The Rights of Malaysia's Ethnic Minorities —
Is Democracy Dead?

by

Tania Jeyamohan
LLB (Murdoch)

This dissertation is presented for the degree of Masters of Laws of Murdoch University. Submitted in 2004.
I declare that this dissertation is my own account of my research and contains as its main content work which has not previously been submitted for a degree at any tertiary education institution.

Tania Jeyamohan
ABSTRACT

Synopsis
This dissertation examines the erosion of minority rights in Malaysia through the implementation of special measures in favour of the majority Malays. This dissertation will consider the appropriateness, effectiveness and legitimacy of these special measures under current international law standards. This involves a comparison of Malaysia's constitutional, legislative and statutory provisions with international principles of customary and treaty law, and applicable regional declarations. This dissertation will conclude by recommending appropriate policy and legislative reform, if such measures are found to be appropriate in the circumstances.

Preamble

Malaysia achieved independence from Britain on 31 August 1957. The Merdeka Independence Proclamation declared that the nation was to be ‘founded upon the principle of liberty and justice and ever seeking the welfare and happiness of its people’. Insightful words for a nation built upon by racial, cultural and religious separatism, as the term ‘its people’ was presumably meant to encompass both the majority Malays as well as all ethnic minorities.\(^1\) Unfortunately, the sentiment expressed in the Merdeka proclamation was marred by ethnic polarisation and its resultant ethnocentric legal and political system.

\(^1\) The term non-Malays and ethnic minorities are used interchangeably. The term 'ethnic minority' in the context of this dissertation is restricted predominantly to the ethnic Chinese and Indians in Malaysia. Malaysia's 'other' ethnic minorities, for example, the Eurasians and Ceylonese, are included in this definition of ethnic minorities. It does not specifically include the orang asli. The status occupied by the orang asli is complicated by the fact that they are also included in the definition of bumiputras.
The reasons for this will be explored in chapter one, which considers Malaysia’s historical and cultural development and the eventual mass pluralisation of Malaysia without a unifying national identity. An understanding of the formation of Malaysia’s cultural hegemony, and its subsequent ethnic polarisation, is required to appreciate the current status of Malaysia’s ethnic minorities. Part A will consider in detail the preferential policies in favour of Malays introduced by the government following the 1969 race riots and the resulting effect this had on the economic, social and cultural rights of non-Malays. The introduction of these policies also led to the implementation of race based quota systems in the education, employment and business sectors. Correspondingly, the socio-economic position of non-Malay minorities have been affected. The legal implications of these policies are discussed in the proceeding chapters and the reasonableness of these policies will be measured against international law standards.

To undertake this assessment, Part B discusses the role of international law and examines its implications to Malaysia. It should be noted from the outset that although Malaysia is a member State of the United Nations, it has elected not to ratify significant human rights treaties. Given this, chapter two considers the role of customary law as a part of international law and its implications to the observance of fundamental human rights. This chapter aims to establish that Malaysia as a member of the United Nations, and by virtue of customary law, is bound to recognise fundamental human rights.

As this dissertation discusses Malaysia’s observance of minority rights at international law, part C examines the availability of fundamental human rights to Malaysia’s minorities. Part C reconciles Malaysia’s pro-Malay preferential policies with minority rights and considers whether minority rights in Malaysia have been eroded through such
policies pursuant to international law standards. Chapter four determines whether the language rights of Malaysia's non-\textit{bahasa} speakers, who also constitute the ethnic minorities, are recognised and protected by Malaysia's national language policy. This chapter also assesses the impact of Malaysia's national language policy and planning on the education and employment rights of non-Malays given the introduction of language based quota systems in both sectors. Chapter five examines the role of Islam in Malaysia and considers the extent of religious freedom available to non-Muslims in Malaysia. Chapter six deals with Malaysia's restrictive laws and how these laws were relied on to revise and modify Malaysia's legal system and policies to benefit Malays whilst simultaneously impacting on the civil, political, economic, social and cultural rights of non-Malay minorities. Chapter six also considers the potential risks associated with the government's continued reliance on these restrictive laws to 'control' inter-ethnic tensions.

On the assumption that Malaysia has breached relevant international law standards in some instances, part D recommends possible methods of legislative and policy reform which may be adopted by the government to remedy these breaches. Part D is the concluding chapter of this dissertation. In concluding, this dissertation examines the impact of ethnic divisions on social and political policies in Malaysia and considers the extent of government intervention in the economy based on race which has ultimately impacted on the protection and implementation of minority rights in Malaysia. It is the writer's opinion that the source of ethnic conflict lies within the introduction of legal doctrines which are purposefully detrimental to the rights of minorities. Accordingly, the concluding chapter recommends reforms to Malaysia's legal system and policies to minimise the risk of an eruption of inter-ethnic tensions.
The aim of this dissertation is to demonstrate that Malaysia's politicisation of competing ethnic interests has resulted in the maintenance of preferential policies detrimental to minority rights and contrary to international law.
**TABLE OF CONTENTS**

Abstract

**PART A**

1. Malaysia's Legal History 1
   1.1 Early race patterns 2
   1.2 Preliminary legal system 3
   1.3 Colonial rule and common law 5
   1.4 The mass pluralisation of Malaysia 6
   1.5 Self-rule sentiments 9
   1.6 Post-independence internal stability 13
   1.7 Malaysia following the paradigm shift 21

**PART B**

2. The law of International Human Rights 29

**PART C**

3. The Observance of Minority Rights in Malaysia 49
4. Recognition of Language Rights in Malaysia 52
   4.1 Language policy planning 52
   4.2 Naming a national language 59
   4.3 The education rights of ethnic minorities 62
   4.4 The legitimacy of Malaysia's national language policy 67
5. Religious freedom in Malaysia 69
   5.1 Constitutional guarantee 72
   5.2 Restrictions on religious freedom 76
      (a) Limitation on proselytising 76
      (b) Curtailing the religious practices of non-Muslims 80
      (c) Conversion 82
   5.3 Summary of religious freedom 85
6. Clamping Down on Opposition 87

6.1 Malaysia's emergency powers 88

6.2 Emergency powers and minority rights 92

6.3 Examining the 1969 proclamation 97

6.4 Assessing the 1969 proclamation at international law 102

(a) Legitimacy of the 1969 proclamation 102

(b) The territorial scope of the 1969 proclamation 105

(c) Validity of a permanent proclamation 106

6.5 Implications of Malaysia's restrictive laws 108

PART D

7. Evaluating Malaysia's Preferential Policies 111

7.1 Preferential treatment at international law 111

7.2 Areas requiring reform 117

(a) Preferential policies 117

(b) Legislative reform 119

(c) Minority rights 122

Conclusion 126

Bibliography
PART A

1. MALAYSIA'S LEGAL HISTORY

"The Malaysian legal system has not been plucked out
of the sky. It is the product of our experiences over the
centuries."\(^1\)

Malaysia’s\(^2\) legal development cannot be understood without reference to its social and
political development. Accordingly, Malaysia’s historical development must be
considered. Culturally, Malaysia is an amalgamation of several differing yet pre-
dominant ethnic cultures. The three main groups are the Malays\(^3\), known as the
bumiputras\(^4\) or sons of the soil, the Chinese and the Indians. There are also several
minority sub-groups such as the Ceylonese and the Eurasians. Malaysia’s indigenous
groups, known collectively as the orang asli\(^5\), are included in the definition of
bumiputras.

---

\(^1\) Tun Suffian, M, *An Introduction to the Legal System of Malaysia*, 1.
\(^2\) Malaysia was not known by that name until the passing of the Malaysia Act (No. 26 of 1963) in 1963.
Prior to that Malaysia was known as Malaya following the passing of the Federation of Malaya
Agreement in 1948. Before 1948, Malaysia was divided into Federated and Unfederated territories and
was not known by a collective ‘national’ name. For ease of reading, the term Malaysia is used in this
dissertation unless otherwise stated.
\(^3\) Article 160 of the Federal Constitution defines a Malay as ‘a person who professes the religion of Islam,
habitually speaks the Malay language and conforms to Malay customs’.
\(^4\) A bumiputra or son of the soil, is a term coined to describe persons native to Malaysia. Although the
term bumiputra refers to Malays, its definition encompasses the aboriginal peoples, or orang asli, of
Sabah and Sarawak, as defined in article 161A(6) of the Federal Constitution. For a fuller discussion see
Ahmad, S S, *Malaysian Legal System*, 50-68, including a discussion of the orang asli’s native court
system. However, see Nathan, K S, *Economic Slowdown and Domestic Politics: Malaysia Boleh?*, 17, in
practice, since the introduction of Malaysia’s New Economic Policy in 1970, the term bumiputra has been
selectively applied to protect and promote the rights, interests and privileges of the Malays and not the
orang asli.
\(^5\) The term orang asli is the Malay name given to the original aboriginal inhabitants of the Malaysian
Peninsula. Translated, orang asli means native man. Many orang asli still subsist on hunting and ‘slash
and burn’ cultivation in the forests.
Malaysia’s various ethnic groups are divided by language, religion and custom. Given this, ethnic and religious considerations have increasingly influenced Malaysia’s social and economic policies. As politics in Malaysia is based on ethnology, racial separatism has played an inherent role in the formulation of Malaysia’s legal ideology. Reconciling these differences under the one system of government has proven to be difficult.

This chapter considers events in Malaysia’s history that were responsible for the shaping of its current legal system.

1.1 Early race patterns

It is believed that in Peninsular Malaysia, the first inhabitants arrived in the Middle Stone Age period (8000-2000 BC). These first inhabitants, the orang asli, were subsequently driven in to the jungles and mountains following the arrival of the Malays from Southern China between 2500 and 1500 BC. These Malays were known as the Proto-Malays, who were themselves later displaced by the Deutro-Malays from the Yunnan province in South-west China. The Deutro-Malays are the ancestors of present day Malays. Peninsular Malaysia remained ethnically unchanged until approximately 1 BC following the advent of trade, predominantly with India, and to a lesser extent China. This period resulted in the establishment of several Hindu and Buddhist

---

7 Emerson, R, *Malaysia – A Study in Direct and Indirect Rule*, 12.
8 Above note 6, 2.
9 Id.
10 Indian kings expanded the consolidation of their power in South-east Asia, resulting in the establishment of the mighty Srivijaya and Majapahit kingdoms south of Sumatra. For a fuller discussion see Above note 4, 1.
kingdoms in the region and saw the influx of Indian culture, architecture and the predominance of the Hindu religion.\textsuperscript{11}

Around 1401, a Hindu prince from Sumatra, Parameswara, founded Malacca. Hindu institutions and the Indian system of law were introduced and became firmly entrenched in the political and social administration of justice in Malacca. Hindu customs were incorporated into Malay cultural practices and continues to be observed by Malays in weddings and coronations.\textsuperscript{12} Due to its strategic location, Malacca became an important sea trade zone. Through the increased regional trade Indian and Arab traders arrived in the peninsula around 1400AD and introduced Islam to the region.\textsuperscript{13} Islam was officially embraced in the 14\textsuperscript{th} century by Parameswara. Malacca thereafter became the official diffusion centre for Islam.\textsuperscript{14}

1.2 Preliminary legal system

There emerged during this period, a more formal system of law. The procedural administration of law became a combination of Islamic law and \textit{adat temenggung} (being the patriarchal Malay customary law).\textsuperscript{15} The Malay customary law itself already included the legal and cultural practices of the South Indians.\textsuperscript{16} Law and order was administered under the direction of the Ruler, or \textit{Sultan}, who was aided by several

\begin{itemize}
  \item \textsuperscript{11} Id.
  \item \textsuperscript{12} Above note 6, 4
  \item \textsuperscript{13} Ibid, 3.
  \item \textsuperscript{14} With Malacca acting as the epicentre of trade at the time, many traders were exposed to Islam. These same traders were then encouraged to initiate conversions in their own states. This is one of the reasons for Islam's rapid growth in the Peninsula. Another was due to the fact that none of the other religions (Hinduism and Taoism) had a system of belief which promoted conversion. Parameswara himself encouraged the rulers of neighbouring states to embrace Islam and encouraged open conversion among his people. For a fuller discussion see Above note 6. Today, almost all Malays are Muslims, and Islam is the predominant religion of the region.
  \item \textsuperscript{15} Ibid, 4.
\end{itemize}
officials. For instance, the administration of justice was delegated to the Chief Minister, or Bendehara, who exercised both political and judicial functions. The preservation of peace and administering criminal justice was left to the Commander of Troops and Police, or Temmengung.¹⁷ Incidentally, the welfare of foreigners was looked after by the Harbor Masters and Collectors of Customs, or Shahbandars.¹⁸ During this period, the Sultanate of Malacca produced two written legal texts: the Hukum Kanun Melaka¹⁹, prescribing the responsibilities of the rulers, and the Undang-Undang Laut Melaka, setting out the laws of the sea and maritime matters.²⁰

The Malacca Sultanate was conquered by the Portuguese in 1511.²¹ Malacca’s strategic trading location soon attracted the attention of the British and the Dutch. Malacca was eventually captured by the Dutch in 1641.²² Neither the Portuguese nor the Dutch conquests significantly altered the racial composition of Malaysia’s society and it is unclear if either of the conquering nations laws were ever incorporated or applied in Malaysia.²³ However, the Portuguese and Dutch did establish administrative hierarchies. At the pinnacle of the Portuguese hierarchy was the Governor who was assisted by a council comprising a Chief Justice, Mayor, Bishop and Secretary. The Dutch also had a Governor and Council comprising of the collector of taxes, the Mayor, the Upper Merchant and a Secretary.²⁴ Again, the exact reach of these administrative systems and the extent of the local communities involvement is unclear. The only reference to the application of European laws to the domestic community during this

---

¹⁶ Above, note 4, 3.
¹⁷ Above, note 6, 4.
¹⁸ Above, note 6, 4.
¹⁹ Melaka is Malacca in the Malay language.
²⁰ Above, note 4, 3.
²² Id.
²³ Above, note 4, 4.
period was in the case of *Rodyk v Williamson* (1935) 2 Ky. 8 where reference was made to 'Dutch law at Malacca'.

### 1.3 Colonial rule and common law

During Dutch rule in Malacca, the British established a rival trading port in Penang in 1786, leasing the island from the Sultan of Kedah. By 1824, the British had gained almost complete control of Peninsular Malaysia, having ousted the Dutch from Malacca. Local opposition to British rule was not evidenced, and the British used their superior bargaining power to demand trading posts, and subsequently, entire territories, in exchange for providing assistance to the *Sultans*. In gaining control, British law was initially introduced in Penang pursuant to the *First Charter of Justice* in 1807 and civil and criminal matters were subject to common law, and it alone. However, the British permitted some continued application of native customary family laws relating to marriage and divorce rights. Any remnants of Dutch law were superseded by British law with the granting of *The Second Charter of Justice* 1826, which also resulted in the formation of the Straits Settlements (Singapore, Malacca and Penang). The Straits Settlements attracted increasing numbers of immigrants, particularly Chinese from southern China to Singapore who developed training and mining interests.

---

24 Id.
25 Id.
28 Above, note 4, 5.
29 Ibid, 84.
30 Ibid, 11.
31 Ibid, 4.
The British created a centralised system of administration, based on the common law model, and formed the Federation of Malay States, consisting of the states of Perak, Selangor, Pahang and Negeri Sembilan, in 1895 under the control of a resident British General and the designated High Commissioner of the Federation.\(^{33}\) The States of Johor, Kelantan, Trengganu, Kedah and Perlis, known collectively as the Unfederated Malay States, enjoyed a higher degree of autonomy and were indirectly ruled by the British via treaties enacted with the various state Rulers.\(^{34}\) British law was formally introduced by statute in the Federated Malay States pursuant to the Civil Law Enactment 1937 and in the Unfederated Malay States pursuant to the Civil Law (Extension) Ordinance 1951.\(^{35}\)

1.4 The mass pluralisation of Malaysia

By the 1890's economic progress in the Malay States was slow when compared to that of the Straits Settlements as the Malays were engaged in agricultural subsistence.\(^{36}\) Cheap labour was sought leading to the transportation of large numbers of Indian and Chinese workers in the latter half of the 19\(^{th}\) and early 20\(^{th}\) century to work in the tea and rubber estates, and in the tin mining industries respectively.\(^{37}\) The British also recruited Ceylonese\(^{38}\) and educated Indians to undertake positions in the government services given their familiarity with British administrative procedures as a result of

\(^{32}\) Hickling, R.H, Essays in Malaysian Law, 79.
\(^{33}\) Above, note 6, 19-20.
\(^{34}\) Ibid, 20-21.
\(^{35}\) Both were replaced by the Civil Law Ordinance (1956), which applied to all 11 Federation States.
\(^{37}\) Above, note 26.
\(^{38}\) It is believed that the first Ceylonese immigrants to Malaya came with the British Civil Servants around the 1880's to help in the establishment of the administrative machinery of the then Straits Settlements and the Malay States. Later came the Ceylon Pioneer Corps with their officers who occupied posts in the
British rule in their respective countries. These immigrant groups were also subject to the common law although the British recognised some local customs and laws (i.e. succession) and appointed community leaders to oversee Indian and Chinese community issues. The Malay administration only intervened to collect levy tolls and royalties from mining.

As a result, there was only minimal inter-ethnic mingling, partly because of the differences in economic specialisation but also because of social, cultural, religious and linguistic differences. Despite the British turning Malaysia into a plural society, it also caused an increase in ethnic polarisation due to this inter-ethnic segregation. British economic policy eventually resulted in Indian and Chinese immigrants constituting more than 50% of Malaya’s total population by 1931. The 1931 census demonstrates this breakdown:

<table>
<thead>
<tr>
<th>Nationalities</th>
<th>Population</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>European</td>
<td>17,768</td>
<td>0.4</td>
</tr>
<tr>
<td>Eurasians</td>
<td>16,043</td>
<td>0.4</td>
</tr>
<tr>
<td>Malays</td>
<td>1,644,173</td>
<td>37.5</td>
</tr>
<tr>
<td>Other Malaysians</td>
<td>317,848</td>
<td>7.2</td>
</tr>
<tr>
<td>Chinese</td>
<td>1,709,393</td>
<td>39.0</td>
</tr>
<tr>
<td>Indians</td>
<td>624,009</td>
<td>14.2</td>
</tr>
</tbody>
</table>

40 Ibid, 19.
41 Ibid, 19.
42 Above, note 36, 13.
43 Above, note 36, 13.
44 Taken from Above, note 4, 7.
<table>
<thead>
<tr>
<th>Nationalities</th>
<th>Population</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Others</td>
<td>56,113</td>
<td>1.3</td>
</tr>
<tr>
<td>Total</td>
<td>4,385,346</td>
<td>100.0</td>
</tr>
</tbody>
</table>

To overcome their reducing majority status, Malays encouraged the immigration of Malays from the Indonesian Archipelago.⁴⁵ This resulted in a considerable proportion of the Malay population being themselves made up of immigrants who were born elsewhere. Malaya’s unique demographic localisation affected internal politics when self-rule sentiments were first expressed following the Japanese occupation during World War II.⁴⁶

Malaya was under Japanese occupation from 1942 to 15 August 1945. During this period, the Japanese systematically dismantled any administrative, political and governmental system of operation utilised during colonial rule given their anti-colonial sentiments.⁴⁷ This in part included encouraging self-rule sentiments amongst Malays, the promotion of the Malay *Sultanates* and the practice of Islam.⁴⁸ Conversely, the Japanese prevented trade with England which affected the socio-economic status of Malaya’s business community, who were predominantly comprised of the Chinese, and to a lesser extent the Indians and some Malays. Given their diminishing economic status, the Chinese were the most prominent opposers of the Japanese and engaged in guerrilla warfare.⁴⁹

---

⁴⁵ Above, note 7, 14.
⁴⁶ Above, note 36, 13.
⁴⁷ Id.
⁴⁸ Id., 29.
⁴⁹ Id. The Malayan Communist Party (‘the MCP’) had been formed during the Japanese occupation and opposed the Japanese and the British. During the Japanese occupation, the British turned to the MCP for assistance to overthrow the Japanese and in the process, MCP members were trained in guerilla tactics. The MCP founded several popular resistance groups – the Malayan People’s Anti-Japanese Army and
1.5 Self-rule sentiments

Following the Japanese surrender in 1945, Malay demands for independence from British rule were initiated as intended by the Japanese. To ease tensions, the British introduced the short-lived system of military administration known as the British Military Administration (‘the BMA’). Both Malays and non-Malays opposed the BMA and demanded greater political and economic autonomy given Malaya’s dwindling economic status caused by Japanese imposed trade and manufacturing restrictions during the occupancy. Recognising the real demands for self-rule, the British conceded that limited autonomy had be granted and attempted to unify the Federated, Unfederated and colonial Malayan territories via the Malayan Union Plan of 1946. The Malayan Union Plan was also opposed as it primarily allowed the British to retain executive, legislative and judicial control. Malays also opposed the unification of Malaya as it meant the introduction of a common citizenship for ‘anybody born after the Malayan Union was passed, anyone above the age of eighteen, who has lived in Malaya for a decade and their children’, and entitled non-Malays to obtain citizenship rights. Malay Sultanates were also concerned that their powers would be restricted to Islamic and customary laws. This unified Malay opposition resulted in the formation of the United Malays National Organisation (‘UMNO’) which was made up by a congress of 42 Malay organisations.

gave rise to a sense of multi-racial, anti-colonial solidarity amongst some elements of Malay, Indian and Chinese youth. For a fuller discussion see Above, note 26, 86 – 102.
50 Above, note 26, 106.
52 Id.
53 Ibid, 29.
Despite Malay opposition, the Malayan Union came into force on 1 April 1946 although plans for it to be replaced by a Federation began by May 1946.\textsuperscript{54} These discussions resulted in the creation of the \textit{Federation of Malaya Agreement} 1948 ('the FMA').\textsuperscript{55} The FMA allowed the Malay \textit{Sultanates} to be retained as constitutional monarchs and formally recognised Malays as the indigenous peoples or \textit{bumiputras}. The Federation and each of the States were to be governed by written constitutions, with the Federal legislature retaining greater power. The power of the State legislatures was limited to Islamic matters and Malay customs and any other matter not covered by the Federal Legislature.\textsuperscript{56} In addition, citizenship for non-Malays was only available to those immigrants who had been residents for 15 years. The British retained some control and the Crown was represented by a High Commissioner as opposed to a Governor.\textsuperscript{57} Prior to the introduction of the FMA, the MCP adopted militant and guerrilla tactics in April and May 1948 during the inter-ethnic constitutional struggle resulting in a proclamation of emergency throughout the entire peninsula on 18 June 1948.\textsuperscript{58}

Inter-ethnic tensions became apparent in 1948 following the introduction of the FMA as non-Malays felt threatened by the citizenship discussions and were concerned over the preservation of their socio-economic position. Reflecting inter-ethnic tensions, racially based political parties such as the Malayan Indian Congress (the 'MIC' – formed in August 1946), the Malayan Chinese Association (the 'MCA' formed on 27 February 1949) and the Malayan Ceylonese Congress (the 'MCC') were formed to protect the interests of their respective ethnic groups. Recognising this growing tension, the British

\textsuperscript{54} Ibid, 24.
\textsuperscript{55} Above, note 32, 89.
\textsuperscript{56} Above, note 51, 27. The FMA was also met with opposition as reflected in the Peoples' Constitutional Proposals of August 1947. For a fuller discussion see Above, note 26, 121-122.
\textsuperscript{57} Department of Information Services Malaysia, 1.
\textsuperscript{58} Above, note 26, 129-130.
formed the Barnes Committee and Penn Wu Committee to address and monitor matters of racial intolerance. These Committee's were collectively placed under the guardianship of the Race-Relations Committee, which expressly recommended in 1949 that non-Malays were to be granted political rights and equal citizenship access. In November 1950 the then UMNO leader, Dato' Onn Jaffar, attempted to unite the races by making UMNO a multi-racial party. This caused UMNO to split and Dato' Onn was replaced as UMNO leader by Tunku Abdul Rahman in September 1951. Dato' Onn however went onto found and lead the Independence for Malaya Party ('the IMP'). Recognising UMNO's need for inter-ethnic support to overcome the IMP's popularity, Tunku Abdul Rahman introduced a new political scheme, the Alliance, at the Kuala Lumpur Council election of February 1952, which incorporated the MCA and MIC. The Alliance won the first Federal Elections on 27 July 1955, although effective power was retained by the British High Commissioner who was able to nullify any law passed or enacted as he saw fit. Recognising this limitation, delegations were sent to London in January and February of 1956 to negotiate Malaya's absolute independence.

Accepting that these demands would have to eventually be met, the British appointed the Federation of Malaya Constitutional Commission, known as the Reid Commission, in 1956 to make recommendations for the soon to be independent

---

59 Above, note 51,27.
60 Id.
61 Ibid, 28.
62 Based on the Report of the Constitutional Commission of February 1957 ('the Reid Commission') chaired by Lord Reid, the Reid Commission, drew up a fresh Constitution. The Reid Commission itself consisted of members appointed from 5 foreign countries. No Malayan national was present. However, the Reid Commission was bound to prepare a fresh Constitution based on the Malayan peculiarities of the Sultanates and a recognition of the special privileges to be accorded to the Malay peoples. The Reid Commission recommended a Parliament consisting of a House of Representatives ('Dewan Rakyat'), consisting of 100 members, and a Senate ('Dewan Negara'), consisting of 2 members from each State and 11 members appointed by the Federal Government.
Federation of Malaya. Amongst the Reid Commission’s recommendations was that of a common nationality for the whole of the Federation and ‘the safeguarding of the special position of the Malays and the legitimate interests of other communities’. An education committee was also appointed to consider Malaya’s future education needs. The education committee's report the Razak Report, published in 1956, endorsed the need for a standardised medium of instruction, and recommended the use of the Malay language bahasa, in conjunction with English, at the secondary and tertiary levels. At this time, Malaya’s national identity and the need for national unity were also considered. The reasons cited for national unity included inter alia:

(a) “The common features [the various States] shared: [that is ] all were Malay states with a traditional type of government which had the Sultan as the head and Islam as the official religion;

(b) The threat of being overpowered by immigrants viz. the Chinese and the Indians, who were becoming increasingly involved with the economic progress of the States concerned;

(c) The weakening power of the traditional government with the intrusion of the British.”

According to this rationale, national unity and Malay nationalism were one and the same. The Reid Commission’s findings were published in February 1957 and

---

64 Ibid, 2.
66 Ibid, 1.
67 Ibid, 1 The more extremist point of view on national unity and identity was expressed by the Association of Enlightened Women (Angkatan Wanita Sedar) (‘AWAS’), which was formerly a part of UMNO. AWAS embraced only Malay nationality, and required that every alien who wished to become a
recognised that special privileges were to be accorded to Malays. The Reid Commission also recommended the need for a common nationality, recommending that bahasa be made the national language and the sole official language 10 years after independence. The Reid Commission’s findings were critiqued by a Working Party consisting of four Alliance members, four Rulers and two British officials. The Working Party did away with the Reid Commission’s recommendation that the special privileges provision be reviewed after 15 years, and instead left such a review to the Agong’s discretion. These joint proposals were enacted by the Federation of Malaya (Amendment) Agreement 1957 (‘the FMA’) which was passed on 15 August 1957.

1.6 Post-independence internal stability

The 1957 Federal Constitution reflected the Reid Commission’s and Working Party’s recommendations. Malaya formally achieved independence, or Merdeka, on 31 August 1957 although the status of the remaining British territories of Sabah, Sarawak, Brunei and Singapore remained unresolved. A Constitutional monarchy was established with the Agong appointed the Head of State. On independence, all existing laws established by the FMA continued in force with appropriate modifications, and the

citizen had to be a Malay which by definition required the adoption of the Malay language and culture. For a fuller discussion see Ibid, 3.

68 Above, note 51,

69 Simorangkir-Simandjuntak, B, Malayan Federalism 1945 – 1963: A Study of Federal Problems in a Plural Society, 6. Plans for bahasa to be the sole national language was opposed by the Associated Chinese Chambers of Commerce of Malaya, who wanted the Malay, English, Chinese and Tamil languages to be on par with each other (as is presently the case in Singapore).

70 The Yang di-Pertuan Agong is chosen for a five year term from the reigning Sultans of the nine Malay States. The Legislative Council was replaced with a bicameral Parliament.

71 Above, note 51;29.

72 The Federation of Malaya (Amendment) Agreement 1957 was passed on 15 August 1957 and came into operation on 27 August 1957 along with the Federation of Malaya Independence Act (UK) (1957) and the Federal Constitution Ordinance 1957. The Federation of Malaya joined the United Nations on 17 September 1957.

73 Lee, H.P, Constitutional Conflicts in Contemporary Malaysia, 8.
definition of “law” in article 160(2) of the Federal Constitution included ‘written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation of any part thereof’. In addition, the 1957 Federal Constitution established a bi-cameral system of government, a Westminster style separation of powers between the executive, which formed a part of the legislature, and an independent judiciary.

On 17 May 1961, Tunku Abdul Rahman proposed the formation of Malaysia, which would incorporate Malaya with the remaining British territories. The proposal was only supported by Singapore who viewed it as a means of increasing security and maintaining economic stability. Externally, the proposal was opposed by Indonesia, given it also intended to lay claim over Sabah, Sarawak and Brunei and the Philippines that also lay claim to Sabah. Given mounting tensions, the Commonwealth Parliaments Association eventually intervened and sought recommendations from the British appointed Cobbold Commission and a United Nations Delegation. Following affirmation from Sabah, Sarawak and Singapore in favour of integration with Malaya, the issue was resolved in Malaya’s favour. The Federation of Malaysia was officially proclaimed on 16 September, 1963.

---

74 Above, note 30, 45. The Agong is chosen for a five year term from the reigning Sultans of the nine Malay States. The Legislative Council was replaced with a bicameral Parliament.
75 Above, note 32, 191.
76 Above, note 73, 8.
77 Above, note 73, 8
78 Hostilities between Indonesia and Malaysia crystallised with Konfrontasi (confrontation) launched by President Sukarno involving ‘unsuccessful parachute drops and amphibious landings in Indonesia’. Konfrontasi abated when Sukarno was overthrown by Suharto. For a full discussion see Above, note 39, 48-53.
79 Above, note 73,9. The delegation published its findings on 17 April 1962 and recommended inter alia that the rights and privileges of the orang asli be protected.
The newly formed Federation enjoyed little internal stability between 1965 and 1969. Firstly, Singapore’s joinder was short lived and by 9 August 1965, it separated from the Federation as a result of ongoing friction between the Federal Government and the Singapore State Government over the economic and political interests of the predominantly Chinese Singaporeans.\(^{81}\) Then in 1966, the Federation was buffeted by the Sarawak crisis relating to the forced resignation and subsequent dismissal of the Chief Minister, Stephen Kalong Ningkan (‘Ningkan’) by the Governor of Sarawak, Tun Abang Haji Openg. Ningkan’s appeal to the High Court to have the dismissal declared void was upheld by the Chief Justice of the High Court.\(^{82}\) Based on the High Court’s finding, Ningkan was re-instated as Chief Minister, following which his position was validly challenged in accordance with the Sarawak State Constitution. Ningkan refused to accede to the request to step down and appealed to the Governor to dissolve the State Council and call for direct elections.\(^{83}\) Following the Governor’s refusal to do so, a political chaos erupted in the State Cabinet and resulted in the Agong issuing a state based proclamation of emergency.\(^{84}\) Ningkan’s appeal to the Privy Council\(^{85}\) challenging the validity of the Agong’s proclamation was unsuccessful.\(^{86}\) These tensions were restricted to the state of Sarawak and did not affect Peninsular Malaysia.

\(^{80}\) Above, note 1, 6. Malaysia Day was specified as 16 September 1963 by proclamation of the Yang di-Pertuan Agong under the Malaysia Act, 1963 (No. 26) Section 2. See IN 214/1963 per Id. 8. The Federation of Malaysia has 14 constitutions, for each of the 14 separate States. Ibid. 6.
\(^{81}\) Above, note 73, 10.
\(^{82}\) For a full discussion refer to the case of Stephen Kalong Ningkan v Tun Abang Haji Openg and Tawi Sli [1966] 2 MLJ 187. Openg had also dismissed several ministers of the Sarawak State Cabinet. The High Court was asked to declare the dismissal void by considering the appropriate method to dismiss a minister under the terms of the Sarawak State Constitution. The Chief Justice found in favour of Ningkan, deciding that under the Sarawak Constitution, lack of confidence may only be demonstrated by a vote of no-confidence.
\(^{83}\) Above, note 73, 13.
\(^{84}\) Emergency (Federal Constitution and Constitution of Sarawak) Act 1966 was issued on 14 September 1966.
\(^{86}\) Above, note 73, 13.
However, economically, by the mid 1960’s, public revenue and expenditure had risen substantially and impacted on Malaysia as a whole.\textsuperscript{87} In response, government revenue was raised largely from taxes on Chinese and foreign businesses. This was then used to benefit the rural Malays.\textsuperscript{88} During this period, the government enacted the \textit{National Language Bill 1967}, which mirrored the Federal Constitution and proclaimed \textit{bahasa} to be Malaysia’s sole official language. The corresponding \textit{National Education Policy 1967} established \textit{bahasa} as the official medium of instruction in secondary schools and universities\textsuperscript{89}

A combination of these policies, so soon after the inter-ethnic tensions evidenced during pre-independence discussions would have further alienated the races given the socio-economic implications. In addition, the large Malay rural classes did not gain any immediate benefit from these measures and were dissatisfied with the rate of reform and their socio-economic position as compared to non-Malays. By the late 1960s, peninsular Malaysia’s poor economic development was a serious source of concern. A rapidly increasing population in the midst of flagging economic growth meant high unemployment rates (from 2\% in 1957 to more than 8\% by 1970).\textsuperscript{90} Those most affected were youths between 15-24 years of age, and was highest amongst urban Malay youths. In addition, many Malay rice farmers, fisherman and sections of the Tamil estate labour had suffered decreases in real per capita income since independence.\textsuperscript{91}

By the 1969 general elections, the Alliance had lost popularity. Opposition parties capitalised on racially charged issues and proclaimed policies which were race specific,

\begin{flushleft}
\textsuperscript{87} Above, note 39, 8.  \\
\textsuperscript{88} Above, note 39, 8.  \\
\textsuperscript{89} Ling, C. Y, \textit{Legal Education in ASEAN Universities – A Critical Appraisal}, 11.  \\
\textsuperscript{90} Above, note 26, 9.  \\
\end{flushleft}
winning in the States of Penang, Perak and Kelantan and forcing a split assembly in Alliance’s traditional stronghold, the capital, Selangor.\(^{92}\) The Alliance’s share of the vote, especially amongst non-Malays was greatly reduced; from 58.3% of the vote in the 1964 elections to only 48.4% of the vote in the 10 May 1969 elections.\(^{93}\) The Alliance was faced with an overall loss of two-thirds of its majority.\(^{94}\) The Alliance suffered a similar fate in the Peninsular Malaysian State assembly elections and failed to take Kelantan, Penang (the only state with a majority of non-Malays as reflected in the election results), Perak (where it only won 19 out of 40 seats) and Selangor (a deadlock 14-14, involving non-Malay opposition parties).\(^{95}\) Malays in Selangor responded by rallying outside the home of Selangor’s Chief Minister on 13 May 1969. A group of Chinese passer-by’s (possibly staging a victory procession) were attacked by the group of rallying Malays resulting in an outbreak of chaos and racial civil disturbances throughout Selangor.\(^{96}\) A central issue was the withdrawal of Chinese support from the MCA, which formed a part of the Alliance, perceived by Malays as a direct challenge by Chinese for political control. The eruption of violence in Selangor resulted in 196 officially recorded deaths, although the number of deaths is said to be much higher, and a resulting damage to shops and properties in Malaysia’s worst recorded racial incident.\(^{97}\)

To contain the violence, the Agong proclaimed a state of emergency throughout the entire Federation, on the grounds of national security, on 15 May 1969 pursuant to

\(^{91}\) Bach, "Historical Patterns", 458 in Above, note 26, 9.
\(^{92}\) Above, note 73,13.
\(^{93}\) Above, note 51, 42.
\(^{94}\) Above, note 73, 13.
\(^{95}\) Above, note 39, 55.
\(^{96}\) Id.
\(^{97}\) Id.
article 150 of the Federal Constitution. The proclamation was issued whilst the elections to all the seats in the House of Representatives had yet to be completed and as a result, all incomplete elections were suspended. Parliament was suspended and a National Operations Council (‘the NOC’) was set up and run as an emergency government under the directorship of Tun Abdul Razak, the Deputy Prime Minister, who acted as the Director of Operations (‘the DOO’). The NOC instituted preventative measures to contain the violence. Pursuant to the *Emergency (Essential Powers) Ordinance* 1970, the entire Federation was declared a security area pursuant to the ISA, firearms were prohibited and restrictions imposed on public assemblies, freedom of speech was curtailed and a curfew was introduced. Persons in breach of these provisions were able to be detained indefinitely under the ISA.

As a consequence of the 1969 race riots, the NOC and the National Consultative Council, drew up the *Rukunegara*, or articles of Faith in the State, Malaysia’s Bill of Rights. The *Rukunegara* reflected the deemed ‘national ideology, and aimed to integrate non-Malays with Malays through this codification of Malaysia’s national identity. This ideology was further refined resulting in the First National Culture Congress establishing three ‘principles’ representing Malaysia’s national ideology. These were that firstly, the national culture should be based on the indigenous culture [ie. the Malay and not the culture of the *orang asli*] of the region. Secondly, that the

---

98 Above, note pg.13.
99 Id.
100 Above, note 51, 43.
101 Id.
102 Above, note 32, 165.
features of other cultures were required to be suited to the national culture and thirdly, that Islam should be an important element of the national culture.\textsuperscript{104}

Apart from refining the national ideology, the NOC was conscious that Malay discontent over the greater socio-economic position of non-Malays had been the cause of the race riots.\textsuperscript{105} The NOC’s solution was the New Economic Policy, implemented as part of the Second Malaysia Plan, which aimed to restructure Malay ownership to ensure that Malays owned 30\% of corporate wealth and for Malays to have 40\% of employment in all sectors of the economy by 1990.\textsuperscript{106} The NEP was explained by Khalid Husin of Malaysia’s Ministry of Lands and Regional Development as follows:

\begin{quote}
"The NEP seeks the eradication of poverty regardless of race and restructuring of Malaysian multi-ethnic society so as to reduce the identification of race with economic function or employment, within the context of an expanding economy...By 1990 the Malays and other indigenous people, collectively termed as ‘bumiputras’, who are hitherto economically unrepresented in relation to their population strength are expected to own about 30\% of the country’s wealth. This is to be done through a restructuring of the employment structure by inducing greater bumiputra participation in commercial and industrial activities. In so doing the largely rural bumiputras, who are engaged in agricultural activities, are to be deliberately urbanised to expose them to the demands"
\end{quote}

\textsuperscript{104} Id.
\textsuperscript{105} Gomez, E T & Jomo, K S \textit{Malaysia’ Political Economy- politics, patronage and profits}, 25.
\textsuperscript{106} Above, note 26, 211.
Accordingly, the NEP’s objective was to restructure the nations wealth in favour of *bumiputras*, actually the Malays given the indigenous peoples did not directly benefit from the NEP, by creating a Malay business community and achieving 30% *bumiputra* ownership of the corporate sector by 1990. To facilitate this, pro-Malay quota systems were introduced, with an increase in the allocation of university and employment positions for Malays. The NEP aimed to increase the percentage of Malays in occupations in which non-Malays had traditionally been dominant. To monitor and appease racial tensions, the NOC established a National Consultative Council to ‘restore racial harmony’. Non-Malays were told that pro-Malay reforms had been “designed to eradicate poverty regardless of race, and to eliminate the identification of occupation with race”. A detailed discussion of the implications of the NOC’s policy reform is considered in chapter 7.

During NOC rule (which lasted until February 1971), it was decided that in order to avoid the recurrence of the May 1969 violence, the rules governing political debate had to be restricted. This resulted in the reconvened Parliament passing a series of amendments to the Constitution and the *Sedition Act* 1948 (‘the Sedition Act’). These amendments forbade the questioning of the position of the Malay Rulers, the use of Malay as the national language, the ‘special position’ afforded to Malays or the rights of non-Malay citizens to their citizenship. During NOC, two broad views on Malaysia’s future direction emerged. The first view endorsed past economic policies but moved for

---

109 Above, note 27, 47.
more effective and forced implementation of the suggested measures. The second view, which predominated, called for major increases in government intervention in the economy to benefit the Malays, even at the cost of economic growth if necessary.\textsuperscript{110}

Parliament was not reconvened until 20 February 1971 following the resumption of the incomplete elections.\textsuperscript{111} The reconvened Parliament passed the Constitution (Amendment) Act 1971 which embodied the policies implemented whilst the NOC had been in operation.\textsuperscript{112} Conscious of the racial sensitivities and a potential reaction to the amended Constitution, the Government established a Department of National Unity to scrutinise all plans and programs in terms of their impact on national unity and social integration.\textsuperscript{113} In the short span between the crises in 1969 and the reconvening of Parliament in 1971, Malaysia’s political and constitutional development had been significantly altered.

1.7 **Malaysia following the paradigm shift**

Malaysia’s legal and political development from 1971 is beyond the scope of this dissertation and therefore is not considered in any great detail. However, for the purpose of completeness, the political and judicial upheaval which occurred in the 1980’s will be touched upon. Both have a bearing to some extent on demonstrating the government’s mindset towards virtually autonomous rule. This in turn has had some impact on the way the government has chosen to monitor and maintain inter-ethnic relations to the present.

\textsuperscript{110} Ibid, 48.
\textsuperscript{111} Above, note 73, 14.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
On 17 July 1981, one of Malaysia’s key political figureheads, Dato Dr Seri Mahathir Mohamad became Malaysia’s fourth prime minister, replacing Tun Hussein Onn. In 1982, Dr Mahathir led Barisan Nasional (the National Front), to a sweeping victory at the polls, taking 140 seats out of a possible 154 in the House of Representatives. Dr Mahathir promoted constitutional amendments aimed at the re-allocation of the powers of the Agong to the Prime Minister and Federal and State Legislatures as reflected by the Constitutional (Amendment) Act 1983 and Constitutional (Amendment) Act 1984. Amongst the amendments introduced was the shift of the power to proclaim an emergency from the Agong to the Prime Minister and the replacement of the royal assent previously required by the Agong prior to a Bill becoming law. 

In the midst of the constitution being refined, the policies introduced by the NEP continued to be applied. By the 1980’s the special privileges had begun to positively benefit Malays as a result of the preferential arrangements in education with private institutions such as MARA Institute of Technology. Strong incentives were introduced in the private sector for firms to employ Malays. In some circumstances, Malays were employed not on merit, but on race, at the expense of non-Malays who

---

114 Mahathir’s ascendance to the role of Prime Minister was confrontational and almost revolutionary. He was initially viewed as a political ‘hot-head’ following the publication of his dissertation, The Malay Dilemma. In it, Mahathir voiced his pro-Malay stance and pushed for an increasingly reformist system to be adopted by UMNO. According to Mahathir, the State was responsible for ensuring the progress of the Malay people. Even more controversial, Mahathir strongly believed that the State should favour the rice and well-to-do Malays over the poor Malays, simply because they would benefit the most from economic reform and use it to its full potential. His views was a shake-up to the staid and true UMNO party members. Until then, it was widely believed that it was the aim of UMNO to oversee the economic progress of all Malays, the large majority of whom comprised the rural classes who were comparatively poorer. If Mahathir’s approach was adopted, this would mean that the rural Malays would essentially not benefit. More controversial was Mahathir’s open criticism of Malays reliant on the State. According to Mahathir, the pro-Malay subsidies and government assistance programs had created Malays who placed reliance on their progress on UMNO. Should they not receive UMNO assistance, Mahathir was concerned that their newly acquired and/or increased wealth would simply pass onto the more aggressively competitive non-Malays.

115 Above, note 73, 25.
might otherwise have been selected.\textsuperscript{117} Government intervention also resulted in an increase in Malay ownership and control of public companies and in the private sector through the allocation of government public funds to purchase the requisite shares as part of the NEP’s 30\% \textit{bumiputra} ownership vision.\textsuperscript{118} Although the business quota system was introduced under the NEP to elevate the economic position of the Malays, the rural classes did not receive the immediate benefits.\textsuperscript{119} There was growing concern over the influence of political patronage on the business sector, the increasingly inequitable distribution of wealth, and the apparent increase in corruption and other abuses of power.\textsuperscript{120} What became apparent was a growing class of select Malay bourgeoisie. By 1984, UMNO was plagued by a series of scandals, including the M\$2.5 billion corruption scandal concerning fraudulent loans made by the Bumiputra Malaysia Finance Corporation, followed by the United Engineers Malaysia scandal where it emerged that a M\$3.42 billion contract for the planned North-South highway in Peninsular Malaysia, had been awarded to an untried UMNO owned company.\textsuperscript{121} This political patronage was particularly not well received given the 1986 economic downturn. In 1987, opposition leaders initiated contempt proceedings against the Asian Rare Earth Corporation, a government approved organisation that refused to comply with a 1985 injunction to stop dumping radioactive waste on inhabited village sites. Abuse of position appeared pervasive: between 1981 and 1986 the governmental Anti-Corruption Agency found 973 government officials guilty of corruption.\textsuperscript{122}

\textsuperscript{116} Above, note 107, 22.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Above, note 105, 1.
\textsuperscript{120} Above, note 105, 1.
\textsuperscript{122} Id.
In the midst of this, UMNO became embroiled in a political scandal arising out of the April 1987 UMNO elections which Dr Mahathir won by a narrow margin of 43 votes out of 1,470 cast votes, over his oppozer, Tengku Razaleigh Hamzah. The validity of the elections were challenged by Razaleigh’s supporters given it included the votes of 44 delegates from 30 unregistered UMNO branches. As these branches were unregistered, they were considered unlawful societies pursuant to section 12 of the Societies Act 1966 (‘the Societies Act’). Razaleigh’s supporters filed a suit on 25 June 1987, Mohammed Noor bin Othman and Ors v Mohamed Yusoff Jaafar and Ors [1988] MLJ 129 (‘the Othman v Jaafar case’) seeking a fresh election. The Court affirmed section 12 of the Societies Act, finding that the establishment of the unregistered UMNO branches deemed UMNO itself to be an unlawful society. In addition, the elections were invalid given previously elected title holders were still in office. However, the Court was unable to order fresh elections given it was now not possible to have lawful office holders in an unlawful society. The Court’s findings were a serious concern for UMNO as it effectively meant that Malaysia’s leading political party was in fact unlawful. UMNO was eventually deregistered on 13 February 1988 and re-registered as UMNO Baru or New UMNO.

UMNO’s instability, the financial scandals and the 1986 economic downturn resulted in rising ethnic tensions over the government’s preferential treatment policies. To contain anti-government sentiment and inter-ethnic sensitivities, the government launched Operation Lallang, a large-scaled security operation, on 27 October 1987. Operation Lallang resulted in the arrest and detention of more than 100 persons, including members of the opposition and social activist groups under the ISA, allegedly for

---

123 Ibid, 2.
promoting racial unrest. Those detained were eventually released towards the end of 1987, through to 1988 and early 1999. Newspapers critical of the government were closed down and restrictions imposed on freedom of assembly.\textsuperscript{124} In addition, Mahathir attempted to curtail the power of the judiciary by initiating changes to the \textit{Printing Presses and Publication Act} in December 1987 and the ISA in July 1988 and 1989. The amendments effectively eliminated judicial review of press regulations and detentions under national security legislation.\textsuperscript{125}

By 1985, appeals to the Privy Council were formerly abolished, and Malaysia’s Supreme Court had become Malaysia’s ultimate Court of Appeal.\textsuperscript{126} Mahathir was conscious of the judiciary’s power and openly criticised the judiciary in a speech delivered on 17 March 1988 moving the bill which became the \textit{Constitutional (Amendment) Act} 1988 that amended article 121 to delete the reference to the vesting of the judicial power in the Supreme Court.\textsuperscript{127} Tun Salleh Abas, the Lord President of Malaysia’s highest Court, the Supreme Court, responded to this in a letter to the \textit{Agong} on 26 March 1988 expressing disappointment over the comments and expressed hope that they would be stopped. Unfortunately, the \textit{Agong} who was mindful of past friction with the executive in 1983, drew the letter to Mahathir’s attention. The eventual outcome of which was that Tun Salleh was asked to step down on 27 May 1988 and an

\textsuperscript{124} Id. The UMNO struggle and continuing detention of many of those detained since Operation \textit{Lallang} raised legal issues argued before the Courts. The government lost several High Court rulings of political importance including \textit{Raja Khalid, Theresa Lim Chin and Karpal Singh} each concerning judicial review of the ISA detentions, \textit{United Engineers Malaysia} concerning a financial scandal implications UMNO (the UMNO 11 case), concerning a challenge to the lawfulness of UMNO and \textit{Aliran} concerning judicial review of decision to without publishing licenses.

\textsuperscript{125} Above, note 121, 2-3.

\textsuperscript{126} Harding, A.J, "The 1988 Constitutional Crisis in Malaysia", 73.

\textsuperscript{127} For a full discussion see \textit{Public Prosecutor v Dato Yap Peng} [1987] 2 MLJ 311.
investigative tribunal, convened pursuant to article 125 of the Federal Constitution, was appointed to investigate Tun Salleh’s alleged misbehaviour.  

In the midst of this, Razaleigh’s supporters instituted an appeal of Othman v Jaafar case, at a time when Mahathir’s settlement of the UMNO crises was uncertain and it was essential that the decision in the first instance not be overturned. Recognising that the issue was crucial, Tun Salleh fixed the appeal for hearing on 13 June 1988 before the entire membership of the Supreme Court bench of nine judges. Another controversial hearing, *Karpal Singh v Minister of Home Affairs* [1988] 1 MLJ (‘the Karpal Singh case’) 468 was also fixed for hearing on 15 June 1988. Both cases were of political significance. The hearing of both cases was delayed as a result of the Tun Salleh crisis. In response to the Tun Salleh crisis, five judges of the Supreme Court, in an emergency session, ordered a stay of the tribunal in July 1988. These five judges were in turn suspended by the *Agong* and also asked to appear before the investigative tribunal. Based on the tribunal’s recommendations, Tun Salleh and all five judges were dismissed by the *Agong* in October 1988.  

The Tun Salleh crisis demonstrated the political interference of the independence of the judiciary in an instance where the judiciary had attempted to assume a meaningful Constitutional role in relation to judicial review. The 1988 crisis was significant as the executive was able to invoke a summary procedure that had been specifically

---

128 Above, note 126, 78.
129 In Karpal Singh, the High Court found against the government in deciding that the order of detention under the ISA is bad in law if it is later proven that the allegations of fact relied on to support the detention are proved to be untrue. The appellate Court in *Minister for Home Affairs v Karpal Singh* [1988] 3 MLJ; 29 reversed the High Court’s position finding that allegations of fact are not open to judicial review.
130 Above, note 121, 2-3.
131 Above, note 126, 78.
established to avoid political interference with the judiciary for political advantage given the Razaleigh threat.\(^{132}\)

By the 1990’s the executive enjoyed virtually autonomous power given the limitations imposed on the Agong, the judiciary and political opponents in addition to the ban imposed on the questioning of any ‘ethnically sensitive issues’. The absence of such constraints has been defended and legitimised ‘by reference to the treat of ethnic conflict and the necessity of making such political sacrifices in the interest of political stability, ethnic harmony, economic redistribution, economic growth and accelerated modernisation, especially industrialisation’.\(^{133}\) In his speech to the Malaysian Business Council in 1991, Mahathir reiterated his commitment to ‘manufacturing-based economic growth’ and modernisation to achieve the status of a fully developed nation by the year 2020 (‘Vision 2020’).\(^{134}\) Whilst Malaysia has enjoyed rapid and strong economic growth, the consequences of the executive’s political autonomy is aptly illustrated by the arrest, detention and eventual dismissal of Malaysia’s former Deputy Prime Minister, Anwar Ibrahim on 2 September 1998.\(^{135}\) Anwar was charged with official corruption following his arrest.\(^{136}\) This dissertation does not intend to examine the validity of Anwar’s arrest save as to note the government’s questionable reliance on restrictive laws in the circumstances.

Having considered Malaysia’s historical and legal development, the preceding sections address the reasonableness on Malaysia’s policies in the context of international law.

\(^{132}\) Above, note 126, 77.
\(^{133}\) Above, note 105, 3.
\(^{134}\) Ibid, vi.
\(^{135}\) Human Rights Watch – Asia, Malaysia, 1.
\(^{136}\) Id
To do this, the following chapter will first discuss the role of the international law of human rights and its implications to Malaysia.
PART B

2. THE LAW OF INTERNATIONAL HUMAN RIGHTS

This dissertation aims to measure Malaysia’s compliance with international human rights standards, as stipulated by the United Nations, in relation to the rights of its ethnic minorities. Given Malaysia is a member of the United Nations, but not a signatory to the major treaties enforcing human rights, this chapter will discuss customary law and its binding force if any, on States.

To undertake this assessment consideration will be given to the legal characteristics of human rights in an international context. Following which, it will be determined whether international principles can be applied within Malaysia’s domestic sphere.

If these principles are not binding domestically, arguably the Malaysian government is not under domestic law bound to recognise the rights of its citizens to certain fundamental human rights. This chapter will put forward the proposition that fundamental human rights are inalienable and accordingly binding on the premise that rights rest on general moral standards established by the use of practical reasoning and apply in all relevant circumstances.\textsuperscript{137}

This chapter aims to establish that Malaysia as a member of the United Nations, and by virtue of customary law, is bound to recognise the fundamental human rights.

This paper will not discuss the jurisprudence of human rights save as to note that it was the United Nations, successor to the League of Nations, which first attributed legal characteristics to human rights following World War II. Human rights can be defined as those rights which are inherent in our nature as human beings, and without which we cannot live.\(^{138}\) One can state in this context that the denial of human rights and fundamental freedoms not only construes an individual and personal tragedy, but also creates conditions of social and political unrest, sowing the seeds of violence and conflict within and between societies and nations.\(^{139}\) The United Nations recognised the importance of safeguarding human integrity, freedom and equality to ensure that there was some remedy available to persecuted persons.\(^{140}\) The United National proceeded to develop a body of human rights instruments to protect these rights.

Malaysia was admitted as a member of the United Nations following its independence. As a member State, Malaysia is governed by the United Nations Charter\(^{141}\) ("the UN Charter"). Article 55 of the UN Charter proclaims one of the purposes of the UN Charter as being to promote ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. Pursuant to article 56 of the UN Charter, all members of the United Nations pledge to take ‘joint and separate action in cooperation with the United Nations for the achievement of the purposes set forth in article 55’.

The General Assembly of the United Nations considered that the UN Charter obliged member States to ‘promote’ human rights and condemned those who violated such


\(^{139}\) Id.


\(^{141}\) Charter of the United Nations (1945).
rights. It is important to observe that the UN Charter recognised the entitlement of human beings to rights by reason of their humanity alone.

An antecedent to the UN Charter is the Universal Declaration of Human Rights (‘the UDHR’), adopted by the UN on 10 December 1948. The UDHR represented a defined and comprehensive code on human rights for member States. Significantly, the UDHR acknowledged certain fundamental freedoms, as reflected in its preamble which states that, recognition of the inherent dignity and equal and inalienable rights of all individuals is the foundation of freedom, justice and peace in the world.

The concept of fundamental rights is inherent throughout the UDHR. Article 1 of the UDHR declares that ‘all human beings are born free and equal in dignity and rights’. Article 2 re-states article 1(3) of the UN Charter, by declaring that the basic principle of equality and non-discrimination forbids any distinction on the base of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The UDHR also gives equal importance to economic, social and cultural rights and to civil rights and political liberties, and affords them the same degree of protection.

It is important to note that the authors of the UDHR, were themselves from different regions of the worlds and had sought to ensure that the draft text would reflect these

---

142 UN General Assembly Resolution 719 (VII); 1953 and UN General Assembly Resolution 285 (111); 1949.
143 Universal Declaration of Human Rights adopted and proclaimed by General Assembly resolution 217 A (111) of 10 December 1948.
145 See Articles 22 and 23 to 27 of the UDHR.
146 See Articles 28 to 30 of the UDHR.
different cultural traditions and incorporate common values inherent in the world’s principal legal systems and religious and philosophical traditions.\textsuperscript{148} Accordingly, from the outset, the UDHR was intended to be a common statement of mutual aspirations. Significantly, Article 30 of the UDHR stipulates that no State, group or person may claim any rights, under the UDHR, “to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth” in the UDHR.

The UDHR is considered to be the yardstick to measure the degree of respect for, and compliance with, international human rights standards.\textsuperscript{149} However, the UDHR is only declaratory in nature and lacks formal provisions to make its content obligatory on member States. The implications of this in the context of customary international law is discussed below.

The provisions of the UDHR have been codified in two binding Covenants, the International Covenant on Civil and Political Rights\textsuperscript{150} (‘the ICCPR’) and the International Covenant on Economic Social and Cultural Rights\textsuperscript{151} (‘the ICESCR’). These instruments are collectively referred to as the International Bill of Rights.\textsuperscript{152} Both Covenants are considered to be treaties and are governed by the Vienna Convention on the Law of Treaties 1969 (‘the Vienna Convention’).\textsuperscript{153} A State

\begin{footnotesize}
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} International Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200 4 (XXI) of 16 December 1966.
\textsuperscript{151} International Covenant on Economic, Social and Cultural Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966.
\textsuperscript{152} Both Covenants have separate Optional Protocols. The Optional Protocol to the ICCPR advocates for the abolition of the death penalty, whilst the Optional Protocol to the ICESCR provides for complaints by individuals.
\textsuperscript{153} The Vienna Convention codifies the law of treaties as between States a party to that treaty. It also codifies the various requirements involved in the making of treaties.
\end{footnotesize}
acquiesces to be bound by the Covenants only after it has signed and ratified, at which point it becomes a binding treaty. Malaysia elected not to ratify both Covenants.\textsuperscript{154} In addition to treaty based law, international law is also derived from custom. Customary law is evidenced firstly by the presence of consistent and general practice by States over a period of time, and, secondly, consideration on the part of those States that their practice is in accordance with the law.\textsuperscript{155} Further, there is a need for the customary law practice to be widely adopted by states for a 'duration of practice' and to be \textit{opinio juris}.\textsuperscript{156} Pursuant to article 64 of the Vienna Convention, customary law also incorporates rules of \textit{jus cogens}.\textsuperscript{157} Only a state that has protested against an emerging principle of customary law from the outset, and has further sustained this protest, is free from being bound by that principle once it has become established.\textsuperscript{158}

The \textit{Statute of the International Court of Justice} ('the ICJ Statute) allows the International Court of Justice ('the ICJ) to apply international custom and the general principles of law recognised by civilised nations subject to the ICJ Statute in addition to treaties: article 38(1). This is reinforced by the Vienna Convention, article 38 of which also recognises the force of international custom.

Customary law was recognised by the ICJ in the \textit{North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark: Federal Republic of Germany v The

\textsuperscript{154} It also did not ratify both Optional Protocols to both Covenants. In respect of the Optional Protocol to the ICCPR, this means that the Human Rights Committee, established under article 28 of the ICCPR, is not able to receive individual complaints of alleged breaches of human rights from Malaysia's citizens.

\textsuperscript{155} Byers, M, \textit{Custom, Power and the Power of Rules}, 130.

\textsuperscript{156} \textit{North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark: Federal Republic of Germany v The Netherlands) 1969 ICJ 3.}

\textsuperscript{157} Rules of \textit{jus cogens} are considered to be so fundamental that they override and invalidate conflicting treaties. Human rights which fall into the category of \textit{jus cogens} are the prohibitions on slavery, genocide and racial discrimination
Netherlands) 1969 ICJ 3 ('the Continental Shelf cases'). The ICJ in the Continental Shelf cases acknowledged that a multilateral treaty may reflect the practice of States, which induces States which are non-parties to confirm to its provisions and interact with the formulation of new custom.

In addition, the Gulf of Marine Case ICJ Report 1980, 291 ('the Gulf of Marine case') supports the view that some signed but unratified conventions may contribute significantly to the formation of customary international law. The ICJ in the Gulf of Marine case held *inter alia*, that codification conventions ought to be seen "against the background of customary international law and interpreted in its light". The Continental Shelf cases and the Gulf of Marine case remain the most notable ICJ decisions lending support to the force of customary law.

However, the ICJ Statute's interpretation of custom is restrictive as article 59 of the ICJ Statute provides that decisions of the ICJ have no binding force except between the parties to the matter and in respect of that particular case. Despite this, article 59 does not deny the existence of custom, which is recognised in article 38(1) of the ICJ Statute. Article 59 does however limit the ICJ's views on the interpretation of custom to each individual case. For present purposes, it is sufficient to note that customary law is recognised at international law.

However, there is no international instrument stating that the fundamental rights contained in the UDHR is to be considered as customary law. This would appear to be contrary to the terms of the UDHR itself. Article 2 of the UDHR states that 'everyone is

---

158 Anglo-Norwegian Fisheries (United Kingdom v Norway) 1951 ICJ 116 at 131.
entitled to all the rights and freedoms set forth in this declaration without distinction of any kind’. Although this would suggest that the rights in the UDHR are universal and absolute, it does not detract from the fact that the UDHR is only a declaration and does not therefore create any binding obligation. In fact, Mrs Franklin Delano Roosevelt, one of the authors of the UDHR was at pains to point this out during the drafting of the UDHR.\footnote{\textsuperscript{159}}

In addition, the process by which a State agrees to be bound by an international treaty is rigorous. A consenting State will evidence its intention to be bound by ratifying the treaty. The process involved supports the argument that consent to be bound is not merely assumed but involves a formal process of acknowledgment.\footnote{\textsuperscript{160}} This process, mirroring the passing of legislation intended to be binding within a State’s domestic sphere, makes human rights a legal right. In summary, a literal interpretation of the law of treaties supports the position that a State is only bound by the recommended human rights contained in the Covenants if its consent is evidenced through ratification.\footnote{\textsuperscript{161}}

Arguably however, the UDHR although not a legal document, has in itself resulted in creating legal norms vicariously as it is concerned with the rights and freedoms of peoples everywhere.\footnote{\textsuperscript{162}} The UDHR has been universally accepted as the charter of minimum international standards which should be respected by all.\footnote{\textsuperscript{163}} Accordingly, the rights contained in the UDHR ought to be recognised and be made accessible to all persons by virtue of their humanity alone.

\textsuperscript{159} Above, note 136, 3.
\textsuperscript{160} Janis, M.W, \textit{An Introduction to International Law}, 9.
\textsuperscript{161} Id.
\textsuperscript{162} Patman, R.G, "International Human Rights after the Cold War" in Above, note 137, 2.
This is not a recent view. For instance, in the United States case of *Filartiga v Pena-Irala* (1980) 630 F. 2nd 896 ('Filartiga'), the Court considered the weight to the UDHR in the context of customary law prohibiting torture. The Court formed the view that the UDHR had 'assumed a force and validity in customary law all of its own'. The case is significant as the Court in that instance favoured the view that the terms of the UDHR created binding obligations as it constituted customary law. An opposite view to that expressed in Filartiga was expressed by the Canadian Supreme Court in the 1952 case of *Sei Fuji v California*¹⁶⁴ ('Sei Fuji') which related to the acquisition of land by aliens. In finding that neither the UN Charter nor the UDHR could invalidate California's *Alien Land Law*, the Court in Sei Fuji rejected the binding nature of both instruments in finding that both were not self-executing.

It should be noted that Filartiga is a more recent decision then Sei Fuji. Arguably, the difference in the two decisions reflects a growing global perception of the need to protect human rights and the evolving nature of these rights. It is accepted that this view cannot be supported simply by relying on the Filartiga decision, which in itself was limited to the issue of laws prohibiting torture. The Filartiga decision does however represent the evolution of human rights.

Proponents of human rights consider these rights to be inherent, inalienable and universal. Inherent in that they are the birthright of all human beings, enjoyed by people simply by reason of their humanity and, as such, they do not have to be granted or bestowed by a sovereign for them to be enjoyed.¹⁶⁵ Inalienable, as people cannot

---

¹⁶⁴ *Sei Fuji v California*, 1952 Reported Decisions of the Supreme Court of California as discussed in Above, note 136, 3.
agree to give them up or have them taken away from them, and universal in that they apply to all persons, regardless of their nationality, status, sex or race.\textsuperscript{166}

Member States of the United Nations have reinforced this view as evidenced by various instruments which were introduced after the UDHR to reinforce the purpose of the UDHR and to protect the rights contained in it. For instance, the first United Nations International Conference on Human Rights in Teheran in 1968 ("the Teheran conference"), resulted in the creation of the Proclamation of Teheran. More than 85 countries, the overwhelming majority of which were non-western, accepted paragraph 2 of the Proclamation of Teheran that:

'The UDHR states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community'.

At the Teheran conference, all States in attendance voted that the UDHR constitutes an obligation for the members of the international community.\textsuperscript{167} This was re-affirmed at the 1993 Vienna World Conference on Human Rights ("the Vienna Conference"). The Preamble to the Vienna Declaration, created following the Vienna Conference, states that:

'All human rights are universal, indivisible, interdependent and interrelated… while the significance of national and regional particularities and various

\textsuperscript{166} Id.
\textsuperscript{167} Patman, R.G, "International Human Rights after the Cold War" in Above, note 137, 3.
historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems to promote and protect human rights and fundamental freedoms.

Paragraph 1 of the Vienna Declaration states further that:

'The World Conference on Human Rights re-affirms the solemn commitment of States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond doubt'.

The Vienna Declaration stipulated that 'the promotion and protection of all human rights is a legitimate concern of the international community'.

Arguably, the Proclamation of Teheran and the Vienna Declaration reflects the intent of the international community as a whole to reconcile the controversy surrounding the 'universality' of human rights. This view was reinforced by Asian governments in Bangkok with the formation of the Bangkok Declaration on Human Rights ('the Bangkok Declaration'). The Bangkok Declaration supported the norms of human rights proclaimed in the UDHR. The Bangkok Declaration stipulated that:

'While advocating cultural pluralism, those cultural practices which

---

derogue from the universally accepted human rights including women's rights must not be tolerated. As human rights are of a universal concern and are universal in value, the advocacy of human rights cannot be considered to be an antecedent upon national sovereignty.\textsuperscript{170}

Arguably, the Bangkok Declaration reflected the regions acquiescence to the universality of human rights. The commitment of the region to human rights was reinforced in the \textit{Asia-Pacific (Governmental) Human Rights Declaration} (1993) (‘the Bangkok (Governmental) Declaration’). Although the preamble stressed the importance of national sovereignty and territorial integrity, it acknowledged that human rights are universal in nature and must be considered in the context of a dynamic and evolving process of international norm-setting against the backdrop of national and regional particularities and various historical, cultural and religious backgrounds.

This view was also reflected in the \textit{Harare Declaration} (1991) (‘the Harare Declaration’) which pledges the Commonwealth and its members to ‘work with renewed vigour’ to protect and promote the Commonwealth’s fundamental political values of: democracy, democratic processes and institutions, the rule of law, just and honest government and fundamental human rights including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief; promotion of equality for women, universal access to education, and the extension of the benefits of development within a framework of respect for human rights. Like the UDHR, the Harare Declaration is only declaratory in nature and does not have any legal force in Malaysia’s

domestic law. Despite this however, observance of the Harera Declaration's principles is required by Malaysia given compliance with the values, principles and priorities set out in the Harare Declaration is one of the conditions of membership of the Commonwealth.\textsuperscript{171} Malaysia remains a member of the Commonwealth.

In 1989, the Commonwealth Heads of Government ('CHOGM'), to which Malaysia is a party to, established a Commonwealth Ministerial Group to deal with serious or persistent violations of the principles contained in the Harare Declaration.\textsuperscript{172} Notably, CHOGM's report, published in 1990, recommended an ongoing observance of human rights and stressed CHOGM's commitment to ensure the protection and implementation of human rights in the region.

It is important to note the consistent involvement of non-Western nations throughout the evolution and codification of human rights. This is because Asian opponents to the universality argument claim that the UDHR reflects Western ideology alone.\textsuperscript{173} Asian opponents criticise the allegedly individualistic approach of the UDHR which they claim to be unsuitable for Asian societies.\textsuperscript{174} According to these critics, Asian societies are premised on collective values which emphasise the greater good of the group over that of the individual. Based on this ideology, the UDHR cannot be applied to Asian societies due to the differing cultural values and regional peculiarities. This viewpoint is inconsistent with the principles expressed by and agreed to by Asian nations in the Proclamation of Teheran, the Vienna Declaration and the Bangkok Declaration. All

\textsuperscript{171} Above, note 165, 11.
\textsuperscript{172} Id.
\textsuperscript{173} Above, note 170, 10.
\textsuperscript{174} Id.
these documents acknowledge cultural pluralism but recognise the universality of human rights and the indivisible nature of these rights.

The UDHR is essentially the yardstick to measure the degree of respect for, and compliance with, international human rights standards.\textsuperscript{175} It is important to recognise that the intent of the UDHR was to codify human rights. Arguably, the UDHR although not a legal document, has in itself resulted in creating legal norms vicariously. The UDHR has been universally accepted as the charter of minimum internal standards which should be respected by all.\textsuperscript{176}

A joint reading of the United Nations Charter and the UDHR suggests that fundamental human rights include freedom from discrimination on the base of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. It is clear that the UDHR intended for these rights to be accessible to all human beings. Proponents of human rights consider these rights to be inherent, inalienable and universal.\textsuperscript{177}

In addition, article 2 of the UDHR supports the notion of fundamental rights by stating that ‘everyone is entitled to all the rights and freedoms set forth in this declaration without distinction of any kind’. Arguably, the UDHR has generated a general principle of customary international law to the effect that States are bound to respect the human rights of persons within their jurisdiction.\textsuperscript{178}

\textsuperscript{175} Mohamed Khalil, N Dato' binti "The International Bill of Human Rights" in Above, note 144, 13.
\textsuperscript{176} Above, note 163, 10.
\textsuperscript{177} Above, note 165, 10.
\textsuperscript{178} Dixon, M, \textit{Textbook on International Law} (3\textsuperscript{rd} Ed), 312.
The chronology of the evolution of human rights discussed above demonstrates the international communities growing recognition of the universality of human rights. As stated, this is not a uniform view shared by all. In addition, it does not alter the declaratory nature of the UDHR itself unless one accepts that the UDHR has evolved into customary law. Since its adoption, the UDHR has stood alone as an ‘international standard of achievement for all peoples and all nations’. It is universally known and is accepted as authoritative both in States which become parties to one or both Covenants and also in those which did not ratify or accede to either.179

However, what must be accepted is that no State can claim to do as it pleases in the manner of denial of justice and human rights on the grounds that its treatment of its own citizens is exclusively within its domestic jurisdiction.180 This archaic and outdated view is unacceptable to the current international community and the United Nations as evidenced by the tone expressed in the Proclamation of Teheran, the Vienna Declaration and the Bangkok Declaration.

This view allows for a State who has elected not to ratify the Covenants to be obliged to recognise the fundamental rights contained in the UDHR and expanded upon in the Covenants. This is reflected by the fact that the bulk of human rights law operates to oblige a State to refrain from causing ‘harm’ to its own nationals or to other persons within its territorial jurisdiction.181 In support of this argument is the view that the impact of the United Nations and related treaty regimes have been so powerful that a general obligation to respect human rights is now a rule of jus cogens.182

179 Above, note 136, 22.
180 Ibid, 34.
181 Above, note 178, 307.
182 Ibid, 312.
Working within the framework of requirements to satisfy the creation of custom, it can be observed that only a state that has protested against an emerging principle of customary law from the outset, and has further sustained this protest, is free from being bound by that principle once it has become established.  

As stated above, Malaysia elected not to ratify the Covenants. Malaysia's government has made it clear that it publicly questions the application of the standards contained in the Covenants within Malaysia's political, social and economic context. According to Malaysia's government, human rights cannot be universal because they are based on western concepts with no allowance for Asian values. Malaysia's government has argued that it prefers 'Asian values' of human rights to the standards set out in what it considers to be treaties of western origin. Dr Mahathir has gone so far as to ask for a revision of the UDHR which he claims was formulated by the superpowers which did not understand the needs of poor countries. This view ignores the substantial involvement of non-Western countries in the formulation of international human rights documents as noted above.

Deputy Minister and Deputy Youth Head of UMNO, Hishammuddin Tun Hussein examined the conceptual basis of human rights from a 'Malaysian perspective'. He stressed the alleged importance for Western [North] nations to understand the need for countries such as Malaysia to gauge for themselves the pace and the depth of the

---

183 Anglo-Norwegian Fisheries (United Kingdom v Norway) 1951 ICJ 116 at 131.
application of human rights. According to Tun Hussein, countries like Malaysia are not against the implementation of civil and political rights, but reserve the right to balance their implementation alongside concerns for the overall prosperity of the nation.

However, Malaysia, under the directorship of Dr Mahathir, agreed to be a signatory to the Proclamation of Teheran, the Vienna Declaration and the Bangkok Declaration. In so doing, the Malaysia's government acknowledged the universality of human rights subject to the limitation that regional peculiarities be taken into account, but not to the detriment of human rights itself. Furthermore, Malaysia, in becoming a member State of the United Nations, agreed to be bound by the terms of the UN Charter. The general principles in the UN Charter seeks to protect human rights. This is reflected in the preamble of both Covenants which places an obligation for all States to recognise the dignity, rights and freedoms of all people. Although the Covenants require formal ratification to be binding, the Covenants themselves have drawn on the universal character of the UN Charter which applies to all member States. Arguably therefore, the Covenants themselves can be viewed as an elaboration of the general principles in the UN Charter, which could justify their universality and that of the UN Charter itself.

---

187 International Herald Tribune, 29 July 1997 see Above, note 170; 10.
190 Lindholt, L, Questioning the Universality of Human Rights, 44.
192 Above, note 190, 44.
It is also promising to observe that following the passing of the *Human Rights Commission of Malaysia Act*, 1999 ('Malaysia's Human Rights Act'),\(^{192}\) Malaysia has the benefit of having a Malaysian Human Rights Commission ('the MHRC'). The MHRC was created to protect and promote human rights in Malaysia having regard to the UDHR.\(^{193}\)

Arguably, Malaysia by establishing the MHRC has acknowledged the existence of human rights. Malaysia's Human Rights Act refers to human rights as the fundamental liberties enshrined in Part II of the Federal Constitution. Part III of Malaysia's Human Rights Act grants powers of enquiry onto the Malaysian HRC to conduct an inquiry into alleged infringements of human rights.

In addressing human rights issues, the MHRC stated that Malaysia's position on human rights issues 'has always been' based on full commitment to the basic principles of the International Bill of Human Rights and on the belief that all human rights are universal, indivisible, interdependent and inter-related.\(^{194}\) Accordingly, Malaysia's government is not in a position to deny the accessibility of human rights to its citizens.

It is the writer's view that human rights has grown to be accepted as not merely an abstract right, but rather an inherent right. The Proclamation of Teheran, the Vienna Declaration and the Bangkok Declaration reinforce the fact that human rights are inalienable that cannot be ignored for mere convenience or to suit the preferences of a

---

\(^{192}\) *Human Rights Commission of Malaysia Act* 1999, publication in the Gazette on 9 September 1999.

\(^{193}\) Approved text of the speech on the Human Rights Commission of Malaysia Bill 1999 delivered in the *Dewan Rakyat* (the House of Representatives) on 15 July 1999 see Above, note 144, 110. However, the powers of the MHRC are restricted to the extent that the MHRC is empowered to have regard to the UDHR but only to the extent that it is not inconsistent with the Federal Constitution.
particular State. Cultural, religious and regional considerations will be taken into account, but only in sofar as they co-exist with the notion of an overall recognition of human rights.

This view is certainly open to challenge. However, the jurisprudence of human rights must be further developed and expanded upon to ensure that gross atrocities are not allowed to occur simply because a State party has not signed a ‘traditionally’ binding instrument such as the Covenants.

The way forward

If it is accepted that the UN Charter and the UDHR constitute customary law, an affected national seeking interventionist assistance will still have to overcome the restrictions imposed by the doctrine of state sovereignty. The United Nations is prevented from intervening in matters essentially within a State's domestic jurisdiction by article 2(7) of the UN Charter.

The difficulty is overcoming the restrictions imposed by article 2(7). The argument in favour of the UN Charter and the UDHR being considered to be customary law were premised firstly on the acquiescence of member States to be bound by the terms of the UN Charter and the provisions of the UDHR. It is difficult to rely on this argument without acknowledging the restriction of article 2(7) which is clearly included in the terms of the UN Charter. In real terms, this suggests that even if an affected national is able to argue his or her entitlement to the rights contained in the UDHR, the United

---

194 Approved text of the speech on the Human Rights Commission of Malaysia Bill 1999 delivered in the Dewan Rakyat (the House of Representatives) on 15 July 1999 see Above, note 144, 109.
Nations and its ancillary bodies, are unable to assist that person due to the doctrine of state sovereignty.

The development of human rights law has removed human rights law away from an individual State's domestic sphere and raised it to an international level. Further, articles 55 and 56 of the United Nations Charter can be read as expressly conceding that human rights are a legitimate issue for consideration at the international level. This view was re-affirmed in the Vienna Declaration which states that 'the promotion and protection of all human rights is a legitimate concern of the international community.' In addition, it has increasingly become recognised through State practice since 1948 that the concept of State sovereignty has limits insofar as international scrutiny of human rights violations are concerned.

The sovereignty of a State is rarely absolute and is generally limited by duties owed to the international community under international law. In theory, flagrant breaches of human rights are no longer allowed to continue unchecked, irrespective of a State's claim of sovereignty. Such behaviour is increasingly recognised as being an attempt by a State not to fulfil its obligations under international law and has not inhibited human rights issues from being realised within the United Nations' system.

Accordingly, a State cannot rely on the non-interventionist provisions associated with State sovereignty to deny its nationals the fundamental rights guaranteed at international law as the observance of human rights is arguably a matter of universal concern.

195 Above, note 178, 309.
197 *Trail Smelter case (US v Canada) (1941)* 3 RIAA 1905.
198 Above, note 168, 33.
Having considered the law of international human rights including customary law, this dissertation is premised on the following views given it aims to measure Malaysia's compliance with international law standards. Firstly, that Malaysia, as a member State of the United Nations, agreed to be bound to recognise the fundamental rights contained in the United Nations Charter. Secondly, that the fundamental rights contained in the UDHR are binding despite the declaratory nature of the UDHR. Thirdly, that Malaysia in any event, reinforced its agreement to recognise the rights of its nationals to these rights by signing the Proclamation of Teheran, the Vienna Declaration, Bangkok Declaration, by being a member of CHOGM and as contained in Part II of the Federal Constitution. Fourthly, that Malaysia's government is not able to deny the universal application of these rights by claiming that they fail to reflect Asian values as this issue was addressed and specifically incorporated in the Bangkok Declaration. Fifthly, that Malaysia cannot rely on the fact that it did not ratify the Covenants to deny its nationals their fundamental human rights on the basis that these rights are inherent and inalienable. Finally, Malaysia's government recognised the inherent and inalienable right of its citizens to human rights as codified by Malaysia's Human Rights Act and the MHRC.

Accordingly, it is the writer's contention that human rights are accessible to nationals of Malaysia and that such rights may be measured against international human rights standards. Given this, the writer contends that Malaysia's minorities are entitled to have their fundamental freedoms protected under the international laws governing the rights of minorities. These rights are discussed in depth in the preceding chapter.
PART C

3. THE OBSERVANCE OF MINORITY RIGHTS IN MALAYSIA

Malaysia’s historical development reflects its cultural evolution into a multi-ethnic society. Malays became aware of the socio-economic consequences of Malaysia’s multi-ethnicity towards the end of colonial rule, and felt dispossessed by the prevalence on non-Malays. At independence, Malays demanded greater socio-economic control and claimed an entitlement to preferential policies to remedy this imbalance. Malays based this claim on their majority ethnic status and on the basis that they were the traditional ‘owners’ of the land. As discussed in chapter one, special measures, recommended by the Reid Commission and implemented by the FMA, attempted to remedy this socio-economic imbalance.

However, following the closely fought 1969 elections and the subsequent race riots, the government was moved by political considerations to increase pro-Malay preferential policies to address continued Malay dissatisfaction over their lesser socio-economic status. The 1969 riots resulted in the political weakening of UMNO and saw a new group of Malay nationalists take over the party. They used the NEP to expand their political base by devoting more of society’s resources to the creation of a broader Malay capitalist and middle class. This included the introduction of defined quota systems in the education, business and employment sectors. Non-Malays were expected to

---

199 Above, note 51, 29.
200 Id.
201 Above, note 73, 13.
202 Above, note 21, 194.
203 Above, note 105, 25.
accept these policies unconditionally. During the Legislative Council Debates\textsuperscript{204}, the then Minister of Finance stated

"an economically depressed Malay community in a prosperous Malaya will not mean a peaceful Malaya. An economically depressed Malay community will never be able to achieve the desired degree of co-operation with the substantially more prosperous non-Malay communities. It is therefore in the long-term interest of all of us to support any measures which will enable our Malay brethren to improve their economic status. Such an attitude and policy is dictated not only by sentiments but by sheer common-sense."\textsuperscript{205}

Despite the inflammatory nature of such sentiments, non-Malays were prohibited from challenging its legitimacy due to the curtailment placed on raising 'ethnically sensitive issues' by Parliament in 1971. The government, in attempting to address the competing racial interests post the 1969 riots, embarked on a preferential policy which resulted in the open and accepted discrimination of non-Malays.

The next section examines whether Malaysia has met its obligations to its minorities in the context of the preferential treatment of Malays. Chapter four considers Malaysia's national language policy and planning and its effect on non-Malays, particularly in the education and employment sector. Chapter five examines the role of Islam and Malaysia and the observance of freedom of religion and belief in Malaysia. Chapter six considers Malaysia's restrictive laws the politicising of these laws in the interest of

\textsuperscript{204} Legislative Council Debates, 13\textsuperscript{th} and 14\textsuperscript{th} meetings of the Second Session of the Legislative Council of the Federation of Malaya, speech by the Minister for Finance see Datuk Justice Sani, H bin Y, \textit{Our Constitution} 11 and 12.

\textsuperscript{205} Id.
maintaining the preferential treatment of Malays and its impact on the civil, political, economic, social and cultural rights of non-Malay minorities.

The assessments in part three all involve a comparison with international human rights standards, of both treaty and custom. It is accepted that preferential treatment is based on arrangements where the law sanctions special measures or differences in treatment that, when certain conditions exist, depart from principles of equality.206 Preferential policies are introduced to protect or promote the welfare of the members of a group previously discriminated against and are justified only when based on the specific needs of the group.207 The general trend is to temporarily approve of these measures.208 Article 2(3) of International Convention on the Elimination of All Forms of Racial Discrimination (‘the ICEFRD’) dictates that preferential policies should in no case ‘entail as a consequence of the maintenance of unequal or separate rights for different racial groups after objectives for which they were taken have been achieved’. Accordingly, preferential polices should cease once the intended aim is achieved to avoid the policies deteriorating into discrimination.209 In the context of Malaysia's minorities, the preceding section considers whether minority rights in Malaysia have been eroded through pro-Malay preferential policies.

206 Lerner, N, Group Rights & Discrimination in International Law, 166.
207 Ibid, 163.
208 Id.
4. RECOGNITION OF LANGUAGE RIGHTS IN MALAYSIA

This chapter considers Malaysia's language policy planning since 1957 and its practical effects on the language rights of ethnic minorities, particularly in the education and employment sectors. By undertaking this examination, this chapter will determine whether Malaysia's national language policy discriminated against non-Malays pursuant to principles of language rights recognised at international law.

4.1 Language policy planning

Given the nature of Malaysia's multi-ethnic society, which lacked a common culture, language had a peculiar significance to its political and social development. The reasons for naming a national language were considered by the Reid Commission during pre-independence discussions. Symbolically, the naming of the Malay language over that of non-Malays allowed Malays to reclaim their majority status that had largely been relegated to the background during colonial rule for the reasons discussed in chapter one. The symbolism of naming a national language ought not be underestimated. "For groups uncertain about their worth, the glorification of the language is also intended to reflect a revised or aspiration evaluation. The status of language is a symbol of new-found group dignity. Claims for official status for a language are typically demands for an authoritative indication 'that some people have a legitimate claim for a grater respect, importance, or worth in society than some others'". In saying this, it should be acknowledged that the majority of countries do

---

210 Above, note 103, 4.
have a nominated national language and it should be borne in mind that language fulfils
a communicative and symbolic function.  

By naming a national language, Malays aimed to promote a national identity and
encourage national unity amongst its multi-ethnic society. As the national majority, and
given their traditional association with the land, Malays opposed the suggestion that the
Malay, English, Chinese and Tamil languages be jointly named as national
languages. Instead, Malays stressed the importance of bahasa being named as the
sole national language in response to ‘the threat of being overpowered by immigrants,
viz. the Chinese and the Indians, who were becoming increasingly involved in the
economic progress of the states concerned’. Recognising the need for national unity
and a national identity, the FMA recognised bahasa as the national language and
required its use for all official purposes. Accepting that most non-Malays were not
proficient in bahasa, the FMA allowed for the dual use of English and bahasa for a 10
year period (ie. until 1967) to allow non-Malays to gain proficiency in the Malay
language. To enable non-Malays to gain proficiency in bahasa the education system
had to be standardised.

Pre-independence the education system had been divided into four systems, each with
differing mediums of instruction. Malays were taught in bahasa, Chinese in
mandarin and Indians in Tamil and each group attended their respective vernacular
schools. Students who attended vernacular schools ceased their education at primary

---

212 Koenig, M, Democratic Governance in Multicultural Societies – Special conditions for the
implementation of international human rights through multicultural, 4.
213 Proposal by the Associated Chinese Chambers of Commerce of Malaya (the ‘ACCCM’)to the Reid
Commission see Above, note 69, 12-13.
214 Above, note 65, 1.
215 Above, note 103, 22.
level, with only the Chinese community providing the opportunity for secondary and even tertiary education in Mandarin.\textsuperscript{217} The ruling Malays, Ceylonese, wealthy Chinese and Indians attended the English schools and this group represented the only real heterogenous mix of people.\textsuperscript{218} To remedy this lack of standardisation, the Razak Report proposed the formation of a national school system for primary and secondary schools in which bahasa and English would be the taught as compulsory subjects. The Razak Report envisaged a system of national schools, which taught in bahasa and national-type schools, which taught in some other language but in which bahasa and English were compulsory. To promote this proposal only those schools that chose to convert to national or national-type schools were eligible for state funding.\textsuperscript{219} The Razak Report's recommendations were adopted by the Education Ordinance 1957 ('the 1957 Education Ordinance').\textsuperscript{220} Thereafter, the Rahman Tahlib Report and the Education Ordinance 1961 ('the 1961 Education Ordinance') extended this system to secondary schools.\textsuperscript{221}

The preamble to the Education Act 1961 ('the 1961 Education Act') provided that the Education Act sought 'the progressive development of an educational system in which the national language is the main medium of instruction. This system appeased both Malays and non-Malays given it promoted the use of bahasa whilst simultaneously ensuring that non-Malays were not disadvantaged because of their lack of knowledge of bahasa.\textsuperscript{222} By 1961, bahasa had been introduced in all national and national-type schools whilst other languages continued to be taught. With the creation of Malaysia in

\textsuperscript{216} Above, note 103, 15.
\textsuperscript{217} Ibid, 18.
\textsuperscript{218} Ibid, 15.
\textsuperscript{219} Tan, T.S, Language Policies in Insular Southeast Asia: a comparative study, 9.
\textsuperscript{220} Above, note 103, 22-23.
\textsuperscript{221} Id.
1963, article 152 of the Federal Constitution re-affirmed the status of *bahasa* as the national language. Article 152(2) to 152(5) of the Federal Constitution maintained the bridging provision allowing for the dual use of English for official purposes until 1967. In addition, article 152(1) of the Federal Constitution recognised that it was permissible for other languages to be taught and learnt, otherwise than for official purposes. The Federal Constitution preserved the rights of non-*bahasa* speakers to speak and teach their languages.

By 1967, Malays were able to focus on internal-policy issues following the end of *Konfrontasi* with Indonesia. In recognition of the lapse of the 10 year bridging period and to appease Malay continued discontent over their socio-economic status, the government revised the language and education policy with the *National Language Act* 1967 (‘the 1967 National Language Act’) and the *National Education Bill 1967* (‘the 1967 National Education Bill’). As a result, *bahasa* was to be used for all official matters, and all other languages, including English, could only be used where convenient. Further, a time table was implemented for using *bahasa* as the medium of instruction in all national and national-type schools expect for classes in the mother tongue and English. On a practical level, this plan could not be immediately introduced given the poor preparation for this to occur during the 10 year bridging period. Accordingly, very little was done to enforce the modifications to the education system introduced by the 1967 National Education Bill. However, it heightened tensions amongst non-Malays were aware that the implementation of both the 1967

---

223 Proficiency in *bahasa* is required by articles 16, 16A, 19 and 152 of the Federal Constitution. The language rights of non-*bahasa* speakers are contained in articles 152, 161 and 161E of the Federal Constitution.
224 Above, note 89, 11.
225 Above, note 103, 24.
National Language Act and the 1967 National Education Bill would be a disadvantage to them socially and economically as they were non- bahasa speakers. Practically, these policies did not affect non-Malays until the 1969 race riots which brought to a head Malay demands for immediate and effective solutions to their lower socio-economic status.

Recognising these concerns, the NOC redefined Malaysia’s nationhood to emphasise Malay dominance, most visibly through the consolidation of bahasa as the national language and restructuring the education system to produce increasing numbers of Malays graduates. This was done in conjunction with the NOC’s ideology of the need for state-determined ethnic quotas and targets in most social and economic sectors to benefit Malays. To address these demands, the NOC increased the educational opportunities available to rural Malay communities in the 1970’s and pushed for the implementation of bahasa in the education system. Based on the NOC’s recommendation, the 1967 National Language Act was amended in 1971, the National Language (Amendment) Act 1971 (‘the 1971 National Language Act’), to reflect that bahasa was to be used for all official purposes. It differed from the 1967 National Language Act as no recognition was given to the use of the English language at all.

As part of the restructure, urban secondary school facilities were expanded to include boarding facilities to enable rural Malay students to attend schools, ‘remove’ classes were introduced to teach Malay students English for a year before they commenced the

---

226 For a detailed discussion see Above, note 103, 24 – 25.
228 Taib A & Ismail MY "The Social Structure" in Above, note 107, 120.
229 Parliament did not exercise its discretion to fully restrict the dual use of bahasa and English until 5 October 1981. Pursuant to the 5 October 1981 Parliamentary directive, “all letters on matters of legal administration should be written in Malay, evidence given by witnesses should be directly translated into Malay, arguments by lawyers should be given in Malay, presidents of Sessions Courts and Magistrates
ordinary curriculum and a considerable number of *bahasa* vernacular schools were introduced in rural areas. In addition, most standard 1 (the first level of primary school) subjects in national schools were to be taught in *bahasa*, in the next year standard 2 would follow suit and so on until 1982, when all national primary and secondary schools would teach all subjects in *bahasa*. It was hoped that these mechanisms would help to increase Malay participation in the secondary and tertiary institutions. Private institutions such as MARA were created to further Malay educational interests in science and technology. In addition, universities such as the Universiti Kebangsaan Malaysia (UKM), University Pertanian Malaysia (UPM) and University Sains Malaysia (USM) taught its subjects in *bahasa*. The standardisation of the education system throughout schools and universities enforced the gradual use of *bahasa* by non-Malays.

In addition to these measures, the NOC also introduced quota systems to favour Malays. These quotas reflected the racial composition of the population and resulted in a fixed proportion of university places for Malays and non-Malays and similar quotas in the employment sector. The quota system intended to achieve 'at least 30% *bumiputra* ownership of wealth.' Recognising that Malays were unable to meet this target unassisted, government resources were redistributed in favour of Malays, and at the expense of non-Malays (ie. doing away with a merits based entry system at university and for jobs) to attain the 30% threshold. Despite these measures, University surveys should write down judgments in Malay and speeches in legal ceremonies should be in Malay see *Bahasa test a "must" for lawyers soon*, The Star, 21 October 1981, Kuala Lumpur in Above, note 103, 1.
[232] Above, note 107, 22.
conducted at the time revealed that the majority of Malays continued not to qualify for university positions in spite of the special scholarships awarded.\textsuperscript{237}

Knowledge of \textit{bahasa} became significant as language criteria was used to assist in filling quotas in universities, although that was not the original intention of the national language policy.\textsuperscript{238} Non-\textit{bahasa} speakers were encouraged to learn \textit{bahasa}. Incentives for learning \textit{bahasa} were offered in terms of opportunities in job recruitment, study grants and bonuses. Proficiency in \textit{bahasa} was deemed a perquisite for applying for government positions and for confirmation in government jobs already held.\textsuperscript{239}

Malaysia's national language policy overhauled the education system to create a standardised system of education. The fact that Malays wanted \textit{bahasa} to be recognised as the national language was not unreasonable given their connection to the land. Furthermore, as the language policy was gradually implemented, through reliance on the constitutional bridging provisions, non-Malays were given a reasonable amount of time to gain proficiency in the national language. The revision of the education system by the 1967 Education Act was also not unreasonable. However, the NOC's forced implementation of race based quota systems in 1970, after the sensitivities over the race riots, and in addition to the special measures granted to Malays by the Federal Constitution, would not have been well received by non-Malays. From the perspective of the Malays, the language and education legislation was intended 'to safeguard and enhance their political rights, to enable them to compete on at least equal terms with non-Malays in the economic system, and to develop the use of the Malay language for

\textsuperscript{237} Above, note 89, 11.
\textsuperscript{238} Yusof Z.A, "Income Distribution in Malaysia" in Above, note 227, 81.
purposes of integrating the nation.\textsuperscript{240} Having considered this progression, the question is whether Malaysia’s language policy, and its ancillary effects on the education and employment sectors, is unreasonable enough to constitute discrimination at international law.

Before undertaking this assessment, it should be noted that language is a measurable right of international law. Protection is afforded by articles 1(3) and 55 of the UN Charter which refer to language in the context of respect for human rights, fundamental freedoms, equality and non-discrimination. Both articles recognise the right to non-discrimination on the basis of language, which is mirrored by articles 2(1) of the UDHR, 2(1) and 26 of the ICCPR and 2(2) of the ICESCR. Of significant relevance to the language rights of non-Malays is article 27 of the ICCPR. Article 27 protects the language rights of linguistic minorities by recognising that ‘in those states in which linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture or to use their own language’.

4.2 Naming a national language

The naming of a national language in spite of the existence of differing linguistic groups, whether they be traditional ethnic minorities or new immigrants, is a common feature of most countries. The nomination of a national language in itself may not be discriminatory, even if it may be unfavourable to speakers of a minority tongue.\textsuperscript{241} The policy may be reasonable in light of its ‘interest and particular demographical, historical

\textsuperscript{239} Above, note 65, 31.
\textsuperscript{240} Above, note 103, 38.
and cultural context.\textsuperscript{242} In this case, it is not in dispute that the Malays had a stronger historical relationship with the land over non-Malays.\textsuperscript{243} Non-Malays did not have a similar relationship. Nor were non-Malays concentrated in any specific geographic territory.\textsuperscript{244} Therefore, from a demographic perspective, the government could not excuse the application of the 1967 National Language Act to any one group because of their demographic concentration. The only minority group likely to be concentrated in any one area to the exclusion of other groups would be the large numbers of Indians relocated to the estates by British in the latter half of the 19\textsuperscript{th} and 20\textsuperscript{th} centuries.

It is also not wrong for a national language to be nominated in the interests of national unity, as long as minorities are not prohibited from learning and using their own languages in private. Non-Malays are permitted to use, teach or learn their native languages pursuant to article 152(1)(a) subject to this right not extending to use for official purposes. As noted, article 152(6) of the Federal Constitution defines official purposes as any purpose of the government, whether Federal or State and includes any purpose of a public authority. In addition, proficiency in bahasa is a pre-requisite to citizenship eligibility and is required by articles 16, 16A, 19 and 152 of the Federal Constitution.

Requiring non-bahasa speakers to use bahasa for official purposes as defined by article 152(6) of the Federal Constitution is also not discriminatory. In assessing the

\textsuperscript{241} de Varennes, F, Dr, Language, Minorities and Human Rights, 90.'

\textsuperscript{242} Id.

\textsuperscript{243} Note that this does not include the orang asli. Although the orang asli are included in the Malay definition of bumiputra, this dissertation has distinguished the orang asli from the Malays in discussing ethnic rights given the primary intention of the so-called pro-bumiputra policies were introduced to progress the Malays and not the orang asli. The demographic location of the orang asli meant that they did not benefit from the national language policy or planning.
discriminatory value of language preferences by public authorities, the need to balance a State’s legitimate interests and goals in prescribing certain preferences with the ensuing disadvantage, denial or burden that this may affect on individuals, must be taken into account and measured against what is reasonable and fair.\textsuperscript{245} In addition, even if a State behaves in a discriminatory manner and shows a definite preference for a specific language to the extent of restricting access to services based on language difference, an individual must demonstrate that he or she was somehow disadvantaged or denied something which others are entitled to.\textsuperscript{246} According to the UN General Comment on Non-Discrimination, the individual must demonstrate a State measure or practice which ‘nullifies or impairs the recognition, enjoyment or exercise by all persons, on an equal footing, or all rights and freedoms’.\textsuperscript{247} Malaysia’s language proficiency requirement falls far short of this test. More importantly, Malaysia’s language policy planning accommodated for non-\textit{bahasa} speakers by allowing for a 10 year bridging provision, until 1967, which thereafter continued to a limited extent until formerly revoked by Parliament in 1981.

Malaysia’s language policy symbolised Malay dominance but was not discriminatory. Its national language policy meets the international requirement of ‘positive’ linguistic rights, which refers to those ‘rights which impose obligations on States to provide positive measures of support to speakers of minority languages’.\textsuperscript{248} This includes the right of minorities to develop their language in community with other members of the group. Its Federal Constitution also provided adequate safeguards to protect the

\textsuperscript{244} For example, the Tamils of Sri Lanka had an extremely strong and historical relationship with the Northern and Eastern provinces of Sri Lanka. They effectively saw themselves as the rightful occupants of that territory and governed themselves as a race entirely separate to the majority Sinhalese.  
\textsuperscript{245} De Vareness, F, Dr, \textit{To Speak or Not to Speak – The Rights of Persons Belonging to Linguistic Minorities}; 6.  
\textsuperscript{246} Above, note 241, 85.
linguistic identity of minorities within the meaning contemplated by article 1(2) of the UN General Assembly's Minorities Declaration ('the Minorities Declaration').

4.3 The Education Rights of Ethnic Minorities

The right to education is an economic, social and cultural right recognised by articles 13 and 14 of the ICESCR and articles 28 and 29 on the Convention on the Rights of the Child.\textsuperscript{249} Malaysia's national education policy recognised the right of all citizens to education. However, the national language policy significantly altered the education system by introducing a standardised medium of instruction in primary and secondary schools by the 1970's. As noted, this meant that non-Malays were required to learn \textit{bahasa} and therefore gained proficiency in \textit{bahasa}. However, non-Malays continued to be able to retain primary level vernacular schools. The education rights of non-Malays were protected by article 12 of the Federal Constitution, article 12(1) of which proclaimed that 'without prejudice to the generality of article 8 [equality], there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth'. In recognition of the language and education rights of non-Malays, article 152(1)(b) of the Federal Constitution acknowledged that the nomination of \textit{bahasa} as the national language ought not 'prejudice the right of the Federal Government or of any State Government to preserve and sustain the use and study of the language of any other community in the Federation'.

\textsuperscript{247} General Comment on Non-Discrimination (1989), paragraph 10.
\textsuperscript{248} Dunbar, R., "Minority Language Rights in International Law"; 107.
\textsuperscript{249} In addition to the International Bill of Rights, the right to education is recognised by the ICEFRD (article 5), the Protocol Instituting a Conciliation and Good Offices Commission to be Responsible for Seeking the Settlement of any Disputes which may arise between State Parties to the convention against Discrimination in Education (1962), the Convention and Technical and Vocational Education (1989), Convention on the Rights of the Child (1989) ('the CRC'). Malaysia has not ratified any of these Covenants apart from the CRC (Date of accession: 17 February 1995). Articles 28 and 29 of the CRC
Although article 12(1)(a) prohibits discrimination ‘in the administration of any educational institution maintained by a public authority, and, in particular the admission of pupils or students or the payment of fees’, or, pursuant to article 12(1)(b), ‘in providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation)’, the Education Act promoted race based preferential education opportunities in the school and university system. Similar opportunities were not provided to non-Malays. Non-Malays also felt that the rights granted to them by article 12(b) were not preserved. For instance, although vernacular schools ceased at the primary level, some allowance was made for the teaching of other languages as a subject in secondary schools where at least 15 pupils requested it.\textsuperscript{250} Non-Malays argued that in practice, the government did not facilitate the teaching of other languages given the shortage of full-time qualified teachers, non-compulsory classes and the Ministry of Education’s unwillingness to take responsibility for the program.\textsuperscript{251}

This would have created a perception amongst non-Malays that the government did not protect their right to 'preserve and sustain the use and study of' their mother tongues contrary to article 152(1)(b) of the Federal Constitution. This issue was further addressed in the High Court case of \textit{Merdeka University Berhad v Government of...}

\textsuperscript{250} Above, note 103, 24.

\textsuperscript{251} These complaints resulted in the Pupils Own Language Memorandum which alleged that that government was not performing its statutory duties pursuant to the Education Act 1971. Non-Malays felt threatened by the government’s failure to support their cultures and languages. When a DAP MP, V David published a document about these concerns, the government relied on the \textit{Internal Security (Prohibition of Documents) Ordinance (No.5) Order 1982} to ban the document and to suppress non-
*Malaysia* [1981] 2 MLJ; 356 (‘the MUB case’). The Chinese community had attempted to set up an independent university in which subjects were taught in the Chinese vernacular. The High Court held that as the university was classified as a public authority, it fell within the definition of 'official purposes' which required the use of *bahasa* in accordance with article 152 of the Federal Constitution. In reaching its decision, the High Court commented that ‘a university established under the Education Act, even if private, clearly has the requisite public element, as it is subject to some degree of public control in its affairs and involves a number of public appointment to office in its framework, acts in the public interest and is eligible for grants-in-aid from public funds’. On this basis, the High Court found against the Chinese communities attempt to establish a Chinese vernacular university.

The Court’s decision in the MUB case to prevent the Chinese community from funding a privately run university in the Chinese vernacular is contrary to article 2(b) of *Convention Against Discrimination in Education* 429 U.N.T.S. 93, *entered in to force* May 22, 1962 (‘CARD’). That article allows for ‘the establishment or maintenance of private educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level’. In addition, article 5(1) of the CARD acknowledges ‘the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each state, the use or the teaching

---

Malays questioning the legitimacy of the government’s education syllabus. For a full discussion see *Ibid*, 25-34.
of their own language’, provided that ‘this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and form participating in its activities, or which prejudices national sovereignty’. Further, the Hague Recommendations Regarding the Education Rights of National Minorities recognises that persons belonging to national minorities have the right to establish and manage their own private educational institutions, including schools teaching in the minority language, in conformity with domestic law. In the MUB case, a broader interpretation of article 152(6) of the Federal Constitution would have allowed the Chinese community to establish the university without it contravening Malaysia’s domestic law. Given inter-ethnic sensitivities, and especially as the Chinese community had sought to establish the university through their own resources, the High Court’s attitude would not have been well received.

Did the education policy discriminate against non-Malays because of an apparent lack of government support for the continuation of vernacular education at the secondary and tertiary levels? Article 5(e)(v) of the ICEFRD guarantees the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, in the enjoyment of inter alia economic, social and cultural rights, including the right to education and training. However, article 1(4) of the ICEFRD recognises that special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination. The special measures introduced to benefit Malays in the education system were done to advance the socio-economic status of that group. Article 1(4) of the ICEFRD cautions that such special
measures are temporary and shall not be continued after the objectives for which they were taken have been achieved.

Unfortunately, in the case of Malaysia, these special measures continue to be applied indefinitely despite the success of the policy. This also appears to be contrary to the 1971 Language Act with envisaged a standardised system of education by 1982 which was achieved as intended. Ideally, the government ought to review and revise the education system in recognition of the education milestones achieved. Arguably, some of the preferential measures, such as the provision of remove classes, and teaching facilities to benefit rural Malays ought to remain. There is no longer a need to maintain race based quotas, especially at the tertiary level. This is because the national language policy has achieved its aims given non-Malays are now proficient in bahasa. Accordingly, the obstacles previously caused by article 152(6) is no longer an issue.

Arguably, the greatest sensitivities felt by non-Malays over the introduction of the national language policy was in the area of employment. Following the introduction of the 1971 National Language Act, non-Malays overcame their lack of proficiency in bahasa to compete within the restrictive quota system to secure employment. Not only was the proficiency requirement disadvantageous to adult non-bahasa speakers, the basis for its imposition and its practical effect was unreasonable given the ultimate intention of the policy was to ensure that Malays received preferential employment opportunities. Despite the national language policy achieving its intended effect, the preferential policies introduced to promote Malay education and employment interests continue to be applied. The ongoing implementation of such policies will not be viewed favourably by non-Malays. Article 23 of the UDHR provides that ‘all persons have the
right to work, to free choice of employment, to just and favourable conditions at work and to protection against unemployment’. Article 23(2) of the UDHR further states that ‘everyone, without discrimination, has the right to equal pay for equal works’. These provisions have been reiterated by the ICESCR. Non-Malays are not denied the right to work but do not have the equal right to work because of the quota systems.

The setting of pro-Malay quotas to tertiary institutions, the allocation of scholarships to Malay students without a corresponding allocation to non-Malays is discriminatory as it denies equal access to all to educational institutions.\textsuperscript{252} Accordingly, the ongoing application of unnecessary preferential measures in the education system, such as race based quotas, would appear to be unnecessary and contrary to article 3(c) of the UNESCO Convention which forbids any differences of treatment by the public authorities between nationals, except on the basis of merit or need. Ultimately, there must be a ‘fair balance’ between the needs and interests of the State and the interests, rights and freedoms of the individual.\textsuperscript{253} This balance has not been met in Malaysia because of the unnecessary and ongoing application of its preferential quota system in the education and employment sectors.

4.4 The legitimacy of Malaysia's national language policy

The nomination of \textit{bahasa} as the national language was not unreasonable and did not discriminate against non-Malays. Anyone who is not a native speaker of the State favoured language will be more or less seriously disadvantaged, depending upon the

\textsuperscript{252} The Limburg Principles (UN Document E/CN.41987/17) were formulated by a group of 29 ‘distinguished experts in international law’ in 1986 who identified a set out guidelines for the implementation of the principles of the ICESCR. The Limburg Principles considered economic, social and cultural rights to form an integral part of international human rights law.
type of service or activity involved, his level of fluency and the language proficiency required by the State.\textsuperscript{254} Recognising this limitation, the constitutional bridging provisions allowed non-Malays to gain proficiency in the national language.

Unfortunately, following the 1969 race riots, it appears that the NOC's aggressive pro-Malay reforms resulted in the removal of a merits based system in the education and employment sectors. By nullification and impairment though excluding the use of most other languages, a linguistic majority can control a government and enjoy the privileges, jobs and services provided by the State in their own language.\textsuperscript{255} This was the aim of the NOC's language policy and planning. The NOC combined language based quotas with race based quotas to ensure benefit Malays who were bahasa speakers. Although the policy may have been reasonable at the time, the ongoing application of such policies is unnecessary and discriminatory.

\textsuperscript{253} Above, note 241, 90.
\textsuperscript{254} de Varennes, F, Dr, "Tensions between Democratic Rule of the Majority and the Rights of Linguistic and Ethnic Minorities", 133.
\textsuperscript{255} Above, note 241, 81.
5. RELIGIOUS FREEDOM IN MALAYSIA

Malaysia remains one of the world’s most religiously diverse Islamic state, due to the cultural hegemony of its population. The majority of Malays are Muslims, the Chinese are Buddhist, Taoist or Christian, the Indians are Hindus, Sikhs or Christians and the Ceylonese are predominantly Hindus. Christianity is also practiced by the orang asli of Sabah and Sarawak. Malaysia’s Muslims are predominantly of the Sunni Islamic stream and are governed equally by the Federation’s laws as well as Islamic law. In a society such as Malaysia, it is important for all religious groups, particularly the religious minorities, to feel that their religious rights are safeguarded. ‘For the religious individual, the right to believe leads ineluctably to the rights to assemble, speak, worship, proselytise, educate, parent, travel or to abstain from the same on the basis of one’s beliefs’. Accordingly, to ignore religious rights is to overlook the conceptual, if not historical, source of many other individual and association rights. These rights includes the right to exist, the rights to corporate property, collective worship, organised charity, parochial education, freedom of press and autonomy of governance. This section examines the role of Islam and Malaysia and considers the extent of religious freedom available to non-Muslims in Malaysia.

256 Above, note 4, 16.
The right to freedom of religion and belief is a recognised right at international law. Article 1(3) of the UN Charter guarantees fundamental freedoms for all without distinction as to religion. Article 18 of the UDHR guarantees freedom of religion and belief and protects the right to freedom from discrimination on the grounds of religion and belief. That article provides:

"Everyone has the right to freedom of thought, conscience and religion;
this right includes the right to change his religion or belief, and freedom,
either alone or in a community with others and in public or private, to
manifest his religion or belief in teaching, practice, worship and observance".

Apart from the UDHR, the right to freedom of religion and belief is also recognised by the ICCPR, article 18.1 of which states that ‘everyone shall have the right to freedom of thought, conscience and religion. Article 18.2 of the ICCPR prohibits coercion which would impair one’s freedom to have or adopt a religion or belief of his or her choice. This guarantee of freedom of religion or belief is limited by article 18.3 which allows for such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. Article 18.4 provides for freedom to impart religion and belief to one’s children. Article 27 of the ICCPR protects the right of minority groups to profess and practice their own religion.

---

It is interesting to note that none of these international instruments have actually defined what is meant by ‘religion’. Fortunately, in the case of Malaysia’s ethnic minorities, and in the context of this dissertation, Malaysia’s religious minorities are grouped into traditional and easily recognisable religions. However, nuances such as Buddhism being a way of life as opposed to a religion should also be noted. Arguably, one is also at liberty not to practice and/ or observe and particular religion ( for those with atheist beliefs or those who do not profess any religion or belief).
Similar provisions are recognised by the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (‘the Intolerance Declaration’). The preamble to the Intolerance Declaration reaffirms the principles of religious freedom and belief provided for by the UN Charter, the UDHR, the ICCPR and the ICESCR. Article 6 of the Intolerance Declaration sets out those rights attached to religious freedom, including the freedom to worship or assemble and maintain appropriate places for these purposes and the freedom to communicate nationally and internationally on religious matters. The Intolerance Declaration defines an ‘intolerant or discriminatory act or practice’ as being any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis’. Article 2(2) of the Intolerance Declaration prohibits unintentional as well as intentional acts of discrimination and applies to not only ‘public life’ but also to the ‘private sphere’. Articles 4 and 7 of the Intolerance Declaration requires States to take positive measures, including the introduction of legislation, to rectify any form of intolerance and discrimination on the grounds of religion and belief.

Consideration should also be given to the Universal Islamic Declaration (‘the Islamic Declaration’), enacted by the International Islamic Council on 19 September 1981, given Islam is Malaysia’s official religion. The Islamic Declaration mirrors the UDHR but incorporates Islamic teachings. The Islamic Declaration recognises the individuals right to freedom of religion, belief and thought. Clause XIII of the Islamic Declaration provides that ‘every person has the right to freedom of conscience and worship in accordance with his religious beliefs’, and the freedom of belief, thought and speech, is
protected by clause XII. The religious beliefs and practices of non-Muslims and ethnic minorities are protected by clause X that provides; ‘there is no compulsion in religion’ and ‘religious minorities shall have the choice to be governed in respect of their civil and personal matters by Islamic Law or by their own laws’.

Given the integral part of religion to that of cultural identity, the denial of religious rights would be a fundamental affront on the rights of minorities in Malaysia. This chapter considers the extent to which the religious rights of minority groups are observed and protected in accordance with international law.

5.1 Constitutional guarantee

Islam is Malaysia’s official religion pursuant to article 3 of the Federal Constitution, which also recognises that ‘other religions may be practiced in peace and harmony in any part of the Federation’. It was the intent of the Reid Commission that Malaysia was to remain a secular state despite Islam being nominated the official religion. 260 Furthermore, it was agreed that the nomination of Islam as the official religion would not in any way affect the civil rights of the non-Muslims. 261 This is reflected in article 3(4) of the Federation Constitution that proclaims that nothing in article 3 ‘derogates from any other provision of the Constitution’, that is the provisions guaranteeing the fundamental liberties and civil rights of the non-Malays. Therefore, although Islam was declared the ‘official religion of the State’, it is not however the religion ‘of the State’.

260 Ibrahim, A, "The Position of Islam in the Constitution" see Above, note 258, 48.
261 Ibrahim, A, "The Position of Islam in the Constitution" see Id.
Accordingly, Malaysia is not an Islamic State in which Islamic law is the constitutional basis of the State and its legislation.\textsuperscript{262}

Religious freedom is recognised by article 11 of the Federal Constitution which allows ‘every person to profess and practice his religion’ subject to article 11(4) which states that ‘Federal law may control or restrict the propagation of any religious doctrine or belief amongst persons professing the religion of Islam’. This is considered in detail below. Article 11(3) recognises the right of every religious group ‘to manage its own religious affairs, to establish and maintain institutions for religious and charitable purposes, and to acquire and own property and hold and administer it in accordance with law’. Religious freedom is also protected during a state of emergency. Articles 149 (dealing with preventative detention) and 150(6A) of the Federal Constitution. Both articles limit the ordinarily expansive powers of the emergency government by providing that during an emergency the government may not interfere with freedom of religion, and may not interfere with the legislative powers of the States with regard to Islamic law.\textsuperscript{263}

State legislatures do have jurisdiction over matters of Islamic law by virtue of article 74 of the Federal Constitution. Islamic law covers family matters such as marriage, divorce, inheritance, guardianship, custody, commercial matters such as Islamic banking and insurance and Islamic criminal law.\textsuperscript{264} Islamic religious laws are administrated by the State authorities though the Shari’a (Islamic) Courts. However,

\textsuperscript{262} Schumann, O, "Christians and Muslims in Search of Common Ground in Malaysia", 242.
\textsuperscript{263} Above, note 51, 202.
non-Muslims are not subject to the Shari’a Courts and are subject to the jurisdiction of the ordinary Courts as defined in article 121 of the Federal Constitution. Similarly, pursuant to article 121(1A), those Courts defined in article 121 do not have jurisdiction over any matter within the jurisdiction of the Shari’a Courts. Accordingly, the constitutional guarantee of religious freedom to non-Muslims, who are predominantly non-Malays, are not impinged upon by the States’ autonomy over Islamic laws given non-Muslims are not governed by such laws.

The jurisdictional effect of article 121(1A) was considered in the Supreme Court case of Faridah bte Dato Talib Mohammed Habibullah bin Mahmood [1990] 1 MLJ 174 (HC) (‘the Faridah case’). The respondent Faridah, sought a temporary injunction against her husband restraining him from assaulting, molesting or harassing her and members of her family. The injunction was granted in the first instance. On appeal, the appellant argued that as a Muslim woman, the respondent was subject to Islamic Shari’a law which did not permit a wife to bring an action against her husband in tort. The Supreme Court indicated that when a challenge to jurisdiction occurs, the correct approach is firstly to ascertain whether the Shari’a Court has jurisdiction and secondly, whether the State Legislature has power to enact the law conferring jurisdiction on the Shari’a Court. The injunction was set aside on the basis that the subject matter of the appeal occurred during the course of the marriage and was not actionable under ordinary criminal law. In the context of non-Muslims, the Faridah case upholds the constitutional immunity of article 121(1A) by recognising that Islamic law can only apply where the Shari’a Court has jurisdiction. As Shari’a Court’s only has jurisdiction

over Islamic matters, the Faridah case reaffirms that non-Muslims are unaffected by Islamic laws.

Religious discrimination in education is prohibited by article 12 of the Federal Constitution. Article 12(2) recognises that 'every religious group has the right to establish and maintain institutions for the education of children in its own religion, and there shall be no discrimination on the ground only of religion in any law relating to such institutions or in the administration of any such law'. However, article 12(2) also distinguishes this right by recognising the special position of Islam by deeming it to 'be lawful for the Federation or a State to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or assist in providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose'. This funding privilege is afforded to Muslims alone, to the exclusion of other religions, although there is no prohibition placed on non-Muslims establishing and maintaining similar institutions at their own expense.

Article 11(5) of the Federal Constitution provides that the constitutional guarantees of religious freedom 'does not authorise any act contrary to any general law relating to public order, public health or morality'. This limitation is not unreasonable and mirrors article 18(3) of the ICCPR that allows for a limitation of these rights 'as are prescribed by law and are necessary to protect public safety, order, health or morals of the fundamental rights and freedoms of others'. A similar limitation is expressed in article 14 of the ICESCR. The primary intent of article 11(5) is not to restrict religious
freedom although it may be used to prohibit the open proselytising of religious groups in the interests of preserving public order.\textsuperscript{265}

Accordingly, the religious rights of Malaysia’s ethnic minorities are constitutionally protected in accordance with the standards recommended by the international instruments canvassed above. This is subject to the restriction on proselytising and in cases of forced conversion to Islam. This is discussed below.

5.2 Restrictions on religious freedom

(a) Limitation on proselytising

Article 11(4) limits the proselytising of religion amongst Muslims and allows the Federal and State legislatures ‘to control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam’. Whilst article 11(4) applies to all Muslims, it greatly affects all Malays, who must by definition, be a Muslim pursuant to article 160 of the Federal Constitution. The effect of article 11(4) was considered in the Supreme Court case of \textit{Minister for Home Affairs v Jamaluddin Othman} [1989] 1 MLJ 369 (‘the Jamaluddin case’).

Jamaluddin was detained pursuant to article 8 of the ISA (enables a person to be detained to prevent that person from acting in any manner prejudicial to the security of Malaysia), for allegedly being involved in a plan for the proselytising of Christianity amongst Malays and for having converted six Malays to Christianity. The Supreme

\textsuperscript{265} Above, note 51, 202.
Court upheld the trial Judge’s finding that article 149, dealing with preventative detention, did not specifically allow the contravention of religious freedom. The Supreme Court agreed that the Minister could not rely on the ISA to restrict the respondent’s rights to profess and practice his religion given the guarantee of religious freedom pursuant to article 11 of the Federal Constitution, subject to article 11(5), which as noted ‘does not authorise any act contrary to any general law relating to public order, public health or morality. The Supreme Court in Jamaluddin concluded that ‘mere participation in meetings and seminars’ do not make a person a threat to the country, nor can ‘the alleged conversion of six Malays, even if it was true…by itself be regarded as a threat to the security of the country’.

The Jamaluddin case is of significance to non-Muslims in Malaysia given it upheld the supremacy of religious freedom in circumstances where no contravention of article 11(5) occurred. The Jamaluddin case further recognised that whilst article 11(4) imposed restrictions on proselytising, a breach of article 11(4) did not warrant reliance on the emergency powers conferred by article 149, including the ISA. The Jamaluddin case did not go so far as to say that conversion out of Islam by Muslims was a right recognised by article 11(1). Neither did it address whether Jamaluddin had the right to disseminate his beliefs pursuant to article 10(1)(a) of the Federal Constitution.²⁶⁶ Arguably, the right to disseminate religious beliefs forms a part of freedom of speech and expression but may be restricted when read in conjunction with article 11(4). To overcome this confusion, State legislatures have imposed additional restrictions on proselytising. For example, section 156(2) of the Malaccan Registration states as follows;
"Any person, whether or not he professes the Muslim religion, who
propagates any religious doctrine or belief other than the religious
document or belief of the Muslim religion among persons professing the
Muslim religion, shall be guilty of an offence cognisable by a Civil Court
and punishable with imprisonment for a term not exceeding one year or a fine
not exceeding three thousand dollars".\textsuperscript{267}

Similar provisions have been enacted in various Malaysian states. In 1991, the state of
Johor passed the Control and Restriction of the Propagation of Non-Islamic Religion
Bill, article 4(1) of which deemed any proselytising to Muslims to be an offence and
provided that Christians may be fined up to M$4,000 or imprisoned for up to four years
for "exposing a Muslim to Christian literature, gospel music or even an evangelistic car
bumper sticker."\textsuperscript{268} Clearly, legislation of this nature would not be well received by
non-Muslims.

In April 2000, the state of Perlis passed a Shari’a law which stipulated that Islamic
‘deviants’ and apostates were subject to 1 year of rehabilitation.\textsuperscript{269} Pursuant to section
166 of the State of Selangor: Administration of Muslim Law Enactment (1952) (3 of
1952), in the absence of permission from the Kathi, the teaching of Islam outside the
home, is treated as a minor offence, entailing imprisonment for one month and a fine of
M$100. Similarly, if the permitted teaching is contrary to Islamic law, up to three

\textsuperscript{266} Article 10(1)(a) guarantees every citizen the right to freedom of speech and expression subject to the
restrictions referred to in articles 10(2) – (4) (inclusive), which omit to refer to the right to disseminate
religious beliefs
\textsuperscript{267} U.S Department of State Bureau of Democracy, Human Rights and Labor Annual Report on
\textsuperscript{268} Wark, “Is the Future of the Malaysian Church at Risk?”.

78
months imprisonment can be ordered, and a person bringing Islamic law into contempt, or a person who publishes anything contrary to the law or doctrine of Islam or ‘Malay customary law’, may be imprisoned for up to six months with a fine of M$500.\(^{270}\)

Accordingly, although Malaysia recognises religious freedom, it attempts to strictly enforce the prohibition on proselytising as much as possible. This restriction may limit the religious practices of some non-Muslims groups, in which evangelism and proselytising are at the core of the groups’ religious beliefs. According to the 1999 Annual Report on Religious Freedom, the Malaysian government has forbidden the circulation of *bahasa* translations of the Bible. The government has also forbidden the distribution of Christian tapes and other similarly printed religious materials in *bahasa*.\(^{271}\) Another likely cause of irritation is that any Muslim authorised to teach Islam is able to proselytise to non-Muslims. This creates an inequality between Muslims and non-Muslims with respect to proselytising which can be viewed as a unfavourably by those non-Muslims whose religious practices encourage proselytising. Article 18 of the UDHR considers religious freedom to include the freedom to change one’s religion or belief.

Article 29 of the UDHR, which sets out the limit of rights and freedoms guaranteed by the UDHR, which would include religious freedom, observes that ‘in the exercise of rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of other and of meeting the just requirements of morality, public order and the general welfare in a democratic society’. The restriction on proselytising

\(^{269}\) Above, note 267.

\(^{270}\) Above, note 32, 130.
falls outside the ambit or article 29 and article 27 of the ICCPR. However, in the overall context of the guarantee of religious freedom in Malaysia, the restriction on proselytising is not so unreasonable as to constitute discrimination when considered in the context of non-Muslims. However, for Muslims (who are predominantly Malays), the restriction on proselytising impinges on their right to change one's religion or belief, and is contrary to article 18 of both the UDHR and ICCPR.

(b) Curtailing the religious practices of non-Muslims

By and large, religious freedom is not curtailed in Malaysia. However, some restrictions are imposed on non-Muslims which have been the source of inter-ethnic tensions. For example, permits for the construction of non-Islamic places of worship such as temples are difficult to obtain. In 1992, Johor mandated that all building applications, including applications to construct churches, be approved by seven state agencies, including the Islamic Affairs Department. Due to the curtailment of raising any 'ethnically sensitive issue' any concerns about the method of administration and the recognition and right to construct non-Islamic places of worship cannot be raised. This is contrary to the provisions of article 11(2) of the Federal Constitution given it would restrict the rights of religious minorities to question matters such as the allocation of government funding towards the development and maintenance of their places of worship. Neither would religious minorities be in a position to query greater government funding of Islamic mosques and Islamic religious groups.

271 Above, note 267.
272 Above, note 184.
273 Above, note 268.
Ethnic tension over religious freedom in Malaysia are generally not prevalent and do not result in open conflict. However, in March 1998, Hindus and Muslims in a Penang village engaged in a violent confrontation over the location of a Hindu temple near a mosque. The situation was contained by the policy and the Government then announced a nation-wide review of unlicensed Hindu temples and shrines.\textsuperscript{274} In July 1999 a collective group of religious minorities officially protested the planned implementation of Ministry of Housing and Local Government guidelines governing non-Muslim places of worship.\textsuperscript{275} The guidelines required an area to have at least 2000 adherents to a particular non-Muslim faith in order for construction permits to be granted.\textsuperscript{276} It was argued that corresponding requirements were not required for the construction of Islamic places of worship.\textsuperscript{277} Concern was also expressed over the fact that under the proposed guidelines, the approval of the State Islamic Council was required in addition to the requirements stated above, prior to construction approval being granted to non-Muslim religious groups.\textsuperscript{278} Of concern is that this guideline would contravene article 11(2) of the Federal Constitution and also article 74 of the Federal Constitution which limits the role of the \textit{Shari’a} Courts, administered at State level, to Muslims alone. The proposed guidelines would amount to an extension this role of an Islamic body scrutinising the activities of a religious minority at a State government sanctioned level. The Malaysian government responded in September 1999 by indicating that the guidelines would be revised, no further reports have been issued regarding the proposed revisions.\textsuperscript{279} The Malaysian government’s decision in this instance evidences a recognition of the highly sensitive nature of matters associated

\textsuperscript{274} Above, note 267.  
\textsuperscript{275} Id.  
\textsuperscript{276} Id.  
\textsuperscript{277} Id.  
\textsuperscript{278} Id.  
\textsuperscript{279} Id.
with religious groups in Malaysia. Had the proposal received approval, it would have heightened religious tensions. In addition, inter-religious sensitivities have arisen in recent times because of requirements such as making compulsory Islamic Civilisation courses for all university students regardless of religion.\(^{280}\)

On the whole, the religious practices of non-Muslims are recognised and are not curtailed, apart from the restriction on proselytising. However, non-Muslim minorities question the conditions imposed on them (ie. building restrictions, granting of licences) when similar limitations are not imposed on Muslims. This creates unnecessary inter-religious sensitivities. Apart from these limitations, the government does not discriminate against the religious practices of non-Muslims. The government's overall attitude towards non-Muslims in this context cannot be said to be discriminatory.

(c) Conversion

The Supreme Court in the case of *Teoh Eng Huat v Kadhi of Pasir Mas, Kelantan & Majlis Ugama Islam dan Adat Istiadat Melayu Kelantan* [1990] 2 MLJ 306 (‘the Teoh case’) considered the extent of religious freedom in Malaysia. In Teoh, the respondent was a Chinese girl who had converted to Islam at the age of 17 years and 8 months. Her father, the appellant had issued proceedings against the Islamic priest who had performed the conversion. According to the father, the priest had performed the conversion in the absence of parental consent at a time when the respondent had yet to attain 18 years of age. Relying on article 12 of the Federal Constitution, the appellant argued that as a parent, he had the right to decide on the appellant’s religion, upbringing

\(^{280}\) Heibert, M, "Required Lessons", 22.
and education. The High Court in Teoh found in favour of the conversion on the grounds that the respondent had been of sound mind at the time and was in a position to decide. The High Court further held that article 12 was not applicable in instances of voluntary conversion. Consideration was also given to the Islamic age of majority, being the age at when a female commences menstruating. On appeal, the Supreme Court over-turned the decision of the High Court and held that ‘in the wider interests of the nation, no infant shall have the automatic right to receive instruction relating to any other religion than his own without the permission of the parent or guardian’. The Supreme Court in Teoh’s case found that a person of less than 18 years did not have a constitutional right to choose his own religion.

In Teoh, the Supreme Court considered it relevant to take into account matters of national stability given the sensitive nature of the dispute. The Supreme Court in Teoh acknowledged that despite the appellant herself having converted to Islam, the inter-religious sensitivities which arose during the case made it more appropriate for the case to be tried before the ordinary Court as opposed to the Shari’a Court. Had the opposite decision been reached, it is likely that non-Muslims would have seen it as the State encouraging the conversion of non-Muslims to Islam by denying the parents entitlement to exercise control in the circumstances.

It should be borne in mind that against the backdrop of the Teoh case was the introduction of the Administration of Islamic Law Bill (‘the Selangor Islamic Law Bill’) by the Selangor State Legislative Assembly. The Selangor Islamic Law Bill provided for conversion to Islam under Part VII, clause 67.²⁸¹ According to its terms, if at the

²⁸¹ See Administration of Islamic Law Enactment 1989 (No.7) Selangor.
moment of conversion, the person converting had any natural children yet to attain the age of majority, such children would automatically also be converted to Islam. This was regardless of whether the converting person had actual custody over the children.\textsuperscript{282} It was argued that the Bill’s terms contravened the religious freedom provisions of article 11 of the Federal Constitution.\textsuperscript{283} In the interest of preserving racial harmony, it was believed that the Supreme Court in Teoh took the impact of the Selangor Islamic Law Bill into consideration in deciding on the age of majority.\textsuperscript{284} The Selangor Islamic Law Bill was passed in July 1989.\textsuperscript{285}

Malays encountered more difficulties with conversion than non-Malays. The actual legal process of a Malay wanting to either embrace a new religion or to become an atheist is unclear. Given the Court’s attitude in the Jammaluddin case, it is likely that conversion out of Islam is not viewed favourably. In accordance with the Islamic laws of the state, in March 1999, the High Court ruled that secular Courts had not jurisdiction to hear applications by Muslims to convert, and restricted such matters to the jurisdiction of the \textit{Shari’}a Courts.\textsuperscript{286} This interpretation is consistent with the findings of the Supreme Court in the Faridah case. The restrictions on Muslims to convert out of Islam similarly affects those non-Muslims marrying a Muslim person. Under Islamic law in Malaysia, a non-Muslim marrying a Muslim will be required to convert to Islam. The process is closely monitored by officials of the \textit{Shari’}a Courts whose role is to ensure that the convert properly embraces the teachings of Islam. This forced conversion is contrary to article 18(1) of the ICCPR and article 18(2) of the ICESCR which recognises the right to change one’s religion or belief, as does article 9 of the

\textsuperscript{282} Above, note 51, 202-204.
\textsuperscript{283} Id.
\textsuperscript{284} Above, note 51, 202-204.
\textsuperscript{285} Id.
UDHR. The forced conversion of non-Muslims will also heighten inter-ethnic sensitivities given a necessary part of conversion requires the person to forego his or her given name and surname. In doing this, the person converting is effectively required to abandon their ethnic and cultural identity and assume the identity of a Malay person which constitutionally means speaking bahasa and adopting the cultural practices of Malays in addition to converting to Islam. In Malaysia's secular society, this requirement is not likely to be well received by non-Malays.

5.3 Summary of religious freedom

Malaysia places some restrictions on the right to religious freedom and belief. Malaysia is not an Islamic state although Islam is recognised at the official religion. Although religious minorities are generally granted freedom of religion and belief, some restrictions are imposed on the establishment of places of worship. Inter-religious sensitivities arise because of the government's preferential funding in support of Islamic places of worship and schools (as set out in article 12(1)(b) of the Federal Constitution). In addition, the quota systems introduced by the NEP, and the national language and education policy planning, benefit Malays, who are necessarily Muslims. In this context, these quotas may be considered to be religiously discriminatory.

However, on a practical level, the races respect each others' traditions and beliefs. For example, a Muslim restaurateur may decide to close during Ramadan and not serve non-Muslim customers, but non-Muslims are not pressured to fast and can freely eat, smoke and gamble during the fasting month. But, any actions taken by the

---

286 Above, note 257.
287 Lee RLM Asian Survey Vol XXVII No.4 April 1988; 403.
government likely to be interpreted as pro-Islam is likely to trigger alarm bells amongst non-Malays. For example in 2001, Dr Mahathir described Malaysia as a model Islamic state. In response, the Catholic Bishops’ Conference of Malaysia president Most Rev Anthony Soter Fernandez emphasised that Islam should not be politicised and asked that human rights of religious freedom in Malaysia be respected in accordance with the Federal Constitution. Although inter-religious conflict is not prevalent in Malaysia, religious sensitivities remain high. Religious minorities are likely to feel threatened by legislation which can potentially be used to restrict religious freedom. For example, the Societies Act 1966 requires that any association of seven or more members register with the government as a society. The government’s reliance on the ISA in the Jamaluddin case fuels concerns over the ability of the government to severely curtail religious freedom through detention when the circumstances may not warrant such action. In the interests of internal stability, the government ought to promote inter-religious harmony and avoid the politicising of Islam. Further, the government should preserve the intent of the Federal Constitution and ensure that to State does not favour Muslims over non-Muslims.

288 The Star (Malaysia), Aug. 3, 2002
289 Above, note 288.
6. CLAMPING DOWN ON OPPOSITION

The previous chapters considered the implementation of pro-Malay preferential policies via Malaysia’s national language policy, quota systems in both the employment and education sectors and the financial benefits scheme. As canvassed in chapter one, these special privileges were introduced at independence to remedy post-colonial socio economic imbalances between Malays and non-Malays. 34 years on, these policies continue to be applied, and correspondingly limit to some extent, the economic, social and cultural rights of non-Malays. This chapter considers the methods employed by the government to contain minority opposition to the ongoing application of such policies. Malaysia has had five states of emergency to date.290 The British proclaimed a state of emergency in 1948 to contain the communist insurgency. The 1964 proclamation was in response to tensions with Indonesia over Sabah and Sarawak.291 In 1966, a state of emergency was declared in Sarawak following the crisis over the dismissal of Sarawak’s then Chief Minister, Ningkan.292 A nationwide state of emergency was proclaimed following the Kuala Lumpur race riots of 13 May 1969.293 That

291 Under Proclamation dated 3 September 1964 resulting in the passing of the Emergency (Essential Powers) Act 1964 which conferred power on the Agong to make ‘emergency regulations’ for securing public safety, national defence, the maintenance of public order and of services essential to the life of the community.
292 Under the Proclamation dated 14 September 1966 resulting in the passing of the Emergency (Federal Constitution and Constitution of Sarawak) Act 1966 and the amendment to article 150(6) of the Federal Constitution to allow ordinances which may be inconsistent with the Constitution to be passed during a proclamation.
293 Under the Proclamation dated 15 May 1969 resulting in the passing of the Emergency (Essential Powers) Ordinance 1969 which conferred additional powers on the Agong for securing public safety and the maintenance of public order. The 1969 Emergency Ordinance also suspended incomplete elections to Parliament and the State legislatures indefinitely. As discussed in chapter one, the 1969 proclamation was issued whilst election results were not fully counted and at a time when the Alliance was at risk of being ousted by opposition parties. The 1969 Emergency Ordinance furthered the political interests of the Alliance in this regard given it was able to retain control of the Executive following the issuance of
proclamation has yet to be revoked. In 1977 an emergency proclamation was declared in Kelantan to deal with a political crisis between the Islamic party PAS and UMNO.

6.1 Malaysia’s emergency powers

Malaysia’s laws relating to preventative detention originated from the Emergency Regulations of 1948 (‘the Emergency Regulations’) and the Sedition Act. The Sedition Act cited as offences, any acts ‘inciting disaffection against the government and provoking discontent among the people’. Against the backdrop of the communist insurgency, the Printing Presses Ordinance 1948 was also introduced, section 7 of which stipulated that in order to use a press for the printing of documents and annual licence from a Minister is required, and any person writing to print or publish a newspaper must first obtain a permit in that behalf from the appropriate Minister. The Minister has the decision to grant a permit, and one granted, can be revoked by the Minister if he thinks fit, although in such an event, an appeal can be made to the Cabinet. Under section 28, the printing and dissemination of false reports likely to cause public alarm, may entail a year’s imprisonment. Malaysia's restrictive laws were built upon with the introduction of the Police Ordinance 1952 which requires any
person wishing to hold a meeting or procession in any public place to obtain a licence from the Officer-in charge of the Police of the District. If that officer is satisfied that the meeting or procession is ‘not likely to cause a disturbance of the peace’ a licence may be granted. There is no specific right of appeal against the police officer’s decision to grant such a licence, s.39(2). It is usual for conditions to be imposed such as that the police be accorded access to a meeting and to tape record the meeting. Under the *Control of Imported Publications Ordinance* 1958 the Minister can, if he is satisfied that the import of any publication from abroad is ‘prejudicial to the public order, morality or security of the Federation’ prohibit such import under s.4(1). Further, any publication, the importation of which is ‘prejudicial to the public order, morality or security of the Federation’ may be seized, s.28. In addition, a Minister may under section 22 of the ISA, prohibit the printing, sale and circulation of documents ‘likely to promote feelings of hostility between different classes of races of the population’ or inciting to violence or civil disobedience or prejudicial to the national interest.

Following independence, Malaysia’s emergency powers are governed by Part IX of the Federal Constitution, articles 149 and 150 of which are of the greatest significance. The ISA is the only law falling under article 149 of the Federation Constitution. Pursuant to section 41A of the *Internal Security (Amendment) Act* 1962 the appropriate Minister can require any person, body or authority having under any law a power to make any appointment to send him a list of the candidates for that appointment, and if the

---

300 Ibid, 137.
301 Ibid, 139.
302 These laws were introduced in response to the 1948 emergency proclamation and was originally aimed at communists and the communist propaganda see Ibid, 137.
Minister considers that the appointment of any particular person would be prejudicial to the interests of the Federation, then that appointment cannot be made.\(^{303}\)

Article 149 governs legislation against subversion and action prejudicial to public order and provides that:

\(\text{‘}(1)\ \) If an Act of Parliament recites that action has been taken or threatened by any substantial body or persons, whether inside or outside the Federation-

\(\text{(a)}\) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or

\(\text{(b)}\) to excite disaffection against the *Yang di-Pertuan Agong* or any Government in the Federation; or

\(\text{(c)}\) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence;

\(\text{(d)}\) to procure the alteration, otherwise than by lawful means, or anything by law established; or

\(\text{(e)}\) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof;

\(\text{(f)}\) which is prejudicial to public order in, or the security of, the Federation or any part thereof;

\(^{303}\) Above, note 32, 143-144.
any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Articles 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament, and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article.'

The 1961 Federal Constitution wound up the 1948 state of emergency which had ended in 1960. In the process, and through the introduction of the ISA in 1960, the opportunity was taken to strengthen the powers of the executive in countering subversion and dealing with a state of emergency. In that year, article 149 of the Federal Constitution was enlarged to cover the non-violent aspects of subversion and article 151 was amended (under which, originally, a detainee had to be released after three months detention, unless the advisory board on detainees considered that there was sufficient cause for his detention). The 12 month limit on an anti-subversion law was abolished and the positive approval of each House of Parliament to action taken in

304 Article 5 relates to liberty of persons, article 9, prohibition or banishment and freedom of movement, article 10 relates to freedom of speech, assembly and association and article 13 the rights to property. All four articles form part of the fundamental liberties provided for pursuant to Part II of the Federal Constitution. Article 149 basically allows for a limitation of the rights referred to above in a state of emergency. Significantly, the right to freedom of religion (article 11) is not included in article 149.

305 Article 79 refers to the exercise of concurrent legislative powers in relations between the Federation and the States. Article 79 normally imposes administrative requirements on both Houses of Parliament and the State Legislative Assemblies requiring that four weeks lapse between the introduction and passing of a Bill. Article 149 overrides this requirement allowing a proclamation to take effect immediately.
relation to an emergency under article 150 within two months of such action, was no longer required.\textsuperscript{307} The 1960 amendments equipped the executive with wider emergency powers, subject to lesser parliamentary control, than those contemplated in 1957. Further, the word ‘emergency’ in the context of article 150(1) cannot be confined to the unlawful use of threat of force in any of its manifestations.\textsuperscript{308}

In 1971 the Sedition Act was amended as an emergency measure to make it seditious to question any matter, right, status, position, privilege or sovereignty, or prerogative established or protected by the citizenship provisions of the Constitution, together with those Articles dealing with the national language, the reservation of quotas in respect of services, permits etc for Malays and the Rulers’ prerogatives. That sanctity is further protected by an amendment to article 10 of the Federal Constitution.\textsuperscript{309}

6.2 Emergency powers and minority rights

In the context of Malaysia’s minorities, article 149(1)(c) is of greatest significance given it was designed specifically to curb inter-ethnic tensions although articles 149(1)(a) to (f) also apply. The terms of article 149 are reasonably broad and does not provide any exact criteria for determining what constitutes a danger to the state of public security. Given this, the Executive has the discretion to determine the criteria of such an act on a case by case basis.\textsuperscript{310} To add to this discretion, article 150(2) of the Federal Constitution allows for a proclamation to be issued prior to the occurrence of

\textsuperscript{306} Above, note 32, 156.
\textsuperscript{307} Ibid, 157.
\textsuperscript{309} Ibid, 164.
\textsuperscript{310} Above, note 184, 13.
the event the subject of the proclamation. Read in conjunction with article 149(1)(c), this suggests that a state of emergency can be proclaimed where there is presumably some indication of the likelihood of hostility between different races. There does not appear to be any evidentiary threshold to be met prior to satisfying the ‘likelihood’ of ‘hostility’ requirement.

Based on this rationale, a joint reading of the emergency powers conferred by articles 149(1)(c) and 150(2) allows Parliament to proclaim a state of emergency if there is some indication of inter-ethnic hostilities prior to the physical manifestation of the hostile act.\(^{311}\) The logic behind this is discernible. In the context of inter-ethnic tensions, it is better to adopt preventative measures prior to the outbreak of hostilities to contain inter-ethnic violence and maintain internal stability. The reverse to this is that it allows for a proclamation of emergency to be made without the crystallisation of the problem. The concern is the potential for abuse of the emergency powers.

Following a proclamation, article 149 confers wide ranging special powers to the legislature and executive.\(^{312}\) For instance as noted above, article 149(1) allows Parliament to act inconsistently with some of the fundamental liberties of Part II of the Federal Constitution during a state of emergency.

The High Court in the case of Lim Woon Chong v Public Prosecutor [1972] 2 MLJ 264 (‘the Lim Woon Chong case’), considered whether any proclamation made by articles 149 and 150 ought to be subject to judicial review. The Court in Lim Woon Chong concluded that an emergency proclamation was subject to judicial review. In 1981,

\(^{311}\) Article 150(2) was amended in 1981 to allow this to occur.
\(^{312}\) Jayakumar, S, "Emergency Powers in Malaysia" see Above, note 258, 328.
Parliament amended the Federal Constitution to prevent any judicial challenge of the validity of any proclamation of emergency, or of any law passed by decree during the proclamation remaining in effect.\textsuperscript{313}

In addition to the constitutional provisions, the \textit{Sedition Act} was amended during the 1969 proclamation with the introduction of the \textit{Emergency (Public Order and Prevention of Crime Ordinance)} 1969 (‘the 1969 Emergency Ordinance’). The preamble of that ordinance recognises that the \textit{Agong} is entitled to issue a proclamation once ‘satisfied that immediate action is required for securing public order, the suppression of violence and the prevention of crimes against violence’. In addition, section 4(1) of the 1969 Emergency Ordinance empowers the Minister to make a detention order if ‘he is satisfied that it is necessary to do so with a view to preventing any person from acting in any manner prejudicial to public order, or where it is necessary for the suppression of violence or the prevention of crimes involving violence’. That ordinance cites as offences any acts with a ‘tendency to promote feelings of ill-will and hostility between the different races or classes of the population of Malaysia’.

Sections 3(1)(e) & (f) of the 1969 Emergency Proclamation mirror article 153 of the Federal Constitution and protects the legitimacy of the special privileges provisions. Those sections prohibit the questioning of ‘any matter, right status, position, privilege, sovereignty, prerogative protected by Part III of the Federal Constitution, or articles 152, 153 or 181 of the Federal Constitution’. This extends the government’s ability to curb minority groups raising ‘racially sensitive’ issues by questioning the validity of the

\textsuperscript{313} Asian Human Rights Commission, "Malaysia Reforms- The Struggle for Human Rights in Malaysia".
special privileges accorded to Malays. These amendments were enforced by the Federal Constitution (amendment) 1971 which amended the Sedition Act to make it seditious to question any matter, right, status, position, privilege or sovereignty, or prerogative established or protected by the citizenship provisions of the Constitution, together with those Articles dealing with the national language, the reservation of quotas in respect of services, permits etc for Malays and the Rulers’ prerogatives.\(^{314}\)

Emergency provisions introduced following a proclamation of emergency remain paramount during the period of that proclamation. This is recognised by article 150(6) of the Federal Constitution which states that ‘no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency’. This was affirmed in *Osman v Public Prosecutor* [1968] 2 MLJ 137, where the Privy Council held that the regulations made under the *Emergency (Essential Powers) Act* 1964 were valid despite being inconsistent with article 8 of the Federal Constitution as they were promulgated whilst a proclamation of emergency was in force.

Unfortunately, the Federal Constitution fails to impose any time-bound Parliamentary controls on the continuance of a state of emergency. This allows for a proclamation of emergency to remain in force indefinitely as occurred with the 1969 proclamation discussed below. The effect of this is that it affords the government the luxury to make regulations under emergency ordinances. Recognising this potential abuse, the Privy

\(^{314}\) Above, note 32, 164.
Council in the case of Teh Cheng Poh v Public Prosecutor [1979] 1 MLJ 50 (‘the Cheng Poh case’) held that once Parliament had sat following a proclamation of emergency, the power of the Executive to make regulations under emergency ordinances, and to enact such ordinances, lapsed. Arguably, the Court in Cheng Poh aimed to overcome the limitation of the Federal Constitution in this regard. The Cheng Poh decision effectively made redundant Parliament’s ongoing ability to rely on emergency ordinances once Parliament had sat. The Cheng Poh decision was considered in the case of Phang Chin Hock v Public Prosecutor [1980] 1 MLJ 70 (‘the Chin Hock case’). Unfortunately, the Court in Chin Hock overturned the Cheng Poh case and upheld the validity of Parliament continuing to make regulations under the Essential Powers Act.

In Johnson Tan Han Seng v Public Prosecutor & Ors [1977] 2 MLJ 66, the appellants argued that the 1969 emergency proclamation was no longer effective because the circumstances which had justified the proclamation were no longer in existence. The consequences of the virtually autonomous power of the government as a result, is aptly illustrated by the arrest, detention and eventual dismissal of Malaysia’s former Deputy Prime Minister, Anwar Ibrahim on 2 September 1998.\textsuperscript{315} Anwar was charged with official corruption following his arrest.\textsuperscript{316} This dissertation does not intend to examine the validity of Anwar’s arrest save as to note the government’s questionable reliance on restrictive laws in the circumstances. That case highlighted the potential for the government to erode the civil and political rights of Malaysia’s minorities by unnecessarily relying on restrictive laws to contain any anti-government opposition in the interests of maintaining internal stability.

\textsuperscript{315} Human Rights Watch – Asia, Malaysia.
\textsuperscript{316} Id.
However, in the context of Malaysia’s minorities, the 1969 proclamation illustrates the government’s unnecessary and ongoing reliance on emergency laws enacted during a proclamation of emergency to erode minority rights. This is considered below.

6.3 Examining the 1969 proclamation

As discussed in chapter one, inter-ethnic tensions erupted following the 1969 general elections, resulting in the race riots of 13 May 1969.\textsuperscript{317} The state of emergency following the May 1969 was proclaimed in response to inter-ethnic violence within the meaning contemplated by article 149(1)(c). In that instance, the act of hostility had crystallised. The 1969 proclamation presents an interesting case study of the potential to abuse the emergency powers in the interest of political gain and arbitrary authoritarianism. It also represented a paradigm shift in Malaysia’s party politics.

From a political perspective, it enabled the Alliance to retain control in circumstances where for the first time, opposition parties had obtained a greater majority. This was because the proclamation was issued before all elections to seats in the House of Representatives were completed. All incomplete elections were suspended. This effectively prevented any opposition party from gaining Parliamentary control.

The NOC proceeded to proclaim \textit{Emergency (Essential Powers) Ordinance No.45}\textsuperscript{318} (the Essential Powers Ordinance), declaring the entire Federation as a security area in accordance with the ISA. Under this directive, articles critical of the NOC’s

\textsuperscript{317} Above, note 73, 13.
\textsuperscript{318} \textit{Emergency (Essential Power) Ordinance} 1970 (No.45).
actions were deemed to be taboo. Following the 1969 proclamation preventative measures were introduced to minimise a repeat of the occurrence of inter-ethnic violence. That proclamation not only dispensed with the procedural requirements for amendments to the Federal Constitution, it also allowed for laws to be passed which otherwise might be substantively contrary to the provisions of the Federal Constitution.  

As noted above, article 150(6) of the Federal Constitution upholds any law inconsistent with the Federal Constitution as long as the proclamation is in force and subject to the law being introduced pursuant to article 150(5) of the Federal Constitution. 92 ordinances were promulgated under the 1969 Emergency Proclamation. These laws continue unchallenged because the 1969 proclamation has never been revoked.

The 1969 proclamation afforded the NOC autonomy over re-structuring Malaysia’s legal system in response to inter-ethnic tensions. Because of this, the NOC was able to develop plans for the ‘restructuring’ of Malaysian society. This restructuring meant emphasising to minorities the special position of Malays as reflected by the NOC’s statement after the 1969 race riots:

"The present multi-racial character of the country is the direct result of British economic policy before the war which encouraged mass non-Malay immigration... Malaya’s vast economic potential and the liberal, tolerant attitude of the Malays, exploited by the colonial government, caused an influx of Chinese and Indian immigrants, and

---

319 Above, note 4, 72.
320 Above, note 184, 9.
mass migration continued until the thirties.

A striking feature of Malayan society at the time (which continues today, slightly abated) was the voluntary cultural segregation—while the Malays lived in a cultural milieu that institutionally continued in a local context, there was no effort made by the colonial authorities to orientate the increasing number of immigrant races towards local institutions. For the most part, the immigrant races were administered independently and led an independent existence. This partly explains some current attitudes among certain sections of the non-Malay communities, and some difficulties experiences today in nation building.\textsuperscript{322}

The NOC’s cryptic announcement, which barely touched on the tensions of the 1969 race riots, nevertheless captured Malay sentiment towards the economic success of non-Malays during British rule. The NOC clearly felt that it was necessary to remedy the socio-economic status of Malays to avoid a repetition of the 1969 race riots and to allow the Alliance to retain power. The proclamation of emergency enabled the NOC to introduce legislative policies unchallenged. Racially based opposition parties such as the MCA, MIC and MCC were unable to speak out against the implementation of the NEP which aimed to create a Malay business community and achieve 30\% \textit{bumiputra} ownership of the corporate sector by 1990.\textsuperscript{323} In achieving this, the NEP aimed to allow a 40\% share for non-Malays and 30\% for foreign investors.\textsuperscript{324}

\textsuperscript{321} Above, note 26, 211.
\textsuperscript{322} National Operations Council, 1969; 1 in Above, note 39, 45.
\textsuperscript{323} Above, note 105, 25.
\textsuperscript{324} Mohamed, R, "Public Enterprises" see Ibid, 238. As noted by Mohammed, this was achieved by public enterprises being assigned the task of holding in trust share capital for \textit{bumiputras}. \textit{Bumiputra} employment in mining, industry, construction and commerce was manoeuvred to reach a target of 50\% of
Ultimately, the aim of the NEP was to advance Malay socio-economic interests.\textsuperscript{325} To achieve this, the NEP introduced controls on Chinese businesses by restricting Chinese participation in sectors where small Malay businesses were concentrated, or making Chinese businesses share ownership with Malay interests at discount prices (to attract Chinese investors).\textsuperscript{326} The NEP gave new support to UMNO leaders who were able to regain the confidence of the Malay peoples that had moved to PAS in the late 1960's (immediately prior to the 1969 race riots).\textsuperscript{327} The NEP itself was meant to meet Malay expectations much more than non-Malays.\textsuperscript{328} As bluntly put by Mahathir;

"The only thing to do is to admit that in giving the Malays their place in the sun, there must be denial for some non-Malays. Some non-Malays will have to be sacrificed in order to bring the Malays up. The thing to do is to be honest about it. The politics of fact is that the Chinese will have to pay, whether you say nice things to them or not. They will have to accept what the Malays want, otherwise they will have to pay the price of harmony".\textsuperscript{329}

Mahathir’s brash sentiment was characteristic of the collective perception shared by Malays of their rightful entitlement to special or preferential treatment regardless of the

\textsuperscript{325} Above, note 108, 19.
\textsuperscript{326} Above, note 21, 195.
\textsuperscript{327} Ibid, 196.
\textsuperscript{328} Khoo, B.T, "Politics after Mahathir" in Above, note 227, 136.
\textsuperscript{329} Yap S (1976), The Prodigal Who Made His Way Up, New Nation, 9 March Khoo BT "Politics after Mahathir" in Id.
cost of such policies on non-Malays. In *The Malay Dilemma*, Mahathir expressed his views on the reason for the 1969 riots. He claimed that the essence of the Malay dilemma was that ‘although the Malays were the definitive people of Malaysia, they could become dispossessed in their own land’. 330 He was pessimistic of the capacity of Malays to compete with non-Malays, particularly the Chinese (in business). 331

Parliament did not sit until 20 February 1971. Had the Cheng Poh decision been upheld in the Chin Hock case, this would have rendered the NEP ineffective at this point given it was introduced by an emergency government during a state of emergency. As noted, the Cheng Poh case was overturned. Given the lack of any constitutional time restrictions on the duration of a proclamation of emergency, the 1969 proclamation, and all legislative policies introduced in that period by an emergency government, the NOC, continues to be in force. In any event, the policies implemented by the NOC, including the NEP was ‘formalised’ once Parliament sat with the passing of the *Constitutional (Amendment) Act 1971*. 332 In doing this, the government also overcame the possibility of the 1969 proclamation being revoked at a future date which would have removed the immunity granted by article 150(6) of the Federal Constitution. 333 The 1969 proclamation represented a turning point in Malaysia’s legal development. It was during this state of emergency that the provisional ruling government, the NOC, introduced a series of policies which continues to impact on the economic, social and cultural rights of Malaysia’s minorities in the interest of assisting the socio-economic growth of the Malay community.

---

332 Above, note 73, 14.
333 Similarly, section 8(B)(1) of the ISA (amended in 1989) does not allow for judicial review ‘in respect of any act done or decision made by the Yang di-Pertuan Agong or the Minister, in the exercise of their
As noted, to contain minority opposition, the government can continue to rely on article 153 of the Federal Constitution, the Emergency Ordinance and the ISA. In addition to the government’s reliance on these restrictive laws to curb opposition, the NEP was able to be implemented with minimal ethnic tensions because of Malaysia’s strong economic growth. 334 Although this explains how such policies were introduced in the absence of minority opposition, the legitimacy of the government’s action is considered below.

6.4 Assessing the 1969 proclamation at international law

This section firstly considers the legitimacy of the proclamation itself. It then assesses the legitimacy of the NOC’s and subsequently Parliaments reliance on the state of emergency to introduce legislation and policies unchallenged. Reference will be made to international provisions in undertaking this assessment. Of note is the

(a) Legitimacy of the 1969 proclamation

As noted, a national state of emergency was proclaimed on 15 May 1969 following the eruptions of inter-ethnic tensions primarily in the capital, Kuala Lumpur, on 13 May 1969. The validity of a declaration of a state of emergency was examined by the International Law Association (‘the ILA’) which identified the basic elements to be met prior to a proclamation being issued. These are, the territorial scope of the emergency, the magnitude of the threat, the requirement that a proclamation be temporary in nature

--

334 Above, note 26, 211.
and that if a proclamation is to be issued, that it be officially done in accordance with the formal procedures of the applicable municipal law.\textsuperscript{335}

The ILA guidelines further stipulates that the threat must be so imminent and exceptional that normal measures of control and regulations would prove futile.\textsuperscript{336} In assessing the magnitude of the threat, the ILA is guided by the ICCPR. The ICCPR recognises that if the situation can be contained through the use of any, or all of the limitation clauses attached to some of the guaranteed rights, then this alternative is to be adopted.\textsuperscript{337} The effectiveness of relying on these limiting measures to control and regulate cases of public dissent and disorders are indisputable. Therefore, to justify a proclamation being issued ‘the public danger must be such as to imperil those institutions which are essential for the proper functioning of a democratic government. Again, the danger must be a potent one and objectively demonstrable, not a latent one subjective perceived or apprehended’.\textsuperscript{338} Further, in the case of \textit{Lawless v Ireland}, the European Court and Commission of Human Rights interpreted the kind of emergency which justifies derogation from human rights standards as ‘a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups and constituting a threat to the organised life of the community which composes the States in question’.\textsuperscript{339}

\textsuperscript{335} Chowdury, S, \textit{Emergency: Declaration, Duration and Control}, 24-27.
\textsuperscript{336} Ibid, 27.
\textsuperscript{337} The six limitation clauses provided for in the ICCPR are in articles 12 (freedom of movement and residence), 14 (right to fair and public trial), 18 (freedom of thought, conscience and religion), 19 (freedom of opinion and expression), 21 (right of peaceful assembly), 22 (freedom of association). Non-derogable rights under the ICCPR are those relating to life, freedom from torture and cruel or inhuman treatment or punishment, forced labour, imprisonment merely on contractual grounds, retrospective criminal offence, recognition as a person before the law and freedom of thought, conscience and religion.
\textsuperscript{338} Above, note 235, 27.
\textsuperscript{339} Oraa, J, \textit{Human Rights in States of Emergency in International Law}, 32.
In this case, the public crisis had been objectively demonstrated prior to the proclamation being issued. However, article 150(2) of the Federal Constitution is inconsistent with the latter position (ie. a proclamation being issued on a subjective basis) given it allows for a proclamation to be issued prior to the occurrence of the event the subject of the proclamation.

In assessing the legitimacy of the 1969 proclamation the following is noted. Firstly, the outbreak of tensions occurred prior to the completion of the general elections. Inter-ethnic tensions may have been curbed by issuing strict curfews and restrictions on freedom of movement and residence and limiting political assemblies. However, given the counting of election results had yet to be completed, and the need for decisive action to be taken immediately to stop the violence and the constitutional powers conferred on the Agong pursuant to articles 149 and 150, the issuance of the proclamation was not an over reaction.

Following a proclamation, parties to the ICCPR are required to communicate its notice of derogation to the ICCPR pursuant to article 4(3). The objective of this being to contain a State’s ability to abuse the autonomous powers conferred upon it during a proclamation. Given Malaysia is not a signatory to the ICCPR it was not required to do this.

(b) The territorial scope of the 1969 proclamation

Another consideration is whether it was necessary for the proclamation to be issued throughout the entire Federation given the fighting was limited to the capital. With
respect to the territorial scope, the ILA observes that, “by definition, the crisis or public danger must be one which poses a threat to the life of the nation”.\textsuperscript{340} Based on this definition, it is not necessary for the situation to be present throughout the entire nation as “a threat to the nation may arise when the immediate danger is perceived in certain limited geographical areas”.\textsuperscript{341} Therefore, a threat to the nation may arise when the immediate danger is only limited to certain geographically territorial areas.\textsuperscript{342} However, the crisis or public danger constituting the emergency must be nationwide in its effect for a proclamation to be issued throughout the entire nation as opposed to a specific territory.\textsuperscript{343}

Article 4(1) of the ICCPR cautions that if the situation is not nation-wide in its effect, it constitutes a breach to institute a state of emergency. ‘Threat to the life of the nation’ in the context of article 4 of the ICCPR requires that there exist an exceptional situation which involves imminent danger. Thus, to have to declare a state of emergency “the public danger must be such as to imperil those institutions which are essential for the proper functioning of a democratic government. Again, the danger must be a potent one and objectively demonstrable, not a latent one subjectively perceived or apprehended”.\textsuperscript{344} In this case, the ‘threat’ was localised to inter-ethnic rioting in the capital Kuala Lumpur although the Agong and subsequently the NOC was under a real apprehension that tensions would spread throughout the Federation given the closely fought general elections immediately prior to the outpouring of tensions.

\textsuperscript{340} Above, note 235, 24.
\textsuperscript{341} Ibid, 25.
\textsuperscript{342} Id.
\textsuperscript{343} Ibid, 27.
\textsuperscript{344} Id.
Article 4(1) of the ICCPR provides that if the emergency is not nationwide in its effect, it effectively constitutes a breach of that article of the ICCPR to institute a state of emergency.

In this case, it was reasonable for the Agong and subsequently the NOC to have a real fear that tensions would soon spread throughout peninsula Malaysia at least given ethnic groups were not demographically concentrated in the capital alone. On the balance of probabilities, the Agong did not over-exercise his powers in proclaiming a state of emergency given the peculiar nature of the 1969 race riots and the high probability of the situation spreading throughout the Federation.

(c) Validity of a permanent proclamation

The International Law Association (‘the ILA’) identified three general principles to prevent the abuse of emergency powers. These were, the temporary or provisional nature of a state of emergency, the theory of control and the premise that there should be no alternation to the bases of institutions – whose functions are merely modified to meet the needs of the moment – so that they can revert to their original functions when the crisis has been overcome”.  

Therefore, the institution of states of emergency is by its very nature temporary, and derogation must end when the threat has disappeared.

As noted, once a proclamation has been issued, the ILA recommends that it be of a provisional nature only. That is, the state of emergency must be limited in time and

---

space as "no derogation is legitimate unless it is clearly aimed in good faith at the preservation of democratic institutions and the return to full operation at the earliest opportunity". Permanent states of emergency are those which are perpetuated, with or without proclamation, either as a result de facto systematic extension or because the Constitution has not provided any time limit.

As stated above, the Federal Constitution did not impose any time limitation on the duration of a state of emergency. Although the Cheng Poh case attempted to remedy this flaw, it was overturned. However, the Kuala Lumpur Declaration on Human Rights to which Malaysia is a signatory, recognised the provisional nature of a state of emergency. Article 4(1) of the Kuala Lumpur Declaration states:

'(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not discrimination solely on the ground of race, colour, sex, language, religion or social origin.'

The Kuala Lumpur Declaration is only declaratory in nature although arguably Malaysia, in signing the declaration, recognised that emergency proclamations were not

---

346 Above, note 239, 30.
347 Above, note 235, 27
to remain in force indefinitely. It is difficult to reconcile this position with that of the Federal Constitution which allows the opposite to occur. What this means is that the government decision not to revoke the 1969 proclamation is not inconsistent with the Federal Constitution, but is with international principles.  

In cases where a permanent state of emergency has become the rule, the common features are: (a) less and less account is taken of the imminence or otherwise of the danger, (b) the principle of proportionality is no longer considered to be fundamental, and (c) no time limit is envisaged'. Malaysia’s maintenance of the 1969 proclamation in unwarranted circumstances for the reasons discussed above falls within this description of the features inherent in a permanent state of emergency. The implications of this are discussed below.

6.5 Implications of Malaysia’s restrictive laws

Despite the clear lapse of the cause of the proclamation (i.e. the 1969 race riots ended on 15 May 1969), the 1969 proclamation has not been revoked. This means that Malaysia’s government is at liberty to limit fundamental freedoms by relying on restrictive laws which were only intended to be applied to preserve internal stability during a state of emergency. This is of concern given the undertones of a dictatorial system of government under the guise of a democratic leadership. This is because the

---

349 The Kuala Lumpur Declaration on Human Rights which was approved by the Second Plenary Session of the 14th General Assembly of the ASEAN Inter-Parliamentary Organisation, 20-23 September 1963, Kuala Lumpur.

350 In addition, the government has yet to revoke the proclamations declared in 1964 (Konfrontasi), 1966 (following the Ningkan case) and 1979 (the Kelantan crisis).

351 Questiaux, N "Study of the Implications for Human Rights of Recent Developments concerning Situations Known as State of Siege or Emergency", 112-117 in Above, note 245, 49.

352 Above, note 186, 5.
1981 amendment, and the fact that the 1969 proclamation has yet to be revoked, allows the NOC and Parliament's actions to continue to go unchallenged. This detracts from principles of natural justice and democracy. The Johannesburg Principles acknowledge and apply *inter alia* the ICCPR and the Paris Minimum Standards of Human Rights Norms in a State of Emergency (adopted in April 1984 by a group of experts under the auspices of the International Law Association). Principle 3 of the Johannesburg Principles relates to ‘States of Emergency’ and provides that:

'In time of public emergency which threatens the life of the country and the existence of which is officially and lawfully proclaimed in accordance with both national and international law, a state may impose restrictions on freedom of expression and information but only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government’s other obligations and international law'.

Malaysia's decision to rely on the 1969 proclamation to limit freedom of expression and to control and contain any questioning of the NOC and the government's actions following the 1969 proclamation is questionable. As noted above by the Johannesburg Principles, limitations on freedom of expression may be imposed only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government’s other obligations and international law.\(^{353}\)

---

The fact that the 1969 proclamation has yet to be revoked allows the government to continue to rely on ordinances enacted following the proclamation of emergency. The government has relied on these restrictive laws to curb anti-government opposition. For example, in 1996, the government threatened to use the ISA to detain NGO organisers who had arranged a forum on police abuses.\textsuperscript{354} On 24 October 1998, the government relied on the ISA to disassemble a forum organised by SUARAM, a group of Malaysian human rights activists.\textsuperscript{355} The 1981 amendment further increased the autonomous powers conferred to the NOC following a proclamation. Accordingly, Parliament and/or the Agong need only proclaim a state of emergency in accordance with articles 149 and 150 of the Federal Constitution, which in itself is not subject to judicial review, to exercise autonomous decisions making powers. This may be an exaggerated perception of the intent of the 1981 amendment. However, it is difficult to discern any merit in the government’s decision to limit the function of the judiciary in this respect. The 1981 amendment is contrary to principles of natural justice and reflects the Malaysian governments increasing interference with the judiciary. The 1981 amendment suggests that Malaysia’s government considers it necessary to continue to rely on restrictive laws which were enacted during a state of emergency to contain the act of hostility.

The Malaysian governments continued reliance on the 1969 proclamation in unwarranted circumstances is contrary to international law principles and represents an abuse of the purpose of international emergency powers provisions.

\textsuperscript{354} Above, note 313, 2.
\textsuperscript{355} Id.
PART D

7. EVALUATING MALAYSIA'S PREFERENTIAL POLICIES

Malaysia is a member of the Southeast Asian regional organisation, ASEAN (Association of Southeast Asian Nations). At the ASEAN summit in 1997, the heads of Government, including Malaysia, adopted Vision 2020 which endorsed:

'Vibrant and open ASEAN societies consistent with respective national identities where all people enjoy equitable access to opportunities for total human development regardless of gender, race, religion, language or social and cultural background'.

Of relevance to non-Malays is the phrase 'where all people enjoy equitable access to opportunities for total human development regardless of gender, race, religion, language or social and cultural background' in Vision 2020. Despite this assurance, Malaysia's government has failed to establish a time frame for the implementation of the preferential policies introduced in 1957 and significantly built-upon by the NOC following the 1969 race riots. This concluding section considers the reasonableness of the ongoing implementation of Malaysia's race-based preferential policies.

7.1 Preferential treatment at international law

Preferential treatment is recognised by article 1(4) of the ICEFRD which allows for distinctions based on race if they qualify as special measures to overcome disadvantage. Preferential policies, are based on arrangements where the law

sanctions special measures or differences in treatment that, when certain conditions exist, depart from the principles of formal equality.\textsuperscript{358} Such measures being introduced to protect or promote the welfare of the members of a group previously discriminated against, provided that the group desires such measures.\textsuperscript{359}

Malaysia's preferential policies were introduced to further the socio-economic needs of the Malay community and was justified on the grounds that Malays had been discriminated against during British rule. These policies accorded benefits to Malays and the \textit{orang asli} with regard to higher education opportunities and participation in government supported business projects in order to achieve the NEP's goal of 'restructuring Malaysian society'.\textsuperscript{360} As canvassed in Part 3, the net effect of these policies was the introduction of quota systems based on ethnicity, language and to a certain extent religion, all of which was done to benefit the Malay community in line with the NEP's vision of 30\% \textit{bumiputra} ownership. Preferential policies continue to be applied and the Malay ideology of an ‘entitlement’ to government induced socio-economic dominance persists.

However, preferential treatment is justified only when based on the specific needs of the group and the general trend is to temporarily approve of these measures.\textsuperscript{361} Article 2(3) of ICEFRD recognises that preferential policies should not result in the maintenance of unequal or separate rights for different racial groups after objectives for which they were taken have been achieved. Accordingly, race-based preferential treatment should

\begin{footnotesize}
\begin{itemize}
\item Also known as preferential treatment, reverse discrimination or positive discrimination.
\item Above, note 206, 163.
\item Ibid, 163.
\item Above, note 206, 163.
\end{itemize}
\end{footnotesize}
cease once the intended aim is achieved to avoid the policies deteriorating into discrimination. 362 As canvassed in Part 3, the preferential treatment to benefit the Malay community was introduced via the national language policy and the quota systems. The NOC combined language based quotas with race based quotas to benefit Malays. This was integrated with the NEP which aimed to restructure Malay ownership to ensure that Malays owned 30% of corporate wealth and for Malays to have 40% of employment in all sectors of the economy by 1990. 363 The NEP was intended to be an interim measure given its aims was to have been achieved by 1990. By 1995, the Malay communities share of national wealth jumped from 2.3 percent in 1970 to 20.6 percent in 1995. 364 The NEP's objectives had been achieved within the intended time frame. As Shamsul AB365 wrote:

"In the NEP it was specifically mentioned that within two decades (1971-1990) the successful implementation of the policy should create a community of Malay entrepreneurs. This was to be done not only through direct government intervention and economic support but also through an aggressive training and educational strategy to create much needed professionally trained Malay manpower... Within two decades the NEP has successfully created and expanded the Malay middle class and new rich. In fact, many of its members have now become extremely rich and are active corporate players in the country and globally. The NEP, through the implementation of its first objective of 'poverty eradication' has also created many new rural-based Malay entrepreneurs".

362 Id.
363 Above, note 26, 211.
364 Hiebert, M "Lessons from Malaysia 5/28/98."
Despite its success, the preferential policies were modified and currently, university quota systems ensure a 60% bumiputra intake and corporate quota systems stipulate a 60% bumiputra composition of any privately run business.\textsuperscript{366} Neither is the policy achieving its primary purpose which was to assist all bumiputras (which includes Malays as well as the indigenous peoples) to gain a stronger socio-economic position in post-independence Malaysia. There is growing recognition of this amongst the Malay elite themselves. Malaysia’s Deputy Prime Minister, Abdullah Ahmad Badawi conceded, “I would like to see affirmative action focus...on those bumiputras who genuinely need a head start by way of income and opportunities. For those mollycoddled by the State, their survival can only be measured in the arena of free competition”\textsuperscript{367} Following the introduction of these preferential policies, favoured Malay businessman had benefited at the expense of the rural Malays who continue to be socio-economically inferior. The least to benefit under the so-called bumiputra policies have been the true people of the land – the orang asli. Prime Minister Mahathir himself challenged the real effectiveness of these preferential policies. According to Mahathir, the question “is whether we have reached the level where we can drop the basics retained in the NEP. Are we confident of our capabilities, without the protection from a government which is sympathetic to us [Malays].”\textsuperscript{368} The Prime Minister also recognises that the preferential policies may in fact have disadvantaged Malays who have become dependent on a system promoting their interests regardless of merit.

\textsuperscript{366} Above, note 105, 25.
\textsuperscript{368} Above, note 267, 2.
Apart from the reasonableness of Malaysia's preferential policies, the maintenance of separate rights for Malays detrimentally impacts on the rights of non-Malays as it does not allow for a merits based system. In the 34 years post the NEP, it can be seen that Malays have clearly benefited through the preferential treatment afforded to them. A trade-off following the 1969 race riots, the NEP ensured that Malay demands for greater socio-economic growth were appeased. Non-Malays were required to accept that they would be discriminated against in the interests of meeting the needs of the Malay community. Against the backdrop of the NEP Malaysia's remarkable economic growth which resulted in real average per capita income increased 2.5 times and the poverty rate shrank from slightly over half of the population to 7.8 percent, between 1973-1995. In real terms, this means that there would be no one left below the poverty line of $2 international dollars a day by 2003.\textsuperscript{369} Accordingly, although non-Malays were discriminated against by the NEP and were made to recognise that they were in fact second-class citizens, the success of Malaysia's economic growth meant that all races prospered financially.

Malaysia however, cannot expect this trade-off to continue indefinitely. At some point, non-Malays will query the ongoing need for the preferential treatment received by Malays, especially as the Malay community continues to prosper at the expense of non-Malays. Even when the policies were first introduced in 1957, the China Press, in an editorial observed that:

"The question of special rights for a particular community may be excusable

\textsuperscript{369} The World Bank Group, "Social Policy and Governance in the East Asia and Pacific Region – Poverty and Malaysia", 1.
at the start of the building of an nation, but if the period of 'special rights' is not restricted, or the scope of special rights is not clearly defined, then endless disputes...will arise later on. For the granting of special rights whether right or wrong, has in fact caused those with special rights and those without them to be in opposite position a cause which may breed mutual mistrust and aversion among the people".\textsuperscript{370}

Clearly, non-Malays are aware that the preferential policies have impacted on their rights, particularly economic rights. Events such as the 1997 Asian Financial Crisis and the threat of recession heightened non-Malay sentiments that they were being marginalised by the NEP because of discrimination faced in educational opportunities, public sector jobs and promotions, and securing contracts for government procurement.\textsuperscript{371} Non-Malays were disgruntled when the government implemented the National Economic Recovery Plan (NERP) to assist Malays following the recession.\textsuperscript{372} The NERP aimed to revive failing and failed Malay businesses through the establishment of funds to buy over non-performing loans and to facilitate the recapitalisation of the finance sector.\textsuperscript{373} As KS Nathan correctly points out;

'Recent incidents (March 2001) involving ethnic clashes between Malays and Indians in Kampong Medan (a squatter area in Kuala Lumpur), and clamours by Chinese parents for relaxation of quotas hitherto reserved only for Malays, have pointed to the growing racial divide simulated partially by economic recession, and partly by perceptions of increasing Malay dominance of both

\textsuperscript{370} Quoted in Ratnam, K.J, "Communalism and the Political Press in Malaysia" in Above, note 32, 179.
\textsuperscript{371} Above, note 4, 1.
\textsuperscript{372} Abidin, M.Z, "The Financial Crisis in Malaysia: The Economic and Political Consequences", 2-3.
\textsuperscript{373} Id.
politics and the economy”.374

The reality is that in the event of an economic slowdown, the ongoing implementation of preferential policies are likely to antagonise non-Malays. To compensate for the sentiment shared by non-Malays that they are suffering from a deprivation of rights through such preferential policies, the government ought seriously consider revoking pro-Malay preferential policies in favour of a needs-based as opposed to a race-based preferential system.

7.2 Areas requiring reform

(a) Preferential policies

The government should properly evaluate the ongoing need to safeguard the special position of the Malays. Although constitutionally protected, Malays have received preferential treatment through legislation, policies and government intervention. For example, the 1971 National Language Act, the 1971 Education Act and the NEP. As canvassed above, these policies, and the NEP in particular, have achieved its intended objective. For those Malays who have benefited under the program, the government must assess the need to continue to support them.

The government should undertake a full and impartial analysis of the real impact of the preferential policies. Whilst it is clear that Malays have benefited, the government should consider whether the NEP has in fact assisted all bumiputras. As canvassed in part 1, the NEP was intended to assist both Malays and the indigenous peoples. It is

---

374 Above, note 4, 1.
clear that the NEP has primarily assisted Malays to the exclusion of the indigenous peoples. Further, the government should also consider whether the interests of rural Malays have been met. As canvassed in chapter five, the language and education policies in particular aimed to increase rural Malay participation in secondary and tertiary institutions with the aim of allowing rural Malays to access the traditionally urban employment sector. As noted, a series of measures were introduced to facilitate this. However, no real study has been conducted to determine whether rural Malays have in fact met the intended objective of the language and education policies. The overall standard of education of the bumiputras ought to be measured on a competitive scale in accordance with international educational standards. This will provide the government with a fair and impartial assessment of the quality of its Malay graduates and will allow the government to determine whether its policies have succeeded or if it has only resulted in a system which allows Malay students to qualify in the interests of meeting the requisite quotas. A realistic determination of the quality of education system is important given the government would ultimately want its Malay graduates to be able to compete at an international level in a level playing field.

The government should also revisit the need for quota systems in both the education and employment sectors. Again, the government ought to consider the quality of Malay employees in the workforce given the quota system requires Malays to be appointed to position based on the quota system alone and not on merit. The government ought to seriously consider whether it wishes to maintain a Malay workforce which may in fact have a detrimental effect on the overall quality of the work being performed because the quota system does not allow employers to employ non-Malays more qualified or fit to perform the work. Race-based quota systems do not appear to have detrimentally
affected Malaysia's business or economy. This may be because 'token' Malays are
employed to fill the requisite quotas whilst more qualified persons (both Malays and
non-Malays) actually perform the work. The risks involved in maintaining such an
artificial system is apparent and may have already had a detrimental effect on the
economy. For example, following the 1997 Asian Financial Crisis the government had
to implement the NERP solely to remedy Malay businesses which had failed because
they were unable to cope with the crisis.

The government ought to scrutinise the merits of allowing for quota systems to be
applied in the education and employment sectors indefinitely. Although Malays are
likely to oppose this on the basis that the absence of quota systems may result in non-
Malays regaining socio-economic dominance, the government ought to consider
whether it wants a Malay workforce which would be unable to compete on a level
playing field 34 years after the Malay community has enjoyed the privileges of quotas.

(b) Legislative reform

It was the original intent of the drafters of the Federal Constitution that the fundamental
rights of non-Malays were to be protected. The fundamental rights enshrined by the
UDHR are similarly reflected in Malaysia's Federal Constitution. The amended
Federal Constitution of Malaysia fails to safeguard the human rights it enshrines. The
qualifications on the fundamental liberties granted by the Federal Constitution has been
abused. This was clearly demonstrated on the amount of restrictions imposed on the
freedom of movement, assembly and association in Malaysia. Of concern is the
continued reliance on these qualifications for the purpose of political gain. It is

375 Above, note 204, 5.
suggested that the fundamental liberties provisions in the Federal Constitution be strengthened. All qualifications on those rights, which negate the right itself, and fails to conform to international standards, ought to be removed. The Malaysian Government should adopt an open system of internal judicial scrutiny (and if required scrutiny by the Malaysian Human Rights Commission, or the United Nations itself) on any limitations on the fundamental liberties. This will allow a fair assessment of whether any limitation imposed is proportionate, legal and legitimate under national and international law.\footnote{Above, note 185, 55.}

Malaysia has laws that have been repeatedly abused, particularly restrictive laws such as the ISA. In addition, the laws relating to the national language and religion serve to reinforce the discrimination of the non-Malay minorities. They include a system of separation of educational and employment policies on racial grounds. These systems based on the affirmative action precept are now outdated. Of concern is the increasingly political role of the judiciary and law enforcement agencies. These branches should aim to facilitate a restoration of Malaysia’s legal system by applying principles of natural justice. The judiciary in particular should adopt a much greater role in minimising discrimination against the non-Malay minorities. In addition, much greater care should be taken to contain any political abuse of restrictive laws. There is a need for Constitutional sovereignty and Parliamentary democracy in Malaysia which will pave the way for the true recognition of fundamental freedoms. This should not be treated as ideal. The basic rights contained in the Malaysian Federal Constitution itself must be upheld. To achieve this there must be supremacy of the rule of law which should be administered by an independent judiciary and governed by the Executive. In this manner, the rights of the citizens, and freedom from discrimination will be upheld.
Malaysia must continue to allow for the freedom of worship, although it is conceded that Islam will continue to be the religion of the Federation. This should not decrease the ability for any other religious group to freely practice their religion. Bahasa Melayu should continue as the national language, but in a secular society, there should be the safeguarding of the minority languages. Minority groups should be allowed to use and learn their languages and not be hampered.

Malaysia has an overwhelming amount of subsidiary legislation which restricts the rights to movement, assembly, association and expression. Instruments such as the ISA, as discussed in Part III, allow for the arbitrary arrest and detention of persons. There must be a re-examination of the validity and continued application of such laws. Firstly, the Government should revoke all proclamations made to date. That amounts to 4 outstanding emergency proclamations. The May 1969 proclamation in particular should be revoked. The revocation of the proclamation will allow Parliament to discuss the application of those laws enacted during the proclamation ‘in a state of emergency’. It is strongly recommended that the ISA be carefully scrutinised and amended to reflect the fact that it is not to be used as an instrument to arrest and detain persons merely expressing their political beliefs. If Malaysia is to succeed, its Government must recognise and allow open politics. This must allow for opposition party’s the opportunity to freely and openly express their party platforms. The Government should also revoke all media and other broadcasting restrictions placed on opposition party’s. Ideally, those persons suspected of threatening the security of the nation, should not be tried under the terms of the ISA alone. Rather, the Malaysian Government should allow suspected persons the opportunity of a fair trial in proceedings that meet internationally
acceptable standards of a judicially fair trial. This includes the right of an accused to Counsel, to defend himself or herself and a right to a fair trial.

The concern is the concentration power in the Executive without any real checks given the concerns over Parliament and the impartiality of the judiciary. Politically, there is the fear that corruption and cronyism have resulted in a Government being able to lead by blind loyalty and/or threat and intimidation. To this end, Malaysia’s restrictive laws are a convenient tool. Laws such as the ISA, the Printing and Publications Act, the University Colleges Act and the Police Act severely curtail the rights of speech, assembly and association. Neither can these concerns be raised before a Court of law. Private demonstrations on these issues can and have been prevented through forceful intervention by the police. These occurrences demonstrate a detraction from principles of natural justice and the original intention of the framers of the Malaysian Federal Constitution, and the Malaysian Bill of Rights, the Rukunegara.

(c) Minority rights

The World Conference on Discrimination urged States to abolish and prohibit any discrimination amongst their citizens on the grounds of their ethnic or national origin, and to protect and promote the rights of persons belonging to minority groups to develop their own culture and to facilitate their full development, in particular in the fields of education, culture and employment. Although Malaysia is not bound to follow this recommendation, it is a useful reference guide (best practice). To adequately protect the rights of non-Malays, the government should evaluate the need for the preferential policies introduced under the NEP. Despite the NEP’s objectives

377 Above, note 184, 55.
having been achieved, it continues to be applied 13 years after it was supposed to have ended. As noted, although the NEP itself expired in 1990, there has been no real discussion by the government on policies to succeed the NEP or an evaluation of whether ongoing preferential treatment is warranted.\textsuperscript{379} In re-evaluating the NEP, the government ought also recognise that its non-Malay population, as ethnic, religious and linguistic minorities, also merit special protection, a position recognised at international law.\textsuperscript{380} Minority rights protected are equality, non-discrimination and special rights (if required). Non-discrimination and equality of treatment of both individuals and groups, irrespective of race, colour, language, religion, social origin, birth and other status – constitutes the cornerstone of international human rights law. Ethnic minorities ought to be able to exert their right to their cultural identity, which embraces religious, ethnic, cultural and social identification.\textsuperscript{381}

Given that the NEP's objectives were met many years ago, there arguably is little need for the NEP's exclusionary policies to continue to be applied. As stated, the government ought to reintroduce a system based on meritocracy. This will allow those Malays in need of assistance to continue to receive aid, whilst extending the benefit of preferential treatment to other races. To allow this to occur the government should reverse its pro-
\textit{bumiputera} policies, in particular the educational, business and employment quota systems, to create favourable conditions based on equality for all. The government should also promote measures in order to further and protect the specific rights of persons belonging to national, religious, linguistic and ethnic minorities. It is recognised

\textsuperscript{378} Above, 108, 78.
\textsuperscript{379} Asia Times Online: Meritocracy: Love it or leave it.
\textsuperscript{381} Above, note 256, 939.
that the adequate cultural development of minorities requires human and financial resources which requires and active and substantial contribution from the government of the State.\textsuperscript{382} The concept of State responsibility today is much wider because international obligations and accountability have an unprecedented range and reach.\textsuperscript{383} For example, the government should ensure that the language rights of non-Malays are protected and preserved. To allow this to occur, the government should provide adequate funding to non-Malay primary schools to enable all linguistic minorities to gain a sound understanding of their respective native tongues.

The high likelihood of the pro-\textit{bumiputra} policies being viewed negatively by the minorities, on a socio-economic and cultural level, are likely to adversely affect Malaysia’s political stability. In the writer’s opinion, the permanent prohibition on questioning preferential policies is likely to result in a future deterioration of Malaysia’s political stability. It is unrealistic of Malaysia’s government to continue to expect non-Malays to acquiesce to being treated as secondary citizens in the education and employment sectors on the basis of their ethnicity. Given Malaysia’s multi-ethnic society, it is of paramount importance for the fundamental rights of minorities to be safeguarded. Continued denial or curtailment of such rights is likely to fuel inter-ethnic resentment. The spate of legislation allowing for this deterioration of basic rights was created at a time when Parliament itself was not operational. To prevent the questioning of such an action a ban was placed on raising any ‘ethnically sensitive matters’. In addition, the proclamation of 1969 has never been revoked, meaning that the laws enacted during that proclamation continue in force unchecked. These problems are affecting the grass roots of Malaysian society. Increases in the cost of housing and

\textsuperscript{382} Ibid. 180.
\textsuperscript{383} Above, note 136, 22.
living increase, and tertiary education becomes more difficult to access for non-Malays in the absence of a scholarship scheme. Discontent is mounting. This, in addition to university and employment quota systems, which have been in place over an extended period of time, is unjustified.
CONCLUSION

This dissertation has examined the erosion of minority rights in Malaysia through the implementation of special measures in favour of the majority Malays. In undertaking this examination, this dissertation considered the appropriateness, effectiveness and legitimacy of the preferential treatment received by Malays pursuant to international law standards. This dissertation expressed the view that Malaysia has breached relevant international law standards because it has unnecessarily maintained discriminatory socio-economic race based preferential policies, and has relied on restrictive laws to achieve this. In concluding, this dissertation recommended policy and legislative reform to replace Malaysia's race based preferential policies with a merits based system to ensure that those in need receive appropriate assistance and to prevent the maintenance of laws and policies purposefully detrimental to the rights of Malaysia's minorities.

Having undertaken this assessment, one may ask "Is Democracy Dead?" in Malaysia? The Oxford English dictionary defines a democracy as "government of a country by representatives elected by the whole people". Malaysia was founded as a democracy, and has in place a system of democratic elections but this has been marred by the politicisation of race based issues. A vital undercurrent to Malaysia's legal development has been the struggle for Malay dominance. With the awakening of Malay nationalism came the perception that non-Malays had taken control of Malay soil and had benefited economically through this. Dr Mahathir identified this paradox in "The Malay Dilemma";
"...suddenly, it has dawnted upon the Malay that he cannot even call Malaya his land. There is no more Tanah Melayu – the Land of the Malays. He is now a different person, a Malaysian, but a Malay Malaysian whose authority in Malaya-his land-is now not only shared with others, but shared unequally. And as if that is not enough, he is being asked to give up more and more of his share of influence."  

This in a nutshell has been the driving force behind the development of Malaysia's political and legal system, which are both necessarily intertwined given the role of race based political parties and ideals. The outcome was the implementation of legislative and statutory pro-Malay preferential policies through reliance on restrictive laws and emergency powers contrary to international law requirements. Although these preferential policies were initially warranted, the ongoing maintenance of such policies has resulted in the erosion of minority rights in Malaysia for the reasons discussed in this dissertation. Of particular concern is that the government at present has failed to prove that it is necessary for its preferential policies to continue. Non-Malays are aware of this and will challenge the validity of such policies being applied indefinitely. The risk is a deterioration of inter-ethnic tensions to the level witnessed during the 1969 race riots. Unfortunately, this has resulted in the establishment of separate rights for Malays as opposed to non-Malays. Ultimately, the government will be doing a disservice to the Malay community by allowing for the ongoing implementation of such policies. As recommended in part four, the government ought to replace its preferential system with a needs based system that eliminates preferential treatment on the base of race.

384 Dr Mohamed bin M The Malay Dilemma Asia Pacific Press (1970); 121.
There is no denying that Malaysia has grown in economic strength, and, as a nation since independence in 1957. Further, although the 1969 race riots represented a black mark in Malaysia’s inter-ethnic relations, Malaysia has managed to avoid the fate seen in other multi-ethnic societies of open, persistent and often violent inter-ethnic conflict. Instead, through the imposition of restrictive laws, in questionable circumstances, the executive has managed to minimise and maintain inter-ethnic harmony, whilst simultaneously facilitating the overall growth of the nation, albeit promoting the socio-economic growth of bumiputras. It is also important to recognise that Malaysia’s rich ethnicity is viewed as a source of pride by the differing ethnic groups. That is, despite the undercurrents of tensions, Malaysia’s varying ethnic groups, especially amongst the younger generation, are proud to be Malaysians whilst accepting and embracing their respective ethnic heritage. Malaysians collectively have progressed through the NEP and under Mahathir’s leadership and it is important not to ignore this very important fact in assessing the legitimacy of the government’s policies in the context of minority rights.

However, it is equally important for Malaysia’s internal stability to be maintained. Similarly, it is unrealistic to expect that such stability can be preserved through the continued application of preferential policies especially in times of severe economic recession. Fortunately, Malaysia has not experienced a severe economic downturn to date. Such an occurrence is likely to test the patience of non-Malay communities when and if they rapidly become the poor of the nation, not through lack of merit but because of race alone. In such a scenario, it is more likely that despite the restrictive laws in
place, a repeat of the 1969 race riots will occur and potentially to a more damaging degree.

Democracy in Malaysia is far from dead but the rights of its minorities, although constitutionally recognised, are no longer protected as non-Malays are treated as secondary citizens, and are discriminated against, on the basis of their race. In the sentiment of the Proclamation of Independence of 31 August 1957, Malaysia as a nation ought not only be founded but maintained 'upon the principle of liberty and justice and ever seeking the welfare and happiness of its people'. For a nation founded on such a sentiment, and through the collective will of all of its peoples in the face of adversity, and in spite of differences, ought to be entitled to human rights as human beings and as Malaysians in the spirit of the Proclamation of Independence.
BIBLIOGRAPHY

BOOKS

1. Ahmad, I, Legal education in Malaysia (Singapore : Maruzen Asia, 1980).


JOURNAL ARTICLES


57. Harding, Andrew ,"The 1988 Constitutional Crisis in Malaysia" (1990) 39 International and Comparative Law Quarterly; 73.


NEWSPAPERS/ MAGAZINES


64. The Star (Malaysia); 3 August 2002.


INTERNET SOURCES


69. Department of Information Services Malaysia www.penerangan.gov.my/history/pwmalay.htm


71. Human Rights Watch – Asia www.hrw.org/wr2k/Asia-0.6html


OTHER SOURCES
