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COMMUNALISM, LAW AND STATE POWER:
THE LIMITS OF POLITICAL CHANGE IN MALAYSIA

Marzuki Mohamad

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This work is the result of original research carried out by the author except where otherwise cited in the text.

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Communalism has been a central feature of Malaysian politics. Communal identity and competing communal interests formed the basis of Malaysia's "constitutional contract" agreed upon by leaders of major communal groups - Malays, Chinese and Indians - on the eve of independence in 1957. Contrary to the liberal notion of social contract, the communally-based constitutional contract had been tilted toward serving competing communal interests rather than promoting individual liberties. Continuing articulation of competing communal interests in post-independent Malaya, coupled with a communist threat, prompted the government to enact and enforce illiberal laws, aiming at maintaining national security and racial harmony in a communally-divided society. The courts too, recognizing the importance of state policies on ethnic relations, economic development and national security, legitimated illiberal statist legal meanings, which prioritized state power over individual freedoms. However, by the 1990s, the easing of ethnic tension and the end of the communist threat led to the questioning of the use of illiberal laws against political opponents and government critics. The trend in subjecting them to criminal and civil proceedings also raised concerns that the courts had been turned into one-sided political arenas to disgrace and humiliate political opponents and make oppositional political activities illegitimate. The criminal trials of former Deputy Prime Minister Datuk Seri Anwar Ibrahim vividly illustrated the conduct of political trials in Malaysia. However, the politics of Reformasi, which began soon after Anwar's ouster from the government in September 1998, had promoted a non-communal vision of Malaysian politics and proliferated liberal legal meanings based on the liberal conception of rule of law, contesting the illiberal statist legal meanings. The government responded to this development by making "superficial" legal changes in politically less sensitive areas like women's rights and normal crime, while continued to maintain an illiberal legal structure in the politically highly sensitive areas like national security and ethnic relations. Progress toward greater government responsiveness in these areas however had been slow and halting. By the mid 2000s, tussles between the Islamic mainstream, which promoted the more conservative view of Islam and religious freedom, and the liberals, who promoted the more liberal understanding of the same, reinforced communalism and raised a specter of divisive communal politics. This in turn provided the government with justifications to maintain the illiberal legal structure on the grounds of maintaining religious and racial harmony. Despite the recent push for democracy and non-communalism, the politics of race, religion and repression continued to be a dominant feature of Malaysian politics.
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I sincerely thank Professor Harold Crouch for agreeing to be my supervisor despite the fact that he was about to retire when I enrolled as a PhD student at the Australian National University in December 2003. He officially retired in 2005, but continued to tirelessly read my numerous drafts and suggested amendments to them. Not only had Professor Harold been very swift in commenting on the drafts, but also tactful in offering a balanced evaluation of my work by pointing out its weaknesses and commending its strengths. As Professor Harold is a well respected scholar in Malaysian politics, it was always easy for me as his student to secure appointments with Malaysian scholars and politicians during my fieldwork in Malaysia. I have to record my highest appreciation to Professor Harold for making my four-year long academic journey at ANU a pleasant one. I also thank Dr. Greg Fealy and Dr. Sinclair Dinnen for their willingness to be on my supervisory panel.

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Dato' Dr. Zambry Abdul Kadir, who was my former boss at the Centre for Leadership and Development Studies (CELDES) in Kuala Lumpur, now an UMNO politician, deserves my heartfelt appreciation. Not only did he give me much needed help after I lost my father when I was still pursuing my law degree at the International Islamic University Malaysia, but also introduced me to politics in a scholarly way. I must say that, as a law graduate then, I began to develop a strong interest in political science when I served under him. I also thank the Malaysian government and the International Islamic University Malaysia where I currently serve for granting me a scholarship and fully-paid study leave to pursue my studies at ANU.

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DEDICATION

To my beloved wife Haryaty Ibrahim who always has faith in me.

To our children Hani, Syifa, Ammar and Azzam who always give me hope.

To my mother whose love for me is so unconditional.

To my late father who always wanted me to become a scholar.

Thank you very much!
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<tr>
<td>ABIM</td>
<td>Angkatan Belia Islam Malaysia (Muslim Youth Movement of Malaysia)</td>
</tr>
<tr>
<td>ACCIN</td>
<td>Allied Coordinating Council of Islamic NGOs</td>
</tr>
<tr>
<td>ADIL</td>
<td>Pergerakan Keadilan Sosial (Movement for Social Justice)</td>
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<tr>
<td>ALIRAN</td>
<td>Aliran Kesedaran Negara (Movement for National Conciousness)</td>
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<tr>
<td>AMCJA</td>
<td>All-Malaya Council of Joint Action</td>
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<tr>
<td>API</td>
<td>Angkatan Pemuda Insaf (Movement of Conscious Youth)</td>
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<tr>
<td>AWAM</td>
<td>All Women's Action Society</td>
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<tr>
<td>AWAS</td>
<td>Angkatan Wanita Sedar (Movement of Awakened Women)</td>
</tr>
<tr>
<td>BA</td>
<td>Barisan Alternatif (Alternative Front)</td>
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<tr>
<td>BADAI</td>
<td>Badan Bertindak Anti IFC (Anti-IFC Action Front)</td>
</tr>
<tr>
<td>BN</td>
<td>Barisan Nasional (National Front)</td>
</tr>
<tr>
<td>CAP</td>
<td>Consumer Association of Penang</td>
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<tr>
<td>CHI</td>
<td>Citizen's Health Initiative</td>
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<tr>
<td>CLS</td>
<td>Catholic Lawyers Society</td>
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<tr>
<td>DAP</td>
<td>Democratic Action Party</td>
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<tr>
<td>DEMA</td>
<td>Gerakan Demokratik Belia dan Pelajar Malaysia (Malaysian Youth and Students Democratic Movement)</td>
</tr>
<tr>
<td>DJZ</td>
<td>Dong Jiao Zong</td>
</tr>
</tbody>
</table>
EPSM - Environmental Protection Society of Malaysia
FORKAD - Front Bertindak Anti-Murtad (Anti-Apostasy Action Front)
GAGASAN - Gagasan Demokrasi Rakyat (Coalition for People's Democracy)
GAMIS - Gabungan Mahasiswa Islam Se-Malaysia (Coalition of Pan-Malaysian Muslim Students)
GERAK - Gerakan Keadilan Rakyat Malaysia (Malaysian People Movement for Justice)
GERAKAN - Parti Gerakan Rakyat Malaysia (Malaysian People's Movement Party)
GMI - Gerakan Mansuhkan ISA (Abolish ISA Movement)
GMMI - Gerakan Mahasiswa Mansuhkan ISA (Abolish ISA Students' Movement)
GPMS - Gabungan Pelajar Melayu Semenanjung (Coalition of Peninsular Malay Students)
HAK - Himpunan Angkatan Keadilan (Assembly of Movement for Justice)
HAKAM - National Human Rights Society
HINDRAF - Hindu Rights Action Force
IFCM - Interfaith Commission of Malaysia
IKATAN - Parti Ikatan Masyarakat Islam se-Malaysia (United Malaysian Muslim Society Party)
ISA - Internal Security Act
ISF - Interfaith Spiritual Fellowship
JIM - Jamaah Islah Malaysia (Malaysian Islah Group)
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<th>Acronym</th>
<th>Description</th>
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<tr>
<td>JUST</td>
<td>International Movement for Just World</td>
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<tr>
<td>KARISMA</td>
<td>Kelab Rakan Siswa Islah Malaysia (Malaysian <em>Islah</em> Students' Peer Club)</td>
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<tr>
<td>KeADILan</td>
<td>Parti Keadilan Nasional (National Justice Party), later known as Parti Keadilan Rakyat or PKR (People's Justice Party)</td>
</tr>
<tr>
<td>KMM</td>
<td>Kumpulan Mujahidin Malaysia (Malaysian Mujahidin Group), later known as Kumpulan Militan Malaysia (Malaysian Militant Group)</td>
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<tr>
<td>KOMAS</td>
<td>Pusat Komunikasi Masyarakat (Centre for Community Communication)</td>
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<tr>
<td>LPM</td>
<td>Labour Party of Malaya</td>
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<tr>
<td>MACMA</td>
<td>Malaysian Chinese Muslim Association</td>
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<td>MAYC</td>
<td>Malaysian Association of Youth Clubs</td>
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<td>MCA</td>
<td>Malaysian Chinese Association</td>
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<td>MCCBCHS</td>
<td>Malaysian Consultative Council of Buddhism, Christianity, Hinduism and Sikhism</td>
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<td>MCLS</td>
<td>Malaysian Civil Liberties Society</td>
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<td>MDU</td>
<td>Malayan Democratic Union</td>
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<tr>
<td>MIC</td>
<td>Malaysian Indian Congress</td>
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<tr>
<td>MNP</td>
<td>Malay Nationalist Party</td>
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<td>MPF</td>
<td>Muslim Professional Forum</td>
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<td>MPT</td>
<td>Majlis Pimpinan Tertinggi (Supreme Leadership Council)</td>
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<td>MTUC</td>
<td>Malaysian Trade Union Congress</td>
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<th>Acronym</th>
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<tr>
<td>MYC</td>
<td>Malaysian Youth Council</td>
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<tr>
<td>NCP</td>
<td>National Convention Party</td>
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<td>NECF</td>
<td>National Evangelical Christian Fellowship of Malaysia</td>
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<tr>
<td>NEP</td>
<td>New Economic Policy</td>
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<tr>
<td>PAS</td>
<td>Parti Islam Se-Malaysia (Pan-Malaysian Islamic Party)</td>
</tr>
<tr>
<td>PBS</td>
<td>Parti Bersatu Sabah (Sabah United Party)</td>
</tr>
<tr>
<td>PEMBELA</td>
<td>Pertubuhan-Pertubuhan Pembela Islam (Organizations of Defenders of Islam)</td>
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<td>PGSM</td>
<td>Persatuan Peguam Syar’ie Malaysia (Malaysian Syar’ie Lawyers Association)</td>
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<tr>
<td>PKPIM</td>
<td>Persatuan Kebangsaan Pelajar-Pelajar Islam Malaysia (National Union of Malsyain Muslim Students’ Association)</td>
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<tr>
<td>PKR</td>
<td>Parti Keadilan Rakyat (People’s Justice Party), formerly known as Parti Keadilan Nasional or KeADILan (National Justice Party)</td>
</tr>
<tr>
<td>PMCJA</td>
<td>Pan-Malayan Council of Joint Action</td>
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<tr>
<td>PPI</td>
<td>Peguam Pembela Islam (Lawyers in Defence of Islam)</td>
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<tr>
<td>PRM</td>
<td>Parti Rakyat Malaysia (Malaysian People Party)</td>
</tr>
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<td>PSM</td>
<td>Parti Sosialis Malaysia (Malaysian Socialist Party)</td>
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<td>PUM</td>
<td>Persatuan Ulama Malaysia (Malaysian Ulama’ Association)</td>
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<tr>
<td>PUTERA</td>
<td>Pusat Tenaga Rakyat (Center of People’s Force)</td>
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<td>RTM</td>
<td>Radio and Television Malaysia</td>
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<td>SF</td>
<td>Socialist Front</td>
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<td>Acronym</td>
<td>Description</td>
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<tr>
<td>SIS</td>
<td>Sisters in Islam</td>
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<td>SMM</td>
<td>Solidariti Mahasiswa Malaysia (Malaysian Students' Solidarity)</td>
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<td>SUARAM</td>
<td>Suara Rakyat Malaysia (Voice of Malaysian People)</td>
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<td>SUHAKAM</td>
<td>Suruhanjaya Hak Asasi Manusia Malaysia (National Human Rights Commission)</td>
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<tr>
<td>SUPP</td>
<td>Sarawak United People's Party</td>
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<td>TERAS</td>
<td>Teras Pengupayaan Melayu (Movement for Malay Empowerment)</td>
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<tr>
<td>UBU</td>
<td>Universiti Bangsar Utama</td>
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<td>UMNO</td>
<td>United Malays National Organization</td>
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<td>USNO</td>
<td>United Sabah National Organization</td>
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<td>WAC</td>
<td>Women's Agenda for Change</td>
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<td>WAO</td>
<td>Women's Aid Organization</td>
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<td>WCC</td>
<td>Women's Centre for Change</td>
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<td>WCI</td>
<td>Women's Candidacy Initiative</td>
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<td>WDC</td>
<td>Women's Development Collective</td>
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Chapter I

Introduction

Communalism has been at the core of Malaysia's constitutional and legal history. Competing interests among major communal groups, which at the time of independence encompassed special position of the indigenous Malays and citizenship and other legitimate rights of the non-indigenous communities, had led to the signification of communal rather than individual rights in Malaysia's political discourse. Continued articulation of these communal rights, which formed the basis of Malaysia's constitutional contract agreed upon by leaders of major communal groups - Malays, Chinese and Indians - on the eve of independence in 1957, has caused Malaysian politics to be at times unstable. Responding to the challenge to political stability, the Malaysian government introduced laws that enhance its powers and limit the interpretive jurisdiction of the courts, especially in the politically highly sensitive areas of ethnic relations, national security and economic development. It is in this context that the government has been promoting an illiberal statist understanding of the law, which tends to enhance state powers rather than limiting them, often on the basis that it is "necessary for the maintenance of order in a multicomunal society where racial tensions could flare up and turn into violence at any time".1 Some of the laws however have been put to quite different uses, the most apparent of which was as a means of political control, aimed at limiting the scope for political competition. These included the use of the Internal Security Act 1960 to detain without trial opposition politicians and government critics, the Police Act 1967 (to make peaceful assemblies without police permit illegal), the University and University Colleges Act 1971 (to control student activities), the Printing Presses and Publication Act 1984 (to curb press freedom), the Official Secrets Act 1972 (to

1 Crouch (1996: 95).
deny public access to classified documents) and the Sedition Act 1972 (to restrict freedom of speech).

The government, however, employs these laws in an unprivileged fashion. Faced with competitive though not necessarily fair elections, as well as the proliferation of liberal legal meanings in the society, i.e. views that law should promote individual liberties and human rights rather than limiting them, the government responded to societal demands for legal change along more liberal lines by taking steps to introduce rights-enhancing laws in politically less sensitive areas such as consumer rights, women's rights and the normal criminal justice system, while maintaining rights-limiting ones in the politically-highly sensitive areas like anti-subversion and security-related legislation. Though societal demand for legal change has been more pronounced since the outbreak of the Reformasi movement in 1998, the communally divided nature of Malaysian politics and society - especially along ethnic and religious lines - limits the possibility of widening the articulation of liberal legal meanings, often understood in its Western secular-liberal fashion, among multiracial and multi-religious Malaysians. As the articulation of communal interests among different communal groups remained significant, the government continues to justify the existence and use of repressive laws on the ground that they were necessary to maintain racial harmony, and since the September 11 attack on the United States, to curb Islamic militancy. Within the judiciary, the general judicial attitude has been to recognize the government's concern in regard to the need to maintain national security and racial harmony, and more recently, with the surge of court cases on the right to renounce Islam and challenge the jurisdiction of the syariah courts, to continue to uphold its long-held commitment to the special constitutional position of Islam under which the legal system affords protection and privileges to the religion of the Malay majority.
Theorizing Communalism, Law and State Power

A brief survey on the debate between the liberals and the communitarians in the Western socio-legal tradition, especially following the publication of John Rawls' *A Theory of Justice*, is useful to understand the recent discourse about communal constitutional contract in Malaysia. In an attempt to revive the idea of social contract, Rawls "imagines a society composed of rational, educated, and morally disinterested men, who are ignorant of or at least not influenced by, their own social position in the community, their own abilities, and their personal prospects and aims in society". The hypothetical "antecedently individuated" men in their original position "denied knowledge of their talents and endowments, motivated not by a particular conception of the good but by their interest in their capacity to frame, revise and rationally to pursue such conceptions", would agree that their society should be regulated by the principles of justice that promote equal rights and freedom to constantly make choices of what is best for them, and to change their choices later. The two principles of justice agreed upon by these hypothetical men are: first, each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all; and second, social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity. The first principle is to take precedence over the second, and in the second, (b) is to take precedence over (a). The basic liberties envisaged by the first principle are "political liberty ... together with the freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold

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2 Rawls (1971).
3 Stein & Shand (1972: 71).
4 Mulhall & Swift (1996:7)
(personal) property and freedom from arbitrary arrest and seizure".\textsuperscript{6} The second principle “applies, in the first approximation, to the distribution of income and wealth and to the design of organizations that make use of differences in authority and responsibility, or chains of command”.\textsuperscript{7} The antecedently individuated man would not therefore pursue his strictly utilitarian interests, but seeks to protect his and other’s right and freedom to make choices, for he himself would not know what position he will occupy in the society, and what conceptions of good, purpose and end are best for him then. In the worst case scenario, the right to equality and freedom of choice promotes everybody’s interests.

The communitarians on the other hand see Rawls’ theory of men as problematic.\textsuperscript{8} Commenting on Sandel,\textsuperscript{9} Mulhall and Swift for instance observe:

If the self is antecedently individuated, then no matter how closely it identifies with a given end, that end can never become integral to the self’s identity. The characterization of such values or interests must describe the object that I seek, not the subject that I am; my identity is fixed in advance of my choice of ends, so that a certain distance between who I am and what I value must always remain. Such a conception of the self rules out the possibility of being torn between several competing values in a way which I experience as the pull of competing identities within my self; in other words, it permits no intra-subjective understanding of the self. And by the same token, it limits Rawls’ understanding of the relation between a self and any other-directed (in particular, any community-directed) end to which that self is committed ... Rawls thus excludes the possibility of purposes and ends held in common with others that inspire more expansive inter-

\textsuperscript{7} Rawls (1971: 61) quoted in Stein & Shand (1972: 72).
\textsuperscript{8} See for example Walzer (1981); Sandel (1982); Taylor (1985); McIntyre (1988).
\textsuperscript{9} Sandel (1982).
subjective self-understandings, one in which I identify myself with that community and regard my membership of it as essential to who I am.10

Mulhall and Swift’s criticism of Rawls’ exclusion of the individual’s sense of purpose and ends held in common with others in his community seems to find resonance with Robert Cover’s explication of the importance of the “normative world” in defining the province and meanings of law. The normative universe, Cover argues, “is held together by the force of interpretive commitments ... that do determine what law means and what law shall be”. In Cover’s view, law can be understood only in relation to a normative universe in which people live in - or nomos, which entails the application of human will to an extant state of affairs (reality), as well as toward their alternative future (vision). The codes that relate the normative system to the construction of reality and to the vision of alternative future are narratives, such as divine texts, history, tragedy or even fiction, which provide the sources of the multiple narratives existing in a society. As there are multiple narratives, there are bound to be different “redemptive communities”, with which people identify themselves, engaging in incessant contestations to redeem each community’s vision of the alternative future. Law is one of the sites of those contestations, and the meaning-giving process to a just law is a communal rather than individual affair.

Building on Cover, Migdal argues that the ability of different categories of law and legal meanings - including those opposed to the state, others not controlled by the state but not necessarily in opposition to it, and still others complementary to state law - to subvert, strengthen, or transform state law has a deep impact on the ability of the state to stay intact. On the one hand, when the state is successful in offering a broad-based shared meaning of law, which necessitates the inclusion in state law of other sets of laws accepted by various communities as just and a guide to their behavior, it reinforces state cohesion. On

10 Mulhall & Swift (1996: 51).
the other, competing legal meanings, as well as emerging new legal meanings brought forth by social change, might turn into texts of resistance, and hence threaten state cohesion.\textsuperscript{11}

While Rawls' imagined society of antecedently individuated men, and his conception of liberal legalism, is premised on a social condition that is recognizably Western, liberal and democratic, different dynamics are seemingly at work in some non-Western illiberal societies. In this regard, Jayasuriya observes that in East Asia's authoritarian and statist-legal systems, “the legal subject is constituted in terms of the enterprise or institution rather than the legal person (natural or juristic), and second, law is used as a technique of rule to implement the policy objectives or goals of the state”.\textsuperscript{12} These features of authoritarian statist legalism were the result of legal institutions being the product of an exceptional form of Asian capitalism, which is characterized by strong state intervention in the economy. While competitive liberal capitalism in the West led to the emergence of “liberal legalism”, strong and interventionist states in East Asia bred “authoritarian legalism”. Jayasuria notes, under this kind of legal system, legal institutions are designed to play a “policy implementing” role in that they serve to enforce government objectives and policies, rather than limiting governmental powers. In this regard, “legal formalism”, which places strong emphasis on adherence to formal rules, processes and procedures, regardless of the fairness of substantive outcomes, provides an ideological basis for the legal system. Jayasuriya argues that the deployment of authoritarian legalism as a technique of rule or governance enables the East Asian states to use legalism to expand and consolidate – rather than restrain – the exercise of its powers. His analysis of the statist-legalist model in Singapore reveals that “the ideology of legalism” not only facilitates the accurate achievement of government policy objectives, but also “provides an instrument for making

\textsuperscript{12} Jayasuriya (1996: 367).
certain types of oppositional political activities illegitimate." Authoritarian and statist legalism, in this respect, is characterized by the "rule through law" rather than the "rule of law."

This thesis finds Rawl’s theory of antecedently individuated men problematic. Not only are individuals more inclined to identify themselves with the community they live in, but also articulate a particular conception of law that derives its meanings from communal narratives and/or promotes the purpose and ends of that community. As in Malaysia, where major communal groups are divided along ethnic and religious lines, ethno-religious narratives play significant role in shaping the discourse about, borrowing from Cover, "what law means and what law shall be". The state, as Migdal argues, is in the position to strengthen its cohesion as long as it could provide broad-based shared legal meanings, presumably by incorporating into the state law certain values and principles of the different visions of law in the society. But in a society where the "interest" of one community is the "deficit" of the other, the state’s ability to forge broad-based shared legal meanings is very much limited. This is all the more so when the discourse about law tends to be colored by contestations between two or more visions of law, as the Malaysian case demonstrates, between the "Islamist" and the "secular-liberal" visions, the proponents of which are increasingly adopting a more hard-line view of such visions.

This thesis will evaluate the ability of the competing visions of law and legal meanings, as Migdal put it, to "subvert, strengthen, or transform state law", within the context of a political and legal system that is designed to serve competing communal interests - along ethnic and religious lines - as well as to keep the destabilizing forces caused by such competition in check. An important question to ask is whether such

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14 Cover (1992: 99)
contestation of legal meanings helped promote legal change toward stronger liberalism, or facilitates the maintenance of an essentially statist-authoritarian legal system, which according to Jayasuriya, “provides an instrument for making certain types of oppositional political activities illegitimate”.16

In answering this question, this thesis will consider the impact of Malaysia’s communally-based constitutional-contract politics on the conception of law and state power. In this regard, this thesis will examine the notion of communal constitutional contract, which recognizes a set of communal rather than strictly individual rights that the constitution and the state need to protect. These include the special position of the Malays and, after the formation of Malaysia in 1963, the natives of Sabah and Sarawak, and the legitimate interests of other ethnic communities. Although the communal constitutional contract had arguably laid down the constitutional foundation of independent Malaysia, the recognition of special position of one community over the others has caused protracted problems in understanding common citizenship and nationhood in modern multiracial Malaysia. There had been protracting debates about the terms of the constitutional contract between the different communities far beyond the period of constitution-making. What is even more, the need to protect these communal rights and ensure racial harmony had been made justification by the government to limit democratic practices mainly by putting the state’s repressive apparatuses ready to circumscribe civil and political rights whenever the need arises.

Recently, however, the constitutional hegemony of the special position of the Malays and the natives of Sabah and Sarawak, and the notion of limited democratic practices to ensure racial harmony, have been increasingly challenged by the articulation of more substantive

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democratic values in the society that catapult to prominence the more liberal conception of civil and political rights including equality among citizens. The main ideas related to the constitutional hegemony that are being challenged are: (i) the notion of state as a political institution the main purpose of which is to serve competing communal interests rather than protecting individual liberties; (ii) the need for expansive state power to maintain racial harmony and public order rather than limited state power to guarantee the exercise of individual liberties; and (iii) illiberal legalism based on an illiberal statist notion of "rule by law" rather than liberal legalism based on a liberal conception of "rule of law" as an overarching legal ideology.

As the articulation of competing communal interests causes potential threat to political stability, and therefore gives a semblance of legitimacy to the expansion of state power and the limit to democratic practices, determining the question of whether communalism still dominates Malaysian politics is central to this thesis. This will be done by analyzing the intensity of communal politics and the use of state power in different political periods beginning with the pre-independence constitution-making period until the eruption of Reformasi (Reformation) movement in 1998 following the expulsion of former Deputy Prime Minister Anwar Ibrahim from the government and the ruling United Malays National Organization (UMNO). The Reformasi period is significant in the sense that the constitutional hegemony of communal bargain that was constructed during the constitution-making period has been increasingly challenged by a set of political ideas stressing on the importance of non-communalism as the basis of political mobilization. Malaysian political discourse since the Reformasi era has revolved mainly around the unresolved contestation between the two ideological postures that have significant bearing on the efficacy of communal arguments as
the basis of limiting democratic practices for the purpose of maintaining racial harmony.

Has Communalism Withered Away?

Informed largely by Furnivall, contributors to The Politics of Multiculturalism: Pluralism and Citizenship in Malaysia, Singapore and Indonesia, suggest that in some plural societies, "civil society" organizations – whose autonomy and self-organization do normally encourage civility and inclusiveness – may not necessarily lead to the rise of civil society and democracy. These civic organizations too have to grapple with social rivalries which emanate from ethnic, religious and cultural divisions that may diminish rather than enhance the social capital needed for democracy and civility to flourish. As often is the case in such societies, there is bound to be oscillation between civic virtues and sectarian interests within the realm of civil society.

Four contributors on Malaysia argue that sustained economic development, particularly during the New Economic Policy (NEP) years, has paved the way for the emergence of sizable multi-ethnic business and middle classes, which in turn eased ethnic tension and turned political discourse away from the old politics of "ethnicism" to the new politics of "inclusive multiculturalism". This new politics is characterized by the emergence of new middle classes with "new forms of civility and participation among various ethnic groups"; the creation by the arts community – the so-called cultural producer – of an inclusive trans-ethnic and trans-regional "national perspective"

17 Furnivall (1944, 1948).
19 The New Economic Policy (1971-1990) is an affirmative action which aimed at restructuring the society so as to eliminate the identification of race with economic function and to eradicate poverty. The policy in essence helped the Bumiputeras (son of the soil), which refers to the Malays and the natives of Sabah and Sarawak, to achieve upward social mobility through government assistance.
of pluralism;\textsuperscript{21} a new non-communal and non-class interest-based politics associated with "mass politics of dissent, more interested in creating spaces for political expression than in winning votes";\textsuperscript{22} and not the least, the valorization of developmentalism, rather than ethnicity, as a new pillar of political discourse.\textsuperscript{23}

An important marker of Malaysia's new politics of multiculturalism was the mushrooming of cross-communal and cross-sectional coalitions of civic associations pressing for political reform, especially at the height of Reformasi following the sacking of former Deputy Prime Minister Datuk Seri Anwar Ibrahim in September 1998. These included social and political movements like the People's Movement for Justice (Gerakan Keadilan Rakyat, GERAK), a coalition of Islamic organizations, human rights NGOs and opposition political parties headed by the opposition Pan-Malaysian Islamic Party (Parti Islam Se-Malaysia, PAS); the People's Coalition for Democracy (Gagasan Demokrasi Rakyat, Gagasan), a coalition of NGOs and opposition political parties led by the human rights NGO, Voice of Malaysian People (Suara Rakyat Malaysia, SUARAM);\textsuperscript{24} the Movement for Social Justice (Pergerakan Keadilan Sosial, ADIL), a loose-knit social movement led by Anwar's wife, Datin Seri Dr. Wan Azizah Wan Ismail; Artis Pro Activ (APA), an arts community initiative aimed at "developing a more open society" in Malaysia;\textsuperscript{25} the Women's Candidacy Initiative (WCI), a campaign to boost women's involvement in electoral politics; and the Abolish ISA Movement (Gerakan Mansuhkan ISA, GMI), a group of about 80 NGOs, Islamic movements, trade unions and political parties, pressing for the repeal of ISA. Among students, there were similar cross-communal coalitions for political reform. One of the most significant coalitions was the Students' Abolish ISA Movement (Gabungan Mahasiswa Mansuhkan ISA, GMMI), the key member organizations of

\textsuperscript{21} Mandal (2001: 162).
\textsuperscript{22} Shamsul A.B. (2001: 222).
\textsuperscript{23} Loh Kok Wah (2001: 184).
\textsuperscript{24} Weiss (1999: 430).
\textsuperscript{25} Mandal (2001: 162).
which included Malay-Muslim student organizations like the National Union of Muslim Students’ Associations of Malaysia (Persatuan Kebangsaan Pelajar-Pelajar Islam Malaysia, PKPIM), the Malaysian Islah Undergraduates’ Peer Club (Kelab Rakan Siswa Islah Malaysia, KARISMA) and the Peninsular Muslim Students’ Coalition (Gabungan Mahasiswa Islam Semenanjung, GAMIS); the predominantly-Chinese Malaysian Youth and Students’ Democratic Movement (Gerakan Demokratik Belia dan Pelajar Malaysia, DEMA); and the socialist-leaning Universiti Bangsar Utama (UBU) group. These are “inclusive” organizations whose members cut across ethnic, religious and class divisions. Apart from being a symbol of spontaneous revolt against state repression, the battle cry of Reformasi also symbolized a new political consciousness among the reformist sections of Malaysian society about the virtues of non-communal politics, characterized by commitment to common values of humanity rather than ethno-religious and class identity.

At this juncture, it is important to note that the call for political reform, which was manifested in the new reform movement, was not altogether new. Back in the 1960s until 1980s, there had been similar struggles against state repression. Plantation workers’ strikes, students’ demonstration against the government, protests against ill treatment of political detainees and lawyers’ boycotts of court cases tried under repressive laws were examples of societal movements against state repression. What makes the struggle new is perhaps the political context within which it occurred. First, it occurred at a time when the middle-class was expanding and ethnic relations improving - both as a result of sustained economic growth over the previous three decades; and the growing involvement of Malays, unlike in the 1960s until 1980s, in mounting an open “cultural revolt” against the Malay-led government, especially in response to the sacking, trial and imprisonment of Anwar.²⁶

²⁶ Hari Singh (2000); Maznah (2003).
Though the call for political reform has been multi-racial, with the Malay segments of the society now playing a more important role, the contributors to The Politics of Multiculturalism hold different views about the movement’s contribution to the widening of democratic space in Malaysia. Abdul Rahman offers a cautious but positive outlook.27 Though religious and cultural divisions may continue to characterize “contestation and struggles among different groups in society”, he argues, “the language of inclusion is making a positive contribution to the evolution of a new political culture that champions universal values such as human rights, democracy and interfaith cooperation among all Malaysians.” He even suggests that should the Islamic elements – represented by the mainstream Islamic organizations and political parties such as the Muslim Youth Movement of Malaysia (ABIM) and PAS – “continue to develop the language and practice of inclusive participation”, a trend toward pluralist participation and cooperation could be reinforced.

Loh Kok Wah, however, doubts that the easing of ethnic tension and the vibrant discourse on participatory democracy, especially among the NGOs, will eventually lead to sweeping political change.28 This, he argues, is due to the predominance of “developmentalism”, i.e. a new legitimating ideology, which not only “valorizes rapid economic growth, rising living standards and the resultant consumerist habits”, but also “privileges political stability, which growth and consumerism necessitated, associated in the minds of most Malaysians with the (ruling coalition) Barisan Nasional, even when authoritarian means are resorted to and cronyism is evident”.29 Another contributor to the volume, Zainah Anwar, is even less hopeful. She points out that “democratizing structures and progressive voices are up against very powerful forces who in the

name of religion deny the plurality and diversity of the Malaysian heritage and the democratic principles and liberties in which most Malaysians believe”.

Not long after the authors of the essays in *The Politics of Multiculturalism* put pen to paper, dissension occurred among the so-called “civic associations” over some contentious religious issues. First was the proposal by the Human Rights Committee of the Malaysian Bar Council to form an independent Interfaith Commission of Malaysia, a statutory body whose primary objective would be to “promote and protect every individual’s freedom to (sic) thought, conscience and religion with a view to (maintain) harmonious co-existence in (Malaysian) society”. A conference was held in February 2005 to discuss the draft bill of the proposed commission and to “receive, address and make recommendations in respect of complaints or grievances brought by persons, bodies or organizations in connection with the individual rights to profess and practice his or her religion or faith of choice”. Leading NGOs such Sisters in Islam, SUARAM and ALIRAN supported the proposal. Others included the Malaysian Consultative Council for Buddhism, Christianity, Hinduism and Sikhism (MCCBCHS), a non-governmental body representing major religions in Malaysia, except Islam; interfaith organizations like the Inter-Faith Spiritual Fellowship (INSAF) and the Malaysian Interfaith Network; human rights NGOs like the National Human Rights Society (HAKAM), the Voice of Malaysian People (SUARAM) and Aliran Kesedaran Negara (ALIRAN); and leaders from the opposition Democratic Action Party (DAP) and Parti Keadilan Rakyat (PKR, People’s Justice Party). Mainstream Islamic organizations such as the Muslim

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31 See the proposed draft bill of the Interfaith Commission of Malaysia presented and discussed at the National Conference toward the Formation of the Interfaith Commission of Malaysia, held in Bangi, Selangor on 24-25 February 2005.
32 Malaysian Bar Council (2003: 1).
33 There were disagreements in PKR regarding this issue. Human-rights based party leaders like Vice-Presidents Sivarasa Rasiah and Tian Chua supported the initiative, while ABIM-linked leaders like Youth Vice-Chief Shamsul Iskandar Mohd Akin was critical of it. Parti Keadilan Nasional (Keadilan, National Justice Party) was renamed Parti Keadilan Rakyat (PKR, People’s
Youth Movement of Malaysia (ABIM), Jamaah Islah Malaysia (JIM) and Persatuan Ulama' Malaysia (PUM, Muslim Scholars' Association of Malaysia), however, protested against the proposal, which they described as anti-Islam and an effort by the non-Muslims to intervene in matters internal to Islam.34

Further dissension arose when Sisters in Islam led a campaign in early 2005 to review syariah (Islamic law) and municipal laws that stood in stark contradiction to the Western conception of individual freedoms. These included the laws that make certain acts, which the critics viewed as strictly "personal" and "victimless", like indecent behavior, close proximity between unmarried men and women, drinking liquor and smoking, as punishable offences. The campaign, dubbed as the "Anti-Moral Policing Campaign", sought to have such laws repealed on the ground that morality is a matter of personal choice and policing morality has no basis in Islam.35 This move was again protested by the mainstream Islamic organizations like ABIM, JIM and the Allied Coordinating Council of Islamic NGOs (ACCIN) on the basis that those punishable offences are sinful acts, and hence the state and the Muslim society owe a collective duty to prevent them. The Islamic concept of al-amr bil ma'ruf wa al-nahy 'an al-munkar (enjoining good and prohibiting evil) was invoked to justify their stance.36 A PAS Member of Parliament and the party's Youth Chief, Salahuddin Ayub, withdrew from the Parliamentary Human Rights Caucus after the caucus decided to endorse the campaign.37 Faced with mounting protests from the Islamic groups, the government shot down both initiatives, though some ministers, including the

Justice Party) after its merger with Parti Rakyat Malaysia (PRM, People's Party of Malaysia) in October 2002.

37 The bipartisan parliamentary caucus, comprising opposition and BN MPs, was established in early 2005 to look into the country's human rights affairs.
Minister in the Prime Minister’s Department, Datuk Seri Mohd. Nazri Aziz, and the Minister of Arts, Culture and Heritage, Datuk Seri Dr. Rais Yatim, expressed open support for the initiatives.

Up to this point, the campaigns brought to the fore hitherto silent protests against “religious authoritarianism”, which mainly refers to the undemocratic ideas, practices and rules that the Islamic law antagonists claimed were prevalent in the Islamic judiciary and bureaucracy. The more secular-liberal sections among the Muslims and non-Muslim groups resented conservative interpretations of Islamic laws, which they claimed were against basic human rights principles and democratic values. These included, among others, allegations that the syariah laws, especially in relation to matrimonial matters, are biased against Muslim women; the overzealousness of religious enforcement officers in enforcing Islamic “morality” laws; the difficulties faced by non-Muslim religious groups to build places of worship; the hardships faced by non-Muslim parents to determine the religion of their minor children when their spouses convert to Islam; and the most sensitive of all, the unsettled legal debates on the right of Muslims to convert out of Islam.

As contestations between the Islamist and the secular-liberal visions of law and fundamental liberties ensued, communalism, this time round based more on religion than ethnic identity, re-emerged as the focal point of interest articulation and political mobilization, calling into serious question the tenacity of multiculturalism as the foundation for new social capital to facilitate the blossoming of civil society and democracy in Malaysia’s ethnically and religiously divided society. Ironically, the articulation of liberal legal meanings aggravated the still unresolved conflict between the “secular-liberals” and the “Islamic mainstream” over the perennial question of the place of divine law and its narrative in a modern state, and stirred up the potential destabilizing forces that such conflict might unleash. As a result, it facilitated the state’s perpetuation.

Farish (2005).
of rule through law which was justified on the ground of maintaining racial and religious harmony, rather than “liberalizing” the legal system based on the more liberal conception of the rule of law.

The Main Arguments

The Westminster-style of parliamentary democracy and English legal system found its way into Malaysia’s political and legal system. However, the Merdeka Constitution, the document that sets out the pillars of the supposedly democratic political system, is not a product of an individually agreed social contract - however fictional that concept is - on which Western liberal democracies are based. The major terms of the constitutional contract – Islam as the religion of the Federation, Malay as the National Language, the special position of the Malays and the Malay Rulers, and the legitimate political and economic rights of other ethnic communities - is a result of a “communal compact” between the leaders of major communal groups, negotiated and reached prior to independence in 1957. The constitution in this respect is not only a legal document that sets out the contractual rights and duties of the people and the state, but also a political document that is carefully crafted to serve competing interests of major communal groups in the country. Contestations between these two purposes characterize Malaysia’s communally-based constitutional contract politics, the central features of which are: first, the focus of interest articulation and political mobilization has been communal rather than individual; second, the need to maintain racial harmony and national security overrides individual liberties; third, the continuing existence of potentially destabilizing forces caused by the competing communal interests serves as a justification for the state to expand its powers through law, rather than to limit them; and fourth, individual’s identification with a particular community – religious and/or ethnic - influences his or her vision of politics and law.
This thesis argues that the process of constitution-making, which involved hard bargaining between competing communal groups, each seeking to maximize group interests in an independent state, had the tendency to aggravate rather than resolve communal tensions. After independence, the ensuing politics of constitutional contract – which encompasses the whole debate on the special position of the Malays and the legitimate interests of other ethnic communities – had been the main source of discontent among major communal groups and fuelled racial tensions. The existence of a communist threat was yet another source of destabilizing forces in the new state. This, in turn, provided the government with a legitimate basis to employ repressive laws to maintain racial harmony and national security. At the same time, the government expanded its powers through law and made certain oppositional political activities illegitimate. The judiciary, recognizing state-defined policy objectives in the politically highly sensitive areas of ethnic relations and national security, helped promote illiberal statist legal meanings, which prioritised state legal powers over individual freedoms, and hence facilitated suppression of dissent.

However, the excessive use of law and legal institutions as a means to suppress dissent and a tool to disgrace political opponents (as illustrated by the corruption and sodomy trials of Anwar) has led the entire political and legal system to a serious legitimacy crisis. It was in this regard that the Reformasi movement, which exploded onto the political scene following Anwar’s dismissal in September 1998, served as an ideological conduit as well as an instrument for political change. Ideologically, it attempted to catapult to prominence a shift in the focus of political interest, from one which is essentially communal to individual, in conceptualising politics in plural society. As an instrument for political change, the movement began as a conglomeration of non-governmental organizations, opposition parties, trade unions and individuals across races pushing for political and legal reform. The articulation of a non-communal vision of Malaysian politics, which sought to contest the communal underpinnings of
the race-based constitutional-contract politics as pursued and perpetuated by the ruling Barisan Nasional, has facilitated the proliferation of a liberal vision of state law, which is associated with the more liberal conception of the rule of law rather than illiberal notion of rule through law. In this regard, the articulation of Reformasi’s non-communal ideology helped de-communalise the legal discourse by shifting the discourse of rights and interests from one which was essentially communal to individual, and pulled together anti-repressive law activists across racial and religious divisions, calling for comprehensive liberal reforms.

But this thesis also argues that there were limitations to the articulation and internalisation of liberal legal meanings among the wider spectrum of Malaysian society. The proliferation of competing legal meanings involving both a modern liberal interpretation of universal human rights principles and values and the Islamist-ethno-religious vision of Islamic law and legal meanings (as seen in the recent debate on the right to freedom of religion and personal morality), has led to the pre-eminence of communally-based constitutional-contract politics based more on religion than ethnicity. Several court cases involving religious conversion39 were followed by fierce contestation between “secular-liberals” – who champion the right to freedom of religion, including the Muslim’s right to convert out of Islam (apostasy); and the “Islamic mainstream” – which seeks to re-emphasize the special constitutional position of Islam and defend the laws and legal system that afford protection to the sanctity of the religion. As ethno-religious interest articulation within Malaysia’s multiracial and multi-religious society remained significant, the government found justification to maintain its illiberal statist legal system as a means to keep potential destabilizing forces at bay. In the face of these contending forces, the

government has been less responsive to the calls for legal change in politically highly sensitive areas, such as the anti-subversion and security-related laws. However, it had shown positive signs of change in the politically less sensitive areas, such as those related to the "normal" criminal justice system, though the actual process remained slow and halting.

Finally, this thesis argues that communalism - this time round based more on religion than ethnicity - continued to characterize Malaysian politics and society. As the focus of political interest remained largely communal, the articulation of a non-communal political vision and liberal legal meanings among wider sections of the society faced a serious challenge. What is more, the articulation of secular liberal legal meanings, especially in respect of religious freedom and personal morality, which stands in stark contradiction to the ethno-religious vision of Islamic law and legal meanings, had the tendency to aggravate communal tensions rather than forge communal harmony. On both sides of the political divide - the secular-liberals and the Islamic mainstream - individual identification with community's purpose and ends remained very significant. This in turn, promotes communalism as the focus of political mobilization, the potential destabilizing force of which legitimises the existence of an illiberal statist legal system.

Chapters Overview

In this introductory chapter, I outline the main arguments of the thesis, the theoretical framework that informs this study and a brief overview of the thesis chapters. The following Chapter 2 will deal with the background of Malaysia's communal politics, in particular the making of the communally-based constitutional contract in pre-independent Malaya. Chapter 3 surveys the development of constitutional-contract politics in the post independence years and the expansion of state power. Special focus will be on how the state employs
law as a means to keep the destabilizing forces caused by articulation of competing communal interests in check, expands its legal powers and, at the same time, suppresses dissent. This chapter will also take a quick glance at the use of courts as arenas of “political trials” to punish opposition politicians and government critics, especially in the early and mid 1990s, which coincided with the beginning of the public questioning of judicial independence as a result of the watershed 1988 Executive-Judiciary crisis.

Chapter 4 looks at how the Malaysian courts recognize the importance of state-defined policy objectives, especially in politically highly sensitive areas of ethnic relations, national security and economic development, and hence help promote illiberal statist legalism as an over-arching legal ideology, which tends to prioritise state powers over individual freedoms. Special attention will also be given to a particular legislative style which limits the court’s power to review executive actions and decisions, which in turn, facilitates the primacy of the Executive over the Judiciary.

Chapter 5 analyses the prospect of political change resulting from the rise of the 1998 Reformasi movement. Special attention is given to the movement’s contribution in promoting a non-communal and democratic vision of Malaysian politics (ideological) and the formation of a broad-based coalition for political change, comprising a wide range of overlapping NGOs and opposition political parties (instrumental) that challenged the ruling Barisan Nasional’s race-based politics and its political dominance. This chapter also discusses the limits to this “new” politics of non-communalism, which in essence, seeks to shift the focus of interest articulation and political mobilization from communal to individual.

Chapter 6 looks at the proliferation of liberal legal meanings in the society and the movements for legal change, following the outbreak of Reformasi in 1998 and the trial and imprisonment of Anwar Ibrahim. This chapter treats the Anwar trial as a focal point for augmentation of liberal legal meanings that marked the beginning of an open Malay revolt against the Malay-led government. It then
discusses the multi-racial initiatives for legal reform, with the Malay segments playing more important roles than before. Such liberal reform sought legal change along more liberal lines, both to the politically-highly sensitive ant subservision and security-related legislation, as well as the less politically sensitive "normal" criminal justice system. This chapter also includes an analysis of the state's responses, as well as the lack of it, to the proliferation of liberal legal meanings following the calls for legal change.

Chapter 7 focuses on the reinforcement of communally-based constitutional-contract politics as a result of fierce contestations between the proponents of the secular-liberal vision of law and legal meanings and the more conservative Islamists—both of which had worked hand in hand in pressing for political and legal reform during the period of Reformasi. Through examples of civil society campaigns and initiatives for religious freedom, and the ensuing debates, as well as court decisions on cases which involved religious conversion and other related matters, such as divorce, child custody and determination of religious status of a deceased person, this chapter attempts at locating the sites and the subjects of contestations between the secular-liberal and the Islamic mainstream on the visions of law and its meanings. Central to this chapter is the political and legal implications of this "communal dimension" of the debate on liberal legal meanings. Does it help move the political and legal system in a non-communal and liberal direction, or does it reinforce communalism and the illiberal statist legal system?
Conclusion

The articulation of a non-communal vision of Malaysian politics, especially following the outbreak of the 1998 Reformasi, coupled with a clamp down on opposition politicians and critics of the government, has led to the proliferation of liberal legal meanings in the society, contesting the illiberal statist legal meanings. However, the reinforcement of communalism as the focus of political interest and the potential destabilizing forces that it might unleash in the wake of contestation between competing visions of law held by the "secular-liberals" and the "Islamic mainstream", limits the capacity of the proponents of liberal legal meanings to effect political and legal change along liberal lines. This concern was reinforced by the continuing presence of a conservative judiciary committed to the promotion of state policy objectives, especially in politically sensitive areas of ethnic relations and national security. This thesis primarily deals with the prospects and limits of political and legal change in a communally-divided society in which the societal forces for change had to operate within the framework of an illiberal-statist legal system.
Chapter II

The Making of Communal-Based Constitutional Contract

Mainly due to the competitive nature of communal politics in pre-independent Malaya, the main features of Malaysia’s Federal Constitution embodied the terms of a communal-based “constitutional contract” which aimed to accommodate competing communal interests as a precondition for independence and the creation of a united Malayan identity. The process of constitution-making itself involved hard bargaining between communal leaders who sought to advance communal interests and vindicate each group’s vision of political community. Communal leaders, as envisaged by Lijphart’s model of “consociational democracy”, engaged in “competitive behaviour” that aggravated mutual tension and political instability, but also made “deliberate efforts to counteract the immobilizing and unstabilizing effects of cultural fragmentation”.1 Realizing the perils of political fragmentation and immobilism, the communal leaders in pre-independent Malaya cooperated with each other and accommodated competing group interests which in turn helped form a stable semi-democratic government in an ethnically and religiously fragmented society. But contrary to the Anglo-American democratic system, which Almond described as a system “characterized by homogeneous, secular political culture”, in which “the great majority of the actors in the political system accept as the ultimate goals of the political system some combination of the values of freedom, mass welfare, and security”,2 the heterogenous and hardly secular political culture which characterized communal politics in pre-independent Malaya was based on the assumption that the desire to form a common nationality, while at the same time serving competing communal interests, necessitated some limits

1 Lijphart (1969: 212).
2 Almond (1956: 398).
on democracy and fundamental liberties. Contrary to the "liberal" terms of the Lockean-type of social contract, the main aim of which is to promote individual freedom by limiting state powers, the implementation of the main terms of Malaysia’s communal-based constitutional contract, i.e. the special position of the Malays and the legitimate interests of other communities, amidst continuing pressures from within each ethnic community for greater rights and privileges, necessitated the entrenchment of state power rather than its limitation, often at the expense of full realization of individual liberties.

This chapter looks at the articulation of competing communal interests in pre-independent Malaya, and the contestations therewith, which set the stage for the making of Malaysia’s Federal Constitution. With the entrenchment of the Alliance’s communal terms in the Constitution, the competing communal groups’ claims to economic, social and political rights in the new nation were accommodated and compromised, with no single group fully accomplishing its communal aspirations. However, the terms agreed by the communal leaders, which contained the maximum agreement on all sides on the vital issues, was not commonly shared by all sections within each ethnic community. Often pressures from within each community demanded greater political, economic and cultural rights and privileges. This, in turn, opened up spaces for further articulation of communal interests, the attendant destabilizing forces of which provided justification for the constitutional recognition of far-reaching state powers to maintain racial harmony and national unity. Coupled with the threat of communist subversion in the nascent state and the need to combat it, the end result was a Constitution that was finely crafted not only to serve competing communal interests but also to entrench state power.
Communalism and Pre-Independence Constitutional Development

Malaysia is a multiracial country, the "plural society" of which comprises three major ethnic groups - Malay, Chinese and Indian - and other ethnic minorities like Ceylonese, Portuguese, Arab, Pakistani, Siamese and Orang Asli. In the East Malaysian states of Sabah and Sarawak, the native Iban, Kadazan, Murut, Bidayuh and Melanau form the majority. Under the Federal Constitution, the Malays and the natives of Sabah and Sarawak, or the Bumiputeras (literally means the son of the soil) enjoy special position which entitles them to the reservation of quotas in government employment, scholarships, tertiary education, licenses and permits. The government is also obliged to reserve a certain amount of land for the Malays. According to the Malaysian Department of Statistics, Malaysia’s population as of June 2005 stood at 26.1 million. Of the total, 24.3 million were citizens. Of the citizens, 65.4 percent were Bumiputeras - 53.9 percent Malay Bumiputeras and 11.5 percent non-Malay Bumiputeras. Non-Bumiputeras consisted of 25.1 percent Chinese, 7.4 percent Indians and 2.1 percent other ethnic groups. Religion is highly correlated with ethnicity. Islam is associated with Malays, Buddhism with Chinese, Hinduism with Indians and Christianity with either the Chinese, Indians or other ethnic minorities. Muslims formed 60.4 percent of the population, Buddhists (19.2 percent), Christians (9.1 percent), Hindus (6.3 percent) and believers of other minority religions such as Sikhism, Confucianism and Taoism (2.6 percent).

The roots of Malaysia’s plural society can be traced as far back as the 10th century when Arab traders were reported to have established settlements in the

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3 Orang asli refers to the aborigines in Peninsula Malaysia.
4 See Article 153 of the Federal Constitution.
5 See Article 89 of the Federal Constitution.
6 About 1.8 million are non-citizens. They are mainly foreign workers from Indonesia, Bangladesh, Myanmar, Vietnam, India and the Philippines.
8 Malaysia (2000).
northern part of the Malayan Peninsula, in a place called Kalah. By the 16th century, Malacca, which emerged as an important port city situated along the busy trade route linking China in the East and India and the Arab Peninsular in the West, had attracted Chinese, Indian and Arab trader communities to live alongside the indigenous Malay community, forming the earliest plural society in Malaya. Merchants from the surrounding Malayo-Indonesian archipelago also came to Malacca to trade and augmented the plural society. It was through the Arab traders that the Malay ruling houses and later the Malay subjects were introduced to Islam, the religion that later became the core of Malay identity. Malayan plural society was enlarged during the British colonial period. British colonialism, which opened up opportunities for wealth accumulation and demands for labor, attracted hundreds of thousands of immigrants from Southern China and India to come to Malaya to seek their fortunes in tin mines around the Kinta and Klang valleys and in plantations. They rapidly grew in number and by the Second World War the non-Malay population slightly exceeded the Malays with the Chinese and Indian forming 37.5 percent and 14 percent of the population respectively.

From Traditional to Modern Constitutional Ideas

The advent of British colonialism in the late 19th century and the subsequent expansion of the Malayan plural society had brought about significant changes to the traditional Malay constitutional ideas. Most notable was the gradual shift in the Malay vision of political system from one which was based on the rule of

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9 Andaya & Andaya (1983: 58). I use the term plural society here in a generic sense which is not necessarily identical with the peculiar institution socially constructed and politically imposed by colonial states as suggested by Furnivall (1944, 1948).
10 Malays are by definition Muslim. Article 160 of the Federal Constitution defines a Malay as “a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom ...”
12 Vorys (1975: 21).
absolute monarch to a modern form of constitutional monarchy and representative government. By the late 1940s, the concept of rakyat,\textsuperscript{13} which originally referred to the Malay subjects, was expanded to include the immigrant non-Malay subjects. During the pre-colonial period, the idea of government mainly revolved around the exalted position of the Malay Rulers who provided political legitimacy to a decentralized system of local government headed by local Malay chiefs.\textsuperscript{14} Within this system, the Ruler, known as Sultan or Raja, acted as a symbol of sovereign rule while the exercise of actual power was left to the Malay chiefs. The Malay Annals (Sejarah Melayu), an important literary history of the tradition and customs of the Malay royal court, depicted the exalted status of Malay Rulers by infusing the stories about their earthly lives with myths and magic and even traced the lineage of the more prominent among them to Iskandar Zulkarnain (Alexander the Great).\textsuperscript{15} Furthermore, with the advent of Islam, the Malay Rulers, who assumed the Arabic title of Sultan, were regarded as the “Vice-regents of God” on earth,\textsuperscript{16} symbolizing their exalted position in the eyes of their subjects.\textsuperscript{17} The Sultan-subject relationship mainly revolved around the duty of the subjects to give absolute loyalty to the Sultan.\textsuperscript{18} In return, the Sultan had a duty never to shame the subjects even when they were guilty of

\textsuperscript{13} Literally means subjects or citizens.
\textsuperscript{14} Gullick (1965: 3).
\textsuperscript{15} It was reported in the Malay Annals that Alexander the Great embraced Islam after his conquest of India and adopted the name Iskandar Zulkarnain. The second chapter of the Malay Annals contained the story of Sang Sapurba, the Ruler of Perlembang (the current Palembang in South Sumatera), who was said to be a descendent of Iskandar Zulkarnain. See Shellabear (1991: 5, 16-26). See also Milner’s (1982: 96) discussion of Hikayat Deli which portrayed the stately manner of the Raja Deli whose lineage was also traced to Iskandar Zulkarnain.
\textsuperscript{16} Another term used to refer to the Malay Sultan is “dzil Allah fi al-‘ilam” (the shadow of God in the universe). See Andaya & Andaya (1983: 60).
\textsuperscript{17} Hooker (1976: 87).
\textsuperscript{18} There were scattered stories about the absolute loyalty of Malay subjects to their Ruler in the Malay Hikayats. Hikayat Deli for example reported that an Achenese aristocrat, Mohamed Dalek, reminded Achenese chiefs not to rebel against their Ruler, even though he himself left the service of the Ruler after learning that the latter had behaved improperly toward his wife. Hikayat Hang Tuah also told of the undivided loyalty of Hang Tuah, a Malay warrior, toward a despotic Ruler. See Milner (1982: 95).
grave offences. The Sultan could only punish them according to hukum syarak (Islamic law).  

But this does not mean that the traditional Malay constitutional ideas and political system were primitive or mythical. The Malacca Sultanate (c. 1400 - 1511), which had immense influence on successive Peninsula Malay Sultanates, was a well organized political system. At the centre of the system was a sovereign ruler drawn from royal patrilineage under whose direction, together with other princes of the royal house, the business of the government was carried out by ministers or executives from the aristocratic class.  

The more prominent among the executives were the Bendahara (Chief Minister), the Temenggung (Commander of Troops and Police), the Penghulu Bendahari (Treasurer), Mentri (Secretary of State) and the Shahbandar (Harbour Master and Collector of Custom). The Ruler also served as the fountain head of justice under whose authority laws were administered by local chiefs and village headmen.  

One important feature of the traditional laws was their affinity with Malay custom and Islam. Adat perpateh which served as a source of law for the Minangkabau community in Negeri Sembilan for instance demonstrated the blending of Malay custom and Islamic law in its unwritten legal codes or perbilangan (customary saying). Pre-colonial traditional written laws like the Undang-Undang Melaka (the Malacca Digest), the Undang-Undang Kerajaan (the

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19 This was the term of a covenant between Sang Sapurba, the Ruler of Perlembang, and Demang Lebar Daun, Sang Sapurba’s father-in-law and Perlembang’s former Ruler, as reported in the Malay Annals. See Shellabear (1991: 19-20).

20 Gullick (1965: 8).

21 Hooker (1976: 72) however drew a distinction between the “Sultan’s law” and the “village law”. While the former was regarded as universal in scope and “God inspired in quality”, the latter rested on such mundane factors as preservation of economic and social stability.

22 Hooker’s (1976: 35) translation of the perbilangan below is most useful in showing the blend of Malay custom and Islam in the adat laws:

- Customary law hinges on religious law;
- Religious law on the word of God;
- If custom is strong, religion is not upset;
- If religion is strong, custom is not upset;
- Religious law is the offspring of covenant;
- Customary law also the offspring of covenant.

29
Laws of the Monarch) and the Kedah Port Laws also bear significant influences of Islamic law. Islam and Malay custom had always been regarded as being under the responsibility of the Malay Rulers, hence symbolizing their special position in the traditional Malay political system.

British direct rule in the Straits Settlements of Penang, Malacca and Singapore, which was established in the late 18th century, gradually introduced modern constitutional ideas into Malaya. Between 1786 and 1826, the Settlements of Penang, Malacca and Singapore were separately administered by the British East India Company. The three settlements were joined together under the Eastern Presidency in 1826 and then, with the abolition of the Eastern Presidency in 1830, became part of the Presidency of Bengal. After the abolition of the East India Company in 1858, the Straits Settlements came under the new Indian Government until 1867 when its administration was transferred from the India Office to the Colonial Office in London. In the meantime, the British Parliament passed the Government of the Straits Settlements Act 1866 which made the Straits Settlements a unitary Crown Colony, the government of which was vested

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23 Sections 24-66 of the Undang-Undang Kerajaan (Laws of the Monarch), which related to Perak, Pahang and Johore, are almost entirely Islamic law of the Shafi’ie sect. Section 29 of the Kedah Port Laws provided that all disputes were to be determined on the principles of Islamic laws. Folios 61-62 of the Undang-Undang Melaka (Malacca Digest) asked forgiveness from Allah since some of the laws violated Islamic law. See Hooker (1976: 73-83).


25 The Island of Penang was ceded to the British East India Company in 1786. The island was previously under the rule of Sultan of Kedah. In 1800, a sizeable territory on the mainland opposite the island, which later became known as Province Wellesley, was also ceded to the East India Company. The cession of Penang to the EIC was made after the company’s representative Francis Light assured the Sultan of Kedah that the British would help protect his kingdom against his enemy, the Siamese. But it transpired later that when the Siamese attacked Kedah in 1821, the British failed to offer the much needed help. See Gullick (1981: 20).

26 Malacca came under British rule in 1795 when the British occupied all Dutch territories in the Far East during the Napoleonic Wars. After the war ended, Malacca was returned to the Dutch under the Treaty of Vienna in 1818. However, in 1824, Malacca was ceded to Great Britain under the Treaty of Holland.

27 The Island of Singapore was ceded to the East India Company in 1824. The Island was previously under the rule of Sultan of Johore.

in a Governor assisted by an Executive and a Legislative Council. The Governor had the power to initiate legislation and assent to Bills or reserve them for the British Crown. He also appointed Judges, Commissioners, Justices of the Peace and other officers. The Act empowered the British Crown to establish laws, institutions and ordinances, and to make provision for the Courts and administration of justice in the Straits Settlements.

British indirect intervention in the Malay states in the late 19th century marked the advent of the modern concept of constitutional monarch in Malaya. The Malay Rulers agreed to the intervention, which was primarily motivated by the need to protect British commercial interests, in return for assistance offered by the British to repel their adversaries and for payment of compensation and allowances. This in turn paved the way for the introduction of a modern system of constitutional monarchy and bureaucracy in the Malay states through an administrative system called the Residential System. The Pangkor Engagement concluded by the British and the Sultan of Perak in 1874 for the first time provided for the appointment of a British officer called Resident to advise the Sultan in the administration of the state. Under the treaty, the Sultan was required to seek and act upon the Resident's advice “on all questions other than

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29 The Executive Council consisted of the Senior Military Officer, the Colonial Secretary, the Resident Councillors for Penang and Malacca, the Attorney General, the Treasurer, the Colonial Engineer and two unofficial members (Mohd. Hishamuddin: 1995a).

30 In 1867, the Legislative Council consisted of the Governor, the Chief Justice, the Officer Commanding the Troops, the Lieutenant Governor of Penang, the Colonial Secretary, the Attorney General, the Colonial Engineer and four unofficial members who were Europeans. By 1931 there were eleven ex-officio members (the Senior Military Officer, the Colonial Secretary, the Attorney General, the Resident Councillors of Penang and Malacca, the Treasurer, the Colonial Engineer, the Director of Education, the Secretary of Chinese Affairs, the Principal Civil Medical Officer and the Commissioner of Lands), two nominated official members elected by the Chambers of Commerce of Singapore and Penang, and eleven nominated unofficial members. Of the nominated unofficial members, one had to be a Eurasian, one a representative of the Malay race, one a British Indian and three Chinese British subjects from the three Settlements (Mohd. Hishamuddin: 1995a).


32 In particular, it was to ensure a stable supply of tin from the Malay states to the Straits Settlements in view of increasing demand for the commodity in the world market.

those touching Malay religion and custom". Between 1875 and 1888, three other Malay states, namely Selangor, Negeri Sembilan and Pahang, entered into similar treaties with the British to receive a British Resident in each state.

Though in theory the Resident was there to advise the Ruler, in practice it was the Resident who had actual authority in running the state. This was done through the State Council which provided a constitutional framework for the government of the state. Though the members of the Council were appointed by the Ruler, normally for life, it was the Resident who had the power to nominate them for approval by the Governor of the Straits Settlements. The Council was in fact an important forum for the state government to gather public opinion, especially on matters affecting the position of the Malays. However, as the Council only convened a few times a year and state administration became more complex, its influence on legislation was rather limited. By the 1890s, the Council's influence on state administration continued to dwindle, leaving the British Resident with enormous power to run the state.

Although the Malay Rulers were required to act on the advice of the British Residents in matters pertaining to the administration of the state, the various treaties concluded by the Rulers and the British made clear that matters pertaining to Islam and Malay custom would remain the sole responsibility of the Rulers. In the 1889 treaty between the Rulers of Negeri Sembilan and the British, the Rulers expressed their desire "that they may have the assistance of a British Resident in the administration of the government of the said Confederation" and they undertake to follow his advice in all matters of

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34 There were seeds of conflict in this key clause. In order to make advice workable, the Malay traditional political structure, which was not adapted to the British administrative method, had to be reformed first. Yet, the traditional structure was part of the Malay custom on which British advice was excluded. See Gullick (1981: 25).
35 The Council was composed of the Ruler, Malay Chiefs, Chinese leaders and the Resident.
37 Negeri Sembilan (Nine States) was a confederation of petty states around Sungai Ujong, Rembau and Tampin districts which form the present Negeri Sembilan.
administration other than those touching the Mohammedan religion".38 Similarly, Sultan Ahmad of Pahang in a letter to the Governor of the Straits Settlements, Cecil Smith, inviting a British Resident to assist in the administration of the state in August 1888 wrote: "In asking this, we request that the British Government will assure to us and our successors all our proper privileges and powers according to our system of government and will understand that they will not interfere with the old customs of our country which have good and proper reasons and also with all matters relating to our religion".39

Islam and Malay custom continued to be under the sole responsibility of the Malay Rulers when the four Malay states of Perak, Selangor, Negeri Sembilan and Pahang were amalgamated as a federation in 1895.40 Under the Treaty of Federation, the Rulers of the four states agreed to accept a British officer, styled the Resident-General, as the agent and representative of the British Government under the Governor of the Straits Settlements and to follow his advice "in all matters of administration other than those touching the Mohammedan Religion".41 The position was similar in all other Un-federated Malay States42 where British Advisers' jurisdiction did not cover matters pertaining to Islam and Malay custom, which remained the sole responsibility of Malay Rulers.43

Up to the outbreak of the Second World War, constitutional development in the Malay States and the Straits Settlements marked a significant shift in the

38 Maxwell & Gibson (1924: 63).
39 Maxwell & Gibson (1924: 67-69).
40 The four states were known as the Federated Malay States.
42 The states which came to be called the Un-federated Malay States were Kelantan, Terengganu, Kedah, Perlis and Johore. The British had less direct control in these states.
43 The agreement for the appointment of British Adviser in Kelantan in 1910 required the Sultan to follow the advice of the Adviser in all matters of administration other than those touching the Muslim Religion and Malay custom. Similarly, in Terengganu, where a British Advisor attended State Council meetings, the state Constitution provided that the functions of the Council were "to assist the Raja and the Cabinet of Ministers in governing the country and its subjects in the way of making, adjusting and adding to the laws and regulations other than those concerning religion and the Mohammedan Law..." (Mohd. Hishamuddin 1995a).
traditional Malay political structure. It no longer centered on the rule of absolute monarchs in a decentralized system of local government headed by the more powerful local chiefs, but on a centralized system of government by professional British administrators in which the Malay Rulers occupied a symbolic position as constitutional monarchs. The shift toward a modern form of government run by professional bureaucrats had significantly eroded the roles and powers of the Malay Rulers as well as those of the Malay local chiefs. Not only did the Malay Rulers become ceremonial monarchs, the hitherto more powerful Malay local chiefs also found themselves being subdued by British District Officers. They no longer had the power to control the peasants or collect taxes, which resulted in significant loss of revenues and means of social control. Only a small number of them were absorbed into the new administration either as Penghulus (district headmen) or members of State Councils. 44

However, one important feature remained. Islam and Malay custom continued to be under the sole authority of the Malay Rulers. While this presumably reflected a strategic move on the part of the British administrators to appease the Malay Rulers and the aristocratic class,45 upon whose cooperation the British relied to advance their colonial enterprise, the preservation of Islam and Malay custom in the hands of the Malays Rulers as exhibited in the modern constitutional structure also pointed to their perennial "special" position in the long history of the Malay monarchy. In fact, the special relationship between Malay Rulers, Malay custom and Islam was already well established in the pre-colonial period. Long before the British started its colonial enterprise in the Malay states, it was not uncommon to find that in negotiations following a conquest of the smaller Malay states by a dominant Sultanate, Malay custom and Islam would remain in the hands of the Rulers of the Malay states.46 It was reported in Hikayat Deli that when Pahang surrendered to Aceh, the Achenese

44 Andaya & Andaya (1983: 202-203)
offered Pahang leaders the following generous conditions: “All matters in the state of Pahang, all the chieftainships and the (Islamic) law, customs and ceremonial (hukum shara’, adat and istiadat) are to remain in the hands of the ruler; these matters will not be altered on Pahang’s becoming a dependency of Aceh”. The modern constitutional safeguard for Islam and Malay custom, by making them the preserves of the Malay Rulers, simply reflects this long-held position in the traditional Malay constitutional ideas.

The Malayan Union: British-ruled Malayan Malaya

Since early 1943, well before the Japanese occupation army surrendered to the Allied Forces, the Colonial Office in London started planning for constitutional reforms in Malaya. The London planners thought that the present administrative structure, with three different political units comprising the Straits Settlements, the Federated Malay States and the Un-federated Malay States under varying degrees of British control, was administratively impractical and ineffectual. The experience with Japanese occupation revealed that more co-ordinated control with strong central administration was necessary for an effective defence of the country against external aggression. What is more, the expected liberation of Malaya from Japanese occupation was seen by the British government as “a supremely opportune moment for revolutionary reform” as the Malay rulers, who had previously been obstacles to such an effort, had been “compromised by

49 A report by Sir W Battershill, GEJ Gent and WL Rolleston (CO 877/25/7/27265/7, no 1, dated 4 December 1942) entitled “Lessons From Hong Kong and Malaya” pointed out, among others, that “complications of the civil machine owing to the existence as separate entities of the Straits Settlements, the Federated Malay States and the Un-federated Malay States” resulted in uncertainty and delay in reaching wartime decisions. See Stockwell (1995: 29).
the collaboration with the Japanese, and none of the machinery of the Government as it existed prior to December 1941 will remain”.

The plan for revolutionary reform culminated in the proposals for the creation of a strong unitary government combining the nine Malay states, Penang and Malacca, excluding Singapore; the acquisition by the British Crown of full executive and legislative powers in the Malay states; the creation of a common Malayan citizenship for people of all races in Malaya; and, finally, the paving of the way for eventual self-government for the Malayan people. An informal Malayan Planning Committee was set up, and in July 1943, formalized as the Malayan Planning Unit. In January 1944, the Secretary of State for the Colonies, Mr O F G Stanley, placed a memorandum before the War Cabinet, outlining in general terms the need for sweeping constitutional change in Malaya and Borneo. For Malaya, the memorandum for the creation of a Malayan Union proposed the signing of fresh treaties with the Malay Rulers to enable the British Government to legislate for the states under the Foreign Jurisdiction Act; a union of all the Malay states and the settlements of Penang and Malacca with central authority representing these states and settlements headed by a Governor who would be assisted by an Executive and Legislative Council; the exclusion of Singapore from the union, but without precluding the possibility of its future fusion; and the accession of the Malay Rulers' authority and jurisdiction to the British, but with proper regard to be given to the political, economic and social interests of the Malays. On 22 March 1944, the War Cabinet Committee

50 Mohamed Nordin (1976:14).
52 Though the memorandum did not clearly spell out the policy on Malayan Union citizenship, it did express the need to provide the non-Malay Asiatic residents “with adequate prospects of participation in the government of the country” (Stockwell 1995: 67). The “Draft of a Directive Policy on Malaya” (CAB 98/41, CMB (44)4) dated 15 January 1944, which was prepared for the consideration of the War Cabinet Committee, also envisaged the need to “provide for a growing participation in the Government by the people of all the communities in Malaya” but “subject to a special recognition of the political, economic and social interests of the Malay race”. See Stockwell (1995: 70).
approved the general lines of the policy contained in Mr. Stanley’s memorandum and subsequently on 31 May 1944 endorsed them.

As the policy only set out the general lines to be followed, there were suggestions by British officials on the details and direction of the policy. One radical suggestion was for the substitution of the present “autocratic political system” with a democratic one. This required the replacement of Malay rulership with an elected legislature. Admiral Lord Mountbatten, who described the move as “progressive in the sound sense of the word and is rationalization which ... could only be condemned on feudal or romantic grounds” suggested that the Malay Rulers be absorbed into some sort of Upper House in a new legislative structure with the more able among them be appointed as the Prime Minister of their respective states. Lord Mountbatten also proposed that the present “racial sectionalism” should be substituted by a “Malayan citizenship”, arguing that “by getting people, whether Malays, Chinese or Indians, to combine together to deal as citizens ... one day they will come to look at the wider problems of Malaya in the same light, and at least Malayan-born and Malayan-domiciled Chinese will begin to identify themselves with Malaya instead of seeking political guidance and interference from China”.54

Mr. Stanley however believed that eliminating the institution of Malay rulership and giving full democratic rights to the Malayan people regardless of race would be too risky at that early stage. Not only was it incongruent with the objective of maintaining tighter control of the “colonial territory”, even if the move for self-government was to be set in motion later, but also grossly insensitive to the feelings of the Malays. In his “top secret and private letter” to Lord Mountbatten dated 13 June 1944, Stanley noted that “the presence of substantial numbers in Malaya of Chinese and Indians makes the future constitutional development a matter of some delicacy, particularly as these

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53 See Mountbatten’s letter to Major-General HIR Hone, the Head of the Malayan Planning Unit dated 4 February 1944 (CO 825/42/2, no 7) reproduced in Stockwell (1995: 72).
communities are likely to demand a more intimate place in the constitutional set up in the future than they have been given in the Malay states in the past". He also warned that the great economic power which the Chinese had already secured might antagonize the Malays. Even the decision to exclude Singapore from the union was made after careful consideration of its implication on the potentially explosive nature of inter-communal relations in Malaya. On the position of the Malay Rulers, though Stanley ruled out the possibility of them being ruthlessly deposed, particularly due to their "peculiar status in Islamic society", he reiterated that as a vital part of the British plans for the future of Malaya, the Rulers "should derive from a central Malayan authority any temporal authority which they are to exercise in the post-war arrangement, and that they should not be given any grounds for believing that they will have derived authority in the constitution - apart from their personal prestige and dignity - either by reason of delegation from any external British authority or by reason of their own royal status".

It seemed that the fragile inter-communal relations in Malaya posed considerable problem to the London planners' attempt to create a common Malayan citizenship. The "Draft Statement of Fundamental Problems in Malaya" considered by the War Cabinet on 15 June 1945 mentioned this delicate situation. "On the one hand", the statement reads, "the relations of the British Government with the Malay States are based on recognition of the right of the

56 Mr. Stanley reasoned, "if we are to secure a greater degree of unification which is clearly essential for the wellbeing and security of the country but which must to some degree (emphasis is mine) depend on the consent of the Malays, we must have to exclude Singapore from any such union, at any rate in the early stages, because of the predominantly Chinese element in its population" (Stockwell 1995: 81). Other principal reasons for the exclusion of Singapore were essentially economic, military and administrative, i.e. (i) preservation of Singapore's status as a "free port"; (ii) its special importance to the United Nations as a naval base; and (iii) as an "urban" government, Singapore would have problems different from the rest of Malaya [See "Plan for Constitutional Reconstruction in Far East" (CO 825/35/6, no 2, dated 20 March 1943) reproduced in Stockwell (1995: 42)].
Malay peoples to secure position in their lands and in their educational and other facilities for progress. On the other hand, the enterprise and capacity of the non-Malay peoples of the country, provided they are accompanied by a sense of civic responsibility, assert a claim that they should exercise a due share in the moulding of Malaya's future. Despite the apparent dilemma, there were other factors that forced the British government to make the common Malayan Union citizenship the cornerstone of its post-war policy. Among them was the potential influence of the Malayan Communist Party's plan for a Malayan Republic, which among others promised equal political participation for the Malayan people of all races and a form of "representative government". Due to this potential influence, British officials believed that their Government must also push its post-war policy in a similar if not more favourable direction.

Meanwhile, the British Cabinet on 3 September 1945 appointed Sir Harold MacMichael as special representative of the British government whose task was to approach the Malay Rulers and get them to conclude new treaties with the British government on the creation of the Malayan Union. Between 20 October and 21 December 1945, MacMichael managed to conclude "snap treaties" with

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60 Mr. ME Dening, Chief Political Adviser to the Supreme Allied Commander of Southeast Asia, in a telegram to the Foreign Office (WO 203/5642) dated 3 September 1945, drew the latter's attention to the Eight-Point declaration signed by the Central Executive Committee of the MCP on 25 August 1945. He commented that "the Communist Party have rather stolen our thunder and that we have lost that element of surprise for our own progressive policy which would politically have been so valuable". The MCP's Eight-Point declaration set out the aims of the party to: (i) support the United Nations of Russia, China, Britain and America and new organization for world security; (ii) establish a democratic government in Malaya with the electorate drawn from all races of each State and the anti-Japanese Army; (iii) abolish Fascism and Japanese political structure laws in Malaya; (iv) enforce freedom of speech, publications and societies, and obtain legal status for anti-Japanese Army; (v) reform the educational system and improve the social conditions of the people; (vi) improve living conditions, develop industry, commerce and agriculture, provide relief for the unemployed and the poor, increase wages to a standard minimum and establish eight hour working day; (vii) punish traitors, corrupt officials, hoarders and profiteers, and stabilise prices; and (viii) ensure good treatment for the members of the anti-Japanese Army and provide compensation for the families of those who died for the Allied cause (Stockwell 1995:124).
all the nine Malay Rulers. Subsequently, on 22 January 1946, a White Paper was tabled in the British Parliament outlining the proposals for the Malayan Union. The White Paper affirmed the earlier proposals contained in the memorandum presented to the War Cabinet in 1944. It roped in the Malay States and the Settlements of Penang and Malacca, excluding Singapore, in a single administrative unit. There would be a central authority consisting of a Governor with an Executive and a Legislative Council. In each State and Settlement there would be a local Council, which would have such powers of administration and subsidiary legislation delegated to it by the central authority. There would also be an Advisory Council whose members would help the Governor to enact necessary legislation. The administrative and legislative powers of the Malay Rulers were inferior to those of the Governor. Though they would preside over a Malay Advisory Council in their respective states, the appointment of members of the Council would require the Governor's approval. On matters of Islam, excepting the collection of tithes and taxes, each Ruler, with the help of his Council, would have legislative powers within his State. But legislation would require the Governor's assent. There would be a Malayan Union citizenship where persons born in the territory of the Union or in Singapore and persons who at the stipulated date had been ordinarily resident in those territories for ten years out of the preceding fifteen would acquire citizenship. Those acquiring

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61 The ease and swiftness by which MacMichael concluded the treaties could have been due to the fact that the Malay Rulers had actually been forewarned by British officials that the British government would “bring to justice” those who were found to have been “collaborating” with the Japanese during the occupation. Many of them tried hard to show that they hated the Japanese and had at all time been loyal to the British. This transpired during the interviews Brigadier HC Willan, the Deputy Chief Civil Affairs Officer (Peninsular Malaya), had with the Rulers from 8-29 September 1945. For example, after meeting the Sultan of Johore on 8 September, Brig. Willan recommended that “if the policy of the British Government is to proceed with the new constitution and the necessary new treaties, the sooner the Sultan of Johore is approached in his present state of mind the better”. Brig. Willan went on to suggest a few persons to be approached and negotiated with, including a person he described as “stupid”, should the present Rulers refuse to sign the treaties. Those who agreed to sign would be confirmed or appointed as Ruler. See “Interviews with the Malay Rulers: Report by Brigadier HC Willan” (CAB 101/69, CAB HIST/B/4/7) dated 7 October 1945, reproduced in Stockwell (1995:142).
citizenship other than by birth would be required to affirm allegiance to the Malayan Union. In the administration of justice, there would be a Supreme Court of the Malayan Union and a Supreme Court of Singapore, each of which would consist of a Court of first instance and a Court of Appeal. Appeals from both Appeals Courts would go to the Privy Council in London. A Governor-General would be appointed to co-ordinate the policies of the British Government in respect to the Malayan Union and Singapore.62

The Malayan Union proposals generated mixed reactions, from half-hearted acceptance to strong protests, both in Malaya and in England. The main issues of contention were the abrupt way by which the Malays Rulers were coerced to accept the treaties, the alteration in Malaya's status from independent protectorates into more closely controlled dependencies and the danger of the indigenous community being swamped by alien residents.63 Leading the protests in England were former British officials who had previously worked in Malaya and enjoyed cordial relationships with the Malayan people, especially the Malays.64 But more important was the reactions from various sections of the Malayan people themselves. Surprisingly, opposition to the proposal for political unification and common citizenship stemmed not only from the community who seemed to lose from the new constitutional arrangement, the Malays, but also from those who were supposed to reap its benefits, the non-Malays. The protests were fomented along two broad lines. First, the propensity to perpetuate ascriptive identity of the indigenous community often associated with the institution of Malay rulership and Muslim religion, and a set of "privileges" that

62 Great Britain (1946).
63 Hawkins (1946).
64 Among the prominent former members of the Malayan Civil Service (MCS) who led the campaign against the Malayan Union proposal in England were Sir George Maxwell (former Chief Secretary of the Federated of Malay States (FMS), 1920-1926), LD Gammans MP (MCS, 1920-1924), Sir Frank Swettenham (former Governor and High Commissioner of FMS, 1901-1904), Sir Richard Winstedt (MCS, 1902-1935, former General Adviser of Johore, 1931-1935) and AS Haynes (MCS, 1901-1934). These "Old Malayans" wrote letters to the national press criticizing the Malayan Union proposal and lobbied the Colonial Office to withdraw the plan (Stockwell 1995: 199).
either befitted the community’s indigenous status or/and their economic alienation. Second, the creation of an independent “Malayan nation”, which necessarily entailed the existence of a political community that would provide equal rights for all, and an end to colonization.

Leading the protest against the Malayan Union proposal along the first line of argument were the Malay Rulers, Malay aristocrats and Malay civil servants. They viewed the accession of Malay Rulers’ sovereignty to the British Crown and the annexation of the Malay states as a “terrible blow to the Malay prestige and self-respect”; and the liberal citizenship proposals for the non-Malays and the opening up of the civil service to them, coupled with the promise of democratization and self-government, as a “terrible threat to, and in part an actual reduction of Malay political power and authority”. The Malay Rulers, the first to lose out when the Malayan Union came into being on 1 April 1946, funnelled their opposition through official and legal means. They decided to petition His Majesty the King of Great Britain and divulged information to former British officials in London who were sympathetic to their cause. They also engaged counsel to challenge the new treaties in the British courts, while politically denouncing the treaties at home.

But the protests which had the deepest impact on Malay political consciousness were perhaps those led by the Malay aristocrats and civil servants. In November 1945, this group of politically conscious Malays formed Kesatuan Melayu Johor (Johore Malay Society) with the goal of fighting against the Malayan Union proposal. Soon after, many other pre-war Malay associations throughout

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65 A number of Malay Rulers claimed that they signed the treaties for there “were no other alternatives”. For example, it was reported that the Regent of Kedah, before signing the treaty, rose to his feet and declared that “this was the most distressing and painful moment of his whole life. Henceforth he would lose the loyalty, the respect and the affection of his subjects, and he would be pursued with curses towards his grave by the ill-informed. He called upon Allah to witness his act and to protect him for the future. He would sign because no other course was open”. See “Notes by Sir Harold MacMichael on Interviews with the Regent of Kedah” (CO 537/1541, no 18) dated 30 Nov-3 Dec 1945, reproduced in Stockwell (1995:183).

Malaya joined the fray. By end of 1945, it seemed that the Malays had woken up from a long deep slumber and became part of a rising political movement. On 15 December 1945, MacMichael's arrival in Kota Bharu was confronted by mass demonstration of about 10,000 Malays. As if this was not enough, on 10 February 1946, about 15,000 Malays staged a mass demonstration at the inauguration of Movement of Peninsular Malays (Johore). Between 1 and 3 March 1946, 115 representatives of 42 Malay organizations, setting aside their state parochialism, met in Kuala Lumpur to debate the Malayan Union proposal and the future of the Malays. The main issue of contention was the liberal common citizenship policy, which would mean a large majority of the non-Malay population would be accepted as Malayan citizens after the formation of the Malayan Union. The Malays, who were already lagging behind the non-Malays, especially the Chinese, in the economy were loath to accept the possibility that eventually they would also be outweighed by the non-Malays in politics. To pursue the Malay cause, the Pan-Malayan Malay Congress in May 1946 resolved to form the United Malays National Organization (UMNO), a political organization that later emerged as a dominant Malay political party.

Among the organizations which fomented opposition along the second line of protest was the predominantly Chinese Malayan Communist Party (MCP). It should be noted that the party's Eight-Point program for a Malayan Republic envisaged an independent Malayan nation which would grant full

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67 Mohamed Noordin (1976: 23) however noted that there was little Malay opposition to the Malayan Union proposal up to the end of 1945. This was due to, among other reasons: (i) the extent of Malay goodwill to the British on their return to Malaya; (ii) the apprehensions amongst traditional Malay leadership, particularly the Rulers, as regards the initial tough British attitude toward those who had "collaborated" with the Japanese; (iii) preoccupation of the Malay Rulers and civil servants with "personal rehabilitation", i.e. of being confirmed to their positions by the British; and (iv) the absence of an organized Malay political mobilization.

68 UMNO was formally inaugurated at the meeting of the Pan-Malayan Malay Congress which took place in Johore Bharu on 11-13 May 1946.
democratic rights to all Malayan people regardless of their race and creeds. As such, the party viewed Malayan Union proposals, short of granting democratic rights and independence to the Malayan people, as antithetical to their vision of an independent Malaya. It was, the party believed, an attempt by the British to strengthen their control over Malaya. The exclusion of Singapore was also viewed as an attempt by the British to control the Malayan economy through the colony’s entrepot. On the other hand, the party proposed the establishment of a National Assembly by universal suffrage; electoral rights to be granted to all Malayan people above the age of eighteen; an Executive and Legislative Council appointed by the National Assembly; establishment of elected State Councils in all states in the Malayan Peninsula; and the inclusion of Singapore in the Union governed by a Mayor. The radical Malay Nationalist Party (MNP) also opposed the Malayan Union on similar grounds. Its main concern was the perpetuation of British colonial rule through the Malayan Union policy. On the contrary, it demanded a form of government based on electoral representation that would transfer political power from the hands of the British officials into the hands of the Malayan people. The party also criticized the “undemocratic” way by which the treaties were concluded; the lack of consultation with the Malayan people; the exclusion of Singapore; and the vague definition of citizenship rights contained in the proposal.

Though there was no united opposition to the Malayan Union, and in fact contradictory grounds of opposition between the conservative Malays, the radical Malays and the Chinese, it was quite obvious that the Malayan Union

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69 According to Khong (1984: 92), the MCP’s program entailed the creation of “bourgeois democracy” with Malaya’s independence presented as “a terminal goal without mentioning the ultimate goal of building a socialist or communist society”.


71 Khong (1984: 91)

72 The MNP at first welcomed the Malayan Union proposal as it promised to create administrative uniformity and promoted self-government. The party considered the tiny feudal Malay states, which the British were resolved to revamp, as an anachronism (Khong 1984: 88).

plan was not popular among the Malayan population. On 1 April 1946, the Malays gathered in Kuala Lumpur to prevent the Rulers from attending the installation ceremony of Sir Edward Gent as the first Malayan Union Governor. Malay appointees also refused to serve on any council or board established under the Malayan Union. In the face of such resistance, the British Government had to reconsider its plan for a Malayan Malaya. By this time, it was rather obvious that the Malayan Union, instead of being a fait accompli, had turned into a failed experiment. Notwithstanding its short-lived existence, the Malayan Union plan had raised the political consciousness of the Malayan people, especially the Malays, which later became an enduring factor in shaping Malaya’s constitutional development along communal lines.

Federation of Malaya: British-ruled Malay-privileged Malaya

Protests against the Malayan Union proposal along communal lines had a strong impact on the way the British planners looked at the Malayan problem. They began to realize that communal division was the most precarious aspect of Malayan politics, insufficient regard to which might lead to political chaos. In order to avoid such risk, the British government agreed to postpone the plan for common citizenship. There was also suggestion that the Malay Rulers should be brought back into the Malayan Union structure on a “strictly constitutional

74 The Malay Rulers, who had been at the Railway Station Hotel, Kuala Lumpur, met Edward Gent on the night of 31 March telling him that they would not attend the installation ceremony the next day. They however assured Gent that their non-attendance was not a show of disrespect to His Majesty’s government. It was rather to avoid being regarded as giving approval to the Malayan Union proposal (See “Inward Telegram no. 1 from Sir E Gent to Mr Hall” (CO 537/1548, no 66) dated 1 April 1946, reproduced in Stockwell (1995: 219)) .

75 By March 1946, the Colonial Office had been furnished with intelligence reports of dissensions among Malays and non-Malays as regards to the Malayan Union policy. There had also been violent clashes between Malays and Chinese, one of which was at Batu Talam in Pahang where 27 people were killed. [See “Local Reactions to the Malayan Union: Minute by WS Morgan” (CO 537/1669) dated 8 March 1946, reproduced in Stockwell (1995: 208)]
basis”. All this, however, was too late. The Malays, by way of their protests against the Malayan Union, had made significant headway toward becoming a political force to be reckoned with. Meanwhile, there had also been growing influence of “Indonesian elements”, which advocated an independent Malayan-Indonesian nation or Indonesia Raya. There were apprehensions that the failure on the part of the British to moderate its position would further embolden these elements and weaken the British position. The Malays were thus set to demand further privileges and the British had to give attention to conciliatory proposals.

The first step towards such conciliation was to solicit the Malays' opinion on Malaya's constitutional reform. On 25 July 1946, a Working Committee consisted of British officials and representatives of the Malay Rulers and UMNO was formed to propose fresh constitutional arrangements “which would be acceptable to Malay opinion, and which would provide a more efficient administration and form the basis of future political and constitutional developments” in Malaya. The Committee was tasked to find ways for the establishment of a strong central government; the maintenance of the individuality of each of the Malay States and the Settlements; the provision of the

76 It was suggested that the Malay Rulers and the Governor, should assent to State Council enactments as well as Ordinances passed by the Central Legislature. This was different from the original proposal in which only the Governor's assent was required (Stockwell 1995: 223).
77 Sir Edward Gent, upon learning the growing strength of the Malays' political mobilization, especially the one which was led by UMNO, reminded the Colonial Office that the Malay consent was necessary if the main object of British government, i.e. “cooperation and unity of purpose for self-government” was to be achieved. He thus advocated the replacement of the Malayan Union with a “Federation”, which was in line with the Malay Rulers' proposal. See “Sultan's Constitutional Proposals: Inward Telegram no 222 from Sir E. Gent to Mr Hall Recommending Conciliation” (CO 537/1528, no 95A) dated 4 May 1946, reproduced in Stockwell (1995: 225).
78 This was the position taken by the radical Malays in the Malayan Nationalist Party (MNP).
79 Representing the Malayan Union government in this Committee were Mr. AT Newboult (Chief Secretary), Mr. KK O'Connor (Attorney-General), Mr. WD Godsall (Finance Secretary), Dr. W Linehan (MCS) and Mr. A Williams (MCS). Representatives of the Malay Rulers were Raja Kamarulzaman Raja Mansur (Perak), Dato' Hamzah Abdullah (Selangor), Hj. Muhammad Sheriff Osman (Kedah) and Dato' Nik Ahmed Kami! Mahmud (Kelantan). Dato' Onn Jaafar and Dato' Abdul Rahman Ismail represented UMNO. The Committee’s meeting were also attended by Sir Ralph Hone (Observer for the Governor-General), Sir Theodore Adams (Adviser to the Malay Rulers) and Dato' R. St. J. Braddell (UMNO's Legal Adviser). Mr. DC Watherston (MCS) acted as Secretary.
80 Malayan Union (1946a: 1)
means for self-government; the creation of a common form of citizenship; and the provision of special position for the Malays and safeguard for their rights.\textsuperscript{61}

The Committee sat at intervals between August and November 1946. The Committee's final report, which was published on 24 December 1946, contained key suggestions on the position of the Malay states, the Straits Settlements and the Malay Rulers; the executive and legislative structure of the new political entity; citizenship and other matters related to finance and the administration of justice. In place of the Malayan Union, the committee suggested the establishment of Federation of Malaya, which consisted of the nine Malay States and the Settlements of Penang and Malacca. As a federation, there would be federal and state governments, each of which would have its own executive and legislative structures.\textsuperscript{82} The federal government would consist of a British High Commissioner, a Federal Executive Council and a Legislative Council. The High Commissioner would function as the representative of the British Crown as well as the Executive Head of the Federation. He would also preside over the Federal Legislative Council which would have comprehensive jurisdiction over important matters such as defence, external relations, administration of justice, maintenance of peace and public order, finance, taxation, banking and regulation of societies and trade unions.\textsuperscript{83} In each Malay state, the government would consist of a Malay Ruler, a State Executive Council and a State Council with legislative powers. Each of the Malay Rulers would preside over the Executive Council in his state, while a \textit{Menteri Besar} (Chief Minister) would be the President of the State Council. The latter would have powers to pass any laws on matters pertaining to Islam and Malay custom, except those in respect of which the Federal Legislative Council had powers to pass laws. Only the Ruler's assent was required for such bills to become law, in contrast to the Malayan Union policy.

\textsuperscript{61} Great Britain (1947: 3).
\textsuperscript{82} This was different from the Malayan Union, which was essentially a unitary state with only a central government.
\textsuperscript{83} See Second Schedule of the draft Federation of Malaya Agreement (Malayan Union 1946a).
which required further approval by the Malay Advisory Council presided over by the British Governor. This proposal practically restored legislative and executive powers on matters related to Islam and Malay custom to the Malay Rulers. The establishment of a Conference of Rulers consisting of all nine Malay Rulers, chaired by one of them selected by the Conference, was also proposed. As far as the Malay Rulers were concerned, the Working Committee’s proposals seemed to have safeguarded their position.

The Working Committee also made other suggestions to protect the political position of the Malays. The Malays would form the majority of the unofficial members of the Legislative Council. More stringent citizenship requirements would also be put in place. Under the proposed new Constitution, automatic acquisition of citizenship would only be available to the Malays, British subjects who were born in the Straits Settlements of Penang and Malacca and in any other territories to be comprised in the Federation, and any other persons who were born in such territories whose parents were also born there. Except for the Malays, the three other categories of persons had to meet certain residential requirements. Others may apply for citizenship if they were born in

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84 The Conference of Rulers would function as a Secretariat through which the High Commissioner would communicate with the Rulers and ascertain their views on important policies of the Federal Government. The subjects that should be brought to the Rulers’ attention were, except in case of emergency, Bills which were to be brought to the Legislative Council; Federal policy and immigration; new salary scheme or major amendments to existing salary scheme of Federal Public Officers; and draft schemes of the creation of major organizations of any department of the Federal Government. The Rulers may consider these matters individually or, if necessary, convene meetings of the Conference. If the majority of the Rulers differed with the High Commissioner on any matters, the point of difference would be referred to the Secretary of State for his decision (Malayan Union 1946a: 21).

85 Seat allocation was based on a hybrid system of functional (e.g. mining, planting, labor, commerce, straits settlements, etc.) and ethnic representation. Malay unofficial members would consist of the nine Menteri Besar of the Malay states and nine other persons appointed by the High Commissioner. The non-Malay representatives to the Council would be six Chinese, three Europeans, two Indians, one Eurasian and two from any community. The other two unofficial members were representatives of the Settlement Council of Penang and Malacca. The total number of Legislative Council members was forty-eight, i.e. three ex-officio members, eleven officials and thirty-four un-officials (Malayan Union 1946b: 3).

86 The British subjects who were born in the Settlements had to be permanently resident, i.e. completed a continuous period of 15 years of residence. A British subject other than the
any of the territories and had been residing there for not less than 10 out of 15 years preceding their application, or, if they were not born in the territories, had been residents for not less than 15 out of 20 years immediately preceding their application; were of good character; had adequate knowledge of the Malay or English language; had made the Declaration of Permanent Settlement; and were willing to take the Oath of Citizenship.

The debate following the publication of the Working Committee’s report showed that different communal groups had different visions of the political community that would advance their communal interests. This was evident in the discussions and representations made by individuals, groups and associations to the Cheeseman Consultative Committee on the Constitutional Proposals between January and March 1947. Deliberating on the issue of Malay language and Islam, the Malay Association of Ulu Terengganu drew the committee’s attention to the special position of the Malays in Malaya. In a memorandum submitted to the Committee, the association claimed that Malaya “is a Malay country, which has been acknowledged to belong to the Malays from time immemorial”. Therefore, the position of Malay language “is extremely important and must be given priority .... If the Malay language is not given preference, the Malay race may be regarded as not being in existence and it

Settlement-born would be entitled to citizenship if his father was born in the territories which would comprise the Federation of Malaya or had resided therein for a continuous period of 15 years. Automatic acquisition of citizenship would also be available to any other person born in any of the territories whose parents were born in and have been resident in any one or more of such territories for a continuous period of 15 years, and whose father was, at the date of his birth, a Federal Citizen (Malayan Union 1946: 7).

As regards to the Working Committee’s constitutional proposals, the British Government was of the opinion that there would be no final decision on any constitutional matters until all the interested communities in Malaya had full and free opportunity to express their views. The Consultative Committee was thus formed with the purpose of gathering public opinions on such matters. The committee was headed by H.R Cheeseman, Director of Education. Its members were Mr. SB Palmer, Mr. MLR Doraisamy Aiyer, Col. HS Lee, Mr. CF Gomes, Mr. A Arbuthnott, Mr. CPR Menon, Mr. Leong Yew Koh, Dr. JS Goointing, Mr. GE Turner (Secretary). Between January and March 1947, the Committee conducted six public sessions in Kuala Lumpur, Penang, Malacca and Ipoh. It also received 81 letters and memoranda on the constitutional proposals. See Malayan Union (1947: 7).
means that this country does not belong to the Malays”. As the Malays profess
the religion of Islam, the association demanded that “the religion of Islam should
be included in the proposals otherwise Islam may be endangered by Christianity
and other religions”. The Ceylonese community, which was represented by the
Ceylon Federation of Malaya also sought to assert their claim for recognition.
They traced their early association with Malaya as far back as to the 1860s when
the early Ceylonese community came “in large numbers to assist the
development of Malaya”. Since then, the organization claimed, the Ceylonese
had “made Malaya their permanent home” and “with traditional loyalty and
conservatism have given their entire lives exclusively to the service of Their
Highnesses and the British administrators, while other races ventured into
vocations of great gains, namely, planting, mining, trading and industry”. As
such, it argued, it would only be appropriate if the residential requirement for
Malayan-born Ceylonese was reduced to five years, the interests of Ceylonese
government servants and of those in other employment should not be
jeopardized, and the Ceylonese community be represented in the Legislative
Council. The members of the Indian Association of Terengganu also sought to
put forth their claim. “Men’s memories”, they wrote in their memorandum, “are
short and hence the tendency is to regard Indians as unwelcome intruders whose
contribution to Malayan economy is nil and their only contribution is to the
English language of the word “coolie” which has found a place in school text-
books”. While “the Malay community may be excused for short memories”, they
said, “the Raj cannot dispute the contributions of India and Indians to the
extension of its influence in this part of the world from the founding of Singapore
in the early part of the nineteenth century to the liberation of Malaya a few

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88 Malayan Union (1947: 116).
89 Malayan Union (1947: 123).
months ago”. As such they pleaded for more generous requirements of citizenship.\(^{90}\)

Two Chinese leaders, HS Lee and Leong Yew Koh, who sat on the Consultative Committee, could not agree with the rest of their colleagues in the committee on two issues affecting the interests of the Chinese, namely, citizenship and representation in the Federal Legislative Council. They sought to impress upon the members of the committee that the Chinese and Malay population were about equal, and by reason of their early association with Malaya, a great number of Chinese had as good claim to be regarded as the sons of the soil as the Malays. They argued that as the Chinese had to pay about 70 percent of the total taxes in the country, they had borne a greater burden in the country’s economic development. Apart from that, they reminded that the Chinese had made a noble contribution toward the defence of Malaya and borne the brunt of the Japanese fury and terrorism during the Japanese occupation. This, they said, was the price for, as well as the symbol of, the Chinese community’s loyalty for the country. As such, the two Chinese leaders demanded, the number of Chinese representatives in the Federal Legislative Council should be about equal to the number of Malay representatives and all Malayan-born Chinese should automatically acquire Federal citizenship.\(^{91}\)

A multi-communal coalition of radical-nationalist political parties, Chinese-based associations and trade unions called the Pan-Malayan Council of Joint Action (PMCJA) formed in December 1946 claimed that they were the “only body which embraced all Asiatic communities in Malaya with which the Government should have had negotiations on constitutional issues”.\(^{92}\) The

\(^{90}\) Malayan Union (1947: 113).
\(^{91}\) Malayan Union (1947: 181).
\(^{92}\) The PMCJA comprised of the Malayan Democratic Union (MDU), Malayan Indian Congress (MIC), Malayan New Democratic Youth League, 12 Womens’ Federation in Malaya, the Malayan People Anti Japanese Ex-Service Comrades Association, the Pan-Malayan Federation of Trade Union (PMFTU), the Malay Nationalist Party (MNP), Angkatan Wanita Sedar (Movement of Awakened Women, AWAS) and Angkatan Pemuda Insaf (Movement of Awakened Youth, API).
coalition, which was led by a wealthy Chinese businessman, Tan Cheng Lock, refused to make any representation to the Consultative Committee on the basis that the Committee's method of inviting opinions from "interested individuals, communities and groups" would encourage "the presentation of views of individuals and groups who represented primarily sectional and communal interests". Such a procedure, they argued, "deliberately fostered inter-communal and inter-sectional hostility and jealousy".93 PMCJA demanded a united Malaya inclusive of Singapore, self-government through a fully elected central legislature for the whole of Malaya and equal citizenship rights for all who made Malaya their permanent home and the object of their undivided loyalty.94

In February 1947, the radical-nationalist Malay Nationalist Party (MNP), Angkatan Pemuda Insof (API, Awakened Youth Union), the Barisan Tani (BATAS, Peasants' Union) and Angkatan Wanita Sedar (AWAS, Awakened Women's Union) formed Pusat Tenaga Rakyat (PUTERA, Peoples' United Front). PUTERA, the coalition of Malay-based organizations, later merged with PMCJA to form PUTERA-AMCJA. As a result of this merger, three more demands were added to the original three put forth by the PMCJA. They demanded that the Malay Sultans should assume the position of fully sovereign and constitutional rulers, accepting the advice, not of the British "advisers", but of the people through democratic institutions; matters pertaining to Islam and Malay custom should be under the sole control of the Malays; and special attention should be given to the advancement of the Malays. These and the original three demands formed the six basic principles of the "Peoples Constitution for Malaya" published by PUTERA-AMCJA in November 1947.95 The ideological foundation of PUTERA-AMCJA however could not capture popular support. On the one hand, the non-

The radical-nationalist Malay-based MNP, AWAS and API withdrew from PMCJA in February 1947 and formed a new coalition called Pusat Tenaga Rakyat (Centre for People's Power, PUTERA) to focus on Malay issues.
93 PUTERA-AMCJA (1947: 5)
94 Malayan Union (1947: 183)
95 PUTERA-AMCJA (1947).
Malay middle classes "were very suspicious of extreme left-wing politics; neither were these people sufficiently nationalistic to be inspired by the coalition's anti-colonial slogans". On the other hand, the Malays generally viewed AMCJA as a communist tool since most of its members were known to be closely associated with the Malayan Communist Party (MCP).

Reconciling the competing claims and demands, so as to incorporate them into a body of constitutional text, was a daunting task. Faced with the articulation of competing communal interests and various claims to rights and privileges in the constitution-making process, the only possible constitutional framework to materialize was the one which could provide a basis for compromise rather than full satisfaction of any of the competing groups. The British rejected the PUTERA-AMCJA constitutional proposals in favour of those put forth by UMNO and the representatives of Malay Rulers. Realizing the importance of communal representation, the Consultative Committee in its report in March 1947, recommended an increase in the number of the unofficial representatives in the Legislative Council from 34 to 52 in order to give greater representation to the various communal groups in Malaya. The Malays however would still have the biggest share of representation in the Council with 29 representatives, including nine Presidents of State Councils as official members. The Chinese would have 15 representatives, European seven, Indian five, Ceylonese and Eurasian one each, and three others from any community.

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96 Ratnam (1965: 151)
97 The two Chinese members of the Consultative Committee were against the inclusion of Malay Presidents of the State Councils as official members as this would disproportionately increase the ratio of Malay representatives to the Chinese.
98 There was no provision for Ceylonese representation in the Working Committee's proposal.
99 See Malayan Union (1947: 9). In comparison, the new seats allocation proposed by the Working Committee showed that the percentage of Malay representation out of the total number of ethnic representatives to the Federal Legislative Council decreased from 56.3 percent to 47.5 percent. Other ethnic communities, except Eurasian, enjoyed slight increases. Chinese representation increased from 18.8 percent to 24.6 percent, European (from 9.4 percent to 11.5 percent), Indian (from 6.3 percent to 8.2 percent) and Ceylonese (from 0 to 1.6 percent). Representation for Eurasians and other communities decreased from 3.1 percent to 1.6 percent and from 6.3 percent to 5 percent respectively.
On citizenship, the Consultative Committee recommended the relaxation of the residence qualification for acquisition of Federal Citizenship by application. It would be five out of 10 years (instead of 10 out of 20 years) for persons who were born in the Federation, and eight out of 15 years (instead of 15 out of 20 years) for those who were not born in the Federation. Persons over 45 years of age and with 20 years of residence would be exempted during the first two years from the language qualification. It also asserted that all Federal citizens who possessed the necessary qualifications would be eligible for employment in all services of the Federal and State Governments.\(^\text{100}\) The Committee, however, endorsed the retention of the main structure of the Federation proposals and the greater proportion of its detailed arrangements as suggested by the Working Committee. The revised constitutional proposals, with minor changes, were accepted by the British government in July 1947. One significant change was the expansion of the size of the Legislative Council to 100 members with the number of Malay unofficial representatives reduced to 22, about the same proportion as recommended by HS Lee and Leong Yew Koh.\(^\text{101}\)

The exalted position of the Malay Rulers and their powers to legislate on matters of Islamic religion and the Malay custom remained. Agreements with the Malay states stipulated that a British Adviser would be appointed in each State and the Rulers undertook to accept the advice of their Advisers on all state affairs other than those relating to Islam and Malay custom. The Rulers also undertook to govern their States according to written constitutions and accepted the responsibility of encouraging the education and training of the Malay inhabitants of the States so as to fit them to take a full share in the economic progress, social welfare and government of the States and of the Federation. In this regard, the Malays would be given certain privileges which included reservation of quotas for admission into the public service, permits, licenses and scholarships. The

\(^{100}\) Malayan Union (1947: 13).

\(^{101}\) See Vorys (1974: 82).
State Agreements also provided that the Rulers would enjoy their pre-war prerogatives, powers and jurisdiction. A Chief Minister and a State Executive Council would be appointed in each state to assist the Rulers in the administration of their respective states. The Federation of Malaya finally came into existence on 1 April 1948 with the conclusion of a new "Federation of Malaya Agreement" between the British government and the Malay Rulers. A Malay-privileged Malaya with the extension of political and economic rights to the non-Malays thus came into being.

Merdeka Constitution:
The Constitutional Contract for Independent Malaya

In the early 1950s, as the road to independence became more tenable and self-government was about to become a reality, contestation started to revolve around the terms of a new "constitutional contract" for an independent Malaya. As Malayan politics had increasingly been communal in nature, the terms of the constitutional contract envisaged hard bargaining between communal leaders rather than a covenant between individual members of the society. A formal mechanism for communal leaders to negotiate the terms of the constitutional contract was first introduced in 1948. The Communities Liaison Committee (CLC) brought together prominent leaders of different ethnic communities such as Dato' Onn Jaafar of UMNO and Tun Tan Cheng Lock of MCA to discuss wide range of inter-communal issues prior to independence. These included matters pertaining to citizenship, the special position of the Malays, Malay land reservation, placement of Malay students in technical schools, racial composition in government departments and other issues of general concern such as

102 Mohd. Hishamuddin (1995b)
developments in tin mining, rubber small-holdings and co-operatives. Although the Committee was often devoid of a consensus on those issues, it managed to identify salient inter-communal issues and helped forge cooperation and understanding among communal leaders, which later proved to be useful in their effort to accommodate competing communal interests and lay the basis for the creation of a united Malayan people who were ready for independence.

By the mid 1950s, three major ethnic-based political parties, namely, United Malays National Organization (UMNO), the Malayan Chinese Association (MCA) and the Malayan Indian Congress (MIC), through their association in the Alliance, had provided a platform for behind closed-door but forceful inter-communal bargaining to reach the terms of the constitutional contract that would be the basis for the inter-communal constitutional arrangement in the independent Malaya. The Alliance leaders, while representing their respective ethnic communities, portrayed themselves as the leaders of Malayan people irrespective of race in an effort to build a united Malayan identity ready for independence. After gaining a large mandate in the first Federal Election held in July 1955 by winning 51 out of 52 seats in the Federal Legislative Council, the Alliance leaders formed the government and were ready to negotiate the terms of independence with the British government.

In January 1956, a delegation consisting of representatives of the Malay Rulers

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103 See the minutes of CLC meetings in “Communities Liaison Committee: Drafts and Notes” (SP. 3/A/174) in Tun Leong Yew Koh’s Papers, National Archive, Kuala Lumpur.
105 The UMNO-MCA Alliance was formed on the verge of the first Kuala Lumpur Municipal Election in 1952. It won nine of the total of 12 seats contested in the election. Since then, it won most of the municipal elections held in Malaya, with exception of the Ipoh municipal election, where the opposition People’s Progressive Party made a significant breakthrough. The MIC joined the Alliance in the first Federal Election held in 1955.
106 But this does not suggest that all was well with the Alliance’s rank-and-file. The creation of a united Malayan identity was still in its formative stage and mired with deep sectional interests. The resignation of MCA President Tun Tan Cheng Lock in July 1954 was reportedly due to his disagreement with a clique within the MCA which wanted the party “to be nothing more than a vehicle for maintaining and promoting mythical Chinese interests”. See “M.C.A or T.L.A (Tolong Lah Association)?” The Singapore Standard, 30 July 1954.
and the Alliance government, led by UMNO President and Chief Minister, Tunku Abdul Rahman, left for London for this purpose. In London, they discussed issues relating to the final process of transition to independence and the future relationship between Britain and independent Malaya. These included matters of defence, internal security, foreign relations, finance and Malayanization of the civil service. The date for independence was set for August 1957. No less important, on 7 March 1956, an independent constitutional commission, chaired by Lord Reid, a senior British judge, was appointed by Her Majesty the Queen and Their Highnesses the Malay Rulers to propose the Constitution for the independent Malaya. The commission’s terms of reference specified its tasks as to make recommendations for a federal form of constitution with parliamentary democracy and constitutional monarchy as the basis of its political system. The Federal Constitution would include provisions for the establishment of a strong central government with the States and Settlements enjoying a measure of autonomy, the safeguarding of the position and prestige of the Malay Rulers as constitutional Rulers of their respective States, a constitutional Yang di-Pertuan Besar as the Supreme Head of the Federation to be chosen from among Their Highnesses the Rulers, 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 ethnic communities.

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107 It was agreed that until independence was achieved, external defence and external relations should be under the responsibility of the British government. Even after independence, the British government would continue to assist in the expansion of the Malayan army. Internal security and internal defence, however, would be the responsibility of a Malayan minister. A Malayan Minister of Finance would be appointed and an Economic Committee under the chairmanship of the Chief Minister would be established. A rapid Malayanization of the civil service with generous compensation to non-Malayan civil servants would also be set in motion. A compensation scheme worth M$74 million was offered to non-Malayan civil servants as a "price for independence" (Vorys 1974: 125).

108 Members of the commission were Sir Ivor Jennings, Master of Trinity Hall, Cambridge, Sir William McKell, former Governor-General of Australia, Mr. B. Malik, former Chief Justice of the Allahabad High Court, and Mr. Justice Abdul Hamid, Judge of the West Pakistan High Court.

109 The term Yang di-Pertuan Besar was later replaced with the Yang di-Pertuan Agong.

110 Great Britain (1957b: 6).
Upon returning to Malaya, the Alliance set up a Working Party
comprising representatives of UMNO, MCA and MIC to draft constitutional
proposals for the independent Malaya.\(^{111}\) By September 1956, the Alliance
leaders, after thrashing out contentious issues relating to, among others, the
acquisition of citizenship, the special position of the Malays, the national
language, the religion of the federation and the institutional set up of the
independent Malaya, had come up with a political testament containing essential
terms of the constitutional contract.\(^{112}\) They desired that the country’s
Constitution “must provide for the establishment of a sovereign and fully
independent State in which the people shall enjoy freedom and equality”.\(^{113}\)
Presumably taking into consideration the potentially destabilizing nature of
Malaya’s ethnically divided society, the Alliance leaders also agreed that the
Constitution should “provide for a stable democratic government and ensure
peace and harmony amongst its people”.\(^{113}\)

It seemed that the acquisition of citizenship by the non-Malays and the
preservation of the special position of the Malays were the two most contentious
issues discussed by the Alliance leaders.\(^{114}\) Realizing that compromises had to be
reached on these two issues, the leaders agreed that in return for guarantees of
the special position of the Malays, generous terms of citizenship for the non-
Malays would be provided in order to create a common nationality.\(^{115}\) This

\(^{111}\) The members of the Working Party were Abdul Kadir Shamsuddin and Senu Abdul Rahman
(UMNO), Ong Yoke Lin and Y.C Kang (MCA) and A Krishnadas and K Ramanathan (MIC).
MCA Executive Secretary T H Tan acted as its Secretary.

\(^{112}\) See the Alliance’s memorandum to the Reid Constitutional Commission entitled “Political

\(^{113}\) Alliance (1956: 2).

\(^{114}\) See Minutes of Meetings of the Working Party on the Constitution and the Alliance Ad Hoc
Political Committee in Tun Leong Yew Koh’s Papers (SP. 3/A/114), National Archive, Kuala Lumpur.

\(^{115}\) The Alliance was against the Malay Rulers’ proposal to maintain state nationality, which
would create dual rather than a single common nationality. Apparently, state nationality was
believed to be relevant for the purpose of eligibility for local election. See Minutes of the Alliance
Ad-Hoc Political Sub-Committee held on 14 March 1957 at MCA Headquarters, Kuala Lumpur.
communal agreement stipulated that all those who were born in Malaysia\textsuperscript{116} on or after independence, including non-Malays, would acquire citizenship by the operation of law. Those of alien parents, however, should be free to choose their nationality after attaining the age of 21 years. If they chose to be nationals, they must make a declaration to that effect within a period of one year after attaining that age.\textsuperscript{117} For those who were born in the Settlements of Malacca and Penang who automatically became British subjects, they would be the nationals of Malaysia on independence. However, they would be entitled to retain their British nationality by making declaration renouncing Malaysian nationality within the period of one year after independence.

Recognizing the fact that a large alien population existed in the Federation of Malaya, the continued existence of which would not be in the interest of national unity, the Alliance leaders agreed that aliens would be given citizenship by registration if they met certain requirements. For those who were born in the Federation before independence, they had to be 18 years of age or more, be of good character, take the oath of allegiance and abjure allegiance to any other country, declare their intention to reside in the country permanently, and to have resided in the country for five out of seven years immediately preceding the date of their application and have a simple knowledge of Malay.\textsuperscript{118} For those alien residents who were not born in the Federation, they would also be eligible for citizenship, provided they had resided in the country for eight out of ten years immediately preceding the date of their application and met all other requirements set for Federation-born aliens. Though the Alliance leaders, for practical reasons, agreed that language qualification for all Federation-born

\textsuperscript{116} UMNO proposed the name "Malaysia" for the independent federation, while the MCA preferred it to be called "Malaya". However, the name Malaysia was used throughout the memorandum.

\textsuperscript{117} There was no consensus on this proviso. The MCA and MIC viewed that a declaration to that effect was unnecessary. See Alliance (1956: 13).

\textsuperscript{118} See Alliance (1956: 16).
aliens and alien residents above the age of 45 should be waived for a short period of time after independence, they reached no consensus on its exact length. UMNO wanted to make it one year, while the MIC preferred it to be two years. Apart from these two categories of citizenship by operation of the law and registration, the Alliance leaders also agreed that, in the future independent Malaysia, those aliens who wished to become nationals might acquire citizenship by naturalization, provided they were 21 years of age or above, had been residing in the country for 10 out of 12 years immediately preceding their application and met all other requirements set for the alien residents and Federation-born aliens.

Though the Alliance leaders accepted that “in independent Malaysia, all nationals should be accorded equal rights, privileges and opportunities and there must not be discrimination on ground of race or creed”, they recognized the fact that “the Malays are the original sons of the soil and that they have a special position arising from this fact, and also by virtue of the treaties made between the British Government and the various sovereign Malay States”. As such, they agreed that the Constitution should provide that the “Yang di-Pertuan Besar should have the special responsibility of safeguarding the special position of the Malays”. In this regard, they proposed that “the Constitution should give him powers to reserve for the Malays a reasonable portion of lands, posts in the public service, permits to engage in business or trade, where such permits are restricted and controlled by law, Government scholarships and such similar

119 Mr. Devaser, an MIC representative in the Alliance Ad Hoc Political Sub-Committee, explained that the longer period of waiver was needed because many non-Malays who lived in isolation from the Malays had no opportunity or necessity to learn Malay at the time. He cited the case of Indian estate workers who only knew Tamil. The MCA representatives too, citing economic and demographic factors, and the fact that it was not the official policy in the past to teach Malay in all schools, contended that the language test should be waived altogether. UMNO representatives however contended that the one year period was sufficient since the test would be in the simplest form. See Minutes of the Third Meeting of the Alliance Ad Hoc Political Sub-Committee held on 27 July 1956 at the MCA Headquarters, Kuala Lumpur in Tun Leong Yew Koh’s Papers (SP.3/ A/114), National Archive, Kuala Lumpur.

120 Alliance (1956: 14)
privileges accorded by the Government”. However, in view of the Yang di-Pertuan Besar’s responsibility to safeguard legitimate interests of other ethnic communities, “the Constitution should also provide that any exercise of such powers should not in any way infringe the legitimate interests of the other communities or adversely affect or diminish the rights and opportunities at present enjoyed by them”. In regard to the acquisition of land, the Alliance’s political testament also categorically stated that it should be done without prejudice to the system of Malay Reservations. The Alliance leaders also agreed that Malay should be the national and official language of Malaysia and Islam, the religion of the Malay majority, should be the religion of Malaysia. The observance of this principle, however, should not impose any disability on

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121 Alliance (1956: 18). The provision for the special position of the Malays however raised concerns among some non-Malay leaders in the Alliance, fearing that it would infringe the existing rights of the non-Malays. MCA leader Tun Tan Siew Sin in an Alliance meeting in April 1957 mentioned the case of rice licensing where, according to him, there had been an attempt to allocate 50 percent of the licenses to the Malays. Saying that Tun Tan got it wrong, UMNO representative Tun Dr. Ismail explained that existing licenses should remain untouched. But in future licenses, considering the possibility that the rice industry was one aspect of business in which the Malays stood a reasonable chance of success, the Malays should be given a certain percentage. Dr. Ismail stressed that the grant of licenses to the Malays should not redound to the disadvantage of the existing license holders. See Minutes of the Alliance Ad Hoc Political Sub-Committee Meeting held on 2 April 1957 at Alliance Headquarters, Kuala Lumpur. The document is available in Tun Leong Yew Koh’s Papers (SP.3/A/114) in the National Archive, Kuala Lumpur.

122 Alliance (1956: 11). It was to be noted that the Working Committee was more explicit in qualifying the application of the principle of equality in view of the provision on special privileges for the Malays. They stated in the memorandum that: “No discrimination against any national on grounds only of religion, race, community, sex, place of birth, or any other, subject to the provisions concerning special privileges for Malays and the legitimate interests of the other nationals”. See Minutes of the Alliance Working Party on Constitution Meeting held on 30 July 1956 at MCA Headquarters, Kuala Lumpur. The document is available in Tun Leong Yew Koh’s Papers (SP.3/A/114) in the National Archive, Kuala Lumpur.

123 There was dissonance within the MCA over the party’s decision in August 1956 to endorse the Alliance memorandum to the Reid Commission which excluded Chinese as an official language. It was reported that the party’s general committee decided against the inclusion of Chinese as an official language only after a personal plea by MCA President Tun Tan Cheng Lock and the Alliance Whip in the Federal Council Tun Dr. Lim Chong Eu. 15 voted against it, 14 for and 31 abstained. See Straits Times, 28 August 1956.
non-Muslims professing and practising their own religions, and should not imply that the State was not a secular State.\textsuperscript{124}

Meanwhile, the Reid Commission sat in Malaya between June 1956 and February 1957. After holding 118 public hearings and receiving some 131 memoranda, the Commission on 11 February 1957 concluded its findings and presented its report to the British Queen and the Malay Rulers.\textsuperscript{125} The report covered matters relating to the political and administrative structure of the state like the Supreme Head of the Federation, the constitution of the Parliament and the Executive, the division of legislative and executive powers, the relationship between the Federal and the State governments, the judiciary, finance, public service, the executive and legislative structures of the States and the Settlements and elections; those related to the rights and privileges of the people like fundamental liberties, citizenship and special position of the Malays; and other general provisions like the national language, the religion of the federation and the supreme law of the land.

The Commission’s recommendations were mainly in line with the Alliance’s proposals, except in four important aspects, namely, citizenship, special position of the Malays, religion and language. The Commission recommended more lenient citizenship requirements than those proposed by the Alliance. Apart from accepting the Alliance’s proposal on the exemption of the language test, the Commission also recommended that incomplete proof of residence would be accepted for applications made within one year after independence provided that such incomplete applications should be completed within a period of 18 months after independence.\textsuperscript{126} Contrary to the Alliance’s opposition to dual citizenship, the Commission recommended that the British

\textsuperscript{124} Alliance (1956: 19).
\textsuperscript{125} Great Britain (1957b).
\textsuperscript{126} See Article 18(2) of the Draft Constitution. This proviso was inserted considering the high illiteracy rate among the applicants and the fact that proof of residence and birth was difficult to obtain in those days.
subjects should not be required to renounce their British nationality upon acquiring Malayan citizenship. This would mean that those, who by virtue of the British Nationality Act 1948 became the citizens of the United Kingdom and Colonies, or "Commonwealth Citizens", would be able to retain their British nationality without having to renounce Malayan citizenship after independence.\textsuperscript{127} What is more, the Commission also recommended that those who were foreign citizens at the time of application may also choose to retain their foreign citizenship.\textsuperscript{128}

On the special position of the Malays, the Commission, with Justice Abdul Hamid of Pakistan dissenting, found it difficult to reconcile the need to create a common nationality with the granting of special position permanently to one race. It argued that as common nationality and a democratic form of government were the basis upon which a unified Malayan nation was to be created "it was inherent that all the citizens of Malaya, regardless of race, creed or culture, should enjoy certain fundamental rights including equality before the law".\textsuperscript{129} As such, it recommended that the special position of the Malays provided under the Federation of Malaya Agreement to be reviewed after 15 years of independence, where it would then be up to the legislature whether to retain, reduce or discontinue it entirely.\textsuperscript{130} It also recommended that there should be no further Malay land reservations and that it should be left to each State to reduce Malay reservations in that State at an appropriate time.\textsuperscript{131} It also rebuffed the Alliance's proposal that the Constitution should confer on the Yang di-Pertuan Besar the

\textsuperscript{127} This would include a large number of Chinese, Indians, Ceylonese and Malays who were born in the Straits Settlements, Hong Kong, India and Ceylon.
\textsuperscript{128} Great Britain (1957b: 14-21).
\textsuperscript{129} Great Britain (1957b: 71).
\textsuperscript{130} Under the Federation of Malaya Agreement, the Malays were entitled to land reservation, quotas for admission to the public service, permits and licences, and preferences in the granting of scholarships, bursaries and other forms of aid for educational purposes.
\textsuperscript{131} This however subject to two qualifications. First, if any land ceased to be reserved, an equivalent area may be reserved provided it is not already occupied by a non-Malay, and second, if any undeveloped land is opened up, part of it may be reserved provided that an equivalent area is made available to non-Malays (Great Britain 1957b: 72).
responsibility to safeguard the special position of the Malays. The Commission contended that constitutional provisions on land reservation and quotas for the Malays were sufficient to safeguard their special position.\textsuperscript{132} The Commission also rejected the Alliance's proposal to make Islam the religion of the Federation. It preferred instead to retain the existing position in the Malay states with regard to its recognition and the non-existence in the federation of any provision preventing recognition of Islam by legislation or otherwise in any respect which did not prejudice the civil rights of individual non-Muslims.\textsuperscript{133} While the Commission recommended that Malay should be the national language, and that for a period of at least 10 years English should continue to be used as an official language, it also recommended that the Indian and Chinese legislators who could not speak fluently in either English or Malay be allowed to speak in their respective languages in the legislature.\textsuperscript{134}

Contrary to the Commission's recommendations on the special position of the Malays and state religion, Justice Abdul Hamid, in a separate note, drew the commission's attention to its own terms of reference that the new constitution should include provision for "the safeguarding of the special position of the Malays and the legitimate interests of other communities". The special position of the Malays, he argued, could only be safeguarded if the Alliance's proposals on the matter were adopted.\textsuperscript{135} He also supported the Alliance's proposal that Islam be made the religion of the Federation provided that non-Muslim citizens shall not be prevented from professing, practicing and propagating their own religions nor shall any citizen be under any disability by reason of his being a non-Muslim.\textsuperscript{136} After all, he justified, no less than 15 countries in the world at

\textsuperscript{132} Great Britain (1957b: 71-73).
\textsuperscript{133} Great Britain (1957b: 73).
\textsuperscript{134} Great Britain (1957b: 74).
\textsuperscript{135} In addition, he proposed a proviso on quotas for the Malays to be alterable by the Parliament only by a majority decision of the total number of members of each house and by a majority of not less than two-thirds of the members present and voting (Great Britain 1957b: 98).
\textsuperscript{136} Great Britain (1957b: 99).
the time had a provision on state religion in their constitutions. Finally, he argued, these were the essence of the Alliance’s memorandum, which contained recommendations on politically controversial matters, the agreement of which was reached by the communal leaders after long and protracted deliberations. Therefore, he reasoned, it was not quite right for the Commission to vary the Alliance’s recommendations on such politically significant issues.137

Under the section on fundamental liberties, the Commission had made extensive recommendations on the supremacy of the Constitution, rule of law, natural justice and the power of judicial review. These are the aspects of the Constitution that the Alliance leaders had given little attention to in their memorandum.138 It recommended that the Constitution should be the Supreme Law of the Federation and that all laws, State Constitutions and executive actions which are inconsistent with the provisions of the Constitution, to the extent of their inconsistencies, shall be void.139 The Supreme Court would have the power to declare as void any written laws or executive actions that are inconsistent with the Constitution.140 In enforcing the rule of law, the Supreme Court would determine whether a public authority exercised its judicial or quasi judicial function in accordance with the “principles of natural justice”.141 More important, the Commission recommended guarantees for fundamental individual rights which they viewed as “essential conditions for a free and democratic way of life”.142 These included provisions against detention without

137 Great Britain (1957b: 98-100)
138 Points on fundamental liberties were contained in only a one-page appendix to the main memorandum. It only listed in brief the “typical” liberties existing in any democratic society. Without sufficient explanation of those liberties, it was hard to ascertain what the Alliance leaders really meant by them. In some respect, the liberties listed in the appendix stood in stark contradiction to some of the terms contained in the main memorandum.
139 See Clauses (1) and (2) of Article 3 of the draft Constitution.
140 See Article 4 of the draft Constitution.
141 Article 4(b)(iii) of the draft Constitution. Justice Abdul Hamid, however, was against the inclusion of the principles of natural justice in the Constitution because they are capable of innumerable interpretations. The inclusion of the principles, without defining them anywhere in the Constitution, he argued, would result in chaos (Great Britain 1957b: 101).
142 Great Britain (1957b: 70).
legal authority, slavery and forced labour which would apply to all persons;\textsuperscript{143} provisions against banishment, exclusion from the Federation and restriction of freedom of movement which would apply to all citizens;\textsuperscript{144} guarantees for freedom of speech and expression;\textsuperscript{145} guarantees for freedom of religion which included the right to profess, practice and propagate one’s religion as well as the right of each religious group to manage its own affairs, to maintain religious or charitable institutions including schools, and to hold property for these purposes;\textsuperscript{146} and provisions against discrimination by law on the ground of religion, race, descent or place of birth and discrimination on those grounds by any Government or public authority in making appointments or contracts or permitting entry to any educational institutions, or granting financial aid in respect of pupils or students.\textsuperscript{147} The Commission also recommended that there should be no discrimination with regard to carrying out of any trade, business, profession or occupation;\textsuperscript{148} that no person should be deprived of his property save in accordance with law;\textsuperscript{149} and that any law for compulsory acquisition or requisition of property must provide for adequate compensation.\textsuperscript{150} The Commission however cautioned that these provisions “must be modified in certain respects to take account of the special position of the Malays”.\textsuperscript{151}

The publication of the Commission’s report in February 1957 caused a stir among various communal groups in Malaya. Two critical points of the communal-based constitutional contract, i.e. common citizenship and the special position of the Malays, generated heated debates. Malay newspapers were sceptical of the concessions given to the non-Malays. The editorial in \textit{Warta...
Negara insisted that "the country had one sovereign nation – the Malays. Therefore, independence and sovereignty under British protection would have to be handed over to the Malays, who in turn, rather than depending on "privileges", would define the terms of citizenship of others".\textsuperscript{152} Utusan Melayu, in a more moderate tone, questioned the merit of imposing a review on Malay privileges after a short period of 15 years.\textsuperscript{153} Malay-based political parties and organizations, other than UMNO, took the more radical view. Pan-Malayan Islamic Party (PMIP), Parti Negara (Nation’s Party) and Parti Ra’yat (People’s Party) pledged to prevent the report from being accepted, while the Perak Malay Chambers of Commerce demanded that the Commission’s report be amended so as to recognize the Malays as the "master race" in the independent Malaya. The Malay Society of Great Britain sent a cablegram to the Chief Minister informing him of its rejection of the commission’s recommendations, while 20 Malay organizations in Kuala Lumpur decided to send delegates to London to directly appeal to the British government against the recommendations.\textsuperscript{154}

Not unexpectedly, Chinese opinion, as it appeared in Chinese and English newspapers, held opposite views about the Malays’ special position. They considered the commission’s report as excessively generous toward the Malays. The Chinese daily Kwong Wah Jit Poh considered it improper for a democratic country to have people of various communities being divided into different grades,\textsuperscript{155} while Nanyang Sian Pau considered the 15-year period for the implementation of Malay privileges policy as too long.\textsuperscript{156} The English-language Singapore Standard was even more cynical. Its editorial proclaimed:

\textsuperscript{153} Vorys (1974: 131).
\textsuperscript{154} Vorys (1974: 132).
\textsuperscript{156} Cited in Vorys (1974: 132)
The greatest defect in the psychology of the Malays is the innate fear that they are unable to stand on their own feet within the 15-year period during which they would enjoy special privileges. They want this period to be for all time. This is tantamount to an admission that they will never be able to compete with other races for a proper place under their own Malayan sun. This is also an admission that they are not prepared to work hard enough for what they want in this world.\textsuperscript{157}

However vociferous and potentially explosive these views were, it was the Alliance which set the terms of the constitutional contract. The Alliance leaders decided to discuss the Commission's recommendations privately in an Ad-hoc Political Sub-Committee headed by Tun Abdul Razak and in the official Working Party consisting of the High Commissioner and representatives of the Malay Rulers and the Alliance Government.\textsuperscript{158} Describing the Alliance's proposal as representing "the maximum agreement on all sides", especially on the issue of citizenship, language, religion and the special position of the Malays, the Alliance leaders decided to stick to their earlier proposals. Obviously dissatisfied with the Reid Commission's departure from the Alliance's proposals on the key issues of citizenship, language, religion and the special position of the Malays, Tun Abdul Razak remarked that these are delicate and controversial issues which should be decided from the political angle and not to be left to the legal "experts" to decide.\textsuperscript{159} As such, while they agreed that the non-Malays should be granted access to the political system through a liberal extension of citizenship, they rejected the creation of "dual citizenship" for Commonwealth citizens. Additional concessions however were given to the non-Malays in which it was

\textsuperscript{158} See Minutes of the Alliance Ad-Hoc Political Sub-Committee between March and April 1957 in Tun Leong Yew Koh's Papers (SP.3/A/114), National Archive, Kuala Lumpur.
\textsuperscript{159} See Minutes of the Alliance Ad-Hoc Political Sub-Committee Meeting held on 14 March 1957 at MCA Headquarters, Kuala Lumpur in Tun Leong Yew Koh's Papers (SP.3/A/114), National Archive, Kuala Lumpur.
agreed that physical absence from the Federation for educational purposes approved by the appropriate Minister would not be regarded as a break in the period of residence. Also the non-Malays’ rights to property, culture and language would not be arbitrarily circumscribed. On language especially, a proviso would be inserted in the Constitution to provide proper safeguards for the teaching, learning and use of vernacular languages, other than for official purposes, as promised in the Alliance election manifesto.\textsuperscript{160}

In return for the generous terms of citizenship, the Malays would be guaranteed that their special position would be safeguarded under a “permanent” rather than “transitional” constitutional provision.\textsuperscript{161} Malay would be the sole official language,\textsuperscript{162} Islam would be the religion of the Federation, and they would share proportionately in economic rewards. Though Islam would be made the religion of the Federation, the non-Muslims would be guaranteed their right to profess, practice and propagate their religion in peace and harmony.\textsuperscript{163}

\begin{itemize}
\item \textsuperscript{160} See “Report to the Alliance National Council by Dato’ Razak b. Dato’ Hussien, Chairman of the Alliance Ad-Hoc Political Sub-Committee” dated 4 May 1957 in Tun Leong Yew Koh’s Papers (SP.3/A/114), National Archive, Kuala Lumpur.
\item \textsuperscript{161} The Reid Commission’s recommendation that the Malay special position policy should be reviewed after 15 years of independence was rejected. However, on the insistence of the non-Malay leaders in the Alliance, the Alliance National Council agreed that a proviso should be inserted in the Constitution to guarantee that the non-Malays’ interests in trade and business would not be adversely affected by the creation of quotas for the Malays. Though the special position of the Malays is now entrenched in a “permanent” provision, Tun Abdul Razak assured his non-Malay colleagues in the Alliance that the policy would be subjected to review from time to time. See Minutes of the Alliance National Council Meeting held on 5 May 1957 at MCA Headquarters, Kuala Lumpur in Tun Leong Yew Koh’s Papers (SP.3/A/114), National Archive, Kuala Lumpur.
\item \textsuperscript{162} Both MCA and MIC agreed to forgo the use of vernacular languages in the legislature. In return, UMNO agreed to drop language qualifications for those standing in election. See Minutes of the Alliance National Council Meeting held on 5 May 1957 at MCA Headquarters, Kuala Lumpur in Tun Leong Yew Koh’s Papers (SP.3/A/114), National Archive, Kuala Lumpur.
\item \textsuperscript{163} It should be noted that although the Alliance National Council adopted the Ad-Hoc Political Sub-Committee report on the Constitution which proposed that “there would be complete freedom to propagate and practice all other religions...”, it was unclear whether the issue of propagation of non-Muslim religion among Muslims, which was restricted by Article 11(4) of the Federal Constitution, was discussed at all by the Alliance leaders at this stage. Relevant official documents on the Alliance leaders’ deliberation on the Constitution such as the minutes of meetings of the Ad-Hoc Political Sub-Committee and the Alliance National Council and Tun Abdul Razak’s report on the Constitution were silent on this issue. It was probable that the issue
\end{itemize}
Procedural mechanisms to ensure Malay political supremacy, such as delimitation of electoral constituencies, which would facilitate a Malay majority in the legislature, would also be put in place. The government was to pursue the goal of making Malay the official language through its education policy and the goal of increasing the Malay's share in the economy through its economic policy. Finally, it was agreed that the Alliance leaders would be the guardians of the "constitutional bargain" and that they would neither be distracted by communal pressures nor would they act arbitrarily against the other communities.

The official Working Party finalized its report in May 1957 and immediately left for London to discuss its final recommendations with the British Government. The recommendations found their way into a White Paper tabled in the British Parliament in June 1957. By July 1957, all three Alliance parties approved the White Paper and the draft Merdeka Constitution. The Federal Constitution Bill 1957, which was adopted by the Federal Legislative Council in August 1957, mainly reflected the wishes of the Alliance leaders on the salient communal issues. The Alliance's proposal on citizenship was adopted, while the Reid Commission's majority view on the special position of the Malays was substantially altered. The Yang di-Pertuan Agong would have the responsibility to safeguard the special position of the Malays and the legitimate interests of

was brought to the Working Party level where the Alliance proposals and the Reid Commission recommendations were scrutinized.
165 Despite pressures from within the Chinese community, the MCA agreed not to press for demands which went beyond the Alliance proposals. These included the demands of the Chinese guilds and associations for nationality by birth (jus soli) to be extended to those born before independence, multi-lingual legislatures, equal rights for all citizens and a five-year residential qualification for citizenship by registration. See Sunday Times, 5 May 1957.
166 Tunku Abdul Rahman, Tun Abdul Razak, Tun Ong Yoke Lin and Tun V.T Sambanthan represented the Alliance government in the delegation.
167 See Straits Times, 8 July 1957.
168 Great Britain (1957a).
169 The term Yang di-Pertuan Agong was adopted in the Federal Constitution instead of Yang di-Pertuan Besar.
other communities. In discharging this responsibility, the Yang di-Pertuan Agong shall act on the advice of the cabinet. He would be required to exercise his functions under the Constitution and the federal laws to ensure the reservation of quotas for the Malays, as he might deem reasonable, of positions in the public service, scholarships, exhibitions, educational or training privileges, and permits and licences. He would also be empowered to give general directions to the appropriate authorities for the purpose of ensuring the reservation of these quotas. However, in the exercise of his function to safeguard the special position of the Malays, no person (presumably non-Malays) should be deprived "of any public office held by him or of the continuance of any scholarship or other educational or training privileges or special facilities enjoyed by him".

The 15-year cut off point for the enjoyment of Malay privileges as proposed by the Reid Commission was dropped from the Constitution. The Malay privileges provision under Article 153 would be retained unless and until the Parliament amended it with the consent of the Conference of Rulers. State Enactments amending existing laws on Malay land reservation should not only be passed by a majority of the total number of members of the State Legislative Assembly and by the votes of not less than two-thirds of the members present and voting, but should also be approved by a resolution of each House of Parliament passed in the same way.

Malay language also gained primacy in the Constitution. It would be made the official language and English would be tolerated as co-equal in official business for ten years after independence "and thereafter until Parliament

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170 Article 153 (1) of the Federal Constitution. All Articles of the Federal Constitution mentioned here refer to the original Articles in the 1957 Constitution before any amendments.
171 Quotas in public service of a State will be under the responsibility of respective State Ruler.
172 Article 153(2) of the Federal Constitution.
173 Article 153(3) of the Federal Constitution.
174 Article 153(4) of the Federal Constitution.
175 Article 159(5) of the Federal Constitution.
176 Article 89(1) of the Federal Constitution.
otherwise provides".177 Contrary to the Reid Commission's recommendation on
the Chinese and Indian languages, neither would be accepted in official councils.
On Islam, the Constitution recognizes its status as the official religion of the
Federation, but without denying the right of non-Muslims to profess and practice
their own religions.178 However, contrary to both the Reid Commission's
recommendation and the Alliance memorandum on the freedom to propagate
one's religion, the Constitution allows State law and, in respect of the Federal
Territories, federal law to control or restrict the propagation of any religious
document or belief among Muslims.179 This, as Tun Abdul Razak explained, was
intended to give power to the Malay Rulers as Head of Religion in their
respective States "to protect the interest of the religion of Islam against any
teaching contrary to the true principles of Islam".180

Though both the Alliance memorandum and the Reid Commission Report
contained a statement implying that the Malayan state would be secular despite
Islam being made an official religion, the phrase "secular state" was not inserted
in the Constitution. This perhaps reflected the special constitutional role of Islam
which goes beyond the symbolism of an official religion, but also as part and
parcel of the political and legal system in the new nation, the implication of
which would negate the proposition that the state was at all secular. Contrary to
the ordinary conception of a secular state, especially in regard to the separation
of religion from the state, the Federal Constitution provides for a special role of
Islam in state administration. It sanctions application of Islamic personal and
family law over persons professing the religion of Islam, provides for the
establishment of syari'ah courts run by state officials to administer Islamic law,181
allows the State to collect Islamic revenues such as zakat, fitrah and baitulmal and

177 Article 152(2) of the Federal Constitution.
178 Article 3 and 11(1) of the Federal Constitution.
179 Article 11(4) of the Federal Constitution.
consider them as state revenues to be paid to a special fund,\textsuperscript{182} and provides constitutional guarantee for the allocation of state funds to Islamic institutions.\textsuperscript{183}

While moving the constitutional proposals in the Federal Legislative Council on 10 July 1957, Chief Minister Tunku Abdul Rahman spoke on the communal formula that laid the basis for the Federal Constitution:

A formula was agreed upon by which it was decided that in considering the rights of the various peoples in this country no attempt must be made to reduce such rights which they have enjoyed in the past. As a result you find written into this Constitution rights of the various peoples they have enjoyed in the past and new rights, in fact, accorded to new people whom it was the intention to win over into the fold of the Malayan Nation. I refer to the Citizenship rights. It is a right which has given the Malays very grave concern and fear. Nevertheless because of their desire and anxiety to put Malaya on the pedestal as an Independent Nation, they are prepared to give that right to the new people.\textsuperscript{184}

To ensure successful implementation of this "communal formula", the Constitution was devised in a way that it would, in certain circumstances, provides room for the State to "transcend" the criteria of democratic politics. These included the qualification to the principles of equality in view of the constitutional guarantee for the special position of the Malays. In this regard, Article 8(2) of the Federal Constitution invalidates state laws that discriminate against citizens on the ground only of religion, race, decent or place of birth except as expressly authorized by the Constitution.\textsuperscript{185} In line with Justice Abdul Hamid's dissenting view on the innumerable interpretations of the principles of

\textsuperscript{182} Article 97(3) and Part II, Tenth Schedule of the Federal Constitution.
\textsuperscript{183} Article 12(2) of the Federal Constitution.
\textsuperscript{184} Federal Legislative Council Debates, 10 July 1957, col. 2841.
\textsuperscript{185} Article 8(2) of the Federal Constitution.
“natural justice”, the phrase was finally omitted from the actual Constitution. But the most significant departure from democratic politics was the Constitution’s tendency to restrict the exercise of fundamental liberties, which the Alliance leaders believed would be necessary to maintain racial harmony. In response to the Reid Commission’s recommendations on freedom of speech, an MCA representative in the Alliance Ad-Hoc Political Sub-Committee conveyed the party’s opinion that there should be safeguards against the abuse of freedom of speech under Article 10(1) of the draft Constitution for the purpose of stirring up racial conflict.186

Though the issue of restrictions on fundamental liberties was not given much attention by the Alliance leaders in the four meetings of its Ad-Hoc Political Sub-Committee held between March and April 1957, the final Constitution contained important provisions which allow the Parliament to impose restrictions on the exercise of freedom of movement, speech, expression and assembly.187 In this regard, Article 4(2) of the Federal Constitution provides that the validity of any law shall not be questioned on the ground that it imposes restrictions on such freedoms. The Constitution went further to state that in the case of restrictions on freedom of speech, assembly and association, the validity of those restrictions shall be beyond question even though they “were not deemed necessary or expedient by the Parliament for the purposes mentioned in that Article”.188 What is more, the Parliament would be the sole judge in determining the reasonableness of the laws it passed. Article 10(1) of the Reid Commission’s draft constitution reads “Every citizen shall have the right to freedom of speech and expression, subject to any restriction imposed by federal law.” However, in the final Article 10(1), the word “reasonable” which appeared

186 See Minutes of the Alliance Ad Hoc Political Sub-Committee held on 11 April 1957 at the Alliance Headquarters, Kuala Lumpur in Tun Leong Yew Koh’s Papers (SP.3/A/114), National Archive, Kuala Lumpur.
187 Articles 4(2), 9(2) and 10(2) of the Federal Constitution.
188 Article 4(2)(b) of the Federal Constitution.
before the word "restriction" was omitted. Obviously, it was intended that the question of reasonableness of the laws passed by the Parliament to restrict the exercise of fundamental liberties should be beyond the scope of judicial scrutiny. Justice Abdul Hamid in his dissenting note supported this position for it would help avoid a situation where legislation on the subject would be challenged in court on the ground that it was unreasonable. This, the learned judge argued, would cause the law to be lacking in certainty. The effect of this provision was that the Parliament would have "unfettered" power to pass laws that restrict the exercise of fundamental liberties.

It seems that the legislative intent behind Articles 4 and 10 of the Federal Constitution was to give wide powers to the Parliament to impose restrictions on the exercise of fundamental liberties. The omission of the entire Article 4 (Enforcement of rule of law) of the Reid Commission’s Draft Constitution and

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189 Great Britain (1957b: 101).
190 Explaining the effect of this "unfettered" power of the Parliament to make such laws, the then Attorney-General, Mr. T.V.A Brodie Q.C, said "if a restriction is imposed by law passed by Parliament, it is not open to somebody to go to Court and say 'Parliament thought it related to public security, but I ask you to say that it did not'". See Federation of Malaya Legislative Council Debates, 15 August 1957, col. 3144.
191 Article 4 of the Reid Commission’s Draft Constitution
(1) Without prejudice to any other remedy provided by law -
the deletion of the word "reasonable" in Article 10 (Freedom of speech, assembly and association)\textsuperscript{192} came under fire, especially from two lawyers-cum-legislators K.L Devaser and S.M. Yong. Devaser described the omission of the entire Article 4 of the Reid Commission's Draft Constitution, which would have given constitutional recognition to the power of judicial review, is like "giving a right but not providing a remedy".\textsuperscript{193} On the new Article 4(2), which provides for the power of the Parliament to pass law imposing restriction on the right to freedom of movement provided under Article 9(2),\textsuperscript{194} regardless of whether the restriction does not relate to the matters mentioned therein, Devaser said that the Article was "very dangerous in the sense that Parliament can pass any law and be out of Court".\textsuperscript{195} On the effect of the deletion of the word "reasonable" in Article 10, S.M Yong warned the members of the house that "it might be inferred that

\begin{quote}
carried out in accordance with the law, any person aggrieved thereby may apply to the Supreme Court for an order requiring the public authority to perform such duty in accordance with the law and, if the Court is satisfied that the allegation is correct, it may take such order as it may consider appropriate in the circumstances of the case.

(2) Nothing in this Article shall entitle any person to institute proceedings in the Supreme Court if he is -

(a) a person subject to military law and he seeks to institute proceedings against a public authority to whom he is subject under military law otherwise than for the purpose of securing a decision whether that authority acted with or without jurisdiction; or

(b) an alien enemy.
\end{quote}

\textsuperscript{192} Article 10 of the Reid Commission's Draft Constitution


\textsuperscript{194} Article 9(2) reads: "Subject to any restriction imposed by any law relating to the security of the Federation, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof".

Parliament could impose such restrictions as it deems necessary or expedient even if it is unreasonable".196

Despite the protests, the Federal Legislative Council passed the Federal Constitution Bill on 15 August 1957 without altering its position on fundamental liberties. Defending the government’s position on the omission of Article 4 of the Reid Commission’s Draft Constitution and the deletion of the word “reasonable” in Article 10, Tunku Abdul Rahman argued that had they been retained, they “would have unduly fettered the power of the Parliament to make appropriate provision in order to safeguard and protect the rights of individuals and of the public”. Describing the Parliament as “the true guardian of fundamental rights and liberties”, the Tunku said that the power to make laws on such matters “must remain with the people themselves and entrusted to the safekeeping of their representatives in the Parliament”.197 This view might seem to be fairly democratic. But in a political and legal system where the laws and legal institutions are to serve state objectives, while the Parliament and the Executive are dominated by the ruling party, the democratic role of the Parliament to safeguard the rights of the individual against their encroachment by the political Executive is suspicious. While the Alliance leaders had made significant headway in reaching compromises on the sensitive communal issues, the process of Malayan constitution-making also demonstrated that constitutional guarantees for fundamental liberties had been compromised in favour of the entrenchment of state power.

Conclusion

As serving competing communal interests formed the basis of the Malayan constitutional contract, the conception of state-society relations understood in

this context departed significantly from that of the individual-based liberal social contract. Mixing the conception of right as communal-based on the one hand, and individual-based on the other, the Federal Constitution provides guarantees for fundamental liberties, but at the same time gives far-reaching powers to the State to restrict the exercise of such liberties. Such restrictions were justified on the ground that they were necessary to maintain racial harmony and national security, especially when destabilizing forces caused by the articulation of competing communal interests and threats emanating from communist insurgency had the potential to cause political instability in the new nation. What followed was the concentration, rather than dispersion, of law-making power in the hands of the political elites who controlled the executive and the legislative arms of the government. Furthermore, with the Alliance’s terms of constitutional contract being entrenched in the Federal Constitution, the competing claims of each communal group to economic, social and political rights in the new nation were compromised, with no one group achieving fully its strictly communal interests. This opened up spaces for further articulation of communal interests which posed potential threats to the longevity of the agreed terms of the constitutional contract. These potential destabilizing forces, in turn, provide justification for the prioritization of state power over individual liberties.
Chapter III


The politics of constitutional contract, which revolves around the debate on the special position of the Malays and the legitimate interests of other ethnic communities, and the resultant prioritization of state power over individual freedoms, have been a dominant feature of Malaysian political discourse. As the major communal groups continued to pursue their distinct communal interests beyond the constitution-making stage, debates on communal issues had become a common source of discontent and a platform for unleashing of, whether perceived or real, the destabilizing forces in Malaysia's communally divided society. During the country's formative years, deep communal cleavages persisted despite efforts by the Alliance leaders to forge communal solidarity through compromises achieved in closed-door negotiations. However, intense pressures, either for modification of the terms of the constitutional contract or for their vigorous implementation, often stemmed from the disgruntled sections of each ethnic community. By and large, since independence in 1957 until the late 1980s, the constitutional contract issues dominated election campaigns and sometimes fueled racial tension.

This chapter argues that the continued articulation of competing communal interests, apart from the existence of communist threat until the late 1980s, had provided justification for the government to expand its legal powers and restrict the exercise of fundamental liberties, often on the grounds of maintaining racial harmony and preserving national security. These powers, however, were sometimes used for quite different purposes. The laws, especially the emergency and anti-subversion laws, had been directed against opposition politicians and government critics, and hence enabled the government to effectively silence dissent and diffuse challenge to its political dominance. By the 1990s, the government had succeeded in consolidating its legal powers and weakening the dissenting voices within the society.
Meanwhile, mainly due to the upward social mobility of the Bumiputera community during the NEP years and the government's more liberal policies on non-Bumiputera culture and education in the early 1990s, ethnic relations had significantly improved. The long period of communist threat had also ended with the official surrender of the Communist Party of Malaya (CPM) in 1989. With the easing of ethnic tension and the absence of the communist threat, the salience of the politics of the constitutional contract and the national security ideology appeared to be in decline. However, although these developments led to the decrease in the actual use of the emergency and anti-subversion laws in the early 1990s, there had been no actual reduction in the legal powers of the executive under those laws, leaving it with enormous potential powers at its disposal, which could be used to silence dissent.

However, in the absence of convincing justification for the use of such laws in normal times, the government had been more cautious in their application. But the government's capacity to control dissent had not been seriously limited. The consolidation of the executive power as a result of its expansion during the country's formative years and beyond together with the emergence of the more compliant judiciary subsequent to the 1988 Executive-Judiciary crisis had increased the state's capacity to use the courts and the normal criminal and civil laws as the more "legitimate" means to silence dissent. By the 1990s, it was common for the more vocal among the opposition politicians and the government critics to be hauled to the courts to face "justice", rather than being detained without trial. Politics has thus been "judicialized" in the sense that supposedly pure political battles had been pushed into the judicial sphere for adjudication. Those who had the powers to prosecute and to exercise control over the judiciary were thus placed in an advantageous position to further consolidate their political dominance.
The Communist Threat and the Permanency of the Emergency and Anti-Subversion Laws

Although militant communist activities had dwindled by the time Malaya gained independence in 1957, the government continued to strengthen and expand its legal powers. A White Paper published by the government in February 1959 detailed a new communist political strategy aimed at creating a communist state through open and legal means. It included the formation of a "United Front" composed of pro-communist organizations, infiltration into existing legal organizations, affiliation with international communist organizations, economic subversion and propaganda aimed at winning the "hearts and minds of the people". In response to this communist offensive, legal development in the post-independent Malaya moved toward enhancing the state's capacity to curb subversive activities and maintain national security.

One of the important developments in this regard was the extension of the powers of the Executive to detain persons without trial beyond the period of emergency. In May 1960, barely two months before the 1948 emergency ended, the Parliament amended Articles 149 and 150 of the Federal Constitution. Under the original Article 149 (2), an anti-subversion law enacted under the Article would have validity for only one year. The amendment changed this position to provide that such law ceased to have effect only "if resolutions are passed by both Houses of Parliament annulling such law". This amendment paved the way towards a law on a more permanent footing, namely the Internal Security Act 1960 (ISA) which was subsequently enacted under the amended Article. The Act conferred wide powers on the Executive to deal with subversion after the end of the emergency. These

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1 The number of "incidents" due to communist activity had decreased from 507 a month in 1951 to less than forty in 1957. During the emergency from 1948 to July 1960, a total of 6,710 insurgents were killed, 2,700 surrendered and 1,500 were captured. This reduced the communist strength to only about 500 men in 1960. See Federation of Malaya (1957: 6), Paget (1967: 74).
2 Federation of Malaya (1959)
3 The government claimed that it had recovered a "secret document" belonging to the then Deputy Secretary-General of the Communist Party of Malaya, Yeong Kuo, during an ambush at a communist camp in December 1955. The document allegedly contained details of the political offensive strategy to supplement the communist armed struggle. This included infiltration into village councils, students' associations and trade unions. See Federation of Malaya (1957: 10-42).
included the power of the police to detain a person without trial for a maximum period of 60 days and the power of the Minister in charge of internal security to detain a person without trial for a period of two years.\(^4\)

Article 150 was also amended to provide that a Proclamation of Emergency and an emergency ordinance would cease to have effect only when it is revoked or annulled.\(^5\) Originally, a Proclamation of Emergency would have validity for the duration of two months and an emergency ordinance would cease to have force fifteen days after the date of both Houses of Parliament are first sitting, unless the Parliament decided otherwise.\(^6\) The amendment was significant in the sense that a Proclamation of Emergency and its ordinances would continue in effect despite the restoration of parliamentary government. As such, though the emergency ended in 1960, the ISA draftsman, Professor Hickling, noted, "the opportunity was then taken to strengthen the powers of the executive in countering subversion and dealing with a state of emergency".\(^7\) Defending the amendment, however, the then Deputy Prime Minister, Tun Abdul Razak Hussein, asserted that the country was likely to have to deal with the remnants of the communist terrorist organization after the emergency ended but the government considered it a sufficient safeguard that the Parliament could annul the emergency legislation at any time rather than determining a specific period.\(^8\) On the other hand, it opened the way to the possibility of a virtually permanent emergency.

The government persistently relied on the continued existence of the communist threat to justify the existence of the emergency and anti-subversion laws beyond the period of actual emergency. In a White Paper published in November 1968, the government claimed that while the Communist Party of Malaya continued with its armed struggle, the Communist United Front was geared toward the creation of conditions favorable for the banned CPM to gain absolute power.\(^9\) The

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\(^4\) The two-year period of detention is extendable by the order of the Minister.

\(^5\) Since independence, four emergencies had been proclaimed, i.e. one each in 1964, 1966, 1969 and 1977. The emergency proclaimed in 1969 has never been revoked, making it to appear that the application of emergency laws had become permanent in Malaysian (Harding 1996: 154).

\(^6\) Jayakumar (1978: 334)

\(^7\) Hickling (1978: 6).

\(^8\) Hansard, 22 April 1960.

\(^9\) Government of Malaysia (1968: v)
government alleged that two major left-wing opposition political parties, the Labor Party of Malaya (LPM) and the Malayan People's Party (PRM), which formed the opposition Socialist Front (SF), had been infiltrated by the CPM and acted as the leading components of the Communist United Front. Apart from the opposition political parties, labor unions and Chinese student movements were also said to be penetrated by the communist elements. The government's education policy, which was viewed by the Chinese as inhibiting Chinese culture and democracy, made it easy for the Communists to sponsor or operate within Chinese student movements which were becoming more sympathetic to the communist struggle. The government claimed that some Malay intelligentsia, religious teachers and politicians were also influenced by the communists.

Not unexpectedly, opposition leaders, union leaders, Chinese educationists and leftist Malays often became the target of the emergency and anti-subversion laws. They were alleged to have been involved in many security incidents that plagued the country throughout the 1960s. These included the Indonesia-Malaysia confrontation between 1963 and 1965, the 1964 communal violence in Singapore, the March

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10 The main role of the United Front was to bring into fruition the communist's strategy of combined parliamentary struggle and open mass-struggle. This strategy envisaged the working of these political parties within the framework of parliamentary democracy while at the same time promoting mass agitation aimed at arousing people's disaffection with the government. In pursuance of this policy, the White Paper states, between October 1966 and November 1968 no less than 250 illegal demonstrations were organized by the LPM and the PRM. See Government of Malaysia (1968: 6)

11 Among the unions were the Selangor Building Workers Trade Union (SBWTU), the United Malay Estate Workers Union (UMEWU), the Electrical Industry Workers' Union of Malaya (EIWUM) and the Pineapple Industry Workers' Union (PIWU). The government also claimed that the communist 'cells' were formed in Chinese secondary schools whose main function was to spread Communism and train student cadres for eventual infiltration into left-wing political parties and other pro-Communist organizations. See Government of Malaysia (1968: 16)

12 Since the 1950s, it seemed that Chinese students in Malaya had been influenced by pro-Communist elements. As a case in point, the banning of pro-Communist Singapore Chinese Middle Schools Students' Union (SCMSU) in 1956 prompted Chinese students to stage demonstrations in Penang in April 1957 (Means 1976: 273).

13 Government of Malaysia (1968: 30)

14 Confrontation was a series of political and military offensives launched by Indonesia between January 1963 and October 1965 as a response to the formation of Malaysia. Indonesia's President Sukarno was against the formation of Malaysia, fearing that the consolidation of Malaya and ex-British colonies of Singapore, Sabah and Sarawak into Malaysia would increase British control over the region, hence threatening Indonesia's independence. The formation of Malaysia was also opposed by the Philippines, which had made a claim to Sabah.

15 See Leifer (1964: 1116).
1967 labor unrest in Bukit Asahan Malacca, the November 1967 hartal (general strike) in Penang and the May 1969 racial riot in Kuala Lumpur. This resulted in the arrests of opposition politicians under the ISA throughout the 1960s. The more prominent among them included PRM President Ahmad Boestaman, PAS President Dr. Burhanuddin Al-Hilmi, LPM President Ishak Haji Muhammad, National Convention Party (NCP) President Abdul Aziz Ishak, DAP Secretary-General Lim Kit Siang, Socialist Front President Hasnul Hadi and LPM/Socialist Front leaders Lim Kean Siew and Karam Singh. In Singapore, protests against the formation of Malaysia in 1963 resulted in the arrest of more than one hundred opposition leaders, mainly of the left wing Barisan Sosialis and the Singapore People's Party. While the government cited security reasons for the arrest of the opposition leaders under the ISA, the law had in fact been a useful tool to eliminate political opponents, especially the “leftist” politicians who could easily be linked to the communists for their political views.

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16 Following the March 1967 labor unrest in Bukit Asahan, Malacca, more than 90 persons were detained under the ISA. Among those arrested was Socialist Front leader and Member of Parliament, Karam Singh. The Statement of Allegations of Fact furnished to him upon his arrest mentioned, among others, his election as legal adviser of two pro-Communist organizations, involvement in public rallies organized by the Labour Party of Malaya and the Socialist Front, involvement with anti-Malaysia elements during the 1964 confrontation with Indonesia, possessing books containing Communist viewpoints and playing prominent role in fomenting labor unrest in Bukit Asahan (Karam Singh v Minister of Home Affairs, Malaysia [1969] 2 MLJ 129, p.p. 5).

17 Following the devaluation of the British currency in November 1967, the Malaysian government devalued its old sterling-based currency, making it 15 percent less valuable than the new gold-based currency. This sparked protests from the people, especially the poor, who were concerned about the sudden drop in the value of the old currency in their possession. The LPM called for a hartal (general strike) to protest against the devaluation. The protest however turned into ethnic violence when Malays, who seemed to ignore the hartal, clashed with non-Malays. 29 people were killed, 200 were injured and some 1300 were arrested. The government claimed that the communists were responsible for the incident. See Snider (1968: 966).

18 Aziz Ishak was a former Vice-President of UMNO and Minister of Agriculture in the first cabinet of Prime Minister Tunku Abdul Rahman. He fell out with the Tunku due to his dissatisfaction with the latter’s conciliatory attitude toward Chinese businessmen and politicians. See Abdul Aziz (1977).

19 The arrested leaders were labeled as communists or communist agents. Among them were the Barisan Sosialis Secretary-General, Lim Chin Siong, and the People’s Party of Singapore Chairman, Said Zahari. With most of the opposition leaders in jail, the ruling People’s Action Party (PAP) easily gained sweeping victory in the 1964 general election. See Said (2001: 198).

The Challenge to the Terms of the Constitutional Contract, 1957 - 1970

The main thrust of the constitutional contract, i.e. the special position of the Malays and the legitimate interests of other ethnic communities, remained the main subject of contestation among the major communal groups in post-independent Malaya. The pressures, either for the rigorous implementation or abandonment of the terms of the constitutional contract, were fomented not only by the opposition leaders, but also by the Alliance leaders and rank-and-file.21 This, in turn, placed the Alliance in a difficult position to maintain its policy of inter-communal compromises while at the same time commanding solid communal support. Consecutive federal election results underlined the Alliance's problem. Its share of popular votes plunged from a high as 79.6 percent in the 1955 pre-independence federal election to 51.5 percent in 1959, and then rose slightly to 58.5 percent in 1964 only to drop again to barely 48.4 percent in 1969. By 1969, manipulation of communal issues by the opposition in order to outbid the Alliance on the terms of the constitutional contract had seriously challenged the Alliance's formula of inter-communal compromises.

Constitutional Contract Issues in Elections

In three consecutive general elections held after the independence, the Alliance faced intense challenge from the opposition political parties which espoused the more hard-line approach to communal issues. In the run-up to the 1959 federal elections, PAS called for the setting up of an Islamic state and the restoration of Malay supremacy.22 Parti Negara, a right-wing Malay political party led by former UMNO

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21 UMNO Vice-President Abdul Aziz Ishak and MCA President Lim Chong Eu were vocal in promoting communal interests to the extent that they fell out with other Alliance leaders. Aziz left UMNO to form the National Convention Party (NCP) in 1964 and Lim founded the People's Movement of Malaysia Party (Gerakan) in 1969. Both were opposition parties. Gerakan however joined the expanded Alliance, the Barisan Nasional, in 1974.

22 PAS viewed the Alliance's compromises on communal issues as a sell-out to the non-Malays. The party thus demanded, among other things, that (1) citizenship laws should be more stringent in the case of "non-Malays"; (2) the establishment of Islam as the state religion should have more practical consequences favoring the Malays; (3) immigration laws should be more restrictive in regard to "non-Malays"; (4) the posts of Menteri Besar, ministers, governors, and heads of armed forces should be reserved for Malays; (5) Malay should immediately be made the country's national and only official language, and that education policies should be substantially changed so as to produce a far more
President, Dato' Onn Jaafar, pressed for more government action to preserve Malay rights and privileges. On the non-Malay side, the Perak-based People's Progressive Party (PPP) stood for equality and progress and demanded amendments to the constitution to provide for equal rights and privileges, multi-lingualism and one class of citizenship. The left-wing Socialist Front (SF), which consisted of the predominantly Chinese Labor Party and the Malay-based Parti Rakyat (People's Party), espoused a planned socialist economy and the elimination of racial separatism.

As new opposition political parties joined the fray, most notably two multi-racial but predominantly Chinese political parties - the Democratic Action Party (DAP) and the Parti Gerakan Rakyat Malaysia (Malaysian People's Movement Party, Gerakan) - the challenge to the Alliance's communal compromises intensified. The DAP, in its "Setapak Declaration", which set out its manifesto for the 1969 federal election and served as the basis for the party's ideology, rebuked the idea of "racial hegemony by one community", meaning Malay hegemony, as inimical to nation-building. It blamed the Alliance for perpetuating racial discrimination which generated deep feelings of cultural insecurity on the part of the non-Malays. Vowing to create a "Malaysian Malaysia", the DAP stated its commitment to "a free, democratic and socialist Malaysia, based on the principles of racial equality and social and economic justice, and founded on the institutions of parliamentary democracy". Meanwhile, the Gerakan, with the slogan of "Equality, Justice and Equal Opportunity for All", called for special attention not only to the "economically weak Malays", but also to "other indigenous peoples, people in rural areas, the fishing community, estate workers, resettled new villages, squatters and the urban pronounced Malay orientation; and (6) a Malay nationality should be introduced (Vorys 1975: 148).

The salient items of PPP's manifesto were: (1) the acceptance of Chinese and Tamil as official languages (with Malay recognized as the national language); (2) a common citizenship law for everyone, based on the full application of jus soli principle; (3) equal privileges for all Malaysians; and (4) the amendment of immigration and education laws, in order to give equal treatment to all communities (Vorys 1975: 149).

Smith(1960: 43-44).

Both political parties demanded that Chinese, Tamil and English should be accepted as the media of instructions in schools.27

These opposition political parties managed to gain substantial support in elections held between 1959 and 1969. PAS increased its representation in the Dewan Rakyat from one seat in 1955 to 13 in 1959. Although it only managed to win 9 seats in 1964, it won 12 in 1969. The party also captured two east coast-Malay heartland states of Kelantan and Terengganu in the 1959 election. While the party lost Terengganu to the Alliance in 1961, it continued to govern Kelantan until 1977.28 The Socialist Front won eight parliamentary seats and 16 state seats in 1959. However, faced with the government crackdown due to its leftist ideology, it only won two parliamentary seats and five state seats in 1964.29 The PPP won four parliamentary seats and 8 state seats in 1959. Though the party's stake in the federal and state legislatures fell to two and five seats respectively in 1964, it regained its strength by winning four parliamentary seats and 12 state seats in 1969. The two first timers in the 1969 general election, the Gerakan and the DAP, performed more impressively. The Gerakan, won eight parliamentary seats and 26 state seats in the election, and gained control over the state of Penang.30 The DAP won 31 parliamentary seats and 31 state seats in the election.31 In total, the opposition won 55 parliamentary seats in the 1969 general election in Peninsula Malaysia as against the Alliance's 66.32 Stalemate occurred in Selangor when both the Alliance and the opposition parties were short of a clear majority to form state government. In Perak, a PAS assemblyman held the balance in the state legislature when the other opposition political parties, namely the PPP, the Gerakan and the DAP, won a total of 19 seats to

27 Drummond & Hawkins (1970: 324). The DAP demanded that the three languages be given official status.
28 PAS lost Terengganu to the Alliance after two of its state assemblymen and all four assemblymen from Parti Negara defected to the Alliance in November 1961 (Means 1976: 232). The UMNO-Berjasa Alliance gained control over Kelantan in the 1978 general election.
29 The SF was dissolved in 1966. The LPM boycotted the 1969 election, while the PRM proceeded with the election but won only two state seats.
30 The Gerakan's predecessor, the United Democratic Party (UDP), won only one parliamentary seat and four state seats in 1964.
31 The DAP's predecessor, the Singapore-based People's Action Party (PAP), won only one parliamentary seat in 1964.
32 Due to racial rioting in Kuala Lumpur, elections in Sarawak and Sabah were postponed. However, the Alliance's tally rose to 76 with the addition of ten uncontested victories in Sabah.
match the Alliance’s 19. It became clear that by 1969, the challenge to the Alliance and its policy of communal compromises had reached a high water mark.

The 1969 Racial Riots and Emergency Rule

The manipulation of communal issues for political gain reached its peak when post-election racial rioting broke out in Kuala Lumpur on 13 May 1969. This in turn prompted the government to use repressive laws to maintain public order and to expand its legal powers. A state of emergency was proclaimed on 15 May 1969 and parliamentary government was suspended. The government immediately enacted the Emergency (Essential Powers) Ordinance No. 1, which gave the Yang di-Pertuan Agong wide powers to make any regulations which he considered desirable or expedient for securing the public safety, the defense of the country, the maintenance of public order and of supplies and services essential to the life of the community. However, under the Emergency (Essential Powers) Ordinance No. 2, the entire executive authority of the Federation, and the legislative powers of the Yang di-Pertuan Agong set out in the Ordinance No. 1, were delegated to the Director of Operations, Tun Abdul Razak, who was also the Deputy Prime Minister. Razak led the all-powerful National Operation Council which ran the country’s administration during the emergency.

It was during the continuance of the emergency that a number of repressive laws were passed. These included the Emergency (Security Cases) Regulations 1975 (ESCAR), which simplified the rules pertaining to criminal trials in "security

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34 The racially charged campaign prior to the 1969 general election and a non-Malay victory procession held in the heart of Kuala Lumpur one day after the full election results were announced, prompted a violent response from radical Malays. Official figures revealed that 196 people were killed and 493 injured during the bloodiest racial clash in Malaysia’s history (Government of Malaysia 1969:88-90). For description of events before, during and after the riots, see Tunku Abdul Rahman (1969) and Slimming (1969).
35 Because the Emergency was proclaimed after the Parliament was dissolved prior to the 1969 general election, and the election had not been completed in Sabah and Sarawak, there was practically no Parliament to meet (Harding 1996: 42).
cases"; 36 the Emergency (Internal Security) (Modification of Laws) Ordinance 1969, which extended the use of ISA as an emergency law; the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (EPOPCO), which provided for preventive detention without trial; and the amendment to the Sedition Act 1948, which made seditious the questioning of the position of Malay Rulers, the Malay special privileges, the legitimate interests of the non-Malays and their citizenship rights. The whole country was also designated as a security area under the ISA, making unlawful possession of firearms anywhere in the country an offence punishable by death. 37 As the 1960 amendment to Article 150 envisaged that these emergency ordinances would be valid unless and until they were annulled by the Parliament, and that there had been no such annulment, the laws not only remained valid but also greatly enhanced the state’s capacity to deal with subversive elements, as well as its political opponents, beyond the period during which the country can properly be said to be in an actual state of emergency. 38

Though the main objective of the emergency was to return the country to normal parliamentary government, the passage of various ordinances under the emergency powers in essence led to the expansion of state legal powers. What is more, the emergency and anti-subversion laws became a permanent feature of the legal system, the application of which was extended to normal times. In a political system where government was dominated by a ruling coalition of political parties, the expansion of state legal powers enhanced the ruling coalition’s capacity to maintain and strengthen itself in power. Indeed, with the proclamation of emergency and the suspension of parliamentary government following the 1969 racial riots, at a time when political competition was intense and the terms of the constitutional contract were severely contested, the Alliance was supplanted by Barisan Nasional (National Front), an enlarged coalition of ruling political parties

36 These are cases related to unlawful possession of firearms, ammunition or explosives, and other cases certified by the Attorney-General as being security cases. The simplified rules included hearing by a judge sitting alone (without jury), the court being specified by the prosecution, no preliminary enquiry, allowing combined trial of multiple accused and offences not relevant to each other, non-disclosure of witness identity, and hearsay evidence being made admissible (Harding 1996: 44).


38 As the 1969 Proclamation of Emergency has never been revoked, legal experts argued that Malaysia is still under the state of emergency (Harding 1996).
consisting the original three Alliance parties and the former opposition PAS and GERAKAN, with new coalition rules that consolidated the political position of UMNO as the backbone of BN and allowed it to determine the future direction of policies on communal relations in Malaysia.

The Re-affirmation of the Pro-Malay Terms of the Constitutional Contract and the Expansion of State Power, 1971-1990

The 1969 racial riots served as an indication that race relations in post-independent Malaya were still fragile. The Malays were alarmed by the widening economic gap between them and the non-Malays, especially the Chinese, while the non-Malays on the other hand were increasingly dissatisfied with the Malay dominance in politics. The tendency to openly criticize and ridicule communal interests, as indicated by the events leading to the racial riots, proved to be fatal.

Subsequent to the tragedy, there had been a change of guard in UMNO and the realignment of the economic and political arrangement between the major communal groups. Tun Abdul Razak, who succeeded Tunku Abdul Rahman as the Prime Minister in 1971, pushed through the pro-Malay New Economic Policy in response to concerns among the Malays that the Tunku’s more conciliatory attitude toward the non-Malays had jeopardized Malay interests. The policy aimed at restructuring the society by eliminating the identification of race with economic function and eradicating poverty. In this regard, new laws were enacted in order to increase the state’s interventionist role in the economy. While a new “national ideology”, called the Rukunegara, was devised with its primary aim to forge national unity, sweeping amendments were made to the Federal Constitution and the Sedition Act to expand the state’s legal powers to curb public debates on

39 In the aftermath of the May 13 racial riots, the government was also concerned with the problem of national integration which impinged on its own political legitimacy. As a result, the Department of National Unity was set up to study, evaluate and implement economic and social programs designed to promote national integration. This new department was also assigned the task to formulate a “national ideology” which would serve as the nexus uniting the Malaysian people. Consequently, a National Consultative Council (NCC) composed of 65 members representing federal and state governments, political parties and functional interest groups was set up in January 1970. Its main task was to advise the government on ways and means to achieve national integration (Means 1976: 400).
communal issues, which were deemed to be sensitive. In a move to minimize excessive manipulation of the communal issues for electoral gain, the major opposition political parties were co-opted into an expanded ruling coalition called the Barisan Nasional (BN, National Front), which replaced the Alliance in 1974.  The government also re-delineated electoral boundaries to amplify Malay political power and amended the Federal Constitution to re-affirm the pro-Malay terms of the constitutional contract. While these measures to some extent helped contain communal tension, they had also expanded the state's legal powers and increased the government's capacity to consolidate its political position.

The Rukunegara

In view of the pressing need to instill a common feeling toward nationhood and national unity among Malaysians of all races, the Rukunegara (The Pillars of the Nation) was launched on 31 August 1970. It reminded Malaysians of all races to appreciate the diverse social and cultural values that existed in their multiracial society and the possible misgivings that such diversity might cause them if no serious effort at nation building was done. Toward this end, the Rukunegara set out the principles that would serve as guides to common understanding and unity. The principles are belief in God, loyalty to the King and the country, upholding the Constitution, rule of law and good behavior and morality. Explanation to these five principles generally assert that although Islam is the official religion of the

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40 The Barisan Nasional (National Front, BN), which replaced the Alliance in 1974, co-opted two major non-Malay opposition parties, the People's Progressive Party (PPP) and the Gerakan, and the Malay/Muslim opposition party, Parti Islam Se-Malaysia (PAS).

41 The proclamation reads:

Our Nation, MALAYSIA, being dedicated to achieving greater unity of all her people;

to maintaining a democratic way of life;

to creating a just society in which the wealth of the nation shall be equitably shared;

to ensuring a liberal approach to her rich and diverse cultural traditions;

to building a progressive society which shall be oriented to modern science and technology;

WE, her peoples, pledge our united efforts to attain these ends guided by these principles -

Belief in God

Loyalty to King and Country

Upholding the Constitution

Rule of Law

Good Behavior and Morality (Government of Malaysia 1977: 6).

Federation, other religions and beliefs may be practiced in peace and harmony. Every citizen was expected to be faithful and bear true allegiance to the Yang di-Pertuan Agong and respect the historical background of the Constitution, which led to the provisions relating to the position of Malay Rulers, Islam as the official religion, the special position of the Malays and other natives, the legitimate interests of other ethnic communities and the conferment of citizenship. The Rukunegara also stressed that each and every citizen is equal before the law and he may enjoy his rights to fundamental liberties subject only to limitations imposed by law. On morality, individuals and groups were expected not to violate any of the accepted canons of behavior, which included the abhorrence and rejection of any conduct or behavior which is arrogant and offensive to the sensitivities of any group.\(^43\)

The 1971 Constitutional Amendment

Complementing the Rukunegara was the 1971 constitutional amendment aimed at providing further safeguards to the communal terms of the constitutional contract. These are the whole of Part III (those provisions relating to citizenship), Article 152 (Malay as National Language and the position of languages other than Malay), Article 153 (special position of the Malays and legitimate interests of other ethnic communities) and Article 181 (sovereignty of Malay Rulers). The National Operations Council, considering these provisions as a binding agreement between the various races in the country, proposed the barring of public debate on the sensitive issues relating to the agreement.\(^44\) Article 10 of the Federal Constitution was amended by inserting a new Clause (4) to allow the Parliament to pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 and 181 of the Federal Constitution, other than in relation to their implementation as may be specified in such law. The government also felt that the prohibition should be extended to the debates in the federal and state legislatures.

\(^44\) Government of Malaysia (1969: 82-85).
As such, Article 63 was amended by inserting a new Clause (4) to exempt a Member of Parliament from parliamentary privileges if he was charged with an offence under the law passed by Parliament under Clause (4) of Article 10 or with an offence under the Sedition Act 1948. Article 72(4) was also amended to bar members of the State Legislative Assemblies from debating the sensitive issues, except in regard to their implementation.

The ambiguities in the use of Bahasa Malaysia for official purposes were also clarified. A new Clause (6) was inserted under Article 152 which defined official purpose as "any purpose of the Government, whether Federal or State, and includes any purpose of a public authority". This amendment, however, did not affect the use of English for official purposes in the states of Sabah and Sarawak for a period of ten years after Malaysia Day. More substantial was the amendment to Article 153 in regard to the special position of the Malays and the natives of Sabah and Sarawak, or the Bumiputeras. A new Clause 8A was inserted to allow the Yang di-Pertuan Agong to direct universities, colleges and educational institutions providing education after the Malaysian Certificate of Education (MCE) or its equivalent to reserve certain numbers of places to Bumiputra students. This was intended to remedy the problem of low number of Bumiputra students pursuing tertiary education in professional and technical courses compared to the non-Bumiputera students. Pursuing technical and professional degrees, which provided better job opportunities in the modern sector of the economy, was deemed to be one of the most important prerequisites to the Bumiputera's upward social mobility.

Further safeguards were put in place for the constitutional provisions on the sensitive communal issues. Article 159(5) provided that, in addition to the Articles

45 For a discussion on the meaning of "official purposes" and its relation to the right to teach or learn in languages other than Malay, see Sinnadurai (1986: 33-36).
46 The Malaysia Day refers to the day Malaysia was formed on 16 September 1963.
47 This was in case where the number of places offered by those institutions for any course of study was less than the number of candidates qualified for such places.
48 The figures for the 1969/1970 enrolment of first year students at University of Malaya showed that only five out of 114 students enrolled for engineering courses were Malays. For science courses, it was 79 out of 307 students, medicine (50 out of 116), and economics and administration (197 out of 507) (Means 1972: 45).
enumerated in Clause (5) of Article 159, no amendment shall be made to the provisions contained in Article 10(4) (restrictions on freedom of speech) or any law passed there under, Part III of the Constitution (provisions relating to citizenship), Article 63(4) (the questioning of sensitive issues in Parliament), Article 72(4) (the questioning of sensitive issues in State Legislative Assemblies) and Article 152 (National Language) without the consent of the Conference of Rulers. Defending the exclusion of sensitive issues from the realm of public debate and further safeguards for the provisions on the communal agreement, Tun Abdul Razak gave a somewhat "balanced" view of the Constitution:

The basic provisions relating to the acquisition of citizenship represented a fair and balanced compromise. The same careful and balanced approach runs through the other provisions of the Constitution protecting the legitimate rights of all races in Malaysia. Thus, the provisions relating to the special position of the Malays are balanced by the guaranteed protection of the legitimate interests of the other communities and by the citizenship provisions ... The provisions relating to the position of Bahasa Malaysia as the sole official and National Language is balanced by the guarantee for the use of the languages of other races other than for official purposes. As regards the provision relating to the sovereignty of the Rulers, surely no one will agree that their position should ever be open to attack or challenge ... These are the main provisions of our Constitution relating to issues which may be regarded as sensitive. These must be removed from the realm of public discussion which could lead to the exploitation of these issues by irresponsible elements to the detriment of all our people. The careful and balanced provisions of our Constitution guaranteeing legitimate interests of all races in Malaysia are the very foundation upon which this nation exists. To challenge them is to challenge the very principle upon which the nation rests.50

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50 These are Article 38 (the constitution and functions of the Conference of Rulers), 70 (precedence of Rulers and Yang di-Pertua Negeri), 71(1) (Federal guarantee for constitutional rights and privileges of State Rulers) and 153 (special position of the Malays).

51 Hansard, 23 February 1971.
The NEP was introduced in 1971 with the two-pronged goal of reducing and eventually eradicating poverty irrespective of race and accelerating the process of restructuring Malaysian society to correct economic imbalance, so as to reduce and eventually eliminate the identification of race with economic function. While the first objective was to be achieved through the opening up of educational and economic opportunities for the poorest section of the society, the second objective required the implementation of an expanded system of Bumiputera special privileges in the grant of government contracts and licenses as well as in the acquisition of shares in public and private companies. To ensure upward social mobility of the Bumiputera community, the government aimed at increasing Bumiputera employment in the modern sector of the economy from 33.8 percent in 1970 to 62.6 percent in 1990. Bumiputera corporate equity ownership was also set to increase from 2.4 percent in 1970 to 30 percent in 1990. As part of the efforts to increase the upward social mobility of Bumiputeras, the government opened up more opportunities for the Bumiputeras to get vocational and entrepreneurial training, tertiary educational opportunities, scholarships and financial assistance to set up businesses.

Among the important regulatory legislation which helped the government to achieve its social restructuring objective under the NEP were the Industrial Coordination Act 1975 and the Petroleum Development Act 1974. The "Guidelines for Equity Participation under the Industrial Coordination Act 1975" dated 28 October 1975 stipulated that only up to 30 percent foreign equity participation would be allowed for new import substitution industrial projects where local...
technology was not sufficiently available. 100 percent foreign equity would be allowed for projects which were 100 percent export oriented. In all other cases, between 30 and 75 percent foreign equity would be allowed depending on the use of local materials and the portion of units exported. Manufacturing industries were required to ensure 70 percent corporate equity ownership by Malaysian citizens by 1990. In order to exempt small Chinese businesses from the restructuring exercise, the government in 1977 adopted the equity ownership requirement only for projects with fixed investment amounting to RM 500,000 or more. Vigorous implementation of the guidelines under the Industrial Coordination Act led to the sudden surge of Bumiputera equity in manufacturing projects approved by the Ministry of Trade and Industry between 1975 and 1985. During this period, Bumiputera equity constituted no less than 40 percent of all projects approved annually, except in 1978 when it dropped to only 33.3 percent. Overall Bumiputera's corporate equity ownership increased from 2.4 percent in 1970 to 19.1 percent in 1985.

Economic recessions in the mid 1980s, coupled with pressures from foreign and local Chinese capital, however, set limits to the efficacy of the Industrial Coordination Act as a social restructuring instrument. In direct response to the 1985 recession, corporations producing 80 percent or more for export markets were allowed to maintain up to 80 percent foreign equity. The limit to shareholders' fund was also raised to RM 1 million with workforce of at least 50 full time paid workers. In 1986, the limits to shareholders' fund were raised to RM 2.5 million and the number of full-time paid workers to 75. These relaxations allowed smaller manufacturing projects to be exempted from the ICA's foreign equity requirement, causing a sudden drop in the Bumiputera equity in manufacturing projects approved by the Ministry of Trade of Industry between 1985 and 1990. Bumiputera equity in

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55 Though the non-Bumiputeras were disadvantaged by the NEP, their share of corporate ownership stood at 46.2 percent by 1990, surpassing its 40 percent target. They made gains in sectors which were least controlled by the state such as service and construction. Yasuda (1991).
56 Yasuda (1991: 340). It should be noted however that substantial portion of the equity was owned by State Economic Development Corporations.
this sector plunged from 54.4 percent in 1985 to 37.6 percent in 1986, 29.4 percent (1987), 12.1 percent (1988), 9.8 percent (1989) and 16.4 percent (1990).57

Another significant legal instrument for social restructuring under the NEP was the Petroleum Development Act 1974, which established the national oil company, *Petroliam Nasional Berhad* (Petronas).58 Prior to the incorporation of Petronas, the offshore and onshore exploitation of oil resources was carried out by foreign companies which worked under a concession system with the relevant state governments. There was no standard agreement between the state governments and the oil companies. The states normally acted as tax or royalty collectors, while complete freedom in the management of the oil resources was vested in the oil companies.59 The oil shortage that plagued the world in the 1970s and the pressing need for cheap energy to fuel Malaysia's march toward rapid industrialization prompted the government to exercise greater control of its oil resources. Furthermore, greater control of the oil industry, with its lucrative downstream and upstream activities, would provide important resources for the government to finance its social restructuring efforts under the NEP.

The exclusive control of the oil industry was given to Petronas, a government instrument, 60 which is subject to the control and binding direction of the Prime Minister.61 The Petroleum Development Act, vested in Petronas "the exclusive rights, powers, liberties and privileges of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia".62 The rights so vested "shall be irrevocable and shall enure (sic) for the benefit of the Corporation

57 Non-Bumiputera equity also experienced similar drop. The real beneficiary of the policy relaxation was foreign investors whose equity in such projects increased from 17.8 percent in 1985 to 28 percent in 1986, 49 percent (1987), 57.9 percent (1988), 73.9 percent (1989) and 64.3 percent (1990). See Yasuda (1991: 340).

58 Petronas, modeled after Indonesia’s national oil corporation, PERTAMINA, is a hybrid of a government company and a statutory corporation by virtue of its incorporation under the Companies Act 1965 and the conferment upon it of special powers and privileges under the PDA. For further discussion on its hybrid legal structure see Singh (1976).


60 Petronas’ status as a government instrumentality is determined by the degree of Executive control over it. See Moorothy (1983: 83).

61 Section 3(2).

62 Section 2(1).
and its successor.\textsuperscript{63} The Act also prohibited the carrying out of "business of processing or refining of petroleum or manufacturing of petro-chemical products from petroleum" by any person other than Petronas except with permission from the Prime Minister.\textsuperscript{64} The amendment to the Petroleum Development Act in 1975 gave exclusive rights to Petronas to carry out business in marketing and distribution of petroleum and petro-chemical products in order to increase Bumiputera participation in downstream activities.\textsuperscript{65} The law also required companies which carried out business in the downstream sector to issue management shares for cash to Petronas.\textsuperscript{66}

The government control of the oil industry through the Petroleum Development Act had opened up opportunities for the Bumiputeras to have greater participation in the industry. In 1989, Bumiputera participation was about 45 percent, with Petronas alone awarding 73.6 percent or RM 1.2 billion of its jobs to Bumiputera companies.\textsuperscript{67} The entry of Petronas Dagangan Berhad (PDB), a subsidiary of Petronas, into retail business in 1982 witnessed the number of Bumiputera-operated petrol station soared from 387 (30 percent) in 1982 to 1,590 (63 percent) in 2000.\textsuperscript{68}

Large Bumiputera companies such as Halim Mazmin and Bumi Armada (shipping), 0065

\textsuperscript{63} Section 2(3). As Clause 2(c) of the State List under the Federal Constitution provides that "permits and licences for prospecting for mines; mining leases and certificates" is within the province of each state, Petronas could only have exclusive claim to petroleum resources after various state governments transferred their jurisdiction over their petroleum resources to it. Though a combination of party pressures and financial inducements was successful in persuading the states to sign agreements giving Petronas exclusive rights over petroleum resources, one state proved to be difficult to acquiesce. Sabah did not sign agreement with Petronas until June 1976. Only when Tun Mustapha was replaced by Tun Haji Mohammed Fuad as Chief Minister was the agreement with Petronas signed (Singh 1976: 130; Gale 1981: 1133).

\textsuperscript{64} Clause 2(c) of the Petroleum Development (Amendment) Bill 1973. See also the speech by Deputy Minister in the Prime Minister's Department, Datuk Abdullah Ahmad, moving the Bill in the Dewan Rakyat on 4 April 1975.

\textsuperscript{65} See Clause 3 of the Petroleum Development (Amendment) Bill 1975. The Parliament however repealed the management shares provisions of the PDA in December 1976 after strong protests from foreign oil companies. Section 6 of the PDA which requires any persons, other than Petronas, to obtain license from the Prime Minister in order to carry on business of manufacturing, marketing and distribution of petroleum and petro-chemical products was also amended. The amendment empowers the Prime Minister to exempt certain business activities relating to petroleum and petro-chemical products from the licensing requirement. Section 9 was also amended to provide for adequate compensation should no extension was granted to the existing exploration licenses, leases or agreements. See Far Eastern Economic Review, 10 December 1976, Hansard, 16 December 1976.

\textsuperscript{66} Business Times, 27 November 1990.

\textsuperscript{67} Out of 526 petrol stations owned by PDB in 2000, 501 (96 percent) were operated by Bumiputeras. See Business Times, 3 May 2000.
Dialog Group (oil and gas equipment manufacturing) and Ranhill (engineering, turnkey construction) also secured lucrative contracts from Petronas. The national oil company also helped develop Bumiputera companies through its Vendor Development Program (VDP) which was introduced in the early 1990s. By 2000, 42 Bumiputera companies successfully participated in the VDP program, with six of them managed to expand their services overseas.69

The Pro-Malay Cultural Terms

At the insistence of the Malay nationalists, the government introduced the National Cultural Policy in 1971. The policy recognized the centrality of Malay culture and Islam, but accepted elements of Chinese, Indian, Arab, western and other cultures as part of the national culture as long as they are consistent with the Federal Constitution, the Rukunegara, national interests, universal moral values and spiritual values of Islam as the state religion. The Ministry of Culture, Youth and Sports was tasked with promoting the national culture through active research, education and cultural activities.70

Although the National Cultural Policy recognized the elements of other cultures, including the Chinese and Indian cultures, as part of the national culture, it was not uncommon for Malay administrators to consider non-indigenous cultures as inimical to the National Cultural Policy.71 In this regard, laws which required the issuance of permits or licenses to organize cultural performances in public were used to exert more government control on the performing arts which were deemed

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70 Government of Malaysia (1971). In the 1970s, the Cultural Division of the Ministry of Culture, Youth and Sports, headed by a Director, was organized into three sections: (i) Research (into Indigenous culture); (ii) Promotion and Training (for organizing training programs, festivals, and competitions in folk dance, music, handicraft; traditional games, and theatre); and (iii) Cultural Productions (comprising a folk dance and music company performing locally and abroad) (Tan 1990: 138).
71 For example, performances of "foreign" dances in public and at schools were often restricted. In August 1984, the Ministry of Education issued guidelines on approved cultural activities to school headmasters. The guidelines mentioned, among others, traditional Malay dances such as iriang, zapin, jogel and kuda kepang as approved cultural activities. Foreign dances were allowed if they conform to the National Cultural Policy (Kua 1990: 36).
inconsistent with the National Culture.\textsuperscript{72} The Police Act 1967 (Revised 1988), which requires license to hold public assembly,\textsuperscript{73} was used to control cultural performances in public.\textsuperscript{74} Non-Malay cultural groups complained that applications for license to hold cultural performances were sometimes denied.\textsuperscript{75} Even if they were allowed, it was often at the very last minute and, in some cases, the performance had to be cancelled because of extensive government censorship.\textsuperscript{76}

The position of Malay as the national language was also strengthened as part of the effort to promote national unity. This envisaged the conversion of non-Malay-medium schools into a national system of Malay-medium schools attended by pupils of all races.\textsuperscript{77} In 1970, the Minister of Education invoked his power under section 21(2) of the Education Act 1961 to convert all English medium national-type primary schools into Malay medium national schools. By 1976, all English-medium primary schools were completely converted to national primary schools and, by 1982 all English-medium secondary schools in the Peninsular Malaysia were converted to national secondary schools.\textsuperscript{78} However, concerned with the possible negative

\textsuperscript{72} Carsten (1999: 20).
\textsuperscript{73} Section 27(2) of the Police Act provides that “Any person intending to convene or collect any assembly or meeting or to form procession in any public place aforesaid, shall before convening, collecting or forming such assembly, meeting or procession make to the Officer-in-Charge of the Police District in which such assembly, meeting or procession is to be held an application for a licence in that behalf”.
\textsuperscript{74} The performing arts are also regulated by the Theatres and Places of Public Amusement (Federal Territories) Act 1977, which requires a license to open a theatre or place of public amusement. For the purpose of considering the application for a license, a licensing officer may require the applicant to furnish him the script and particulars of persons who promote and who have agreed to participate in the theatrical performance as well as the interests which they represent, and “the purposes to which any profits from the theatrical performance or public amusement are intended to be or have been applied”. Licensing of theatres, cinemas and places of public amusement is also regulated under various state laws.
\textsuperscript{75} One such example was police refusal to issue permit to Chinese groups to organize lion dances in July 1982. The refusal was made on the ground that official directives permitted the lifting of a ban on lion dances only during the Chinese New Year. Defending the decision, Tan Sri Ghazali Shafie, Foreign Minister and an ideologist of the National Culture, argued that only characteristics of art which are based on Malay identity could be accepted as elements of the National Culture (Kua 2005: 27).
\textsuperscript{76} Tan (1990: 146).
\textsuperscript{77} See Government of Malaysia (1964).
\textsuperscript{78} Solomon (1988: 46). When the government embarked on the conversion exercise in the 1960s, 55 out of 71 Chinese secondary schools were converted to national-type secondary schools, leaving only 16 independent non-government Chinese secondary schools which used Chinese as a medium of instruction. Although the national-type secondary schools used Bahasa Malaysia as the main medium of instruction, certain subjects (such as the Chinese language and the Chinese literature) could be taught in Chinese for 1/3 of the total number of periods in a week. That worked out to be at least 13
reactions from the Chinese and Indian communities, the conversion exercise was carried out without affecting the status of the Chinese and Tamil national-type primary schools. By the mid-1980s, all examinations in national schools were fully conducted in Bahasa Malaysia.

In 1970, the country's first Malay-medium university, the Universiti Kebangsaan Malaysia (National University of Malaysia), was set up with a mission "to be the premier university that affirms and promotes the values of the Malay Language, while globalizing knowledge within the framework of the national culture". Beginning with only 192 students, 78 academic staff and three faculties namely, Faculty of Arts, Faculty of Science and Faculty of Islamic Studies, the university had developed into one of Malaysia's premier public universities by the 1990s. In 1982, all public universities were instructed to start first-year courses in Malay. The position of the Malay language was further strengthened by amendments to the National Language Act in 1983 and 1989. The former allowed the coming into force of the Act in Sabah and Sarawak, while the latter was to make compulsory the use of national language in all court proceedings, except in the giving of evidence by a witness. By 1990, the government strictly enforced the use of Bahasa Malaysia for official correspondence, and occasionally directed private companies to enhance its usage.

periods a week. All national-type secondary schools received financial assistance from the government. See Yong (2003).

79 Report of the Cabinet Committee on the Implementation of the National Education Policy 1979, or the Mahathir Report, cited "current political climate" as an obstacle to the full implementation of the National Language as the sole medium of instruction in all primary schools (Government of Malaysia 1979: 16).

80 Abdul Samad et al. (2002:3)

81 Abdul Samad et al. (2002:2)

82 During this period, the university intake for Malay students also increased significantly. By 1985, the number of Bumiputera students pursuing degree courses in local tertiary institutions surpassed that of other ethnic groups. There were 23,841 Bumiputera students (63.5 percent), 11,241 Chinese (29.9 percent) and 2,473 Indians (6.6 percent) enrolled in the seven public universities. MARA Institute of Technology (ITM) and the MCA-run Tunku Abdul Rahman College (TAR College). See Government of Malaysia (1986: 490-491).

83 The Court, however, "may either of its own motion or on the application of any party to any proceedings and after considering the interests of justice in those proceedings, order that the proceedings ... shall be partly in the national language and partly in the English language". See Section 8 of the National Language Act.

84 Straits Times, 13 June 1990.
Apart from the national culture and language, another important pro-Malay cultural term that was re-affirmed in the 1970s and 1980s was Islam. Faced with the emerging sense of Islamic revivalism among university students in the 1970s, as well as the growing influence of Islamic da'wah organizations, the government introduced Islamic-oriented policies, expanded Islamic bureaucracy and set up more Islamic institutions entrusted with the task to promote Islamic da'wah, education and economy. On the verge of the 1982 general election, the then Prime Minister Dr. Mahathir Mohamad co-opted the then President of the Muslim Youth Movement of Malaysia (ABIM), Anwar Ibrahim, into the ranks of UMNO. Anwar, who rose to become the party's Deputy President and Deputy Prime Minister in 1993, played a key role in promoting Islamic oriented policies and in the setting up of state-sponsored Islamic institutions.

Resistance and Control

The re-affirmation of the pro-Malay terms of the constitutional contract caused disaffection among the non-Bumiputeras who viewed this policy as a deliberate attempt to disregard their legitimate interests. At the same time, the NEP had also

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85 Literally means spreading the teachings of Islam.
86 Anwar contested the Permatang Pauh parliamentary seat in the 1982 general election as an UMNO candidate. He won the election and was subsequently appointed as a deputy minister in the Prime Minister's Department. In the cabinet, he served as the Minister of Culture, Youth and Sports (1983-1985), Minister of Agriculture (1985-1986), Minister of Education (1986-1991), Minister of Finance (1991-1998) and Deputy Prime Minister (1993-1998). He also rose through the ranks of UMNO to become its Youth Chief (1982-1987), Vice-President (1987-1993) and Deputy President (1993-1998). In 1998, he was sacked from the government and the party for allegations of corruption and sexual misconduct. Anwar claimed that the allegations were trumped up by his political enemies in UMNO who wanted to end his political career. See further discussion on the Anwar case in Chapters 5 and 6.
87 These include the introduction of Dasar Penerapan Nilai-Nilai Islam (Inculcation of Islamic Values Policy) and the setting up of Islamic institutions such as the International Islamic University Malaysia and the International Institute of Islamic Thought and Civilization (ISTAC). Anwar, who became the Minister of Education in 1986, also played key role in the formulation of the National Education Philosophy which reflects some basic elements of Islamic education. "Education in Malaysia," the national philosophy proclaims, "is an on-going effort towards further developing the potential of individuals in a holistic and integrated manner, so as to produce individuals who are intellectually, spiritually, emotionally and physically balanced and harmonic, based on a firm belief in and devotion to God". The philosophy bears a resemblance to the aim of Islamic education declared at the First World Conference on Muslim Education held in April 1977 in Mecca. Syed Muhammad Naquib Al-Attas, a leading advocate of Islamic education and one of the key speakers at the conference, was the intellectual mentor of Anwar.
created greater expectation among the Malays who demanded the government to take swift actions to address the problem of Malay economic backwardness, especially hard-core poverty among the rural Malays. As the NEP objectives could only be fully achieved in an expanding economy, depending mainly on rapid industrialization, there had also been a need on the part of the government to keep resistance among the workforce at bay. In all this, law assumed an important function as an instrument of political control, which was justified on the grounds of maintaining racial harmony, political stability and ensuring economic development.

(i) The Chinese Education and Cultural Community

Since the 1950s, the Chinese Education Movement had been wary of the British educational policies which were viewed as having negatively affected the future of Chinese education in Malaya. These included the policy which required the establishment of one type of primary school as an instrument for building a common Malayan identity which the movement viewed as inimical to the efforts at maintaining Chinese cultural identity. This has given rise to the formation of the influential United Chinese School Teachers Association (UCSTA) for the purpose of defending Chinese culture and education. During the 1955-1957 period, the UCSTA had been working very closely with the MCA to promote Chinese education, but beginning from the late 1950s the movement was embroiled in confrontation with the Alliance over its insistence on the official language policy. This confrontation led to the marginalization of the UCSTA by the MCA and the Alliance in the 1960s.88

The government’s pro-Bumiputera educational and cultural policies in the 1970s provided the Chinese educationists with new rallying points to pursue their struggle to defend Chinese education and culture. These included the government’s rejection of the proposal to set up the Chinese-medium Merdeka University89 and the ban on cultural activities which were deemed to be contrary to the National Culture. In March 1983, fifteen Chinese organizations issued a joint memorandum on the

88 Tan (1997).
89 See further discussion on the Merdeka University case in Chapter 4.
National Culture, which stressed the fundamental aspects of the multi-ethnic and multi-religious character of Malaysian society, the acceptance of which was essential to national unity. Believing that the national policies on language, education and culture were “heavily tainted with communalism and tend towards forced assimilation”, the organizations asserted that the policies had been formulated “from the perspective and stand-point of only one ethnic community”, obviously the Malays. A Joint Declaration issued by 24 Chinese guilds and associations in 1985 urged the government to give equal rights and privileges to all citizens regardless of race, religion, language and class, and abolish the distinction between the Bumiputera and non-Bumiputera community. The joint declaration blamed the New Economic Policy as the major cause of ethnic polarization and economic anomalies in the country and maintained that it should be eliminated. In place of the NEP, the Chinese organizations called for a new policy which would guarantee equal opportunities for all ethnic groups to participate in the privatization exercises.  

90 The organizations were the Selangor Chinese Assembly Hall, the Penang Chinese Town Hall, the Perak Chinese Association, the Federation of Chinese Association (Johore), the Terengganu Chinese Assembly Hall, the Kelantan Chinese Assembly Hall, the Federation of Chinese Associations (Sarawak), the United Chinese School Committees’ Association of Malaysia, the United Chinese School Teachers’ Association of Malaysia, the Malacca Chinese Chamber of Commerce, the Malacca Chinese Chamber of Commerce, the Kedah Chinese Chamber of Commerce, the Perlis Chinese Chamber of Commerce, the Perak Chinese Chamber of Commerce and the Sabah United Chinese Chamber of Commerce. See Kua (2005: 125).

91 A similar view was expressed at the Malaysian Indian Cultural Congress held in May 1984. A joint memorandum issued by ten Malaysian Indian organizations in conjunction with the congress warned that “any attempt to create a supra-culture (National Culture) artificially, in complete disregard of the existing cultural plurality, is to court trouble”. The Indian organizations were the Federation of Malaysian Tamils, the Dravidian Society of Malaysia, the Tamil Youths’ Bell Club Council, the Malaysian Tamil Youth Council, the Tamil Writers’ Association of Malaysia, the National Union of Tamil Schools, the Malaysia Hindu Sanggam, the Tamil Arts Society of Malaysia, the Tamil Literature Society of Malaysia and the Malaysian Tamil Artists Association. See Kua (2005: 115 - 128).

92 The organizations were the Selangor Chinese Assembly Hall, the Penang Chinese Town Hall, the Perak Chinese Association, the Federation of Chinese Association (Johore), the Terengganu Chinese Assembly Hall, the Kelantan Chinese Assembly Hall, the Federation of Chinese Associations (Sarawak), the United Chinese School Committees’ Association of Malaysia, the United Chinese School Teachers’ Association of Malaysia, the Malacca Chinese Chamber of Commerce, the Malacca Chinese Chamber of Commerce, the Kedah Chinese Chamber of Commerce, the Perlis Chinese Chamber of Commerce, the Federation of Hokkien Associations of Malaysia, the Federation of Kwan Tung Associations of Malaysia, the Malaysia Kwangsi Association, the Federation of Teochew Associations of Malaysia, the Federation of Kheng Chew Hwee Kuan of Malaysia, the Associated Eng Choon Societies of Malaysia, the Kuala Lumpur and Selangor Chinese Chamber of Commerce and Industry, the Nanyang University Alumni Association of Malaysia, the Johore Associated Chinese Chamber of Commerce, the United Association of Private Chinese Secondary Schools (Sabah), the Federation of Alumni Associations of Taiwan Universities, Malaysia. See Kua (2005: 161).
distribution of lands in the new land schemes and in the civil service and the state-owned enterprises. It promoted the idea of "cultural pluralism", stressing in particular the withdrawal of the Malay-centric cultural policy from the public sphere as well as the abrogation of all Acts and Regulations which were unfavorable to the existence and development of cultures of various ethnic communities. While it accepted Bahasa Malaysia as the National Language, it maintained that the different languages of Malaysian people were equal in status and should be allowed to be used freely in all sectors.93

Although the prime movers behind the Chinese community's resistance against the government's pro-Bumiputera policies were apparently the major Chinese guilds and associations,94 the Chinese-based political parties also played important roles. In November 1986, the Selangor State MCA, headed by the Minister of Labour and MCA Deputy President, Dato' Lee Kim Sai, passed a resolution questioning the indigenous status accorded to the Malays. This resolution irked UMNO leaders who subsequently urged the Prime Minister to sack Lee from the Cabinet.95 The controversy however died down when Lee apologized and retracted his statement. Another row sparked off in August 1987 when Lee criticized the NEP, prompting the UMNO Youth to once again demand his expulsion from the cabinet. Prior to the row, racial tension already ran high in a series of controversies involving communal issues. UMNO Youth had earlier urged the government not to bail out Chinese depositors who had lost investments worth about RM 1.5 billion as a result of the closure of 24 MCA-backed deposit taking cooperatives amid allegations of fraud and mismanagement. The government however proceeded with the bail out plan after receiving numerous counter-protests from the MCA and the Chinese community. In July, the University of Malaya abolished a few courses taught in Chinese and Tamil, prompting yet another protests by the MCA.96 Certainly, when the questioning of

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93 Kua (2005: 147-161).
94 Among the major Chinese organizations were the various states Chinese Chamber of Commerce, the Chinese Assembly Halls, the Federation of Chinese Associations, the United Chinese School Teachers' Association and the United Chinese School Committee Association.
95 The Sydney Morning Herald, 8 November 1986.
96 Reuters, 3 August 1987.
NEP by Lim Kim Sai cropped up in August, there had been an air of racial antagonism between the Malays and the Chinese.

It was amidst this air of racial animosity that the government's decision in September 1987 to promote non-Mandarin educated staff to senior administrative positions in Chinese primary schools caused another blow to Malay-Chinese relations. Fifteen major Chinese associations and three Chinese-based political parties, namely the MCA, the Gerakan and the DAP, formed a joint action committee to protest against the move. In a protest held in Kuala Lumpur on 11 October 1987, Lee Kim Sai, in a highly communal tone, pledged that the MCA would take "an uncompromising stand to swim or sink with Chinese primary schools whether in the cabinet or outside". The opposition leader and DAP Secretary-General, Lim Kit Siang, described the government's decision as "the most disturbing issue for Chinese in recent years and a challenge to their constitutional right to mother tongue education". In response to the Chinese protest, UMNO Youth organized an approximately 10,000 strong rally on 17 October 1987 in Kuala Lumpur. In a similar communally charged tone, the then Youth Chief Datuk Seri Mohd Najib Tun Abdul Razak told the protesters that the UMNO Youth "will not allow the sovereignty of the government and UMNO to be questioned". The rally also challenged the MCA to leave the BN if the party felt it was no longer feasible to remain in the government.

The heightened ethnic tension led to the arrest of more than 100 persons under the Internal Security Act in October 1987. Among those arrested in the operation codenamed Operasi Lalang were opposition politicians, academicians, church workers, social activists and several BN politicians. The government

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98 Reuters, 11 October 1987. A boycott of schools was planned, but later cancelled following the setting up of a five-man Cabinet Committee to look into the suitability of teachers appointed to the schools. The boycott however was carried out in Penang when an estimated 30,000 pupils stayed away from schools. See Kua (2005: 92).
100 Among those arrested were DAP Secretary-General Lim Kit Siang, DAP Deputy Chairman Karpal Singh, DAP Deputy Secretary-General P Patto, DAP Socialist Youth leader Lim Guan Eng, Negeri Sembilan DAP Chairman Hu Sepang, PAS Youth Chief Abdul Halim Arshad, Penang PAS Youth Chief Muhammad Sabu, PAS Youth Exco Buniyamin Haji Yaakob, United School Teachers Association of Malaysia President Sim Mou Yu, ALIRAN President Chandra Muzaffar, MTUC Secretary-General.
maintained that the arrests were necessary in order to "maintain peace and stability". The government also banned public rallies and tightened control over the press. Three newspapers, the English daily The Star, the Chinese daily Sin Chew Jit Poh and the biweekly Malay language Watan, were ordered to close. The government claimed that the three newspapers had published news "prejudicial to national security and added to racial tension in the country". In December 1987, the Parliament amended the Printing Presses and Publications Act 1984 to empower the Home Affairs Minister to ban any publication which contained materials prejudicial to public order and which is likely to alarm public opinion. Those found guilty of maliciously publishing false news would be liable to imprisonment of up to three years or a fine of RM 20,000 or to both. There would be no recourse to the court to challenge the government's decision to suspend or revoke a publication license. The government also had the power to control or stop the import and circulation of foreign publications if they were found to contain materials prejudicial to public order or the national interest or alarm public opinion. In a move to further enhance the power of the government to deal with the threats to national security and racial harmony, the Parliament in June 1989 amended the Internal Security Act 1960 to deny the court the power to review preventive detention cases under the Act, except in regard to questions on

V. David, social activist Dr. Kua Kia Soong, UPM lecturer Dr. Tan Ka Kheng, UKM lecturer Dr. Mohamed Nasir Hashim, Consumer Association of Penang Legal Advisor Meenakshi Raman and church worker Tan Bee Hwa. Several BN politicians were also arrested. Among them were MCA Youth Chief Datuk Yap Pian Hon, MCA Vice-President Chan Kit Chee, MCA Youth Vice-Chief Tan Chai Ho, UMNO leader and Member of Parliament for Pasir Mas Ibrahim Ali and UMNO Youth Exco members Tajuddin Abdul Rahman and Mohamed Fahmi Ibrahim. See Koh (2004: 312).

101 Reuters, 28 October 1987. It was important to note that the crackdown on the opposition politicians and other political dissidents occurred soon after Dr. Mahathir was almost defeated by Tengku Razaleigh in the contest for UMNO Presidency in the 1987 UMNO election. The election results were being challenged and the party was declared unlawful by the court. Dr. Mahathir’s position as UMNO President and Prime Minister tilted on the balance. The use of legal coercion at this point of time led to allegations that it was for the purpose of silencing dissent and consolidating political power.

102 The ban on the three newspapers was only lifted in March 1988.


104 Section 7(1).

105 Section 8A.

106 Section 13A.

107 Section 9(1) of PPRA 1984.
compliance with procedural requirements. Justifying the amendment on the
ground of maintaining racial harmony, the then Prime Minister Dr. Mahathir said:

A multiracial society is often prone to internal and external threats to its
stability and security. We can now see that a number of multiracial countries
had fallen into the dungeon of racial violence. Amendments to this act are
deemed necessary in order to enable the government to discharge its duties in
maintaining peace and order.

(ii) Radical Malay Students

While the implementation of the pro-Bumiputra policies generated protests from the
non-Bumiputeras, the same policies raised Bumiputeras' expectations that the
government would improve their social and economic position. By the 1970s, the
radical Malay students emerged as a vocal group which pressed for immediate
government actions to uplift the economic position of poor rural Malays. In the
1969 general election, many of these students campaigned for the opposition and, in
the aftermath of the 1969 racial riots, rallied behind Dr. Mahathir who was expelled
from UMNO following the publication of his letter blaming Tunku Abdul Rahman
for his failure to protect Malay interests. The Malay students, many of whom
hailed from poor families, formed solidarity with the Malay peasants, organized
field welfare programs in the villages and blamed the government for the failure to
address the problem of poverty among the rural Malays.

Faced with possible student's uprising, the Parliament in 1971 passed the
University and University Colleges Act, which prohibited student bodies from
having affiliation with or expressing support, sympathy or opposition to any

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110 Among the “radical” Malay student bodies were the University of Malaya Malay Language Society
(UUMMLS), the University of Malaya Student Union (UMSU) and the National Union of Malaysian
Muslim Students' Association (PKPIM). Another important Malay student group, the Gabungan
Pelajar Melayu Semenanjung (GPMS), was more pro-government in its approach.
111 Muhammad Abu Bakar (1973: 85).
112 Muhammad Abu Bakar (1973: 28)
political parties, trade unions or any unlawful organization, body or group of persons. University Vice-Chancellors were authorized to suspend or dissolve any student body which in his opinion conducted itself in a manner prejudicial to the interests or well being of the university or to public order, safety and security. University students were only allowed to form a representative council managed by an executive committee. Student bodies were also prohibited from having association with any political parties, trade unions or any other organizations established under the law except with approval of the Vice-Chancellor. Apart from controlling student activities, the Act also aimed at regulating the establishment and administration of higher education institutions. Under the Act, a university could only be established by order of the Yang di-Pertuan Agong, thus placing the establishment of universities under full control of the government.

Despite the restrictions under the University and University Colleges Act 1971, university students continued to be a formidable pressure group in the early 1970s. In November 1974, the plight of poor rural Malays in Baling in the northern state of Kedah caught their attention. Backed by several academicians at the University of Malaya, they held demonstrations in Kuala Lumpur, Ipoh and Penang, demanding the government to immediately help alleviate the hardships faced by the poor peasants. Following a massive demonstration on 3 December 1974 in Kuala Lumpur, prominent student leaders and university lecturers who supported them were arrested under the ISA. In September 1974, seven University of Malaya

113 Section 15.
114 Section 16.
115 Section 48.
116 Section 50.
117 Section 19.
118 This provision was also seen as an attempt by the government to foil Chinese educationists' effort to establish a Chinese-medium Merdeka University in the late 1960s (Junaidi 1993: 31).
119 Demonstration first started on the University of Malaya campus in Kuala Lumpur. They later spread to campuses of the MARA Institute of Technology and the National University, both in Kuala Lumpur, and to the Ungku Omar Polytechnic (Ipoh) and the University of Science (Penang) (Syed Hussin 1996: 2).
120 Among those arrested were Anwar Ibrahim (ABIM President/Malaysia Youth Council President), Syed Hussin Ali (Secretary of University of Malaya Staff Association), Tengku Shamsul Bahrain (President of University of Malaya Staff Association), Gurdlal S. Nijhar (University of Malaya law lecturer), Ibrahim Ali (President of MARA Institute of Technology Student Union), Kamaruzzaman.
students were also arrested after they protested against the government move to evict poor Malay squatters in Tasek Utara, Johore. The arrests were justified on the ground of maintaining national security.

Following the student protests, the Parliament in 1975 passed amendment to the University and University Colleges Act to tighten student disciplinary rules and gave more powers to the Vice-Chancellor to take disciplinary actions against the students. Among others, it provided that office bearers of student organizations would be liable for any criminal offence committed on behalf of the organizations; that any persons found in the possession of books, accounts, writings, etc. which relate to an organization would be presumed to be a member of such organization; that a university student who is charged with a criminal offence would immediately be suspended from the university; that the university Board would have disciplinary authority over every staff of the university and would exercise disciplinary control over them; that the Vice-Chancellor, who is the disciplinary authority in respect of students of the university, shall have the power to take disciplinary action against the students as may be provided for under any disciplinary rules made by the university Board; and that the university Board would have the power to make disciplinary rules as it deems necessary or expedient. With these amendments in place, and strictly enforced by the authority, the government had effectively managed to silence the radical student groups and curbed student activism.

Yaakob (President of University of Malaya Student Union) and Lau Heng Neng (University of Malaya Chinese Language Society leader) (Syed Hussin 1996).

121 Munroe Kua (1996: 82).
122 The grounds of detention of one of the detainees in the December 1974 demonstration, University of Malaya sociology lecturer and Malaysian People's Socialist Party (PSRM) leader Syed Hussin Ali, mentioned his consistent involvement in activities prejudicial to national security. He was alleged to have "actively, knowingly and willingly assisted the illegal Communist Party of Malaya (CPM) by promoting subversive student activities in institutions of higher learning and the legally registered Partai Sosialis Rakyat Malaysia (PSRM) in order to overthrow the legally constituted Government of Malaysia by unconstitutional and revolutionary means" (Syed Hussin 1996: 160).
123 Section 15B.
124 Section 15C.
125 Section 15D.
126 Section 16A.
127 Section 16B.
128 Section 16C.
129 Section 16D.
130 Junaidi (1993: 52).
As the success of the pro-Bumiputera economic policy depended on an expanding economy based on labor-intensive industries, there was an urgent need on the part of the government to subject labor unions to tighter governmental control. In the 1950s and 1960s, it was not uncommon for labor unions to organize strikes and protests as a means to force the government and employers to listen to their demands. To avoid this situation, the Malaysian government put restrictions on labor rights by not allowing labor unions to organize strikes over recognition claims or to bargain on issues designated as "managerial prerogatives". Strikes and lockouts could only be carried out after complying with strict requirements. In order to insulate labor unions from the activities of political parties, office bearers or employees of political parties were not permitted to hold office in unions, while the unions were prohibited from establishing political funds.

The government was also determined to intervene in disputes between workers and employers. Sometimes, this was done by the use of coercion. In 1979, the dispute between Airlines Employees Union (AEU) and the government-owned Malaysian Airlines System (MAS) led to the detention of 23 union activists under the Internal Security Act. 200 employees were suspended and 11 dismissed. Though all the detainees were soon released and most of the suspended employees were reinstated, the aftermath of the dispute proved to be disastrous for the union. The AEU was deregistered and its members were divided into two new unions, namely the more docile in-house Malayan Airline System Employees' Union (MASEU) and the Foreign Airlines Employees' Union (FAEU).

Restrictive labor laws and state intervention in industrial relations effectively helped the government to reduce labor activism in the 1970s. In most instances, the government and the employers ignored workers' demands without much

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131 These are matters relating to dismissal, retrenchment, hiring, promotion, transfer and work allocation.
132 Jomo & Todd (1994: 130-131)
resistance. In the 1980s, the labor position was further undermined by the setting up of the more docile Japanese-style in-house unions. Labor laws also became more restrictive. In the 1980 amendment to the labor laws, the right to take industrial action was further inhibited, union recognition disputes were no longer considered legitimate trade disputes, the definition of strikes was expanded to include unauthorized reduction in work, unions in essential services were required to give three instead of two weeks notice of their intention to strike and the list of essential services was expanded to include banking. There were other restrictions on voting, holding of strike and picket, and an increase in the powers of the Registrar of Trade Unions.

Though the pressures from the international labor organizations in the late 1980s seemed to ease labor's predicament, state capitulation to foreign capital prevailed over the need to liberalize labor policy. Such was the case when the government, faced with the possible withdrawal of privileges under GATT's Generalized System of Preferences (GSP) for violating workers' rights, allowed unionization of electronics workers in September 1988. However, counter-protests from the foreign-dominated electronics industry forced the government to confine unionization to in-house unions instead of industry-wide unions. All this led to the waning of labor activism throughout the 1980s and 1990s.

(iv) Non-Governmental Organizations

Another group which was subjected to strict governmental control was the non-governmental organizations. Vocal NGOs like Aliran Kesedaran Negara (ALIRAN), Muslim Youth Movement of Malaysia (ABIM), Consumer Association of Penang (CAP) and Environmental Protection Society of Malaysia (EPSM) had strong views on issues affecting the public. Some of these NGOs, owing to their network with international organizations and funding from abroad, had been labeled as foreign agents. What is more, these NGOs were also associated with the opposition for their

136 Jomo & Todd (1994: 147)
critical views and activities. Some even campaigned for the opposition during elections.\textsuperscript{137}

It was in response to this development that the Parliament in 1981 passed sweeping amendments to the Societies Act 1966.\textsuperscript{138} It introduced a new category of "political society", which was meant for the vocal NGOs, and put more restrictions on their activities.\textsuperscript{139} It also gave power to the Registrar of Societies to cancel the registration of a society, whose activities violate or militate against the basic principles of the Constitution, while the court is shut out from reviewing the Minister's decisions made under the Act.\textsuperscript{140} Any affiliation or connection with international organizations had also to be approved by the Registrar of Society.\textsuperscript{141} Notwithstanding such approval, the Registrar could force the societies to cease dealings with foreign bodies if satisfied that it was necessary to do so in the interest of the society, public order, safety and security.\textsuperscript{142} Though protests from the NGOs caused the "political society" category to be deleted from the Act, most of the restrictions on the activities of the societies as well as the expanded power of the Registrar of Societies and the Minister remained.\textsuperscript{143}

(v) The Opposition and Other Political Dissidents

The use of restrictive laws on the ground of maintaining racial harmony and political stability had limited the scope for political competition. More often than not, the laws, especially the emergency and anti-subversion laws, had been used against opposition politicians and other political dissenters to silence dissent. Sometimes,

\textsuperscript{137} ABIM, for example, openly campaigned for its former leaders who contested in the 1978 election as opposition candidates.
\textsuperscript{138} See Barraclough (1984: 454-456)
\textsuperscript{139} Sections 2 and 10 of the Societies (Amendment) Act 1981. The term "political society" refers to any society which by its objects, rules or conduct, seeks "to influence in any manner the policies or activities ... or the functioning, management or operation of the Government of Malaysia or of the Government of any State, or of any local authority or any statutory authority or of any department or agency of any such Government or authority" (Section 2). Special provisions for political society provide for the exclusion of non-citizens from membership and the prohibition of foreign fund except with permission from the Registrar of Societies (Section 10).
\textsuperscript{140} Section 3.
\textsuperscript{141} Section 6.
\textsuperscript{142} Section 8.
\textsuperscript{143} See Gurmit (1984: 30); Barraclough
the seemingly escalating racial tension and impending threat to public order gave credence to the government's claim that the use of such laws was necessary. However, such justification is hard to maintain when the laws were used at times when political intrigues involving those in power were more obvious than indications of racial or other conflicts.

This was the case in November 1977 when an emergency was proclaimed in Kelantan subsequent to the disagreement between PAS and UMNO over the post of the state *Menteri Besar* (Chief Minister). The crisis began when the PAS-dominated State Legislative Assembly passed a motion of no confidence against the then *Menteri Besar*, Dato' Mohamad Nasir, a PAS leader who was backed by UMNO. Refusing to acquiesce, Mohamad Nasir advised the Regent of Kelantan to dissolve the State Legislative Assembly in order to allow a fresh election to be held. In the meantime, demonstrations broke out in the state, seemingly in support of Mohammad Nasir. Though the demonstrations were minor, the Parliament on 8 November 1977 passed a Bill to bring Kelantan under emergency rule. As a result, Mohamad Nasir retained his post, but the state came under the direct control of the Federal Government, administered by a senior federal civil servant who was in turn responsible personally to the Prime Minister. With the direct control of the federal government, UMNO together with the newly-formed *Barisan Jemaah Islamiah Selangor* (Pan-Malaysian Islamic Assembly Front, BERJASA) led by Mohamad Nasir, managed to defeat PAS in the 1978 election. The UMNO-BERJASA alliance won 34 seats in the State Legislative Assembly, leaving PAS with only two seats.

Repressive laws were also used against rival factions within UMNO. In the 1970s, a political schism in the party caused two UMNO leaders, Abdullah Ahmad and Abdullah Majid, to be detained under the ISA. Abdullah Ahmad was a deputy minister and a long serving political secretary to the second Prime Minister Tun Abdul Razak, while Abdullah Majid was a parliamentary secretary and former press secretary to Razak. Both men were deputy ministers in the cabinet of Tun Hussein

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144 PAS gained control over Kelantan in the 1959 election when it was in the Opposition. As the party joined the BN in 1974, the UMNO President, who was the BN's Chairman, usually had the final say in the appointment of state *Menteri Besar* (Muhammad Kamlin 1980).

Onn, Razak's successor. The two Abdullahs, who were close to Razak, were alleged to have been involved in an attempt to oust Datuk Harun Idris, the then Menteri Besar of Selangor and UMNO Youth Chief. The ouster of Harun, who was implicated in a corruption case, was seen as a part of the larger move to sideline the "Old Guards" within the party. The death of Razak in January 1976 provided an opportunity for Harun and his allies to fight back. They accused the two Abdullahs of being communist agents and demanded that the government take serious action against them. The move against the two Abdullahs gained momentum after two Malay journalists in Singapore were arrested in June 1976 for their alleged involvement in a communist scheme allegedly masterminded and directed by Samad Ismail, a journalist who was closely associated with Razak. Samad was later arrested and made a televised confession that he had, with the help of several young UMNO leaders, succeeded in approaching the leadership of UMNO and influenced UMNO leaders to see issues and solve them in his way. The younger UMNO leaders whom Samad referred to were the two Abdullahs, with whom he had worked closely. In November 1976, although the confession was rather unconvincing, the Home Minister, Ghazali Shafie, ordered the detention of the duo under the Internal Security Act.

Factionalism within UMNO in the mid 1980s also precipitated the use of law to purge rival factions within the party. Faced with a challenge against the legality of the 1987 party election, which saw Dr. Mahathir being returned to the post of party President with a slim 43-vote majority; and the court's decision which declared UMNO an unlawful society, Dr. Mahathir initiated an open attack against the judiciary, which culminated in the sacking of the then Lord President Tun Salleh Abbas and two Supreme Court judges. Tun Salleh, who had been critical of the

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146 Abdullah Majid, like Samad Ismail, had a leftist background. His prominence in Razak's administration was perceived as the growing influence of the socialists who surrounded the prime minister.

147 The decision was made on the ground that 30 party branches, which send 44 delegates to the 1987 party general assembly, had not been approved by the Registrar of Societies. Section 12 of the Societies Act 1966 provides that, "where a registered society establishes a branch without the prior approval of the Registrar such registered society and the branch so established shall be deemed to be unlawful society". See Mohamed Nor bin Othman v. Mohamed Yusoff Jasfar [1988] 2 MLJ 129.

148 The two Supreme Court Judges were Tan Sri Wan Sulaiman Pawan The and Datuk George Seah.
government in a number of cases in the mid 1980s, was to preside over the full panel of nine Supreme Court judges to hear an appeal against the High Court's decision declaring UMNO an unlawful society. The appeal was filed by the rival faction led by former Finance Minister Tengku Razaleigh Hamzah. Should the appeal be allowed, the old UMNO would be revived and a fresh election would be held. Meanwhile, Dr. Mahathir formed UMNO Baru (New UMNO), of which he was the President, and excluded the rival faction from the new party and purged them from the cabinet. It was after the change of guard in the judiciary that the panel of Supreme Court judges presided over by the new Lord President Tun Abdul Hamid Omar dismissed the appeal by Razaleigh's faction, hence assuring the position of UMNO Baru as the successor of the Old UMNO and Dr. Mahathir's position as its President. In a move to avoid future party disputes from being put under judicial scrutiny, an amendment was made to the Societies Act 1966 to bar intra-party disputes from being brought to the courts.

By the late 1980s, while the destabilizing forces unleashed by the continued debate on the constitutional contract issues provided justification for the government to use laws to maintain racial harmony, the laws had in fact been directed more against opposition politicians and vocal critics of the government. This, in turn, weakened the dissenting voices within the society and seriously limited the scope for political competition. The government, having its legal powers expanded during the tumultuous post-independence years and beyond, had effectively employed the law to consolidate its political position.

_The De-politicization of Constitutional Contract Issues, 1990 - 1997_

By the 1990s, as a result of the implementation of the New Economic Policy, the Bumiputera community, especially the Malays, had experienced significant upward social mobility. The Malay middle class expanded and the incidence of poverty among rural Malays declined significantly. At the same time, the government had relaxed its pro-Malay policy on education and culture, which made it less alienating for the non-Bumiputera community. In 1990, the emphasis on national unity and
multiculturalism gained a new boost with the launch of Malaysia’s Vision 2020, which made the creation of a united multiracial Bangsa Malaysia (Malaysian Nation) one of its main goals. Although the old constitutional contract issues had not completely subsided, they no longer dominated election campaigns. There had been an air of easing ethnic tension and a move toward greater inter-ethnic understanding. Despite this positive development in ethnic relations, there had been no reduction in state legal powers. The government continued to use laws to silence dissent, with the opposition and vocal critics of the government remained the main targets.

The Relaxation of Education and Cultural Policy

Throughout the 1990s, except for the relaxation of the Bumiputera equity condition under the Industrial Coordination Act during the 1997/98 economic crisis, the government economic policy continued to be directed toward enhancing Bumiputera economic achievement by giving them preferential treatment in the award of shares and government contracts, permits and licenses. Non-Bumiputera disaffection with the NEP thus continued, although the momentum had somewhat dwindled. This was partly due to the fact that many non-Bumiputera businessmen also benefited from the policy. It was a common practice among Malay businessmen to sub-contract the jobs they received from the government to non-Bumiputera contractors, resulting in economic benefits trickling down to the non-Bumiputera business community as well. Apart from that, the more politically well-connected non-Bumiputera businessmen benefited from the government’s privatization policy,

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149 Since the early 1990s, although the government continued to give special attention to the Bumiputera economic achievement, there had been subtle changes to the government economic policy, especially in regard to the liberalization of some key sectors of the economy. Mainly due to the pressures of globalization and the need to maintain global competitiveness, the government adopted a more market friendly policy in some key sectors such as securities, investment and banking. These included relaxation of the foreign equity ownership rules in manufacturing firms; revision of bankruptcy law to assist credit; law reform to make the financial sector more efficient and competitive; reduction in licensing control for manufacturing companies; amendment to the company laws to strengthen shareholders’ rights; market-based procedures for commodity trading; and new legislation for offshore insurance, banking and trusts to facilitate the creation of the offshore financial market. See Pistor and Wellons (1999).

150 Although the NEP ended in 1990, its main thrust was incorporated in the New Development Policy, one of the main aims of which was the creation of the Bumiputera Commercial and Industrial Community (BCIC).
which began in the early 1980s. No less important, by the mid 1990s, the Chinese-based political parties in the BN had paid more attention to providing better services to the Chinese community as part of the efforts to fulfill the community’s needs for “economic development”. This development, to a certain extent, helped reduce the politicization of constitutional contract issues, especially in regard to the pro-Malay economic policy.

There had been further relaxation of the government’s pro-Bumiputera policy on education and culture. In 1996, education laws were revamped with the introduction of the new Education Act and the Private Higher Education Institution Act. These Acts paved the way for the implementation of an education system which was more acceptable for the non-Bumiputera communities. The new Education Act for instance explicitly exempted the national-type schools from using Bahasa Malaysia as the medium of instruction, hence supporting the development of mother-tongue education in vernacular schools. More significant, the Ministerial power to convert these schools into national schools was abolished. Apart from that, the Minister may exempt any other educational institution from the National Language requirement. The Private Higher Education Institution Act provides for the first time the establishment and regulation of private tertiary education institutions. Though the Act requires these institutions to conduct courses in the National Language, they may use English as a medium of instruction with the approval of the Minister, hence liberalizing the government policy on the medium of

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151 Non-Malay tycoons like Tan Sri Vincent Tan of Berjaya Group, Tan Sri Ananda Krishnan of Maxis Communications Berhad and Tan Sri Francis Yeoh of YTL Corporation were among those who benefited from the government’s privatization policy. Despite this, the policy was said to be contributing to the NEP as the government can directly pick Malay businessmen to be awarded privatization projects, which was usually done through closed or negotiated tender.

152 See Loh (2001).

153 Section 17(1) of the Education Act 1996. The Education Act 1961 does not contain specific section on medium of instruction in schools. It however defines a national-type school as a fully assisted school that, among others, uses the English, Chinese or Tamil language as the main medium of instruction and in which the national language is a compulsory subject of instruction.

154 Section 28.

155 Section 17(1).
instruction in education institutions. Arabic may also be used as a medium of instruction for Islamic courses.

One of the important milestones for the non-Bumiputera community, especially the Chinese, as a result of the more liberal education policy was the establishment of the Dong Jao Zong-run New Era College in May 1997. Funded mainly by Chinese philanthropists, the college offered a wide range of diploma and associate degree courses in arts, sciences and other professional fields using English and Chinese as the medium of instruction. It also offered associate degree program in Chinese Language and Literature under its twinning program with the universities in China and Taiwan. Another important achievement was the expansion of the MCA-run Tunku Abdul Rahman College from an institution which offered pre-university studies beginning in 1969 to a fully fledged tertiary education institution offering certificate, diploma and advanced diploma courses by the end of the 1990s. In 2001, the MCA established Tunku Abdul Rahman University (UTAR) as an extension of the TAR College. Meanwhile, the mushrooming of private colleges offering twinning degree programs with renowned universities in western countries provided the non-Bumiputera community with greater access to higher education. In this regard, the more liberal government policy on education had remedied one of the main causes of resentment arising from the National Language Policy and the pro-Malay university entry quota system under the NEP.

The more liberal government policy could also be observed in the performing arts. Partly due to the need to promote tourism as one of the country’s major sources of foreign exchange, the non-Malay cultures were increasingly promoted as part and parcel of Malaysia’s rich Asian cultural heritage. Beginning in 2000, a multicultural parade called Citrawarna, or the colors of Malaysia, was made an annual event. The National Day celebration had also turned into a multi-cultural parade showcasing Malaysia’s cultural diversity to the world. In both events, the liberty to showcase cultures of various races in the state-sponsored events was portrayed as

footnotes:
156 Section 41(3)(a).
157 Section 41(3)(b).
159 Malaysia’s tourism motto “Truly Asia” reflects the government’s effort to promote the country’s rich Asian cultural heritage.
not only evidence of Malaysia’s cultural richness, but also of its harmonious race relations. Apart from these, Malaysia’s religious and cultural celebrations like the Muslim Eid, Chinese New Year, Deepavali, Christmas and the Dayak’s Gawai were portrayed as key events that were celebrated not only by the respective religious or racial communities, but also by all Malaysians regardless of race and religion.160

By the mid 1990s, the constitutional contract issues had gradually been depoliticized. Although the Chinese associations continued to champion Chinese interests, many had openly expressed support for the government and become more aligned toward the MCA or the Gerakan.161 The Chinese political parties in the BN too had focused their efforts more on offering services to their constituents rather than sensationalizing communal issues. On the other hand, only a handful of concerned Malays protested against the gradual decline of Malay special privileges as a result of the more liberal government policies on culture and education. One of the concerned Malay groups was Kumpulan Prihatin (Concerned Group) led by former Malay civil servants and academics.162 However, their activities were much restrained owing to the lack of wide based organizational support and mass following.163

The Use of Repressive Laws amidst Easing Ethnic Tension

As ethnic relations improved and social resistance to the government’s more liberal cultural, education and economic policy subsided, resort to repressive laws to maintain racial harmony and political stability had become increasingly difficult to justify. What is more, the official surrender of the Communist Party of Malaya in

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160 In the 2000s, there have been combined celebrations of Muslim Eid, Chinese New Year, Deepavali and Christmas. The government usually sponsored grand “open house” to celebrate these festivals.
161 Interview with Kua Kia Soong, a Chinese education movement activist and Principal of the New Era College, 22 August 2005.
162 Among prominent members of this group were Datuk Zainal Abidin Wahid (former National University of Malaysia senior academic), Tan Sri Aminuddin Wahid (former Vice-Chancellor of Malaysian University of Technology), Datuk Hassan Ibrahim (former senior civil servant), Datuk Hassan Ahmad (former Director of Dewan Bahasa dan Pustaka), Datuk Abu Bakar Hamid (former Chairman of Malaysian News Agency) and Dr. Awang Sarlyan (President of Malaysian Linguistic Society).
163 Although ABIM and PKPIM were sympathetic to this group, both organizations too lacked mass following, thus seriously limited their ability to offer mass support for the group to pursue its cause.
1989 ended the long period of communist threat to national security. Reflecting these circumstances, not only had the number of arrests and detentions under the ISA significantly decreased but, of those detained, an increasing number were held for reasons unrelated national security.\textsuperscript{164} As the traditional communist-linked subversive elements and racial extremists faded away, the ISA increasingly focused on a new group of common criminals involved in activities like bringing in illegal immigrants, counterfeiting currency, phone cloning, falsifying documents and possessing firearms without license.

Nevertheless, repressive measures continued to be taken although on a much reduced scale. For example, on a few occasions the ISA was used against members of religious groups deemed to be deviationist by the government such as the Shi'ite sect\textsuperscript{165} and the spiritual group Al-Arqam.\textsuperscript{166} During the 1990s only two minor ethnic-related incidents prompted the use of ISA. The first was in response to untrue rumors on the internet that racial violence had broken out in Kuala Lumpur in August 1998. Three persons were soon arrested under the ISA for allegedly spreading the rumors.\textsuperscript{167} In the same month, a person was arrested under the ISA for distributing seditious pamphlets on an earlier Muslim-Hindu clash in Kampung Rawa, Penang.\textsuperscript{168} The clash had broken out after Muslims who frequented the village mosque complained about the loud sound of the bell at a nearby Hindu temple.\textsuperscript{169} Four persons were reportedly injured in the incident and the police detained 185

\textsuperscript{164} The number of arrests made under the ISA decreased from 6,328 in the 1970s to 1,346 in the 1980s and 1,066 in the 1990s. Nevertheless, the number of those served with detention orders under the Act slightly increased from 559 in the 1980s to 680 in the 1990s. This number, however, was still small compared to the issuance of 1,299 detention orders in the 1960s and 1,673 in the 1970s. See Suaram (2003: 23).

\textsuperscript{165} In November 1997, 10 followers of the Shi'ite sect were detained under the ISA for activities prejudicial to national security and Muslim unity. The Malaysian government banned the Shi'ite sect alleging that its teachings deviated from the mainstream Sunni's. See New Straits Times, 12 November 1997.

\textsuperscript{166} In September 1994, Ashaari Muhammad, the leader of Muslim spiritual group Al-Arqam was detained under the ISA. The government had earlier banned the movement and declared it as a threat to national security. Ashaari's wife and a senior leader of the movement were also arrested under the ISA. Four other Al-Arqam senior leaders were arrested under the Societies Act. See Straits Times, 6 September 1994.

\textsuperscript{167} The Straits Times, 14 August 1998. The fourth suspect, a college student, was detained under the Criminal Procedure Code.

\textsuperscript{168} The Sun, 18 August 1998. The

\textsuperscript{169} Four villagers were reportedly injured in the incident and some 200 rioters were detained by the police. The clash was soon contained by the authorities.
people under remand for allegedly causing riots and possessing dangerous weapons. Although the government warned that ISA would be used against the rioters, none of them were in fact detained under the law. In relation to the arrests of the “cyber rumor-mongers” under the ISA, there had been protests from human rights groups arguing that they should be charged under the normal criminal law instead. Several rights groups expressed concerns that the arrests could spark fears over the possibility of the government’s arbitrary actions in dealing with “cyber subversion” which did not auger well for the development of the country’s information and communication technology. Subsequent to the protests, the persons arrested for spreading rumors on the internet were charged under the Penal Code rather than the ISA.170

Opposition politicians and NGO activists, however, remained the main targets of repressive laws in the 1990s. Several high-ranking members of the opposition Parti Bersatu Sabah (PBS) were arrested under the ISA between 1990 and 1991 for allegedly plotting to pull Sabah out of Malaysia. Among those who were arrested were Jeffrey Kitingan, the brother of PBS leader and Sabah Chief Minister, Datuk Joseph Pairin Kitingan; Dr. Maximus Ongkili, a close associate of Pairin; and Benedict Topin, a PBS youth leader. All of them, however, were soon released.171 During the outbreak of Reformasi following the sacking of former Deputy Prime Minister, Anwar Ibrahim, in September 1998, about 40 of Anwar’s supporters were detained under the ISA. Among them were key UMNO leaders and Islamic movement activists who played key roles in the Reformasi movement.172

In November 1996, the police arrested about 100 NGO activists who took part in the Second Asia Pacific Conference on East Timor (APCET II). The Malaysian government was against the organization of the conference for fear that it would sour the country’s diplomatic ties with Indonesia.173 Taking cue from the

171 PBS was a BN partner until it left the coalition on the verge of the 1990 general election, in which the ruling BN faced the most intense challenge from the opposition since 1969. PBS rejoined BN in 2002. Dr. Maximus Ongkili is now a PBS Member of Parliament and a Minister in the Prime Minister’s Department.
172 See Chapter 5 for further discussion on the 1998 Reformasi and the ISA arrests occurred during the period.
government's stand on the issue, a group of UMNO Youth members called Barisan Bertindak Rakyat Malaysia (Malaysian People's Action Front) stormed the conference venue on 9 November 1996 purportedly to stop the conference from being convened. As a result of this incident, the police arrested 113 persons including foreign NGO activists who participated in the conference. All of them were soon released with the foreign participants deported to their countries for violating social visit passes. In December 1996, a group of NGO activists who attempted to hold a forum to discuss abuses of police powers were threatened with detention under the Internal Security Act, resulting in the forum being suspended indefinitely.

In view of the increasing NGO activism in the 1990s, the Parliament in 1997 amended the Societies Act to provide higher penalties for those who violate the law. Under the amendment, the maximum fine for those who carry out activities of a society before the Registrar of Societies (ROS) approves its application for registration was increased from RM 2,000 to RM 5,000. The maximum fine for office bearers of an unlawful society was increased from RM 10,000 to RM 15,000. Higher fines were also imposed on persons found guilty of allowing unlawful societies to use their premises, inciting a person to become member of an unlawful society, procuring subscription for an unlawful society, publishing propaganda materials of an unlawful society, acting on behalf or representing unlawful societies, being office bearers of societies the registration of which had been cancelled, displaying flags of unapproved societies, being members of triad societies, misusing money or property of registered societies or making false declaration of society rules. The ROS officials were also given power to seize any documents or materials belonging to a registered society if they had reason to believe that such documents may be required for proceedings under the Act. As a number of human rights NGOs were registered as companies or businesses under the Companies Act or the Registration of Businesses Act respectively, both Acts were

175 Section 6.
176 Section 42.
177 Sections 44, 46, 47, 48, 49, 50, 52, 53 and 54.
178 Section 64.
amended to allow greater governmental control of the NGO activities. The Registrar of Companies (ROC) was empowered to refuse the registration of a company if he believed that it was to be used for unlawful purposes or for any other purposes prejudicial to national security and public order. As part of the control measure, the NGOs which were registered as businesses were also required to submit their annual reports to the Registrar of Businesses (ROB).

The Judicialization of Politics

Although ethnic relations improved in the 1990s, the government continued to consolidate its legal powers and put them to use to silence dissent. It is in this regard that the de-politicization of constitutional contract issues, improving ethnic relations and the non-existence of a communist threat led to increased questioning of repressive laws that had been justified as necessary to maintain national security and racial harmony, especially the emergency and anti-subversion laws which had been used against dissenting voices within the society. The government therefore turned to a more "justifiable" way of legal coercion to bring political dissidents to "justice" through normal criminal or civil proceedings. This approach entailed the use of normal criminal and civil laws against political dissidents and the role of the courts to try and punish them. Politics was thus "judicialized" in the sense that supposedly pure political battles were pushed into the judicial sphere for adjudication, with those who had the power to prosecute and to exercise control over the judiciary being placed in an advantaged position to consolidate their political position. According to Simon Barraclough, the advantage of this form of legal coercion is that:

it avoids, to some extent, the odium of arbitrary action under the Internal Security Act as well as reinforcing the notion of the rule of law. Opponents of the regime can be portrayed as acting illegally, and the Government's substantial legal and financial resources can be pitted against the limited resources of opponents. Even if a prosecution is unsuccessful (as has often been
the case), an opponent will have been subjected to lengthy, costly and emotionally taxing legal proceedings.\(^{179}\)

Though this kind of judicialization of politics was not new, the conduct of such “political trials” in the more compliant courts made the genuineness of outcomes very suspect.\(^{180}\) This was evident in a series of court cases involving opposition politicians and government critics in the early 1990s. In 1991, Manjeet Singh Dhillon, the then Secretary of the Malaysian Bar Council, was found guilty of contempt of court for instituting contempt proceedings against the then acting Lord President, Tun Abdul Hamid Omar. Manjeet instituted the proceedings in relation to Abdul Hamid’s involvement in the sacking of former Lord President Tun Salleh Abbas and the suspension of five Supreme Court Judges during the Executive-Judiciary crisis in 1988. In 1995, Tommy Thomas, a prominent lawyer, made some critical comments in the International Commercial Litigation magazine about the administration of justice in Malaysia. He revealed that another prominent lawyer, Dato’ V.K. Lingam,\(^ {181}\) who represented one of the parties in a high-profile commercial litigation, had “shopped” for a certain favorable judge to hear the case.\(^ {182}\) The comments gave rise to a

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\(^{179}\) Barraclough (1985: 808-809).

\(^{180}\) The objective of a political trial is “the destruction, or at least, the disgrace or disrepute, of a political opponent”. See Shklar (1964: 49).

\(^{181}\) Dato’ V.K. Lingam had been implicated in a number of controversies involving the judiciary. In 1998, a photograph showing Lingam on holiday with former Chief Justice Tun Eusoff Chin was widely circulated on the internet. In August 1995, Eusoff presided over the panel of three judges which allowed Lingam’s client’s appeal in the controversial Ayer Molek case (see below). In 2007, a video tape spotting Lingam speaking on the phone with someone who was supposedly a “senior judge” was widely circulated on the internet. The eight-minute video footage, which was recorded in 2002, showed Lingam having a discussion with the senior judge about his effort to broker the latter’s appointment as Chief Justice. The identity of the “senior judge” was not immediately known, although many believed that he was the then Chief Judge of Malaya, Tan Sri Ahmad Fairuz Sheikh Abdul Halim. Fairuz was promoted as the President of the Court of Appeal in December 2002 and Chief Justice in 2003. Lingam said in the video that other prominent figures like tycoon Tan Sri Vincent Tan (Lingam’s client in the Ayer Molek case) and former Minister in the Prime Minister’s Department, Datuk Seri Tengku Adnan Tengku Mansur, were also involved in the attempt to fix the judicial appointment.

\(^{182}\) The case was *Insas & Metropolitan Nominees v Ayer Molek Rubber Company* (the Ayer Molek case) which involved a dispute over shares. Lingam, who was the counsel for the plaintiff (Insas), filed the suit in the Appellate and Special Powers Division of the High Court rather than in the usual Commercial Division. In April 1995, High Court Judge Datuk Azmel Maamor who heard the case ex-parte ordered the defendant (Ayer Molek) to register and transfer 540,000 ordinary shares to Insas within two working days. The judge adjourned the hearing of the defendant’s application to set aside the order to a date after the period of compliance with the order and refused the defendants'
defamation suit by the parties involved in the case against Thomas and his Kuala Lumpur-based legal firm, Skrine & Co. An out-of-court settlement was brokered but Thomas was cited for contempt after he made a statement in a local daily that "the actions were settled despite (his) express objections". In relation to the same case, Dato' Param Cumaraswamy, former United Nations Special Rapporteur for the Independence of Judges and Lawyers, was also sued for defamation by the parties in the case, claiming a total of RM 30 million in damages. Param was sued after being quoted in the same magazine as saying, among other things, that "complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice". The court refused to give him legal immunity, which he supposedly enjoyed as an expert performing a mission of the UN, until the International Court of Justice made a decision to that effect.

In 1995, Lim Guan Eng, the then DAP Deputy Secretary-General and Member of Parliament for Kota Melaka, was charged under the Sedition Act and the Printing Presses and Publications Act for making a statement implying the practice of selective prosecution on the part of the Attorney-General in relation to a statutory rape case involving an under aged girl, in which former UMNO Youth Chief and Malacca Chief Minister, Tan Sri Abdul Rahim Tamby Chik, was implicated. The then

application for a stay of the order pending the hearing of the setting aside application. On appeal by Ayer Molek, the Appeals Court in July 1995 reversed the High Court decision. Delivering the Appeals Court's decision, Justice NH Chan remarked that the conduct of the High Court Judge and Lingam was "a misuse of the court procedure" and "manifestly unfair". In August 1995, the Federal Court's panel of three judges presided by the then Chief Justice Tun Eusoff Chin overturned the Appeals Court's decision and expunged the judge's remarks from the judgment. In September 2006, High Court Judge Dato' Hishamuddin Mohd Yunus, dismissing Lingam's defamation suit against the International Commercial Litigation Magazine, refused to be bound the Federal Court's decision in the Ayer Molek case arguing that the panel of judges which decided the case was not legally constituted. One of the three judges who sat on the panel at the Federal Court was High Court Judge Datuk Pajan Singh Gill. Under the Federal Constitution, a High Court Judge cannot be nominated to sit on the Federal Court. See "Malaysian Justice on Trial", International Commercial Litigation, November 1995; The New Straits Times, 2 September 2006.

183 The parties involved in the defamation suit against Tommy Thomas were Dato' V K Lingam, tycoon Tan Sri Dato' Vincent Tan Chee Yioun, Berjaya Industrial Bhd, Berjaya Corp (Cayman) Ltd, MBf Capital Bhd, MBf Northern Securities Sdn Bhd, Insas Bhd and Megapolitan Nominees Sdn Bhd. See MBf Capital Bhd & Anor v Tommy Thomas & Anor & Other Suits [1999] 1 MLJ 139.
184 The Star, 21 October 1996.
187 Under Malaysian law, sexual intercourse with a minor, with or without consent, constitutes statutory rape.
Attorney-General Tan Sri Mokhtar Abdullah decided not to charge Abdul Rahim, while the alleged victim, a fifteen-year old Muslim school girl, was placed under “protective custody” at a rehabilitation centre. The exact charges against Lim were that he had “prompted disaffection with the administration of justice in Malaysia” and maliciously printed a pamphlet containing allegedly “false information” in that he had used the term “imprisoned victim” in reference to the alleged rape victim. The first was an offence under Section 4(1) (b) of the Sedition Act and the second under Section 8A (1) of the Printing Presses and Publications Act. Despite concerns from local and international human rights organizations that the charges were politically motivated, Lim was convicted on both counts and fined RM15,000. In a rare move, the Attorney-General appealed against the “leniency of the sentence”, which resulted in Lim’s sentence being increased to three years imprisonment by the Appeals Court in April 1998. Lim lost his parliamentary seat as a result of the sentence.

The use of court proceedings to legitimize punishment of political offenders was not without repercussions. There had been strained relationship between the Bar and the Bench as a result, with the legal fraternity continuing to publicly question the independence and integrity of the judiciary. What is more, in 1996, a 33-page anonymous letter containing various allegations of corruption, abuse of powers and judicial misconduct involving twelve senior judges was widely

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188 It was reported that the girl admitted that she had sex with Rahim and 14 other men. However, there was no police report lodged against Rahim. The Malaysian government maintained that it was on the basis of the absence of any police report against Rahim that he was neither investigated nor prosecuted. All those men, against whom police reports were lodged, were hauled into the court to face rape charges. Meanwhile, the girl was transferred by the court to a rehabilitation centre for wayward girls for three years, despite continued efforts by her grandmother to secure her release. See Inter-Parliamentary Union document on Lim Guan Eng’s case at http://www.ipu.org/hrc/e/162/mal11.htm (Accessed on 14 November 2007). See also International Bar Association (2000: 24-64)

189 Under Malaysian law, members of Parliament who are jailed more than a year or fined more than RM2,000, automatically forfeit their parliamentary seats. They are also barred from active politics for a period of five years after serving their jail sentence.

190 The Bar-Bench relation had undergone ups and downs following the Executive-Judiciary crisis in 1988. The Bar Council in September 1988 passed a vote of no confidence against the new Lord President, Tun Abdul Hamid Omar, and refused to have any relationship with him. Though communication was finally restored, the relationship turned sour after allegations of corrupt practices among senior judges cropped up in the mid 1990s. The Bar Council took a strong view on the matter and called for the clean-up of the judiciary.
circulated among the public. These allegations raised further doubts about the integrity and independence of the judiciary. The government shot down the opposition’s call for the setting up of an independent board of inquiry to investigate the allegations. A special motion by the Opposition Leader, Lim Kit Siang, to discuss the issue in the Parliament was also rejected by the House Speaker. The case was finally closed by the Attorney-General, who maintained that the allegations were slanderous and baseless. Subsequently, a senior High Court judge who purportedly wrote the letter resigned, without action being taken against him. According to the Attorney-General, the resignation was already “a form of punishment”.

These are a number of examples where the administration of justice had been turned into a one-sided political arena to try and punish political offenders. The trend toward judicialization of politics and the use of repressive laws amidst easing ethnic tension indicated that the lack of justification for the use of such laws to silence dissent did not lead to the reduction of state legal powers or limit the state’s capacity to act against political “offenders”. State powers have been further consolidated even at normal times.

**Conclusion**

Up to the late 1980s, the continuing debate on constitutional contract issues and the presence of the communist threat had, to certain extent, generated destabilizing forces in Malaysia’s multiracial society and provided justification for the state to expand its legal powers and limit the exercise of fundamental liberties on the grounds of maintaining racial harmony and preserving national security. More significantly, these powers, which were strengthened and expanded during the

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191 The New Straits Times, 10 July 1996.
192 Hansard, 10 July 1996.
193 The New Straits Times, 2 & 10 July 1996. The author of the anonymous letter was former High Court Judge Datuk Syed Ahmad Idid Syed Abdullah. He revealed in a press interview in June 2006 that he was forced to resign and his allegations were never investigated. See New Sunday Times, 11 June 2006.
194 The more glaring example of Malaysia’s “political trial” was the corruption and sodomy trials of former Deputy Prime Minister Datuk Seri Anwar Ibrahim. The conduct of the trials and its impact on the public perception about the independence and integrity of the judiciary will be discussed in Chapter 6.
period of emergency, had continued to be further consolidated at normal times, leaving the government with enormous powers at its disposal. As these powers, especially those under the emergency and anti-subversion laws, had been directed toward the opposition politicians and government critics, they had also been a potent means by which the government silenced dissent and consolidated its political power. Despite easing ethnic tension and the non-existence of communist threat in the 1990s, the government continued to use the laws to silence dissent, this time round with the normal criminal and civil laws being applied and the courts being turned into a one-sided political arena to try and punish political dissidents. As a result, by the 1990s, the expansive state legal powers had been further consolidated and the scope for political competition had been further limited.
Chapter IV

The Creation of Statist Legal Meanings by the Courts

The competitive nature of Malaysia's communal politics bears significant impact on judicial decision-making. Taking cognizance of the seemingly perpetually unstable politics of competing communal interests, Malaysian judges have been loath to inquire into the substantive justness of government policies in relation to ethnic relations, national security and economic development. More often than not, the judges have no qualms in accepting the necessity of those policies and the objectives which they serve. It is in this context of competitive communal politics that restrictions on fundamental liberties and encroachment on the rule of law have often been justified in order to maintain racial harmony and national security.

Furthermore, based on the view that fair economic distribution among competing communal groups can only materialize in an expanding economy, the judges seemed to recognize the law's instrumental role in equipping the dirigiste developmental state with necessary legal powers to effect robust economic development.

Though law in this kind of illiberal statist legal system assumes an "instrumental" function, it is legal formalism - rather than realism - that provides the ideological basis for such a judicial attitude. Legal formalism's separation of legal reasoning from normative or policy consideration not only compels the judges to be constrained in interpreting legal texts by confining themselves to what the law does say rather than what the law should be,¹ but also discourages judicial inquiries into the appropriateness of government policies. What is more, the concept of decision-making according to rule, or more precisely, the language in which the rules are

¹ Formalist judges, according to Scalia (1997), should concern themselves with what the legislature promulgates rather than what the law-makers had in their mind when they passed the law. Posner (1987: 6) however rejected the application of strict formalist theory - and for that matter realist as well - in constitutional and statutory interpretation. He regarded constitutional and statutory interpretation, contrary to common law reasoning, as a "communication" process by which the judges are concerned with decoding the message sent by the law-giver, rather than simply deducing legal meanings from the legal texts before them.
written,² which lies at the heart of legal formalism, helps produce policy outcomes that accurately reflect the intentions of policy-makers.

But Malaysian judges, imbued by the common law tradition of judicial lawmaking, had also developed a strong doctrine of judicial review, which led to judges striking down Executive decisions, often for failing to comply with the requirements of the law. This raised concern among members of the Executive over the judges' independence in making decisions against the intention of the legislature or that of the political Executive. As such, there have been numerous attempts by the Parliament to make legal texts very clear about its intention, often as the Executive views it, by inserting precise words into the statutes, leaving little or no room for judicial interpretation. At the same time, in cases of statutory ambiguity, the Parliament, through legislation, compels the judges to interpret legal texts in such a way that would promote the object of the law. Though this kind of "purposive approach" to statutory interpretation has been well received by common law judges, statutory recognition of such an approach reflects the government's penchant for interpretation that promotes its policy objectives.

In this kind of legal system, legal formalism has an important role to play. Its principle of decision-making according to rule compels the judges to confine themselves to the precise words in the legal texts in interpreting the law, hence ensuring that the court's decisions are in line with what the Parliament has expressly proclaimed in statutes. Furthermore, its doctrine of separation of legal reasoning from normative or policy consideration goes a long way to justify judges' restraint from inquiring into policy matters, which the judges themselves viewed as best left to the Parliament to deliberate. This judicial attitude, operating in an illiberal legal system where statutes are designed in such a way as to entrench state power, helps maintain statist legal meanings, i.e. laws as proclaimed and intended by the state. This, in turn, legitimizes the expansion of state power rather than limiting it.

² Schauer (1988: 510). This is called "textualism", a formalist theory of statutory interpretation which requires judges to give literal or ordinary meaning to the words or phrases in a statute. The courts, the textualists maintained, should listen for "the ring of the words of a statute would have had to a skilled user of words at the time, thinking about the same problem" (Manning 1997: 675).
Jayasuria observes that under authoritarian legal systems in East Asia, legal institutions are designed to play a policy implementing role in that they serve as a means to achieve government policy objectives and to make certain types of oppositional political activities illegitimate. Contrary to the liberal assumption that "the development of rule of law can occur at the expense of a weakening of governmental or public power", the essentially authoritarian notion of rule of law in such legal systems "serves to entrench and consolidate public or state power". Arguing that ideological notions of security and order were constitutive of many post-colonial states in East Asia, Jayasuriya describes these states as "enterprise associations", in which "validity of rules springs not from association itself but from the ends or purposes of the organization". From this perspective of purposive and end-oriented organization, "laws are seen in terms of their capacity to produce accurate outcomes that reflect substantial state objectives and interests". In this regard, "legal formalism", which places strong emphasis on adherence to formal rules, processes and procedures, regardless of the fairness of substantive outcomes, provides an ideological basis for the legal system.

Malaysian judges are "formalists" in the sense that they normally avoid inquiring into the government's policy objectives in interpreting a statute, choosing to confine themselves to the law as it is. What is more, taking cognizance of the prevailing socio-political condition in Malaysia's ethnically divided society, they generally acknowledged the importance of government policies on ethnic relations, national security and economic development. Being formalistic, as far as rule following is concerned, helped the judges to escape from engaging in normative debate about government policies, which in turn insulate the justness of such policies from judicial inquiry. But unlike American formalist judges, Malaysian judges are not strict "textualists". In cases of statutory ambiguity, it is normal for

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4 Jayasuriya (1999: 2).
5 Jayasuriya (1999: 3).
6 Jayasuriya (1999: 3).
them to rely on legislative history in order to construe the meaning of ambiguous words or phrases in a statute. This approach to statutory interpretation not only helped Malaysian judges to avoid conflict with the other branches of the government, namely the Executive and the Legislature, except during the brief period of fierce judicial activism in the mid 1980s, but also maintained statist legal meanings.

But as the judges, imbued by the common law tradition of judicial lawmaking, had also developed a strong doctrine of judicial review, which provided an important safeguard for individual liberties against arbitrary exercise of governmental powers, it was not uncommon to find the courts striking down executive decisions on the ground that they fell outside the scope of the government’s legal powers. During the Executive-Judiciary crisis in the late 1980s, the Executive fought back by launching an attack on the Judiciary, culminating in the sacking of the then Lord President, Tun Salleh Abbas, and two Supreme Court Judges for “judicial misconduct”. Also, there has been in existence a particular legislative style which militated against active judicial scrutiny of executive decisions, which in turn constrained the judges’ supervisory role. This was done, inter alia, by stating in statutes express words indicating the intent of the legislature, inserting ‘ouster’ or ‘finality’ clauses excluding judicial review and giving statutory recognition to “purposive approach” to statutory interpretation. The existence of an anti-judicial-scrutiny legislative style, coupled with the judges’ acceptance of government policy objectives, especially in regard to ethnic relations, national security and economic development, helped maintain statist legal meanings, which had the tendency to enhance rather than limit the exercise of state power. The judges’ formalist but non-strict textualist approach to statutory interpretation, in turn, provided an ideological basis for the maintenance of such meanings.

Central to the maintenance of statist legal meanings is acceptance by the judges of government policy objectives, which the laws are supposed to serve, and their obligation, through interpretive power, to interpret the law based on its express provisions, without attempting to inquire into the appropriateness of its policy objectives. Though it is hazardous to associate judges’ decisions with their personal...
inclination for or against any particular government policy, there have been instances where the judges, many of whom hailed from the government's legal and judicial service before taking their oath as judges, hold a cautious view of the rule of law, taking into consideration the prevailing socio-political conditions and the government policies in that regard. Former Lord President of the Supreme Court, Tun Mohamed Salleh Abbas noted in a speech delivered in 1968, "legal concepts such as parliamentary government, rule of law, independence of judiciary, and a score of other legal and constitutional concepts" could not be "transplanted in toto, without some form of modification which would suit local conditions and climate".7 He contended that "in a society in which the rumbling thunder heralding the threat to the very existence of the institutions from which freedom emanates are constantly and clearly heard not far off, a certain amount of control on freedom is inevitable, or there would be a breakdown of law and order".8 Tun Salleh's assertion of limited freedom to safeguard the institution from which freedom itself emanates refers to the extensive use of emergency and anti-subversion laws by the government against communists and communal extremists as well as ordinary political dissidents, in the face of potential threats that such groups might pose to nascent democratic institutions.

Taking cognizance of the prevailing socio-political conditions, the intention of the legislature and the express words in statutes, the judges have been loath to review executive decisions on matters of national security on substantive grounds, arguing that the executive is the sole judge of what is in the best interest of the security of the nation.9 Applying the "subjective test" to determine the legality of detentions made under the Internal Security Act 1960, the courts would not question the subjective opinion of the Minister in issuing the detention orders, and hence avoided the obligation to show that the Minister's grounds for acting were

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7 Mohamed Salleh (1984: 82)
9 The Federal Court in Karam Singh v. Minister of Home Affairs Malaysia [1969] 2 MLJ 129 held that the question whether there was reasonable cause to detain the appellant (under the Internal Security Act) was a matter of opinion and policy, a decision which could only be taken by the executive. See also Harding (1996: 217).
objectively reasonable. Compounding this judicial attitude were clear and unequivocal words in the statutes which exclude substantive judicial review of matters of national security, except on issues of procedural compliance with the law. Section 8B (1) of the Internal Security Act, an "ouster clause", for example excludes 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 discretionary power in accordance with the Act, save in regard to any question on compliance with any procedural requirement in the Act governing such act or decision. In the face of the overarching government policy on national security and its importation into written laws, the application of rule of law has thus been viewed as a matter of expediency rather than an absolute value to be maintained. As Harding remarks:

(The rule of law) is seen as a value to be maintained, but not as an *absolute* value: when policies seen as fundamental come into play, the rule of law is just one value among several values, and gives way on occasion to them ... The principles of natural justice and reasonable exercise of discretion, for example, certainly apply, but only so far as to mitigate the effect of wide administrative discretion and untrammelled pursuit of government policy.  

All this boils down to the maintenance of statist legal meanings by the court, by which restrictive laws and the executive's wide discretionary powers were legitimated. The consideration of what is just and what is not has often been viewed against the backdrop of prevailing socio-political conditions and state policy objectives, especially in the key areas of ethnic relations, national security and economic development. Operating within a socio-political condition where competing communal interests are the source of potential destabilizing forces that would endanger national unity, the government found justification for invoking repressive laws as a means "to curb the inflammation of racial hatred and bigotry".  

In this perspective, the official notion of rule of law thus seems to mean, as former

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12 Lee (2004: 226)
Minister in the Prime Minister’s Department and de facto Law Minister Datuk Seri Dr. Rais Yatim put it, while he was in the political wilderness, “no more than rules and regulations made by the government (that) must be followed”. In the main, the judiciary has adopted a more restrictive view of the rule of law when it conflicted with the official notion of “national interests”, which usually refers to the maintenance of racial harmony, national security and the pursuit of economic development, giving rise to the maintenance of statist legal meanings by the courts, which in turn, legitimizes the expansion of state powers.

Security Justice

The illiberal statist legal meanings were very apparent in court decisions in cases involving the use of emergency and anti-subversion laws. This is particularly evident in preventive detention cases where the courts demonstrated its unwillingness to review “subjective satisfaction” of the Minister in issuing detention orders, reckoning that the Executive is the best judge on matters of national security. With this view in mind, the judges would only review detention orders on limited grounds such as *mala fide* on the part of the detaining authority, which was normally very difficult to prove, and procedural non-compliance in issuing such orders.

It is in security cases that the liberal notion of rule of law gives way to the illiberal statist notion of rule through law. The Federal Court’s decision in Karam

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13 Cited in Lee (2004:225). Datuk Dr. Rais Yatim was ousted from the cabinet after supporting Tengku Razaleigh Hamzah in the 1987 UMNO election. He then formed Parti Melayu Semangat 46 with Tengku Razaleigh and was made the party’s Deputy President. He rejoined UMNO in 1996 after the dissolution of S46. He was appointed as a Minister in the Prime Minister’s Department (de facto law minister) in 1999 and Minister of Arts, Culture and Heritage in the new cabinet formed after the 2004 general election.


15 This includes situations in which the grounds of detention stated in the order do not fall within the scope and ambit of the relevant legislation, or that a condition precedent for the making or the continuance of the order of preventive detention has not been complied with. See *Attapuran a/f Arumugam v Menteri Hal Ehwal Dalam Negri, Malaysia* [1984] 1 MLJ 67.
Singh v Minister of Home Affairs, Malaysia illustrates this situation. The appellant in this case was detained under the Internal Security Act in 1967 and served with a detention order under Section 8(1) of the Act which expressed its purpose as being to "prevent him from acting in any manner prejudicial to the security of Malaysia/maintenance of public order therein/the maintenance of essential services therein." The appellant, who was an opposition Socialist Front Member of Parliament, was accused of furthering the cause of Communist Party of Malaya (CPM). The High Court dismissed his application for writ of habeas corpus and he appealed to the Federal Court. He argued, inter alia, that section 8 of the Internal Security Act allows a person to be detained on four grounds, the order of detention stated three grounds in the alternative, and the grounds supplied to him stated only one ground. All this, he argued, showed a casual and cavalier attitude on the part of the detaining authority, indicating that they had not given the matter adequate consideration, and hence made the order of detention invalid and his detention unlawful. Dismissing the appeal, the then Federal Court Judge Tun Mohamed Suffian Hashim said:

When the power to issue a detention order has been made to depend on the existence of a state of mind in the detaining authority, which is purely a subjective condition, so as to exclude a judicial inquiry into the sufficiency of the grounds to justify the detention, it would be wholly inconsistent to hold that it is open to the court to examine the sufficiency of the same grounds to enable the person detained to make a representation ... it is not for the court of law to pronounce on the sufficiency, relevancy or otherwise of the allegations of

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16 Karam Singh v Minister of Home Affairs, Malaysia [1969] 2 MLJ 129.
17 The four grounds under Section 8 of the ISA are "acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of public order or essential services therein".
18 The order recited three of the four grounds, leaving out "acting in any manner prejudicial to any part of Malaysia". See [1969] 2 MLJ, p.p. 132.
19 That applicant had "since 1957 consistently acted in a manner prejudicial to the security of Malaysia". See [1969] 2 MLJ 129, p.p. 132.
fact... The discretion whether or not the appellant should be detained is placed in the hands of the Yang di-Pertuan Agong acting on Cabinet advice.20

It is noteworthy that in arriving at the decision, the court had the opportunity to consider a number of Indian and English authorities on the question of whether the court should inquire into subjective satisfaction of the Minister in making the order of detention. Indian cases, as cited by the appellant's counsel, tended to answer this question in the affirmative. In Dwarka Das v State of Jammu & Kashmir,21 Jagannadhadas J said, "where power is vested in a statutory authority to deprive the liberty of a subject on its subjective satisfaction with reference to specified matters, if that satisfaction is stated to be based on a number of grounds or for a variety of reasons, all taken together, and if some out of them are found to be non-existent or irrelevant, the very exercise of that power is bad".22 Similarly, in Jagannath Misra v State of Orissa,23 the order of detention sets out six objects or purposes for the detention of the detainee and in the alternative. The affidavit of the Home Minister pointed out, however, that the petitioner was detained with a view to preventing him from acting in a manner prejudicial to the safety of India and the maintenance of public order etc. The court held the view that such discrepancy between the grounds mentioned in the order and the grounds stated in the authority concerned can only show an amount of casualness in passing the order of detention and that this casualness also shows that the mind of the authority concerned was really not applied to the question of the detention of the petitioner in that case.24

The Malaysian courts, however, as shown in Karam Singh, refused to follow the more stringent view adopted by the Indian judges pertaining to deprivation of personal liberty in preventive detention cases. Justice Suffian said that although the judgments of the Indian Supreme Court were of great persuasive value, the judgment should not be followed in Karam Singh. Noting that in Malaysia, the power

of detention was given to the “highest authority” in the land, that is the Yang di-
Pertuan Agong acting on the advice of the Cabinet, which is answerable to the
Parliament, unlike in India where such power was exercisable by “civil servants who
are not answerable politically to the Parliament”, the learned judge observed:

The discretion whether or not the appellant should be detained is placed in the
hands of the Yang di-Pertuan Agong acting on Cabinet advice. Whether or not
the facts on which the order of detention is to be based are sufficient or
relevant, is a matter to be decided solely by the executive. In making their
decision, they have complete discretion and it is not for a court of law to
question the sufficiency or relevance of these allegations of fact.25

It seemed that the Malaysian courts preferred to follow English cases rather
than the Indian cases in determining the justiciability of the order of detention under
the ISA. This is understandably so since in England, like in Malaysia, the power of
detention was exercisable by one of the highest authorities of the state, i.e. one of the
Principal Secretaries of the State, rather than ordinary officers. Maintaining that the
subjective satisfaction of the Secretary of the State is beyond judicial enquiries, Lord
McMillan in *Liversidge v Sir John Anderson*26 observed that the question of whether
there was a reasonable cause to detain a person under preventive detention law “is a
matter of opinion and policy,” the decision of which can only be made “by one who
has both knowledge and responsibility which no court can share”.27 The one with
knowledge and responsibility was obviously the Executive. Asserting that the
English courts “took a more realistic view of things” while Indian judges “were
indefatigable idealists seeking valiantly to reconcile the irreconcilable”, former Chief
Justice of Malaya, Tan Sri Ong Hock Thye in *Karam Singh* observed:

Under article 149 (of the Federal Constitution), any provision in the Internal Security Act designed against action prejudicial to national security is declared "valid notwithstanding that it is inconsistent with any of the provisions of article 5, 9 or 10, namely, the fundamental liberties. This, of course, means sanction of encroachments on the rule of law, justified in the national interest. Under the circumstances I think it must be frankly acknowledged that a perfect decision is in most cases an unattainable ideal (emphasis is mine).\textsuperscript{28}

The Malaysian courts after \textit{Karam Singh} had generally affirmed the non-justiciability of subjective satisfaction of the Minister in making preventive detention orders.\textsuperscript{29} In fact, the so-called subjective test was also extended to detention made by the police pursuant to section 73(1) of the ISA. This was evident in the Supreme Court's decision in 1988 in \textit{Theresa Lim Chin Chin & Ors v Inspector General of Police}.\textsuperscript{30} Briefly, the facts of the case are as follows. The appellants were arrested by the police under section 73 of the ISA and no counsel was allowed to see them. They applied for writ of habeas corpus arguing that their arrest was illegal. The application was rejected by the High Court and the appellants appealed to the Supreme Court. They argued, \textit{inter alia}, that the power under section 73 of the ISA to arrest and detain a person pending enquiry was open to judicial examination, the test being an objective test. Dismissing the appeal, former Lord President Salleh Abbas said:

The expression "subjective and objective tests" is merely a label to show the results of the court's attitude as to whether or not it will or it will not exercise its jurisdiction. It is descriptive of the result of the court's decision elicited from

\begin{footnotesize}
\begin{enumerate}
\item See for example Yeap Hock Seng \& Ah Seng v Minister of Home Affairs, Malaysia [1975] 2 MLJ 279; Theresa Lim Chin Chin \& Ors v Inspector General of Police [1988] MLJ 293; Minister of Home Affairs Malaysia v Karpal Singh [1988] 3 MLJ 29. Edgar Joseph Jr ] in Yi Hon Kit v Minister of Home Affairs, Malaysia \& Anor [1988] 2 MLJ 638, however, questioned whether the principle of non-justiciability of subjective satisfaction of the Minister as enunciated in Karam Singh was a good law, considering that even English decisions of the highest authority had departed from Liversidge to use objective tests. See for example R v Inland Revenue Commissioners, \textit{ex parte} Roosminster [1980] AC 952 and Reg v Secretary of State for the Home Department, \textit{ex parte} Khatouja [1983] 2 WLR 321.
\item Theresa Lim Chin Chin \& Ors v Inspector General of Police [1988] MLJ 293.
\end{enumerate}
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factual situations reflecting judicial attitude rather than a starting point or a legal element from which legal result could be arrived at. In this case, whether the objective or subjective test is applicable, it is clear that the court will not be in a position to review the fairness of the decision-making process by the police and the Minister because of the lack of evidence since the Constitution and the law protect them from disclosing any information and materials in their possession upon which they based their decision. Thus, it is more appropriately described as a subjective test.31

Obviously, the subjective test as laid down in Liversidge and followed in Karam Singh made challenge to the Minister’s order a gruelling task. Attacks can only be launched on limited grounds like procedural non-compliance and the use of law for improper purpose or mala fide.32 The latter is, of course, very hard to prove. The court will first assume legality of the detention order, if its authenticity is not challenged, and then shift the burden of proving mala fide to the applicant. As Justice Suffian in Karam Singh put it, “the onus of proving the legality of the detention is on the Minister in the first instance. This he can discharge simply by producing the order of detention which, if its authenticity and good faith are not impugned, is a sufficient answer. If the detainee alleges mala fide … then the onus shifts to him and it is for him to prove mala fide”.33 This approach was followed in Yeap Hock Seng [commat] Ah Seng v Minister of Home Affairs, Malaysia,34 a High Court case decided in 1975, where Justice Abdoolkader said that once the detaining authority showed that the detention order was made in the exercise of valid legal power, “it is for the detainee to show that the power was exercised mala fide or improperly for a collateral or ulterior purpose in fraudem legis”.35

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But in most instances, where the Minister was aided by extensive police machinery to help him gather valuable information before making a detention order, it is relatively easy for him to rebut an allegation of mala fide made by the detainee. The courts are more inclined to accept classified information known only to the Minister as a valid basis for his subjective satisfaction in making the detention order, though any of the allegations of fact might turn out to be untrue. In Karpal Singh s/o Ram Singh v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor,36 a High Court case decided in 1988, the applicant, who was an opposition DAP Member of Parliament, was detained under the ISA during the October 1987 Operasi Lalang. He applied for a writ of habeas corpus challenging the detention order on the ground of, inter alia, mala fide. He claimed that the sixth allegation which mentioned that he, at the place, time and on the date stated in the detention order, used the issue of appointment of non-Mandarin qualified headmasters and senior assistants in the national-type Chinese primary schools to incite racial sentiments of the Chinese community was false as he did not on that date, time and place speak of the issue. The Minister also admitted that the allegation was an error. The Ipoh High Court allowed his application and ordered him to be released from detention.37 In making the decision, High Court Judge Datuk Peh Swee Chin observed that "mala fide does not mean at all a malicious intention. It normally means that a power is exercised for a collateral or ulterior purpose, i.e. for a purpose other than the purpose for which it is professed to have been exercised".38 Using an objective rather than subjective test, the learned judge said:

Viewed objectively and not subjectively, the error, in all the circumstances, would squarely amount to the detention order being made without care, caution and a proper sense of responsibility. Such circumstances have gone beyond a mere matter of form; the sixth allegation, though an irrelevant

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37 Karpal was hours later arrested by the police.
allegation which the court can enquire into, was also an inaccurate allegation that can be treated as being outside the scope of the Act.39

On appeal, the Supreme Court held that the learned High Court judge had misdirected himself by failing to distinguish between grounds of detention and the allegations of fact supplied to the detainee. Whilst the grounds of detention stated in the detention order are open to challenge, the allegations of fact upon which the subjective satisfaction of the Minister was based are not.40 Though the sixth allegation turned out to be untrue, as admitted by the Minister himself, his subjective satisfaction was supported by his affidavit which stated that “reports and the information relating to the conduct and activities of the applicant that (he) received from the police, (he) was satisfied, notwithstanding that (the respondent) was not present at the said gathering, that it was necessary to detain him with a view to preventing him from acting in a manner prejudicial to the security of Malaysia”.41 The Supreme Court in this case asserted that “the subjective satisfaction of the Minister of Home Affairs is not subject to judicial review”.42

The more positive judicial attitude in reviewing the legality of detention orders on subjective ground was unveiled in Chng Suan Tze v Minister of Home Affairs in 1988,43 an appeal decided by the Singapore Court of Appeal, the decisions of which are persuasive in Malaysian courts. In considering subjective satisfaction of the President under Section 8 of Singapore’s Internal Security Act, which is in pari materia with Malaysia’s ISA, the island republic’s Court of Appeal held that “evidence of the President's satisfaction must be such evidence as would be admissible at a trial where neither the recital in the detention order nor an affidavit by the Permanent Secretary, Ministry of Home Affairs is sufficient”. The Singapore Parliament, however, thwarted the court’s move toward the application of the objective test as shown in Chng Suan Tze by amending its ISA in 1989 to exclude judicial review of the President’s subjective satisfaction. A similar step was taken by

40 Minister for Home Affairs, Malaysia & Anor v Karpal Singh [1988] 3 MLJ 29.
43 Chng Suan Tze v Minister of Home Affairs [1989] 1 MLJ 69.
the Malaysian Parliament by introducing a new section 8B of the ISA, which provides that:

[t]here shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.44

Within this limited scope of judicial review, the Malaysian courts did in some cases invalidate the Minister's order either on the grounds of procedural non-compliance or that the Minister's action is outside the scope of the Act.45 In Re Tan Sri Raja Khalid Raja Hanum,46 High Court Judge Datuk Harun Hashim held that Section 73(7) of the ISA, which deems lawful all detentions made under the powers conferred by it, does not mean a complete ouster of the court's jurisdiction to issue a writ of habeas corpus. The purpose of subjecting the exercise of power under a statute to judicial review is, as the learned judge said, “to ensure that the scope and limits of the power were not exceeded”.47 In this case, the applicant was a director of Perwira Habib Bank, the majority shareholder of which was the Armed Forces Fund Board, and a member of its loans committee from October 1975 to August 1985. It was alleged that during his tenure as a Director of the Bank, the applicant had provided consultancy services to the bank, which resulted in massive loans by the bank to various parties, causing it to suffer substantial losses. In January 1987, the Police Commercial Crime Branch investigated allegations of criminal breach of trust involving the applicant, leading to his arrest under Section 73 (1) of the ISA on 13 January 1987. The arresting officer stated in his affidavit that he had "reason to believe that the substantial losses suffered by the bank ... has evoked feelings of

anger, agitation, dissatisfaction and resentment among members of the armed forces and it is likely that such feelings may be ignited and lead to their resorting to violent action and thereby affect the security of the country.48 The court however was loath to accept that the losses suffered by the commercial bank, whose depositors also included members of the public, would likely cause a revolt among the soldiers. As the court found no evidence that the applicant had acted in any manner prejudicial to the national security, a writ of habeas corpus was granted to him.

Similarly, in Jamaluddin bin Othman v. Menteri Hal Ehwal Dalam Negeri & Anor49 in October 1988, High Court Judge Datuk Anuar Zainal Abidin, ordered the release of the applicant, a Malay Christian who was detained under Section 8(1) of the ISA for allegedly carrying out missionary activities considered to be prejudicial to national security. The grounds of detention served on the applicant alleged that he, since 1985, was involved in a plan to propagate Christianity among Malays, which the government believed might create tension and enmity between the Muslims and the Christians in the country, and hence was prejudicial to national security. The allegation of fact stated that he had participated in a workshop and seminar for such purpose and converted six Malays to Christianity. Maintaining that grounds of detention, rather than allegations of facts, are open for challenge in court, Justice Anuar held that the ground of detention supplied to the applicant fell outside the scope of the Act. The learned judge reasoned that as Article 149 of the Federal Constitution does not invalidate provision in the ISA which is inconsistent only with Articles 5 (liberty of the person), 9 (prohibition of banishment and freedom of movement), 10 (freedom of speech, assembly and association) of the Federal Constitution, provision which is inconsistent with Article 11 (freedom of religion) is therefore invalid. As such, the learned judge ruled, the Minister had no power under the ISA to restrict the right of the applicant to profess and practice Christianity as

guaranteed by Article 11 of the Federal Constitution.\footnote{According to Pawancheek (2007: 7), the decision does not indicate that freedom of religion under Article 11 is absolute. It only shows that security legislation does not override the right to freedom of religion guaranteed by the Article.} This decision was upheld by the Federal Court.\footnote{Minister of Home Affairs v Jamaluddin bin Othman [1989] 1 MLJ 418.}

The Federal Court's decision in \textit{Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals} in September 2002,\footnote{Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals [2002] 4 MLJ 449.} marked a shift toward the application of an objective test in reviewing detentions made under the ISA. Departing from \textit{Theresa Lim},\footnote{Theresa Lim Chin Chin \& Ors v Inspector General of Police [1988] MLJ 293.} the Federal Court held that the subjective judgment accorded to the Minister under section 8 of the ISA cannot be extended to the police in the exercise of their discretion under section 73(1) of the Act. The appellants, who were the leaders of the opposition National Justice Party (Parti keADILan Nasional, keADILan) and reformasi activists, were arrested and detained under section 73(1) of the ISA for allegedly planning a violent street demonstration in Kuala Lumpur in April 2001. The police claimed that the appellants, who had allegedly gathered weapons and explosives to cause violence in the capital city, had acted in a manner prejudicial to the national security, and hence warranted their arrest under the ISA.\footnote{It transpired later that there was no evidence to prove that they had actually gathered weapons and explosives as claimed by the police.} The appellants however challenged the legality of their arrests, contending that the arrests were not for the dominant purpose of Section 73 of the ISA, that is, to enable the police to conduct further investigation regarding the appellants' alleged acts and conduct which were prejudicial to the national security, but merely for the purpose of intelligence gathering which was unconnected with national security. They therefore argued that the exercise of the powers of detention by the respondent under s 73(1) of the ISA was \textit{mala fide} and improper. The High Court and the Court of Appeal rejected their application and the appellants appealed to the Federal Court. Allowing the appeal, Justice Tan Sri Steve Shim held that:

The learned High Court judge took the view that the right of non-disclosure under Section 16 makes the test under Section 73(1) a subjective one. Here, it is
important to note the actual wording in Section 16. It is expressly stated to be applicable only in relation to Ch II, Pt II of the ISA. To read it as applying to s 73 which falls under Pt IV would clearly be contradicting the expressed intention of Parliament. Given the enormous powers conferred upon police officers including minor officials such as guards and watchmen and the potentially devastating effect or effects arising from any misuse thereof, it could not have been a matter of accident that Parliament had thought it fit that the right of non-disclosure under Section 16 should only be confined to those personalities and circumstances falling within the ambit of Ch II of the ISA and not beyond. It therefore makes sense that the subjective judgment accorded to the minister under Section 8 cannot be extended to the police in the exercise of their discretion under Section 73(1). 55

Though the Federal Court's decision in Mohamad Ezam marked a shift toward the application of an objective test in reviewing executive detentions under Section 73(1) of ISA, it did not suggest that the Minister's satisfaction under Section 8 is now justiciable. The Federal Court's judgment indicates that the contrary is true. Asserting that Sections 73(1) and 8 of the ISA are not "inextricably connected", Justice Steve Shim said:

Inextricably connected would mean that Sections 73(1) and 8 are wholly dependent on each other. In the court's view, such a proposition would have the effect of inhibiting or restricting the unfettered discretion of the Minister. It would mean that the Minister could not, on his own and independent of the police, conduct any investigation or take into consideration factors extraneous to those arising from police investigation under Section 73 ... In the exercise of his discretion he need not necessarily have to consider and rely on police investigation. This is implicit in the very nature of an unfettered discretion.56

And, as it turned out, four of the five appellants continued to be detained under the ISA since the Minister’s order under section 8 had been issued against them. Obviously, the subjective test as laid down in Liversidge and affirmed in Karam Singh still applies to the Minister’s order made under section 8 of the Act. Attacks on the Minister’s order can only be made on the grounds of procedural non-compliance with the law, mala fide or the use of law for improper purposes on the part of the detaining authority. In the absence of the apex court’s decision to depart from its earlier position on the non-justiciability of subjective satisfaction of the Minister, the present status quo will certainly remain. Amidst recent calls for greater respect for human rights and democracy, as well as for the state’s accountability and transparency, the Malaysian courts seemed unwilling to mitigate the effect of the executive’s wide discretionary powers in deciding what is in the best interest of national security. The Federal Court’s decision in Mohamad Ezam shows that there is, and has been, an overriding view among Malaysian judges that the Minister’s subjective satisfaction in making detention orders under preventive detention laws is non-justiciable. Apart from limits drawn by the legislature on the judges’ supervisory powers, their judicial attitude in the final analysis reflects not only acceptance by the judiciary of the specific state-defined policy objectives that the laws are supposed to serve, but also a strand of formalist judicial reasoning which is divorced from normative consideration. Phrases such as “judges in the matter of preventive detention are the executive” and “disclosure of facts would be against the

57 The four appellants were keADILan Youth Chief Mohamad Ezam Mohd Noor, keADILan Vice-President Tian Chua, a member of keADILan Supreme Leadership Council and Jemaah Islah Malaysia President Saari Sungib, and Reformasi activist Hishamuddin Rais. Another appellant, Raja Petra Kamaruddin, who was the Director of Free Anwar Campaign, was released on 2 June 2001, after being detained by the police under Section 73(1) of the ISA for 52 days. See New Straits Times, 11 September 2002.
national interest" found in landmark decisions reflect this statist judicial attitude, which in turn, led to the prioritization of state power over individual freedom.  

Communal Justice

Other than preoccupation with national security, articulation of competing communal interests continued to be the main feature Malayan politics after independence. Issues of inter-ethnic inequalities, language and culture fuelled communal tension in the 1960s, culminating in the tragic racial riots on May 13, 1969. Far from easing the tension, the government’s enthusiasm in implementing policies providing for Bumiputera privileges after the 1969 racial riots caused much disaffection among the non-Bumiputera communities. Such disaffection was further compounded by the fact that the privileges in securing permits, licences, employment in public service and places in public universities worked in favour of the Malays who already possessed political control. However, concurring with the government on the necessity of such policies in correcting inter-ethnic imbalances and promoting national unity, the courts had generally construed the meaning of Articles 8 (equality before the law), 152 (Malay as national language) and 153 (special position of the Malays and natives of Sabah and Sarawak, or the Bumiputeras) of the Federal Constitution in such a way that they accommodated the government’s policy objectives. Article 153 was put in place on the basis that without such protection the Bumiputeras “would be completely overwhelmed by the other racial groups, particularly the Chinese, who already control the economy and dominate the professions”. Recognizing the importance of such provisions, former Lord President Tun Mohamad Suffian Hashim wrote:

Protective provisions were written into the Malaysian constitution not with the intention of pulling back the advancement of the non-indigenous people but with the intention of securing the advancement of the indigenous people

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who, through no fault of their own, were and are educationally, socially and economically less advanced, and the leaders of the non-indigenous people consented to these provisions in return for generous citizenship terms that enabled a large number of them to become citizens by a stroke of the pen.62

The extent to which the judges' ethnic identity influenced their decisions in racially charged cases is uncertain.63 As case laws indicated, there has been no single pattern of decisions where the judges can be said to have always decided in favour of their respective ethnic community in such cases. Even if they did, the decisions seemed to reflect their adherence to legal formalist rules and procedure rather than to a communal notion of substantive justice.64 A Muslim judge even decided in favour of a Christian applicant who was detained under the Internal Security Act 1960 for propagating Christianity among Muslims.65 Speaking of Malaysian judges' impartiality in handling racially charged cases, Justice Suffian once noted that "nobody reading our judgment with our name deleted could with confidence identify our race or religion".66

As communalism lies at the core of the 1957 constitutional contract, it is not surprising to find that the principle of equality under the Constitution is qualified by provisions which are communal in nature. Article 8(2) provides, "except as expressly

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63 Though the Malaysian judiciary is multiracial in its composition, the majority of the judges are Malays. As at 18 July 2007, of the 8 judges sitting in the Federal Court, 7 are Malays (88%) and 1 Indian (12%). Of the 22 judges in the Court of Appeal, 17 are Malays (77%), 3 Chinese (14%) and two Indians (9%). Of the 39 judges in the High Court, 27 are Malays (70%), 6 Chinese (15%) and 6 Indian and other races (15%). Of the 26 Judicial Commissioners, 21 are Malays (81%), 3 Chinese (12%) and 2 Indian and other races (8%). Since the first local Lord President (currently known as Chief Justice), Tun Syed Sheh Barakbah took office in 1966, the highest judicial post has always been held by a Malay judge. As a matter of practice, the post of Chief Judge of Sabah and Sarawak, the fourth-highest ranking judicial post, is normally held by a non-Malay judge, while Malay judges normally assume the post of President of the Court of Appeal and Chief Judge of Malaya, the second and third highest-ranking judicial post respectively. In 1993, of the 53 judges sitting on the bench, listed in Foong (1994), 33 (62%) were Malay/Muslims, 12 (23%) were Chinese and 8 (15%) were Indian or other race.
64 See for example Merdeka University Berhad v. Government of Malaysia [1982] 2 MLJ 243.
65 See Jamaluddin bin Olkman v. Mentari Hal Ehwal Dalam Negeri & Anor [1989] 1 CLJ 448. See also Teh Eng Huat v. Kadhi of Pasir Mas, Kelantan & Anor [1990] 1 CLJ 277 where Lord President Tun Abdul Hamid Omar held that a non-Muslim parent had the right under Article 12(4) of the Federal Constitution to decide the religion of his minor child (below 18 years old). In this case, Suzie Teoh, a Buddhist under-aged girl, converted to Islam against the wishes of her parent.
authorized by this Constitution, there shall be no discrimination against citizens on
the ground only of religion, race, descent, place of birth or gender in any law or in
the appointment to any office or employment under a public authority or in the
administration of any law relating to the acquisition, holding or disposition of
property or the establishing or carrying on of any trade, business, profession,
vocation or employment". Clause (5) of Article 8, however, does not invalidate or
prohibit: (a) any provision regulating personal law; (b) any provision or practice
restricting office or employment connected with the affairs of any religion, or of an
institution managed by a group professing any religion, to persons professing that
religion; (c) any provision for the protection, well-being or advancement of the
aboriginal peoples of the Malay Peninsula (including the reservation of land) or the
reservation to aborigines of a reasonable proportion of suitable positions in the
public service; (d) any provision prescribing residence in a State or part of a State as
a qualification for election or appointment to any authority having jurisdiction only
in that State or part, or for voting in such an election; (e) any provision of a
Constitution of a State, being or corresponding to a provision in force immediately
before Merdeka Day; and (f) any provision restricting enlistment in the Malay
Regiment to Malays.

The Federal Court in Datuk Haji Haron bin Haji Idris v. Public Prosecutor in 197767
had the opportunity to interpret the principle of equality under Article 8. Subjecting
the operation of Article 8 to the limiting principles based on the classification
permitted by the Article, the Federal Court adopted the view that the equality
provision in Article 8 is qualified and "does not mean that all laws must apply
uniformly to all persons in all circumstances everywhere".68 As clause 5 of Article 8
itself envisages, there may be lawful discrimination based on "communal"
classifications such as Muslims as opposed to non-Muslims, aborigines as opposed

69 Article 8(5)(b) allows "any provision or practice restricting office or employment connected with the
affairs of any religion, or of an institution managed by a group professing any religion, to persons
professing that religion"
to non-aborigines, Malays and natives of Borneo as opposed to other communities, and “non-communal” classification such as residents in a particular State as opposed to residents elsewhere. Avoiding excessive idealism in treating equality as a legal concept, Justice Suffian in Datuk Harun said:

(W)hile we are all familiar with the idealistic concept of equality, Indian -- and Malaysian judges -- are not familiar with it as a legal concept, having been introduced in India only in 1949 and in Malaysia in 1957. As a legal concept it is easy to state, but difficult to apply -- because, first, equality can only apply among equals and in real life there is little equality and, secondly, while the concept of equality is a fine and noble one it cannot be applied wholesale without regard to the realities of life. While idealists and democrats agree that there should not be one law for the rich and another for the poor nor one for the powerful and another for the weak and that on the contrary the law should be the same for everybody, in practice that is only a theory, for in real life it is generally accepted that the law should protect the poor against the rich and the weak against the strong.

The communal dimension of the principle of qualified equality under Article 8 was put to test in Merdeka University Berhad v. Government of Malaysia, or the Merdeka University case in 1981. The appellant argued, inter alia, that the government refusal to allow the setting up of a Chinese-medium university on the basis that the use of Chinese language as the medium of instruction violated the national education policy, which required the use of National Language, i.e. the Malay language as the

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70 Article 8(5)(c) allows “any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service”.

71 Article 153 states that “it shall be the responsibility of the Yang di-Pertuan Agong to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities. . .”

72 Article 8(5)(d) allows “any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election.”


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medium of instruction, was discriminatory in nature, and hence contravened Article 8 of the Federal Constitution. High Court Judge Justice Abdoolcader held that the government refusal was not discriminatory since Article 8(2) of the Federal Constitution does not treat language as one of the grounds of discrimination prohibited by the Article.75 Giving a strict construction to Article 8(2), the learned judge said:

Article 8(2) further refers to discrimination purely and solely on account of all or any one or more of the grounds mentioned in that clause and cannot apply if it is alleged to be on one or more of those grounds and also on other grounds as well (Datuk Harun bin Haji Idris [1976] 2 MLJ 116, 119, 120 (at page 119)). Language in any event is not one of the prohibited grounds of discrimination in Article 8(2).

The setting up of Merdeka University was proposed by Chinese associations in the late 1960s with the primary aim to provide tertiary education for private Chinese secondary school graduates whose access to the government-funded tertiary public educational institutions had been adversely affected by the post-1969 pro-Malay education policy. The government maintained that the use of the National Language as the medium of instruction in public educational institutions, as was envisaged in the national education policy set out in the preamble to Education Act 1961, was necessary for national unity. Agreeing with the government on such a policy objective, Justice Suffian, delivering the Federal Court's majority decision upholding the decision of the High Court in the Merdeka University case, said:

In any event, bearing in mind the history of education in this country and the divisive results of allowing separate language schools ... and the determination of Parliament to so regulate schools and universities and education generally as an instrument for bringing about one nation out of the disparate ethnic elements in our population, we have no choice but to hold, as

we have already held, that Merdeka University if established would be a public authority within Article 160(2) of the Constitution and that accordingly teaching in Chinese there would be use of that language for an official purpose, which use [sic] may be prohibited under Article 152.76

Article 152 (1) of the Federal Constitution provides that the national language shall be the Malay language and shall be in such script as Parliament may by law provide: Provided that - (a) no person shall be prohibited or prevented from using (otherwise than for official purposes), or from teaching or learning, any other language; and (b) nothing in the Clause shall 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. The majority decision in Merdeka University suggested that as the proposed university, which was to be established under the University and University Colleges Act 1971, is a "public authority" and the use of Chinese as a medium of instruction falls within the scope of "official purpose" under Article 152, and hence was limited by Clause 1(a) of the Article.

It is to be noted however that Justice Datuk George Seah, in his dissenting judgment disagreed with the majority view on the status of the proposed university as a public authority. The bone of the learned judge's contention was that, "since a university incorporated under the Universities and University Colleges Act 1971 would not be exercising governmental or quasi-governmental powers vested in it by Federal law ... such a university would not be a public authority".77 It follows that the use of Chinese as a medium of instruction at the proposed university is not for an official purpose within the meaning of Article 152. Offering a more liberal construction of the Article, the learned judge said:

"(u)sing" does not mean "speaking" and it would be wrong to give such a narrow and artificial construction to the word "using" when the only

restriction imposed by Article 152(1)(a) is limited to using any other language or the Chinese language for official purposes ... There is nothing in Article 152(1)(a) to prohibit or prevent the using of the Chinese language for non-official purposes, and it is within the legitimate right of a businessman to put up his business signboard in the Chinese language as well as in the national language. In my opinion, this constitutional privilege guaranteed by Article 152(1)(a) should be given a liberal interpretation and no attempt should be made to whittle it down.78

The Malaysian courts also defended the purpose for which Article 153 is to serve, that is to safeguard the special position of the Malays and the natives of Sabah and Sarawak through reservation of quotas for them in respect of employment in the public service, permits, licences, scholarships and education.79 The courts too, taking into consideration the sensitive and potentially inflammable nature of open debates on the issue of Bumiputera special privileges and the legitimate interests of other communities, adopted the more restrictive view of the right to freedom of speech and expression if such freedom amounts to questioning the special privileges guaranteed by the Constitution. In Public Prosecutor v Fan Yew Teng,80 the defendant, who was the Deputy Secretary-General of the Democratic Action Party (DAP) and the editor of the party’s official organ, the Rocket, was convicted under the Sedition Act 1948 for publishing an article questioning Bumiputera special privileges. The article entitled “Alliance Policy of Segregation ‘Evidence Galore’ listed by Dr. Ooi” published in the December 1970 issue of the Rocket, in the main, questioned the dominant position of one ethnic community, apparently the Malays, in the army, police, education institutions, land schemes, public housing, business and industry. Parts of the article read:

There is evidence galore of the Alliance policy of segregation.

No. 1. Take our Malaysian Army. New and better battalions are being formed from members of one ethnic group. Here you have an excellent opportunity for integration in a vital part of our national structure but this opportunity is being missed.

No. 2. New police contingents. Here again recruitment mainly from one ethnic group. Another excellent opportunity for integration (is) being missed.

No. 3. Schools, colleges and universities are being organised by different ethnic groups, and everybody is moving along his own separate path. Therefore, the cleavage between our future leaders and intellectuals will be all that more difficult to bridge in years to come.

No. 4. Public housing. Another avenue for integration (is) not being exploited. Instead, housing and shopping complexes for one ethnic group are still being built all over the country.

No. 5. Land Schemes. Vast land schemes with real opportunities for people of all races to live and work and grow up together. Here again a golden opportunity being missed.

No. 6. Gigantic business and industrial concerns are being organised, not for the benefit of ALL poor Malaysians, but again only for the benefit of one ethnic group. The latest of these is the National Corporation. Even the Prime Minister, Tun Abdul Razak, says blatantly that this is for the benefit of one ethnic group, although this huge multimillion dollar Corporation is called a 'national' corporation. Can't the Alliance Government imagine for a minute what the reaction of the country will be, and the far-reacting implication of calling this huge corporation a 'national' corporation when it serves the interests of only one ethnic group? Is it being suggested that other groups in this country are not part of the national structure? Or is this another bad example of governmental arrogance?81

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81 See the full text of the article which was reproduced in Public Prosecutor v Fan Yee Teng [1975] 1 MLJ 176, p.p. 177.
The article was originally the text of a speech delivered by a DAP leader, Dr. Ooi Kee Saik, on 22 November 1970 at a dinner to celebrate the release of DAP Secretary-General, Lim Kit Siang, from ISA detention. During the trial at the High Court, the counsel for the defendant argued that the defendant was entitled to his right to freedom of speech and expression as guaranteed by the Federal Constitution, and hence he should not be convicted for sedition. The trial judge Justice Abdul Hamid, however, maintained that the right to freedom of speech and expression is not an absolute right, and the Parliament, considering the multiracial composition of Malaysian population, may by law impose restrictions to these rights. Finding the defendant guilty of the offence in January 1975, the learned judge made the following observation:

Speaking of the freedom of speech and expression ... this is the right of every citizen and it is guaranteed by our Constitution, the supreme law of the country. That may well be, although I do not conceive it can ever be seriously suggested that such right to freedom of speech and expression is absolute. Clause (2)(a) of Article 10, for example, clearly empowers Parliament to impose, by law, "such restrictions as it deems necessary or expedient in the interests of the security of the Federation ... public order or morality ..." While I quite agree that there is no ambiguity in regard to this aspect of the citizen's fundamental liberty, there is equally no ambiguity that the right is subject to certain restrictions that Parliament may by law impose. It simply means that one is free to say or express as one pleases so long as one does not offend the provisions of such law. I will not profess that I am qualified to question the wisdom of Parliament for enacting particular legislation. This, I think, is a matter for the elected representatives to decide whether Malaysia, with her multi-racial society, and in view of the composition of her people, there is a need for a legislation, in the interests of security, to adequately and effectively deal with those words which are expressive of a tendency not to promote peace but to excite illwill [sic] and hostility. There must be adequate provision to effectively extinguish a spark without waiting for it to enkindle a flame. We
have witnessed a tragic incident and I have no doubt it is the earnest hope of every peace-loving citizen that he may not live to witness yet another incident or even a spark that may enkindle a fire that would burst into a sweeping and destructive conflagration.82

Justice Abdul Hamid's contention reflects the formalist strand of argument for it refused to question the wisdom of the Parliament in determining policy issues while at the same time, taking into consideration the potentially inflammable consequence of communal conflict in Malaysia's ethnically divided society, recognized the necessity of laws which limit the exercise of freedom of speech and expression. This position was upheld by the Federal Court in July 1975. Defending the constitutionality of the government policy on Bumiputera special privileges, former Chief Justice of Borneo Tan Sri Lee Hun Hoe said:

That the Yang Dipertuan Agong is to safeguard the special position of the Malays and the natives in Sabah and Sarawak and the legitimate interest of other communities is clearly spelt out in Article 153 of the Federal Constitution. These provisions cannot be questioned and are necessary to assist the less advanced or fortunate in the light of the conditions prevailing in the country at the time of independence. It may take time, certainly not in our generation, for the provisions to become redundant. But as long as the provisions are there it is mischievous to seek to attack the Government for doing something in accordance with the Constitution.83

Even legislators cannot plead parliamentary privileges when they are prosecuted for making speeches on sensitive racial issues. In Mark Koding v Public Prosecutor,84 the accused, who was a Member of the Dewan Rakyat, made a speech in Parliament in October 1978 questioning the existence of Chinese and Tamil schools, as well as signboards written in both languages. He advocated the closure of the two

84 Mark Koding v. Public Prosecutor [1982] 2 MLJ 120.
vernacular school streams and the complete restriction of the two languages on signboards. The failure to do so, the accused said, would mean “to ignore the trust of the people and frustrate the wishes of the new generation who do not want their country to be identified with the alien identity”. \(^{85}\) He was subsequently charged under the Sedition Act 1948 for uttering seditious words. During the trial at the High Court, the trial judge referred to the Federal Court the question of whether the accused person’s right to free speech as a Member of Parliament had been validly limited by Article 63(4) of the Federal Constitution as amended in 1971. Article 63 (2) of the Federal Constitution exempts a person from any legal liability “in respect of anything said or any vote given by him when taking part in any proceedings of either House of Parliament or any committee thereof”. Clause 4 of the Article however provides that “Clause (2) shall not apply to any person charged with an offence under the law passed by Parliament under Clause (4) of Article 10 or with an offence under the Sedition Act 1948 (Act 15) as amended by the Emergency (Essential Powers) Ordinance No. 45, 1970”. While holding that such a right was validly limited by the amendment to Article 63(4), Justice Suffian went further in his judgment to state the legitimate basis for such limitation was on Malaysia’s own experience of fragile ethnic relations. In this regard, the former Lord President said:

Malaysians with short memories and people living in mature and homogeneous democracies may wonder why in a democracy discussion of any issue and in Parliament of all places, should be suppressed. Surely it might be said that it is better that grievances and problems about language, etc. should be openly debated, rather than that they be swept under the carpet and allowed to fester. But Malaysians who remember what happened during May 13, 1969, and subsequent days are sadly aware that racial feelings are only too easily stirred up by constant harping on sensitive issues like

\(^{85}\) Part of the accused person’s speech in Malay is reproduced in Justice Mohd Azmi’s written judgment in *Public Prosecutor v Mark Kading* [1983] 1 MLJ 111, p.p. 112.
language; and it is to minimize racial explosions that the amendments were made.\textsuperscript{86}

The operation of Bumiputera special privilege under Article 153 itself was dealt with in \textit{TSC Education} in 2000.\textsuperscript{87} The issue at hand was whether Rule 2 of Majlis Amanah Rakyat (Yayasan Pelajaran MARA) Order 1969 should be given wider interpretation so as to allow Chinese students from the People's Republic of China to study at Kolej Yayasan Pelajaran MARA, a corporation established under the Majlis Amanah Rakyat Act 1966 (Revised 1992) and the Order. Rule 2 of the Order specifically outlines the corporation's purposes as follows: (i) to provide educational and training facilities for the Bumiputeras; (ii) to encourage Bumiputeras' education and training; and (iii) to provide scholarships, loans and other financial assistance to Bumiputeras for the purpose of enabling them to further their studies. Applying a literal construction of the clear and unequivocal words in the Order, and relying on the provisions in Article 153 of the Federal Constitution, High Court Judge Datuk Abdul Malik Ishak held that the corporation was not empowered to provide training and educational facilities to non-Bumiputeras. As to the plaintiff's counsel's argument that neither the Act nor the Order contained express or implied provisions which prohibited foreign students from studying at the college, and that allowing their entry would promote, stimulate and facilitate economic and social development of the country, the learned judge said:

In simple language, it means this. What the statute does not expressly or impliedly authorize is to be taken as prohibited. Likewise here, the said Act and the said Order did not expressly or impliedly authorise the defendants to take in the China students and that must be taken to be prohibited. I am constrained to hold that the whole purpose of the said Act and the said Order being enacted was exclusively for the advancement of Bumiputera students. It would certainly be absurd if foreign students from the People's Republic of

\textsuperscript{86} \textit{Mark Kading v Public Prosecutor} [1982] 2 MLJ 120, p.p. 123.

\textsuperscript{87} \textit{TSC Education Sdn. Bhd. v Kolej Yayasan Pelajaran Mara \\ & Anor} [2002] 2 CLJ 581.
China, the China students, were allowed entry but, on the other hand, the entry of local students who are non-Bumiputeras are disallowed. To adopt the argument of the learned counsel for the plaintiff would defeat the purpose of enacting the said Act and the said Order. The plaintiff seemed to suggest and advocate that local non-Bumiputera students should also be allowed entry because this would also "promote and stimulate the economic and social development of Malaysia". But the long line of authorities as alluded to earlier would certainly put an end to that kind of suggestion. The exclusive rights of the Bumiputeras are enshrined in the Federal Constitution. Article 153 of the Federal Constitution provides for reservation of special benefits for the Malays and natives of any of the States of Sabah and Sarawak ... ...

It seems that Malaysian judges, apart from being constrained by the legal texts in interpreting laws on Bumiputera special privileges and legitimate interest of other communities, had also accepted the necessity of government's efforts to correct imbalances among ethnic groups through implementation of positive discrimination policy in favor of the Bumiputeras. Furthermore, taking into consideration the potentially inflammable consequence of open debates on such issue, what is more questioning government policies on ethnic relations, the judges tended to view that the untrammelled exercise of freedom of speech and expression would not be in the interest of the nation. This, in turn, led to the legitimization by the court of the "wisdom" of the Parliament in enacting laws that limit the exercise of fundamental liberties for the purpose of maintaining racial harmony. In racially charged cases, the notion of national interest, which also means valorization of state power, gained priority over individual freedom.

**Developmental Justice**

The primary role of law and legal institutions viewed in the context of the dirigiste developmental state has been to facilitate and not to impede economic development

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as defined and initiated by the state. This idea is well encapsulated in the notion of developmental justice that prioritizes economic development over individual rights and freedom. While the former is an object of state policy, the latter is regarded as its main obstacle. It is in this context that the judiciary in an illiberal statist legal system is expected to vindicate the government’s economic development policies, even though the implementation of such policies raised human rights and environmental concerns. Former Prime Minister, Dr. Mahathir Mohamad, in his speech delivered in Montevideo in 1997 affirmed that “a requisite for development is a judicial system that understands and supports the aspirations of the people for development and justice”. What is more, rapid economic development has also been viewed as a necessary means to correct economic imbalances among the country’s major communal groups, especially between the Malays and the more economically advanced Chinese.

While the Malaysian state has been pro-active in instituting a market friendly legal framework in order to promote economic development, the Executive has wielded wide discretionary powers in guiding economic policies and programs. Statutes such as the Industrial Coordination Act 1975 and the Land Acquisition Act 1960 contain provisions which not only confer wide discretionary powers to the executive, but also exclude judicial review of the executive action. Delegated legislation has also been invoked, sometimes by making orders with retrospective effect, to validate executive actions in the implementation of development projects. Maintaining that ‘industrial harmony’ is necessary for the country’s economic

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89 Soyinka (1999).
90 Mahathir (1997).
91 Pistor & Wellons (1999: 91)
92 Section 3 (1) of the Land Acquisition Act gives wide discretionary powers to the State Authority to acquire “any land which is needed-
(a) for any public purpose;
(b) by any person or corporation for any purpose which in the opinion of the State Authority is beneficial to the economic development of Malaysia or any part thereof or to the public generally or any class of the public; or (c) for the purpose of mining or for residential, agricultural, commercial, industrial or recreational purposes or any combination of such purposes.
93 On aggrieved parties' appeals to the Minister regarding revocation, variation or refusal of licences, Section 13(2) of the Industrial Coordination Act 1975 provides that “The Minister may after hearing the appeal make such order as he deems fit and that order shall be final and shall not be questioned in any court”.
growth, the government introduced labour legislation which severely restricted labour rights. 'Finality' clauses which render the Minister's decision final and conclusive were also put in place. All this amounts to enhancing state authority in furthering its economic development programs, while circumscribing judicial scrutiny in this key policy area.

Very often, the pursuit of breakneck economic development brings to the fore tussles between sectional interests as represented by large corporations backed by the state on the one hand, and ordinary people who were displaced as a result of implementation of the so-called economic development projects. This undermined the very claim of economic development supposedly inherent in the notion of developmental justice. There are sections of displaced Malaysian communities who find themselves trapped in the "development vs. human rights" conundrum, and who believe that economic development and social justice are antithetical to each other, that economic development benefits only a few and victimizes many others.

It is in these tussles that the courts had to consider the issue of whether a private citizen has locus standi to file a legal suit against project proponents. Two controversial cases, in particular, set limits to such rights. In Government of Malaysia v Lim Kit Siang in 1988, the respondent, who was the Opposition Leader, sued for a declaration that a letter of intent pertaining to construction of the multibillion ringgit North-South Highway given to United Engineers Malaysia (UEM), a company linked to the ruling UMNO, was invalid and for an injunction to restrain UEM from signing any contract pursuant to the letter of intent. He alleged that the ministers involved in making the decision to grant the contract were guilty of criminally corrupt practices, in that they were biased in favour of the UEM. He alleged that the

95 See for example Section 9 of the Industrial Relations Act 1967 on the recognition of trade unions. Subsection (6) of the said section provides that "A decision of the Minister under subsection (5) shall be final and shall not be questioned in any court". The court however assumed its power of judicial review in cases where the Minister has erred in law in making such decision. See Paterson Candy (Malaysia) Sdn Bhd v. Minister for Labour and Manpower & Ors [1978] 1 LNS 141.

96 Tan (1997).

97 This includes the plight of the Penan community in the interior of Sarawak who were displaced as a result of logging activities and the construction of the controversial Bakun dam in the state. In 2003, the people of Braga in Selangor objected the state's proposed RM 1.5 billion incinerator project, which was to be built in their vicinity, citing health hazard as the main reason. In July 2007, the government decided to scrap the proposed project, citing its high cost as a reason (Malaysiakini, 7 July 2007).

decision had discriminated against two other companies which offered lower
tenders, and by rejecting their offers in favour of UEM's higher bid, the government
had incurred huge expenditure from public funds. Lim's motion for an interim
injunction was granted by the Supreme Court. On the application by the government
to set aside the injunction on the ground of lack of standing, the Supreme Court, by a
majority of three to two, overruled its previous decision and decided in favour of the
Government. On the issue of locus standi, the majority held that, where a statute
created a criminal offence but no civil remedy, the Attorney-General was the
 guardian of public interest and he alone could enforce compliance with the law. Lim
failed to show that he suffered special damage peculiar to himself and, therefore, his
claim for locus standi on this ground could not stand. As the Leader of the
Opposition, the court said, "Lim's remedy in this matter does not lie with the court,
but with Parliament and the electorate." 99

Similarly, in Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajeng Tubek & Ors
and other appeals in 1997, 100 which is better known as the Bakun dam case, the Court
of Appeal refused to grant locus standi to private citizens seeking injunction to stop
work on one of the main infrastructure projects in Malaysia. Bakun dam in the
interior of Sarawak, the construction of which began in the early 1980s, was to have a
power-generating capacity of 2,400MW, approximately ten times more than the
projected energy need for the whole of Sarawak in 1990. As a spin off effect, the
project would attract foreign investment to Sarawak, and hence boost the state's
industrial development. After several hiccups in the project's preparatory stages,
due to economic recessions in the 1980s, a RM 15 billion contract to build the dam
and an undersea transmission cable to supply power to Peninsular Malaysia was
finally awarded to Ekran Bhd, a construction company owned by a politically well-
connected businessman, Datuk Ting Pek Khiing. 101 Ekran also stood to reap other
accompanying benefits like RM 1 billion worth of timber, which would be cleared
for the dam project. Ekran's plan to set up a plant to manufacture high tension cables

for the undersea power transmission project was also underway.\textsuperscript{102} Despite the fact that the project would involve flooding of about 70,000 hectares of tropical rainforest and displacement of approximately 10,000 indigenous people, the government in February 1995 gave the go-ahead to the project proprietor to start work on the dam without waiting for a report on its environmental impact being completed.\textsuperscript{103}

It was against this backdrop that three longhouse residents who were affected by the construction of the dam filed a suit in the High Court seeking a declaration that the project was illegal.\textsuperscript{104} They claimed that the Government and Ekran failed to comply with Environmental Quality Act (EQA) 1974 which requires the Environmental Impact Assessment (EIA) report to be completed before work on the prescribed activities could begin. In March 1995, a Minister’s Order was made with retrospective effect to exempt the application of EQA 1974 to prescribed activities in Sarawak. The order practically excluded the Bakun dam project from EQA’s requirements, which included the public’s entitlement to a copy of the EIA report and their rights to give comments on it.\textsuperscript{105}

The plaintiffs in the Bakun dam case claimed that they had been deprived of their rights to obtain a copy of the EIA report, to be heard and to make representation prior to the approval of the report. They also claimed that “their homes and land would be destroyed, their lives uprooted by the project and that they would suffer far more greatly and directly than other members of the public as their land and forest are not just a source of livelihood but constitute life itself, fundamental to their social, cultural and spiritual survival as native peoples”.\textsuperscript{106} In allowing the plaintiffs’ application, High Court Judge Dato’ James Foong held, \textit{inter alia}, that “a valid assessment of an EIA prepared by the project proponent of the prescribed activities cannot be made without some form of public participation”.\textsuperscript{107} He added that “this is essential, for interaction between people and their

\textsuperscript{102} Business Times, 31 January 1994.
\textsuperscript{103} Kua (2001: 55)
\textsuperscript{105} Business Times, 7 April 1995.
environment is fundamental to the concept of environmental impact”. As such, “a right is vested on the plaintiffs to obtain and be supplied with a copy of the EIA coupled with the right to make representation and be heard”. The court therefore granted a declaration that the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995 was invalid, and that Ekran, before it could begin work on the dam, had to comply with the EQA, and with any regulations and guidelines made under the Act.

The Court of Appeal, however, allowed Ekran’s ex-parte application for an interim order to suspend the High Court’s decision. In the inter partes proceedings that followed, Ekran’s counsel argued that unlike the residents, “Ekran would lose substantially if the effect of the declaration was not suspended pending appeal”. He added that “dislocation would defer the immense benefit from the project accrued to the nation”, because the project “would make cheap power available to consumers”. A final mortal blow to the longhouse residents was dealt by the Court of Appeal which overturned the High Court’s decision. Allowing Ekran’s appeal, Court of Appeal Judge Dato’ Gopal Sri Ram held that the respondents lacked substantive locus standi because they were, in substance, attempting to enforce a penal sanction, which was a matter entirely reserved by the Federal Constitution to the Attorney-General. The respondents also did not suffer any special injury over and above the injury common to others so as to make them entitled to standing in court. The court held that deprivation suffered by the respondents, a claim made under Article 5(1) of the Federal Constitution, was “in accordance with the law”. They therefore suffered no injury and there was no necessity for a remedy. As regards to the question of substantive locus standi, Justice Gopal Sri Ram said:

110 The New Straits Times, 12 July 1996. Similar argument was accepted by the Supreme Court in Asian Rare Earth Sdn. Bhd. V. Woon Tan Kan & Ors [1992] 4 CLJ 2207. The court allowed the appellant’s application to suspend the injunctions restraining it from producing, storing and keeping its toxic waste pending appeal because the injunctions “would cause harm to the appellant and hardship to its workers if they were allowed to operate before appeal is heard and disposed of”.
111 The New Straits Times, 12 July 1996.
The factors that go to a denial of substantive *locus standi* are so numerous and wide ranging that it is inappropriate to attempt an effectual summary of them ... As regards subject matter, courts have — by the exercise of their interpretative jurisdiction — recognized that certain issues are, by their very nature, unsuitable for judicial examination. Matters of national security or of public interest, or the determination of relations between Malaysia and other countries as well as the exercise of the treaty making power are illustrations of subject matter which is ill-suited for scrutiny by the courts. Jurisdiction is declined, either because the supreme law has committed such matters solely to either the Executive or the Legislative branch of Government — which is termed as 'the political question' by jurists in the United States — or because the court is entirely unsuited to deal with such matters.113

Justice Gopal Sri Ram also took the trial judge to task for not taking into account relevant considerations when deciding whether to grant declaratory relief. In particular, the appeal judge claimed that the trial judge "did not have sufficient regard to public interest, i.e. the failure to consider the interests of justice from the point of view of both the appellants and the respondents".114 Above all, the appeal judge concluded that the trial judge had erred because,

He failed to ask himself the vital question: are public and national interest served better by the grant or the refusal of the declarations sought by the respondents? ... The affidavit evidence filed on the respondents' behalf reveals that they were not against development in the national interest. They were merely concerned that, in respect of the project, there should be compliance of written law ... (The trial judge) certainly took into account the interests of justice from the respondents' point of view. However, he does not appear to have taken into account the interests of justice from the appellants' point of

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view as well. This omission fatally flaws the exercise of discretion. Justice is not meant only for the respondents. The appellants are equally entitled to have their share of it.115

The court's acceptance of the need to support development in the national interest and its preference to see justice from the appellant's point of view represents a dominant perspective which prioritizes state-led economic development even though such a view would fly in the face of individual rights. After all, giving limited meaning to the rule of law, the court conveniently concluded that no remedy is available for encroachment of individual rights done in accordance with the law. In treating both parties to the proceeding as equals, the court missed the fact that the tussle was actually between powerless private citizens and a giant corporation backed by the might of state power, in which no level playing field could be expected.

Apart from the courts' apparent acceptance of the state-defined economic development objectives, expressed provisions in the statutes, which give broad discretionary powers to the Executive to act on matters pertaining to economic development, left the courts with very limited space to strike down executive decisions. One such example is the provisions in the Land Acquisition Act 1960, which gives broad power to State Authority to acquire lands for public purposes. Section 3 of the Act provides that "State Authority may acquire any land which is needed--(a) for any public purpose; (b) by any person or corporation for any purpose which in the opinion of the State Authority is beneficial to the economic development of Malaysia or any part thereof or to the public generally or any class of the public;116 or (c) for the purpose of mining or for residential, agricultural, commercial or industrial purposes". This section had enabled state authorities to acquire lands for a wide range of purposes like development of townships, ports, 

116 Before amendment in 1991, section 3(b) reads, "by any person or corporation undertaking a work which in the opinion of the State Authority is of public utility". The amendment further broadened the scope of section 3.
residential areas and industrial zones, construction of roads and causeways, reservation for public parks, and even tourism.

In such cases, what constituted public purpose is up to the acquiring authority to determine, while the courts were left with limited room to intervene. In *Syed Omar bin Abdul Rahman Taha Alsagoff & Anor v The Government of the State of Johore*, the Privy Council held that the declaration issued under Section 8(3) of the Land Acquisition Act 1960 shall be conclusive evidence that all the scheduled land is needed for the purpose specified therein. The declaration can only be nullified on the ground of improper use of the statutory powers conferred to the acquiring authority or by reason of bad faith. This principle was followed in *Kulasingam & Anor v. Commissioner of Land, Federal Territory & Ors*, when the Federal Court held that:

The purpose of the acquisition can be questioned but only to the extent that it be shown that the acquiring authority has misconstrued its statutory powers or that the purpose stated does not come within section 3 of the Land Acquisition Act, 1960 or if bad faith is established.

Referring to the 1991 amendment to s 3(b) of the Land Acquisition Act, High Court Judge Justice Mohamad Ghazali in *Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Ors* observed that the powers of a State Authority had been broadened in

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119 See for example *Madeli Bin Salleh (suing as Administrator of the estate of Salleh bin Kilong, deceased) v Superintendent of Lands and Surveys, Miri Division & Anor [2005] 5 MLJ 305.
120 *Ahmad bin Suman v Kerajaan Negeri Kedah [2003] 4 MLJ 705.
122 Judicial Committee of the Privy Council in London continued to hear civil appeals from Malaysia until such practice was abolished on 1 January 1985. Criminal and Constitutional appeals to the Privy Council was abolished on 1 January 1978.
123 For useful discussion on the use of statutory powers for improper purpose, see Jain (1997: 466-474). See also *Pengarah Tanah dan Galian Wilayah Persekutuan, KL v Sri Lempah Enterprises [1979] 1 MLJ 135.
that it could now “acquire any land which is needed by any person or corporation, for any purpose which in its opinion is beneficial to the economic development of Malaysia or any part thereof or to the public generally or any class of the public”. As in the Honan Plantation case, the court viewed that the proposed construction of a second causeway between Malaysia and Singapore and the development of Gelang Patah into a new township would definitely amount to a purpose which was beneficial to the economic development of that part of the State of Johor and also to the public residing within the surrounding areas. The State Authority, the court maintained, is the best judge of what amounts to a purpose which is beneficial to economic development within the contemplation of s 3(b). Though the plaintiff’s appeal to reverse the High Court decision was allowed by the Court of Appeal, on the ground that it had reasonable cause of action to file the suit, Appeal Court Judge Dato’ Gopal Sri Ram affirmed the settled principle in land acquisition cases, that is, “an acquisition made under the provision of the Act cannot be challenged unless a plaintiff establishes that the acquiring authority had misconstrued its powers or had acted in bad faith or with gross unreasonableness”.

It seemed that the above view not only affirmed the executive’s wide discretionary power in determining what constitutes a public purpose, but also made challenge to such power an extremely difficult task. Proving bad faith or mala fide on the part of the acquiring authority is not an easy task. In Yeap Seok Pen v Government of the State of Kelantan, the appellant applied to the High Court for a declaration that the acquisition of her land by the State Government was invalid because the acquiring authority had acted in mala fide. She claimed that her land was selected for compulsory acquisition because she was not of Malay origin and that the government used its compulsory purchase power as a device to prevent her, as a Chinese Malaysian, from becoming the owner of the land. The High Court rejected her claim; so did the Federal Court. On appeal to the Privy Council, Lord Griffiths said, “bad faith of this order is an exceedingly serious allegation to make and she,

who makes it, has a heavy burden to discharge the onus of proving it”. Dismissing the appeal, His Lordship continued:

A person who asserts bad faith has the burden of proving it and mere suspicion is not enough. In considering whether the burden is discharged, the court will consider all the evidence before it including any explanation given by the Minister and any inference to be drawn from the failure to give an explanation.

Having shut themselves out from intervening in executive actions on substantive grounds, the courts were fairly vigilant when it came to scrutinizing the State Authorities’ compliance with the procedures and legal requirements set out in the statute. In *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee*, the then Chief Justice of Malaya Tun Salleh Abas asserted that “every exercise of statutory power must not only be in conformity with the express words of the statute but above all must also comply with certain implied legal requirements”. His Lordship further asserted that the exercise of such power is an abuse if “it is done for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness”. The Federal Court in this case agreed with the High Court that the seven-year delay between the declaration to acquire the land made under section 8 of the Land Acquisition Act and the holding of an inquiry to assess payment of compensation to the respondent was unreasonable. The High Court’s *certiorari* order to quash the acquisition proceedings was upheld by the Federal Court.

Express words in the statute giving wide discretionary powers to the Executive, coupled with the court’s acceptance of state-defined economic development goals, makes attempts to challenge executive actions in pursuing state-

131 *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee* [1983] 2 MLJ 35.
led economic development objectives almost a futile exercise. Only in rare cases were such attempts successful. In land acquisition cases for example, litigants are more inclined to challenge acquisition of their lands on the ground of inadequate compensation rather than seeking the nullity of such executive action. Justice is thus served by awarding compensation to the aggrieved party while allowing state-led economic development to take its course. The courts seemed to be content with the literal interpretation of Article 8 of the Federal Constitution which provides that no person shall be deprived of their property save in accordance with law and subject to the payment of adequate compensation.

Limiting Interpretive Jurisdiction of the Courts

The doctrine of legal formalism has been a potent ideological tool for the judges to stick to the legal text in interpreting a law, and avoid inquiring into its policy consideration, which is a matter for the Parliament to decide. This certainly worked well for the legislature. It ensures that judges interpret laws according to what the legislature has proclaimed, and more important, by not inquiring into its policy consideration, promote the government policy objectives. But once the circumstances within which the law operates change, it is the judges' prerogative to interpret the actual legal text based on the exigency of the changed circumstances. What is more, imbued by the common law tradition of judicial law-making, Malaysian judges had developed a strong doctrine of judicial review. This, in turn, provided a space for the judges to take a more activist line in judicial reasoning as transpired during the


short-lived fierce judicial activism in the mid 1980s. In the aftermath of the watershed Executive-Judiciary crisis in the late 1980s, former Lord President of the Supreme Court Tun Salleh Abbas wrote about this space for judicial activism:

Judges, of course, do not become involved with the functions of the Legislative arm of Government. However wise they may be, they cannot participate in making laws which they will later have to interpret. No one can anticipate what use any particular law would be put to when they are writing the law. Judges have to interpret the laws according to the circumstances at hand. Laws can become obsolete and meaningless when changes take place in society, and again, only judges can decide how to view the law in a new circumstance. Therefore the power to make laws and the powers to interpret them must lie in clearly separate compartments.

The judges on many occasions struck down executive decisions or even declared laws passed by the Parliament as unconstitutional, resulting in a period of tension between the Executive and the Judiciary in the late 1980s. Thinking that the court had gone too far in reviewing executive decisions, and that the dividing line between the executive and judicial powers needed to be clarified, the Parliament in 1988 amended Article 121 of the Federal Constitution to remove the exclusive vesting of judicial power in the High Courts and the inferior courts. According to Harding, while the amendment was apparently an attempt to codify the separation of powers in the Constitution, “it is heavily implicit this meant restricting the power of the judiciary to introduce into statute law and the Constitution concepts which do not expressly appear in them.” This in particular refers to the application of

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137 It seems that Dr. Mahathir’s direct intervention with the judiciary in the 1980s prompted the previously very conservative judges like Tun Salleh Abbas and Tun Suffian Hashim to become quite “liberal” in their views.

138 Mohamed Sall eh & Das (1989).

139 In March 1987, the Supreme Court in Dato Yap Peng declared Section 418A of the Criminal Procedure Code unconstitutional on the basis that the said section, by allowing the Attorney-General to transfer a case from a Session Court to the High Court, is inconsistent with Article 121 which vested judicial power only in the courts.

English common law and the unwritten concepts of natural justice and judicial review by the Malaysian judges to strike down executive decisions and acquit critics of the government in a string of high-profile cases in the mid 1980s.\textsuperscript{141} However, the far-reaching impact of the amendment on judicial power of the courts is a matter of some doubt. At best, it would only prevent the courts from striking down legislation which interferes with its judicial powers.\textsuperscript{142}

It is noteworthy at this juncture to briefly look at the cases which formed the bedrock of fierce judicial activism in the mid-1980s. In January 1986, the Kuala Lumpur High Court in \textit{Public Prosecutor v Param Cumaraswamy},\textsuperscript{143} acquitted the defendant, who was former Vice-President of the Malaysian Bar Council and a stern critic of the government, of an offence under the Sedition Act 1948. The defendant in July 1985 called a press conference at the Selangor and Kuala Lumpur Bar Committee, calling the Pardons Board to commute the death sentence of a Chinese convict, Sim Kie Chon, who was found guilty for possessing firearms without licence, an offence under the Internal Security Act 1960. He drew the Board's attention to its earlier decision to commute the death sentence of Dato' Mokhtar Hashim, a former UMNO Minister who was found guilty for murder. But the allegedly seditious nature of his speech was contained in the following statement he made during the press conference:

\begin{quote}
On records before the courts, Sim's case certainly was less serious than Mokhtar Hashim's case yet the latter's sentence was commuted. The people should not be made to feel that in our society today the severity of the law is meant only for the poor, the meek and the unfortunate whereas the rich, the powerful and the influential can somehow seek to avoid the same severity.\textsuperscript{144}
\end{quote}

Finding it difficult to concur with the prosecutor that the defendant's statement was likely to cause dissatisfaction among different classes of the

\textsuperscript{142} Harding (1996: 134).
\textsuperscript{143} \textit{Public Prosecutor v Param Cumaraswamy} (No. 2) [1986] 1 MLJ 518.
\textsuperscript{144} \textit{Public Prosecutor v Param Cumaraswamy} (No. 2) [1986] 1 MLJ 518, p.p. 523.
population, and hence was seditious, High Court Judge Justice N.H Chan made strong assertion about judge's independence from the Executive in deciding what is seditious and what is not:

The line between criticism and sedition is drawn by a judge who is independent of the party in power in the State ... A judge has to ask himself if it is in his honest judgment that the statement was likely to create dissatisfaction among the people. If it is likely to do that then the statement is seditious. If in his honest judgment he does not think that the words were likely to create dissatisfaction among the people, then he has to find that the words are not seditious. In my judgment, I do not think that words which were used to point out to the Pardons Board that the people should not be made to feel that the Board was discriminating between Mokhtar Hashim and Sim Kie Chon are words which were likely to create discontent or dissatisfaction among the people.145

What is more significant in Justice Chan's judgment was his reference to English cases and works by English jurists which affirmed the doctrine of separation of powers, rule of law and judicial independence. To stress his point, the learned judge quoted the following passage from Lord Denning's *The Family Story*, which sent a strong message to the Executive not to interfere with judges' decisions:

The keystone of the rule of law in England has been the independence of the judges. It is the only respect in which we make any real separation of powers. There is here no rigid separation between the legislative and the executive powers, because the ministers, who exercise the executive power, also direct a great deal of the legislative power of Parliament. But the judicial power is truly separate. The judges for nearly 300 years have been absolutely independent ... No member of the government, no member of Parliament, and no official of any government department, has any right whatever to direct or

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to influence or to interfere with the decisions of any of the judges ... The critical test which they must pass if they are to receive the confidence of the people is that they must be independent of the executive.\textsuperscript{146}

In some cases, not only did the judges decide against the Executive, but also made critical remarks about the introduction of a Bill in the Parliament, which took effect retrospectively, for the sole purpose of frustrating an on-going legal suit seeking review of an executive decision. In \textit{Petrolim Nasional Berhad (PETRONAS) & Anor v Cheah Kam Chiew},\textsuperscript{147} the Supreme Court in February 1986 dismissed an appeal by the national oil company Petronas and the government against a High Court's decision to grant cost to the respondent in a legal suit against the appellants. In December 1984, the respondent, who was a member of the Democratic Action Party and an account holder of government-owned Bank Bumiputra Malaysia Berhad (BBMB), filed a suit against Petronas and the government seeking declaration that Petronas' acquisition of RM 2.488 billion worth of bad loans from BBMB was ultra-vires the Petroleum Development Act 1974. This was done to rescue the bank from heavy losses in the wake of the notorious financial scandal involving Bumiputra Malaysia Finance (BMF), a subsidiary of BBMB. Before the case was disposed by the High Court, the Parliament in 1985 amended the Petroleum Development Act, giving necessary power to Petronas "to take over or acquire by agreement, assignment, purchase or by any other means the whole or any part of any commercial undertaking, business or enterprise of whatever form of any person or body of persons".\textsuperscript{148} This amendment was made retrospective to have effect from 1 October 1974, i.e. the date when the Act first came into force. This left the respondent with no reasonable cause of action to proceed with his legal action given that Petronas, by virtue of the amendment, had the power to acquire the bad loans. Considering the circumstances of the case, the Supreme Court refused to interfere with the High Court Judge Justice Datuk Harun Hashim's discretion in granting the cost to the respondent. Delivering the decision of the Supreme Court, Justice Tan Sri

\textsuperscript{146} Denning (1981: 191-192).
\textsuperscript{147} \textit{Petrolim Nasional Berhad (PETRONAS) & Anor v Cheah Kam Chiew} [1987] 1 MLJ 25
\textsuperscript{148} See Section 3A of the Petroleum Development Act 1974.
Hashim Yeop A. Sani apportioned the blame to the government for “taking a Bill through Parliament which altered the very basis on which (the respondent) relied for his application for the declarations”.  

Furthermore, trained in English common law, it is natural for the judges to base their reasoning on the “unwritten” common law principles, the application of which sometimes produced results that ran counter to the wishes of the government. This transpired in *JP Berthelsen v Director-General of Immigration, Malaysia*, where the Supreme Court, with its quorum made up of Lord President Tun Salleh Abbas and Supreme Court Judges Tan Sri Wan Suleiman Pawan Teh and Tan Sri Eusoffe Abduolecader, ruled on 3 November 1986 that the Home Ministry’s suspension of the Asian Wall Street Journal and the expulsion of its correspondent JP Berthelsen were wrong.  

Relying on English cases, the court held that the failure on the part of the Immigration Department to give the journalist a fair hearing before the decision to cancel his employment pass was made violated the requirement of natural justice.  

Delivering the Supreme Court’s decision, Justice Abduolecader said:

> In the light of the authorities we have adumbrated, we regard the appellant as so circumstanced in relation to the action of the first respondent as to be entitled to the observance of the rules of natural justice. Whatever the grounds be upon which the first respondent was proceeding, the appellant might, in addition to attacking those grounds, also desire to refer to any matters of special hardship which the cancellation of his employment pass would impose upon him and he should have been invited to do so. If, having done all this, the first respondent then gives consideration to the appellant’s representations, the requirements of natural justice will have been satisfied and it would be for the first respondent to make his decision whether or not to cancel the employment pass in the exercise of the discretion conferred upon him by regulation 19 of the Regulations.

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150 *J.P Berthelsen v Director-General of Immigration, Malaysia* [1987] 1 MLJ 134.  
In arriving at this decision, the Court refused to follow the Federal Court’s decision in *Andrew s/o Thamboosamy v Superintendent of Pudu Prison, Kuala Lumpur*153 which held that the Immigration Ordinance 1959 did not give the right to a hearing before detention order is issued against the applicant for entering the country illegally. Unlike Andrew, who was an illegal immigrant, Berthelsen, the Court said, possessed a valid employment pass before the Immigration Department decided to cancel his pass, and hence he had “legitimate expectation” for a hearing. This decision, according to Harding, “was remarkable because it extended the scope of natural justice into an area where security considerations might be thought to negative the application of natural justice”.154 The cancellation of Berthelsen’s employment pass, as well as that of another AWSJ journalist Raphael Pura, was made subsequent to publication of a number of articles exposing irregularities in Malaysia’s corporate and financial affairs in the Asian edition of Wall Street Journal in 1985 and 1986.155 These included an article about Mahathir-sanctioned failed attempt to corner the world’s tin market in late 1981 and early 1982, using funds from state-owned Bank Bumiputra, resulting in losses of more than US$ 190 million.156

There were other high-profile cases in the late 1980s in which the courts decided against the wishes of the government. In 1987, the Supreme Court reversed the Penang High Court’s decision refusing an ex-parte application by DAP Secretary-General Lim Kit Siang for an interim injunction against the United Engineers Malaysia (UEM), an UMNO-linked company, to restrain the company from signing a government contract to construct the multibillion North-South Highway, linking Perlis in the North and Johore in the South of Peninsular

Malaysia. Subsequent to the Supreme Court’s decision, the government and UEM applied to the High Court to set aside the injunction. High Court Judge Justice VC George in October 1987 refused the application on the ground that, *inter alia*, Lim had *locus standi* to bring the suit. This decision was however reversed by a majority decision of the Supreme Court in early 1988. In *Persatuan Aliran Kesedaran Negara v Minister of Home Affairs*, the High Court in December 1987 struck down government refusal of a licence to ALIRAN, a human rights movement, to publish its magazine in Malay. High Court Judge Dato' Harun Hashim held that “although the discretion exercised by the Minister (to refuse the application for license) was absolute, it was not unfettered, and therefore the exercise of the discretion was subject to judicial review”. As discussed earlier, in *Karpal Singh s/o Ram Singh v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor*, the Ipoh High Court in March 1988 allowed an application by DAP Member of Parliament and State Assemblyman Karpal Singh for writ of *habeas corpus* and ordered him to be released in an ISA case. Karpal was earlier detained under the ISA during the *Operasi Lallang* in November 1987 for allegedly using the issue of government appointment of non-Mandarin qualified headmasters and senior assistants in the national-type Chinese primary schools to incite racial sentiments of the Chinese community.

The court also ruled against the wishes of the federal government in a case involving the appointment of Chief Minister of Sabah after the conclusion of the 1985

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157 The judges who decided the case were Chief Justice of Borneo Tan Sri Lee Hun Hoe and Supreme Court Judges Tan Sri Wan Suleiman and Tan Sri Wan Hamzah.
158 *Lim Kit Siang v United Engineers (M) Bhd & 3 Ors (No 2) [1988] 1 MLJ 50*.
159 Lord President Mohamed Salleh Abbas, Chief Justice of Malaya Abdul Hamid, Supreme Court Judge Hashim Yeop A Sani were in the majority, while Supreme Court Judges Seah and Abdul Malek dissenting. See *Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12*.
161 *Persatuan Aliran Kesedaran Negara v Minister of Home Affairs [1988] 1 MLJ 440*, p.p. 440. Justice Harun’s decision was however reversed by the Supreme Court in January 1990. Maintaining that under Section 12(2) of the Printing Presses and Publications Act 1984 the Minister of Home Affairs had ‘absolute discretion to refuse an application for a licence or permit’, Supreme Court Judge Dato’ Ajaib Singh held that “unless it can be clearly established that the Minister for Home Affairs had in any way exercised his discretion wrongfully, unfairly, dishonestly or in bad faith, the High Court cannot question the discretion of the Minister”. See *Minister of Home Affairs v Persatuan Aliran Kesedaran Negara [1990] 1 MLJ 351*, p.p. 351.
162 *Karpal Singh s/o Ram Singh v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1988] 1 MLJ 468*.
Sabah State elections. In Tun Datu Haji Mustapha bin Datu Harun v. Tun Datuk Haji Mohamed Adnan Robert, Yang di-Pertua Negeri Sabah & Dato’ Joseph Pairin Kitingan (No 2), the Kota Kinabalu High Court in April 1986 ruled that the appointment of Tun Datu Haji Mustapha, President of the Federal Government-backed United Sabah National Organization (USNO) as the Chief Minister of Sabah by the Yang di-Pertua Negeri of Sabah was void, and that the subsequent appointment of Dato’ Jospeh Pairin Kitingan, the President of Parti Bersatu Sabah (PBS) as the Chief Minister was valid. High Court Judge Tan Chiaw Thong said in his judgment that “there was sufficient cogent evidence in this case to conclude that there was a conspiracy to effect the entry of the plaintiff to the Istana and to have him appointed as Chief Minister and that the first defendant was to be persuaded to do so”.165

In 1987, the Supreme Court also declared two federal laws as unconstitutional. In Dato' Yap Peng v Public Prosecutor, the majority decision of the Supreme Court in March 1987 declared Section 418A of the Criminal Procedure Code as unconstitutional for it allowed the Attorney-General to interfere with the judicial power of the court. The section allowed the Attorney-General to withdraw criminal cases before the lower courts, even after the court was seized of the case, and send them to the High Court. Similarly, in Mamat bin Daud & Others v Government of Malaysia, the Supreme Court in a majority decision in October 1987 struck down section 298A of the federal Penal Code for it was, “in pith and substance, a law on the subject of religion with respect to which only the states have power to legislate”.169

It was against this backdrop of fierce judicial activism that the Executive launched an open attack on the Judiciary. One of the first signs of the attack came

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167 Chief Justice of Borneo Tan Sri Lee Hun Hoe and Supreme Court Judges Tan Sri Mohamad Azmi and Tan Sri Abdoolcader were in the majority, while Lord President Tun Mohamed Salleh Abbas and Supreme Court Judge Tan Sri Hashim Yeop Sani dissenting.
169 Lord President Tun Mohamed Salleh Abbas and Supreme Court Judges Tan Sri Mohamad Azmi and Tan Sri George Seah were in the majority, while Supreme Court Judges Tan Sri Hashim Yeop A Sani and Tan Sri Abdoolcader dissenting.
soon after the Supreme Court's decision in *JP Berthelsen* in November 1986. In an interview published in the *Time* magazine on 24 November 1986, the then Prime Minister Dr. Mahathir Mohamad made remarks which indicated his dissatisfaction with judges' decisions which flew in the face of the Executive and his penchant for statutory interpretation that would be in tandem with the wishes of the Executive. The former Prime Minister was reported to have said:

The Judiciary says (to us), 'Although you passed a law with a certain thing in mind, we think that your mind is wrong, and we want to give our interpretation.' If we disagree, the courts will say, 'We will interpret your disagreement.' If we go along, we are going to lose our power of legislation. We know exactly what we want to do, but once we do it, it is interpreted in a different way, and we have no means to reinterpret it our way. If we find out that a court always throws us out on its own interpretation, if it interprets contrary to why we made the law, then we will have to find a way of producing a law that will have to be interpreted according to our wish.170

In response to the statement, Opposition Leader Lim Kit Siang applied for a leave from the Kuala Lumpur High Court to apply for an order of committal against the Prime Minister for contempt of court. Lim claimed that Dr. Mahathir had scandalised the Judiciary and brought it "into disrespect, disrepute, offended its dignity and were an affront to its majesty" and amounted to "a challenge to the authority of the Judiciary and the doctrine of separation of powers guaranteed by the Federal Constitution".171 High Court Judge Justice Datuk Harun Hashim, in his judgment dated 3 December 1986, found an opportunity to rebut Mahathir's "misconception" about the role of the judiciary. Saying that the "court does not substitute the intention of the legislature with that of its own" the learned judge asserted that the role of the court is merely to interpret legislation. In so doing, "a judgment of the Court triggers off new legislation because the legislature cannot be

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expected to foresee all the possibilities of the future”. If the court gives an interpretation different from that intended by the Executive, the learned judge suggested, “the remedy is to amend the law”. Furthermore, to avoid difficulties in determining the intention of the Legislature when the provisions contained in statutes are ambiguous, the learned judge said “the time has arrived to design a new format for Acts of Parliament either by means of a comprehensive preamble to the Act declaring the intentions of the legislature or in an introductory part in the main body of the Act stating the objects and reasons for the Act, so that the intention of the Legislature is clear to all, including the judiciary”.172

Though the High Court dismissed Lim’s application, Justice Harun took a swipe at the Prime Minister and the Executive. The learned judge cynically remarked:

The impugned statement, read objectively is not even a criticism of the Court far less scandalizing it or a threat to the independence of the Judiciary. In essence it is the despair of a Prime Minister on the inadequacies of the law and more particularly the officials whose duties are to translate into law the policies and aims of the administration to ensure a more effective Government. But however comprehensive laws might be there is still no 100% guarantee that the Government will win its cases in Court all the time. If that were so, the public will lose confidence in the Judiciary altogether. Apart from the law, the decision in a case much depends on the facts and it is in this area that improper or poor enforcement of the law by the Executive and its agencies which results in failure of Government cases in the Courts.173

Dissatisfied with the High Court’s decision, Lim appealed to the Supreme Court. The apex court in a unanimous decision in December 1986 upholding the High Court’s decision seemed to have flexed its muscle. Describing Dr. Mahathir’s statement as “an articulation of the executive’s frustration in not being able to

achieve its objects in matters where the intervention of the courts has been sought to some avail" it gave a long lecture on the doctrine of separation of powers and re-affirmed the court's power of judicial review. In this regard, Lord President Tun Salleh Abbas said:

When we speak of government it must be remembered that this comprises three branches, namely, the legislature, the executive and the judiciary. The courts have a constitutional function to perform and they are the guardian of the Constitution within the terms and structure of the Constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review — a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but of the Constitution over both. The courts are the final arbiter between the individual and the State and between individuals inter se, and in performing their constitutional role they must of necessity and strictly in accordance with the Constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action. If that role of the judiciary is appreciated then it will be seen that the courts have a duty to perform in accordance with the oath taken by judges to uphold the Constitution and act within the provisions of and in accordance with the law.174

Apparently, Dr. Mahathir held on to his own conception of separation of powers, particularly on the power of the Parliament, not the court, to make laws. While moving the motion to pass the Official Secrets (Amendment) Bill 1986 in the Dewan Rakyat on 5 December 1986, Dr. Mahathir denied that the government was “confused” when it made laws or “frustrated” when the courts decided against its wishes. The Parliament, the former Prime Minister maintained, “has made adequate provisions and used accurate words when it enacted laws”. But the problem, according to him, occurred when “other parties interpreted the law quite

differently” by “ignoring the written law and upholding the unwritten ones”.\textsuperscript{175} Stressing that it is the right of the Parliament to make laws, Dr. Mahathir urged the judges to apply a “purposive approach” in interpreting a statute by looking at the speech of the member who moved the Bill in the Parliament and the parliamentary debate that ensued in order to determine the meaning and object of the law. The amendment to the Official Secrets Act 1972 in December 1986 was itself an attempt to clarify the intention of the legislature in passing the law, expecting that it would deliver accurate results. In so doing, the Parliament not only defined the word “official secrets” more clearly, but also introduced mandatory jail sentences, the purpose of which, as Dr. Mahathir indicated in his speech, was to prevent judges from using their discretionary power to impose lesser punishment, such as fines, that would minimize the deterrent effect the punishment would bear on the offender.\textsuperscript{176}

It was amidst this Executive-Judiciary face-off that an imminent political crisis was brewing in UMNO. Dr. Mahathir’s presidency was challenged by his nemesis, former Finance Minister Tengku Razaleigh Hamzah in the 1987 UMNO election. Dr. Mahathir only managed to retain his presidency by a slim majority of 43 votes. Dissatisfied with the election results, Razaleigh’s supporters challenged the legality of the election on the ground that delegates from the party’s unregistered branches had attended the annual assembly and took part in the election. The case, Mohamed Noor bin Othman v. Mohamed Yusoff Jaafar,\textsuperscript{177} better known as the UMNO election case, set the stage for an Executive-Judiciary crisis and a series of government broadsides against the courts and the judges. The plaintiff, a supporter of the defeated Team B led by Razaleigh in the 1987 UMNO election, filed a suit challenging the legality of the election and sought orders to hold fresh party elections. He contended that, among other irregularities, the presence of 44 delegates from 30 unregistered branches rendered the elections invalid. But it was the contention of the defendant’s counsel, Gopal Sri Ram, that by virtue of Section 12 of the Societies Act 1966, the party itself was made unlawful. The section reads, “Where

\begin{itemize}
\item \textsuperscript{175} Mahathir (1986: 7)
\item \textsuperscript{176} Mahathir (1986: 5)
\item \textsuperscript{177} Mohamed Noor bin Othman v. Mohamed Yusoff Jaafar [1988] 2 MLJ 129.
\end{itemize}
a registered society establishes a branch without the prior approval of the Registrar such registered society and the branch so established shall be deemed to be unlawful society”. Instead of calling for fresh election, High Court Judge Datuk Harun Hashim, applying strict construction of the law as suggested by the defendant’s counsel, declared UMNO an unlawful society.

What happened next revealed the likely effect of judicial independence on the power struggle between rival factions within the ruling party, and the extent to which the political Executive would go to limit such independence. The defendant in the UMNO Election case appealed to the Supreme Court, the hearing of which was set for June 1988 before the full panel of nine judges. In the meantime, the Team A faction led by Dr. Mahathir formed UMNO Baru (New UMNO), excluding the supporters of Team B from its pro-tem committee, and hence practically ruled out any possible challenge against Dr. Mahathir’s presidency in the new UMNO. But the problem was, should the court allow the appeal and grant an order for a fresh election to be held, not only would the old UMNO be revived but Dr. Mahathir’s position as UMNO President would also be open for challenge. It was possible that the Supreme Court judges, including Tun Salleh who had earlier involved in a protracted war of words with the Prime Minister, would allow the appeal.

It was against this backdrop that the Executive-Judiciary crisis took a new turn. In May 1988, Dr. Mahathir started necessary process to remove Tun Salleh by recommending to the Yang di-Pertuan Agong to set up a tribunal under Article 125 of the Federal Constitution to hear charges of judicial misconduct and incompetence against the Lord President. The charges, among other things, related to a letter he wrote to the Yang di-Pertuan Agong on behalf of other judges expressing concerns over the Executive broadside against the Judiciary and several speeches he made on the role of judges which were construed as open criticism of the government.

178 The new section 12(3) as amended by Societies (Amendment) Act 1988 provides that “(w)here a registered society establishes a branch without the prior approval of the Registrar the branch so established shall be an unlawful society”.

179 18 years later, Dr. Mahathir admitted that as an alternative to being subjected to trial by the tribunal he did ask Tun Salleh to resign, promising him a high-paying job as a director of an Islamic Bank in Jeddah. The latter rejected the offer. See “Dr. M: I Personally Asked Salleh to Resign”, The Star, 27 September 2006.
Despite objection from Tun Salleh and the Bar on the constitutionality of the tribunal, mainly on the fact that the tribunal was made up of former judges lower in rank than Tun Salleh and headed by Acting Lord President Tun Abdul Hamid Omar who stood next in line to succeed Tun Salleh as the Lord President, the tribunal proceeded to hear the charges in July 1988 and found Tun Salleh guilty. Two other Supreme Court judges, Tan Sri Wan Sulaiman Pawanteh and Datuk George Seah were also dismissed. Wan Sulaiman and Seah, with three other Supreme Court Judges, Tan Sri Eusoff Abdul Kadir, Tan Sri Azmi Kamaruddin and Tan Sri Wan Hamzah Mohamad Salleh, were earlier suspended from their job for allowing an application by Tun Salleh for an order restraining the tribunal from submitting its report to the Yang di-Pertuan Agong. The change of guard in the judiciary was politically significant. It was after the change that the Supreme Court heard the appeal in the UMNO Election case and unanimously dismissed it. UMNO Baru led by Dr. Mahathir continued to be the legitimate successor of the old UMNO, and as such inheritor of its power, while Razaleigh and his supporters had to be content with their new role as opposition politicians in the newly formed opposition party Semangat 46 (Spirit of 46).

Apart from taking action against the judges, the government also reacted to the fierce judicial activism by amending the Constitution with a view to curtail judicial power of the court. The Constitution (Amendment) Bill 1988 amended Article 121 of the Federal Constitution by deleting the words vesting ‘judicial power’ in the courts. The new Article 121(1) only states that “there shall be two High Courts of co-ordinate jurisdiction and status” without mentioning where the judicial power is specifically “vested”. The Prime Minister in his speech moving the Bill in the Dewan Rakyat reasoned that the amendment was necessary so as to make explicit the separation of powers between the judiciary and the Executive.\footnote{\textit{Hansard}, 17 Mac 1988.} The Supreme Court in \textit{Dato Yap Peng}\footnote{\textit{Dato' Yap Peng v Public Prosecutor} [1988] 1 MLJ 119.} in March 1987 had relied on the original Article 121 to declare Section 418A of the Criminal Procedure Code unconstitutional for allowing the Attorney-General to interfere with the court’s judicial power.
As a direct reaction to the Berthelsen's case, the Parliament in December 1987 amended the Printing Presses and Publication Act 1984. A new Section 8A was inserted into the Act to make those found guilty for maliciously publishing false news liable to imprisonment for a term not exceeding three years or to a fine not exceeding RM 20,000 or to both.\textsuperscript{182} The new Section 13A made Minister's decision to refuse to grant or to revoke or to suspend a license or permit final and not to be questioned by any court on any ground whatsoever.\textsuperscript{183} Section 13B excluded one's right to be heard with regard to his application for a license or permit or relating to the revocation or suspension of the license or permit.\textsuperscript{184} This amendment was indicative of the government's effort at making the legal text expressly clear on its intention, leaving the judges with little or no room for judicial interpretation. While criticizing the judges for applying unwritten laws such as the English common law, natural justice and the doctrine of judicial review in striking down Executive decisions, Dr. Mahathir categorically said:

The amendments are made because it is important that the powers of the government be made clear in written laws. The amendments are even more necessary due to the inclination of certain parties to use unwritten laws to obstruct the functions of the government. It is difficult for the Government to accept unwritten laws because it will never be able to know what it can do and what it can't. Under this unclear circumstance, government administration will be topsy-turvy. Anybody can challenge the Government and obstruct actions that the Government deems legal.\textsuperscript{185}

To avoid the recurrence of legal complications similar to the UMNO Election case, the Parliament in March 1988 amended the Societies Act 1966. Section 12(3) of the Act now states that “where a registered society establishes a branch without
prior approval of the Registrar the branch so established shall be unlawful society".186 This was certainly to avoid the recurrence of the UMNO election case where the party, rather than only the branch, was declared unlawful by the court. Section 17 of the Act was also amended to facilitate the transfer of UMNO's properties to UMNO Baru (New UMNO), a new political party formed by Dr. Mahathir's faction after the old UMNO was deregistered. Another amendment was made to the Societies Act in 1990 to shut out the court from intervening with party matters. A new section 18C, an 'ouster' clause, made "decision of a political party or any person authorised by it or by its constitution ... final and conclusive and such decision shall not be challenged, appealed against, reviewed, quashed or called in question in any court on any ground." Furthermore, "no court shall have jurisdiction to entertain or determine any suit, application, question or proceeding on any ground regarding the validity of such decision".187

The amendments were made as a result of the fierce judicial activism in the mid 1980s and the UMNO litigation debacle that followed. This was notwithstanding the fact that there had already been many ouster clauses in existing statutes which aimed at limiting the interpretive jurisdiction of the courts. Among these are section 29(3) (a) of the Industrial Relations Act 1967 regarding awards granted by the Industrial Court; section 9(6) of the Industrial Relations Act regarding the Minister's decision pertaining to Trade Union's claims for recognition; Section 2, Part III, Second Schedule of the Federal Constitution regarding Federal Government decisions to deprive a person of his citizenship; section 15(1) of the Control Rent Act 1966 regarding Board of Appeal decisions on appeals from rent tribunals; and section 68 of the Land Acquisition Act regarding the setting aside of an award or appointment under the Act. Though the courts had creatively interpreted these ouster clauses so as not to preclude judicial review altogether, the existence of these clauses pointed to a particular legislative style which eschews close judicial scrutiny of executive actions. In June 1989, while tabling amendment to the Internal Security Act 1960, which excluded judicial review of decisions made by the Yang di-Pertuan

186 Section 12(3) of the Societies Act 1966. See also Section 5 of the Societies (Amendment) Act 1988.
187 Section 18C of the Societies Act 1966. See also Section 2 of the Societies (Amendment) Act 1990.
Agong and the Minister to detain a person under the Act, except on the question of compliance with procedural requirements, Dr. Mahathir again repeated his uneasiness with the power of judicial review. The former Prime Minister said:

Foreign courts’ interventionist role by which the courts substituted decisions made by the Executive with its own decisions cannot be followed because it is contrary to the concept of separation of powers between the Executive and the judiciary as practiced in this country. If the courts are allowed to reverse the Executive’s decision, the Executive cannot do anything for fear that its decisions will be reversed by the courts. The Government cannot operate because it has to wait for court’s decisions and the outcome of appeals to higher courts.188

It was obvious that Mahathir’s notion of separation of powers necessarily means that the Executive should be left alone in carrying out its functions without interference from the Judiciary. Ironically, this belief in “Executive supremacy” militates against the main purpose of separation of powers, which entails checks-and-balances among independent arms of the government. In a further move to ensure that the judiciary interpret laws in line with the government’s policy objectives, the Parliament in 1997 passed an amendment to the Interpretation Acts 1948 and 1967. The new section 17A of the Act provides, “in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object”. In determining the object of the law, the courts can make reference to the Parliamentary Hansard, “provided always that the statement reported in the Hansard was made by a Minister or other promoter of the Bill”.189 It is to be noted that long before section 17A was introduced, Malaysian judges, relying on English

188 Hansard, 23 June 1989.
cases, had applied the purposive approach to statutory interpretation in cases where the words in a statute are ambiguous or their strict literal construction led to absurd meanings. 190 Referring to the trend toward the application of the purposive approach in statutory interpretation since Lord Diplock’s decision in Kammins Ballroom191 in 1971, Federal Court Judge Tan Sri Chang Min Tat in United Hokkien in 1979 observed that the approach “is not a modern fashion. Since the 17th century, it has been the task of the judiciary to interpret an Act according to the intent of them that made it”.192

Given that the judges, by avoiding strict textualism, had already accepted the purposive approach in common law, the amendment to the Interpretation Acts did not bring about much change to the existing trend in statutory interpretation. Even without relying on the new section 17A, the judges held that the purposive approach was to be regarded as the most important rule of interpretation.193 The only effect of the amendment was perhaps that the judges have since felt more compelled to comply with the object of the law in interpreting it.194 But this does not mean that express words in statutes are now substituted with that of the legislators. Federal Court Judge Datuk Augustine Paul in All Malayan Estates Staff Union195 in September 2006 held that when the meaning of a statutory provision is plain and unambiguous, section 17A of the Interpretation Acts would have no application as “the question of another meaning does not arise”.196 In such a case, literal construction of the words is to be preferred, lest it would lead to importing into the legislation words which are not intended by the legislature itself. It seems that the Federal Court, by resorting to the literal rule in interpreting clear and unambiguous words, despite the existence of section 17A, implied that other common law rules of statutory interpretation still

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195 All Malayan Estates Staff Union v Rajasegaran & Ors [2006] 4 CLJ 195.
apply. Be that as it may, statutory recognition of the purposive approach to statutory
interpretation goes a long way to reflect the government's penchant for the
interpretation that promotes its intended objectives.

Conclusion

The doctrine of separation of powers demands that each branch of the government
must be independent of each other in carrying out its functions. But in an illiberal
statist legal system, where the political Executive stands paramount in determining
government policy objectives, and the courts are expected to serve them, there have
been attempts by the former to ensure that the latter interpret laws in a way that
would help produce appropriate policy outcomes. Though the courts seemed to
have made decisions on settled principles of law, judges' explanations of the
decisions indicated an inclination toward recognizing state-defined policy objectives,
particularly in matters pertaining to national security, ethnic relations and economic
development. The judges, taking cognizance of prevailing socio-political conditions
in a communally divided society, recognized the necessity of government policies in
regard to them, although such recognition means allowing encroachment on the rule
of law justified in the national interest. This led to the legitimation by the court of
illiberal statist legal meanings, based on a limited notion of the rule of law, which
tends to enhance state powers rather than limiting them. Coupled with the existence
of an illiberal legislative style that eschews close judicial scrutiny of executive
decisions, and legislation that contains clear and unequivocal words expressing the
intent of the legislature, the judges were left with a very limited space to come up
with alternative legal interpretation that would promote the liberal notion of the rule
of law. However, the judges' vigilance in developing the doctrine of judicial review
indicated that the courts had not transformed themselves into a full-fledged policy
implementing agencies of the government. Malaysian judges, as case laws indicate,
can still be expected to strike down executive actions, though it was rarely in highly
sensitive political cases. But as long as the government continues to entrench a
particular legislative style in the legal system that eschews judicial review, especially
in matters related to national security and the exercise of fundamental liberties, and as long as the judges have no qualms about accepting the importance of government policies in those matters, and the purposes of which they are to serve, there is little prospect for a drastic substitution of illiberal statist legal meanings with more liberal ones in Malaysian courts. It is in this context that the politics of competing communal interests and the formalist but non-strict textualist approach to judicial reasoning provides an ideological basis for the maintenance of illiberal statist legal meanings.
Chapter V

The 1998 Reformasi and Non-Communal Politics

The Reformasi movement, which exploded onto the political scene following the dismissal of former Deputy Prime Minister Datuk Seri Anwar Ibrahim in September 1998, served as an ideological conduit as well as an instrument for political change. Ideologically, it attempted to shift the focus of political interest from one which was essentially communal to individual, by prioritizing individualism over communalism in conceptualizing Malaysian politics. This alternative non-communal vision contested the communal underpinnings of politics based on the constitutional contract pursued and perpetuated by the ruling Barisan Nasional. In so doing, the movement aimed to forge a new non-communal social contract among multiracial Malaysians, the main objective of which was to promote democracy and dismantle communalism as the main basis for group mobilization and interest articulation in Malaysia. As an instrument for political change, the movement began as a conglomeration of non-governmental organizations, opposition parties, trade unions and individuals across races pushing for political reform. This non-communal and cross-sectional mass movement, which rallied behind Anwar in the aftermath of his dismissal, soon metamorphosed into a formal coalition of political parties, the Alternative Front (Barisan Alternatif, BA), seeking political, social and economic reform. Despite initial optimism that the BA could help bring about political reform along democratic and non-communal lines, developments following the 1999 general election showed that it was an uphill task. The BA itself was composed of ideologically distinct political parties like the predominantly Chinese Democratic Action Party (DAP) and the Malay/Muslim-based Parti Islam Se-Malaysia (PAS), which had been promoting different communal interests. However, as the movement operated within both the realm of civil and political society, the expectation that a broader political change was underway led to a sense of euphoria.

This chapter argues that while the Reformasi's non-communal vision of Malaysian politics paved the way for the formation of multiracial but non-communal
coalitions for political change that posed a challenge to the ruling Barisan Nasional’s communal vision of politics and its political dominance, the process of internalisation of the non-communal political vision among the rank-and-file of the Reformasi movement, and later the Barisan Alternatif, remained slow and halting. The general election precluded any attempts at thrashing out core ideological differences between the main actors of Reformasi, including PAS and DAP, and a host of secular NGOs and Islamic groups, which held different views on important issues like the role of Islam in the modern state, the philosophy and scope of human rights and individual liberties, and the special position of Bumiputeras in multiracial Malaysia. The non-communal “social contract”, as was evident in the Barisan Alternatif’s election manifesto in the 1999 general election, was a modest attempt at dismantling communalism as a basis for interest articulation and political mobilization. But beyond the polls, the sources of differences between the main actors of Reformasi, especially PAS and DAP, had mainly revolved around the themes of the old communal politics of race and religion, and hence called into serious question the ability of the Reformasi movement to forge a new non-communal vision of Malaysian politics, and to bring about political change along the more democratic and non-communal lines.

The 1998 Political Crisis: From Elite Rivalry to Reformasi

Hari Singh offers two distinct but not necessarily mutually exclusive models of political reform prior to and during the heyday of Reformasi in 1998. The first involves a struggle over political power and a kind of elite displacement process within the UMNO oligarchy in which rival factions comprising UMNO politicians and their allies in the business community and bureaucracy sought to restructure the oligarchic distribution of political powers within the party. This struggle spilled over into the public domain after one faction was booted out from the oligarchy, resulting in a mass struggle against the oligarchy as a whole. The second model pertains to a genuine process of democratization taking place within the context of

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1 Hari (2000: 540)
wider socio-political change since the 1980s marked by the expansion of a multiracial middle class, an easing of ethnic tension and a growing civil society’s call for democracy and human rights. According to this second model, the Anwar saga and the Reformasi that followed was only incidental to the democratic ferment that had already taken place within the context of a democratizing society.2

The First Who Brooked No Equals

In the traditional Malay oligarchy, Hari Singh points out that power distribution between the Sultan and the territorial chiefs was pluralistic. While the Sultan occupied a symbolically exalted position, the powers of the territorial chiefs in practice were equal to, if not greater than, those of the Sultan. Applying the traditional Malay oligarchic model to the power distribution among the elites within the government and the United Malays National Organization (UMNO), Hari Singh shows that characteristics of the pre-colonial traditional system continued in the post-independence era. During the premiership of the first three Prime Ministers, cabinet portfolios were distributed among senior party officials based on the hierarchical order within the UMNO Supreme Council, with important cabinet portfolios often given to the most senior among them. Under this system of power distribution, the Prime Minister, like the earlier sultans, occupied the symbolically exalted position but in reality he was just “the first among equals” in his relationship with his colleagues in the party. State institutions like the Malay Rulers, the Parliament and the Judiciary also remained as important power bases, enabling a system of checks and balances to function within the government.

However, since Dr. Mahathir’s ascendancy to political power, heading both the ruling party and the government since 1981, power distribution among the party elites was less pluralistic, but increasingly concentrated in one man’s hands. This was attributable to Dr. Mahathir’s own personal traits as well as the politico-business relations that permeated UMNO politics since the 1980s. The close nexus between UMNO, the government and business escalated power rivalry within

2 Hari (2000: 536)
UMNO as UMNO politicians saw party posts as important stepping stones for more strategic positions in the government and state enterprises, which in turn opened up access to a web of lucrative patronage networks. Securing positions in the party alone, however, did not always lead to appointments to important positions in the government and state enterprises. Faced with challenges from within the party and potential consequences on the dynamics of the party's patronage dispensing function, especially among the business and corporate elites, Dr. Mahathir placed his supporters in strategic government positions and sidelined non-supporters. In so doing, he ignored the hierarchical order within the UMNO Supreme Council or the State Liaison Committees in distributing cabinet portfolios and chief ministerial posts. Furthermore, direct challengers like Tengku Razaleigh Hamzah and Tan Sri Musa Hitam had to make an early exit from UMNO politics. On the contrary, staunch supporters like Tun Daim Zainuddin, Datuk Seri Rafidah Aziz and Tan Sri Sanusi Junid had a different fate when they found themselves in powerful government positions despite losing their posts in party elections. Datuk Seri Abdullah Ahmad Badawi, who was expelled from the cabinet for supporting Tengku Razaleigh Hamzah in the 1987 UMNO elections, was retained as a cabinet minister despite failing to retain his Vice-President post in the 1993 UMNO elections, presumably to check Anwar Ibrahim's increasing influence in the party.

3 Current Prime Minister Datuk Seri Abdullah Ahmad Badawi was an elected Vice-President in the 1987 party election. But he was excluded from the new cabinet line up formed after the 1987 UMNO crisis for having been a member of Team B faction led by Tengku Razaleigh. Similarly, Anwar's closest ally in the 1993 party election and the most senior Vice President, Tan Sri Muhyiddin Yassin, was appointed as Youth and Sports Minister, a relatively junior portfolio in the new federal cabinet formed after the 1995 general election. Muhyiddin was previously the Johore Chief Minister. His posts as the Chief Minister and the State UMNO Liaison Chief were taken over by Dr. Mahathir's loyalist Dato' Abdul Ghani Othman.

4 Sanusi who lost in the contest for the Vice President post in the 1993 party election and failed to defend the Langkawi Divisional Chief post in the 1995 divisional election was appointed Kedah Chief Minister in June 1996 replacing Tan Sri Osman Aroff, an Anwar supporter. Daim who withdrew from the contest for the Merbok Divisional Chief post in the 1995 divisional election was appointed to the powerful position of Special Functions Minister in charge of economic affairs in 1998. Despite failure to defend the Women's Chief post in the 1996 party election, Rafidah was retained as the Minister of International Trade and Industry, a high profile portfolio in the federal cabinet.

5 This account was given by Tan Sri Sanusi Junid, former UMNO Vice-President and Kedah Menteri Besar in his speech at the opening ceremony of the National Seminar on 50 Years of Merdeka: Malaysian Political Development in Perspective organized by the International Islamic University Malaysia's Political Science Department in Gombak, Selangor on 8 December 2007.
Apart from packing the government with his supporters, Dr. Mahathir also strengthened his grip on the party apparatus. Especially after Anwar and his Wawasan Team made a clean sweep by capturing all the posts of Deputy President and the three Vice-Presidents in the 1993 party election, the party introduced several measures that reduced the possibility of a successful challenge to Dr. Mahathir’s presidency. These included the abolition of the bonus vote system that worked well for Anwar in winning the Deputy Presidency in the 1993 party election, and the passage of a resolution in the 1995 UMNO Annual General Assembly that discouraged contests for the presidency and deputy presidency in the 1996 party election. By so doing, Dr. Mahathir secured his position as the UMNO President, while freezing Anwar in his post as deputy. In preparation for the 1996 party election, Dr. Mahathir also made full use of his prerogative as the UMNO President and the Chairman of Barisan Nasional to carefully select the candidates for the 1995 general election, and hence ruled out any possibility of Anwar supporters dominating the list. Though Anwar rose through the UMNO hierarchy to be its Deputy President and simultaneously the Deputy Prime Minister in 1993, it was Dr. Mahathir who determined power distribution within the government. In this regard, Dr. Mahathir’s exalted position in the party and the government was unmatched by the power and position of his colleagues, especially that of his deputy and heir apparent Anwar. Breaking the tradition of the UMNO oligarchic hierarchy, Dr. Mahathir put himself as the first who brooked no equals.

Power relations between important state institutions too had gradually been subjected to the increasingly dominant position of the Executive. The first few years of Dr. Mahathir’s premiership witnessed successful attempts by the Executive to reduce the powers of the Malay Rulers and curb the independence of the judiciary. This included a constitutional amendment in 1983 which limited the power of the Malay Rulers to withhold royal assent to the Bills passed by the Parliament. Another

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6 See Case (1997: 398). In hindsight, Dr. Mahathir himself admitted that holding the party election after the general election gave enormous advantages to the party President. He said, “I was the leader of the party many times after the election. At that time you are very powerful because you got appointed as the Prime Minister. You are going to decide who is going to be your deputy, who are going to be ministers and who are going to be chief ministers. At that time you can do what you like. So you can structure it that in the party election you can always win”. See Malaysiakini interview with Dr. Mahathir at http://www.malaysiakini.tv/ (Accessed on 17 May 2007).
amendment in 1993 stripped the Malay Rulers of their legal immunities. In 1988, an amendment to Article 121 of the Federal Constitution limited the judicial powers of the courts by having the words vesting judicial powers in the courts deleted from the original Article which now only states the existence of two High Courts of coordinate jurisdiction in Malaysia. The amendment, which was made following several court rulings that overturned executive decisions during the executive-judiciary crisis in the late 1980s, revealed Dr. Mahathir’s uneasiness with pluralistic arrangement of power distribution within the government.

Given Dr. Mahathir’s enormous political influence within the UMNO oligarchy and the government, it was almost impossible for anyone from within the party to mount an open challenge against him. It was not surprising therefore that Anwar as a politician who was seeking elite displacement within the party constantly pledged his loyalty to Dr. Mahathir, while at the same time carefully planning his move to rise to the top while guarding against the manoeuvres of other UMNO politicians. Though Anwar avoided direct confrontation with Dr. Mahathir, he strengthened his political base by expanding his patronage networks within the party and the business community in preparation for a smooth succession. However, Anwar’s expansion of his political base led to confrontations between his supporters and those of Dr. Mahathir in the party and the business community. Between 1993 and 1998, it was not uncommon for UMNO politicians to be associated with either Anwar or Dr. Mahathir when they contested party elections. Within the business community, the competition for major privatization contracts and licences had been mainly between Anwar and Dr. Mahathir’s associates, as well as those of Daim.7

The Anwar-Mahathir Ideological Tussle

Another dimension of the Anwar-Mahathir rift, which was to contribute to the Reformasi movement’s role as an ideological conduit for political change, was the ideological differences between the two leaders. Though both leaders shared some values in common, such as the idea of progressive and moderate Islam and the need

7 See Gomez (2002).
to promote the welfare and advancement of Muslims, there was an ideological tussle between them in conceptualizing freedom and development. As one of the longest serving Prime Ministers in Asia at the time when the region was experiencing tremendous economic and social transformation, Dr. Mahathir believed that there was a different political dynamism at work in Asia. Defying what many would believe as the inseparability between economic development and freedom, Dr. Mahathir attributed the rise of Asia to the "Asian" way of governance which prioritized political stability over personal freedom. To Dr. Mahathir, the communitarian values of Asian societies, which hold sway over individualism, had contributed to the maintenance of political stability, which in turn set the stage for robust economic development to take place. Asian nations, Dr. Mahathir asserted, could not afford the Western model of liberal democracy for it would allow destabilizing forces within their societies to disrupt political order, frustrate economic development and breed anarchy. It was in this context that Dr. Mahathir believed for Asian nations to thrive on their own, their governance must be based on a different form of democracy in which individual rights are subservient to the community's right to development. In a speech delivered at the Conference on New Asia held in January 1996 in Kuala Lumpur, Dr. Mahathir spoke of his vision of the "Asian Renaissance" and the Asian way of democracy and human rights:

(The) Asian Renaissance must be a psychological and cultural rebirth, freeing us from the bonds of mental servitude and enriching our arts and our cultures. It must be an economic renaissance, vigorously propelling our material condition of life forward whilst ensuring social and economic justice for all our citizens. It must be a political renaissance, founded upon the richest development of different forms of democracy and the greatest respect for and nourishment of all rights of the individual person in the context of community

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8 The late Dr. Ismail R. Faruqi, a professor of Islamic Studies at the Temple University, in his letter to Anwar Ibrahim inviting him and ABIM to support Dr. Dr. Mahathir and the government in 1981, observed that both Anwar and Dr. Mahathir shared the same goal in promoting Islam and the welfare of the Muslim ummah. See Dr. Ismail Faruqi's letter to Anwar Ibrahim dated 26 January 1981, published in Harakah, 12 October 1998.

rights in which the individual exists... Asians interpret human rights and the rule of law as being for the good of the majority, not the freedom for a few politicians, or for that matter the leaders of the perpetually disgruntled minority parties or trade unions. They can have their freedom but their right is restricted to hurting only themselves. If they hurt innocent bystanders then they are abusing their democratic right. They must not hold others, hold society at large to ransom.\textsuperscript{10}

Given Anwar’s background as a former ABIM leader whose struggle encompassed not only Islam, but also democracy, individual freedom, social justice and inter-civilizational co-existence, he developed an ideological approach which contrasted with Dr. Mahathir’s espousal of the essentially communitarian Asian values and scepticism toward the Western liberal democracy. In his book \textit{The Asian Renaissance} published two years before his dismissal, Anwar wrote:

If the term Asian values is not to ring hollow, Asians must be prepared to champion ideals which are universal. It is altogether shameful, if ingenious, to cite Asian values as an excuse for autocratic practices and denial of basic rights and civil liberties. To say that freedom is Western or unAsian is to offend our own traditions as well as our forefathers who gave their lives in the struggle against tyranny and injustice. It is true that Asians lay great emphasis on order and societal responsibility. But it is certainly wrong to regard society as a kind of deity upon whose altar the individual must constantly be sacrificed. No Asian tradition can be cited to support the proposition that in Asia, the individual must melt into a faceless community.\textsuperscript{11}

But Anwar too was cautious in articulating his more liberal ideas on democracy and civil society. Taking into consideration the different stages of

\textsuperscript{10} Mahathir (1996: 6-7).
\textsuperscript{11} Anwar (1996: 28).
economic development as well as the cultural diversity that existed in Asian societies, Anwar noted:

The fact that Asian countries are in different stages of economic development suggests that each country will negotiate its way to democracy and civil society at its own pace. This is further attenuated by the diversity of cultures, social systems and historical experiences. While accepting that all humanitarian ideals are universal, we cannot deny that cultural diversity exerts a powerful influence on the social and political processes.12

Being part of the UMNO oligarchy, it was not always easy for Anwar to articulate more liberal political ideas beyond what was permitted by the conventions within the party. Often he had to balance his lofty ideological ideals which he had developed while he was outside the UMNO oligarchy with justifications of the policies of the party and the government of which he was part. His view on detention without trial law under the ISA, of which he was once a victim, illustrated this delicate balancing game. Speaking at a conference in Singapore in December 1992, Anwar tried to maintain his ideological position intact by opposing the traditional way of using the ISA as a means to silence critics of the government. But at the same time he defended the need to selectively retain the law "as long as Malaysia's multi-cultural and multi-religious society remained fragile".13 No matter how balanced Anwar's view was, articulating unconventional ideas within a political culture which had not been accustomed to a plurality of views, especially among the top echelon of party leaders, had its own limits. What is more, within a political culture where loyalty to the leader at the apex of the political hierarchy is paramount, holding any views different from his equated with treachery. In March 1994, barely four months after Anwar was appointed as the Deputy Prime Minister, his loyalty to Dr. Mahathir was put to test when they held different views on the National Censor Board's decision to ban Steven Spielberg's Oscar-winning film

Schindler's List. The banning of the film, which featured the story of a German wartime profiteer, Oskar Schindler, who saved the lives of hundreds of Polish Jews from the Nazi holocaust, drew strong criticism from local film makers as well as the international film industry. Jewish lobby groups in the United States even accused Dr. Mahathir of anti-Semitism.\textsuperscript{14} Dr. Mahathir, who claimed himself to be anti-Zionist rather than anti-Semitic, maintained that the government had the right to ban the film. Anwar, on the other hand described the film as a "powerful moral voice against crime toward humanity" and called for the lifting of the ban.\textsuperscript{15} The ban was finally lifted by the cabinet when Anwar chaired a meeting in March 1994, while Dr. Mahathir was overseas.\textsuperscript{16}

Though Anwar maintained that Dr. Mahathir had been consulted before the cabinet decision was made, the controversy over the issue brought to the fore glaring ideological differences between the two leaders. The Schindler's List saga, as well as several other issues including Anwar's attendance at the meeting of Asia Pacific Economic Cooperation (APEC) Finance Ministers in March 1994, despite Dr. Mahathir's earlier disapproval of the move to formalize APEC as an institution, later put much strain on the Anwar-Mahathir relationship.\textsuperscript{17} Rumours circulated within the party that the two leaders had fallen out. Though both dismissed the rumours, with Dr. Mahathir describing them as a "wishful thinking on the part of those who want to see problems",\textsuperscript{18} his remarks in a speech delivered during an UMNO Youth event in April 1994 gave impetus to the rumours when he said that UMNO members who aspired to become leaders should not be "in too much of a hurry".\textsuperscript{19} The remarks were made in response to an article in the April issue of the Far Eastern Economic Review which highlighted Anwar's ideological differences with Dr. Mahathir, as well as Anwar's increasing influence in Malaysian politics, as signs of his impatience for the top job.\textsuperscript{20} In a move to diffuse tension, Anwar supporters

\textsuperscript{14} International Herald Tribune, 24 March 1994.
\textsuperscript{15} AFP, 26 March 1994.
\textsuperscript{16} Straits Times, 31 March 1994.
\textsuperscript{17} Far Eastern Economic Review, 21 April 1994.
\textsuperscript{18} Straits Times, 20 April 1994.
\textsuperscript{19} Straits Times, 23 April 1994.
claimed that the rumours of a split between the two leaders were the work of "some businessmen who were accustomed to favours before Anwar became Finance Minister" and who now aimed "to fuel suspicions between the two top leaders in the hope that Dr. Mahathir might then seek to replace his deputy".  

Though Anwar constantly pledged his loyalty to Dr. Mahathir, it was obvious that he too wanted to prove himself to be a different breed of Malay-Muslim political leader in the new club of emerging Asian leaders such as Indonesian Vice-President B.J. Habibie and Thailand Foreign Minister Surin Pitsuwan. Through the Institute for Policy Research, a political think-tank headed by Datuk Kamaruddin Jaafar, Anwar’s long time ABIM friend and a rising UMNO politician and corporate figure, Anwar organized a series of conferences on renowned Asian thinkers such as Jose Rizal, Rabindranath Tagore and Muhammad Iqbal, whose thoughts on the universality of human dignity and personal freedom laid an ideological foundation for Anwar’s view on the Asian Renaissance. As a Finance Minister, Anwar too articulated more liberal economic and monetary policies and listed as his friends the proponents of free market economy such as the IMF chief Michael Camdessus and the World Bank President James Wolfensohn. At home, Anwar gained popularity by pursuing socio-economic projects for the poor as well as his rhetoric about fighting corruption, cronyism and nepotism.

The 1997 Financial Crisis and Anwar’s Dismissal

As the 1997 Asian financial crisis deepened, the Anwar-Mahathir ideological differences became more marked, eventually turning into a policy battle and, more dramatically, a politico-business factional tussle. Anwar was obviously supportive of

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22 It is noteworthy that by the mid 1990s, Anwar was increasingly associated with Habibie whose leadership of the Indonesian progressive Islamic movement, Ikatan Cendekiaan Muslim Indonesia (ICMI), resonated with Anwar’s long time involvement in ABIM. Surin, another progressive Muslim who was associated with Anwar, commented on Anwar’s arrest that Anwar had been "caught up in that wave of confrontation between those who want to see some reform, as in other countries in Asia, and those who are still comfortable with the traditional way." (International Herald Tribune, 7 October 1998)
IMF-style economic crisis management which favoured the tightening of monetary policy and shelving public spending. Dr. Mahathir on the other hand opted for Keynesian economic pump-priming measures by expediting mega projects and increasing public spending as a means to boost the ailing economy. Though the differences were seemingly about how the two leaders evaluated the economic crisis from two different perspectives, it had deep-rooted political ramifications for it affected the balance of power in the politico-business area. In this regard, the 1997 East Asian financial crisis, which saw the exchange rate of the Malaysian Ringgit depreciate from RM 2.50 per US Dollar to about RM 4.00 in July 1997, exacerbated the tension between Anwar’s faction and those who were opposed to his rapid ascendancy in the party and the government. In the wake of the crisis, Anwar was not only opposed to Dr. Mahathir’s reflationary economic measures, but also to the bail outs of some well-connected firms, particularly, Renong, a conglomerate linked to Daim, and companies owned by Dr. Mahathir’s son Mirzan.23 Anwar’s stance seemingly confirmed rumors of an irreconcilable Anwar-Mahathir rift.

Adding to the intensity of the rift was concern among Dr. Mahathir’s loyalists that Anwar was also plotting their forced exit from UMNO. When Anwar was the Acting Prime Minister for two months in mid 1997, he stepped up his anti-corruption drive with the passage of the Anti-Corruption Act. It was rumored that Anwar would use the law as a means to get rid of Dr. Mahathir’s loyalists. The Anwar-Mahathir rift grew more intense in the run up to the 1998 UMNO General Assembly in June. A cabinet reshuffle in May saw the appointment of UMNO Deputy Youth Chief Hishamuddin Tun Hussein as Deputy Minister of Primary Industry, sidelining the UMNO Youth Chief and Anwar loyalist, Datuk Ahmad Zahid Hamidi. To compound the matter, just a few days before the delegates were to meet in Kuala Lumpur, Zahid launched veiled attacks on Dr. Mahathir. He criticized the government for practicing cronyism and nepotism in the award of government contracts to private firms and individuals, an attack which seemed to be targeted at Dr. Mahathir’s selective bail outs of ailing companies during the 1997 economic

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23 Anwar strongly opposed the national oil company Petronas’ acquisition of stakes in Mirzan’s ailing Konsortium Perkapalan Berhad (KPB), which he believed was an attempt by Dr. Mahathir to bail out his son. See Gomez (2002).
Zahid repeated his criticism during his opening speech at the UMNO Youth delegates' meeting, held a day ahead of the opening of the 1998 UMNO General Assembly. But there was more to his criticisms. As an Anwar protégé, Zahid appeared to be the mouthpiece of Anwar, the actual man behind the mounting criticism against Dr. Mahathir and his economic policies.

In an extraordinary counter-attack to silence his critics, Dr. Mahathir disclosed the names of those who had received privatized contracts, licenses and special share allotments for Bumiputeras. The lists which were distributed to UMNO delegates in the 1998 party assembly and publicized in the mainstream press, included Dr. Mahathir's detractors in UMNO Youth, members of Anwar's family and businessmen closely associated with the former Deputy Prime Minister. Also listed were family members of Dr. Mahathir, serving UMNO ministers, former ministers and Malay and non-Malay tycoons closely connected to top UMNO leaders. Acting under pressures from Dr. Mahathir and fellow UMNO leaders, Zahid in particular criticized the government over the allocation of minor government contracts through an umbrella body controlled by big corporate players. This system, he argued, benefited only "big boys" who would take all big contracts, leaving little to small contractors. The system which came under the purview of Rural Development Minister, Datuk Annuar Musa, a potential contender for the post of UMNO Youth Chief held by Zahid and a Dr. Mahathir loyalist, was scrapped in June 1998 (The Sun, 18 June 1998). Zahid's salvo was however directed against the practice of closely negotiated government contracts which has become a norm during Dr. Mahathir's tenure as Prime Minister, and in the wake of the 1997 economic crisis, the bail outs of ailing companies belonging to politically well connected individuals including Dr. Mahathir's son Mirzan's shipping company. While party leaders rapped Zahid for his criticism of the government and top leadership, Anwar on the other hand echoed Zahid's concern, adding that bold reform must take place if the country's economy is to be revived (The Sun, 17 June 1998; AFP, 18 June 1998).

Among them were Anwar’s father Datuk Ibrahim Abdul Rahman who received an option for 3.7 million shares of Nissan-Industrial Oxygen (IOI) incorporated, Anwar’s UMNO politician-cum-businessman loyalist Datuk Kamaruddin Jaafar who received an option for a total of 12.5 million shares in various public listed companies and Zahid Hamidi himself whose company was awarded a contract to redevelop Kampung Abdullah Hukum, an urban settlement on the outskirts of Kuala Lumpur. See the full list of companies awarded privatization projects (Bernama, 20 June 1998) and the list of special share allotment to individual bumiputeras (Bernama, 21 June 1998). Zahid however defended himself that his name was included in the list in his capacity as a trustee of a foundation which was awarded the privatization project by the government (The New Straits Times, 22 June 1998).

They include Dr. Mahathir's sons Mirzan and Mukhriz (development of Tanjung Jara Beach Hotel), Mohamed Nazir Tun Abdul Razak, the son of former Prime Minister the late Tun Abdul Razak and brother of the present Deputy Prime Minister Datuk Seri Mohd. Najib Tun Abdul Razak (420,000 shares of Genetech Resources Berhad), former Deputy Prime Ministers the late Tun Ghafar Baba (5 million shares of Pan Malaysian Cement Works Berhad) and Tan Sri Musa Hitam (747,000 shares of Bright Packaging Industry Berhad), cabinet ministers Datuk Seri Mohd. Nazri Abdul Aziz (700,000 shares of Super Ent Holdings Berhad) and Datuk Seri Hishamuddin Tun Hussein (3 million shares of Nanyang Press (M) Berhad), and a host of prominent tycoons like Tan Sri Halim Saad, Tan Sri...
Zahid was forced to retract his claims about cronyism and nepotism by saying that such practices did not exist in Malaysia.²⁷

But a more drastic move to halt any challenge from Anwar was the distribution of a book entitled “50 Dalil Mengapa Anwar Tidak Boleh Menjadi Perdana Menteri” (50 Reasons Why Anwar Cannot Become Prime Minister) which found its way into the bags of the delegates to the 1998 UMNO General Assembly. The way in which copies of the book were distributed precluded any possibility that it was done without Dr. Mahathir’s sanction.²⁸ The book listed a host of moral improprieties allegedly committed by Anwar, including homosexual acts and treason. These allegations, which were contained in a poison pen letter, had been around for quite some time before the annual assembly and had been dismissed by the Prime Minister as baseless. However, it was during the assembly that these allegations resurfaced and later served as a basis for Anwar’s forced exit from UMNO. On 2 September 1998, a day after Dr. Mahathir introduced sweeping capital controls in a move to insulate the country’s economy from the volatility of the free global financial market and keep the ringgit from falling, Dr. Mahathir sacked Anwar from the cabinet. Though no reason was given for the dismissal, local newspapers and television networks highlighted the contents of affidavits filed in court in relation to a criminal charge against Anwar’s businessman associate, Dato’ Nallakaruppan.²⁹ The affidavits implicated Anwar in numerous cases of sexual misconduct including a sexual relationship with the wife of his aide and sodomy.³⁰ Nallakaruppan was mentioned in the 50 Dalil book as Anwar’s tennis partner who also “supplied” women to Anwar.

²⁷ New Straits Times, 10 July 1998.
²⁹ Nallakaruppan was a director of Magnum Corporation, one of the country’s largest licensed gaming operators.
It transpired later that the Nallakaruppan's case had been used by the authorities to nail Anwar. In the course of police investigation into the 50 Dalil book, the police raided Nallakaruppan's house in the elite enclave of Bukit Tunku in Kuala Lumpur in July 1998 and found in his possession 125 rounds of ammunition for which he had no valid license. Although such an offence is punishable under Section 8 of the Firearms Act 1960, which carries a maximum sentence of seven years imprisonment or a fine of ten thousand ringgit or both, the Attorney-General preferred against him a heavier charge under Section 57 of the Internal Security Act, which carries a mandatory death penalty. Nalla's counsel, Manjeet Singh Dhillon, claimed in a statutory declaration that two senior officers at the Attorney-General's office, the then Senior Deputy Public Prosecutor Dato' (now Tan Sri) Abdul Gani Patail and the then Head of the Prosecution Division (now Dato') Azahar Mohamed, used the heavier charge to extort from Nalla evidence of Anwar's sexual misconduct. Manjeet stated in a letter he wrote to Attorney-General Tan Sri Mohtar Abdullah that Abdul Gani, in a meeting with him and another lawyer Balwant Singh Sidhu on 2 October 1998, had said he wanted Nallakaruppan, in exchange for a reduced charge under the Arms Act which did not carry mandatory death sentence, to co-operate with the prosecutors and to give information against Anwar, specifically on matters concerning "several married women".

A day after Anwar was removed from office, the UMNO Supreme Council in an emergency meeting chaired by Dr. Mahathir, decided to expel Anwar from the party. Dr. Mahathir gave no immediate reason for the expulsion, stating only that Anwar was "not suitable" for the post, that the matter was exclusively internal to the party and he owed no obligation to explain it to the people. But on 8 September,
Dr. Mahathir briefed UMNO grassroots leaders on the reasons for Anwar’s expulsion, stating that his former deputy had “low morals”. Speaking to reporters after the briefing, Dr. Mahathir referred to the police investigation into the allegations of Anwar’s sexual misconduct contained in the “50 Dalil” book and revealed that he too had conducted “his own investigation” into the matter after which he concluded that Anwar “was not qualified to lead the country”.

The Birth of Reformasi: A Battle on Ideological Grounds

It was at this juncture that Anwar, after being deprived of all avenues to displace Dr. Mahathir from within the UMNO oligarchy, turned to the masses outside the party for political support. Though it was difficult to deny that elite rivalry within the UMNO oligarchy played major role in Anwar’s fallout with Dr. Mahathir, the battle cry of Reformasi pointed to the more substantial issue of ideological differences between the two leaders as the underlying motivation for a revolt against the government. It was in this context at the height of Reformasi, that Dr. Mahathir’s promotion of an illiberal democracy for a mainly economic purpose was viewed by the Reformasi activists as nothing more than an excuse to perpetuate undemocratic rule pure and simple. Backed by his espousal of freedom as an individual right, Anwar turned his ideological differences with Dr. Mahathir into a pivotal ideological tool to legitimize his challenge against the government. Claiming that the allegations of sexual misconduct were part of a high level conspiracy to topple him, Anwar called for a complete overhaul of the government to stem abuse of powers and corruption, and to create wider spaces for democracy. Dr. Mahathir’s 17 years long tenure as the Prime Minister, his known antagonism toward liberal democracy and the West, his shoddy track record in dealing with the independence of the judiciary, and the allegations of cronyism, nepotism and corruption involving himself, his family members and cabinet ministers close to him, were easy targets for Anwar to stage a political battle on ideological grounds.

36 AFP, 8 September 1998; Business Times, 9 September 1998.
The "Permatang Pauh Declaration", launched on 12 September 1998, laid the ideological basis for the Reformasi movement. The essentially democratic and non-communal political statement sets out the philosophy and key objectives of the Reformasi movement. It started with the recognition of the nobility and freedom of man and condemning any form of restrictions to that freedom "without following the due process of law". It then promised to establish justice for all and "preserve the institutions and processes of law from defilement of graft and abuse of power". It also pledged to sanctify the power of the people through democratic means, champion economic justice, eradicate graft and reinforce faith in noble cultural traditions. Above all, it assured the people that the movement was a peaceful one launched in accordance with the spirit of the Constitution and in observance of the rule of law. With such lofty ideals, Anwar’s reform movement aimed to shift Malaysian politics away from its authoritarian and communal bases toward one which was democratic and non-communal, the goal of which was the widening of the democratic space and the dismantling of communalism as the main basis for group mobilization and interest articulation. As uncontrolled articulation of communal interests had often been made valid justification by the government to limit the scope for political competition and discard democratic practices, the dismantling of communalism was intended to remove this main obstacle to democracy.

However, this articulation of the democratic and non-communal political ideals was not altogether new. It bears close ideological resemblance to the ideas that had long been articulated by the democratic elements within the society especially since the 1980s. What made the 1998 Reformasi politically significant was its organizational and mobilizational aptitude. As a broad-based non-communal and cross sectional mass movement, the Reformasi brought together key opposition parties, Islamic movements, conglomerations of NGOs and trade unions, and other activists cooperating across sectors and issue areas into a coalition for political

40 Permatang Pauh Declaration.
41 Permatang Pauh Declaration.
42 Permatang Pauh Declaration.
The inclusion of the predominantly Chinese secular social democratic DAP, the Islamic party PAS and the socialist PRM in a single platform for political reform was a remarkable milestone in dismantling communalism as the main bases for group mobilization and interest articulation. These parties were then joined by the newly set-up multiracial but non-communal National Justice Party (Parti KeADIlan Nasional, keADILan) led by Anwar’s wife Datin Seri Dr. Wan Azizah Wan Ismail. Within the civil society, there had been a kind of conjunction between the secular human rights groups like SUARAM and ALIRAN, which had been at the forefront of the struggle for democracy and human rights in Malaysia, and established mainstream Islamic movements like ABIM and JIM, which played significant role in wooing Malay support for Reformasi. The rest were ordinary citizens whose association with the movement found expression in their participation in street demonstrations, ad-hoc political ceramahs and voluntary Reformasi work - from distributing Reformasi pamphlets to providing legal, financial and emotional support to the Reformasi detainees and their family members. Other than these, an important section of Reformasi actors were anti-Mahathir webmasters and alternative media practitioners who helped disseminate valuable Reformasi write-ups and updates on Reformasi activities.

Another significant aspect of the Reformasi movement was that it was a largely Malay-based movement with support from the more progressive and anti-establishment sections within the non-Malay communities. This was quite different from most of the democratic and human rights movements since the 1980s, which had been predominantly non-Malay with little support from the Malay masses and the Malay-based organizations. On the day Anwar was sacked, steady streams of supporters, most of whom were his Malay supporters in UMNO and ABIM, thronged his official residence in Kuala Lumpur. The Malay support for Anwar was given further boost when ABIM, the National Union of Malaysian Muslim Students’
Associations (PKPIM), Jamaah Islah Malaysia (JIM) and the Malaysian Academy of Islamic Sciences (ASASI) launched a “reformation movement” in Kajang four days after his sacking, vowing to arouse public awareness about “injustices” done to Anwar. The majority of those who attended his nightly political ceramahs outside his private residence in the elite enclave of Bukit Damansara near Kuala Lumpur for weeks following his sacking were Malays. The majority of thousands of demonstrators who took part in the weekend street demonstrations in Kuala Lumpur, as well as those who flocked to his public rallies held in Penang, Kedah, Selangor, Malacca, Negeri Sembilan, Pahang and Kelantan following his dismissal were also Malays. There was a psychological and moral motivation behind the overwhelming Malay support for Anwar. As Anwar’s longtime loyalist, former ABIM President and former keADILan Deputy President Dr. Muhammad Nur Manuty put it, it was the sense of gross injustices meted out to Anwar that became the prime motivator for the Malay masses to support him. Politically, it was the beginning of a large-scale Malay revolt against the Malay-led government giving an impression that a significant political change was underway.

Meanwhile, the Reformasi movement’s articulation of the non-communal political ideology, coupled with the overwhelming Malay “revolt” against the Malay-led government, had resonance with the more progressive and anti-establishment sections within the non-Malay communities. Coincidentally, several weeks before Anwar’s sacking, Lim Guan Eng of the DAP was jailed for sedition. Guan Eng’s trial and conviction arose in connection with a statutory rape case involving an under-aged Malay girl. Former Malacca Chief Minister Tan Sri Abdul Rahim Tamby Chik was implicated in the case but was not prosecuted. Anwar was quick to express his solidarity with Guan Eng for sacrificing his career and liberty to assist a girl “who was not of his race or religion”, showing his good will to Guan Eng

48 Foreign press and newswire estimated the size of the crowd at each of Anwar’s rallies as follows: Permatang Pauh, Penang (10,000), Jitra, Kedah (50,000), Malacca (20,000), Bangi, Selangor (30,000) and Kota Bharu, Kelantan (40,000). (AFP, 12 September 1998; AFP, 13 September 1998; Sydney Morning Herald, 18 September 1998; AFP, 20 September 1998)
49 Informal discussion with Dr. Muhammad Nur Manuty, former ABIM President/keADILan Deputy President, Taman Tun Dr. Ismail, Kuala Lumpur, 18 April 2007.
as well as to the non-Malays at large.\textsuperscript{50} At the height of Reformasi, many NGOs with largely non-Malay membership began to associate with Anwar’s call for political reform, giving the Reformasi movement a more multiracial outlook, rather than being solely a “Malay phenomenon”. For the first time since the 1990 General Election, the more progressive and anti-establishment sections within the non-Malay communities were convinced that the democratic wave to challenge the Barisan Nasional’s political hegemony was under way.\textsuperscript{51}

The Anwar-led Reformasi movement however faced an early set back when Anwar was arrested under the ISA on the evening of 20 September 1998 after he led a massive public rally at Merdeka Square in Kuala Lumpur. While under police custody, Anwar was beaten by none other than the Inspector-General of Police, Tan Sri Rahim Noor. Anwar was then hauled to the court to face charges of corrupt practices and sodomy. His key supporters were also arrested under the ISA while a number of them fled the country leaving the nascent Reformasi movement in disarray.\textsuperscript{52} In the largest crackdown since the 1987 Operation Lallang, about 40 Reformasi supporters were arrested under the ISA while many others faced illegal assembly charges in court. Similar to the 1987 UMNO elite rivalry, the winning faction once again put the repressive state apparatus to use in a move to halt a possible challenge from the losing faction. But more serious than the crisis in 1987 was the role of the repressive state apparatus - the police, the courts and the Attorney-General’s office - that were forced to play a far more direct part in suppressing the challenge to the winning faction’s political dominance. The losing faction, however, also failed to garner the support of the top echelon of party

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\textsuperscript{50} Khoo (2003: 113).

\textsuperscript{51} Interview with Kua Kia Soong, former member of Parliament for Petaling Jaya and a Chinese educationist movement activist, Kajang, 22 August 2005.

\textsuperscript{52} Among Anwar’s key loyalists detained under the ISA were UMNO Youth Chief, Ahmad Zahid Hamidi; UMNO divisional heads, Kamaruddin Jaafar (Tumpat, Kelantan), Kamaruddin Mohd. Noor (Pasir Puteh, Kelantan), Tamunif Mokhtar (Bandar Tun Razak, Wilayah Persekutuan Kuala Lumpur); and Asma’on Ismail (Bandar Tenggara, Johor); Lumut UMNO Divisional Youth Chief, Dr. Zambry Abdul Kadir; Negeri Sembilan UMNO Youth Chief, Ruslan Kassim; ABIM leaders, Ahmad Azam Abdul Rahman (President), Mokhtar Redzuwan (Deputy President), Shaharuddin Badaruddin (Secretary General) and Abdul Halim Ismail (Treasurer); International Islamic University Deputy Rector and former ABIM Vice-President, Dr. Sidek Baba; and PKPIM leaders, Amidi Abdul Maman (President) and Ahmad Shabrimi Mohamed Sidek (Secretary General). All of them were released after several weeks of detention. Among those who fled the country were Ezam Mohd Noor (Political Secretary), Khalid Jaafar (Press Secretary) and Abdul Rahim Ghouse (Penang Youth Chief).
\end{footnotesize}
leaders, leaving them with no viable alternative but to turn to the masses and the opposition parties for political support. Though the absence of top echelon party leaders’ support for Anwar’s Reformasi, let alone support from top civil servants, judges or police personnel, indicated growing consolidation of Dr. Mahathir’s personal political power, the Reformasi movement’s “forced” turning to the masses, which meant to ordinary citizens across class and communal division, opened up opportunities for articulation of the democratic and non-communal political vision outside the UMNO oligarchy.

Assessing Harl Singh’s model of “oligarchic restructuring” and “genuine democratization” against the backdrop of the 1998 Reformasi, one could argue that both models had been at work in the aftermath of Anwar’s sacking. Anwar espoused democracy and human rights as an ideological stance that contrasted with Dr. Mahathir’s semi-authoritarian approach to political authority in his attempt to legitimize his challenge against the government. In this regard, Hari Singh argued, “Reformasi was an extension of the democratic reform that Anwar had articulated within the party as a strategy for elite displacement”, which later spilled into the public domain after he was deprived of the opportunity to mount a challenge from within the UMNO oligarchy. However, “while involvement of the masses in checking political decay may be a function of strategic manipulation by UMNO elites to reorder the power distribution within the oligarchy, it is also a reflection of growing public discontent within the entire UMNO oligarchy, with the Anwar case being merely incidental and instrumental in a process where the masses seek to

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53 Even key Anwar loyalists who were detained under the ISA like Youth Chief Zahid Hamidi, Divisional Heads Kamaruddin Mohd Noor (Pasir Puteh, Kelantan), Tamunif Mokhtar (Bandar Tun Razak, Kuala Lumpur) and Asma’on Ismail (Bandar Tenggara, Johor), and Divisional Youth Chief Zambry Abdul Kadir (Lumut, Perak) remained in UMNO and pledged their loyalty to Dr. Mahathir soon after they were released from ISA. It was related that Special Branch (SB) officers continued to keep an eye on the movement of these former detainees after their release from ISA, making it difficult for them to have any kind of communication with Anwar and his supporters, even if they would have wished to do so. The detainees too had to convince the SB officers that they were completely “clean” by shutting down all communication channels with their former allies in Anwar’s camp. The extent to which SB’s surveillance was conducted is pervasive. One of the detainees revealed that his phone conversation had been intercepted by the SB, and the details of his conversation were shown to him while he was under detention. He believed that the SB continued to monitor his phone conversation after his release. Confidential discussion, 10 October 2004, Kuala Lumpur. See also Saari (2001) and Raja Petra (2001) for useful information on SB’s surveillance and scare tactics.

restructure the power relationship between the rulers and the ruled”. It was in this context that the power struggle within the UMNO oligarchy spilled into the public domain, giving greater momentum to democratic ferment, the struggle for which had previously been pursued mainly by the select groups of NGO activists and opposition politicians.

**New Opposition and the Non-Communal Social Contract**

One of Reformasi’s main contributions to Malaysian politics was its espousal of an alternative political vision which transcends communal divisions. This vision of Malaysian politics beyond communalism conceptualizes political struggle in a plural society not as an inter-communal bargain by which each communal group agrees to cooperate in a multi-communal coalition of political parties while at the same time seeking to maximize distinct communal interests but an attempt to create a non-communal “social contract” among individuals across communal divisions, the primary aim of which is the replacement of communalism with racial equality and democracy as the focus of political struggle. This vision of politics necessitated the creation of a community-neutral coalition of political parties, the leaders of which agree not only to act as leaders of their own communal group but also of others. This section will show that although the process of internalization of non-communal vision of politics among the Reformasi activists remained slow and halting, articulation of such a vision served as a basis for the launching of the multiracial non-communal National Justice Party (keADILan) in April 1999 and the Barisan Alternatif (BA), a united opposition front comprising Malaysia’s main opposition political parties to challenge the BN in the 1999 general election.

There had been in the past attempts at catapulting to prominence such an alternative democratic and non-communal vision of Malaysian politics and

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57 Anwar for example persistently stressed that he is the leader of the “people”, rather than of the Malays or Muslims, signifying a shift from an essentially communal vision of politics. See for example excerpts of his speech delivered at his Damansara home after his removal from office in September 1998 (The New Straits Times, 15 September 1998).
leadership. The pre-independence PUTERA-AMCAJA coalition and the 1990 Gagasan Rakyat electoral pact were more or less echoes of such vision. Throughout the 1980s, various coalitions of issue-oriented NGOs also generally espoused a democratic and non-communal vision of Malaysian politics and society. But the support base for these coalitions and initiatives, except the 1990 Gagasan Rakyat, were confined mostly to the urban educated middle-classes, thus seriously limiting their capacity to shift the foundation of Malaysian politics away from its communal underpinnings more broadly. By the early 1990s, however, subtle changes had occurred in the landscape of Malaysian communal politics. As Loh Kok Wah observes, developmentalism had emerged as a new political culture. Developmentalism, which valorized economic growth, rising living standards, a consumerist style and most of all, political stability, had begun to contest ethnicism as the overwhelmingly dominant component in Malaysia's political discourse.

The global surge of capital flows in the late 1980s and early 1990s, which coincided with the end of NEP, forced the government to adopt new policies of economic deregulation and privatization. There were, at least, two main consequences of the more liberal economic policies that eventually had a significant impact on communal politics. First, the more liberal policies led to rapid growth, new economic opportunities and better employment prospects for Malaysians of all races, the "trickle down" effects of which led to the growth of a sizable multi-racial middle classes. Second, as non-Malay capital had been seriously constrained during the NEP years, the adoption of more liberal economic policies presented new opportunities for the non-Malay business and industrial community to reap larger economic benefits. Meanwhile, there had been greater appreciation of the non-Malay cultures in the public sphere. These had contributed to the eventual easing of ethnic tension and, consequently, a new lurch toward sustained economic growth and political stability. Apart from that, since 1990, Dr. Mahathir's Vision 2020, which marked a halting departure from the ideology of a protectionist Bumiputera state toward greater economic and cultural liberalization that envisioned a united Bangsa

Malaysia (Malaysian Nation), in which all Malaysians regardless of race would gradually have a fair share in fully developed Malaysia by the year 2020.

Another salient impact of economic growth and the expansion of the multiracial middle class on Malaysian politics and society by the late 1990s was that this class demonstrated greater support for the advocacy of social and environmental issues, which had previously been the almost exclusive concern of select groups of mainly urban educated NGO activists. These were concerns over day-to-day livelihood issues such as rising living costs, increasing crime rate, environmental degradation and other consumer-related issues. Over the years, politically highly sensitive issues also generated wide public debate. These included public calls for government's transparency and accountability, judicial independence, media freedom and electoral reform. Specific human rights issues such as women's rights, workers' rights and the rights of immigrants and other minority groups also gradually took the centre stage in the human rights discourse in Malaysia.

It was against this backdrop that Anwar's Reformasi movement struck a chord with the human rights activists and their sympathizers among the members of the urban middle class. As communalism had never been the main rallying point for these activists in mobilizing support for their cause, it was easier for them to accept Anwar's democratic and non-communal vision of politics as a new agenda for comprehensive political reform. It was not surprising therefore that prominent human rights activists like Chandra Muzaffar (former President of Aliran Kesedaran Negara, ALIRAN/President of JUST World Trust), Irene Fernandez (Director of Tenaganita), Chua Tian Chang (Voice of Malaysian People, SUARAM activist/Chairman of Coalition for People's Democracy, GAGASAN) and Sivarasa Rasiah (SUARAM activist) played important roles in the Reformasi movement, and later being part of the Opposition. Also, an important development in this regard was the formation of two important coalitions, the Gagasan Demokrasi Rakyat (GAGASAN, Coalition for People's Democracy) and the Gerakan Keadilan Rakyat

59 Interview with Ahmad Shabrimi Sidek, Personal Aide to Anwar Ibrahim and former Secretary-General of National Union of Malaysian Muslim Students' Associations, 20 April 2007, Kuala Lumpur.
Malaysia (GERAK, Malaysian People Movement for Justice), consisting of overlapping NGOs and opposition political parties, including PAS and DAP, pushing for political reform in the heyday of Reformasi. GERAK, headed by PAS, included more Islamic groups than the NGO-led GAGASAN. Both coalitions focused their struggle on challenging the BN’s authoritarian rule, with GERAK primarily seeking the abolition of ISA.

Another coalition was Pergerakan Keadilan Sosial (ADIL, Movement for Social Justice), a loose multiracial but non-communal movement for political reform led by Anwar’s wife, Wan Azizah. Launched in December 1998, ADIL espoused the same aims as those of GAGASAN and GERAK, i.e. democracy, human rights, social justice and the like. But unlike GERAK and GAGASAN, ADIL could be joined by individuals. Detached from organizational constraints, leading individual ADIL members had more leeway to rally behind Anwar in pursuing political and social reform as individuals. Also, being a loose-knit reform movement rather than a formal political party, ADIL attracted a wide range of endorsees including prominent academicians, professionals, religious leaders, student activists, women’s rights activists and other NGO activists.

Formation of the National Justice Party

After a few months of campaigning, and claiming about 70,000 endorsements, ADIL formed the basis for the setting up of a formal political vehicle for Reformasi activists. But the road to forming a formal political platform to pursue the Reformasi movement’s agenda for political change through electoral means was bumpy.

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61 The members of ADIL Pro-Tem Committee include Dr. Chandra Muzaffar (deputy president), ABIM President Ahmad Azam Abdul Rahman, JIM President Saari Sungib, former Bar Council President Hendon Mohammad, former ABIM President Dr. Muhammad Nur Manuty, women’s rights activist Irene Fernandez, prominent academic Assoc. Prof. Maznah Mohamad and political analyst Rustam A. Sani. Among the endorsees were Anwar Ibrahim, prominent academics Prof. Johan Saravanamutto, Prof. Francis Loh Kok Wah, Assoc. Prof. Mustaffa K Anuar, Prof. Shahrir Mohd Zain and Assoc. Prof. Khoo Boo Teik; and human rights lawyer Sivarasa Rasiah. See the full list of committee members and endorsees at http://members.tripod.com/GERAK_ADIL/declaration.htm (Accessed on 3 February 2007).

ADIL’s attempt to register itself as a society under the Societies Act was rejected by the government. An attempt by a group of Reformasi supporters to register a new political party, Himpunan Angkatan Keadilan (HAK, Assembly of Movement for Justice), was also foiled.63 Due to the government’s unwillingness to allow registration of new political parties to cater to the Reformasi’s struggle, Anwar loyalists, mostly young activists in ABIM, discreetly “took over” Parti Ikatan Masyarakat Islam Malaysia (IKATAN, United Malaysian Muslim Society Party), a nearly defunct political party based in Terengganu. The takeover occurred around the same time ADIL was launched in December 1998.64 The new office bearers of IKATAN kept a low profile for quite some time, during which an Extraordinary General Meeting was held to change party’s name, flag and constitution.65 The party was renamed Parti KeADILan Nasional (keADILan, National Justice Party)66 and the new constitution was to reflect the Reformasi movement’s aspiration for democracy, human rights and social justice. The party’s membership was to be opened to all Malaysian citizens, regardless of race or religion. The changes were then approved by the Registrar of Societies in early 1999. Just before the “new” party was launched in April, its office bearers resigned en-masse to allow the election of a new leadership, headed by Wan Azizah as its new President.67

The discreet way in which keADILan was formed gave leeway for Anwar to handpick its office bearers in order to reflect the party’s non-communal and cross-sectional features. Main office bearers of the party such as Chandra Muzaffar

63 The initiator of HAK was former UMNO Youth Executive Secretary and Anwar supporter, Hanafiah Man (Straits Times, 27 March 1999)

64 The takeover took effect when the old office bearers of IKATAN resigned en-masse to pave way for the appointment of new office bearers consisting of young ABIM activists. IKATAN’s constitution allowed its President to appoint new members of the Central Leadership Council, without requiring any election to be held, in the event any of its members resigned.

65 The party’s EGM was a completely tame affair. Because all of its branches are “non-existent”, many of them are already defunct or de-registered, the EGM was only attended by its new office bearers. This allowed the EGM to complete its work “discreetly”.

66 The acronym keADILan, with the word “ADIL” (which means justice) spelt in capital letters, was intended to highlight the struggle for justice as the party’s main rallying point as well as to tap on the popularity and goodwill of ADIL as prime mover of Reformasi. Though there has been no formal connection between ADIL and keADILan, the initiators of keADILan sought to impress upon the public that the party was a continuation of ADIL’s struggle for reform, and that the party was the formal political platform for Reformasi activists.

67 This account is based on the author’s personal involvement in setting up keADILan. He was the Executive Secretary of the party between April and September 1999.
(Deputy President), Sheikh Azmi Ahmad (Vice-President) and Mohd Annuar Tahir (Secretary-General) were Anwar’s longtime friends who had longstanding involvement in either human rights advocacy or Islamic activism. Chandra Muzaffar was a former President of Aliran Kesedaran Negara (ALIRAN), an issue-oriented NGO focusing mainly on human rights advocacy. Sheikh Azmi and Mohd. Annuar were former ABIM leaders. Anwar continued to maintain close ties with these people when he was in the government. Some had even occupied high-ranking government positions. Chandra was the Director of the Centre for Civilizational Dialogue at the University of Malaya, the setting up of which received Anwar’s strong backing. Sheikh Azmi was the Chief Judge of Federal Territory Syariah Court before joining keADILan, while Mohd. Annuar was the Executive-Director of Yayasan Salam, a semi-government foundation set up to coordinate voluntary relief work locally and abroad. The membership of the party’s Majlis Pimpinan Tertinggi (MPT, Supreme Leadership Council) was mixed, with members representing diverse groups within Malaysia’s political and civil society. They included non-Malay human rights activists, prominent members of Islamic movements, a church leader, former opposition leaders, ex-UMNO members and ordinary professionals.68 Unlike Parti Semangat 46, which was formed following the 1987 UMNO crisis, no UMNO big guns joined keADILan.69 The fear of being reprimanded by Dr. Mahathir, losing government jobs or, even worse, facing criminal charges might have deterred some of Anwar’s sympathizers in UMNO from rallying behind him.70

68 Among the MPT members were Marina Yusoff (Vice President/former opposition Semangat 46 Vice-President), Tian Chua (Vice-President/human rights activist), Mohd. Ezam Mohd. Noor (Youth Chief/former UMNO Deputy-Divisional Chief), Goh Keat Peng (Member/church leader), Irene Fernandez (Member/women’s rights activist), N. Gobalakrishnan (Member/former Malayan Indian Congress (MIC) leader), Zainur Zakaria (Wilayah Persekutuan Liaison Chief/former President of Bar Council).

69 Anwar’s closest allies in UMNO like Youth and Sports Minister Tan Sri Muhyiddin Yassin and Back Bencher’s Club Chairman and Member of Parliament for Parit Sulong Ruhanie Ahmad never left UMNO for keADILan. Both were present at Anwar’s official residence the night he was sacked, but their show of support ended there. Other known staunch supporters like Deputy Ministers in the Prime Minister’s Department, Datuk Ibrahim Saad and Datuk Faizul Abdul Rahman, and Minister in the Prime Minister’s Department and Women’s Chief Datuk Dr. Siti Zaharah Sulaiman also remained in UMNO.

70 Anwar mentioned in passing that not all of his sympathisers had “clean records”, indicating that they might face retaliation, legal or otherwise, should they choose to break rank. Interview with Anwar Ibrahim, 26 December 2004, Kuala Lumpur.
The more substantial attempt to present the party as a conduit for Reformasi's democratic and non-communal ideology was the party's constitution. The party's new constitution, the objectives of which were personally written by Anwar, vowed to create a just society and a progressive democratic nation. With its motto of "Justice for All", the party pledged to uphold the rule of just law and the independence of the judiciary as well as to guarantee freedom of thought, speech, movement, assembly and association for all. Operating under a situation where the mainstream media hardly gave favorable media coverage to the opposition parties and those who were critical of the government, keADILan emphasized the need to promote media freedom. The more substantial attempt at dismantling communalism as the basis of political struggle was the party's resolve to substitute the BN's race-based socio-economic distribution policy with one that promotes equitable distribution regardless of race. While the party pledged to continue to improve the socio-economic condition of the poor and the marginalized among the Bumiputeras, it also promised to look after the welfare of the less fortunate among the non-Bumiputeras. While promoting a just, dynamic and robust economy, the party condemned wastage, misuse of public funds and concentration of wealth among the select few of the country's elite. On the issue of religion, the party recognized the position of Islam as the Religion of the Federation, while it guaranteed the right of the non-Muslims to profess and practice their religion of choice. Pledges were made to provide public goods such as affordable public education, health services, public housing and transport especially to cater to the needs of the low and middle income groups. It also vowed to fight for the rights of workers and the aborigines, and to enhance the status of women.71

Except for maintaining commitment to two important cultural terms of the communally-based 1957 constitutional contract, i.e. Islam as the Religion of the Federation and the Malay language as the National Language,72 keADILan's vision of Malaysian politics departed significantly from that of the BN. Rejecting BN's espousal of an essentially communal vision of politics, which is rooted in the

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71 Parti keADILan Nasional (1999: 2-3)
72 Parti keADILan Nasional (1999: 2-3).
understanding that Malaysian society is a grouping of competing communal groups recognizing Malay dominance, keADILan treats Malaysians of all races as co-equals who should have their fair share in the country's economy and politics. Party leaders believed that discriminatory race-based policies, such as the New Economic Policy (NEP), should be reviewed and substituted with alternative policies which are more democratic. Criticizing BN's perpetuation of discriminatory race-based policies and arguing for a communally neutral vision of Malaysian politics as well as the widening of the democratic space, Anwar noted:

When government policies are drawn along chauvinistic lines and marked by discriminatory practices, discontent is bound to foment. This problem must be tackled at the core while allowing for civil society to blossom. Democratic space must continue to be opened and not further eroded. In Malaysia, the call by dissident voices has been to move beyond the decades-old paradigm of the New Economic Policy and forge a blueprint to narrow the economic divide regardless of ethnic lines.

By dismantling the communal division, and shifting the focus of political interest from communal groups to individuals, the party strove to pave the way for greater appreciation among Malaysians of all races of a new politics which prioritized, among other things, the virtues of non-communalism, participatory democracy, personal freedoms and social justice, over preoccupation with state power and communalism. But this does not mean that all was well with the nascent keADILan. Despite its claim to be a multiracial and non-communal party, its members were largely Malays with only pockets of non-Malay supporters comprising activists of human rights groups and some DAP and MIC dissidents. There were at least three reasons why the party failed to attract large non-Malay following. First, the Reformasi which gave the impetus for the formation of the party

73 Informal discussion with Sivarasah Rasiah, PKR Vice-President, 9 September 2006, Kuala Lumpur.
74 Anwar (2006).
was mainly regarded as a “Malay phenomenon” in which non-Malay participation was only ancillary to the mainly Malay open revolt against the Malay-led government. Second, most of the non-Malay leaders who were appointed to the party’s MPT were NGO leaders who were politically detached from grassroots support. Devoid of the most important link to the grassroots, the non-Malay leaders failed to attract mass following from their respective ethnic communities. Third, as a non-Malay political commentator noted, the non-Malays, especially the Chinese, were quite apprehensive about Anwar’s “Islamic image”. Not surprisingly, keADILan Deputy President Chandra Muzaffar, in an open letter to Lim Guan Eng, welcoming his release from prison in August 1999, admitted that the reform movement, though it was multiracial in orientation, was still predominantly Malay. He thus invited Lim to help “transform the movement into a powerful political force that transcends ethnic boundaries”.

Meanwhile, being a nascent party, keADILan had to grapple with its own “teething problems” too. There were internal fault lines within the party. The first was between the politician camp and the NGO activist camp which were in conflict over how to best manage the party. As many of the party’s main office holders were former NGO activists who had little experience in active partisan politics, they had been the main target of ridicule by the more seasoned politicians, most of whom were former members of UMNO and S46, for being inefficient in handling party matters. The bulk of criticisms were about the slow progress in recruiting new members, inefficiency in dispensing party funds and inability to deal with internal disputes. The second fault line was between ABIM and JIM, the two Islamic movements which had been at odds with each other since the 1980s. Not only was cooperation between party leaders who hailed from the two organizations shallow, there was also a strong tendency among them to form competing alliances within the party. Another fault line was between the non-communalist NGO leaders and the more communalist grassroots leaders. For instance, there had been tussles between the Tamil-speaking grassroots leaders and the English-speaking Indian NGO

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76 See Quek (1999).
77 See Chandra’s open letter to Lim Guan Eng, “Welcome to a New Malaysia”, in Harakah, 28 August 1999.
activists over who had the better right to represent the Indian community in the party’s MPT. Down to the grassroots, problems cropped up when different groups of party activists formed overlapping pro-tem committees at the divisional level, each trying to lay claim to the right to lead the troubled divisions. The party leaders spent much of their time during the first few months of the party inception to solve the “teething problems”, while the internal power struggle between the competing groups continued to build up. With Anwar behind bars and the party left to novices in partisan politics, keADILan faced initial setbacks as a formal political vehicle for Reformasi activists.78

Formation of the Alternative Front (Barisan Alternatif)

While keADILan was grappling with its “teething problems”, party leaders continued to focus on their efforts to unseat the BN in the impending General Election. For Anwaristas, winning the election was the only way to get Anwar out of the jail. But it was impossible for the nascent party to achieve this goal if it were to work alone. The party had no experience in contesting any election and also lacked strong networks of grassroots supporters to face the gigantic and better oiled BN machineries. Though keADILan managed to recruit about 30,000 new members in the first few months after its inception, organization and mobilization processes at the division and branch level remained slow and halting.79 This was due to the registration process itself which allowed direct registration with the party’s headquarters rather than through divisions or branches, which were in any case still in the process of formation. Even after the divisions and branches were formed,

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78 Information in this paragraph is based on the author’s personal knowledge of keADILan’s internal affairs in his capacity as the party’s Executive Secretary between April and September 1999. He was then privy to the party’s MPT meetings and responsible for the day-to-day management at the party’s headquarters in Kuala Lumpur.

79 The slow and halting process can be illustrated by the following facts and figures. In 2004, 5 years after its formation, keADILan/PKR had managed to form 163 divisions comprising only 445 branches nationwide. Only 14 divisions had more than 10 branches, the largest of which were Gombak (27 branches), Permatang Pauh (26 branches) and Pasir Salak (25 branches). 92 divisions (56 percent of the total divisions) had no branches at all (People’s Justice Party 2004: 13-23). This is way behind the width and breadth of the UMNO network which comprised about 19,000 branches nationwide (Utusan Malaysia, 24 Jun 2004).
there were difficulties in tracking down the new members and channeling them to their respective branches and divisions. Furthermore, organizing a party at the grassroots level on a large scale required a strong working network of party supporters as well as considerable funding. As the party’s sources of access to organized networks were mainly limited to Islamic movements like ABLM and JIM, the grassroots network of which had been seriously dwindling since the late 1980s, as well as other sporadic individual-based networks among former UMNO, S46 and MIC leaders who now supported keADILan, the party had no capacity to organize and mobilize its grassroots supporters on a large scale. The party therefore needed reliable allies among the opposition parties that already had their own webs of grassroots networks and popular support in order to mount a formidable challenge against the BN. On 4 April 1999, while addressing a 3000-strong audience at the launch of the party, which was also attended by the leaders of PAS, DAP and PRM, Wan Azizah emphasized the need for the opposition parties to work together “in order to achieve the larger goal of forging a credible alternative to the Barisan Nasional”.80

There had been seeds of cooperation between major opposition political parties right after Anwar was sacked from the government and UMNO. Leaders of all three major opposition political parties - DAP, PAS and PRM - visited Anwar at his house after his sacking.81 Though Anwar initially denied any pact with the opposition parties, the parties had given him much needed platform to launch attacks on the government in his brief nationwide tour which ended with his abrupt arrest under the ISA on 20 September 1998. With the launch of keADILan, the efforts at uniting opposition parties on a single platform to challenge the BN gained more momentum. It was clear then that keADILan would be the main political vehicle for Reformasi supporters, though they were free to join other political parties. Anwar would then play a unifying role of sorts, from behind bars. But the objective was to bring the opposition parties together in a single grand coalition. Party leaders viewed that it was important at this juncture that Anwar did not join any one of the

80 See Sabri Zain (1999).
opposition political parties, including keADILan, so as to emphasize his somewhat neutral position when communicating between the opposition leaders. \(^\text{82}\)

There had been encouraging developments to this end. On 14 April 1999, the day the High Court found Anwar guilty of corruption, GERAK, led by PAS, announced its "April 14 Declaration", which aimed at changing the Government through the electoral process. In view of this aim, the organization issued a statement calling for formation of a coalition to form a new government. \(^\text{83}\)

But forming a grand coalition among the ideologically incompatible political parties like PAS and DAP was not an easy task. PAS had always been known for its propagation of the Islamic state objective, with the implementation of Hudud (Islamic criminal law) lying at the core of its political agenda. The DAP on the other hand is a secular social democratic political party which had always been opposed to any move to form an Islamic state in multiracial and multi-religious Malaysia. Both parties appealed to different constituents as well as having limited short-term electoral goals. Focusing on the predominantly Chinese-majority urban and semi-urban constituencies, the DAP's short-term electoral goal had always been to deny the BN's two-thirds majority in the Parliament as well as wrestling control over the Chinese-majority state, Penang. Being a predominantly Chinese party, the DAP fared better in areas where a large majority of voters (i.e. more than two-thirds of the registered voters) were Chinese. \(^\text{84}\)

As the number of such constituencies was only 12 out of 193 parliamentary seats in 1999, it was understandable that the DAP did not overstate its short-term electoral goal. PAS on the other hand appealed to the rural Malay voters in the Malay heartland states of Kelantan, Terengganu, Kedah and Perlis and regions like upper Perak. Its immediate electoral goal had always been to win as many seats as possible in the Malay heartland and wrest control over one or two of those states. The radical Malay-based PRM, which was part of the influential left-leaning Socialist Front in the 1950s and 1960s, remained a fringe party after the 1960s.

\(^\text{82}\) Interview with Mustafa Kamal Ayub, Secretary-General of PKR, 18 January 2005, Sungai Petani, Kedah. See also Hilley (2001: 227). But it was an open secret that Anwar, through his "prison notes" and emissaries, did send messages to party leaders expressing his views on party matters. More often than not, party leaders took his views as necessary instructions from him.

\(^\text{83}\) The New Straits Times, 15 April 1999.

\(^\text{84}\) Marzuki (2004).
Given this scenario, keADILan's resolve to unseat the BN in the general election was somewhat overstated. But the euphoria caused by the Reformasi movement had given a boost to the opposition political parties. PAS membership has grown from 500,000 in 1998 to 700,000 a year later. More significantly, the party drew growing support from Malay professionals and the urban middle class, indicating an expansion of its support base beyond the traditional Malay heartland states. The prospect of a significant swing of support to the opposition, especially among the Malay voters, emboldened the party leaders to seriously think about winning the election at the national level. Some Malays too started to show open support for the DAP. It was not uncommon to see hundreds of Malays attending ceramahs organized by the DAP at the height of Reformasi. To a certain extent, the Lim Guan Eng saga had helped cast the DAP's "chauvinist Chinese" image away from the Malay minds. As the Reformasi movement drew greater public support, there were signs that the opposition parties could make a significant electoral breakthrough. But different from PAS and keADILan, the DAP looked at the Reformasi and the election that followed in more realistic terms. Should they fail to unseat the BN at the national level, the election was still an opportunity for the party to win more seats and eventually to be better positioned to press the government for greater political reform. As the DAP Secretary-General Lim Guan Eng put it:

The government will never have the drive to reform. It has got to be pushed to do that, and this is where the people come in. If the people do not want to push for reform, the government will never be pressed for it. As for the DAP, provided we win, the government cannot afford to ignore us. If we win more votes, more seats then the government will be under pressure to change.

After much deliberation on the longstanding issues of differences between PAS and DAP, especially PAS’s espousal of the idea of Islamic State and the DAP’s

85 Weiss (1999: 432)
87 Khoo (2003: 113).
88 Interview with Lim Guan Eng, DAP Secretary-General, Petaling Jaya, 25 April 2005.
secular Malaysian Malaysia concept, as well as several hiccups regarding DAP members joining keADILan, four major opposition parties - keADILan, DAP, PAS and PRM - announced the formation of a single coalition of opposition parties, Barisan Alternatif (BA, Alternative Front) on 24 October 1999. The launch of the new opposition front, which coincided with a large gathering of about 100,000 guests at the glittering new Bukit Jalil National Stadium on the outskirts of Kuala Lumpur to celebrate the 25th Anniversary of Barisan Nasional, marked a concerted effort by the opposition to challenge the BN. Formed just before the 1999 General Election, the BA was the first successful attempt to bring together all major opposition parties on a unified political platform. It was an attempt to build an alternative two-party system, with a host of alternative programs and policies, the primary aim of which was to end BN's dominance in Malaysian politics.

The BA Common Manifesto: The Making of a Non-Communal Social Contract

As a coalition, rather than an ad-hoc electoral pact, the BA came up with a common election manifesto which emphasized the creation of a democratic and non-communal social contract. Blaming the BN government for its failure to live up to the people's aspiration for a just and democratic Malaysia, the common manifesto, "Toward a Just Malaysia", listed the major problems associated with the BN. These included concentration and personalization of power in the hands of the Prime Minister which resulted in the crippling of the system of checks and balances and growing oppression, corruption, cronyism and nepotism. It also criticized the government for manipulating the New Economic Policy (NEP) to enrich a small group of politically well-connected individuals, while the country's economic competitiveness and resilience were on the decline. It also took the BN to task for resorting to slander, persecution of political opponents and excessive use of public funds as a means to stay in power. The manifesto claimed that human rights and democracy suffered a major setback under the BN rule. The BN government, the manifesto asserted, had denied people's rights to freedom of expression, peaceful assembly and association, curbed media freedom and damaged the integrity of
public institutions such as the Parliament, the judiciary, the public service and the
police. It also claimed that the BN government's penchant for mega projects rather
than socio-economic initiatives for the poor had further increased the gap between
the haves and the have-nots across racial groups. In view of the people's increasing
awareness about the weaknesses of the BN's development policy and the more open
expression of dissent, the manifesto warned that:

the BN government has attempted to frighten the people by threatening that
such dissent will result in racial conflict. They threaten that chaos will result
should the strong position of the BN government be questioned. They have
mobilized the mainstream mass media which is completely under their control,
and have used it to vilify the dissent, spreading lies and fear. Their sole aim is
to cause fear and disunity. They hope their campaign of lies and fear-mongering
will prevent the people from coming together for change towards a
just and democratic nation.

In its attempt to rally support against the BN, the BA promised in its
manifesto a set of alternative economic and social policies, which it claimed would
benefit Malaysians of all races. These were the terms of the "new" non-communal
social contract. While the BN, especially its political anchorage UMNO, was quite
 apprehensive in promoting the non-Malays' right to mother tongue education, the
BA openly recognized and promoted their right. It also pledged to protect non-
Muslims' right to freedom of worship, while maintaining the position of Islam as the
Religion of the Federation. On the question of Malay special privileges, the BA
seemed to be quite careful in not rejecting the policy entirely, but to condemn its
abuses, while it pledged to extend affirmative action programs to the weak and
marginalized groups among the non-Malays. This rather ambivalent position
toward the Malay special privileges policy was essential since revamping the policy

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90 Barisan Alternatif (1999: 3).
entirely would not go down well with the Malay-majority, the backbone of the Reformasi movement and the new opposition. As such, the focus of BA’s criticism was on the implementation of those policies which the opposition front claimed only benefited a handful of the Malay elite rather than the Malay masses. These included the allotment of shares, approved permits, state lands and privatization projects to politically well-connected Malay individuals. As far as the non-Malays were concerned, the BA was trying to be more even handed by pledging to extend a genuine affirmative action policy to help the poor and marginalized among them.

The manifesto too promised to pay special attention to the Orang Asli (indigenous people) communities and the indigenous people of Sabah and Sarawak. This included the establishment of a commission to protect the Native Customary Rights (NCR) land and to promote their cultures and traditions. Other pledges were essentially those relating to the provision of public goods such as low cost health services, affordable housing schemes for the low and middle income groups and comprehensive, fair and efficient social services. The BA also promised to formulate a long-term sustainable development policy, strengthen consumer protection laws, repeal or amend laws which restrict worker’s rights, promote women’s rights, empower the youth and safeguard the welfare of the elderly and pensioners.

An important development in the BA’s attempt to forge a new democratic and non-communal social contract was the exclusion of the Islamic state agenda in the common manifesto, despite the fact that PAS was one of its major partners. This can be attributed to developments within PAS itself. Since 1999, a growing force within PAS, the so-called the “mainstreamers”, had espoused a more moderate and democratic view of Islam and played down the Islamic state agenda in order to facilitate multi-ethnic coalition building among the opposition parties. But as the party also needed to respond to the demands of the “purists” within the party for the maintenance of its theocratic agenda, as well as to the possible criticisms from its competitor in the Malay/Muslim constituency - UMNO - its supplementary

94 Barisan Alternatif (1999: 23)
95 Barisan Alternatif (1999).
manifesto for Kelantan and Terengganu, the two Malay-heartland states in which the party had substantial footing, was directed towards the attainment of such goal. But the exclusion of the Islamic state agenda in the common manifesto itself indicated that PAS tried to soften its approach to political Islam and attempted to turn its Islamic image into a more democratic outlook in order to expand its support base beyond the traditional Malay heartland states. To this, PAS President Dato’ Hj. Fadzil Mohd Noor gave an ambivalent explanation. Although the party did not drop the idea of creating an Islamic State, he said, the party’s struggle “is through the democratic process, that is, giving the rakyat the right and freedom to elect the government”.

Above all, the BA promised to build a democracy which provides “meaningful space for the people to express their views and to participate in various processes of daily administration”. Central to this pledge was the BA’s promise to abrogate the Internal Security Act and other detention without trial laws, form an Independent Commission to review all repressive laws with the ultimate objective of repealing whatever laws that violate basic human rights. As part of the measures to promote media freedom, the BA promised to corporatize the national broadcast agency, the Radio and Television Malaysia (RTM), and subject it to an independent Broadcasting Commission. It also promised to ensure that the Malaysian Human Rights Commission is independent and has representation from all major groups. In a move to promote transparency, the BA proposed to formulate a Freedom of Information Act as well as to enact a law to protect "whistle-blowers". In a further move to ensure that the protection of basic human rights was up to the international standard, the BA promised to sign and ratify the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as improving the quality and effectiveness of human rights education in the country.

98 See “Fadzil: Islamic State is Our Objective” (The New Straits Times, 11 April 1999).
100 Barisan Alternatif (1999: 24).
Complementing the BA’s common manifesto was a plethora of civil society campaigns for political reform. An online “People Are the Boss” campaign initiated by a group of Chinese journalists and professionals in August 1999 called upon all Malaysians “to insist on their right and dignity” as bosses by expressing their wishes and aspirations in unequivocal terms and ask political parties and candidates to fulfill their wishes. The document reminded the people as the “bosses” that they should not treat the election as an obligation to return favor to the ruling party for the development that they had been enjoying and that the ruling party should not use deprivation of the people’s right to development as a threat against voting the opposition.101 A resounding call for political change also came from ALIRAN. The Aliran Monthly magazine had a special coverage on the general election with its “thinking voter’s checklist” enumerating demands for abolition of repressive laws, judicial independence, press freedom, restoration of local council election, eradication of money politics, de-privatization of public goods and amenities, better healthcare services, affordable housing scheme for the low income group and stoppage of mega projects.102 Above all, the ALIRAN’s organ called for a shift toward a two-party system and an end to the BN’s political dominance. And yet there were other less publicized civil society campaigns for political reform such as Women’s Agenda for Change’s (WAC) Women Candidacy Initiative (WCI) which supported the candidacy of women in the election; the Indian Malaysians’ petition for greater representation of ethnic Indians in politics, business and education; the Penang-based Citizen’s Health Initiative’s (CHI) campaign against privatization of public hospitals; the Coalition of Concerned Trade Unions’ call for the protection of worker’s right to organize, access to comprehensive social security system and a minimum wage legislation; and the wish list of the Gerakan Demokratik Belia dan Pelajar Malaysia (DEMA, Malaysian Youth and Students Democratic Movement), calling for a freer and democratic Malaysia.103

103 Netto (1999); Weiss (2006: 135). Other pro-opposition student groups included Persatuan Kebangsaan Pelajar Islam Malaysia (PKPIM, National Union of Muslim Students’ Associations of Malaysia).
But the most significant demand for political reform was an election appeal by an influential group of Chinese associations and guilds, Suqiu, which was endorsed by about 1,800 Chinese organizations. The 17-point document launched in August 1999 covered wide range of democratic aspirations such as the demands for greater press freedom, protection of women’s rights, respect for workers’ rights, restoring the independence of the judiciary and repeal of the Internal Security Act. It also sought the review of privatization projects, a curb on corruption and affordable housing for the people. Others were the usual Chinese demands such as an increase in the number of Chinese schools and modernization of Chinese new villages. The most crucial part of the “appeal” was the call for the abolition of the quota system based on race, which had its origin in Article 153 of the Federal Constitution and later become the main thrust the Malay-favored New Economic Policy. Calling for a fair and equitable economic policy, Suqiu stressed that “businesses must be allowed the opportunity to compete on a fair basis regardless of race, and contracts and shares must not be given out through nepotism, cronyism and corruption”. Suqiu then took the government to task for neglecting the “modernization and development of small and medium industries”, which had largely been associated with the Chinese-owned enterprises, while it continued to “focus on the business and industrial development of the Bumiputeras during the last thirty years”.

The above wish lists indicated a shift away from the BN’s espousal of the communal terms of the 1957 informal constitutional contract - i.e. special privileges for the Malays in return for political and economic rights of the non-Malays. With exception of the communally-oriented part of the Suqiu’s wish list, all the lists were

Malaysia), Gabungan Mahasiswa Islam Semenanjung (GAMIS, Peninsular Muslim Students’ Coalition), Barisan Bertindak Mahasiswa Negara (BBMN, National Students’ Action Front) and Universiti Bangsar Utama (UBU).

104 Netto (1999).
105 The full document is reproduced in Kua (2005: 187-195). The initiators of the appeal are 11 influential Chinese organizations: United Chinese School Committees Association of Malaysia (Dong Zong), United Chinese School Teachers Association of Malaysia (Jiao Zong), United Chinese Schools Alumni Association of Malaysia, Nanyang University Alumni Association of Malaysia, Taiwan Graduates Alumni Association of Malaysia, Selangor Chinese Assembly Hall, Federation of Guangdong Associations of Malaysia, Federation of Guangxi Associations of Malaysia, Federation of Sanjiang Associations of Malaysia, Federation of Fuzhou Associations of Malaysia and Huazi Research Centre.
non-communal in nature and aimed at creating a more democratic Malaysia. But even the communally-oriented part of the Suqiu’s wish list struck at the heart of the BN’s espousal of the communally-based constitutional contract for it called for the dismantling of the Malay special privileges policy in favor of the one which would promote racial equality. However, fearing that this part of the Suqiu’s wish list would not go down well with Malay voters, the BA parties, especially PAS, were quite cautious in not adopting the election appeal in total. It rather said that it accepted most of the appeals.108

As the open Malay revolt against the BN did not auger well for the ruling coalition to face the impending general election, it was not surprising that it was the BN which came into the open to pledge full support for the appeals. The cabinet ministers who headed the three predominantly Chinese parties in the BN, namely MCA, GERAKAN and SUPP, at a meeting with the Suqiu’s initiator-organizations on 23 September 1999, accepted the appeals hoping that the Chinese would support the BN in the general election.109 MCA President Datuk Seri Dr. Ling Liong Sik who headed the Chinese ministers said that the appeals were not a “threat” to the BN and that “the principles (contained in the appeals) are universal and meant for all races, not the Chinese alone”.110 They also promised to hold further dialogues with the Chinese associations and recommended that the government appoint a few representatives from these organizations to sit in the National Economic Consultative Council II, which was responsible to devise proposals for Malaysia’s 10-year development plan.111

The 1999 General Election

The open Malay revolt, coupled with the presence for the first time ever of a unified opposition coalition force, struck the BN/UMNO with its “most historic challenge”

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110 Quoted in Loh (2000).
in the 1999 General Election.\footnote{Maznah (2003).} Though the BN maintained its two-thirds majority in the Parliament by winning 148 of 193 parliamentary seats, UMNO suffered a decline of support in the Malay-majority constituencies. The party’s representation in the Peninsular Malay-majority parliamentary constituencies was reduced from 87 in 1995 to 66 in 1999. Its overall share of the national popular votes also dropped from 36.5 percent in 1995 to 29.5 percent in 1999.\footnote{Marzuki (2004).} The major setbacks were in the large Malay-majority constituencies especially in Kedah, Kelantan and Terengganu. Out of 59 parliamentary seats in these areas, UMNO won only 27 seats, compared to 47 seats in 1995. Its share of popular votes in these constituencies also dropped from 62 percent in 1995 to 49 percent.\footnote{Marzuki (2004).} Adding to the setbacks were the defeats of several UMNO ministers, all of whom contested in the large Malay-majority constituencies. They were Minister in the Prime Minister’s Department, Tan Sri Abdul Hamid Othman (Baling, Kedah), Domestic Trade and Consumer Affairs Minister, Datuk Seri Megat Junid Megat Ayub (Parit, Perak), Rural Development Minister, Datuk Seri Annuar Musa (Peringat, Kelantan), Entrepreneurship Development Minister, Dato’ Mustapa Mohamad (Jeli, Kelantan) and Terengganu Chief Minister, Tan Sri Wan Mokhtar Ahmad (Cukai, Terengganu). Even the then most senior UMNO Vice-President, Datuk Seri Mohd. Najib Tun Razak, won the Pekan parliamentary seat with a slim majority of 241 votes, indicating a large withdrawal of Malay support from UMNO. The party however fared better in the medium Malay-majority constituencies, where the Malay voters constituted between 50 to 66 percent of the electorates. UMNO won all 39 parliamentary seats in these areas, but with a decline in its share of the popular votes from 77 percent in 1995 to 62 percent.\footnote{Marzuki (2004).} This indicated that the UMNO candidates might have depended on the non-Malay votes to win.

UMNO’s arch-rival PAS triumphed in Kelantan and Terengganu. The Islamic party strengthened its position in Kelantan by winning 41 of the 43 seats in the state legislature, leaving UMNO with only two seats. It also won ten of the 14
parliamentary seats in the state, while keADILan won three seats. UMNO only managed to retain its Gua Musang parliamentary seat through its candidate, former Finance Minister Tengku Razaleigh Hamzah. The opposition had done even better than the 1995 general election when the Angkatan Perpaduan Ummah, a PAS-led coalition, won 12 of the 14 parliamentary seats and 36 of the 43 state seats in Kelantan. In neighboring Terengganu, a large swing of Malay votes toward the opposition helped PAS seize the state from UMNO. PAS won 28 of the 32 state seats, while UMNO won the remaining four seats in the state. PAS also won seven of the eight parliamentary seats in the state, while keADILan won the remaining one seat. This reversed the result of the 1995 general election in which the BN won 25 of the 32 state seats and seven of the eight parliamentary seats in the state. Outside Kelantan and Terengganu, the Malay votes were quite divided in the large Malay-majority constituencies. In Kedah, PAS won 12 of the 36 state seats, one seat short of denying the BN of its two-thirds majority in the state’s legislature. The party also managed to win eight of the fifteen parliamentary seats in the state, while the BN won the remaining seven seats.

Overall, the BA made successful inroads into a number of central west-coast states like Selangor and Perak, hitherto BN’s strongholds. In Selangor, the BA failed to win any parliamentary seat but won six state seats while in Perak it won three parliamentary seats and eight state seats. This was a remarkable achievement given previous lackluster performances of the opposition, especially PAS, in these states.116 Among all the BA parties, PAS emerged as the main gainer by winning 98 state seats and 27 parliamentary seats. The DAP came next by winning 11 state seats and 10 parliamentary seats, while the nascent keADILan was less successful, winning only five parliamentary seats and four state seats, all of which were located in the Malay

116 In Selangor, PAS emerged victorious in the state seats of Sungai Besar, Sungai Burung and Gombak Selia, all of which were previously held by UMNO. In Perak, the Islamic party won state seats of Titi Serong, Gurnong Semanggol and Belanja, while wresting from UMNO the parliamentary seats of Parit Buntar and Parit.
majority areas in Peninsula Malaysia. Wan Azizah herself won the Malay-maj
ority Permatang Pauh parliamentary seat previously held by Anwar.

The DAP’s performance, however, was not encouraging. The party gained
one extra parliamentary seat from nine in 1995, but party stalwarts like Secretary-
General Lim Kit Siang and Deputy Chairman Karpal Singh lost theirs. It also failed
to attract a large Chinese vote swing toward the BA. In fact, there was a slight drop
in its share of popular votes in the large Chinese-majority areas from 52 percent in
1995 to 51.2 percent in 1999. This indicated that while the revolt against the BN
government had largely been a Malay phenomenon, which resulted in the
significant swing of votes toward the BA in the large Malay-majority areas, the
Chinese voters remained divided right down the middle.

As PAS won the most number of seats among the opposition parties, its
president Dato’ Hj Fadzil Noor was elected as the Opposition Leader in the
Parliament, replacing DAP Secretary-General Lim Kit Siang. The open Malay revolt
resulted in, for the first time ever, a direct face-off between the Malay-led BN and a
Malay-led opposition in the Parliament, defying the hitherto ethnic equation of
Malay-supported government and Chinese-supported opposition. The election
results show that opposition to the government, like support for it, had been
multiracial, with the Malay segment of the electorate increasingly supporting the
opposition.

As the BN’s hegemonic stability had always been legitimated upon the basis
of the communally-based constitutional contract, the BA’s democratic and non-
communal social contract, coupled with the numerous civil society actors’ wish lists
struck at the heart of the BN’s legitimacy itself. All the more so, a fusion of formal
and informal political activism - as represented by coalitions of political parties and
civil society actors in fomenting demands for political change, as well as NGO
leaders’ candidacy in the election – gave a boost to the democratic ferment in the

117 The parliamentary seats were Permatang Pauh (Penang), Kemaman (Terengganu), Kota Bharu
(Kelantan), Tanah Merah (Kelantan) and Peringat (Kelantan). The state seats were Ciri (Pahang),
Penanti (Penang), Bota (Perak) and Hulu Kelang (Selangor).

118 Its actual votes in 12 large Chinese-majority parliamentary constituencies (where Chinese voters
constituted more than 66 percent of the electorates) in the Peninsular Malaysia however increased
run-up to the 1999 General Election. Furthermore, as civil society actors played more significant roles in the election campaign, they had either directly or indirectly catapulted to prominence their democratic and non-communal vision of politics, hence supplementing that of the BA. State repression against Anwar and his supporters, coupled with the wide coverage the Anwar saga received in the alternative print and internet media, emerged as a focal point for valorization of democratic values and practices especially among the young and middle-class Malays, as well as the anti-establishment sections within the non-Malay communities - mostly supporters of the opposition keADILan and DAP and the educated urban NGO activists. The result was that the BN’s highly divisive communal politics based on the communal constitutional contract has been increasingly challenged by an emerging new political force, however nascent and amorphous, desiring abrogation of the terms of the old communally-based constitutional contract and its replacement with a non-communal social contract built upon multiracial commitment to democracy, individual freedom and equality.

Beyond Reformasi: Whither Non-Communal Politics?

The task to envision non-communal politics had been all the more important since the 1998 Reformasi and the conclusion of the 1999 General Election. Reformasi actors had to deal with perennial issues of race relations, religion and state repression in more concrete terms beyond the immediate goal of ending BN’s dominance in an impending election. As for the BA parties, holding to common long-term goals and policies, as well as maintaining a truly communally neutral vision of politics, beyond the election proved to be a daunting task. While trying to be committed to the long-

119 Kuttan (2005). Civil society activists like Chandra Muzaffar, Tian Chua, Sivarasa Raisah and Zaitun Kassim contested in the election as opposition candidates though all of them lost. Muslim activists from ABIM and JIM also contested in the election as opposition candidates but only a handful of them were successful. keADILan candidates, Ramli Ibrahim and Muhammad Mustafa, both of whom were former ABIM leaders, won large-Malay majority parliamentary seats of Kota Bharu and Peringat, both in Kelantan. While civil society activists' candidacy has given a boost to opposition's struggle for democracy, active participation of Muslim activists from leading Islamic organizations such as ABIM and JIM in opposition politics lends the opposition a sort of Islamic legitimacy, supplementing that of PAS.
term goal of building an alternative multiracial opposition coalition to challenge BN’s dominance, individual parties in the BA, especially PAS and DAP, also need to respond to the forces within their own constituencies, which have been very much community-oriented in the past. While staunch PAS followers were adamant to see the establishment of Islamic state in Malaysia, the DAP supporters were vehemently against such an idea. There lies a great question of how the BA parties are to move from Reformasi to building a non-communal political system in Malaysia. In the realm of informal politics too, the question has been how far Reformasi actors of different social and religious backgrounds could further solidify efforts at building a common coalition for political reform. Civil society’s encounter with issues of race, religion and repression in different sites of domination and opposition are more complicated than meets the eye.

In the midst of these uncertainties, some reformist intellectuals tended to read emerging signals in positive ways. Khoo Boo Teik, a political scientist at the University of Science Malaysia and an ALIRAN member, was optimistic that real political change was underway. Noting that the politics of “Chinese chauvinism” and “Islamic extremism” were on their way out, he observes:

For three decades after 1957, the social contradictions of colonial capitalism, experience with decolonization, and hangovers from separate Malay, Chinese and Indian nationalisms easily inflamed interethnic passions ... Those passions have largely burned themselves out.\(^{120}\)

Khoo based his observation on a number of exciting developments almost one year after the conclusion of the 1999 General Election. On 29 October 2000, about one thousand people from BA parties, NGOs and concerned individuals gathered outside the Kamunting detention camp to protest 40 years of ISA. What is exciting was not the number of people gathered but the fact that “past anti-ISA protests hadn’t seen Malay protestors outnumbering non-Malay protesters by such a wide, 

\(^{120}\) Khoo (2000: 5).
wide margin".121 Barely one week after the protest, on 5 November, keADILan's "100,000 Persons Rally" along the KESAS Highway near Shah Alam, about 30 kilometres west of Kuala Lumpur, attracted thousands of protesters who were predominantly Malays.122 Adding to the excitement was BA's victory in a by-election at Lunas on 29 November 2000. The election was held following the murder of BN assemblyman, Dr. Joe Fernandez. The electoral victory in Lunas, a racially mixed state constituency in Kedah, the home state of Dr. Mahathir, symbolized BA's capability to win support of multiracial voters, hitherto the BN's preserve, hence making an alternative multiracial two-party system more likely. Sharing the same sentiment was another prominent political scientist and, up to October 2001, the Deputy President of keADILan, Chandra Muzaffar. Commenting on BA's victory in the Lunas by-election, he observes that "a multi-ethnic, loosely cobbled opposition is beginning to take shape and form".123 He attributed such an emerging trend to the existence of a common enemy, Mahathir and his iron-fist leadership, and to a lesser extent, the ability of BA leaders, supporters and the voting populace to overcome the "seemingly insurmountable barriers separating the different communities".124 At least, these developments indicated that opposition to the government had taken a multiethnic rather than a mono-ethnic character. It was no longer a highly divisive ethnic affair in which non-Malay opposition forces are pitted against a Malay-dominated government. Opposition forces too have been ethnically mixed, with the Malay segment seeming to be taking the leading role, like in the government.

But beneath these optimistic observations about the emerging new politics of non-communalism, lies the old politics of race and religion. In the run-up to the Lunas by-election, the choice between a DAP Indian candidate and a Malay keADILan candidate to represent the BA was an issue of much contention. keADILan Vice-President, Tian Chua, quit his party post in protest against BA's

121 Khoo (2000: 2).
122 The national news agency Bernama reported the number of protesters was 500 while the Associated Press, quoting the Inspector-General of Police, Tan Sri Norian Mai, stated the number at 5,000 (Bernama, 5 November 2000; Associated Press, 5 November 2000). The local Chinese press diplomatically reported the size of gathering as "too many to count" (quoted in Khoo (2000: 4))
decision to field S. Neelamekan, an ethnic Indian from DAP. When the BA, after last-minute lobbying by keADILan leaders, finally changed its decision and fielded Saifuddin Nasution, a Malay member of keADILan’s Supreme Leadership Council as its candidate, Perak DAP Secretary-General, M. Kulasegaran, resigned from his party post “in a symbolic gesture of protest against the opposition front’s treatment of non-Malays”. DAP Secretary-General, Kerk Kim Hock, while urging voters to support Saifuddin, reviewed his party’s position in the BA as a result of the dispute. Though the BA’s final decision to field Saifuddin was a “strategic decision”, as Chandra explained, “to harness the tilt, i.e. the growing antagonism towards Mahathir within the UMNO rank-and-file, the pro-PAS-keADILan mood in Kedah and the advantage that Saifuddin had as the BA Parliamentary candidate in the area in the 1999 General Election”, the ruckus that resulted from the dispute was full of racial overtones. Furthermore, the main issues that fuelled BA’s campaign in the by-election, other than Anwar’s incarceration and a host of other “injustices” associated with the BN, were essentially communal. These include the Chinese community’s objection to the assimilationist tendency of the government’s Vision School project and Mahathir’s remarks in his Merdeka Day speech which equated the Chinese educationist movement Dong jiao Zong with communism. These issues could have angered the Chinese community who in turn voted for the BA candidate in the by-election. Less explicit was the talk in town that ex-Lunas assemblyman, Dr. Joe Fernandez, was a Christian preacher and his murder was related to his missionary activities within the local Malay community. This fact, or rather

125 The Sun, 20 November 2000. Tian Chua, however, retracted his resignation after keADILan candidate, Saifuddin Nasution, was fielded as BA candidate in the by-election.
126 The Straits Times, 24 November 2000. Lunas had previously been considered as an Indian seat where in the previous election the constituency was won by an MIC candidate. Again, this time, the BN fielded an Indian candidate, S. Anthonysamy, from MIC to contest in the by-election.
127 The Straits Times, 24 November 2000.
129 Vision School is an integrated school system proposed by the government in its effort to forge national unity among students of various ethnic groups. Under this system, national schools and Tamil and Chinese vernacular schools will be built in the same compound and students will share facilities. However, the emphasis on a common administrative structure of the Vision School invites objection from the Chinese community fearing that it would erode the identity of Chinese vernacular schools.
perception, might have bolstered Malay voters’ rejection of the BN candidate, S. Anthonysamy, who was a Christian.

But much deeper than election fissures was the need on the part of individual BA parties to respond to forces within their own constituencies which remained largely communal. Two days after being swept to power in Terengganu, PAS Deputy President and the state Menteri Besar (Chief Minister), Datuk Seri Abdul Hadi Awang, vowed to implement strict Islamic laws, including closure of gambling joints and the curbing of alcohol sales, as steps toward the establishment of an Islamic state. The DAP objected and strongly opposed any move by PAS to create an Islamic state. DAP Deputy Chairman, Karpal Singh, called on PAS to honour its commitment to the opposition pact, which excluded the creation of an Islamic state in its common manifesto, otherwise DAP would not hesitate to review its position in the coalition. Such a reaction from DAP was understandable. PAS, by winning 27 parliamentary seats, was now the biggest opposition party in the Parliament and would certainly have more clout in the BA. DAP only won 10 parliamentary seats and three of its heavyweights, Secretary-General Lim Kit Siang, Chairman Dr. Chen Man Hin and Deputy Chairman Karpal Singh lost in the election. The tide now favoured the Islamic party PAS, while the DAP was far from reviving its heyday of the 1980s. Party leaders believed that its affiliation with PAS had turned many Chinese voters away from DAP, which in turn resulted in the party’s less than expected showing in the election. The only way for the DAP to revive its influence among Chinese voters was by distancing itself from any move by PAS to implement Islamically inclined policies, otherwise the party would lose its clout in its traditional constituencies, the Chinese-majority areas. With PAS at the helm of the opposition, and UMNO attempting to regain its lost ground in the Malay heartland states, the

130 Agence-France Presse, 1 December 1999.
131 Bernama, 1 December 1999.
132 DAP’s poorest showing in a general election was in 1995 when the party managed to win only 9 parliamentary seats, a big plunge from the 20 seats it won in 1990.
133 Interview with Lim Guan Eng, DAP Secretary-General, 25 April 2005, Petaling Jaya. Karpal Singh attributed DAP’s poor showing in the 1999 General Election to MCA’s exploitation of the party’s association with PAS. Referring to PAS’s Islamic State manifesto for Terengganu, he said “MCA fully exploited this against us by emphasizing our association with PAS. We lost a lot of ground as a result of this” (The Sun, 25 July 2001).
pursuit to out-do each other in the Islamization race could further weaken DAP’s position within the opposition coalition, and erode further its credibility in the eyes of Chinese community. Such an apprehension could have not been more apparent when Lim Kit Siang, in his letter of resignation as DAP Secretary-General stated, “the next five years will principally become the battleground between UMNO and PAS for the hearts and minds of the Malays in the Malay heartland, resulting in a spiral of Islamisation policies -- threatening a democratic secular Malaysia and sidelining all other great issues”. 134

The death knell for the DAP-PAS coalition, however, came in September 2001 when DAP finally decided to pull out from BA over PAS’s ambition for an Islamic State. Earlier, the PAS-led Terengganu government had introduced a host of Islamic laws and policies such as the kharaj tax (business tax) on non-Muslims, a ruling on the wearing of the tudung (veil) for women and the implementation of Islamic criminal laws, including hudud, in the state. The implementation of the kharaj tax was however put off due to growing resentment from non-Muslims, including strong objections from DAP, while the Shariah Criminal Bill (Hudud and Qisas) was finally passed by the state legislature in July 2002, amidst protests from non-Muslim community, women’s groups and the Federal Government. Adding to the complexity of PAS’s Islamic state proposal was the worldwide Islamophobia following the 11 September terrorist attacks on the United States and ISA arrests of members of Kumpulan Mujahidin Malaysia (KMM, Malaysian Mujahidin Group, which was later called as Kumpulan Militan Malaysia by the government) for their alleged involvement in militant activities. One of the arrested KMM members was Nik Adli Nik Abdul Aziz, the son of PAS’s spiritual leader and Kelantan Chief Minister, Dato’ Nik Abdul Aziz Nik Mat. Despite PAS’s assurances that its Islamic State concept would not disadvantage the non-Muslims, DAP leaders remained unconvinced. 135 The fear over the Islamic party’s apparent penchant to put Malaysia

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134 Agence France-Presse, 2 December 1999.
135 Abdul Hadi, for example, gave his assurance that non-Muslims would be exempted from enforcement of Islamic laws on “specific matters”, though they have to abide by the law just as Muslims would do on matters of public interest such as land and traffic rules (The New Straits Times, 3 July 2001).
under a seemingly theocratic rule was too powerful among non-Malays for PAS’s assurances to be accepted. 136

The nascent keADILan too continued to grapple with its teething problems. In the lead up to party elections in November 2001, factionalism within the party became more apparent. While party factionalism is nothing new, it was a cause for concern in the case of keADILan. Since its inception, the party’s strength was built upon its ability to hold together distinct social and religious groups by incorporating Islamists, NGO activists, social democrats, former UMNO leaders and plain Anwaristas in a rainbow coalition within the party. What transpired in the lead up to the party elections was the break up of that rainbow coalition. There had been at least three major factions within the party – the ABIM camp, the Jamaah Islah Malaysia (JIM) camp and the former ex-UMNO camp. To compound the matter, the ABIM camp’s opposition to Anwar’s proposal to merge keADILan with Parti Rakyat Malaysia (PRM) became a major election issue. The three major factions had realigned themselves into two factions, i.e. the pro-merger faction consisting mainly of ex-UMNO and JIM members, supported by the NGO activists, and the anti-merger faction comprised mainly ABIM members. The tussle between these two factions had taken a religious slant because the ABIM camp’s opposition to the merger was, among other things, due to its uneasiness with PRM’s “socialist” ideological leaning. 137 The result was a blow to ABIM when its key affiliates lost, except Sheikh Azmi Ahmad who retained the Vice-Presidency. Four key ABIM-linked candidates who lost in the party election refused to accept appointment as MPT members. 138 Though not all ABIM members deserted keADILan after the

136 Equating Taliban to PAS was obviously an exaggeration, however, since the party has not been as intolerant to religious freedom as Taliban. In PAS-led Kelantan for example, a Buddhist temple with the largest statue of Buddha in the region was declared open in September 2001 (Agence France-Presse, 9 September 2001).

137 Interview with Shamsul Iskandar Mohd. Akin, Vice Chief of Angkatan Muda, PKR, 10 October 2006, Kuala Lumpur. See also Kabilan (2001).

138 The four were Dr. Muhammad Nur Manuty (former ABIM President/keADILan Deputy President candidate), Mohd. Anuar Tahir (former ABIM Secretary-General/ Vice-President candidate), Mustaffa Kamal Ayub (former PKPIM President and ABIM Exco member/ Vice Youth Chief candidate) and Ruslan Kassim (Vice-President candidate). Ruslan, who had no previous position in ABIM but was closely associated with the Islamic movement, later accepted his appointment as keADILan’s Information Chief. He, however, left keADILan to rejoin UMNO before the 2004 General Election.
polls, ABIM started to distance itself from the party and concentrated more on its work in Islamic activism and, to certain extent, Malay nationalism. Remaining ABIM supporters in keADILan continued to oppose the merger plan, both on tactical and ideological grounds. The reason for ABIM’s objection to the merger plan, as ABIM President Ahmad Azam Abdul Rahman explained, was “not to let PRM’s red (socialist) history to be a burden to keADILan”, which had started with a clean slate. However, with the departure of anti-merger ABIM faction from party’s key leadership positions, the pro-merger faction had been gaining more ground in the party. The merger was finally materialized when a two-thirds majority vote in its November 2002 Annual General Meeting agreed to amend the party constitution in relation to the merger. The party’s name was changed to Parti keADILan Rakyat (PKR, People’s Justice Party) to reflect the presence of PRM leaders in the new entity.

Conclusion

The 1998 Reformasi occurred during a period when previous justifications for authoritarian controls had lost much of their relevance. There was no communist threat, ethnic tensions had eased and multi-racial middle class was expanding. This, in a way, helped the Reformasi activists to articulate a non-communal vision of Malaysian politics and forge new multiracial coalitions for political change. The struggle was premised on a non-communal social contract, aimed at widening the democratic space and shifting the foci of political interest from communalism to

139 Mustaffa for example remained in the party and was appointed Secretary-General in April 2003. He did not contest in the 2004 party polls, but was appointed Vice-President afterwards. The party’s constitution provides for the appointment of two Vice-Presidents, in addition to the three elected Vice-Presidents.

140 ABIM had since worked very closely with a group of Malay nationalists called Kumpulan Prihatin (Concerned Group). The group’s “Malay Agenda” initiative calls upon all Malay-based organizations and political parties to work together to ensure the survival of Malay ummah. See the speech of Ahmad Azam Abdul Rahman, ABIM President, at the opening of Malay Agenda Assembly, 8 March 2004. The text of his speech can be accessed at http://www.abim.org.my/web/modules/news/article.php?storyid=306 (Accessed on 26 November 2006).

141 See Kabilan (2001). The same ‘tactical’ reason was shared by Hassan Karim, a PRM party leader. See Hassan (2001).

142 Up to June 2007, PRM has yet to be deregistered and remained as a legal entity.
individualism. To this end, the Reformasi movement served as an important ideological conduit for political change, posing a challenge to the Barisan Nasional's espousal of highly contentious communally-based constitutional-contract politics. The opposition's historic electoral show-down against the Barisan Nasional in the 1999 General Election proved that the Reformasi movement too was an important instrument of political change. But as Reformasi also occurred at a time when political power had been strongly consolidated and highly personalized in the hands of the Prime Minister, challenging the ruling government's political ascendancy was an uphill task. Though the results of the 1999 General Election dealt a costly blow to UMNO, the political anchorage of Barisan Nasional, the ruling coalition easily managed to retain its control over the government. Meanwhile, the articulation of a non-communal political vision among the Reformasi movement's rank-and-file remained shallow, and communally-based interest articulation remained significant, even among the main Reformasi actors like PAS and DAP. Beyond the polls, both parties had to grapple with longstanding ideological differences pertaining to the role of Islam in the modern state. The Reformasi's role as a conduit of political change was soon called into serious question. The PAS and DAP break-up on the heels of the September 11 attack on the United States, as well as the skirmishes between various groups in the nascent keADILan seemed to suggest that the internalisation of non-communal vision of Malaysian politics among the main Reformasi actors themselves leaves much to be desired.
Chapter VI

The Proliferation of Liberal Legal Meanings and the State's Response

The Reformasi movement's articulation of a non-communal vision of Malaysian politics not only brought together political and civil society actors across communal and religious cleavages into a new broad-based coalition for political change, but also facilitated the proliferation of a more liberal vision of state law than the prevailing illiberal statist notion. This chapter argues that the articulation of Reformasi's non-communal ideology helped de-communalize the legal discourse and pulled together anti-repressive law activists across races calling for comprehensive legal reforms along more liberal lines. It was in this context that the articulation of Reformasi's democratic and non-communal ideology, coupled with the numerous exposes of government and judicial misconduct during the infamous Anwar trial, facilitated the rise of liberal legal meanings, catapulting to prominence the liberal conceptions of the rule of law, personal freedoms and natural justice. Reformasi, which shifted an essentially communal discourse on rights and interests to one which stressed the individual, helped unleash a whole set of liberal legal meanings which augmented individual rights and liberties rather than the prioritizing of state legal powers as a means to regulate and control inter-communal relations. Supporters of Reformasi sought the repeal or review of laws that limit or regulate the exercise of personal freedoms.¹

But there were limitations to the spread of the new liberal legal meanings more widely within the society. This legal vision was mainly confined to the more reformist sections within the society, comprising mainly human rights activists and lawyers, supporters of opposition parties, some sections within the Islamic mainstream and anti-establishment student groups. Furthermore, as ethnic-based interest articulation within Malaysia's multiracial society remained significant, the

¹ These included the Internal Security Act 1960, which provides for detention without trial, Police Act 1967 (restrictions on peaceful assembly), University and University Colleges Act 1971 (restrictions on student activism), Printing Presses and Publication Act 1984 (limitations on press freedom), Official Secrets Act 1972 (denial of public access to "official secrets"), Sedition Act 1972 (restrictions on freedom of speech) and the like.
government justified the continued existence and use of repressive laws as a necessary means to maintain racial harmony, and following the September 11 attack on the United States, to curb Islamic militancy. In view of this limitation, the government was less responsive to demands for legal changes in politically sensitive areas, such as anti-subversion and national security-related legislation than to calls for legal reform in politically less sensitive areas, such as those related to the “normal” criminal justice system, though the actual process of change remained slow and halting in those areas also.

**Anwar’s Trial and Contested Legal Meanings**

The more compliant judiciary which emerged after the 1988 judiciary crisis set the stage for the use of courts by the government as one-sided political arenas to purge political opponents. Ever since, it has not been uncommon for criminal prosecutions and civil suits to be initiated against critics of the government. Moreover, those in authority became increasingly inclined to use court proceedings as a means to disgrace and humiliate political opponents. The Anwar trial and his subsequent conviction for corrupt practices and sodomy illustrate the use of political trials in Malaysia. But as Anwar’s trial also indicated, excessive use of courts as one-sided political arenas to try a political opponent could lead to a serious erosion of public confidence in the independence of the judiciary, which in turn gave rise to greater articulation of liberal legal meanings among the reformist sections of the society, contesting the restrictive understandings that the government, through the courts, sought to articulate and disseminate. As a prominent lawyer and the then head of the Bar Council’s criminal law section, Dato’ Mohamed Apandi Ali (he was later

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3 The objective of a political trial is “the destruction, or at least, the disgrace or disrepute, of a political opponent” (Shklar 1964: 49). Not only do these “political trials” aim at eliminating political opponents, but also serve as a medium by which the political regime articulates its version of “legality”. Once the court decides against the political “offender”, he becomes an ordinary criminal who deserves legal retribution. In this regard, normal civil and criminal law legitimizes the state’s domination by transforming political conflicts into legal battles.
appointed as a High Court Judge), put it, "Malaysians not only want to find out if the allegations (against Anwar) are true, but whether the judiciary is truly independent".4

Anwar, while still being held under the ISA (during which time he was beaten by none other than the then Inspector-General of Police, Tan Sri Rahim Noor) was hauled into the courtroom on 5 October 1998 to face charges of corruption and sodomy. In fact, allegations of Anwar’s sexual misconduct had been on the cards since 1997 when Umni Hafilda, a sister of Anwar’s private secretary, Azmin Ali, wrote a letter to Dr. Mahathir accusing Anwar of sodomizing the family driver, Azizan Abu Bakar, and having an illicit affair with the wife of her brother.5 These allegations were then published in a book entitled "50 Dalil Mengapa Anwar Tidak Boleh Jadi Perdana Menteri" (50 Reasons Why Anwar Cannot Be Prime Minister), copies of which found their way into the bags of UMNO delegates to the party assembly in June 1998. Ironically, though Dr. Mahathir initially appeared hesitant to take the allegations seriously, it was those allegations that Dr. Mahathir referred to later as "incontrovertible evidence" against Anwar.6 In relation to these allegations Anwar, as a member of the government, faced charges of corrupt practices under section 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 for directing Special Branch officers to obtain written admissions from Azizan and Umni Hafilda denying their allegations of sexual misconduct and sodomy. Anwar’s alleged purpose was to protect himself against criminal proceedings.7 The charge carried a maximum penalty of 14 years imprisonment. Anwar, together with his adopted brother Sukma Darmawan Sasmitaat Madja, also faced charges of sodomy, which were tried separately. These charges came under section 377B of the Penal Code and carried a maximum penalty of 20 years imprisonment.8 Earlier, Sukma and Anwar’s speech writer, Dr. Munawar Anees, were sentenced to six months

4 The Sun, 2 November 1998.
5 The letter entitled "Perihal Salah Laku Timbalan Perdana Menteri Malaysia" (On Misconduct of the Deputy Prime Minister of Malaysia) dated 5 August 1997 was reproduced in Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, p.p. 34 - 42.
7 Public Prosecutor v. Dato' Seri Anwar bin Ibrahim [1999] 2MLJ 1, p.p. 23-24. The ‘corruption’ allegations against Anwar did not relate to the illegal acquisition of wealth but the misuse of political power.

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imprisonment by the Kuala Lumpur Sessions Court after they pleaded guilty to allowing Anwar to sodomize them. Munawar was a Pakistani national who served as an advisor to Anwar between 1991 and 1998. A biologist by training, he wrote extensively on Islam and science, and founded an internationally respected journal, *Periodica Islamica*. Both Sukma and Munawar denied later that the alleged crime had ever taken place, stating that their guilty pleas were obtained under duress.9

Anwar claimed that the charges were trumped up by conspirators in high offices. The prosecutors however maintained that Anwar was a common criminal and the trial was a normal legal process. Anwar insisted that he was a victim of a political conspiracy, his trial was politically motivated, and he above all was innocent. It was in this context that both the prosecution and defence teams sought to prove their respective claims within the contested sphere of the legal process. The prosecution team argued against evidence of political conspiracy being adduced in court and sought to confine the trial strictly to "legal" matters. The defence counsels were instead adamant that the claim of political conspiracy was their client's only defence and the exclusion of such evidence would frustrate the justice that the court ought to dispense. In Anwar's corruption trial, High Court Judge Dato' Augustine Paul ruled that the defence based on political conspiracy was irrelevant.10 This ruling came after the trial judge allowed the prosecution to drop from the proffered charges

9 Reuters News, 23 October 1998. Munawar Anees narrated in vivid detail how he was made to confess to the offence while he was under police custody. He mentioned in his statutory declaration dated 7 November 1998 that the police interrogators threatened him with all sorts of grave consequences including indefinite detention under the ISA, threats to the safety of his family members and cancellation of his application for American citizenship should he refuse to confess. The text of the statutory declaration can be accessed at http://www.malaysiakini.com/link/eNocFwVEKgCAMANAhObW6jklGTQszfP9183GCeDucWQlobcwPbTmTVAhS1EsqC7QNUTw7CnHDaeRYW0F+Xv1STGm0f3/KeQbpw (Accessed on 23 November 2006). Sukma too told the High Court in June 1999 that he was forced by the police to confess to the crime otherwise a bullet would be planted in his car and he could face charges of illegally possessing ammunition, a crime that carries the death penalty. See "Anwar's Brother: Threats Forced Sex Confession" (BBC News, 30 June 1999, http://www.freeanwar.net/news/bbc300699.html, accessed on 7 October 2004).

10 Some quarters within the legal fraternity questioned the selection of Augustine Paul, a relatively junior judge then, to hear a high profile case involving none other than the former Deputy Prime Minister. Paul was appointed a High Court Judge in May 1998, just a couple of months before the trial began. Prior to his appointment as a High Court Judge, he was a Judicial Commissioner in the Malacca High Court. Many in the legal fraternity believed that a more senior judge should have handled the case. Interview with Dato' Shaik Daud Mohd Ismail, former Judge of the Court of Appeal, 17 November 2006, Bukit Damansara, Kuala Lumpur.
the words “sexual misconduct and sodomy committed” by Anwar, though “evidence” of such offence had been adduced before the court, rendering any attempts by the defence team to rebut those allegations by adducing evidence of “political conspiracy” irrelevant. Put simply, the amendment, which was made at the end of the prosecution case effectively barred the defence team from rebutting the prosecution’s “smear campaign” against Anwar.

At this juncture, it is pertinent to illustrate how the process of smearing and humiliating a political offender was systematically carried out in the court of law and reproduced by the media. From the very beginning, Malaysian newspapers published in minute detail the contents of an affidavit filed by the police prosecutor, Senior Assistant Commissioner II Dato’ (now Tan Sri) Musa Hassan (later promoted to Inspector-General of Police) in the related Nallakaruppan case which implicated Anwar in many instances of sexual misconduct. The affidavit, which was filed a day after Anwar was removed from office, was in support of an application to enable Dato’ Nallakaruppan to be held in the Bukit Aman police lock-up in order to assist in the police investigation into his alleged offence of illegal possession of ammunition. The Malay Mail screamed “Affidavit – Anwar Sodomised Man 15 Times” while the New Straits Times pronounced “Ex-DPM Implicated in Sexual Misconduct”. Another daily, The Sun, stated “CID – Anwar Involved in Sexual Misconduct”. Bernama, the national news agency, also joined the fray by stating “Anwar Had Homosexual Relationship, Tried to Seduce Man’s Wife” Inside the news stories were lurid details of the alleged sexual misconduct, supposedly revealed by Nallakaruppan and other witnesses in the course of police investigation.

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11 See for example The Malay Mail, 3 September 1998; The New Straits Times, 4 September 1998. Dato’ Nallakaruppan Solaimalai was an Indian businessman who was associated with Anwar. One of the allegations contained in a book entitled “50 Dalil Mengapa Anwar Tidak Boleh Jadi Perdana Menteri” (50 Reasons Why Anwar Cannot Become Prime Minister) was that Dato’ Nalla acted a pimp for Anwar. The book was widely circulated during the 1998 UMNO general assembly. See discussion on the Nallakaruppan case in Chapter 5.
12 In a blatant attempt at intimidation, Nallakaruppan was charged with an offence under the ISA carrying the death penalty. His offence was the unlawful possession of 125 unregistered bullets but without a weapon to fire it. These bullets, along with their accompanying pistol, had previously been held lawfully under a permit, but when Nallakaruppan returned the pistol to his business partner (the principal licensee) on the expiry of the permit in 1992, he had neglected to return the accompanying 125 bullets. See HAKAM’s website at http://www.hakam.org/isaamnesty.htm (Accessed on 24 November 2007).
14 Bernama, 3 September 1998.
into Nalla's case. The Malay Mail reproduced excerpts from the affidavit which, among other things, stated that a male witness (Azizan Abu Bakar) admitted to being sodomised 15 times by Anwar and this homosexual activity took place in several places including the Tivoli Villa apartments, which were said to be owned by Nallakaruppan in Bangsar, an upper class residential area on the outskirts of Kuala Lumpur. Another witness, Ummi Hafilda, gave a statement that she suspected her sister-in-law had a sexual relationship with Anwar. Nallakaruppan's former private driver also gave a statement that he had brought Anwar and Nallakaruppan to certain places for seks haram (illicit sex). As if this was not enough, The Sun reported parts of the affidavit which stated that Chinese, Mexican and Eurasian prostitutes were "supplied" to Anwar through Nallakaruppan. Bernama also reported that an unnamed corporate figure had lodged a police report claiming that Anwar had tried to seduce his wife when he and his wife were part of an official delegation to Washington led by Anwar. TV3, Malaysia's premier private television station, also broadcast allegations made against Anwar contained in the affidavit in its afternoon news on 3 September. The court had earlier allowed reproduction of those allegations despite objection from defense counsels on the basis that the affidavit itself had not been read in court.

While many other allegations were laid against Anwar, ranging from bribery to jeopardizing national security, it was the six-month jail sentence handed down on Sukma and Munawar for allowing Anwar to sodomize them that provided more ammunition for the smear campaign against the sacked Deputy Prime Minister. The headline "We Were Sodomized" filled the front page of The New Sunday Times on 20 September 1998, noting that Sukma and Munawar had pleaded guilty to acts of gross indecency during their brief court appearances on 19 September 1998, a day before Anwar was arrested. Berita Minggu had it that "Anwar Sodomized Two Men", while Mingguan Malaysia carried "Admission of Sodomy by Anwar" on its

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15 The Malay Mail, 3 September 1998.  
16 The Malay Mail, 3 September 1998.  
17 The Malay Mail, 3 September 1998.  
18 The Sun, 4 September 1998.  
19 Bernama, 3 September 1998.  
front page although this was not substantiated in its report. Both newspapers are owned by UMNO-linked companies. The Sunday Star, owned by an MCA-linked company, screamed “Two Jailed for Sodomy: They Implicate Anwar in Unnatural Sexual Acts”. During Anwar’s trial itself, detailed accounts of the charges and lurid explanations of Anwar’s alleged sex offences as described by prosecution witnesses made headlines in mainstream newspapers. A photo of a semen-stained mattress purportedly used by Anwar and his “sex partners” during his trysts was also reproduced by the local media. That the government was resolute in using the court as an arena to legitimize the humiliation of a political offender and vindicate the government’s action was evident when the then UMNO Vice-President and Education Minister, Datuk Seri Mohd Najib Tun Abdul Razak, told reporters that “once the evidence that has been accumulated against (Anwar) unfolds in court, more and more people will come to believe in what the government has been doing and saying thus far”. The court did just that. In sentencing Anwar to nine years imprisonment for sodomy, which was to run consecutively after the expiry of the six-year imprisonment for the earlier conviction of corrupt practice, High Court Judge Dato’ Ariffin Jaka slammed Anwar for “being the number two in the hierarchy of the country’s administration”, and yet “has not shown a high moral standard by committing sodomy, an offence which demands outright condemnation”. Key defence points raised by the defence teams in both the corruption and sodomy trials, the most important of which were inconsistencies in the testimony of Azizan Abu Bakar, the prosecution’s star witness in the corruption trial, and evidence of Anwar’s alibi, were ignored by the court.

The case was an attempt to legitimize the humiliation of a political offender by interweaving legal precepts with moral standards generally accepted by the

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26 In cross examination by Anwar’s lead counsel, Christopher Fernando, Azlzan admitted three times that Anwar did not sodomise him. The trial judge however dismissed his admission as irrelevant because what mattered was the existence of the allegation that Anwar had sodomised him (Azizan) and not the truth or falsity of such allegation. Public Prosecutor v Dato’ Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, p.p. 90.
society, creating a sense of meaning the state sought to articulate – that the crime was "demeaning", that the court was a legitimate arena to dispense "justice", that Anwar had committed a heinous "crime", and that it is only just and reasonable for the court to punish him with the most severe possible punishment for such a grave offence. In response to criticisms that the Anwar trial was devoid of due process, Dr. Mahathir unwittingly said,

"Anwar Ibrahim could have been held under the ISA for as long as it was necessary but the government allowed police to take action through trial in open court ... the trial lasted one year and was conducted in English ... and Anwar was defended by nine of the country's best lawyers ... and yet they say there is no due process ... I do not understand the due process (which they mean)".27

Anwar as a "political offender", believing that the court had been turned into a one-sided political arena, the main objective of which was the destruction of his political career and to caste aspersions on his morality, had chosen to turn the court into a contested political arena. Throughout the trials, Anwar revealed the inner working of his opponents' political machinations by raising political conspiracy as his main defence. These included revelations of his stressful relationship with some senior ministers whom he alleged were involved in corruption, and who later worked in concert to purge him;28 the circulation of poison pen letters by the then Minister of Domestic Trade and Consumer Affairs Datuk Seri Megat Junid Megat Ayub and his artiste wife Ziela Jalil alleging Anwar's sexual misconduct; involvement of Dato' Abdul Aziz Shamsuddin, the then Political Secretary to the Prime Minister (later Minister of Rural and Regional Development), in a plot to topple him; the Prime Minister's directive to the Anti-Corruption Agency to close a corruption case involving Tan Sri Ali Abul Hassan Sulaiman, the then Director-

27 Bernama, 6 November 2000.
28 The ministers who were known to have tense relationship with Anwar included Minister of International Trade and Industry Datuk Seri Rafidah Aziz and former Malacca Chief Minister Tan Sri Abdul Rahim Tamby Chik.
General of the Economic Planning Unit, one of the most influential government agencies under the Prime Minister’s Department; a Malaysian diplomat’s attempt to bribe a limousine driver in Washington to induce the latter to fabricate evidence of Anwar’s sexual misconduct; and a failed attempt by two senior officers of the Attorney-General’s Chamber to fabricate evidence against him. But the most fundamental claim in Anwar’s arsenal was his insinuation that the court was biased, and that the country’s highest ranking judge was involved in the scheme to finish him off, shattering the whole basis of the court as a legitimate arena to try the case fairly. Anwar revealed:

I have ample evidence to show that the Chief Justice craved for an additional six months extension, to ensure that no action would be preferred against him, and to ensure that I fail in my appeal. I am also privy, then as Deputy Prime Minister, to the fact that the Anti-Corruption Agency had prepared a preliminary report against the Chief Justice in 1998 over corruption... And with the issue of corruption left hanging, would the CJ dare cause displeasure of the Prime Minister?

In his statements from the dock, Anwar attempted to hold the moral high ground. He revealed corrupt practices involving senior judicial officers and

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30 Anwar Ibrahim (2000: 2). The Chief Justice was Tun Eusoff Chin who had been subjected to allegations of judicial misconduct after he and his wife were pictured in a photograph with a prominent lawyer, Dato’ VK Lingam, while they were on vacation in New Zealand in 1994. The photograph was widely circulated on the internet. In 1995, Lingam won a controversial multimillion ringgit commercial case, in which Eusoff sat as presiding judge when the case reached the Federal Court. Earlier, the Court of Appeal in its judgement dated 31 July 1995, reversed the High Court’s decision favoring Lingam, rapping the counsel for filing the case in the wrong division of the High Court, stating that such an act gave the impression that litigants can choose a judge whom they preferred to adjudicate their case. On 12 August 1995, the Federal Court, presided over by Eusoff, quashed the Court of Appeal’s decision and expunged the remarks criticizing Lingam from the record. The Federal Court proceeding was tainted with controversy when P.S Gill, a High Court Judge, was allowed to sit as a judge, whereas in normal circumstances no judges lower in rank than a Judge of the Court of Appeal can be allowed to sit as a judge in any proceedings at the Federal Court. This raised suspicion among the legal fraternity that the selection of PS Gill as a member of the panel of judges was manipulated by Eusoff in a move to favour his decision. See also Ayer Molek Rubber Co Bhd & Ors v Insas Bhd & Anor [1995] 2 MLJ 734 and Insas Bhd & Anor v Ayer Molek Rubber Co Bhd & Ors [1995] 2 MLJ 833.

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members of the administration, including a report by an unnamed senior judge handed personally to him while he was the Deputy Prime Minister, revealing personal misbehaviour and professional misconduct by judges. He also revealed that a senior minister allegedly involved in corrupt practices was spared criminal prosecution, despite the recommendation of the Anti-Corruption Agency and the Prosecution Division of the Attorney-General’s Chamber that she should be prosecuted.31 Above all, he attempted to impress upon the public that it was because he opposed corruption that he was expelled from office and that his case could not be tried fairly. Describing the court’s decision to convict him as “stinking to high heaven”, Anwar asserted that the trial had been a “political persecution hiding behind the cloak of law”.32

The courts in both the corruption and sodomy trials finally convicted Anwar on all the charges proffered against him, and sentenced him to a total of 15 years imprisonment. Thus, with a five-year ban on contesting elections for political office after serving the sentence, observers were convinced that Anwar would remain on the sidelines “beyond the time frame of Dr. Mahathir’s political life”.33 The clouds over political motives behind the trial, however, tarnished Dr. Mahathir’s credibility. William Case, in his analysis of the trial notes:

Dr. Mahathir leaves a complex legacy … Nor can one gainsay his country’s rapid industrial progress. But the obduracy with which he has dealt with opposition forces while pursuing these aims – then tapped the country’s judiciary so deeply for legitimacy that he has deadened it – forges an old trajectory in which the country modernizes its industrial base while its political institutions are demeaned.34

31 It transpired later that the senior minister whom Anwar referred to was Datuk Seri Rafidah Aziz, Minister of International Trade and Industry and UMNO Women’s Chief.
34 Case (2003: 130).
Open Malay Revolt and the Proliferation of Liberal Legal Meanings

The Anwar trial dramatically exposed the coercive function of the law to the extent that not only was it used by those in authority to stifle dissent, but also to disgrace a political opponent. Not unexpectedly, the Anwar saga, as some scholars argue, set the stage for a Malay cultural revolt against the political establishment.35 This was evident in the changing conceptions of the “ruler” and the “ruled” taking place among the Malays - the UMNO’s constituency. Hari Singh traces the concept of loyalty to the ruler, which is part of the ethos of Malay political culture, to the narrative in the Malay annals (Sejarah Melayu) in which it was understood that subjects owe loyalty to their ruler as long as the ruler does not shame them.36 In this sense, loyalty to the ruler is absolute. Those who withdraw their loyalty are considered as traitors and as such are subject to punishment. The ruler, on the other hand, has a moral obligation to act as “protector” of his subjects. He may punish them if they are guilty of offences, but must not in any circumstances humiliate them.37 This ethos was breached when Anwar was not only convicted for the crime which he claimed was trumped up, but also accused of committing sodomy, the most heinous of sexual crimes in the eyes of the Malays. The reformist Malays reacted to this humiliating and “unjust” episode by thundering into the streets, braving water cannons at “illegal” assemblies, and flocking to the opposition’s “illegal” ceramahs in small towns and villages. This indicated the withdrawal of their loyalty from, and an open revolt against, their hitherto “ruler” and “protector” - the UMNO establishment. To these reformist Malays, the Anwar saga was a turning point for their “cultural revolt”, because not only was it a breach of their cultural ethos, but also unjust. The concept of justice in Islam - a defining element of Malay identity - was also evoked to justify their abhorrence of the court’s verdict on Anwar. An Aliran eyewitness account quoted a member of the public as saying “(i)n Islam, we prize above all the law of Allah which ensures justice. But in this case, it is

36 Hari (2000).
37 Chandra (1992: 4)
difficult to see the court being just”. The western conception of natural justice also came into play. The Malay-based Islamic movement, ABIM, described Anwar’s sodomy conviction as one that “smacked of political persecution and revenge that is devoid of natural justice”. The “hate verdict”, the movement asserted, “came from a cruel source with no regard for fairness and justice”.

This sentiment however was not shared by the pro-establishment section within the Malay community. There were moves by the UMNO leaders to defend criminal prosecution against Anwar by explaining the situation to the grassroots supporters. Other Malay-based organizations reacted to the episode by lashing out at the foreign critics of Anwar’s trial and conviction. The UMNO-linked Federation of Malay Students in the Peninsula (Gabungan Pelajar Melayu Semenanjung, GPMS) and the Malaysian Youth Council (MYC) publicly criticized Singapore Senior Minister Lee Kuan Yew who described Anwar’s trial as a “sad saga” for the people of Malaysia and its neighbours. The then GPMS President Suhaimi Ibrahim criticized Lee for meddling in Malaysia’s domestic affairs, while the MYC President Saifuddin Abdullah said that Lee’s statement was very much unexpected.

Responding to the move by seven US congressmen to introduce a resolution calling for Anwar’s retrial or release in November 2000, the MYC, with the support of the Ex-Policemen Association of Malaysia, the members of which were largely Malays, launched the “Tell Off 7” campaign for one million signatures in protest against the move. Earlier, another UMNO-linked youth association, the 4B Youth Movement, headed by the then Deputy Transport Minister and UMNO Supreme Council Member Datuk Wira Mohd. Ali Rustam, sacked the Chairman of its Kuala Selangor branch Mohd Shafid Omar for being involved in the Reformasi movement. Others tried to justify Anwar’s trial as just a normal legal process, the justness of which was

38 Aliran (1999).
41 The Sun, 17 April 1999.
42 The Sun, 17 April 1999.
43 New Straits Times, 11 November 2000.
always on trial. In this regard, former Supreme Court Judge, the late Tan Sri Harun Hashim, wrote in his column “The Bench Mark” in the New Straits Times:

“in every trial, justice itself is on trial always - the system, the police, the judge, the prosecutors, the defence counsel and the accused person. There is no reason to doubt the Anwar trial will be any different.” 45

The tussle between the reformist and the pro-establishment Malays showed that the Malay ground was divided over the justness of Anwar’s trial. Be that as it may, Anwar had successfully turned the court into a contested political arena, challenging the legitimacy of the country’s judicial institutions and the attendant statist legal meanings the government sought to articulate. It was in this vein that the trial has been perceived from critical points of view, citing the abandonment of “natural justice”, “rule of law”, and “judicial independence”, contesting the government’s insistence on Anwar’s “crime” and the supposedly independent judiciary.46 The legal coercion and systematic humiliation meted out to a Malay “subject” by a Malay “protector” had unleashed a whole set of the more liberal legal meanings among the reformist-Malays. It was not surprising therefore that even a Malay-based Islamic organization like ABIM was at ease with the western-liberal legal jargon such as “natural justice” and “rule of law” in condemning the “injustices” done to Anwar.47 The Malays who participated in the street demonstrations in support of Anwar too began to value the rights to freedom of assembly, of expression and of speech which were understood in terms of the western liberal tradition. Sabri Zain’s Reformasi Diary quoted a Malay demonstrator as saying, “I think the demonstrations were good. They showed Dr. Mahathir that the people are angry with what he had done. But the police were rough with us and it frightened a lot of people. ‘They’ had to use violence and fear to silence the people.

45 See “Justice itself is always on trial”, New Straits Times, 12 November 1998.
46 See Malaysian Bar Council (2001).
That is not a sign of good government."48 Such a western conception of the rights to freedom of assembly and expression, and the role it plays in making the government more accountable to the people was then fused with the conception of dignity in the Malay tradition, giving a further boost to the reformist-Malay open revolt against the Malay-led government for the un-Malay treatment that Anwar received from it. Again, Sabri Zain's diary quoted a Malay lady as saying, "'We Malays don't usually treat people like this. 'Maruah' (Dignity) is very important to us. Even the guilty deserves dignity ... But our leaders don't seem to understand this. This is not the Malay way. That is why so many of us are angry."49 It was in this context that the reformist-Malays were increasingly more concerned with the justness of the law rather than the law's essentially statist objectives. These legal meanings had then turned into the reformist-Malays' text of resistance.

But, there are of course factors other than the essentially "cultural" that may help explain the open Malay revolt against the political establishment, especially UMNO. It is noteworthy that the Anwar saga occurred in a period during which the use of repressive laws on the grounds of maintaining racial harmony and preserving national security had increasingly been called into question. The expansion of the Malay middle class and the narrowing gap in inter-ethnic income disparity eased any apprehensions about possible ethnic or religious conflict. As a recent survey administered by the Merdeka Centre for Opinion Research revealed, 97.1 percent of Malaysian Muslims, the majority of whom were Malays, said that it was acceptable for them to live alongside the people of other religions, indicating a greater level of acceptance of racial, cultural and religious diversity among the Malays in Malaysia.50 Coupled with the eclipse of the communist threat, the government's rationale that the ISA is necessary to preserve racial harmony appeared less convincing. In addition, since the 1990s the ISA has also been increasingly used against Malay

49 See the online version of Sabri Zain's Reformasi Diary, above.
50 The survey entitled "Muslim Identities Public Opinion Survey: Peninsula Malaysia", coordinated by Associate Professor Dr. Patricia Martinez of the Asia-Europe Institute at the University of Malaya, was conducted in December 2005. It involved about 1000 respondents across peninsular Malaysia. See also New Straits Times, 20 August 2006; The Sun, 5 September 2006.
political dissidents, something of a reversal from the trend in the 1960s through 1980s when the law was mainly used against the "communists" and the so-called "chauvinist" elements often associated with the Chinese. At the same time, there had been growing disaffection among the Malays with UMNO's patronage dispensing function, which seemed to benefit only a few politically-well-connected individuals rather than the Malay masses. This was particularly evident at the peak of the 1997 economic crisis, roughly coinciding with the UMNO leadership crisis, when the bailouts of companies belonging to politically-well-connected individuals, including that of Dr. Mahathir's son and the Daim-linked Renong, exacerbated not only factional conflict within UMNO, but also Malay anger toward the party. Worse still, public funds such as the cash-rich Employees Provident Funds (EPF) and Lembaga Urusan Tabung Haji (Pilgrimage Fund Management Board), which are often loosely referred to as the "people's money", were involved in bail-out exercises. Hence, the notion of "protection" for the Malays that UMNO claimed to offer gradually diminished in the minds of disgruntled sections of the Malay community. The power spawned by the ruling elites seemed always open for abuse, serving the interests of the few.51

As such, the law's instrumentalist-purposive function has been to be a tool by which the ruling elites limited the scope of political opposition. Coupled with the wide attention and voluminous comments the Anwar saga received in the international media as well as local alternative print and internet media, however, the contestations between liberal legal meanings and the illiberal legal meanings reached a higher level of intensity with the former being mainly informed by the minimalist conception of rule of law while the latter by the statist instrumentalist-purposive notion of rule by law. Both were attempting to counteract each other in defining the public's consciousness of what is right and what wrong. It is important to note that the Anwar saga and the attendant legal coercion had merely intensified the proliferation of the liberal legal meanings that had been unfolding in a society now experiencing upward social mobility and "open-sky" exposure as a result of the state-led economic development "project" and the expansion of global capitalism.

The liberal legal meanings, in turn, served as the ideological basis for an open revolt against the political establishment, especially among the more reformist Malays.

**The State's Response to the Liberal Legal Meanings**

Since the outbreak of *Reformasi*, a number of civil society coalitions articulated the liberal legal meanings and mobilized public support for legal change. Groups such as the Abolish ISA Movement (*Gabungan Mansuhkan ISA*, GMI), Malaysian Bar Council, Media Charter 2000, Police Watch and Human Rights Committee (PWHRC) and Malaysian Students' Solidarity (*Solidariti Mahasiswa Malaysia*, SMM) pressed for the review or repeal of the Internal Security Act, University and University Colleges Act, Printing Presses and Publications Act, Police Act, Official Secret Acts, Sedition Act, Penal Code, Criminal Procedure Code and the like. Though articulation of the liberal legal meanings was limited to the more reformist sections within the society - mostly members of the human rights NGOs, anti-establishment Islamic groups and opposition politicians - its coming to the limelight, especially through the BA's election manifesto and those of other civil society groups, caused a dent to the BN's image. The *Reformasi* and the extent to which the new opposition was able to challenge the BN prompted the government to respond to the rise of the liberal legal meanings, in both responsive and repressive ways. It was in the politically less sensitive areas such as normal crimes that the government showed some responsiveness to change, albeit very limited. While in the more politically sensitive areas such as race relations and national security - especially with the rise of Islamic militancy, whether perceived or real - the government continued to adopt a restrictive legal approach.

An important development in the state's positive response to the rise of liberal legal meanings was the setting up of ombudsman-like organizations such as the National Human Rights Commission (*SUHAKAM*) in 1999 and the Royal Commission to Enhance the Operation and Management of the Royal Malaysian Police (*Police Royal Commission*) in 2003, which provided opportunities for various interest groups and members of the public to channel their grouses and
recommendations for legal change. Though the bulk of the commissions' recommendations were left unheeded by the government, the setting up of the commissions created an initial climate of responsiveness on the part of the government in dealing with human rights issues and allegations of abuse of powers in the police force. Within the judiciary, however, there had been no major indication that judges were adopting a more liberal judicial attitude. One exception is perhaps the Federal Court's decision to overturn Anwar's sodomy conviction in September 2004 which resulted in his release from prison.

This section looks at the role of civil society coalitions for legal change and subsequent state's responses to them in three specific cases - the movement against the ISA; the police and "normal" criminal justice system; and the Anwar release. This is mainly to demonstrate the dynamics of the state's mixed responses to the rise of liberal legal meanings and the subsequent calls for legal change. It is argued that while the government lacked political will in making significant legal changes along more liberal lines, the reformist sections within the society too, which made up the bulk of the multiracial civil society coalitions for legal change, failed to mobilize substantial mass multiracial support for their initiatives, hence undermining their position vis-à-vis the government. Furthermore, the continued articulation of competing ethnic interests and the rise of Islamic militancy following the September 11 attack on the United States, whether perceived or real, provided the government with justifications to maintain, and occasionally use, repressive laws as a means to maintain national security and preserve racial harmony.

Case 1: Movement against the Internal Security Act 1960

The Abolish ISA Movement (Gabungan Mansuhkan ISA, GMI) is a coalition of about 80 NGOs calling for the repeal of ISA and the release of ISA detainees. Launched in April 2001, the movement consisted of human rights groups, Islamic movements,
women's groups, trade unions, Chinese associations and student movements. SUARAM served as its secretariat and the then PAS President, Dato' Hj. Fadzil Noor, chaired its main committee. The movement was set up as a response to the ISA arrests of ten keADILan politicians and Reformasi activists in April 2001 for their alleged involvement in planning a street demonstration in Kuala Lumpur on 14 April 2001 (Black 14) to commemorate Anwar's conviction. Another coalition against the ISA was the Students' Abolish ISA Movement (Gabungan Mahasiswa Mansuhkan ISA, GMMI) formed in May 2001. Like its parent organization GMT, GMMI, which comprised twelve anti-establishment student groups, was also multi-racial and cross-sectional in its composition. The student movement was also active in campaigning against the University and University Colleges Act, which restrains student activism. The Malaysian Bar Council, a regular opponent of the ISA and other preventive detention laws, also joined hands in the campaign against the ISA. Outside Malaysia, a similar anti-ISA movement was also launched by Malaysians who lived in the United Kingdom. The movement aimed at "organizing campaigns..."

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52 Among its key members were Reformasi actors like the Voice of the Malaysian People (SUARAM), Jamaah Islah Malaysia (JIM), Muslim Youth Movement of Malaysia (ABIM), Aliran Kesedaran Negara (ALIRAN) and National Human Rights Society (HAKAM).

53 Interview with Chang Lih Kang, GMI Secretary, 18 March 2005, Petaling Jaya. Those arrested were keADILan Vice-President Tian Chua, Youth Chief Mohamad Ezam Mohd. Noor, Youth Secretary Lokman Nor Adam, MPT Members Saari Sungib, N. Gobalakrishnan and Dr. Badrulamin Baharom, Director of Free Anwar Campaign Raja Petra Raja Kamaruddin, former socialist student leader Hishamuddin Rais and Reformasi activists Abdul Ghani Haroon and Badaruddin Ismail.

54 Among its key members were the Malay/Muslim-based student organizations like the National Union of Muslim Students' Associations of Malaysia (Persatuan Kebangsaan Pelajar Islam Malaysia, PKPIM), the Malaysian Islah Students' Peer Club (Kelab Rakan Siswa Islam Malaysia, KARISMA) and the Peninsular Muslim Students' Coalition (Gabungan Mahasiswa Islam Senenunjung, GAMIS); the predominantly-Chinese Malaysian Youth and Students' Democratic Movement (Gerakan Demokratik Belia dan Pelajar Malaysia, DEMA); and the socialist leaning Universiti Bangsar Utama (UBU). Other members were the National Student's Action Front (Badan Bertindak Mahasiswa Negara, BBNM), National Vocal Students' Movement (Gerakan Mahasiswa Lautang Negara, GMLN), Wangsa Maju Student Coalition (Gabungan Mahasiswa Wangsa Maju, GMWM), Youth's Front for Democracy (Front Anak Muda Untuk Demokrasi, FRASKI), Islam the Saviour of Ummah Group (Jamaah Islam Penyelamat Ummah, IPU), Malaysian Ulama' Society's Student Secretariat (Sekretariat Pelajar Persatuan Ulama' Malaysia, SPPUM) and Students' Committee (jawatankuasa Mahasiswa Mahaswiss, JKMI).

55 The Bar Council was one of the first organizations which called for the repeal of repressive laws since the outbreak of Reformasi. In its Annual General Meeting (AGM) on 10 October 1998, the organization passed a resolution calling for the repeal of the ISA and other preventive detention laws such as the Emergency (Public Order and Prevention of Crime) Ordinance 1969 and the Dangerous Drugs Act 1985. See Memorandum from the Malaysian Bar Council on the Repeal of Laws Relating to Detention Without Trial, 1998.
demanding the repeal of all preventive detention laws which run contrary to the
basic tenets of human rights". 56

Among the main concerns raised by the opponents of the ISA was the
government’s penchant for using the detention without trial law to silence critics. A
report by a delegation of legal experts from Fordham Law School in the United
States, who carried out a year-long study on the use and impact of the ISA in
Malaysia in 2002, stated that by detaining opposition leaders under the ISA, the
government had effectively silenced their critical voices and left their organizations
in disarray.57 This was achieved by breaking down the chain of communication
between the leaders and party members, as well as using interrogation sessions,
during which the opposition politicians were detained, to demoralize them and dig
out valuable information about their party’s organization and activities.58 Another
concern was with the Malaysian government’s reliance on the global war against
terror as a justification to step up the use of ISA against suspected Muslim
“militants” as well as to vindicate its continued existence. In the months
immediately subsequent to the September 11 attack on the United States, more than
70 individuals were arrested and detained under the ISA for their alleged
involvement in militant Islamic groups said to be linked to the international terrorist
organizations like the al-Qaeda and Jamaah Islamiyyah.59 It was on the heels of this war
against terror that the government found a new justification for the continued use of
the ISA, against the wishes of its critics, as a means to curb the threats of Islamic
militancy. The then Deputy Prime Minister and Home Minister, Datuk Seri Abdullah
Ahmad Badawi announced soon after September 11 that the attacks demonstrated
the value of the ISA as “an initial preventive measure before threats get beyond
control”.60

56 See statement by Jeffrey Tan, AIM-UK coordinator, quoted in Malaysiakini, 9 May 2001.
58 See Saari (2001). See also the affidavits of the 10 keAdilan leaders and Reformasi activists who were
detained under the ISA for their alleged involvement in planning the “Black 14” street demonstration,
filed at the Federal Court supporting their habeas corpus application.
60 Cited in Fritz & Flaherty (2003: 1346). See also Human Rights Watch’s report on Malaysia in
“Opportunism in the Face of Tragedy: Repression in the Name of anti-Terrorism” at
http://hrw.org/campaigns/september11/opportunismwatch.htm#Malaysia (Accessed on 30 May
2007).
The bulk of complaints against the ISA were about the law's lack of safeguards for human rights. The wide powers given to the police to arrest a "suspect" for the initial period of 60 days as well as the wide discretionary powers of the minister in charge of national security to detain a person without trial for a period of two years, which can be renewed indefinitely, had led to allegations of various forms of abuses of the detainees' basic rights by the authorities.61 These included arbitrary arrests and detentions of suspects; failure to provide adequate access to legal counsel; the absence of any effective forms of review of arrests and detentions, or of the conditions in which the detainees were kept; and the infliction of intolerable conditions of detention and treatment which was "cruel, inhuman and degrading".62 In January 2004, 31 ISA detainees, all of whom were alleged Muslim militants, handed a memorandum to the National Human Rights Commission (SUHAKAM), outlining 59 forms of abuses by the detaining authority.63 These included allegations of them being kicked, beaten up and spat on by the interrogators, forced to drink spittle, stripped naked during interrogation and threatened with arrest of family members should they refuse to 'cooperate' or file *habeas corpus* applications challenging their arrest and detention.64 A memorandum by the GMI to SUHAKAM in October 2001 also stated that the detainees had very limited access to reading materials; were not allowed to perform the Friday prayer; family visits and personal correspondences were closely monitored by the detaining authority, and the detainees' discussions with their lawyers were held under the watchful eyes of the detaining officers.65

It was in this context that the basis for the opposition to the ISA had mainly been on grounds of its violation of basic human rights and personal liberties, which in turn paved the way for the promotion of liberal legal meanings as the ideological

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64 See *Malaysiakini*, 20 January 2004. Deputy Internal Security Minister Dato' Noh Omar however refuted the detainee's claim, saying that they were not tortured but "rehabilitated". He added that the claim was part of a smear campaign "by those who were unhappy with the way the government fought terrorism". See *Malaysiakini*, 17 May 2004.
basis for the civil society's call for legal reform. Again, this was not altogether new. The same liberal legal concepts had served as the ideological basis for the opposition to the ISA since its introduction in 1960. But what is salient this time round was the vigor with which the more reformist sections within the Malay/Muslim community articulated those liberal legal concepts, which were sometimes fused with the Islamic worldview of liberty and justice, in opposing the ISA. Since the outbreak of Reformasi, it was not uncommon to find the leading members of the Malay-based Islamic groups like ABIM and JIM to talk fondly about individual rights and liberties, and its compatibility with the Islamic conception of justice. Calling all concerned Malaysian citizens to uphold their rights and oppose all forms of injustices, Dr. Harlina Haliza Siraj, a Jamaah Islah Malaysia’s (JIM) women’s central committee member, asserted that the ISA “violates the fundamental rights of individuals and the principle of justice as outlined in the Holy Qur’an and al-Sunnah (prophetic tradition)” 66. The editorial in the July 2001 issue of Risalah, the ABIM’s organ, called on the government to release all Reformasi activists who were detained under the ISA, asserting the Islamic movement’s stance that the detention was in breach of the “principles of democracy, justice and human rights”.67 The same issue of Risalah also carried an article about the Islamic perspective on human rights, which includes the rights to life and property, personal dignity, individual liberty, freedom of speech and equality before the law.68 Treating these rights as something “given” by Allah, the article declares:

> When we discuss human rights, we are discussing the rights that Allah endows to His servants. The rights are not granted by the Sultan or rulers of any country. Rights granted by the Sultan or any legal bodies can be withdrawn. The same goes for the privileges given by a dictator. He can even manipulate the privileges according to his whims. But since human rights are

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endowed by Allah, nobody can (violate) those rights. Every Muslim who claims to profess Islam as his religion must respect these rights.69

The fusion of Islam and human rights as the ideological basis for the reformist Malays’ opposition to the ISA was not surprising. By 2001, not only the number of organizations protesting against the ISA had doubled from about 40 in 1987 to about 80,70 but the protests had also taken a multi-racial outlook with the Malay/Muslim organizations assuming the more significant roles. At its inception in 2001, the GMI was led by Zaid Kamaruddin, a Jamaah Islah Malaysia (JIM) leader, while the GMMI was led by Syahrir Mahmood, a leader of the JIM-linked Malaysian Islah Students’ Peer Club (Kelab Rakan Siswa Islah Malaysia, KARISMA). This was quite different from the situation in the 1960s through 1980s when the campaigns against the ISA had mainly been led by non-Malays, especially Chinese.71 However, since the 1990s onwards, “political detentions” under the ISA had been increasingly directed toward the Malays, rather than the Chinese “communists” and “chauvinists”. These included the mid-1990s ISA arrests of the followers of Al-Arqam and the Shi’ite sect, which had both been declared as deviationists by the government.72 By November 2001, all except one of the 39 political detainees at the Kamunting Detention Camp were Malays/Muslims.73 The Malay anti-ISA campaigners had also been subjected to arrests under the ISA and the illegal assembly law. In July 2001, the police arrested two Malay student leaders under the ISA for their active involvement in the anti-ISA movement.74 Earlier, on 8 June 2001, seven student leaders, all of whom were Malays, were remanded by the police after they participated in a

69 See “Hak-Hak Kemanusiaan yang Dijamin Islam” (Human Rights Guaranteed by Islam) above.
71 See Kua (2005).
72 See Marzuki (2007). The Muslim bureaucrats in the government are mainly Sunnis of the Shafie school, which regarded the Shi’ite teachings as a form of deviation from Islam.
73 They were members of the Al-Mu’mah group (15), members of Kumpulan Militan Malaysia (9), “militant” Reformasi activists (4), members of the Free Aceh Movement (4), members of jihadi Gang (3) and followers of the Shi’ite sect (3). The exception was leADILan Vice-President, Tian Chua, who was arrested in connection with the foiled “Black 14” streets demonstration in Kuala Lumpur in April 2001. See SUARAM (2004: 28).
74 The two were University of Malaya Student’s Representative Council President, Mohamad Fuad Mohd Ikwan, and MARA Skills Institute student, Khairul Anuar Ahmad Zainuddin. See Malaysiakini, 7 July 2001.

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demonstration at the National Mosque to protest against the ISA. All of them were subsequently expelled from their respective universities and faced criminal charges for participating in the illegal assembly.75 The fact that more Malays were subjected to arrests and detentions under the ISA had drawn more Malay/Muslim based organizations, mostly key actors of Reformasi, to work hand in hand with the regular ISA critics among the anti-establishment sections within the non-Malay communities as well as the secular human rights groups to oppose the law.

On a positive note, the public calls for the repeal of ISA had struck a chord with the National Human Rights Commission’s (SUHAKAM) position on the issue. The government’s human rights watchdog in its review of ISA in 2003 recommended an interim amendment to the ISA, in anticipation of its eventual repeal, and the enactment of a new comprehensive security law to redress an “imbalanced situation” which it described as “disproportionately weighted in favor of national security”.76 Recommending that the new security law should “take a tough stand on threats to national security, and yet conforms to the international human rights standard”,77 SUHAKAM proposed that the period of detention for investigation purposes should not exceed 24 hours; detainees be allowed bail; extension orders must only be granted by the High Court; detainees must be present before the judge to obtain the order; a court order can only extend the detention by seven days each time; and the total detention time must not be more than 29 days, after which a detainee must be charged or released.78 The proposed interim amendment to the ISA would include clear definition of the detention criteria; reducing the detention period from two years to three months; charging or releasing a detainee after the expiry of the three months period; requiring the detaining authorities to submit an annual report on the ISA to the Parliament; and making the ISA valid for one year unless renewed by the Parliament annually.79 In a separate report on conditions of detention under the ISA, which was made following a hunger strike staged by the six Reformasi detainees in April 2002 demanding their

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77 Malaysiakini, 9 April 2003.
78 See SUHAKAM (2003b); Malaysiakini, 9 April 2003.
79 See SUHAKAM (2003b); Malaysiakini, 9 April 2003.
release or being charged in court, SUHAKAM recommended, \textit{inter alia}, that disciplinary actions be taken against the detaining officers who inflicted "cruel, inhuman and degrading treatment" on the detainees; family members should be informed of the detainees' arrests within 24 hours of the arrest; an officer will only need to be "within sight" during family visits to guarantee a higher level of privacy between the detainees and their family members; and the detainees should be produced before a magistrate within 24 hours of arrest and be allowed access to legal counsel.\footnote{The six detainees were Mohamad Ezam Mohd Noor, Tian Chua, Saari Sungib, Hishamuddin Raid, Dr. Badrulamin Beharom and Lokman Noor Adam.} \footnote{See SUHAKAM (2003a).}

Some positive developments also occurred within the judiciary. In May 2001, Shah Alam High Court Judge Dato' Mohd Hishamudin Yahya allowed \textit{habeas corpus} applications of two keADILan politicians, N. Gobalakrishnan and Abdul Ghani Haroon, who were earlier arrested under Section 73(1) of the ISA in connection with the foiled "Black 14" street demonstration. The judge held that their arrest was \textit{mala fida} and ordered their release.\footnote{Abdul Ghani Haroon v Ketua Polis Negara and Another Application [2001] 2 MLJ 689} Noting the heavy presence of police officers at the court complex on the day of the judgment, the judge allowed another application for an order prohibiting the police from arresting the two opposition politicians within 24 hours of their release. The judge also took a swipe at the police for not allowing family members to visit the two detainees for almost 40 days after their arrest despite a formal request having been made to the Inspector-General of Police, saying that such an action was "cruel, inhuman and oppressive not only to the (detainees) but (also) to their families".\footnote{[2001] 2 MLJ 689, p.p. 690.} But the more significant part of the judgment was the judge's assertion that by virtue of Article 5(2) of the Federal Constitution,\footnote{Article 5 (2) of the Federal Constitution states that "where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him".} "a detainee had every right to be present in court at the hearing of his \textit{habeas corpus} application".\footnote{[2001] 2 MLJ 689, p.p. 696.} This was a departure from the previous principle that the \textit{habeas
corpus application does not come with the applicant's right to be present in court. As access to ISA detainees was normally difficult during the initial 60 days detention period, the right to be present in court provides the lawyers and family members with an opportunity to get access to them and to know their condition.

In September 2002, a landmark Federal Court's decision in Mohamad Ezam Mohd Noor v Ketua Polis Negara departed from the settled Jaw on the application of subjective tests in determining whether the police had exercised their power of arrest under section 73(1) of the ISA in accordance with the law. The five appellants, who were detained under the ISA in connection with the foiled "Black 14" street demonstration, alleged that their detention was mala fide as it was merely for the purpose of "intelligence gathering which was unconnected with national security". The appellants claimed that the police interrogators had quizzed them about their political activities and sexual lives, not about the police allegations that they had acquired explosives and weapons to cause a violent demonstration in Kuala Lumpur in April 2001 involving at least 50,000 people. Delivering the Federal Court's judgment, Chief Judge of Sabah and Sarawak, Tan Sri Steve Shim, departing from the principle set out in Theresa Lim, held that the subjective judgment of the Minister to detain a person under Section 8 of the ISA cannot be extended to the police. This implied that an objective test was to be applied in respect of the first 60 days detention by the police and that the court was not barred from perusing "information concerning matters of national security" at this stage. This decision had wide implications for the initial detention under the ISA since the police, in respect of habeas corpus applications by the detainees, are obliged to reveal essential information pertaining to the facts and reasons of the arrest. The police too can no longer hide behind the subjective test principle to arrest a person under the ISA for

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86 See Minister of Home Affairs v Lim Guan Eng [1989] 1 MLJ 420.
88 [2002] 4 MLJ 449, p.p. 450. The five appellants were keADILan Vice President Tian Chua, keADILan Youth Chief Mohamad Ezam Mohd. Noor, keADILan MPT Member Saari Sungib, Free Anwar Campaign Director Raja Petra Raja Kamaruddin and social activist Hishamuddin Rais. Raja Petra was however released before the expiry of the 60 days detention period.
the purpose of intelligence gathering and building up a case against a detainee, as
the five appellants alleged.

Though the Federal Court’s decision in Mohamad Ezam was lauded by the
reformist civil society activists, a significant change toward liberal legal reform in the
judiciary was not in sight. The Federal Court continued to acknowledge the long
held principle that the subjective test was to be applied in respect of the minister’s
satisfaction to detain a person without trial for a period of two years under Section 8
of the ISA, echoing the long standing judicial attitude toward matters of national
security that they are best left to the discretion of the Executive.93 In fact, as detention
orders by the minister had been issued against the appellants, the Federal Court’s
decision in practice became academic. The Federal Court in August 2001 also
reversed Justice Hishamudin’s decision on the detainees’ constitutional right to be
present in court in respect of the habeas corpus application. The reason was that as the
ISA is a security law under Article 149 of the Federal Constitution, such right was a
limited one.94 Touching on the function of the court as the guardian of justice, and
the trial judge’s concern about the detainees’ constitutional rights, Chief Judge of
Sabah and Sarawak, Tan Sri Steve Shim, who presided over the Federal Court’s
panel of judges in the appeal, quoted Federal Court Judge Raja Azlan Shah’s (as he
then was) judgment in Loh Kooi Choon v Government of Malaysia95 to substantiate
his opinion. The following excerpts from Raja Azlan’s judgment speak volumes for the
apex court’s long held “restraint” approach in dealing with the “justness” of security
laws:

The question whether the impugned Act is “harsh and unjust” is a question of
policy to be debated and decided by Parliament, and therefore not (meant) for

93 See also the subsequent Federal Court’s decision in Kerajaan Malaysia & Ors v Nasharuddin Nasir
[2004] 1 CLJ 81. Chief Judge of Sabah and Sarawak, Tan Sri Steve Shim, delivering the Federal Court’s
judgment said, “In this case the Minister, having seen the police report, was satisfied, on a subjective
basis, that the respondent’s activities had threatened national security. It was therefore not open for
the court to examine the sufficiency or relevance of the allegations contained in the report”.
94 See Ketua Polis Negara v Abdul Gani Haron [2001] 4 MLJ 11. The judges who sat on the panel to
decide this appeal were Chief Judge of Sabah and Sarawak Tan Sri Steve Shim and Federal Court
95 [1977] 2 MLJ 187
judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the constitution.96

The government too was unresponsive to public calls for the repeal of the ISA and to the SUHAKAM’s recommendations. The general attitude of the government toward the ISA remained, as it always has been, that “it protected the people from threats to public order”.97 In response to the Federal Court’s decision in Mohamad Ezam on the application of the objective test to determine the exercise of police power to detain a person for the initial 60 days period, the government even mulled an amendment to the ISA in order “to eliminate the risk of evidence being revealed in court that could compromise national security”.98 The Malaysian Bar Council opposed this move saying that there must be “a fair balance between legitimate national security concerns and fundamental liberties”.99 SUHAKAM too called on the government not to proceed with the amendment that “would further enhance the power of the Executive and limit the civil liberties of ISA detainees”.100

Though it turned out that no such amendment was made, other “tactics” were used by the detaining authority to circumvent the law. This included causing the court hearing of the detainees’ habeas corpus application be delayed so that it would past the initial 60 days detention period.101 This was done by denying lawyers’ access to the detainees, thereby causing unnecessary delay on the part of the lawyers in getting precise instructions from their clients, and hence causing them to be unable to discharge their duties.102 In the case of Nasharuddin bin Nasir, a suspected “militant” arrested under the ISA on 17 April 2002, the police denied him access to

96 [1977] 2 MLJ 187, p.p. 188.
97 See statement by Deputy Minister in the Prime Minister’s Department, Dato’ M. Kayveas quoted by Bernama, 20 November 2003.
98 See statement by Minister in the Prime Minister’s Department Datuk Seri Dr. Rais Yatim (the de facto Law Minister) quoted in Malaysiakini, 8 October 2002.
100 Bernama, 23 December 2002.
lawyers until the initial 60 days detention period ended. The police head of special branch Dato' Hj Md Lazim Ahmad in his letter to the detainee’s counsel stated security reasons as the basis for the denial. A family visit was however allowed by the police. The detainee’s lawyer then applied for a court order granting the lawyers the right to access to see the detainee. Allowing the application, Shah Alam High Court Judge Dato’ Suriyadi Halim Omar questioned “the arbitrary attitude of the police in permitting the family (visit), but not his solicitors”.

The learned judge was also perturbed by the police tactics of “carting off” the detainee to the hospital on some medical “pretext” to avoid the lawyer’s visit as ordered by the court. Referring to some “overzealous officers” in the police force, the judge remarked, “it will be the lowest ebb in the history of the judiciary ... when a perfectly legitimate court order may be contemnuously, but legally avoided by certain irresponsible persons who are endowed with certain specialized skills”. Apart from this, there were also cases in which the detainees rejected legal recourse after they were “turned over” by the police interrogators.

Another tactic used by the government to circumvent the judicial precedent set out in Ezam’s case was to straight away detain a person under section 8 of the ISA. This was the case when Prime Minister Datuk Seri Abdullah Ahmad Badawi, who is also Internal Security Minister, issued a two-year detention order under section 8 of the ISA against five leaders of Hindu Rights Action Front (HINDRAF) in December 2007, without first detaining them under section 73(1). This new method of detention effectively barred the court from relying on the judicial precedent set out by the Federal Court in Ezam’s case as an authority to inquire into the reasonableness of the grounds of detention. Earlier, on 25 November 2007 HINDRAF organized street demonstrations in Kuala Lumpur protesting against alleged government’s discrimination against ethnic Indians in the country. The

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107 SUARAM (2006: 41). “Turning over” is a commonly used term to refer to the psychological warfare tactics employed by the police interrogators in getting the detainees either to confess to their “mistakes” or to agree to suggestions made by them.

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group had also filed a suit in the British court claiming compensation amounting to US$4 trillion from the British government for bringing Indian indentured labors into Malaya during the colonial period and allegedly left them without protection after Malaya gained independence in 1957. In a memorandum sent to the British government, the group also accused the "Islamic-fundamentalist and Malay-Chauvinist UMNO-led Malaysian government" for committing "ethnic-cleansing" and "mini-genocide" against the minority Indians. These accusations were made following demolition of several "illegal" Hindu temples by the government to give way for development projects. Abdullah initially appeared to be hesitant to use the ISA against the HINDRAF leaders, but finally gave in to the pressures from within the Malay community, especially UMNO. Prior to the ISA arrests, HINDRAF leaders P. Uthayakumar, S. Ganapathi Rao and P. Waytha Moorthy were charged under the Sedition Act for allegedly inciting racial sentiments. 31 protesters who took part in the November 25 demonstration were initially charged with

108 The full text of the memorandum can be accessed at http://rockybru.blogspot.com/2007/11/why-i-didnt-walk-yesterday.html (Accessed on 28 Nov 2007). The use of the word "ethnic-cleansing" and "mini-genocide" was rather exaggerating. Dato' A. Vaithilingam, the President of Malaysia Hindu Sanggam, expressed his concern that the bad choice of words in HINDRAF's memorandum had divulged public attention away from its otherwise legitimate concern of highlighting the plight of Indian community, especially the poor among them. According to Dato' Vaithi, the term "mini-genocide", which HINDRAF leaders often used to refer to the Indian-Malay clash in Kampung Medan in March 2001, was overboard. Giving an example, HINDRAF leaders often claimed that 104 Indians were "slashed and killed" in the incident, whereas the official statistics show that 104 were injured and only 4 were killed. Interview with Dato' A. Vaithilingam, President, Malaysia Hindu Sanggam, Petaling Jaya, 14 December 2007.

109 The Hindu temples were "illegal" as they were built on government or private lands without approval from local authorities or consent from land owners. An officer at a local council confided that the authorities usually avoided demolishing the illegal temples, especially the old ones, fearing that such an action would cause racial sentiment to run high. Confidential informal discussion, Kuala Lumpur, 14 December 2007.

110 It is difficult to rule out internal power-struggle within UMNO as a factor that led to the use of ISA against the HINDRAF leaders. Since Abdullah came to power in 2003, it was not uncommon for UMNO members to perceive his leadership as "weak". His avoidance from using the ISA would only reinforce this perception, giving ammunition to his "rival" within UMNO to further discredit his leadership. What is more, the HINDRAF protest coincided with another street protest by a group called Coalition for Clean and Fair Election (BERSIH) led by PAS. About 30,000 protesters took part in the street protest in Kuala Lumpur on 10 November 2007, calling for a clean and fair election in the country. The seemingly "unstable" political condition could have prompted Abdullah to use repressive measures in order to send a message to UMNO members that he is in control of the government. Interestingly, in a nationwide opinion survey conducted by the Merdeka Centre for Opinion Research soon after the ISA arrest, a majority of the respondents believed that Abdullah had strengthened his position in the government, although many of them, especially the non-Malays, disapproved the use of ISA against the HINDRAF leaders. Informal discussion with Ibrahim Suffian, Director, Merdeka Centre for Opinion Research, Bangi, Selangor, 16 December 2007.
attempted murder, but the charge was later dropped as a result of protests from Indian groups and human rights NGOs. All except five of them were later charged for participating in an illegal assembly, which carries lesser penalty.

The government also went a step further in its war on terror by amending the Penal Code in November 2003 “to widen the powers of the authorities to tackle violent issues”. The amended law imposed, *inter alia*, sentences ranging from seven years imprisonment, natural life imprisonment and death on convicted terrorists and their accomplices. SUARAM in its 2003 human rights report described the provisions as “arbitrarily and widely drafted to cover every possible act – from serious bodily injury to a person to an act that involves prejudice to national security or public safety”. The offences were also extended to cover services, facilities, solicitation or support given to terrorists that includes services provided by lawyers and accountants. Anyone who harbors, or interferes with the arrest of, terrorists, recruits members into a terrorist group or provides them with explosives or facilities such as places of meeting is also liable for a crime punishable with a sentence of up to life imprisonment. Though this anti-terrorism provision was already inserted in the penal code, it was not a substitute to the ISA. The government made it clear that it would still continue to use the ISA against suspected terrorists “where circumstances do not allow the use of the Penal Code”. Regarding the condition of detention under the ISA, the government seemed to be responsive only to the SUHAKAM’s recommendations in the less “sensitive” area such as improving recreational facilities at the detention camp but not in the more important areas such as the detainees’ right to speedy medical treatment, the right to consult a lawyer and visitation rights by the family members. Up to 2005, the human rights body still received complaints about delay in giving medical treatment to the detainees, delay in processing lawyer’s visits, detention camp officers being rude to the detainees’

115 See SUHAKAM’s comments on the government’s response to its 2003 annual report (SUHAKAM: 2006).
family members and re-introduction of wire mesh and fiberglass partitions to separate the detainees and their family members during family visits.116

Apart from the war on terror, which served as the new justification for the government’s lack of political will to institute a more liberal legal reform pertaining to the ISA, the civil society coalitions against the law too had not made much progress in mobilizing mass multiracial support for the initiative so as to compel the government to be more responsive to their demands. Support had mainly come from the more “activist” sections within the society – consisting of BA politicians, reformist NGO activists and the anti-establishment student groups – without significant multiracial following among the masses which remained polarized along ethnic lines. In the case of GMI, despite being multiracial and cross-sectional in its composition, the movement’s campaign drew more support from Malays rather than non-Malays.117 This was especially evident during the numerous protests against the ISA where the Malay protesters normally outnumbered the non-Malays.

Furthermore, since the September 11 attack on the United States, the government’s use of the ISA against suspected Muslim “militants” raised a specter of growing Islamic militancy in Malaysia, a development that was not welcomed by non-Muslims.118 What is more, the trial of the JI leader Abu Bakar Bashir by an Indonesian court in April 2003 also revealed a supposedly “terrorist” plan to establish a pan-Islamic state in Southeast Asia, including Malaysia.119 The arrest of Hambali@Riduan Isamuddin, an Indonesian national with Malaysian PR status, by the Thai authorities in August 2003 for his alleged role as an al-Qaeda operative in Southeast Asia, raised concern that Malaysia too had been a hot bed of terrorism and was on its way to becoming an Islamic state.120 In November 2003, thirteen Malay/Muslim Malaysian students who had just returned to Malaysia from their

117 Interview with Chang Lih Kang, GMI Secretary, 18 March 2005, Petaling Jaya.
118 This included the ISA arrest of a University of Technology Malaysia (UTM) lecturer, Wan Min Wan Mat, in September 2002. Wan Min, who allegedly led the KMM’s Johore branch, was linked to Dr. Azahari Husin, a fellow UTM lecturer accused of being involved in the 2002 Bali blast and several other bombings in Indonesia. Dr. Azahari was killed during a police raid at his hideout in East Java in November 2005.
119 Bernama, 23 April 2003.
120 New Straits Times, 16 August 2003.
studies in Pakistan were arrested under the ISA for allegedly having been trained as "future leaders" of the JI. Many of those suspected "terrorists", especially the members of KMM, were also associated with PAS, which had hardened its stance on the Islamic state issue after the 1999 general election. It was in the wake of this chain of events and coincidences that the GMI faced difficulties in drawing significant non-Malay/non-Muslim opposition to the ISA for its seemingly "legitimate" role in curbing Muslim militancy and the emergence of an Islamic state. The non-Muslims' fear was perhaps best encapsulated by the DAP Life Advisor Chen Man Hin's remark explaining the party leaders' feeling about the Islamic state issue, leading to the party's break up from PAS and the BA in September 2001:

"The Islamic state issue is something very serious and not just far-off thing. They (the non-Muslims) feel the heat of Islamic fanaticism, including the visions of Taliban, Iran and Iraq".

Though ethnic relations remained harmonious, with the exception of limited Malay-Indian clashes in Kampung Medan, a suburb near Kuala Lumpur in March 2001, ethnic issues continued to linger in the mainstream of Malaysian politics, giving a basis for the government to justify the maintenance of ISA as a means to curb ethnic tension. These included a row over Suqiu's appeals which came on the heels of UMNO Youth demonstration in front of the Selangor Chinese Assembly Hall in August 2000, demanding apology from Chinese organizations which endorsed the 1999 election appeals (Suqiu) for questioning the Malay special rights

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121 SUARAM (2004: 32). The students were first detained by the Pakistani authorities in September 2003 for their alleged involvement in militant activities (Bernama, 21 September 2003).
122 Interview with Chang Lih Kang, GMI Secretary, 18 March 2005, Petaling Jaya.
123 See Chen Man Hin's remarks on the DAP break-up with the BA in September 2001, quoted in the World Socialist Web Site News, 1 October 2001, at http://www.ws ws.org/articles/2001/oct2001/mala-001.shtml (Accessed on 28 May 2007). It is to be noted however that DAP's break-up with PAS in the BA was the culmination of other issues concerning PAS's stand on the Islamic state which occurred before the September 11 attack on the United States. The attack, as well as the non-Muslims' perceived fear of Muslim militancy and its version of Islamic state, in one way or other, served as a catalyst for the break-up.
and privileges. To add insult to injury, Dr. Mahathir in his *Merdeka Day* speech on 30 August 2000 condemned the "Chinese extremists" by equating them with the Islamic deviationists and the communists who "wanted to totally abolish the special status of the Malays in Malaysia". The prime minister's remark enraged the anti-establishment sections within the Chinese community who came into the open to criticize him for his racial slant. At the same time, the Chinese community was also alarmed by the government's proposal to implement the Vision School project, which would house Chinese and Tamil vernacular schools and the Malay-medium national schools on the same premises. The project's main objective was to promote national unity through friendly interaction among students of different races. The Chinese education movement Dong Jiao Zong (DJZ) however rejected the proposal, fearing that the setting up of coordinating committees comprising representatives of the three school streams to assume management of the schools would affect the roles and functions of the Board of Directors of the Chinese vernacular schools, and eventually hamper mother-tongue education and the promotion of Chinese culture.

In a related development, the DJZ, as well as some Malay educationists and opposition politicians, were also opposed to the government's policy on the use of English language as the medium of instruction in teaching Mathematics and Science in schools. The policy, which was introduced in mid 2002, aimed at improving the students' mastery of English especially in the fields of science and technology. The DJZ's opposition to the policy was primarily based on its fear that it would hamper

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124 Bernama, 18 August 2000. In the 1999 general election about 1800 Chinese organizations endorsed an election appeal (suqiu) which contained, among others, demands for democracy, human rights, equitable distribution of wealth, curb on corruption, review of privatization policy, liberal education policy, multiculturalism, modernization of Chinese new villages, protection of women's rights, restoration of confidence in the police force, media independence, better social services, better public housing scheme, protection of environment, indigenous people's right to native customary land and respect for the rights of workers. Under the demand for equitable economic policy, the election appeal pressed for the abolition of "quota system based on "race" and replace it with a means-tested sliding scale". This demand was viewed by the Malay critics as an attempt to question Malay privileges. For a full list of the appeal, See Kua (2005: 187-195).

125 AsiaWeek, 15 September 2000.

126 See statement by Dong Jiao Chief Executive Officer, Bock Tai Hee, quoted in *Malaysiakini*, 15 November 2000. Dong Jiao Zong, which consisted of the United Chinese School Committees' Association of Malaysia (Dong Jiao) and the United Chinese School Teachers' Association of Malaysia (Jiao Zong), was among the initiators of the Suqiu's appeals.
mother-tongue education, while the Malay educationists were concerned that the policy would not only erode the role of Malay as a modern language, but also pose difficulties for Malay students, especially those with poor mastery of English, to comprehend the two difficult subjects.\textsuperscript{127} Though the organized articulation of ethnic interests in relation to these issues remained contained, in an attempt to silence the critics of the government, Deputy Home Minister, Dato' Zainal Abidin Zin, warned that the government would use the ISA as a last resort to quell the education “extremists” from aggravating racial tensions.\textsuperscript{128}

In a nutshell, it seemed that the government had found justification in the continuing articulation of competing ethnic interests, as well as in the fight against terrorism, to maintain the existence of the ISA as a means to curb racial tension and the threat of, whether perceived or real, Muslim militancy. Though the articulation of liberal legal meanings, especially among the reformist Malays, the anti-establishment sections within the non-Malay communities and the human rights groups, helped civil society actors forge a multiracial and cross-sectional coalition against the ISA, their ability to mobilize mass multiracial support to the cause was seriously limited by the society’s continued polarization along ethnic and religious lines, as well as the government’s resolve to use repression to curb any move toward that goal.

\textit{Case 2: The Police and the “Normal” Criminal Justice System}

At the height of Reformasi, the Malaysian police came into the limelight, but for the wrong reason. Its harsh actions against the demonstrators, its unnecessarily violent raid on Anwar’s house, the then Inspector-General of Police Tan Sri Rahim Noor’s assault on Anwar - while he was in police custody - and the questionable ways by which police interrogators “turned over” ISA detainees raised serious questions about the integrity and accountability of the police force when it came to handling “political offenders”.

\textsuperscript{127} See statement by Malaysian Linguistic Society President Dr. Awang Sariyan quoted in Bernama, 14 May 2002.
\textsuperscript{128} Malaysiakini, 12 August 2002.
The handling of ordinary criminal suspects seemed to be even worse and came suddenly to public attention on successive days in October 1998 when police killed eleven people suspected of crimes in separate incidents in different parts of the country. On 2 October, police shot dead three men and two women suspected of kidnapping the 11-year-old son of former Selangor Menteri Besar Tan Sri Muhammad Muhammad Taib. The next day in a separate incident the police shot dead six men in Tumpat, Kelantan, who were believed to be involved in armed robberies, firearms smuggling and drug trafficking. But these were not the only cases. In May 1999, the then Deputy Home Minister, Datuk Seri Abdul Kadir Sheikh Fadzir, revealed in Parliament that over the previous ten years, a total of 655 people had been shot dead by the police. Between 2000 and 2004, a total of 127 cases of deaths caused by police shooting were reported (see Table 6.2). Some, however, had been accidental victims. For example, a bank teller had been inadvertently killed by police during an armed robbery at the Bank Simpanan Nasional's Kepong branch in January 1999 and a young doctor was shot dead in an open area near Bandar Tasik Selatan light rail transit station in Kuala Lumpur in September 1999. These shootings raised concerns about the way the police used their fire-power, which resulted in the deaths of innocent civilians and suspected criminals before they were proven guilty by the courts. And, in some cases, the offence that the suspects allegedly committed did not warrant death sentences.

Deaths at the hands of the police occurred in other ways as well. The Deputy Home Minister, Dato' Chor Chee Heung, revealed to Parliament on October 14 2002 that six people had died in police custody in 2000, ten in 2001 and 18 in the first nine months of 2002. Five years later in April 2007 the government provided revised figures - seven deaths in 2000, 16 in 2001, 15 in 2003 and 19 in 2004 but did not provide equivalent statistics for more recent years. In the meantime, several high-profile cases of deaths in police custody came to public notice, raising further doubts about the police's handling of ordinary suspected criminals. For example, three
Indian youths died in July and August 2002, while they were in police custody. The family members of Tharmarajen, 19 and Ragubathy, 24, claimed that the two youths died under "mysterious circumstances", while they were detained at the Putrajaya police station in July 2002. Another Indian detainee, Vivashanu, 24, was claimed to have been beaten by the police before his body was dumped into the Klang River.134 In May 2005, the decomposed body of another Indian youth, Francis Udayappan, 24, was recovered from the Klang River, after he allegedly "escaped" from the Brickfields police lock-up more than a month earlier. Udayappan's mother, G Sara Lily, alleged that her son was beaten to death by the police before his body was thrown into the river.135

Malaysian NGOs and the Bar Council reacted vociferously to episodes of police violence by calling for inquests to be held into the incidents of custodial death and police shootings, and for a sweeping legal change in order to hold the police more accountable for their actions. These were not the first protests, however, as similar demands had been made by a group of 61 NGOs in October 1998. The group, calling itself Shot-Dead Issue Ad-Hoc Committee, demanded, inter alia, that the police stop all actions that were against the law and the constitution; that the government draft laws whereby complaints against the police were investigated by an independent body, not by members of the police force; and that the government ratify international treaties on human rights.136 The Malaysian Bar Council added its voice when its President, Dr. Cyrus Das, urged the Attorney-General to hold a public inquiry into the police shootings, saying that "the inquiry will go a long way toward abating public concern over the incidents".137 Three years later at its Annual General Meeting in March 2001, the Bar Council reiterated its concern about the increasing incidents of police shootings by passing a resolution demanding an inquest over the issue.138 In a memorandum prepared by the Kuala Lumpur Bar Committee, the legal body also called for a complete overhaul of the criminal justice system in Malaysia to overcome the many aspects, which the Bar claimed were

134 Malaysiakini, 22 August 2002.
136 The Sun, 15 October 1998.

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“contrary to the expectations and values of a civilized society”. These included cleaning-up of custodial violence and abuse in detention; elimination of the culture of intimidation and fear; stricter enforcement of procedures to investigate all police shootings; conducting remand hearings in public, not in chambers; and facilitating the detainees’ access to counsel.

Another group calling for a better criminal justice system was the Police Watch and Human Rights Committee of the unregistered Malaysian Human Reformation Party (Parti Reformasi Insan Malaysia, PRIM), a splinter group of keADILan. This group consisted predominantly of Malaysian Indians pressing for the review of the Police Act, the Penal Code and the Criminal Procedure Code to curb police brutality. The group, formed in 1999, provided legal service, often on pro bono basis, to the victims of police brutality and their family members. Their lawyers handled cases of death in police custody and unlawful shootings by the police. A report compiled by the group in 2003 revealed that there were on average 2.2 people being killed or dying in police lock-ups or detention centers every month. It also reported 122 cases of assaults, beatings and torture of detainees while in police custody, indicating the extent of police heavy-handedness in dealing with “normal” suspected criminals. Apart from handling cases of custodial death and police shootings, the committee also called for a comprehensive review of the Penal Code and the Criminal Procedure Code to promote and safeguard the rights of suspected criminals and the public. This included requiring a warrant of arrest to be produced in all cases of police arrest, except when an officer directly witnesses the commission of an offence or arrives at the scene immediately afterward; reduction in the maximum remand period from 15 days to three days for offences punishable with 14 years imprisonment or less; prohibition of “serial remand”; the police to apply the

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140 The Sun, 7 March 2001.
143 The practice by which a suspect is transferred from one jurisdiction to another to enable the police to obtain fresh remand order after the existing one expires.
principle of “investigate first and arrest later”, rather than “arrest first and investigate later”; remand proceedings to be conducted in public; elimination of malicious prosecution by the police prosecutors; severe punishment for unlawfully causing death to a suspected criminal; and the Attorney-General to commence a mandatory inquest within two weeks of any incidents of unlawful killings by the police.144

The group’s struggle landed its leader P. Uthayakumar, also a lawyer, in deep trouble in May 2004. Uthayakumar claimed that a group of men, whom he believed were acting under the instruction of police top brass, assaulted him on his way home from work.145 Uthayakumar had been representing the families of several detainees who died while in police custody in a number of inquests, and aggressively urging the police to acknowledge responsibility for the deaths. Other allegations of police abuse like inflicting physical and mental torture on suspected criminals continued to gain publicity, especially in the alternative online news-sources like Malaysiakini.146

The mainstream media too aired the concerns of the public as well as NGOs’ about such incidents, giving a further boost to the calls for reform in the police force and the entire criminal justice system.147 The New Straits Times even published in its Saturday Forum an article authored by a prominent senior lawyer and the then President of National Human Rights Society (HAKAM), Raja Aziz Adruce. Referring to an incident of police shooting in 1998, the article commented:

144 See the Police Watch and Human Rights Committee’s memorandum on “Proposed Amendment to the Criminal Procedure Code and the Penal Code” dated 19 August 2004.

145 Malaysiakini, 11 May 2004. In January 2003, Uthayakumar, who was also the Secretary-General of the unregistered PRIM, was charged in the Sepang magistrate’s court for criminally intimidating a police officer. However, in May 2003, High Court Judge Dato’ Suriyadi Halim Omar granted him a discharge without amounting to acquittal. Following the incident in May 2004, Uthayakumar sought asylum in the United Kingdom. He however returned to Malaysia in mid-June, after the government assured him of his safety. The Court of Appeal in April 2005 upheld the High Court’s decision on his discharge. See New Straits Times, 16 June 2004; New Straits Times, 19 April 2005.


"If the trend continues, would members of the general public, unimaginable though it may be, be caught in crossfire one day? More importantly are the criminal elements in Malaysia of such a special breed who must be gunned down in their cars or houses, a scenario which is becoming the norm rather than exception. What about affording them, as suspects, an opportunity to surrender? Even more significantly, what about the basic creed of "innocent until proven guilty"? These are not trivial questions. They all point to possible lapses in the performances, professionalism and overall discipline of the police force which impinge on the collective interest and well-being of our society.\textsuperscript{14}

The government's responses to these public calls were mixed. On a positive note, the government in January 1999 set up an independent commission of inquiry to probe Anwar's assault allegation.\textsuperscript{149} After examining testimonies of several witnesses, who included senior police officers at the scene of the assault, the commission found Rahim Noor responsible for the attack. The former Inspector-General of Police was then hauled to the Kuala Lumpur Sessions court in April 1999 to face charges of attempting to cause grievous hurt.\textsuperscript{150} He was found guilty by the court in March 2000, and sentenced to two months imprisonment and RM 2000 fine.\textsuperscript{151} The police had earlier conducted an internal investigation into the October 1998 incidents of police shootings in Kelantan and Selangor, which had led to public outcry over the manner the police used their fire-power. The police however stopped short of making public the results of its investigation, and hence raised doubts over the credibility and thoroughness of the investigation.\textsuperscript{152} Responding to

\textsuperscript{14} \textit{New Straits Times}, 11 April 1998.
\textsuperscript{149} \textit{Bernama}, 27 January 1999. The commission members were former Chief Judge of Malaya Tan Sri Anuar Zainal Abidin (Head), former Attorney-General Tan Sri Abu Talib Othman, Appeal Court Judge Datuk Mahadev Shankar, and Pantai Medical Centre's consultant orthopedic surgeon Datuk Dr Yeoh Poh Hong.
\textsuperscript{150} \textit{Bernama}, 22 April 1999.
\textsuperscript{151} \textit{Bernama}, 15 Mac 2000.
\textsuperscript{152} The then Acting Inspector-General of Police, Tan Sri Norian Mai, however, defended his men who involved in the incidents, saying that as those who were shot dead were themselves armed with firearms, the action taken by the police "was appropriate and within the provision of existing laws". See \textit{Bernama}, 11 February 1999.
the public outcry over several high-profile cases of custodial death in mid-2002, the Attorney-General's Chambers in September ordered inquests to be held into the deaths of Tharma Rajen, Ragubathy and Vevashanu. An inquest was also held in August 2004 to probe the death of Francis Udayappan. Despite these positive efforts, the number of inquests had been far below the actual number of reported incidents. The available data shows that only six inquests were held out of 80 reported cases of custodial death between 2000 and 2004 (See Table 6.1). The police continued to attribute incidents of death in custody to various diseases (see Table 6.2), while the family members of the deceased reported cases of police withholding and suppressing evidence, and hospitals refusing to release coroner's or medical reports pertaining to such deaths. Official statistics on deaths by police shooting showed significant decline in 2004 (see Table 6.3), but the police maintained, in virtually all cases, that the suspects shot first, and that return fire was necessary.

Table 6.1: Official Statistics on Incidents of Death in Police Custody, 2000-2004

<table>
<thead>
<tr>
<th>Year</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of deaths</td>
<td>7</td>
<td>16</td>
<td>15</td>
<td>23</td>
<td>19</td>
<td>80</td>
</tr>
</tbody>
</table>

Source: Bernama, 23 April 2007

153 Bernama, 2 September 2002.
155 The breakdown of cases of custodial death according to year is as follows: 2000 (7 cases), 2001 (16), 2002 (15), 2003 (23) and 2004 (19). See Prime Minister Datuk Seri Abdullah Ahmad Badawi's written reply to a parliamentary question in April 2007 reported by Bernama, 23 April 2007. For the number of inquests, see New Straits Times, 10 February 2007.
156 SUARAM (2006: 45).
157 SUARAM (2006: 53). The police in 2002 tested the use of electric taser gun, which had the capacity to temporarily immobilize a person, making it easier for the police to arrest criminal suspects without seriously injuring them. The use of taser gun was however limited, and not suitable in a situation where the suspects were armed (New Straits Times, 5 July 2002).

<table>
<thead>
<tr>
<th>Cause of Death</th>
<th>Death in Prison</th>
<th>Death in Lock-up</th>
</tr>
</thead>
<tbody>
<tr>
<td>HIV/AIDS</td>
<td>523</td>
<td>31</td>
</tr>
<tr>
<td>Septicaemia</td>
<td>391</td>
<td>-</td>
</tr>
<tr>
<td>Pulmonary Tuberculosis</td>
<td>196</td>
<td>-</td>
</tr>
<tr>
<td>Pneumonia</td>
<td>111</td>
<td>-</td>
</tr>
<tr>
<td>Meningocuaphacitis</td>
<td>9</td>
<td>-</td>
</tr>
<tr>
<td>Heart Disease</td>
<td>32</td>
<td>3</td>
</tr>
<tr>
<td>High Blood Pressure</td>
<td>9</td>
<td>-</td>
</tr>
<tr>
<td>Hepatitis</td>
<td>8</td>
<td>-</td>
</tr>
<tr>
<td>Diabetes</td>
<td>6</td>
<td>-</td>
</tr>
<tr>
<td>Breathing Difficulties</td>
<td>27</td>
<td>-</td>
</tr>
<tr>
<td>Asthma</td>
<td>-</td>
<td>8</td>
</tr>
<tr>
<td>Other Diseases</td>
<td>271</td>
<td>60</td>
</tr>
<tr>
<td>Suicide</td>
<td>-</td>
<td>33</td>
</tr>
<tr>
<td>Fighting Among Detainees</td>
<td>-</td>
<td>5</td>
</tr>
<tr>
<td>Bleeding of Brain</td>
<td>-</td>
<td>3</td>
</tr>
<tr>
<td>Fleeing from Custody</td>
<td>-</td>
<td>6</td>
</tr>
<tr>
<td>Slipped in the Lock-up</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1,583</strong></td>
<td><strong>150</strong></td>
</tr>
</tbody>
</table>


Table 6.3: Official Statistics on Deaths by Police Shooting, 2000-2004

<table>
<thead>
<tr>
<th>Year</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of Deaths</td>
<td>27</td>
<td>14</td>
<td>43</td>
<td>29</td>
<td>12</td>
<td>127</td>
</tr>
</tbody>
</table>

In the midst of growing public concerns over the high incidence of crime, police abuse and perception of corruption in the police force, the government in February 2004 set up the Royal Commission to Enhance the Management and Operations of the Royal Malaysian Police (Police Royal Commission). Headed by former Chief Justice, Tun Mohamed Dzaiddin Abdullah, the commission aimed to find ways to modernize the police force, improve its service and efficiency, eliminate corruption and police brutality, and restore public confidence in the police.\footnote{SUARAM (2006: 46). Other commissioners were Tun Mohammad Hanif Omar (Deputy Chairman/former IGP), Tun Salleh Abbas (former Lord President), Tan Sri Azizan Zainal Abidin (Chairman of Petronas), Tan Sri Lee Lam Thye (former Member of Parliament/Vice-Chairman of Malaysian Crime Prevention Foundation), Tan Sri Zaki Tun Azmi (prominent lawyer), Tunku Abdul Aziz Ibrahim (President of Transparency International, Malaysian Chapter), Datuk Seri Lim Ah Lek (former MCA Deputy President), Datin Paduka Zaleha Zahari (High Court Judge), Dato' Micheal Yeoh (CEO, Asian Strategy and Leadership Institute), Tan Sri Abdul Kadir Jasin (former New Straits Times Group Editor), Dato' Kamilla Ibrahim (President of Malaysian Muslim Women Consultative Council), Khutubul Zaman Bukhari (President of Malaysian Bar Council), Dr. Denison Jayasooria (Executive Director of Social Strategic Foundation) and Ivy Josiah (Executive Director of Women's Aid Organization)\}. After receiving more than 1200 responses and suggestions through letters, emails and public hearings, the commission released its 600-page report in May 2005. Based on the inputs, the commission made 125 proposals to enhance the performance and management of the police force.\footnote{New Straits Times, 17 May 2005.} Among others, it proposed the setting up of a Code of Practice for arrests and detention to ensure compliance with the provisions in the Criminal Procedure Code (CPC).\footnote{The proposed code included a 24-hour camera surveillance at all police stations; access to detention cells be made only through a custody officer; all cells must have adequate ventilation and lighting; and a detainee should be informed of his alleged offence and of his right to counsel, right to communicate with his family and right to bail (Bernama, 16 May 2005).} Citing a custodial death case in 2003, the commission rapped the police and magistrate for refusing the request by the detainee’s family to have a second independent post-mortem.\footnote{See the case of Ho Kooi Sang v University of Malaya Medical Centre [2004] 2 MLJ 516. See also news reports in Bernama, 16 May 2005 and New Straits Times, 21 August 2003.} The commission also noted with concern the trend by the police in classifying the deaths in police custody as “accidental deaths”, and hence no post-mortem or inquest being held.\footnote{Bernama, 16 May 2005.} The commission suggested that all cases of death in custody be reported to a magistrate within one week of the incident, and an inquest be held within a
Following complaints that detainees were beaten up by the police when they were in remand to make them confess to the crime that they allegedly committed, the commission recommended that all statements taken from the suspects to be made inadmissible in court, except the one made before a magistrate under section 115 of the Criminal Procedure Code.

On the issue of corruption, the commission made a shocking revelation about "common knowledge" within the police force that a senior officer made an asset declaration amounting to RM 34 million, and yet no action was taken against him. Calling for a holistic approach to tackle corruption, the commission proposed the setting up of anti-corruption committees at the federal, contingent and district police levels; regular job rotations and limitation of tenure in areas of policing vulnerable to corruption; amendments to the Prevention of Corruption Act 1997 and the Public Officers (Conduct and Discipline) Regulations 1993 to facilitate more effective action against alleged corrupt practices; and the setting up of the Independent Police Complaints and Misconduct Commission (IPCMC). The commission also recommended amendment to section 107(1) of the CPC (to allow any police officer on duty, whether in or outside the police station, to accept any report made by any person), section 108A of the CPC (to ensure certified documents be made available to the complainants seven days after they have lodged their reports), section 27 of the Police Act 1967 (to expedite approval of permits to hold gatherings), section 73 of the ISA (to allow detainee's access to a magistrate within 24 hours of arrest and decrease the initial period of detention from 60 to 30 days), section 3 of the Dangerous Drugs (Special Preventive Measures) Act 1985 (to limit the maximum period of detention to only 30 days) and section 117 of the CPC (to reduce the period of remand from 14 to seven days, and a requirement to see a magistrate for every 48 hours). The Restricted Residence Act 1933 and the Emergency (Public Order and Prevention of Crime) Ordinance 1969, which allow preventive detention of suspected criminals in specified areas and two years detention without trial respectively, were

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163 *New Straits Times*, 3 August 2005.
164 *Bernama*, 16 May 2005. This requires the repeal of section 113 of the Penal Code, which currently renders such statements admissible in court.
165 *New Straits Times*, 17 May 2005.
166 *Bernama*, 16 May 2005.
recommended for repeal. However, against the wishes of the ISA critics, the commission did not recommend the repeal of the law.

Meanwhile, efforts were also underway to amend the Penal Code and the Criminal Procedure Code to cope with the rising number of violent crimes against women. Between 1999 and 2003, there were several high-profile rape-cum-murder cases. In May 1999, a schoolgirl, Melissa Audrey, 17, was raped and murdered while she was on her way to her school in Jalan Cenderasari, Kuala Lumpur, a stone throw away from the Federal Police Headquarters Bukit Aman.167 In October 2000, a United Kingdom-graduate computer engineer, Nor Suzaily, 24, was raped and murdered by the driver of the bus she was traveling in. Her body was found abandoned on a construction site in Klang.168 In June 2003, an information technology executive, Canny Ong, was abducted by a man while she was entering her car, parked at a shopping complex in Bangsar. She was later raped and her body was set ablaze in an attempt to eliminate evidence.169 Enraged by these horrific cases of violence against women, the All Women’s Action Society of Malaysia (AWAM) in August 2003 launched a nation wide “Citizens Against Rape” campaign, urging the government and the private sector to beef up efforts to increase security in public places as a means to protect women from violence.170 In the meantime, there were also concerns among the public about the incidents of violent snatch thefts, which in most cases caused serious injury to the victims, and even death. It was amidst this growing public concerns that the Parliament in July 2004 set up a parliamentary select committee to receive feedback from the NGOs and public on the proposed amendments to the Penal Code and Criminal Procedure Code. Chaired by the Minister in the Prime Minister’s Department, Datuk Radzi Sheikh Ahmad, the committee held nationwide meet-the-people sessions to receive suggestions and memorandums on the proposed amendments, which were mainly about imposing harsher punishments for crimes against women and snatch theft, and ensuring

168 *Bernama*, 16 October 2000.
greater police accountability. More specifically, the suggestions, which in some instances overlapped with those of the Police Royal Commission, included harsher punishment for convicted rapists (30 years jail and whipping, compared to the existing 20 years plus whipping); wider definition of domestic violence; the police to provide status reports on investigations within two weeks of receiving requests from the public; mandatory inquests within two weeks of any cases of death in custody; repeal of section 113 of the CPC (admissibility of suspect's cautioned statement in court); legal action not only against mothers, but also fathers of abandoned babies. But there were also concerns about possible abuse of human rights with the proposed amendment to the CPC, which would give wider powers to the police to act against terrorist threats.

After two years, and input from 67 organizations and 35 individuals, the Penal Code (Amendment) Bill 2006 and the Criminal Procedure Code (Amendment) Bill 2006 were finally tabled in Parliament in July 2006. The amendments incorporated some of the views given by the public and the NGOs, as well as those of the Police Royal Commission. These included a harsher penalty for snatch theft, with a maximum of 14 years imprisonment, compared to seven years for normal theft (Section 390e of the Penal Code); a person in authority who uses his position to have sexual relations with a woman under his subordination will be considered as committing rape (Section 375f of PC); a five-year jail term for a man who causes hurt to his wife, with a view of having sex with the latter (new Section 375A of PC); and a minimum of 15 years jail sentence and a maximum of 30 years for committing aggravated rape (Section 376 of PC). In an attempt to enhance the administration of

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171 Other members of the committee were Barisan Nasional Member of Parliament for Gelang Patah, Tan Ah Heng, Teresa Kok (DAP-Seputeh), Datuk Wan Junaidi Tuanku Jaafar (BN-Santubong), Devasamy a/I S. Krishnasamy (BN-Cameron Highlands), Donald Peter Mofuntin (BN- Penampang) and Che Min Che Ahmad (BN-Pasir Puteh).

172 In connection with the proposal to repeal section 113 of CPC, committee Chairman Datuk Radzi Sheikh Ahmad was reported to have said, "Let the police go and do their own work. When we say 'No more 113', the police will have no more choice. They will have to go and do the investigation properly - they can't just have a shortcut. They have DNA and forensics now. They can do all sorts of things. They don't need to depend on confessions or cautioned statements. Nowadays, it is taken for granted that when a suspect is arrested, he will be tortured in order to obtain a confession." Earlier, the Attorney-General issued a directive to all Deputy Public Prosecutors not to use cautioned statements and confessions in criminal trials. See New Straits Times, 7 September 2005.

criminal justice, amendments to the Criminal Procedure Code incorporated a number of important recommendations of the Parliamentary Select Committee and those of the Police Royal Commission. These included facilitating the public to lodge reports at any station, mobile or patrol unit, or to any officer on the street (Section 107), the police to give status reports to a complainant not later than two weeks after a request is made (new Section 107A); and the Public Prosecutor, upon receipt of a report by a complainant of the failure on the part of the officer-in-charge to furnish the status report within the specified period, shall cause such report to be furnished to the complainant (new Section 107A). The amended CPC also did away with cautioned statements (Section 113 of CPC) and made prosecution documents available to the defense (Section 51A of CPC) in order to speed up trial and clean up the image of the police. The police must also inform the detainees of the grounds of their arrest as soon as possible, and allow them to place calls to their family, friends and lawyer free of charge, within 24 hours of the arrest (new Section 28A). Remand periods were also determined according to the severity of crime. For “heavy” crimes, the period is not longer than seven days on the first application, followed by a maximum of seven more days on the second (Section 117 of CPC). For other offences, the period cannot be more than four days on the first round and three days on the second (Section 117 of CPC).

The amendments to the Criminal Procedure Code and the Penal Code, even though not all recommendations and suggestions from the public, the NGOs and the Police Royal Commission were incorporated into the amending Acts, shows that the government was more responsive to the calls for legal reform in the non-political “normal” criminal justice system, compared to the more political anti-subversion and other security-related legislations. The Prime Minister, who is also the Internal Security Minister, said in March 2007 that 80 percent of the proposals by the Police Royal Commission had been implemented. But without available details on the

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174 The admissibility of cautioned statements not only led to allegations of police brutality, in getting confessions from criminal suspects, but also delayed trials when a “trial-within-a-trial” had to be conducted to ascertain the admissibility of the confession, especially when the accused person alleged that his confession was made under duress.

175 “Heavy crimes” refers to offences punishable with death or imprisonment of 14 years or more.

specific areas of improvements, it was difficult to determine to what extent the
government and the police had been responsive to the public calls for
comprehensive reform. Despite the government’s assurance that the commission’s
recommendations were being implemented, human rights activists saw no
significant progress in the country’s criminal justice system. In some instances the
police too resisted important reforms proposed by the commission, including the
setting up the Independent Police Commission on Misconduct and Complaints
(IPCMC). There were also concerns that the issue of custodial death and police
shooting, which caused public cry since 1998, had not been sufficiently dealt with by
the amendments. What is more, as of June 2007, not all the amendments to the CPC
and PC were yet in force. It seems that while the government had been responsive in
taking efforts to reform the “normal” criminal justice system, its actual
implementation leaves much more to be desired.

Case 3: The Judiciary and Anwar’s Release

As the Reformasi campaign grew in strength, some court decisions on matters related
to national security seemed to be sympathetic to the human rights cause. But as
judges interpreted the law “as it is”, and of course they were bound by the rules of
interpretation and the principle of stare decisis, they had very little room for
maneuver beyond the parameters that the law “as it is” demarcates. They could
hardly go beyond the parameters of the statist-purposive legal framework, which
seeks to strike a balance between the need to safeguard individual freedoms and to
maintain national security.

Anwar’s case proved to be different. Since Anwar was prosecuted under a
“normal” criminal law, and not detained under any of the more politically-guided
anti-subversion and security-related legislation, the judges in his trials were not so

177 See statement by Tenaganita Director Irene Fernandez quoted in The Sun, 15 January 2007.
178 See for example High Court Judge Dato’ Hishamuddin Mohd Yunus’ judgment in Abdul Ghani
Hasson v Ketua Polis Negara and Another Application [2001] 2 MLJ 689; High Court Judge Dato’ Suriyadi
Halim Omar’s judgment in Nasharuddin bin Nasir v Kerajaan Malaysia & Ors [2002] 6 MLJ 65; and the
landmark Federal Court’s judgment in Mohamad Ezam Mohd Noor v Ketua Polis Negara [2002] 4 MLJ
449.
confined to the more “political” statist-purposive legal framework in interpreting the state law “as it is”. They could have been more at liberty to make their findings of facts, based on available evidence, adduced and examined according to the rules of “normal” criminal proceedings. In the absence of undue influence and unbound by the more restrictive statist interpretation of the politically-guided anti-subversion and security-related legislation, the judges, in normal circumstances, could have had more leeway to come up with an independent, apolitical decision. But the Anwar trial was not like other “normal” criminal trials. Anwar’s stature as a former Deputy Prime Minister, the political facts surrounding the case, and the political ramifications the trial generated, made his trial more political than any other trials. There were widespread concerns that the trial was politically motivated, and that the trial judges, in both his corruption and sodomy trials, were biased against him. What is more, some of the critics of Anwar’s trial within the legal fraternity alleged that the judges had even breached the “normal” rules of criminal proceedings. In the sodomy trial, the judge not only failed to give the benefit of the doubt to Anwar as an accused - in connection with the star witness Azizan Abu Bakar’s conflicting statements on the dates of the offence, as well as over his admission in court that he had never been sodomized by Anwar – but drew conclusions that would be quite unusual in “normal” criminal proceedings when he went on to say that Azizan was a “wholly reliable, credible and truthful witness.” The general view about the cause of the seemingly biased trial, and as Anwar himself alleged, was because the judiciary, in connection with the trial, having been subjected to the wishes of the political elite.

But there were some positive developments after the March 2004 general election. Abdullah, who succeeded Mahathir as the Prime Minister in October 2003, promised a sweeping political reform, which included fighting graft, improving public delivery system, restoring judicial independence and promoting wider democratic participation. As a grandson of a prominent Islamic scholar and a graduate in Islamic studies himself, Abdullah polished his Islamic credentials by

179 Interview with Dato’ Shaik Daud Mohd. Ismail, former Court of Appeal Judge, 17 November 2006, Bukit Damansara, Kuala Lumpur.

180 See Malaysian Bar Council (2001).
promoting Islam Hadhari (Civilizational Islam), which emphasized the universal values of Islam and its balanced approach to material and spiritual well-being. Abdullah’s pledge of political reform, coupled with his Islamic credentials, added to the feel-good factor in the run-up to the March 2004 General Election. The BN won spectacularly in the election by winning 198 of the 219 parliamentary seats and 453 of the 505 state seats. The ruling coalition formed governments in all states except Kelantan, where it was narrowly defeated by PAS. In a reversal of its lackluster performance in 1999, UMNO emerged victorious this time by winning 109 of the 198 parliamentary seats won by the BN parties, hence confirming its position as the dominant Malay partner in the ruling coalition. On the contrary, the opposition political parties, except the DAP, suffered major setbacks. PAS’s representatives in the Dewan Rakyat dropped from 27 to only seven, with almost all party heavyweights, including its President Abdul Hadi Awang, loosing. The party lost Terengganu to the BN and only managed to retain Kelantan by a two seats majority in the state legislature. keADILan did not fare any better, winning only the Permatang Pauh parliamentary seat with a thin 590 votes majority, after a recount. The DAP, however, slightly improved its performance by winning 12 parliamentary seats, two more than in 1999. The BN’s landslide victory, and more specifically the UMNO’s regained strength, indicated that the Anwar saga and the attendant “Malay revolt”, which had posed a “historic” challenge to UMNO in 1999, was no longer a factor in the election.

Meanwhile, Anwar too was suffering from acute back pain. Serving his jail sentence for the sodomy conviction, Anwar had tried many times to get permission to travel to Germany to undergo medical treatment of his choice there, but was turned down by the government. Languishing in prison, his only chance to overcome his health woes was to get an acquittal for his sodomy conviction and then travel to Germany as a free man.\footnote{\textsuperscript{181} Anwar completed serving his jail sentence for corruption in April 2003.} But this too proved to be very unlikely since he failed in his appeal to the Court of Appeal in April 2003, and the same court in January 2004 rejected his application for a review of the appeal decision. In May 2004, the Federal Court rejected his bail application pending appeal, and until July
2004, the apex court was still withholding its decision on his final appeal. But in August 2004, things took a turn for the better. Sources close to the former Deputy Prime Minister believed that there had been a high-level meeting between Anwar’s and Abdullah’s right-hand men in August, in which the latter indicated that Abdullah would not interfere in the impending Federal Court’s ruling on the appeal. Party insiders secretly passed news that there had also been a meeting between Abdullah and Wan Azizah, purportedly to discuss about Anwar’s medical treatment, where the former gave assurance that he would let the judges to decide on Anwar’s appeal. In the meantime, there were also moves from some groups within the UMNO circle, one of which was closely associated with Daim Zainuddin, to persuade Abdullah to help secure Anwar’s release, or at least, grant permission for him to undergo medical treatment in Germany. But there were also pressures from quarters within UMNO, especially those associated with Dr. Mahathir, to oppose Anwar’s acquittal and release. What is more, rumors of secret meetings between Anwar’s former Political Secretary Mohamad Ezam Mohd Nor and Abdullah’s son-in-law and UMNO Youth Deputy Chief Khairy Jamaluddin, suggested a possible political deal between Anwar and Abdullah, which enraged the remnants of Mahathir’s supporters in UMNO, who were now aligned to the Deputy Prime Minister Datuk Seri Mohd. Najib Tun Razak.

Amidst rumors of pressures and counter pressures on the judges and the government in relation to the impending Federal Court’s decision, the apex court on 2 September 2004, by a 2-1 majority decision, acquitted Anwar and set him free. Delivering the majority decision, Federal Court Judge Dato’ Abdul Hamid Mohamad, who presided over the panel of three judges, with Judge of the Court of Appeal Dato’ Tengku Baharudin Shah concurring and Federal Court Judge Dato’ Rahmah Hussain dissenting, said that some parts of Azizan’s evidence - particularly relating to his uncertainties over the exact dates of the commission of the offence - were doubtful, inconsistent and uncorroborated, making it unsafe for the court to

183 Confidential interview, 10 October 2006, Kuala Lumpur.
184 Interview with Anwar Ibrahim, 26 December 2004, Bukit Damansara, Kuala Lumpur.
185 Confidential interview, 10 October 2006, Kuala Lumpur. Both Anwar and Abdullah however denied that there was any “deal” between them.
convict Anwar. But the judge made a perplexing remark at the end of his judgment, saying that based on the appeal record, they were more inclined to believe that the sodomy incident did happen, but the prosecution had failed to prove the alleged offence beyond reasonable doubt. It was not certain as to why the judge made such a statement, but considering the highly political nature of Anwar’s trial, it was not impossible that it reflected a kind of “political compromise”, which Anwar believed was a move to please Dr. Mahathir. However, reminding that his acquittal would have not been possible had Dr. Mahathir remained as the Prime Minister, Anwar praised Abdullah “for allowing the judiciary to decide in accordance with the law”. Dr. Mahathir on the other hand noted that the Federal Court’s decision was not unanimous, and was still convinced that Anwar was guilty. The judgment was of course lauded by Anwar’s supporters and the legal fraternity. Some credited the judges for their courage in correcting the “wrong judgments” made by their colleagues, while others hailed Abdullah as a “reformist” Prime Minister for allowing the judiciary to regain its independence.

It seemed that Abdullah had nothing much to lose from Anwar’s acquittal, and nothing much to gain either. Anwar’s corruption and sodomy verdicts and his subsequent incarceration were more of a political ramification stemming from the irreconcilable conflict between Anwar and Dr. Mahathir, a “legacy” that Abdullah had no qualms about abandoning. Judging from the public responses, the Federal Court’s verdict to acquit Anwar augured well for Abdullah’s promise to restore

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188 Anwar said that on the evening before the Federal Court’s judgment was delivered, he expected to lose. He heard that the judges were divided 2 to 1 in his favour, but were under great pressure, from “certain quarters” within UMNO, not to acquit him. He was quite surprised that the judges “remained firm”, but the last “compromise” was to insert a paragraph in the majority judgment saying that though there was insufficient evidence to convict him, the judges might personally believe that the offence did take place. This, according to Anwar, was certain to please Dr. Mahathir. Interview with Anwar Ibrahim, 26 December 2004, Bukit Damansara, Kuala Lumpur.
191 Anwar’s lead counsel, Christopher Fernando also believed that the judges had made their courageous decision based on the merit of the case. Anwar’s solicitor, Saiful Izham Ramli, also concurred with Fernando. Informal discussion with Christopher Fernando and Saiful Izham, 24 June 2004, Penang. See also statement by ALIRAN President, P Ramakrishnan, in Inter Press Service, 2 September 2004.
192 Inter Press Service, 2 September 2004.
judicial independence, and hence boosted his image as a "reformist" Prime Minister. And as Abdullah himself initially appeared hesitant to pressure the judges not to acquit Anwar, it could be possible that the judges had more leeway to decide the case according to the rules of "normal" criminal proceedings. As Anwar himself suggested, his release could have not been made possible if Dr. Mahathir was still in power, indicating that in the absence of strong undue political pressures from the top, the judges could come up with quite a reasonable decision. But this too suggests that the proliferation of new "liberal" legal meanings did not cause much change to the judiciary. Judicial independence, especially in relation to politically highly sensitive cases, remained an issue around which the judges needed to tread very carefully.

Conclusion

The Reformasi movement's articulation of a non-communal vision of Malaysian politics, and its contribution to shifting the discourse of rights from communal towards individual, helped promote a more liberal and human rights-based understanding of the law, moving away from its illiberal statist perspective. Anwar's protracted trial, and the questionable ways in which the courts tried the case, provided avenues for opposition politicians and civil society actors to inflict moral injury on the country's political and legal system, putting its credibility in peril. But as the articulation of competing communal interests among different communal groups remained significant, there was a serious limit on the articulation of the reformist liberal vision of the law more widely within the society, so as to enable the reformist sections within the society to mobilize sufficient mass multiracial support to press the government for a significant legal reform in a more liberal direction. The ever-present existence of possible racial tension resulting from articulation of

193 Abdullah’s “reformist” image was soon lost into oblivion when he made only slow progress in fighting corruption, widening democratic space and improving public delivery system, which were supposed to be the key areas of his reform agenda.

194 But according to Anwar, Abdullah himself was under great pressures from some quarters in UMNO not to let the judges acquit him. Interview with Anwar Ibrahim, 26 December 2004, Bukit Damansara, Kuala Lumpur.
competing communal interests, and since the September 11 attack on the United States, the threat of Islamic militancy, provided justification for the government to perpetuate the existence and use of repressive laws as a means to maintain racial harmony and national security. Except in politically less sensitive legal areas, a shift toward liberal legal reform had not been in sight. The judiciary too, though in a couple of cases had shown its sympathy to the human rights cause, had not been making significant progress in adopting a less restrained approach in interpreting politically-guided anti-subversion and security-related legislation, leaving the statist-purposive legal meanings still dominant in relation to this legislation.
Chapter VII

The Pre-eminence of Constitutional-Contract Politics

By the early 2000s, a proliferation of competing legal meanings had produced both a modern liberal interpretation of universal human rights principles and values and the pre-eminence of communally-based constitutional-contract politics based more on religion than ethnicity. This chapter is concerned with the still unresolved struggle between the two approaches. On the one hand, an emerging new liberal human rights struggle in Malaysia revolved mainly around resistance to religious laws and practices which sit uneasily with a modern liberal interpretation of universal human rights principles and values. On the other, the Islamic mainstream formed coalitions to defend the Islamic faith as well as its communitarian values and "special" constitutional position from the liberal challenge. Though the new human rights struggle may not be altogether new, its predominance in the discourse of law and human rights in Malaysia is a recent development. As the proliferation of liberal legal meanings subsequent to the 1998 Reformasi helped civil society coalitions to oppose repressive laws on the basis that they militate against the principles of individual rights and freedoms, the new human rights struggle attempts to re-define the country’s Islamic religious laws on the same basis. One important aspect of this struggle is a plethora of civil society initiatives against so-called "religious authoritarianism" — a complex constellation of official and un-official Islamic religious laws embedded in state laws and edicts of the ulama' (religious scholars) respectively, the former vigilantly enforced by state religious bureaucrats. Human rights activists criticized enforcement of those laws, claiming that they impinge on individual rights and liberties as understood in the libertarian fashion. Contrary to the new human rights struggle, the Islamic mainstream sought to re-affirm the
special constitutional position of Islam, giving a new lease of life to the
communally-based constitutional-contract politics. It is in this context that the
proliferation of liberal legal meanings contributed to the pre-eminence of
communal politics in Malaysia in which religion rather than ethnicity becomes
its main marker. The persistence of communally-based constitutional-contract
politics and the potential destabilizing forces it may unleash seems to restore a
semblance of legitimacy, however minimal, to the use of repressive laws as a
means of keeping any possible rupture in ethno-religious relations in check.

Religious Freedom versus Religious Authoritarianism:
A Conflict of Legal Meanings

Since the mid 1990s, the more liberal sections of Muslim society, such as the
Muslim intellectuals in Sisters in Islam (SIS), an organization consisting of
professional Muslim women committed to promoting the rights of women using
the more liberal interpretation in Islam, have been critical of the implementation
of Islamic criminal and family laws, which they viewed as not in conformity with
the principles of human rights and discriminatory against women.1 By the early
2000s, the liberal Muslims formed overlapping coalitions with human rights
NGOs, non-Muslim religious groups and concerned individuals in opposing the
Islamic laws contained in the various State Enactments and Acts of Parliament.2
In support of promoting personal freedoms, understood in its essentially western
liberal notion, and guided by common humanitarian rather than ethno-religious

1 See for example SIS's Memorandum on the Syariah Criminal Code (II) 1993 State of Kelantan
(25 December 1993), Memorandum on the Provisions in the Syariah Criminal Offences Act and
Fundamental Liberties (8 August 1997), Memorandum on the Reform of the Islamic Family Laws
on Polygamy (11 December 1996), Memorandum on the Equal Right to Guardianship for Muslim
Women (18 December 1998). The full texts of the memorandums are available at
2 These included the various states' Syariah Criminal Offences Enactments and, in regard to the
Federal Territories, the Syariah Criminal Offences (Federal Territories) Act.
communitarian values, these groups advocated the repeal or review of Islamic laws as well as municipal by-laws, which infringe the principles of human rights and equality understood in its exclusively western liberal tradition. These include prohibition of gambling, drinking liquor, close proximity between unmarried couples and other “indecent behaviors” ranging from “indecent” dressing to participating in beauty contests and patronizing night clubs. These laws have their roots in ethno-religious communitarian doctrine – and are based on Islamic religious texts as interpreted by traditional Islamic religious scholars, often according to the Shafi‘e school of thought, the religious denomination to which the majority of Malays belong.

The view which rejects the primacy of ethno-religious communitarian underpinnings in defining the parameters of what is legally right or wrong, and which prioritizes common humanitarian values in guiding state laws and individual behavior, is indicative of a major shift in the understanding of state law. It not only rejects ordinary illiberal state laws that infringe on fundamental human rights, the legitimacy of which has been increasingly questioned by Reformasi-leaning activists across social, political and religious divisions; but also opposes state religious laws, the legitimacy of which rests upon a “conservative” interpretation of the sacred religious texts. It is in this context that the politics of

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3 An example of alleged infringement of personal freedoms by law applicable to Muslims and non-Muslims alike is section 8(1) of Park (Federal Territory) 1981, which provides that ‘Any person found behaving in a disorderly manner in any park commits an offence.’ On 2 August 2003, an enforcement officer of the Kuala Lumpur City Hall served summons on a young non-Muslim Chinese couple for hugging and kissing in public, and thereby committing an offence under the by-law.

4 The enforcement of these laws, a Malaysian academic and human rights activist, Farish Ahmad Noor, has argued, “is a logical extension of the policing and control of the Malays, which in turn is reflection of the divisive, unstable and – ultimately – self-defeating politics of communitarianism in Malaysia”. As “this (religious) authoritarianism rests on denial of the common humanity that (Muslims) share with others”, Farish argued, such denial “can only be transcended through a politics that is predicated on the ethics of Love”, which is defined as “the recognition of the common humanity people share with the Other,” and as such compels them “to act for the Other and in defence of the Other”. See Farish (2005).

5 The word “conservative” is loosely used to refer to the majority view among the traditional Islamic legal scholars especially in matters related to Islamic criminal laws and transactions. One
"common humanitarian values" -- which militates against the compartmentalisation of the common human race through vigilant enforcement of ethno-religious legal edicts applicable only to Muslims -- collided with the politics of "defenders of the faith" which seeks the maintenance of those ethno-religious legal edicts, as embedded in state law.

There have been fierce contestations within civil society – between the "liberal" camp, which comprises the more liberal Muslim groups such as Sisters in Islam (SIS) as well as most secular human rights NGOs and non-Muslim religious groups on one hand and the "conservative" camp, which consists of mainstream Islamic organizations such as ABIM and JIM and a host of other Islamic organizations, on the other – with both forces vying for moral and political authority to guide people's behavior and influence state policies. At the core of these contestations are different sets of legal meanings which seek to define the parameters of legitimate state law. As Migdal puts it, there exist in society "multiple sets of law including those opposed to the state, others not controlled by the state but not necessarily in opposition to it, and still others complementary to state law".\(^6\) That contestation has been marked by opposing coalitions within the civil society – one pushing toward liberal reform and the other pulling towards maintenance of the religious status-quo.

**Religion and Constitutional-Contract Politics**

By the mid 2000s, communal politics once again came to prominence with religion as its important marker, as defenders of the religious status quo rely

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\(^3\) Migdal (1998: 24)

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\(^5\) For example, the view that apostasy is a crime in Islam. In a recent nationwide opinion survey conducted by the Merdeka Centre for Opinion Research, 98 percent of Malaysian Muslims concur with such a ‘conservative’ view. 57 percent of respondents support the implementation of *hudud* (Islamic criminal law), while 73 percent think that Malaysia is an Islamic state, reflecting their essentially conservative stance (*The Sun*, 5 September 2006).
heavily on the communally-based constitutional contract, which they claim gives a special position to Islam to justify their arguments. The promoters of religious freedom on the other hand defy the notion of an Islam-favored constitutional contract and emphasize the secular nature of the 1957 Federal Constitution to press for re-interpretation of the constitutional position on religious freedom along modern, liberal lines. The still unresolved struggle between the two viewpoints can be seen in a number of campaigns and initiatives for religious freedom and the debate that followed.

Anti-Moral Policing Campaign

In early 2005 a multiracial and multi-religious coalition of human rights activists launched a campaign against moral policing by state Islamic and municipal authorities. This initiative was significant in the sense that it offered a different interpretation of basic tenets of Islam and attempted to convince the public that religious interpretations should not be monopolized by a group of conservative ulama', the hitherto authoritative interpreters of religion. Put simply, it attempted to challenge the mainstream-defined Islamic legal meanings by offering alternative interpretations of Islamic legal precepts which are based on the Qur'anic texts and prophetic traditions, but are also infused with modern-liberal perspectives on universal human rights principles and values.

Sisters in Islam (SIS), a strong opponent of moral policing and campaigner for individual liberties, views the religious authorities' zeal in enforcing Islamic moral laws as violating both the Qur'anic spirit of morality and fundamental human rights.7 A statement issued by SIS quoted several Qur'anic verses such as "Do not pry into others' secrets";8 "Do not enter other houses except yours without first asking permission and greeting the occupants [saluting the

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8 Verse 12 in Surah A-Hujrat
inmates]; and also a hadith of the Prophet (p.b.u.h) which means “Do not harm Muslims, and do not revile them, nor pursue their imperfections.” These Qur’anic verses and Hadiths were quoted to support the organization’s claim that moral policing, as practiced by religious authorities in various raids on unmarried couples, night club patrons and gamblers, has no basis in Islam. The statement concluded in liberal style by stating that “the balance between law and morality must be decided by society in a democratic manner and not through legislation driven from above with no public support nor public discussion.” In another joint statement, the anti-moral policing campaigners maintained that the question of “how people dress and where, how and with whom they socialize” should be best left to their personal choices, indicating the group’s sanctification of the individual’s private space in regard to matters of personal freedoms. The use of punitive religious and municipal laws to regulate morality, the opponents of moral policing argued, “results not in a more moral society but a mass of terrified, submissive and hypocritical subjects”.

The Anti-Moral Policing Campaign launched in March 2005 was in protest against the arrests of about 100 Muslim patrons of the Singapore-owned Zouk night club in Kuala Lumpur by the Federal Territories Religious Department (JAWI) enforcement officers during a raid in January 2005. The religious officers claimed that those arrested were dressed indecently or had consumed alcohol. The anti-moral policing campaigners, who called themselves Malaysians Against Moral Policing, also questioned the state’s role in defining the morality of its citizens and the use of punitive religious and municipal laws to curb immorality and indecency. The campaign called for the repeal of provisions in religious and municipal laws that deny citizens their fundamental right to privacy, freedom of

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9 Verse 27 in Surah An-Nur
speech and expression, and those that overlap with the federal penal code; the appointment of a committee to monitor the process of repealing these laws, including representation from women's groups, human rights groups, civil society organizations, progressive religious scholars and constitutional experts; and the strengthening of pluralism through community dialogue on the issue of morals in the society. The campaign was endorsed by about 50 NGOs and more than 200 individuals including prominent government and opposition politicians. The NGOs include Sisters in Islam (SIS), Suara Rakyat Malaysia (SUARAM, Voice of Malaysian People), National Human Rights Society (HAKAM), Aliran Kesedaran Negara (ALIRAN, Movement for National Consciousness), All Women’s Action Society (AWAM), International Movement for a Just World (JUST), Malaysian Youth and Student Democratic Movement (DEMA), Malaysian Trade Union Congress (MTUC), Pusat Komunikasi Masyarakat (KOMAS, Centre for Community Communication) and Universiti Bangsar Utama (UBU). Most of these NGOs had been in the forefront of the 1998 Reformasi movement. Three opposition political parties - the DAP, PKR and the unregistered Parti Sosialis Malaysia (PSM, Malaysian Socialist Party) - also

13 These included Section 29 of the Syariah Criminal Offences (Federal Territories) Act 1997 and Section 31 of the Syariah Criminal Offences (Selangor) Enactment 1995 which makes it an offence for a Muslim who, contrary to Islamic law, acts or behaves in an indecent manner in any public place; Section 9 of the Syariah Criminal Offences (Federal Territories) Act/Section 12c of the Syariah Criminal Offences (Selangor) Enactment which make it an offence for a Muslim to defy the fatwas (religious edicts) of a Mufti. See for example Sisters in Islam’s memorandum on “The Provisions in the Syari’ah Criminal Offences Act and Fundamental Liberties” dated 8 August 1997. The full text of the memorandum is available at http://www.sistersinslam.org.my/memo/080897.htm.


15 Prominent Malay BN politicians who endorsed the campaign include Minister in the Prime Minister’s Department Datuk Seri Mohamad Nazri Aziz, Minister of Youth and Sports Dato’ Azalina Othman Said, Minister of Culture, Arts and Heritage Datuk Seri Dr. Rais Yatim, Member of Parliament for Kota Bharu Dato’ Zaid Ibrahim and Member of Parliament for Gombak Datuk Dr. Rahman Ismail. Others include DAP Members of Parliament Lim Kit Siang, Chong Eng, Fong Po Kuan, Tan Seng Giaw, M Kulasegaran and Teresa Kok. PKR Vice President Sivarasa Rasiah also endorsed the campaign. See the full list of endorsees at http://www.petitionspot.com/petitions/mamp (Accessed on 7 December 2006).
endorsed the campaign. Earlier, a women's group called Joint Action Group Against Violence Against Women (JAG), which consists of Women's Aid Organization (WAO), Women's Development Collective (WDC), Sisters in Islam (SIS), All Women's Action Society (AWAM) and Women's Centre for Change (WCC), also opposed the Zouk raid, citing unprofessional conduct of religious officers against women detainees. As a result of the various protests, none of those arrested were charged in the Syariah court. The Minister in the Prime Minister's Department (the de-facto Islamic Affairs Minister), Dato' Dr. Abdullah Mat Zin, explained in Parliament in April that the decision not to charge them was made due to “lack of evidence which warrants prosecution”. The cabinet too discussed the arrest and ordered a review of religious enforcement powers, including requiring future raids to be carried out only with police approval and in the presence of senior police officers. The Cabinet also ordered the newly formed 4B Youth's “Mat Skadeng Squad” (Snoop Squad), which was set up to spy on Muslim couples, to stop their activities.

In response to the Anti-Moral Policing Campaign, a coalition of mainstream Islamic organizations launched a counter-campaign to defend the enforcement of Islamic moral laws. About 50 Islamic organizations, which included ABIM, JIM, PKPIM, Malaysian Ulama' Association (PUM), Malaysian Chinese Muslim Association (MACMA) and Indian Muslim Youth Movement of Malaysia (GEPIMA) issued a joint statement claiming that the campaign “has

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16 See http://www.petitionspot.com/petitions/mamp for a full list of endorsees.
18 MalaysiaKini, 14 April 2005.
20 The Star, 25 March 2005. Formed in 1965, the 4B Youth is one of Malaysia’s oldest youth organizations. Although its membership is open to all Malaysian citizens above the age of 18, the organization is predominantly Malay-based and closely associated with UMNO. Its current President is UMNO Vice-President and Malacca Chief Minister Datuk Seri Mohd Ali Rustam. Its previous presidents, Dato' Seri Tajol Rosli Ghazali (1991-1994), Dato' Hj. Suhami Kamaruddin (1968-1991) and Mohd Kassim Shah (1965-1968) were all UMNO leaders. The word 4B refers to the organization's motto of Bersatu (to unite), Belajar (to learn), Bekerja (to work) and Berkhidmat (to serve). See the organization's history at http://www.4bmalaysia.com/sejarah4b%20page.htm ( Accessed on 19 June 2007).
caused confusion and ambiguities about the concepts of prevention of sin and the limits of individual freedom in Islam.” Prevention of sin, especially by the government, the organizations maintained, is a manifestation of the principle of hisbah and al-amr bi al-ma’ruf wa al-nahy ‘an al-nunkar (enjoining good and forbidding evil) which are central to the teachings of Islam. The group also maintained that although the weaknesses in the implementation of those laws should be properly addressed by the authorities, by no means should they be made an excuse to justify the repeal of those laws. Sharing the same sentiment was the National Fatwa Council, which consists of state muftis and religious scholars who urged the government in its April meeting to uphold the Islamic concept of “enjoining good and forbidding evil” by enforcing those laws more responsibly.

As the Anti-Moral Policing Campaign was portrayed as a non-partisan initiative aimed at promoting the rights of individuals in choosing their moral life, and thus essentially not a threat to the existing political regime, some Barisan Nasional (BN) politicians also expressed their support for the campaign. UMNO Supreme Council member and Minister in the Prime Minister’s Department Datuk Seri Mohamad Nazri Aziz even described the arrest of over 100 Muslims at the Zouk night club as an action akin to those under Afghanistan’s infamous


22 The Hisbah literally refers to a religious institution under the authority of the state that appoints people to carry out the responsibility of enjoining what is right and forbidding what is wrong. Its purpose is to safeguard the society from deviance, protect the faith, and ensure the welfare of the people in both religious and worldly matters according to the Islamic law.

23 See the Joint Statement on Prevention of Sins.

24 See the Joint Statement on Prevention of Sins.

25 The chairman of the National Fatwa Council, Datuk Dr Ismail Ibrahim, was quoted as saying, “When we elect a government, we give it powers to uphold the moral values of society because the destruction of morals will bring disaster to the country”. He also viewed that the government is the responsible body to issue Islamic decrees (The Straits Times, 16 April 2005).

26 See note 12. [Better to place footnote 12 here]
Taliban rule.\textsuperscript{27} Giving his support to the memorandum seeking the repeal of the ostensibly rights-infringing Syariah and municipal moral laws, he stated that "no one religion should dominate the private lives of Malaysians in general."\textsuperscript{28} In a rare display of solidarity between government and opposition Members of Parliament, the bi-partisan Parliamentary Caucus on Human Rights, with the exception of PAS's representative, endorsed the anti-moral policing memorandum.\textsuperscript{29}

But the endorsement of the campaign by UMNO ministers like Mohamad Nazri, Datuk Seri Dr. Rais Yatim (Minister of Arts, Culture and Heritage) and Dato' Azalina Othman Said (Minister of Youth and Sports), did not represent a consensus within the party. Other UMNO politicians protested against the campaign. UMNO Secretary-General and Minister in the Prime Minister's Department (the \textit{de facto} Law Minister) Dato' Radzi Sheikh Ahmad shot down the campaign and described the demands made by its advocates as "unreasonable".\textsuperscript{30} Echoing the same sentiment was another Minister in the Prime Minister’s Department (the \textit{de facto} Islamic Affairs Minister) Dato' Dr. Abdullah Mat Zin. He claimed that the demands made by the anti-moral policing advocates "would only worsen the situation as it could spiral out of control".\textsuperscript{31} An outspoken UMNO politician and Member of Parliament, Dato' Badruddin Amiruddin, even accused the anti-moral policing campaigners as traitors for attempting to split the Muslim community.\textsuperscript{32} Other party leaders openly

\begin{itemize}
\item \textsuperscript{27} \textit{The Star}, 25 March 2005.
\item \textsuperscript{28} \textit{The Star}, 25 March 2005.
\item \textsuperscript{29} PAS Youth Chief and Member of Parliament Salahuddin Ayub withdrew from the Human Rights Caucus after disagreeing with its decision to support the anti-moral policing campaign (\textit{Malaysiakini}, 8/4/2005)
\item \textsuperscript{30} \textit{The Star}, 25 March 2005.
\item \textsuperscript{31} \textit{Malaysiakini}, 14 April 2005.
\item \textsuperscript{32} \textit{Malaysiakini}, 30 March 2005.
\end{itemize}
supported the actions by the Federal Territories Religious Department (JAWI) officers in conducting the raid on Muslim party goers.\textsuperscript{33}

Beneath the surface of these advocacies and counter-advocacies lies longstanding ideological contest between the Islamists and the secularists who since the 1998/99 Reformasi had participated in a common struggle for political and legal reform. The mainstream Islamic organizations, while reiterating their commitment to democracy, human rights and pluralism, rejected what they viewed as a process of secularization pursued by the anti-moral policing campaigners.\textsuperscript{34} This secularization, they argued, was indicated by the campaigners’ insistence on relegating religion into private space, subjecting observances of religious duties to the whims and fancies of individuals, while rejecting the religious authorities’ role in enforcing religious laws.\textsuperscript{35} Obviously, the campaign was viewed by the mainstream Islamic groups as an attempt to push religion out of the public space in the name of human rights and individual liberties, a process closely associated with secularism, which is anathema to many in the Islamic mainstream in Malaysia. The government, responding to the protests from the Muslim majority, shot down the initiative and promised to retain all laws on morality including the Syariah laws in order to safeguard the morals of Malaysians.\textsuperscript{36}

\textsuperscript{33} Umno Youth religious bureau chairman Shamsul Najmi Shamsuddin for example backed the JAWI raid, saying that it was wrong for Muslims to be in a place that serves liquor or which is involved in gambling (\textit{Malaysiakini}, 23 February 2005).
\textsuperscript{36} See Prime Minister Abdullah Ahmad Badawi’s statement in Utusan Malaysia, 16 April 2005.

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About the same time as the outcry over moral policing by religious authorities, a
group of human rights organizations, a professional organization, a number of
liberal Muslim organizations and non-Muslim religious groups, proposed the
formation of an Interfaith Commission of Malaysia (IFCM), a statutory body that
would have functions and powers similar to that of the Malaysian Human Rights
Commission (SUHAKAM). The initiative to form such an interfaith body was
first conceived in a conference on freedom of religion organized by the Human
Rights Committee of the Bar Council and HAKAM on 10 December 2000. A
multi-faith committee which included mainstream Islamic organizations as
members was then set up to discuss the formation of a multi-faith Inter-Religious
Council (IRC). In August 2001, the Malaysian Consultative Council of
Buddhism, Christianity, Hinduism and Sikhism (MCCBCHS) submitted a
memorandum to the Human Rights Committee of the Bar Council outlining the
main problems in relation to the freedom to profess and practice one's religion

37 The group consists of the following organizations: Malaysian Bar Council, Malaysian
Consultative Council of Buddhism, Christianity, Hinduism and Sikhism (MCCBCHS), Pure Life
Society, Inter-Religious Spiritual and Fellowship (INSAF), Malaysian Interfaith Network, Sisters
in Islam, FORUM IQRA, Spiritual Assembly of Baha'i's of Malaysia, Persekutuan Pertubuhan
Agama Tao Malaysia, Federation of I-Kuan Tao Associations Malaysia, Soka Gakkai Malaysia, Sri
Sathya Sai Central Council, Circles of Life, Theosophical Society, National Human Rights Society
(HAKAM), Suara Rakyat Malaysia (SUARAM), Aliran Kesedaran Negara (ALIRAN), National
Council of Women's Organizations Malaysia (NCWO), Research for Social Advancement
(REFSA). The conference to discuss the formation of IFCM held in February 2005 was funded by
German-based Konrad Adenaur Foundation (KAF).
38 The idea to form an inter-religious council was mooted by Dr. Chandra Muzaffar, President
of the International Movement for a Just World (JUST), in a paper presented at the conference
(Malaysian Bar Council 2000).
39 Such a council has a precedent in the form an inter-religious committee set up under the
purview of the Prime Minister's Department when Tun Hussein Onn was the Prime Minister.
The committee, which comprised representatives of Malaysia's main religions, functioned as an
advisory body to the government and deliberated on inter-religious issues such as building
places of worship and dissemination of religious literature. The committee was disbanded after
faced by members of the non-Muslim communities. The problems stated in the memorandum included the absence of the legal right to revert to his or her former religion after converting to Islam, the stating of Muslim religious identity on identity cards which causes problems for converts out of Islam, the illegality of inter-religious marriage, the difficulties faced by non-Muslim family members to claim the body of Muslim converts upon their death, difficulties in obtaining approval for building of non-Muslim places of worship and the ban on the Malay-language Bible.

The MCCBCHS' memorandum became an issue of much contention when mainstream Islamic organizations in the committee rejected reference to the memorandum as the basis for the formation of the inter-religious council. This resulted in their withdrawal from the committee in mid-2003. Despite strong objections from Islamic groups such as ACCIN and ABIM, as well as the International Movement for Just World (JUST), the committee proceeded to organize a workshop "Toward the Formation of an Inter-Religious Council" on 17 May 2003. The workshop resolved to propose the setting up of a "statutory

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40 See MCCBCHS covering letter dated 22 August 2001 addressed to Mr. Cecil Rajendra, Chairman of the Human Rights Committee of the Bar Council.
41 See MCCBCHS memorandum to the Human Rights Committee of the Bar Council dated 22 August 2001.
42 Obviously, the Islamic groups could not accept the tendency to advocate for the right of Muslims to renounce Islam, which is considered as an intra-religious issue. Interview with Azril Mohamad Amin, ABIM Vice President, 19 August 2005, Kuala Lumpur.
43 ACCIN consists of the following 14 Islamic groups: Malaysian Chinese Muslim Association (MACMA), Indian Muslim Youth Movement of Malaysia (GEPIMA), ABIM Islamic Outreach, Jamaah Islah Malaysia (JIM), Malaysian Ulama' Association (PUM), World Assembly of Muslim Youth (WAMY), National Union of Malaysian Muslim Students’ Associations (PKPIM), SABA Islamic Media, Al-Hidayah, Islamic Information and Services, Al-Hunafa Society, Malaysian Darul Fitrah Society, Research and Information Centre on Islam (RICOI) and Islamic Welfare Society of Malaysia (PERKIM) Youth.
44 Dr. Kamar Oniah, JUST representative in the committee, explained that the Human Rights sub-Committee of the Bar Council, chaired by Cecil Rajendra, dominated the meetings and ignored opinions of others, giving rise to a perception that there had been a prior decision on the matters discussed. She was also strongly dissatisfied with attitudes of the members of the Human Rights sub-committee who were keen to blame Islam for restricting religious freedom, citing apostasy cases in which they, as lawyers, lost. She concluded that this group of lawyers, Muslims and non-Muslims, were not interested in negotiating the formation of an interfaith consultative body, but
body whose primary objective shall be to advance, promote and protect every individual’s freedom of thought, conscience and religion with a view to promote harmonious co-existence (of different religious communities) in Malaysia”.

SIS too boycotted the workshop due to the committee's failure to build common understanding among the faith groups, but later rejoined the initiative.

The committee then proceeded to draft an Interfaith Commission of Malaysia Bill, which was presented for discussion at the National Conference Toward the Formation of the Interfaith Commission of Malaysia in February 2005. The Bill, in concurrence with the points of agreement achieved in the May 2003 workshop, enumerates the main functions of the proposed commission, which, among other things, include to "advance, promote and protect every individual’s freedom of thought, conscience and religion"; "identify values and ethical standards universal to all religions, faiths, beliefs and ways of life with a view to promoting the same"; "identify and recommend ways in which harmonious interfaith co-existence in larger society can be promoted and achieved with a view to (promoting) national harmony and unity"; "receive, address and make recommendations in respect of complaints or grievances brought by persons, bodies or organizations in connection with the individual right to profess and practice his religion or faith of choice"; and "recommend to

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46 Sharifah Zuriah, SIS representative in the committee, said that she boycotted the workshop as its organizers had failed to focus on the importance of creating a basis for common understanding among the faith groups before addressing grievances of some non-Muslim groups. She described the organizer’s insistence on making the MCCBCHS’ memorandum to the Bar Council a benchmark for the formation of IRC, despite objections by some Muslim groups, as a wrong move (Yap 2003).
47 Clause 4(1)(a) of the proposed Interfaith Commission of Malaysia Bill.
48 Clause 4(1)(b).
49 Clause 4(1)(c).
50 Clause 4(1)(d).
the Government with regard to the subscription or accession of treaties and other international instruments in the field of religious harmony";51

The draft Bill itself reflected an attempt to substitute the ethno-religious statist conception of legal meanings in relation to laws which regulate matters of religion with those based on universal principles of human rights and individual liberties. For instance, the draft Bill defines "infringement of religious harmony" as including "any act or omission which has as its effect the nullification or impairment of the recognition, enjoyment or exercise by any person or community of persons of his or their freedom of thought, conscience, religion or belief as prescribed by international norms" (emphasis is mine).52 The draft Bill's reference to universal human rights principles as prescribed by international norms as a basis for religious harmony was a clear departure from the ethno-religious statist legal meanings in two ways. First, it contradicted the limited mainstream Islamic-defined legal position on freedom of religion. Though most of the Islamists do not deny a person's right to profess and practice religion of his or her choice, they adopt a much stricter view in regard to the right of a Muslim to convert into other religion, or to apostatize, which is considered as a serious crime in Islam.53 Some of the states in Malaysia like Pahang, Perak, Kelantan, Sabah and Malacca criminalize apostasy.54 Only Negeri Sembilan has a clear

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51 Clause 4(1)(i).
52 Clause 2.
53 According to an opinion survey on Malaysian Muslims' identity conducted by the Kuala Lumpur-based Merdeka Centre for Opinion Research (commissioned by Asia Europe Institute, University of Malaya) 97 percent of respondents say 'yes' when asked about their willingness to live alongside people of other religions, but 98 percent say 'no' to the right of Muslims to renounce Islam. The telephone survey which was conducted between 15 - 18 December 2005 involved 1,029 Muslim respondents throughout Peninsular Malaysia.
54 In Pahang, an apostate upon conviction is liable to a fine not exceeding RM5,000 and/or imprisonment of not more than three years, and possibly six strokes of the cane. In Perak, an apostate shall be liable to a fine not exceeding RM3,000 or to imprisonment for a term not exceeding two years or to both (Section 13 of the Perak Syariah Criminal Offences Enactment No 3 of 1992). In Malacca, a person who attempts to apostatize shall be liable to a fine not exceeding RM5,000 or to imprisonment for a period not exceeding three years or to both (Sections 67 of the Malacca Syariah Criminal Offences Enactment No 6 of 1991). In Sabah, a Muslim who claims that he is not a Muslim shall be liable to a fine not exceeding RM2,000 or to imprisonment for a term

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procedure on application for renouncing Islam. The state’s Administration of Islamic Law Enactment 1991 (Amended 1995) provides for Muslims to declare renunciation of Islam at the state Syariah High Court. All states in Malaysia, except Penang, Sabah, Sarawak and the Federal Territories, restrict propagation of religious doctrines and beliefs other than those of Islam among Muslims. Such restriction is authorized by Article 11(4) of the Federal Constitution. Second, its propagation of religious freedom and equality among religions as a basis for religious harmony is a clear departure from the statist illiberal conception of the constitution. The Malaysian state, apart from giving a special position to Islam as the state religion, has instituted various restrictive laws, such as the Sedition Act, the Internal Security Act and the various state laws which restrict the propagation of non-Muslim religions among the Muslims, the objective of which, the government claims, is to regulate inter-ethnic and inter-religious relations in order to maintain racial and religious harmony. By making such references in a Bill intended to be presented to the government for consideration, the advocates of IFCM challenged not only the mainstream limited Islamic-defined legal meanings of religious freedom, but also the illiberal statist vision of fundamental liberties. The Bill in essence reflected the proliferation of new legal meanings.

not exceeding one year or to both (Sections 55(2) of the Sabah Syariah Criminal Offences Enactment 1995). Detention at the Islamic Rehabilitation Centre for the purpose of religious counseling was also provided in Kelantan, Sabah and Malacca. It was for a period not exceeding three years in Kelantan and Sabah and not exceeding six months in Malacca. (Section 102 of the Kelantan Islamic Religious Council and Malay Customs Enactment No. 4 1994, Section 66 of the Malacca Syariah Criminal Offences Enactment No 6 of 1991, and Section 63 of the Sabah Syariah Criminal Offences Enactment 1995).

55 Section 119. Between 1994-2003, 16 such applications were approved by the state. See Malaysiakini interview with MARA University of Technology (UiTM) Professor of Law, Dr. Mohd Azam Mohd Adil (Malaysiakini, 11 November 2006). The Negeri Sembilan Mufti, Dato’ Mohd. Murtadza Ahmad, speaking at the “Convention on Freedom of Religion and the Issue of Apostasy: Towards a Practical Resolution” held at the International Islamic University Malaysia (IIUM) on 29 November 2006, however said that a preventive and punitive law on apostasy needs to be formulated (Malaysiakini, 29 November 2006).
along the line of universal principles of human rights and individual liberties within the broader political space following the 1998/99 Reformasi.\textsuperscript{56}

Hardly unexpected, strong protests emerged from the ACCIN and its affiliated organizations, as well as the Syariah Committee of the Bar Council. In a joint memorandum against the proposed Interfaith Commission of Malaysia, ACCIN described the proposal as essentially anti-Islam and therefore urged the government to reject it.\textsuperscript{57} The organization quoted several items in the MCCBCHS' memorandum to the Bar Council to substantiate its claim. These items related to matters of law and administration such as suggestions that a Muslim's identity card should not disclose his or her religion, the civil courts rather than the Syariah courts should have jurisdiction to determine the right of a Muslim to renounce Islam and Article 11 of the Federal Constitution (freedom of religion) should be interpreted in tandem with international human rights instruments. ACCIN also referred to juristic matters that it claimed were specifically internal to Islam. These include suggestions that Muslims should have the right to renounce Islam and nobody should be regarded as a Muslim by reason of both parents being a Muslim.\textsuperscript{58} ACCIN believed that the motive for the formation of IFCM was based on the MCCBCHS' memorandum, which it described as non-Muslim interference with Islam. The organization believes that such an attempt would "imperil rather than ensure communal harmony".\textsuperscript{59}

The committee submitted the proposed Bill to the government in March 2005. Copies of the Bill were sent to the Prime Minister, Deputy Prime Minister, Dr. Shad Faruqi, a Malaysian constitutional expert, commenting on the proposed Bill, said that "the Bill tried hard to evade constitutional provisions and was more of a call for reform of the constitution and rewriting of the social contract than the drafting of legislation under the existing constitution" (Malaysiakini, 1 April 2005). Dr. Shad gave the same opinion in my interview with him on 25 February 2005, Bangi.

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\textsuperscript{59} See ACCIN's statement "ACCIN Insists on Protesting against the Formation of IFC" dated 7 March 2005.
two Cabinet Ministers and the Attorney-General for consideration.\textsuperscript{60} The government however called for the proposal to be deferred due to “different levels of sensitivity among the people”.\textsuperscript{61} Prime Minister Abdullah Ahmad Badawi told the Parliament in March 2005 that the setting up of the commission “may result in complications arising, rather than achieving inter-religious understanding”. Instead of forming the commission, the Prime Minister suggested that more interfaith dialogues be held.\textsuperscript{62} Minister of Arts Culture and Heritage Datuk Seri Dr. Rais Yatim who had earlier described the initiative as “a milestone event” when opening the conference toward the formation of IFCM in February concurred with the Prime Minister’s decision and urged all parties involved to engage in more informal interfaith dialogues instead. But as the protests against IFCM persisted, the government finally sealed the coffin on the initiative by saying that it would not entertain any more efforts to set up the commission.

\textit{The Article 11 Group}

Article 11 is a coalition of thirteen NGOs formed in May 2004, the primary aim of which is to uphold the supremacy of the Federal Constitution and to promote religious freedom in Malaysia. The thirteen NGOs are the All Women’s Action Society (AWAM), Malaysian Bar Council, Catholic Lawyers Society (CLS), Interfaith Spiritual Fellowship (ISF), Malaysian Civil Liberties Society (MCLS), Malaysian Consultative Council of Buddhism, Christianity, Hinduism & Sikhism (MCCBCHS), National Human Rights Society (HAKAM), Pure Life Society, Sisters in Islam (SIS), \textit{Suara Rakyat Malaysia} (SUARAM, Voice of Malaysian People), Vivekanda Youth Movement, Seremban, Women’s Aid Organization

\textsuperscript{60} Malaysiakini, 17 Mac 2005.
\textsuperscript{61} Malaysiakini, 24 Mac 2005.
\textsuperscript{62} Malaysiakini, 24 Mac 2005.
(WAO) and Women's Development Collective (WDC). Most of these organizations were either involved in advocating the formation of IFCM or supporting the application by Azlina Jailani, a Malay-Muslim woman who converted to Christianity, to drop the word Islam and her Muslim name from her identity card. The joint secretariat of Article 11 was formed by WAO and SIS. The reason for the setting up of Article 11, as its proponents claim, was to fight against the purported injustices meted out to persons like Shamala, a Hindu woman whose husband had converted to Islam. In April 2004, the High Court in Kuala Lumpur granted Shamala custody of her two young children, but with a condition that she must not expose them to the Hindu faith. Her estranged husband had earlier converted their children to Islam without her knowledge. The civil court rejected her application for a declaration that the conversion was invalid, citing that the correctness or otherwise of their conversion was a matter for the Syariah court to decide. The court's decision, Article 11 claims, violated Shamala's parental right to co-determine the religious upbringing of the children, and as such a serious infringement of her right to religious freedom. Article 11 itself was named after Article 11 of the Federal Constitution which provides for freedom of religion. Shamala's case has been a rallying point for the thirteen NGOs to promote greater freedom of religion among all Malaysians regardless of race or religion.

The coalition insisted that no citizen should be discriminated against on the basis of religion, race, descent, place of birth or gender. It also called for the individual rights to freedom of thought, conscience and belief to be fully respected, guaranteed and protected, while every citizen should have a responsibility to condemn discrimination and intolerance based on religion or belief. Religion or belief, the organization emphasized, should support human

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63 See further discussion on the Azlina Jailani (Lina Joy) case below.
64 See Article 11's background information at http://www.article11.org/01AboutUs.htm (Accessed on 3 December 2006).
dignity and peace. On the issue of guardianship of children, it promoted both
parents’ equal right to guardianship and that children should be protected from
any form of discrimination on the grounds of religion, and in all cases, the
interests of children should be paramount.65

In its open letter to the government, the coalition outlined its position on
the supremacy of the constitution, the nature of the Malaysian state and the right
to freedom of religion.66 Apparently, the bone of the coalition’s contention was
that although Article 3 of the Federal Constitution provides that Islam is the
religion of the Federation, the Federal Constitution is the supreme law of the
land and Malaysia remains a secular state. It drew the government’s attention to
the Report of the Federation of Malaya Constitutional Commission, 1956-57,
which states that Article 3 “shall not imply the state is not a secular state”.67 It
also referred to the Supreme Court decision in Che Omar Che Soh v Public
Prosecutor in 1988,68 which reaffirmed that “the law in this country is still what it
is today, secular law”. Based on this perspective, the coalition criticized the civil
courts which generally declined to adjudicate on “pressing issues simply because
they involved some elements of Islamic law, leaving litigants without any
remedy”.69 Obviously, the coalition referred to judicial attitudes toward Article
121(1A), which provides exclusive jurisdiction to the Syariah courts to hear cases
on matters related to Islamic law. The coalition thus called upon the government
and the judiciary to uphold the supremacy of the Federal Constitution; to ensure
governance in accordance with the Federal Constitution and premised on the

65 See Article 11’s background information at http://www.article11.org/01AboutUs.htm
(Accessed on 3 December 2006).
66 See Article 11’s “Open Letter: Reaffirming the Supremacy of the Federal Constitution”
(undated) at http://www.article11.org/02OpenLetter.htm (Accessed on 3 December 2006). The
coalition claims that the open letter garnered 18,000 signatures on hard copy. As of 3 December
2006, the open letter obtains 2,609 online signatures.
67 This contention had its origin in the Alliance’s memorandum to the Reid Commission as
discussed in Chapter 2.
69 See Article 11’s Open Letter.
universal values of all Malaysian peoples; to reaffirm that Malaysia shall not become a theocratic state; and to recognize the proper position of the judiciary within the constitutional framework, as an independent and equal arm of Government. Article 11 member organizations had been calling upon the government to repeal or amend Article 121(1A) to enable the civil High Courts to hear cases, which by virtue of the said Article, are strictly within the jurisdiction of the Syariah courts.

Article 11 sought to advocate its ideas and raise people's awareness about the supremacy of the Federal Constitution and the individual right to freedom of religion through public discussions in a series of nationwide "road shows". Its first two public forums held in Petaling Jaya and Malacca on 12 March and 21 April 2006 respectively ran smoothly. About 200-300 participants, mostly non-Muslims, attended the forums. However, its third public forum in Penang on 14 May 2006 met fierce protests from Muslims led by a group called Badan Bertindak Anti-IFC (BADAI, Anti-IFC Action Front). About 1000 protesters gathered in front of the Cititel Hotel along Penang Road, where the public forum "Federal Constitution: Protection for All" was held. The protesters waved banners and placards with words like "IFC Rampas Kuasa Raja" (IFC Seizes (Malay) Rulers' Powers), "IFC Angkara Zionis" (IFC is Zionist Savagery) and "Batalkan IFC" (Stop IFC), indicating their attempt to link the Article 11 initiative with the proposed IFCM. Some of the protesters even joined the forum and engaged in heated discussions.

70 See Article 11's Open Letter.
71 These include cases on guardianship of a minor and the status of his or her religion when one parent converted to Islam, religious status of a Muslim who converted out of Islam, the religious status of a Muslim convert who reverted to his or her previous religion, etc. See for example the Malaysian Bar Council's press release "Amend Constitution with Care" dated 17 January 2006. The full text of the press release is available at http://www.malaysianbar.org.my/content/view/2232/2/ (Accessed on 19 June 2007).
72 This is most probably due to the similarities in the main objective of both initiatives, i.e. to promote freedom of religion. Furthermore, the majority of the member organizations of Article 11 were either advocates or supporters of the IFCM. Article 11 however denied that it had any connection with IFCM, or seeks to revive the initiative to form the interfaith body.
arguments with the panelists. As a result of the protest, the forum had to be cut short when only three of the five speakers were able to speak.73

Another public forum held in Johor Bharu on 22 July 2006 also met with protests from Muslims led by a group called Front Bertindak Anti Murtad (FORKAD, Anti-Apostasy Action Front). About 300 protesters gathered outside the hotel venue where the forum was held.74 Similar to the Penang protest, the Johore protesters also held placards and banners with printed slogans such as "Pertahankan Hak Umat Islam" (Defend Muslims' Rights), "Jangan Cabar Kami" (Don't Dare Us), "Jangan Ganggu Agama Kami" (Don't Meddle with Our Religion), "Jangan Sentuh Sensitiviti Islam" (Don't Touch on Islamic Sensitivities) and "Hancurkan Gerakan Anti-Islam" (Crush Anti-Islam Movement).75 Tensions ran high and commotion broke out when the organizer refused to call off the forum as demanded by the protesters. The forum proceeded as planned, but with a heavy presence of about 200 police personnel including the riot police.76 This incident again indicates strong contestation between the two contending forces and the possibility of tensions running out of control.

In response to the escalating religious tensions resulting from Article 11's road shows, which also occurred about the same time that the Azlina Jailani (Lina Joy)'s case was heard at the Federal Court, the government in July 2006 curbed freedom of speech by banning public debate on sensitive religious issues.77 Describing the tensions as reaching a "worrying level", Prime Minister

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73 The three speakers were AWAM Executive Director Honey Tan, constitutional expert Professor Dr. Shad Saleem Faruqi and HAKAM Deputy President, Malik Imtiaz Sarwar. Two other speakers, ALIRAN President P Ramakrishnan and Member of Parliament for Kota Bharu Dato' Zaid Ibrahim, could not speak. See ALIRAN report on the incident at http://www.aliran.com/content/view/62/11/ (Accessed on 3 December 2006)

74 Malaysiakini, 22 July 2006.

75 Justifying the protest, Johor PAS Commissioner, Dr. Mahfodz Mohamed who led the mob was reported to have said, "We can't just keep quiet. We don't want to see apostasy continuing before our very eyes in a country that proclaims Islam as the official religion" (Malaysiakini, 22 July 2006).

76 Malaysiakini, 22 July 2006.

77 New Straits Times, 26 July 2006.
Abdullah Ahmad Badawi warned that such issues “evoke emotions, and when discussed openly, without control, they create anger, and this leads to unwanted situations”. The ban was lauded by Islamic organizations, which had earlier opposed the Article 11’s road shows. The Muslim Professional Forum (MPF) President Dr. Mazeni Alwi welcomed the ban and concurred with the Prime Minister that “issues of religious sensitivity should not be openly debated in the public arena”. He condemned the Article 11 advocates for turning the climate of relative openness under Abdullah’s government “into a free-for-all Islam-bashing in the name of championing religious freedom”. In a similar vein, ABIM President Yusri Mohamad urged the Article 11 group not to use a “confrontational” approach in discussing sensitive religious issues like freedom of religion, especially by organizing open public debate on the matter. As a result of the Muslim protests, the government also dismissed the possibility of amending Article 121(1A) and assured the Muslims that the Syariah courts would retain jurisdiction on matters concerning Islam.

Ayah Pin’s Sky Kingdom

In July 2001, the Terengganu Islamic Affairs Department acted against the followers of Ayah Pin’s Kerajaan Langit (Sky Kingdom), a religious cult that had been declared deviant by the Terengganu Fatwa (Islamic religious edict)

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78 New Straits Times, 26 July 2006.
81 Harakahdaily, 4 August 2006.
Committee in 1997. Ayah Pin, or Ariffin Muhamad, is a self-style ‘spiritual leader’ of Malay descent who claimed he is the reincarnation of God on earth. He preached that all religions are the same and everybody has the right to submit to God in whatever ways they wish. An anonymous person who claimed to be an ex-member of Ayah Pin’s sky kingdom wrote in Malaysiakini, a local internet news source, alleging that the cult leader prohibited Muslims from performing mandatory daily prayers for they had yet to know God.83 Four of the cult followers had been sentenced to two years imprisonment in 1998 for attempting to renounce Islam.84 Ariffin himself was sentenced to 11 months imprisonment by the Syariah court in 2001 for insulting Islam.85 His followers, who include Malays, Indians, Chinese and a number of foreigners, attended his sermons in a small commune in Hulu Besut, a district in the interior of Terengganu. The commune itself is home to about 200 cult followers.

Ariffin’s teaching could be traced back to the 1980s but his commune came into prominence when a giant teapot, an umbrella tower and other weird structures built on the land housing the commune – which cult members claimed cost millions of ringgit – caught media attention in 2005. Acting on public complaints, Islamic Religious Department enforcement officers and the police broke into the commune on 2 July 2005 and arrested 21 cult members for allegedly possessing documents about teachings which were contrary Islam.86 Ariffin and the first of his four wives, however, escaped arrest.87 On 20 July, a second arrest took place in which 59 cult members, including a New Zealand citizen Judith Lilian, were arrested for breaching the fatwa (edict) issued by the Fatwa Committee in 1997 banning the cult. Judith however escaped charges for

84 Malaysiakini, 25 May 2005.
85 Malaysiakini, 28 January 2005.
87 Malaysiakini, 4 July 2005.

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she was a non-Muslim. As for the Muslims, they were charged for the offence and upon conviction would be liable to a maximum of two years imprisonment or RM 3,000 fine.88 On 31 July 2005, the Besut district authorities moved into the commune and destroyed the giant structures on the land for violating the National Land Code.89 Earlier, a group of angry villagers, mostly Malay Muslims, had attacked the commune and torched the structures.90 By August 2005, most of the residents deserted the commune, leaving only about 10 families who "had no other place to go".91

Against the backdrop of Ayah Pin’s Sky Kingdom controversy was contestation between the promoters of absolute religious freedom and the defenders of Islamic faith. It is in this context that there had been calls for the use of restrictive laws against the cult followers as a means to preserve the sanctity of Islamic faith. A threat to the Islamic faith was viewed as a threat to national security. The Religious Adviser to the Prime Minister, Tan Sri Abdul Hamid Othman, for example, said that Ariffin was a threat to national security and thus should be detained.92 Perak Mufti and member of National Fatwa Council, Datuk Seri Harussani Zakaria, shared this view and urged the government to use the Internal Security Act against Ariffin and his followers as a means to contain their activities and influence.93 Ayah Pin’s Sky Kingdom, Harussani claimed, was a "government-within-the-government", which was a serious threat to national security.94 The Terengganu NGOs Action Front, which consisted of 12 Malay-

88 Among those arrested was Kamariah Ali, a Muslim woman who claimed that she had renounced Islam in 1998. Kamariah had earlier applied to the Federal Court for a declaration of her right to renounce Islam under Article 11 of the Federal Constitution. Her application was however dismissed by the Federal Court in July 2004. See Kamariah bte Ali & Ors v Government of Kelantan & Anor [2005] 1 MLJ 197.
89 Malaysiakini, 31 July 2006. The structures were erected on agricultural land, violating the land law.
90 Malaysiakini, 18 July 2005.
91 Malaysiakini, 12 August 2005.
based national and local NGOs in Terengganu, called upon the government to
detain Ariffin under the ISA. The NGOs were the 4B Youth Movement,
Malaysian Association of Youth Clubs (MAYC), Gabungan Pelajar Melayu
Semenanjung (GPMS, Peninsular Malay Students’ Association), Terengganu
Young Professional Movement, Malaysian Muslim Youth Club, Muslim Youth
Movement of Malaysia (ABIM), Terengganu Literature Society, Terengganu
Young Entrepreneurs Assembly, Terengganu Bestari Association, Silat Gerak
Sejati Association of Terengganu, Sultan Mahmud College ex-Boys Association
and MARA Junior College ex-Boys Association (Ansara). In a memorandum
submitted to the Prime Minister on 21 July 2005, the movement claimed that the
activities of Ayah Pin’s cult since 30 years ago “endangered the Muslim
ummah”.95 The memorandum also mentioned foreigners’ involvement in the cult
and the moral and financial support it allegedly received from international
organizations as a threat to national security and public order.96

On the other side of the fence stood human rights NGOs which were
perturbed by the government’s apparent persecution of members of a “minority
religious sect” and the infringement of their right to freedom of religion.97
SUARAM filed a formal complaint with the United Nations Special Rapporteur
for Freedom of Religion, alleging state-led persecution against Ariffin and his
followers.98 In a letter to the UN Special Rappoteur dated 15 August 2005,
SUARAM said the organization had learnt that the “followers of the minority
religious sect have pursued their faith in a peaceful and law-abiding way”. The
organization further said “none of their activities have in any way infringed
other people’s rights or threatened social order”. Thus SUARAM viewed their
arrest and detention as “unlawful and arbitrary and the authorities’ action

95 Malaysiakini, 21 July 2005.
96 Malaysiakini, 21 July 2005.
97 See SUARAM statement in Malaysiakini, 17 August 2005.
98 Malaysiakini, 17 August 2005.
against them as totally uncalled for". SUARAM also viewed the action against Ariffin and his followers as a deprivation of their fundamental human rights enshrined in the Universal Declaration of Human Rights. Not only that, the human rights organization named Prime Minister Abdullah Ahmad Badawi and several others involved in the "persecution" of the cult members as "perpetrators (sic) of human rights". SUARAM's position on Ayah Pin Sky Kingdom signified a challenge to the limited statist ethno-religious legal meaning of freedom of religion, preferring instead a wider interpretation based on the principles enshrined in international instruments. By saying that the cult members did not do anything wrong in law, the organization in essence was trying to put in question the legitimacy of state Islamic laws which authorized state actions against them.

The Judicial Attitude toward Religious Freedom: Re-Affirming Islam

In the early 2000s, there was a host of controversial litigations in which the limited ethno-religious statist legal meanings of freedom of religion were challenged. These included challenging the established view among the civil court judges on the exclusive jurisdiction of the Syariah courts, as provided under Article 121(1A) of the Federal Constitution, to decide on matters relating to conversion to and from Islam. Paragraph 1 of List II (State List) of the Ninth Schedule in the Federal Constitution empowers the State Legislative Assemblies to make laws creating the Syariah courts in their respective states. The Syariah courts have jurisdiction only over persons professing the religion of Islam and in

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100 *Malaysiakini*, 17 August 2005. The word "perpetrators" must have meant "violators" or "perpetrators of violations of human rights".
101 See for example *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor* [2004] 2 MLJ 648.
respect of matters enumerated in the paragraph 1 of the State List. They also have jurisdiction in respect of the control of propagation of doctrines and beliefs among persons professing the religion of Islam and in determining matters of Islamic law and Malay custom.

Previously, there had been cases in which decisions of the Syari'ah courts were reversed by the civil courts which ruled that they also had jurisdiction over matters which were presumably said to be pertaining to Islamic laws. This led to a conflict of jurisdiction between the Syariah and the civil courts. To avoid such conflict, the Parliament in 1988 amended the Federal Constitution to introduce new Article 121(1A) which provides for exclusive jurisdiction of the Syariah courts to hear matters relating to the administration of Islamic laws. Since then, the general attitude among the civil court judges has been not to entertain cases which involved matters pertaining to Islamic law and passed it on to the Syariah courts. These include cases relating to renunciation of Islamic faith. Such restrictive interpretation had been criticized by the promoters of absolute religious freedom because it curtails the right of a Muslim to renounce Islam, given that the Syariah courts had usually been loath to allow renunciation.

102 Among the matters included in the list were Islamic laws relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against Islamic precepts, except in regard to matters included in the Federal List; and the control of propagating doctrines and beliefs among persons professing the religion of Islam.

103 See Paragraph 1 of List II of the Ninth Schedule in the Federal Constitution.


105 For more detail analysis see Abdul Hamid (2002).


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of Muslim faith. To make matters more problematic, some states like Pahang, do not have legal provision to allow a Muslim to renounce his religion, nor for a Muslim convert to revert to his previous religion. This has left the litigant in a legal limbo without possible remedy. Furthermore, in most of the states, there have been severe punishments for those who were found guilty of deliberately renouncing Islam.

The Shamala and Mohamad Abdullah & Moorthy Case

The Malaysian dual legal system - shariah and civil legal systems - proves to be cumbersome when it comes to the conversion of a non-Muslim spouse to Islam. This is when the question of dissolution of marriage, child custody and maintenance criss-crosses the two legal systems. The converting spouse normally approaches the Syariah court for legal remedies, while the non-converting spouse goes to the civil courts. When minor children are involved, the question of who has the right to determine their religion also becomes an issue.

The Shamala litigation vividly illustrates such a legal limbo. In November 1998, Shamala Sathiyaseelan and Dr. Jeyaganesh, both Hindus, were married in a Hindu ceremony. Four years later the husband converted to Islam and subsequently converted their two minor children to Islam without the wife’s knowledge. The marriage eventually broke down. In December 2002, Shamala initiated legal proceedings at the civil High Court, seeking custody of her two children. The matter was fixed for hearing in January 2003, but on the defendant

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108 This view is however not always correct when Syariah courts in some instances did pronounce Muslims as apostates. The Negeri Sembilan Syariah High Court for example allowed 16 apostasy applications between 1994 and 2003 (see note 49). The case of Nyonya Tahir is another example. Nyonya Tahir (deceased) was born as a Muslim but lived as a Buddhist after she was married to a Buddhist. Based on evidences given by the deceased’s family, the Syariah Court declared her as a non-Muslim and allowed her body to be buried according to Buddhist rite.

109 Thio (2006)

husband’s (whose Muslim name was Muhammad Ridzuan) request, was postponed several times until March 2003. In the meantime, Muhammad Ridzuan, through his solicitors on 7 January 2003 filed an application in the Selangor Syariah High Court for an ex-parte hadanah (custody) order. On 8 May 2003, the Selangor Syariah High Court granted him the order. But as the civil High Court on 17 April 2003 had granted an interim custody order to Shamala, the Syariah High Court’s hadanah order did not change her right to custody. Meanwhile, Shamala applied for a civil High Court’s order that her children’s conversion to Islam was null and void, claiming that as the children’s natural mother, she had the right under Article 12(4) of the Federal Constitution to determine their religion. However, the Kuala Lumpur High Court on 13 April 2004 dismissed her application on the ground that under Article 121 (1A) of the Federal Constitution, the Syariah Court is the only qualified forum to determine the religious status of her two children, whom the court considered as Muslims at the time the application was made. High Court Judge Dato’ Faiza Tamby Chik referred to a letter from the Federal Territory Mufti saying that the children were automatically converted to Islam, when one of the parents embraced Islam and the conversion was effective even though one parent opposed it.

The High Court’s decision was criticized by human rights NGOs and non-Muslim organizations. Pushpa Ratnam, a legal officer at the All Women’s Action Society (AWAM) described the decision as akin to “slamming the door shut on Shamala’s rights as a mother”. The National Evangelical Christian Fellowship of Malaysia (NECF) carried an article in its newsletter which says that

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111 See Shamala Sathiyaseelan v Dr Jeyaganes C Mogarajah [2004] 2MLJ 241. The interim order gave Shamala custody of the children while Muhammad Ridzuan was allowed to see them over the weekends, but not to take them out of Alor Setar where they lived.
112 Bernama, 13 April 2004.
113 Bernama, 13 April 2004.
114 Pushpa (2004)
“Shamala’s case not only illustrates the dilemma of a dual-legal system and infringement of the rights of non-Muslims when their spouses embrace Islam, it also raises the imminent issues on the question of public confidence in the law of the land and the judiciary”.115 Bar Council President Kuthubul Zaman Bukhari commented on the case saying that the right to decide a minor’s religion is “an issue of parental right, rather than an issue of religion”.116 MCCBCHS President Harcharan Singh described the decision as “the last straw in a series of decisions that have systematically emasculated the civil courts vis-à-vis the Syariah Courts”.117 Harcharan further said that the situation in which “a non Muslim parent can have her children converted against her will by her estranged husband” is utterly unjust. He thus called for a protection “to those from minority religions in Malaysia on an urgent and immediate basis”.118

The issue of conversion to Islam is even more complicated than meets the eye when the Muslim convert dies without his family knowing that he had converted to Islam. The legal battle over who has the right to bury the dead according to which religious rites had caused considerable tensions in a multi-religious and multiracial society such as Malaysia. The Mohamad Abdullah @ Moorthy litigation illustrates this point. M. Moorthy, an army commando who made his name as the first Malaysian to climb Mount Everest in 1997, converted to Islam in October 2004 without the knowledge of his wife and family members.119 He continued to live with his family until he died on 20 December 2005. The legal battle ensued when the Syariah High Court on 23 December 2005 ordered the Kuala Lumpur Hospital to release his body to the Federal Territory

118 See Harcharan’s statement “Last Straw in a Series of Decisions - MCCBCHS Aghast at the Situation” (undated).
119 Mohamad’s brother, Husin Abdullah, who converted to Islam in 1981, also did not know that Moorthy converted to Islam (Bernama, 29 December 2005).
Islamic Religious Council (MAIWP) for burial according to Muslim rite. Syariah High Court Judge Mahayuddin Ibrahim said that Mohamad had converted to Islam and there was no evidence that he had been made an apostate by any Syariah court in the country. A day before the decision was made Mohamad’s Hindu wife Kaliammal filed an originating summons at the High Court seeking an injunction to restrain the Islamic religious council from claiming Mohamad’s body from the hospital. On the day the Syariah High Court made the decision, she once again filed an application for an interim injunction at the Kuala Lumpur High Court. She also asked the court to declare null and void all documents pertaining to Mohamad’s conversion to Islam and that he never embraced Islam. Meanwhile, the Kuala Lumpur Hospital, after negotiating with the parties involved, retained Mohamad’s body pending High Court decision on Kalliamal’s application. The application was heard on 27 December 2005 and two days later High Court Judge Datuk Mohamed Raus Sharif ruled that the High Court had no jurisdiction to decide on the question of whether Mohamad had converted to Islam because the issue falls within the jurisdiction of the Syariah court. He said his decision “is in line with Article 121(1A) of the Federal Constitution which states that the Civil Courts have no jurisdiction regarding matters over which the Syariah Court has been vested jurisdiction by the written law”. Mohamad’s body was then surrendered to the Federal Territory Islamic Religious Council (MAIWP) for burial according to Muslim rite, despite protests from the deceased’s Hindu family.

The Mohamad Abdullah@Moorthy litigation again raised the issue of freedom of religion and the right of religious minorities. Malaysia Hindu Sangam President Datuk A Vaithilingam regretted the lack of legal protection given to non-Muslims, while the Muslim community is fully protected by the

120 Bernama, 23 December 2005.
121 Bernama, 23 December 2005.
122 Bernama, 28 December 2005.
law. A coalition of 35 Hindu-based NGOs submitted a memorandum to the Yang di-Pertuan Agong on 9 January 2006 requesting the King to “take into account the feeling of the minority and advise (government) officers to take necessary action”. The legal and constitutional side of the issue moved to higher ground when non-Muslim religious groups and NGOs called for the amendment of Article 121 (1A) of the Federal Constitution which gives exclusive jurisdiction to the Syariah courts to decide on matters relating to the administration of Islamic law. MCCBCHS called upon the government to give powers to the High Court, not the Syariah Court, to determine the validity of conversion into and out of Islam so that “all Malaysians can be parties and have equal rights as witnesses”. Catholic Archbishop Datuk Murphy Pakiam urged the government to consider repealing Article 121(1A) and “restore sovereign power to the civil courts to rule in cases involving non-Muslims in Islamic affairs”. A DAP-organized roundtable discussion held on 5 January 2006 passed a resolution that the decisions by the Syariah courts should be open for review by the civil high courts. HAKAM President and human rights lawyer Malik Imtiaz Sarwar, speaking at the roundtable discussion, advocated the repeal of Article 121(1A) in order to avoid jurisdictional conflict between the Syariah and the civil courts.

But these calls met protests from Islamic groups. A coalition of Muslim organizations called the Syariah Law Action Committee condemned the resolution reached at the parliamentary roundtable discussion. The coalition’s

124 The Star, 10 January 2006.
125 New Straits Times, 29 December 2005.
126 New Straits Times, 12 January 2006.
127 The discussion were attended by Indian Malaysian community leaders, interfaith groups activists, lawyers, social and human rights activists and concerned individuals (Malaysiakini, 5 January 2006)
128 New Straits Times, 6 January 2006.
member organizations included the Malaysian Institute of Syariah Research and Development (ISRA), Ulama’ Association of Malaysia (PUM), Ulama’ Association of Kedah (PUK), Secretariat for the Assembly of Ulama’ for Asian Region (SHURA), Malaysian Syari’e Lawyers Association (PGSM), Muslim Youth Movement of Malaysia (ABIM) Jamaah Islah Malaysia (JIM) and Movement for Malay Empowerment (TERAS). A statement issued by the coalition’s secretary Azmi Abdul Hamid said “the resolution, if accepted by the government, would degrade the status of Syariah judicial system and subordinate it to civil judicial system like the situation was during the colonial era”.\(^\text{129}\) In a separate statement, ABIM called upon the government to retain Article 121 (1A) as it is.\(^\text{130}\)

The call for review of Article 121 (1A) and protection for non-Muslim rights reached new heights when nine non-Muslim cabinet ministers, led by MCA President Datuk Seri Ong Ka Ting, submitted a memorandum on non-Muslim rights to the Prime Minister on 19 January 2006. The memorandum, which was drafted in consultation with NGOs, especially the MCCBCHS, called upon the government to review Article 121(1A), amend laws that allow only one parent to convert children below 18 years of age and rectify conflicts between Syariah and civil laws.\(^\text{131}\) On 20 January, about 200 Muslim students gathered at the National Mosque in Kuala Lumpur to protest against the proposal to amend Article 121 (1A). The participants in the protest included members of PAS-linked

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\(^{130}\) See ABIM’s media statement “ABIM Pertahan Kedaulatan Mahkamah Syariah yang Diperuntukkan Dalam Perlembagaan” (ABIM Defends the Sanctity of Syariah Courts Provided in the Constitution) dated 18 January 2006.

\(^{131}\) *New Straits Times*, 20 January 2006. The Minister in the Prime Minister’s Department, Datuk Dr. Maximus Ongkili, one of the ministers who signed the memorandum, explained that the memorandum included specific proposals submitted by the MCCBCHS. He also said that MCCBCHS met most of the ministers and handed them a copy of the memorandum they had submitted to the Prime Minister (*Bernama*, 21 January 2006).
Coalition of Peninsular Muslim Students (GAMIS), ABIM-linked National Union of Muslim Students’ Association of Malaysia (PKPIM) and JIM-linked Malaysian Islah Students Peer Group Club (KARISMA). A joint statement issued by the three Muslim student organizations urged the government to retain the powers of the Syariah courts as contained in Article 121 (1A). Responding to the protests, the Prime Minister announced that there would be no changes to Article 121 (1A). UMNO Supreme Council member and Perlis Menteri Besar Datuk Seri Shahidan Kassim backed the Prime Minister’s decision and described the move by the nine non-Muslim ministers as an open criticism of the government. All the non-Muslim ministers, except the Minister in the Prime Minister’s Department Tan Sri Bernard Dompok, later withdrew the memorandum.

The Kamariah Ali Case

In Kamariah bte Ali & Ors v Government of Kelantan & Anor, the counsel for appellants who claimed that they had renounced Islam requested the Federal Court to interpret the meaning of religious freedom under Article 11 of the Federal Constitution. Should a wider interpretation of religious freedom be accepted, the laws which restrict a person’s right to profess and practice the religion of his choice, including to renounce Islam, would be void for contravening a provision of the Federal Constitution, the supreme law of the land. Interpretation of the constitution is within the jurisdiction of the Federal Court, not the Syariah Court.

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133 New Straits Times, 21 January 2006.
134 Bernama, 21 January 2006.
In brief, the facts of the case are as follows. In 1992 four Muslims were sentenced to two years imprisonment by the Syariah court in Kelantan for their involvement in a religious cult, the teachings and practices of which contravened hukum syarak (Islamic law). The four were Daud Mamat, Kamariah Ali, her husband Mohamad Ya (deceased) and Mad Yacob Ismail. All of them were Kelantanese of Malay descent born into the Islamic faith and brought up as Muslims. In 1996, the Kelantan Syariah Court of Appeal changed the sentence to a bond of good behavior for three to five years, during which they were required to attend monthly counseling sessions at the District Qadhi Office to pronounce repentance. They failed to attend the sessions. As a result, the four faced new charges of contempt of court in 2000. During the trial for contempt, they claimed that they had renounced Islam in 1998, producing a statutory declaration to that effect, and as such, they argued, the Syariah court had no jurisdiction to try them. The Syariah court, however, found them guilty and sentenced them to three years imprisonment. The four did not file an appeal against the decision of the Syariah court but instead applied to the civil High Court in Kota Bharu for a declaration of their right to profess and practice the religion of their choice under Article 11 of the Federal Constitution and asked the court to grant a writ of habeas corpus. In brief, the declarations sought were:

1. the plaintiffs had the constitutional right to profess and practice the religion of their choice under Article 11(1) of the Federal Constitution;

2. Article 11(1) of the Federal Constitution holds sway over any other laws, be they Federal or State as regards the choice and practice of the religion;
3 the absolute right and freedom of the plaintiffs under the said article to profess and practice their religion of choice, could only be decided by themselves alone and not subject to the declaration or confirmation of anybody else, be they individual or otherwise;

4 any provision in the law, be they Federal or State, that does provide for the definition of a Muslim but does not recognize Article 11(1) of the Federal Constitution is void;

5 any law, be they Federal or State, pertaining to the religion of Islam will be inapplicable to the plaintiffs, as they had declared their apostasy and hence are protected by Article 11(1) of the Federal Constitution;

6 any law that empowers the Syariah court to decide whether they had left the religion of Islam or not, or requires a declaration from such court as a precondition before they are considered as having left the religion of Islam, contravenes Article 11(1) of the Federal Constitution;

7 any provision in the law, be they Federal or State, that restricts or prevents the right of the plaintiffs to declare themselves not wanting to profess, and practice the religion of Islam contravenes the said article, and hence is void; and

8 pursuant to the above anticipated declaratory orders, the defendants or their agents are not entitled to demand or impose any conditions before they are considered as having left the religion of Islam.137

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Obviously, declarations sought by the plaintiffs pertain to their right to renounce Islam and to be free from any obligation under the religion. The plaintiffs relied heavily on Article 11(1) of the Federal Constitution, which grants the right to every person “to profess and practice his religion”, to support their application. Rejecting the application, High Court Judge Datuk Suriyadi Halim Omar, in his judgment in February 2001, said “The act of exiting from a religion is certainly not a religion, or could be equated with the right ‘to profess and practice’ their religion. To seriously accept that exiting from a religion may be equated to the latter two interpretations, would stretch the scope of art 11(1) of the Federal Constitution to ridiculous heights, and rebel against the canon of construction”.

Suriyadi also held that the plaintiffs were still Muslims as they had never been declared apostates by the Syariah court as provided under section 102 of the Kelantan Islamic Religious Council and Malay Custom Enactment 1994. In affirming the competency of the Syariah court to ascertain whether a person has indeed apostatized, the judge said, “the jurists in the Syariah Court, apart from being conversant with religious matters, will also be in a more elevated position to make sound judgment of the status of any would-be-apostate, bearing in mind their constant interaction with the Muslim populace”.

More important is the issue of jurisdiction. Suriyadi re-affirmed the general judicial attitude toward exclusive separation of jurisdiction between civil and syariah courts as provided under Article 121(1A) of the Federal Constitution. As the plaintiffs were legally Muslims, Suriyadi held, they remained within the jurisdiction of the syariah court, and the Islamic court was the competent court when it sentenced them to three years imprisonment for contempt. Their application for a writ of habeas corpus was rejected by the court accordingly.

The plaintiffs then appealed to the Court of Appeal to have the High Court’s decision quashed. The counsel for the plaintiffs, Haris Mohd Ibrahim,

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submitted *inter alia* that section 102 of the Kelantan Islamic Religious Council and Malay Custom Enactment 1994, which requires a Muslim who wishes to apostatize to obtain prior leave of the Syariah Court, is contrary to Article 11 of the Federal Constitution, which guarantees the right to freedom of religion, and as such is void. He argued that Article 11 not only grants the right to every person to profess and practice religion of his choice, but also to renounce it. It is also up to the person whether to profess a religion or not to profess any religion at any time he wishes. Preferring a wider interpretation of Article 11, he further argued, no law shall restrict a person from making his religious choice or require him to follow certain religious requirements. In dismissing the appeal, the three panel judges of the Court of Appeal unanimously held that Article 11 of the Federal Constitution cannot be interpreted so widely as to revoke all legislation requiring Muslims to perform certain requirements under Islam or prohibit them from committing certain forbidden acts because “the Federal Constitution itself empowers State Legislative Bodies to codify Islamic law in matters mentioned in the State List”. Furthermore, the judges said, should wide interpretation be given to the right to freedom of religion under Article 11, then all Islamic laws prohibiting adultery, close proximity, avoiding payment of zakah (alms), etc. will be void. The court also held that Section 102 of the Kelantan Enactment does not prohibit a person from renouncing Islam. It only requires a person who wishes to renounce Islam to obtain prior confirmation from the syariah court. This is to avoid confusion in law as to whether a person is a Muslim or not. The court however agreed with the appellants’ counsel that section 102 (1) and (2) is only applicable to the *muallaf* (converts to Islam). As the appellants were not *muallaf*, the two sub-sections are not applicable to them. However, by virtue

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of Article 121(1A), the Court of Appeal upheld the High Court’s decision that it had no jurisdiction to decide on the correctness of their renouncement.

On 5 November 2002, the Federal Court granted leave to the appellants to appeal on perennial questions of freedom of religion under Article 11 of the Federal Constitution. The questions in brief were whether a person’s right to profess and practice his religion under Article 11(1) includes the right of a Muslim who has attained the age of majority to renounce Islam; whether the laws which restrict the right of a person (other than those who have yet to attain the age of majority) to renounce his religion is inconsistent with Article 11(1) and as such is void; and whether the restrictions under sections 102(1)144, (2)145 and (3)146 of the Kelantan Islamic Religious Council and Malay Custom Enactment 1994, read together with the definition of “Muslim” under section 2 of the Enactment is inconsistent with Article 8147, 11(1)148 and (5)149, and Article 74150 of the Federal Constitution, and thus void. Malik Imtiaz Sarwar, the counsel for the appellants, argued that it is implicit in Article 11(1) that a person is free to choose any religion he wants to profess and practice, and the concept of choice includes the right to change or renounce his religion. This right, he argued, is only restricted by Article 11(5) of the Federal Constitution which outlaws “any act contrary to any general law relating to public order, public health or morality”. The act of the appellants renouncing Islam, Malik contended, is not contrary to any laws on public order, public health or morality, and thus not contrary to

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144 This sub-section prohibits a person who had been admitted as Muslim to claim otherwise without confirmation from the Syariah Court.
145 This sub-section provides that a person is still deemed a Muslim until confirmed by the Syariah Court as having apostatized.
146 This sub-section provides maximum three years detention at the Islamic Education Centre for any Muslim who is found guilty of purposely renouncing Islam.
147 Article 8 grants all persons equality before the law and equal protection of the law.
148 Article 11(1) grants every person the right to profess and practise his religion and, subject to Clause (4), to propagate it.
149 Article 11(5) does not authorise any act contrary to any general law relating to public order, public health or morality.
150 Article 74 empowers the Parliament and the State Legislative Assemblies to make laws on matters within their jurisdiction.
Article 11(5). Malik also drew the court's attention to international instruments on human rights which had been ratified by the Malaysian government. These include the United Nations Charter, Universal Declaration of Human Rights, Bangkok Declaration and Vienna Convention. He urged the court to apply the doctrine of legitimate expectation in relation to Malaysia's stance on those international instruments and interpret the constitution in such a way that the fundamental rights guaranteed by the Federal Constitution would not be illusory. Section 102 of the Kelantan Enactment, which prohibits a Muslim from claiming that he is a non-Muslim without prior confirmation by the Syariah Court, Malik argued, is a restriction to the right to freedom of religion thus inconsistent with Article 11(1) of the Federal Constitution.

The Federal Court, in its judgment on 21 July 2004, dismissed the appeal. The five-member panel judges unanimously agreed that the appellants' act by making statutory declarations to declare that they were no longer Muslims does not automatically render them non-Muslims, and as such they were not exempted from the charges proffered against them in the Syariah Court. Using a purposive approach, the Federal Court held that the material time to determine whether the appellants were Muslims or not is the time when they committed the crime under the Kelantan Enactment, which was, according to the fact of the case, prior to the making of the statutory declaration in 1998. To decide otherwise, the judges reasoned, would open a floodgate for those who want to evade punishment under the Islamic laws to renounce Islam when they face charges in Syariah courts. The Federal Court however reserved its judgment on the issue of whether the appellants had the right to renounce Islam under Article 11 of the Federal Constitution, saying that the issue was not relevant to

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133 The five panel judges were Chief Justice Ahmad Fairuz, Federal Court Judges Mohd Noor Ahmad, P S Gill, Rahmah Hussain and Court of Appeal Judge Richard Malanjum.
the present case. It cited Lord Bridge's decision in *Ainsbury v Millington*\(^{155}\) which says, "It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved". Obviously, in reaching this conclusion, the Federal Court concurred with the Attorney-General Tan Sri Abdul Ghani Patail's argument that the question is general and hypothetical since the appellants did not identify the relevant laws that restrict their right to freedom of religion. Though they cited section 102 of the Kelantan Enactment, Abdul Ghani argued, this section applies only to *muallaf* (converts to Islam), and the fact was that the appellants were not.\(^{156}\)

Though the Federal Court might be correct in refusing to answer those questions, the opportunity was missed for the apex court to clarify once and for all the perennial issue of whether or not a Muslim has the right to renounce Islam under Article 11 of the Federal Constitution. This has given rise to continued use of the courts by the proponents of absolute religious freedom to seek a favorable legal position on the issue. Kamariah Ali for example once again declared her renunciation of Islam in front of a Syariah court judge in Terengganu in July 2005 to avoid being convicted as a follower of the deviationist Ayah Pin Sky Kingdom. Subsequent to that, Kamariah and another follower of the cult, Daud Mamat, filed a suit against the Terengganu Islamic Religious Council and Malay Custom seeking, *inter alia*, a court declaration that they had the right to religious freedom under Article 11 of the Federal Constitution. They applied to the High Court to refer to the Federal Court questions of law on whether the right to profess and practice a religion under Article 11(1) includes the right of a Muslim who has attained the age of majority to renounce his religion. High Court Judge Dato' Mohamed Raus Sharif dismissed the application on the ground that the issue had been dealt with by the Federal Court in their earlier litigation against the

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\(^{155}\) [1987] 1 All ER 929.

\(^{156}\) [2005] 1 MLJ 197, pp. 205.
Government of Kelantan. The court also noted that the proceedings were akin to an abuse of court procedure. 157

The Lina Joy (Azlina Jailani) Case

The debate over the right of Muslims to renounce Islam reached a new height when the Federal Court in June 2006 heard an application by Azlina Jailani, a Malay-Muslim woman, to remove the word Islam from her identity card. Azlina claimed that she had converted to Christianity in 1990. In 1997, she applied to the National Registration Department to change her name to Lina Lelani, stating her conversion to Christianity as the reason. The application was rejected and she made a second application in March 1999 to change her name to Lina Joy but stated the same reason. She received no reply to her second application. In July 1999, she was told by an NRD officer that she should not mention conversion to Christianity as the reason for name change for it would complicate her application. She then resubmitted her application with a new Statutory Declaration sworn on 2 August 1999. In October 1999, the NRD approved her application and asked her to apply for replacement identity card. Meanwhile, the National Registration Regulation 1990 had been amended, which came into force retrospectively on 1 October 1999, to require that the identity card should state the particulars of religion for Muslims. When Azlina applied for the replacement identity card on 25 October 1999, she stated Christianity as her religion in the application form. As a result, her application was rejected. She then made a third application in January 2000 and asked that the word “Islam” and her original name be removed from her replacement identity card. The NRD refused to

accept her application stating that the application was incomplete without an order of the Syariah court to the effect that she had renounced Islam.  

Azlina challenged the National Registration Department's decision to require her to obtain the Syariah court order as a proof of her conversion. Her application was rejected by the High Court and the Court of Appeal. When the matter was heard before the High Court, Justice Dato' Faiza Tamby Chik held that, since the plaintiff was still a Muslim, by virtue of Article 121 (1A) of the Federal Constitution, the finality of her conversion out of Islam was within the competency of the Syariah Court, not the Civil Court. The majority decision of the Court of Appeal, with Justice Dato' Gopal Sri Ram dissenting, upheld the High Court's decision on the same ground. The question before the Federal Court was whether the National Registration Department had correctly construed its powers under the National Registration Regulations 1990 to require Azlina to produce a certificate from the Syariah Court as a proof of her conversion to Christianity. The bone of the appellant's contention, as lead counsel Dr. Cyrus Das argued, Azlina could profess and practice the religion of her choice without prior declaration by the third party (i.e. the Syariah court) on her religious status, because the right to profess and practice the religion of one's choice is a right under Article 11(1) of the Federal Constitution. This argument is yet another attempt at offering an alternative liberal legal meaning to that given by the Islamic mainstream in regard to the legal position on freedom of religion involving Muslims as embedded in state law.

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159 Article 121 (1A) provides exclusive jurisdiction to the Shari'ah court to hear cases on matters pertaining to Islam. See judgment by High Court Judge Dato' Faiza Tamby Chik in Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Anor [2004] 2 MLJ 119.
160 See judgement by Court of Appeal Judges Abdul Aziz Mohamad, Ariffin Zakaria and Gopal Sri Ram in Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors [2005] 6 MLJ 193. Gopal Sri Ram in his dissenting judgement said that the baptismal certificate dated 11 May 1998 produced by the appellant in evidence amply supported the accuracy of the particular that the appellant was a Christian.
As Lina Joy’s case generated intense public concern, the Federal Court, in a rare occasion, had allowed a number of interested organizations which hold watching briefs to submit their opinion before the court. Taking a more liberal line, the Bar Council, the National Human Rights Society and the Malaysian Consultative Council for Buddhism, Christianity, Hinduism and Sikhism submitted that Azlina’s declaration that she is a Christian was a good proof of her religious identity. As such, requiring her to subject herself to the jurisdiction of the Syariah Court, which only had jurisdiction on Muslims, was a violation of her right to freedom of religion under Article 11 of the Federal Constitution. Representing the Islamic mainstream, ABIM, Muslim Lawyers Association and Syarie Lawyers Association on the other hand submitted that Article 11 uses the words “profess” and “practice”, which means if a person wishes to convert out of Islam, he or she must do so in accordance with the laws and regulations of the religion. As determination by the Syariah Court on the status of Azlina’s conversion is in accordance with Islamic law, requiring such determination does not contravene Article 11.

The Federal Court in May 2007 dismissed Azlina’s appeal, with two Muslim judges, Chief Justice Tun Ahmad Fairuz Sheikh Abdul Halim and Justice Datuk Alauddin Mohd Shariff in the majority and a non-Muslim judge, Justice Dato’ Richard Malanjum dissenting. Delivering the majority decision, Chief Justice Ahmad Fairuz, in full agreement with the Islamic mainstream view said:

There was no final decision that the appellant had no longer professed Islam. Thus, the statement that the appellant could no longer be under the jurisdiction of the Syariah Court because the Syariah Court had only jurisdiction on persons professing Islam should not be emphasized accordingly. The way a person renounced from a religion should be in

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accordance of the regulation or law or practice determined or stipulated by the religion itself ... The freedom of religion under art 11 of the Federal Constitution required that the appellant complied with the rituals or law of the Islamic religion specifically regarding renunciation of the religion. Once the decision of the religion of Islam had been complied and the religious Islamic authority admit (sic) her apostasy then only could the appellant profess Christianity.164

Stressing that a Muslim who intends to renounce Islam must exercise his right in the context of Islamic law, the Chief Justice added:

Islam is not only a collection of dogma and rituals but it is also a complete way of life comprising of all kinds of human, individual or public, legal, political, economic, social, cultural or judicial activities. And when reading arts 11(1), 74(2) and item 1 in second list of the Ninth Schedule of the Federal Constitution it was obvious that Islam among others included of (sic) Islamic law. Hence, if a Muslim intends to renounce from Islam, he is actually exercising his rights in the syariah law context which has it own jurisprudence relating to apostasy.165

While the majority decision concurred with the argument put forth by the Islamic mainstream, the dissenting judgment did not. Preferring the more liberal view on religious freedom and equality, Justice Richard Malanjum said Regulation 4 of the National Registration Regulations 1990 which requires Muslims to state their religion on their Identity Card, which is not applicable to non-Muslims, is tantamount to unequal treatment under the law. On another point, criticizing the NRD policy of requiring Azlina to produce an order of the

Syariah Court as a proof of her conversion and the majority judgment that the policy was reasonable, Justice Richard asserted:

There was an abuse of power on the part of NRD when it failed to take into consideration a legally relevant factor, namely the statutory declaration and the documents submitted by the appellant, preferring its policy of requiring a certificate of apostasy from the Federal Territory Syariah Court which in the first place was not stipulated in the regs 4 and 14 thereby taking legally irrelevant factor into consideration in making a decision. Further, the conclusion in the majority judgment that the impugned policy adopted by NRD was reasonable within the test of *Wednesbury Corporation v Ministry of Housing* [1966] 2 QB 275 has unfortunately missed one cardinal principle. The implementation of the policy had a bearing on the appellant’s fundamental constitutional right to freedom of religion under art 11 of the Constitution. Being a constitutional issue it must be given priority and independent of any determination of the *Wednesbury* reasonableness. Hence, before it can be said that a policy is reasonable within the test of *Wednesbury* its constitutionality must be first considered. The majority judgment failed to carry out such an exercise before coming to its conclusion on the NRD policy.166

Societal Response to the Lina Joy Case

It is noteworthy that the Bar Council and a host of NGOs which had earlier advocated the formation of IFCM supported Azlina’s application. These NGOs include Sisters in Islam, Interfaith Spiritual Fellowship, MCCBCHS, SUARAM, HAKAM and Pure Life Society. Islamic organizations on the other hand formed

two main coalitions in an attempt to defend the Islamic faith against yet another ‘onslaught’ on its sanctity. The first was Peguam Pembela Islam (PPI, Lawyers in Defence of Islam), formed on 12 July 2006, comprising Muslim lawyers led by former President of the Bar Council Zainur Zakaria. At the top of PPI’s agenda was to tackle the ‘partisan stand’ taken by the Bar Council on cases of apostasy, as well as to counter move by certain quarters within the Bar to ‘liberalize’ the Federal Constitution. The second coalition, which consists of a broader range of Islamic organizations, including the newly formed PPI, was Pertubuhan-Pertubuhan Pembela Islam (PEMBELA, Organizations of Defenders of Islam), led by ABIM. PEMBELA’s main objective is to raise awareness among Malaysian Muslims about the attempts by secular-oriented NGOs and some liberal Muslims to liberalize the constitution by advocating the right to renounce Islam, which the organization believes constitutes a serious challenge to Muslim faith and a bold attempt to undermine the special constitutional position of Islam in Malaysia. It has done so by organizing public forums, ceramahs and seminars as well as sending memoranda to the government. In its memorandum to the Malay

167 Zainur Zakaria, after the launching of PPI said, “Cognisant of the recent attacks against the religion of Islam, a group of Muslim lawyers had taken action to defend the position of Islam in this country ... Some quarters have questioned and challenged the position and status of Islam in this country by using the argument that the human rights of individuals is higher than Islam”. A member of PPI, Zulkifli Nordin, said “If certain groups want the constitution to be liberalized, we want the constitution to be strengthened to reflect the supremacy of Islam”. See Malaysiakini, 13 July 2006.
168 Formed on 16 July 2006, PEMBELA consists of about 80 member organizations, which include ACCIN, JIM, Muslim Professionals Forum (MPF), Malaysian Muslim Lawyers Association (MMLA), Malaysian Syari’e Lawyers Association (MSLA), Malaysian Chinese Muslim Association (MACMA), Pertubuhan Kebajikan dan Dakwah Islamiah Malaysia (PERKIDA, Islamic Welfare and Da’wah Association of Malaysia), Teras Pengupayaan Melayu (TERAS, Movement for Malay Empowerment), Research and Information Centre on Islam (RICOI) and a host of Muslim students’ organizations like the National Union of Malaysian Muslim Students’ Association (PKPIM), University of Malaya Muslim Students’ Association (PMIUM) and Gabungan Mahasiswa Islam Semenanjung (GAMIS, Peninsular Muslim Students’ Coalition).
169 See Pembela’s pamphlet “Frequently Asked Questions on the Azlina Jailani (Lina Joy) Case”.
170 Among the first of its gatherings was a forum held at the Federal Territory Mosque in Kuala Lumpur on 23 July 2006 which was attended by about 10,000 Muslims (Malaysiakini, 24 July 2006). There were numerous other ceramahs (public talks) held at the state and district levels to address the issue of Lina Joy case and apostasy generally. Some of these ceramahs were foiled by
Rulers and the Prime Minister, which it submitted together with 701, 822 supporting signatures, PEMBELA urged the Yang di-Pertuan Agong and the Malay Rulers, as the Heads of the Religion of Islam, to “defend the special constitutional position of Islam in Malaysia”.\textsuperscript{171} It also urged the government to take necessary actions against “those who attempt to question the special position of Islam in the country and promote skewed understanding of the Muslim faith”.\textsuperscript{172} Other demands included the maintenance of exclusive jurisdiction of the syariah courts as stated in Article 121(1A) of the Federal Constitution; amendment to Article 11 of the Federal Constitution by inserting clear provision subjecting the right to freedom of religion to Hukum Syarak (Islamic law); and for the states which have yet to pass laws restricting propagation of non-Muslim religions among the Muslims, as provided under Article 11(4) of the Federal Constitution, to immediately pass the laws.\textsuperscript{173}

But also high on PEMBELA’s agenda was to funnel Muslims’ resentment in a more contained way so as not to jeopardize racial harmony and law and order.\textsuperscript{174} In the memorandum submitted to the Malay Rulers and the Prime Minister, the organization reminds that “any efforts or actions taken to solve problems related to sensitive issues of religion must be based on the principles of
rule of law and the supremacy of the constitution, and must not in any way jeopardize inter-religious and inter-ethnic relation in the country". Despite this reminder, several incidents raised the specter of mob rule. In August 2006, anonymous Short Messaging System (SMS) texts were widely circulated threatening Malik Imtiaz Sarwar with death. Malik is a Muslim human rights lawyer and President of National Human Rights Society (HAKAM) who strongly advocates the formation of IFCM and who had appeared in courts either representing or supporting applications by Muslims to renounce Islam. In the Azlina Jailani litigation, Malik held a watching brief for the Bar Council supporting Azlina’s application. There were also malicious SMS texts which claimed that the Federal Court had decided in favor of Azlina’s application, giving rise to increased anxieties among the Muslim population. In both cases, PEMBELA denied involvement and condemned those responsible for making such malicious claims. But such condemnation does not stop beleaguered Muslims from believing in “rumors” easily spread through modern channels of communication, and being jolted into protests and demonstrations in the name of defending the Islamic faith against a clear and imminent danger of aggressive proselytization. On 5 November 2006, about 300 Muslims gathered in front of the Church of Our Lady of Lourdes in Ipoh to protest against the conversion of Muslims to Christianity, in which the “National Sailor” Dato’ Azhar Mansor was said to be involved, after receiving a false SMS text on the event. The event turned out to be the first Holy Communion service for about 100 Catholic Indian

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175 See Pembela’s “Memorandum to the Malay Rulers and the Prime Minister of Malaysia” dated 29 September 2006.
176 As of November 2006, the Federal Court has yet to hand down its decision on the case.
178 Azhar was the first Malaysian to break the world record in non-stop round-the-world solo sailing in a yacht in 1999.
Riot police from the Federal Reserve Unit (FRU) had to be called to disperse the angry crowd. A Muslim couple was arrested in relation to the fake SMS case, in which Perak Mufti Datuk Seri Harussani Zakaria, a strong antagonist of liberal Islam, was also implicated.

As the Ipoh incident indicates, apostasy has always been a taboo to Muslims. More often than not, the Islamic mainstream is willing to “defend” their faith in whatever ways possible. Though public gatherings without a police permit are illegal in Malaysia, the Muslim protest in Ipoh suggests that state law is less important when it comes to defending Islam against the threat, whether perceived or real, it is facing. More pronounced were calls by certain parties within the Islamic mainstream urging the government to use detention without trial law under the ISA against the apostates in lieu of death penalty which is even harsher. In this instance, there is a tendency to liken apostasy to a threat to national security which, according to some traditional jurists, warrants the death penalty. Echoing this view was a law lecturer at the International Islamic University Malaysia, Dr. Zulkifly Muda. He said, during a conference on apostasy held at the university on 29 November 2006, “in the absence of hudud laws, ISA can be used against the apostate in order to protect the religion.”

Though his view was not shared by many of his colleagues at the conference, citing the lack of judicial review under the ISA as one of the reasons, ABIM President Yusri Mohamad agreed that ISA can be used “in the extreme or worst-case scenario where certain apostates are threatening peace and order and their activities suggest grave security consequences and the authorities have trouble

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179 A group of Hindus later protested against the baptism ceremony. The issue was resolved after they found out that the Indian children were of Catholic parents, not Hindus. Informal discussion with K. Shanmuga, MCCBCHS Legal Advisor, Perth, Australia, 6 December 2007.

180 See Malaysiakini, 6 November 2006.

181 The Perak Mufti said the couple had earlier told him that a baptismal ceremony of a group of Malay Muslims would be held at the church in which the “National Sailor” would also be present. He then related this information to a number of persons during a meeting in Ipoh. He claimed that someone might have spread the “news” through SMS.

182 Malaysiakini, 29 November 2006.
compiling the evidence to prosecute". Yusri's view caused a stir within the Gerakan Mansuhkan ISA (GMI, Abolish ISA Movement), of which ABIM is a member organization. GMI Chairman Syed Ibrahim Syed Noh called upon Yusri to clarify his statement while maintaining that ISA is a draconian law which should be abolished. Mixed views within the Muslim community on the use of restrictive laws as a means to protect the sanctity of the Islamic faith and maintain national security suggested that perceived or real threats against Islam are likely to restore the semblance of legitimacy to the use of restrictive laws such as the ISA in Malaysia's multiracial and multi-religious society. To what extent the Islamic organizations, which since 1998 had been at the forefront of the Reformasi movement fighting alongside the secular NGOs against the excesses of state powers, will pursue this hard-line approach to law and religion remains to be seen.

The Opposition and the Politics of New Legal Meanings

There have been mixed responses from the opposition parties to the contestations between the new liberal legal meanings and the limited statist ethno-religious legal meanings on the issue of personal liberties and religious freedom. Subsequent to the campaigns by secular human rights groups for greater space for religious freedom and personal liberty, skirmishes surfaced within the multi-racial Parti Keadilan Rakyat (PKR). The party had been hard pressed to live up to its expectation as a bastion of the new politics of multiculturalism and human rights based on the promotion of racial equality and individual liberties rather than communal appeal. However, communal appeal was still prominent when it comes to grappling with sensitive religious issues. In relation to the Anti-Moral Policing Campaign, which called upon the

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183 Malaysiakini, 29 November 2006.
184 The Sun, 5 December 2006.
government to stop using Syariah laws against offenders of “moral crimes”, some sections within the party criticized the party’s Vice-President Sivarasa Rasiah for endorsing the campaign. Malay/Muslim grassroots leaders from the Permatang Pauh Division, one of the few party strongholds, expressed their rejection of the campaign and demanded apology or explanation from Sivarasa, describing his endorsement as an act which was “insensitive to the wishes of the majority of the grassroots”. PKR’s Angkatan Muda (Youth Wing) Vice-Head, Shamsul Iskandar Mohd Akin, issued a strong-worded statement against the anti-moral policing campaigners accusing their effort as a “misguided move and sheer hypocrisy”. Shamsul who is closely associated with ABIM singled out Sisters in Islam, a strong proponent of the campaign, as an organization promoting a “skewed understanding of religion and politics” and ridiculed them for colluding with UMNO leaders in giving a “semblance of democratic legitimacy to an increasingly corrupt and authoritarian political regime”. Shamsul made this claim following several UMNO ministers’ endorsement of the campaign led by Sisters in Islam. A senior PKR leader described Shamsul’s statement as interfering with Anwar’s efforts at promoting multicultural politics and ordered it to be withdrawn from the party website. Another party stalwart said the statement was too extreme and “Taliban-styled”. A strongly worded letter purportedly written by a prominent opposition politician closely associated with SIS was also directed against Shamsul.

PAS, which after the outbreak of Reformasi in 1998 had been delicately balancing its identity as supporter of democracy and human rights on the one hand, and defender of Islam on the other, could hardly hide its conservative stance. Its Youth Wing organized rallies at several mosques in the Klang Valley

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186 Umno Reform.com, 5 April 2005.
188 Interview with Shamsul Iskandar Mohd Akin, Vice Head of Angkatan Muda PKR, 25 April 2005, Kuala Lumpur.
in April 2005 to oppose the anti-moral policing campaign and demanded, among other things, intervention by the Conference of Rulers to put the issue to rest; serious legal actions against Sisters in Islam, including deregistration of the organization; SIS and the Parliamentary Caucus on Human Rights to withdraw their demands for review of the Islamic morality laws and issue a public apology to Muslims; and the Malaysian Islamic Development Department (JAKIM) to probe SIS for making allegations that caused confusion about matters of 'aqidah (Islamic belief). The actions and demands by the PAS Youth Wing generated criticisms from the anti-moral policing campaigners, accusing the party of merely "playing to the gallery" and backtracking from its ostensibly softer approach toward Islam and democracy since 1999. It raised concerns that the party had failed to soften its stance on the Islamic state policy crucial to winning non-Muslim votes. Rather unconvincingly, PAS Youth Chief, Salahuddin Ayub, insisted that the party's softer stance on the Islamic state policy and the reactions towards anti-moral policing campaign were two different issues. Be that as it may, the reaction proves that once fundamental aspects of Islam are challenged, the Islamic party will be loath to abandon its essentially conservative stance. PAS also objected the proposal to form Interfaith Commission of Malaysia and the call for legalization of apostasy and review of Article 121(1A) of the Federal Constitution.

The DAP on the other hand took a totally opposite stance. The non-Muslim-based opposition party was more comfortable championing the right to personal liberties and freedom of religion compared to the multiracial but Malay-based PKR, or even the non-Malay based political parties within the BN. The party supported the Anti Moral Policing Campaign, the formation of the Interfaith Commission of Malaysia and the call for review or repeal of Article

\[190\] *Malaysiakini*, 16 April 2005.
\[191\] *Malaysiakini*, 20 April 2005.
121(1A) of the Federal Constitution. In addition to the party’s endorsement of the Anti Moral Policing Campaign, DAP members of Parliament including its Chairman Lim Kit Siang endorsed the campaign individually. In relation to the proposed Interfaith Commission of Malaysia, Lim Kit Siang described the effort as “the most important and commendable initiative to promote national unity in multi-religious Malaysia”. He took a swipe at the opponents of the IFCM by saying that the flak and negative reactions toward the proposal were “completely unthinkable in the first quarter-century of national independence”, indicating that Malaysian Muslims have grown more conservative over the years.192 DAP has also been supportive of the call for review or repeal of Article 121 (1A). In response to the interfaith disputes over the right of burial as transpired in the Mohamad Abdullah@Moorthy litigation, and later the Rayappan litigation,193 the DAP advocated restoration of judicial powers to the civil courts to hear cases which involves non-Muslims as parties. DAP Secretary-General Lim Guan Eng said in a statement that the 1988 constitutional amendment which introduced Article 121(1A) “goes against the social contract and the original 1957 Merdeka Constitution”.194 He thus calls for “full restoration of the 1957 social contract and the Merdeka Constitution that gave birth to a


193 Rayappan was a Christian who converted to Islam in 1990 to marry a Muslim wife. In 1999 he reverted to Christianity and returned to his Christian family. He made a statutory declaration to confirm his reversion to Christianity. His identity card also stated Christianity as his religion. Dispute over his religious identity and the right of burial between Selangor Islamic Religious Council (MAIS) and Rayappan’s family cropped up upon his death on 29 November 2006.

nation based on a shared sense of values of a secular democracy and justice for all Malaysians”.195

Conclusion

It seems that the proliferation of liberal legal meanings, especially the attempt to catapult to prominence the more liberal interpretation of state laws on religious freedom, had reinforced communalism as the main basis of interest articulation and political mobilization in Malaysia. Since the 1998 Reformasi, overlapping coalitions of non-governmental organizations, non-Muslim religious groups and some politicians had been openly advocating wider interpretation of personal liberties and religious freedom based on secular human rights principles and libertarian values, and promoted equal rights and privileges for followers of non-Muslim religions. This has put them in direct confrontation with the Islamic mainstream which views such advocacy not only as a threat to the special constitutional position of Islam, but also a challenge to the fundamental principles of the Islamic faith. In the face of such a “threat”, whether perceived or real, the “defenders of the Muslim faith” across ethnic divisions mobilized communal support and, to a certain extent, aligned themselves with the government to defend the sanctity of Islam. The non-Muslim faith-based organizations too mobilized support from their religious communities and worked hand in hand with human rights NGOs to press for greater space for religious freedom. Religion rather than ethnicity has become an important marker of this new phase of communal politics. The politics of constitutional contract had been reinforced with both sides trying to portray the Constitution as either Islamic or secular. This raised the specter of the communally-based

195 See Lim Guan Eng’s statement dated 6 December 2006. It is noteworthy that while the DAP looks at the 1957 social contract as essentially secular, the Islamic mainstream on the other hand view it as mainly Islam-favoured.
constitutional contract politics, which rests primarily on the mobilization of distinct ethno-religious consciousness to pursue communal interests. It also caused dissension among the ideologically incompatible opposition political parties, halting any effort at their consolidation. More important, the potential destabilizing forces that this new phase of communal politics may unleash, to certain extent, restore a semblance of legitimacy to the restrictive state legal powers, the legitimate existence of which has been increasingly put to serious question since the 1998 Reformasi.
Chapter VIII

Conclusion: The Limits of Political Change

As individuals tend to uphold their sense of ends and purposes together with others sharing a common social identity, their vision of group interests in a communally-divided society is often determined by their association with their own communal group. In Malaysia, competing communal interests - based on ethnic and religious identity - formed the basis of a "communal compact" between communal leaders prior to independence in 1957. The nature of the state-individual relationship understood in the context of communally-based constitutional-contract politics mainly revolved around the debate on the special privileges of indigenous Malays and the legitimate interests of other ethnic communities. It is therefore quite distinct from that envisaged by liberal social contract theory. In independent Malaya/Malaysia the balance has been tilted toward prioritizing state power over individual liberties due to a deep concern that in a communally-divided society racial tensions can flare up and turn into violence at any time. Priority has been given to enhancing the state's capacity to maintain order.

The prioritization of state power originated in the process of constitution-making itself, which involved hard bargaining between communal groups seeking to maximize communal interests. Faced with potentially explosive communal politics, as well as a communist threat, the Constitution was finely crafted not only to serve competing communal interests, but also to ensure that the state was equipped with sufficient powers to keep destabilizing forces in check. The Malaysian head of state was given the power to proclaim a state of emergency and suspend parliamentary democracy in times of troubles. As communal groups continued to promote communal interests beyond the constitution-making stage, partly as a result of the constitutional compromise
itself which tended to aggravate rather than resolve communal tensions, state power was expanded rather than limited over time. During the first two decades of independence, various amendments were made to the Constitution and laws adopted that enhanced the state’s capacity to activate emergency and anti-subversion powers as a means of political control. These laws, which were supposed to be used only at exceptionally troubled moments, became normalized as part of the established structure of the state.

The courts too, recognizing state-defined policy objectives in the politically highly sensitive areas of ethnic relations, national security and economic development, promoted illiberal statist legal meanings in these areas, which in turn legitimated the exercise of state power over individual freedom. Toward the end of the 1980s, the judiciary, as a result of continued measures adopted by the legislature and the executive to limit the court’s interpretive scope as well as the packing of the bench with friendly judges, became more inclined to be supportive of executive actions. The 1988 judiciary crisis which culminated in the sacking of the then Lord President Tun Salleh Abbas and two other Supreme Court judges marked the beginning of the more compliant role of the judiciary. To a certain extent, the courts too had become one-sided political arenas in which the state punished political opponents and delegitimated oppositional political activities.

By the 1990s that government’s continual harping on the potential threat of communal conflict as a reason for the maintenance of repressive laws was becoming more difficult to justify. For a long time no major racial conflict had broken out and the communist threat had ended when the Communist Party of Malaya surrendered in 1989. During the 1990s, resort to security laws such as the Internal Security Act (ISA) had declined. When used, it was primarily against “normal criminals” rather than racial extremists or communists. Facing increased questioning from opposition politicians and other critics of the use of the security laws during “normal times”, the government turned to the courts for legitimacy.
Instead of detention under the ISA, political dissidents now found themselves hauled to the courtroom to face criminal charges or civil suits, ranging from sedition to libel. Political trials had been a means by which the government portrayed its opponents as acting illegally, while reinforcing the notion that the government actually acted within the confines of the law.

But excessive use of courts as one-sided political arenas to disgrace political opponents, as the Anwar trials demonstrated, had deadened the legitimacy that the government sought to pursue. In the wake of the Anwar trials, civil society organizations, opposition political parties and concerned individuals who formed the backbone of the Reformasi movement launched subsequent to Anwar’s sacking from the government and UMNO in September 1998, condemned the conduct of such trials and questioned the integrity and independence of the judiciary. Anwar himself turned the courts into contested political arenas by “revealing” the inner political machinations of senior ministers, the judiciary, the police and the Attorney-General’s office, whom he alleged were involved in a high-level conspiracy to end his political career. While the government accused Anwar of moral impropriety for his alleged sexual misconduct and corrupt practice, Anwar portrayed himself to the masses as a victim punished because he was opposed to corruption and abuse of powers in the government. The courts had become arenas where politicians could wash their dirty linen in public.

No less important, the 1998 Reformasi movement saw the emergence of overlapping multiracial and cross-sectional coalitions involving opposition political parties, human rights NGOs, mainstream Islamic movements, women’s groups and concerned individuals pushing for political reform in a democratic and non-communal direction. In the realm of formal politics, the Barisan Alternatif (BA) drew together major opposition political parties, including the communally and ideologically incompatible Parti Islam Se-Malaysia (PAS) and Democratic Action Party (DAP), in one electoral coalition to challenge Barisan
In the 1999 general election, this coalition presented a blueprint for a more democratic and non-communal Malaysia as an alternative to BN’s semi-democratic and race-based politics. Although the BA failed in its bid to deny the BN its two-thirds majority in the Parliament, it made significant inroads in the Malay-majority constituencies in the election, thus striking at the heart of the BN’s political anchorage, the UMNO constituency. In the realm of non-formal politics, overlapping multi-communal coalitions of human rights NGOs, professional organizations, trade unions and Islamic groups focused on such issues as repressive laws, media freedom, judicial independence, transparency, good governance and police accountability. In the area of law and human rights, liberal legal meanings based on the liberal notion of rule of law contested illiberal statist legal meanings based on the illiberal notion of rule by law. This was accompanied by a sense of euphoria that not only Malaysia’s communally-divisive politics had reached its limits, but its semi-democratic politics had also exhausted its utility.

This euphoria, however, was soon confronted by old political realities. Not long after Reformasi, the BA had to face the brunt of communal politics when the DAP in 2001 pulled out from the coalition after disagreement with PAS over the Islamic State issue. Dissension also arose within the realm of non-formal politics, especially between the secular human rights NGOs and Islamic groups. The proliferation of liberal legal meanings and the organization of social movements for political and legal reform during the Reformasi had given an ideological boost as well as organizational platform for greater promotion of liberal legal meanings in the area of religion and politics, the movement for which had previously been mainly confined to a small group of NGOs. There had been overlapping coalitions for religious freedom that consisted mainly of secular-liberal human rights NGOs, non-Muslim religious groups, human rights lawyers, non-Muslim-based political parties and some “liberal” Muslims. They formed overlapping coalitions for religious freedom and campaigned for reform
of the country’s dual legal system - civil and syariah - which was seen by non-Muslims who were concerned about discrimination as discriminatory against them, especially at the intersection between civil and Islamic law.

The Muslim groups reacted by forming coalitions to protect the “sanctity” of the Islamic faith from the liberal “onslaught” and the constitutional position of Islam in Malaysia. They argued that Islam, together with Malay privileges, had been part of the constitutional contract agreed in 1957, and therefore should be respected by all. The more liberal group on the other hand stressed the secular nature of the Malaysian state based on pronouncements of communal leaders before and after independence, as well as several court decisions, and hence interpreted freedom of religion under the constitution in more secular terms. The politics of the constitutional contract - this time round revolving around the contest between “Islamicity” and “secularity” that had not been adequately resolved by the 1957 communal compact - reinforced communalism as a focus of interest articulation and political mobilization. The Muslim groups, which wanted to defend the special constitutional position of Islam, mobilized the Islamic mainstream in support of their position, while the secular human rights and non-Muslim groups, which felt that their rights to religious freedom has been curtailed, mobilized non-Muslims, as well as some liberal Muslims, against it.

Although the contest between the two groups did not lead to physical violence, it caused considerable tension within the society, prompting the government to turn again to laws that limited freedom of speech and assembly. Voices within the Islamic mainstream called for the retention of key features of the security laws, like detention without trial, in order to maintain peace and order in a communally-divided society. Even without these voices, the government found justification in maintaining the laws in view of the potential destabilizing forces that a renewed communal contest would unleash. Despite demands by human rights groups that the government repeal laws that curtailed
individual freedoms such as the Internal Security Act, the Sedition Act, the Police Act, the Printing Presses and Publications Act, no significant progress was made toward that end. Democratic space, especially when it borders on the politically highly sensitive areas of ethnic relations, continued to be circumscribed.

Fifty years after independence, communally-based constitutional-contract politics remains significant in Malaysia. It has been made justification by the government of its measures to limit democratic space and halt political change in a more liberal direction. While the democratic forces had pushed hard for political and legal reform along more liberal lines, the underlying forces are still largely communal. What is more, the proliferation of liberal legal meanings, especially in religion and politics, reinforced rather than weakened communalism. In the 2000s, the contestation of legal meanings - along ethnic and religious lines - had a contradictory effect on political change. While it helped galvanize societal forces in support of liberalizing political and legal change, it also generated an illiberal reaction. The ensuing threat of destabilization in the multi-communal society provided justification for the maintenance of an illiberal political and legal system. It seems that, for some time to come, efforts at political change will still have to deal with the perennial issue of race, religion and repression.

The study of constitutional-contract politics thus offers a fresh look at the intersection between communalism, law and state power in explaining the nature of authoritarian politics and the limits, as well as possibilities, of political change in Malaysia. While existing literatures on Malaysian politics mainly look at, among others, the nature of elite relations and the ability of state functionaries to dispense patronage in explaining regime continuity or change, this thesis views the articulation of non-communal ideas to challenge the notion of communally-based constitutional-contract politics as central to the discussion about political change or continuity in Malaysia. As this thesis demonstrates, the intensity of communal politics to a large extent provides justification for the
government to use state power to fend off any possible threats to racial harmony, which in turn prevents the political system from moving in a more democratic direction. Having said this, one could argue that the possibility of political change in Malaysia depends very much on the ability of its political actors to successfully challenge the hegemony of communally-based constitutional-contract politics. Understanding this salient relationship between communalism, law and state power is thus a key to understanding the dynamics of political change or continuity in Malaysia.
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