



**RE-APPRAISING SECULAR-ISLAMIC POLITICS IN MALAYSIA:
LOCATING THE CASE FOR COMMON CITIZENSHIP**

by

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ABSTRACT

This dissertation analyses the process of de-secularization of the Malaysian state. It identifies the political role of Islam as an important element in explaining how the Malaysian state sustains the language of special ethnic 'rights' to negate the ideal of common citizenship in Malaysia. The historical dominance and constant politicization of Islam reinvents the notion of special citizenship 'rights' for the majority Malay citizens, which has serious impacts upon equal opportunities and fundamental liberties of minority citizens. This process is further buttressed by legal apparatus that separates Syariah jurisdiction from civil courts, leading to unequal public access to justice and public deliberation in favour of reasons grounded in religious doctrine.

Drawing on Rawlsian-informed critique of power, the thesis advances previous work on Malaysian democracy to critically assess the role of religion in politics that defends state-sanctioned differential citizenship rights. The condition of pluralism in Malaysia is an important case study for a robust understanding of the value of secularism as a principle of state practices. In doing so the thesis makes the normative claim that religion should not reside within the state where it can be politicized with the cost of justifying differential citizenship in a multi-cultural democratic society.

TABLE OF CONTENTS

| | | |
|-----|--|----|
| 1 | INTRODUCTION..... | 1 |
| 1.1 | Problems, aims and objectives | 1 |
| 1.2 | Background | 5 |
| 1.3 | The framework to capture the secular-religious polemics of the Malaysian state | 11 |
| 1.4 | Contemporary contentions | 18 |
| 1.5 | The arguments sketched out..... | 19 |
| 2 | Approaches to state power and the use of reason..... | 24 |
| 2.1 | Introduction..... | 24 |
| 2.2 | Power, ideology and public reasoning | 28 |
| 2.3 | Research questions | 31 |
| 2.4 | Legitimacy, stability and the public reasoning of secular/religious dynamics..... | 37 |
| 2.5 | Religious power and the use of reason..... | 48 |
| 2.6 | Capturing the process of de-secularization | 54 |
| 2.7 | Collection of data | 56 |
| 3 | LOCATING SECULARISM | 58 |
| 3.1 | Introduction..... | 58 |
| 3.2 | Separation thesis and the public role of religion | 61 |
| 3.3 | Conduct of the state and the citizens as the agency of secularism | 69 |
| 3.4 | Secularism and the historical debate of Islamic state..... | 76 |
| 3.5 | Conclusion..... | 80 |

| | | |
|-----|--|-----|
| 4 | COLONIAL TERRITORIES AND DISPARATE STATE PRACTICES: FROM BRITISH MALAYA TO MALAYSIA..... | 83 |
| 4.1 | Introduction..... | 83 |
| 4.2 | Merging the historical narratives of Malaya, Sabah and Sarawak..... | 84 |
| 4.3 | The conception of the secular state, the Malay <i>Kerajaan</i> and religious forces..... | 88 |
| 4.4 | The business of governing and the politics of belonging..... | 98 |
| 4.5 | Conclusion..... | 124 |
| 5 | POLITICAL TRANSITION FROM SUBJECTS TO CITIZENS..... | 126 |
| 5.1 | Introduction..... | 126 |
| 5.2 | The cultural conversion and the differentiation of colonial subjects..... | 131 |
| 5.3 | Post-war left-wing movement and the politics of the right of abode in Malaya..... | 141 |
| 5.4 | Conceptualizing Political ‘rights’: From colonial subjects to citizens..... | 145 |
| 5.5 | Ideological preamble to the definition of citizenship..... | 152 |
| 5.6 | Conclusion..... | 160 |
| 6 | MALAYSIA: THE FRACTURED NATION-STATE..... | 162 |
| 6.1 | Introduction..... | 162 |
| 6.2 | A fractured vision of nation-state..... | 165 |
| 6.3 | The secular state and differential rights in Malaysia..... | 168 |
| 6.4 | Ideological dominance of Islam-Malay and fractured citizenship..... | 173 |
| 6.5 | Separation of Singapore from the Malaysia Federation 1965..... | 181 |
| 6.6 | The Constitution and Malaysia (Singapore Amendment) Separation Bill, 1965: The erosion of parliamentary democracy..... | 187 |

| | | |
|-----|--|-----|
| 6.7 | Constitutional restrictions on free speech after 1969 ethnic riot: the cultivation of self-censorship in the public political culture..... | 192 |
| 6.8 | Conclusion..... | 199 |
| 7 | RE-POSITIONING THE POLITICAL ROLE OF ISLAM AND THE DE-SECULARIZATION OF THE MALAYSIA STATE | 201 |
| 7.1 | Introduction..... | 201 |
| 7.2 | De-secularization of the state | 206 |
| 7.3 | Selective government intervention in the structuring of economic nationalism via the New Economic Policy in the 1970's..... | 211 |
| 7.4 | The 1988 amendment to Article 121(1) and judicial lacuna | 215 |
| 7.5 | The quest for Islamic State..... | 229 |
| 7.6 | Contesting the de-Secularization of the Malaysian state..... | 234 |
| 7.7 | Conclusion..... | 270 |
| 8 | Conclusion..... | 274 |
| 8.1 | Further reflections on the secular-Islamic discourse | 274 |
| 8.2 | The Malaysian scenario..... | 282 |
| 8.3 | Wither the secular state in Malaysia?..... | 291 |
| | Appendix I..... | 297 |
| | Appendix II | 305 |
| | References..... | 319 |

1 INTRODUCTION

Abstract: This chapter presents the problems, background and provides the overall frame to capture the historical narratives and contemporary contentions associated with the process of de-secularization. It also sketches the overall plan of the dissertation in the last section.

1.1 Problems, aims and objectives

This dissertation analyses the de-secularization process of the Malaysian state. It examines the discourse of public deliberation on the negotiation of the secular as a political value in the continuing narratives of the Malaysian political landscape, in different stages – colonial, the decolonisation and the transition into the contemporary period. For this purpose, documented public debates by key state and non-state agents will be used as a way to map the historical and ideological journey of secular-religious deliberations. These documented debates will be substantiated with contemporary empirical political events to establish the dynamic relationship between the nature of the secular state and the political construction of rights for Malaysian citizens.

The analysis of the de-secularization of the state reassesses the concept of the ‘secular state’ in Malaysia, in particular how religion, as a dominant cultural feature in the society, underscores the dynamics of political relations between the state and the citizens. Since religion is a dominant element in the construction of cultural and political identities in Malaysia, the use of ethno-religious category to refer to group dynamics will be used in the dissertation. This is particularly pertinent where the dominant ethnic Malays are concerned because in Article 160 of the Malaysian Constitution the Malays are legally identified as Muslims, and the position of the Muslims in general is strengthened by its legal proxy to the official position of Islam in the Federation. Ethnicity and religion are the key elements of

political control for the state and thus all issues related to the commonality of citizenship are affected by the ways in which these elements come into play upon the distribution of the state resources.

The reappraisal of the secular state is especially relevant where religion plays such critical role in the public sphere in Malaysia. There is a need to unpack the relationship between the state and religion where the issue of coercive use of state power upon the right of citizens is at stake, and this is ideologically interconnected with the political construction of Malaysian citizenship right. This is examined historically in different stages of colonial and postcolonial rule, by drawing out the key elements of ideological construction underlining the developing political conceptualization of rights through the procedures of constitutional amendments. The amendments being made to the Constitution in the Parliament gradually resulted in the political erosion of citizenship rights particularly among citizens coming from the minority ethnic and religious backgrounds. The de-secularization of the state therefore critically affects the values of equality and justice usually accorded to all citizens who should enjoy the commonality of rights.

Three contemporary cases are highlighted to substantiate the claim that the de-secularization of the state has undermined the rights of minority citizens. These include the use of the word 'Allah' among non-Muslim congregations, the rise of the Indian HINDRAF (Hindu Rights Action Force) movement against institutional discrimination and the religious persecution of the LGBT community. The first case study looks at the official ban on the use of the word 'Allah' among non-Muslim citizens. It addresses the issue of 'liberty of conscience', constituting as it does a direct and radical challenge to the dominant conceptualization of faith and identity in the country. The word 'Allah' has been used by Christians -mainly in the Malaysian states of Sabah and Sarawak - for Church worship, Biblical studies as well as in

other religious scriptural publications. The use of ‘Allah’ for Christian worship has been somewhat tolerated by the religious authorities until recently when the Malaysian Federal government imposed legal ban upon the use of the word ‘Allah’ in Christian publications and worship. This prompted the Christian group, especially the Catholic Church to challenge the official ban in the High Court. The second case looks at the empirical aspect to the de-secularization process of the state by the HINDRAF movement. The HINDRAF movement is an organisation associated with a specific minority ethnic group within Malaysia—the ethnic Indians—and making political and economic claims on behalf of that group. Within this theoretical framework, HINDRAF has not for the most part radically contested the dominant mode of ethnic bargaining embedded in the state practice. Yet it is nonetheless interesting for two reasons. Firstly, while it has not extensively challenged the nature of the secular state in Malaysia, its emergence was undoubtedly linked to the contemporary de-secularizing trend, specifically in relation to the destruction of nearly 80 Hindu places of worship. Secondly, while the movement began as a set of primarily ethnic claims, elements within the movement have sought to reorient towards a more structural critique of contemporary ethnic bargaining in Malaysia—a shift epitomised by the name change from HINDRAF to HRP (Human Rights Party).

Yet this shift is not uncontested within the movement, and it hence represents a useful lens through which to analyse the ways in which strategies of contestation and alternative expressions of public reason constitute not only a critical engagement with the dominant modes of political ethnic bargaining in the country, but also a critical discourse between opponents of the status quo. The third case concerns the government-backed public condemnation of the LGBT community. Such political repression against the minority group is epitomized in recent times when the criminalization of homosexuality is played out in the

public discourse - the second Sodomy trial of Anwar Ibrahim, a prominent opposition leader, and the police ban on the human rights awareness events organized by 'Sexuality Merdeka'. The experiences of discrimination faced by the Mak Nyah (Transgender) community will be highlighted. Currently four Mak Nyahs are challenging the constitutionality of the Syariah law in prohibiting cross-dressing. Most Mak Nyahs are Malay Muslims, and are therefore subject to the penal code under Syariah. Section 28 of the Syariah Criminal Offences (Federal Territories) Act 1997 forbids 'any male person from wearing a woman's attire in a public place and posing as a woman for immoral purposes'. Religious authorities at the state level have used such legislation to oppress the Mak Nyah community through arrests, interrogation, violence and detention. In November 2011 the Seremban High Court granted legal permission for four Muslim trans-genders to challenge Section 66 of the Syariah Criminal (NS) Enactment, on the grounds that the Syariah penal code denies them their fundamental liberties guaranteed under the Constitution. All four claimed that they've been unfairly treated, arrested, sexually abused, beaten and subject to degrading treatments by the religious officers.

These three cases are selected because the Christians experience ideological repression due to the ban on the usage of 'Allah' in worship and their publications. The ethnic makeup of Malaysian Christians are diverse, they include mainly the Chinese, Indians, ethnic groups from Sabah and Sarawak. The HINRAF movement saw the sudden surge of Indian grassroots mobilization that was unprecedented in the history of Malaysian politics. The Mak Nyah and LGBT community include all ethnic groups. For this dissertation the focus is on the Malays Mak Nyah because of the way they challenge religious laws meant to regulate Muslims at sub-national level, which is unusual in the Malaysian experience.

1.2 Background

Normative Western political philosophy on secularism and its historical roots within the Judeo-Christian tradition has tended to project 'religion' as the problematic significant other. How faith and politics organize the governing principles of society will have significant impact upon the rights of citizens. Global migration and the expansion of multi-cultural communities in a single nation-state place an immediate demand upon most of these governments to reassess their political outlook and relations with such conditions of pluralism. The conventional understanding of politics and the 'political' within the discursive ambit of secularism is increasingly challenged by the empirical upsurge of religious inspired civil society formations and political movements in the public sphere (Habermas 2011). The relationship between the 'secular' and 'religious' and the ways in which their dynamics have become entrenched in contemporary politics, have engendered serious polemics in deliberative democracy across all societies in the contemporary experience. The fact of pluralism in contemporary societies continues to shape the content of our political debates, to the extent that it impacts upon the liberty of conscience of the citizens in the discourse of deliberative democracy. It is therefore imperative to redefine the conceptual meanings of secular politics and the significance of religious convictions underpinning political debates in the democratic discourse (Taylor 2011). Religious convictions can play important role in the political construction and understanding of citizenship rights and an overlapping consensus needs to be developed by communicating ideas through the process of public deliberation.

The de-secularization of the state emerged as a result of the mismanagement of the condition of pluralism in Malaysia. Like many modern societies, Malaysia is characterized by the diversity of values and perceptions grounded in people's competing comprehensive

doctrines¹. The provisions that privilege the Malay special position and Islam in the Malaysian Constitution partly reflects the political arrangements that prioritize consociational power sharing (Lijphart 1977). The ruling elites have been relying on the Malaysian Constitution to sustain the political stability to overcome the competing claims of religious, linguistic, ideological, or other cultural divisions. By invoking the special provisions for Malay and Islam in the Constitution, the ruling party UMNO (United Malay National Organization) have been able to mediate conflicts and negotiate the process of ethnic bargaining on the pretext of protecting the interests of the Malay and Islam for popular appeal, as well as for national security. This in turn leads to instances of group inequality and the undermining of equal citizenship at the same time.

The study draws upon Rawlsian political liberalism to deconstruct the content of arguments offered by government agents and to provide the normative avenue for the development of an overlapping consensus for the prospect of equal citizenship. Developing an overlapping consensus represents an important groundwork for the ideal of equal citizenship to rise above politics that have largely been driven by ethnic consociationalism (Mauzy 1993; Haque 2003). In ethnic consociationalism the balance of political power depends on guaranteed group representation, and these are often recommended for managing group conflict and maintain political stability in deeply divided societies. Using Rawlsian informed perspective in framing political engagements around overlapping consensus would challenge the politics of

¹ A doctrine is fully comprehensive when it covers all recognized values and virtues within one rather precisely articulated scheme of thought; whereas a doctrine is partially comprehensive when it comprises certain, but not all, non-political values and virtues and is rather loosely articulated. By definition, then, for a conception to be even partially comprehensive it must extend beyond the political and include non-political values and virtues. These include the fundamental conception about values of human life, ideals of personal virtues and characters that will inform the conducts of citizens. Rawls (1989:240) *The Domain of the Political and Overlapping Consensus*, New York University Law Review vol. 64(2)

ethnic consociationalism that has so far legitimized the special citizenship rights for the dominant ethnic group. It calls for greater citizens' participation in the public sphere where equal democratic citizens can make claims based on reasons that all can share, instead of negotiating claims on the grounds of special ethnic rights. This is a proposition to shift the paradigm from ethnic representation to proactive citizenship participation in the process of democratic deliberation.

The idea of common citizenship has always been problematic in Malaysian political developments and ethnic consociationalism has been used as the practical solution to resolve many political problems. Hence the current practice does not sit well with the liberal-democratic conception of guaranteeing citizens full membership with equal access to resources of the state (Marshall 1965). The politics of ethnic consociationalism has been practiced as a mode to mediate the dynamics of political bargaining in the Malaysian experience (Milne 1981; Gomez and Jomo 1999) but this dissertation argues that the examination of the contestation of the secular state offers an alternative thinking to theory of communal politics. The considerable focus on group politics, particularly on the practices of ethnic bargaining among the elites tends to lead to the focus on the political behaviour of particular ethnic groups. There needs to be a new approach in uncovering the nuanced link between identity politics and the role of religious ideas in unpacking the coercive means of state power that sustains the Malaysian political structure. The underlying problems of common citizenship in Malaysia cannot be explained by the discourse of ethnic bargaining alone, and further analyses on the agency of public deliberation needs to be explored in order to find out the ideological linkage behind the practices of ethnic bargaining and the power of the state.

Public debates, deliberation, discussions are important aspects of communicative action and reasoning that constitute the vital underpinnings of democracy and political participation of the citizens (Habermas 1981; Calhoun 1992). The conventional approach of the ‘vote-centric’ analysis mainly shows the procedural aspects of public decision making and the quantitative behaviour of citizens’ preferences in democratic deliberation. This approach alone does not address the critical issue of fulfilling the norms of democratic legitimacy where public debates provides to democratic deliberation (Kymlicka 2002). The main reason is that the ‘vote-centric’ model does not take into account the significance of public communication, debates, and how citizens provide reasons for the persuasions and the claims they make in the public sphere.

The discourse of public deliberation and political debates in Malaysia are largely driven by the polemics of ethnic and religious sentiments and this had had tremendous effect upon national identity formation of citizens in the plural society². The lack of common social and political will underscores the fractured sense of national identity, which then reciprocates the dynamics of ethnic consociationalism the public political culture. The politics of ethnic consociationalism combined with the historical dominance of Islamic precepts within its sub-national administrative structures results in the complex implementation of the legal principles of justice for a nation practicing diverse faiths.

² Using J.S Furnivall’s definition, ‘is in the strictest sense a medley, for they [ethnic groups] mix but do not combine. Each group holds by its own religion, its own culture [End Page 33] and language, its own ideas and ways. As individuals they meet, but only in the market-place,... [and] ... with different sections of the community living side by side, but separately, within the same political unit. Even in the economic sphere there is division of labor along racial lines, Natives, Chinese, Indians and Europeans all have different functions, and within each major group subsections have particular occupations. *Colonial Policy and Practice: A Comparative Study of Burma and Netherlands India*. J.S. Furnivall. New York: New York University Press, 1956 (1956, pp. 304–05)

Since the country's independence from British colonialism the institutional syncretism of secular Constitution and Islamic jurisprudence were formally accepted as part of the political governance in Malaysia. The development of the legal-political structure of the government had allowed the ideological fluidity of the religious precepts to gradually furnish the policy-making among key state agents. The significance of Islam in furnishing the core values of politics and the 'political' in Malaysia contrasts in many ways from the normative understanding of secularism and politics the West, to the extent that 'secularism' has been posited as the destabilizing element within mainstream politics.

Conventional understanding of the secular state apparatus generally requires the state to rise above sectarianism and religious disputes in the process of political and judicial deliberation. However in the Malaysian context, faith and the fundamental liberties have become the main locus of increasing state coercion. The main reason for this is that Islam plays a crucial role in the discourse of the 'political' among its community of believers, or *Umma* (Peletz 2002; Tibi 2002; Liow 2004; Peletz 2005; Hiroyuki, Milner et al. 2011). Political convictions and the expression of the political among the *Umma* tend to be grounded in the Islamic precepts. This becomes problematic where ideas of the secular and the practice secularism as principles of governance in societies are undermined by the public role of religion. The normative understanding of the fundamental liberties of the individuals as autonomous agents and the communitarian principle of faith in binding individuals to certain collective thinking constitute the on-going polemics in the debate about civil rights and notions of justice. Such debates have reached critical heights when the dynamics of the secular confront the political idioms of religious convictions (Weithman 2002; Rawls 2005; Habermas 2006; Freeman 2007; Laborde 2008). For these reasons, these debates are identified within the political

trajectories of the modern state, and used to examine how they shape the political conception of citizenship and the formulation of civic identity in the Malaysian public sphere.

The critical assessment of the secular state in Malaysia is compelled by the way the government utilizes state power and religious values to limit the scope of citizen's participation in the public sphere. The government selectively interprets the constitutional essentials for the purpose of dictating the political conduct of citizens holding other competing beliefs, religious or otherwise. The official role of Islam has been selectively interpreted by the state elites to elevate and protect the rights of the dominant Malay ethnic group over the rest of the population – thus justifying the preservation of differential rights, whilst undermining the rights of other citizens belonging to the minority ethno-religious backgrounds and the LGBT community. The general acceptance of such political practice has generated the conditions for key agents within the ruling party to execute systemic abuse of the statutory rights granted for the Malay community. This practice contributes to the process of de-secularization of the state resulting in the juridical autonomy of Syariah justice and Islamic public policy making.

Islam has always played a vital role in the history of Malaysian politics. In so far as Islam has the power to unite the *Umma*, identify the *bangsa* or the collective consciousness of the Malay people, religion becomes instrumental for the political elites to appeal to identity politics, fracturing citizens on the grounds of ethnic and religious identities. As far back as in the history of the Malay world, Islam has been tied to the discourse of politics, the institutional procedure of 'separating' religion from politics, as it is normatively accepted in the modern conception of the state, did not really occur in the early formation of the modern Malaysian state. Hence the legacy of institutional syncretism in fusing Islamic values and

precepts into modern day governance becomes the established norms of political governance in Malaysia. The problem with the fusion of religious precepts and modern bureaucracy is that it gives key stakeholders in the ruling party the autonomy to interpret the official status of Islam in the Malaysian Constitution to justify the elevated rights of the *Umma* over others, becoming the mainstay behind the official thinking of the government.

1.3 The framework to capture the secular-religious polemics of the Malaysian state

This section frames the historical inquiry into the process of de-secularization of the Malaysian state. ‘De-secularization’ as a conceptual framework was introduced by Peter Berger as a theoretical construct to reassess the theory of secularization against the contemporary resurgence of political theology in global politics³ (Berger 1999; Karpov 2010). For this dissertation, ‘de-secularization’ examines the conceptual erosion of secularism and its relationship to institutional violence against religious liberty, ethnicity and sexuality in the Malaysian context.

The problems of institutional discrimination in Malaysia are compounded by religious symbolism and arguments to reassert the narratives of ‘rights’ through:

- The historical dominance of majority ethnic rule,
- The political legitimacy of UMNO as the sole protectors of the Malay special position against the competing claims from minority ethnic groups,

³ This framework captures the sociological shifts on the ways in which the religious communities and its agents challenge the institutional norms underlining the public and private division of faith and political conduct

- The constitutional position of the special Malay-Muslim citizenship right as the preferred status quo in the political culture.

The political amalgamation of ethnic symbolism (Smith 1986; Smith 2000) with an increasingly more religious connotation in the contemporary period is indicative of how the public role of religion has displaced substantive political debates in favour of the moral polemic of sin and faith – the latter one mainly refers to the public display of religious credibility. Instead of addressing the fundamental problems of differential rights that is endemic in this ethnically divided and structurally unequal society, the religious discourse has contributed to the perpetuation of the hierarchy of ‘rights’, where the rights of citizens belonging to the dominant ethno-religious⁴ group are legally protected over and above the minority citizens. The political discourse on ‘rights’ in Malaysia has in many ways exposed the vulnerability of the liberal conception in framing the debates between group right and the range of choices and opportunities available to the individuals. This problem becomes critical when the public interpretation of ‘justice’ is framed in dual-legal system – the civil court and the Syariah justice system. It tends to fracture the concept of common citizenship because the public understanding of justice is polemically divided between religious truth and humanist reason. This is especially so, when the government actively pursues the value of religious credentials to justify political legitimacy.

At the heart the Malaysian Constitution lays the public role of Islam as the official religion of the Malaysian Federation enshrined under Article 3. The government emphasis on the Islamic values in the public sphere increasingly furnishes the popular perception that religion should displace the ‘secular’ for good governance and the dispensation of justice. The critical

⁴ This dissertation uses the term ‘ethno-religious’ to denote the importance of both ethnic and religious elements in social and political representation.

problem of embedding religion within the legal infrastructure of the state rests on the potential risk that the state and its agents employ the monopoly of coercion and power over its subjects, through the politicization of religious symbolism. This is further amplified by the legislative demands of the Malaysian Constitution necessitating the Malay monarchy to protect the ‘special position’ of the majority ethnic Malay under Article 153⁵. Contrary to the normative political consideration for the protection of the minorities in many democratic societies, Article 153 in the Malaysian Constitution defends the rights and interests of the Malay majority. Until today the statutory design of the Malaysian Constitution does not permit the formulation of liberal principles of citizenship that are all-inclusive and this problem had its roots embedded in the history of British colonialism.

‘The Rulers and their entourages are at the centre of the conservative opposition to constitutional reform, especially to reform based on equal rights and opportunities for members of all races who have made their permanent home in Malaya.’⁶

The legacy of colonial rule over plural society presents considerable obstacle to the process of political democratization because it played critical role in structuring racial domination through the legalization of native customs and rights, crystalizing racial identity in the subjects and cultivating the political roots of ethnic nationalism in the modern conceptions of citizenship (Mamdani 1996; Ndegwa 1997). The roots of contemporary ethnic nationalism grew as a result of the historical arbitration of racial domination in the colonial history, and

⁵ Reservation of quotas in respect of services, permits, etc., for Malays and natives of any of the States of Sabah and Sarawak. On Clause (1) of that Article it states that: It shall be the responsibility of the Yang di-Pertuan Agong to safeguard the special position on 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. *Malaysian Constitution* (2002)

⁶ *Public Records Office* CO 1030/67, no.1 ‘United Kingdom policy in Malaya’: CO memorandum for UK high commissioners in Commonwealth countries, 14 Sept 1954

the institutional credit given to the local practices of the native customs and cultures laid the grounds for the contemporary practices of racism and other forms of discrimination to emerge in relatively later in Malaysia.

In the history of British Malaya, the British colonial policy recognized independent sovereignty of the Malay rulers in history. The current Federal system in Malaysia grew out of the historical treaties that legally distinguished the differential power of jurisdictions between the Federal legislature which was administered by the British colonial officers and the Malay Rulers in the Malay States (except the British Straits Settlements of Penang and Malacca). The treatment of the Malay Rulers as independent sovereigns as well as allies was critical to the strategic extension of the British Imperial power into the Malays states. More than a decade after Queen Victoria's "1858 Proclamation to the princes, chiefs, and the people of India" – following the Indian Rebellion of 1857 – British foreign policies on colonialism shifted attention to the importance indigenous sentiments and the preservation of their indigenous rights (Metcalf 1965; Huttenback 1966; Belmekki 2008). These treaty obligations between the British and the Malay sultans underlined the 'non-interference' rationale expressed in the Proclamation⁷. By granting the Malay Sultans the power over Islamic affairs and the Malay subjects in the Malay states, the indigenous sovereignty and the inherited forms of inequality were preserved. The British had no jurisdictions whatsoever in the affairs of the Muslim community, who were (and still in ideological terms) the subjects of the Malay

⁷ 'Firmly relying ourselves on the truth of Christianity, and acknowledging with gratitude the solace of religion, we disclaim alike the right and desire to impose our convictions on any of our subjects. We declare it to be our royal will and pleasure that none be in anywise favoured, none molested or disquieted, by reason of their religious faith or observances, but that all alike shall enjoy the equal and impartial protection of the law; and we do strictly charge and enjoin all those who may be in authority under us that they abstain from all interference with the religious belief or worship of any of our subjects on pain of our highest displeasure'. (Queen Victoria's Proclamation, November 1, 1858)

Rulers, and likewise the Malay Rulers surrendered the business of administrating the overall political economy of Malaya to the British.

The differential legal powers that divided Colonial affairs from indigenous customs constituted the biggest obstacle to the formulation of common citizenship in the post-war period. The British tried to introduce and reconcile the two principles of HM government declared policy, which were citizenship by loyalty and the Malay special position⁸ (267 M1). The liberal conception of common citizenship that the British attempted to introduce was premised on the conviction that political right should be afforded ‘to all those of whatever colour or race, who might fairly be held to regard Malaya as their home and object of their loyalty’ (353-355 Malaya I). However the intended policy of the H.M.G became untenable as politics on the ground were polarized by the nationalist conservative movements dominated by the Malays on the one hand, and the remnants of the left-wing movements from the Second World War largely supported by the non-Malay, particularly the Chinese community (Cheah 2003). ‘The Emergency has given the Malays an outlet for the expression of national enthusiasm for the defence of their country against a threat inevitably associated with China and the Chinese’⁹. The Communist Insurgency triggered the polarizing development of ethno-religious relations.

The differential legal powers had considerable implications upon the process of constitutional framing for Malaya, resulting in a number of constitutional safeguards set out to prioritize the framing of the rights of indigenous Malays and the powers of the Malay Rulers (Fernando 2001). The constitutional provisions included safeguarding the socio-economic rights for the Malay community, preserving the sovereign functions of the Malay Rulers and the elevation

⁸ *Public Records Office*, CO537/1538 DO 43, p. (203-209), and (p.267)

⁹ *Public Records Document*, CO967/84, no.7. The Emergency here refers to the post 2nd World War Communist Emergency movement in Malaya.

of Islam as the official religion of the Federation. The political emphasis given to these categorical concepts by the Working Party¹⁰ generated significant ideological impetus for the Malay Kingship to claim the sovereign function in protecting the status of Islam and the Malay culture. The institution of the Malay Kingship is influential to the cultural heritage of the Malay community, and these elements of cultural influence have been extended to include the sovereign functions of the Malay Rulers. The most enduring sovereign function inherited in history includes the protection of the Malay culture and Islam. Malay, Islam and the Malay Kingship became inseparable elements in the ideological construction of the Malay Kerajaan (government), and as these constitute the domineering ingredients of governance, they inevitably furnish the logical extension of how the Malay citizen is projected and imagined. Gradually Islam becomes the unifying factor in defining the moral and social fibre of the Malays as individuals, the Malay culture and the Malay Kingship. Since Islam is the definitive moral compass and the legitimate identity bearer of Malay ethnicity, this becomes an established concept in the Constitutional vocabulary.

Where the evolution of the justice system was concerned, two areas of legal jurisdiction furnished the genealogy of legal thinking in the Malaysian justice institution. Logically Malay ethnicity and the foundation of Islamic thinking became legally congealed within the Constitutional definition of Malay. This is reflected in the glossary of definition under Article 160 where the definition of 'Malay' is one who professes Islam, speaks Malay and practices the Malay custom. This definition furnishes the ideological convergence for the ethnic identity of the Malays with Islamic doctrine, consequently blurring the lines between the social category of ethnicity and the conceptual category of religion as a belief system. It is

¹⁰ This Working Party was comprised of the Alliance, the Malay Rulers and the British Colonial Administration to review the constitutional proposals designed by the Reid Commission (Fernando 2002:143-188)

implicit in the common understanding that the Malay identity instinctively becomes subject to the moral dictation of Islam. Once the reciprocal linkages between Malay ethnicity and Islam were legally bounded, it paves the way for the government to claim the political obligations to protect and control the ethno-religious category of Malay-Muslims instead of nurturing the value of common citizenship.

In the 1957 Malaya Constitution billed for an independent nation, the political commitments to secular state were only expressed as ‘intentions’ by the ruling elites, leaving gaps in the meaning of secular to be interpreted and developed. Juxtaposing the conceptual dominance Malay Kerajaan (government) and the normative values of tolerance, neutrality and equality the political values of secularism tended to be perceived in contrary to the inherited special position of the Malay majority and the Malay ruling elites. The special position of the Malays has consistently been an integral part of the wider political scheme of economic development throughout the country’s developmental progress. In each phase of the political-economic development, the Malay agenda has remained consistent as a priority consideration for the ruling party UMNO (United Malay National Organization). A critical juncture in the 1980’s changed the legal-political landscape of the country when the ruling party faced an internal crisis, prompting the president of UMNO, who was also the prime minister to make major amendments in the Malaysian Constitution.

The executive action of the Prime Minister in the 1988 Constitutional Amendment had the effect of subverting the meaning of the ‘secular’ state in Malaysia. One of the most compelling amendments was the addition of Clause (1A) to Article 121 which effectively restricted the High Court from interfering into the jurisdictions of the Syariah courts. This amendment gives the government greater the use of coercive state power against other political contenders - Muslim and non-Muslim alike - for questioning the legitimacy of the

government. At the individual state level¹¹, it strengthened the juridical autonomy of Syariah justice in the policing the moral conduct of the Muslim population. The legal and sociological implications of this particular Amendment has generated unprecedented complications in adjudicating justice in matters relating to inter-faith relations - marriage and divorce, custodial rights, burial rights, the conversion of minors and apostasy.

1.4 Contemporary Contentions

The process of de-secularization in Malaysia is a gradual historical build-up, with it and its socio-political implications became apparent when Islam and its principle values are defended at the cost of citizen's fundamental liberties and rights to equal justice. The intense state politicization of Islam has not only limited the scope for liberal interpretation of justice, but the official status of Islam lends weight to the dominance of the Malays in mainstream politics. The ideological potency of Islam in politics is considerably linked to the history of Malay grassroots politics in Malaysia and because of this, the dynamics of political contention was fragmented by the diverse ethnicity and religious perspectives (see Khoo 2010; Cooke 2003).

The rise of civil society movements along deep ethno-religious differences presents perennial difficulties for the various civil and political organizations to reach a common objective and concerted strategy in their quest to challenge authoritarian state policies. These differences on the other hand have been instrumental for the state to keep applying policies of repression including the application of detention without trial under the Internal Security Act (1960)

¹¹ The Malaysian Federation is made up of 13 individual states and the Ninth Schedule of the Malaysian Constitution delineates the legislative functions of the government into Federal List and the State List. Under List II of the State List, except for the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic laws are administered and legislated under the purview of the State government. (Federal Constitution, 2002)

upon many political dissidents and leaders of civil movements in the name of public order or national security. This Act is the legal hallmark of the Malaysian government's repressive measure against any further attempts by individuals, civil organizations and other political groups to push for a liberal agenda in the political landscape.

The repressive policies of the ISA (Internal Security Act) combined with the legal amendments since the 1980's shifted the conception of justice from a generous interpretation to the elevation of theological discourse. This constituted a path-dependent that furnished significant discursive turn for the political ascendancy of Islam as a contentious force in post-Mahathir era. Islam has now become an important political conception both for the state and other political contenders. This is particularly so when the organizing principles of governance are entwined with the salience of Islam as the doctrinal foundation of the private lives and public discourse of the Malay-Muslims.

1.5 The arguments sketched out

In Chapter 2, the dissertation locates the history of ideas that structure the relations of power underpinning the institutional frame of the ambivalent secular state in Malaysia. In drawing out the strands of thinking behind such power structure the dissertation uses critical junctures¹² to illuminate the explicit institutional changes in the legal sphere that have considerable impacts upon the multicultural citizens in the Malaysian society. The study of the state reconstructs a timeline of the critical events that constitute the process of de-

¹² Critical junctures frames the events to contextualize the study of multifaceted causal relationships usually underscored by multiple causality, path dependencies, contingent events, and complex interaction effects. Büthe, Tim. 2002. "Taking Temporality Seriously: Modeling History and the Use of Narratives as Evidence." *American Political Science Review* 96 (3): 481-493. Hall, Peter A. 2003. "Aligning Ontology and Methodology in Comparative Politics" In *Comparative Historical Analysis in the Social Sciences*, edited by J. Mahoney and D. Rueschemeyer, New York: Cambridge UP, 373-404

secularization, in particular on how certain ideas about religion and political rights were developed and institutionalized within the historical framework of a particular state tradition. It illuminates the interplay between the opportunities of political freedom and the immediate constraints imposed upon the prospects of liberal space by repressive state actions.

The critical juncture framework suggested by Capoccia and Kelemen (2007:348) will be used to analyse the events that triggered the production of a certain political practice that transform the ideological character of the state that constrains future choices. This emphasizes the significance of political crises and the ensuing decisions that shape the terms and understanding of the notions of rights in the political discourse. This approach aims at linking ideas, reasons and values with the institutional practices of the state following the major shifts or changes in the political events in Malaysian. By linking political text – public records, justifications for Constitutional amendments, political statements – and debates to real political events (van Dijk 1995), it aims to construct a coherent frame with which to underpin the process of de-secularization.

Chapter 3 addresses how government involvement in religion influences understanding of secularism as a state practice and how they impact upon the public deliberation. In re-exploring the concepts of secularism as state practice, the aim is to bring to light a different dimension of state theorizing whereby the inclusion of religion may add to our contemporary understanding about its impact upon public deliberations and ideas that underpin Malaysian citizenship. This chapter illuminates the importance of agency within the normative structure of secular politics by setting out the dynamics of political relations between the state and the citizens within a democratic framework.

Chapter 4 is a historical narration about the institutional merging of Colonial Territories and disparate colonial state practices. It traces the problematic emergence of secular governance and native customary practices in the Malaysian history. Where ideas and the practice of secular governance were historically framed by colonialism, the colonial creation of the semi-modern states in Malaya, North Borneo and Sarawak incorporated many elements of traditional authority and religion was particularly tied to the nature of the local customs. It identifies the important events at which the secular-religious (Islam and other) encounters shape the narrative of political interactions and participation. This chapter reviews the local literature and Public Records Documents on the formation of the semi-modern state in Malaya, North Borneo and Sarawak, paying particular attention to the three important ways in which colonialism formalized the establishment of religion within the semi-modern state formation: the institutional reinforcing of local or indigenous leadership, establishing the role of Islam and the construction of ethnic-communalist ties, bringing the histories of the three territories together to analyse Malaysian politics as a whole, rather than different geographical partition.

Chapter 5 examines the political transition from colonial subjects to citizens. This chapter focuses on the problematic transitions from colonial subject to citizens and examines the post-war conflicts and politics of reconstruction. Considerable attention is given to the era of the Communist insurgency and the ways in which this part of history plays important role in implicating the state to dominate a particular narrative about nationalism, loyalty and the elements of citizenship.

Chapter 6 discusses the concept of 'fractured nation-state'. It contextualizes the political events that had significant impacts upon the re-positioning of the role of Islam in politics and society. It explores the political engagement of the state with religion and its impact upon the

Malaysian public sphere. It focuses on how the events of the ethnic riot in 1969 revitalized the use of state coercive power upon individuals and groups that were perceived to challenge the special position of the Malays in the Constitution. This chapter highlights the beginning the use of Constitutional amendments as a strategy of control over contestations in Malaysian politics.

Chapter 7 examines the re-positioning the political role of Islam and the de-secularization of the Malaysian state. It traces the emergence of the dominant concept of Malay-Muslim identity in the public discourse and identifies the role of political agents in furnishing the justification of differential rights through the narratives of political text and debates. The amendments made to Article 121 of the Constitution in 1988 are identified as a major turning point in the repositioning of the role of the Islamic laws and this will be linked to the analysis of de-secularization. The chapter argues that amendments to Article 121 had resulted in the gradual loss of human rights among the minority communities and uses three empirical cases to substantiate the claim.

Chapter 8 recaps the issues that have been raised in the Malaysian public discourse, particularly the use of state coercive power in shaping the trajectories of differential rights and the ways in which these have been linked to the undermining of basic liberties brought about by the Constitutional Amendment to Article 121. It illuminates this issue as a problem of political legitimacy and to apply Rawlsian informed conception of the role of ‘public reasoning’ to frame the problematic issue of legal dualism grounded in the secular-religious jurisdictions in Malaysia. The Constitutional Amendment to Article 121 has contributed to significant changes to the political terms and agreement of how basic justice should accrue to all citizens. Whilst the religious institutions have been granted considerable judicial role in dictating the moral conducts of Muslim citizens, there have been a significant lack of judicial

recourse for citizens who are wedged in between this logjam of legal dualism. In the final analysis this amendment has considerably undercut the meaning of fundamental liberties and the liberty of conscience for democratic citizens to co-exist in a multi-cultural society.

2 APPROACHES TO STATE POWER AND THE USE OF REASON

Abstract: *This chapter presents the study of secular practices in the Malaysian state in the context of the Anglo-Malay development of the institutional concept of Malay Kerajaan. The conceptual underpinnings of the power play within the Kerajaan are then explored in relation to conceptual developments of political 'rights' associated with common citizenship. Since Islam occupies an important role in the dynamics of traditional legitimacy and the modern governance of the Kerajaan, this gives a critical dimension to the modern political debates about justice and the conception of rights.*

2.1 Introduction

The concept of the secular state is intricately tied to a number of institutional considerations that are broadly defined in relation to the empirical changes associated with modernity, economic industrialization and the process of democratization (Lechner 1991:195; Lechner 1992). In this context the institutionalization of a secular state implies the logic of secularizing the society, thus entailing a certain break or intellectual rupture from the traditional beliefs in religion and its practices of the past, making religion insignificant in the public sphere. However the reality is somewhat different because new forms of faith based movements have equally emerged with such force that they become assertive the world of politics (Cassanova 1994; Asad 1999; Lambert 1999; Sheehan 2003; Norris and Inglehart 2004; Martin 2005). Religious revivalism in the public sphere has now reached a cross road between religious moral thinking and secular thinking and this necessitates the intellectual engagement of the secular with its theological past and in its present relationship. Where competing notions of rights are concerned, the ways in which rights are negotiated and deliberated within this frame of religious and secular contentions become key to unpacking the fundamentals of human rights in the discourse of democratization.

The analysis of the secular state in Malaysia locates politics of citizenship right in the arena of secular-Islamic contestation. The institution of governance is identified as the institutional domain to examine the use of public reasoning in the deliberation of citizenship right. Although the secular-religious contestations can happen both in the formal (government) and the informal (non-government but public) domains, they are not mutually exclusive. Instead these two domains influence one another, and it remains the focus of this study to zero in on the kinds of reasons motivating the government to deliberate on political questions related to the rights of the citizens. The examination of the secular state is confined within the institutional or the formal domain of the government, but the analysis will take into consideration the ways in which state practices and public policies influence the informal domains, and in turn, reshape the ideological foundation of the state.

In the process of identifying these contestations, it is argued that some of the major political events have contributed to the de-secularization of the Malaysian state. These political events and contestations have often been stabilized usually through political mediation in the form of ethnic consociationalism, or in the extreme case, the coercive use of state power through detention without trial. Unpacking the values of political mediation through examining the agency of reasoning constitutes the main focus of the study in reappraising the Malaysian secular state. The call for a Rawlsian informed liberal framework in the Malaysian secular constitution is critical here because of how the government has tended to use religion to justify increasing coercive measures against political actors and ordinary citizens. The ideological reasoning behind the coercive state practices will be traced through the analysis of public text and debates. The content of these debates will be drawn from archival documents and contemporary Parliamentary debates as it explores the motivations behind the political reasoning in the formulation of policies and legislations by state agents.

The process of de-secularization reflects major ideological shifts in the practices of local institutions and these are historically contingent that underscore the political development of the Malaysian state. Local institutions, particularly the Malay *Kerajaan* for instance, came to participate in the alliance partnership with the British colonial government, played a significant role in shaping the public role of Islam in institutional governance as well as in their obligation towards the political destiny of the Malay community. In the history of the old Malay world, the concept of *kerajaan* came to mean, 'the condition of having a raja' (Milner 1982). In this context, the role of the raja was mainly ceremonious in bestowing titles and conducting other cultural ceremonies, and was usually conceived by Malays as the upholder of the political and cultural universe. Hence the historical linkages between the cultural world of the Malay community and the role of the Malay *Kerajaan* continue to shape the character of power relations despite the introduction of secular values in modern governance.

The Malay *Kerajaan*, as a local institution, also interacted with other bodies created for and by the immigrant communities that continually shaped the dynamics of the administrative domain of colonial governance. Considerable attention will then be given to the agencies of people and the role of ideas, particularly those related to theological convictions and its counterparts, in shaping critical policies and legislations that have serious impacts upon the initial conception of common citizenship.

Unpacking the course of de-secularization will combine an exploration into the history of ideas and in the making of institutional framework with the contemporary focus on the discourse of political reasoning that constitute the substance of micro-level debates in the Parliament. It is a process of continual investigation into the fluidity of ideas linked to the dynamics of power and the discourse of reasoning throughout the different stages of history.

At the backdrop of these constant and unwavering episodes of historical progression, significant political events will be identified as critical junctures that marked considerable changes to the state and the society as a whole, to the extent that they produce divergent institutional legacies, and for that matter public policies from the preceding era (Collier and Collier 1991; Villalon 1998; Greer 2008). This study recognizes a number critical junctures that rendered decisions made about the impending development of politics and public policies irrevocable, thus having significant effects upon the fundamental liberties and rights of Malaysian citizenship.

This study locates the Parliament as the important arena of formal decision making following a moment major political event to represent a critical juncture. The Parliament generates the outcomes of the important decisions and amendments that are related to the distinct processes of change at the broader institutional level. In examining these political debates documented in the formal arena, the recurring ideas and values that the state and its agents employ will be traced and scrutinized particularly on how they play significant role in the ideological construction of the separate identities for the citizens and the justifications for the policies of differential group right. The ideological construction of separate identities and the concomitant policies governing differential rights problematize the broader dynamics that fused these communitarian ideas of rights with the symbolic values of religion into the foundation of the modern state formation in Malaysia.

Political events that led to legal amendments have had the biggest impact upon the de-secularization process, which subsequently undermine the fundamental liberties of the citizens. The study identifies three separate but related informal arenas in the contemporary period that have been affected by the political-legal contestations. The first one is the empirical arena where the ideological contestation of secularism manifests in the legal row

over the use of the word ‘Allah’ by the non-Muslim faith communities. The government imposed restrictions upon the distribution of the Malay translation of the Bible to the Christian believers only, thus putting limits upon the exercise of fundamental liberty of Christian citizens to propagate the faith to people who are non-Muslim and non-Christian. Article 11 of the Freedom of religion in the Malaysian Constitution, Clause (1) states that ‘Every person has the right to profess and practice his religion and, subject to Clause (4)¹³, to propagate it. The second case examines the political activism of the HINDRAF and HRP as a significant counter-hegemonic movement challenging the dominant interpretation of Malay-Muslim discourse in justifying the policies of differential citizenship rights in the Malaysian public sphere. The third one relates to the religious repression of sexual minorities where four Malay transgender or *Mak Nyah* had used the Federal Constitution to challenge the Syariah law on cross-dressing.

2.2 Power, Ideology and Public Reasoning

This dissertation analyses the secular-religious dynamics of the Malaysian state in different phases of political governance: the colonial, the decolonization, the transition into the post-colonial and the contemporary. In each phase of political governance, the secular-religious dynamics redefine the relationship between the governing state and the subjects or citizens through the conceptual interpretation of ‘rights’. It begins with framing the sociological emergence of ethnic power relations since the colonial period by examining its ideological dominance in implanting the values of ethnic symbolism into the structure of the governing elites throughout the historical process of state formation. Focusing on the values defining the practices of early historical alliances between the British and the Malay Ruling elites, it

¹³ Article 11 Clause (4) states that, ‘State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Federal law may control or restrict the propagating of any religious doctrine or belief among persons professing the religion of Islam’.

draws on the domineering influence of Anglo-Malay relations upon policy choices as well as the development of the *Kerajaan* concept over time. Once the Anglo-Malay institutional alliances were established, colonial policies on the issues of land, culture and legal jurisdictions over immigration and citizenship in particular – would be grounded in the treaty arrangements that governed the political relations between the British and the Malay Ruling elites. The patterns thus created continued to persist within in the basic frame of working relations between the British and the Malays Ruling elites. Unless there are contingency forces strong enough to break the pattern, the dynamics of ethnically structured power relations constitute the ‘path dependency’ well into the contemporary development of Malaysian politics.

The political structure of ethnic symbolism imposed considerable restrictions upon the interpretation of citizenship rights in Malaysia, and as time goes by, ethnic symbolism transpired into the contemporary practice of ethnic consociationalism, resulting in the political contestation of ethnic related discrimination against minority groups. These contestations emerged as a consequence of the ways in which the political interpretation of special citizenship right translate into giving preferential treatment one particular ethnic group over others, further entrenching the institutional discrimination against minority citizens. The growing strength of public religion playing a role in the political interpretation of this special citizenship constitutes a significant tension between the secular and religious dynamics of contention in the Malaysian political climate (McAdam, Tarrow et al. 2001). The HINDRAF movement, Article 11 and the Malay trans-genders challenging Syariah enactments on cross-dressing have therefore been identified as the emerging dynamics of counter-movements against the de-secularization of the state.

This study claims that the de-secularization of the state has resulted in the erosion of the rights of citizens belonging to the minority ethnic, religious and LGBT background, thus prompting them to mobilize and reclaim their rights to equal treatment by challenging the de-secularization process. Underlining the de-secularization of the state is the dynamics of contention between religious ideas and secular political concepts structuring the political thinking of collective movement at different stages of the development process of the modern state. Whilst ethnicity has been identified as the prime mover of political contention and the major point of conciliatory bargaining, the dissertation claims that the main undercurrents motivating the mechanics of ethnic politics were the dynamics between religious values and the forces of secularity.

Notwithstanding the historical dominance of the structure of ethnic consociationalism in the Malaysian political discourse, this dissertation finds the agency of public deliberation as the critical avenue for the construction of the universal ideal of citizenship. The ideal of citizenship is broadly understood here as the non-violation of fundamental liberties by the use of state power and where there's equality of political rights among citizens. The Rawlsian informed framework of public reason is useful as the normative benchmark for gauging the nature with which citizens use and evaluate the moral reasons to communicate their grounds for political decisions. Likewise, evaluating the official use of reason is equally significant in determining the grounds for its decisions on fundamental political questions. It is the argument of this dissertation that only through the use public reasons in the deliberation of fundamental political questions that basic citizenship rights can be upheld. The three case studies identified in the dissertation will highlight the instances of the violation of public reason as the study shows the ways in which the government employs religious doctrine in its deliberation of fundamental political questions. Consequently this approach addresses a

defining normative argument about how the ‘use of public reason’ can be theoretically extended to a society that is constantly struggling to expand the boundaries of political democratization.

The contemporary institution of the state in Malaysia could be problematized in two distinct tendencies: the diminishing or demonization of the political values of secularism in the public discourse and the potency of religion in reforming government policies. Within the broader political debates surrounding the secular-religious dichotomies, the conventional understanding about their distinctions may lead to a problematic interpretation of the institutional norms of the secular polity particularly in the context of an ethnic, religious and diverse society. However the normative understanding about the boundaries of secular-religious distinctions are increasingly nebulous following the growing public role of religion and how it has been making inroads into public policy deliberations in many parts of the world. Against this backdrop of public resurgence of religion there is an urgent need to review the political construction of the secular state and the assumptions it generates about the role of the state in interpreting/regulating religion in the public sphere.

2.3 Research Questions

This dissertation straddles empirical and normative debates about secularism and religious politics in the Malaysian pluralism. Normative political theory is rarely completely abstracted from empirical realities, but rather takes as its implicit reference point the Western liberal democratic experience. Following broadly in the comparative political ideologies tradition that seeks to move away from Eurocentricism (see methods section below), this dissertation explores on the one hand how consideration of a non-Western political tradition might inform the debates within normative political theory and, on the other hand, how a more explicit engagement with Western political theory might illuminate our understanding of religious

politics in Malaysia. The overarching research questions that will provide answers to these issues can be expressed thus:

1. How has the historical evolution of the Malaysian state embodied and enacted changing notions of the secular-religious distinction?
2. What are the factors explaining the contemporary retreat from secularism in Malaysia?
3. In what ways can the polemics of secular-religious discourse be overcome in constructing the universal ideal of citizenship?

In charting the historical paradigm of the emergence of institutions, and this exercise asks how they structure political practices and the conducts of citizens, and tries to connect normative theory with empirical research (Thelen and Steinmo 1992; Thelen 1999). By engaging in key normative concerns about equality, justice and liberty with empirical investigation, this approach discusses contemporary struggles with unpacking the role of history in structuring the political thinking and practices behind the process of policy making (Skocpol and Pierson 2002). Juxtaposing these arguments in relation to the historical formation of ideas and practices could bolster the analysis of power in social relations, by illustrating how inequalities of power are constantly reinforced to become deeply embedded in mainstream mode of political understanding.

The first question addresses the reinforcing process that contributes to the logic of path-dependence where 'critical juncture' generates particular outcomes that set off response mechanisms underpinning the recurrence of a certain pattern, in this case of power relations, into the future. A particular pattern of power relations could become embedded in the political structure over a period of time which would then dictate the course of political agency that may become irreversible. Skocpol and Pierson (2002:6) argue that it is the event

or process occurring during and immediately following critical junctures that will emerge as crucial to the impending course of a particular political development.

Religion as the classical source of knowledge and power in the traditional practices of ancient kingdoms is in constant struggle with modern secular ideas in the conceptual validation of truth in contemporary political thinking. This changes the ways in which power relation is played out, and produces a particular configuration of truth or reality that will influence the conduct of agents in the contemporary experience. Throughout the historical development of particular state tradition or institutional governance, there will be ‘critical junctures’ that may constitute a break from the past, affecting the rhythm of development that may prompt state agents to intervene for the purpose of maintaining political stability. During these critical junctures, new values, new laws and economic policies may be introduced creating new pathways in the formation the state tradition and these will be explored in relation to the thesis of de-secularization of the state.

The second question examines the empirical cases relating to the process of ‘de-secularization’ with the coercive use of state power. It investigates the reasoning behind political deliberation and its application in public policies. The third question represents the ‘so what?’ element of this study. In many ways, it reflects quite substantially the problematic aspect that Rawls’ had identified about finding the avenue for ‘overlapping consensus’ to be politically sustainable. Here the main concern for employing Rawlsian-informed critique of the Malaysian state is to put the case for the use of public reasoning and deliberation as the path for the liberal and democratizing prospect of free and equal citizenship (Rawls 1985; Habermas 1994; Bohman 1997; Elster 1998; Kymlicka 2001). This dissertation contends that the Malaysian political structure does not offer basic conception of persons as free and equal where the access of social rights is concerned. Despite these constraints, the process of

deliberation has emerged, where Rawlsian normative approach to the use of public reason is anticipated.

This is the unique problem of Malaysia where the basic principles of rights are unequally distributed by the legal provision of affirmative action for a particular ethnic group, through Malay special position. The situation of citizenship right in Malaysia may not fit into Marshall's formulation of the linear progression of civil, political and social rights. However Marshall's formulation of rights that are distinctly divided into – civil, political and social rights will still be useful for the purpose of understanding the political relation between citizens and the state. Civil rights existed as the basic minimum of rights that were required to cement the relationship between the state and its inhabitants within a particular territory, but these were not spelt out in terms of individual wellbeing, and the claims upon the state were non-existent. Depending on the changes in the society, Marshall identified political right as the important catalyst for the achievement of social rights in the development of citizenship. It was argued then that no universal principles existed to define the elements of citizenship as it was driven by the collective projection of values, rights and norms a particular society. This vein of argument suggests that the notion of citizenship was historically contingent and socially located (Marshall 1950:150) and the model of citizenship development that was proposed by Marshall was contextualized in the exigency of war-time conditions that necessitated the institutional growth of the welfare state in Britain.

It is submitted that Marshall's thesis has its limitations for focusing on the rights to political participation and the contemporary literature on citizenship have developed beyond the elements of rights to include the effects of globalization upon the perception, negotiation of identities in the understanding of citizenship (Barbalet and Ingleton 1988; Alexander 1998; Linklater 1998; Ong 1999; Turner 2002; Frey 2003). The civic-republican theorization of

citizenship is equally important, where the emphasis on the elements of citizenship is placed on the politically educative society in fostering ‘republican virtues’ of moral integrity, patriotism and self-discipline of the citizens (Heater 2004:41). For civic-republicanism, it is recognized that there are different ‘will’ at play, setting the stage for the tensions between the will of the individual and the general will. The aim is therefore to realize the common good, over and above the satisfaction of individual self-interests (Oldfield 1990; Williams 1991; Dagger 1997; Kymlicka 2001).

Marshall’s theory on citizenship is useful in highlighting the state-centric domination of political membership and rights at the same time that saw the various competing claims of ethnic and religious rights in the contemporary condition of Malaysian pluralism. Since citizenship has largely been a state-driven project, beginning from the post-war reconstruction period right until the formation of the Malaysian Federation, drawing out the seeds of contention becomes imperative in explaining the onset of de-secularization in the Malaysian political development.

It is in this context of political contention of rights within the ambit of the normative argument of Rawls’s use of public reason provides a possible outline to locate for the ideal of free and equal citizenship. The disputed nature of the secular state in the Malaysian political discourse, represented by the periodic episodes of contestation or ‘critical juncture’ would prompt the state to use coercive means to intervene to restore political stability, and introduce religious values to further political legitimacy. These periodic discontinuities would create the conditions for citizens to politically mobilize not only against the increasingly narrow interpretation of fundamental liberties but also for the equal access to social rights. In analysing how state power operates within the scope of contested secular state, the study tries to uncover the active knowledge behind the practices of power that privileges Islamic

discourse in the Malaysian political context. In order to answer these questions, the dissertation addresses two sets of sub-questions, the first one political Islam and the historical patterns of state formation, and the second one on locating the middle ground on religious contestations.

Political Islam and the normative worth of the secular state:

- In what way does the state in Malaysia respond to religious revivalism particularly among Muslim social movements in the country?
- How has state-sponsored Islamization led to the counter-hegemonic movement that challenges the dominant interpretation of Malay-Muslim discourse? I will choose the case study focusing on HINDRAF and HRP as a marginalized social community in Kuala Lumpur.
- How have changing legal and constitutional norms been driven by ideological or pragmatic concerns on the part of the state, and what implications have they had for subsequent religious and secular mobilization? Case study—Constitutional Amendment to Article 121 in 1988 and the ideological ban on the use of the word Allah among the Christian community.
- In what way does the Malaysian Constitution empower Malay trans-genders in their quest to challenge the Syariah Enactment on cross-dressing?

Locating the middle ground for religious and secular citizens:

- In the context of cross-cultural political dialogue, is it possible to locate the historical emergence of public reason in the Malaysian political society?

- How does the Rawlsian conception of ‘public reason’ provide a means of developing a critique of the processes at work in the Malaysian public discourse?
- In which way can public reasoning be used to analyse/evaluate the changing role of the state (i.e. from a relatively secular to one that inclines toward Islamic state) in influencing/shaping the discourse of public debate on the competing ideas of citizenship for a society in transition like Malaysia?
- How significant is the role of the secular state in adjudicating the competing demands of a culturally divided society in creating the ideal of common citizenship?

2.4 Legitimacy, stability and the public reasoning of secular/religious dynamics

The citizenship model formulated by Marshall addresses the core issues of structural inequalities in a society that develops from a feudal power relation into a capitalist power relation, using the British class system as the case study. Marshall’s work outlined the systematic conception of citizenship by looking at how society began to experience substantial economic transformations, focusing on how ideas about freedom and equality began to change the meaning of citizenship (Marshall 1950:150; Marshall 1965; Marshall 1972; Marshall 1981; Marshall and Rees 1985). This was grounded in the historical analysis of the development of the social right in the British capitalist society from 1890 to 1945 addressing the problems of liberty and social inequality. Structural inequality is still a major problem underlining the contestation of citizenship right in Malaysia, and Marshall’s formulation provides a good platform as a starting point to understand the social inequities of the Malaysian pluralism. Where Rawls’ contribution is concerned, it is in addressing the significance of moral agency in furnishing the substance of political debates and deliberation.

Rawls concept of public reason is employed here because it offers the analysis of agency as thinking moral agents through the formulation of a person or citizen as ‘reasonable and rational’¹⁴. This is a considerable shift from Marshall’s formulation of citizenship that analyses the issues of structural inequality to the conceptual analysis of citizens as thinking moral agents deciding or evaluating upon fundamental political questions. Marshall’s formulation is effective in that it pinpoints the problems of inequality as the locus of contention that mobilizes citizens to reclaim their rights on the moral grounds of equal access to social minimum in the form of the welfare state. Rawls contribution is significant in the rethinking of Malaysian citizenship because it provides the analytical tool to unpack and evaluate the motivation behind the reasons given for a particular decision, policy or law in the context of public deliberation of fundamental political questions.

The understanding of citizenship in Malaysia involves both an analysis of the structural inequality affecting citizens living in the condition of pluralism as well as the reappraisal of the kinds of values and reasons being put forth in the process of public deliberation. Given that the structural inequalities remain unresolved, and this is an established fact of constitutional provision of special citizenship for the Malay ethnic group, the contemporary challenge is to uncover the ideological tensions that such legalized inequality have engendered in the public sphere. Despite the general acceptance of government sanctioned inequality, political contestations have emerged at different levels of social and economic relations. Where the question of citizenship rights are concerned, fundamental liberties as a category of rights would be difficult to quantify and one of the ways to uncover the depth of

¹⁴ In *Political Liberalism*, Rawls says ‘the reasonable and the rational are complementary ideas’ and that ‘neither the reasonable nor the rational can stand without the other’. In this context, the reasonable and rational agents are the basic units of responsibility in social and political life. A person who is rational but wholly unreasonable is not fit for social life, and a person who is reasonable but wholly irrational is incapable of concerted action.
Freeman, S (2007) *Rawls*, Routledge, New York, pp.345

violation against this category of rights is to investigate the nature of political contestation initiated by aggrieved citizens.

Within a minimally acceptable set of democratic institutions, the political culture establishes an egalitarian form of government whereby all the citizens participate in the design of public policy, uphold the laws and secure the liberty to express their opinions and challenge the actions of their state. This study focuses on the aspect of liberalism that addresses the issues of basic civil liberties and the democratic process. Rawls' notion of the liberal conception of the role of justice will be explored here in relation to the normative argument that government should be neutral between the competing ideas of good (Rawls 1993). This supports the claim of this dissertation that using Islam as a comprehensive doctrine for the basis of political deliberation undermines democratic governance in Malaysia. This dissertation makes the argument that comprehensive doctrine, where Islam is the official religion, should not be used as the foundation for democratic governance in Malaysia, and instead proposes that the 'freestanding conception of political justice' should be the basis for democratic rule and citizenship (Rawls 2005).

The use of religious comprehensive doctrine, as a basis of political deliberation and governance restricts the political interpretation of the human rights of citizens living in conditions of pluralism. Where the establishment of a common law is concerned, every citizen should be subject to the same law but the historical presence of the Syariah legal system has created a society that is divided by the legal obligations of Islam. The respect for civic order and the principles of impartiality in the system of law has been adversely affected by the dominance of political Islam. Whilst Rawls accepted that it is not unreasonable for a particular comprehensive doctrine to become relatively dominant in the government policies

of a society, the common good conception of justice must be upheld so that the human rights of citizens are not infringed.

An established religion may have the dominant authority within society and influence government policy on certain issues. Having religious doctrine is not unreasonable provided that the liberty of conscience and freedom of thought are given certain flexibility, and the other religions are 'not persecuted or denied civic and social conditions that permit their practice in peace and, without fear' (Rawls 1993:53). The common good conception of justice in any society should fulfil these requirements in order to establish a regime's legitimacy to be accepted by its own people. Hence a consensus on a common law ensuring human rights is not peculiar to the liberal or Western tradition. The conceptions of justice can at least be agreed on terms that do not violate or infringe these basic rights¹⁵.

Rawls (1993:59) classified human rights as a special category of rights that have universal applications because the conditions of these rights would reflect the state of political legitimacy and the legal order of a society. The conditions of these rights would influence the answers to the questions about legitimacy and the legal system of a society. These questions 'are questions of transition, and they start from where a society is and seek effective ways by the law of peoples to move the society some distance towards the goal' (Rawls 1993:60). Political liberalism is not about prescribing the liberal principles justice for other non-liberal societies, but to widen the scope of the conception of justice by making such transition possible through the recognition and protection of basic human rights. The main object lies in empowering the people to take charge of their political life and social institutions, instead of advocating structural policies grounded in liberal conceptions. This is the significance of

¹⁵ The basic rights are the right to life and security, to personal property and the elements of the rule of law, as well as the right to a certain liberty of conscience and freedom of association and the right to emigration. These rights we refer to as human rights (Rawls 1993:57).

thinking moral agency politically mobilize themselves to pursue social rights conceived on the grounds of equality and justify these movements on grounds or reasons that are publicly accessible and understandable for all. This idea is important for the Malaysian experience because of how public reasoning affects or challenges certain ideological status quo held by the state or government that infringes the rights of minority citizens.

Since many non-liberal societies, like Malaysia, are able to function with limited economic resources, this dissertation emphasizes Rawls' (1993) chief concern about the public political culture¹⁶, particularly the religious and philosophical traditions that structured its government institutions. Political oppression, institutional corruption and the disempowerment of women aided by unreasonable ideologies often constitute the source of problems that undermine the quality of human rights in these societies. This makes the question of justice pertinent in the legitimate use of coercive power. In *Political Liberalism* the norm of legitimacy sets the minimum for the use of coercive political power, where it states that the exercise of coercive political power over persons is legitimate only when this exercise of power is in accordance with a basic structure acceptable by reasonable citizens (Wenar 2006).

The major criticism to Rawls' public use of reason comes from Habermas who argues that expecting religious citizens to fulfil the criteria for the use public of reason in their arguments does not accommodate the democratic requirements of a liberal state (Habermas 2006). Rawls' emphasis on reasonableness and reciprocity in the process of deliberation through public use of reason undermines the level of existing conflicts that normally arise from the competing worldviews between the secular and the religious citizens. The existing conflict and disagreement of ideas between the secular and religious citizens is far too great to fulfil

¹⁶ A society's public political culture comprises its political institutions and the public traditions of their interpretation, as well as historic texts and documents that have become part of common knowledge, Rawls (1993) *Political Liberalism*, New York: Columbia University Press, pp. 8-15.

the criteria of public use of reason, Habermas argues further that without recognizing this gap, public use of reason will remain highly contested. The main contention against this proviso is the lack of consensus on what is considered as reasonable in the light of the competing notions about the right to justice.

Other critics like Weithman contends that in the ideal condition of political liberalism, citizens should be allowed to make their political arguments and viewpoints about 'justice' conceived in religious terms. Faith movements have long been credited with their positive contributions to the moral debates about rights and justice in the political context, and religiously inspired political activity and intellectual debates have made valuable influence to the emergence of civic virtues in the making of democratic citizens, particularly in the context of political participation in the American society (Weithman 2002:62). There is also the extreme proposal by Nicholas Wolterstorff who does not think that the political use of religious reasons should be reserved at all. In fact, his arguments go as far as to allow the legislatures to make laws grounded in religious arguments. He contends that it is not reasonable to ask everyone to abstain, as Rawls proposes, from using comprehensive doctrines in political debate about questions of basic justice because

"it belongs to the religious convictions of a good many religious people in our society that they ought to base their decisions concerning fundamental issues of justice on their religious convictions" (Wolterstorff 1997:105)

On any issue of significance facing our society, Wolterstorff suggests that it is naïve to expect that all adult citizens are fully rational and sufficiently informed about equivalent secular reasons along with their religious convictions to deliberate on the fundamental political questions.

Granted that the public use of reason may seem to impose unnecessary restrictions upon religious citizens, it must be emphasized that the liberalism that Rawls proposed does not restrict the liberty of religious people alone. Political liberalism conceived by Rawls precludes the domination of any comprehensive doctrine in the formal process of political deliberation. By allowing for a political legislature to make use of religious arguments in the formulation of public policies and laws, this would then lead to the parliament becoming a forum for theological arguments, giving way for governmental authority to become the agent of a religious majority that imposes its will upon the minority citizens, and thus infringes the very essence of democratic procedure.

Rawls' thesis on the public use of reason is significant for Malaysia because the country's public political culture is structured in such a way that the public interpretation of justice tends to be in favour of the Islamic precepts belonging to the religious majority. The special citizenship right for Muslim Malays, established as the legal status quo for the preferential consideration in the allocation of governmental resources, defines the criteria of differential position in the deliberation of public policies. The complex nature with which citizenship rights are categorically differentiated according to ethnicity and religion has considerable implications upon how the notions of rights are negotiated politically, economically and culturally, as this dissertation will show, the formulation of special categories in defining the criteria of eligibility for minimum social rights violates the fundamental concept of universal citizenship right. Where the ascendancy of such state practice condones the ideological norm of differential citizenship right on the grounds of ethnicity and religion, this will result in the erosion of the values of impartiality and objectivity consistent with the process of de-secularization of the state.

The idea of liberal democracy extends the vision of a society where citizens are treated as free and equal within a frame of social cooperation. Wenar (2006) highlights the Rawlsian abstract ideas of fairness, freedom and equality as the important fulfilling conditions to resolve the problem of legitimacy for creating the institutions of a liberal society, and this constitutes a proposal where a more extensive scheme of justice can be developed in order to give the concept of justice a generous interpretation within a particular public political culture. The problem of legitimacy lay in the process of 'de-secularization' of the Malaysian state, and as this dissertation will demonstrate in the three case studies, the reasons given as justification for political coercion did not comply with the increasing awareness about the value of justice that is fundamental to basic human right. In the Malaysian experience, poverty and lack of social mobility are still conceived on ethnic terms where the measures of group inequality dominate the studies of socio-economic research (Klitgaard and Katz 1983; Faaland, Parkinson et al. 1990; Hashim 1998; Mohamad 2005; Bangura 2006). These are quantifiable measures of socio-economic deprivation that undermines fundamental human rights where group rights are concerned. Liberty of conscience, the right to worship, the right to sexual identities, equality of citizenship rights on the other hand, are other examples of unquantifiable forms of deprivation that affect both group inequality as well as on individual terms, and these are equally important moral and philosophical considerations for fundamental human rights in the Malaysian context.

Religious and philosophical differences do exist in every society regardless of whether it is a liberal Western or non-Western society. It is only reasonable that citizens should not accept legitimate coercion on the grounds of religious doctrine and this it is equally valid to suppose that citizens should be empowered to seek for a conception of a society that affirms the universal ideals of fairness, freedom and equality. Currently the basis for political stability in

Malaysia rests on the public political culture where citizens have to accept the political dominance of a majority religious doctrine at the cost of undermining the human rights of the minority peoples. The quest for free, fair and equal terms of social cooperation requires a fuller expression of justice where citizens communicate a common vision through overlapping consensus, to develop the moral agency for free and equal citizenship. Central to the criterion of legitimacy is that the system of law must be publicly endorsed by all citizens, without which the justification for the exercise of state power fall short of fulfilling the basic requirements of human rights.

Having a system of law that can be publicly endorsed by all citizens also means that the sectarian engagement on terms of religious and philosophical doctrines should be avoided. Political cooperation and consensus of justice should be grounded in the moral conceptions, and the cooperative virtues should embody those principles central to the human character and expressed in public life (Rawls 1987:11). The idea of overlapping consensus is therefore different from a *modus vivendi* because it demands citizens to cultivate political conception about justice as the moral grounds as well as the agency for public and social cooperation. The political conception of justice represents the intellectual movement of thought that frames the historical and social circumstances of a society grappling with the principles of state power and equal liberty of conscience.

Social consensus founded on self-or group-interest, or as a result of political bargaining only preserves the existing status of group power relation. In a condition of pluralism where the nature of stability is sustained by the practice of political bargaining or interests-driven politics, the slight shift in the political power of a particular religious group or an extreme political organization would inevitably result in the political ascendancy or dominance of a particular group. An overlapping consensus allows for the agreement on how political

conception of justice should be developed, according to circumstances of a public political culture. The political awareness for the conception of justice encourages the exercise of intellectual freedom among citizens to apply the principles of toleration for social cooperation and resolve the questions of religious and other comprehensive outside the realm of the political.

‘Given the fact of pluralism, what does the work of reconciliation by free public reason, and thus enables us to avoid reliance on general and comprehensive doctrines, is two things: first, identifying the fundamental role of political values in expressing the terms of fair social cooperation consistent with mutual respect between citizens regarded as free and equal; and second, uncovering a sufficiently inclusive concordant fit among political and other values as displayed in an overlapping consensus’ (Rawls 1987:17)

The kind of social cooperation and the basis for stability that can fulfil the liberal conception of justice requires that citizens be regarded as free and equal. This is an important criterion; Rawls calls it the principles of reciprocity, for public deliberation to be conducted on the terms of free public reasons. Justice being conceived in political liberalism depends on the ways in which citizens communicate to one another on the basis of reasons, the public stock of knowledge that is accessible and legible to all. The Rawlsian approach emphasizes that this is the only manner that the liberal model of justice and fairness can account for political legitimacy. Central to this approach is the universal acceptance of the fact of pluralism as a permanent feature of political life and the rejection of the oppressive use of state power to enforce a particular comprehensive doctrine to legitimize social unity. Only through the rejection of such legitimate coercion the prospect for liberal democracy can be realized.

‘Hence to achieve social unity for a well-ordered democratic regime, what I have called political liberalism introduces the idea of an overlapping consensus and along with it the further idea of the political as a special domain. Political liberalism does this not only because its content includes the basic rights and liberties the securing of which leads to pluralism, but also because of the liberal ideal of political legitimacy, namely, that social cooperation, at least as it concerns the constitutional essentials, is to be conducted as far as possible on terms both intelligible and acceptable to all citizens as reasonable and rational. Those terms are at best stated by reference to the fundamental political and constitutional values (expressed by a political conception of justice) that, given the diversity of comprehensive doctrines, all citizens may still be reasonably expected to endorse’ (Rawls 1989:247).

This is where the Rawlsian ‘use of public reason’ can be applied in the Malaysian experience to offer the frame of social cooperation where citizens communicate and justify their decisions to one another using publicly available values and standards (Rawls 1997). The exercise of reason forms an important basis of critique of the multicultural approach and ethnic consociationalism that furnish reason for the current regime to defy the principles of neutrality and equal treatment in a society like Malaysia. Rawls’ doctrine of public reason can be used to expand role of justice, particularly the normative conception about how the state should practice the values of neutrality between competing perspectives of what constitutes the good life (Rawls 2005), and finding the common ground between competing comprehensive doctrines (Larmore 1999).

Cultural pluralism and religious diversity have become the basic facts of life that constitute the multiple identities of citizens in Malaysia. Culture as the basis of common identity has become a qualified source of political mobilization and social identification in the contemporary history of Malaysian politics. Whilst arguments based on culture and cultural differences have substantive analytical purchase both in the empirical and ideological explanations; there is the worrying trend within the multicultural approach that take culture as the legitimate catalyst for politics in a diverse society. Using ‘culture’ as justifications for how political thinking and political conducts are grounded could distort the universal understanding of justice and equality. The political argument based on ‘culture’ could pit one group against another, thus increasing the risk of ethno-religious polarization on the one hand, and thwarting the prospects of advancing the civil liberties and social mobility for the individual citizen, on the other hand.

2.5 Religious power and the use of reason

Combining the analysis of the ideological power of religion in the construction of social relations and Rawls’ exposition of the ‘use of public reason’ to assess the political legitimation of state power addresses two important methodological issues. The first one is an issue of timeline, and second one is the merging of normative political theories with the area-study focus of Southeast Asian studies. The first issue of timeline represents the need to understand the context of “*longue durée*”, on how human agency carry the vectors of religious values and power that substantiate the process of structural change in the society (Giddens 1979; Giddens 1984). Religious ideas together with the use of power are identified as prime indicators on how state agents politically justify certain policies and actions over time and space. This is because individual citizens, who belong to diverse sets of communities, are themselves the principal bearers of ideas and values that reciprocate and

substantiate the construction of societal norms that are dominant. In order to understand the political constitution of the secular state, it is important to situate the dominant thread of ideas that were promoted historically.

The study identifies the British colonial penetration into the Malay world as the main reference point for gradual transformation of the nature of governance and how the strategies for population control were put in place under the aegis of Malay *Kerajaan*. There were two important changes being made to the traditional authority of the Malay *Kerajaan*, one was the introduction of colonial political economy to manage the migrating population in the Malay peninsula (Kahn 2006), and the other was the demarcation of the public sphere according to religious beliefs. Under British colonialism, Islam was singled out as the sphere of autonomous power to which the Malay Rulers were given the authority to identify and structure their relations with their subjects under the Syariah jurisdictions (Gullick 1989; Horowitz 1994; Roff 1998). Similar analysis of how ideas of Syariah justice became established within the secular order of colonial administration is provided by Asad (2001), who argues that the *Sharia* principles of justice came to be associated with the colonial administration in Egypt as a public discursive strategy to manage the population via the private domain of the family (Asad 2001).

The ideological emergence of Islam in forging the social relations of power and the exercise of doctrinal knowledge through *Sharia* principles of justice brings to light the beginning of the historical merging of Islamic social thinking with the modern art of governance. This was made possible under the tutelage of the British colonial administration whereby the sovereign tradition of the Malay *Kerajaan* was retained in line with the policy of non-intervention. The Malay ruling elites were granted political power via religious autonomy in matters relating to the indigenous communities, thus constituting the path-dependence for the

Malay ruling elites to act as agents in modernizing the operational dynamics of the Malay *Kerajaan* in extending their governing powers over and beyond the existing population. The conceptual mechanics of the Malay Kingship¹⁷ (*Kerajaan*) examined by historians (Milner 1981; Gullick 1988; Gullick 1989; Walker 2002) constitute the key elements in framing the political motives of the *Kerajaan*, whereby the primary concern centres on the control of subjects and to explore the ways in which people submit to the power grounded in religious reasons. Such authority then becomes contested when state elites deploy religious values as reasons for the contemporary interpretation of justice, the application of public policies and political legitimation.

Rawls' doctrine of public reason is applicable here because it can shift important arguments about justice and form the basis of critique against the dominant imposition of religious resources in the exercise of legitimate coercion. This dissertation claims that the use of public reason should be considered as the critical pathway to resolve the contestation between the secular-religious dynamics impinging upon the Malaysia political discourse, and to alleviate the unnecessary burden of religiously motivated ideological imposition upon the fundamental liberties of all citizens. The use of public reason should therefore rest upon the state agents who are responsible for the formulation of laws and the deliberation of public policies.

It cannot be denied that the conceptual interactions between the political ideals of the secular state and religious agencies constitute the distinctive character of the secular age (Taylor 2007). It is not easy to sever the role of religion in the ideological makeup of contemporary pluralism and in the public sphere (Casanova 2001). It is not surprising, therefore that the tensions between secularism and religious forces in the public sphere are recurring and these

¹⁷ The thesis on the Malay Kingship is further elaborated in Chapter 2, but the main emphasis of this concept revolves around the control of men and population as a symbol of wealth and political power.

have contributed to the substantive difficulties in setting the common ground for the multicultural citizens and democratic political engagement (Parekh 1990; Asad 2003; Habermas 2006).

The political concept of secularism remains elusive particularly where religious beliefs are strongly rooted in the lives and the collective experiences of citizens. When the politicians use religious values to justify public policies, this will have negative implications upon the fundamental rights of the citizens. In the absence of secular values, the language of public policies and politics that are motivated by religious values not only divide/polarize public opinion but may lead to the predominance of religious reasons in the public political discourse. For this dissertation, the examination of the content of secular/religious dialogue within the bounds of political debates, involves linking Parliamentary debates with the process of legal amendments in the Constitution. Unpacking the content of political dialogue documented in the Parliamentary debates or Hansard will provide insight into the ways in which state agents embed the norms of Islamic doctrines that eventually destabilize the conceptual principles of the secular state.

The secular state faces the contemporary dilemmas of institutional adjudication between the politics of multicultural recognition and the universal values of liberalism (Bonham 1995). The Malaysian case presents this difficulty where there's always tension between the politics of recognition and the universal principles of the right to choose, particularly for individuals. This is further complicated by the history of immigration and Malayan federation with the Borneo territories that historically furnished the condition of pluralism in Malaysia. Contemporary literature on the multicultural approach addresses the cultural considerations for the politics of recognition, difference and choice (Young 1990; Kymlicka 1995; Parekh 2000). It reassesses the universal values of the Enlightenment and how the ideal solution

within liberalism should deal with the cultural relativity of human rights, of individual mobility and the minority groups around the world. The emphasis upon the preservation of cultural difference substantiates the logic of defending the authentic character of a particular group identity against globalization and the homogenizing 'Western' cultural force.

However this has been contested by some liberals that the uncritical promotion of culture as the basis for the politics of group identity and the mobilization of right can be detrimental to the universalistic liberal principles of equality (Barry 2001). The political mobilization driven by the interests of cultural identity could undermine the political values of justice, equality and neutrality that are universally accepted as critical to the protection of fundamental human rights. The argument for 'moral relativism' should be contextualized in terms of the universal consideration for justice, as a value that every person should be entitled to. Hence there's a limit to how 'moral relativism' can be applied.

'But it seems overwhelmingly plausible that some groups will operate in ways are severely inimical to the interests of at any rate some of their members. To the extent that they do, cultural diversity cannot be an unqualified good. In fact, once we follow the path opened up by that thought, we shall soon arrived at the conclusion that diversity is good to the degree, and only to the degree, that each of the diverse groups functions in a way that is well adapted to advance the welfare and secure the rights of its members' (Barry 2001:134)

The invocation of 'moral relativism' could undermine the liberal principles of justice, toleration and equal treatment in adjudicating the competing interests of diverse groups.

‘What liberalism is about is how polities, however constituted, should be run. In particular it is a theory about constraints that should be imposed on the use of political power so as to avoid it from being abused’ (Barry 2001:137).

The multiculturalist argument on political right involves substantive reinterpretation of the universal values of liberalism chiefly on the basis on recognition of cultural practices and norms of minority groups. Where the rights of a group are concerned, the multiculturalist emphasizes ‘cultural norms’ as the defining features, which could easily be misunderstood as something essential and non-negotiable, thus incompatible with the notion of justice and equality framed in political liberalism.

Group rights that are essentially defined in terms of cultural membership and/or particular ethnic affiliation for self-protection are increasing incompatible with the universal values of liberalism(Doppelt 2001-2002:662-665). There are two significant issues that multicultural liberalism attempts to grapple with the politics of group rights, one is the way multicultural approach to cultural identity tends to portray only the empowering aspect of group identity instead of addressing the underlying problems of exploitative social relations that violate the basic liberties of the individual trapped within the ambit of traditional cultural norms. The second issue involves the question of the formation of the liberal identity and the extent to which the discourse of rights between the majority-minority cultures contributes to the misrepresentation of the liberal democratic ideals of equality and personhood (Doppelt 2001-2002).

The other critique of the multicultural approach to cultural identity and group rights lies with the demands for state policies that adopt the strategies of difference in addressing the

universal problems of socio-economic injustices and inequalities in contemporary societies (Joppke 2004). The recent reversal of the official policies of multiculturalism in Australia, Britain and the Netherlands, came about as the result of the lack of coherent strategies compounded by the multiple creation of special treatments aimed at minority groups as well as the immigrant communities (Joppke 2004:244-48). Hence despite the aims of empowering minority groups according their cultural needs, the net effects have been far more uncertain as these policies began to fuel further segregation and separation from the mainstream society. Policies aimed at addressing difference can take a life of its own and without the grounding of state policies to the universal principles of neutrality and equal treatment; the political argument for special treatments and differential rights would actually lead to the reification of cultural pluralism that firmly established groups as fixed political entities.

2.6 Capturing the process of de-secularization

The secular state provides the prospects or the political space of extending the liberal principles of equality of rights to the realities of cultural pluralism. The dissertation claims that the secular state should be promoted with the aim of adjudicating the issues of special recognition and the liberal conceptions of the individual right that shape the trajectories of public debates in the Malaysian context. The institution of the secular state rests on the normative assumptions that faith resides in the private convictions of citizens and that public policies directed at the citizen population should be framed on the political considerations on neutrality and toleration. The reality of cultural pluralism however does not really permit such normative position to prevail according to the strict separation of faith in the private from public sphere. Secular interpretations vary from one country to another where in some governments' legal statutes are put in place for the purpose of regulating the relationship

between religion and the power of the state, thus implicating the scope of coercive power that the state has been able to apply upon the (religious) liberty of the individual citizens.

The idea of the secular state is defended in what McClay (2001) terms as the ‘anti-theocratic understanding of the secular state, fully compatible with the practices of religions’(McClay 2001:59). It is reasonable to defend the principle of neutrality within secularism that allows for the egalitarian participation in the public and legal sphere for individual citizens regardless of ethnic and religious background.

The de-secularization of Malaysia will be analysed from the conception of the state, beginning with the 1957 Malayan Constitution, focusing primarily on how the Malay identity and Islam was constitutionally fused as a protected identity in the Constitution. There were critical junctures leading to the de-secularization of the state and these were related to the amendments made to the Malaysian Constitution. By employing the concept of critical junctures to link major shifts in political events, this dissertation uncovers the reasons given to these legal amendments. It teases out the discursive nature of these shifts and their ideological implications by examining political documents – public records, justifications for Constitutional amendments, political statements – and debates (van Dijk 1995). The application of the critical junctures framework (Capoccia and Kelemen 2007) will be used to analyse politics the macro-level, as these larger processes will be linked to the analysis of ‘reasons’ at the micro politics dimension where state agents articulate their ideas, reasons and values debating important Bills and Constitutional amendments in the Parliament.

By focusing specifically on those Constitutional amendments that had considerable implications upon interfaith relations in the community and the fundamental liberties of the individuals, the dissertation shows the extent to which the prevalence of religious moral

discourse has led to the dislocation of substantive political debates and the popular demonization of the concept of the secular state. The concept of secular state gradually loses its political currency/meaning in relation to the textual changes being made in the Constitution. This manifests partly in the institutional aspect in that it altered the relations of power/authority between the secular and the Syariah legal apparatus. At the societal context these legal changes have had considerable impacts upon the civil rights of the multicultural citizens in the Malaysian society. Through critical junctures the framework of institutional analysis connects the interactive processes of political decisions that motivate the proposals for Constitutional amendments. In this way the dissertation elucidates, firstly, the connection between the declining conditions of the secular institution of the state/government – in other words, de-secularization - with the on-going/diachronic ideological justification for special citizenship rights. Secondly to analyse these political decisions in relation to Rawls' use of public reason to identify the extent to which the progressive and liberal elements are sustainable, and can be ideologically transferable by human agents to counter the ideological rigidity of ethno-religious constructions.

2.7 Collection of Data

The bulk of the data for this dissertation will come from the British public records as well as the selected Parliamentary Debates in Malaysia. The mainstream media news report will be used to relate political events and experiences of social marginalization with the policy-making decisions and debates of the state elites. The researcher has made essential connections with political parties and civil society groups which provide very useful and invaluable insights into the kinds of questions raised in this thesis. These groups include the HINDRAF movement, the Justice Movement and a few of the churches that have been fighting against the government ban on the use of 'Allah', and to demand the right to use the

word 'Allah' in the sermons. Toward the end of fieldwork, the issue of sexuality became the latest target of political control by the government and the mainstream religious groups. However there was also an emerging counter movement by the LGBT (Lesbian Gay Bisexual and Transgenders) to challenge some of the legal codes that are discriminating to their rights as citizens. The most interesting one involves the legal suit taken up by four Malay Transgenders using the 'secular' Constitution to challenge the criminalization of cross-dressing in the Syariah Enactment. Although the case was dismissed by the High Court in October 2012, it forms an important ground for identifying the critical junctures that transform the political landscape of Malaysian society.

3 LOCATING SECULARISM

Abstract: *This chapter aims to establish the origin of the secular establishment, especially on how religious convictions become subject to political governance. It traces ideas of secular as a particular history of the Enlightenment and discusses the importance of neutrality as a political value for institutional secular practices. For purely theoretical discussion, the examples of the U.S and France are used here to highlight role of the constitution in mitigating religiosity in the public sphere and its implications upon citizenship right.*

3.1 Introduction

This chapter surveys and discusses the recent literatures on the dynamics of religion within the institutional practices of the state. It focuses on the complex relationship between the state as an institution of secular practices and the role of religion in the conception of citizenship. This chapter locates the secular state as the locus of political interplay between state practices and the content of religious argument in shaping the debates about citizenship in the public discourse. The secular state plays the role of adjudicating the competing arguments that emerge from the public debates with regard to the fundamental questions affecting the rights of citizens. In this context, considerable debates about the nature of the separation doctrine, or the secular state itself, are found in the literatures of Western philosophical discussion, and for the contemporary discussion, this chapter identifies works of Audi (Audi 2000) and Laborde (Laborde 2008) to have considerable implications upon the Rawlsian conception of public use of reason, which ultimately is central to the question of legitimacy.

Secularism is a subject of the West, both in historical and political terms. However the secular state is a model of institutional governance that has been adopted by many countries in Asia, including Malaysia. It is argued that secularism is an ‘unfinished project of modernity’

(Habermas 1997) and this is especially true where faith-based movements have garnered strengths in contemporary politics (Appleby 1999; Wickham 2002; Fox 2006). The ‘unfinished’ project implies that the secular state as a model of institutional governance is very much contested. Religion remains resilient in the public sphere and continues to animate the democratic space in societies that may not share considerable grounds with the philosophical and the Enlightenment traditions of the West. Secularism as a comprehensive doctrine has consistently derived its authority from the history of the institutional establishment of the secular state and as such, the power of the state and religious reasoning becomes an indefinite tension in the current political discourse. The history and the modern practices of secularism represent the exclusive the norms of Western liberal democratic tradition, and little is known about the historical development of secularism in non-Western societies despite the adoption of secular state and its institutions (Taylor 2007).

Hence one of the greatest challenges in discussing about the secular state from the non-Western perspective is the existing gap in the literature about secular state and secularism particularly from the Asian perspectives. Contemporary works on re-thinking the discursive ‘traffic’ of religious and secular ideas from the Asian perspectives are emerging but these constitute a diverse mix of studies ranging from sociology, history, politics and law (Heng and Ten 2010). The literatures on the secular state and secularism other non-Western and Southeast Asian countries are limited to the local histories, cultures and their linkages to the colonial past, and admittedly it is beyond the scope of this dissertation to explore these other issues but to strictly focus on the role of the Malaysian constitution in regulating religion in the public sphere, and in this case on how constitutional changes contribute to the de-secularization of the Malaysian state. This line of reasoning aims to sustain the normative argument that, despite the modern eagerness to embrace identity politics and cultural

pluralism, a strong constitutional paradigm that maintains the separation of the state from religious activism could strengthen the egalitarian principles that are vital to common citizenship.

The dissertation maintains that the secular state is vital in addressing the meaning of citizenship rights and political freedom. An influential human rights and legal Muslim scholar states that, 'In order to be a Muslim by conviction and free choice, which is the only way one can be a Muslim, I need a secular state' (An-Na'im 2008: 1). The secular state is interpreted to mean the securing of basic freedom for individuals and groups to express religious and other cultural practices without the fear of public reprisal. The level of freedom that individuals can articulate their religious obligations and choices can sometimes become restricted by particular state practices and at this point it is important to establish political conditions with which a secular state allow for the expression of competing comprehensive doctrines.

The first section of this chapter broadly discusses the normative positions of the separation doctrine. It elaborates the principle of institutional neutrality propounded by Audi (1989; 2000) and compares it to the approach taken by Laborde (2008). Laborde's conceptual approach to analysing ideas and assumptions of the state tradition within a particular national history is particularly useful because it takes into consideration the agency of the state in the exercise of defining secularism (Laborde 2000). The second section draws on some of the important arguments made by contemporary Muslim scholars about how the normative ideas of the secular state engage with the obligations of faith in Islamic intellectual discourse. The third section briefly discusses issues related to the legislation and the regulation of the Islamic faith. The chapter then proceeds to try and place Malaysia's location in the spectrum of separation-laicism that the dissertation chose to exemplify.

3.2 Separation thesis and the public role of religion

Crucial to debates over ‘secularism’ – both as a normative political philosophy and as an empirical political practice – is the relationship between religious and state *institutions* and, in particular, what has become known as the ‘separation thesis’ – the idea that secularism demands that the institutions of the state are kept entirely separate from religious institutions. Hurd (2008:23) identifies two distinct paths in the ways secularism is constructed and how they become dominant in international politics: the *laïcité* trajectory is a product of the European Enlightenment and advocates the exclusion of religion from politics; the second trajectory involves the Judeo-Christian understanding of secularism which reinforces the idea of the ‘secular’ as a unique Western civilization, culture and identity¹⁸.

There are major differences in the practice of separation in the international arena. Jonathan Fox has written extensively on the varying models of state-religion separation in the contemporary world survey, using the concept of the degree of government intervention or regulation of religion as a benchmark (Fox and Sandler 2005; Fox 2006; Fox 2008). These institutional arrangements that have emerged tend to vary across culture, and were historically contingent depending upon the nature of the relationships between the state and the religious forces of the society. A framework of understanding the relationship between religion and the state will be important to understand how they relate specifically to the conception of justice, political rights and legitimacy. Since this dissertation focuses on the role of the constitution in mitigating religiosity in the public sphere and its implications upon citizenship right, the discussion will be limited to the examination of the theoretical debates of the separation doctrine by comparing the Franco-American ideal of separating religion and state along private and public lines (Hirschl 2012; Hirschl 2013). Where the secular state is upheld, high

¹⁸ ‘Varieties of Secularism’ in *The Politics of Secularism in International Relations* (Hurd 2008:23-45)

courts have assumed the role of secularism against the perceived threat to the concept of a religiously neutral public sphere.

The debates about the separation of the state from religion highlights a critical challenge about defining the scope and limit of the state's regulation of religion in the public sphere, and for this purpose, the extent to which the state adopts or rethink the policies of legal pluralism and how the margins of accommodation are tolerated (Hirschl and Shachar 2008). This dissertation will therefore briefly discuss the Franco-American model of separation between the Church and the state, particularly on how the theory of separation was conceived differently from the history of Western Europe, particularly in France, and then to locate the Malaysian version of secular state along the spectrum of separation-laicism debate from such normative ideal.

The main reason United States and France are selected as reference cases for examining the public role of religion is because they address the core theoretical differences underpinning the state regulation of public religion along the spectrum of the separation-laicism debates. It is submitted that there are limits to this approach as the dissertation omits the necessary and categorical comparisons with non-Western societies. However it will be maintained that such omission is not fatal to the essential arguments of the dissertation as it limits its attention to drawing references to the abundant literature written mainly on the subject of constitutional containment of religion in the Franco-American model. The values of the West and the non-Western countries should not be a conceptual barrier to the analysis of the secular as an institutional arrangement that can promote or undermine fundamental liberties and human rights. Where the issue of human right and citizenship right are concerned, these concepts serve as the common denominator and critical agency to achieve the universal values of social justice and equality. The Asian values discourse that claimed to challenge the global agenda

of human rights was mainly promoted by political elites to justify authoritarian practices and was hardly the values embraced by the communities of non-Western countries (Sen 1997; Thompson 2001; Thompson 2004)

The dissertation aims to sustain a level of consistency to the values being discussed specific to the matrix of separation-laicism. This is done by trying to draw out the elements where the Malaysian secular state locates itself within the matrix of separation-laicism. The literature on the Franco-American model consistently frames the polarizing concept that addresses the limits and degrees of state intervention and regulation of religiosity in the public sphere. For this reason, the discussion of other countries has been left out to give more room for greater understanding of the theoretical foundation of the separation-laicism and its theoretical relevance to the analysis of the secular arrangement in Malaysia.

The Franco-American ideal epitomizes important dynamics and theoretical implications – both in history as well as in the contemporary climate - about how the state, along with the law, regulates and negotiates with the ideas of political right and religious beliefs among its citizens (Gunn 2002). Most importantly, as Gunn (2002:452) has extensively written on this subject and cogently argues how France and the United States incorporated early concepts of human rights in their respective constitutions¹⁹. These processes have been instrumental to the foundational principles defining the normative relationship between religion and the state, underlining the trajectories citizenship rights and identity formations. The political analysis of the separation doctrine has to some extent tended to overlap with the sociological dimension of the secularization debates, which shows how the state exerts control over religion and its institutions (Keddie 2003). Nuanced understanding about their historical

¹⁹ France's first constitution dates to 1791, long before most other European countries, their oldest human rights texts, both written in 1789, that are in effect today: the French Declaration of the Rights of Man and Citizen and the American Bill of Rights. (Op. Cit in Gunn 2002).

meanings would illuminate the subtle differences with which the relationship between religion and the state was theoretically conceived.

The focus of scholarly and political debate on the separation thesis has been on the Establishment Clause of the First Amendment to the constitution, which has come to be seen as enforcing the strict separation of state and religion. Feldman (2002:350) argues that the intellectual foundation of the Establishment Clause was traceable to John Locke's theory of the liberty of conscience; which was considerably endorsed by the rationalist deists and evangelical Baptists alike underlining the discursive ideas of preserving the liberty of conscience as an unalienable right on the one hand, and the restriction of the role of the state to act within the bounds of temporal civic ends. This was particularly pertinent during the era of constitution-making in the USA, where the issue of taxation became contentious among those who do not share similar religious convictions (Feldman 2002). The phrase 'separation of the Church and the State' therefore was grounded within a particular American experience that illuminated the historical predicaments of religious persecution where questions of religious liberty became increasingly significant in addressing issues of civil peace. The core meaning of the phrase underpins the 'essence of religion as exercise of conscience' (Eberle 2005:312) and Roger Williams, an influential Baptist theologian of the time, attributed the individual right to religious liberty as the precondition for the value of tolerance in civil engagements. Hence in order to protect the liberty of conscience – which in this case was strictly concerned with religious belief - Williams advocated for the separation of Church from the state as the institutional strategy for protecting religion and the liberty of religious conviction from the temporal realm of the world, and to limit state control over the right to religious belief so civil peace could be secured (Eberle 2005). In delineating bounds between church and state, Eberle (2005:313) attributes the origin of the evangelical strand of

separation to the theological discourse of Williams which subsequently became influential in the framing of First Amendment²⁰ religious protections, substantiating the more secular perspectives on separation among the likes of Thomas Jefferson and James Madison.

The intended meaning of the phrase has not been unproblematic, and many legal scholars have begun to critically reassess the constitutional implications in the ways which the phrase has been understood in judicial understanding and how it feeds into the discourse of American liberalism²¹. Critical reflections upon the concept of separation have generated more questions than certainty about how the state mediates its relationship with religion²². A number of scholars have questioned on how the contemporary interpretation of the separation doctrine justifies the legitimate coercion of the law upon individual religious liberty (Conkle 2000; Carter 2002). The unspecified meaning of the phrase is inherently paradoxical because

²⁰ The Establishment Clause of the First Amendment read, “*Congress shall make no law respecting on establishment of religion or prohibiting the free exercise thereof...*”

²¹ The Supreme Court’s decision to reinterpret the constitutional meaning of the ‘separation of Church and state’ since 1947 had generated debates among scholars about the intended meaning of the phrase in preserving religious liberty, ‘*Of Church and State and the Supreme Court*’ in Kurland, P. B. (1961). “Of Church and State and the Supreme Court.” The University of Chicago Law Review 29(1): 1-96.

; ‘*The Separation of Church & State*’: *A Debate*, in Cord, R. L. and H. Ball (1987). “The Separation of Church and State’: A Debate.” Utah Law Review: 895-926.

; ‘*Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*’ L.S.W (1985). “Beyond the Establishment Clause: ENforcing Separation of church and State Through State Constitutional Provisions.” Virginia Law Review 71(4): 625-653.

²² Feldman (2002:729-730) provides the normative argument that political changes and the modern reinterpretation of Establishment Clause by the Supreme Court ruling in 1947 had contributed to the transformation of the language of the ‘separation of Church and State’ from the idea of individual religious liberty into the concerns about religious minorities’ political equality; and since state supports both religious and non-religious institutions under the rubric of ‘political equality’, the ‘equality’ argument tends to undermine instead of justify the separation of Church and State Feldman, N. (2002). “From Liberty to Equality: The Transformation of the Establishment Clause.” California Law Review 90(3): 673-732.

. *Everson v. Board of Education of Ewing Township (1947)* was a landmark case that saw the Supreme Court in the U.S extending the Establishment Clause to the state laws, which previously was applied only to the Federal laws. Detailed case can be referred to <http://supreme.justia.com/us/330/1/>

in its broadest understanding, it ‘forbids relationships between church and state’, and that such interpretation fails to take into consideration the inevitable day-to-day contacts between government and religious organizations that have always been part of the American political life²³(Hamburger 2002). Despite the competing interpretations of the phrase in the contemporary American political discourse, the ‘separation of Church and State’ remains a salient metaphor in conceptualizing the relationship between the state and religion, the limit of the state in regulating religion in the public sphere and the American case provides an important philosophical landmark in assessing some of these trajectories relating to the liberal interpretation of citizenship right.

The metaphor of the ‘separation of Church and State’ took on a different historical meaning in the French experience. The historical conditions for the emerging secular phenomenon of the ‘state’ came about as a result of the vicious power play between the religious and the political communities that gradually began to challenge the uniting principles of Christendom in Western Europe, and such dynamics subsequently influenced the intellectual conception of citizenship right underlining the development of positive legal framework that constituted the fundamental principles of the modern state (Mock 1975:123-125). He cites the example of the conception of the ‘state’ in the French Declaration of Human Rights in 1789 which was grounded in the recognition of individuals as free and self-determined – the Rights of Man, and emphasizes the emerging principles of neutrality of the state in the French Constitution 1791 to protect the fundamental freedom of individuals with regard to religious beliefs (Mock 1975).

²³ Hamburger (2002:18) argues that the phrase – ‘separation of Church and State’- is problematic and ‘lends itself to a prohibition on contact between institutions that inescapably must have contact with each other –whether through the government’s protection of churches and church property or through the church’s participation in moral and political movements’.

The term ‘laicism’ was associated with the educational reforms introduced by Jules Ferry²⁴ in early 17th century France paving the way to free education and the introduction of laic (secular) instruction in the content of public education(Osterwalder 1999). The institutional separation of the Church and the state was adopted through the introduction of two articles in the 1905 French Law²⁵ whereby the state was obliged to be neutral, neither disadvantaging nor recognizing, financially supporting and subsidizing religious establishments (Robert 2003). Jean Baubérot²⁶ (2003:459-464) writes that the French Revolution had had long lasting impact upon the character of French secularity whereby the motivating rationale of the anti-clerical movements was to challenge the authority of the ecclesiastical institutions in the matter of religious faith, by insisting the idea of ‘free religiosity’ with regard to the individual’s relationship with the Divine. The political triumph of the anti-clerical movements in French history played significant role in the development of French-style republican secularism.

Having said that, the French model of the secular state is now confronted with the pluralizing of contemporary culture through immigration where new issues – particularly the wearing of hijab among schoolchildren - are challenging the laïcité principles of the republican nation-

²⁴ Ferry’s Legal Concept of the “École laïque” is discussed in Osterwalder (1999:54-57) “*The Laicism and Its Religious Limits*”.

²⁵ Article 1: The Republic ensures the liberty of conscience. It guarantees the free exercise of religion, under restrictions prescribed by the interest in public order.

Article 2: The Republic does not recognize, remunerate, or subsidize any religious denomination (Robert 2003:640)

²⁶ A leading French academic on the sociology of secularism who was the only member of the Stasi Commission to abstain from voting the legal reforms being made to ban conspicuous religious symbols in schools. The Stasi Commission was set up by Bernard Stasi in 2003 to reassess the application of laïcité in France in the light of the Islamic headscarf controversy, and in 2004 it became law that prohibit the wearing of all religious symbols in schools. Baubérot critical assessment of the French secular law is available at www.info-france-usa.org/IMG/html/secularism.html Baubérot, J. (2006). The Secular Principle, French Embassy in the U.S.A: <http://www.info-france-usa.org/IMG/html/secularim.html>.

state(Baubérot 2003). The legislative intervention into the regulation of overt religious symbolism in the public generated more questions of interpretation than the reaffirmation of the principles of *laïcité* in the context of civil liberties. Balibar (2004:359-361) highlights the critical dynamics with which the power of the state confronted religious reasoning in the public arena. Firstly the hijab case implicated the public schools in taking up the mediating role of neutralizing the ideological polarization between French republican secularism and the plurality of religious identities on the school ground; and secondly the feminization of hijab exposed the contradicting situation with which female Muslim citizens are made to struggle between the powers of ‘patriarchal authority wrapped up in religion on the one hand, and the national authority wrapped up in secularism’(Balibar 2004).

Juxtaposing the different historical trajectories of religion and state relations in U.S and France, it is possible to draw the spectrum of political capacity and limitation to which the state and its apparatuses are capable of legitimating intervention in religious establishments and movements. Whilst the model remains committed to the ideal of separation, it cannot be denied that nature of state intervention in religious matters, whether it is limited or extensive, tend to have significant impacts upon the rights of citizens and this has continually attract contestations by civil society as well as individual citizens. The political understanding of secularism, the mediation of the relationships between the state and religion exemplified by the Franco-American model show the significant role of history and the empirical conditions in framing the dynamics of change and contention in the societies that contribute to the emergence of secular governance to adjudicate competing views of rights entwined with the formation of national and civic identities. Hirschl (2011) maintains that the secular precept remains resilient in the practice of constitutionalism, and even though Malaysia does not subscribe to the strict separation model and categorizes Malaysia as having *constitutional*

*theocracy*²⁷, the institutional adoption of constitutionalism is itself an appreciation of the secular principles. Hence the model of secular state was adopted in the Constitution of post-independence Malaysia but it is the contention of this dissertation claiming that the Malaysian Constitution gradually loses its secular appeal as the result of numerous politically motivated amendments to the Constitution to accommodate the political force of Islam as the established religion of the country.

3.3 Conduct of the state and the citizens as the agency of secularism

The content of public debates involving constitutionalism, religious laws and human rights can shape the conceptual framework of a secular state. The conception and interpretations of the 'secular state' may differ from one country to the next, but the formation of the modern state and the spread of the nation-state systems were significantly a universal by-product of secular rationalization (Meyer, Boli et al. 1997). The nation-state arrangements adopted by most post-colonial societies have in principle established secular institutions advocated in many Western liberal democratic countries. The legal-rational expansion of the state bureaucracy, the process of differentiation involving the specialization of the various public institutions in the society enabled the state to become institutionally autonomous from the doctrinal influence of religion, and one of the most important outcomes of the process of rationalization was the gradual extension of citizenship to the members of the society regardless of ethnicity, religious, gender and class differences (Lechner 1991).

²⁷ Constitutional Theocracy refers to the 'simultaneous adherence to modern constitutional principles, including the core distinction between political and religious authority and religious authority. Hirschl argues that this model emerged in response to the increased intensity of religious activism around the world. Some of the basic features of constitutional theocracy include the sanction of a 'state religion' and the recognition of religious law as 'a' or the main source of legislation. More importantly, the study conducted by Hirschl examines the relationship between state and religion as a part of a larger continuum of 'state and religion' models. Hirschl, R (2011) *Constitutional Theocracy*, Cambridge, Harvard University Press.

The adoption of the secular institutional arrangement may not necessarily bring about the universalization of human rights and the equality principles of citizenship that the modern state claims to uphold (Chatterjee 1995). The question of secularism needs to be understood as a dialogue about how it addresses the political conception of citizenship rights to address difficult questions of relating to religion and fundamental liberties, instead of accepting the cultural fault lines as a given (Lewis 1990; Huntington 1997; Gottschalk and Greenberg 2007). The analysis of the 'separation' between religion and the state in this dissertation transcends the boundaries of constitutionalism to include a reassessment of how the empirical grounding of the secular along with the accommodation of religious authorities frame the debates about legitimate coercion and the adjudication of rights in contemporary pluralism.

The dominant perspective on the ideals of the secularism, it is suggested, underestimate the complexity of the relationship between the religious and the political in many non-Western societies (Bajpai 2002) and, in a curious way, actually privilege a particular Judeo-Christian perspective on the state (Hurd 2008). The institutional impacts of secularization in structuring the legal and institutional norms have been viewed by the religious groups as marginalizing the democratic space for religious movements and the public relevance of faith among believers; and such interpretations have led to the call for the return of the sacred into the public sphere by some religious movements (Keane 2000-12). Keane's depiction of the 'self-contradictory principles of secularism' (2000:10) echoes a similar but more nuanced conception of secularism propounded by McClay's positive and negative understanding of the concept (McClay 2001).

Drawing on Isaiah Berlin's two concepts of liberty, McClay (2001:60-69) grounds the understanding of secularism into the negative and positive conception. The first one emphasizes the importance of the liberty of individual's conscience to allow for religious or

non-religious beliefs as well as recognizing the public vitality of congregation in sustaining the social world of religion. Negative secularism therefore does not assume that religious impulse is confined to the individuals and it identifies religion as a social institution that allows for the freedom of associations in the public sphere. The positive understanding of secularism on the other hand, is linked to the modern development of knowledge, and in particular the validity of 'science' as the legitimate explanation for the existential life, the nature of social and political reality. The competing 'truth claims' can be hijacked by the extremes of the secular and religious political agenda and this can become polemical, thus undermining the prospect of substantive engagement on fundamental issues relating to civic virtues and civil liberty, this is the main reason why Rawls proposed the avoidance of relying upon comprehensive doctrines in the realm of the political.

Where the role of the state is implicated between the positive affirmation and the restrained imposition of the secular ideals in its mitigation of religious forces in the public sphere, the Franco-American model shows the difference in emphasis upon which the agency of secular responsibility is located. In this context, the secular responsibility generally refers to the component of values, reasons and evidence that are not grounded on theological considerations or the existence of God. The debates and discussions generated by Robert Audi and Cecil Laborde have shown how the separation-laicism debates present the divergence of deliberation between the agency of the citizen and the agency of the state in relation to the burden of secular responsibility. More importantly, the content of these public debates have in one way or another shape the institutional feature of the secular state, thus influencing the relationship between the state and its citizens on how the secular responsibility is sustained in the political discourse.

The term ‘separation doctrine’ may be more specific to the American experience, as it has been discussed in the previous section, but for the purpose of analysing state practice the terminological differences between ‘separation’ and ‘secularism’ will be considered as one category of state practice. In order to recap, nuanced differences between the US version of ‘separation doctrine’, which has a long history of constitutional arrangement to secure religious freedom and communities from state intervention, and French *laïcité* which seeks to protect the state from the influence of religion, provide important empirical insights as to how these ideas became crystallized (Gunn 2004). Ideas of separation were grounded in the empirical conditions of social relations. The ‘separation doctrine’ was crucial in the rethinking of the relationship between the meanings of civil and religious liberty and its impact upon the loyalty to the American nation (Hamburger 2002:489-90). Whereas French secularity developed as a result of a protracted struggle on the part of the French civil government to gain political autonomy from the authority of the Catholic Church grounded in the 1789 Revolution. The philosophical tradition and moral implications of *laïcité* have had long history in addressing fundamental issues of civic obligations as well as ethics of modern state practices that have been underscored by the themes of equality, liberty and fraternity (Laborde 2008:7-8). These differences were historically contingent and to some extent, ideologically pertinent but the core issues surrounding the relationship between religion, civil liberties and the substance of political reason remain central to address the political relationship between the state and the citizens.

The normative grounds for the separating doctrine rest on the central premise that religious liberty can be only secured if the neutrality principle frames the institutional relationship between the government and religious institution (Audi 1989:274). State practices as well as religious institutions therefore need to stick to the institutional principle of neutrality because

of how they may implicate upon the norms of individual conduct, which in this case Audi refers to as the principles guiding the obligations of citizens in articulating issues of laws and public interests (1989:278).

‘In a free and democratic society, people who want to preserve religious and other liberties should not argue for or advocate laws or policies that restrict human conduct unless they offer adequate secular (none religious) reasons to support the law or policy in question (where an adequate reason for a law or policy is a proposition whose truth is sufficient to justify). By “secular reason” I do not mean one that is consciously held in contrast to a religious one, nor is there anything anti-religious implicit in a proper use of the term’ (Audi 1989:278).

The principles of secular rationale and motivation propounded by Audi constitute the methodical process where the formulations of public laws and policies are concerned, and whilst such principles do not restrict the scope of religious liberty and expression among ordinary citizens, they are applicable to government officials²⁸. The normative position that Audi proposes is an important institutional framework that works out the details of how public opinions should be articulated and on what grounds such reasons should be motivated. These constitute the criteria for tolerance and mutual respect in political engagements, and the translation of the religious values into an official instrument of the law or public policy should only be considered if there were adequate secular motivation supporting such values. The vital strength of the secular motivation lies in,

‘the decisive principles and considerations can be shared by people of differing religious views, or even no religious convictions at all. If, beyond this, people

²⁸ Audi elaborates this extensively in “*Religious Commitment and Secular Reason*”, (2000:90-110)

follow the principle of secular motivation to the best of their ability, the issues are much less likely to be decided along religious lines' (1989:290)

Audi (1989:291-92) stresses that 'a moral agent need not necessarily be religious' and that basic of moral principles of civilized living can be built upon consensus by those who are religious and non-religious. Such normative grounds in framing the political dimension of secularism share similar points with proponents of constitutional secularism. The central idea underlines the need for the public reason of law, "that humans are capable of testing their experience without reference to transcendental concepts and concerns" as opposed to the divine or revealed source of law, in order to establish the conditions for accessible reasons accepted by all citizens (Sajó 2008:608). This is a way of overcoming the existing reality with which the plurality of strong religions could easily undermine the negative understanding of secularism and inevitably threaten the scope of religious liberty (Sajó 2008).

Audi's positions emphasizes the need to offer relatively strong secular motivations on the part of the government officials when it comes to the formulation of laws and public policies as well as setting the normative parameters upon how citizens should participate in the public sphere. A slightly nuanced with more empirical substance added to the institutional principle of neutrality comes from Laborde's critical secularism suggesting the state setting the norms of secular restraint upon the how minority religious citizens should be allowed to make claims in the public sphere (2008:89). In the French Hijab controversy, Laborde challenges the neutrality role assumed by the state, which had become uncritical of the dominating facet of the secular state, thus undermining the ideals of religious liberty in a democratic framework. Laborde is critical of the Judeo-Christian assumption of the secular that imposes domineering secularist demands upon minority religious citizens. To avoid this, Laborde insists upon two

vital provisos - the ‘basic free exercise’ and the ‘contextual parity’²⁹ - in reappraising the secular state practice in a plural society, which although in this case she specifically addresses the issues raised by minority Muslim communities in France, Laborde suggests the practical rethinking of the role of the secular state in considering the values and adjudicating multifaceted claims made in the name of religion in contemporary society.

Some relevant points will be highlighted to distinguish her position slightly from that of Audi. The first proviso – basic free exercise - concerns the need for the secular state to guarantee the rights of religious citizens to practice their religions and undertake systematic re-evaluation of the kinds of reasonable demands made by religious citizens following the basic tenets of religious freedom. The second proviso stresses the need for the secular state to shift from the neutrality principle into non-dominating secular impartiality when it comes to consider religious issues, to allow for greater reflection upon the equality of opportunities consistent with contemporary philosophical discourse on social justice (Sajó 2008:88-89). These debates have important ramifications upon how the issues of right are conceptualized when competing religious convictions are expressed in public political terms. For Audi the public political conduct of the citizens ought to be framed in secular terms, whereas Laborde emphasizes the conduct of the state to give generous definition for the religious liberty. These positions are both imperative because having such institutional benchmark ensures non-sectarian public sphere to flourish by guaranteeing the basic rights and exercise of beliefs among citizens. It also reflects how the boundary of tolerance within the secular state can be negotiated, thus mediating the nature of public dialogue from the overbearing dominance of a

²⁹ The actual parity of status between the majority and minority religions, chapter 4 in *Critical Republicanism* by Laborde (2008)

particular comprehensive view, into one that is more reflexive, inclusive and non-discriminatory.

3.4 Secularism and the historical debate of Islamic state

Abdullahi Ahmed An-Na'im, stresses that the idea of an Islamic state has no basis in pre-colonial Islamic history and that its historical innovation was linked to the development of the state and law under colonialism (An-Na'im 2008). An-Na'im argues that *Syariah* is a matter of religious obligations for all Muslims and 'can best be achieved when the state is neutral regarding all religious doctrines and does not claim to enforce *Syariah* principles as state policy or legislation' (2008:3). This perspective strongly recommends the institutional separation of the state apparatus from religion chiefly because the religious obligations will have a considerable impact upon the behaviours of government and state officials who are Muslims, thus putting unnecessary burden upon the grey area between official authority and voluntary conviction in Islam. This position relates closely to Rawls' concern about how the state uses political power to impose a particular comprehensive doctrine in the society. The normative argument for *Syariah* rests on the idea of voluntary religious convictions to grow among individual believers within the Muslim society. An-Na'im emphasizes that 'coercive enforcement promotes hypocrisy (*Nifaq*), which is categorically and repeatedly condemned by the Qur'an' (2008:4). The significance of this position underlines the recognition that state power as a collective agency encompassing the judiciary, administration and the legislative arms could become entangled with the individual obligations of faith; and that this may engender a dominating position of the state with regard to the practice of religious obligations within the society.

An-Na'im's critical assessment of the relationship between the state and Islam as a faith reflects a similar analysis from, Asma Afsaruddin, who argues that within the historical and

the intellectual discourse of Sunni political thought, there was no religious basis for the establishment of a specific political institution (Afsaruddin 2006). The emerging conception for a kind of Islamic governance was located within a very specific historical and political context especially after the passing of Prophet Muhammad whereby early Muslim thinkers began to rely on the Qur'an, and the practice of consultation or the collective decision-making (*Shura*) to establish a sense of political order that would reflect the precept of the Islamic faith. Afsaruddin (2006) argues that the primary sources of Islam provided substantive principles for the righteous conduct of Muslims in the public sphere; and Islamic religious law (*Syariah/Shari'a*) functions primarily as a broad moral guideline to regulate the mechanisms of human transactions, relations including political behaviours, and these legal rulings were never specifically translated into the political ordering of human life, let alone designating the particulars of political administration.

Mashhour (2005) explains that *Shari'a* is not a rigid code of religious laws and the process with which *Shari'a* is applied involves the primary reference to the Qur'an and the *Sunna*³⁰, supplemented by the rule of *Qiyas, Ijmaa and Ijtihad*³¹. The Qur'an and *Sunna* formed the primary source of divine ruling that underscore the tenets of ethical principles and moral guidelines in Islam, and these are supplemented by strenuous exercise of contextual analogy, consensus and reasoning which draw attention to the role of human agency and reason in interpreting justice in the context of *Shari'a* (Mashhour 2005). The role of human agency is stressed here because in as much as the human world is considered as the temporal realm, the exercise of human reason, interpretation and propagation carries the burden of the

³⁰ *Sunna* means 'tradition', referring to the oral teachings or practical traditions and model of behavior of Prophet Muhammad (Mashhour 2005:566)

³¹ *Qiyas* refers to reasoning by analogy, *Ijmaa* points to the consensus of opinions and agreements of decisions taken among Muslim scholars (*Mufti*), and *Ijtihad* is the exercising of independent juristic reasoning to the textual foundations of the Qur'an and *Sunna*. *Ibid.*,

transcendental ideal of religion, in this case Islam. To some extent Mashhour (2005) highlights the reflexive nature of *Shari'a* in a way that would allow its interpretation to critically assess traditional practices that undermine women's status within the Muslim world and restore justice to gender equality consistent with the tenets of Islam.

The issue of constitutional rights and the legal equality of non-Muslims is another major concern where the application of the public laws of *Shari'a* are increasingly building towards the foundational structure of an Islamized state (An-Na'im 1996). In as much as the call for *Shari'a* and the idealization of an Islamized state have become the central plank in the discourse of Islamic revivalism, the implications of such laws - even if applied as 'personal laws' to Muslims - do not itself give substantive constitutional guarantee to non-Muslims that there would not be unnecessary burden placed upon the civil liberties of non-Muslims in a country where Muslims are the majority population. The impact of *Shari'a* upon the shared public sphere between the Muslims and the non-Muslims could potentially result in the unintended segregation along religious lines. The application of laws which are exclusively intended for regulating the conduct of Muslims in the public sphere raises two important issues. Firstly it creates unparalleled notions of justice along with the setting up of different legal codes and jurisdictional apparatus that is amendable to the interpretations of the Holy Book. Secondly it can put pressure upon the kinds of social relations that citizens are normally engaged in within the contemporary environment and may even restrict meaningful dialogue.

The recognition of the role of human agency in informing the interpretation of the divine text is central to the application of *Shari'a* justice in establishing the avenue for the prospect of a communicative ground where reasons of a public nature could be negotiated.

‘*Shari’a* is not divine because it is the product of human interpretation of these sources. Moreover this process of construction through human interpretation took place within a specific historical context which is drastically different from our own. It should therefore be possible for contemporary Muslims to undertake a similar process of interpretation and application of the Qur’an and *Sunna* in the present historical context to develop an alternative public law of Islam which is appropriate for implementation today’ (An-Na’im, 1996:185-86).

Where the issues of human governance and political administration in the temporal world are concerned, the source of authority and the delicate line between what is recognized as God’s sovereignty and the sovereignty of the people – problematizes as well as polarizes the intellectual and political movements in Islam at various historical and contemporary locations (Tamimi 2007). Drawing on the intellectual influence of Ghannouchi³², Tamimi (2007:54) argues that Islamic thinking and the ‘transcendent morality’ in Islam can contribute significantly to the theory of governance to frame the ethics of democratic practice in the contemporary world. The principles of *Shura* combined with the deliberate inclusion of the *Umma* (community) in the government do not deviate considerably from the basic principles of Western democratic consensus. As the procedural dimension of democratic institutions have now been widely adopted in many Muslim countries, the substance of state practice and the question of how *Shari’a* could adequately address the issue of ‘contextual parity’ that will implicate the status of citizens particularly from minority religious background remain highly serious when it comes to reassessing the political relation between the state and religion.

³² *Rachid Ghannouchi: A Democrat within Islamism* by A. Tamimi 2001.

Drawing on this discussion about Islam and the secular state, the core emphasis rests on the obligations of the believers in understanding and exercising the holistic requirements of the scriptures in becoming a practicing Muslims. The institutional support for the believers is equally important but these were not required to be part of an official arrangement as the social participation of the community of faith in providing the welfare of the Umma has greater social value than the need for institutional legislation. The role of interpretation is critical where Syariah laws are used in the resolving civil disputes and regardless of the institutional nature of the state, the individual believers of Islam have the obligations to be knowledgeable as well as to enlighten others about their conduct in the public sphere. Where the state shoulders the burden of secular responsibility, this should not be an issue a problem for religious citizens unless this infringes upon their liberty to profess and exercise their religious expression in the public sphere.

3.5 Conclusion

This chapter briefly discusses the nature of institutional arrangement of the secular state epitomized by the separation-laicism of the Franco-American model. The dissertation justifies the selection of this model for discussion because it captures the role of the constitution in particular, in regulating the role of religion in the public sphere. The other important aspect that can be drawn from this model is the ways in which it differentiates the agency of the state from the agency of the citizen in locating the burden of secular responsibility. The separation thesis approaches the issue from a minimalist state intervention stance, where the emphasis is upon the citizens to carry the obligation of the normative role in upholding the value of secularism. The laïcité perspective generally stresses the importance of the role of the state in retaining the value of secularism by regulating religious expression and activism in the public sphere.

Where the secular responsibility is placed upon the state, it matters significantly as to the degree of state intervention it imposes upon the fundamental liberties of citizens professing different beliefs. For this reason, the idea of the secular itself presents no threat to religious citizens committed to their respective obligations, and as An-Na'im has convincingly argued, the secular state is normatively considered to be more conducive for Muslims to profess and practice their religious obligations. The main contention here is the ideological content and motivations of the state that in implementing the secular values. The reasonable expectation would be that secular state should promote and encourage the liberty of conscience and expression beliefs instead of restricting the liberal vision on the pretext of maintaining security and order in the public sphere.

As a country adopting secular constitution, the Malaysian state should be carrying the burden of secular responsibility in creating the condition for the harmonious living of citizens professing different faiths and of different ethnic backgrounds. Historically Islam has had a dominant presence both in the public sphere as well as in the government. The political significance of Islam in the government renders the secular meaning ambiguous, and for that matter, the ambiguity of secular meaning provides a default position for the government to actively promote Islamic principles and values, thus minimizing the secular responsibility normally expected from the secular constitution. This paradoxical position that caught the Malaysia state between a secular constitution and politically driven Islamic appeal meant that there's a constant pull and push between the agency of the state and the citizens in defining the nature of the secular state in Malaysia. Hence the task of this dissertation to show the direction with which this paradox is going and the events that had driven the course of de-secularization.

4 COLONIAL TERRITORIES AND DISPARATE STATE PRACTICES: FROM BRITISH MALAYA TO MALAYSIA

Abstract: *Malaya, North Borneo (Sabah) and Sarawak make up the country that is Malaysia today. The history of each colonial territory tells different stories about colonial practices and political cultures. Mainstream political analyses in Malaysian studies tend to focus on West Malaysia and the political relations of the Malays-Chinese-Indians ethnic identities. Political developments in Sabah and Sarawak are analysed differently not only because of their distinct histories from Malaya but also the fact that these two territories have diverse mix of ethno-religious backgrounds compared to Malaya. This chapter aims to weave the disparate histories into a coherent understanding, and argues that analysis of Malaysian politics should be inclusive in conceptualizing common citizenship.*

4.1 Introduction

This chapter locates the early notions of ruler-subject relations in context of differing colonial practices in Malaya and the Borneo territories. Malaysia as we know it today came from a diverse history of colonial administrations: British Malaya and the Straits Settlement, North Borneo under British North Borneo Company and Sarawak under three generations of Brooke rule. The differences with which these territories were governed by different colonial masters had considerable impacts upon the construction of political relations, the nature of legitimacy, and the ideological construction of right. As this chapter is closely linked to Chapter 5 – where the political transition from subject to citizens will be explored – the colonial construction of right examines the historical institutional context in which ideas of indigenous custom and religion shape the trajectories of political legitimacy and notion of right in Malaya, North Borneo and Sarawak.

Political legitimacy addresses the question about the right to govern and this chapter identifies ‘whose right to govern’ as a by-product of colonial intervention in the political construction of identity. In the Malaysian historical context the ideological construction of ‘right’ was linked to the processes of indigenous claims to territorial belonging harnessed by the colonial policies of ethno-religious identification. This became significant with the arrival of foreign immigrants and their increased roles in the socio-economic landscape. In comparing the institutional practices of the three colonial territories and the historical contexts of how the discourse of indigenous claims to ‘right’ developed, this chapter shows how the intensity of ethno-religious contestations differed and why the level of contestation in Malaya was higher than in the Borneo territories. Such disparities between Malaya and the Borneo territories constitute serious challenges to the preliminary conceptions of Malaysian citizenship.

4.2 Merging the historical narratives of Malaya, Sabah and Sarawak

Merging these historical narratives highlights the critical issues underpinning the problems of coherent analysis of political developments in Malaysia. The inclusion of Sabah and Sarawak as an integral part of the analysis of Malaysian politics provides vital insight into the discursive challenges of political Islam and how religion underpins the conception of ethnic indigenous right. Ethno-religious contestation and the nature of colonial politics in Malaya, North Borneo and Sarawak contributed significantly to the construction of differential notions of right in these colonies. In examining the colonial practices of conceptualizing rights among the indigenous and migrant communities, this chapter illuminates the historical processes to which Islam began to furnish the meaning/content of the Malay identity, in particular the substance of their special rights. The structured ethno-religious identification began to anchor the political deliberations about rights and these were critical to the early notions about citizenship in the Malaysian historical discourse.

Many scholars of Malaysian political studies tend to focus solely on the history of the Malayan Peninsula, thus neglecting the important historical contributions of Sabah and Sarawak in understanding the dynamics of Islamization and the idea of citizenship rights in the making of Malaysian identity. The geographical separation from the Malayan peninsula and the lack of systematic study on Sabah and Sarawak meant that these two territories have been somewhat neglected from the mainstream Malaysian political analysis. Bringing Sabah and Sarawak into the mainstream of Malaysian political analysis offers the critique of indigenous claims to right that centres on Malay special position, and unpacks the differing layers of ethnically driven notion of citizenship in the Malaysian political culture. This would hopefully transcend the excessive focus on the reified relations of the tri-ethnic political culture (Malay-Chinese-Indian) in the Malayan peninsula by exploring the organizing principles that define the practices that governed the colonial subjects in Malaya, North Borneo and Sarawak.

The policy for 'Special Position' was created by the British colonial state for the Malay-Muslim community and this policy consideration affected a whole host of other rights belonging to other ethno-religious political communities and individuals. The special treatment for one ethnic group remains politically contentious even until today because, firstly the idea of ethnic identity, so rooted in the history communal politics, never fails to come in conflict with the notion of civic identity and increasingly the issue of religion is digging into the deeper meaning of civil liberties and rights of citizens in Malaysia. Such institutional framing of unequal rights further contributes to the problematic conception of justice, making religion a forceful factor in the issue of political legitimacy.

Religious forces and critical historical contingencies accentuated the formation of individual and group identities in relation to the state, and the interplay of these forces can become

dominant in the contemporary public sphere (Eley and Palmowski 2007). The remnants of colonial practices that structured group identities continue to pepper the language of rights when the institutionalization of citizenship came to associate with the formation of the modern state in Malaysia. The Anglo-Malay treaty agreements established an exclusive institutional partnership that promoted the special domain for the Malay ruling elites to reformulate their indigenous political power within the ambit of Islamic authority and jurisprudence³³ (Horowitz 1994). Despite the seemingly separate domains of secular-religious governance, certain ideological links between the British colonial government and the Malay ruling elites began to flourish, and that ideology harnessed a particular conceptual notion of protecting the right of Malay indigenous way of living.

The reorganization of the indigenous political authority by the British was contingent upon commercial profitability³⁴(Smith 2001). Maintaining secular governance was instrumental for British commercial interests in land use, and as the systematic formulation on the use of land for plantation agriculture, mining and taxation increasingly became central to the business of colonial administration, the colonial state claim to forest land began to take precedent over local customs and indigenous inheritance. The colonial interpretation of land use and the subsequent imposition of land coding formed the basis for the emerging notions of customary native land rights in most colonial territories in Southeast Asia. Although the notions of

³³ The dual existence of the Colonial civil courts and the indigenous Syariah courts during the colonial period that characterized the complex legal world of the inherited duality in Horowitz, L. D. (1994). "The Qu'ran and the Common Law: Islamic Law Reform and the Theory of Legal Change." The American Journal of Comparative Law **42**(3): 543-580.

, *'The Qur'an and the Common law: Islamic Law Reform and the Theory of Legal Change*, pp.254-258.

³⁴In *Piloting Princes: Hugh Clifford and the Malay Rulers*, Smith (2001) shows the extent to which the British colonial policy was designed to preserve the power of the Malay rulers and how key colonial agent like Clifford was convinced that the institution of Sultan was appropriate for the well-being of the Malay society.

indigenous customary rights vary according to the local conditions, population and the extent of immigrant settlers, the colonial claim to land use and the interpretation legitimate access formed the genesis of discursive trajectories with which ideas of indigenous right took shape in this region (Peluso and Vandergeest 2001:778-780).

The following section compares the different colonial policies in Malaya, North Borneo and Sarawak. It draws out the ways in which differential notions of customary indigenous rights were developed under colonialism and explores the decisive factors that form the basis for the claims of indigenous political right that motivate the agenda of citizenship rights. The British post-war effort to renegotiate the treaty agreements with the Malay rulers was an important factor that distinguished the mode of indigenous claims to right between Malaya and the Borneo territories. These were key moments where issues of constitutional development and the political status of the colonial subjects in the region were taken into serious consideration as part of the decolonization policy of the British Colonial office³⁵.

The development of the secular state and its relationship with religious forces are historically situated, and as much as the normative positions discussed in the previous sections contextualized the norms and ethics of desirable political practice, these concepts will remain meaningless if they were not illuminated by the empirical substance of social history. The historical examination of the Malay Kingship will illuminate how state power is conceived in the making of the modern state in Malaysia and why Islam becomes vital to the constitutional make-up of the state. This explains the historical dimension of the relationship between the state and religion as well as lending preliminary assumptions about how Islam set roots within

³⁵ CO824/35/4, no.15 (12 June 1942)

the discourse of Malay political identity and subsequently the crystallization of the ethnic conception of rights.

4.3 The conception of the secular state, the Malay *Kerajaan* and religious forces

This section examines the institutional emergence of the syncretic mix of secular-religious matrix characterising the British colonial regime and the Malay *Kerajaan* (*Kingship*). By situating the historical construction political authority, this provides an insight into making of the modern state and the content of public political culture in the Malayan history. Within the dynamics of the Malay *Kerajaan*, Islam plays an important role in harnessing control upon the mind, body and soul of the *Umma*. These involve the elements of coercion as well as reciprocity in terms of gaining enough support from civil groups in the society to sustain political legitimacy. In the realm of state-society relations, many have focussed on the socio-economic and structural transformations underpinning the dialectics of power relations between the state and social forces (Migdal et al 1994; Migdal 2001). This dissertation claims that the role of religion and its agents play important parts as vectors within these setting, particularly on how the state attempts to link these resources to capitalize and contain the civic resources and networks that religion promotes/generates within the society (Casanova 2001; Weithman 2002; Turam 2004). But before this analysis can be extended to the modern state in Malaysia, the subject of inherited traditional authority and the origin or the source of such power needs to be elaborated in the context of the Malay *Kerajaan*.

The traditional practices of legitimacy in the Malay *Kerajaan* retained many of its features in the modern Malaysian *Kerajaan*. The secular practices that emerged from within this state tradition are historically contingent, which subsequently shape the public political culture.

The pre-colonial Malay *Kerajaan* marked the reference point with which ideas about religion and political practices interacted with the secular administration of the British colonialism. The secular colonial state was the primary model upon which the modern Malaysian state established Islam as the official religion of the Federation of Malaysia (Article 3) and constitutionally provided the legal caveats protecting the rights of the majority Malay citizens under Article 153. These special provisions are the results of the many treaty protections that the British established with the traditional Malay authorities, thus projecting a particular historical construction of the relationships between the state, Islam and ethnic identity.

The pre-colonial states in Southeast Asia emerged differently from the Western European experience but how they were transformed at the height of colonial penetration and drew ideas from the secular institutions of the colonial state contributes significantly to an alternative conception of the state. Early examinations into nature and patterns of ancient civilizations in Southeast Asia gave insights into the hypothesis of the 'Indianized native societies' (Coedès 1968:25). Increasingly historians and social anthropologists are taking a situated approach in reconceptualising the origin of power and the underlying networks that sustain the cultural matrix of power centres in the Southeast Asian history. Wolter's concept of the 'men of prowess' revolutionized the ways in which the study of localized power relations and the ways in which political space are created in the Southeast Asian context (Wolters 1999). This line of reasoning is by far and away the most consistent thesis that supports other studies that locate people or communities as the centre of power play in the formation of local leaderships and the locus of mobilization for political power.

In the pre-colonial Malay *Kerajaan*, the concept of *Kerajaan* (Kingship) departs significantly from the Western institutionalized conception of territorial state power. *Kerajaan* means the

‘condition of having a raja’ and this underscores the understanding of the cultural identification of the Malay people to the symbol authority in the traditional custom.

‘Every Malay considered himself be living not under a divinely revealed law but under a particular Raja, an institution which, it will be seen, had deep roots in the Malay world’s animistic and Indian influenced past’ (Milner 1981:49)

It shares a parallel analysis with Geertz’s Balinese state in *Negara* that emphasizes the significance of ‘the symbolic dimension of state power’ (1981:122) in institutionalizing/homogenizing a common identity through the display of court ceremonies. Allegiance to the Raja had important material bearings upon the livelihood of the Malays and this had spiritual bearing upon the political relation of power between the ruler and subject. Walker emphasizes the significance of such ‘ritual relationship’ particularly in the form of ceremonial rituals of the royal courts as it strengthened the material and spiritual bondage of the subjects to the ruler (Walker 2002). Despite the ceremonial display of traditional power, the interpretation of the omnipotence of the *Kerajaan* ideology should not be taken as unchanging and that the textual portrayal of royal absolutism must be critically examined to account for the substance of power relations that contributed to the sustainability as well as the vulnerability of the *Kerajaan* ideology (Walker 2005).

The institution of *Kerajaan* was not uncontested, in fact, there were two significant processes of change that compelled the Malay *Kerajaan* to shed some of its Indianized past in the attempt to establish Islam as the source of symbolic authority at the turn of the 19th century. These changes came about as a result of the growing social force of Islam among the Malay communities and the impact of colonial bureaucratization upon the administration of the populace. Mass conversion occurred particularly during the 13th to 16th century through trade,

commerce and the courts embracing Islam (Hamid 1982; Alatas 1985). Islamic conversions continue to play critical role in changing the demographic landscape of the population as well as forging the dynamics of political relations throughout the modern history of Malaysia. Milner (1981:60) documents that initially the Malay Sultans tried to restrict the spread of Islamic teachings that went against the grain of the ceremonial display of power associated with the Indianized *Kerajaan*, but the influence of *Syariah* oriented Islam among the Malay indigenous society eventually compelled the Malay Sultans to incorporate Islamic doctrines into their rule, and with the advent of British colonial rule, the terms within treaties of protection actually aided the Malay Sultans' attempt in usurping the symbolic role of Islam through the formalization of the Sultan's role as the protectors of Islam and the Malay customs (Milner 1981). The key to sustaining the Islamic dimension of the indigenous Malay political institutions lies in the vibrancy of the Islamized Malay community and where the source of political power was concerned, the patronage support³⁶ of local chiefs was central in channelling the wealth and resources generated over the control of population (Gullick 1988).

Islamic conversion aside, education resulted in the gradual loss of the *Kerajaan's* Indic past. At the turn of the 19th century there were growing forces of Islamization in Malaya and Islamic teaching and observance came to dominate the communal life of the Muslim *Umma* (Roff 1998). These elements of Islamic teaching became significant for the village and communal life of the Malays, religious scholars and the praying facilities like mosques,

³⁶ The significance of 'political following or entourage' as an established locus of power among successful local chiefs and the ways in which the political space was generated by these 'men of prowess' in mobilizing sizeable following within a locality has now been recognized as one of the enduring forms of political relations within a growing corpus of literature that engages with the public political culture in Southeast Asia (Walker 2002; Warren 2002; Abinales and Amoroso 2005).

*surau*³⁷ and *pondok*³⁸ schools and constituted the central organizing principle of Malay customary life. It formed the earliest system of religious education for the Malay communities at the village level (Gullick 1989:277-303). Since then Syariah oriented Islam grew influential at all levels of the Malay society (Milner 1981:58-89) and the Malay Rulers gradually felt the loss of traditional power under the Residential system and Islam became an ideological force with which the Malay Rulers could re-establish the social infrastructure to link with the religious leaders and their congregations at the village level (Gullick 1989). It was no coincidence that the Malay rulers observing the ‘treaty reservation’³⁹ of the Residential system in the Federated Malay states were able to play key roles in supporting the expansion of Islamic jurisprudence (Muhammadan law) in matters relating to Malay customs as they remained autonomous from the judicial practices of the British colonial administration. Such development actually contributed to the concentration of doctrinal and administrative religious authority in the hands of the hierarchy of officials directly dependent on the sultanate establishments for their position and power (Roff 1998:212).

Islam began to undergo successive bureaucratization at the turn of late the 19th century. Despite the supremacy of the secular courts developed according to English legal system, the parallel growth of Islamic Syariah courts were greatly influenced the procedural judicial

³⁷ These are community halls at the village level.

³⁸ Literally translated as small hut but in this context some religious schools provide training facilities and boarding.

³⁹ The British came to Malaya for trading purposes and were never interested in getting involved in domestic issues. The on-going feuds among the local chiefs in the Malay states however prompted the British to stabilize the political situation for economic purposes and this situation led to the British involvement in the politics and administration of the Malay states. Penang, Melaka, and Singapore were brought together as the Straits Settlements headed by a government in 1826. The British Residential system was first introduced in Perak after the Treaty of Pangkor in 1874 and such administrative system was expanded to include Selangor, Negeri Sembilan and Pahang. The treaty specifically defined the role of the British Resident in administering all secular matters with the exception of Malay customs and the Islamic religion whereby these were regarded as the protected royal privileges of the Malay sultans (Hooker 2003:128-130).

template of the former, resulting in the current template of inherited duality (Horowitz 1994:254-260). The Syariah court came to be part of the indigenous state apparatus and the dynamics of nationalist politics followed by such process of institutionalization have been addressed by many scholars examining the question of Islam in the Malaysian political landscape (Hooker 1984; Roff 1994; Hooker and Othman 2003). The colonial interaction with the Malay *Kerajaan* as well as the indigenous society marked an important shift in the ways power and authority were to be legislated, arranged and institutionally organized at the turn of the century. This was an important historical juncture as the modern institutional arrangement began to take shape and where the conditions of secular and religious distinctions departed considerably from the norms of the separation thesis conceived in the Western context.

Official recognition was given to the existing system of Muhammadan law and Malay custom to deal with matters relating to the land, inheritance and social issues affecting Malay communities. However the content of Islamic law and how they were applied to the customs (*Adat*) in different localities – *Adat Temenggong*, *Adat Perpatih*⁴⁰ - and in different social circumstances by the elders and the local chiefs were not translatable into the normative understanding of justice in the secular courts (Sutherland 1980). Such sentiment was

⁴⁰ 'The term "*adat perpatih*" has a fairly well defined meaning so far as law is concerned. It means a body of rules based upon the existence of a set of unilineal descent groups, which are organized on a matrilineal and matrilocal basis. There is no such definite meaning attaching to "*adat temenggong*." This term is generally used to refer to the contents of the Malayan Legal Digests and also sometimes to *adats* outside the *adat perpatih* areas of Negri Sembilan. This latter use is almost exclusively confined to commentators on *adat perpatih* who use *adat temenggong* to mean an *adat* which is not *perpatih*. The Malays themselves generally use such terms as *adat kampung*, *adat ketua*, *adat mukim* or *pakat*. The content of these various terms is a strictly local matter'. Op cit, p.442 Hooker, M. B. (1968). "The Interaction of Legislation and Customary Law in a Malay State." The American Journal of Comparative Law **16**(3): 415-430.

reflected by the legal adviser in the proposal for the amendment of the Muhammadan Law and Malay Custom 1929 into Enactment No.4 of 1930,

‘...the Supreme Court, while it cannot know Muhammadan Law, is debarred from informing itself what the Muhammadan Law is. It has, therefore created an impasse out of which we have to find a way. It also raised the question whether this particular matter – a case involving a woman who just became a widow and her right to her late husband’s inheritance – was one of Muhammadan Law. It is, I believe, a disputed point whether it is Muhammadan Law or whether it is Malay Custom’⁴¹.

Under British Malaya the distinction of the secular from the religious was made on the basis of foreign and indigenous distinction of political practices. The secular administrations of the British colonial state co-existed with the indigenous authorities of the Malay *Kerajaan*. Islam as a religion was granted autonomous authority from the secular considerations of colonial government (Hussin 2007:779-783), giving the Malay Rulers power to regulate Malay customs and Islam. The colonial regime effectively established Islamic jurisprudence tied to the patronage of the Malay Sultans at the turn of the 19th century, giving ample substance to the ideological conception of Malay *Kerajaan* as an outgrowth of an Islamic civilization. The colonial interventions into the traditional system of authority had in fact fused religion into the local political practice through Malay indigenous system of authority, strengthening the substance of faith with power play for the Muslim *Umma*. Faith and the norms of religious observance were institutionally amalgamated with the symbolic authority of the Malay Rulers, creating the autonomous sphere with which Islam and politics were allowed to grow

⁴¹ Proceedings of the Federal Council of the Federated Malay States for the year 1933, FMS Government Press 1934

within the Malay society, thus enabling the interested parties and individuals to appropriate Islam as a source of faith and cultural identification to expand the networks of political relations.

The close link between religion and power play is highlighted in the discourse of ‘little wars’ in the Strait settlement of Melaka⁴², as Chew demonstrates how the local Malay chiefs played significant role in drawing spiritual resources from the syncretism of religion and culture to form indigenous resistance against foreign encroachments into their lives. These resistance movements prompted the British to employ tactics of collaboration with the local power elites to subdue the widespread lawlessness in the western Malay states, thus paving the way for the Pangkor Agreement in 1874 (Chew 1998:373-381). As local collaborations proved to be successful in subverting indigenous resistance to foreign encroachment into the livelihoods of the indigenous society⁴³, the Pangkor Agreement provided the strategy for the successive treaties conducted between Malay Rulers and the British. These also included,

‘new security arrangement’ in which the Malay Rulers under the treaty obligations were expected to provide logistical support to the Indian troops stationed in these four Malay states and the Straits Settlements, ‘should war

⁴² ‘In common with the other minor Indian presidencies of Madras and Bombay, the Straits Settlements – Penang, Melaka and Singapore - in 1826 had a Governor and council responsible to the Governor General in Calcutta. In turn the Governor General was subordinate to the Court of Directors of the East India Company and the Board of Control established under the terms of Pitt’s India Act of 1784, as the dual government of the Company in London. Straits Settlements became Crown Colonies in 1867’ p.52

⁴³ British colonialism transformed the livelihoods of the local chiefs, mainly in terms of channeling the collection of revenues and natural resources to provide for the infrastructural support for British capital and economic interests Chai, H.-C. (1968). The Development of British Malaya, 1896-1909. Kuala Lumpur, Oxford University Press.

break out between Her Majesty's Government and that of any other power'
(Haron 1990:284).

The re-invention of Malay *Kerajaan*, with the concomitant appearance of Islamic laws and authority as part of the Malay Ruling apparatus and the obligations to protect the British commercial interests generated dissenting voices in the form of indigenous resistance among ordinary Malays who were critical of such unholy collaboration. The Kelantan rising in 1915 for instance provided important insight into the ambivalences in the way the Kelantan Rulers conducted their dealings between the British. The Malay subjects, and most significantly the strength of local leaders, in particular the ability of the religious leaders –*Imams and Hajjis* (Allen 1968:252-257) – to articulate their increasing scepticism about the advisory role of the British Residents system among the Malays on moral grounds (Allen 1968; Kershaw 1977).

The British policy of non-interference in the 'religion and custom' of the Malay society actually engendered the separation of administration and legal jurisdictions according to religion and ethnicity. As the ruling elites developed a system of religious administration akin to the Western bureaucracy in managing their customary affairs, other grassroots religious leaders and scholars began to question the religious credibility of the traditional elites (Roff 1994). By late 19th the religious education had considerable impact upon Malay political awareness and such 'awareness' communicated via modern prints and journals in the Malay society, prompting the British colonial state to brand these Malay leaders as 'deviants' (Khoo 1974:197-198). Local Malay journals like *Al-Imam*, *Al-Ikhwān* became critical of the Rulers who failed to improve the welfare of the Malays, and as these writers were non-English educated, their writings were treated with greater suspicion by the British, unlike the aristocratic Malays who were groomed to become the bureaucrats of the Malayan civil service (Khoo 1974).

The political challenge against the customary authority of the traditional elites came from the reformist Muslims in this period, who began to question the validity of 'orthodox Islam' and progressively adopted the use of reason (*akal*) as the basis for the a religious-driven political activism (Roff 1994:54-90). Such critical discourse also animated the local politics in the Malay states as the economic and social landscape were transformed by foreign capital and the rising numbers of labour immigration originating mainly from India and China. These changes considerably structured the social relations between the indigenous and the migrant communities (Freedman 1960; Khoo 1981; Abraham 1983; Lee 1989). Colonialism and the pluralisation of the socio-economic relations during the colonial period fostered cultural division grounded in the perceptions of livelihood and the use of natural resources that was structurally linked to the ethnic division of labour (Stockwell 1982; Hirschman 1986; Hirschman 1987).

Prior to the Japanese Occupation, the British non-interference policy on indigenous 'religion and custom' anchored the autonomous condition for Islam to be the symbol of monarchical authority within the apparatus of Malay *Kerajaan*. In time the position of Islam as a source of monarchical legitimacy became the source of indigenous mobilization within Malay society. Such development reflects the complexity with which Islam as a religious force is constantly being pulled in different directions within the Malay society; polarised and fragmented by the demands of individuals, community groups and most importantly, the Malay *Kerajaan* itself. However as the preservation of Malay-Muslim monarchies in the Malay states were vital to the political economy of the British colonial state and the extent to which non-interference came to be associated with protecting the sovereignty of the Malay rulers, what seemed to continue up to the Japanese Occupation was apparent, that

‘political power in Malaya was the prerogative of the British administrators and the traditional Malay establishments alone. Disputes might arise about which should have the lion's share, but nobody else was to have any share at all’⁴⁴ (Allen 1970).

4.4 The business of governing and the politics of belonging

The section aims to highlight how the formalization of leaderships was increasingly driven by religious and ethnic concerns, and how they underpinned the conceptions of the colonial subject. The historical narratives present how the different territories were governed by different colonial institutions and to draw out the competing notions of national identity in the historical context. Under colonialism state-making was set against the backdrop of a pluralizing society through immigration and the deliberate colonial policy of structuring economic roles according to ethnicity and the power of capital. However in deciding who had the political right to govern, the British colonial regime had the upper hand.

4.4.1 Malaya

The Anglo-Malay alliance under the British colonial government tended to prefer the Malays, especially from the aristocratic background, to participate in the civil service and they were actively encouraged to go through special training schools to learn the skills of becoming bureaucrat (Roff 1994). These differed from colonial practices in North Borneo, Sarawak, and Singapore. The historical diversity in these colonial policies and local participation in

⁴⁴ ‘High Commissioner Sir Hugh Clifford told the Federal Council in 1927 that the States were, and must remain, Malayo-Muslim monarchies; Britain had neither the mandate nor the desire to make them anything else. Any form of democracy was totally inapplicable to them. Clementi, his successor, wrote confidentially that ‘the Sultans [were] not an anachronism [but] a buffer between us and the Chinese, a buffer too... between us and events such as have been taking place in Ceylon’. Op Cit. P.153 Allen, J. d. V. (1970). "Malayan Civil Service, 1874-1941: Colonial Bureaucracy/Malayan Elite." Comparative Studies in Society and History **12**(2): 149-178.

governance and administration constituted major problems in conceptualizing national identity for Malaysia. The problem of consensus on nation-building is not only a reflection of the increasingly conflicting ideas of national identity projected by the local nationalist elites in Malaya and Singapore but it is symptomatic of a deeper misreading about the histories and the identities of the other colonies (Stockwell 2004; Stockwell 2005) .

The previous section discusses how Malaya came under the consolidation of British colonialism through various treaties with the Malay sultanates, and how the pre-colonial form of Malay kingship and the forces of Islam within the indigenous Malay society generated the condition for the substantive interaction of religion and political practice in the Malay *Kerajaan*. The Malay *Kerajaan* formed the well spring of traditional form of political legitimacy underpinning the development of the legislative apparatus of the colonial state. Towards the early part of the 20th century, the colonial administration of Malaya was carried out in ‘seven-fold fragmentation of administration’ - the Crown Colonies of the Straits Settlements in Penang, Melaka and Singapore; the British Residency system in the Four Federated states (Perak, Selangor, Pahang and Negeri Sembilan) – whilst the rest of the five Malay states (Kedah, Kelantan, Perlis, Terengganu and Johor) remained fairly independent at the periphery and subject to the varying strengths of British control (Tilman 1961).

The complex institutional administration that characterized the British Malaya regime undermined the original policy intention of the British to maintain original intention of ‘non-interference’ policy. Where the issues of land tenure, ownership and inheritance were involved, the drafting of land laws began to demarcate land for commercial development and those under Malay Reservations in the Federated Malay States. The Torrens System land registration in the Malay states was introduced as part of the administrative demands of increasing European enterprises in tin mining industry and the growing plantation estates

among foreign investors (Allen and Donnithorne 1957; Wong 1975). It was argued that the British rule established different legal codes for the indigenous population in the name of protecting their land holdings, and title ownership of land for the use of commercial industries invested by foreign capital.

The idea behind the conception of the Customary Land rights for the Malay population began to take root following the rubber boom when the British officials in Selangor discouraged the sale and conversion of village sites into rubber cultivation estates⁴⁵ (Ho 1967; Kratoska 1983). In the attempt to protect what the British officers thought was the proper ancestral province of the Malay peasant community against the influx of Chinese and European commercial ventures, 'peasant tenure, or the right to hold Customary Land' was legislated under the Selangor Land Enactment 1891 which required the 'original holder to be a Mohammedan'⁴⁶. Lands that were gazetted under such ancestral consideration were then effectively incorporated into the Malay Reservations Enactment 1913⁴⁷, hence gazetted areas considered to be Customary Land to which the original holders must be Mohammedans became embedded within the land tenure of the Malay Reservation Enactment 1913 - substantiating

⁴⁵ W.E.Maxwell, an official who came to Malaya in 1865 and was appointed Commissioner of Lands for the Straits Settlements in 1882, became the British Resident of Selangor in 1891. His local knowledge on Malay land tenure led him to believe that land laws for areas under British control should follow indigenous forms. Maxwell played an important role in drafting the land legislation for the state of Selangor (which in fact owed little to indigenous land tenure) and the Selangor law later became the basis of land enactments put into effect throughout the Peninsula. Maxwell created a category of "customary land" for peasant smallholdings which provided security of tenure (the law refers to "a permanent, transmissible, and transferable right of use and occupancy") but made no mention of matters such as leases and mortgages, as these were considered unnecessary for land under peasantry subsistence cultivation (Kratoska 1983:151).

⁴⁶ Both Means (1972:32-33) and Kratoska (1985:26-27) explain how legal strategies were employed by the British officials to restrict the conduct of the Malay peasants from disposing and mortgaging their land for cash particularly from non-Muslim creditors.

⁴⁷ Under the Malay Reservations Enactment, neither state land nor private land owned by a Malay within any area designated a Malay Reservation could be transferred to a non-Malay; mortgaged land could be sold in execution of a court decree only with the consent of the State Council, and could only be purchased by a Malay. (Kratoska 1983:154)

the conceptual genesis of defining a Malay who was ‘a person belonging to any Malayan race who habitually speaks the Malay language or any Malayan language and professes the Moslem religion’ (Means 1972; Kratoska 1982; Kratoska 1983; Kratoska 1985).

By the early 1920s, where tin and rubber made up about 60% of Malaya’s total exports, official statistics showed that the 97.6% of Malays worked in rice planting, 95.5% of Chinese were employed in the tin-mining industry and about 53.1% Indians worked as agricultural coolies⁴⁸. These figures began to convince the British Residents in the Federated Malay States that the birth right of the Malay peasants, as the ‘sons of the soil’ in the rice industry, must be safeguarded (Kratoska 1982:304-309). The categorical assumptions about ethnicity and livelihood formed the basis of colonial pseudo-sociological analysis of work ethics differentiating the ‘laid-back Malays’, the ‘money making Chinese’ and the ‘amendable Indian coolie’, giving substance to the colonial policies to differentiate workplace, living space and most importantly, constructing the notion that migrant subjects did not ‘belong to the local society...where only Malay aristocrats and their colonial advisors should be allowed full participation in political or administrative roles’ (Hirschman 1986:353).

Maintaining ethnic frontiers was increasingly instrumental to the business of colonial governance in which ‘the census, landownership, the regulation of labour, education policy, representation on the Federal Council’ was based on ethnicity (Stockwell 1982:57). Years of structured segregation in work and living spaces went hand in hand with the institutionalisation of government departments dealing with issues relating to particular ethnic groups, i.e. Chinese Protectorate and the Department of Labour dealing mostly with Indian immigration and estate employment (Stockwell 1982), where ideas about ethnicity continually feeding into the institutional practices of segregation building the basis for early

⁴⁸ Op. cit in Kratoska 1982: 291.

racial ideology consistent with the business of governing in British Malay (Hirschman 1986; Hirschman 1987).

In the year 1933, some of the clauses in the Malay Reservation Enactment 1913 were subject to a number of amendments with the aim of ‘preventing the negotiability of land as an article of commerce’ and to prevent Malay landowners in the Malay reservations from getting into debt⁴⁹. Official estimates on the amount of debt incurred upon land in Malay reservations went up to about 5 million dollar⁵⁰ by 1930 and the colonial government intended to protect lands in Malay reservations from all commercial, legal and administrative dealings that had nothing to do with the Malay community⁵¹. Whilst the British Residents and most of the Malay Rulers were in agreement about the role of the government intervention to alleviate the problem of indebtedness among the Malay peasants and to restrict the transactions and legality of money lending charged upon Malay reservation lands between Malays and non-Malays⁵², a handful of the legislative council members expressed concerns about the ways in which the policy of ‘non-interference’ on the part of the government implicated upon the issue of justice to persons who were not Malays.

‘...I do assume that Government desires to be just to all races in the Federated Malay States and does not desire to be partial merely to one, and that is the Malay

⁴⁹ Malay Reservation Bill, 1933, B132 official documents of the Federated Malay States Government, 1934.

⁵⁰ The Straits dollar, issued by the Government of the Straits Settlement was the currency until 1939., Ibid

⁵¹ Ibid.,

⁵² B132-B161, Ibid,. The Raja Muda of Perak was particularly adamant about the necessity of such involvement, ‘...To my mind, this amended law is absolutely necessary in the interests of the Malay community. I am quite sure that anybody who has lived in this country with the Malays since the rubber boom and particularly those who are really in sympathy with the many shortcomings and weaknesses of the Malays, will agree with me that this Bill. Though very drastic as it appears, is really needed to protect the interests of the Malays in general.’

race. As this Enactment stands, it will cause gross injustice and great hardship to persons not of the Malay race...We must remember and we are all aware of the fact that this country is a country inhabited by several races, and there can be no doubt that the ill-feeling and resentment to which I have referred will be intensified when one race is selected for specially privileged treatment at the expense of others.⁵³

With the passing of the amendments made to the Malay Reservation Enactment, 1934, the British ‘non-interference’ policy turned out to be one of positive intervention when it came to the issues of land tenure and the perceived role of the Malay peasant community. Compared to the other colonial territories, the idea of indigenous land tenure and native rights to special treatment did not resonate strongly among the colonial masters of British North Borneo and the Rajah Brooke in Sarawak. It is not within the scope of this thesis to find out why there were differences in the institutional practices of colonial governance; however what was effective about the legislation of land right and its implication upon the development of the constitutional protection of the Malay special position was the ways in which the ideas of indigenous Malay rights and the role of Islam became dominant in the language of political representations and citizenship rights as these colonies merged into a Federation.

4.4.2 North Borneo

North Borneo and Sarawak came into the radar of British Imperialism through the ‘agency of political structures and vehicles outside the direct control of Whitehall’ (Wright 1972:39). The Chartered Company of North Borneo and the Brooke raj, it was argued, were mere proxies to the British Imperial power, hence there were neither direct British colonial

⁵³ Mr. E.D Shearn, member of the Federated Malay States legislative council. B161, Amendment of Section 9, Malay Reservations Enactment, 1933. Ibid.,.

responsibility nor systematic imperial funding granted for the internal administration in these territories (Wright 1972). North Borneo and Sarawak became British Crown Colonies in 1946 after the end of the Japanese Occupation. The pre-colonial histories of indigenous political systems in North Borneo and Sarawak shared some similarities to the *Kerajaan* model in Malaya, where local chiefs or *Datu* played pivotal roles in making and breaking alliances with the established sultanates in Brunei and the Sulu Archipelago (Kathirithamby-Wells and Villiers 1990; Manguin 1991; Walker 2002; Abinales and Amoroso 2005). The political authorities of these Sultanates were limited to the coastal areas of North Borneo because the vast areas of the interior were almost impenetrable. Historians focusing on the maritime trading in this region documented how slave trading and maritime piracy became vital to the maritime economy and the political structure of the Sulu Sultanate in the Southern parts of the Philippines⁵⁴ (Wright 1966); these activities were extended to the northern parts of the Borneo island which significantly influenced the nature of traditional authorities in areas under the suzerainty of the Brunei Sultanate (Pryer 1883; Pringle 1974; Sutherland 1983; Bently 1986; Nicholl 1989; Warren 2002). Regional instability following the activities of slave raiding, piracy and local rebellions against the Brunei Sultanate⁵⁵ as well as the

⁵⁴ The issue of North Borneo sovereignty prior to the history of colonialism is unresolved, although this remains a thorny diplomatic issue between Malaysia and the Philippines in the light of the recurring territorial claims of the Sulu Sultan over Sabah Jayakumar, S. (1968). "The Philippine claim to Sabah and International Law." *Malaya Law Review* **10**(2): 302-335.

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, Fernandez, E. S. (2007). "Philippine-Malaysia Dispute over Sabah: A Bibliographic Survey." *ASIA-PACIFIC SOCIAL SCIENCE REVIEW* **7**(1): 53-64.

⁵⁵ 'When Sir James Brooke made it his business to administer the country, it was for the natives and by the natives, and it is by that equitable system of government that the country has grown practically without bloodshed and without ill-feeling on the part of the natives....The only thing that the Government puts down with a firm hand are murder and head-hunting and theft...the natives may retain all their customs, their religion is not tampered with'Haddon, Lord Stanmore, et al. (1900). "In the Heart of Borneo: Discussion." *The Geographical Journal* **16**(1): 59-62

presence of other European powers – French in Indo-China, Spanish in the Philippines, Dutch in West Borneo and the Indonesian Islands – were cited as the key turning points that influenced Great Britain to assume protectorates over Sarawak, Brunei and North Borneo in order to secure the international trade routes within the South China Sea (Tarling 1962; Wright 1970).

It was crucial for Britain to secure the trade route from India via the South China Sea to the various ports in China as opium was a profitable commodity and was shipped to Ceylon, Siam, Cochin China, Straits Settlements, Netherlands India, Natunas Islands, Sarawak, Labuan, the Philippines, Japan and China⁵⁶. Official figures on the total value of opium exported from India from the year 1904-1905 was £7,082,295 of which opium to the value of £5.5 million was shipped directly to the ports in China. The net opium revenue for the British Colonial Government in India was estimated at about £ 4,050,999 of which £3 million was derived from the opium exported directly to China⁵⁷.

The acquisition of Labuan Island (off the west coast of North Borneo) in the British-Brunei Treaty in 1847 coincided with the end of the first Anglo-Chinese opium war (1839-1842) and this treaty rested on the justification of protecting the British international trade routes from China to Singapore against piracy and the mining of coal deposits in the island (Galbraith 1965; Horton 1986). When the Sultan of Brunei ceded the north-western part of North Borneo to an American Trading Company in 1865 for the purpose of commercial venture for ten years, the British became aware of other colonial threats to her strategic position in the region (Tregonning 1954). When the American settlement failed, the ceded territory was then

p.59

⁵⁶ *HC Deb 27 Feb 1908 Vol.185 cc51-2* Official figures on the total value of opium exported from India from the year 1904-1905 was £7,082,295 of which opium to the value of £5.5 million was shipped directly to the ports in China. *HC Deb 30 April 1906 Vol. 156 cc233-4*

⁵⁷ . *HC Deb 30 April 1906 Vol. 156 cc233-4*

renegotiated in a three-way arrangement between the Brunei, the Sulu Sultanate and the Overbeck and Dent Association (ODA), whereby the ODA acquired the right to govern North Borneo independently in return for annual fees of 15,000 straits dollars to the Brunei Sultan and 5,000 straits dollars to the Sulu Sultan (Tregonning 1965)⁵⁸. These rights were secured on condition that the sale of the North Borneo lease must be approved by the British Government, paving the way for the ODA to apply a Royal Charter for North Borneo (Tarling 1971; Tarling 1978).

Pending approval for the Royal Charter, the ODA employed British Residents to secure peace in the territory, the cooperation of local chiefs and proceeded with instituting the Residency system of administration in the territory (Tregonning 1954). Although some of the local chiefs were willing to participate in the Residency system, many were unhappy with the introduction of taxation and other forms of sanctions, particularly the abolition of the slave bondage system in the communities (Black 1968; Reid and Brewster 1983). The British North Borneo Company (BNBC) officially began administering North Borneo in 1881⁵⁹

⁵⁸ Pre-colonial North Borneo was territorially divided between the suzerainty of the Bruneian riverine system Kathirithamby-Well, J. (1993). "Hulu-hilir Unity and Conflict: Malay Statecraft in East Sumatra before the mid-Nineteenth Century." Archipel **45**: 77-96

, Hall, K. R. (2001). "Upstream and Downstream Unification in Southeast Asia's First Islamic Polity: The Changing Sense of Community in the Fifteenth Century Hikayat Raja-Raja Pasai Court Chronicle." Journal of the Economic and Social History of the Orient **44**(2): 198-229.

and the maritime trading prowess of the Sulu kingdom Warren, J. F. (2002). Iranun and Balangingi: Globalization, Maritime Raiding and the Birth of Ethnicity. Singapore, Singapore University Press.

In '*The Historical Note on North Borneo Dispute*', Wright (1966) provides an excellent genealogy of the territorial rivalry between the Brunei and the Sulu Sultanates, and how these were complicated with the British chartering of North Borneo.

⁵⁹ There was a debate in the House of Commons where Sir John Gorst protested that 'the Company is not a commercial but a British political Company' and the fact that the Company was 'authorized and empowered to take Sovereign rights from two Sultans of the Island, who are authorized and empowered by the Government to use and exercise those rights under the supreme authority and under the control of the Government of Great Britain' and therefore had hidden political agendas behind the façade of a mere trading company. *HC Deb 17 March 1882 vol. 267 cc1148-230*

through the appointment of Governor, a Legislative council and a civil administration. As a business organization the role of BNBC was to secure peace⁶⁰, open up the territory for foreign investments, pay dividends to its shareholders in Britain and follow the authority of the Courts of Directors in London⁶¹(William 1981). With regard to its policy of non-interference in local religion and custom, Article 8 and 9 of the BNB Charter⁶² specifically required the Company to exercise discretion in its treatment of the local inhabitants (British North Borneo Chartered Company 1878). In hindsight, this policy of non-interference was impractical as the BNBC was legally the Government of North Borneo where the ‘law of England, both Civil and Criminal, became the law of the State’ (Macaskie 1912:201).

The first Governor of the BNBC was pessimistic about the commercial viability of the company (Treacher 1891:128-129). This was due to the increased administrative costs and the lack of concrete development plans designed for the territory(Treacher 1891). Land

⁶⁰ One of the MP (Mr. Richard) was particularly sceptical about the ways in which peace could be secured in North Borneo given the historical evidence of how the Englishmen as the colonizing race managed to come into contact with ‘any other nation, tribe or race, in any part of the world without quarrelling and fighting with them... We must remember that the people of these ceded Provinces have not been consulted in regard to this transference; and nothing is more likely than that they will rebel against the authority of the foreign adventurers to whom they have been handed over without their consent and possibly without their knowledge. Indeed, we are not without a warning example even in Borneo. We know what took place before under Rajah Brooke. *Ibid.*, cc1186-1187

⁶¹ Sir Rutherford Alcock, Richard Biddulph Martin, Richard Charles Mayne, and William Henry Macleod Read, with the Petitioner Alfred Dent, were the founding Directors of the Association (BNBC 1878:7).

⁶² Article 8 on the ‘Religions of the Inhabitants’ – ‘*The Company as such, or its officers as such, shall not in any way interfere with the religion of any class or tribe of the people of Borneo, or of any of the inhabitants thereof*’;

Article 9 on the ‘Administration of Justice to Inhabitants’ – ‘*In the administration of justice by the Company to the people of Borneo, or to any of the inhabitants thereof, careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong, especially with respect to the holding possession transfer and disposition of lands and goods, and testate or interstate succession thereto, and marriage divorce and legitimacy, and other rights of property and personal rights* (1878:9-10).

became the fall back commodity to which the major source of income for the BNBC would be derived, ‘...the source from which the shareholders are to be recouped is the surplus revenues which a wisely administered Government, would ensure, by judiciously fostering colonisation, principally by the Chinese, by the sale of the vast acreage of ‘waste’ or Government lands, by leasing the right to work the valuable timber forests...by custom duties and ‘farming out’ of the right to sell opium, spirits, tobacco etc.’ (1891:129). The Company’s intention to protect the ‘rights of the native inhabitants’ were driven by the conditions of settlement⁶³, where restrictions were gradually being introduced as a way of reducing the practice of swidden agriculture and as a result changes were made on land tenure, labour⁶⁴, and the acquisition of rivers as well as the introduction of taxes on the indigenous collection of jungle produce. The interpretation of the phrase (a) "lands possessed by customary tenure” required the fulfilment of one of the other conditions in Section 26 of the Land Law (1913) in order to meet the test of customary tenure. Hence the individual native was required to prove a ‘right’, subject to the conditions written in the said Section in order to demand a title for the land or money compensation from the Company (Macaskie 1921). The legalization of the

⁶³ Proclamation 3 of 1889 laid down rules by which native rights to land by customary tenure should be decided; these rules are embodied in s. 26 of the Land Law (Ordinance 7 of 1913) which defines native rights as follows: (a) "Land possessed by customary tenure or occupied for residential purposes for the last three years preceding settlement. (b) " Land planted with fruit trees, when the number of fruit trees amounts to twenty and upwards to each acre. (c) " Isolated fruit trees, and sago, rotan, or other plants of economic value, that the claimant can prove to the satisfaction of the Collector were planted or upkept and regularly enjoyed by him as his personal property. (d) " Grazing land that the claimant agrees to keep stocked with a sufficient number of cattle or horses to keep down the undergrowth. (e) Wet and dry padi or other grain land that has been cultivated within three years. (f) " Burial grounds or shrines. (g) " Usual rights of way for men or animals from rivers, roads, or houses to any or all of the above." (Macaskie 1921:207-209).

⁶⁴ The Company policy on the importation of Javanese and Chinese labor to meet the demands of plantation estates was underscored by the official’s view that the indigenous workers were tied to the seasonal planting of paddy, hence the need to return to their respective villages for the planting and the harvesting season North Borneo (1949). Annual Report 1949. Jesselton.

access to land and jungle resources considerably affected the traditional ways in which the indigenous communities utilize land and in many ways contradicted the indigenous practices of collective ownership (Cleary 1992; Cleary 1996; Cleary 2002).

In the eyes of the Company officers, the indigenous people failed to make profitable use of land in North Borneo and their local custom defied the norms of landownership understood in the Western legal concept, and this led them to view the natives as 'squatters', instead of landowners (Doolittle 2003). As the inhabitants of North Borneo were very diverse and they tended to be nomadic and lived in small clusters of villages, early colonial description of the population classified the major tribes into three main categories - Bajau, Dusun and Murut⁶⁵ - Kazufumi (2001:229) in particular presents quite a detailed classification of ethnic groups in North Borneo (Sabah) from 1891-1991; as successive census report since 1921 recorded more than 30 different ethno-linguistic groups existed in North Borneo. Colonial anthropology depicted the difficulty in assigning the native communities of North Borneo into a structured identity, where this was also exacerbated by the lack of coherent settlement structures among

⁶⁵ As this was the broadest classification of ethnicity in the earliest colonial account, various anthropological studies on the various ethnic and linguistic groups of Sabah indigenous communities are available among these scholars - Williams, T. R. (1963). "The Form of a North Borneo Nativistic Behavior." *American Anthropologist* **65**(3): 543-551.

, Williams, T. R. (1965). The Dusun : a north Borneo society New York, Holt, Rinehart & Winston.

, Appell, G. N. and R. Harrison (1969). "The Ethnographic Classification of the Dusun-Speaking Peoples of Northern Borneo." *Ethnology* **8**(2): 212-227.

, Brewis, K. S. (1990). The Timugon Murut. The Social Organization of Sabah Societies. S. G. Lingenfelter. Kota Kinabalu, Sabah Museum and State Archives Department.

, Sather, C. (1997). The Bajau Laut: Adaptation, History, and Fate in a Maritime Fishing Society of South-eastern Sabah. Kuala Lumpur, Oxford University Press.

, Kazufumi, N. (2001). Pirates, Sea Nomads and Protectors of Islam: Changing Images of Sama and Their Self-Identification in the Malaysian Context. International Association of Historians of Asia (IAHA). Kota Kinabalu, Kyoto University: 212-230.

the population largely subscribed to the local animistic practices that tended to vary from one place to another according to different ethno-linguistic grouping⁶⁶ (Ireland 1905; Evans 1923).

Towards the end of the 19th century⁶⁷, indigenous resistance to the Company's policies on land and taxation led to the Mat Salleh revolt from 1895-1903 as well as the Rundum Rebellion among the Murut community from 1900 to 1915⁶⁸. In the aftermath of the revolts, the BNBC began to restructure its administration to include native participation by establishing the Advisory Council for Native Affairs⁶⁹ alongside the existing Legislative Council which deliberated the commercial aspects of the Company (Kahin 1947). Since then

⁶⁶ 'The Bajaus are a race of sea gypsies, pirates turned fishermen, under British guidance, the Dusuns are a coast folk living in small villages or kampongs by the shore and along the foothills, the Muruts are a half-savage tribe in the far interior...These people differ greatly from one another in many important respects, but from the administrative standpoint they have this much in common, that they have no written language, no cities, no wealth and that the internal relations of each tribe are purely feudal in character.' (Ireland 1905:42)

⁶⁷ Operations against the Natives *HC Deb 23 May 1887 Vol. 315 cc871-2*

⁶⁸ The studies done by scholars on the two major indigenous resistance under the BNBC showed that local chiefs and their communities were unhappy with the ways the Company alienated considerable tracts of land for commercial developments, the introduction of taxation on land, rice and jungle produce as well as the coercive employment of indigenous people in the construction of bridle paths linking the various stations of the BNBC in the interior region Tregonning, K. G. (1956). "The Mat Salleh Revolt, 1894-1905." *Journal of the Malayan Branch of the Royal Asiatic Society* 29(1): 20-36.

, Wookey, W. K. (1956). "The Mat Salleh Rebellion." *Sarawak Museum Journal* 7(8): 193-201.

, Black, I. (1981). The Rundum Rebellion of 1915 in Sabah: Millenarianism and Social Protest. *Seminar on the History and Society of Sabah*. Kota Kinabalu, 12-16 August.

, Black, I. (1985). *A Gambling Style of Government: The Establishment of Chartered Company Rule in Sabah, 1878-1915*. Kuala Lumpur, Oxford University Press.

, Brewis, K. S. (1990). The Timugon Murut. *The Social Organization of Sabah Societies*. S. G. Lingenfelter. Kota Kinabalu, Sabah Museum and State Archives Department.

. The case of Mat Salleh had attracted the attention of the Under Secretary for Foreign Affairs regarding the correspondence between the company and Mat Salleh. That correspondence ought to be placed upon the Table of the House, so that the House might ascertain whether Mat Salleh had been treated fairly by the company. *HC Deb 02 March 1900 vol. 79 cc1604*

⁶⁹ The institution of native council was interrupted when the Second World War affected North Borneo in 1935 and there's no information available on whether it was revived under the administration of the Crown Colony in 1946 or a different model of native participation was re-introduced by the British Colonial administration.

there had been increasing awareness on the part of the BNBC to include the indigenous leaders in the running of the administration, but this new relationship was still framed within the overriding concern of the Company to achieve profitability and accountability to the shareholders in Britain, and far from the ‘protectionist’ approach in Malaya. The commercial pursuit of the BNBC not only favoured the privileging of private and the commercial ownership of land over the interests of local customary practices but the exclusive monopoly over timber resources by BNBC also drew flak from other Chinese investors⁷⁰.

Under the BNBC no comparable measure on specific land reservation was accorded to the ‘native’ that was analogous to the Malay Reservation Enactment in British Malaya. In so far as the definition of customary land tenure was concerned, the BNBC did not provide specific legislation that linked the protection of land tenure to the interest of the indigenous communities. Instead land became the prerogative of the Company government - where some of these dominant state discourse appeared to linger in the modern government practices (Doolittle 2005) - practical recognition of native customary rights has been subject to state approvals, restrictions and at times contested within the common law framework in Malaysia⁷¹ (Bulan 2001; Xanthaki 2003). The contemporary issues of native customary right and access to land in one sense highlights the complexity of legal pluralism and the issues

⁷⁰ Over 300 Chinese merchants of North Borneo sent a petition to the British North Borneo Company protesting against the grant of exclusive rights to the British Borneo Timber Company, Limited, to cut timber for export on all State lands challenging Clause 17 of the BNBC Charter on the grounds of unjust trade practices. *HC Deb 09 June 1921 vol. 142 c2100W*

⁷¹ 23/12/2005 (Daily Express) Land issues dominated the list of 720 complaints received by the Human Rights Commission of Malaysia (Suhakam), between January and November, 2005. Suhakam Vice-Chairman Tan Sri Simon Sipaun said there were 358 complaints on land issues, followed by 129 assorted cases involving identity cards, birth certificates and passport. Other complaints included 55 cases on work issues, police (43), basic facilities (35), EPF/insurance/Socso and pension claims (25), legal matters (17), housing (12), education (3) and other matters (43). Cases of land scams are also rampant in Sabah where many have resulted in entire villages and lands going to certain individuals and corporations 30/01/2010 (www.Malaysiakini.com)

about fundamental rights in Malaysia. Several points of differences can be made on the colonial practices of the BNBC, firstly there was no special alliance that mirrored the establishment of Anglo-Malay alliance in Malaya as the treaties for North Borneo were negotiated on the basis of cession from the Brunei and Sulu Sultanates. Secondly the BNBC did not single out a particular ethnic group to identify with land ownership as there were more than 30 ethno-linguistic groups living in disparate areas. Thirdly, in terms of religious identification, Islam was influential among the coastal communities of the Bruneian and Bajau population whereas the interior population were largely animistic. It was not until the arrival of Christian Missions in the middle of 19th century that the Christian faith became popular among the Chinese immigrant communities in the towns and the indigenous people in the interior region where the missions began to transform their lives and communities⁷².

4.4.3 Sarawak

The colonial history of Sarawak differed greatly from Malaya and North Borneo in that the political landscape of the territory was considerably shaped by the dynastic ruling of three generations of the Brooke family beginning from 1842 until it became Crown Colony in 1946⁷³. Sarawak lies in south of Brunei and was under the suzerainty of the Brunei Sultanate

⁷² The Christian missions included St. Joseph Foreign Missionary Society established since 1859, others included the Society for the Propagation of the Gospel, Seventh Day Adventist and the Borneo Evangelical Mission – these churches played significant roles in the teaching of English, provision of medical and health services as part of its mission to spread Christian faith among the Chinese and the native communities in the interior British North Borneo (1952). Annual Report 1952. Jesselton.

, Rooney, J. (1981). Khabar Gembira: A History of the Catholic Church in East Malaysia and Brunei (1880-1976). London and Kota Kinabalu, Burns and Oates/Mill Hill Missionaries.

, Pugh-Kitingan, J. (1989). Cultural Development in Sabah, 1963-1988. Sabah: 25 Years Later, 1963-1988. M. J. Ongkili and J. G. Kitingan. Kota Kinabalu, Institute for Development Studies.

⁷³ James Brooke was an ex-officer of the East India Company, who became an adventurer after inheriting a fortune from his father in 1835. He was described as very religious in his pursuit of civilizing the natives of Borneo, 'If it please God to permit me to give a stamp to this country which

where early colonial anthropology described the incessant feuding tensions between the Brunei chiefs and the local Dayak population⁷⁴. James Brooke's initial role in containing local rebellions earned him the title of the Rajah of Sarawak. His relentless pursuit to defeat the terrors of piracy and to promote the civilizing mission⁷⁵ were officially recognized as the designated British agent of the British Government in Borneo when he became the first Governor of Labuan in 1847 (Keppel 1846; ST. John 1897). Initially the terms and agreements on the governorship of Sarawak were negotiated personally with Raja Muda Hashim, in which James Brooke was expected pay an annual sum of 2,500 dollars and refrain from infringing "upon their customs or religion; and in return, that no person is to interfere with me in the management of the country" (Brooke 1842:29-30). In the account of Brooke's intervention in Sarawak, he not only revealed the humanitarian concerns about the violent

shall last after I am no more, I shall have lived a life which emperors might envy' (Ireland 1905:63). James Brooke was conferred the Governorship of Sarawak in return for the support he gave to the Malay chief of Sarawak, Raja Muda Hashim (the uncle of the Bruneian Sultan Omar Ali), to quell a rebellion under the Raja Muda administration. The Brooke dynasty lasted three generations whereby the first Raja Brooke ruled for twenty-six years (1842-1868), was then succeeded by his nephew Sir Charles Johnson Brooke (1868-1917) and finally Charles' son, Charles Vyner Brooke (1874-1963).

⁷⁴ 'For generations the Dyak and the Malay had been enemies. To the Mohammedan Malays the Dyak appeared merely as a barbarous infidel, whose country was just the spoil of the faithful. His religion, since it was not Mohammedan, was false...it was clearly from the Malay standpoint, a race to be used as long as it would submit, to be exterminated as soon as it resisted. The Dyaks, on the other hand, regarded the Malays as their tyrants and oppressors, the people who had come over the sea, to rob them of their country, to destroy their customs...' (Ireland 1905:66-67).

⁷⁵ 'Dec. 31.1844...I am surprised, however, that they say they do not understand my intentions. Independently of my published letter, I thought they had had my intentions and wishes dinned into them. My intention, my wish, is to develop the island of Borneo. How to develop Borneo is not for me to say, but for them to judge. I have, both by precept and example, shown what can be done; but it is for the Government to judge what means, if any they will place at my disposal. My intention, my wish, is to extirpate piracy by attacking and breaking up the pirate towns; not only pirates direct, but pirates indirect. Here again the Government must judge. I wish to correct the native character, to gain and hold an influence in Borneo proper, to introduce gradually a better system of government, to open the interior, to encourage the poorer natives, to remove the clogs on trade, do develop new sources of commerce. I wish to make Borneo a second Java. I intend to influence and amend the entire Archipelago, if the Government will afford me means and power...' (St. John 1879:68)

implications of the activities of piracy – largely condoned by the Bruneian chiefs - upon the interior Dayak natives, but also indicative of the Christian mission upon which he intended to introduce to the native Dayak communities by protecting them from the terrors of slave raiding⁷⁶. Middleton (2010) argues that the epic characterization of Brooke's campaign against piracy captured the British public imagination on two important grounds: the first one concerned the reputation of British Imperialism in Britain and secondly the increasing anxieties about legality of foreign intervention as an individual, as an official British agent for the British Government and his sovereign status as a the Rajah of Sarawak⁷⁷.

The controversy⁷⁸ surrounding Brooke's position in Sarawak throws an interesting light to the role of proxies in the history of British Imperialism, and in particular the role of the British East India Company in shaping the entrepreneurs of British imperial agents in the Far East - the likes of Stamford Raffles (Singapore), Francis Light (Penang) and James Brooke

⁷⁶ The missionary drive with which James Brooke expressed in his humanitarian reasons for intervening in the lives of the Dayak natives were emphasized in pages 19-20, 26,31,35,40 in his personal letter to James Garner Brooke, J. (1842). A letter from Borneo with notices of the country and its inhabitants. J. Gardner. London, L. And G. Seeley.

⁷⁷ This article documents how domestic politics in the Victorian period was affected by the 'projection of British character' abroad and the extent to which these were appropriated in the form of ideological battles for the political parties involved Middleton, A. (2010). "Rajah Brooke and the Victorians." The Historical Journal 52(3): 381-400.

⁷⁸ A Royal Commission of Inquiry was conducted in 1853, headed by the Advocate-General of India, Charles Henry Prinsep, and a government agent, Humphrey Bohun Devereux – the charge was that, 'James Brooke settled in Borneo with the sole object of seeking profit by trade, of having meddled in Brunei politics for his own personal ends, of having made cruel attacks on the inhabitants of Borneo on the pretext that they were pirates, but really to subject them to his rule, and of having obtained the assistance of the ships of the Royal Navy and of the East India Company in making these barbarous attacks.' Although the findings of the Commission exonerated James from the charges brought against him, attempts by others to re-open the case on Battle of Batu Maru (Beting Marau) had been unsuccessful. The Commission concluded that the Rajah had been pronounced a vassal of the Sultan of Brunei and in no way entitled to call upon the protection of Great Britain. His prestige in the East was damaged, and there were elements there which did not fail to notice his official isolation. (St. John 1867:114-117)

(Sarawak). Compared to his predecessors, James Brooke had to defend his role in the mission to civilize the governing affairs of Sarawak⁷⁹ and in doing so; Brooke highlighted the contradiction of British involvements in the native affairs elsewhere in the form of British Residents and how their role as advisors to the local elites were somewhat similar to his position,

‘Mr. Hume has asserted that there is a law against a subject of England becoming the ruler of a foreign country. I know no such law, and supposing such a one could be discovered, and could be enforced, of what practical use would it be? Would such a law preclude a British subject becoming the minister or the adviser of a native chief? And supposing Mr. Hume’s objections to the tenure of Sarawak to be valid, what practical result could follow?’ (Brooke 1853:46-47)

This statement critically illuminates the issue of the British Imperial power undermining the existing indigenous sovereignty in the colonial territories where the advisory roles of British Residents were concerned, which echoed the point made by Wright (1972:48) that the British Government had known, and tacitly supported James Brooke for more than 10 years. Brooke’s intense participation in the native affairs was reflected in his own admission the he was ‘personally bound to the son of the late Raja Muda Hashim’ - the legitimate contender to the Brunei throne murdered under suspicious circumstances – (Brooke 1853:55). The Brooke family was intensely engaged in the complex power struggles against the various Muslim ruling clans to administer a predominantly pagan Iban and Melanau population in the areas of Kuching, Sarebas and the Rejang (Pringle 1974). It was only after James Brooke was

⁷⁹ In his defence Brooke had offered to make Sarawak a British protectorate (*p.11*) and repeatedly expressed his disinterest in commercial pursuit (*p.20*), Brooke, J. (1853). *A Vindication of His Character and Proceedings: In reply to the statements Privately Printed and Circulated by Joseph Hume, MP. H. Drummond. London, James Ridgway.*

succeeded by his nephew, Charles Brooke⁸⁰, the dynastic pattern rule became fused with modern administration (Pringle 1974).

James Brooke was able to capture the cultural symbols and relations of power and appropriated these local customs into his state-building prowess (Walker 2002). Walker's (2002) account of the origin of power and how the substance of trade underpinned the development of power relations among the coastal Muslim-Malays, Ibans (Sea Dayaks) as well as the nearby Bidayuh (Land Dayaks) hill dwellers, also draws upon the spiritual dimension of culture that supported the ideological hierarchies of power in 19th century Sarawak. Brooke's position as an independent ruler allowed him to penetrate into the cultural symbolism of social affirmation where he was able to capitalize his position as the white Rajah to seize upon the traditional hierarchy of power relations in Sarawak (Walker 1998). Isolated from the bureaucratic demands of the Colonial and Foreign Office but instrumentally supported by the military prowess of the British Navy, this situation enabled him to project the logistic scope of military prowess that overwhelmed the traditional weaponry among the indigenous people, thus congealed the coercive power of the Kingship that he was establishing. James Brooke used his material privileges and spiritual engagement to reinforce the centrality of his prowess by 'staging ceremonies in which he dispensed gifts of clothes and weapons' as a way of cementing the layers of dependency relationships that accrued from his generosity (Walker 1998:101-105). The necessity to cement the ties of dependency was continued through the recognition of the authenticity of the native customary land use and this became useful in shoring up the support among the native communities (Ngidang 2005:52). Sarawak's land mass measures about 125,000 sq. km almost equal to the size of Malaya and it

⁸⁰ Sarawak was granted a Protectorate status in 1888 when Charles Brooke took over the administration from James Brooke. Detailed discussion on the historical background to the extension of the protectorate in Tarling (1971:340-399) and Wright (1970:178-204).

became imperative for James Brooke to introduce a system of land regulation in 1863 in which land came under the possession of the Government for revenue purposes. Where land had been plentiful, Brooke's sovereignty over the territory of Sarawak was translated into the regulative policy of categorizing forests into productive commercial use and 'unoccupied waste lands' (Colchester 1993; Cramb 1993; Kaur 1998).

Successive Brooke administrations changed the migration and the settlement patterns of the native communities in Sarawak⁸¹. The recognition of customary tenure among the local communities was granted only in so far as no existing tenure rights had been established upon an unoccupied land. When the 1842 Law Code was introduced to allow Chinese immigrants to settle on lands unoccupied by the Malays or Dayaks, the new settlement policy had the effect of segregating the living spaces between the immigrants and the natives, as well as physically restricting the movements of the native communities on the basis of land codes (Ngidang 2005). Despite the moral recognition of the existing practices of native customary land tenure, in reality however, indigenous peoples have never really been granted titles under Sarawak land legislation for much of their lands⁸².

⁸¹ Drawing upon the existing anthropological and political literature on Sarawak, R.A Cramb(2007) provides a rich narrative account of Brooke administration and its implications upon the lives of the Iban communities in 'Land and Longhouse: Agrarian Transformation in Uplands Sarawak', *Part III Agrarian Transformation in the Brooke Period*, pp113-212, Cramb, R. A. (2007). Land and Longhouse: Agrarian Transformation in the Uplands of Sarawak. Copenhagen, Nordic Institute of Asian Studies.

⁸² Although land dispute did not feature considerably under the Brooke administration, this is very much a contemporary dispute where other scholars have extensively written about it. Cooke, F. M. (1997). "The politics of 'sustainability' in Sarawak." Journal of Contemporary Asia **27**(2): 217-241.

, Horowitz, L. S. (1998). "Integrating Indigenous Resource Management with Wildlife Conservation: A Case Study of Batang Ai National Park, Sarawak, Malaysia." Human Ecology **26**(3): 371-403.

, Bulan, R. (2001). "Native Title as a Proprietary Right Under the Constitution in Peninsula Malaysia: A Step in the Right Direction?" Asia Pacific Law Review **9**(1): 83-101.

The Brooke administration was able to depend upon the support of these coastal communities through the rituals of cultural symbolism and patronage; however there were pockets of resistance to the ways in which James Brooke tried to channel the revenue resources of the existing trade networks in Sarawak. The main resistance to Brooke rule came from the mining communities where Chinese capital and enterprise had been dominant. One of the most profitable trades in Sarawak was mining –gold, coal, antimony, quicksilver and diamond – and as the Chinese community had settled in parts of Western Borneo and Upper Sarawak since the early 19th century through retail trading and agriculture, they played a significant role in the political economy of the mining industry in Bau where large deposits of gold were found (Lockard 1971; Lockard 1978; Chew 1990; Kaur 1995). In the 1857 Chinese rebellion against the Brooke administration, Lockard (1978: 91-95) details how the growing administrative prowess of James Brooke began to threaten the territorial control of the Bau Chinese over the mining areas, leading some of the society leaders to contest Brooke's sovereign rights over Bau and the Upper reaches of Sarawak.

As a result of the gold merchants' conflicts with James Brookes, most of them decided to change their trading port from Kuching to the Dutch port in Samba, thus depriving the Brooke authority the necessary export duties, causing greater resentment between the Brooke administration in Kuching and the Chinese business communities in Bau. The events that led to the Chinese sacking of Kuching in February 1857 and its deadly consequences upon

, Ngidang, D. (2002). "Contradictions in Land Development Schemes: The case of joint ventures in Sarawak, Malaysia." *Asia Pacific Viewpoint* 43(2): 157-180.

, Bulan, R. (2006). *Native Customary Land: The Trust as a Device for Land Development in Sarawak. State, Communities and Forests in Contemporary Borneo*. F. M. Cooke. Canberra, ANU E Press: 45-64.

European settlers and Malay casualties are interpreted elsewhere⁸³ but what was critically illuminating about the attack was the ethnic dimension to the whole conflict. The Chinese rebels specifically targeted the Europeans. The following counter attack against the Chinese was led by James Brooke with the help of Malays and the Dayaks⁸⁴. An estimated 3,500 Chinese were killed, almost half of the casualties were women and children (Lockard 1978:95).

‘The Chinese will play no further treachery here, and in future we shall prevent their being associated in companies, disavow them, and reduce them to a daily obedience to the laws and a strict surveillance...’⁸⁵.

⁸³ Discussions on the Chinese Rebellion are accounted by the Rajah's letters and a narrative from his servant Penty, see Gertrude L. Jacob, *The Raja of Sarawak: An Account of Sir James Brooke, KCB, LLD, Given Chiefly Through Letters and Journals* (London: Macmillan, 1876), vol. II, pp. 237-44; the account of the First Rajah's Secretary who recorded the incident five months later, see Spenser St John, *The Life of Sir James Brooke, Rajah of Sarawak from his Personal Papers and Correspondence* (Edinburgh and London: Blackwood, 1879), pp. 294-315; from a visitor's observations, see L. V. Helms, *Pioneering in the Far East* (London: W. H. Allen & Co., 1882), pp. 164-92; an account from the future Second Rajah, see C. Brooke, *Ten Years in Sarawak* (London: Tinsley Bros, 1886), vol. I, pp. 214-25; and from Harriette McDougall's viewpoint as well as that of her husband, the Anglican Bishop Francis T. McDougall, see Harriette McDougall, *Sketches of Our Life at Sarawak* (London: Society for Promoting Christian Knowledge, 1882), pp. 120-56. Also Steven Runciman, *The White Rajahs :A History of Sarawak from 1841-1946* (Cambridge: Cambridge University Press, 1960), pp. 119-33; and for a new assessment, Craig A. Lockard (1978) and Graham Saunders (1991), 'The Bau Chinese Attack on Kuching, February 1857: A Different Perspective. Op. Cit in Ooi, K. G. (1994). "Chinese Vernacular Education in Sarawak during Brooke Rule, 1841-1946." *Modern Asian Studies* 28(3): 503-531.

⁸⁴ 31/07/1857 The Sydney Morning Herald, '*Sir James Brooke's Personal Narrative of the Insurrection at Sarawak*' in which James wrote, '...My next measure was to let the land Dayaks loose upon them (Chinese), and within the circuit of thirty miles from Siniawan, Bau and Bula, they were driven to their defenses with great loss of life...The Dayaks cut the Chinese to pieces in the jungle, and the half-hour before sunset cost our enemies from one hundred to one hundred and twenty men.'

⁸⁵ 31/07/1857, *Ibid.*,

Disloyalty to the Brooke regime became a punishable crime. Aside from the Chinese who had borne the brunt of regime punishment from James Brooke, the indigenous population living in the interior and near the Dutch borders were not spared from punishment for refusing taxes imposed by the Brooke administration; and the successive Brooke administration under Charles was known to practice the mantra that ‘only Dyaks can kill Dyaks’⁸⁶ in their punitive measures to discipline the unrepentant Ibans who defied Brooke’s orders on head-hunting practices, paying taxes and the prohibitions on the practices of ‘*bejalai*’⁸⁷ (Wadley 2001).

There was a gradual shift from the emphasis of kingship and the ritual relationship onto a more secular outlook with regard to the Government administration of Charles Brooke, the second Raj (Walker 2005). It appeared that Charles was reluctant to join in the ceremonial practices that James Brooke used to partake in the maintenance of the Brooke state and Charles was more than eager to reform the ritual basis of kingship that his uncle had established. Since 1873 Charles restructured the Brooke system of administration in Sarawak into three main Divisions, whereby such reform necessitated a slow diminution of the ritual basis of kingship (*Kerajaan*) into a Weberian basis of modern bureaucratic government (Walker 2005:439-44). The changes initiated by the second Raj saw the emphasis of native participation – particularly in remote stations - in the modern sense of bureaucratic

⁸⁶ Brooke, Ten Years in Sarawak Vol. 1, p. 188; Pringle, Rajahs and Rebels, p. 237. Op. cit in Wadley (2001)

⁸⁷ ‘*Bejalai*’ defines the world of the Iban community, which means a kind of voyage, journey of discovery that forms a fundamental core of Iban identity. Peter M. Kedit (1993) ‘*Iban Bejalai*’ provides the classic account of the Iban custom on *Bejalai*, and the contemporary interpretation is also undertaken by Wadley (1999) in *Disrespecting the Dead and the Living: Iban Ancestor Worship and the Violation of Mourning Taboos*, The Journal of the Royal Anthropological Institute, 5(4). It was against this culture of *Bejalai* that prompted official communications between Charles Brooke and the Dutch Indies to overcome issues of cross-border raiding between Sarawak Ibans and Dutch Ibans. Wadley’s account of the cases involved revealed the extent to which the colonial governments on both sides failed to appreciate the Iban’s way of living and their need for space and the freedom to move (2001:630-632).

government. The Brooke's administration appeared to assume the practice of differential treatment where the appointment of native representation or leadership was concerned.

'Every Malay and Melanau village had its chief (*Tua Kampong*) who was elected by the people and, if approved by the Rajah (which was normally the case), was given a commission on the taxes he collected. The Ibans, Kayah, Kenyahs and other indigenous people were under distinct chiefs (*Penghulus* or sometimes *Orang Kayas*) appointed by the government; except in rare cases they were usually the choice of the people' (Reinhardt 1970:856).

The Brooke administration granted political autonomy for the Malay Muslim community to elect their leaders; however the principle of selective appointment remained in place for the native leaders of non-Malay indigenous communities. The Brooke administration also employed strict rules upon the physical and spatial mobility among the Ibans where they were expected to stay put in their respective districts in the interior unless the permit to travel was given by the Resident⁸⁸. This policy originated from the cross border agreement between Charles Brookes and the Dutch following the Kedang Expedition in 1886 where heavy casualties among the 'unrepentant' Ibans forced them into submission and accepted the orders to move away from the border and be subject to control and surveillance (Wadley 2001:635-636).

Since the Chinese had been living in relative autonomy, they were less likely to experience direct control under the Brooke administration. However after the 1857 Rebellion, the Chinese increasingly came under the Brooke's surveillance particularly where activities of the

⁸⁸ Pringle Rajahs and Rebels, pp. 135-77; Robert Pringle, 'The Brookes of Sarawak: Reformers in Spite of Themselves, Sarawak Museum Journal vol. XIX, no. 38-39 new series (July-Dec. 1971), pp. 65-9 Op. Cit in Kaur (1995)

secret societies were suspected⁸⁹. The Chinese community were active in business and plantation agriculture; industrious and contributed considerably into the government's coffers through trade and taxes, vital to developing the economy of Sarawak. On the other hand, there existed instances of exploitation of the indigenous people – through trade and the use of land for cash crops - (Chin 1997:23). This provided the reason for the physical segregation of ethnic communities under the Brookes administration, entrenching the ethnic identification of livelihood by the nature of political relations with the Rajah. Under the first Rajah, the Chinese leaders were expected to 'govern' the internal affairs of their communities, playing the role of *Kapitan* whereby they were regarded as agents performing the intermediary roles in conveying the laws and decrees of the government to their respective communities⁹⁰ (Lockard 1971). The different practices to which the Brooke administration conducted its political relations with the various ethnic communities saw the gradual development of a government system where different sets of laws were applied to different the ethnic communities. Within the broad structure of the Sarawak Council Negeri⁹¹, there were different civil courts for the Malays and the Chinese that was established in 1911, with the aims of addressing civic needs – i.e. marriage, property inheritance - according to the customs of the respective ethnic communities (Lockard 1971:207-208; Reinhardt 1970:857).

⁸⁹ In 'Secret Societies Reconsidered' Ownby, D. and M. S. Heidhues, Eds. (1993). "Secret Societies" Reconsidered: Perspectives on the social history of modern South China and Southeast Asia. New York, M.E. Sharpe Inc.

provides an important insight into the origin, the nature and the development of these movements in the historical context of the migrating Chinese population in and around South China and Southeast Asia.

⁹⁰ Lockard (1971) charts the patterns of Chinese leadership under Brooke and the ways in which the hierarchal structure of the various dialect groupings tended to be shaped by the intensity of social networking and the economic dominance of the clan-based societies.

⁹¹ A legislative template that was established by the Brooke regime, which hadn't changed much until Sarawak came under the Crown Colony in 1942, evolving into present day Sarawak state legislature under the Malaysian Federation.

Education under the Brookes administration developed in ways that followed a similar pattern to the regime's political relation to the ethnic communities. As an integral part of his civilizing mission, James Brooke actively encouraged the early establishment of Christian missions among the Dayaks in 1848 but stopped short of any attempt to convert the coastal Muslim communities into Christianity, in which subsequent generations of Dayaks became nominal converts through the association of Christianity and modern education⁹² (Taylor 1983; Saint 1985; Saunders 1992; Boulanger 2002).

James Brooke was regarded as the 'Christian ruler of a Mahommedan and heathen land' and he granted Christian missionaries land and the autonomy to educate the non-Muslims through the Christian faith whereby 'The new religion presented to the natives is the religion of "their white friend," as they call their Christian Rajah; and for this reason it is, as well as for the manner in which operations have been commenced by the Missionary mixing freely with the natives, and offering them medical assistance, and secular as well as religious instruction, that the Mission has been introduced without exciting the Mahommedan prejudices of the Malay..' ⁹³. The ethnic segregation of living and social spaces were further underpinned by the Brooke's ad hoc policies on the issue of education, where ethnic intermingling was discouraged, setting the pace for the gradual progression of the vernacular education system particularly for the Chinese community, and further entrenching the views held by Charles

⁹² 'After residing among the people, and becoming intimately acquainted with their characters and many virtues,--after witnessing their sufferings and patience, and very firmly convinced of the facilities with which they might be improved,--after struggling to protect them, and after acquiring their slowly bestowed confidence, it cannot be a matter of surprise that I appeal in their behalf, to that generosity which I am led to think aids the distressed, and commiserates the sufferings of our fellow-creatures. If a case of misery ever called for help, it is here; and the act of humanity, which redeems the Dyak race from their condition of unparalleled wretchedness, will open a path for religion, and for commerce, which may in future repay the charity, which ought to seek no remuneration.' *The Colonial Church Chronicle and Missionary Journal*, Vol. I (No I) (July 1847), pages 26-34.

⁹³ *The Colonial Church Chronicle, and Missionary Journal*, Vol. IV (August, 1850), pages 68-72.

Brooke that promoted the case for the segregation of education system that would preserve the cultural identities, customs and traditions of each native group(Ooi 1990; Ooi 1994; Ooi 1996; Ooi 1999).

4.5 Conclusion

This chapter spelled out the historical conditions for the different colonial administrations in Malaya, North Borneo and Sarawak. The original British intention of non-intervention actually ended up becoming one of active intervention where issues of religion and native customs were concerned. There were two reasons for its empirical failure: the first one was the introduction of the Torrens land laws where the procedure of land registry which necessitated the role of the state to intervene in the categorization of land use. Secondly the commercial need for the use and tenure of land was one of the top priorities of the colonial regimes in these territories as plantation agriculture, timber extraction, and mining constituted major revenue earnings for the colonial governments, thus contradicted, in some significant way, the local customs and traditions with regard to the communal access to land and inheritance. Ironically the introduction of laws and codes in the use of land had also led to the conception of belonging and this idea began to take considerable purchase where the rhetoric of the 'sons of the soils' was gradually wormed into the legislative definition of the Malay special position.

In North Borneo and Sarawak, no such provision was designed for the indigenous population where the colonial regimes of the British North Borneo Company and the Brooke administration differed in form and policy content. The nature of the societies in the Borneo territories was also very different from Malaya where the non-Muslim indigenous population was larger and more diverse in terms of religious beliefs and customs than the coastal Muslim communities that represented the legacies of the Bruneian Sultanate in Sarawak and to some

extent, the Sulu Sultanate in North Borneo. In that sense Christian missionaries providing education and medical provision were actively supported if not considerably encouraged by the Colonial regimes in these two territories compared to the pre-dominantly Islamic outlook in Malaya.

Understanding these institutional differences is vital in order to comprehend how the idea of special right became the dominant language of the Malay elites and why it was absent among the indigenous communities of North Borneo and Sarawak. This particular aspect of history has enormous impact not only upon the nature of relation between the state and the structure of ethnic identities on who's right to govern but more importantly how it is shaping the trajectories of transition where colonial subjects became citizens of a new nation state.

Central to the problem of designing a governmental framework for the independent nation of the Federation of Malaya was the idea that the Malay special rights needed to be secured through measures that would guarantee the Malay access to public services and land ownership, to prevent the submergence of the Malays from the other immigrant communities⁹⁴. The earlier British policy on the Malay Reservation Enactment gave way to structured Malay notions of privilege which were extended to the employment in the civil service and the Malay regiments, underlining the British policy of favouring the Malays, and such hierarchical structure of ethnic favouritism also became integral to the Japanese Military Administration which remained largely unchanged whereby the post-war attempts of the British to re-enact the special alliance were actively pursued (Groves 1959; Wilcox 1978).

⁹⁴ CO825/42/3, no. 27, (21/8/1944)

5 POLITICAL TRANSITION FROM SUBJECTS TO CITIZENS

Abstract: *This is an important historical period of political conflicts that had had a long lasting impact upon the conception of citizenship and political belonging in the Malaysia. The ethnic dimension to political conflicts became most potent particularly after the Japanese Occupation and the Communist Emergency. These ethnic conflicts continued right through to the Malayan independence and manifested in aggressive ideological battle that divided the conceptual formation of modern citizenship.*

5.1 Introduction

This chapter focuses on the impact of the Communist Insurgency upon the conception of citizenship and subsequently on how it shaped the content and hierarchy of political ‘rights’ for the different ethnic and religious communities in Malaysia. The Insurgency was an intense period of civil conflict in Malaya that inadvertently placed the Malays and the Chinese in extreme political contention. The bone of contention in this conflict lay in the competing political right over the negotiation for common citizenship right and the Chinese population became the target of political contention because of their active political movement and close links to the political parties in mainland China. This period saw the sharp emergence of the concept of citizenship right and the claims to right in Malaya as the result of the Communist Insurgency.

The left-wing movement was mainly mobilized by the Chinese as they were not only the biggest immigrant community in Malaya but also the most persecuted community by the Japanese in Malaya during the war. As the largest immigrant community in Malaya, the Chinese made up about 37% compared to the Indians who made up about 11% of the total population in Malaya from 1947-1957 (Hirschman 1975). The emergence of a largely ethnic Chinese movement in the left-wing movement was not only seen as a threat to the

predominance of the Malay 'Special Position', but also seriously destabilized the British colonial economy in Malaya. The emphasis moves back to Malaya because the political intensity of the conflict not only shaped the political meaning of right but it also began to implicate the political notion of national security as well. After the Japanese Occupation ended, the conception of 'special position' remained resilient in defining the notion of 'who's right to govern' where the value for 'loyalty' came to furnish the criteria to acquire citizenship for the non-Malay population in Malaya. Over time, the ethno-religious grounding of 'Special Position' created ideological challenges to the establishment of secular governance that destabilized the ideal of common citizenship.

This chapter argues that the conception of Malaysian citizenship has been largely shaped by the ideological battle that pitched British colonialism against the Malayan Communist Party struggle for the 'rights to self-determination'. The Communist Emergency episode has been instrumental to the conception of Malaysian citizenship. Increasingly the history of the Communist Emergency is selectively narrated to suit the Malay nationalist agenda and the historical role of UMNO as the main protagonist in the fight for Malayan Independence has strong presence both the public discourse and the popular imagination. The Communist movement on the other hand was portrayed as violent banditry that condoned many acts of terrorism, and because of that they have been written off from history books and the collective consciousness. In one of his political *ceramah* (public speech) Mat Sabu highlighted the historical contribution of the left-wing movement in the fight against British colonialism, by saying that the guerrilla fighters who attacked the police station at *Bukit Kepong* had contributed to the country's independence as the police at the time served the interests of the

British colonial master⁹⁵. The simple suggestion that the Malayan Communist Party had fought for Malaya's independence prompted widespread outcry from UMNO and other Malay nationalist NGOs, to the extent that a historian, Professor Zainal Kling made a statement on behalf of the Malaysian National Professor's Council denying British colonialism ever took place in Malaya, 'that Malaya had in fact never been colonized and was only a protectorate of the British'⁹⁶. The emphasis on the Malay states as British protectorates implies the ageless character of Malay royal ascendancy that prevailed throughout the period from Pangkor Treaty 1874 until Malayan Independence 1957. The selective chronicling of history to support the ideology of the Malay political right to rule is a reassertion of,

'the notion that Malaysia is still *Tanah Melayu*, a nation embodying Malay sovereignty, and a nation inscribed in whose innermost nature is the principle of Malay primacy'⁹⁷ (Clive Kessler).

The Malay-centred nationalist conception of citizenship finds powerful expression in the contemporary public and popular discourses. Such selective conception undermines the political histories and cultural heritage of other minority citizens, especially from the ex-British colonies of North Borneo and Sarawak. Malay conception of special citizenship is further strengthened by the history of Malay sovereignty and 'special position', making

⁹⁵ 29 August 2011, *Mat Sabu may sue over 'communist heroes' report* <http://www.malaysiakini.com/news/174393>,

Bukit Kepong (1983) was a film made by Jins Shamsudin about the attack of the police station at Bukit Kepong in 1950 by leftwing guerilla fighters. This incident is frequently cited in the run-up to the Independence Day as a symbol of Malay nationalism and bravery in the struggle against a communist insurgency. The attack left 25 people dead, including 14 policemen and some of their family members, including several wives who took up arms against the insurgents.

⁹⁶ 9 September 2011, *Prof's Council: Leftists not freedom fighters* <http://www.malaysiakini.com/news/175322>

⁹⁷ 13 September 2011, *Continuity and discontinuity: Professor Zainal Kling and Malaysian history* <http://www.themalaysianinsider.com/sideviews/article/continuity-and-discontinuity-prof-zainal-kling-and-malaysian-history-clive-kessler/>

Malay an exclusive political identity from other groups in the conception of Malaysian citizenship. These processes of ideological struggles and how they were translated into the public discourse will be examined, where the trajectories of colonial politics and left-wing movements are included to demonstrate power dynamics that exposed the contestation of the nation's sovereignty in the run-up to Malayan independence 1957.

This chapter identifies two significant political transitions that set the tone for the modern conception of Malaysian citizenship: British Malaya to independent Malaya (1957) and subsequently the Malaysian Federation – in 1963 with the inclusion of North Borneo and Sarawak. These were historical junctures that dictated the polemical divide of the ethnic indigenes vs. civic nationalism of the '*Pendatang*' (immigrants). The political question over the issue of common citizenship was an important one for the departing colonial government and this matter came to dominate the constitutional agenda that was being framed for Malaya's Independence in 1957. In preparation for decolonization process, the colonial government must address the future residency status of the 'immigrant races' whilst at the same time 'safeguarding the special position of the Malay race'⁹⁸. The colonial government had to find the right political approach to admit non-Malay communities into a political union with the Malays. But in doing so the British must put in place, a kind of constitutional guarantee that civil service employment and the ownership of land ought to be reserved for the Malays so that 'common citizenship' would not result in the submergence of the Malays in the political and social field. Initially this approach drew criticism from the War Cabinet Committee that became increasingly aware of how the pre-war system of British Residency would adversely affect the prospect of broad-based governing institutions,

⁹⁸PRO, CO825/42/3, no. 27, (21/8/1944)

‘There are important non-Malay Asiatic communities in the country which have substantially contributed to its development and have acquired permanent interests therein. But the Malay Rulers have always set their faces against any proposals to recognise as their subjects any person not of Malay race or Mohammedan religion. The relaxation in due course of British official control over the Rulers would therefore, on the basis of the pre-war constitutional system, not be likely to provide the other communities with adequate prospects of participation in the government of the country’⁹⁹.

The British Residency system institutionalized the Malay Rulers as the rightful claimants of the Malay states and the Malay subject¹⁰⁰. These processes inevitably contributed to the emergence of an exclusive ideological conception of Malay ethnic awareness about their rights over land, public governance and religious authority. This contrast sharply against the increasing influx of human migration, particularly with the British importation of foreign labourers from India, China and the surrounding Indonesian islands under Dutch colonialism – in order to fulfil the demands of capitalist expansion in Malaya.

Strict socio-economic segregation between the immigrant and the Malay communities was grounded in the protectionist policy that the British took towards the Malay Rulers and their subjects. This contrasted sharply against the migrant labouring communities whose livelihoods were largely shaped by poor conditions of work, employers’ abuses and depressed wages. This generated the blossoming of local self-help organizations, especially among the Chinese communities, in the form of reading societies and the night schools generated by the

⁹⁹ *Public Records Document*, CAB98/41, CMB(44)3 (14 Jan 1944)

¹⁰⁰ I have elaborated in Chapter 3, how the practical aspect of the ‘special alliance’ between the Malay Rulers and British Residents was translated into policies that created an autonomous domain for the Malay Rulers to execute ceremonial powers over the Mohammedan courts, the Malay Reservation Enactments, and the inclusion of Malay aristocratic members in the civil service.

local Kuomintang and Communist movements. The creation of an informal public sphere where ideas related to these movements were communicated to the labouring communities, providing essential platforms for the diverse working groups to articulate their grievances. These movements played considerable role in setting the pace for a particular political awakening about the rights to decent livelihood. However the experience of Japanese Occupation changed these sentiments from the workers' demand for decent livelihood to the demand for equality of political rights in the process for political independence.

5.2 The cultural conversion and the differentiation of colonial subjects

Under British colonialism, Malaya was governed by complicated maze of administrative and legislative apparatus differentiated by the political criterion of the Federated Malay States, Un-Federated Malay States and the Straits Settlements (Carnell 1952; Carnell 1953; Lau 1989). At the same time considerable number of non-Malay communities without legally recognizable status of nationality and residency had settled in the segregated domains of such complex administration. In the early 1920s, as the rate of immigration increased along with the growing economy in Malaya, the British Residents and the Malay Rulers reacted to this new situation by emphasizing the obligations to protect and empower the Malay community. Through the Malay Reservations Enactment (1933), the creation of a Malay regiment, the reservation of seven out of ten government posts for Malays and the promotions of Malays in senior Malay Civil Service¹⁰¹ (Allen 1970; Turnbull 1974; Sidhu 1980; Heussler 1981; Roff

¹⁰¹ In *The Malays and the British: The Middle Years*, Roff (1994:91-123) provides a very extensive account of the ways in which the British Residents played significant role in structuring the participation of the Malay aristocrats and 'Malays of good birth' (p.22) into the expanding system of administrations through the provision of residential education at the Malay College of Kuala Kangsar (The Malay Eton) as the primary step to grooming the Malay elites to become administrative civil servants.

1994) – these legislative measures were sought as preliminary means to protect the ‘Special Position’ of the Malays against the surge of immigrant communities in Malaya.

Having established the legislative measures to protect the ‘Special Position’ of the Malays in land and the employment of civil service, the other significant policy was the practice of classifying colonial subjects into different ethnic and religious categories. The policy of categorizing immigrants ‘graded’ according to their assimilability to the native Malays began to have an impact upon the criteria of granting legal residency status as well as citizenship rights to the immigrant population. Due to their status as migrant labourers as well as their distinct cultural origins, Chinese and Indian labourers were not only considered as ‘transient’ but also “unassimilable”[sic] by the British. This was in contrast to the migrants who came from the Indonesian archipelago, who were automatically granted legal ‘Malay’ status by the Colonial regime (Roff 1994:111). Becoming Malay or ‘*masuk melayu*’ symbolizes a cultural rite of passage that involves the conversion of a non-Muslim into Islam, thus constructing the Malay identity concomitant with Islamic civilization (Hirschman 1987; Andaya 2001; Reid 2001; Christopher 2005). Upon embracing the cultural identity of being Malay, the rite of passage also confers certain privileges that are guaranteed in the legislative measures where the ‘Special Position’ of the Malays in land reservation and civil service positions was guaranteed.

This rite of passage occurred not just in the Malay Peninsula but also in other parts of Borneo as well (Freedman 1955; Nagata 1974; Horton 1986; Mutalib 1990; Gerke 1995; Saunders 2002; Mutalib 2008). The process of *Masuk Melayu* represents a dynamic aspect of the Malay society whereby day-to-day interaction with other ‘migrants of similarity’¹⁰² continue

¹⁰² “Wang Gungwu described the Chinese and Indians in Malaysia as "migrants of difference" because they have cultural backgrounds totally different from the local Malay people. In contrast, the

to redefine the boundaries of cultural assimilation and distinction(Miyazaki 2000), however the continuing practice of the British rulers in using ‘Malay’ as the umbrella term of reference overshadowed other competing ethnic diasporas – Achenese, Javanese, Bugis etc - in the colonial censuses. The British colonial census taking was firmly established in India and it set the precedent for the method of enumeration for other colonies where conditions of plurality existed (Christopher 2005:104-105) . Although racial categorization was commonly applied to simplify the diversity of human representation on numerical terms (Appadurai 1993; Maheshwari 1996), in the Malayan experience, the colonial approach to the problems racial identification rested on religion as the key determinant(Christopher 2005).

Where intermarriage and cross-cultural assimilation occurred between the native Malays and Chinese, *Masuk Melayu* was a socially accepted norm among the minority Chinese who eventually became the descendants of the *Peranakan* Baba population in the Straits Settlements of Penang, Malacca and Singapore¹⁰³ (Edmonds 1968:59-60). Within the Chinese community itself, differences in the socio-cultural and linguistic backgrounds tended to shape the multiple levels of associational dynamics and organizational networks that helped sustain the social fabric of the immigrant communities (Freedman 1960; Mills 1966; Ownby and Heidhues 1993; Yen 2000). Linguistic differences play an important role in deconstructing the myth of homogeneity within the Chinese community. With the exception of the Baba Malay of Malacca who mainly spoke Malay and English, the rest of the Chinese

Javanese-Malays and the recent migrant workers from Indonesia are described as "migrants of similarity" because they follow Islam as the Malay people, speak languages closely related to Malay and have similar customs". Op. Cit in Miyazaki 2001:77

¹⁰³ The Baba population are descendents of the pre-colonial Chinese Muslims who adopted the Malay language and Malay customs but in social identification remained Chinese. *Peranakan* originally refers to the descendents of inter-cultural union between Chinese and the Malays or other indigenous groups, but it has a wider usage nowadays to refer to the off-springs of cross-cultural marriages.

regarded Mandarin as the language of the Chinese heritage providing essential template for the Chinese education movement and cultural connections to Chinese sojourners around the region. The linguistic distinctions that characterise the varying cultural dialects of the Chinese – *Hokkien, Cantonese, Hakka, Foochow, Teochew, Hainanese* – to name a few, have been equally important in preserving their cultural history and political alliances (Tan 2000; Chin 1997); increasingly studies on these communities show the positive effects on the ways which ethno-religious syncretism contribute to the rich social fabric of Malaysian multiculturalism (Gosling 1964; Raghavan 1977; Tan 1988; Tan 1997; Teo 2003; Dhoraisingam 2006). However the degree to which the Chinese were able to penetrate the cultural borders of assimilation with the Malays and other indigenous communities tended to vary according to regions. The space for social interaction was also determined by the administrative policies of the Colonial government, and these tended to be restrictive especially in the Malay States and in Sarawak where the Brooke legacy discouraged inter-ethnic marriages between the Chinese and the indigenous people. If there were cases of miscegenation the children would strictly belong to one or the other ethnic group (Chew 2000). Cross-cultural intermarriages and the *Peranakan* phenomenon on the other hand were higher in the Straits Settlements and North Borneo (Sabah). Under the British North Borneo Company rule, no restriction was imposed upon the social interactions between the Chinese migrants and the indigenous communities. This explains why intermarriages are still being practiced widely in the modern times where the official creation for the Sino-Native status in 1991 reflects the facts of social life in contemporary Sabah society (Roff 1969; Reid 1997; Wong 2000).

Until the early 20th century, *Masuk Melayu* and the *Peranakan* communities were socially acceptable intermarriage prospects for both the immigrant and the host communities.

Changes in the socio-economic circumstances began to usher in new forms of bounded identities in Malaya. Firstly the number of new immigrants from China went up relatively more than the previous generation and when combined with locally born Chinese, they made up about 39.2% of the total Malayan population – 1,709,392 out of the total population of 4,385,346 – in the 1931 official census. Overseas Chinese in Thailand, the Spanish and the Dutch colonies tended to be in the minority, however in Malaya and Singapore the Chinese constituted the majority population as Singapore by then was ethnically dominated by the Chinese communities (1956:268). Secondly, Hirschman (1986, 1987) argues that the official categorization of ‘race’ came to play an important role as the colonial administration began to expand, and by 1921 a single census taking was designed to include the Straits Settlements, the Federated and Un-federated Malay States. Ten years later official classification listed the main categories of population in British Malaya as - ‘Malaysians by Race’¹⁰⁴, ‘Chinese by Tribe’, ‘Indians by Race’ and ‘Others by Race’ – Malaysian as understood from the 1931 to 1957 was an inclusive category for Malays and peoples from Borneo and Indonesia (Hirschman 1987:563). The practice of census taking, the categorical summarization of racial grouping combined with the generic allocation of economic functions¹⁰⁵ gradually set the pace for the crystallization of structured ethnic identification according to the means of livelihood (Lim 1995; Chin 2000; Phang 2000; Huff 2002)

Thirdly, the Chinese migrants and settlers relied upon the traditional networks of clan or family associations for basic welfare provisions and financial aid; and whilst some of these

¹⁰⁴ Malays, Javanese, Boyanese, Achenese, Batak, Minangkabau, Korinchi, Jambi, Palembang, Sumatra, Riau Lingga, Banjarese, Other Dutch Borneo, Bugis, Other N. E. I., Dayak, Sakai, Other (Hirschman 1987:576).

¹⁰⁵ Rural Malays tilling the land, the Chinese communities working on the banking, mining, agricultural estates and retail businesses, Indians being employed on the rubber plantation estates, and the urban Malays being groomed into politics and the civil service under the tutelage of the British Residents

organizations began to establish primary Chinese education and trade guilds, where they also undertook serious petition works demanding better conditions of treatment in trade, immigration from the local authorities (Mallory 1956; Yen 1981). By the 1900s some of these associations began to shed their conventional roles when they no longer able to accommodate the changing circumstances of their communities, where some had immensely affected by the political developments in mainland China (Heng 1983). Between 1900 until 1911, increasing revolutionary forces came into conflict with the Imperial Qing Dynasty, and the parties in conflict began to turn to wealthy overseas Chinese for revolutionary effort and other counter-revolutionary efforts within China (Duara 1997). These movements had profound impact upon the political bearing of overseas Chinese in Southeast Asia, whereby various political groups in Singapore and Malaya began to establish links supporting the republican movements led by Sun Yat Sen (Yen 1976). Since then these political groupings ushered in the modern forms of Chinese political organizations in Malaya that were split along ideological and class differences – the Kuomintang Malaya (KMTM); the Communist Party of Malaya (CPM) and the Straits Chinese British Association (SCBA)¹⁰⁶ – playing significant roles in providing relief effort for China under Japanese Occupation and becoming more engaged in the local issues in their adopted countries (Yen 1982; Heng 1983).

One of the major predicaments facing the Chinese communities in Malaya was the lack of bargaining power among Chinese labourers and the poor treatments given to their working conditions (Leong 2000:170). There were different policies regulating the recruitment of labourers in Malaya and the Straits Settlement; the Indian labourers came under the

¹⁰⁶ The ideological outlook of the Kuomintang and the MCP in Malaya tended to correspond with the respective nationalist and communist movements based in mainland China. Whilst they drew their support from the existing traditional clan based organizations in Malaya, the SCBA derived its support mainly from the Baba population of the Straits Settlements (Heng 1983: 292-2930).

Department of Labour whereas the Chinese Protectorate dealt exclusively with Chinese affairs (Stockwell 1982:57). The abusive practices in the recruitment of Indian labourers received the attention of the government authorities and was abolished on the basis of political negotiations between the Malayan government and the Government of India, leading to the promulgation of Labour Codes of 1912 and 1923¹⁰⁷(Parmer 1960; Tinker 1993). These measures were intended to stop the scale of violence experienced by the Indian labourers but they remained ineffective in addressing appalling living conditions, low wages and the daily assaults which drove many labourers to desert the plantations (Ramasamy 1992). The recruitment of Chinese labourers on the other hand was carried out by private agents and the government in the Straits Settlement did not intervene against the mistreatment of the Chinese labourers. The employers' abuse on Chinese workers fell outside the supervision of the authorities(Ee 1961; Leong 2000). The recruitment systems practiced by these private agents who tended to label themselves 'heads of piglets' worked on the basis of debt bondage, where most of these workers were reduced to subhuman status where terms like 'piglets' were generically used to designate bonded labourers who were locked up in lodging houses in the evenings and were expected to work their way out of debts in deplorable conditions (Blythe 1947; Ng 1961; Trocki 2001; Cottle and Angela 2007; Li 2010).

In 1913 the Colonial government in Singapore sought to end the indentured system imposed upon Chinese immigrants by introducing the Labour Contracts Bill with the aim of ending the elements of coercion that characterized the main feature of the debt bondage contract. Despite the passing of the Bill in 1914 leading to the abolition of the system of indentured

¹⁰⁷ The Labour Code of 1912 aimed to regulate the working hours, pay, housing and accommodation among the Indian labourers in the rubber estates. The later Acts provided the controller of Labour to inspect these premises and to compile reports of worker mistreatments with the extra power to prosecute those who committed violence against Indian labourers.

labour on the Chinese immigrants, the legislation could not address the real issue of poverty among Chinese immigrants and the problem of debt-bondage (Ee 1961:41-42). Strategies of labour control included opium addiction and gambling among the labourers to keep them indebted, as well as the lock-up system imposed upon labourers and their families in the barracks (*Kongsi houses*) (Ramasamy 1992:92-95)

Labour exploitations became the source of contention where local mobilization was initiated by the Kuomintang parties in Malaya under the guise of night schools¹⁰⁸ (Png 1961; Yong and McKenna 1990). The revolutionary ideas of Sun Yat Sen became powerful¹⁰⁹ - ‘San Min Chu I’ the abbreviated concepts relating to ‘anti-Imperialism’ (*Minzhu*), ‘the sovereignty of people’ (*Minquan*), and ‘livelihood of people’ (*Minshengzuyi*); the flowering of literatures related to the discourse of imperialism, the collective awareness of overseas Chinese through

¹⁰⁸ In 1924 Dr. Sun Yat-Sen established the Overseas Affairs Bureau whose aims were to see that the overseas Chinese received equal treatment in the territories they were living, to facilitate overseas Chinese returning to study in China, and to protect overseas investors. As early as 1910 the Reading Societies had sections dealing with schools and many Kuomintang branches in Malaya were set up in the guise of night schools. For more details see Png (1961: 17-23) in *KMT in Malaya*.

¹⁰⁹ Bergère (2000) highlights the role of Sun Yat Sen as the voice of Chinese Diasporas, ‘expatriate Chinese settlements’ worldwide at the turn of the 20th century and the ways in which his ideas of the Three Principles of the People were spread to overseas Chinese through his extensive travels and networking. For further elaboration of San Min Chu I, see Sun Yat-Sen Three Principles of the People, pp.352-394 in *Sun Yat Sen* Bergère, M.-C. (2000). Sun Yat-sen. Stanford, Stanford University Publisher.

. Earlier works on the political doctrine of Sun Yat Sen and the historical developments on the ideas of nationalism, democracy and socialism have been written by Linenbarger(1937) in *The Political Doctrines of Sun Yat Sen: An Exposition of the ‘San Min Chu I’* Linenbarger, P. M. A. (1937). The Political Doctrines of Sun Yat Sen: An Exposition of the ‘San Min Chu I’. Baltimore, Johns Hopkins.

. Sharman’s (1968) account of Sun Yat Sen provides very rich biography of Sun as a child of peasantry background, disadvantaged by the elitist system of the learned Chinese society, became an émigré at the age of 12 in Hawaii and was educated by the Anglican Church in his formative years. This biography indicates the ways in which Sun operated through Christian missionary movements, the formulation of his modernist political philosophy and revolutionist calling Sharman, L. (1968). Sun Yat-sen, His Life and its Meaning: A Critical Biography. Stanford Stanford University Press.

the term '*hua ch-iao*' and the increasing concern about the national status of '*hua ch-iao*' vis-à-vis the Republic of China (Wang 1981); communist literatures also began to reach Malaya by 1921 where early mobilizations of Chinese labourers, mining workers and working class youths in schools were initiated through collaborative efforts of the local Kuomintang and Chinese Communist Parties. The death of Sun Yat Sen in 1927 caused an ideological split between these two parties (Yong 1991). Despite this the night schools and reading societies for the working labourers continued to raise awareness about the workers' plight particularly during the 1930's economic depression (Leong 2000:170-174). The trade unionist movements galvanized by the Chinese Communist Party in China also continued to fuel the awareness of workers' plight, challenging the mercantilist power of the guilds that were more inclined to protect the interests of foreign powers in Malaya and the Straits Settlements.

Beginning from the early 1930s until the Japanese Occupation in 1942, labour unrests among the Chinese and Indian workers in the factories, the mining industries and the rubber plantations became endemic (Gamba 1958; Gamba 1962; Stenson 1970; Wilson 1981). These unrests were sporadic and ethnically divided, reflecting the British policy of ethnic economic segregation. The Chinese Unions, English-speaking unions and Indian unions existed side by side, with the main target going against the Colonial regime (Trocki 2001:123). These unrests set the scene for the Communist Party of Malaya to play key roles in mobilizing dissatisfied workers in the various industries and estates towards changing public opinion, particularly among the Chinese communities, about the exploitative capitalist policies of the British Colonial regime (Chin 2003). Gradually the Colonial officials began to blame communist propaganda as the main agitator to these labour unrests (Leong 1999; Leong 2000; Tai 2000).

As far as the reactions from the Malay community were concerned, these unrests prompted the rallying call for an alliance of religious conservatism across the aristocratic-peasant divide, and mobilize political defence for their rights and privileges against the immigrant communities (Edmonds 1968; Roff 1994; Smith 1994). Some pre-war Malay scepticism towards the special alliance of the British and the Malay royals remained resilient, resulting in a persistent split within the community ¹¹⁰(Ahmad Fauzi 2007). Within the immigrant communities, save for the mercantile elites, the immediate predicaments of the immigrant labourers lay in the condition of debt-bondage and the growing uncertainties about their status following the Great Depression. For the descendants of the immigrant communities, their status as locally born Chinese, Indians, Peranakan and Others remained ambiguous. Since the overriding concern of the British Residents during the pre-war period was the obligation to secure the special interest of the Malay ruling class and the British mercantilist, against the possible threat of submergence by the economic power of foreign Chinese capital, a sentiment that was shared by the Malay intelligentsia and the Malay press – it was therefore imperative that these special interest must assume the prerogative of political authority which essentially exclude transient migrant communities¹¹¹.

¹¹⁰ See Ahmad Fauzi (2007) 'Malay Anti-Colonialism in British Malaya: A Re-appraisal of Independence Fighters of Peninsular Malaysia', *Journal of Asian and African Studies*, pp.376-382.

¹¹¹ See Roff (1994:211-248) "New Elites and National Organizations in the 1930" in *The Origins of Malay Nationalism*. For other works discussing the role of Islam in Malay nationalism in the century, see Funston N.J. (1976) 'The Origins of Parti Islam Se Malaysia', *Journal of Southeast Asian Studies* 7(1):51-70; Funston (1980) 'Malay Politics in Malaysia: A Study of the United Malays National Organization and Party Islam'. Mohamad Abu Bakar(1986) 'Islam and Nationalism in Contemporary Malay Society' in Abdullah Taufik and Sharon Siddique (eds) *Islam and Society in Southeast Asia*, pp. 155-174. Singapore: ISEAS

5.3 Post-war left-wing movement and the politics of the right of abode in Malaya

The Japanese Occupation polarized an already pluralistic Malayan society, dividing the local population mainly along the lines of allies and resistant movements. When the second Sino-Japanese war broke out in 1937, overseas Chinese in Malaya and Singapore provided capital toward the China Relief Fund to support the anti-Japanese guerrilla movements in mainland China (Akashi 1970; Hayashi 2008). Because of the movement to support the China Relief Fund, the Japanese forces became increasingly hostile to Chinese communities in Malaya who were actively involved in the anti-Japanese campaign. This in turn compelled the Japanese Military Administration to seek local allies from the non-Chinese population in Malaya. The official reports among the British army confirmed the news that the Malay nationalist group - Kesatuan Melayu Muda¹¹² (KMM) – was instrumental to the Japanese Military Administration at the early stage of the invasion (Cheah 2003:20).

The Japanese administration co-opted the Muslim leaders through the strategy of drawing analogy between the Greater East Asia and the Islamic concept of *Jihad* (holy war) against Western imperialism. This was propagated through the use of mosques and *surau* to spread their Occupation propaganda, however this practice actually caused deep resentments among local Malay-Muslims (Abu Talib 2002; Abu Talib 2003). Despite the apparent cooperation

¹¹² The KMM or the Young Malay Union was the first leftwing Malay political organization, its main protagonist; Ibrahim b. Haji Yaacob drew inspiration from the Indonesian nationalist movements against the Dutch regime in the 1930's. Ibrahim Yaacob was one of the new breed of Malay nationalists at the turn of the century, very influential in the Malay publishing industry and in 1939 became the editor of *Majlis* – a pro-Malay publication that tended to voice certain anti-imperialist sentiments against the British. Ibrahim was reported to receive financial support from the Japanese to buy another daily *Warta Malaya* for the purpose of anti-British propaganda (Roff 1994:173). For more details on the role of Ibrahim Yaacob, see Cheah Boon Kheng (1979) 'The Japanese Occupation of Malaya, 1941-45: Ibrahim Yaacob and the Struggle for Indonesia Raya' in *Indonesia*, Vol. 28, pp. 84-120.

established between some of the local leaders with JMA, the Malay community did not escape the regime brutality and violence if they showed any resistance against the Japanese (Kratoska 1995; Kratoska 1998). Under the brief and extremely brutal regime of the Japanese Military Administration from 1942-1945, selective persecution of the Chinese led to the deterioration the social relations among the various ethnic groups in Malaya. These narratives of war memories are beginning to convey the demands for moral accountability and redress among survivors and perpetrators (Wong and Lim 2000; Frei 2004; Akashi and Mako 2008; Blackburn 2009).

The initial military operation against anti-Japanese elements led to extreme abuses and widespread genocide – codename *Sook Ching*¹¹³ – inflicted upon the local population by the *Kempeitai* (Japanese Military Police), the casualties among them were disproportionately Chinese. The Chinese were also forced to establish the Overseas Chinese Association (OCA) for the purpose of raising 50 million in local currencies to atone for their pre-war anti-Japanese resistance movements¹¹⁴. The *Sook Ching* episode and the financial extortion drove many, especially the Chinese into the Malayan Communist Party and its paramilitary wing the

¹¹³ Sook Ching means ‘purge through purification’ (Akashi 1970:63), also known as ‘Operation Clean-up’. They started out on the grounds of military operation to wipe out anti-Japanese sentiments; however a combination of factors led to these operations becoming violent, including the need to maintain security with limited army personnel and the fear of guerrilla attacks from the communists in Singapore and Malaya. The primary targets included the British, members of the KMT and MCP, supporters and financiers of the China Relief Fund Committee, members of the secret societies and Chinese immigrants who came to Malaya after the Sino-Japanese War. The operations first began in Singapore but were later extended to Malaya where they degenerated into wanton killings of innocent civilians who were mostly Chinese (Cheah2003:21-24). Similar operations were carried out around the neighbouring countries, see Geoffrey C. Gunn (2007) ‘Remembering the Southeast Asian Chinese Massacres of 1941-45 in *Journal of Contemporary Asia*, 37(3), pp.273-291.

¹¹⁴ Low and Cheng, *This Singapore*, pp. 33-34; Y.S. Tan, "History of the Formation of the Overseas Chinese Association and the Extortion by J.M.A. of \$50,000,000 Military Contribution from the Chinese in Malaya," *Journal of the South Seas Society III, Part I* (September, 1946). (Op. Cit in Akashi 1970)

MPAJA¹¹⁵(Malayan People's Anti-Japanese Army) (Cheah 1981). Crucially, it was the MPAJA that was the only functioning resistance movement in Malaya after the Japanese invasion and in December 1943 the British sought the assistance of MPAJA for the Allied cause at Blantan camp in the Perak jungle(Cheah 2003; Chin 2003).

The Japanese military operation against these resistance movements remained top priority when the Malayan Military Administration was established in 1943. Under the MMA, the recruitment of local civilians and the militarization of local Malay youths became imperative in maintaining security and the campaign against the communist insurgents. Subsequent Japanese administrative strategy tried to reverse the damaging effects of Col. Watanabe Wataru's¹¹⁶ hard-line position against the Chinese since the beginning of the Occupation; however the pro-Malay policy – administrative and clerical positions, the military training of Malay youths, and the role of the Malay rulers - remained largely unchanged from the pre-war period. The pro-Malay policy of the Japanese administration 'made the occupation both an opportunity and an arena for communal confrontation' (Cheah 2003:xiv).

After the Japanese surrendered, Sino-Malay relations took a fractious turn in Malaya¹¹⁷. The sense of distrust that was sowed under the Japanese occupation was compounded by the post-

¹¹⁵ MPAJA was the armed guerrilla movement established under the command of the Malayan Communist Party in 1942, and the MPAJU (Malayan People's Anti-Japanese Union) was the civilian organization that provided funds, food, clothing and other logistics support to the guerrilla movement. These movements worked together with the British Force 136 reconnaissance party in Japanese occupied territories. See Cheah (2003) Chapter 3, 'The MCP and the Anti-Japanese Movement' in *Red Star Over Malaya: Resistance and Social Conflict during and after the Japanese Occupation, 1941-1946*, pp.56-100.

¹¹⁶ See 'Colonel Watanabe Wataru: The Architect of the Malayan Military Administration, December 1941- March 1943' in *New perspectives on the Japanese occupation in Malaya and Singapore, 1941-1945*,(eds) Akashi, Y & Yoshimura, M. pp. 33-64

¹¹⁷ See Cheah Boon Kheng (2003:25-45) on the clashes between the Chinese dominated MPAJA and the pro-Japanese Malay collaborators in *Red Star over Malaya: Resistance and Social Conflict during and after the Japanese Occupation, 1941-1946*, Chapter 2.

war crusade against the local collaborators – codename Japanese ‘running dogs’ – which inevitable turned communal in nature¹¹⁸. The religious undertone of the ‘cult of invulnerably’ began to manifest strongly amongst the Malays in their retaliation against the perceived threat of the MPAJA guerrilla taking over Malaya after the Japanese surrender, and in these violent retaliations the identities between guerrillas and innocent civilian Chinese were blurred, which in many cases led to wholesale attacks upon Chinese settlements¹¹⁹. These sentiments became entwined with the nationalist fervour that set the two communities apart, giving substance to the nationalist idea of claiming ‘Malaya for Malays’ by spreading the propaganda that the ‘Chinese desired to make Malaya a part of her empire’, creating fear among the Malay communities¹²⁰.

The post-war conflict coincided with high rates of unemployment, particularly among the labouring masses, widespread poverty and illnesses, and the general breakdown of the capacity for the local communities to rebuild their lives (Harper 2001). The British tried to initiate a ‘liberal experiment’ against this backdrop of social dislocation in the form of the Malayan Union Scheme (Harper 2001) on the grounds that the restoration of the pre-war constitutional and administrative system will be undesirable in the interests of efficiency and security for the declared purpose of promoting self-government in the Colonial territories¹²¹. The war provided the impetus for the Colonial Office to rationalize the administrative system and to address the problem of dual sovereignty over the ethnically segregated population in

¹¹⁸ See Cheah (2003), ‘The Malay/MCP/Chinese Conflict’ in Chapter 8 in *Red Star over Malaya: Resistance and Social Conflict during and after the Japanese Occupation, 1941-1946*, pp.195-240.

¹¹⁹ See Cheah (2003:199-209) on the *Kiyai* phenomenon and the Holy war army of the Red Bands.

¹²⁰ *Public Records Document* CO 537/1581, no 14, 15 and 16 [Communal violence and political militancy]: HQ Malaya Command weekly intelligence reviews no 30-32. 31 May -22 June 1946

¹²¹ *Public Records Document* CAB 98/41, CMB(44)4, 15 Jan 1944

Malaya¹²², forming the central planks of the Malayan Union¹²³(Purcell 1946). A caretaker government – British Military Administration (BMA) – was then established to commence the post-war reconstruction from September 1945 until the Malayan Union proposal could be implemented as part of the civil administration in April 1946.

5.4 Conceptualizing Political ‘rights’: From colonial subjects to citizens

The major concern of the BMA was to restore political stability in post-war Malaya. In the run up to the decolonization process, the issue of citizenship for the immigrant British subjects in Malaya was a significant consideration in the Constitutional design for Malayan nation-state. Common citizenship was at the crux of the Malayan Union scheme that was conceived as part of the constitutional transfer of sovereignty from the Malay Rulers to the British Crown¹²⁴. Malayan Union aimed at establishing centralized governance in Malaya and reassessing Malay ethnic privileges in relation to enfranchising the non-Malay British subjects into common Malayan citizenship. The Malayan Union included all the Malay states as well as the two Straits Settlements in Penang and Malacca, with the exclusion of Singapore¹²⁵. In principle the Malayan Union Scheme was liberal on the citizenship proposal;

¹²² ‘In the interests of Malayan unity, the anomalies of citizenship had to be removed. The Malay states had now a large non-Malay population, but whilst the Malays were the subjects of their sultans, and Indonesian Mohammedans who immigrated into Malaya were also recognized as such by the Malay Sultans, the non-Malays, of whom the Chinese were the most numerous, had an indeterminate status in law. Those, however, who were born in the Straits Settlements were British subjects’ (Purcell 1946:23).

¹²³ The main features of the policy were: a) The creation of a Malayan Union (to exclude Singapore in the first instance, but to include the Settlements of Penang and Malacca; b) The establishment of a Malayan Union citizenship with the purpose of granting full political rights in the Malayan Union to all those, of whatever race, who regard Malaya as their true home and as the object of their loyalty. *Public Records Document* CAB 129/7, CP(46)81

¹²⁴ The covert mission to renew the Anglo-Malay treaties with the Malay Rulers was conducted by Sir Harold MacMichael in 1944, who had been Governor of Tanganyika from 1934 to 1938 and High Commissioner for Palestine and Trans-Jordan from 1938 to 1944.

¹²⁵ The War had led to the divergence of policies being pursued in Malaya and Singapore as separate entities, however increasingly the issue of special position and the concentration of political power at

however the post-war treaties with regard to the transfer of sovereignty carried out between Sir Harold MacMichael and the nine independent Malay Sultans became questionable. The lack of proper engagement with the local population with regard to the British intentions in Malaya¹²⁶ raised suspicions among the Malays to agitate against the Scheme. It crystalized around the citizenship proposal, expressing the unwarranted fear among the Malays that the non-Malays would gain competitive access to Government appointments¹²⁷.

The Pan-Malayan Malay Congress¹²⁸ emerged with the sole intention of opposing the idea of 'common citizenship'. Since then the BMA were forced to compromise its stand because they were dependent upon the support of the local police to maintain security. This episode changed the political tone of the BMA's message to the War Office in Britain emphasizing the importance of establishing collaborative support with the Malays and to sustain favourable Malay public opinion¹²⁹. Most Malays led by the Malay Congress under Dato Onn Jaafar were considerably apprehensive by the citizenship proposal and religion became instrumental

the hands of the Malay Ruling class in Malaya became an important reason for the unwillingness of the Chinese community in Singapore to link their fortunes with the rest of Malaya. CO 1030/67, no.1 *Public Records Document*

¹²⁶ *Public Records Document* CO 273/675/18, 20, 'We are, in fact, far in advance of general public opinion. After all it has taken over three years of hard thinking by a number of people at home to arrive at the policy as announced...It must always be remembered that in addition to introducing a radical change in policy, we are trying to restore a country which has with difficulty survived three and a half years occupation by a ruthless enemy' – [Political position in Malaya with regard to the new policy proposals: memorandum by Brigadier A T Newbould, 31 Dec 1945] Newbould was a Malayan Civil Service officer attached to the BMA.

¹²⁷ *Public Records Document* CO 537/1528, no 44 [Malay reactions to the White Paper]: Minute by H T Bourdillon.

¹²⁸ The Malay Congress subsequently founded the United Malays National Organisation (UMNO) in Johor Bahru, 11-13 May 1946.

¹²⁹ *Public Records Document* CO 537/1548, no 31 – BMA (Malaya) to War Office on the resolution of the Pan-Malayan Malay Congress. 'Majority of the Government servants, including Police, are Malays and we are very dependent upon retention of their goodwill. We can only implement new policy successfully with co-operation of Malays, which we have not (repeat not) at present got, but can get given further time for discussion with new Governors.'

in galvanizing the support against the proposal, but there was ‘no indication that the policy has provoked any reaction whatsoever from amongst the non-Malays’¹³⁰.

Against the backdrop of Malay resistance against the Malayan Union, other forces of politics were at play: the Malayan Communist Party and the General Labour Union were mobilizing labour strikes in ‘widespread localities, including Singapore, Penang, Kelantan, Ipoh and Province Wellesley’ and these openly confronted the British Military Administration¹³¹. The BMA¹³² was not impartial in its mode of governing (Rudner 1968:102-104). Its selective use of private agencies to manage rubber exports and other the imported goods, led to unfair trade practices against the Chinese traders. The re-employment of Malay bureaucrats who served under the Japanese regime also intensified communal distrust as the memory of collaboration began to haunt the survivors of the Japanese regime. The capability of the BMA was severely undermined by the emergence of the ‘heterogeneity of Malaya’s political activity’ immediately after the war, and suggested the importance of finding collaborative support from ‘moderate and responsible leaders’ in the future civil administration¹³³.

The differentiated response to Malayan Union was a manifestation of the deliberate segregation policy that had polarized the collective livelihoods of the Malayan population crystallized around the ideas of the ‘sons of the soil’ and the ‘unassimilable’ migrants. The citizenship proposal of the Malayan Union had provoked an acute sense of political awareness

¹³⁰ *Public Records Document* CO 537/1669 [Local reactions to the Malayan Union]: minute by W S Morgan (Malayan Education Service 1931; fought in the Malayan campaign, 1941-1942; was appointed principal in the CO, 1947).

¹³¹ *Ibid.*,

¹³² The BMA also suffered the historical stigma of being called the ‘Black Market Administration’ Rudner, M. (1968). "The Organization of the British Military Administration in Malaya, 1946-48." *Journal of Southeast Asian History* 9(1): 95-106.

¹³³ *Ibid.*,

among the Malays particularly with regard to their pre-war established notions of rights on landholding and government positions, 'where the principle of Malay 'Paramountcy' formally enunciated by the British in 1927 was unchallenged by the non-Malay' (Carnell 1952:506).

As these notions of rights were protected by the British through legislative means prior to the war, they became increasingly forceful in defining the collective position of the Malays vis-à-vis the non-Malay communities. The bulk of immigrant communities on the other hand, never really had definitive notions of 'rights' accorded to them apart from the nominal rights and obligations to work in the mining, the plantation estates etc. In many cases these labouring masses had to endure poor working conditions, job insecurity, and debt bondage. Instead of addressing the immediate concerns of the workers' predicaments and the insecurities of the unemployed, the Malayan Union citizenship proposal had focused more on drawing out the sentiments of 'loyalty to Malaya'¹³⁴ among these communities with the aim of 'promoting common interest and the development of common institution' (Lau 1989:67). The final assessment of the 'local reactions' to the Malayan Union by the British Colonial office classified public opinion along ethnic lines where the Malay opinions were given weight over the Chinese and Indian labouring communities¹³⁵.

¹³⁴ *Public Records Document*, CO 537/1542, no 97, 28 September 1946. In the light of the Malay protest, the Working Committee set up to review the Malayan Union had revised their proposal to emphasize the HMG's declared policy: 1) That Malayan citizens are to be people who regard Malaya as their real home and the object of their loyalty. 2) That the special position of Malays must be safeguarded.

¹³⁵ *Public Records Document*, CO 537/1528, no 95A, [Sultans' constitutional proposals]: inward telegram no 222 from Sir E Gent to Mr. Hall recommending conciliation. 'HMG's own policy for constitutional unity in all important fields can, in my opinion, be essentially fulfilled under the Federal system to which Malay opinion has come to attach the greatest importance. I believe that if HMG were to make favourable response with expression of confidence and goodwill to Malay opinion, there would be ample room to secure agreement here on many points in present proposals which need revision,' (Sir E Gent was the governor of Malayan Union, 1946-1948 and Mr. G.H Hall the Secretary of State for the colonies, 1945-46).

The Malayan Union proposal became significant turning point where the different notions of rights structured the socio-political mobilizations in Malaya. On the one hand it appeared to be an optimistic introduction of liberal conception of citizenship to the Malays (Ishak 1960), on the other hand such liberal proposals were undercut by the British anxieties over anti-colonial sentiments and their pre-war obligations to protect status of the 'sons of the soil'. The conception of citizenship in this case was largely driven by the persistence of indigenous claims to right grounded in the 'sons of the soil' and the Malay Rulers' sovereign obligations to defend this 'Special Position' against a politically agitated the left-wing migrant workers.

When the Malays boycotted the scheme, the British set up an exclusive consultation Anglo-Malay Working Committee in the subsequent renegotiation paving the way for the Federation of Malaya that restored the symbolic position of the Malay Rulers (Soh 1960)¹³⁶. The Malayan Union roused the political sentiments among the Malay elites to form UMNO (United Malays National Organization) and this brought Malays from all social standing into a semblance of ethnic unity (Stockwell 1977). UMNO was a polarizing contrast from Trade unionism and industrial strikes that grew substantively among the non-Malay communities under the mobilization of the Malayan Communist Party and the General Labour Union (Hawkins 1946; Allen 1967; Stenson 1969; Turnbull 1974; Stockwell 1979; Lau 1981).

The British colonial post-war policy underestimated the political mobilization of the labouring forces among the Chinese and the Indians calling for better living and working conditions in Malaya (Stenson 1969:347), and because of its support for the British merchants, the colonial regime undermined the Malayan Communist Party's call for

¹³⁶ Soh Eng Lim (1960:37) argues that the strong protest from the Malays forced the British Government to deal exclusively with the Malays at the expense of the other communities in Malaya. The British Government 'held consultations with the Malays and made certain moves in connection or in conjunction with them but with them alone, without bothering to make any prior announcements or explanations to the general public'.

democratic and multiracial government in the aftermath of the Japanese surrender (Turnbull 1974:250). The BMA's experiment in democracy involved a number of socially oriented policies employed with the aim of rejuvenating a war-torn society through self-help movements (Harper 2001:62-83), with the left-wing movement gaining considerable foothold in these social dynamics, where competing notions of 'democracy' began to flourish.

The 'experiment in democracy' involved abolishing pre-war restrictions upon the freedom of association and saw the flowering of social movements the public sphere in Malayan politics. The official Protector of Chinese in the Malayan Planning Unit, Victor Purcell actively encouraged public participation from the local population. Through self-help movements encouraged by the BMA, they provided the space for people to express their post-war anxieties and control political radicalism. It was a deliberate attempt to regenerate local support among the community leaders and to ease the transition from military administration into civil administration as the British prepared for the reoccupation of Malaya via the Malayan Union scheme. More importantly the BMA was morally obliged to recognize the role of the MCP during the Japanese invasion and to reverse the pre-war policy on restricting Chinese public opinion.

The official tolerance of such liberal experiment notwithstanding, the public sphere was constantly monitored by the colonial regime. Through the vernacular press¹³⁷, organized labor movements, the left-wing politics of the Malay Nationalist Party and the Malayan Communist Party in particular, these discursive trends began to challenge the boundaries of 'legitimate public debate' constructed by the colonial government. The conflicts over land use between the colonial authority and the landless squatters, plus other localized conflicts

¹³⁷ The growth of the vernacular press especially in the Malay and the Chinese languages was a significant turning point for the expression of public opinion and debates on issues of local concerns, and the Malayan Union was particularly targeted in this period (Harper 1999).

among the warring factions involving the Triads, the KMT and the MCP posed serious challenge to the general administration of the BMA. Despite these, the defining role of the MCP and the trade union organizations in general gave structure and institutional support to the existing squatters who were landless as well as the laborers employed in the estates (Harper 2001:107-113).

The ongoing postwar conflicts prompted the colonial regime to employ legal restraints against trade union activism in Malaya in 1948. The Trade Unions (Amendment) Ordinance that was passed by the colonial regime in 1948 imposed legal restrictions upon the trade union administrative procedure and membership affiliation (Shurcliff 1951)¹³⁸. This restriction aimed at undercutting communist infiltration into the trade union movements by prohibiting persons not employed by the industries from holding office¹³⁹. Subsequently the trade union movement was disempowered by the declaration of Emergency mid June 1948 following the murder of three European planters and two Chinese estate overseers¹⁴⁰. The Emergency Regulations passed by the colonial government extended the provisions for ‘death penalty for

¹³⁸ The amendment required that, (1) all officers of the trade unions, except the secretary, must be of good character, actually employed in the industry or having had 3 years of such employment, and (2) federations were to be confined to unions of similar occupations or industries (Shurcliff 1951:275)

¹³⁹ *Public Records Document*, CO 537/3755 [Internal security]: minutes by J B Williams and G F Seel (Assistant under-secretary of state, CO) ‘The greatest immediate danger undoubtedly arises from Communists attempt to gain control of the trade unions and the High Commissioner for the Federation has proposed vigorous action to counter these attempts in the shape of amending trades union legislation which at this moment of writing is about to be considered by the Secretary of State’. 28-31 May 1948

¹⁴⁰ *Public Records Document*, CO 717/167/52849/2/1948, f302 [Declaration of Emergency] On 16 June three European planters in the Sungei Siput district of northern Perak were murdered by members of Malayan Peoples’ Anti-British Army. They were Arthur Walker, manager of Ephel Estate, and John A Allison and I D Christian, manager and assistant manager of the Sungei Siput Estate. On the same day two Chinese were also murdered one on a n estate near Johore Bahru and the other on a Taiping estate (Perak). Although these incidents did not mark the start of Malayan violence, they did trigger the state of emergency which was declared in three stages: over partes of Perak and Johore on 16 June, over the rest of Perak and Johore on 17 June, and over the whole of the Federation on 18 June.

unlawful possession of arms, power of detention of any persons, search of persons and premises without warrant, and power to occupy properties'¹⁴¹.

The declaration of Emergency was galvanized by the concerted pressure from the European business interests in Malaya.

‘The government shares the belief of your Association that in many instances of unrest on estates the workers are being subjected to exploitation by subversive political elements which have no interest except to disturb good relations in industry to the detriment of both workers and employers’¹⁴².

The alliance between the big businesses, estate employers and the Colonial government effectively severed the organizational links between trade unionism and the left-wing political movement associated with the MCP through legal means to protect European business interests and its revenue sources from the tin and rubber industries. The legal approach was also used as a strategic public policy to demonize the MCP as ‘terrorists’ in the public discourse.

5.5 Ideological preamble to the definition of citizenship

‘Many members present here do not obviously accept the communist ideology, while some of them do. For my part I do not. I am a positive person, not an 'anti' person. I want positive good for my country and the world. Therefore, are we, the countries of Asia and Africa, devoid of any positive position except being pro-communist or anti-communist? Has it come to this that the leaders of thought who

¹⁴¹ Ibid.,

¹⁴² *Public Records Document*, CO 717/172/52849/9/1948, no 15 [European business interests in Malaya]: notes by W G Sullivan of a meeting between the Colonial Office and a delegation representing European business interests on Malayan lawlessness and Sir E Gent’s counter-measures.

have given religions and all kinds of things to the world have to tag on to this kind of group or that and be hangers-on of this party or the other carrying out their wishes and occasionally giving an idea? It is most degrading and humiliating to any self-respecting people or nation. It is an intolerable thought to me that the great countries of Asia and Africa should come out of bondage into freedom only to degrade themselves or humiliate themselves in this way' (Kahin 1956)

(Prime Minister Nehru, Speech to Bandung Political Committee, 1955 – cited in Kahin 1956:64-72)

The Malayan Government's use of political language in shaping public perception on 'Communism' had had tremendous implications upon the politics of communal relations and ideas of citizenship rights. The resistance movement galvanized by the Communists against the Japanese Occupation continued to have long lasting impacts upon the labour strikes, trade unionism and the left-wing politics until the 1960's. There was a compelling economic reason for the British to outlaw communism and weaken its ties to the trade union movements after the Japanese Occupation. At the early stage of the Emergency declaration, the British government was reluctant to lend credibility to the MCP as a political movement that was part of a global anti-colonial struggle. Instead the MCP were labelled as 'a band of thugs and criminals' for fear of the withdrawal of insurance cover on the estates in Malaya (Deery 2003). The official anxiety over this issue was related by Henry Gurney – British High Commissioner of Malaya,

'In the event of prolonged terrorism and heavy damage to property, the insurance companies may consider withdrawing cover under the "riot and civil commotion" clause of their policies...it is therefore advisable to avoid the use of terms in official

statements which might serve as a handle to the insurance companies. These terms include “enemy”, “war”, “insurrection”, “insurgents”, “rebellion”, etc., and these considerations lie behind the preference for such names as “bandits”, “thugs” and “terrorists” which have not the same significance for insurance companies’¹⁴³

Great Britain’s determination to re-colonize Malaya and defeat communism was also driven by the territory’s dollar-earning power (Deery 2007). Creech Jones, who was the Parliamentary Under-Secretary of State at the Colonial Office, reported that,

‘During 1947 the total value of exports of Singapore and the Malayan Federation together was £151 million of which dollar exports accounted for £56 million. Malaya is by far the most important source of dollars in the colonial empire and it would gravely worsen dollar balance of the Sterling Area if there were serious interference with Malayan exports’ (Op Cit in Deery 2007:37)

The Briggs plan was designed to counteract the Communist insurgency beginning in May 1950. It aimed at cutting the logistic supplies from the People’s Organization (Min Yuen) in predominantly Chinese populated areas and resettle them along with the existing ‘squatter’ Chinese communities, estate and mind labourers – who were susceptible to Communist recruitment – into compact ‘New Villages’¹⁴⁴. Under the administrative control of the ‘New Villages’, new road communications were linked to these villages with police posts being established in these areas to contain further spread of Communist activities with a propaganda

¹⁴³ *Public Records Document*, CO537/4773, no 3 [Insurgency and counter-insurgency]:despatch no 5 from Sir H Gurney to Mr Creech Jones, 30 May 1949

¹⁴⁴ *Public Records Document*, CAB 21/1681, MAL C(50)23, ‘Federation plan for the elimination of the communist organisation and armed forces in Malaya’ (Briggs Plan): report by COS for Cabinet Malaya Committee’ 24 May 1950

expert to engage in ‘psychological warfare’ against Communist banditry¹⁴⁵. Five months into the implementation of Briggs plan, the Federation Government in Malaya was already seeking financial assistance from the U.K Government meant for the Emergency¹⁴⁶. A joint memorandum written by Sir H Gurney, the British High Commissioner and Sir H Briggs in June 1951 showed mixed progress being made in the implementation of the Briggs plan - citing the successful resettlement of about 240,000 people, the marginal increase in the arrests of bandits and their supporters, changing public perception among the Chinese population against Communism, whilst at the same time highlighting the seriousness of Communist attacks in South Malaya, the increasing demand for costly building materials and the request for reinforcing the Police Jungle Squads and medical services¹⁴⁷. In exactly four months, Sir Henry Gurney was assassinated in an ambush, this prompted the Secretary of State to criticise the approach of Briggs plan being too soft on combating Communist banditry and tougher measures were needed to protect European business interests in the rubber estates and the tin mining industries¹⁴⁸. In February 1952 Sir Gerald Templer was appointed as the new High Commissioner to Malaya as well as the Director of Operations for the Emergency.

The intensification of the Communist attacks in the estates and the intimidation of labour brought the economy almost to a standstill, so much so that in 1951 the extra cost for the Federation Government arising from the Emergency came to about £13.8 million, in which the major burden came from the recruitment of police forces (£5.6 m.) and resettlement of

¹⁴⁵ *Public Records Document*, CO 537/5961, no 25 [Constitutional Development] *point 13. ‘Information and propaganda’* 7 June 1950

¹⁴⁶ *Public Records Document*, T220/282, ff 1-7 [UK financial assistance of the emergency] 24 October 1950

¹⁴⁷ *Public Records Document*, CO 537/7263, no 38A ‘Federation of Malaya – combined appreciation of the emergency situation’: joint memorandum by Sir H Gurney and Lieutenant-General Sir H Briggs, 4 June 1951

¹⁴⁸ *Public Records Document*, CO 1022/39, no3 ‘Emergency in Malaya’: CO record of a meeting between Mr Lyttelton and a delegation representing British business interests in Malaya, 15 Nov 1951

Chinese squatters (£4.8 m)¹⁴⁹. By the end of 1953 the Federation had mounting deficits and this coincided with falling revenue in the rubber and tin prices for two consecutive years¹⁵⁰. The Head of the Colonial Office Finance Department reported that the public spending meant for the program of rehabilitation and development following the Japanese Occupation had been channelled to the cost of Emergency, which amounted to £80 million over the whole period¹⁵¹. The battle against the Communist Emergency was initially framed in the context of protecting the economic interests of the British Empire but increasingly the Federation Government began to target the Chinese communities for resettlement, collaboration and punishment as the bulk of the supplies for the Communist armed forces was supported by the Chinese, who constituted about 37% of the civil population¹⁵². The Government realized that the Emergency situation in Malaya would not come to a peaceful conclusion unless the Chinese were won over and the MCP denied from legitimate political representation. The next step was to give the Chinese community the option to participate in the decision making process of running their own villages affairs, under the guidance of the Government,

‘They had never viewed Government as in [an] instrument to which they themselves could belong and in which they could take part. This attitude of mind does not change quickly, and has constituted a strong barrier to Chinese co-

¹⁴⁹ *Public Records Document*, CAB 129/48, C(51)26 ‘The situation in Malaya’: Cabinet memorandum by Mr Lyttelton, Annexes I-III, 20 Nov 1951

¹⁵⁰ The price of rubber had dropped from its peak of 230 cents a lb. in February 1951 to 140 cents a year later and 58 cents by December 1953, and the price of tin, which peaked at 740 dollars a picul in February 1951, had fallen to an average of 480 dollars in 1952, and to under 300 dollars by August 1953. *Public Records Document*, CO 1030/174, no 10 [Security in Malaya] 26 Jan 1955

¹⁵¹ *Public Records Document*, T220/285, ff 57-69, [Financial difficulties of the Federation] 3 Nov 1953

¹⁵² *Public Records Document* 1030/174, no 10 [Security in Malaya]: despatch no 94/55 on the conduct of the emergency, 26 Jan 1955

operation with Government in its struggle against the Malayan Communist Party',¹⁵³

The plan was to encourage the Chinese community to participate in the Government program and reject the Communism ideology. On this account, it was then imperative for the Federation Government to stop the MCP from penetrating into party politics in Malaya lest the international fight against imperialism and the MCP struggle against British colonialism in particular found its way into the collective consciousness of the Chinese community. The fight against the Emergency became ideologically driven when the Federation Government could no longer justify the economic cost of fighting the Emergency largely burdened by the U.K taxpayers¹⁵⁴. The Government propaganda resorted to polarized discourse between nation-building and the fight against 'Communist terrorism' as the means to sway public opinion. After the Bandung Conference¹⁵⁵ in April 1955 the MCP offered the letter of negotiation¹⁵⁶ to the Malayan government. However the British managed to convince the

¹⁵³ *Public Records Document*, CO 1030/174, no 9 [Malayan Chinese and the MCP]: despatch no 104/55 from the High Commissioner, Sir D MacGillivray to Mr. Lennox-Boyd, Secretary of State for the Colonies, on Chinese support for MCP and MCP strategy. 28 Jan 1955

¹⁵⁴ *Public Records Document*, CO 1030/27, no 2 [Risks to British interests in Malaya and Singapore] 23 October 1955

¹⁵⁵ This was the Asian-African Conference that was held in Bandung, Indonesia on the 18-24 April 1955 where 29 Asian and African countries gathered to address the global issues of world peace, colonialism and self-rule. The conference reached consensus on the mutual interests and some issues of major concern to the Asian African countries. A 'Final Communique' was adopted and the contents included economic cooperation, cultural cooperation, human rights and self-determination, the issue of people in dependent countries, promotion of world peace and cooperation. Among others it also adopted the contents of the Declaration on the Promotion of World Peace and Cooperation and listed ten principles in handling international relations. The spirit of unity of the Asian and African people, opposing imperialism and colonialism, struggle for the defence of national independence and world peace and the promotion of friendship among the peoples as demonstrated at the Conference formed the core principles of the 'Bandung Spirit'.

¹⁵⁶ *Public Records Document*, CO 1030/319, no 31 'Malayan government rejects negotiation with terrorists': CO press release for publication on 24 June. Annex: 'Translation of letter from communist terrorists'

Executive Council and Malayan leaders not to recognize the political legitimacy of the MCP.

The British officials feared that if the Federation government did not take a hard line position,

‘the MCP would be in a far stronger position than any Communist party in Western Europe, where Communism cannot dominate to so great an extent by fear and where it is not backed by the racial ties that exist between the Chinese in Malaya and their kinsmen in Communist China’¹⁵⁷.

The British were apprehensive about the depth of ethnic consciousness in Communist ideology and they encouraged the Malayan leadership to adopt a defensive political approach in their negotiation effort with the MCP. The most important conditions tied to the amnesty proposal included the uncompromising position of the Federation Government in denying the MCP a legitimate recognition as a political organization, the criminalization of the Communist ideology as a political movement that condoned the acts of violence against the Federation government and the people, and demanded the Communist leaders to redeem themselves by pledging loyalty to Malaya¹⁵⁸. The pledge to loyalty was set as a precondition for the Communists to prove their allegiance and political commitment to Malaya if they

The letter expressed the aim of the communist struggle for a peaceful, democratic and independent Malaya. The four main points to the negotiation addressed the existing factors contributing to the Emergency situation (1) The British Government remained indifferent to the resolutions of Afro-Asian Conference in Bandung (2) The call for the representatives of various political parties, guilds associations and communities to hold a roundtable conference to discuss about how to end the Emergency and plan for the political future of self-government in Malaya. (3)The amnesty proposal by the Alliance leaders of UMNO for unconditional surrender was unreasonable and the MCP insisted on negotiating the proposal with the British Government. (4) They were willing to come to Kuala Lumpur for the meeting if the British Government would guarantee the safety of their representatives.

¹⁵⁷ *Public Records Document*, CO 1030/319, no 7 [Communists’ first peace offer]: inward telegram no 347 from D Watherston to Mr Lennox-Boyd. 19 June 1955

¹⁵⁸ *Public Records Document*, CO 1030/30, ff 3-16 ‘Report by the chief minister of the Federation of Malaya on the Baling talks’: draft summary by Tunku Abdul Rahman of the verbatim record 29 December 1955

wanted to participate in the bargaining process for independence from the British. Implicit in this pledge of loyalty was a sense of fear against the ideological momentum of the Communist as a political organization in Malaya. When Chin Peng, the lead negotiator of the MCP asked for the meaning of ‘Loyalty to Malaya’ the Alliance leader, Tunku Abdul Rahman insisted that,

‘You have to prove that this is the country to which you really owe your allegiance because today the people in Malaya, one and all regard the Communist activities as something entirely foreign to the Malayan way of life. They regard the Communist Party as belonging to a power outside this country, and consider its members give allegiance to that foreign country and not to Malaya’¹⁵⁹

Such loyalty also implied the acceptance of the position of the Rulers and their constitutional roles as the guardians of Islam and the Malay customs, setting the parameters of ‘duties and responsibilities’ in the early definition of good citizenship in Malaya.¹⁶⁰ The subjective emphasis on ‘loyalty’ underlined the ideological preamble to the Government’s attempt at regulating the liberty of conscience of political subjects, to which Chin Peng countered,

‘As a member of the MCP, we still believe in our ideology. We will never allow ourselves to be forced by others to give up this ideology, but we wish to put our ideology to the people to decide, if that is possible. Now that the Government requests us to give up this ideology. As a citizen, of course, we have obligations, but at the same time we must have freedom of thought, the right of freedom of thought, but the Government’s point is that they don’t want this’¹⁶¹.

¹⁵⁹ Ibid.,

¹⁶⁰ Ibid.,

¹⁶¹ Ibid.,

5.6 Conclusion

This chapter teases out the socio-economic aspects structuring cultural identifications in the history of Malaya and how the different strands of ideas about identities in Malaya began to develop throughout the different stages of colonialism. The pre-war era was an important turning point for the transformation of the social demography of Malaya, but the processes of transformation were structured by the policy of ethnic segregation that dominated colonial politics then. What were significant about this era were the multiple processes of cultural identification having simultaneous grounding with the emerging polemic of political awareness (consciousness). The British colonial policy engendered these divergent discourses: on the one hand, defending the socio-economic position of the indigenous Malay community grounded in the moral obligations of the Anglo-Malay treaties; on the other hand, nurturing capital investment and the protection of the European business interests in Malaya generated the need for the increasing importation of migrant labours from other countries. These polemics were increasingly characterized by two main ideological expressions, one that was grounded in ethno-religious terms that were synonymous with the politics of ethno-nationalism, whereas the left-wing movement was largely shaped by the ideological fight against colonial capitalism, trade unionism and the Japanese invasion in Asian countries.

These two distinctive ideological processes appeared to have strong correlation with the ways the British colonial government rationalized the management of colonized subjects in Malaya. The Chinese community were victims of Japanese military persecution during the war, the dynamics of persecution led to their increased political mobilization through the Malayan Communist Party. The British re-occupied Malaya after the Japanese surrendered and instigated war against the Malayan Communist Party, the British propaganda and campaign against the Malayan Communist Party played significant ideological role in shaping the

perceptions of ethnicity, loyalty and citizenship in Malaya. The pathological picture of the Communist ideology projected by the British, glorified the acts of political aggression that overshadowed the other memories of more violent atrocities committed by the Japanese army during the Occupation. The demonization of the Communist ideology ultimately dominated the political discourse of the Malayan agenda for self-government.

Self-government was in turn constructed on two polarizing theme, the nationalist movement that was framed in the context of peaceful political negotiation on the one hand, and the violent acts of terrorism condoned by the Malayan Communist Party on the other hand. At the backdrop of the polemical narratives of the Malayan agenda for self-government were the simmering undercurrents of problematic ethnic relations, compounded by the issues of divided loyalty and the definition of common citizenship. These would become the pertinent factors that constantly feed into the ideological contestations about citizenship rights and the contemporary political debates that increasingly identify the political and civil 'rights' of the citizens in historically situated interpretations of ethno-religious origins and political cultures.

6 MALAYSIA: THE FRACTURED NATION-STATE

Abstract: *The problem of identity politics is historically contingent, and when citizenship rights are not conceptualized in the universal language of the rights to decent livelihood, equal of opportunities, access to justice or fundamental values that are important to human living, the notion of citizenship would be narrowly understood to serve the abstract ideals of preserving traditionally conceived identities. When these ideas become dominant in the governmental institution, ethno-religious stereotypes underpin the rules of public engagement, making it insurmountable to construct the space for common citizenship.*

6.1 Introduction

The notion of ‘state without nation’ (Stockwell 2004:97) problematizes the political imagination of the Malaysia as a nation-state. The Communist Insurgency had the effect of fracturing conception of common citizenship in the making of Malaysian Federation. As a product of decolonization the Malaysian Federation was politically engineered to prop up the institution of a new state, and the nation-state was externally designed by the policies of decolonization (Zubaida 2002). The Malaysian nation thus created was politically constructed through a process of imagining that differed both in substance and ideological outlook (Anderson 1991). The imagination of the nation was further fractured by the politicization of two conflicting ideologies: 1) the Malay-centric ideal of citizenship that was driven by the principle of indigenous claims to right, and 2) the concept of Malaysian Malaysia grounded in common citizenship. Malaysian Malaysia was introduced by Singaporean leaders that shook the foundation of the Malay special position and for that matter, Singapore is included in this Chapter because of how its brief partnership in the Malaysian Federation unravelled the Malay Special Position. The making and the break-up of Malaysian Federation was therefore an important historical episode to examine the ways

citizenship were debated and adjudicated in the absence of secular principles governing the terms of official political debate.

The Malaysian Federation was envisaged to operate on the model of federal system but the executive role of the government was hijacked by party political control under UMNO and power of the executive grew highly centralized (Watts 1996; Work 2002). Despite its modern adoption, most of the colonial features of governance have been retained especially the application of repressive laws that were used to combat the Communist Insurgency, and which are still being applied today upon political dissidents on the pretext of national security. Previously the colonial state had used the legal apparatus to regulate the population on two significant grounds, mainly to structure land rights and reserve public service appointments of the Malay-Muslim communities, and subsequently to suppress the forces of left-wing movements in Malaya.

Some of the legal provisions under colonialism, especially the Bill of Rights for its special citizenship provision were embedded into the original framework of the 1948 Federal Constitution of Malaya that was eventually enshrined to the Malaysian Constitution (Saunders 1995). The Constitution also defines the administrative roles and responsibilities of the Federal government and the state-level/or subnational governance into Federal and State List respectively. The institutional arrangement was inherited from the historical structure of the British Residency and the Malay states, progressing out of the inherited duality of legal system (Horowitz 1994) that reflected the separated authorities of the colonial regime and the local ruling elites. Where the regulations of the colonial subjects were concerned, the immigrants were administered by the British Residents and were subject to the secular courts. Whereas the local Malays were the loyal subjects of the Rulers governed under the Mohammedan laws. The separated domains of legal administration underpinned a critical

aspect of the British colonial legacy that divided colonial subjects according to migrant and indigenous groups, making institutional governance a function of the default lines of ethnic and religious differences.

The duality of legal system underpinned the ideas of differential ‘rights’ that had had considerable impact upon the framing of the Constitution and subsequently on state practice. It is argued that citizenship right is not a mere legal formula, and it should occupy a central place in the administrative structure and political culture of the modern nation-state and state system (Brubaker 1992:23). In the development of the nation-state, the dynamics between the state and the nation are conceived as independent entities in shaping the historical trajectories of citizenship. Hence the ways in which citizenships were constructed depended upon the historical primacy of the existence of either the state or nation (Hein 1993). Under British colonialism the primacy of Malay special position in the Malay *Kerajaan* was recognized as politically legitimate, and the Malay nation was conceived simultaneously with the Malay *Kerajaan* (government). This simultaneous conception of Malay-Muslim identity and Malay-centred governance was then buttressed by the special provisions in the modern Constitution.

The legal provision of ethno-religious identities posed a critical challenge to the development of common citizenship. The discourse of ethnic identification has been reinforced by the sovereign role of Malay Rulers to protect Islam, and demand for ‘political loyalty’ from the migrant communities domiciled in Malaya. They constitute the emerging ideological precepts that dominated the political thinking of the elites who played key roles as the agents of nation-building. The systematic thinking behind such ideological precepts provided important basis for the state-centred construction of the nation and the legal justification of differential citizenship rights Malaysia.

The state-centred narrative for the construction of a particularly Malay nationalist conscience set the stage for the ideological construction of the other ‘less significant’¹⁶² identities whose loyalty to the state would always remain suspect. This was especially true for Communist insurgents, in which the state began to politically engineer a particular strand of nationalism. These sentiments, expressed in terms of the Malay ethnic right to govern, gained considerable momentum through the legislative validations of the Colonial public policies. The legislative elevation of one ethnic group above the rest resulted in the development of fragmented identities within the Malaysian nation (Loh Kok Wah and Kahn 1992).

6.2 A fractured vision of nation-state

The examination of a fractured vision must include Singapore¹⁶³, and whilst its presence was brief in the Federation, its subsequent expulsion had deep implications upon the negotiation of common citizenship in Malaysia. The vision of ‘Grand Design’ mooted during the wartime planning by the British government as a strategic consideration for decolonization after the Second World War. Decolonization process in Malaya differed greatly from the Borneo Territories and Singapore. When the Federation of Malaya was granted self-government in 1957, the Communist Insurgency had not ended and this aspect of the political conflict had had serious implications upon the conception of citizenship. In between this period and the political consideration for the ‘Grand Design’, the question of ethnic balance and the political threat of Communism dominated the official thinking behind the political negotiations of

¹⁶² I use ‘less significant’ because of the way in which the Malay identity was given special recognition in the legal and public policy of the British colonial government, which is valid until today.

¹⁶³ Singapore is only mentioned in this chapter because its political involvement in the Malaysian Federation was only very brief, from 1963-1965. However the issues surrounding its severance from the Federation were closely tied to the problems of citizenship and its implications upon the conception of nation merit discussion in the context of political right. Singapore had established its own system of government way before the Federation and its inclusion into Malaysia was the result of the decolonization process of the British in Southeast Asia.

merging the Federation of Malaya with the other British colonial territories of Singapore, Brunei and the Borneo territories.

The ‘Grand Design’ had focused significantly on the institutional aspects involving the merger of disparate colonial territories whilst leaving the problem of the ‘nation’ couched in ethno-religious differences. The liberalization of citizenship proposed in the 1946 Malayan Union scheme that was fiercely contested by UMNO, was subsequently replaced by the 1948 Federation of Malaya Constitution, restoring many old features of the Anglo-Malaya administrative framework. The written Constitution was described by a colonial officer as

‘...primarily devised not as an instrument of administration but as a political compromise, with the Central Government safeguarding the non-Malay and the States [protecting] the Malay interests’¹⁶⁴.

This enabled the ruling party UMNO to have executive control over the federal government and through its politics, promoted the ideology of Malay special citizenship right through the practice of ethnic consociationalism, subsequently the deepening problems of patronage in the public political culture (Means 1972; Case 1996; Case 1996; Crouch 1996; Gomez 2004; Jomo 2004).

The ideology of special citizenship, so historically rooted in the Malayan public political culture contributed to the intense political debate against the call for Malaysian Malaysia that eventually led to the abrupt separation of Singapore in the space of two years after the establishment of the Federation in 1963. The two historical events that defined the moment of intense ethnic conflict were the Singapore exit from the Malaysian Federation in 1965 and the

¹⁶⁴ *Public Records Document*, CO1022/22, no 1 [Reorganization of government]: memorandum by Mr Hugh Fraser for Mr Lyttelton the Secretary of State for the colonies. 16 Jan 1952

ethnic riot on 13 May 1969. In 1965, the conflict began as an ideological one that subsequently manifested into actual physical violence in 1969. In the analysis of the Parliamentary debates, the ideological thread behind these debates could be traced, and by illuminating the reasons and justifications of these arguments, it is possible to establish how the role of ideas could become forceful in the manifestation of the acts of violence in the community. These were the critical junctures that transformed the dynamics of ethnic and religious contestation in the Malaysian political development, and after the ethnic riot in 1969 the ruling party introduced a number of Bills and amendments in the Malaysian Constitution to restrict the scope of dissent in the name of national security.

The analysis of Parliamentary debates is an important exercise to uncover the defining themes of public debates because the ideas and reasons professed in these arguments associate closely with the political conducts of state agents. By retracing some of the big debates on the creation of common identity, these Parliamentary debates will illuminate the root of the polemical divide between ethnic and civic values in shaping the trajectories of political rights and citizenship for the new Malaysian nation. The ideological tension hinges on the problematic dislocation between the normative conception of the secular state and the preservation of Malay sovereignty and special position. With the union of Singapore and the Borneo territories, the preservation of traditional authority and the Malay ethnic position in Malaya was tested by the challenges of civic demands associated with the emergence of neo-liberal political thinking. The political dynamics between the preservation of Malay political power and the demand for common citizenship in the name of Malaysian Malaysia led to the unprecedented expulsion of Singapore from the Federation in 1965. This was then followed by the 1969 ethnic riot, which then saw the cumulative dominance of ethnic Malay political power, creating the condition for the gradual de-secularization of the Malaysian state.

6.3 The secular state and differential rights in Malaysia

A 'State without nation' problematizes the subjective tensions between the imaginations of a political territory and a community or nation that lacked shared histories, cultural identities and commonality. The lack of commonality has been entrenched by the unqualified value of differential rights that were deep-seated within a particular state tradition. Where the idea of the secular (and the practice of secularism) was undermined within a particular state tradition and where the primacy of race and religion was instead promoted, this creates the condition for partiality to prevail. Malaysia presents an important case to the problem of secular state because common citizenship was overruled by the partiality of the state to allow for the preferential treatment of the dominant Malay ethnic group. Central to the problem of designing a governmental framework for the independent nation of the Federation of Malaya was the idea that the Malay special rights needed to be secured through measures that would guarantee the Malay access to public services and land ownership, to prevent the submergence of the Malays from the other immigrant communities¹⁶⁵.

This was the inherited British policy on the Malay Reservation Enactment that privileged the Malays in the civil service and the Malay regiments (Groves 1959; Wilcox 1978). When the 1948 Federation of Malaya Agreement replaced the Malayan Union scheme with the restricted scope of citizenship,

'it had created a distinct Malayan political community whereby, Malays who were subjects of any of the nine sultans and British subjects in the Settlements of Penang and Malacca automatically qualified for Federal citizenship, leaving the rest of the domiciled non-Malays as non-citizens' (Fernando 2002:73).

¹⁶⁵ *Public Records Document*, CO825/42/3, no. 27, (21/8/1944)

The official accounts of the political tensions over the issues of citizenship during this period of time only represented the views of the Alliance leaders of UMNO (United Malays National Organization), MCA (Malayan Chinese Association) and MIC (Malayan Indian Congress), as the positions of the legitimate political parties representing the three main ethnic groups in the Federation of Malayan Government.

In the Constitution, the Alliance leaders negotiated for the legislative power and political control to remain within the purview of the central government (Fernando 2002:71). The Alliance memorandum for the Reid Commission demanded ‘strong central government’ for the Federal government and the State governments. The Alliance also advocated that ‘...in times of national crisis, the central government should have the residuary legislative powers’¹⁶⁶. Through the design of the Constitution, the ruling party UMNO was granted considerable scope to appoint party elites into executive positions and monopolize control over the functions of the Federal government.

Within the Alliance coalition, the ethnic representative parties resembling each of the major ethnic groups in Malaya – UMNO, MCA, and MIC – negotiated over the criteria of how Malayan citizenship should be framed in the Constitution. The main contention rested on UMNO’s proposal for the incorporation of the Malay ‘special provision’ into the Constitution and the MCA political demand over the liberalisation of the Citizenship Law, ‘*jus soli*’ and the procedure for the application of citizenship for non-Malay immigrants¹⁶⁷. There were fundamental disagreements among the parties over the content of citizenship right as the justification for unequal or differential right was dominated by the narrative of migrant-ethnic

¹⁶⁶ *Public Records Document*, CO 889/6, ff 219-239 , ‘Political testament of the Alliance’: memorandum by Tunku Abdul Rahman for the Reid Commission. Appendix: ‘Fundamental rights’ 25 Sept 1956

¹⁶⁷ *Public Records Document*, CO 1030/258, no 7 [Political tension over nationality and citizenship] 1 May 1956

distinctions. UMNO's rejection of the 1946 Malayan Union scheme had led to the shift in the British liberal position on the criteria of citizenship, which was then replaced by the 1948 Federation of Malaya Agreement.

The 1948 Agreement institutionalized differential citizenship around the concept of Malay subject and sovereign kingship (Fernando 2002:73). It reinforced the position of the Malays as subjects of any of the nine Sultans, granted Federal citizenships to the British subjects in Penang and Malacca but left the rest of the immigrant population to fulfil strict residential requirements in order to apply for Federal citizenship. As a result, considerable number of domiciled non-Malays did not have citizenship status. For instance, only about 320,000 out of the total of 2,011,000 Chinese populations in Malaya were qualified to apply for Federal citizenship¹⁶⁸. The 1948 Agreement created two tiered citizenship rights - special position conferred to the Malays complete with the bundle of social rights, whereas the immigrant population were fortunate enough to be granted the right to remain in Malaya¹⁶⁹. The creation of two tiered citizenship had significant influence over the core ingredients of Malayan constitutional framing process.

In 1956 an independent commission called the Reid Commission was set up to formulate a working constitution for the independence of Federation of Malaya. The Reid Commission was a product of consensus from the London Conference between the Alliance leadership, the representatives of the Malay Rulers and the Secretary of State to design a constitutional template for self-governing Malaya. The challenge for the Reid Commission was to try and

¹⁶⁸ *Public Records Document* CO1022/174 (25) Note on citizenship by A.S. Melville, 3 June 1952. Op Cit Fernando (2002)

¹⁶⁹ See *Federation of Malaya Agreement* (1948), Kuala Lumpur: Government Printer, pp. 11-12. Clause 19(1)(d) of the Federation Agreement made the High Commissioner personally responsible for "safeguarding the special position of the Malays and the legitimate interests of the communities". Op. Cit Fernando (2002:73)

formulate a working constitution that would conform to the norms of parliamentary democracy and constitutionalism, with due considerations to the facts of pluralism in Malaya (Fernando 2002:97). In the light of the recent post-war conflicts, the left-wing movements, the Communist Insurgency and the stateless condition of a large number of migrant workers, a liberal framework was not achievable. The liberal framework was hampered by the prevailing institutional structure of the colonial government, i.e. Federal executive power residing in the colonial administration whilst the traditional authority rested among the Malay Rulers at State level administration. The new governing framework had to include the terms of traditional authorities to prevail and this meant that the rights of Malay subjects were to be secured along with the governing privileges of the Malay Rulers¹⁷⁰.

The Alliance memorandum to the Reid Commission in 1956 stated clearly the non-negotiable 'right' the special position of Malays and religion:

On Religion: 'The religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religions, and shall not imply that the State is not a secular State'.¹⁷¹

On special position of Malays: 'While we accept that in independent Malaysia, all nationals should be accorded equal rights, privileges and opportunities and there must not be discrimination on grounds of race or creed, we recognize the fact that the Malays are the original sons of the soil and that they have a special position arising from this fact, and also by virtue of the treaties made between the British

¹⁷⁰ Reid Commission Report (1957), Op Cit in Fernando (2002:116)

¹⁷¹ *Public Records Document* CO889/6, ff219-239 'Political testament of the Alliance': memorandum by Tunku Abdul Rahman for the Reid Commission. *Appendix: Fundamental rights*

Government and the various sovereign Malay States. The Constitution should, therefore, provide that the Yang di-Pertuan Besar (*Malay Rulers*) should have the special responsibility of safeguarding the special position of the Malays. In pursuance of this, the Constitution should give him powers to reserve for Malays a reasonable proportion of lands, posts in the public service, permits to engage in business or trade, where such permits are restricted and controlled by law, Government scholarships and such similar privileges accorded by the Government; but in pursuance of his further responsibility of safeguarding the legitimate interests of the other communities, the Constitution should also provide that any exercise of such powers should not in any way infringe the legitimate interests of the other communities or adversely affect or diminish the rights and opportunities at present enjoyed by them'.¹⁷²

The privileges derived from the special position outlined above are intended only for existing nationals of Malay descent and their descendants. We therefore suggest the following as a definition:

‘A person shall be deemed to be a Malay, if: He practices the religion of Islam; He habitually practises Malay Customs; and, He habitually speaks the Malay language;’¹⁷³

The Malay identity defined under Article 160 of the Interpretation and General Clauses Ordinance (1948) is tied to Islam. This definition makes the Malay identity and culture inseparable from Islam. The sovereign position of the Malay Rulers is secured in the Constitution part XIV in Articles 181 – 183, whereby their symbolic roles in safeguarding the

¹⁷² Ibid

¹⁷³ Ibid.,

Islamic faith and the Malay civilization remained intact (Milner 2011). Certain provisions in Article 3(5)¹⁷⁴ and 153(2)¹⁷⁵ underline the sovereign role of the Malay kingship in preserving their ceremonial persona in the modern statecraft. These provisions serve to buttress the subjective meaning of *bangsa Melayu* that is historically tied to the sovereignty of the Malay kingship (Kerajaan).

6.4 Ideological dominance of Islam-Malay and fractured citizenship

The relationships between Islam, Malay identity and the ‘secular practices’ have reciprocal links with the public political culture in Malaysia. In the process of state making, the ‘secular practices’ have been increasingly circumscribed by the state agents whose primary object is to protect and expand the ideological identification of Malay and Islam as an ethno-religious category. While the framing of the Malaysian constitution afforded only a symbolic position for Islam and was envisaged of as primarily secular, the increasingly strong link between Malay ethnic identity – which was legally enshrined and protected constitutionally – and the politically revivalist Islamic identification has undermined the secular nature of the constitution in the contemporary experience. With the historical position of Islam established as the official religion of the Malaysian Federation through the Constitution and where the dominant Malay-Muslim agents continue to actively promote the values of Islam in

¹⁷⁴ Article 3(5) Notwithstanding anything in this Constitution the Yang di-Pertuan shall be the Head of the religion of Islam in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya; and for this purpose Parliament may by law make provisions for regulating Islamic religious affairs and for constituting a Council to advise the Yang di-Pertuan Agong in matters relating to the religion of Islam.

¹⁷⁵ In the Malaysian Constitution, Article 153(2) states: Notwithstanding anything in this Constitution, but subject to the provisions of Article 40 (cabinet ministry advise) and of this Article, the Yang di-Pertuan Agong shall exercise his functions under this Constitution and federal law in such manner as may be necessary to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak of such proportion as he may deem reasonable of positions in the public service (other than the public service of a State) and of scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government and, when any permit or license for the operation of any trade or business is required by federal law, then subject to the provisions of that law and this Article, of such permits and licenses.

governance; this paved the way for the subtle shift from a secular intention into making Islam central to politics, thus created the gap to the process of de-secularization.

Hitherto the colonial state preserved substantial aspects of the traditional structure of the Malay sovereign kingship through the protection of the Malay special position and the sanctity of Islam. The official policy to safeguarding the Malay 'special position' established the definitive citizenship premise for Malays to magnify their rights to claim government resources over and above others – non-Malays - on the basis of the legal enactment of ethnically based privileges in the Constitution. Some British officers expressed concern over the idea of special privileges as a strategy of decolonization,

‘restoration of the pre-war constitutional and administrative system will be undesirable in the interests of efficiency and security and our declared purpose of promoting self-government in Colonial territories’,¹⁷⁶

However these officers were obliged to abide by their official commitments to the old treaty. The War Cabinet suggested abandoning the pre-war system of autocratic rule in favour of a self-governing system that would provide for,

‘a growing participation in the Government by the people of all the communities’, however for Malaya this political system would be– ‘subject to a special recognition of the political, economic and social interests of the Malay race’¹⁷⁷.

¹⁷⁶*Public Records Document* CAB66/50, WP(44)258, Appendix I to 25 (for Malaya) and Appendix II to 25 (for Labuan, North Borneo, Brunei and Sarawak)

¹⁷⁷ *Ibid.*,. There was no special recognition of a particular race for the Borneo territories.

This policy of special recognition took important precedent in the post-war constitutional development and structured the development of ethnic politics in the Malaysian public sphere.

The provisions of Malay 'special position' expressed in Article 153, emphasizes the definitive/affirmative rights of the Malays to claim greater access to opportunities in the government provisions for human capital development as per guaranteed by the Malay Rulers. Within the Alliance leadership, the ruling party UMNO had played a central role in entrenching ethnic nationalism by promoting the idea of the 'Malay' ethnic group as the rightful owners of Malaya. In this context the Constitution was framed to accommodate the range of legal rights designed for the political survival of the Malay ethnic group. Since the provision for the Malay special position had its precedent in the previous government setting, the sense of moral obligation to continue the provision in order to assist the Malays socially and economically became compelling (Fernando 2002:126).

The 1957 Malaya Constitution had set the tone of how citizenship rights should be granted according to the criteria of ethnic privileges. It was against this political backdrop when the Grand Design was actively pursued and at a time when the British government was becoming conscious of the financial cost of maintaining colonial territories.

'By 1960, there was no material asset in the area essential to our national economy to compare with, for example, oil in the Middle East. Rubber and tin were no longer essential to our balance of payments and we are spending money for political reasons rather than any prospect of financial gain.'¹⁷⁸ When the British finally decided to officially end its colonial policy in the Southeast Asian region, the official approach aimed at merging all the British colonies was largely

¹⁷⁸ *Public Records Document*, CAB 134/1929, 7 June 1959

motivated by ‘the security of the region and the expense of maintaining it’ (Stockwell 2004:xlvi). Hence in the Grand Design, the British was far more concerned about the strategic positioning of its security interests, resulting instead a ‘brokered compromise’ that was followed by an uneasy agreement in the merging of Malaya, Singapore, Brunei, North Borneo and Sarawak. Aside from the long-term strategic interest of the presence of the British defence in the region, the formation of Malaysia was political driven as a way of overcoming the threat of communism in Singapore. However it is also important to emphasize the failure of the political leaders in addressing the fundamental issues affecting citizenship. The ideological preoccupation of merging the disparate colonies in the region resulted not in ‘the fulfilment of nationhood but a structure for nation-building’ (Stockwell 2004:lvii).

The formation of the Malaysian Federation went ahead despite incoherent process of ‘consolidation and fragmentation’ (Stockwell 2005:193). The ‘Greater Malaysia’ agenda was ideologically driven by elites expecting a community of people to identify their sense of belonging Malaysian Federation on the assumption of close ethno-cultural proximity without fully addressing the problems of differential citizenship. Tunku Abdul Rahman (the first PM of Malaya) anticipated the prospect of culturally assimilating the indigenous people of North Borneo and Sarawak with the Malays in Malaya on the assumption that the various indigenous peoples of those territories are of the same Malay racial group¹⁷⁹. At the same

¹⁷⁹ Ibid., (26 June 1961)

time, Tunku was also driven by the fear of the majority Chinese and left-wing elements in Singapore which could potentially destabilize his leadership position within UMNO¹⁸⁰.

Table 1: Population by ethnicity in Malaya, Singapore, British North Borneo and Sarawak, 1961

| Ethnicity | Estimated number | Percentage |
|-----------------------------|------------------|----------------|
| MALAYA | | |
| Malays | 3,500,000 | 49.3% |
| Chinese | 2,675,000 | 37.6% |
| Indian | 795,000 | 9.8% |
| Others | 125,000 | 3.3% |
| Total | 7,095,000 | 100.0% |
| SINGAPORE | | |
| Malays | 227,500 | 13.3% |
| Chinese | 1,289,600 | 75.7% |
| Indians | 145,100 | 8.7% |
| Others | 45,000 | 2.3% |
| Total | 1,707,300 | 100.0% |
| BRITISH NORTH BORNEO | | |
| Non-Muslim | 233,081 | 49.9% |
| Muslim | 72,804 | 15.6% |
| Chinese | 116,016 | 24.8% |
| Others | 45,099 | 9.7% |
| Total | 467,000 | 100.0% |
| SARAWAK | | |
| Indigenous Non-Muslim | 353,130 | 44.7% |
| Indigenous Muslim | 47,400 | 6.0% |
| Chinese | 243,320 | 30.8% |
| Malays | 137,460 | 17.4% |
| Others | 8,690 | 1.1% |
| Total | 790,000 | 100.00% |
| Grand Total | 9,598,300 | |

Source: *Public Records Document CAB 134/1949, GM(61) 11* Date: 20 Oct 1961

¹⁸⁰ *Public Records Document, PREM 11/3422* 'Greater Malaysia': inward telegram no 705 from Sir G Tory to Mr Sandys, reporting the Tunku's reaction to Mr Macmillan's latest message' 26 September 1961

Table 2: Population of the proposed Greater Malaysia, 1961

| | Estimated number | Percentage |
|--------------------------------|-------------------|----------------|
| By Territory | | |
| Malaya | 7,095,000 | 70.51% |
| Singapore | 1,707,300 | 17.00% |
| North Borneo | 467,000 | 4.64% |
| Sarawak | 790,000 | 7.85% |
| Total | 10,059,300 | 100.00% |
| By Ethnicity | | |
| Malays | 3,906,610 | 38.90% |
| Indigenous Muslims (Borneo) | 49,654 | 0.50% |
| Indigenous Non-Muslim (Borneo) | 595,561 | 6.00% |
| Chinese | 4,340,086 | 43.00% |
| Others (including Indians) | 1,167,389 | 11.60% |
| Total | 10,059,300 | 100.00% |

Source: PRO CAB 134/1949, GM (61) 11 Date: 20 Oct 1961

Table 1 shows the population breakdown in each of the territories in Malaya, Singapore, North Borneo and Sarawak. Table 2 shows the estimated population figure in the territories for the proposed Greater Malaysia, with the estimated percentage of ethnic breakdown of the overall population. The estimation of the population breakdown by ethnicity in Table 2 shows a relatively higher percentage of Chinese and Other population combined together compared to the Malays. The prospect of non-Malays emerging as the majority communities in Greater Malaysia exacerbated Tunku's fears of the possible intensification of the left-wing movements, which could undermine his attempt at mediating the competing factions within UMNO.

The power play among the elites came to dominate the overall process of the merger to the extent that the British colonial agents were overwhelmed by the local political momentum that overshadowed the meticulous deliberations for the desired constitutional groundwork in an

independent Federation (Stockwell 2004:lvii). As the forging of the disparate colonial territories in Southeast Asia was carried out in a rather incoherent process of ‘consolidation and fragmentation’ throughout the decolonization period (Stockwell 2005:193), the state that was framed upon ‘contradictory objectives and painstaking negotiations’¹⁸¹ came to represent a big political void that the local elite players were keen to fill in with their imagined prospect of bounded nationhood,

‘National identification in a large and powerful federation comprising a grand total of nearly ten million people with a total of 130,000 square miles as against the Federation’s (Malaya) of 50,000 and Singapore’s 225 square miles would hold the hearts and minds of the people. Pride in a more powerful and viable state, which may be called the ‘Federation of Malaysia or the United States of Malaysia, would give a boost to nation-building to the mutual advantage of the three territories and would help to stabilise the future of the whole region.’¹⁸² (Lee Kuan Yew, the first PM of Singapore, 9 May 1961) This sentiment was reiterated by the first Prime Minister of the Federation of Malaya, Tunku Abdul Rahman, in his letter to the British Prime Minister, Mr Macmillan on 26 June 1961 in which he stressed how the federation would create ‘a national pride which would go a long way in building up a feeling of loyalty to the country’¹⁸³.

¹⁸¹ Stockwell 2004:lviii, ‘Lacking compliant proxies and mistrustful of *force majeure*, the British relied on painstaking negotiations in order to reconcile the contradictory objectives of the participating territories.

¹⁸² *Public Records Document*, CO1030/973, no E203 [‘Paper on the future of the Federation of Malaya, Singapore and the Borneo Territories;]: memorandum by Lee Kuan Yew for the government of the Federation of Malaya. (9 May 1961)

¹⁸³ *Public Records Document*, PREM 11/3418 [The Grand Design]: letter from Tunku Abdul Rahman to Mr. Macmillan. (26 June 1961)

The nationhood that was to furnish 'Greater Malaysia' was largely constructed upon the unproblematic notion of a community of people that would readily express/identify their sense of belonging on the assumption of primordial or close ethno-cultural proximity. Tunku went as far as claiming the prospect of culturally assimilating the indigenous people of North Borneo and Sarawak with the Malays in Malaya on the basis that 'Racially the various indigenous peoples of those territories are related to the Malays, in fact they come of the same stock'¹⁸⁴.

How people were imagined as sharing a 'similar genealogy of ethnic stock', as expressed by Tunku, reflected a deeply primordial assumption of the people's instinctive subjective identification through ethnicity. Both the Muslim and non-Muslim indigenous people in North Borneo and Sarawak were assumed to possess supposedly closer primordial association to Malays on the qualifying assumption of their status as natives in their own lands. The dominant thinking behind such primordial assumption reflected the politics of ethnicity and secular/religious segregation practised back in British Malaya. The administrative circumstances of segregation worked in tandem with the logic of categorization that generated the divisive mental schema where people were historically grouped into different ethnic backgrounds on the basis of customary norms and religious laws and economic placement of the migrant communities. Whilst such conceptual schema highlights the importance of cognitive-stereotyping approach to illuminate the way of thinking about ethnicity (Brubaker, Loveman et al. 2004), the reasoning for this mental schema was ideologically constructed upon the 'protective' legislation that was meant to safeguard the special position of a particular ethnic community. The existing legislative guarantees came to structure important

¹⁸⁴ Ibid., (26 June 1961)

ideas, perception and thinking about the relationship between ethnic identification and the fundamental rights of the citizens.

The cognitive perspective of ethnic identification here draws upon the dynamic process of official categorization and classification of subjects which had been crucial in structuring people's self-understanding and the projection of shared as well as overlapping cultural identification (Caplan and Torpey 2001). In the Malaysian public culture religious doctrines gradually came to synchronize with the cultural perceptions of ethnic identification. These have considerable reciprocal impacts upon the ways in which knowledge, beliefs, and expectations are structured about group identities as well as the expectations about 'rights'. The legal provision of 'right and the language of 'right' that are couched in terms of the sanctity of religious belief contributes to the shared ecumenical representations of particular *Bangsa Melayu* or Malay identity, which in many ways have led to the fractured concept of citizenship. This fractured concept of citizenship was sustained by the non-negotiability of Malay special position and had arguably broken the deal of Greater Malaysia through Singapore's ejection from the Federation in 1965. More importantly, the undermining of secular values in the Constitution since the beginning of self-governance in Malaya had contributed to the gap in upholding the neutrality principles within the governmental apparatus, thus allowing this fractured perception of citizenship to take firm hold upon political debates.

6.5 Separation of Singapore from the Malaysia Federation 1965

'Indeed, the Malaysia that was inaugurated on 16 September 1963 failed wholly to satisfy any of the parties to it. It was neither forged through nationalist struggle, nor did it reflect a homogenous national identity. Rather it was the product of grudging compromise and underpinned by only fragile guarantees; its formation

was peppered with resistance and that it came into being at all was regarded by many at the time as a close-run thing.’ (Stockwell 2004: xxxvi)

The ideological tensions between the Malay special position and Malaysian Malaysia underscored the dynamics of ‘citizenship debates’ prior to Singapore’s secession from the Malaysian Federation. These ideological contentions stemmed from the dominant customary conceptions of rights that the local state formation inherited from the legacy of colonialism (Mamdani 1996; Mamdani 2001) and these found articulations in the form of political belonging, rights and obligations when a certain ethnic group successfully captured the post-colonial state for their ethnic agenda (Ndegwa 1997).

Initially the secular commitment was declared by Tunku Abdul Rahman on May 1, 1958, in Parliament,

‘I would like to make it clear that this country is not an Islamic state as it is generally understood; we merely provided that Islam shall be the official religion of the State’¹⁸⁵

The consensus reached by the Alliance leadership gave the assurance that the Constitutional position of Islam ‘...*shall not imply that the State is not a secular State*’. The political assurance given by Tunku in the Alliance Memorandum on the concept of ‘secular state’ was not as morally convincing as it was given to the Constitutional establishment of Islam. The role of the ‘secular state’ was never spelled out in the Constitution, thus rendering the normative interpretation of ‘secular state’ for Malaysia absent. With the position of Islam being defined as the official religion of the Federation, the interpretive scope for the ‘secular

¹⁸⁵ <http://www.themalaysianinsider.com/print/malaysia/history-contradicts-ministers-arguments-that-malaysia-is-not-secular/> 22 October 2012 *History contradicts Minister’s arguments that Malaysia is not secular*

state' is limited. There's no categorical definition for the Constitutional establishment of the secular state in Malaysia that is comparable to the contextual definition of the political-legal relationship between the role of religion and the state - discussed in 'Locating Secularism' in chapter 3. The lack of proper definition in political-legal terms has therefore resulted in the demonization of the political value of secularism in relation to the dynamics of Islamic politics in the country. Juxtaposing 'bangsa Melayu' and 'common citizenship' highlights the polemics of ethnic and civic nationalism that parallels the tension between the increasing Islamization of politics and the secular values in Malaysia.

The political imaginations of the new nation came undone by the growing identity politics and nationalist movements that polarised the ideas of citizenship into two discernible political trends at the time. On the one hand there was the political assertion of protecting the rights of the indigenous Malays along with the symbolic role of the Malay Rulers that furnished the Malay nationalist movements led by Tunku. On the other hand, there was the bounded territorial definition of 'Malaysian Malaysia' that was inclusive of the various peoples of the participating territories envisioned by Lee Kuan Yew. Citizenship issues aside, Tunku Abdul Rahman was determined to retain executive control over proportional representation and internal security at the Federal level in Kuala Lumpur, and his main demands were documented in the report of the Official Committee for 'Greater Malaysia' as follows¹⁸⁶:

The first demand was the immediate inclusion of the Borneo territories as a political strategy to offset the threat of increased percentage of the Chinese population (43%) against the Malay population (38.9%) in the proposed merger. Once the first demand was secured, Singapore would then be allowed to join the Federation on

¹⁸⁶ *Public Records Document*, CAB134/1949, GM(61)11(Final) 'Greater Malaysia: report by the chairman of the Official Committee' 20 October 1961

condition that she would have proportionately smaller representation in the central Parliament than it could claim on a population basis if it came in on the same footing as the other existing States. The existence of communist threats in Singapore had in many ways obliged Lee Kuan Yew to negotiate the Merger that would both address the strength of the People's Action Party and accommodate Tunku Abdul Rahman's condition where the Federation retain control over Defence, External Affairs and Internal Security, while Singapore would keep control of Education and Labour. In essence the main agreement between the two leaders was that the Federation should have complete Constitutional safeguards against any possibility of the Singapore Chinese upsetting the political dominance of the Malays in the Kuala Lumpur House of Representatives. On the subject of political authority, the number of seats granted to Singapore in the House of Representatives would be 15 instead of 25 to which she was entitled by reason of her population, and that Singapore citizens should not become Federation citizens on Merger despite them being given Malaysian nationality and passports¹⁸⁷.

There was thus the special agreement on the reciprocal restrictions on franchise right and between the Governments of Malaya and Singapore. These restrictions were imposed upon the citizens originally from Singapore with regard to their eligibility to vote and stand as political candidates in any part of Federation outside Singapore. Likewise, a citizen of Malaysia, who was not a citizen of Singapore, would not be allowed to vote or stand in election in Singapore. In addition to that, citizens originating from Singapore would qualify for the right to enfranchisement in Malaysia provided that the person 'satisfies the residence

¹⁸⁷ *Public Records Document*, CO1030/1150, no 183 [Political developments in Singapore since the Tunku speech of 27 May 1961]: despatch from P B C Moore to Mr Maulding on the chances of Lee winning the battle of Merger. 12 July 1962

and other qualifications for citizenship under the Federal law to qualify for a registration as a voter in the Federation outside Singapore. So long as he is registered in the Federation, his name will be deleted from the electoral roll of Singapore¹⁸⁸.

These official statements show that political representation based on ethnicity came to be a defining problem in the conception of citizenship for the Federation. The explicit political identification of ethnicity with power play inspired a very ethnic-centric view in the official thinking behind the notion of differential citizenship rights. Whilst the criteria for disenfranchisement were categorically spelt out for Singapore citizens, there was no mention of how their contribution to the new nation would be taken into consideration. The deliberate measure on the part of the UMNO leadership to exclude citizens of the Singapore territory from voting and standing as candidates outside Singapore contributed to the fractured sense of political ownership to 'Greater Malaysia' whereby the civic contribution of one particular group of citizens was not given due recognition by the Federal Government in Kuala Lumpur.

This fractured sense of political ownership was compounded by the conflicting visions of the local nationalist leaders and their lack of empathy towards the individual histories of the other merger territories, which ultimately underscored the fragility of the Malaysian Federation in its early years (Stockwell 2005: 210-11). How the issues of national identity were being addressed by the political elites, combined with the kinds of ideas that informed their perspectives about what constitute citizenship rights underscored the 'fragile guarantees' that destabilized the Malaysian Federation in its early years. One of the major signs of such instabilities was the expulsion of Singapore from the Federation in 1965, largely due to the

¹⁸⁸ *Public Records Document*, DO 169/273, no 16A 'Agreement on the setting up of the Federation of Malaysia': agreement in principle signed at Admiralty House by Mr Macmillan and Tunku Abdul Rahman. *Annex and Appendices*: A 'Framework of initial state constitutions of Sarawak and North Borneo'; B 'Citizenship'; C 'Singapore Citizenship'; D 'Joint public statement' 31 July 1962

problem of finding a common ground to agree upon the rights of citizenship for the Malaysian subjects in a multi-ethnic society (Grossholz 1966; Milne 1966; Milne 1970; Siddique and Suryadinata 1982; Crouch 1996). The idea of a common citizenship in the form of 'Malaysian Malaysia' proposed by Lee Kuan Yew was enthusiastically supported by non-Malays in the Peninsula as well as the political parties in Sabah and Sarawak through the formation of the Malaysian Solidarity Convention in 1965. This was fiercely resisted by UMNO because 'Malaysian Malaysia' posed a serious political threat to the prevailing status quo of UMNO as the dominant power bloc in the Federal government. More importantly, the call for a common citizenship rights to the Malaysian identity brought about the fear among the Malay elites of the prospects of Singaporean Chinese dominating in the political mainstream (Tan 2008).

It became increasingly apparent that what the leaders of UMNO envisaged for the Malaysian nation was never defined in terms of the duties and obligations of citizenship, instead it was grounded in the political will to power for *Bangsa Melayu*. The Merger was therefore negotiated upon a one-sided view of political dominance that was conceived in terms of a particular ethnic ownership of the nation. Whilst the fragility of the Merger had been caused by other material and ideological reasons, the issue of political ownership grounded in the differential citizenship rights had triggered the ideological split between Tunku Abdul Rahman and Lee Kuan Yew. The fundamental disagreements over the principles of citizenship began to fuel the political gulf between the Federal government led by Tunku in K.L and the PAP government led by Lee Kuan Yew in Singapore, which contributed to the unilateral decision by Tunku to expel Singapore two years after the Malaysian Federation, was established.

6.6 The Constitution and Malaysia (Singapore Amendment) Separation Bill, 1965: The erosion of parliamentary democracy

The Constitution and Malaysia (Singapore Amendment) Bill, 1965 was Parliamentary motion that severed Singapore from the Malaysian Federation and in about three hours of deliberation, it was the fastest constitutional resolution ever achieved in the politics of peaceful secession (Young 1994). The aim of this analysis is to highlight the critical debates that dominated the ideological foundation of the political ownership of Malaysian Federation. At the heart of the debates lay the ideological contrast between the historically-constructed privileges of the *Bangsa Melayu* and the call for equal citizenship rooted in the Malaysian Malaysia campaign galvanized by the Malaysian Solidarity Convention. Prior to the creation of Malaysia, the politics of ethnic consociationalism had been practiced by the Alliance as the means to sustaining the ideal of political right for *Bangsa Melayu* under the mitigating concept of ethnic bargaining (Lijphart 1977; Mauzy 1993; Case 1996; Lijphart 1998). However two years after the inauguration of the Malaysian Federation, the ideological thrust of Malaysian Malaysia – one that centred on the political demand for equality – was deemed hostile by the Alliance leadership.

Lee Kuan Yew dissolved the state assembly a few days after the inauguration of Malaysian Federation on 16 September 1963 to make way for a fresh election. However political tensions between Kuala Lumpur and Singapore began to intensify as each began getting involved in the politics of the other. The Alliance coalition fielded UMNO candidates to contest in Singapore's state elections, but were trounced by the political might of the PAP (Trocki 2006:125-126). A year later the PAP ran its candidate, Devan Nair who won the Parliamentary seat of Bangsar in the April 1964 Malaysian general election. Tunku accused the PAP's of meddling in the political affairs of Malaysia and hinted that the PAP had broken

its agreement (Milne 1966:180). The said agreement referred to the 'secret London Agreement' 1962¹⁸⁹ signed between the Harold Macmillan (for the British Government) and Tunku Abdul Rahman (For the Malayan Government) because the agreement covertly transferred sovereignty of North Borneo, Sarawak and Singapore to Kuala Lumpur before the Merger. Whilst the London Agreement was never made public, it signified the concealed assurance of the British Government to guarantee absolute political hegemony for the Malayan Government to dominate national administration and prevail over political dissents.

Few months after the election, the State government in Singapore began to pursue the policy of non-discrimination that fell short of extending Article 153 to the Malays in Singapore. On 19 July 1964, Lee Kuan Yew and the Minister of Social Affairs, Othman Wok met with the leaders of Malay community to explain the policies of equal opportunities for all Malaysians. However the Singapore UMNO Action Committee reacted negatively to this policy and accused Lee of undermining Sino-Malay relations (Leifer 1965; Clutterbuck 1984). This was then followed by protests from the Malays fuelling into further ethnic and religious tensions (Leifer 1964; Abraham, Liu et al. 2002). Against the backdrop of these tensions, progress on establishing a common market became challenging even though Singapore had committed to fund substantial development loan to Sabah and Sarawak¹⁹⁰. In December 1964, the Federal

¹⁸⁹ *Public Records Document*, DO 169/273, no 16A. There were two reasons for its secrecy, the first one relates to the 'transfer of sovereignty over Singapore, North Borneo and Sarawak by 31 August 1963 and the second one was the contingency plan for in case the present Government of Singapore led by Lee Kuan Yew fell into the Communist party. This was the 'secret London Agreement' was signed a day before the Cobbold Commission Report was published 1 August 1962.

¹⁹⁰ PRO CO1030/1515, no 80 'Draft agreement between the governments of the Federation of Malaya and Singapore on common market and financial arrangements'.

Common Market : These include the economic integration involving all the territories in the Federation and the minimal regulation of trade restriction as well as tariffs being imposed on goods and products being circulation in Malaysia

Finance for Borneo territories: To assist development in the Borneo territories the Singapore Government shall make available to the Federal Government.

Government had also begun to demand a higher percentage of Singapore's revenue in order to meet defence expenditures incurred fighting Confrontation¹⁹¹.

The strategy of non-discrimination continued to shape PAP's political outlook in the Malaysian Federation to the extent that Lee Kuan Yew took the initiative to add to the speech of His Majesty the Yang di-Pertuan Agong (Report 1965c:10-32) by way of an amendment the following statement.

‘But regrets the Address by His Majesty Yang di-Pertuan Agong did not reassure the nation that Malaysia continue to progress in accord with its democratic Constitution towards a Malaysian Malaysia, but that on the contrary the Address has added to the doubts over the intentions of the present Alliance Government and over the measures it will adopt when faced with the loss of majority popular support’ (Report 1965b:568)

Lee Kuan Yew's motion to include the concept of Malaysian Malaysia to the King's speech in the House of Representative was an attempt to force the agenda of non-discrimination into in the debates. His motion for Malaysian Malaysia to be included in the Malaysian political discourse was a strategy to counter ideological dominance of loyalty to the political party and shift the political nature of loyalty back to the concept of government as the representation of the will of the people¹⁹². The PAP found four opposition parties from Malaya and Sarawak to form the Malaysian Solidarity Convention to support the Malaysian Malaysia concept. This

¹⁹¹ 8 December 1964, *The Straits Time*, ‘Bank to give \$250,000 to Defend fund’. The Overseas Chinese Banking corporation Ltd will hold an extraordinary general meeting on 19 December to consider a resolution that it contribute out of its profits to the National Defence Fund, in response to the Government appeal for national unity and solidarity in the defence of the country.

¹⁹² ‘Loyalty to Malaysia is not equal and not the same to loyalty to the Alliance Party or the Alliance Government. I am under no Constitutional obligation to be loyal to the Alliance Party or the Government, but I must be loyal to the Constitution of Malaysia and I must obey the dicta of a democratically elected government of Malaysia’ *Parliamentary Debates* 27 May 1965, p.568

concept was sharply distinguished from *Bangsa Melayu* by Lee Kuan Yew, in his speech during the Malaysian Solidarity Convention in 1965.

‘We are co-owners. This is important. We are fighting for Malaysia: agreed. Who own Malaysia? This is very important because having fought for Malaysia, 10 years of Confrontation, suddenly we find only some are owners. The others are what Dato Syed Albar has called *Orang Tumpang*, or squatters...I like Tunku’s way. He says, “Soft talk. Come let us talk, let us say anything” Very honestly, I used to talk with him for hours, yes. He said he is prepared to listen for more hours. I was very cheered when I read that, because I will have to talk to him for more hours. But a long talk is in order to achieve certain fundamentally agreed objectives. What are we fighting for? You say donate Defence Fund, mobilize the people, Vigilante Corps, National service. I say alright, agreed. But what is this for? For Malaysia? Agreed, very good. Who gets the benefits out of Malaysia? Who gets the benefits out of Malaysia? In other words, to whom does Malaysia belong? To some or to all Malaysians? If to all Malaysians, regardless of race, language, culture, religion, I say well, three cheers, full agreement, proceed. Satisfied, win or lose we will fight on. But if there is any doubt about that, I say let us clarify this first’ (1965: 11, 21)¹⁹³.

As most of PAP members were of Chinese ethnic background, UMNO leaders began to politicize this as a Chinese plot to take over control of Malaysia. The situation got worse in the following months, with abusive speeches in the House of Representatives including demands for the arrest of Lee Kuan Yew and other PAP leaders by UMNO extremists.

¹⁹³ Text of Mr Lee Kuan Yew’s speech at the Malaysian Solidarity Convention at the National Theatre, Singapore, 6 June 1965

Fearing further outbreaks of communal violence, Tengku Abdul Rahman decided to separate Singapore from Malaysia. The reason given was the alleged divisive 'communal issue' that was brought up by the leaders of Singapore. Tunku's immediate response to Lee Kuan Yew's call for Malaysian Malaysia was, '(1) to take repressive measures against the Singapore Government or their leaders for the behaviour of their leaders; and (2) in the course of action, which we are taking now, to sever connection with the State Government of Singapore that has ceased to give even a measure of loyalty to the Central Government' (Report 1965a:1460).

The sudden introduction for this Bill was described as a 'certificate of emergency'¹⁹⁴ in the Parliament. Lim Chong Eu (MP for Tanjong) went as far as to claim that 9 August 'is not only the day of liberation for Singapore but it will be remembered as the day of the death of Constitutional procedure in Malaysia' (Report 1965a:1502). The Malaysian Malaysia ideal of common citizenship was seen as a serious political challenge not only to the Alliance practice of ethnic bargaining, but also threatened the safeguards for Malay political power. The threat to Malay political power essentially motivated UMNO leaders to justify the imposition of repressive measures against the Singapore leaders on the grounds of 'national security' and to diffuse the political threat via the procedure of Constitutional amendment.

The tabling of the 1965 Bill to separate Singapore from the Malaysian Federation at the Parliament marked an important watershed where a serious Constitutional precedent was committed amounting to the political abuse of the Constitution by the executive power. Since 1965 the procedure to amend the Constitution as a political strategy has been used by the ruling party UMNO time and again whenever there's considerable challenge to Malay political power. In its political quest to preserve Malay political power, UMNO's strategy to

¹⁹⁴ MP for Ipoh, D.R. Seenivasagam (1965a:1499)

amend the Constitution in every major crisis destabilizes the impartiality of the state, further eroding the fundamental liberties of citizens by widening the differential gap between the majority Malay citizens professing the Islamic religion and the rest of the population.

6.7 Constitutional restrictions on free speech after 1969 ethnic riot: the cultivation of self-censorship in the public political culture.

The Constitutional act of severing Singapore from the Malaysian Federation in 1965 provided the impetus for the Federal government to contain political dissents and consolidate power through the use of the law. Immediately after the Singapore debacle, local leaders from the Borneo territories expressed anxieties and dissatisfactions against the Federal government for failure to consult them over the separation crisis. In order to stem further demands from the Borneo leaders for the review of the terms of Malaysia Agreement, the Federal government engineered the downfall of the non-Muslim leaders in Sabah and Sarawak in 1967 by setting up proxy alliances with Muslim leaders in both territories¹⁹⁵ (Means 1968). It was important for the Federal government to contain political dissents in Sabah and Sarawak at the time in lieu of the General Election in 1969. The Alliance party did not envisage heavy losses in the General Election, losing its popular support from 58.4% in 1964 to 48.4% and winning only 66 seats out of 103 total parliamentary seats contested. The Opposition parties had collectively increased their support from 41.6% in 1964 to 51.6% and winning a total of 37

¹⁹⁵ In Sabah and Sarawak, the first Chief Ministers for both territories were Christians and came from the native backgrounds. Right after the Singapore ejection, the Federal government intervened in local politics and replaced them with Muslim leaders and those who were allied with the Federal government. Tun Mustapha who was the leader of USNO (United Sabah National Organization), the leading Muslim party in Sabah replaced Fuad Stephen as Chief Minister. Fuad Stephen was the leader of UPKO (United Pasok Momogun Kadazan Organization), the ethnic Kadazan Christian political party. Whilst in Sarawak, the Federal government declared the state of Emergency because of the constitutional crisis and the incumbent Chief Minister, Stephen Kalong Ningkan, who was a Christian with Chinese-Iban parentage was replaced by Tawi Sli who held the post briefly before Abdul Rahman Ya'kub, a Muslim leader for PBB (Pesaka Bumiputera Bersatu). For more info please refer to Means (1968) *Eastern Malaysia: The Politics of Federalism*, *Asian Survey* 8(4): 289-308.

parliamentary seats, thus denying the Alliance coalition from a 2/3 majority in the Parliament. Perhaps the most significant impact of the Singapore ejection upon the 1969 General Election was the emergence of the DAP as the leading opposition party. After its antecedent, PAP (People's Action Party) won a single seat in 1964, the DAP increased its Parliamentary seats to a total of thirteen in 1969 (Ratnam and Milne 1970; Rudner 1970).

The reduced majority of the Alliance created the condition for the politicization of ethnic sentiments that pitched the Malays against the Chinese communities in the Peninsular Malaysia. The Malaysian Malaysia debate and the Singapore ejection from the Federation could have contributed to the loss of support for the Alliance coalition. Within the Malay community, the main contention between UMNO and PAS (Pan-Malaysian Islamic Part) rested on the ideology of selling the rights of the Malays to the Chinese; similarly the Chinese were politically divided on the concept of 'Malaysian Malaysia' where the DAP (Democratic Action Party) insinuated the MCA (Malaysian Chinese Association) of colluding with UMNO to undermine the prospect of building equal society in Malaysia (Milne 1970; Comber 1983; Case 1993; Lee 2000; Horowitz 2001; Kua 2007). Three days after the conclusion of the General Election on the 13 May 1969, violent ethnic clashes mainly between the Malays and the Chinese took place in the capital. Official records stated that 196 people were killed and this followed the declaration of national emergency by the Malaysian government giving way to the National Operations Council to be the caretaker government between 1969 until Parliament was resumed in February 1971.

When the House of Representatives reconvened in February 1971 the motion to amend the Constitution was tabled by the new Prime Minister, Tun Abdul Razak in a bid to stop the resurgence of political demand for common citizenship right. The proposed amendments had two important aims: the first one was to deter the public discussion of sensitive issues in

order to maintain the smooth running parliamentary democracy, and the second one was to restore inequalities between the ethnic groups (Report 1971:550). The motion to restrict the public discussion of sensitive issues fell under the Constitutional remit of Article (10) ‘Freedom of speech, assembly and association’¹⁹⁶, and Article (63) ‘Privileges of Parliament’ as well as Article (72) ‘Privileges of Legislative Assembly’. The need to restrict the freedom of speech and the public articulation of opinions was argued on the grounds of the national security of the Federation. Tun Razak stated that, by such amendments, this strategy would give power to the Parliament to approve laws that prohibit the acts of questioning anything related to the citizenship provisions in Part III of the Constitution, the rights, status, special position in Article 153, the privileges of the national language in Article 152, as well as the institution of the Malay Sultans in Article 181(Report 1971:56). Anyone who is found guilty of such public expression will be subject to Sedition Act 1948 and can be arrested without a warrant¹⁹⁷

‘Let those who are citizens of Malaysia under this provisions be ensured clearly that their rights shall not be challenged. The basic provisions relating to the acquisition of citizenship represented a fair and balanced compromise. The same careful and balanced approach runs through other provisions in the Constitution protecting the legitimate interests of all races in Malaysia. MPs and State Legislators should be publicly accountable for their roles in public discussion.

¹⁹⁶ Clause (4) was added by Act A30, section 2, 10-3-1971, it reads,

‘In imposing restrictions in the interest of security of the Federation or any part thereof or public order under Clause (2) (a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153, 181 otherwise than in relation to the implementation thereof as may be specified in such law.’

¹⁹⁷ *Laws of Malaysia Act 15, Sedition Act 1948*
<http://www.agc.gov.my/Akta/Vol.%201/Act%2015.pdf>

Since these debates are recorded and would be disseminated into the public, Parliament must be given the authority to approve laws to restrict the freedom of speech among MPs and State Legislators in the House so that they would not bring issues of sensitive nature into public political discussions. The freedom of speech for elected public representatives is not equivalent to the right to insult and instigate communal hatred’ – Tun Razak (Report 1971:57-60)

Two important issues linked to this Constitutional amendment are the reservation of educational opportunities and the restructuring of the Malaysian economy. This is because these two subjects have considerable impacts upon the citizen’s right to equal opportunities and the prospects of social mobility. The reservation quota for higher education opportunities was addressed by the amendment to the Constitution was the inclusion of a new clause 8(A)¹⁹⁸ under Article 153, ‘which places the responsibility on the Yang di-Pertuan Agong (King) to safeguard not only the special position of the Malays but the legitimate interests of the other communities’. The inclusion of the new clause afforded greater Constitutional scope for the sovereign role of the King to offer categorical protection to the specific provisions reserved for the Malays and natives of any of the States of Sabah and Sarawak. The term ‘Malay’ Article 160¹⁹⁹ is specifically read with the provision of Article 153 within

¹⁹⁸ 8 (A) of Article 153 states, ‘Notwithstanding anything in this Constitution, where in any University, College and other educational institution providing education after Malaysian Certificate of Education or its equivalent, the number of places offered by the authority responsible for the management of the University, College or such educational institution to candidates for any course for study is less than the number of candidates qualified for such places, it shall be lawful for the Yang di-Pertuan Agong by virtue of this Article to give such directions to the authority as may be required to ensure the reservation of such proportion of such places for Malays and natives of any of the States of Sabah and Sarawak as the Yang di-Pertuan Agong may deem reasonable; and the authority shall duly comply with the directions.

¹⁹⁹ *Federal Constitutions 2002*

Article 160 (1) The Interpretation and General Clauses Ordinance 1948 [*M.U.7 of 1948*] , as in force immediately before Merdeka Day shall, to the extent specified in the Eleventh Schedule, apply for the

the ambit of the New Economic Policy. The term ‘native’ for Sabah and Sarawak under Article 161A defines their status as belonging to indigenous race, but not carefully defined as the definition for ‘Malay’²⁰⁰. Whilst the extension of special position to the natives in Sabah and Sarawak was meant to protect the indigenous communities in the territories²⁰¹, it is debatable whether their protection was on par with the Special Position enjoyed by the Malays particularly when the Federal government abrogated the power of the Chief Ministers in both territories on policy of civil service appointments.

The 1969 ethnic riot shifted the pre-Malaysia concern about Sino-Malay power balance to the focus of Malay special rights and the executive decision over how these rights were to be safeguarded. The Prime Minister emphasized that these changes to the Constitutions were necessary not only on the grounds of moral obligation but also underlined the legal commitment of the Government to rectify the ethnic group inequalities in the fields of education and economy. This shift in focus emerged as a result of the perception that ‘Malays

interpretation of the Constitution as it applies for the interpretation of any written law within the meaning of that Ordinance, but with the substitution of references to the Yang di-Pertuan Agong for references to the High Commissioner.

²⁰⁰ *Federal Constitutions 2002*

Clause 6(A) of Article 161A ‘Special Position of natives of Sabah and Sarawak:

- (a) In relation to Sarawak, 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; and
- (b) In relation to Sabah, 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.

Clause (7) 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.

²⁰¹ *Public Records Document*, CAB 134/1951, GM (62) 15 ‘The Cobbold Commission Report. Interim Report by the Committee on Greater Malaysia. 2 July 1962

felt insecure about the existing gap between them and the non-Malays in the fields of education and economy' (Report 1971:64). Hence the conceptual grouping of the Malays and natives of Sabah and Sarawak into the new umbrella term of *Bumiputera* became the new target group thought to be more deserving in the restructuring agenda of New Economic Policy.

'The privileges that the Yang di-Pertuan Agong can give under Article 153 to the natives of Sabah and Sarawak will only be in respect of Federal matters, i.e., matters under the jurisdiction of the Federal Government. These amendments will not in any way affect the power of the State to provide privileges to the natives in the two States in matters which are under their jurisdiction. By these amendments, it can now be clearly seen that the natives of Sabah and Sarawak are placed exactly in the same position as the Malaysians in the States of West Malaysia' (Report 1971:64). This entailed the cancellations of Clauses (1), (2) and (3) under Article 161A- on the 'Special position of natives of the Borneo states' - where it involved the power of the Chief Ministers in Sabah and Sarawak to decide on the matters relating to the reservation of public services in the two states, so as to streamline the decision making under the Federal jurisdictions (Report 1971:63)

These amendments to the Constitution proposed by the Prime Minister, Tun Razak had two important political implications. 1) The use of legal sanctions against the freedom of speech among citizens and elected representatives. This was politically motivated to censor the public discussion on certain issues classified as sensitive issues. The decreeing of the

‘penalties for opinion’ to paraphrase J.S Mill²⁰² marked the discursive start for the criminalization of public opinion as a political strategy to undermine the dynamics of contestation. 2) The Constitutional amendment to override the power of the Chief Ministers in Sabah and Sarawak on the issue of public service appointments was justified on the grounds of streamlining the special position of the *Bumiputera* (Sons of the soil) in Sabah and Sarawak that would commensurate with the special privileges enjoyed by the Malays in the West Malaysia. This had the effect of transferring political control over the appointment of key public service positions into the hands of UMNO in the Federal government.

“Bumiputera” (Sons of the soil) became a de facto category that was formulated exclusively as a policy measure to fulfil the educational and economic demands of the Malays in West Malaysia as well as the other indigenous groups in East Malaysia. Whilst the NEP has been instrumental in addressing the issue of Malay poverty (Ariffin Omar 2004; Faruqi Shad Saleem 2004) and many studies have shown that it contributed significantly to the expansion of the Malay middle-class in West Malaysia (Gomez 2004; Maznah Mohamad 2004), the same could not be said of the “Bumiputera” in Sabah and Sarawak. This is due to the unequal political weight designated to the concept ‘right’ largely in favour of the Malays in West Malaysia.

UMNO makes exclusive claim upon the political meaning of Malay identity and privileges (Singh 1998). The NEP was designed to alleviate conditions of poverty among the Malays and other indigenous people in Sabah and Sarawak categorized as “Bumiputera”. However UMNO’s exclusive claim to uphold Malay special rights exposes the ambiguous and layered meaning of “Bumiputera”, especially when we consider its purpose and its ideological

²⁰² Mill, John Stuart (1996), *On Liberty & The Subjection of Women*, Wordsworth Editions Limited, Hertfordshire.

underpinning vis-à-vis Sabah and Sarawak “Bumiputera”. Whilst Malay as an ethnic category has a Constitutional definition and tangible provisions, the designation of “Bumiputera” and how it is understood in Sabah and Sarawak is definitely not as empowering. “Bumiputera” has no legitimate status in the Malaysian Constitution and remains an abstract concept that is only instrumental for political arguments.

6.8 Conclusion

This chapter traces the problematic development of nation-state and its repercussions upon the conception of Malaysian citizenship: ethnic claims against the political language of Malaysian Malaysia. The Grand Design for the Malaysian Federation was a politically motivated decolonization project on the part of the British to retain a certain strategic influence in the region. The political deliberations involved in achieving consensus over wide-ranging issues were challenging, not least on the accounts of the key agents, notably Tunku Abdul Rahman and Lee Kuan Yew, having conflicting ideas over the issues of political power and criteria for citizenship. Despite these conflicts the Malaysian Federation was inaugurated in 1963. The new Federation was structured or institutionalized as a state system that was somewhat divorced from the political histories of the people, particularly from the Borneo territories of North Borneo (Sabah) and Sarawak. These territories were geographically separated not only by the South China Sea but also from the centre of all important political decisions in Kuala Lumpur and Singapore.

The first major political crisis emerged as political disputes between the Alliance party in Kuala Lumpur and the PAP in Singapore over the content of Malaysian citizenship. Lee Kuan Yew’s attempt to galvanize political support for the Malaysian Malaysia agenda resulted in Singapore’s ejection from the Federation through the 1965 Separation Bill tabled by the Prime Minister, Tunku Abdul Rahman. The effect of this Bill had created the

Constitutional precedent for the ruling party UMNO to employ similar political strategy to contain the dynamics of contention from the opposition. The constitutional amendments as a political strategy to contain dissent was employed again following in 1971 after the ethnic riot, and this time it was used to criminalize citizens and elected representatives for publicly challenging UMNO's legitimacy in the government. The 1965 and 1971 Constitutional amendments were critical junctures that paved the way for the ruling party to resort to legislative procedures to eliminate political dissension and stay in power.

7 RE-POSITIONING THE POLITICAL ROLE OF ISLAM AND THE DE- SECULARIZATION OF THE MALAYSIA STATE

Abstract: *The process of de-secularization of the Malaysian state occurred both within the institutional changes in the law and in the conduct of political agents. These have had significant impacts upon the citizenship rights of minority citizens in the country. The progressive de-secularization of the Malaysian state emerged as a result of the ideological shift in the ways laws have been publicly interpreted to legitimize the power of the state on the pretext of fulfilling the obligation of Islamic grounded moral precept. The process leads to the erosion of fundamental liberties of the citizens who in turn contested the legitimacy of the state by reasserting the humanistic principles enshrined in the supposedly secular Malaysian Constitution. Such contestation demands a conception of justice that is not narrowly interpreted to serve the dominance of Islamic comprehensive doctrine, signifying the reinvigoration of the political agency to reclaim common citizenship right.*

7.1 Introduction

‘Malaysia ini Negara Islam. You tidak suka, you keluar dari Malaysia’²⁰³

[Malaysia is an Islamic country. You don’t like it, you get out of Malaysia]

(UMNO MP for Jerai, Kedah: Dato Paduka Haji Badruddin bin Amiruldin, Parliamentary Debates, 11 July 2005, pp. 34-35)

The promotion of the idea of Malaysia as an Islamic country in the public discourse has generated the implications of ‘who owns Malaysia’ and ‘on what terms the criteria for citizenship are negotiated’. Loyalty to the government becomes imperative to retaining

²⁰³ <http://www.youtube.com/watch?v=xXp4SB3LrEg>

citizenship and Islam has somehow assumed the signifier of privilege to preferential citizenship in Malaysia. The de-secularization of the Malaysian state appeared to gain momentum ever since the ‘Allah’ controversy first emerged under the Abdullah Ahmad Badawi administration²⁰⁴, coinciding with the political quest for an Islamic state post 9/11. This accelerated pace of de-secularization of the state has generated a fractured sense of identity with dire implications upon the ideal of common citizenship rights.

This chapter presents three cases highlighting the relationship between the de-secularization of the state and the fractured sense of citizenship in the contemporary experience. These cases show the ideological, empirical and legal implications of the de-secularization of the state upon citizenship rights. Historically the unique confluence of the sovereign Malay Kingship and Western colonialism created the syncretic legal framework of Civil-Syariah in the Malaysian Federation and the dynamics of the religious and secular have had reciprocal bearing upon the politicization of citizenship rights that was split into indigenous and migrant dialogues throughout the history of colonialism. The tension between these two strands of ideological perspective of citizenship rights intensified during the Communist Insurgency and continued to influence the making of the Malayan constitution in 1957. In its political transition into the 1963 Malaysian Federation, the contention over citizenship right found political articulation and mobilization that divided the issue into Malay special position supported by the Alliance led by Tunku and Lee Kuan Yew’s Malaysian Malaysia backed by the Malaysia Solidarity Consultative Committee; this subsequently led to the ejection of Singapore in 1965.

²⁰⁴ Abdullah Ahmad Badawi, who was the successor of Mahathir Mohammad, became the 5th prime minister of Malaysia in 2003. He is also popularly known as *Pak Lah* in the media mainstream.

The ejection of Singapore in 1965 marked the critical juncture where the use of Constitutional Amendments was employed to eliminate political dissent. This practice was again employed after the 1969 ethnic riot in which the Malaysian Government justified using ‘national security’ as the main reason to amend the Constitution again 1971 (discussed in Chapter 6) to contain the political conduct and the public expression of the citizens. Since then the main ideological thread to this mode of eliminating dissent was the increasing emphasis upon the language of political right, grounded in the symbolic complexes of *Bangsa* Malay, Islam and Raja.

These political events show that the values accorded to the symbolic complexes of *Bangsa* Malay, Islam and Raja has become indisputable, and therefore acquire the status of morally defensible in the public political culture. It has now reached the point where the Malaysian government has taken the legal approach to defend these values not only because they are at risk of being submerged by the forces of modernity but more importantly, it is defending the sense of ‘ownership’ conceived in terms of the heritage of the Raja, and the ecumenical representation of *Bangsa* Malay founded on the civilization of Islam. In the process of defending these values, the state policies and practices were then grounded in the language of ‘rights’ as the overriding reason to sustain public order, or in other words, to avoid further communal conflicts in the name of national security. In such condition, the understanding of the nature of the secular state and the process of its de-secularization in the Malaysian experience has to be contextualized in terms of the reciprocity between political events and the interpretation of Malaysian Constitution.

Unlike Islam, no special provision for secular state was established in the Malaysian Constitution, and whilst the political commitment to a kind of secular state was formally articulated by the Alliance leadership, the values that were central to the normative

understanding of secular state were not expounded as it should. Although the awareness for secular state was given due political recognition, the absence of legal obligation for the Malaysian government to apply the values of neutrality and equal treatments in the condition of pluralism in the Malaysian society is all too apparent. In the ‘Equality’ provision in Article 8 of the Constitution where it states,

in Clause (1) ‘*All persons are equal before the law and entitled to the equal protection of the law*’, its interpretation would be subjected to Clause (2) that states, ‘*Except 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...*’²⁰⁵

Within the ‘Equality’ provision alone the scope and meaning of equality is fairly restricted because of the caveat on Clause (2) relates to the special position provisions that the Constitution has explicitly authorized for qualified safeguard.

Since the ‘Equality’ provision does not carry as much legal weight as the provisions for *Bangsa Malay, Islam and Raja*, discriminatory offences that are grounded in overt racism and sexism for instance, are less likely to get criminalized by the Malaysian State. The Education Minister, Muhyiddin Yassin who is also the Deputy Prime Minister, recently admitted publicly that he has no power to take action against two secondary school principals over racism in secondary schools, where teachers told Chinese students to go back to China for disrespectful behaviours²⁰⁶. The Education Minister gave the reason that the disciplinary matters involving

²⁰⁵ *Federal Constitution, Laws of Malaysia (2000)*

²⁰⁶ *Police Report Ref: Kulai/007963/10* was made by a secondary school student against Siti Inshah Mansor, the Principal of S.M.K Tunku Abdul Rahman Putra, Johor Bahru on 14/08/2010. The principal made the racist comments against students who had disciplinary problems during the school assembly marking the Malaya Independence celebration on the 12/08/2010. In the report, she was

high ranking civil servants comes under the jurisdiction of the Public Service Department²⁰⁷ and not considered to be a criminal offence.

After many decades of state driven nation- building agenda through education, higher learning institutional expansion and economic restructuring, the ideal of integrated Malaysian citizenship has not prevailed. Instead the country remains a nation of ‘ethnic citizens’ whereupon the basic criteria of loyalty and absolute gratitude to the government are central to the conception of nationhood (Brown 2007). Loyalty and gratitude as virtues of citizens are promoted in favour of other virtues like justice and equality, as they may be destabilizing to the special position of the Malay status quo - that found its way into the national school curriculum in the Form Five History workbook. The following question is found in Chapter 4, which relates to the topic on ‘*The Federation of Malaya: 1948 Federation of Malaya Agreement*’:

“If you are a leader, name two steps you can do to defend the Malays’ status quo?”²⁰⁸

The answer to the question, which is found on Page J10 of the book states: “To tighten citizenship” and “Pressure the British to protect Malay interests”.

quoted, ‘Chinese students are not needed here and they can return to China or attend Foon Yew Chinese Independent School. The Chinese and the Indians are squatters in the country and therefore they should not have equal claims upon the country similar to the Malays. Non-Malay students are squatters in this 1Malaysia concept, and that is why the special right of the Malays must be defended under Article 153’.

The other case of school principal making racist remark was Ungku Aznan, the head teacher of SMK Bukit Selambau in Sungai Petani, Kedah. The principal apparently told off some Chinese students for not respecting their Muslim friends and that they should return to their country of origin if they did not show such respect. *The Star* 21 August 2010, ‘Another racist school head in Kedah’.

²⁰⁷ www.themalaysianinsider.com (26.03.2012) ‘I cannot act against racists principals’.

²⁰⁸ *Effective Practice Sejarah Tingkatan 5 (ISBN: 9789834704452)* p.31

7.2 De-secularization of the state

The Malaysian government was never designed to be an Islamic theocratic state. However, the ways in which the legal-political apparatus was established, along with the creation of special provisions in the Constitution to defend the position of the Malay, Islam and sovereign Kingship, contributes the inclination towards Islamic governance on the back of modern constitutionalism. This paper adopts the Christian terminology ‘ecumenism’ to describe how the ruling party UMNO (United Malay National Organization) tries to homogenize Malay citizens through the universalization of Islamic values in the public sphere. The course of de-secularization cannot be understood in terms of the design of the institutional framework of the state alone as it requires careful analysis of the ideological thinking behind the strategy of the state elites, in this case UMNO (United Malays National Organization), to sustain power and political legitimacy through the use of law.

‘De-secularization’ as a conceptual framework was introduced by Peter Berger as a theoretical construct to reassess the theory of secularization against the contemporary resurgence of political theology in global politics²⁰⁹ (Berger 1999; Karpov 2010). In this dissertation, ‘de-secularization’ addresses the conceptual erosion of secular responsibility and its relationship to the institutional violence against religious liberty through the application of the laws. The normative components of secular responsibility include neutrality, tolerance and equality, essential to the operational requirements of secular governance to ensure that all citizens, regardless of religious backgrounds are equal in the eyes of the law.

²⁰⁹ This framework captures the sociological shifts on the ways in which the religious communities and its agents challenge the institutional norms underlining the public and private division of faith and political conduct

This chapter highlights three significant cases that challenged the deliberate practices of the Malaysian state in promoting the universalization of Islam for the preferential treatment of the majority ethnic group. The first case relates to the government ban on the use of the word ‘Allah’ among the Christian congregation, in the printed materials and the Bible that are meant for the Christian readership. The Christian community is the third largest faith community in Malaysia, comprising about 9.1% of the population after Islam (60.2%) and Buddhism (19.2). Although the Christians have been using the word ‘Allah’ for many years, the ideological claim upon the exclusive right to use the word ‘Allah’ for the Muslim community has become a recent political contestation raised by some radical Muslim groups and government leaning Muslim scholars. The second case is the urban mobilization of the Indians by HINDRAF in 2007 as a crucial moment of counter-Islamization movement that challenged the de-secularization of the state.

The third case is the challenge of sexuality in the Islamized public discourse, where four Malay *Mak Nyahs* (transgender people) have submitted legal challenge against the Syariah law for criminalizing cross-dressing²¹⁰. Violent abuses against the transgender community have risen especially at the hands of the authority and the religious police²¹¹. Under the Syariah criminal law, the Muslim transgender can be persecuted for being a man who dresses like a woman (*lelaki berlagak seperti perempuan*). In almost every state, this offence carries a jail term of six months (or one year in some states) or RM 1000 fine (up to a maximum of RM 5,000 in one state). The constitution, organization and procedure of Syariah courts have jurisdiction only over persons professing the religion of Islam, and the administration of

²¹⁰ Application for Judicial Review no: 13-1-2011 in the High Court in Malaya, at Seremban, Negeri Sembilan Darul Khusus, Malaysia.

²¹¹ www.thestar.com.my *Sister Solidarity*, 20 February 2011

Syariah justice comes under List II - *State List* in the Ninth Schedule of the Federal Constitution²¹².

The process of de-secularization of the state in Malaysia reflects the politicization of Islam and ethnicity in Malaysia. The rapid momentum of the process has been linked to the ideological implication of the laws being amended, resulting in the unequal protection of rights against religious discrimination. The status of Islam as the official religion in the Federation with the juridical autonomy of the Syariah courts in the Malaysian sub-national states often result in conflicting interpretation of laws when it comes to the subject of rights for Muslims and interfaith relations. Over the years Islam's role has expanded in the official formulation of policies in legal systems, religious instruction in schools, funding and permits for the building of the places of worship, and other matters confined to its Constitutional remit.

As the most influential set of comprehensive doctrine in Malaysia, Islam surpasses other competing forms of knowledge as the socially accepted guiding principles for just governance, the regulation of inter-faith relations, and where the adjudication of legal matters are concerned, justice is mainly understood within the context of *Fiqh* or Islamic jurisprudence. Because of its position as the official religion, Islam has been institutionally recognized as the standard bearer of moral truth in the public discourse, and for this reason it precludes the consideration of other non-Islamic values as morally valid. It is on this basis that any form of critical analysis or the questioning of public policies formulated within the theoretical frame of Islam will be interpreted by the Malaysian government as violating the

²¹² Federal Constitution, *Laws of Malaysia* (2002)

religious sensitivities of the Muslim community and this would constitute an offence under in Section 3 (1) of the *Sedition Act 1948*²¹³.

The lack of impartiality in the nature of government intervention in Malaysia has been further intensified by the way the ruling party UMNO (United Malay National Organization) tries to dominate the social forces of Islam that emanate from within the Malay community. Through the government machinery, UMNO has engineered a sense of bounded entity grounded in Malay-Muslim ecumenism by emphasizing the moral virtues of loyalty and gratitude to the government as the essential character of patriotic citizenship, an imagined patriotism for slogan pleasing purposes during Independence Day celebration²¹⁴. The emphasis on loyalty and gratitude displaces the other competing virtues like justice, equality and human rights that are increasingly finding a foothold among citizens in their challenge against the homogenizing policies of state Islamization. In its attempt to universalize Islamic values in the public sphere and monopolize the official interpretation of Islam, the Malaysian government compromised some of the fundamental values that are central to the impartiality of the secular state. Impartiality here does not imply that the state should not reflect the concerns, interests and aspirations of the citizens at all; on the contrary, the state that is

²¹³ This point has been elaborated in the last chapter. The Sedition Act 1948 has been replaced by the new Harmony Act 2012, however the new Act would, however the Prime Minister Najib Razak maintained that the Government's powers to act against those inciting hatred in order to give rise to disloyalty to the Yang di-Pertuan Agong or any Malay Ruler; those who spread ill will and animosity between races; and those who question any right, special position, privileges and prerogatives enshrined and protected under Part 3 or Articles 152, 153 and 181 of the Federal Constitution. 12 July 2012 www.thestar.com.my/news/story.asp?file=/2012/7/12/nation/11649513&sec=nation

²¹⁴ 'One Merdeka day, many slogans' <http://www.asianewsnet.net/home/news.php?id=34921>; 'Merdeka Slogans: Can it belong to one party?'- lists the national independence day slogans from 1970 to 2012 <http://www.malaysiandigest.com/opinion/72691-merdeka-slogans-can-it-belong-to-one-party.html>

secular allows for the rule of law to protect the fundamental liberties and the human rights of all citizens living in the social condition of pluralism.

What UMNO, has done so far – with regard to the Constitutional amendments – was to focus only on the rights of the majority Malay-Muslim group on the pretext of protecting the position of Islam in the country. The latest publication of the Federal Constitution (2006) shows that there had been about 300 amendments to the Articles being made, excluding those made to the Schedules²¹⁵. Of all these amendments being made to the Constitution, the 1988 amendments marked the critical juncture that contributed to the loss of the independent role of the judiciary, and subsequently the rapid de-secularization of state practices. The reason for the rapid de-secularization of the state was because the 1988 amendment to the Constitution created a legal lacuna that risks undermining the judicial role of the High Court in mediating cases grounded in interfaith conflicts.

The events leading to the amendment played critical role because the motivation behind the proposal for the amendments were ideologically driven and politically charged. The main contenders for Islamic leadership credentials are UMNO (United Malay National Organization), a Malay ethnic party and PAS (Parti Islam Se-Malaysia), a Muslim political organization. Political rivalry between them triggered the Islamic revivalism in the 1980's leading the government to keep reforming the public institutions and make these services appear Islamic. Increasingly, the provisions in the Constitution have been sought to find ways to make Islam an exclusive political prerogative for UMNO.

²¹⁵ <http://www.tindakmalaysia.com/threads/4636-SPR-Federal-Constitution> - TindakMalaysia is an NGO that fights for the Constitutional electoral reform in Malaysia.

7.3 Selective government intervention in the structuring of economic nationalism via the New Economic Policy in the 1970's

The process of de-secularization of the state in Malaysia involved the active role of the state in promoting values in line with the safeguarding the Malay special position. The introduction of the New Economic Policy in 1971, two years after the 1969 ethnic riot, was a case in point. It is a policy that deliberately gave priority considerations to Malay-Muslim citizens in education, civil service employment and the businesses through the design and allocation of opportunities, social resource and the reservation of training opportunities as well as employment positions for Malay citizens. The 1970's was a period of significant government intervention in the investment of rural development and the restructuring the socio-economic through a series of Constitutional reforms in Malaysia that was ideological driven by Malay ethnic nationalism (Jomo 1986; Lall 1995; Crouch 1996).

The expansion of Malay entrepreneurship and the intensification of Malay ethnic participation in public enterprises was bolstered by the amendment to the Industrial Relations Act in 1975 giving the Ministry of Trade and Industry the powers to direct and control the development of industrial development, including the power to issue manufacturing licenses grounded on the terms of the New Economic Policy (Milne 1976; Wong 1990; Kuruvilla 1995). The role of the state in the regulation of industrialization coincided with the Federal government control over the mining of oil and its related exploration activities, thus enabling the state to carry out its redistributive policies aimed addressing the problems of ethnic inequality and poverty (Gale 1981; Rasiah and Shari 2001; Jomo 2004).

The deliberate industrialization strategy and the redistributive policies in the 1970's undermined the role of impartiality in the systematic inquiry involving the understanding of

social problems and subsequently the formulation of public policies (Davies, Nutley et al. 2000; Sanderson 2002)²¹⁶. Whilst the overall aims of the New Economic Policy were to eliminate poverty and reduce economic inequalities among different ethnic groups, the motivating factor behind the formulation of such policy was grounded in the historical protection of Malay sovereignty and in preserving the ideological dominance the Malay Special Position. Whilst these policies were being pursued, the second Prime Minister and main protagonist of the NEP, Tun Abdul Razak, passed away in 1976 effecting regime change that saw the appointment of Hussein Onn, who was then the Deputy PM, to assume premiership after Tun Abdul Razak's passing.

Hussein Onn took over the administration of the country from 1976-1981, coinciding with the implementation of the Third Malaysian Plan. During his short tenure, Hussein Onn executed economic policies that were relatively more inclusive in addressing the issue of poverty for all Malaysians compared to the ethnic centric vision of NEP under Tun Abdul Razak. However the re-orientation of this ethno-centric policies into an inclusive agenda was somewhat derailed by the emerging factionalism not only within the ruling party UMNO but also the Barisan Nasional as well (MacAndrews 1977; Hui and Canak 1981). There were serious problems involving federal-state relations where the executive power of Chief Ministers (Menteri Besar) over the use of funds at the sub-national level intensified UMNO factionalism at the national level as well as creating tensions with other coalition members in the Barisan Nasional. Some of the Malaysian states having troubles with the issue of Menteri Besar's discretionary over state funds included Selangor, Malacca, Perak, Negeri Sembilan, Kelantan,

²¹⁶ There is a wide range of academic literature on the subject of evidence-based policy making but this concept is used here in this section to highlight the displacement of objective social inquiry in public deliberation and government policy making. Evidence-based policy making forms the core values of government decision making process in many liberal democratic societies in order to achieve government efficiency and reflexive social learning about the changing social conditions.

Johore, Terengganu and Sabah where the core issues revolved around how party bosses at the subnational level distribute the benefits of office and funds among their loyalists (Muzaffar 1978).

These problems continued to plague the BN and UMNO when Dr Mahathir Mohamad took over the administration in 1981. Through the process of selecting his loyal supporters and using draconian laws to intimidate any individuals that stood in his way, Dr Mahathir was able to personalize power by virtue of the party-state apparatus (Slater 1999; Slater and Bunce 2008). There was no shift in the Mahathir's stance to human rights as he resorted to the use of the Internal Security Act 1966 (ISA) to detain political dissidents without trial, and also the Societies Act 1966 with the purpose of criminalizing 'politicized' groups or civil society movements (Mauzy 1993).

The selective nature of government intervention in the economy during the 1970's continued to shape the character of public debates in Malaysia, and this was further intensified by the way the ruling party UMNO tried to overcome the dissenting social forces of Islam emanating from within the Malay community throughout the 1980's. Through the government machinery, Mahathir tried to engineer a sense of bounded entity grounded in Malay-Muslim ecumenism by emphasizing the moral significance of loyalty and gratitude to the government for maintaining political stability and the economic progress for the Malay-Muslim community. Loyalty and gratitude to the government have been held as the essential character of patriotic citizenship and they are repeatedly emphasized in different slogans on Merdeka or Independence Day celebration²¹⁷. The emphasis on loyalty and gratitude

²¹⁷ 'One Merdeka day, many slogans' <http://www.asianewsnet.net/home/news.php?id=34921>; 'Merdeka Slogans: Can it belong to one party?'- lists the national independence day slogans from 1970 to 2012 <http://www.malaysiandigest.com/opinion/72691-merdeka-slogans-can-it-belong-to-one-party.html>

displaces the other competing virtues like justice, equality and human rights that are increasingly finding a foothold among citizens in their challenge against the homogenizing policies of state Islamization. These strategies were aimed at universalizing Islamic values in the public sphere and also to monopolize the official interpretation of Islam compromised some of the fundamental values that are central to the impartiality of the secular state²¹⁸. Dr Mahathir was responsible for the amending of the Constitution in 1988, and it marked the critical event that contributed to the loss of the independent role of the judiciary, and subsequently the de-secularization of state practices. The latest publication of the Federal Constitution (2006) shows that there had been about 300 amendments to the Articles being made, excluding those made to the Schedules²¹⁹.

The 1988 Constitutional amendment intensified the process of de-secularization of the state at the institutional level. This was ideologically by the unceasing political quest and contestation for legitimacy as PAS began to challenge UMNO's credibility on Islamic leadership. The Islamic revivalism since the 1980's triggered interminable pressures for the ruling party to keep reforming the public institutions and make these services appear Islamic. Islam and the Malay identity began to furnish the ideological foundation upon which the political values of rights are being defined, reinterpreted and employed by the political leaders of the dominant Malay ethnic in public discourse. One of the distinctive consequences of this has been the gradual weakening of the political commitment to the secular values of neutrality and tolerance, and this has led to the systemic abuse through Constitutional amendments as a

²¹⁸ Impartiality here does not imply that the state should not reflect the concerns, interests and aspirations of the citizens at all; on the contrary, the state that is secular allows for the rule of law to protect the fundamental liberties and the human rights of all citizens living in the social condition of pluralism.

²¹⁹ <http://www.tindakmalaysia.com/threads/4636-SPR-Federal-Constitution>

way to strengthen the political prowess of the ruling party UMNO within the ambit of the dominant Islamic political discourse.

The 1988 amendment to the Constitution resulted in the perceived juridical autonomy of the Syariah courts, thus creating room for the politicization of Islam in the public sphere. As the most influential set of comprehensive doctrine in Malaysia, Islam surpasses other competing forms of knowledge as the socially accepted guiding principles for just governance, and where the adjudication of legal matters are concerned, justice is mainly understood within the context of *Fiqh* or Islamic jurisprudence. Because of its position as the official religion, Islam has been institutionally recognized as the standard bearer of moral truth in the public discourse, and for this reason it precludes the consideration of other non-Islamic values as morally valid. It is on this basis that any form of critical analysis or the questioning of public policies formulated within the theoretical frame of Islam will be interpreted by the Malaysian government as violating the religious sensitivities of the Muslim community and this would constitute an offence under in Section 3 (1) of the *Sedition Act 1948*²²⁰.

7.4 The 1988 amendment to Article 121(1) and judicial lacuna

In the run-up to the 1988 Constitutional amendments, there were a number of significant events that drove UMNO's leading agents to affect important changes into the law to maintain political legitimacy. The emergence of the political and social contestations in the 1980's

²²⁰ This point has been elaborated in the last chapter. The Sedition Act 1948 has been replaced by the new Harmony Act 2012, however the new Act would, however the Prime Minister Najib Razak maintained that the Government's powers to act against those inciting hatred in order to give rise to disloyalty to the Yang di-Pertuan Agong or any Malay Ruler; those who spread ill will and animosity between races; and those who question any right, special position, privileges and prerogatives enshrined and protected under Part 3 or Articles 152, 153 and 181 of the Federal Constitution. 12 July 2012 www.thestar.com.my/news/story.asp?file=/2012/7/12/nation/11649513&sec=nation

intensified the coercive nature of the Malaysian state. Political repression against the opposition parties gradually led to the ideological split within the Malay community on the one hand and the polemic divide between the Muslim and the non-Muslim citizens on the other hand. The socio-political background in the 1980's underscored a number of critical junctures that furnished the rationale for UMNO to tighten its executive grip on the contest for Islamic values as a means to regain political legitimacy.

The 1980's marked a significant era in which Islam began to occupy a central place in the public political sphere in Malaysia. The shift in the mode of thinking about Islam, about its prospect in the formulation of laws, in the restructuring of the moral order, in bringing back Islam into politics - had in many ways, challenged the meaning of Islam as the official religion of the Malaysian Federation. This mode of thinking about Islam as 'political' galvanized the existing Islamic movements - Islamic youth movement ABIM (Angkatan Belia Islam Malaysia), PAS political party (Parti Islam SeMalaysia), Jemaah Islamiyah Malaysia as an NGO, and the *dakwah* or unregistered missionary movements of Al Arqam and Jamaat Tabligh, to name but a few prominent ones - to question the moral and political credibility of UMNO (Liow 2004; Liow 2004; Ahmad Fauzi 2007; Hamid 2008). When Dr Mahathir Mohammed assumed the premiership in 1981, there was a heightened level of political awareness not only about the role of Islam in revolutionizing governance and society among the Muslim community, but also the emergence of civil society movements from the non-Muslim citizens (Mauzy and Milne 1983; Jesudasan 1995; Jesudasan 1996; Verma 2002; Weiss 2006).

There were many different levels of contestations at the time. Within UMNO party itself, the internal crisis and leadership challenges began to destabilize Mahathir's position and Mahathir took on authoritarian stance to overcome challenges to his leadership (Boo Teik

1995; Leftwich 1995; Hilley 2001). There was the fierce rivalry between UMNO and PAS, and whilst other forces of contentions also came to dominate the political scene on the substantive issues of education²²¹, freedom of speech²²², federal-state relations particularly the rift between Kuala Lumpur and Sabah (Kahin 1992; Loh Kok Wah 1992; Lim 1997; Lim 2008), it was Islam that became the main ideological contender to capture the political agency of Malay identity (Ahmad 1986; Lee 1988; Abdullah 1999; Liow 2004). Instead of allowing Islam to ‘re-flower’ and generate healthy debates within the public political discourse, Mahathir actually clamped down dissents and alternative forms of Islamic interpretations considered deviant from the official version (Mutalib 1990; Mutalib 1993).

The government had to control the ‘political’ aspect of Islam, and had to rationalize with the liberal aspect of economic values as the moral catalysts for making modern Islamic entrepreneurship. A series of institutional reforms were made to restructure the fundamentals of the economy to tame the political resurgence of Islamic movements. There were reforms in the banking system, insurance, finance – were aimed at casting a different light on the New Economic policy to empower the Malays and the *Bumiputera* economically, which paved the way for the gradual Islamization of the Malaysian capitalist system (Choudury 2000; El-Gamal 2007; Abbot and Gregorious-Pippas 2010; Khoo and Vedi 2010). Hence policy

²²¹ For further reading on the restructuring of the education system in Malaysia, please read: Heng Pek Koon (1997) *The New Economic Policy and the Chinese Community in Peninsular Malaysia*, The Developing Economies, XXXV (3), pp. 262-92; Molly NN Lee (2005) *Global trends, Nation Policies and Institutional Responses: Restructuring Higher Education in Malaysia*, Educational Research for Policy and Practice 3(1) pp. 31-46

²²² Please refer to the link on the court decision that rejected the Home Ministry’s ban on Aliran’s (alternative media) application for permit to publish in the Malay language [http://www.ipsofactoj.com/archive/1990/Part01/arc1990\(1\)-005.htm](http://www.ipsofactoj.com/archive/1990/Part01/arc1990(1)-005.htm); see also, Wan A Manan (1999) *A Nation in Distress: Human Rights, Authoritarianism and Asian Values in Malaysia*, Sojourn – Journal of Social Issues in Southeast Asia, 14(2), pp. 359-381; Slater, D (2003) *Iron Cage in an Iron Fist: Authoritarian, Institutions and the Personalization of power in Malaysia*, Comparative Politics 36(1) pp.81-101

intervention involving Islam, Malay and to a lesser extent the *Bumiputera* would be systematically entwined with the Islamizing practices of the state. Islam played such a vital role in the policy deliberation of the state under Mahathir that state practices appeared to be institutionally synonymous with Islam (Nagata 1984; Chandra 1987; Camroux 1996; Martinez 2001; Hamayotsu 2003).

The government, with the help of the Islamic authorities on issuing *Fatwa* has managed to subdue some of the dissenting forces within the Muslim community²²³. The government was never hesitant in imposing detention laws upon dissidents and the Internal Security Act 1960²²⁴ for instance was imposed upon the followers of Ibrahim Mahmud, following the Memali incident in 1985²²⁵. Thirty six people were arrested under ISA for practicing deviant Islamic teaching (Lee 1988; Ahmad Fauzi 2000; Tunku Muszaffar 2011). The ISA was again used to arrest 106 individuals under Operation Lalang in 1987, which included the detention of high-profile opposition politicians, on the grounds of exploiting the racial sentiments²²⁶.

²²³ Sisters-In-Islam has been particularly vocal against the introduction of the Faith Reform Bill 1996, 'Do not control faith with laws' (translation) by SIS, 29 September 2000 published in New Straits Times, Utusan Melayu, Malaysiakini.

²²⁴ 'An Act to provide for the internal security of Malaysia, preventative detention, the prevention of subversion, the suppression of organized violence against persons and properties in specified areas of Malaysia, and for matters incidental thereto', <http://www.agc.gov.my/Akta/Vol.%202/Act%2082.pdf>

²²⁵ On the 19 November 1985, the Acting PM and Home Minister Musa Hitam ordered 200 policemen to infiltrate the village of Memali in Kedah, where the leader of an Islamic sect, Ibrahim Mahmud and his 400 followers were residing. The villagers defended themselves with a few hunting rifles and spears whilst the police used heavy armoured vehicles to destroy the houses. The Home Minister even claimed that the women and children were attacking the police. The siege left 14 civilians and four police officers dead. *Parliamentary Debates* (20-11-1985) <http://www.parlimen.gov.my/files/hindex/pdf/DR-20111985.pdf>

²²⁶ According to the Government White Paper (KP14 1988) the opposition politicians attempted to cause racial tension for questioning the Government policies on Chinese vernacular education, the Education Act 1961 and most importantly the proposed commercial and housing development of an ancient Chinese cemetery in Malacca – which the Government White Paper did not elucidate.

The political upheavals in the early 1980's merits serious examination here because prior to the 1988 Constitutional Amendment, individuals and groups were still able to rely on the justice system and the independence of the judiciary to counter the coercive use of state power²²⁷. The 1988 Constitutional reforms initiated by Dr Mahathir was a political response to the legal lawsuits undertaken by 11 contending UMNO members who claimed that,

- (a) The election of the office-bearers at the general assembly on 24 April 1987 was unconstitutional, illegal and void and of no effect because of the existence of delegates from 30 unapproved branches in four divisions Registrar of Societies under the Societies Act 1966²²⁸.
- (b) A consequential declaration that the previous elected office-bearers of UMNO Malaysia at the 37th UMNO Malaysia general assembly still exists in law with all the powers subscribed to them until expiration of their full term or upon fresh UMNO general assembly and election being taken on a date to be fixed in accordance with the UMNO constitution.

Justice Harun Hashim²²⁹ of KL High Court presided over the trial and dismissed the claims that the plaintiffs had sought. His judgment was presented on the 4 February 1988 and the

²²⁷*Operation Lalang Revisited* is a short article that recounts the human rights abuses which occurred during Mahathir's regime in the 1980's <http://aliran.com/archives/hr/js3.html>

²²⁸ Section 12 of the 1966 Societies Act states that, 'where a registered society establishes a branch without the prior approval of the Registrar such registered society and the branch so established shall be deemed to be unlawful societies'. Under Section 41(c) of this Act, 'a society which establishes a branch without the prior approval of the Registrar in contravention of section 12 and the branch so established', will be deemed an unlawful society.

²²⁹ On 5 September 1987, Harun Hashim J, then a High Court Judge, made a speech at a law seminar held at the National University of Malaysia (UKM) calling for improvements in the Federal Constitution. There was an immediate response from Dr. Mahathir who was reported in The Star newspaper as saying that certain judges were encroaching into other branches of Government and should remain neutral in politics. *May Day for Justice*, by Tun Mohamad Salleh Abbas, with K, Das <http://www.oocities.org/capitolhill/congress/5544/mayday4.htm>

reason given was that under the existing law he had no option but to find the party, UMNO, an unlawful society due to the existence of several unregistered branches:

‘It follows that UMNO is still an unlawful society. That being so, the plaintiffs as members of UMNO cannot acquire any right which is founded upon that which is unlawful. The court will therefore not lend its aid to the reliefs sought by the plaintiffs. Having said that, I do not think it is necessary to deal with the other issues and I accordingly dismissed the plaintiffs’ claim.’²³⁰

When UMNO was declared an unlawful society, it became politically critical for UMNO’s survival as a party because this declaration simultaneously affected its legitimacy as the Malaysian government. In a separate incident that was later linked to the process of the amendment, one of the ISA detainees under Operation Lalang – Karpal Singh – was granted release by order of the court on 9 March 1988 in response to a habeas corpus application²³¹, only to be rearrested again after that. The court’s deliberation on Karpal’s *habeas corpus* application exposed the gap in the way government officials exercise their discretionary power upon a person’s liberty. This point referred to Point Number Six²³² of the Home Ministry’s allegations made against Karpal that was not found or undetectable in the police case file, and so this allegation could not be admitted in the court. The detainee was, and still

²³⁰ *Mohamed Noor bin Othman and On v. Mohamed Yusoff Jaafar and Ors* [1988] 2M.L.J. 129; affirmed on appeal, sub nom. *Mohamed Noor bin Othman and Ors v. HajiMohamed Ismail and Ors* [1988] 3 M.L.J. 82, [1988] 2 S.C.R. 219.
<http://www.ipsofactoj.com/archive/1988/Part4/arc1988%284%29-002.htm>

²³¹ <http://www.ipsofactoj.com/archive/1988/Part3/arc1988%283%29-013.htm> *Karpal Singh vs. The Minister for Home Affairs*

²³² (6) On 10 October 1987 at a gathering in front of Tuanku Syed Putra, Lebuhr Downing, Pulau Pinang you used the issue of appointing non-Mandarin qualified headmasters and senior assistants in the national-type Chinese primary schools to incite racial sentiment of the Chinese community. *Statement Under s 11(2)(b), Internal Security Act 1960*

is; one of the leading counsels in Malaysia and the court was of the opinion that excluding Karpal in court to argue for his own liberty would go against the ordinary sense of fairness.

These two court cases set off a chain of events that brought about the political conflict between the judiciary and the executive. When judicial appeals were submitted for these cases to be heard, the Lord President fixed the dates for UMNO appeal on the 13 June 1987 and Karpal's *habeas corpus* on the 15 June 1987. These events prompted Dr Mahathir to table a number of amendments to the Federal Constitution at the Parliament on the 17th March 1988, that many have now argued that these amendments had somehow curtailed the autonomy of the judicial power (Funston 1988; Nathan 1989; Lee 1989-1990; Harding 1990). The amendments were tabled in haste and in the absence of prominent opposition MPs detained under Operation Lalang. The Lord President of the Supreme Court, Tun Salleh Abas then met up with all the judges in Kuala Lumpur on the 25 March 1988 to discuss about the repeated public attacks on the judiciary by the Prime Minister and how to salvage the role and the independence of the judiciary. They reached a consensus to bring this matter into a diplomatic resolution through a letter requesting the King (Yang diPertuan Agong) to intervene²³³. The King did not intervene and it has been mentioned elsewhere that the non-intervention appeared to have been influenced by the 1983 crisis between the Rulers and the executive over the royal assent on the issue of legislation²³⁴.

²³³ Judges are appointed by the King, acting on the advice of the Prime Minister, after consultation with the Conference of Rulers. Art.122B - The Conference of Rulers consists of the Sultans of the Malay States and the Governors of the non-Malay States, and performs certain constitutional functions: see Art.38. *Federal Constitution, Laws of Malaysia (2002)*

²³⁴ For the crisis over the royal assent in 1983/84 see H. P. Lee, "The Malaysian Constitutional Crisis: King, Rulers and Royal Assent" (1984) *Law Asia* 22, which also appeared as a postscript to F. A. Trindade and H. P. Lee (Eds.), *The Constitution of Malaysia: Further Perspectives and Developments* (1986); A. J. Harding, "Monarchy and the Prerogative in Malaysia" (1986) *Mai. L.R.* 353

The tension between the judiciary and the executive led to the Prime Minister officially suggesting to the King to remove the Lord President from his office on the grounds of judicial misbehaviour²³⁵. The Prime Minister explained that the letter written by the Lord President had greatly displeased the King, despite the fact that the letter was written after joint consultation and that they acted well within their Constitutional remit(Harding 1990:64). The removal of the Lord President in a tribunal was fixed on the 29 June 1988, and prior to the date, Tun Salleh Abas (the Lord President) filed an application in the High Court for an order of Prohibition to restrain the tribunal from proceeding on the grounds of dissatisfaction with the composition of the tribunal judges of whom, two occupied junior rank, one was the Speaker of Parliament, and another was a practising solicitor involved in business (Verma, Ebrahim et al. 2008:24). The application for the order of Prohibition was only heard on the 2 July 1988 in a special sitting of the Supreme Court in which the judges unanimously granted Tun Salleh Abas application for a limited stay restraining the tribunal from submitting its report, recommendation and advice to the King until further order.

The five judges who granted the application were then charged with judicial misbehaviour following the commendation of the acting Lord President Tan Sri Dato' Abdul Hamid Omar, in consultation with the Prime Minister. Pursuant to Article 125(3) the King recommended that another tribunal would be established on 6 July to inquire into the conduct of the five judges who participated in the unauthorised 2 July Supreme Court hearing. Within the space of a month there were two tribunals investigating the judicial misconducts that led to the

²³⁵ Art. 125: "(3) If the Prime Minister, or the Lord President after consulting the Prime Minister, represents to the Yang di-Pertuan Agong that a judge of the Supreme Court ought to be removed on the ground of misbehaviour or of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office, the Yang di-Pertuan Agong shall appoint a tribunal in accordance with Clause (4) and refer the representation to it; and may on the recommendation of the tribunal remove the judge from office . *Federal Constitution, Laws of Malaysia (2002)*

removal of the Lord President in the first tribunal, and two Supreme Court judges in the second tribunal under Article 125(3).

Judicial misbehaviour carries the meaning of improper conduct of a judge that renders the person unfit to continue in the office of a judge that could erode public confidence in the judiciary as the guardian of the rule of law. The haste with which the tribunals were composed, conducted and came to swift conclusion seriously undermined the credibility of the trial in deliberating the charges of judicial misbehaviour. The panel review of the 1988 of the judiciary concluded that the tribunals were unparalleled attacks on the rule of law with intent to subdue if not subvert the independence of the judiciary, and were unconstitutional under Article 125 (Verma, Ebrahim et al. 2008).

The events that led to the tribunal of the judges reflected the Prime Minister's long-held disregard for the independent function of the judiciary. He held the belief that the judiciary should function in a similar role as the civil service,

‘The Government will ensure that each branch of its service carries out its respective duties so as to avoid duplication of roles. A branch of service such as the Police, Army and Civil Service or Judiciary, should not interfere in the jurisdiction of another. But recently there have been unhealthy trends and the Government will ensure that they are kept to that stage only’. (*Kota Bharu, 2 October 1987*)²³⁶

The Prime Minister held the view that judges should confine themselves only to the matter of applying the laws already passed by Parliament, instead of giving opinions the areas of law-

²³⁶ *May Day for Justice* <http://www.oocities.org/capitolhill/congress/5544/mayday4.htm>

making. Mahathir's view about the judiciary was then translated via the amendments in the Constitution under Act A704 in 1988 when he tabled more than 10 Articles proposed for amendments. For the purpose of this study the amendment to Article 121(1)²³⁷ is identified as the critical juncture that has serious implications upon the principle of the separation of power. The amendment to this Article had the effect of removing the judicial powers of the courts, thus resulting in them retaining judicial powers as and when the Parliament accords to the judiciary. Effective on 10 June 1988, Article 121(1) was amended to remove the words, "the judicial power of the Federation shall be vested in two High Courts", from that Article, thus deleting the provision that the judicial power of the Federation vested in the Judiciary. Instead, it was stipulated that the "*High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law*"²³⁸. As the new wording stands, the amendment effectively rendered the judiciary to function under the command of the Parliament. A prominent ex-chief justice Mohd Dzaidin stressed that,

"The amendment alters in a fundamental manner the basic structure of the Federal Constitution, from the concept of the independence of the judiciary to

²³⁷ Prior to 1988, Article 121(1) of the Federal Constitution provided as follows:

Subject to Clause (2) the judicial power of the Federation shall be vested in two High Courts of coordinate jurisdiction and status, namely—

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Borneo and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed),

and in such inferior courts as may be provided by federal law.

²³⁸ Act A704 Constitution (Amendment) Act 1988, *Laws of Malaysia* http://www.digitalibrary.my/dmdocuments/malaysiakini/810_act%20a704%20constitution%20%28amendment%29%20act%201988.pdf

the dependence of the judiciary on the executive for its judicial powers. Malaysia's judiciary should not be a tool used by the government for any kind of political expediency"²³⁹

Since the amendment altered the judicial powers of the courts to function under the purview of the Parliament, the real test of the judiciary now is in deciding controversial cases that are ethically challenging and religiously complicated. The circumstances that led to the 1988 amendment of Article 121(1) were political in nature and Mahathir's critical review of the judiciary when tabling the motion seemed to suggest that the independence of the judiciary was not desirable on the grounds that: 'some of the judges have been tacitly involved in politics. Having been publicly recognized as "fiercely independent" a few judges have been complicit with opposition politics. This can either mean that they reflect their independence or they will "bend over backwards" to make decisions in favour of the contenders of the Government'(Report 1988:1359). The new clause (1A) added to Article 121 states, 'the High Courts in the States of Malaya, Sabah and Sarawak shall have no jurisdiction of the *Syariah* court' that was enforced in June 1988. The reason for adding this new clause to Article 121 was that,

'There's been dissatisfaction among the Muslims that the High Courts have been able to override the jurisdictions of the *Syariah* courts. The Government is of the opinion that the judicial power of the civil courts could undermine the legal competence of the *Syariah* Courts and the proper administration of the Islamic religious laws. It is very important to safeguard the legal competence of the *Syariah* Courts because it is high time that *Syariah* should be given complete

²³⁹ Judiciary now cowed due to Dr. M, says ex CJ, 11 February 2012 <http://www.themalaysianinsider.com/print/malaysia/judiciary-now-cowed-due-to-dr-m-says-ex-cj/>

judicial power to decide on matters within its jurisdiction precisely because these matters are relevant to Islamic religious laws or *Hukum Syarak*' (Report 1988:1364).

Two decades after this amendment, the social and political repercussions have been considerable. The Malaysian Bar Council concluded that the 1988 amendment to Article 121(1) has promoted the following ideas in the public perception that:

- (a) The courts are powerless to address issues and do justice wherever there is a lacuna in the law;
- (b) The courts are confined to merely interpreting and implementing acts of Parliament;
- (c) The courts are no longer able to make and develop common law;
- (d) The courts are deprived of their inherent jurisdiction, along with their inherent right to exercise judicial review over the decisions of public bodies and Executive functions²⁴⁰.

The Malaysian Bar Council has recently urged the Government to restore Article 121(1) to its pre-1988 position because of how the Judiciary is made subservient to the Executive, and there's nothing to stop the Executive from dictating how justice is interpreted. This amendment could be detrimental to the interpretation of the fundamental liberties in the Constitution, these include:: *Article 5 (Right to life and personal liberty)*, *Article 6 (No slavery or forced labour)*, *Article 7 (Protection against retrospective criminal law and repeated laws)*, *Article 8 (Equality – but not applicable to Article 153 and other laws)*²⁴¹,

²⁴⁰ Ibid.,

²⁴¹ Article 8 does not apply to: laws regulating personal law; laws relating to office or any employment connected to any religion or religious institutions; laws on the Election regulation; laws for the protection, well-being or advancement or the reservation of quota for public service employment for Orang Asli in the Peninsula Malaysia; laws in the Constitution of Malaysian state that were made

Article 9 (Freedom of Movement), Article 10 (Freedom of speech, assembly and association) and Article 11 (Freedom of religion). The ‘Allah’ controversy is an example of the violation of Article 11 whereby the government ban was premised on a narrow interpretation of Article 3(1) that favoured the demands of right-wing conservative Islamist.

The socio-political impacts of the 1988 amendment have altered the conception of differential justice for the Muslim and the non-Muslim citizens in Malaysia. It paved the way for the legal ascendancy of Islamic precepts in the conception and interpretation of the meaning of rights and justice. Hitherto the secular High Courts functioned as the superior courts, applying the same laws for all, with careful consideration of the characteristic needs of lower courts – i.e. the native court and Syariah. After the 1988 amendments, Islam came to dominate the ideological outlook of state and other political contenders. When both public policies and legal statutes reflect the values and doctrinal norms of Islam, politicians from both sides of the political divide would start competing for the honour Islamic credentials, thus tilting the public political discourse into the direction of moral debates that tended to be theologically biased. The organizing principles of political governance have now become entwined with the salience of Islam as the doctrinal foundation that favours justice for the Muslim majority in Malaysia; however this goes against the spirit of equality that is embedded in the Constitution. What is originally thought as secular in the Constitution has become untenable as the Islamist outlook of the Malaysian government and the juridical autonomy of the Syariah begun to shape the meaning of political legitimacy.

before Merdeka or Independence Day (31 August 1957); and laws restricting Malay enlistment to the Malay Regiment
http://www.malaysianbar.org.my/constitutional_law_committee/my_constitution_fundamental_liberities_and_citizenship.html

The addition of Clause (1A) to Article 121 effectively restricts the High Court from interfering into the jurisdictions of the Syariah courts. It gives populist appeal to the ideology of Islam as the legitimate political doctrine and an apparent of moral truth the legal sphere. The political-legal nexus of Islam is a powerful justification used by UMNO against other political contender - Muslim and non-Muslim alike - for questioning the legitimacy of the government. At the sub-national administration²⁴², this amendment strengthened the role of the Islamic councils, granting juridical autonomy to the Syariah courts to morally police the Muslim populations as provided in the State list²⁴³. The buttressing of Syariah court coincided with the Islamization of many public institutions, thus reinforcing the process of the de-secularization of the state.

The amendment to Article 121 1(A) also re-shaped the terms of public engagements between the Muslim and the non-Muslim citizens, whereby it accentuated the idea that the secular courts are alien to the moral obligations of Islam, thus creating the public impression that the social needs of majority Muslim citizens must be fulfilled by Syariah courts at all cost. The interpretation of justice gradually bifurcated into accommodating the needs of citizens on the grounds of religious identities, whereby the juridical autonomy of Syariah began to supersede the fundamental liberties of citizens, generating unprecedented judicial complications in

²⁴² The Malaysian Federation is made up of 13 individual states and the Ninth Schedule of the Malaysian Constitution delineates the legislative functions of the government into Federal List and the State List. Under List II of the State List, except for the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic laws are administered and legislated under the purview of the State government. (Federal Constitution, 2002)

²⁴³ List II of State List in the Federal Constitution (2002:186) provides, ‘..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; 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...’

matters relating to inter-faith relations - marriage and divorce, custodial rights, burial rights, the conversion of minors and apostasy.

The judicial autonomy of the Syariah courts and the restrictions imposed upon the High Courts from interfering Islamic cases meant that the legal avenues for non-Muslims to appeal for such cases are increasingly limited. There are two distinctive impacts that have emerged from the amended Article 121 1 (A). The first one relates to the greater role of the Islamic institutions in regulating the collective moral behaviours of Muslim citizens in the private as well as in the public spheres, which in many ways do affect the nature of social relations among the multi-ethnic citizens in the society. Secondly the political significance being attached to the Islamic identity of the Malays led to the elevation of religiously grounded moral arguments in the public debates. This created the 'secular public space' being increasingly circumscribed by the 'state' whose primary object is to protect and entrench the ideological identification of Malay and Islam as an ethno-religious category. While the framing of the Malaysian constitution afforded only a symbolic position for Islam with a firm political commitment to being secular, the increasingly strong link between Malay ethnic identity – which was enshrined and protected constitutionally – and revivalist Islamic identification has undermined the secular nature of the constitution particularly in the contemporary experience.

7.5 The quest for Islamic State

The accelerated de-secularization state has also been propelled by the quest for Islamic state and this phenomenon is not entirely isolated from the exogenous factors. The 9/11 attacks in the US, Islamophobia and the emergence of the far-right media in the West had had significant impacts upon the local dynamics of identity conflicts in Malaysia (Peletz 2005). Post-9/11 represented an important turning point on how the local processes of interpretation

and the understanding of global conflicts accentuated cultural differences underlining the politicization of religious identity. In the attempt to counter the tide of Islamophobia among right-wing media in the West, Dr Mahathir publicly declared that Malaysia was an Islamic state just weeks after the attack²⁴⁴. This statement generated great outcry from the public, followed by a burst of debates on secular-Islamic discourse, which were then banned by the government. When Abdullah Ahmad Badawi took over the premiership in 2003, he declared that Malaysia is “neither a secular nor a theocratic country, but a country governed on the basis of Islamic principles and observance to the principles of Parliamentary democracy grounded in the spirit of social contract within the Federal Constitution”²⁴⁵. Abdullah’s deputy, Najib Razak (now Prime Minister) followed suit by claiming that Malaysia has ‘never been secular’.²⁴⁶

The notion of Islamic State in Malaysia is a recent phenomenon which became pronounced after the 9/11 attacks. Abdullah was trained as a Muslim scholar and he aimed to counter the pathological image of Islamic extremism and was determined to push for a liberal and modern Muslim paradigm for the future of Islamic development in the country²⁴⁷. However the search for a liberal Muslim paradigm did not prevail, instead Abdullah’s broad vision of Islamic modernization was somewhat constrained by the constitutional demands of Article 153 of the Federal Constitution, and these were translated into the contemporary redefinition

²⁴⁴ “Mahathir isytihar Malaysia negara Islam”, *Berita Mingguan*, 30 September 2001.

²⁴⁵ *Malaysiakini*, 27 August 2007.

²⁴⁶ “Deputy PM Najib Razak declared that ‘We have never been secular’”, *The Rocket*, 17 July 2007.

²⁴⁷ 5 September 2002, ‘Extremists, Set Aside’ by M. Vatikiotis and S. Jayasankaran, in *Far Easter Economic Review*.

of rights clothed in the new language of social contract²⁴⁸ aimed at preserving differential citizenship.

‘Perhaps the most significant aspect of the contract was the agreement by the indigenous peoples to grant citizenship to the immigrant Chinese and Indian communities. This changed the character of the nation, from one that originally belonged to the indigenous peoples to one that Chinese and Indian citizens could also call their own. Chinese and Indians now share political power with the Malays, and sit in the Federal cabinet and State executive councils. In return for being granted these political rights, the immigrant communities agreed to special economic privileges for the indigenous peoples given their disadvantaged position. This constitutes the political, economic, legal and moral foundation for the distributive justice policies of the country.’²⁴⁹

The political commitment to Islam as the principle public policy combined with the state rejection of the political neutrality of the secular state has promoted the irregularity of civil and religious rights. This resulted in the non-Muslims treated as second-class citizens in contemporary Malaysia²⁵⁰. Legally speaking, non-Muslim citizens in Malaysia have been greatly disadvantaged by Article 121 Clause 1(A) because it prohibits the civil courts from interfering issues arising from the *Syariah* jurisdictions, thus limiting their rights to justice.

²⁴⁸ ‘Malaysia’s social contract: Exposing the myth behind the slogan’, by Mavis Puthuchery, <http://www.projectmalaysia.org/articles/malaysia-social-contract-exposing-the-myth-behind-the-slogan.html>

²⁴⁹ Keynote address by Abdullah Badawi, PM Malaysia, ‘The Challenges of Multireligious, Multiethnic and Multicultural Societies’, *Asia Media Summit*, 19.04.2004(www.un.int/malaysia/PMStatement/PM041904.htm)

²⁵⁰ Malik Imtiaz Sawar, Malaysian human rights lawyer and President of Hakam, interview with the BBC 07/02/2005.

Whilst the ‘state’ in Malaysia was never categorically defined as secular, the rule of law by which the country operates remains secular²⁵¹. This amendment took away the commonality of legal rights, resulting in the unequal access to justice between the Muslims and the non-Muslim citizens. The restricted role of the High Courts in presiding over state-administered (sub-national) Syariah courts created judicial lacuna in the legal settlement of rights between Muslim and non-Muslim citizens. The loss of religious liberties among the non-Muslims was considerable as the state increasingly dictate the terms of inter-faith dialogue between Muslim and non-Muslim citizens in Malaysia.

There’s growing public disenchantments among civil society movements and intellectuals following the censored debate on the secular state in Malaysia, the expanded role of Islam in the legal system and the challenges faced by minority religious groups²⁵². Article 11 initiatives emerged as a civil group to challenge the Islamists’ assertion that Malaysia is - in law - an Islamic State²⁵³. Article 11 also addressed the social problems arising from legal logjam affecting religious conversion²⁵⁴, custodial rights²⁵⁵, body-snatching by Islamic

²⁵¹ *Article11 – Setting the record straight by Malik Imtiaz Sawar, 27 July 2006*
<http://www.malaysiakini.com/letters/54522>

²⁵² Dr. Mohd. Asri Zainul Abidin, Muslim scholar and the ex-Mufti of Perlis, expressing his disenchantment about the siege mentality of the Malay-Muslim political and legal bureaucrats with regard to their treatment of the minority population. www.drmaza.com (02/02/2010).

²⁵³ Article 11 of the Federal Constitution states that ‘Every person has the right to profess and practice his religion and, subject to Clause (4), to propagate it. In Clause (4) ‘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’. See <http://www.article11.org/>.

²⁵⁴ ‘A view on infant conversions to Islam’ by Salbiah Ahmad, *Aliran Monthly*, Vol 24 (2004): Issue 9

²⁵⁵ ‘Malaysia’s parallel judicial systems come up against legal challenge’, 5 September 2011 <http://www.bbc.co.uk/news/world-radio-and-tv-14630851>; ‘Non-Muslim mother denied justice’, 21 April 2004 <http://www.malaysiakini.com/letters/27596>; ‘Ethnic and religious discrimination big challenges for Malaysia minorities’, 25 May 2011 <http://www.minorityrights.org/?lid=10815>

authority²⁵⁶ and others aspects of repression (see, e.g., NECF Malaysia 2007). Around seventy places of worship, mostly Hindu temples were demolished within the space of a year, from 2006-2007²⁵⁷. The Malaysian government has also assumed the role of legislating Islamic faith as it adopts a similar stance to the Syariah criminalization of apostasy²⁵⁸ (Peletz 2002; Smith 2003-2004; Peletz 2005; Nurjaanah Abdullah 2007). The ideological dominance of Islam in the government was evident when the Home Minister capitulated under the weight of the Malay-Muslim NGOs protesting the public discussion of conversion issues organized by the Malaysian Bar Council²⁵⁹.

Leaving the Islamic faith or apostasy is generally considered as an act of betrayal to the Malay identity in Malaysia and the government linked Islamic agencies labelled these as the ‘enemies of the state’ (Abdullah Saeed and Hassan Saeed 2004:68). These Islamic bodies tend to follow the strict interpretation of apostasy, leading to the drafting of the Faith Reform Bill 1996²⁶⁰, giving the government the ultimate prerogative to measure the faith of individual Muslims.

‘As a result of the law, the state has become the ultimate arbiter of Muslim faith and belief. It could be said that there are inherent dangers when the state becomes

²⁵⁶Malaysian opposition calls for end to ‘body-snatching’, 27 January 2008 <http://www.abc.net.au/news/2008-01-27/malaysian-opposition-calls-for-end-to-body/1024760>

²⁵⁷ Figures compiled by *Hindraf* (Hindu Rights Action Force) – Jayathas Srikunavelu (ex Hindraf Activist) and also please see Appendix I

²⁵⁸‘Life as a secret Christian convert’, 15 November 2006 http://news.bbc.co.uk/1/hi/programmes/crossing_continents/6150340.stm; ‘Talking Apostasy’, 27 December 2007, <http://www.littlespeck.com/region/CForeign-My-041228.htm>; ‘Apostasy in Malaysia: The hidden view’, 10 November 2011 <http://asiapacific.anu.edu.au/newmandala/2011/11/10/apostasy-in-malaysia-the-hidden-view/>

²⁵⁹ www.malaysiakini.com Protesters stop Bar’s ‘conversion’ forum’ and ‘Syed Hamid: Event cut short to avoid tension’, (09/08/2008), www.malaysianbar.org letters on provocation of Muslim’s patience (11/08/2008)

²⁶⁰ Rang Undang-Undang Kesalahan Jenayah Syariah (Wilayah-Wilayah Persekutuan) 1996.

the ultimate adjudicator of personal faith. This is especially the case in countries like Malaysia where religious institutions and religious officials are subordinated to political authority' (Ibid: p.143).

7.6 Contesting the de-Secularization of the Malaysian state

The following cases represent the crucial trends that emerged as counter-movements against the de-secularization of the state. These three are selected on the basis of the ideological challenge against the ban on the use of 'Allah', the empirical challenge against the government discrimination of minority citizens of Indian descent, and the challenge against the public demonization of the LGBT community on the grounds of religious reasons.

7.6.1 The controversial use of 'Allah'

The 'Allah' controversy is a legacy left by Abdullah. He began to lose support among non-Muslim communities as he began pushing a more stridently pro-Islamic agenda than his predecessor, Dr Mahathir. The 'Allah' controversy emerged because of the official prohibition against the use of the word 'Allah' by the congregation and their publications. Hitherto, the Federal government formally banned the use of the word 'Allah' among the Christian communities in April 1986²⁶¹ and this official circular was given to all Christian churches, particularly the Catholic Church in Sabah not to use the word 'Allah' and 15 other words in their Christian publications. Christian population in Sabah and Sarawak make up about 64% of the total Christian population in Malaysia, and many rely on the importation of Indonesian translation of the English Bible. The Malaysian government banned the Malay translation of English Bible under the Internal Security Act 1960 for being 'prejudicial to

²⁶¹ Official letter ref. S.59/3/9/A

national interests and security'²⁶². The official reason given was because the Arabic language is the official language of Islam and the use of 'Allah' can be confusing and may encourage Muslims to apostate. One of the first casualties of such ban was the Iban-language Bible, *Bup Kudus*, in Sarawak²⁶³, and then followed by the seizure of Christian books imported by the Sabah Injil Borneo from Indonesia by the Royal Customs and Excise Department officers in 2006²⁶⁴.

The government restriction on the distribution of Malay-language Bible and other audio and video materials intensified under Abdullah administration. In 2005 Malay-language Bibles were labelled "Not for Muslims" printed on the cover to restrict distribution to churches and Christian bookshops. The controversy over the word "Allah" also led to the confiscation of children's Sunday school publications imported from Indonesia by the Customs authorities under Customs Act 1967. The head of the restricted publication unit and Quran Text division from the Ministry of Internal Security claimed that these books contained words or phrases exclusive to the religion of Islam, and they were 'Allah', 'Baitullah', 'Solat' and 'Kaabah'²⁶⁵. The Ministry cited Article 3 and Article 11(4) of the Federal Constitution emphasizing the revered position of Islam in the Federation, and the restriction of religious propaganda on Muslims respectively (Constitution 2002). Confusion and public order are the reasons given

²⁶² <http://www.necf.org.my/newsmaster.cfm?&menuid=43&action=view&retrieveid=1402>

²⁶³ www.dapmalaysia.org 'Home Ministry should immediately lift the ban on 13 Christian books and other banned Muslim books in order to be consistent with natural justice (02/05/2003)

²⁶⁴ www.themalaysianinsider.com Allah: Court asks Home Ministry to settle with SIB (11/03/2010).

²⁶⁵ Online copy of the application of judicial review by Pastor Jerry Dusing over the detention of children education material for the Borneo Evangelical Mission Church http://www.necf.org.my/aeimages/File/FAIR_COPY-SUBMISSION_-FI.pdf

by the Ministry for imposing restrictions, and the confiscation was justified as a security issue under Section 22 of the Internal Security Act 1960²⁶⁶.

In January 2008 the books were returned to the SIB church; however SIB continues to argue that the government prohibition to use the word "Allah" in all of its religious publications and practices is unconstitutional and unreasonable. There was a similar but separate court case on this 'Allah' issue when *The Herald*, a Catholic magazine took the Home Ministry to Court in 2007. In December 2009 the High Court overturned the Home Ministry's ban, thus allowing the Catholic magazines and other non-Islamic publications to use the word 'Allah' as a direct translation for the word 'God' in the Malay language versions of their publications²⁶⁷. Following this a number of Malay-Muslim NGOs began to organize public demonstrations after the Friday prayer against the court ruling insisting that 'Allah is only for Muslim'²⁶⁸. A few days after the judgment a number of churches were firebombed²⁶⁹ and it continued for two weeks, bringing a total number of 11 places of worship under attack²⁷⁰. Within the space of about a month, these Malay-Muslim NGOs joined forces to establish a consultative council to 'to defend Malays right and Islam in the country' and continued to pressurize the government to ban non-Muslims from using the word 'Allah'²⁷¹.

The build-up of defensive sentiments towards the preservation of special citizenship for Malays can also be attributed to Abdullah's inertia against growing fundamentalism in UMNO. During the Assembly, young and ambitious Malay politicians were brandishing a

²⁶⁶ Ibid.,

²⁶⁷ *Titular Roman Catholic Archbishop of Kuala Lumpur v 1, Menteri Dalam Negeri 2, Kerajaan Malaysia, Kuala Lumpur High Court Judicial Review: R1 - 25 - 28 -2009*; www.malaysiakini.com Court declares 'Allah's ban invalid (31/12/2009)

²⁶⁸ www.malaysiakini.com 'Allah' row escalates, more protests lined up (06/01/2010)

²⁶⁹ www.malaysiakini.com Three Churches firebombed (08/01/2010)

²⁷⁰ www.malaysiakini.com Church in Johor splashed in red paint (14/01/2010)

²⁷¹ www.malaysiakini.com 76 NGOs formed council to defend Malay Rights (27/02/2010)

Malay *Keris* (dagger) to symbolize public warning against other ethnic groups not to challenge this *Ketuanan Melayu*²⁷² or in other turn of phrase, Malay hegemony. UMNO finds justification in claiming Malay special rights under Article 153 of the Federal Constitution and this was reinvigorated through Abdullah's Islamic approach that sanctioned religious comprehensive doctrine as the dominant public policy in a multicultural society.

Islam Hadhari²⁷³, the ideological agenda promoted by Abdullah projected an imagined Islamic civilization for contemporary Muslims to succeed in multiple global challenges; it aimed to offer an alternative modernity that is independent of Western values to make Islam authentic. The privileging of the Islamic discourse gave ideological purchase to *Ketuanan Melayu* (Malay hegemony) to sustain the political legitimacy of UMNO and this continued to give purchase to UMNO's warning to minority citizens not to publicly challenge the status quo of Islam. The privileging of the Islamic discourse by the government created the condition for extremist groups to intimidate minority citizens, and the fire-bombing of the Churches was indicative of such intimidation.

On the 13 August 2010, the Sessions Court judge, S.M. Komathy Suppiah sentenced two brothers – Mohamad Faizal Raja Ibrahim, 24 and Raja Mohamad Idzham Raja Ibrahim, 22 – to five years jail each for torching the Metro Tabernacle Church in a suburban Kuala Lumpur on the 8 January 2010. The attack was linked to the 2009 High Court ruling that allowed non-Muslim Malaysians using "Allah" as a translation for "God" in their worships and in all forms

²⁷² See, e.g., "UMNO: A threat to national prosperity", *Aliran Monthly* vol.25:7 (2005).

²⁷³ Islam Hadhari is an approach that emphasizes development, consistent with the tenets of Islam and focused on enhancing the quality of life. It aims to achieve this via the mastery of knowledge and the development of the individual and the nation; the implementation of a dynamic economic, trading and financial system; and integrated and balanced development that creates a knowledgeable and pious people who hold to noble values and are honest, trustworthy, and prepared to take on global challenges. Abdullah's speech in 2004 UMNO General Assembly.

of publications. Following the High Court ruling, the Home Ministry initiated a legal appeal against the judgment and this was recently granted by the Appellate Court that held the veto against the use of the word ‘Allah’ by the Catholic weekly publication, *The Herald*²⁷⁴. In paragraph 5 of the judgment, *inter alia*, the appeal judges reasoned that,

“It is our common finding that the usage of the name “Allah” is not an integral part of the faith and practice of Christianity. From such finding, we find no reason why the respondent is so adamant to use the name “Allah” in their weekly publication. Such usage, if allowed, will inevitably cause confusion within the community.”²⁷⁵

The appeal judges also concluded in paragraph 4 of the judgment that they found ‘no infringement of the any of the constitutional rights, as claimed by the respondent’²⁷⁶. The legal dispute over ‘Allah’ reflects the unreasonable conduct on the part of the state that has failed to assume its normative role as the arbiter of equality and justice for all citizens. The Islamic revivalism and identity mobilization by state elites and other non-state stake holders meant that the Malaysian public life is not only increasingly dominated by a one-sided discourse on political and civil Islam, but that these trends underscore the growing sense of ethno-religious polarization in recent political trends.

The Allah controversy represents one of the many occurrences in contemporary Malaysia whereby religious symbolism becomes embroiled into heated political contention. It challenges the mainstream notions of (civil) rights grounded in the idioms of religious

²⁷⁴*In the Court of Appeal of Malaysia (Appellate Jurisdiction) Civil Appeal No. “-01-1-2010 Between 1, Menteri Dalam Negeri 2, Kerajaan Malaysia And Titular Roman Catholic Archbishop of Kuala Lumpur...Respondent”, 14 October 2013*

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

convictions. Whilst moderate Muslims in Malaysia do not have problems with non-Muslims using the word ‘Allah’ in their worship and publications, there are equally considerable number of Muslims who subscribe to the view that ‘Allah’ belongs exclusively to the Islamic religion (Masod 2008).

‘Allah’ as the exclusive term for Islam remains the dominant view sanctioned by Jakim²⁷⁷, the National Islamic body regulating the issuance of religious edicts (*Fatwa*). As Jakim functions as part of the government branch, it hijacks the public interpretation of ‘Allah’ issue, lending credibility to government’s projection of an Islamized state. With the official ban on the use of ‘Allah’ by non-Muslims, this further undermines the prospect of the secular values to be restored in the governmental apparatus. In the absence of the value of neutrality principle in the state practices, this could seriously limit the liberal conception of justice in the protection of liberty and equality of rights in Malaysia. The need for High Court intervention to restore the fundamental rights of minority citizens signals the critical failure of the Malaysian government to guarantee a basic level of justice for the practice of religious liberty and the exercise of civil rights in the country.

The story of citizenship ‘rights’ in the Malaysian political narrative exposes the problem of adjudicating the tensions between group right and the range of choices and opportunities available to the individuals. Where issues of special rights for the minority groups are concerned, the liberal framework normally justifies such policy for the elimination of the structural disadvantages affecting the minority cultures so as to empower their members to participate into the society dominated by a majority culture without the fear of losing their cultural roots and linguistic heritage (Kymlicka 1992). In the Malaysian context, the

²⁷⁷ <http://www.islam.gov.my/rujukan/213> *Isu-isu Aqidah (Faith issues)*

Constitution actually protects the ‘special position’ of the majority Malay ethnic group by virtue of the British colonial legacy.

This particular development in the history of the Malaysian politics challenges the normative understanding of equal rights that dwells within the ambit of political theory. The ideas of right that have emerged from the history of ethnic politics shows the perennial problem in the political conception of right that does not sit well with what is normatively conceived in the Universal declaration of Human Rights. The ‘Allah’ controversy necessitates the call for serious reappraisal on the role of the state in censoring the exercise of basic religious liberties among minority faith groups in Malaysia. It is unreasonable for the state to restrict the use of ‘Allah’ because it is an abstract noun that could not be legislated nor patented. Such restrictive official policies on religious words and symbols demonstrate how the de-secularization of the state violates the fundamental liberties of minority citizens.

The normative assumption that the secular state should rise above sectarian conflicts remains ideologically contested in the Malaysian public sphere. The empirical contestations over the idea of the secular are political but the ideological divergences about how the modern state should operate are largely underpinned by the historical-cultural conception of the ‘*Kerajaan*’ or Malay kingship. The idea of ‘government as a condition of having a Raja’ imposes a domineering criteria of cultural loyalty in defining the political relations between subject and ruler. The problem with cultural loyalty as an essential aspect of the Malay sovereign kingship is that, such cultural bondage undermines the principle of neutrality that forms the institutional core of modern secular state and it has the potential to make culture, instead of the equality or commonality of citizenship right, as the locus of political struggle. The Constitution provides the Malay rulers in each Malaysian state to be the Head of the religion of Islam and to safeguard the custom and affairs of the Malays. When a section of the Malay-

Muslim community objected to the non-Muslim use of the word 'Allah', this issue created a constitutional polemic that pit the provision to safeguard Islam and the Malay custom against the other provisions in the Federal Constitution that secures the freedom of religion for every person.

When this happens, as the case illuminates, official arguments for the banning of non-Muslims using the word 'Allah' were grounded in reasons inclined towards religious comprehensive doctrine to safeguard the interests of Islam and the Malay customs. The conduct of the government goes against the basic tenets of a secular state to rise above sectarian conflicts and protect the fundamental liberties of citizens. The non-Muslim's right to use 'Allah' does not in any way transgress nor contribute to the deterioration of the rights of the Muslims. So far there's no evidence whatsoever to show that the non-Muslim use of 'Allah' would diminish the spiritual worth of Islam. The fact that Christians in Sabah and Sarawak have been using the word 'Allah' in the sermons for decades is enough to prove that the theological pre-eminence of Islam has not been undermined at all. This is a further indication that such official ban is purely motivated politically in recent times, reflecting the growing conservatism among certain sections of the Malay community that subscribe to the ethno-nationalist values of UMNO.

The religious intolerance shown by an extremist section of the Malay-Muslim community can be attributed to the de-secularization processes of state, which in this case shows how the government capitulates from its role as the arbiter of competing comprehensive doctrines. It is a most bizarre situation whereby the right to use the Arabic word for God had resulted in a seriously contentious legal battle. This legal episode shows how the de-secularization of the state diminishes the prospect of religious freedom even at the level of moral construct, but it also begs the question of how effective theological reasons have been applied in mediating the

rights of citizens in a condition of pluralism. The legal challenge mounted by the Borneo Evangelical Mission and Catholic Church against the ban illustrated an encouraging sign that active and deliberative citizenship has not been daunted despite the restrictive interpretation of Malay-Islam provisions in the Constitution. The counter conduct to the de-secularization is not only ideological, but empirical too as the HINDRAF demonstrates.

7.6.2 The HINDRAF (Hindu Rights Action Force) movement in Malaysia

The demolition of many Hindu temples since 2006 triggered massive protest movement from the Indian community in West Malaysia. A paradigmatic case for the study of *ethnic* politics (Lijphart 1977; Horowitz 1985), comparative political scientists rarely afford much attention to the dynamics of religious mobilization in Malaysia, although Malaysianists – both local and international – have paid considerable attention to Islamic revivalism as a growing political phenomenon (Hussin 1990; Nagata 1997; Brown 2009). Under Abdullah, the Islamization of public policies has had serious implications upon the religious liberties of other communities. If Mahathir's regime promoted statist Islamization as a strategy to undermine political contestations from within the Malay-Muslim community and also from the opposition parties, Abdullah employed Islam Hadhari as the organizing principles of in the formulation of public policy – the *Ninth Malaysia Plan*²⁷⁸. Socio-economic marginalization has been a longstanding issue of political concern for the minority ethnic Indians, but the emergence of HINDRAF has been particularly triggered by the unprecedented increase in the violation of civil rights. This relates to the cases of extra-judicial killings and deaths in police custody; forced Islamic conversion and the government sanctioned destruction of Hindu places of worship. These cases appeared to manifest steadily ever since Abdullah Badawi became Prime Minister and promoted the principles of Islam

²⁷⁸ http://www.parlimen.gov.my/news/eng-ucapan_rmk9.pdf

Hadhari (Civilizational Islam) as the fundamental framework for good governance, furnishing the strategy for national development in the 9th Malaysian Plan 2006.

HINDRAF claims that there's disproportionately higher percentage of ethnic Indians being imprisoned - 48% in 28 prisons nationwide²⁷⁹ - and the deaths among Indian detainees under police custody tend to be relatively higher compared to other ethnic groups, and in the extreme cases, some of families were left wondering how these bodies were returned to them battered conditions. These factors motivated lawyers, P. Waytha Moorthy, P. Uthayamoorthy, and M. Manohan representing HINDRAF, to issue a 'petition' to address the marginalization and exclusion of the Indian community. This process led to the lawsuit against the UK government on 31 August 2007 by P. Waytha Moorthy to demand US\$4 trillion claiming compensation for Indians brought to Malaya as indentured labour in the 19th century. This lawsuit was similar to the slavery compensation class actions in the US. The lawsuit also sought to obtain a ruling to strike out Article 153 of the Federal Constitution which allows for official discrimination of citizens through the granting of the 'Special Position' for the Malays and indigenous Muslim groups.

This dissertation argues that minority Indian community have been adversely affected by Article 121 (1A) over the destruction of the places of worship, forced conversion, child custody and burial. From February 2006 to June 2007, there were a total of 79 Hindu temples officially demolished in Malaysia, these included historic cultural heritages like the 80 year-old Sri Muthumariamman Alayam and the 100 year-old Maha Mariamman that were demolished by the authorities on the grounds of illegal structure (see Appendix I). Forced

²⁷⁹ 16 March 2010 *The Star*

Islamic conversions were extensive as in the case of S. Banggarna²⁸⁰, a Hindu woman who grew up in an orphanage was converted to Islam when she was five. Despite having been married in a cultural ceremony with a Hindu man, she couldn't register her marriage because of her legal status as a Muslim. In her children's birth certificate, the father's details were not available, making her looked like a single parent. Since apostasy is a criminal offence under Syariah, there's nothing much she or her husband could do to seek legal redress in such judicial lacuna. The issue of conversion also presents moral dilemma to Syariah lawyers as it is less likely for them to defend the act of apostasy.

Conversion to Islam gives legal leverage over child custody as in the case of Indira Gandhi, a kindergarten teacher whose husband of 17 years converted to Islam after some marital disputes. Without her consent, he converted all their three children into Islam, making it an uphill legal battle for her to be the legal guardian. Once these children become Muslims, they are required to study Islam at school and are subject to Syariah laws that prohibit Muslims from marrying outside the faith, and they are not allowed to participate in non-Muslim religious ceremonies²⁸¹. Even in death the Kuala Lumpur's Islamic Affairs Department is adamant about conducting Muslim burial. The most notorious one involved the said Department fighting over the dead body of Malaysia's first ever Mt. Everest climber, M. Moorthy over the rites of burial. The Islamic department claimed that M. Moorthy, born a Hindu, converted to Islam in hospital and became Mohamad Abdullah and therefore he must

²⁸⁰ <http://thestar.com.my/news/story.asp?file=/2009/11/20/nation/5148045&sec=nation> 20 November 2009, *Eight years on and woman can't register her marriage*.

²⁸¹ http://www.nytimes.com/2010/04/02/world/asia/02malay.html?_r=0 1 April 2010, *Malaysian Custody Disputes Lost Between Courts*.

be buried according to Islamic ritual²⁸². His Hindu family vehemently denied that he ever converted to Islam, but the Islamic department filed a petition at the Syariah court insisting the body for Islamic burial. Whilst the family asked for the same rights from the High Court, the secular courts had no jurisdiction over Islamic matters, and civil lawyers can not appear in the Syariah court because only Syariah qualified lawyers are allowed.

The above cases are some examples of how the judicial lacuna generated by Article 121(1A) further marginalized the Indian community, and there were many more similar incidents, albeit under reported, that have triggered the communal sense of anger directed at the policies of discrimination condoned by the government. As most Indians are trapped in urban poverty, many of those who were affected do not have legal access, let alone having the money to pay for legal representation. As the leaders of HINDRAF have credible legal background, they have been able to comprehend the severity of Article 121 (1A) and therefore were able to capitalize on the plight of the urban poor among the Indian community. Focusing mainly on the ethnic Indian concerns, HINDRAF remained active in raising issues of discrimination against the Indian and Hindu communities, and continued to appeal for legal and socio-economic redress.

Due to their political activism and grassroots appeal, HINDRAF has been monitored constantly by the authority and the office of the Human Rights Party that is linked to HINDRAF suffered periodic raids from the police. Because of this, the HRP office remained closed most of the time after the biggest police raid on 19 November 2007. Following the raid, and increasing rate of temples being demolished, a massive rally ensued on the 25 November 2007 in Kuala Lumpur (Belle 2008; Lee 2008; Lai and MD Sidin 2012). It was

²⁸² <http://www.asianews.it/index.php?l=en&art=4941> 22 December 2005, 'Religious Tussle' over Everest's Hero Burial

the biggest Indian ethnic protest in Malaysian political history²⁸³ and was violently repressed²⁸⁴. HINDRAF was banned and its organizers detained without trial. HINDRAF legal advisors, P Uthaya Kumar and Manoharan Malayalam along with 241 targeted participants were forced to plead guilty for organizing the rally²⁸⁵. The two legal advisors were subsequently detained under the ISA (Internal Security Act) for 514 days until 9 May 2009 when they were finally released. HINDRAF was declared an illegal organization and the Registrar of Societies refuses its application to be a registered society.

The lack of legal redress as a result of Article 121 (1A) has so far done the most damage to disempower the minority Indian community who have by far suffered socio-economic marginalization in the urban areas. HINDRAF activists have explained that as most of the rubber plantation estates that were legacies of the colonial period have now been converted into housing estates, industrial parks, golf courses and luxury homes. Hence most of the poor Indian workers migrated to the urban areas and the combination of inadequate compensation with poor education, they became the urban poor. Generational poverty seemed to affect many Indian families and with the current discriminatory policies on training and education reserved for the Malays Special Position, many Indian youths suffer from the lack of social mobility²⁸⁶. The long-term economic marginalization combined with the demolition of temples became the catalysts for the contemporary protests.

²⁸³ <http://www.malaysiakini.com/news/75315> 26 November 2007, '*HINDRAF protest: Special Report*' – a collection of journalistic and visual report stored in online archive.

²⁸⁴ <http://www.malaysiakini.com/news/75289> 26 November 2007, '*Fearless Indians Fights For Rights*'

²⁸⁵ 17 December 2010 *New Straits Times*

²⁸⁶ Interview with HINDRAF activist, Johnson Doss (May 2011) and Jayathas Sirkunavelu (June 2011)

The extent to which HINDRAF played the role of raising awareness of the Indian poor and provide a channel to express their anger at the erosion of their fundamental rights as citizens contributed significantly to the loses of the ruling *Barisan Nasional* (BN) coalition in March 2008. According to some analyses, there was an estimated 80% swing in Indian votes from the BN to the opposition during the General Election (Singh 2009). The protests had also played an instrumental role in the fall of four state governments to the opposition parties (Brown 2008; Bunnell, Nagarajan et al. 2010). Yet while religious markers were evident both in the events leading up to the main rally – particularly the destruction of Hindu temples – and evident in the name of the organization itself, the HINDRAF movement rapidly disassociated itself from a *religious* Hindu agenda and focused on *ethnic* Indian claims, such that both critics and supporters of HINDRAF now explicitly deny that the movement has any religious connotations. HINDRAF was declared an illegal organization in October 2008 by the Home Minister, Syed Hamid Albar²⁸⁷, and as a way of continuing the movement the Human Rights Party was then formed in 2009, shifting the political focus on the specifics of human rights violations against Malaysian Indians living in poverty and social marginalization²⁸⁸.

To understand the role of ethnic and religious dimensions of HINDRAF, it is necessary to take a look at the diversity of the Indian population within Malaysia. Originally considerable number of Indians migrating to colonial Malaya came as indentured labour for the plantation industry and to staff the colonial bureaucracy. The Indian labourers brought into Malaya were regulated by the Indian Government (Stockwell 1982). During the Great Depression and the economic hardship in Malaya, more than 870,000 Indian labourers left Malaya and since then the level of labour inflow into Malaya had remained low compared to the pre-Depression

²⁸⁷ <http://thestar.com.my/news/story.asp?file=/2008/10/15/nation/20081015184431&sec=nation>

²⁸⁸ <http://www.humanrightspartymalaysia.com/>

period. This was further compounded by the Indian Government's ban on assisted labour emigration and the selective immigration policy of post-war Malaya (Sandhu 2010). The relatively smaller number of Indians compared to the Chinese was one of the reasons why the scale of their political mobilization was not as considerable as the Chinese during the Communist Insurgency.

The Indian community is probably the most socially and religiously heterogeneous of the socially and religiously heterogeneous 'races' that make up Malaysia's multi-ethnic plurality. According to the 2000 census, around 85% of Indian Malaysians are Hindu, 7.4% Christian, and 3.9% Muslim; the remainder fall into much smaller categories such as Buddhist and Confucianism²⁸⁹. This religious diversity within the Indian community largely coincided with class divisions – the Indian brought to staff the civil services were largely Christianized, while the indentured labourers were overwhelmingly Hindu. These religious class division have largely remain intact over the post-colonial era, such that in 2000, Christian Indians were the most highly educated major ethno-religious group in the country with over 25% of 18-35 years old with university education in 2000; Hindu Indians were among the least well educated, with an equivalent figure of around 11%.

This division is largely representative of the original colonial migration policy, reinforced by the greater availability of education to Christian families through mission-backed schools. While for many decades after independence, less educated Hindu Indians were concentrated in the rubber-tapping plantation industry, the collapse of rubber prices in the mid-1980s and the concomitant shift toward less labour intensive palm oil has seen a substantial proportion of the Indian workers move to the city in search of employment, where they have come in

²⁸⁹ Data here are the authors' calculations from 2000 Census sample (IPUMS 2009)

some areas to constitute an urban underclass (Wilford 2006; Wilford 2008). The structural segregation of the education system has also played important role in arresting the social mobility of the Indian community settled in plantation estates. It has been argued that the present socio-economic predicament of the Indian poor is directly related to the historical development of the plantation estate environment (Colleta 1975; Ramachandran and Shanmugam 1995; Lee 2005)

Social discontent among urban Indians was for many exacerbated by their inability to access anti-poverty programmes under the pro-Malay affirmative action policies (NEP) that the BN regime has implemented since the early 1970s (Thillainathan 2008). This resulted in a growing perception among Indians – rich and poor alike – that Malay poverty was not tolerated by the government, but that Indian was a matter of little concern. Such has been the clear pressure from below on this that leaders of the Malaysian Indian Congress (MIC), the senior Indian party within the BN coalition, have on occasion criticized government policy and called for remedial pro-Indian policies (Ramasamy 2008).

The rising level of social discontent among the Indian community has been linked to the increasing instances of poverty, social marginalization and the recent cases of Hindu temples demolition by the government under the Abdullah administration. The HINDRAF and HRP are a collective civil movement that primarily focuses on targeting the political miscarriages of justice by the state. The chief claim of the movement is that the state has failed to address the perennial socio-economic marginalization of the Indian communities, fuelling the trappings of long-term deprivation that undercuts the prospects of social mobility particularly among citizens from the Indian community. The lack of higher educational opportunities, jobs training and employment are but a number of factors that have restricted the prospects of social mobility for the Indian community, forcing a substantial number to take up low paid,

insecure jobs and to live at the margins of urban development. In relation to these socio-economic deprivations, many Indian youths also face higher risks of becoming victims of custodial abuse and the extra-judicial killings by the police force in West Malaysia²⁹⁰. The above factors, combined with the official destruction of the places of worship under the Abdullah administration, un-investigated deaths in police custody²⁹¹ and the logjam of Islamic conversion issues, which time and again the court ruling upheld that that only a syariah (Islamic) court could decide on conversion issues and that the High court does not have the jurisdiction²⁹².

Among the Indian community, as well as sympathetic members of other communities, particular alarm was raised by a series of demolitions of Hindu temples that stood in the way of large development projects. Most, if not all, of these temples were built on ‘squatter’ land – land for which titles had never been issued and which was technically illegally occupied, albeit for more than fifty years of independence – and government figures claimed that the temple committees had been offered relocation compensation, which had been refused. This was nonetheless taken by many within and beyond the Indian community as clear indication of the ‘second class’ status of their religion – it was seen as utterly inconceivable that similar

²⁹⁰ ‘Malaysia activists sound alarm over extrajudicial killings’, 4 December 2010 <http://www.asiaone.com/News/AsiaOne+News/Malaysia/Story/A1Story20101204-250794.html>

²⁹¹ ‘Death of justice in police custody’, 4 February 2011 <http://www.tindakmalaysia.com/threads/2185-Police-Death-of-justice-in-police-custody>; ‘Kugan death in custody case: Cop acquitted of causing hurt’, 28 January 2011 <http://thestar.com.my/news/story.asp?file=/2011/1/28/nation/20110128095626&sec=nation>; ‘Making Kugan’s death matter’, 10 March 2009 <http://www.thenutgraph.com/making-kugans-death-matter/>

²⁹² ‘Conversion still a problem’, 15 December 2009 <http://www.thenutgraph.com/conversion-still-a-problem/>; ‘Malaysian Indian woman wants her conversion to Islam invalidated’, 4 August 2010 <http://www.sify.com/news/malaysian-indian-woman-wants-her-conversion-to-islam-invalidated-news-international-kierabicgbe.html>; ‘Conversion of minor to Islam in Malaysia: Wither consent of parents’ by Narizan Abdul Rahman in *Shariah Journal*, Vol. 16, *Special Edition* (2008), pp.585-602 http://umrefjournal.um.edu.my/filebank/published_article/2602/944.pdf

actions would have been taken against a mosque²⁹³. These have formed the necessary catalyst that brought the movement into the political limelight.

In the light of these factors the HRP and HINDRAF are particularly salient for the reassessment of the secular state in Malaysia on two important grounds. The first one is grounded in their attempt to employ the political language of human right- HRP's slogan of 'right not mercy' - to counter the burden of state Islamization upon the fundamental rights of citizens and the religious liberties of the Indian ethnic citizens. Secondly the rise of Indian activism in the form of HINDRAF and HRP represent an important political contestation that aimed at challenging the ways in which the Malaysian state selectively interpret the Constitutional provisions to justify the differential treatment of citizens. By challenging the selective and to a greater extent, the politicization of the interpretation of the Constitutional essentials, HINDRAF and HRP play an important role in informing the Indian community about the ideological source of discrimination underlining their empirical experiences of long term socio-economic marginalization and the restrictions on religious liberties. The HRP and HINDRAF challenge against the increasing Islamization of state policies exposed the lack of neutrality and equality when the official thinking behind the formulation of public policies is grounded in theological reasoning. These movements have used the universal ideas of human right²⁹⁴ to create awareness and counter the inconsistent claims made by the Malaysian state when it comes to the selective interpretation of these Constitutional essentials. The universal call for humanistic values of freedom, equality and justice constitute the ideological strategy to which these movements contest the process of the de-secularization of the state in Malaysia.

²⁹³ Interview, anonymous HINDRAF organiser, December 2008.

²⁹⁴ 217 (III) International Bill of Human Rights.

Throughout the political existence of the HINDRAF and HRP, and the political nature of its struggle, the media has tended to portray the HINDRAF in particular, as an organization grounded in somewhat insular political agenda with the sole aim of championing the rights of the Indian ethnic citizens. Despite HINDRAF's and HRP's overwhelming membership and support coming from the Indian community, the movements have addressed some elements of political values of human rights consistent with the values of freedom, justice and equality rooted in the modernist secular ideology of the post-Enlightenment era. However these aims have been interpreted as a challenge to the affirmative action policy of special citizenship that warrants the coercive use of force by the state in the name of maintaining national security.

Within the context of assessing the secular state in Malaysia, the political discourse of HINDRAF and HRP illuminates the negative impacts of the de-secularization process of the state practice particularly upon the religious liberties of minority Indian ethnic citizens in the contemporary period. The socio-economic marginalization and the ghettoization of the Indian community in both the urban and the rural areas in the Malaysian society have been linked to the effects of unequal treatments borne out of the National Economic Policies, privileging positive affirmative action for the Malays. However the repressive measures which the government employed in the destruction of the places of worship, the tightening of the legal scope for religious liberty and the escalating Indian deaths in custody are fairly recent, and these have become the main triggers for the massive peace protest rally that was participated by a huge wave of Indian ethnic citizens in Kuala Lumpur on the 25 November 2007. The media claimed that the protest rally was attended by a least 30,000 people but the HINDRAF organizers put an estimated figure of up to 100,000²⁹⁵. In October 2008, Hindraf was declared an illegal organization under Section 5(1) of the Societies Act by the Home Ministry.

²⁹⁵ 3 March 2011 HRP and HINDRAF briefing for foreign diplomats, K.L.

The justification for this was that HINDRAF had actively exploited the Indian community to participate in illegal assemblies and instigated street protests among the community to rise up against the government and promote hatred between the Malays and Indians²⁹⁶.

The shock collapse of the BN vote in the March 2008 election saw Manoharan and Uthayamoorthy both ran as candidates from prison and won; Sami Vellu, the previous political unassailable leader of the MIC who has controlled the party since 1978, lost his seat. The results signalled the end for Abdullah's administration, paving the way for his deputy, Najib bin Razak to assume the Premiership in April 2009. Temple demolitions stopped and the government began actively courting Indian grievances. At the same time, HINDRAF and HRP supporters and activists clearly began to steer clear of religious discourse, returning to the theme of ethnic marginalization.

In a separate but related theme of HINDRAF contestation against the de-secularization of the state, the movement played a significant role in challenging the Ministry of Education proposal for the controversial novel, *'Interlok'*, as the Malay literary text for Form Five students for the 2011 Malaysian Certificate Education examination²⁹⁷. *Interlok* (1971) is a Malay language novel written by Abdullah Hussain and it revolves around the story of three male characters – Malay, Chinese and Indian – and their families. Set in the early 1900' it narrates the meeting point of the three main ethnic groups through the characters of three men and the ways their lives 'interlocked' or intertwined during the Japanese Occupation. *Interlok* is a political novel in that it depicts the historical formation of the plural society in Malaya, the social relations structured in the context of ethnic division of labour and economic

²⁹⁶ 15 October 2008 *The Star* [Hindraf Declared Illegal](#)

²⁹⁷ This examination is the equivalent of GCSE exams for secondary students in the U.K.

livelihood and it ends with a multicultural narrative on nation building that cast the left-wing movement as nothing more than groups of bandits and thugs.

HINDRAF's public protest against *Interlok* saw the arrests of more than 500 people in Kuala Lumpur on the 27 February 2011²⁹⁸. Many of those who were arrested expressed deep concerns about the negative impacts of the novel upon how teenagers perceive others ethnicity and how these values are internalized in their daily interaction with others. HINDRAF's contention over the use of the novel for Secondary School text is that novel uses many terms of references that normalize racial stereotypes, including other turn of phrases that reify derogatory depiction of the cultural values of the Chinese and the Indian communities in particular. *Interlok* depicts the Chinese as ruthless swindlers, gamblers, with the readiness to sell their daughters in times of economic need. The Indian community is portrayed as cantankerous, violent, devious, and pariahs. The novel ascribes depraved behaviours to the immigrant community, for instance, the unethical Chinese businessman who likes to sleep with prostitutes (who also happened to be Chinese)²⁹⁹ and describing the anger of one Indian character akin to a 'mad pig'³⁰⁰. The Malays on the other hand are described as pious and their main weakness at the time was their general unwillingness to send their children to secular school, preferring instead for them to learn the Quran with religious teachers³⁰¹. The lack of literacy among the Malays made them easy victims at the hands of unethical Chinese shop owners – one of the reasons for losing their land ownership to the Chinese and became poorer³⁰².

²⁹⁸ The author was also arrested along with HINDRAF activists on the same day.

²⁹⁹ *Interlok*, p.146

³⁰⁰ *Interlok*, p.278

³⁰¹ *Interlok*, p.43-46

³⁰² *Interlok*, p.56

The novel does not celebrate diversity as some of its protagonists had claimed³⁰³. It locates people within their ethno-religious construction and develops their characters in their respective socio-value systems. The women tend to stay in the kitchens waiting to be married off, as in the case of the Malays, or in they are either described prostitutes or victims of rape among the non-Malays. Professors at UKM (*Universiti Kebangsaan Malaysia*) argue that the novel should be considered as literary text for the schools because of the merits of Islamic teaching it instilled in the Malay characters (Jusuoh and Bakar 2011). As a historical fiction, many of its characters are historicized in rigid ethnic identities and the values of the migrant communities have been represented in many ways at odds with the values of Islamic teaching. So this novel has the effect of polarizing the moral ethics of the migrant community from the virtuous and the authentic moral grounding of Islam. The novel ends with the destruction of the Communists' hideout, and the emphasis on the hopes of harmonious integration among the major ethnic communities.

Hitherto many public figures including the leader of the Opposition Coalition, Anwar Ibrahim did not think that *Interlok* contain racist elements as it depicted the social reality at the time³⁰⁴. Since the HINDRAF street rally against *Interlok*, public debate on the issue increased exponentially, it prompted the Education Minister to set up an independent panel of reviewers to evaluate the novel. Unfortunately the panel could not come to a consensus about the points for amendments³⁰⁵. In the meantime, an incident occurred at the Kuala Kubu Bharu secondary school, where a teacher made racist remark – *Keling memang Pariah (Indians are pariahs)* – against Form 5 students who refused the books as standard text in school. After

³⁰³ <http://smzakirsayapmatahari.blogspot.co.uk/2012/03/interlok-from-multiculturalism.html>

³⁰⁴ <http://www.themalaysianinsider.com/malaysia/article/interlok-novel-not-racist-says-scholar/>

³⁰⁵ <http://www.malaysiakini.com/news/158836> 16 March 2011, *Indian members quit Panel*

making a police report against the teacher, five Indian students from the same school and one ex-student were instead arrested for allegedly threatening the teacher³⁰⁶. Having had no money to pay their lawyers or bail of even RM 2,000 in the first place, they may be forced to plead guilty or face the prospect of a jail term of up to 7 years for making threats³⁰⁷.

The negative ethnic stereotypes promoted by the novel for literature curriculum does not contribute positively to the quality ethnic relations in the country. The risk of having the novel as the exam text for national examination is that students may be coerced into giving an 'officially correct' interpretation of the novel in their exam papers, as these will be assessed by the authorities marking the exam papers. Online petition and constant public pressure from NGO like NIAT (National Interlok Action Team)³⁰⁸ compelled the Education Ministry to drop the word '*pariah*' from the book³⁰⁹, whilst HINDRAF/HRP and other NGOs wanted the Ministry to drop the book from the education curriculum altogether. These societal pressures galvanized as the months went by³¹⁰ and the Education Ministry finally agreed to revoke the novel from the exam curriculum³¹¹

³⁰⁶ <http://thestar.com.my/news/story.asp?file=/2011/3/9/nation/8213453&sec=nation> 9 March 2011, *Students detained for questioning Interlok*

³⁰⁷ <http://www.humanrightspartymalaysia.com/2011/03/10/indian-students-arrested/>

³⁰⁸ <http://www.freemalaysiatoday.com/category/nation/2012/03/01/niat-all-set-for-bigger-battle/>
NIAT is an NGO that aims to improve the Tamil vernacular school system. Increasingly the debate about national vs. vernacular schools has intensified because of the creeping Islamization of the school curriculum in Malaysia.

³⁰⁹ <http://www.humanrightspartymalaysia.com/2011/03/24/pariah-dropped-from-interlok-says-muhyiddin-but-hrp-wants-interlok-book-revoked-see-malaysiakini/>
24 March 2011

³¹⁰ <http://goodtimes.my/index.php/Education/textbooks-the-issue-is-balance.html>

Textbook: The Issue is balance

³¹¹ <http://thestar.com.my/news/story.asp?file=/2011/12/17/nation/10116907&sec=nation>
17 December 2011, *Interlok novel to be dropped*

7.6.3 'Mak Nyah'- challenging the Syariah court on sexuality in Malaysia

The legal contestation against the ban to use 'Allah' and the political rise of HINDRAF/HRP both reflect the ideological as well as the empirical dimensions that are symptomatic of process of the de-secularization of the state following the introduction of Clause 1(A) to Article 121 in the Federal Constitution in 1988. The reorganization of public policies and the restructuring of the dual-legal systems grounded in the comprehensive doctrine of Islam have had powerful impacts upon public perceptions of what's morally defensible in politics and what constitutes 'threat' to national security. In the Malaysian political culture, one of the most serious threats to national security is communism and the Emergency Ordinances have consistently been used by the government to detain political activists and religious dissidents without recourse to justice. In the recent experience, homosexuality has become the latest threat, not only to national security but more importantly, the moral fibre of the Islamic community.

Dissenting political ideology and homosexuality have now captured the political imagination of those in power and these are being portrayed as the contemporary crises to the social order that necessitate legal and moral policing over the behaviours of public and private citizens. The high profile public figure that was subject to the legal-moral policing is Anwar Ibrahim, an ex-Deputy Prime Minister to Dr Mahathir Mohamed, who was incarcerated in 1998 for Sodomy. Sodomy is categorized as *Unnatural Offences* under penal code 377A, 377B and 377C³¹². Anwar Ibrahim was sentenced to six years in prison for corruption, and in 2000,

³¹²377A – 'Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature'.

377B – 'Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping'.

sentenced for nine years for committing sodomy. In 2004 the Federal Court reversed the second conviction and he was released. Anwar was again arrested in July 2008 over allegations of sodomy by his male aide, Mohd Saiful Bukhari and after 4 years of botched trial, he was finally acquitted³¹³. The sodomy saga was again politicized under the administration of Najib Tun Razak. The day that the Malaysian State of Sarawak dissolved the legislative assembly 21 March 2010, a sex tape implicating an ‘Anwar’ look-alike emerged, and there have been reports that these images were distributed to the voters in Sarawak to discredit Anwar Ibrahim, who is currently the leader of the Pakatan Rakyat opposition coalition³¹⁴.

Under Najib’s administration, the moral discourse on ‘sex’ enters into the political mainstream as a new threat to public order. Whilst the sodomy trial and the sex tape were deliberate strategies to tarnish Anwar’s political image and his moral credentials as a leader of Islamic nation, the moral panic about sex and sexuality has now prompted the state institutions, particularly the religious departments to expose the sexual minorities as morally corrupt, leading to the widespread increase in homophobic attacks and the dehumanization of their rights as citizens. A movement for the LGBT community, ‘*Seksualiti Merdeka*’³¹⁵ has

377C - Whoever voluntarily commits carnal intercourse against the order of nature on another person without consent, or against the will of the other person, or by putting the other person in fear of death or hurt to the person or any other person, shall be punished with imprisonment of a term of not less than 5 years and not more than 20 years, and shall also be liable to whipping. *Laws of Malaysia, Penal Code, Incorporating all amendments up to January 2006*
<http://www.agc.gov.my/Akta/Vol.%2012/Act%20574.pdf>

³¹³ ‘Anwar Ibrahim acquitted of sodomy in Malaysia’, 9 January 2012, <http://www.bbc.co.uk/news/world-asia-16463989>

³¹⁴ ‘Sarawak polls: Is BN afraid of Pakatan?’, 3 April 2011, <http://www.barubian.net/2011/04/sarawak-polls-is-bn-afraid-of-pakatan.html>

³¹⁵ **Seksualiti Merdeka** is an annual sexuality rights festival held in Kuala Lumpur, and represents a coalition of Malaysian NGOs (incl. Malaysian Bar Council, SUARAM, Empower, PT Foundation, United Nations, Amnesty International) and individuals. It aims to empower individuals from the LGBT community to celebrate their identities through arts, workshops, music and films

been organizing annual public awareness events since 2008 to promote awareness, empowerment and platform to restore the human rights of the LGBT community in Malaysia. However under Najib, the government crackdown on the LGBT community and *Seksualiti Merdeka* has portrayed the LGBT community as a problematic subculture that is detrimental to the Malaysian society. Homosexuality is publicly condemned by the Islamic authorities, putting the blame on ‘choice of lifestyle’ as a deliberate moral attack upon Islam and the Muslim nation (Negara Islam). The official demonization of the LGBT community justified repressive actions upon them resulting in the further erosion of their rights as equal citizens and to seek decent livelihood. On 3 November 2011 the police banned all events organized by *Seksualiti Merdeka* after receiving complaints from a Malay right wing organization, PERKASA that the event was promoting ‘abnormal and immoral activities’. The reason given by the Deputy Inspector General of Police was, ‘If the event creates uneasiness among the vast majority of the population, it may result in disharmony, enmity and threaten public order’,³¹⁶

The festival organizers were taken into police custody for question under Section 298A1 of the Penal Code³¹⁷ and under Section 27A (1)(c) of the Police Act³¹⁸. Following the ban,

<http://www.seksualitimerdeka.org>; <http://www.seksualitimerdeka.org/p/identifying-your-sexuality-gender.html>

³¹⁶ <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/545-1.pdf>

³¹⁷ Causing, etc, the disharmony, disunity or feelings of enmity, hatred or ill will or prejudicing etc., the maintenance of harmony or unity on the grounds of religion – Section 298(A) (1) Whoever by words, either spoken or written or by signs or by visible representations or by any act, activity or conduct, or by organizing, promoting or arranging, or assisting in organizing, promoting or arranging any activity or otherwise in any one manner. . *Laws of Malaysia, Penal Code, Incorporating all amendments up to January 2006* <http://www.agc.gov.my/Akta/Vol.%2012/Act%20574.pdf>

³¹⁸ **27A.** (1) Where any activity takes place on or in any land or premises which do not constitute a public place and—

(c) the activity is likely to be prejudicial to the interest of the security of Malaysia or any part thereof or to excite a disturbance of the peace, any police officer may order the persons involved in the activity

organizers of the event filed a judicial review application with the aim to challenge police ban in December 2011³¹⁹. The police ban was upheld by the High Court, and Judge Rohaha Yusuf maintained that, ‘The police are empowered under Section 27 of the Police Act to stop an event for investigation purposes,’ adding that, ‘The country will come to a standstill if everyone wants to call for a review of actions taken by the police’³²⁰

Since the condemnation of homosexuality is sanctioned by the Malaysian government, the public ridicule of sexual minorities became normalized and accepted. Citizens from the LGBT community are witnessing the rapid erosion of their fundamental liberties in the country³²¹. There are now increasing public hostilities to sexual minorities to the extent that members of 47 Islamic NGOs protested in front of the National mosque condemning the UN Resolution to outlaw discrimination against gay people³²². Some MPs even proposed on a motion in Parliament to bar LGBT people from holding high office as MPs and senators³²³. Some of the Muslim NGOs went as far as accusing *Seksualiti Merdeka* of undermining Islam and therefore challenging the sovereign role of the Malay King who protects the religion. They have also charged that the LGBT is against Syariah principles and urged the police to

to stop the activity and may order all persons found on or in or outside the land or premises to disperse. *Laws of Malaysia, Act 344, Police Act 1967*, Incorporating all amendments up to January 2006 <http://www.agc.gov.my/Akta/Vol.%207/Act%20344.pdf>

³¹⁹ ‘Seksualiti Merdeka judicial review decision on 1 March 2012’, 21 February 2012, <http://www.nst.com.my/latest/seksualiti-merdeka-judicial-review-decision-on-march-1-1.49984>

³²⁰ ‘Malaysian Court Upholds Ban on Sexuality Rights Festival, "Seksualiti Merdeka"’, 9 March 2012 <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/1497.html>

³²¹ ‘Malaysian states to punish homosexuality’, 11 November 2011 <http://www.guardian.co.uk/world/2011/nov/11/malaysian-states-to-punish-homosexuality>

³²² ‘Demo against UN Resolution on human rights of LGBT’, 2 March 2012 <http://www.mmail.com.my/story/demo-against-un-resolution-human-rights-lgbt>

³²³ ‘Muhyiddin: Counselling can curb LGBT threat’, 5 April 2012, <http://www.malaysiakini.com/news/194177>

take actions against such unacceptable lifestyles³²⁴. Anti-gay sentiments have permeated into the public imagination now that some Malay NGOs, especially *Jaringan Melayu Malaysia* (JMM) is collaborating with the parent-teacher associations in the Malaysian State of Selangor to stage a peaceful assembly rally to oppose 'LGBT and free sex practices'. The JMM president Azwanddin Hamzah gave the reason that the assembly was aimed at objecting the LGBT community who are compromising religion for political interests³²⁵.

Islam seems to have become the cure-all remedy for all sorts of public disorder, including homosexuality, in the Malaysian public political culture, and apart from requiring surveillance from the public authority, there's been a repetitive invocation of Islam as the ideological benchmark to restore the nation to an imagined moral order against the tide of decadent Western values. This includes the language of human rights, where its prospects for liberal interpretation are considered to be a moral threat to sanctity of Islam and its civilization. Under Malaysian law, sodomy is legally categorized as *unnatural offence* and subject to criminalization, this piece of legislation actually gives purchase to right-wing and anti-gay groups to normalize sexual stigma, hetero-sexism and sexual prejudice in the public discourse. Prominent leaders of the opposition front, notably Anwar Ibrahim and other civil society groups who happened to have links with the LGBT or *Seksualiti Merdeka* will have their leadership credentials tarnished in an increasingly homophobic public discourse. Hence in this climate of government crackdown on the notion of unnatural sexual liaison, particularly from the police and the Penal Code system, official discrimination against the LGBT community increases the risks of sexual minorities being attacked in the public space, not least officially violating the fundamental liberties of citizens.

³²⁴ Perkasa: Act against Ambiga, the 'antichrist', 2 November 2011, <http://www.malaysiakini.com/news/180332>

³²⁵ 'Assembly to speak out against immoral culture', 8 April 2012 <http://www.nst.com.my/nation/general/assembly-to-speak-out-against-immoral-culture-1.71966>

The Deputy Education Minister, Dr Mohd Puad Zarkashi launched a parenting guideline on how to handle the issue of LGBT in May 2012, stating,

‘It is important for parents and teachers to understand this because the wayward practice is akin to an epidemic that may spread and become cancerous in the society. It is a threat that will invite negative impact and spoil the fabric of the society in the country. This is a culture that does not reflect our values and must be addressed before it spreads further. The culture is like drugs, if the children are not introduced to it, they will not try it out’³²⁶

Few months later the Education Ministry introduced official “guidelines” to help parents to identify gay and lesbian symptoms in their children so they can take early corrective measures.

The guidelines list four symptoms each of gays and lesbians³²⁷:

Symptoms of gays:

- Have a muscular body and like to show their body by wearing V-neck and sleeveless clothes;
- Prefer tight and light-coloured clothes;
- Attracted to men; and
- Like to bring big handbags, similar to those used by women, when hanging out.

Symptoms of lesbians:

- Attracted to women;

³²⁶ <http://www.nst.com.my/nation/general/call-to-educate-kids-on-lgbt-issues-1.88046>

26 May 2012, *Call to educate kids on LGBT issues*

³²⁷ <http://www.freemalaysiakini2.com/?p=46392> 22 October 2012, *Guidelines to identify symptoms of gays and lesbians published*

- Besides their female companions, they will distance themselves from other women;
- Like to hang out, have meals and sleep in the company of women; and
- Have no affection for men.

The guide was published by Yayasan Guru Malaysia Bhd (Teacher Foundation of Malaysia) and the Putrajaya Consultative Council of Parents and Teachers Associations. In response to the Ministry's guidelines, social activists and netizens came online to organize V-neck day public gathering on 1 October 2012. According to the event's *Facebook* page, more than 2,000 people have agreed to don V-neck T-shirts in the event organised through the social media, where a restaurant in Kuala Lumpur offered free meals for customers who turned up wearing V-neck T-shirts³²⁸. As the issue of LGBT heats up, the Vice-President of the Muslim Lawyers Association of Malaysia, Azril Mohd Amin, made a statement that LGBT rights should be excluded from the human rights declaration currently being drafted by Association of Southeast Asian Nations (ASEAN). He wrote that,

Were ASEAN to endorse such rights in the final declaration, Malaysia as a Muslim-majority country would have to reiterate her strong objections; as such a policy clearly contradicts the principles enshrined in the religion of Islam. Malaysian and those who are against LGBT rights are thereby protecting the human race from the secular fallacy, perpetrated by the United Nations, that human beings may do as they please, within their so-called "sovereign borders" (as laid down by the European powers)³²⁹.

³²⁸ <http://www.freemalaysiakini2.com/?p=48764>

³²⁹ <http://www.malaysiakini.com/letters/208463>, 10 September 2012, *LGBTIQ rights should be excluded*. <http://www.gaystarnews.com/article/malaysia-lawyer-says-lgbt-rights-should-be-excluded-human-rights-declaration120912>

The concept of secular in this context is understood as a doctrine that endorses the acceptance of homosexuality, and as homosexuality is a sin and a threat to human reproduction in the Islamic understanding, the denial of basic rights to the people belonging to the LGBT community is justified on the grounds of religious doctrine. Religious doctrine is used as a way of controlling human behaviour and sexuality as Foucault has demonstrated the role of the pastoral power in shaping the moral conducts of its believers (Golder 2007). In the Malaysian case, Islamic religious doctrine is applied as a form of policing the moral conducts of the believers both in the private domain of the family unit as well as the conduct of the *Umma* in the public discourse. The legal criminalization of sodomy and the assumption of guilt through political association with homosexuality have become strong enough grounds for the government authority to reciprocate the religious castigation of homosexuality in the form of public Syariah law.

This dissertation argues that denial of legal rights is most evident among the transgender community because of their physical appearance. In *'The Struggle to be Ourselves, neither man nor woman: Mak Nyahs in Malaysia'*, Khartini Slamah describes how the *Mak Nyahs* in Malaysia are probably the most discriminated sexual minorities within the LGBT community. *Mak Nyahs* are male by birth and are essentially effeminate, but this is not the main signifier of the identity of *Mak Nyahs*. Instead *Mak Nyahs* choose to express themselves across the spectrum of gender and sexuality – interchangeably as women or as men in different contexts, hence cross-dressing is part of this expression as well (Khartini 2005:100). In 1983 the Conference of Rulers in Malaysia issued a *fatwa* (decree) banning sex change operation on all Muslims, except for conditions of hermaphrodite or medically known as 'intersexuality' (Teh 2002). Subsequently, cross-dressing was also prohibited under Syariah enactments. Muslim *Mak Nyahs* can be fined up to RM 1,000 (approximately 200 Pounds) for exhibiting 'indecent

behaviours' under the Syariah Criminal Act (Federal Territories) 1997, and/or imprisoned³³⁰, whereas non-Muslim transsexuals, the fine for 'indecent behaviour' is less severe, usually less than RM100 (20 pounds).

Khartini (2005) argues that discrimination in the employment sector is one of the most detrimental experiences for many *Mak Nyahs* because they failed to fit into the heterosexual norms and expectations at the workplace. In many cases, they ended up working in casual employment, entertainment outlets, massage parlours, and also prostitution, where the risks of abuse, physical violence and sexual transmitted diseases tend to be higher (Teh 2008). Due to the insecure environment of their livelihood, the *Mak Nyahs* face increasing threat of arrests, detentions and also punishments from the police and particularly from the Islamic religious department. In Teh's (2002) study of the social lives of *Mak Nyahs*, the author shows that more than half of the respondents had been caught by the police, and they are more likely to face repeated arrests because of their existing records with the authorities. The study also revealed that the main reasons that they had been caught by the police were for cross-

³³⁰ *Laws of Malaysia, Act 559, Syariah Criminal Offences, (Federal Territories) Act 1997, Incorporating all amendments up to 1 January 2006*

Male person posing as woman Section (28) - Any male person who, in any public place, wears a woman's attire and poses as a woman for immoral purposes shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding one year or to both.

Indecent acts in public place Section (29) - Any person who, contrary to Islamic Law, acts or behaves

in an indecent manner in any public place shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.

dressing (33%), indecent dressing (18%) and prostitution (16%), failing drug tests (13%), during a police raids or operations (10%), and for loitering late at night (6%)³³¹.

When *Mak Nyahs* are detained at the police stations, Khartini explains that they will be stripped of their women's clothing and humiliated in front of other people, locked up with other men, subjecting them to further humiliation and sexual violence by the inmates. Other harassments include invitation to have sex, forced to change their religion, had their hairs cut short, their breasts and private parts assaulted. Most of the *Mak Nyahs* face continuing harassments and humiliation at the hands of the police and the Islamic authorities, and it is because of the cumulative effects of these official violations of rights, they have now instigated legal challenge against the Syariah law on the criminalization of 'Cross-dressing'. Four *Mak Nahs* in Seremban have recently been granted leave to challenge the criminalization of cross-dressing stated under Section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992³³². Enactment 4 of 1992 (Section 66) criminalises any male person who "wears women's attire" or "poses as a woman", and as citizens of Malaysia, they argue that this penal code is inconsistent with various fundamental liberties guaranteed by the Federal Constitution of Malaysia, including: (i) Article 5(1) which protects the right to live with dignity, the right to work and livelihood and the right to privacy; (ii) 8(1) which guarantees the right to equal protection of the law; (iii) Article 8(2) which prohibits discrimination on a

³³¹ Jeffrey Jessie: Recognising Transsexuals by Honey Tan Lay Ean 17 November 2005 http://www.malaysianbar.org.my/gender_issues/jeffrey_jessie_recognising_transsexuals_by_honey_tan_lay_ean.html

³³² 'Four get leave to challenge law barring cross-dressing', 5 November 2011 <http://www.freemalaysiakini2.com/?p=1372>

number of grounds, including “gender”; (iv) Article 9(2) which protects the right to freedom³³³ of movement; and (v) Article 10(1)(a) which protects the right to freedom of expression³³⁴.

In their application to the High Court of Malaya for the judicial review of Section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992, the four *Mak Nyahs* sought to challenge the restrictions on Cross dressing through the legal avenues provided in the Federal Constitution³³⁵. The claimants have been repeatedly arrested, detained and charged for offences under the Syariah law because of the choices they have made about how they want to express themselves, and the fact that they trapped in low-skilled jobs that expose them to social stigma and risks of physical violence. The original work of the Equal Right Trust (ERT 2011) in documenting the testimonies by the claimants can be referred in the Appendix II, and are reproduced to demonstrate how the de-secularization of the state combined with the juridical autonomy of the Syariah contributed to the erosion of fundamental liberties among Muslim transgender women.

In order to understand the legal context in which these *Mak Nyah* attempted to overcome the jurisdictional conflict between the Civil Courts and the Syariah, it is important to briefly understand how the Syariah laws are enacted and applied differently in each Malaysian state.

³³³ These testimonies are included here because they are important insights into the subjective experiences of the *Mak Nyahs*, and as they face the risks of discrimination daily, it is very difficult to gain access to them. This is the main reason for the author to reproduce the work of Equal Right Trust, in support of the argument of the dissertation.

³³⁴ This is an EU-funded project initiated by the Equal Right Trust in Malaysia, entitled “Empowering Civil Society to Combat Discrimination through Collective Advocacy and Litigation”. ERT has been made aware of the discrimination faced by the Malaysian *mak nyah* community. ERT is currently providing international and comparative law research in support of a judicial review case in which four *mak nyahs* are challenging the constitutionality of the Syariah (Shari’a) law prohibition on cross-dressing. http://www.equalrightstrust.org/equality_malaysia/index.htm

³³⁵ IN THE HIGH COURT IN MALAYA AT SEREMBAN IN NEGERI SEMBILAN DARUL KHUSUS, MALAYSIA

APPLICATION FOR JUDICIAL REVIEW NO: 13-1-2011

http://www.tanjongbunga.com/website/pdf/statement_court.pdf

The administration of Syariah is regulated by the Administration of Islamic Law Enactments where the Sultan in each Malaysian state is the Head of the religion of Islam. For the Federal Territories of Kuala Lumpur and Labuan, and the Malaysian states without Sultan – Sabah, Sarawak, Penang and Melacca, the Yang di-Pertuan Agong or the King is the Head of the religion of Islam. There is a Council of Muslim Religion to advise the rulers on all Islamic matters except Syariah and the administration of justice, and the Ruler is empowered to appoint a *Mufti* or the ‘lead scholar’ of Islam in each Malaysian state to oversee the administration of Syariah and Fatwa. There is the National Islamic Consultative Committee to standardize the issuance of Islamic *Fatwa* or edicts, but each Malaysian state has established its own Fatwa committee pursuant to their respective Administration of Islamic Law Enactments³³⁶, having absolute autonomy over Islamic matters and therefore not bounded by the National Islamic Consultative Committee. Generally all Muslim residents are obliged to observe the *Fatwa* once it is issued and such edict is normally recognized as an authority in Syariah Courts.

The jurisdiction of Syariah Courts is specified in the item 1 of the State List³³⁷ in the Constitution’s Ninth Schedule. Syariah Courts have jurisdiction over all Muslims in respect to the various matters listed in item 1, except for criminal offences, whereby the power to define criminal laws remains within the ambit of the secular courts by virtue of the Constitution’s Federal List. Syariah Courts have jurisdiction on offences committed by Muslims only on those conferred by the Federal law. Normally the criminal jurisdiction of the Syariah Courts is limited to religious offences where the scope of punishment does not

³³⁶ Administration of Islamic Law, *Supra* note 26, at 266; Powers and Jurisdictions, *Supra* note 1, at 44

³³⁷ This refers to the List II of the State List where the Islamic laws and obligations relating to personal faith, family laws, and all other matters pertaining to the social welfare of the Muslim communities will be supervised by the Islamic laws enacted within the individual Malaysian state. Federal Constitution (2002)

exceed three years imprisonment, a fine not exceeding RM 5,000, or whipping not exceeding six strokes, or any combination thereof.

The amendment of Article 121 in 1988 (with the addition of section 1A) extended the provision where the Civil Courts have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts, where the purpose of was to deter litigants appealing Syariah Court decisions to the High Court (Smith 2003-2004). The addition of the new clause, section 1A to Article 121, the interpretation of justice will tilt in favour of the conception of differential rights on the grounds of religion, thus deterring these *Mak Nyah* from ever having the legal remedy to challenge kinds of discrimination and violence they face from the religious police and the public.

On the 11 October 2012 the Seremban High Court dismissed application by four transgender individuals to challenge the ban on Muslim men to dress and pose as women under Section 66 of the Syariah Criminal (Negeri Sembilan) Enactment. The four applicants, Adam Shazrul Mohammad Yusoff, Mohammad Juzaili Mohammad Khamis, Shukur Jani and Wan Fairol Wan Ismail, had appealed for judicial review of Section 66 of Islamic Sharia law at the secular court on the grounds that Section 66 violated the Federal Constitution on the freedom of expression and therefore unconstitutional. Justice Siti Mariah Ahmad, in her judgment, said that it was undisputed that the four applicants were Muslims and hence Section 66 applied to them³³⁸. According to the Judge, Part 2 of the Federal Constitution, which guarantees fundamental liberties to an individual, is exempted from the Negeri Sembilan Syariah penal code Section 66. The immediate implication of this judgement sets the precedent for the juridical autonomy of the Syariah court that denies the rights and liberties of

³³⁸ <http://www.freemalaysiatoday.com/category/nation/2012/10/11/transgenders-lose-bid-to-challenge-dress-ban/> 11 October 2012, *Transgenders lose bid to challenge dress ban*

all citizens guaranteed under the Federal Constitution. There is also the increased risk of Mak Nyahs being persecuted by the religious authorities as a result of this judgment. This fear is expressed by the Malaysia AIDS Council (MAC) media and communications head Azahemy Abdullah,

‘We fear that this judgment could lead to increased stigma as well as acts of persecution and discrimination by authorities, especially from the enforcement officials of the religious department’³³⁹

The de-secularization process involving the judicial lacuna that emerged from the amendment of Article 121 (1A) not only led to the erosion of the rights of citizens from the minority communities, but the increasing strength of Islamic moral discourse in the public political sphere indirectly tip the interpretation of law in favour of securing the religious doctrine of public morality over the concept of natural justice and the duty to act fairly.

7.7 Conclusion

This is not the first time that citizens from the sexual minorities have tried to overcome both the legal and bureaucratic restrictions that are undermining their fundamental liberties. The high profile case prior to this one involved a *Mak Nyah* by the name of Aleesha Farhana who had applied to the court to change her name from Mohd Ashraf Hafiz Abdul Aziz to Aleesha Farhana Abdul Aziz. On 18 July 2011 the High Court rejected her application despite the fact that she had undergone a sex reassignment surgery. In less than a month after that she passed

³³⁹ <http://www.mmail.com.my/story/mak-nyah-witch-hunt-fear-34148> 19 October 2012, *Mak Nyah witch-hunt fear*

away³⁴⁰. The High Court judge, Mohammed Yazid Mustafa rejected the application on the grounds that there was no legal statute to grant the application based solely on sex reassignment surgery and that the applicant did not meet the criteria for being a woman – chromosome count, and exterior and interior organs. He further said that, ‘In making my judgment, I have to take into account the legal impact as well as whether a decision would confuse the public’³⁴¹.

Changing name and gender does not only involve the court, but also the hospital and the National Registration Department where MyKad or Malaysian Identity Cards are issued. Muslim Malaysians will have ‘Islam’ written on the MyKad to show their religion and the National Registration Department has been very restrictive on making technical changes to gender and religion³⁴². The institutional barriers combined with the ideological underpinning of Islamic moral codes are indicative of the substantial process of de-secularization of the state apparatus, practice and official thinking in the Malaysian contemporary discourse. It has now come to a point where the ‘ideal’ of Islam- as a way of life, as a way of governing and as a way of organizing the public moral discourse - supersedes the fundamental recognition of the right to decent living, equal opportunities, and most importantly the right to justice for all citizens.

³⁴⁰ Official statement from the Malaysian Trans community on Aleesha Farhana’s application to change her name and gender, 1 August 2011 <http://www.seksualitimerdeka.org/2011/08/court-must-allow-trans-people-to-change.html>

³⁴¹ SEX CHANGE OP NOT ENOUGH FOR GENDER CHANGE, SAYS JUDGE, 19 JULY 2011

<http://thestar.com.my/news/story.asp?file=/2011/7/19/courts/9128957&sec=courts>

³⁴² ‘No change in MyKad, says department’, 20 July 2011

<http://thestar.com.my/news/story.asp?file=/2011/7/21/metroperak/9139213&sec=metroperak>

Islam has increasingly become the main organizing principles in the way justice is dispensed, socio-economic rights are negotiated, and public deliberations are conducted. Understanding the ideological effects of statist Islamization upon the fundamental rights of the Malaysian citizens provides critical insight into the empirical likelihood for liberal conception of justice. So far the three empirical cases have shown that the Malaysian government failed to allow for generous interpretation of the Constitutional provisions that are vital to the growth of liberal democratic participation. The evidence of state repression in the forms of word censorship – ‘Allah’, institutional discrimination and the homophobic abuses suggest that the conception of justice is broadly understood to rationalize dominance of Islamic thinking in the Malaysian public political culture.

Statist Islamization, in other words, state-sponsored Islamization is directly correlated to the process of the de-secularization of the state. This process has had discursive impacts upon how official reasoning can influence the ways in which coercive state power is used for the purpose of political legitimacy. The three cases show how state practices that are motivated in theological reasons have been detrimental to the conception of equality and justice for all. The existence of selective laws to protect the historically dominant ethnic-religious provisions has led to the structuring the official policies of discrimination (whether intentional or not) against citizens from the minority backgrounds – religious, ethnicity and sexuality, further eroding the fundamental liberties of citizenship. The process of the de-secularization of the state has been largely driven by the political will to power and the ideological content to this dynamic has been furnished by the Islamic precepts, to the detriment of the rights of non-Muslims, and the LGBT community. Nonetheless, the three cases have shown incredible awareness to galvanize contestations that are not only vital to stem the further de-secularization of the state in Malaysia, but to create the conditions for locating the prospect of

common citizenship. There's hope yet for the emergence of an overlapping consensus whereby public deliberation will be motivated by publicly shared reasons in which citizens are regarded as free and equal. As long as these contestations remain organic, state legitimacy that rests on theological reasons and ethnic bargaining will be challenged.

8 CONCLUSION

8.1 Further reflections on the secular-Islamic discourse

“I have a dream. I want Malaysia to remain an Islamic country. Let us create history by becoming the first Islamic country to achieve the status of a fully developed nation. Islam is manifested in several forms as seen in the country’s economic and social development, Islamic institutions and politics. We have not strayed or diverted from the path of Islamic teaching. Nobody can belittle the Islamic faith and conscience as they please, because we have specific laws to safeguard them. Nobody can even chaff any Islamic term as we have a law to stop them, and this is what the government has struggled for all the time. When Muslims embrace moderation (*Wasatiyyah*), there would be unity among the *Umma* and with those from other religions. When we achieve this, the administration of the country would go smoothly and Malaysia would progress further”

(Najib Razak, PM Malaysia at the Putrajaya International Convention Centre, 7 April 2012, *NST*)

Islam, *Umma* and the law are the ideological markers that have become dominant in controlling the Malaysian public political discourse. Islam as a government-sponsored religious ideology is consistently being invoked by UMNO (United Malays National Organization) to draw political support among the Malay-Muslim believers or the *Umma*, where the law is used to dictate the conduct of citizens from questioning the political exploits of the party. The obligation to support UMNO is predicated on the risk of Malay-Muslims losing their special citizenship rights and this is continually politicized so that other political

ideologies do not appeal to the interest of the *Umma*. Such ideological ransom is aimed at both cultivating gratitude and eliciting guilt among the *Umma* to continue submitting to the political legitimacy of UMNO to protect their historically dominant political position with the power of the state to command the resources of the country.

The public justification for the protection of the special citizenship right is historically grounded in the traditional authority of the Malay ruling elites nurtured by British colonialism, and this continues to furnish the official ideology of the contemporary Malaysian government. The special citizenship right for the Malays was grounded in the belief that such legal protection was needed to secure their socio-economic well-being and future progress. This ideology underlined the official thinking in problematizing the issues of poverty and set the terms of ethnic bargaining framed in the New Economic Policy of the 1970's. Along with the politics of ethnic bargaining, Islamic moral discourse gradually dominated substantial aspects of public policy formulation in response to the Islamic revivalist and civil society movement in the 1980's. Islamizing the public sphere was instrumental to regulating the role of faith in politics, and this was justified through public investment on religious institutions and the strengthening of the Islamic legal apparatus. Following the amendment to the Article 121 of the Constitution, the role of Islamic precepts was repositioned in the governmental apparatus to expand the juridical autonomy of the Syariah legal system. As a result of such political-legal development, Islam becomes the object of political struggle in the contemporary public political culture.

When Islam becomes the reason for and the object of political struggle, as in the Malaysian case, political deliberations then developed into a series of self-reinforcing statements that cannot be disproved or challenged because they are grounded in the doctrinal truth claims about Islamic moral precepts. The political obligation to accept the sanctity of Islam as both

the reason for a particular governmental conduct or a public policy in order to achieve the civilizational purpose of Islam, other matters that concern the conditions of human living and experiences will be relegated to secondary concerns. Political legitimacy grounded in the truth claims about Islamic doctrine does not celebrate diversity as the government is more inclined to impose Islamic morality and ethics through coercive laws.

The dominance of Islamic precept and its position as the official religion of the Federation is an accepted condition for the viability of pluralism in the Malaysian public political culture. The elevation of the rights of the *Umma* through the principle of special citizenship right underlines the criteria for political stability. It shapes the politics of ethnic bargaining; public policy making and frames the political perimeter for the conduct of citizens in the public political culture. Having said that, these ideological markers are equally subject to contestations because of how citizens respond to the changing conditions of their freedom through the exercise of reason. It is this form of contestation between the dominance of ideological markers linked to Islam and the alternative mode of secular thinking that constantly characterizes the nature of state practice and how it informs political engagement in the Malaysian condition of pluralism.

The conceptual dynamics between the Islamic and the secular in Malaysia illustrate how Islam has become instrumental to organizing the principles of state power. What Rawls defined as the 'plurality of conflicting reasonable comprehensive doctrines' (Rawls 1997:766) captures a broad stream of competing claims of right which can be employed to critically unpack the domain of activism that problematizes the conduct of the state and the citizens in the Malaysian context.

The main contention of this dissertation is to capture the process of the de-secularization of the state and explain how it contributes to the erosion of fundamental liberties of citizens in a condition of religious pluralism. It traces the conceptual understanding of the 'secular' in the Malaysian political context and analyses the 'secular' in relation to the historical agency of Islam in the public political domain. The dissertation has come to the conclusion that as Islamic moral precepts are institutionally adopted to be part of the legal apparatus in the Malaysian society, adjudication of citizenship rights becomes bifurcated along the lines of religious backgrounds. The three cases have shown how such bifurcation of citizenship rights has had their ideological and empirical implications, thus prompting the need to reassess the benefits of restoring the elements of secular thinking in the practice of governance.

The privatization of religious belief rests on the assumption that secularization as a process of differentiation in the modern age diminishes society's reliance upon religion as a public institution. This process has given rise to the impression that the logical conclusion to achieving the practice of liberal democracy requires the privatization of religious belief from the public sphere. However the contemporary study of religion in the modern age has largely been cast on the polemical debates that swing from the declining position of religion in modern secular society into the extreme arguments about the rising religious movements on a global scale.

Religion has been shaping the secular civilization from its inception within the Enlightenment tradition. In the modern secular age, the role and the position of religion in the public sphere have undergone major transformations where the claims of religious 'decline' tend to be more apparent in many areas of the hard sciences and cultural practices. The relationship between the religious and the secular has been taken to assume that certain aspects of the modern cultural and political practices have moved away from older beliefs and practices, however

increasing evidence of transcendental beliefs remained despite substantial modernization in the material conditions of life. Far from being on the collision course against Western norms of modernity; many non-Western countries have embraced modern technologies and even political systems into their societies. The conception of the modern and the plurality of modernization is more complex than the strict division between religion and secular ideas (Kaya 2004:3).

The secularization thesis provides important conceptual vocabularies to contextualize the role of religion in modern society (Lechner 1991; Lechner 1992). Nonetheless the major pitfall of the secular paradigm is the tendency for its protagonists to subsume the 'decline' of religiosity as a progressive and the normative consequence of being modern and the prevailing secularist bias against the resourcefulness of religious ideas in politics (Casanova 1994; Fox 2002; Philpott 2007).

The privatization of religious belief as the dominant premise of the secular understanding in modern society has undermined public recognition for the role of religion in civil society movement. The comparative studies on church-state relations in Spain, Poland, Brazil and the United States show that religious discourse in the public sphere empowers citizens to challenge the authoritarianism of the state (Casanova 2001). Hence the dynamics of religion and the secular ideas have the mechanism to create multiple forms of identities in political contestation. It is for this reason that democratic deliberation has become the focal point of modern state-making where the ideal of common citizenship can be established to enable civic participation for the protection of basic human rights.

'Secularism' as a political concept central to modern state-making is historically contingent and politically contested in many different countries. The term itself is burdened with the

normative understanding of the separation between the church and the state and how it has been used or analysed in certain socio-political contexts. In many Western democracies the concept of secularism is generally accepted as an important agenda of the Enlightenment project to sustain the modern state in endorsing the norms of impartiality in an environment of competing worldviews. Secularism is commonly understood to embody the ‘unifying elements of freedom, neutrality and equality’ as the preferred principles upon which the modern regimes are being constructed to secure the basic norms of human rights (Gunn 2004). However in reality, the issue of religious conviction and the question of liberty remained contested within the conceptual frame of the ‘secular’ state because the questions about faith and conviction will always shape the debates about the meaning of liberal democracy.

The secular state is therefore normatively conceptualized to provide a template for adjudicating the competing forms of beliefs found in societies living in conditions of pluralism. How the state governs the relationship between the state and religious beliefs differs in content from one country to another but these constitute the founding myths and the shared belief in the making of the nation-state, and therefore the public political culture. These differing interpretations notwithstanding, the dynamics between religious convictions and the liberty of conscience engendered significant roles for the state to enact laws circumscribing the public role of religion in the contemporary society.

The separation thesis and the assumptions about the legal separation of religion and the state play significant role in the ‘differentiation’ process linked to the development of democratic institutions. It is important to note that democracy is not exclusive to secularism and that there is the empirical need to re-negotiate the role religion in building a democratic consensus (Stepan 2000). This empirical need requires an analysis of the structure of state tradition that

has had considerable implications upon how relations between religion and the state are regulated.

The historical presence or absence of an *ancien régime* followed by periods of critical junctures in secular state-building constitutes important structural trajectories in conditioning the state's relation to the role of religion in the construction of political dominion and legitimacy (Kuru 2007).

“The critical condition that affects these views is the absence or existence of an ancient régime that combines monarchy with hegemonic religion. If such an *ancien régime* exists, then, it is hard to convince hegemonic religious groups to agree to the disestablishment of their religion. Moreover, the *ancien régime* also leads the secular elite, who oppose the monarchy in founding a new republic, to combat the hegemonic religion that justifies monarchy” (Kuru 2007:584).

The existence of *ancien régime* in the form of the Malay *Kerajaan* combined with Islam as the *hegemonic* religion constitute the central features in the process of reinventing the ideological construction of *Bangsa Malay* and *umma*. When the British muscled their way into the *Malay* world, the mode of colonial penetration was negotiated through stages of diplomatic consensus whereby the sovereignty the Malay *Kerajaan* was ceremonially recognized. The parallel existence of dual political domains - the British colonial regime and the Malay *Kerajaan* – was supported by the development of twin structures of the ‘secular’ court and the Mohammedan laws that dealt with the affairs of the Malays and Muslim subjects. The evolution of the modern Malaysian state-making coupled with the syncretic fusion of theocratic forces of Islam underscore the continuity of Anglo-Malay power alliance embedded in the secular practices of colonialism and the sovereignty of Malay *Kerajaan*.

This continuity is not only institutional in character but more importantly the theocratic vision of Islam established a firm grip on the values of the moral conduct of its believers – in both the domains of the political and non-political. Hence throughout the historical development of politics in Malaysia, the ideological precedence of *Bangsa Malay*, Islam and *Raja* continue to endow certain quality deliverance for the state to justify its political legitimacy.

Whilst the historical dialectic between religion and the secular has its roots embedded in Western philosophy, the idea secularism has often faced the charges of colonial import in countries that have undergone Western colonial administration. The secular rupture or the emergence of Enlightenment from the theological power of religious authority is but a form of intellectual and political resistance that emerged as a response to the religious stronghold of Christendom. The Enlightenment movement was an exclusive historical experience in the West, but where the ideas and the elements of the secular are practiced in the contemporary experience, they represent the intellectual and ideological counter movement against the powerful onslaught of religious persecutions. This dissertation has identified those secular forces being present in the three cases that were discussed the dissertation as the intellectual and ideological counter movements emerging from the critical awareness against the rapid de-secularization of the state in Malaysia and as the local form of ideological resistance to the government's use of laws to coerce citizens from the minority backgrounds.

The concept of secularism is used to analyse the empirical dimension of state practice, which this dissertation have applied to explore the government treatment of citizens in a religiously diverse and ethnically plural society. The focus on the role of state in adjudicating the competing claims of citizens provides important insight into the manner with which the conception of justice and citizenship right are formulated to reflect the diverse political requirements of ethnic and religious pluralism. In a condition of pluralism, it is only

reasonable for the state to ground its policies and practices upon reasons that are publicly shared as these will have considerable bearing upon the process of deliberation on fundamental political issues. In many countries it is not uncommon to find that citizens are obliged to submit to the political dominance of a particular doctrine, whether religious or secular. When fundamental political issues are decided on the grounds of one particular comprehensive doctrine, it will generate the conditions for critical awareness to arise among disaffected citizens to demand minimum justice to prevent further erosion of their rights. In many cases such critical awareness can lead to empirical challenges in the form of legal battle and/or political uprising against the legitimate rule of the state, thus undermining the nature of political stability for a particular regime. How the state responds to political and social contestations and the public reasoning given for the way these challenges are mediated will be crucial in determining the liberal constraints upon the conception of justice.

8.2 The Malaysian scenario

Since the condition of pluralism is now the norm of contemporary societies, Malaysia is not a special case in the way this dissertation approaches the reappraisal of secularism. It is a case that is important to consider because of how it informs the wider debates about secularism, the role of religion in public sphere and how the decisions of state on this matter can have serious impacts upon the fundamental liberties of individual citizens. The debate about the secular state in Malaysia is vital, not because it would pose a challenge to the official role of Islam in the Federal Constitution, but in allowing the avenue to debate; this would address the polemical divide between Islam and the 'secular', and problematize the structural rift inherent within the dual-legal system that accentuates differential rights and access to justice. The censorship of debate on the secular state in Malaysia has actually exacerbated the polemical rift between what the secular principles stand for and the public significance of protecting the

Islamic faith. The prevailing understanding of the 'secular' among the vocal Malay-Muslim NGOs tend to be narrowly conceived in terms of its potential to violate the official role of Islam and the risks it would pose to Islamic morality.

The secular-religious debates in contemporary Malaysia are an ideological battle, where the fundamental questions of morality are grounded in Islamic resources tends to supplant other values that are non-Islamic related and/or moral convictions emerging from the 'secular' movement. The re-positioning of the theological role of Islam has gained further ground in the formulation of public policies, in law, in reorganizing the terms of public engagements, down to the state policing of the moral conducts and the private lives of Muslim citizens. Whilst these efforts have been publicly justified on the prescriptive grounds that Islam demands these obligations to be set out to its adherents, the empirical consequences the dogmatic approach by the government has been detrimental to the prospects of democratic deliberation, thus undermining conditions for equal and common citizenship to flourish. With respect to the questions about fundamental liberties, the rights of citizens and the fair and equal access to justice, it becomes impossible to do justice to these issues when the appeal to the doctrine of Islamic values prevailed. In the condition of pluralism in Malaysia, the use 'public political power'(Rawls 1989:243) to enforce the doctrine of the Islam as the primary template for the formulation of public policies, is serious miscarriage of political reasoning.

There are many layers of power struggle in the Malaysian political context but the most persistent one remains to be the resistance against the state monopoly of ethnic and religious domination. The dissertation has shown that the condition of pluralism in Malaysia is both historically contingent and politically determined or shaped by the structure of the Anglo-Malay alliance under British colonialism, and after Malayan independence in 1957, a predominantly Malay-centred political coalition represented by UMNO. Independence for

Malaya was less about the political struggles against British colonialism, instead the pre-independence divergences about the criteria for common citizenship continued to mar political deliberations in Malaya as these began to emerge and crystalize into notions of differential ethnic rights. These differential terms of ethnic rights were enshrined within the Federal Constitution, and legally justified on the grounds of protecting the rights of the Malay indigenes against foreign ownership and competition.

In 1963 Malaysia was forged into a mosaic of 'state without nation' after going through tough negotiation process to combine Malaya, Singapore North Borneo and Sarawak. Prior to 1963, each individual territory had a very distinctive structure of colonial authority, cultural identity and political contestation. When all of these territories were forged to become a new Malaysian nation, the politics of national belonging was fractured along the lines of ethnic ownership mainly advocated by UMNO and other right-wing Malay groups, against the more inclusive multi-ethnic ideal of 'Malaysian Malaysia' galvanized by the Singapore leaders, other opposition leaders in Malaya and representatives from the Borneo territories. 'Malaysian Malaysia' broke the Malaysian Federation prompting the separation of Singapore from the Federation in the 1965 Constitutional Amendment. This created the political precedent for the Malaysian government to use the Constitution to dictate political contestation against the norms of differential rights.

This strategy was redeployed after the 1969 riot. The 1971 Constitutional Amendment was tabled to limit the scope of the freedom of speech, prohibiting the public discussion of the Malay special position, the Malay language as well as the sovereign position of the Malay Rulers. Even MPs were barred them from publicly debating them in the Parliament. With these amendments in place, the pro-Malay affirmative action program under the New Economic Policy legally obliged the UMNO-led government to formulate positive

discrimination approach in the government resource allocation for human capital investment among the Malays, and to some extent, the *Bumiputera* community.

Ethno-religious sentiments penetrate in almost every layer of political struggle in the Malaysian narrative of contention. This process came about in stages, subject to the nature of political contentions targeted against the state. Power operates through framing the agency of a free subject, but always with the consequence of the subject responding or countering the imposition of power in innovative and creative ways. The religious form of domination over the 'bodies' of its adherents through religious values internalized by individuals have been one of the most compelling disciplinary technologies employed by the Malaysian government to seek political legitimacy from the majority Muslim population in the country. These values provide continual discipline through the personalization of the ecumenical bond of the *Umma* and Malay ethnic community, ideologically framing the Malay civilization in the institution of Malay monarchy.

These sentiments justify defending the status quo of the Malay special citizenship through the faith of the *Umma*. When ethnicity and religious values are internalized as a form of political conviction, these personalized sentiments - ethnic identity and religious persuasions - would be expressed as political, and because of the ways in which these values have been prioritized and publicly understood as 'rights' in the legal domain, formulated in the form of affirmative action in public policies, other political values have become secondary and unimportant to the fundamental consideration of human liberties, equal treatment and justice. The importance of ethnicity and religion in the public domain has prompted the state to sustain the monopoly over the legitimacy to protect these values as political 'rights', projecting them as inimical to Western liberal values and employing the modern art of policy making and laws to preserve these values as authentic to contemporary Malaysia. Whilst there are emerging dissenting

voices to challenge the ways in which the essential values of ethnicity and religion have been employed for political purposes, these forms of counter conducts from the citizens will be greeted with punitive laws from the state.

Under Mahathir two very important structural changes were made in the repositioning of the public role of Islam. In the economy, a whole host of financial, insurance and commercial portfolios emerged under the banner of Islamic entrepreneurship. In managing political contestations, Mahathir employed the strategies of constitutional amendment in 1988 by changing Article 121 in the Constitution to limit the autonomy of the judiciary, which effectively compromised the doctrine of the separation of power in real politics. The legal changes made to the structure of the court system significantly transformed the nature of equality of access to justice for Malaysian citizens, particularly the inter-faith relations in matrimony, custody and conversion. After more than a decade that these legal changes were made, many legal cases in divorce, child custody, even to the extent of burial were caught in serious legal logjam because the Syariah courts are limited to Muslims only. This gave rise to the immediate public misconception that the High Courts have no jurisdictions on matters relating to the Islam.

These cases of legal logjam became particular prominent and widespread under the Abdullah regime, and with the introduction of Islam *Hadhari* as the new approach to Islamic living and thinking, such ideological intervention reinvigorated Islam onto a new high of cultural civilization. It emphasizes the significance of civilized mentality among the Muslims to counter the crises of identities in the information age. The professed civilized mentality that was supposed to frame the conduct of the state under Abdullah however failed to translate into public reasoning when non-Muslims were officially barred from using ‘Allah’ in the congregation and theological publications. Public reasoning by the state became problematic

with the sudden increase in the number of Hindu temple demolition under the Abdullah regime. Within the space of 16 months, more than 70 temples were demolished for various official reasons. The Islamization of the state alone may not be enough to explain why some of these official policies have been detrimental to the fundamental rights of other non-Muslim citizens. The term of explanation needs to be unpacked to illuminate how the economic, legal and ideological changes made to the public role of Islam impinged upon the political role and the conduct of the state in adjudicating these competing notions of right for greater democratic prospects for all citizens.

The power of the state is constantly revived and reinvented by the politicization of Islam and the ideological demand for expanding the Islamic legal precepts in policing the moral conducts of the Muslim citizens, and in regulating the political demands of the non-Muslim citizens in Malaysia. Islamization under Mahathir was largely done out of the need to minimize political crisis within UMNO and destabilize contestation from the opposition, but under Abdullah, Islamization began to focus on the ideological consolidation of everything Islamic – complete state imposition of power over bodies, the collective mind-set and the public sphere - even at the cost of public reasoning. On this score, the de-secularization of the Malaysian State is directly related to the discourse of party political domination over Islamic values formulated within the structure of the state, combined with the political use of the legal apparatus to justify a very narrow understanding of the official role of Islam that is enshrined in Federal Constitution. The de-secularization of the state has not gone unchallenged, and this is where the significance of reason is employed to highlight the initiative of citizens (Muslims and non-Muslims alike) demanding the evaluation of the neutrality of the state on just and equal treatment of citizens.

The original commitment of secular state in the Malaysian context was grounded in the political consensus among the leaders of the Alliance party. Whilst the legal qualifications were not categorically spelt out to frame the normative consensus of how the state should remain secular, the principles of the rule of law have so far been considered adequate for the Malaysian state to function nominally as a secular state. Since no legal provisions were made to support the ideal of the secular within the institution of the government, the existing Constitutional provisions supporting the essence of ethnicity and religion found public purchase through the politicization of Islam, and this had significantly contributed to the state capitulation from the practices of secular considerations in the face of increasing demands for citizenship rights and privileges on ethnic and religious terms.

The dominant public assumption about Malay special citizenship rights is ideologically grounded in the logic of protecting the position of Islam. This argument equates the ethnic interest of the Malays with the official position of Islam. Hence the official government position rests on protecting the legality of the status quo, and punishes individuals or groups that question or challenge the special position accorded to the majority Malay-Muslim population. Since the overriding concern of the Malaysian government has been driven by the aim to protect these positions, it is evident that the norms of neutrality have not been established as the guiding principles of state practices. When the political values of Malay special citizenship and Islamic supremacy have furnished the institutional establishment of government for more than five decades, public deliberation on many fundamental political issues will always take this position as the primary concern. Even though the principles of secular state were never spelt out, the normative expectation that the state should appeal to reasons other than religious values is understood as the minimum required of a government that professes constitutional democracy. In the Malaysian case, such normative expectations

are declining at a faster rate as the Islamization of politics gains momentum in the public political culture.

The decline of the political neutrality of the state prompted some of the contemporary civil society movements and individuals to legally challenge the constitutionality of these religiously informed public policies as well as the Syariah penal codes. On account of the Home Ministry's official ban on the use of the word 'Allah', the legal challenge mounted by the Catholic magazine, *Herald* against the Federal government reflected the failure of the government to engage in the use of reason and instead succumbed to the politicization of Islam in the public sphere. The High Court in Kuala Lumpur had granted the use of the word 'Allah' to *Herald* in 2009 but the decision was reversed in the Appellate Court in October 2013. The fact the government had used its power to enforce the ideological assertion that 'Allah' exclusively belongs to Muslims shows that the state has not only failed to observe the political norms of justice required to negotiate with the fact of pluralism in Malaysian experience, but there seemed to be a deliberate strategy to uphold values that appeal to the dominant Malay-Muslim population by denying the basic liberties of other minority citizens to express their faith with the word 'Allah'. There seems to be no end to the 'Allah' issue because the Islamic authority in Selangor had only recently seized 300 Bibles from the Bible Society on the 2nd of January 2014 because they contained the word 'Allah'.

On the rise of HINDRAF (Hindu Rights Action Force) in challenging the de-secularization of the Malaysian state to address the problem of ethnic group inequality, this is an indication of how Malaysian citizens are beginning to draw upon the universal ideals of human rights to counter state sanction values that are comparable to the past policies of Apartheid in South Africa or even *Ethnocracy* in Israel (Yiftachel 1999; Maznah 2004). As a civil society movement that emerged from the collective awareness and experiences of state racism among

the Malaysian Indian citizens, the rise of HINDRAF was symptomatic of serious governmental failure to address poverty as an endemic social problem. The government's conception of poverty as an ethnic issue, guided by the pro-Malay affirmative action agenda in the New Economic Policy, led to very narrow formulation of public policies to address the socio-economic marginalization of citizens categorized under the Malay and *Bumiputera* group. Even the latter group *Bumiputera*, particularly in the Malaysian states of Sabah and Sarawak are relatively disempowered by the government policy that focuses mainly on the special position of the Malays. The HINDRAF movement brought into sharp focus the extent to which the regressive and proscriptive elements in the Constitution led to the deterioration of the quality of living especially among the Indian poor who are trapped in the cycle of poverty with no immediate institutional recourse to human development and social mobility. When public political power is used to reflect only one set of ethno-religious doctrine, denying justice and equal treatment for others who do not belong to the privilege group would only sustain the existing nature of systemic abuse which could further entrench ethno-religious polarization in the existing condition of pluralism.

In the current political climate, the LGBT community are seen as great moral threat to Malaysia's national interest as an Islamic country. Given that the law and the use of power reside within the ambit of the state, rationalizing the Islamic precepts as the legal benchmark to discipline and police the moral thinking and conducts of citizens has become the normative tool for the state to project the national image of the country as culturally free from the decadent influence of homosexuality, which is popularly conceived as the product of Western liberalism. Gender pluralism (Peletz 2009) is one aspect of the Malaysian social reality that the government is not willing to negotiate, or even to give public recognition to the right of sexual minorities to decent livelihood. After suffering many years of physical, mental and

financial abuse under the Syariah authority, four Malay *Mak Nyahs* have recently decided to challenge the constitutionality of the Syariah penal code against cross-dressing. The claimants appealed to the fundamental liberties and equality treatment for gender under the Federal Constitution to mount a legal challenge against Section 66 of the Syariah criminal enactment 1992. In many ways this will address the judicial lacuna between the High Court and the Syariah court that the 1988 Constitutional Amendment generated through the addition of Clause (1) to Article 121. Unfortunately their case was dismissed with the judge insisting on the Islamic authorities to overcome this social problem. These cases show that the dual-legal system has failed to grant justice equally, and as long as the judicial non-interference remains in force, this form of legal pluralism does more harm to Malaysian citizens.

The public awareness and political awakening from the people have reached new heights since 2007 when civil society movements and other protest groups emerged demanding for political change. The big shift from elite centred politicking to a greater non-elite movement via civic protests and civil society movements can be attributed to the democratizing effect of the social media networking and the spread of alternative news via the online portal. Whilst the government retains its grip on the mainstream media and news portal, the internet has allowed the free flow of information particularly for the younger generation to participate in the new social and political movement. This contemporary phenomenon requires greater exploration and study in the light of the greater public awakening that began from the urban centres to the semi-urban areas, in order to gauge how far the ideal of public reason is growing as part of the process of political awakening.

8.3 Wither the secular state in Malaysia?

The Malaysian secular state model is a mix of secular Constitution with strong state control over the public role of religion through the use of selective provisions in the Constitution, in

furtherance of the interests of the historically dominant Malay-Muslim group at the cost of citizen's fundamental liberties. Going back to some of the important questions in this thesis: whether it is possible to locate the discourse of 'public reasoning' in the Malaysian political society, and what way would public reasoning influence or shape the discourse of public debate on the competing ideas of citizenship for a society in transition like Malaysia. Like most contemporary societies living in condition of pluralism, the structural rigidity of ethnic identifications and competing religious doctrines present considerable challenges to the ideal of common citizenship. This dissertation claims that the emergence of public reasoning is not only contingent but it is also dependent upon the generous interpretation of political values that are transferable by human agents to counter the ideological rigidity and historical constructions of ethno-religious aphorisms in the country. However in tracing the historical development of public debates since colonialism in Malaya, racial domination has grown as a result of the structure of institutional mediation between the British colonial power and the local *ancient regime* in the form of Malay Kerajaan.

The persistence of ethnic politics and the significant ways in which religion began to undergird ethnicity in shaping politics and the thinking about politics is the result of the failure of public reasoning. Failures to reason and address the problems of common citizenship had been apparent as far back as the Communist Insurgency, Malaysian Malaysia, the legal changes made to the freedom of speech in 1971 and in the 1988 amendment to the judicial autonomy of the High Court. On the back of these crises the Malaysian state has drawn upon the doctrinal power of Islam for the following purposes: to impose the ecumenical bond of Malay identity, to rationalize an official version Islam to deter political dissents and regulate the public and moral aspects of human living and relations. Islamic reforms featured extensively in public policy formulation, gradually expanding into

governmental agencies, the education curriculum and higher learning institutions, banking and insurance, and most prominently in the legal sphere. Islam becomes highly visible in the public sphere as a result of direct state intervention, and it is increasingly entwined with the exclusive protection of the rights and privilege of the dominant Malay ethnic group in the Malaysian society.

Failure to public reasoning doesn't mean that this cannot be elicited and practiced for a society like Malaysia that is well-informed and modern in almost every aspect in life. The public contentions against the rigid interpretation of fundamental liberties in the Federal Constitution are strong enough evidence to suggest that civil society and citizens, whose rights have been undermined by the process of de-secularization, play important roles in raising awareness about the importance of values other than ones that are grounded in Islamic precepts. There's hope yet for Malaysia to become a stable liberal society but there's a critical need to recognize the significance of open communication to negotiate not only the competing views among different beliefs and philosophies but that it is imperative to overcome the public 'fear' of the meaningful role of the secular principles among the Muslim populations.

The significance of applying Rawlsian informed critique on establishing an *overlapping consensus* in the Malaysian case rests on the substantive evidence that the enforcement of one particular comprehensive doctrine, i.e. Islamic precept, upon the condition of pluralism that is diverse in terms of ethnic-religious-gender dynamics, considerably led to the erosion of the fundamental liberties of the individuals. The problem with universalizing the Islamic precepts in government policies, law and moral public policing is that this approach fulfils a very narrow interpretation of moral values, failing which the risks of public discrimination, stereotyping and condemnation of other minority ethnic, religious and gender community will

increase. In a diverse society, Rawlsian informed overlapping consensus encourages citizens to participate in the political conception of justice as the moral grounds for public and social cooperation that goes beyond the simple requirement of toleration. So far, the Malaysian experience has shown that the act of toleration in itself has failed to protect the erosion of neutrality values against the political forcefulness of religious pressures. The only compelling way for minority citizens to restore their basic elements of citizenship rights involves making the case for the political conception of justice to be considered as the basic common ground in the process of public deliberation (Larmore 1994; Larmore 1999).

Whilst the exposition of ‘public reason’ is situated within the conceptual bounds of Rawlsian political liberalism, the dissertation takes this idea as a possible avenue to evaluate the nuanced changes in mode of political thinking and articulation in the Malaysian political discourse. It is used to examine how political ideas have been communicated and justified on terms that do not appeal to fundamental doctrines, and to show how significant the role of ‘public reason’ can play in a society that is undergoing tremendous challenges towards the process of democratization. The role of public reasoning in this sense is useful in making the necessary discursive changes to the ideological content of political legitimacy in grounding public political debates in the country. In appealing to the idea of the exercise of ‘public reasoning’, it is possible to do away with the overbearing use of Islamic percept in framing public conduct and political engagement. In this way, public debates and discussions can be encouraged without the fear of legal sanctions and unjustified censorship.

A reasonable liberal public space is important for common citizenship. The conception of political liberalism represents a procedural framework of political constructivism (Freeman 2007) and if liberal principles should govern the exercise of ‘public reason’ within the constructive framework of political liberalism, then the constructive elements with which

liberal principles undergirds the exercise of ‘public reason’ could be drawn from the ways in which issues of equal participation for citizens and the language of rights are debated in the Malaysian political forum. The use of ‘public reason’ will be able to inform the shifts in the ways ideas of citizenship and the language of right are being conceived or reconsidered in the contemporary Malaysian context. This will have important repercussions upon how contemporary debates are changing the way people think about politics and most importantly, about agency of the citizens involved in the process of critical engagement over the use of coercive state power (Solum 1993).

The author is aware of the existing criticisms against adopting the Rawlsian informed ‘public reasoning’ for a society that does not typify the liberal democratic features, but the use public reasoning is vital to illuminate the challenges and potentials of a society in transition, of identifying new modes of political thinking that nurtures critical awareness among citizens and *netizens* widely engaged in the discourse of democratic deliberation. The internet and social media networking have revolutionized the ways people think about politics. The Arab Spring and the Occupy movement around the globe are recent examples of how people begin to embrace ideas about public engagement, deliberation, democratic demands that make up the core elements of liberalism in contemporary politics. In the Malaysian experience, there is a critical need to restore the principles of the ‘secular’ into the practices of state, not because it is used to challenge the Islamic precepts or the symbolic role of Islam in the Constitution, but to create the avenue for *overlapping consensus* whereby the political conception of justice can be applied as a guideline to be inclusive of other humanistic values to be taken into consideration when fundamental political issues are deliberated and decided to reflect the needs of a diverse society.

Malaysia is a good case for an empirical evaluation of the use of ‘public reason’ because the country unwittingly adopts many aspects of secular principles mainly within the procedural dimension of politics, economy and modern cultural practices whereby God has not been invoked repetitively. Despite this the legal and operational concept of what is secular and humanist in political debates remains fragile as the politicization of Islam continues to undergird the collective if not the Constitutional identity of the Malays, and this has increasingly contributed to the socio-political bifurcation of identities between the Muslim and the non-Muslim citizens. The political conception of a secular polity that supports a non-discriminatory public sphere would constitute the normative ideal for a liberal democracy and common citizenship to thrive. The secular space needs to be given generous interpretation as an idea of autonomous thinking and public reasoning if these were to be aspired. Using the Malaysian case as an example, this dissertation has demonstrated that affirmative action policies that are grounded in ethno-nationalistic and religious concerns have done more damage to fundamental liberties, inter-faith relations and the livelihood of citizens from the minority community. Proposing the restoration of the secular humanist values into the practices of the state may entail the redefinition of the public role of Islam in politics and the legal sphere, but this is vital to mediation of justice where the judicial lacuna exists in the current civil-Syariah logjam. There’s a need to go beyond toleration and ethnic consociationalism as the standard practice to maintain political stability because these do not provide effective means to counter the radical forces of within political Islam. The strategy of public reasoning based on the political conception justice will create a module of communication that deliberates upon publicly shared values but at the same time affirms the convictions from within these competing doctrines.

APPENDIX I

List of Hindu temples demolished in Malaysia in 16 months

LIST OF HINDU TEMPLE DEMOLISHED – compiled by Hidraf and Human Rights Party

From 22.2.2006 TO 13.6.2007 (one year and four months), 79 HINDU TEMPLES in MALAYSIA were demolished:

FIFTEEN (15) HINDU TEMPLES DEMOLISHED IN THE KLANG VALLEY

1. The Sri Ayyanar Sathiswary Alayam Temple (more than 65 years) Jalan Davies was demolished on 22.2.2006 and the statues buried at site.

2. The Malaimel Sri Selva Kaliyamman Temple Pantai (more than 100 years) was demolished on 17.4.2006 by the Kuala Lumpur City Hall.

3. The Vaalmuniswarar Rajaamman Kovil (more than 60 years) at Lady Templer Hospital demolished on the 3.05.2006 by City Hall Kuala Lumpur.

4. Sri Kaliyamman temple at Midlands Estate, Seksyen 7, Shah Alam (more than 100 years) was demolished by the Shah Alam City Hall on 9.5.2006.

5. The Sri Balakrishan Muniswarer temple in Setapak (more than 60 years) was partly demolished on 11.05.2006 by the Kuala Lumpur City Hall.

6. The Sri Balakrishan Muniswarer temple in Setapak was completely demolished and deities broken up on 8.6.2006.

7. The demolished Sri Kaliyamman temple at Midlands Estate, Seksyen 7, Shah Alam was demolished for a second time on the 12.06.2006 wherein 3 main Hindu deities were hammered and smashed up to pieces with a sledge hammer by the Shah Alam City Council enforcement officers.

8. On 1.08.2006 the Om Sri Sakti Nagamma Allaya Hindu Temple in Taman Sri Manja, PJS 3/30 Petaling Jaya, Selangor was demolished by the Petaling Jaya City Council.

9. Demolishment of the Sri Subramaniam temple in Country Homes, Rawang, Selangor, Malaysia on 29.09.2006.

10. On 31.10.2006 Sri Muniswarar Temple (more than a 100 years old) which was built on private land in Bandar Rinching, Semenyih Selangor was demolished

11. The demolishment of the Devi Sri Karumaniamman Hindu Temple, Petaling Jaya Utara, Section 21, Kampung Taman Aman on 30.11.2006.

12. On 29.12.2006 Sri Muniswarar Temple (more than a 100 years old) which was built on private land in Bandar Rinching, Semenyih Selangor was demolished.

13. On 22/2/2007 the Sri Maha Nageswari Hindu Temple in Taman Cahaya 7, Ampang, Selangor Darul Ehsan was demolished.

14. On 15.5.2007, the JKR Sri Muniswarar Hindu Temple, Jalan Kapar, Klang was demolished.

15. On 13.6.2007 the Sri Kaliaman Hindu temple in Midlands estate Shah Alam was demolished.

FOUR (4) OTHER DEMOLISHED HINDU TEMPLES LOCATED OUTSIDE KLANG VALLEY BUT WITHIN PENINSULAR MALAYSIA:-

16. The Demolishment of the Sri Maha Sivalingaeswarrar Hindu Temple, Batu 7, Gemas Tampin 10/04/2002.

17. The 80 year old Sri Muthumariamman Alayam Hindu Temple in Skudai JohorBahru was demolished in August 2006.

18. Statutes from Sungai Wangi Mathurai Veeran Temple (60 years old) in Sitiawan, Kampung Tirali, 9th Mile Jalan Air Tawar, Sungai Wangi Estate, Perak were hammered, smashed up and thrown into a drain and temple demolished on 17.10.2006 by the Manjung District Council.

19. The 55 year old Kaliaman Alayam Hindu Temple in Taman Impiana Mengelembuin Ipoh was demolished on 27/11/2006.

THIRTY ONE (31) HINDU TEMPLES WITHIN THE KLANG VALLEY THAT HAS BEEN THREATENED WITH DEMOLISHMENT NOTICE:-

20. Kuil Hindu Sri Mariaman di Seksyen 11, Shah Alam has been given notice to the demolished on 26.4.2006 from the Shah Alam Municipal Council.

21. The Sri Maha Mariamman Temple Taman Intan Baiduri Selayang has been given notice to be demolished recently (Nanban June 2006)

22. The Sri Subramaniam Temple Kg.Jawa Klang(107 years old) has been given notice to be demolished (June 2006)

23. The Mariamman Temple Jalan Meru Bandar Setia Alam, Shah Alam (101 years old) has been given notice to be demolished (June 2006)

24. The Kg.Jawa Mariamman Temple (more than 120 years) has been given notice to be demolish (June 2006).

25. The Sri Maha Laxhsmi temple in Sunway has been given notice to be demolished by the Petalaing Jaya City Council in June 2006.
26. The Sri Angineer Temple in Taman Tun Dr. Ismail, Kuala Lumpur built on a private land has been given notice to be demolished by the Kuala Lumpur City Manager(June 2006).
27. Sri Mahamariamman Hindu Temple in Kg Semarak, Old Klang Road has been threatened with demolishment five (5) times before on TOL Land-Nanban(6/7/06) pg. 12
28. Sri Sai Bala Raman Hindu Temple in Klang Jaya is being threatened with demolishment - Nesan (7/7/06)
29. 101 year old Dewi Sri Karumari Aman Temple in 4 1/2 Mile Jalan Meru, Klang was ordered closed by Selangor State Government on 10.07.2006 and thereafter the said temple is threatened to be demolished to make way for housing development.
30. The 101 year old Thevy Sri Karumariamman temple's Bandar Setia Alam, Shah Alam access road to be closed on 10.7.2006 by the Selangor State Government and later to be demolished to make way for a private housing development.
31. Arun Estate Temple in Shah Alam- Nesan (12/7/06) pg. 6
32. In July 2006 the 110 year old Tepi Sungai JKR Mariaman Temple was given notice to be demolished.
33. In July 2006 the Sri Muniswarar temple in Jalan Air Panas Baru Setapak was given notice to be demolished.
34. In July 2006, the Sri Jada Muniswarar Hindu Temple in Danau Kota, Kuala Lumpur was given notice to be demolished.

35. Jedda Manismanar Hindu Temple in Jalan Setapak was informed to vacate is being threatened with demolition - Nesan(17/8/06)
36. Sri Maha Megeswari Hindu Temple in Lembah Jaya, Ampang is being threatened with demolition -Nesan(20/8/06)
37. Muniswarar Hindu Temple in Bandar Baru Ampang is being threatened with demolition -Nesan(20/8/06)
38. Sri Sakti Vinayar Hindu Temple in Kampung Ampang Indah is being threatened with demolition -Nesan(20/8/06)
39. Mariaman Hindu Temple in Kg Tasik Permai, Ampang is being threatened with demolition -Nesan(20/8/06)
40. Siti Subramariam Hindu Temple in Kg Tasik Permai, Ampang is being threatened with demolition -Nesan(20/8/06)
41. Sri Mariaman Temple (60 years old) in Section 18 given notice to relocate on 18/10/2006.
42. Sri Kaliaman Temple (80 years old) in Section 18 given notice to relocate on 18/10/2006.
43. Sri Vinayagar Temple (80 years old) in Section 18 given notice to relocate on 18/10/2006.
44. Sri Mariaman Temple (109 years old) in Section 19 which has a sacred 100 year old tree given notice to relocate on 18/10/2006.
45. Sri Mariaman Temple (100 years old) in Section 15 given notice to relocate on 18/10/2006.
46. Sri Maha Mariaman Hindu Temple in Section 11 given notice to relocate on 18/10/2006.

47. The 80 year old Sri Athi Muniswara Temple in Jalan Semarak, off Jalan Gurney in Kuala Lumpur was given notice to be demolished on 19.10.2006.

48. On 21.11.2006 the Sivaksakthi Linggeswara Hindu Temple in Kampung Tropikana, Jalan Padang Tembak, Subang Jaya given notice to be demolished.

49. The Sri Kamatchie Amman Telecoms Temple Cheras (more than 100 years) is being threatened with demolishment.

50. Despite receiving recognition from UNESCO, Nageswari Hindu Temple in Bangsar is being threatened with demolishment.

SEVENTEEN (17) OTHER HINDU TEMPLES LOCATED OUTSIDE THE KLANG VALLEY BUT WITHIN PENINSULA MALAYSIA THAT HAS BEEN THREATENED WITH DEMOLISHMENT:-

51. The Sri Muniswarar Aalayam Seremban (150 years) and a 150 year old Raintree have been threatened with demolishment since March 2006 by the District and Land Office .

52. On 26.6.2006 the 110 year old the Sri Chinna Karuppan Temple in Masai Johor was given notice to be demolished

53. The 60 year old Saiva Muniswarar Temple Temple in Sg.Petani Kedah given notice to be demolished (Nanban 29.6.2006 pg 4)

54. Sri Muthumariamman Aman Skudai Hindu Temple (70 years old) in Lindon Estate risks being demolished- Nesan (3/7/06) pg. 7

55. Sri Muniswarar Temple in Slim River- Nesan (14/7/06)

56. On 15.7.2006 the Muniswarar Temple in Sitiawan was given notice to be demolished-
Nanban(15/7/06)
57. Hindu Temple is being threatened with demolishment - Nesan (19/7/06) pg. 6
58. Sri Nageswari Amman Alayam Hindu Temple is being threatened with demolishment -
Nesan (19/7/06) pg.
59. Muniswarar Hindu Temple is being threatened with demolishment - Nesan (19/7/06) pg. 6
60. Sri Sakti Viyanayagar Hindu Temple is being threatened with demolishment - Nesan
(19/7/06) pg. 6
61. Sri Maha Mariaman Hindu Temple is being threatened with demolishment - Nesan
(19/7/06) pg. 6
62. Sri Subramaniam Hindu Temple is being threatened with demolishment -Nesan (19/7/06)
pg. 6
63. Muthu Mariaman Hindu Temple in Liutan Estate Skudai threatened to be demolished on
13.08.06.
64. Sri Subramaniam Hindu Temple in Kampar is being threatened with demolishment -
Nesan(21/8/06)
65. Bangi Mariaman Hindu Temple is being threatened with demolishment -Nesan(23/8/06)
66. Taman U Hindu Temple in Skudai, Johor Bahru was on the verge of being demolished
when about 600 Hindu devotees protested on 23.08.06.

67. Sri Mathuraimeraan Hindu Temple in Kampar Taman, Sri Wangi is being threatened with demolition -Nanban(25/8/06).

THREE (3) HINDU TEMPLES THAT HAVE BEEN BURNT TO THE GROUND:-

68. The Gangai Muthu Karumariamman temple in PMR Batu Buntung Estate Kulim,Kedah on 15.5.2006 was torched by unknown / mysterious criminals.

69. The Sri Kalikambul Kamadeswarar temple in Ebor Estate Batu Tiga, Shah Alam Selangor.

70. The Sri Kalkattha Kaliyamman temple in Kampung Sungai Kayu Ara, 47400 Petaling Jaya.

SIX (6) TEMPLES FORCED TO BE RELOCATED NEXT TO SEWERAGE TANKS:-

71. The Sri Muneeswarar JKR Temple, Batu 5/12, Jalan Kapar, 42100 Klang, Selangor (73 years old) was given notice to be demolished forced to be relocated next to a sewerage tank (June 2006). (Hindraf)

72. Sri Kumaravel Hindu Temple in Kampung Medan, Petaling Jaya, Selangor was forcibly relocated next to a sewerage tank, electric station (TNB) and high voltage cable on 14.07.2006 . (Makkal Osai 15.7.06)

73. Mariaman Hindu Temple in Bukit Beonang, Taman Bukit Melaka forced to relocate next to sewerage tank.(Nanban 25/8/2006)

74. Sri Raja Rajeswarar Hindu Temple in Taman Tunku Jaafar, Senawang, Seremban. (Hindraf)

75. Mariaman and Perumal Hindu Temple in Puchong Perdana, Selangor. (DAP sources)

76. Mariaman Temple in Desa Mewah, Sunway Semenyih forcibly relocated next to a septic tank. (Bandar Rincing, Semenyih Temple Chairman)

THREE (3) HINDU TEMPLES WHERE DEITIES FORCIBLY REMOVED:-

77. Statues from 73 year old JKR Sri Muniswarar Temple, Jalan Kapar Klang Temple was forcibly removed and taken away under mysterious circumstances in July 2006.

78. Deities from the Devi Sri Karumariamman Hindu Temple, Petaling Jaya Utara, Section 21, Kampung Taman Aman forcibly removed and left in a construction site.

79. Kaliamman Hindu Temple, Jalan Matin Batu 5 Seremban (more than 28 years) deities and temple bell was removed. (Nanban - 3.9.2006)

APPENDIX II

The documentary interviews by the Equal Right Trust are reproduced here:

“The biggest challenge which we face is from the religious authorities in Malaysia. They arrested me one night when I was not working. I was just sitting on the steps outside, waiting for my friend when a group of guys on motorbikes suddenly appeared and took me by surprise. They came up to me and grabbed me – I thought they were robbers trying to steal from me, so I tried to shut the outside gate of the shop. They stopped me, and pushed me against the wall. They were physically assaulting me. They started to grope me, and I tried to push them away but I did not manage because they were too big. I looked across the road and saw another friend of mine being beaten up by some other guys. At that point, the men holding me identified themselves as representatives of the Religious Department”

(Equal Rights Trust, 2011)

‘Zura: I am a 24 year old Malay Muslim, born in Kelantan. I moved to Seremban ten years ago when I was only 14 years old because I had been orphaned when I was seven. I was forced to remove myself from my remaining family seven years later because no-one accepted me. From the age of 12, I realised that I liked to wear female clothes and to do the jobs which are traditionally done by women, like cooking and cleaning, and I enjoyed wearing make-up. I decided to go and live in Seremban because this is where my mother was from, and I therefore felt a connection to this place. I wanted to start a new life here.

I felt responsible for providing financial support to my foster father and my younger brother, so I needed to earn money as soon as possible. My family was so poor, and my foster father was also sick and in need of medication which we were struggling to afford, so I was forced to finish school and start work. I tried working in other jobs first, but I faced too many problems. For example, when I worked in a restaurant, they told me that with a face like mine, I could only work at the back of the restaurant and only deserved five ringgit a day whilst the other workers were earning 50 ringgit a day. I did not want to continue living with this injustice so I decided it would be better for me to be a sex worker, and I have remained in that work since I was 15 years old.

Last year I was arrested on four separate occasions by representatives from the Religious Department. On the first occasion, I was not working. I was just hanging around in the area where we usually work, wearing a nightgown. I was picked up by the religious officers who charged me for wearing a nightgown. Apparently, as no man in their right mind would wear a nightgown, I was accused of impersonating a woman. I was taken to the offices of the Religious Department

and forced to undress. Even though the officers were not in the room, I know that they were watching me through a one-way mirror. I was only just recovering from my breast augmentation surgery, so it was very embarrassing for me to have to change whilst they could see me. My friend brought spare clothes for me, as the officers wanted to keep my nightgown as evidence against me. I locked up for a night and had to pay RM 700 (140 pounds) and then released.

On the second occasion, I was subjected to severe violence during the arrest. On I drove to AST (an entertainment outlet) to give some make-up to a friend of mine. As I was just about to give her the make-up, a raid began during which representatives from the Religious Department were rounding people up. Everyone was running everywhere. I was very shocked so I began to run as well. I was chased into a hotel. I was wearing a nightgown again, but I had no make-up on my face. I took refuge in a small store in the hotel. It was a karaoke lounge. After I ran in, I managed to lock the door behind me and I hid behind the counter. Three men began to pound on the door. They told the bouncer that if he did not open the door, they would break it down and he would have to pay for it to be fixed. They identified themselves as representatives from the Religious Department so the bouncer immediately opened the door. They came after me. I resisted at first, but eventually surrendered. At first, they held me by my neck against the wall, and then they punched me in the nose until I was defenceless. I was slipping in and out of consciousness. They then threw me to the floor, stepped on my chest and kicked me. There was a real danger that they could have hit the silicone implants in my chest which could have been very dangerous. After being physically abused in the karaoke-lounge, I was taken to the Religious Department

with a few other people. This was the most violent raid I had ever experienced. Almost all of the people who were taken there with me had been beaten. I was asked to remove my clothes as evidence, but they did not take a photo of me because I was not wearing make-up this time. The following day, I was taken to court again. I was forced to plead guilty to an offence under Section 66, saying that if I did not, I would prolong the situation and I would have to go to jail. I therefore followed their advice and also paid a 1000 ringgit fine.

On the third occasion, I was picked up once again by the same men from the Religious Department who had punched and kicked me on the previous occasion. I was just standing in AST, wearing a nightgown and waiting for friends to go for food. A man standing behind me grabbed my hair, and without showing me any form of identification, told me to follow him. I was taken to the offices of the Religious Department once again, and the following day I went to court. On this occasion, I did not plead guilty, and as a result, I was given a date for trial. There is a three strike rule, and as this was the third time I was arrested, I was forced to have a full trial. I paid a bond and was then released.

On the fourth occasion, I was arrested at the same time as Miss Kay. She was picked up in the first batch, and I was in a second batch. On that evening, I was wearing a big t-shirt and football clothes. These were not female clothes! The representatives from the Religious Department, however, said that my physical appearance was that of a woman. They lifted up my shirt without my consent, and I asked them why they had done that because I was not wearing a bra. We do not wear bras; as such female lingerie item would be very obvious evidence to be used against us by the Religious Department. As they did not find the evidence they

were looking for, they took my flip flops and my hair band as evidence. I was taken to the office, and again in court the following day, I did not plead guilty but I was told that there would have to be a trial in relation to this incident, in addition to the trial relating to my third arrest.

By this time, I was in communication with KRYSS (an NGO working with the LGBTI community in Malaysia) having met them only a few days earlier. They found a Syariah lawyer to represent me at the trial relating to the third arrest. The Syariah lawyer convinced the court to combine the trials for the third and fourth arrests, and then sought a postponement. Our strategy is to postpone my trial in the Syariah court until after the leave hearing for the judicial review case has taken place.

I very much hope that as a result of our legal challenge, the situation facing trans-women in Malaysia will change. I am prepared to die for this cause, because there is such a lot of discrimination against us. I found it so difficult to find a job when I was younger. The Malaysian people do not allow trans-women to be anything other than sex workers. This really is the only work that we can do because when we look for work elsewhere, we are ridiculed. But we also have people to feed, and responsibilities to manage. We should be able to make money safely, and take care of our people like everyone else”.

‘Linda: I am a 25 year old Malay Muslim. I was born in Ipoh but I have lived in Seremban for the last seven years. Since I was 16 years old, I started to identify as a woman. I started to take hormone pills which I bought from the pharmacy. My siblings had no problem with me dressing as a woman, but my father did not like

it. He used to scold me and beat me, so I was forced to run away on two occasions to the house of a friend. After I completed my high school education, I moved to Seremban in order to study architecture at the college here.

I found it incredibly difficult to study at college as a trans-woman. Firstly, I had no other trans-women friends on the campus. Secondly, I was forced to share a room (as were all of the other students) with a member of the same sex as me. Because my identify card says that I am male, I was made to share a room with a guy. I asked the Principal of the college if he could make an exception for me. I felt that they should demonstrate some flexibility in my situation. I should have been allowed either to share a room with other female friends, or to rent accommodation outside of the campus. As the college rules did not permit students to rent elsewhere, I was forced to stay on campus. I also found the studying very difficult as there was a tendency to separate the college classes according to gender. This did not work out at all for me, and I found being forced to study alongside only men very uncomfortable. I also faced dilemmas every day, such as which toilet I should use on campus. Eventually, the campus environment became so uncomfortable for me that I was no longer able to continue with my studies. I had completed two years of the three-year course but I could not face it anymore. Very soon after I left college, I met new trans-friends, and became a sex worker. I have been doing that work for four or five years now. I was very much influenced by the choices which my *trans*-friends had made. If you look around other places of employment, like shops or restaurants, you do not see any trans-women working there. Being a sex worker is the only job which gives me freedom – I am able to

wear what I like and I can do what I like. Apart from when the representatives of the Religious Department cause problems for me.

I have been arrested twice. The first time was in 2005. It was night-time in the AST area and I was caught by three men. I was with another friend and they started to chase both of us. I tripped, but my friend managed to run. I fell down, but instead of helping me up, they stepped on me to keep me on the ground. They acted like they are above God. In Islam, there should be no compulsion. You should only provide advice, but not force people to do things. I was taken to the office of the Religious Department. They did not take a statement from me straight away, but they kept me and another three of my friends in overnight. Only in the morning did they take our statements. It seemed that they were not carrying out the proper process, but rather they were just making fun of us and ridiculing us. They did not seem to want to teach us a lesson, but rather to mock us.

On the second occasion, I was picked up by three religious officers in a white van. They just picked me up from the street and took me on a joyride, asking me questions the whole time. They asked me to remove my clothes and they tried to grope my breasts. After some time, they dropped me off at the top of a hill and I was forced to walk home alone in the dark. The officers who picked me up were not actually on duty, which was why they did not arrest me. They just took me for a ride to mock me and to take advantage of their position of authority.

I have become involved in the legal case because having been arrested on two separate occasions I believe that it is wrong that it should be a criminal offence for me to wear whatever I want to wear. I want to fight for my rights, and the rights of

my friends. These people arrest us, beat us up and break into our properties. They hunt us down as if we are the biggest murderers, when the only “offence” we are “guilty” of is wearing female attire’.

‘Kay: I am a 27 year old Malay Muslim. I was born in Pahang and moved to Seremban about eight years ago. When I was about 10 years old, I began to feel confused about my identity. I began to dress as a woman whilst I was at high school, when I was probably about 15 years old. I also started to take hormone pills at that same time. I would use my pocket money to buy birth control pills from the pharmacy, or otherwise I would ask my mother for her pills. My family had no problem with the decisions I made because they understood me. I currently work in various jobs. I work as an administrative assistant in a Chinese herbal tea shop. I also assist my friend in her bridal make-up shop and I work as a part-time model. I also work as a sex worker in Seremban when I need extra money.

I have faced many problems as a result of being a transgender woman. I have found it very difficult to get jobs since I started to wear *trans* clothing because people have very negative perceptions. I once applied for a job in a factory in Sunway City which is not far from Kuala Lumpur. I attended an interview for a job as an Operator, but they never called me back and I am sure it was because of who I was. I know this because of the way they looked at me during the interview. I have also found it very difficult to find places to rent. When I first arrived in Seremban, I was urgently looking for a house. I picked up a flier advertising accommodation for rent. I contacted the person, but when we met up, he told me that he could not rent the place to me because he had decided to sell the house instead. I know that this was not true, as two months later I found out that

someone else was renting the place. This same experience has happened to me many times. Eventually I was able to find someone who did understand me. She is happy for me to rent her property as long as I pay the rent on time.

I also experienced problems in the hospital in Seremban. I was there recently, and although I am a trans-woman, I was put into a male ward. I was unconscious for five days after a car accident in which I hurt my head very badly. When I woke up, I was surrounded by men, and I freaked out. Eventually, the doctor agreed to put me in a different room so that I had a room to myself, but I should have been there from the beginning of my stay. I also found that many of the hospital workers shouted “*pondan*” at me, which is a very disrespectful name used interchangeably for homosexuals and transgender people.

Women like me regularly face trouble from other people in the community. I often meet people who are not happy with the way that I live, and they choose to pick a fight with me. I have been in fist fights with people who try to cause trouble for me. Often it is women who are the worst in this respect.

The biggest challenge which we face is from the religious authorities in Malaysia. They arrested me once. On that particular night, I was not working, so I went to my friend’s bridal boutique. I was just sitting on the steps outside, waiting for my friend to come with me to get some food. A group of guys on motorbikes suddenly appeared and took me by surprise. They came up to me and grabbed me – I thought they were robbers trying to steal from me, so I tried to shut the outside gate of the shop. They stopped me, and pushed me against the wall. I asked why they were doing this, and what was happening to me. I asked them who they were

and what they wanted, but they just told me to be quiet. They started to grope me, and I tried to push them away but I did not manage because they were too big. I looked across the road and saw another friend of mine being beaten up by some other guys. At that point, the men holding me identified themselves as representatives of the Religious Department.

I was then told that I must wait for a van to arrive. While I was waiting, they continued to beat up my friend. It was very bad – I saw it all. While I was sitting waiting for the van, one of the men sat next to me and started to grope me once again. The van finally arrived and took me to the Religious Department in Seremban. When we got there, I was put in a room, and they told me to take off my clothes which they wanted as “evidence”. I did not want to do this because I had nothing else to wear. Other staff from the Religious Department kept coming into the room. They touched my face and commented on my breasts. Eventually I was given the opportunity to telephone a friend to come and offer bail for me. She arrived with a spare set of clothes for me to change into. My friend gave a verbal assurance for me, and I was then allowed to leave.

I have chosen to take the legal case against Section 66 because I do not agree with the law and I want to change the perception of transgender women in Malaysia. As it stands, the law means that I can be arrested for simply being myself in public. I want to be free to go outside during the day time without feeling scared. I am not doing all of this for a show – this is who I am for real. Members of the Religious Department continue to hunt us down. They continue to search for trans women in Seremban. They know who we are, and they have now recruited the police officers

to assist them. So we now face problems from both the Syariah authorities and the civil police as well.

I want to live a good life. I want to find a good job through legal channels. I am prevented from doing the jobs I would like to do – like being a model or a singer – because I am a trans-woman in a Muslim country where there are laws which stop me from being who I want to be’.

‘Fifi: I am a 25 year old Malay Muslim. I was born in Seremban and I have been working as a sex worker for two years. I have been dressing as a woman, and taking hormones, for only three years. I have known that I was different since I was 13 or 14, and I have always been sexually attracted to men, but I did not start to identify as a woman until I was 22. I became a sex worker because I am not from a very well-off family, and I am able to make good and easy money in this job. I am treated very differently during the day time to how I am treated at night. During the day, people make fun of me. People talk down to me and ridicule me. They just do not understand what it is like to be a trans-woman. They do not understand it at all. My family seems to accept me dressing as a woman, but if they knew the line of work I am in, they would probably kill me.

The first time I was arrested was in 2009. I was picked up on the street and taken to the offices of the Religious Department. I was asked to take off my clothes, which I did, and they then asked me to wash off my make-up. I was interviewed by a female religious leader, who told me that I am a very handsome boy. They did not press any charges against me. Whilst they were not violent towards me, I did feel very uncomfortable because they made me remove all of my clothes.

The second time I was arrested was in November 2010. I was on the pavement in the AST area. I was wearing leggings, a white singlet top and I was holding a clutch bag. I was wearing my hair down, and I had only eye make-up on. Two men came out of the pub near where I live, and one of them approached me and started to flirt with me. He asked my name, and seemed to want to get to know me. Things progressed quite quickly, and I was swept away by this guy. Eventually I touched him, and I thought that if he was from the Religious Department, he would not have let me do that.

After I did that, however, he took my arm and told me not to resist because he was from the Religious Department. After five minutes, a van arrived and I was taken to their office. I was put into a detention room, and they told me to call someone who could provide bail on my behalf and bring some spare clothes for me. They asked me to remove my clothes, which I did. They confiscated them. They did not take a statement from me, but just took my clothes as evidence. They then told me that I would be taken to court the following morning.

The following morning, they took me to court, but then realised that they did not have a statement from me, so they had to postpone my hearing so that we could go back to the office and I could give them a statement. The hearing was delayed until after Friday prayers. The officers were scolded by the judge because my case should have been heard between ten and eleven o'clock in the morning. I was not treated well during my time in detention at the Religious Department. I was arrested at 10p.m. in the evening, and by the time I was released after my court hearing at 3p.m., I had still not been given any food. In court, I was charged with an offence under Section 66, and I was made to pay a fine of 1,000 ringgit.

I have become involved in this legal case against Section 66 because I want to change the law. The religious authorities are the biggest problem facing trans-women like myself and I want this to stop.

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