

Legal Herald

MAY 2016

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The Federal Constitution, Islamisation and the Malaysian Legal Order

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KDN PP 12853/07/2012 (030901)

The Federal Constitution of Malaya is the *grundnorm* of the Malaysian legal order, the ultimate norm against which the legality of all other norms (or laws) must be measured.¹ It is the supreme law of the nation. It lays down the framework and basic structures for the governance of the nation, constituted by the federation of the nine Malay States and the two Straits Settlements.² Subsequently, in 1963, a new nation was birthed with North Borneo (now Sabah) and Sarawak joining Malaya to form Malaysia together with Singapore. The basic pillars which undergirded the Malayan nation were reasserted for the enlarged Malaysian nation. In fulfilment of pre-conditions for Sabah and Sarawak agreeing to confederate with Malaya, new provisions were engrafted on to the document to form the Federal Constitution of Malaysia. The Constitution is both foundational and fundamental for the nation and its people to continue to strive, survive and thrive together.

1 Kevin Y L Tan & Thio Li-ann, *Constitutional Law in Malaysia and Singapore* (LexisNexis, 3rd Ed, 2010)

2 Clause 3 of that Federation of Malaya Agreement as is relevant here reads as follows:

"As from the thirty-first day of August, nineteen hundred and fifty-seven, the Malay States and the Settlements shall be formed into a new Federation of States by the name of Persekutuan Tanah Melayu, or in English, the Federation of Malaya, under the Federal Constitution set out in the First Schedule to this Agreement."

Formation of the secular Malaysian nation with Islam as the religion of the Federation

The Merdeka Constitution of 1957 was the result of the work and deliberations of the Federation of Malaya Constitutional Commission, commonly referred to as the Reid Commission. It is the product of the consensus arrived at after intense negotiations between the leaders representing the various stakeholders of the states of Malaya.

As to the Malaysian Constitution, a similar process occurred prior to Malaysia Day where the wishes and the special concerns of the Borneo entities of North Borneo (now Sabah) and Sarawak and Singapore took centre stage. A Commission of Enquiry consisting of two nominees each of the UK and Malayan governments was set up under the chairmanship of Lord Cobbold, hence the reference to the “Cobbold Commission”.

The Reid Commission and the Cobbold Commission reports, together with ancillary preparatory documents, are part of the legislative history of the Malaysian Constitution, the *travaux préparatoires*. They are a proper source of reference when constitutional provisions call for interpretation and application by a court of law.

Article 3, which provides that “Islam is the religion of the Federation”, has a socio- political context. The Pan-Malaysian Islamic Party³ sought to establish an Islamic state. This was countered by the Alliance party’s proposal for Islam to be the official religion of the Federation. Using a double negative, the proposal asserts that this proposal shall not imply that the state is not a secular state.⁴ A member of the Reid Commission who agreed with this proposal did so on the basis that such a provision would be innocuous.⁵ It was not meant to affect any other provision of the Constitution. Thus the drafters expressly and perhaps anxiously added another caveat

in the sub-clause that nothing in the Article derogates from any other provision of the Constitution.⁶ This might be incomprehensible legalese to the layman and even to some lawyers. The Malay version makes it plain:

“Perkara 3(4): Tiada apa-apa jua dalam Perkara ini mengurangkan mana-mana peruntukan lain dalam Perlembagaan ini.”

The basic character of the Federation of Malaya is recorded in a most important constitutional document in the form of the “White Paper on the Constitutional Proposals for the Federation of Malaya” tabled in the Legislative Council. The paper reaffirmed the continuance of the secular basis of the Federation, notwithstanding the provision that Islam is the religion of the Federation in the following terms:

“There has been included in the proposed Federal Constitution that Islam is the religion of the Federation. This will in no way affect the present position of the Federation as a secular State...”⁷

The Malaysian federation project witnessed the process of a thorough revisit and review of the underlying premises and rationale of the Articles of the Malayan Constitution. They were either reaffirmed or modified with regard to their application to these Borneo state entities.

The Cobbold Commission Report recorded deep anxieties over the position of Article 3 of the Federal Constitution. It noted the reservations, and even outright opposition, of the non-Muslim communities of the two Borneo territories to the provision making Islam the religion of the Federation. The concerns and anxieties of the non-Muslims and non-Malay components of the population stemmed from the concern over the prospect of Malay/Muslim domination. The two Malayan members, in mooted the retention of Article 3, made the following observation:

3 Now known as Parti Islam Se-Malaysia (PAS)

4 The Reid Commission Report states: “In the memorandum submitted by the Alliance it was stated:

‘The religion of Malaysia [sic] shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising other religions and shall not imply that the state is not a secular state’ (at p 73).

5 “A provision like the one suggested above is innocuous. Not less than 15 countries of the world have a provision of this type entrenched in their Constitutions.” — Reid Royal Commissioner Justice Abdul Hamid

6 Article 3(4): Nothing in this Article derogates from any other provision of this Constitution

7 Legislative Council Paper No 41 of 1957. The Federation of Malaya government stated:

“There has been included in the proposed Federation Constitution a declaration that Islam is the religion of the Federation. This will in no way affect the present position of the Federation as a secular State...”

“Taking these points fully into consideration, we are agreed that Islam should be the national religion for the Federation. We are satisfied that the proposal in no way jeopardises freedom of religion in the Federation, which in effect would be secular.”

The Cobbold Commission was preceded by an important step taken by the North Borneo and Sarawak colonial governments in early 1962 to issue Government Papers to explain why the creation of a greater Malaysian nation was desirable and outlined the framework of the new federation. Very significantly, these papers addressed the concern over the position of Islam and the implications on religious rights and freedom. The Sarawak State Paper reads:

“People have wondered whether the fact that Islam is the official religion of the Federation of Malaya would affect religious freedom in Sarawak as part of Malaysia. This has been clarified at the recent Consultative Committee Meeting. Although Malaysia would have Islam as the official religion of the enlarged Federation there would be no hindrance placed on the practice of other religions. Complete freedom of religion would be guaranteed in the Federal Constitution. Sarawak has at the present no established religion and it would not be required to accept Islam as its State religion.”⁸

The Sarawak State Paper refers to the “Memorandum on Malaysia” dated 3 February 1962 prepared by the Malaysia Solidarity Consultative Committee.⁹ This memorandum provides the context to the assurance on religious freedom made by the respective colonial governments. Such freedom will be freely exercisable in a

Malaysia which will not be made less secular. Paragraph 13 records that:

“the Committee directed a great deal of its attention to the question of Islam as the religion of the Federation. It is satisfied that the acceptance of Islam... would not endanger religious freedom within Malaysia and nor will it make Malaysia a State less secular. The present Constitution of the Federation of Malaya, which would serve as the basis of the new Federation, has adequately guaranteed that other religions can be practised in peace and harmony in any part of the Federation.”¹⁰

Following the Cobbold Commission Report, an Inter-Governmental Committee (IGC) was formed to work out the constitutional arrangements, including safeguards for the special interests of Sabah and Sarawak. Five political parties in Sabah submitted a joint memorandum to the IGC on the areas considered most crucial to Sabah and its people. At the top of the “20-Point Memorandum” was the issue of religion. Sarawak also submitted a memorandum of 18 points as a basis for the deliberations of the IGC.¹¹ There was agreement that Article 3 of the Merdeka Constitution of 1957 would be retained with consensus on several points of concern with regard to the position of Islam and the remit for expenditure being incurred for religious purposes in these two states. It need hardly be gainsaid that the reason for retaining it without modification was that the new Malaysia would retain its character as a secular and not a theocratic state.

There are certain features of the Malaysian Constitution that somewhat modify the fundamental character of Malaysia as a secular state. Islam, as the religion of the

8 Government Paper “Malaysia and Sarawak” published by authority of the government of Sarawak dated 4 January 1962, para 15. Government Paper “Malaysia and Sarawak” dated 4 January 1962 published by authority of the government of Sarawak. The North Borneo Government Paper dated 31 January 1962, at para 10, states the position in similar terms.

9 Among its aims and objects are to:
(a) collect and collate views and opinions concerning the creation of Malaysia consisting of Brunei, North Borneo (Sabah), Sarawak, Singapore and the Federation of Malaya;
(b) disseminate information on the question of Malaysia;
(c) initiate discussion on Malaysia; and
(d) foster activities that would expedite the realisation of Malaysia; at para 3.

10 Malaysia Solidarity Consultative Committee Memorandum on Malaysia dated 3 February 1962, at para 13

11 Herman Luping, *The Formation of Malaysia Revisited in Sabah 25 Years Later: 1963-1988* [Institute for Development Studies (Sabah)] at pages 11 and 15

Federation, is accorded an official status at the federal level in the sense that Islamic rites and rituals may be applied for official and ceremonial purposes.¹² Under Article 12(2) which pertains to educational rights, both the federal and the state governments are permitted to provide special financial aid for the establishment or maintenance of Muslim institutions or the instruction of Islam to Muslims.¹³ Funds may also be expended for certain Islamic purposes and for the establishment of Syariah courts within the scope stated in the Constitution. States have legislative power over Islamic matters such as family law and religious trusts. The powers of Syariah courts to punish Muslims for offences against precepts of Islam are subject to jurisdiction being first conferred by Federal law.

With such a carefully circumscribed scope for state involvement in Islamic matters, which would otherwise not be evident in a strictly secular state, Malaysia may be described as a nation which is essentially a secular state adapted to accommodate funding for Islamic purposes and for administration of certain aspects of Islamic law.

Islamisation initiatives and impact of Islamisation policies

The concept of an Islamic state is premised on Islam as a political ideology and the supremacy of Syariah. In the post-Merdeka period from the early 1980s, demands by Islamic state proponents and activists as well as the political responses of Umno set the stage for a unique form of Malaysian-style Islamisation and the erosion of the basic structure and character of the Malaysian polity. In 1982, the Umno-led government under then prime minister Tun Dr Mahathir Mohamad announced the policy of inculcating 10 Islamic values that are universal in nature in the administration. These universal values are: trust,

responsibility, honesty, dedication, moderation, diligence, discipline, cooperation, honourable behaviour and thanksgiving. The initiative was hardly pursued with any degree of commitment or vigour. It became the launching pad and platform for gradualist Islamisation of national policies, systems and institutions as conceived by the religion bureaucrats which have scant, if any, significance to the promotion of universal values.

This was followed by former prime minister Tun Abdullah Ahmad Badawi's concept of "Islam Hadhari" and current prime minister Dato' Sri Najib Tun Razak's "Islam Wasatiyyah".

Islamisation of laws and legal order

The Malaysian legal system is based on English common law together with statutes enacted by Parliament. These laws are administered by civil courts. Article 162 preserves the continuity of the common (civil) law which had been in place prior to the promulgation of the Constitution.

The scope of Islamic law which comes within the legislative power of the state mainly pertains to personal law, offences against precepts of Islam and the establishment of Syariah courts. State Islamic laws apply and state Syariah courts have jurisdiction only within their state boundaries and in respect of Muslims.

Islamic state proponents demand the Islamisation of laws and national legal order. The ultimate vision is for the establishment of a constitutional framework and a legal and judicial system in which Syariah law is the supreme law of the land, and the full implementation of Syariah law by Syariah courts. The underlying demand is that the Syariah is to be established as the *grundnorm* for the nation's legal order.¹⁴

12 The first Malayan prime minister, Tunku Abdul Rahman, reasserted the constitutional position in the following words:

"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" (Official Report, Federation of Malaya Legislative Council Debates [Hansard], 1 May 1958, Kuala Lumpur, Government Press 1958).

Hashim Yeop Sani in *The Malaysian Constitution* wrote:

"The words 'Islam is the religion of the Federation' appearing in clause 1 of that Article has no legal effect and that the intention was probably to impose conditions on federal ceremonies to be conducted according to Muslim rites."

13 Constitutional amendments in 1976 extended the dispensation to allow for the direct establishment or maintenance of Muslim institutions or instruction and not only to provision of financial aid for such purposes

14 The Constitution of an Islamic State should comprehend the following Basic Principles:

1. Ultimate Sovereignty over all Nature and all Law vests in Allah, the Lord of the universe, alone.

2. The law of the land shall be based on the Qur'an and the *Sunnah*, and no law shall be enacted nor any administrative order issued, in contravention of the Qur'an and the *Sunnah*.— S Abdul A'la Maududi, *The Islamic Law and the Constitution* (Islamic Publications (Pvt) Ltd, 11th Ed, 1992) at p 332.

In his article “Making Laws Islamic in Malaysia: A Constitutional Perspective”,¹⁵ Mohammed Imam offers a subtle strategy for Islamisation of the national legal order. It should be low-profiled, pre-planned, graduated and given a subtle secular or non-religious form and appearance buttressed by secular or non-religious reasons. This will be most effective in the face of likely opposition, given the character of the Malaysian populace in a multi-religious and multi-cultural society.

Mohammed Imam’s rationale for the Islamisation of laws in Malaysia appears to be premised upon the claim that Article 3 serves the same purpose as the declaration in the constitutions of some Islamic countries that Syariah is to be the principal source of legislation. In “Freedom of Religion under Federal Constitution of Malaysia — A Reappraisal”,¹⁶ he advances the view that Article 3 of the Constitution, far from being innocuous, casts upon the “Federation” a positive obligation to protect, defend and promote the religion of Islam, and to assist, enable and facilitate Muslims, individually or collectively, to order their lives in accordance with the injunctions of Islam.

According to Mohammed Imam, the positive obligation on the Malaysian Parliament to enact fundamental Islamic constitutional principles is to be effected by recourse to its powers of amending the Constitution. With regard to other legislation, he recommends that Malaysia emulate the Pakistan modality, whereby all laws are to be brought into conformity with the injunctions of the Qur’an and *Sunnah* and that no law (other than the personal laws of non-Muslims) should be enacted repugnant to such injunctions.

Mohammed Imam went on to advocate the strategy of judicial Islamisation of the law by judges using their creative power in law-making when adjudicating cases

brought before them. The same strategy based on subtlety and imperceptibility is recommended:

“It is not difficult for a judicial mind nurtured in the traditions of Islamic ideals, values and precepts to perceive the unfolding problems, social needs, and the thrust of social change against that backdrop, and seek and find in them the right solutions to the issues that come before them for resolution. This imperceptible process can be a reality. There is no need nor it is [*sic*] desirable to state the source of such chosen solutions by Islamic labels.”¹⁷

In Malaysia, where the Constitution is the supreme law, legislation enacted by Parliament must pass the test of constitutionality and consistency with other laws. While Parliament has not embarked on constitutional amendments along the lines suggested by Mohammed Imam, there are disturbing signs that legislation intended for general application are now subject to the scrutiny of religion bureaucrats who can halt the implementation of such laws. A case in point is the Domestic Violence Act 1994 [Act 521], which could not be brought into force for almost two years as certain provisions were said to be contrary to Islamic law and could not be implemented in their present form. The same fate befell proposed law reforms seeking to preserve the status quo of parties to a civil marriage where one spouse has converted to Islam. It appears that in addition to constitutionality and compatibility with other laws, Syariah compliance is now becoming part of the law-making process.

Mohammed Imam’s opinion on the significance of Article 3 in imposing obligations on government and the role of creative law-making by judges in Islamisation of laws appears to have found some receptive judicial minds. In *Meor Atiqulrahman Ishak & Yang Lain Iwn Fatimah Sihi & Yang Lain* [2000] 1 CLJ 393 (BM),¹⁸ the High Court held that

15 [1994] 3 CLJ vii

16 [1994] 2 CLJ lvii

17 *Supra*, n 15 at xxi

18 *Meor Atiqulrahman Ishak & Yang Lain Iwn Fatimah Sihi & Yang Lain* [2000] 1 CLJ 393 (BM)

Article 3 obliges the government to preserve, promote and propagate Islam to the full extent of its capacity. The court put forward several ways that the government ought to give effect to Article 3 such as by setting moral codes as well as to make rules to ensure the supremacy of Islam as the superior religion. The practice of non-Islamic religions should be conducted and observed so that it is exercised in peace and harmony and does not endanger the superior position of Islam.¹⁹

In the case involving the Catholic publication the *Herald*,²⁰ the Court of Appeal, citing Mohammed Imam, held that Article 3 is not a mere declaration but that it imposes positive obligations on the Federation to protect, defend and promote Islam and to give effect by appropriate state action, to the injunction of Islam and to facilitate and encourage people to hold [*sic*] their life according to the Islamic injunction on spiritual and daily life.²¹ The court also held that Article 3 places the religion of Islam on par with the other basic structures of the Constitution, the reasoning being that it is the third in the order of precedence of the Articles.²² Article 11 is to be read subject to Article 3, the Article on fundamental liberties, having been grouped together subsequently under Part II. The insertion of the words “in peace and harmony” in Article 3 was to protect the sanctity of Islam and also to insulate it against any threat.²³

Other judges do not go to such lengths. However, they abdicate their judicial duty to hear, determine and grant remedies. They concede jurisdiction to Syariah courts effectively acceding to claims that Syariah laws ought to override the civil laws. This occurs when they face

objections that issues involving Syariah matters or law ought to come within the jurisdiction of the Syariah court. One bench of the Court of Appeal has gone so far as to elevate the Syariah court to the status of the High Court holding them to be courts of coordinate jurisdiction.²⁴ This is but one short step away from conferring supremacy of the Syariah court over the High Court.

Such judicial revisionism impacting on the character of the Malaysian polity with its serious implications on the national legal order is a worrying development. Article 3, which was intended to be “innocuous” and which expressly provides that nothing in it “derogates from any other provision”,²⁵ is now construed to impose obligations on government and on governance to the extent that the Article is held to have an overarching effect over other provisions. The incremental and gradualist way of building a set of judicial doctrine premised on Article 3 is both disingenuous and startling. Wholly unsupported by, and indeed contradicted by, the Constitution as previously construed by the highest court of the land,²⁶ it flies in the face of any legitimate interpretation of the Constitution and its legislative history. The implications are far reaching.

National legal order: Repository of judicial power

Judicial independence is imperative in a nation governed by the twin pillars of the rule of law and the supremacy of the Constitution. This requires that the courts be presided by men and women of integrity, competence and courage. In the face of loud voices demanding the Islamisation of law and the legal order, judges must act impartially,

19 *Ibid*, at 407b

20 *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLJ 468 (CA)

21 *Ibid*, at 511 [104]

22 *Id*, at 489I-490A [31]

23 *Id*, at 490 [33]

24 *Saravanan a/l Thangathoray v Subashini a/p Rajasingam* [2007] 2 MLJ 705 (CA), at 745. The judgment proceeded on the basis that Article 121(1A) of the Federal Constitution, which provides that the civil court has no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts, means that the Constitution recognises the coexistence of the two systems of court in the administration of justice in this country and, as such, the two courts must be regarded as having the same standing in this country.

25 *Supra*, n 6

26 In *Che Omar Che Soh v PP* [1988] 2 MLJ 55, the apex court addressed the issue whether the reference to “Islam as the religion of the Federation” in Article 3 only referred to “acts as relate to rituals and ceremonies” or whether it is an all-embracing concept which encompasses a “comprehensive system of life including its jurisprudence and moral standards”.

Salleh Abbas LP rejected the very wide interpretation which would have compelled the court to hold that the death penalty was unIslamic and therefore unconstitutional. The judicial reasoning was that had it been otherwise, the Constitution would have contained another provision to the effect that any law contrary to the injunction of Islam will be void. Instead, Article 162 preserves continuity of secular law which had been in force prior to the Constitution and further provides that such laws are to be in force unless they are contrary to the Constitution.

regardless of their own religious beliefs. Judges, as do members of the legislative and executive arms of the government, take the oath of office to “preserve, protect and defend the Constitution”.²⁷ As the judicial arm of government, they are not encumbered with the super-added obligation to defend and promote Islam to the full extent of their capacity or to facilitate and encourage people to order their lives according to the Syariah.

In 1988, judicial independence in Malaysia suffered a serious setback. The express conferment of judicial power on the High Court of Malaya and the High Court of Borneo was removed.²⁸ Henceforth, they would also have no “jurisdiction in respect of any matter within the jurisdiction of the Syariah courts”.²⁹

What is the position of the law where both courts have jurisdiction? Does the provision imply that the Syariah court can oust the jurisdiction of the civil court? What is the position where the subject matter in dispute involves a non-Muslim who is not subject to the jurisdiction of the Syariah courts?

There are authoritative and binding decisions of the apex Federal Court on the judicial authority of the High Court which will overcome any disputation over the clash and contest for jurisdiction over a subject matter, but these appear to have been ignored.³⁰

Of late, it is becoming distressingly frequent for the High Court, in matters where it does have judicial power to act, to decline to do so — in the belief that it would be more appropriate for the Syariah court to act — and accede the jurisdiction to the Syariah court. This occurs even where there are serious constitutional issues that are within the sole purview of the High Courts and the appellate and apex courts. They mainly involve the religious status of a litigant,³¹ a spouse³² or a deceased,³³ in matters that affect succession, marriage and custody of children.³⁴ The fact that these cases have a divisive impact on families and for children adds a poignant and often painful dimension to the case.

In cases where the High Court declines jurisdiction in favour of the Syariah court on questionable grounds, a non-Muslim party can be left without any access to justice, the Syariah court giving no recognition to non-Muslim applicants. The principle *ubi jus ibi idem remedium* — where there is a right, there is a remedy — is discarded in such cases.

In *Moorthy's* case,³⁵ a widow sought a declaration that her husband died a Hindu and was not or no longer a Muslim. The first declaration was within the civil court. The High Court held that issues of conversion were within the jurisdiction of the Syariah court and declined jurisdiction,³⁶ well aware that the widow had no access to the Syariah court. The presiding judge queried Senior

- 27 Article 124 refers to the Sixth Schedule of the Federal Constitution prescribing the Oath of Office and Allegiance. It reads:
“... I will faithfully discharge the duties of that office to the best of my ability, that I will bear true faith and allegiance to Malaysia, and will preserve, protect and defend its Constitution.”
- 28 Article 121(1) was amended to delete the term “Judicial power of the Federation” and to provide that the two High Courts shall have such jurisdiction and powers as may be conferred by or under federal law
- 29 The new Article 121(1A) provides:
“The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.”
- 30 One example is where the Federal Court in *Subashini Rajasingam v Saravanan Thangathoray and other appeals* [2008] 2 CLJ 1 gave no heed to its own decision in *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101. In *Latifah*, the Federal Court held that unlike the civil High Courts, the Court of Appeal and the Federal Court, all of which are established by the Constitution itself, a Syariah court in a State is established or comes into being only by the enacting powers of the State Legislature. The position of the Syariah courts is similar to the Sessions Courts and the Magistrates’ Courts, which are referred to in the Constitution as “inferior courts”. Also note the decision of the Federal Court in *Abdul Kahar Ahmad v Kerajaan Negeri Selangor Darul Ehsan; Kerajaan Malaysia & Anor (Intervenors)* [2008] 4 CLJ 309.
- 31 *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585 (BM): Right to freedom of religion; a citizen professing the religion of her choice (Christianity) and leaving Islam. The Federal Court held that the matter of apostasy is to be decided by the Syariah court.
- 32 Jonathan Kent, “Malaysia ‘convert’ claims cruelty” (6 July 2007) <<http://news.bbc.co.uk/2/hi/asia-pacific/6278568.stm>> (accessed 21 March 2016)
- 33 *Kaliammal Sinnasamy lwn Pengarah Jabatan Agama Islam Wilayah Persekutuan (JAWI) & Yang Lain* [2006] 1 CLJ 753; [2006] 1 MLJ 685 (BM)
- 34 *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor* [2004] 2 MLJ 648 (HC); *Saravanan a/l Thangathoray, supra* n 24; *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors* [2013] 5 MLJ 552 (HC) and *Viran Nagapan v Deepa Subramaniam* [2015] 3 CLJ 537 (CA) all concerned the custody of children
- 35 *Kaliammal Sinnasamy, supra* n 33
- 36 The case of *Nor Kursiah bte Baharuddin v Shahril bin Lamin & Anor* [1997] 1 MLJ 537 (HC) cited in support of the decision can be distinguished as all parties in the case were Muslim

Federal Counsel on the dilemma that the widow faced:³⁷

Judge: “She is not a Muslim and cannot go to a Syariah court. When she goes to a civil court, the respondents there will say that the case cannot be tried in a civil court. So, she has no remedy?”

Nasir: “Yes. She has no remedy.”

That answer was greeted with loud murmurs from the public gallery.

Judge: “Is there something wrong then?”

The whole court went silent.

Conclusion

The policy introduced by the Mahathir administration in the early 1980s, innocuously promoting Islamic universal values, became a platform for certain quarters to embark on a drive to change the fundamental character of the Malaysia polity and its legal order.

Will Malaysia end up as an Islamic or quasi-Islamic state by the gradual and subtle re-writing of her foundational document, the Federal Constitution?³⁸ Or will she retain her character as an essentially secular nation?

These developments in Islamisation threaten to subvert the very foundation on which we, the citizens, and the territorial components of Peninsular Malaysia, Sabah and Sarawak have held together as one nation. **LH-AG**

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³⁷ Chelsea L Y Ng, “Widow has no remedy, counsel tells High Court” *Star* (28 December 2005) <<http://www.thestar.com.my/story/?file=%2f2005%2f12%2f28%2fcourts%2f12970832&sec=courts>> (accessed 5 October 2015)

³⁸ Professor Shad Saleem Faruqi notes that Syariah courts are being placed on a higher pedestal than the ordinary courts, even on issues that involve constitutional rights. In his view, “a silent rewriting of the Constitution is taking place”. (‘Seeking Solutions’, *theSun Weekend*, July 17-8 2004)