

**THE ANTI-THESIS BETWEEN CIVIL LAW AND ISLAMIC LAW IN A
PLURALISTIC SOCIETY**

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Abstract

Malaysia is known for its pluralistic society. This is due to its multi-racial, multi-cultural and multi-religious society. Thus, the Federal Constitution has been drafted to reflect this spirit. Nonetheless, one of the articles of the Federal Constitution provides that Islam is the religion of the Federation. As a result, Islamic principles were introduced to govern the Muslim community. Laws were enacted to provide legal effect to the principles. Nevertheless, intricate issues arise if one of the contending parties in the courts is not a Muslim. In such a case, the dichotomy is which laws is to be applied i.e. Civil Law or Islamic Law. The courts have been faced with this acute dilemma in recent years again and again. During such times, there have been calls made by various parties to amend the current legal framework to pave the way for the application of Civil Law if one of the contending parties is not a Muslim. Nonetheless, to the Muslim community, amending the relevant laws is akin to giving less recognition to the religion of Islam. On the other hand, to those who do not profess Islam, the application of Islamic law is seen as an encroachment to their legal rights. That is exactly where the conflict begins. On the other hand, the government, which is guardian of the society in totality, has constantly voiced its opinion that these issues will be resolved soon. The purpose of this study is to primarily investigate where the problem lies. The study will then proceed to explore whether there is a way to resolve these intricate issues in the application of Civil Law and Islamic Law. This is important because society must feel that the outcome takes into account their legal rights and interests for a meaningful pluralistic society.

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Introduction

The study will focus on the issue of religious conversion. The study will then explore the legal implications of conversion on a minor. The study will unearth the conflict between Civil law and Islamic law in such a situation.

Background of Study

Malaysia is made up of multi-ethnic, multi-cultural and multi-religious society. The major ethnic communities are Malays, Chinese and Indians. The Malays constitute 67%, the Chinese constitute 24.3%, the Indians constitute 7.4% and the other races make up to 9.8% (Department of Statistics, 2006). In East Malaysia, the ethnic communities are even more diverse namely Dayak, Kadazan and Murut. They are further divided into Iban, Bidayuh, Melanau, Orang Ulu, Kelabit, Kayan, Kenyah, Berawan, Kadazan, Murut, Bajau, Dusun, Lumbawang, Sulok, etc.

According to census carried out in 2000, 60.4% in Malaysia are Muslims, 19.2% are Buddhists, 9.1% are Christians, 6.3% are Hindus and 2.6% are Confucianist/Taoist (Department of Statistics, 2000). Observably, Muslims constitute the largest religious community. This is because the majority of the population in Malaysia is made up of the Malay Community. Thus, it can be seen that religion is identifiable with races (Aziz, 2007).

It should be noted that among the ethnic communities, the term 'Malay' is defined in Article 160 of the Federal Constitution which provides that Malay is a person who professes the religion of Islam, habitually speaks the Malay language and conforms to Malay custom. On the other hand, there is no definition or interpretation given in the Federal Constitution as regards to Chinese, Indian, Dayak, Kadazan or Murut. Furthermore, Article 152 provides that the national language is the Malay language. Article 153 of the Federal Constitution provides for the special position and rights of the Malays. Thus, it can be seen that the Malay language and rights are protected by the constitution.

Notably, any person who is a Chinese, Indian, Dayak, Kadazan or Murut could be of any religion *i.e.* Islam, Buddhism, Christianity, Hinduism, Sikhism, Confucianism or Taoism. Furthermore,

he could be speaking of any language *i.e.* Malay, Mandarin, Cantonese, Hakka, Teochew, Hainan, Foochow, Hokkien, Tamil, Malayalam, Telegu, Punjabi, Bengali, Gujaratai, Dayak, Kadazan, Murut, etc. Additionally, he could be conforming to any cultural practices *i.e.* Malay, Chinese, Indian, Dayak, Kadazan or Murut. The fact that there is no definition or interpretation in the constitution would mean that flexibility is afforded to a Chinese, Indian, Dayak, Kadazan or Murut as to religion, language and culture to be practiced. On the other hand, the languages are not accorded constitutional recognition and thus, their cultural rights are not entrenched.

Be that as it may, due to the diversified ethnic-cultural landscape, Malaysia is not only unique in the South-east Asian region but in the international fore-front too. Malaysia has managed to attract millions of tourists into the country to witness the magnificent pluralism. Nonetheless, in light of regionalization, internationalization and globalization of businesses there are increasing movement of people from one country to another in search of better prospects in terms of employment and standard of living. Thus, more and more countries have begun to accommodate a more multi-ethnic, multi-cultural society and multi-religious society. Therefore, multi-ethnicity, multi-cultural and multi-religious society is not just a national issue but a regional, international and global issue.

As such, countries have to ensure that a fair balance of rights is struck to ensure there is no marginalization of any segment of the society on the grounds of ethnicity, culture and religion. If there is marginalization of any segment of the society, the country has to address it accordingly. Otherwise it does not do justice to the term multi-ethnicity, multi-cultural and multi-religious society.

Religious Rights

Article 3(1) of the Federal Constitution provides that Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation. The constitution expressly provides that other religions can be practiced. Although the article did not expressly stipulate what are the religions, the fact that it stipulates that other religions can be practiced shows that the Federal Constitution acknowledges the existence of other religions besides Islam. Hence, applying the *ejusdem generis* rule, other religions are namely Buddhism,

Christianity, Hinduism, Sikhism, Taoism or Confucianism. Hence, the fact that the article did not expressly state the names of the religions is not an issue. However, it should be noted that the list of religions aforementioned is not exhaustive and thus the article does allow for the possibility of new religions being practised.

A point to be noted is since Article 3(1) of the Federal Constitution enables the practice of other religions, this means that religious ceremonies, festivals and observances can be carried out by any person professing any of the afore-mentioned religions. This right is guaranteed by the highest law of the country since it is imbedded in the Federal Constitution. Hence, the right to practise the religion has a constitutional footing. In that case, the right should not be arbitrarily denied as it can amount to a breach of the constitution.

Observably, Article 160 interprets the term ‘The Federation’ as the Federation established under the Federation of Malaya Agreement 1957. Thus, the Federation refers to the fourteen states in Malaysia. When Article 3(1) of the Federal Constitution provides that Islam is the religion of the Federation, it means that Islam is the religion being practiced in the fourteen states. In such a case, it could mean that other religions are not allowed to be practiced. However, reference should be made to article 3(1) of the Federal Constitution which states that “...but other religions may be practised in peace and harmony in any part of the Federation.” This means Islam and other religions can be practiced in any part of Malaysia.

Moreover, Article 11(1) of the Federal Constitution provides that every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it. Article 11(4) of the Federal constitution restricts the propagation of any religious doctrine or belief among persons professing the religion of Islam. Thus, if there is any propagation on any religion among the Muslims, it is against the Federal Constitution.

Fundamental Liberties

A concern to be noted is that since the Federal Constitution allows the religious practices to be carried out, the question is whether these rights can be taken away *i.e.* be restricted or prohibited.

The articles of the Federal Constitution concerning religious rights fall under the purview of Part II of the Federal Constitution titled 'fundamental liberties'. The court in *Tan Hoon Seng v Minister of Home Affairs, Malaysia & Anor & Another Appeal* (1990) remarked that any law governing fundamental liberties must be interpreted liberally and broadly. Thus, the manner ordinary legislations are interpreted should not be adopted in interpreting the Federal Constitution.

In the decision of *Dewan Undangan Negeri Kelantan v Nordin* (1992) the court declared that that the fundamental rights as enshrined in Part II of the Federal Constitution enjoy precedence and primacy. If that is the case, then the religious practices cannot be restricted or prohibited.

Fundamentally, Article 5(1) of the Federal Constitution provides that no person shall be deprived of his life or personal liberty save in accordance with law. The concern is the meaning of the term 'life' and 'personal liberty'. The Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan & Anor* (1996) eloquently interpreted that the term 'life' does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life.

It should be noted that the decision does not concern religious conversion. Nevertheless, the principle of law expounded is sound and apt to the issue at hand. This is because the right to practice religious observances is an important part of a human life. Such observances will mould and shape a person to be spiritual and religious. If a person does not have religious freedom, the right to practice religious observances has been taken away. The damage can be even more drastic especially to those young minds and children who need a strong foundation in religion. Thus, the issue of religious conversion is in breach of Article 5(1) of the Federal Constitution

As regards to the concept of equality in the eyes of the law, it is imperative in any country which adopts democratic ideals (Buruma, 1996). The idea of equality in the eyes of the law was first initiated in the 17th and 18th century in the United Kingdom (Tan, 1994). The idea was then spread to Europe and United States of America. Thus, it is not surprising that the idea of equality was imported into the Federal Constitution.

Article 8(1) of the Federal Constitution provides that all persons are equal before the law and entitled to the equal protection of the law. This means that regardless of whether a person is a Muslim, Buddhist, Christian, Hindu, Sikh, Tao or Confucianist, he should be accorded equal protection of the law. Furthermore, Article 8(2) of the Federal Constitution provides that except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion. Thus, in the case of *Public Prosecutor v Su Liang Yu* (1976) the court expounded that the objective of Article 8 is to bestow equal justice to everyone. This is regardless of the religion a person professes.

Nevertheless, the decision of his Lordship Gopal Sri Ram was given a full blow by the Federal Court. The Federal Court in *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] disapproved the decision of the Court of Appeal. Further, the court stated that perhaps the Court of Appeal was not aware of the recent and clear reminder of the law by the highest court in the land. The Federal Court also found that the conclusion of the Court of Appeal is a total deviation from the law regulating Article 5 and 8 of the Federal Constitution. Thus, it shows that one will not be able to assert constitutional rights based on Article 5 and 8 of the Federal constitution due to the Federal Court decision in *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004].

Notably, the constitution of any country is the body of rules which deal with the fundamental and far reaching principles governing the structure of a country (David, 1996). In a liberal society, one of the main purposes of a constitution is to restrain the exercise of political power (Alder, 1989). This is the reason the forefathers of the country drew the Federal Constitution. The constitution is the antecedent to the government (McIlwain, 1947). The framers of the constitution intended the government to be governed by the constitution. Nevertheless, the rights under constitutional law depend very much on the political-social environment (Jackson & Tushnet, 1999). Thus, it is important to consider the thinking behind the constitution which is known as 'constitutionalism (Harding, 2006). The spirit of the constitution must be examined upon coupled with the intention of framers of the constitution.

Thus, it is important for the judge to look into the spirit of the law and not strictly stick to the letters of the law (Denning, 1975). This is because the articles are fundamental to the meaning and effect of the constitution (Das, 1983). If the articles are misunderstood, it is akin to

misunderstanding the whole constitution (Hickling, 1978). Ultimately, the validity of the laws are determined by the fact of whether it produces just or unjust results (Hart, 1961). Furthermore, every law is said to have an expressive function (Mullender, 1998).

As for the Federal Constitution, one of its functions is to protect the rights of the citizens of Malaysia as rightly pointed out by his Lordship Raja Azlan Shah F.J (as he then was) in *Loh Kooi Chon v Government of Malaysia* (1977). Nonetheless, the findings of the Federal Court in *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] do not protect the religious rights of the respective ethnic community.

The Issue of Religious Conversion

There have been many reported cases in the media on the issue of religious conversion in recent years. The cases involve non-Muslims who convert to Islam and wish to later return to their original religion. Another difficult issue is the status of the religion of the children in the event they are minors. This is especially in cases where only one of the parent converts to Islam. It should be noted that the issue of religious conversion is not merely viewed by non-Muslims as mere change of religion. It is viewed from human rights point of view *i.e.* freedom of religion. This is because religion is a choice which should be left to the individual.

Religion is an identity of a particular ethnic community. The ethnic community will gather and carry out their religious observances. To an individual, religion has a sacrosanct link from the time of his birth. The moment a baby is born, the parents will indicate in the birth certificate their religion. Thus, the baby follows the religion of the parents. When he reaches a certain age depending on which religion, he will learn the Holy Scripture. When he begets a child, the procedure will be repeated for his child. One day when the person departs, his next of kin will carry out the necessary religious observances on behalf of the deceased person. The whole process will continue without a break in the continuity. Thus, when a religious conversion takes place, there is a break in the continuity. This is because the religious observances vary from one religion to another.

Hence, the concern is whether the laws provide adequate protection to the Muslims and Non-Muslims with regards to religious conversion. Most importantly, the laws must be able to provide certainty and justice in this rapidly changing environment (Nolan, 1999). Otherwise, the laws have failed in its aim, objective, purpose and goals.

The conflict between Civil law and Islamic law can result to conflicts among the various races and ethnic communities. The inter-racial conflicts can cause political instability depending on the gravity of the situation. Furthermore, the inter-relationship among the various races will be strained. One segment of the society will view the matter dishearteningly. In fact inter-racial and inter-religious conflicts are a serious threat to the country (Hwang, 2003). Thus, it is important that in a land which is rich of ethnicity, culture and religion, the inter-relationship among the various ethnic communities is preserved and well-guarded. This is because the religion of a particular ethnic community is their identity. If a person is robbed of his freedom of religion, it is the beginning of erosion of human rights.

If this ethnic conflict is not nipped at its bud, it can result to death or personal injury *i.e.* bloodshed. The whole nation can be paralysed if such state of affairs persists. It can affect the economic development of the country. It can destroy whatever was built by the forefathers and being built by the present generation. The country will not be able to accommodate any person regardless of ethnic, religious or cultural traits in a peaceful and harmonious manner.

Observably, since independence, the country has witnessed racial conflicts which have contributed to the political-social-economic direction of the country. Nevertheless, the conflicts can be avoided if the principles of tolerance and understanding are practiced by the various races and ethnic communities. The racial riot of 13 May 1969 although not concerned on religious conversion is a good example of how ethnic conflict can become very serious.

Malaysia is in its race to achieve developed nation status. It is taking drastic steps to develop the country and the society at large. This is because as a progressive nation, the government shoulders the responsibility in achieving a developed nation status. Hence, the government crafted the vision that in the year 2020, Malaysia will be a fully developed nation. In order to

achieve this vision, the government has planned several strategies to ensure that it achieves its mission. One of the main concerns of the government is building racial integration

Hence, the issue of religious conversion should be handled with utmost care. The sensitivity of the various communities and religious rights must be taken into account. This is because religious conversion will affect the particular ethnic community. In such a case the concern is whether such an act is legal and just. If the act is for the general welfare of the country, the fact that it affects the rights or interests of the particular ethnic community is not an issue (Shabbir, 1999). Religious conversion has been justified on the basis that Islam is the official religion of the Federation. This will be at the expense of the rights and interests of the particular ethnic community.

If the government were to pursue such a matter at the expense of the particular ethnic community, the government is faced with acute dilemma. On one hand it wishes to develop the country but on the other hand it affects the particular ethnic community. Thus, the government has to strike an appropriate balance between the interests of the nation and interests of the particular ethnic community. This is because it is a clear case where there is conflict of interests. The government has to ponder as to how it will reconcile the rights of the particular ethnic community to exercise its religious rights and the need to develop the nation.

Thus, the concern is whether the rights of the respective ethnic community are a pawn in the hands of the government (Wade & Bradley, 1986). Notably, the government must bear in mind that the government is of law and not men (Wade & Bradley, 1985). The government must be bounded by the law and act in accordance with the law. The decisions made cannot be solely based on what the decision-maker has in mind. The decision made must be inclusive in nature. The government must include the affected ethnic communities as part of its decision making.

On the other hand, the respective ethnic community has to realize too that the government is faced with this dilemma. The respective ethnic community should not consider that the issue was intentional, deliberate and flavoured with racism and hatred. Thus, the biggest challenge is to not to look any matter with a racial element. If such is the approach, the matter can be resolved

amicably. In order for this to materialize, there is a need for a system of mutual forbearance and compromise which is the base of both legal and moral obligation (Hart, 1990). Otherwise there will be a continuing dilemma for the government and there will be a constant conflict among the various ethnic communities.

The particular ethnic community expects the government to adopt a liberal approach in dealing with the issue of religious conversion. In fact liberalists argue that the best approach in any conflicts is to have a government with least powers (Afsaid, 1990). However, that is not the case in most countries. This is because in most countries the government is becoming more and more powerful (Hailsham, 1978). This is particularly because the government is pressured by the public to develop the nation to greater heights.

Nevertheless, the decision of the government must be fair and there must be justice imbibed in the decision. Essentially justice has many meanings as there are moral and social philosophies attached to the concept (Bodenheimer, 1967). Essentially, justice is the ultimate ideal social ordering of a community (Hall, 1982). In a multi-ethnic-cultural-religious landscape this is vital. Most importantly there must be a minimum machinery of justice (Friedman, 1967). This is to ensure that the respective ethnic community is given what is due to the community.

Case One – Subashini Rajasingam v Saravanan Thangathoray

The decision was made on December 27, 2007. The Federal Court held that the husband who had embraced Islam could lawfully, following his conversion, have the right to convert his child who is below 18 years old without the consent of his non-Muslim spouse. The Federal Court held that based on Article 12(4) of the Federal Constitution, the religion of a person under the age of 18 shall be decided by his parent or guardian. The court interpreted the term parent in a singular sense.

Nonetheless, according to the Eleventh Schedule of the Federal Constitution, words in the singular include the plural, and words in the plural include the singular. Thus, although the term parent is used in Article 12(4) of the Federal Constitution, rightfully, the court should have

declared that the consent of both the parents is required. In that case, the Muslim parent will not be able to convert the minor to Islam unless the non-Muslim parent gives consent. In the event, consent is not given it means that the minor will remain in the religion before one of the parent converted.

This makes sense since both the parents are responsible for the child. They both begot the child. The decision of one parent cannot become insignificant or irrelevant merely because the other parent has converted to another religion. Furthermore, if the decision of one parent supersedes the other by reason of the religion of the other parent, it shows that one religion has overshadowed the other religion. In such a case, one parent is not afforded equal protection by the law. This will run contrary to Article 8 of the Federal Constitution that everyone is equal in the eyes of the law and thus require equal protection of the law.

Furthermore, the Guardianship of Infants Act 1961 gives equal rights to a mother and father on the upbringing and custody of their children. This is in line with the 11th Schedule of the Federal Constitution which requires the consent of both the parents.

On the other hand, in Islam when the father or mother is a Muslim, the child automatically becomes a Muslim unless the child is above the age of 15 and can choose his or her own religion. First in foremost, it can be observed that there is a conflict between Islamic law and Civil law on this point. This is because the decision rests on a single parent. Furthermore, the legal age for choosing a religion under Islam is 15 years. This is to be contrasted with Civil law where the age of majority is 18 years by virtue of S. 2 of the Age of Majority Act 1971.

Case Two – Shamala and Muhammad Ridzwan Mogarajah (Dr Jeyaganesh)¹

Shamala's husband named Dr Jeyaganesh has converted to Islam. She is fighting for the custody of their children. The matter has been fixed for hearing at the Federal Court to answer several constitutional questions. Of interest to this study are the conflict between Civil laws and Islamic laws governing conversion and family matter; whether the Administration of Islamic Law

¹ Shamala seeks 9-man bench in custody battle, (May 27, 2009) *New Straits Times*, p. 13

(Federal Territories) Act 1993 runs contrary to the Federal Constitution when a parent converts a minor and where would the non-Muslim parent seek remedy when the Muslim spouse had converted their child from a civil marriage.

It should be noted that on April 22, 2009 the Cabinet decided that the religion of children born to non-Muslims must be the common religion of the parents when they were married. This means that Muhammad Ridzwan Mogarajah has no right to convert the minor. It also means that the minor will follow the religion at the time of the civil marriage *i.e.* Hinduism. Although such a decision is welcomed by the Hindu community, it may not be welcomed by the Muslim community. This can be seen in the reaction of Pas over the issue and the reaction of the non-Muslim over the reaction of Pas.² It should be noted that when the government made the decision, the Cabinet did not only comprise of Muslims. There were also persons of other religions. Thus, it is a decision which is inclusive in nature. On the other hand, it cannot be said that the decision was made by non-Muslims.

In view of the decision, the government agreed to amend the Law Reform (Marriage and Divorce) Act 1976, Islamic Family (Federal Territories) Law 1984 and Administration of Islam (Federal Territories) Islamic Law 1993.³ Nevertheless, the issue will have to be discussed at the Rulers' Council first.⁴ However, the Rulers' Council decided they will have to first seek the views of the Islamic Council of each of the states.⁵

Case Three – Indira Gandhi and Pathmanathan

The Syariah Court has granted interim custody of children to Pathmanathan who has converted to Islam. Meanwhile Indira Gandhi has applied to the High Court to claim custody of the children. The court has granted her interim custody too. The concern is which decision stands.⁶

² Pas slammed over conversion issue, (May 2, 2009) *New Straits Times*, p. 15

³ Amendments coming to ease conversions, (June 17, 2009) *New Straits Times*, p. 8

⁴ Rulers to discuss cabinet decision, (June 27, 2009) *New Straits Times*, p. 1

⁵ Rulers seek councils' view on conversion of minors, (June 30, 2009) *New Straits Times*, p. 1

⁶ Conversion laws face major test, (May 3, 2009) *New Straits Times*, p. 31

The problem arises because Malaysia has a dual legal system with Civil and Syariah courts operating side by side. Nonetheless, they do not see eye to eye. If the decision of the Syariah court stands it is unfair to the non-Muslims and if the decision of the Civil courts stands, it is unfair to the Muslims.

Conclusion

The conflict between Civil Law and Islamic Law on the issue of religious conversion and its effect on minors is far-reaching. The decision made by the Cabinet has found solace in the hearts of the non-Muslims but it is not in favour of the Muslims. Both parties do not want to compromise on the matter. This is so especially due to the fact that it concerns religion. The very core principle of any religion is understanding and acceptance. Yet neither party is willing to do so. There is a feeling that their respective religion is given less importance if they were to give in. Hence, both parties are at logger-heads on this issue. Solution does not seem to be the answer to this problem. Perhaps, this is a price to pay having two systems in a pluralistic society.

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