadvantaged, the sum total of such opportunities open to all Malaysians must be expanded rapidly. This expansion is an essential element in the New Economic Policy."*[17]

It seems quite clear, from the reference to "the creation of a Malay commercial and industrial community" and the hope that "within one generation Malays and other indigenous people can be full partners in the economic life of the nation" that the NEP was intended to be a race-based affirmative action programme, in the spirit of ICERD. It was hoped that "[these] policies and programmes will be implemented in such a manner that no one will be deprived of his rights, privileges, income, job or opportunity", by way of an overall rapid expansion of the economic cake that was to be shared amongst the various races in Malaysia.

However, it should also be noted that in drafting Article 153 of the Federal Constitution, the framers of that document – namely the Reid Commission – intended that its provisions should

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14 Federal Constitution of Malaysia, Articles 161A(6)(a) and (7).

15 Parliament of Malaysia, Hansard 12 July 1971, paras. 2628-2648.

16 2nd Malaysia Plan 1971-1975, Chapter 1 entitled "The New Development Strategy".

17 Ibid, at para. 20.

be reviewed after 15 years to see if such affirmative action was still required. In other words, the provisions of Article 153 were not intended to be permanent:

> *"It is one of the terms of reference of the Commission that the new Constitution should include provision for the safeguarding of the special position of the Malays and the legitimate interests of other communities. A safeguard in the same language exists in clause 19(1)(d) of the Federation Agreement of 1948. Recommendations for a safeguard of this kind were made by the Alliance Party and the Rulers in their memoranda submitted to the Commission.*
>
> *The Commission has agreed to insert certain safeguards relating to the special position of the Malays in Articles 82 and 157 of the draft Constitution and all that is required to be seen is whether the safeguards embodied in these articles are in accordance with the recommendations of the Alliance.*
>
> *The two provisions stand on a different footing in their effect. As regards the special quotas for the Malays the quotas in existence on 1st January, 1957, are to continue for a period of fifteen years. After the expiry of that period a Committee shall be appointed to review the position and after such review Parliament can by law reduce or discontinue the quotas then in existence if it so chooses."*[18]

Additionally, as attributed to Tun Dr. Ismail, who served as Deputy Prime Minister to Tun Abdul Razak:

> *"An avid golfer, Dr Ismail likened the NEP to a handicap for the Malays which "will enable them to be good players, as in golf, and in time the handicap will be removed," he was quoted as saying, in a retrospective article on his contributions to the nation, carried in the Sun daily. "The Malays must not think of these privileges as permanent: for then, they will not put effort into their tasks. In fact, it is an insult for the Malays to be getting these privileges," he said.*
>
> *Even concerning the question of the special position of the Malays, which was a core issue in the Independence negotiations, Dr Ismail is quoted in his biography 'The Reluctant Politician' (2007) as having written that "the leaders of the Alliance realised the practical necessity of giving the Malays a handicap if they were to compete on equal terms with the other races. The only point of controversy was the duration of the 'special position' – should there be a time limit or should it be permanent? "I made a suggestion which was accepted, that the question be left to the Malays themselves, because I felt that as more and more Malays became educated and gained self-confidence, they themselves would do away with this 'special position' because in itself this 'special position' is a slur on the ability of the Malays and only to be tolerated because it is necessary as a temporary measure to ensure their survival in modern competitive world: a world to which only those in the urban areas had been exposed."*[19]

But for the occurrence of the racial riots on 13 May 1969, it can only be conjectured whether the provisions of Article 153 of the Federal Constitution would have been reviewed and, possibly, removed. However, the racial riots became the raison d'etre for the promulgation and

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[18] Report of the Federation of Malaya Constitutional Commission 1957, (the "Reid Commission"), at pp. 101-102.

[19] Mohd Kamal bin Abdullah, in "Malaysians Must Know The Truth", https://malaysiansmustknowthetruth.blogspot.com/2015/10/tun-dr-ismail-rahman-malaysian-patriot.html, dated 31 October 2015.

implementation of the NEP and, since then, its successor policies. The golfing handicap continues until today. In fact, the questioning of the provisions of Article 153 of the Federal Constitution was, subsequent to the racial riots, made unconstitutional by way of an exception to the freedom of expression provisions in the Federal Constitution, and also made an offence under the Sedition Act 1948.

OTHER PROVISIONS RELATING TO DISCRIMINATION IN THE FEDERAL CONSTITUTION

Apart from Article 8 of the Federal Constitution that deals specifically with the issue of equality before the law and non-discrimination, Article 12 in relation to rights to education, and Article 153 on the "special position" of three defined groups of people, there are other provisions of the Federal Constitution that relate to the issue of distinction and/or preference which need to be considered.

The first of these has to do with provisions relating to freedom of religion. Article 3(1) of the Federal Constitution states:

> *"Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation."*[20]

In addition, Article 11(4) states:

> *"State law and in respect of the Federal territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam."*[21]

This provides for a distinction and difference in the freedom to propagate one's religion in favour of and to "protect" persons professing the religion of Islam.

As we have already noted above, the issue of religion, especially the religion of Islam, is critical in the appreciation of the definition of "Malay". It is important to note in this context that no other religion other than the religion of Islam is specifically named in the Federal Constitution.

The second of these is a set of several provisions in the Federal Constitution that were inserted as a consequence of the formation of Malaysia by the coming together of the Federation of Malaya, the State of Sabah, the State of Sarawak and the State of Singapore on 16 September 1963.[22] As a result of this merger, specific provisions were inserted into the Federal Constitution to cater to the needs and to address the concerns of the peoples of Sabah and Sarawak. So, for example, the provisions of Article 9(3) of the Federal Constitution, which state:

> *"So long as under this Constitution any other State is in a special position as compared with the States of Malaya, parliament may by law impose restrictions, as between that State and other States, on the rights conferred by Clause (2) in respect of movement and residence."*[23]

The effect of this provision is to permit the states of Sabah and Sarawak to introduce and maintain autonomous immigration procedures that could lead to the prevention of entry into the states of Sabah and Sarawak of citizens of Malaysia who originate from outside their respective states. Apart from the states of Sabah and Sarawak, there is no similar or reciprocal right of refusal

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[20] Federal Constitution of Malaysia, Article 3(1).
[21] Federal Constitution of Malaysia, Article 11(4).
[22] Singapore subsequently left Malaysia on 8 August 1965.
[23] Federal Constitution of Malaysia, Article 9(3).

by the states within Peninsular Malaysia.

In addition to the provisions of Article 9(3) of the Federal Constitution, there was added to the Federal Constitution on the formation of Malaysia a new Part XIIA, which is entitled "ADDITIONAL PROTECTIONS FOR STATES OF SABAH AND SARAWAK". This encompasses Articles 161A to 161H, although some Articles have since been repealed. This Part contains, as the title indicates, distinctions and preferences for the benefit of the inhabitants of the states of Sabah and Sarawak, based on national origin, and which are not enjoyed by the inhabitants of the states within Peninsular Malaysia.

THE MALAYSIAN LEGAL FRAMEWORK

Any analysis of the provisions of the Federal Constitution that have an impact on racial discrimination must begin with the legislative framework, dating back to colonial times. The Pangkor Treaty of 1874, signed by the Government of Great Britain and the Sultan of Perak and his hereditary chieftains, provided the means by which the British began their intervention in the Malay States that would ultimately see them colonise the whole of Malaya. The Pangkor Treaty constituted the precedent for British intervention that would be applied to the other Malay States.

The Treaty provided, "That the Sultan receive and provide a suitable residence for a British Officer to be called Resident, who shall be accredited to his Court, and whose advice must be asked and acted upon on all questions other than those touching Malay Religion and Custom."[24] The Pangkor Treaty provided the first formal instance of the division between matters of civil governmental administration and "Malay Religion and Custom".

The Reid Commission which was responsible for the drafting of the (then) Malayan constitution in 1957 retained this distinction. The special position of the Malays, in terms of race and religion, was preserved (see above at paras. 24-25). The Cobbold Commission, which was responsible for seeking the views of the peoples of the states of Sabah, Sarawak and Singapore on whether to merge with the Federation of Malaya to form Malaysia, recommended the extension of the special position to include the natives of Sabah and Sarawak.

Fast-forward to the present day, any ideology that promotes racial equality and non-discrimination effectively represents a denial of the special position of the "Malays and the natives of the states of Sabah and Sarawak", with its myriad of inter-locking privileges and preferences. This is viewed as a threat to the national security of Malaysia and is heavily resisted. This builds upon earlier identifications of "human right-ism", "humanism", "secularism", "pluralism" and the recognition of the LGBT community as threats to Islam, and therefore by implication to the Malays, in Malaysia.[25]

MALAYSIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS

Malaysia is not a signatory to the International Covenant on Civil and Political Rights ("ICCPR") or the International Covenant on Economic, Social and Cultural Rights, nor of ICERD. It can further be summarised from the legal provision included in the Human Rights Commission of Malaysia Act 1999, which states:

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[24] Treaty of Pangkor, Sixth Article, http://www.fas.nus.edu.sg/hist/eia/documents_archive/pangkor-treaty.php

[25] https://www.thestar.com.my/news/nation/2014/05/13/najib-human-rightsism-against-muslim-values/, accessed on 19 September 2019.

"For the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution."[26]

However Malaysia's position with respect to the Universal Declaration of Human Rights ("UDHR") is that it is only a "declaration" and therefore non-binding.[27] In the words of Siti Norma Yaakob FCJ:

"It must be borne in mind that the 1948 Declaration is a resolution of the General Assembly of the United Nations and not a convention subject to the usual ratification and accession requirements for treaties. By its very title it is an instrument which declares or sets out statement of principles of conduct with a view to promoting universal respect for and observance of human rights and fundamental freedoms.

Since such principles are only declaratory in nature, they do not, I consider, have the force of law or binding on Member States. If the United Nations wanted those principles to be more than declaratory, they could have embodied them in a convention or a treaty to which Member States can ratify or accede to and those principles will then have the force of law. The fact that regard shall be had to the 1948 Declaration as provided for under s. 4(4) of the Human Rights Commission of Malaysia Act 1999 makes no difference to my finding.

This is so as my understanding of the pertinent words in the sub-section that "regard shall be had" can only mean an invitation to look at the 1948 Declaration if one is disposed to do so, consider the principles stated therein and be persuaded by them if need be. Beyond that one is not obliged or compelled to adhere to them. This is further emphasised by the qualifying provisions of the sub-section which states that regard to the 1948 Declaration is subject to the extent that it is not inconsistent with our Federal Constitution."

Thus the fact that the UDHR is referred to is not directly pertinent in interpreting the provisions of the Federal Constitution. It is only and unless international human rights instruments are actually signed/ratified or acceded to by the government, and domesticised through municipal law, would the provisions therein become binding in Malaysia.

Having said that, in signing/ratifying and/or acceding to the Convention on the Elimination of all forms of Discrimination Against Women ("CEDAW"), the Convention on the Rights of the Child ("CRC") and the Convention on the Rights of Persons with Disability ("CRPD"), the three international human rights treaties that Malaysia has signed to-date, Malaysia entered reservations on those provisions relating to non-discrimination. By so doing, Malaysia ignored provisions in the Vienna Convention on the Law of Treaties against making reservations to core provisions of a treaty and of invoking constitutional law and/or domestic legislation as a reason to limit the full effect of a treaty.

Further, with respect to the UDHR, Malaysia has sought to invoke the exception contained in Article 29(2) of the UDHR which provides:

"In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order

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[26] Human Rights Commission of Malaysia Act 1999, Section 4(4).

[27] https://en.wikisource.org/wiki/Human_Right_Council_Resolution_5/1_-_Malaysia. See also the decision to this effect of the Federal Court in Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals [2002] 4 MLJ 449.

and the general welfare in a democratic society."

In this regard, Malaysia has not acknowledged international jurisprudence on the ambit/limit of both Article 29(2) of the UDHR and Article 18(3) of the ICCPR, in particular General Comment No. 22,[28] preferring instead a superficial and simplistic approach to the interpretation of such exceptions. It has resisted calls to interpret the word "law" to mean a law that conforms to international human rights norms, preferring instead to understand the word "law" as simply one duly passed by the Malaysian Parliament.

There is no recorded court case where the issue of racial discrimination has been raised. The most proximate issue has been that of gender discrimination. However, the approach adopted by the Malaysian courts in this regard is instructive of how they may approach the issue of racial discrimination, in which case the outlook is not positive.

As previously stated, Malaysia has acceded to CEDAW. Save for the amendment to Article 8(2) of the Federal Constitution in 2001, which prohibits gender discrimination, CEDAW's principles of substantive equality and non-discrimination have not been incorporated into domestic legislation and cannot be invoked and given effect to by courts, tribunals and administrative authorities. This was clearly illustrated in the Beatrice Fernandez case.[29] Pursuant to a collective agreement Fernandez, a flight stewardess, was dismissed for failing to resign when she became pregnant. Fernandez challenged the validity of the collective agreement as being unconstitutional and discriminatory against her as a woman. The Federal Court[30] held that the equal protection guarantees in Article 8(2) extended only to persons in the same class, i.e. as all female flight stewardesses were subject to the same requirement, there was no discrimination. It also held that Article 8(2) was limited to individuals aggrieved only by violations of rights by the State. In the words of Abdul Malek Ahmad PCA in the Beatrice Fernandez case:

> *"Constitutional law, as a branch of public law, deals with the contravention of individual rights by the Legislature or the Executive or its agencies. Constitutional law does not extend its substantive or procedural provisions to infringements of an individual's legal right by another individual. Further, the reference to the 'law' in art 8 of the Federal Constitution does not include a collective agreement entered into between an employer and a trade union of workmen."*

In other words, individuals had the choice to walk away from agreements which infringed upon their constitutional rights. If, however, they entered into such agreements, and had agreed such terms, they should not be allowed to challenge those agreements in court.[31] It appears that the doctrine of the sanctity of the contract trumps constitutionally-provided protections.

So while Beatrice Fernandez and Rafidah Shima failed, when the state discriminated against a pregnant woman in relation to her employment as a temporary teacher, such a challenge was permitted.[32] In this particular case, jurisprudence of the CEDAW Committee to the effect that pregnancy was a characteristic in respect of which discrimination could arise was accepted by the courts. That the courts were prepared to accept international jurisprudence on this was novel, but

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28 Issued by the United Nations Human Rights Committee in 1993.

29 Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia [2004] 4 CLJ 403 (CA) and [2005] 2 CLJ 173 at 719 (FC). The same approach was taken in AirAsia Bhd v Rafizah Shima bt Mohamed Aris [2014] 5 MLJ 318.

30 The apex court in Malaysia.

31 Nurul Shamini Zainul Ariffin v Universiti Pertahanan Nasional Malaysia & Anor [2017] 1 LNS 1740.

32 Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors [2012] 1 MLJ 832.

it may be argued that this was because Malaysia had acceded to CEDAW.

While labour laws in Malaysia do provide against discrimination, it is not in respect of race or religion. Thus, the legal position in Malaysia remains that constitutional remedies are not available for violations of rights by private individuals.

The new Malaysian Government that was formed in the aftermath of the 9 May 2018 General Election pledged to, among other things, accede to ICERD. This however has not come to pass, due to massive street demonstrations in protest against such a move in late 2018. Opponents of the accession repeated the claims that the "rights" of the Malay community under the Federal Constitution, in particular the provisions of Article 153 and the exceptions laid out in Article 8(5), would have to be given up. Their opposition to ICERD has been framed as a defence of Malay and Muslim rights. Sadly, even the Prime Minister has chosen to distance himself from the manifesto promises made in relation to accession to ICERD by the political coalition that he leads in government.[3334]

Those in favour of the accession to ICERD argue that the aims underlying Article 153 of the Federal Constitution are not inconsistent with the 'harm' that ICERD was intended to address, namely the consequences of racial discrimination.[35]

Under ICERD, the term 'racial discrimination' is defined as:

> *"any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."*[36]

As can be seen, the term 'racial discrimination' covers much more than just discrimination based on race. It includes discrimination based on descent and national or ethnic origin as well. Further, not only must there be 'any distinction, exclusion, restriction or preference' but that the purpose or effect of 'any distinction, exclusion, restriction or preference' also must be considered. Applying this definition to the Malaysian context, it can be concluded that the Federal Constitution does contain various provisions which would constitute 'racial discrimination' under ICERD.

Having said that, ICERD allows for certain forms of differential treatment to compensate for previous racial discrimination. Hence, Article 1(4) states:

> *"Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."*[37]

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33 https://www.thestar.com.my/news/nation/2018/11/24/govt-not-ratifying-icerd-we-will-continue-to-defend-federal-constitution-says-pms-office/, accessed on 27 February 2020.

34 https://www.themalaysianinsight.com/s/117016, accessed on 27 February 2020.

35 For an example of public opinion on this matter, see https://asklegal.my/p/ICERD-treaty-international-law-malaysia-constitution-racial-discrimination, accessed on 19 September 2019.

36 International Convention on the Elimination of All Forms of Racial Discrimination, Article 1(1), https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx, accessed on 19 September 2019.

37 International Convention on the Elimination of All Forms of Racial Discrimination, Article 1(4), https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx, accessed on 19 September 2019.

There is also the provision in Article 2(2) of ICERD, which states:

> *"States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."*[38]

It may be argued that provisions such as Article 153 of the Federal Constitution are, in fact, provisions along the lines of Articles 1(4) and 2(2) of ICERD, i.e. temporary special measures. The challenge in this regard is to determine when such measures have achieved their desired effect and should be terminated, or at least no longer continued notwithstanding that the provisions remain in the Federal Constitution. In Malaysia, supporters of ICERD are prepared to argue that the NEP and its successor policies are long-term temporary special measures whose goals have yet to be achieved, notwithstanding the passage of almost 50 years. Opponents reject such arguments, maintaining instead that such provisions are permanent and confer inalienable rights to the specific groups mentioned.

However, separate from this debate is the fact that if Malaysia were to accede to ICERD, it would be obliged to implement other crucial provisions of ICERD, namely:

i. not to engage in any act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

ii. not to sponsor, defend or support racial discrimination by any persons or organizations;

iii. take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

iv. prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

v. encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division;

vi. declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

vii. declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and recognize participation in such organizations or activities as an offence punishable by law; and

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[38] International Convention on the Elimination of All Forms of Racial Discrimination, Article 2(2), https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx, accessed on 19 September 2019.

viii. not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.[39]

The realisation of the above may be challenging for Malaysia, but fortunately implementation of and adherence to the provisions of ICERD can be progressive.

[39] International Convention on the Elimination of All Forms of Racial Discrimination, Articles 2 and 4, https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx, accessed on 19 September 2019.

RECOMMENDATIONS

The most obvious ways in which Malaysia could comply with international human rights law and standards on protecting and promoting racial non-discrimination would be:

i. accede not only to ICERD but also to the ICCPR and the ICESCR, and remove all reservations to CEDAW, CRC and CRPD in relation to non-discrimination;

ii. utilise international human rights mechanisms such as reviews by treaty bodies, engagements with Special Rapporteurs of the United Nations Human Rights Council, the UPR and the relevant Sustainable Development Goals to continue to engage with the international community on progressive acceptance and implementation of recommendations in relation to non-discrimination;

iii. domesticise international law and international human rights norms and standards into Malaysian law;

iv. review, with the intention of removing, all government policies and programmes that discriminate on the basis of race, and to consider the introduction of legislation to promote racial equality and non-discrimination, and to criminalise discrimination, such as a Non-Discrimination Act;

v. prohibit the formation or maintenance of organisations established to promote or which have the effect of perpetuating racial superiority;

vi. de-link the issue of the elimination of racial discrimination from the threat to national security or public order;

vii. promote efforts for a formalised inter-racial council with mediation and intervention mechanisms, and undertake more inter-racial activities to promote better mutual inter-racial understanding and acceptance, including recognition of the role of the traditional/hereditary Sultans/rulers in maintaining checks and balances in respect of any overreach by civic groups or Federal or state governments; and

viii. consider amending the Federal Constitution to insert further protections in respect of the equality and non-racial discrimination, in line with existing and future obligations under international law.

CONCLUSION

It may be argued that the institutionalisation of a racial preference framework was required as a means of addressing the different historical and social threads of the country's diverse ethnic populations which were now to be woven together into a national fabric at the onset of independence. In order to bring about a strong and stable multi-racial nation united for the future, the multiple trajectories of the past needed to be acknowledged. A social contract which undergirded the Federal Constitution was explicitly negotiated by the politicians of the day and implicitly endorsed by the various communities which they led and which recognised a certain socio-political framework that legitimately had its origins partly in the ancient heritage of empires and sultanates and partly in the more recent colonial experience.

However, as may be seen, such political compromises that were forged in the relative peaceful post-World War II period were insufficiently firm to withstand the political, economic and social pressures that were to visit the country at the end of the 1960s and into the 1970s, and the rise of Islamic fundamentalism at the end of the 1970s until the present day.

It is apparent therefore that one of the ways to address the issue of non-discrimination is for there to be much greater legal and constitutional literacy on the issue of non-discrimination within the constitutional framework of Malaysia.

Learning from the experience in other situations, be they domestically, regionally or internationally, may encourage a more moderate perspective to be instilled on inter-racial relationships. Appreciating the need for equitable and non-discriminatory treatment of different racial or ethnic minorities by the majority, regardless of which race or ethnicity is dominant, may also go some way to negating ethno-religious extremism and promoting genuine inter-racial harmony.

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Non-Discrimination in Islam and *Syariah* Law in Malaysia

PROFESSOR DR. MOHD AZIZUDDIN MOHD SANI

ABSTRACT

Malaysia, a diverse country in terms of the culture, traditions and beliefs of its people have pledged to ratify the International Convention on the Elimination of Racial Discrimination (ICERD). Yet, in late 2018, the country reversed its decision to do, raising many questions for human rights observers and human rights institutions. Even the United Nations (UN) have questioned Malaysia's sudden decision not to ratify ICERD, which is considered one of the most recognized international instruments protecting human rights and eliminating discrimination. One of the arguments in rejecting ICERD was that ICERD is not compatible with the Syariah law in Malaysia. Therefore, there is a need to understand the perspective of Islam on the issue of non-discrimination. This essay also seeks to analyze further on the non-discrimination issues from the Syariah law's context, which is under the jurisdiction of states, not federal, in Malaysia. This is interesting and will definitely enlighten many on the discourse of Islam vis-a-vis Syariah law and non-discrimination in Malaysia as a whole.

Keywords: *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Syariah Law, Federal Constitution, human rights, law and policies*.[1]

[1] Special thanks to Noor Ashikin Basarudin and Nur Dhania Aqilah Ahmad Jelani who assisted me in preparing the draft.

INTRODUCTION

According to Committee on Economic, Social and Cultural Rights (2009), the principle of non-discrimination seeks "to guarantee that human rights are exercised without discrimination of any kind based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status such as disability, age, marital and family status, sexual orientation and gender identity, health status, place of residence, economic and social situation". Countries including Malaysia are urged to find ways and means to eradicate all kinds on discrimination particularly in relations to race and religion. Mechanisms such as policy and law should be introduced and implemented in order to bring prosperity to the society which is free from any type of discrimination.[2] Ratifications of international treaties of other forms of international instruments, however, are issues of concern for states, especially in terms of national politics. States have a duty to balance out between upholding international responsibilities and protecting their states interest, as well as maneuvering the lines of the states' national politics. Malaysia, a diverse country in terms of the culture, traditions and beliefs of its people has pledged to ratify the International Convention on the Elimination of Racial Discrimination (ICERD). Yet, in late 2018, the country reversed its decision not to ratify, raising many questions for human rights observers and human rights institutions particularly Human Rights Commission of Malaysia (SUHAKAM). Even the United Nations (UN) have questioned Malaysia's sudden decision not to ratify ICERD, which is considered one of the most recognized international instruments protecting human rights and eliminating discrimination.

Malaysia is unique in the sense of practising mixed legal system which includes the Customary law, Islamic law and Common law provided by the Article 121(1A) of the Constitution of Malaysia. Article 3 of the Federal Constitution provides that the Islamic or *Syariah* law is under the state jurisdiction. Thus, the *Syariah* courts have jurisdiction in civil matters such as inheritance, apostasy, and marriage. There are limited literatures that analyze academically *Syariah* law from the context of non-discrimination. Hence, this paper seeks and aims to do a general examination of Islam and Syariah Law particularly in dealing with the issues of non-discrimination. Yet, it cannot be denied that national factors must be taken into account and consideration before Malaysia can ratify and subsequently adopt any form of international instruments into its domestic law.

This paper will explain the dynamic that Malaysia has in managing the Islamic affairs and will come out with solution on *Syariah* law vis-à-vis non-discrimination in Malaysia. This study to see suitability of ICERD with Syariah law will make this report more interesting and can be used for future policy formulation on issues of racial discrimination. Hence, the next section will start by analyzing the concept of non-discrimination in Islam in which is relevant as mechanism to eradicate discriminations.

EQUALITY AND NON-DISCRIMINATION IN ISLAM

The Islamic Syariah was one of the religious laws to establish and apply the principle of equality between persons in regard to their rights and obligations, without discrimination on grounds of origin, colour or sex, in accordance with the words of Almighty God:

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[2] Committee on Economic, Social and Cultural Rights (2009). *Non-Discrimination in Economic, Social and Cultural rights*. General Comment No. 20. New York: United Nations.

"People! We created you from male and female and divided you into peoples and tribes so that you may know each other. In the sight of God, the most noble of you is the most pious" (Quran 49:13) and the words of the Prophet (God bless him and grant him salvation) during his farewell address: "People! You have one God and one father. All of you are descended from Adam and Adam was created from dust. In the sight of God, the most noble of you is the most pious."

"And among His wonders is the creation of the heavens and the earth, and the diversity of your tongues and colours. For in this, behold, there are messages indeed for all who are possessed of innate knowledge!" (Quran 30:22).

Pertaining to the equality of human beings, Islam does not only recognize absolute equality between men irrespective of any distinction of colour, race, or nationality, but makes it an important and significant principle, a reality. In this manner, Islam established equality for the entire human race and struck at the very root of all distinctions based on colour, race, language, or nationality. According to Islam, God has given man this right of equality as a birth right. Therefore, no man should be discriminated against on the ground of the colour of his skin, his place of birth, the race, or the nation in which he was born. The Almighty God has laid down in the Quran:

"Oh men! Behold, We have created you all out of a male and a female, and have made you into nations and tribes, so that you might come to know one another. Verily, the noblest of you in the sight of Allah is the one who is most deeply conscious of Him. Behold, Allah is All-Knowing, All-Aware" (Quran 49:13).

This means that the division of human beings into nations, races, groups, and tribes is for the sake of distinction, so that people of one race or tribe may meet and be acquainted with the people belonging to another race or tribe and cooperate with one another. This division of the human race is neither meant for one nation to take pride in its superiority over others, nor is it meant for one nation to treat another with contempt or disgrace, or regard them as a mean and degraded race and usurp their rights.

Besides, the superiority of one man over another is only on the basis of God-consciousness, purity of character and high morals, and not on the basis of colour, race, language, or nationality, and even this superiority based on piety and pure conduct does not justify that such people should play lord or assume airs of superiority over other human beings. Assuming airs of superiority is in itself a reprehensible vice which no God-fearing and pious man can ever dream of perpetrating. Nor does the righteous have more privileged rights over others, because this runs counter to human equality, which has been laid down in the beginning of this verse as a general principle.

From the moral point of view, goodness and virtue are in all cases better than vice and evil. This has been exemplified by the Prophet Muhammad SAW (Salallahu 'Alaihi Wassalam or peace be upon him) in one of his sayings thus:

"No Arab has any superiority over a non-Arab, nor does a non-Arab have any superiority over an Arab. Nor does a white man have any superiority over a black man, or the black man any superiority over the white man. You are all the children of Adam, and Adam was created from clay."[3] *(The Last Sermon of Prophet Muhammad)*

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[3] Wani, H. A., & Suwirta, A. (2013). Human Rights in Islam: A Way towards Justice for Humanity. *Jurnal Pendidikan Sains Sosial dan Kemanusiaan*, 6(1).

Hence, the idea of one race superiority is rejected by Islam. The principles of equality and non-discrimination form a cornerstone of the rights-based approach. The most fundamental difference between an Islamic and an internationalist point of view of human rights lies in the concept of rights itself.[4] While the international instrument stresses the universality of human rights, Islam recognizes two types of rights. It includes rights that humans are obliged by virtue of being the creations of God which they have to fulfil and obey; and rights that they are entitled to expect from their fellow human beings. It is the latter that correspond to what are elsewhere termed 'human rights'.[5] The former is rights that stem from, and is obtained through, belief in God and religion. In this concept only God truly has rights and the rights of humans are understood as their obligation to abide by God's commands. They are, first and foremost, the rights of individuals to abide by and adhere to the laws that God decreed and are only possible through this belief system, thus excluding non-Muslims.[6]

As one noted Islamic law scholar, J. Rehman has pointed out "the so-called legal matter consists mainly of broad general propositions as to what the aims and aspirations of Muslim society should be. It is essentially the bare formulation of the Islamic religious ethic. In short, the primary purpose of the Quran is to regulate not the relationship of man with his fellows but his relationship with his creator".[7] Similar positions have been advanced in relations to other sources of the Syariah, including the Sunnah (sayings and teachings) of Prophet Muhammad. Thus Syariah, is undoubtedly filled with some legal content although '[this legal content] is hard to find'.[8]

The fixed penalties laid down in the Quran, as well as the right to retaliation and blood money, are intended to protect the social entity and ensure equality among its members by preventing any disparity in the punishment of offenders. The penalties for lesser offences are left to the discretion of the judge. Racially motivated violations of human life, dignity and freedoms are acts of disobedience to God which merit the fixed penalty, retaliation or discretionary punishment, depending on the circumstances, since human life, dignity and freedoms are among the interests protected by Islam, as explained above.

With regard to reparation for damage suffered as a result of racial discrimination, under the Islamic Syariah the payment of reparation is a general principle derived from the Prophet's comprehensive dictum: "There shall be no infliction of damage or reciprocal damage." This covers reparation for material damage, as well as pain and suffering, resulting from any violation of human life, dignity or fundamental freedoms motivated by racial or any other form of discrimination. Therefore, Syariah's primary and most eminent sphere is at the ethical, moral and spiritual level.

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4 Policy Paper on Equality and Non-discrimination, Extraordinary General Assembly Brussels, Belgium, 15-16 April 2016.

5 There are five essential interests including religion, life, intellect, lineage and property which Islam protects by punishing any violation thereof since these necessities, which are bestowed by God on man, are necessary for a decent human existence. The fact that they are bestowed by God implies, inter alia, the need to safeguard dignity, avoid all types of abuse and prevent any violation of liberty, such as freedom of thought and freedom of residence, which are vital requirements if man wants to live in a free and active life without violating other people rights. The bulk of the *Syariah* is focused towards man's spiritual needs, the relationship of man with Allah, man's relationship with man in the sense of ethics, morality, religious, ritual practices and mannerism. It is undoubtedly that case that the *Syariah* does contain some law, but the content of law is very limited and is subject to individualized, subjective assessments. See Qibtiyah, A. (2015). Homosexuality Islam and human rights perspectives. *Musãwa Jurnal Studi Gender dan Islam, 14*(2), 197-210.

6 Islam, Human Rights and Displacement. Available at https://www.refworld.org/pdfid/50c06f672.pdf

7 Rehman, J. (2014). Islam and Human Rights: Is Compatibility Achievable between the Sharia and Human Rights Law? Available at SSRN: https://ssrn.com/abstract=2373930 or http://dx.doi.org/10.2139/ssrn.2373930

8 Glenn, H. P. (2014). *Legal traditions of the world: sustainable diversity in law*. Oxford University Press, USA.

The essence of the Syariah is targeted towards man's spiritual needs, the relationship of man with Allah Almighty, man's relationship with man in the sense of ethics, morality, and ritual practices.[9] In overall, Islam has always against racial hatred policy, agenda and action. In this case, Islam upholds any decision against any type of discrimination. Based on this argument, that is clear that the true teaching of Islam should be compatible with any anti-racial discrimination law like the ICERD. However in Malaysia, there is rejection on ICERD saying that it is not in line with Islam even though the majority of Islamic countries have ratified ICERD. Therefore in the next section, we will try to understand ICERD and the reality of Syariah law practised in Malaysia from the perspective of non-discrimination.

NON-DISCRIMINATION AND SYARIAH LAW IN MALAYSIA

1. Introduction

Recent issues concerning on ratification of ICERD[10] created tension among Malaysian citizens especially among the main races in Malaysia; Malay, Chinese and Indian. The biggest point of contention seems to be the issue of direct violation of Article 153 of the Federal Constitution, challenging on granting the Yang di-Pertuan Agong the power to safeguard the "special position" of the Malays and natives of Sabah and Sarawak through the racial quota system.

Nevertheless, as race closely associated with religion, this issue to certain extent has tempered with the implementation of Syariah law in Malaysia. Article 160 of the Federal Constitution defines Malay as "person who professes the religion of Islam, habitually speaks the Malay language and conforms to Malay culture." Thus, as ICERD struggle with demand for the freedom of living as well as for the protection of human rights, arguments by several human rights activists in some way challenged the implementation of Syariah law in Malaysia.

The Ninth Schedule, Article 74 of the Federal Constitution empowers each state in Malaysia to enact personal and family laws for Muslims, and to set-up and oversee Syariah courts implementation of Islamic law and what areas of law fall under the jurisdiction of each State. It also assigns them the prerogative over the "creation and punishment of offences by persons professing the religion of Islam against precepts of religion." According to the State List, legislative power of the State assembly to legislate on Islamic law and Malay customs is confined to 26 matters, that includes: [11]

a) Succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts;

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[9] Rehman, J. (2014). Islam and Human Rights: Is Compatibility Achievable between the Sharia and Human Rights Law? Available at SSRN: https://ssrn.com/abstract=2373930 or http://dx.doi.org/10.2139/ssrn.2373930

[10] ICERD is the generally accepted acronym for the International Convention on the Elimination of Racial Discrimination. ICERD was adopted and made opened for signature and ratification by the UN General Assembly resolution 2106 (XX) on 21 December 1965. Subsequently, ICERD came into force on 4 January 1969. ICERD is an international convention aimed at promoting and encouraging "universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion" . As of 2019, ICERD has 180 parties and 88 signatories. Article 1 of ICERD sets out to define racial discrimination as: "any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

[11] Ninth Schedule, List II – State List, Federal Constitution.

b) Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State;

c) Malay customs;

d) Zakat, Fitrah and Baitulmal or similar Islamic religious revenue;

e) Mosques or any Islamic public places of worship;

f) Creation and punishment of offences by persons professing the religion of Islam against precepts of that religion; and

g) Constitution, organization and procedure of the Syariah courts.

The State List stipulates on the jurisdiction of the Syariah court is to have power only over persons professing the religion of Islam and in respect only of the above matters. It is also provided that the Syariah court shall not have any jurisdiction in respect of offences unless conferred by federal law.[12] Nevertheless, Syariah court has no ipso facto jurisdiction over all matters relating to Islamic law and Malay customs set out in the State List. In the case of Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan, where a widow sought a declaration that her deceased husband was a Buddhist during his lifetime and at the time of his death, the High Court held that the jurisdiction of the Syariah court cannot be derived by implication and that if State law did not confer jurisdiction to deal with a particular matter in the State List, the Syariah court would be precluded from dealing with that matter. As State law did not confer jurisdiction to determine the issue whether a person is a Muslim or not at the time of his death, the High Court was not precluded from hearing and determining that issue.[13]

However, there is dicta to the contrary in Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor,[14] a case before the Federal Court, that the jurisdiction of the Syariah court to deal with the issue conversion out of Islam, although not expressly provided in State law, could be implied from the express provisions conferring jurisdiction on the issue of conversion into Islam.[15] The Syariah court in that case had held that the deceased convert had not renounced the religion of Islam and therefore was a Muslim at the time of his death. The Federal Court was much persuaded by statements in the authorities that the question of conversion out of Islam involves issues requiring substantial consideration of the Islamic law by relevant jurists qualified to do so and that therefore the only forum to be qualified to do so is the Syariah court.[16]

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12 Ibid.

13 (No 2) [1991] 3 MLJ 487. Similarly, in a dispute over *wakaf* land, in the case of Shaik Zolkaffily bin Shaik Natar & Ors v Majlis Agama Islam Pulau Pinang and Seberang Perai it was held that when there is a challenge to the jurisdiction of the High Court, the test was not whether the court had jurisdiction but whether jurisdiction had been conferred on the Syariah court. Only if such jurisdiction were conferred on the Syariah court would the High Court be precluded from considering the matter before it. See [1997] 3 MLJ 281.

14 [1999] 1 MLJ 489.

15 The rationale of the Federal Court appeared to be as follows:
"As in the case of conversion to Islam, certain requirements must be complied with under '*hukum syarak*' (Islamic law) for a conversion out of Islam to be valid, which only the Syariah courts are the experts and appropriate to adjudicate. In short, it does seem inevitable that since matters on conversion to Islam come under the jurisdiction of the *Syariah* courts, by implication conversion out of Islam should also fall under the jurisdiction of the same courts."

16 Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1992] 1 MLJ 1. It is submitted

2. The Right to Marriage and Choice of Spouse

One of the purposes of marriage is to legalize sexual intercourse between male and female which is undeniable a part of human nature (fitrah). Nevertheless, it is not the sole objective. Marriage can be considered as the best platform to secure comfortable atmosphere for the couple. Allah has mentioned explicitly in the Holy Qur'an: "One of His signs is that He created for you spouses of your own species, so that you might find comfort with them. And He put mutual love and affection in your hearts. Surely in this there are lessons for the thinking people"[17] The next objective of marriage is to ensure preservation of the human species and continuation of the human race. This is in line with a Quranic verse stating that: "O mankind! Be careful of your duty to your Lord, who created you from a single soul and from it created its mate and from them has spread abroad a multitude of men and women."[18] Since marriage is a union between a man and a woman, it can be inferred that any union between the same sexes is considered a crime and a sin. Therefore, committing homosexuality and engaging in same sex marriages punishable crimes under Islamic law.[19]

Sodomy and lesbianism are crimes under the Malaysian laws. For example, Section 25 of the Syariah Criminal Offences (Kedah Darul Aman) Enactment 2014 and Section 13 of Criminal Offences in the Syarak (Perlis) Enactment 1991 uses the term 'liwat' which appears to overlap with 'sexual intercourse against the order of nature' and 'outrages on decency' in sections 377A and 377D of the Penal Code, respectively.[20] Section 2 of the Syariah Criminal Offences (Kedah Darul Aman) Enactment 2014 defines 'liwat' as "an unusual sexual intercourse between a man and a man or between a man and a woman". The Enactment further provides: "Any male person who commits liwat shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof."

Further, Section 24 of the Syariah Criminal Offences (Kedah Darul Aman) Enactment 2014 and Section 14 of Criminal Offences in the Syarak (Perlis) Enactment 1991 provides: "Any female person who commits 'musahaqah' shall be guilty of an offence and shall on conviction be liable to

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that although the fact that the determination of a Muslim's conversion out of Islam may involve inquiry into the issue of renunciation of Islam under Islamic law, it did not follow that it would be 'inevitable' that the *Syariah* court should have jurisdiction. However, the Federal Court decision also appears to contradict two authorities cited in the judgment: "... express and unambiguous language appears to be absolutely indispensable in statutes passed for the following purposes: imposing tax; conferring or taking away legal rights; excepting from the operation of or altering clear principles of law; altering the jurisdiction of courts of law... 'the general rule undoubtedly is, that the jurisdiction of the superior courts is not taken away, except by express words or necessary implication'." Unfortunately, Soon Singh was not discussed, but by implication not followed, in Latifah Mat Zain, where the Federal Court clearly held that: "What it means is that, the Legislature of a State, in making law to 'constitute' and 'organize' the *Syariah* courts shall also provide for the jurisdictions of such courts within the limits allowed by item 1 of the State List, for example, it is limited only to persons professing the religion of Islam. The use of the word 'any' between the words 'in respect only of' and 'of the matters' means that the State Legislature may choose one or some or all of the matters allowed therein to be included within the jurisdiction of the *Syariah* courts. It can never be that once the *Syariah* courts are established the courts are seized with jurisdiction over all the matters mentioned in item 1 automatically. It has to be provided for."

17 Ar-Rum (30:21)

18 An-Nisa' (4:1)

19 Tauqir, M. K. (2007). *Law of Marriage and Divorce in Islam*. India: Pentagon Press, pp. 1-9.

20 Furthermore, *liwat* is also considered as an offence under Section 377A of Malaysia's Penal Code states on prohibition of carnal intercourse against the order of nature, which includes oral and anal sex. According to Section 377B of the same, offenders can be punished with up to twenty years in prison and are also liable to whipping.

a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof." Section 2 of the same Act defined 'musahaqah' means sexual relations between female persons.[21]

The issue of same sex marriage has been decided in the year 2007, in the case of Mohd Sufian Mohamad @ Mazinah Mohamad who married a woman. Contracted a marriage by having a forged identity card bearing a name of a female, her same-sex marriage with Zaiton Aziz was ordered to be separated, being an offence under Section 11 of the Islamic Family Law Enactment of Malacca 2002. Judge Che Saufi Che Husin said Mohd Soffian Mohamad, aged 40, who was born as Mazinah Mohamad from Klebang Besar near here, failed to prove that he was a man or a hermaphrodite. Examinations on Mohd Soffian by two medical specialists were comprehensive and found that he did not have male genitals.[22]

Interfaith marriage can be defined as a marital union in which the partners believe and belong to different faith or religious traditions. The marriage laws that govern Muslims in Malaysia largely prohibit Muslim-non-Muslim marriages. For example, section 10 of the Islamic Family Law (Kedah Darul Aman) Act 2008 states: "(1) no man shall marry a non-Muslim except a Kitabiyah,[23] (2) No woman shall marry a non-Muslim." In addition, Malaysian state laws on apostasy make it an offense to convert out of the Muslim faith, and such conversion must be authorized or confirmed by a Syariah Court. Muslims also cannot marry under the civil marriage law. Section 3 of Law Reform (Marriage and Divorce) Act 1976 clearly excludes marriages involving a Muslim party, stating that "this Act shall not apply to a Muslim or to any person who is married under Muslim law and no marriage of one of the parties which professes the religion of Islam shall be solemnized or registered under this Act...".

It appears that interfaith marriages, where they do not involve a Muslim party, are permitted under the 1976 Act. Marriages under the Act may be solemnized in the office of a registrar or "in a church or temple or at any place of marriage in accordance with section 24 at any such time as may be permitted by the religion, custom or usage which the parties to the marriage or either of them profess or practice."[24]

In the case of Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors,[25] who was born in Malaysia into a Muslim family decided to convert to Christianity. She announced her intention of marrying a Christian man. Under the Malaysian Law Reform (Marriage and Divorce) Act 1976, she would not be able to contract such a marriage unless her new status as a non-Muslim was recognised. For these reasons, Azalina applied to the Malaysian National Registration Department (NRD) to change her name on her identity card to a Christian name. She was successful in having the name changed to Lina Joy. However, in the year 2000, amendments, which came into force retrospectively, were made to the National Regulations. The amendments required that the identity cards of Muslims should state their religion. Therefore, when Lina Joy received her new identity

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[21] Muhammed, A. A. A., & Amuda, Y. J. (2018). LGBT: An Evaluation of Shariah Provisions and The Laws of Malaysia and Nigeria. *Global Journal Al-Thaqafah*, 8(1), 15-29.

[22] https://www.thestar.com.my/news/nation/2007/09/04/marriage-void-rules-court

[23] Kitabiyah essentially refers to a "person of the book." In practice, the marriage of Muslim men to non-Muslim women is also highly restricted due to the definition of who constitutes a Kitabiyah in the legislation: "Kitabiyah" means:

a) a woman whose ancestors were from the Bani Ya'qub; or
b) a Christian woman whose ancestors were Christians before the prophethood of the Prophet Muhammad; or
c) a Jewish whose ancestors were Jews before the prophethood of the Prophet Isa.

[24] Law Reform (Marriage and Divorce) Act 1976 (Act 164) § 22(1)(c).

[25] [2007] 4 MLJ 585.

card, reflecting the change of her name, the word 'Islam' still appeared on her card. This defeated the purpose of applying for a change of name. Effectively, it stood as a barrier to her marriage. Lina Joy therefore applied to the NRD in 2000 to have the word 'Islam' removed from her identity card. The NRD rejected her application. Lina Joy contested the policy of the NRD in the High Court of Malaysia. Apart from the issue of interfaith marriage, it brought us to the attention of issue of apostasy whereby she raised the administrative law point that, in law, the National Regulations did not, and should not, require an order or certificate of apostasy. More importantly, she argued that the NRD's insistence on its policy infringed her right to freedom of religion under the Malaysian Constitution.[26]

3. The Right to Inherit

Non-Muslim spouse according to the Islamic law of inheritance are prohibited from succession or inheritance in law to the deceased's property. However, in civil marriage in Malaysia, the non-Muslim spouses are eligible to receive deceased's property if the civil marriage has not dissolved. In the case of Eeswari Visuvalingam v Government of Malaysia, the appellant sought a declaration that she was a dependant as defined in section 4 of the Pensions Adjustment (Amendment) Act 1983 and also a declaration that she was entitled to a derivative pension under section 15 of the Pensions Act 1980. The appellant was married according to Hindu rites and the marriage was registered. Her husband subsequently embraced Islam. He was a pensioner under the Pensions Act 1980 and later died. The appellant had not sought a divorce from him under the Law Reform (Marriage and Divorce Act) 1976. The High Court held that the appellant was not entitled to the derivative pension. Hashim Yeop Sani while delivering his decision in the Supreme Court observed that there is no evidence that the marriage has been dissolved. The appellant is suing as a widow as defined under the pension laws. The fact that the husband has converted to Islam does not in our view effect the appellant's rights under the Pensions Act, 1980 and the 1980 (Pensions) Regulations. The court has decided against the Islamic law which prohibits a non-Muslim from

[26] Justice Faiza Tamby Chik addressed Article 11 directly. He explained that Joy's fundamental freedoms were not violated because the actual intent of Article 11 is to protect the freedom of religious communities to practice their faith free of interference, rather than for individuals to profess and practice the religion of their choice. To support this interpretation, Justice Faiza pointed to other clauses in Article 11 of the Federal Constitution, including Clause 3, which states: "Every religious group has the right … to manage its own religious affairs…", as well as to Article 3(1) of the Federal Constitution, which proclaims that "Islam is the religion of the Federation; but other religions may be practiced in peace and harmony." The actual meaning of freedom of religion, Justice Faiza argued, is that religious groups should be left to regulate their internal matters without outside interference: When a Muslim wishes to renounce/leave the religion of Islam, his other rights and obligations as a Muslim will also be jeopardized and this is an affair of Muslim [sic] falling under the first defendant's jurisdiction …Even though the first part [of Article 11] provides that every person has the right to profess and practice his religion, this does not mean that the plaintiff can hide behind this provision without first settling the issue of renunciation of her religion (Islam) with the religious authority which has the right to manage its own religious affairs under Article 11 (3) (a) of the Federal Constitution. Justice Faiza reasoned that Article 11(3) protects religious communities to practice their faith free of interference, including the ability to regulate matters of entry and exit from the faith. Those guarantees must supersede the ability of individuals to drift among different religious affiliations to suit whimsical desires under the guise of Article 11 (1). Departing from such an interpretation would threaten 'public order'. It is worth noting that Justice Faiza made extensive use of Islamist scholarship to support his reasoning. Extended quotations were offered from Professor Ahmad Ibrahim, the most prominent early advocate of an expanded role for Islamic law in the Malaysian legal system, as well as more recent writings from Muhammad Imam and others. The High Court decision makes broad claims about the meaning of Article 3, with implications for all facets of social and political life. According to the decision, "… the position of Islam in art 3(1) is that Islam is the main and dominant religion in the Federation. Being the main and dominant religion, the Federation has a duty to protect, defend and promote the religion of Islam."

inheriting the property of a Muslim. Court was of the view that their marriage was still considered legal under civil law, thus Muslims were denied to marry another Muslim couple after their conversion to Islam.

In the case of Isabela Madeline Roy & 5 Ors v. Sarimah Low Bt Abdullah & 3 Ors, in 1957, one Teddy Rock Roy ('the deceased') married the first defendant. Being a monogamous marriage, it was deemed registered under the Law Reform (Marriage and Divorce) Act 1976. Subsequently, the first defendant left the deceased and in 1968 went through a civil marriage with one Subramaniam. In 1973, the first defendant converted to Islam and entered into a Muslim marriage with another man. In 1980, the deceased contracted a civil marriage with the second defendant, notwithstanding that there was no evidence that the first defendant had died at the material time or that he had divorced the first defendant. Following the deceased's death in 1998, the second defendant, together with her children from her marriage to the deceased (the third and fourth defendants), staked a claim to the estate of the deceased. The plaintiffs, the children of the deceased and the first defendant, contended that there was no valid marriage between the deceased and the second defendant, that the second, third and fourth defendants had no right of succession or inheritance in law to the deceased's estate, and in the circumstances, applied for a declaration to the effect. The court decided that since the deceased had contracted a monogamous marriage with the first defendant, and since there was no evidence that he had divorced the latter, or of the latter's death at the material time, the deceased had no capacity to enter into a marriage with the second defendant. Being a Eurasian Christian, the deceased just had no capacity to enter into a polygamous marriage with the second defendant in 1980. The second defendant, therefore, had no right of succession or inheritance.

4. Sexual Orientation and Gender Identity

Lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) is prohibited and a punishable crime both under Syariah law.[27] Section 7 of Syariah Criminal Code Enactment 1988 pertaining to gender identity or known as 'pondan', any male person who, in any public place, wears woman attire and poses as a woman shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding four months or to both. Fatwas on 26 April 2010 (gazetted): Whereas, based on the decision made at the 83rd Conference of the Committee for the National Fatwa Council for the Islamic Religious Affairs of Malaysia, the Fatwa to be adopted in the state of Kedah Darul Aman is as follows:

> "Tomboy behaviour, women with the image, appearance and characteristics of a man is forbidden in Islam. Tomboy behaviour, by law, is forbidden in the Islamic religion because women who imitate men are condemned by Allah and Prophet Muhammad p.b.u.h because this behaviour mimics and resembles (tasyabbuh) another sex which is contrary to their original sex or natural characteristics."

This behaviour must be restricted in Kedah Darul Aman if a female has/resembles a male in the aspects of physical characteristics, style, hairstyle, adornment, appearance, manner of speech, manner of dress and sensual desires or has homo-sexual instincts (lesbianism).[28]

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[27] Katjasungkana, N., & Wieringa, S. E. (Eds.). (2011). *The future of Asian feminisms: confronting fundamentalisms, conflicts and neo-liberalism*. Cambridge Scholars Publishing.

[28] Meanwhile in Perlis, Section 7 of the Criminal Offences in the Syarak Enactment 1991 pertaining to gender identity known as 'pondan'; (1) Any male person who poses (tasyubbah) as a woman in any public place shall be guilty of

The current state of laws in Malaysia results in the social exclusion of the transsexual community at various levels as was elucidated in the judgment of the Court of Appeal in Muhamad Juzaili Mohd Khamis & Others v. State Government of Negeri Sembilan (2015), where his lordship Hishamudin Mohd Yunus JCA extensively referred to the expert opinion of Teh, Y. K a renowned sociologist as follows: In Malaysia, a law like section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 which criminalizes any male person who in any public place merely wears a woman's attire or poses as a woman:

I. Stigmatizes transsexuals as deviants and in doing so:
   (a) strips them of their value and worth as members of our society.
   (b) affects their ability to freely engage in decent and productive work, and this results in them pursuing sex work as a source of income.
   (c) affects the ability for transsexuals to move freely and reside within the borders of Negeri Sembilan without fear of persecution.
   (d) affects their well-being, self-confidence and self-empowerment.
   (e) impedes awareness-raising among members of society on the problems and troubles faced by transsexuals and how society can play a part in helping them.
II. Adversely affects society by depriving it of an entire class of individuals, that is transsexuals, who could contribute to its wellbeing.
III. Infringes the privacy of transsexuals by preventing them from making decisions and choices regarding their own bodies.
IV. Infringes the ability for transsexuals to express their identity through speech, deportment, dress and bodily characteristics.

His Lordship Hishamudin Mohd Yunus JCA delivering the judgment of the court concluded that the provisions of Section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 clearly conflicted with the fundamental right to equality and equal protection under the law as enshrined under Article 8(1) as it subjects the three appellants who suffer from Gender Identity Disorder to the same treatment as a normal Muslim male, thus treating those who are unequal as the same as those who are normal and thereby is not only discriminatory but also denies the appellants equal protection under the law in these words: Just as a difference in treatment of persons similarly situate leads to discrimination, so also discrimination can arise if persons who are unequals, i.e., differently placed, are treated similarly. Section 66 is therefore unconstitutional as it offends Article 8(1) of the Federal Constitution, and is therefore void.

Although the Court of Appeal's landmark decision in the Negeri Sembilan transgender case was applauded by human rights activist, civil society groups and some members of the legal fraternity in Malaysia as a step in the right direction in the protection of constitutional rights of all Malaysians, it was however not without its critics. The critics have largely argued that transgenderism is prohibited by Islam and the Court of Appeal's decision which contravenes Islamic law principles

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an offence and shall be liable, on conviction, to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both. (2) Any female person who poses (tasyabbah) as a man in any public place shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.

is wrong as it ignores the special position of Islam under Article 3(1) within the Malaysian Constitution. The Federal Court in Malaysia has since overruled the Court of Appeal's decision following an appeal by the State Government of Negeri Sembilan and Department of Islamic Religious Affairs of Negeri Sembilan in a decision handed down on 8 October 2015.

The Apex Court concluded that the failure to obtain leave as required under Article 4(3) and 4(4) resulted in both the High Court and the Court of Appeal incompetent to hear the case and as such the decisions in both courts will be set aside. Be that as it may it cannot be ignored that the Federal Court only overruled the Court of Appeal's decision purely on the issue of jurisdiction and had not in fact ruled on the Court of Appeal's reasoning in reaching its conclusion that Section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 is unconstitutional and void.[29] Although it is widely believed that in Islamic jurisprudence gender classification operates in a binary form of male and female, therefore excluding the recognition of transsexuals, among Islamic scholars there are divisions and some have suggested that in Islam there is no blanket ruling against all forms of transsexualism nor is it universally condemned and therefore there is room for recognition in some instances.[30]

5. The Right to Freedom of Thought, Conscience and Religion

5.1 The Right to Religion and Practice of Religion

The Constitution provides a number of important protections for the right to freedom of religion or belief. Article 11 of the Constitution guarantees the right of every person to "profess and practise their religion, and to propagate it," subject to constitutional limitations set out in Article 11(4) regarding the control or restriction of the propagation of any religious doctrine or belief among persons professing the religion of Islam. Article 11(3) of the Constitution also recognizes the right of each religious group to "manage its own religious affairs, to establish and maintain institutions for religious or charitable purposes, and to acquire and own, hold and administer property".[31] Thus, while the Constitution recognizes an individual right to freedom of religion, it is defined within the ambit of Article 11(3), which protects the rights of religious groups to manage their own affairs. Notably, Article 12(2) of the Constitution further provides that "every religious group has the right to establish and maintain institutions for the education of children in its own religion."

While these provisions create a strong basis for the protection of freedom of religion or belief, as well as non-discrimination, it is argued that they are subject to limitations that are incompatible with international human rights law and standards.[32] For instance, the definition of 'freedom of religion' in Article 11 of the Constitution, limited to the 'profession, practice and propagation' of

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[29] Mageswary, S. S., Asmida, A., Yusnita, M. Y., & Asro, R. S. N. F. (2016). Gender Recognition Of Transsexuals In Malaysia: Charting The Way Towards Social Inclusion.

[30] Sayed Sikandar Shah Haneef, International Islamic University of Malaysia, "Transsexuals and Sex Change: Legality Debate in Islamic Law", [2011] 6 Malayan Law Journal cxxv, Khaleelsharwar, Right of transgender in Islam <http://muslim-academy.com/rights-of-transgender-inislam/#sthash.pkW2TWDm.dpuf> accessed on 16 December 2015.

[31] Article 11(3) of the Federal Constitution.

[32] In General Comment 22, the Human Rights Committee has affirmed that the freedom to "have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another religious belief or to adopt atheistic views, and the right to retain one's religion or belief. It further stressed that "the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs…the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications." Human Rights Committee, General Comment 22, paras 4-5.

one's religion, is overly narrow and does not expressly include the freedom to have or adopt a religion or belief of one's choice. Article 11 does not provide for the freedom to manifest one's religion or belief in 'worship, observance, practice and teaching,' fundamental elements of the right to freedom of religion and belief under the international human rights law. In addition, Article 11(4) imposes limitations on the right to propagate any religious doctrine or belief "among persons professing the religion of Islam" in line with state and federal laws, and gives state and federal legislative bodies the power to promulgate laws that restrict and control the propagation of religious doctrine to Muslims.[33] The article does not address proselytism in respect of non-Muslims. Article 11(5) includes a more general limitation, prohibiting "any act contrary to any general law relating to public order, public health or morality," the ambiguity of which makes it prone to inconsistent or arbitrary enforcement. The language of Article 11(3), along with other provisions that protect the rights of religions groups (such as 12(2)), also create a tension between the protection of individual rights and the rights of religious communities, illustrated in the case of the right of religious groups to provide religious education to children.

Islam has granted the freedom of religion in Quran: "Let there be no compulsion in religion."[34] What is meant by freedom in the context of the verse is a person in the matter pertaining to religion he is free either to have or not to have a religion, either to practice or not to practice, either to embrace or not to embrace or either to change or not to change his or her religion.

This liberty or freedom is given to the non-Muslim only. For a Muslim there is no such freedom in religion. This is because a Muslim is abiding by the Syariah rules without looking to the situation either he is under the Muslim rule or non-Muslim rule. The name as a Muslim itself meant that the person must submit and surrender to the will of Allah in the matter related to the belief and pillars of Islam, to keep him as a believer and a Muslim. While the Malaysian Federal Constitution is clear on the right of religion for all, religion has been used to curtail the express freedom to choose one's religion, the question is to what lengths the Judiciary intends to extend the supremacy of Islam as the religion of the Federation.[35] In Wan Jalil Bin Wan Abdul Rahman & Anor v Public Prosecutor Lord President Salleh Abas stated as follows:

> The first point to consider here is the meaning which could be given to the expression 'Islam' or 'Islamic religion' in Article 3 of the Constitution. If the religion of Islam in the context means only such acts as relate to rituals and ceremonies, the argument has no basis whatsoever. On the other hand, if the religion of Islam or Islam itself is an all-embracing concept, as is normally understood, which consists not only the ritualistic aspect but also a comprehensive system of life, including its jurisprudence and moral standard, then the submission has a great implication in that every law has to be tested according to this yard-stick.[36]

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[33] Article 74(2) of the Constitution provides that "Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List." The State List includes "Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts."

[34] Al-Baqarah verses 256.

[35] [1988] 2 MLJ 55.

[36] Wan Jalil Bin Wan Abdul Rahman & Anor v Public Prosecutor [1988] 2 MLJ 55.

Based on this, while it can be argued that this is the original intention of the framers of the Federal Constitution, it is nevertheless a fact that the current judicial approach to religious matters has had a very different result following constitutional amendments made on the power of the courts to decide on matters relating to Islamic principles and precepts.

On the issue of conversion out of Islam or apostasy, Umma Devi Loganathan in her article "Apostasy and Article 11 of the Federal Constitution: Personal or Third Party Choice?" expressing her dissatisfaction on the issue of freedom of religion and apostasy. She mentioned that in Perlis, the state government introduced the Faith Protection Bill in 2000 to regulate the conversion of Muslims. She further argued "a Muslim who seeks to convert to another religion must first obtain approval from the Syariah courts to declare them "apostates".[37] However, this is not an easy task since Syariah courts seldom grant such requests and impose penalties in the form of rehabilitation on apostates. Despite that, the government strictly prohibits groups from proselytising Muslims although non-Muslim are allowed to be proselytised. In the case of minority religion practitioners, they are free to practice their religion of their choice but face limited access to religious expression.[38]

The next landmark case also went all the way to the Apex Court, which was by then renamed the Federal Court. Soon Singh v. Malaysian Islamic Welfare Organization of Kedah[39] involved a Sikh man who had converted to Islam as a minor but later reverted to his original Sikh faith in a religious ceremony. Soon Singh was flesh and blood Malaysian, pleading for official recognition of his religious conversion out of Islam. At the time of his reversion back to his original Sikh faith, Malaysians like Soon Singh were able to secure official recognition of conversion out of Islam by affirming a statutory declaration before a commissioner of oaths and registering a new name in the civil court registry through a deed poll. With this documentation, an individual could then apply for a new identity card reflecting the name change, which signified one's new religious status. However, Singh encountered difficulties when he sought a declaration of his new religious status from the High Court in Kuala Lumpur. The Kedah Islamic Affairs Department challenged the High Court's jurisdiction in light of the newly adopted constitutional amendment, Article 121 (1A). The High Court agreed that the new amendment prevented it from certifying Soon Singh's new faith.

The Court drew upon the 'fatwa' from Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor[40] and ceded jurisdiction on that basis. The court decision stated:

> It is clear from the fatwa that a Muslim who renounced the Islamic faith by a deed poll or who went through a baptism ceremony to reconvert to Sikhism continues to remain in Islam until a declaration has been made in a syariah court that he is a 'murtad' [apostate]. Therefore, in accordance with the fatwa, the plaintiff is still a Muslim. He should go to a syariah court for the declaration. Whether or not his conversion is invalid is also a matter for the syariah court to determine in accordance with hukum syarak and the civil courts have no jurisdiction.

Singh appealed, pointing out that there were no express provisions in the Kedah Administration of Muslim Law Enactment that conferred jurisdiction on the Syariah courts. However, the Islamic

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[37] Marikan, P. (2012, February 11). Sekatan penyebaran agama bukan Islam di kalangan orang Islam dibawah Perlembagaan Persekutuan. Retrieved from onmalaysianlaw: http://www.onmalaysianlaw.com/

[38] Umma Devi Loganathan. Apostasy and Article 11 of The Federal Constitution: Personal or Third Party Choice? Current Law Journal [2019] 1 LNS(A) liii.

[39] [1994] 1MLJ 690; [1999] 1 MLJ 489.

[40] [1992] 1 MLJ 1 at 6.

Affairs Department invoked Article 121 (1A) again. The Supreme Court affirmed the decision and adopted a new doctrine of implied jurisdiction. The new doctrine effectively ceded jurisdiction to the Syariah courts on all cases concerning conversion out of Islam. The Court held that "jurisdiction of the Syariah courts to deal with conversions out of Islam, although not expressly provided for in some State Enactments, can be read into those enactments by implication derived from the provisions concerning conversion into Islam." Similar cases that followed conformed to the same logic. The civil courts would no longer certify conversion out of Islam, ceding their jurisdiction to the Syariah courts.[41]

The decision papered over the fact that most state enactments provide no viable avenue for official conversion out of Islam, with some states treating requests for official change of religion as criminal offences. Six of Malaysia's thirteen states (Perlis, Kedah, Penang, Selangor, Johor, and Sarawak) and the Federal Territories do not criminalize conversion out of Islam, but nor do they specify a legal mechanism for the official recognition of religious conversion. Five more states (Perak, Pahang, Terengganu, Malacca, and Sabah) criminalize conversion out of Islam with punishments that include fines and imprisonment (and whipping in the case of Pahang).[42] In three more states (Sabah, Kelantan, and Malacca), a judge may order mandatory counselling at a "faith rehabilitation center" for periods ranging from six to thirty-six months. Negeri Sembilan is the only state that provides a formal avenue for official conversion out of Islam, but the process is lengthy, and it requires mandatory counselling.[43]

Further, concerning the issue of right to propagate other religion under Article 11(4) of the Constitution provides that, State law and, in respect of the Federal Territories of Kuala Lumpur and Labuan, federal law, may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam. Pursuant to the powers granted under article 11(4) of the Constitution, nine State Legislatures have passed laws on the control and restriction on the propagation of non-Islamic religions to Muslims.[44]

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41 Soon Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1994] 1MLJ 690; [1999] 1 MLJ 489.

42 For example, the Terengganu Administration of Islamic Law Enactment of 1996 provides that "any Muslim who attempts to renounce the religion of Islam or declares himself to be non-Muslim, shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding one year or both."

43 Adil, M. A. M. (2007). Law of apostasy and freedom of religion in Malaysia. *Asian Journal of Comparative Law*, 2, 1-36. In Kedah, there have been at least two applications for apostasy. The first was an oral application and no proper application was made to the Syariah Court. In the written application, a Muslim by conversion had renounced and abandoned the Islamic religion. He made a deed poll and statutory declaration before an Oath Commissioner in Penang dated 10 August 2002. The applicant, through his counsel had sent an application for conversion out of Islam to the Registrar of Syariah Court in Alor Setar on 18 August 2002, for the Syariah Court to take further steps over the application; because there is no provision for Muslims to convert out of Islam in the State's Enactment, the matter was not brought forward. His attempt to renounce Islam and return to his original religion, Hinduism, could not be proceeded with even though he never practised the religion of Islam.

44 See Control and Restriction of the Propagation of Non-Islamic Religions (Johore) Enactment 1991 (Enactment 12/1991); Control and Restriction of the Propagation of Non-Islamic Religions (Kedah) Enactment 1988 (Enactment 11/1988); Control and Restriction of the Propagation of Non-Islamic Religions (Kelantan) Enactment 1981 (Enactment 11/1981); Control and Restriction of the Propagation of Non-Islamic Religions to Muslims (Malacca) Enactment 1988 (Enactment 1/1988); Control and Restriction (Propagation of Non-Islamic Religions Among Muslims)(Negeri Sembilan) Enactment 1991 (Enactment 9/1991); Control and Restriction of the Propagation of Non-Islamic Religions (Pahang) Enactment 1989 (Enactment 5/1989); Control and Restriction of the Propagation of Non-Islamic Religions Enactment 1988 (Enactment 10/1988); Non-Islamic Religions (Control of Propagations Among Muslims) (Selangor) Enactment 1988 (Enactment 1/1988); Control and Restriction of the Propagation of Non-Islamic Religions Enactment 1980 (Enactment 1/1980).

There has been at least one criminal prosecution against an offender (a non-Muslim) in the State of Pahang. In PP v Krishnan a/l Muthu[45] the complainant, one Maziah Jusoh had known and was in love with the accused, a married man, for seven years. As the complainant did not have a place to stay, she asked permission from the accused and his wife to live with them. The accused and the complainant had a series of arguments which resulted in physical fights. There was an instance where the accused issued threats against the complainant to leave Islam and embrace Hinduism. The complainant was also asked to make an oath at a Hindu temple and was prevented from praying as a Muslim. Two charges were filed against the accused in the Magistrate's Court. The accused was convicted and fined RM2,000 under section 325 of the Penal Code. The accused was also convicted under section 4(2)(i) of the Control and Restriction of the Propagation of Non-Islamic Religions (Pahang) Enactment 1989, fined RM 1,500 and imprisoned for a period of 20 days. Articles 11(1) and 11(4) of the Constitution indicate that the provisions on Islam as a faith and Islam as a law are intertwined; one cannot look at one provision in the Constitution without looking at the other provisions. This is how Article 11(1) should be construed. It becomes evident therefore that the issue of a Muslim attempting to apostate is not merely an issue of faith but one of Islamic law, which applies to all Muslims in the States of the Federation.

5.2 Religious Minorities

Pertaining to the issue religious minorities, it is contended that even Article 8 of the Constitution recognizes the right to equality and freedom from non-discrimination, there are no laws that specifically protect religious minorities from discrimination or unequal treatment. The Constitution also provides no specific protections for the freedom of 'thought and conscience', which includes the freedom to have a theistic, non-theistic or atheistic belief and the freedom from coercion to adopt a religion or belief of one's own choice.

Syiah is a religious sect within Islam whose adherents differ from majority Sunnis in recognizing Imam Ali as successor to Prophet Muhammad after the death of the Prophet. Syiah Muslims, both Malaysian and non-Malaysian nationals, have been subject to harassment, arrest and prosecution by the authorities for professing their faith. Both federal and Islamic laws have been used to prosecute Syiah Muslims.

The now-repealed Internal Security Act (ISA) 1960,[46] which allowed for preventive detention without trial for up to 60 days, was contended used to harass religious minorities, and to interfere with Syiah religious practice on the basis that it was "prejudicial to the security of Malaysia."[47] Religious law has also been used by authorities to justify discriminatory measures against Syiah Muslims. In 1996, the Fatwa Committee for Religious Affairs issued a Syariah order (or fatwa) dictating that Sunni Islam is the permitted form of Islam in Malaysia, and imposing a prohibition on the proselytism, promulgation or professing of Syiah beliefs, including the distribution of any

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[45] Magistrate's Court Case No MA-83-146-2002 (Unreported). See Mohamed Azam Mohamed Adil, "Kebebasan Beragama dan Hukuman Ke Atas Orang Murtad di Malaysia" in Ahmad Hidayat Buang (ed.) Mahkamah Syariah Di Malaysia: Pencapaian Dan Cabaran, supra n. 32, p. 165.

[46] The ISA was replaced and repealed by the Security Offences (Special Measures) Act 2012 which obtained royal assent on 18 June 2012, and came into force on 31 July 2012.

[47] Under Section 73 (1) of the ISA, police may detain any person for up to 60 days, without warrant or trial and without access to legal counsel, on suspicion that "he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to maintenance of essential services therein or to the economic life thereof."

electronic or print resources.[48] Eleven of Malaysia's fourteen states have since given effect to the fatwa through state Islamic bodies.

In the Preliminary Observations in Malaysia in 2017, United Nations Special Rapporteur in the field of cultural rights, Karima Bennoune, recognized that Syiah Muslims in Malaysia complained of their "inability to worship freely", and that they faced "obstacles in carrying out rituals which are both cultural and religious."[49] The 1996 fatwa left Syiah Muslims at risk of arrest under criminal provisions of Syariah law. For instances, Section 4 of Syariah Criminal Offences (Kedah Darul Aman) Enactment 2014 highlights on offence of false doctrine which include Syiah other unrecognized doctrine. The provision states that, any person who teaches or expounds in any place, whether private or public, any doctrine or performs any ceremony or act relating to the religion of Islam shall, if such doctrine or ceremony or act is contrary to Hukum Syarak (Islamic law) or any fatwa for the time being in force in the Kedah Darul Aman, be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.

Section 34 of Criminal Offences in The Syarak Enactment 1991 states on expounding of doctrines and performing ceremonies contrary to the Hukum Syarak where "Whoever teaches or expounds to anyone or propagates in any place, any teaching or performs any ceremony or act which is contrary to the Hukum Syarak as practiced in the state of Perlis shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding five thousand ringgit or to imprisonment, for a term not exceeding three years or to both."[50] Through the judgment of this case, it is clear that Islamic law in Malaysia is based on the doctrine of Sunni (Ahl al-Sunnah wa al-Jama'ah) doctrine. Yet, other person embraces of other sect is also subject to the law of this country. In other word, any marriage under the teaching of Syariah must also be registered under the Malaysian law. The court further affirmed that decision on punishing the accused should not be understood as negating other sect, however, it is an action against a group of Muslims that violates the provisions of Islamic law enforced in Malaysia.

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48 Razak Ahmad. Reason behind ban on Syiah teachings. (Dec 16, 2013) The Star Online. Retrieved from https://www.thestar.com.my/news/nation/2013/12/16/reason-behind-ban-on-syiah-teachings-controversial-doctrines-have-led-to-many-seeing-it-as-a-potenti

49 Preliminary Observations by the United Nations Special Rapporteur in the field of cultural rights Karima Bennoune at the end of her visit to Malaysia, 21 September 2017, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22121&LangID=E

50 The case of Johor Syarie Prosecutor v. Abd. Talib bin Harun & Ors is identified as the first case of *Syiah* teachings in Malaysia. There are several charges against the first accused being the leader of the *Syiah Imamiah* group called as Ab Talib Harun or known among them as Ahmad Habibullah al-Salafi bin Harun. The charge includes:

a) charges of holding Friday prayers without the permission of the Islamic Religious Council
b) teaching unauthorized religion
c) teaching and performing ceremonies or acts contrary to Islamic law
d) taking and receiving zakat *fitrah* without being *amil* (collector)
e) associating with women without a legal marriage
f) having sex with women who are not his wife.

The second accused, Mohamed Nor bin Othman (assistant to the first accused), was charged with unlawful conduct of Friday prayers and receiving zakat *fitrah* without being appointed as *amil*. The third group of 6 women of *mut'ah* marriage (wives to the first accused) were charged of carrying out rituals or acts contrary to Islamic law, sexual intercourse and cohabiting with man without valid relationship of husband and wife. While the fourth accused (4 wives of the first accused), were charged of having conspiracy to perform ceremonies or acts contrary to Islamic law. In conclusion, the first accused had 4 wives and 6 wives of *mut'ah* marriage altogether. The first accused was convicted and sentenced to all charges although the accused admitted that he is *Syiah Imamiah* follower thus justify the marriage of mut'ah.

In conclusion, legal control over freedom of religion is necessary in the context of Malaysia. As His Lordship the late Raja Azlan Shah J (as he then was) stated in PP vs Ooi Kee Saik (1971) 2 MLJ 108, quoting the following passage from A.K. Gopalan vs State of Madras AIR (1950) SC 27 with approval: "There cannot be anything as absolute or uncontrolled liberty wholly free from restraint; for that would lead to anarchy and disorder…".

RECOMMENDATIONS

Based on the study about the *Syariah* law in several states, in general Syariah law is incompatible with the ICERD on Article 5(d)(iv), (vii) concerning:

iv) the right to marriage and choice of spouse;

vii) the right to freedom of thought, conscience and religion;

However this report recommends that ICERD is ratified subject to certain reservation imposed in the implementation of ICERD. Without doubt, the ratification of ICERD will not affect the superiority of the Federal Constitution as the supreme law of the country. I would suggest after studying the Syariah law's perspectives that several reservations would be made such as:

i. Malaysia should interpret the Convention as not implying any obligations beyond the limits of their existing provision in the Federal Constitution.

ii. Article 5 of the ICERD can be put into reservation. Malaysia is a party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Children (CRC). In both conventions, Malaysia made and modified some reservations (even withdrew some of the reservations) after ratifying them especially regarding provisions which are perceived incompatible with the Islamic law. Therefore in the case of ICERD, Provision of this Article should in line with the Federal Constitution and Syariah law. Therefore, several points such as the right to nationality, the right to marriage and choice of spouse, the right to inherit, and the right to freedom of thought, conscience and religion should be based on Malaysian Civil and Syariah law.

iii. Build inter-religious relationships at the grassroot level. This entails ensuring that religious education in schools emphasize the importance of building a cohesive society and teaching all students about all the major religions and creating the platform for social cohesion, which allows Malaysians to come together and have an open dialogue to appreciate the other religions.

iv. Engender greater political will and commitment towards ensuring religion is not used for political purposes. Besides the will to build inter-religious cohesion, there is also need for Muslims in Malaysia to promote intra-religious peace and acceptance, especially honouring the Amman Message[51] which several Malaysian leaders were signatory to. This can be implemented through specific regulations and official policies including those related to practices by officials of religious authorities such as JAKIM.

This paper actually wants to stress as well that Malaysia should consider to ratify International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) together with ICERD. The issues of race and religion have been

[51] Amman Message was constructed on 9 November 2004. In the Message, scholars unanimously issued a ruling on three fundamental issues (which became known as 'Three Points of the Amman Message':
1. They specifically recognized the validity of all 8 *Mazhabs* (legal schools) of *Sunni*, *Syiah*, and *Ibadhi* Islam; of traditional Islamic Theology (*Ash'arism*); of Islamic Mysticism (Sufism), and of true *Salafi* thought, and came to a precise definition of who is a Muslim.
2. Based upon this definition they forbade *takfir* (declaration of apostasy) between Muslims.
3. Based upon the *Mazhab*, they set forth the subjective and objective preconditions for the issuing of fatwas, thereby exposing ignorant and illegitimate in the name of Islam.

politicized heavily in Malaysia. Therefore, if ICERD to be considered for ratification, it is better to ratify ICCPR and ICESCR in order to compliment and embed the implementation of ICERD and make the agenda of anti-racial discrimination will be successful realized in Malaysia. Of course, ICCPR and ICESCR will be subjected to certain reservations which are in line with local law particularly Syariah law practised in Malaysia.

CONCLUSION

Opinions have been voiced out that Malaysia could ratify ICERD with reservations due to the existence of Article 153 of the Constitution,[52] and based on the UN Treaty Collection records, many countries have adopted ICERD with reservations.[53] This paper acknowledges the fact that further open debates on the pros and cons of adopting ICERD would just fuel tensions and worse, might cause racial conflicts between Malaysians if they are not properly managed. Indeed, Malaysia does not need another 13 May Incident written in its history books. This issue on ICERD in Malaysia should serve as a wakeup call to Malaysians, regardless whether they are politicians, civilians, scholars, etc. There is a need to protect human rights and to ensure that all Malaysians should be treated equally without any form of discrimination against them. But, factors, especially racial and religious matters must always be taken into consideration. This issue concerning the ratification of ICERD also reflects how deeply rooted racial and religious factors are embedded in Malaysian politics, and these factors may just be a hindrance to the progress of Malaysian politics. Blatant practices, policies, regulations are not uncommon in Malaysia, and it is important that these sort of practices are abolished. However, when these actions are justified on the basis of rights and privileges, it pushes the subject matter in very sensitive territory and makes it harder for the subject matter to be examined and evaluated in a neutral manner. Malaysia's decision to backtrack on ratifying ICERD should encourage more scholarly and academic discussion and research on issues of international law and national policies, and how to harmonize between the two. It is important that Malaysia strikes a balance between its international obligations to protect human rights, while also protecting its internal national politics and security.

Clearly, it is essential for Malaysia to ratify ICERD. It will not harm the country. In fact it will improve the race relations and policy on non-discrimination. Any concern about ratification of ICERD can be overcome with reservation on particular provision in order to secure some local practices and belief especially with regard to protecting the Malays and Bumiputera, Islam as religion of the Federation and Syariah law. It is time now for Malaysia to champion on this issue of racial non-discrimination. It can start with the ratification of ICERD if the government decided to pursue in the future.

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[52] http://ohrh.law.ox.ac.uk/analysing-malaysias-refusal-to-ratify-the-icerd/

[53] https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&lang=en

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