

# **The Name of God on Trial: Narratives of law, religion and state in Malaysia**

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The right of the masters to confer names extends so far that one should allow oneself to grasp the origin of language itself as the expression of the power of the rulers: they say 'this is such and such', they put their seal on each thing and event with a sound and in the process take possession of it (Nietzsche 1996: 13).

## **Introduction**

The power to name is both an awesome and awful power – it is an exercise of sovereign power. In the Abrahamic religions, the monotheistic God is the ultimate sovereign. The power to name God, then, is one of the most magnificent powers that is conceivable to humans: it is the sovereign power to name the ultimate sovereign. It is this naming of God that has been put on trial in Malaysia. The state decrees that the name 'Allah' is only to be used in reference to the Islamic God. Christians, in response, have insisted that the state has no monopoly over the power to name God, and they too should be able to call their God – the Christian God – by the name of 'Allah'. The matter ends up in court, where judges are asked to decide on the name of God. This case raises a perplexing puzzle: how on earth did the human judges in Malaysia end up with the power to name the divine judge?

On an explanatory level, this paper charts the story of how this peculiar state of affairs came to be, that is, how the name of God came

to be put on trial in the courts in Malaysia. The story runs from the postcolonial settlement that resulted in the Federal Constitution till the Federal Court decision that upheld the ban on the use of the name Allah by non-Muslims. The story will identify the various actors and agents, forces and pressures, twists and turns, which led to the name of God being put on trial in Malaysia. In (re)telling this story about the trial of Allah, more ambitiously, this paper also attempts to provide a meta-narrative of the various narratives and counter-narratives of law, religion and state in postcolonial Malaysia.

On an analytical level, this paper argues that the Malaysian postcolonial constitutional settlement is precarious – not only because the constitution is an ‘incompletely theorized agreement’ (Sunstein 2007: 1) – but also because it speaks with two discordant voices and presents two conflicting visions on issues of law, religion and state. In effect, there are two constitutions embedded in the one constitutional text. The constitutional text engages in double-speak and presents a double vision of the Malaysian polity. This bifurcation in the constitutional text makes the postcolonial constitutional settlement a precarious arrangement because its meaning is internally incoherent and inherently unstable.

While this constitutional duality may not provide the benefit of stability, it may, ironically, create the benefit of longevity. Two competing camps can appeal to the same constitutional text, with the result that the ensuing ideological competition is contained within the constitution itself. Proponents on both sides of the ideological divide can find their voices and visions in the same constitutional text, drawing on the same document to support opposing views. Thus, both sides can construct their own narratives and counter-narratives from the available constitutional materials. The methodological maneuver of this paper is to advance this analytical argument through the explanatory story of how the Allah ban became one of the most explosive inter-religious controversies in Malaysia.

## 1 Postcolonial (Un)Settlement

The unsettledness of the postcolonial settlement on the question of the relationship between law, religion and state in Malaysia is nowhere better illustrated than in art 3 of the Federal Constitution. Article 3(1) states that 'Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation'; this clause is coupled with the proviso in clause (4) that 'nothing in this Article derogates from any other provision of this Constitution'. Art 3(1) is supposed to be innocuous because of the proviso in clause (4). However, this article is now at the centre of constitutional contestation in Malaysia. This article may be the tail that wags the dog.

The Constitution was drafted by the Reid Commission, which consisted of Lord Reid (UK); Sir Ivor Jennings (UK); Sir William McKell (Australia); Justice Malik (India); and Justice Abdul Hamid (Pakistan). The Commission took evidence in Malaya from political parties, organisations and individuals from June to October 1956, and submitted a draft Constitution to the Alliance government, the Malay Rulers and the Colonial Office on 20 February 1957 (Fernando 2006: 249; see also Fernando 2002). In its Report which accompanied the draft Constitution, the Commission stated that, although 'there has been included in the Federal Constitution a declaration that Islam is the religion of the Federation, this will not in any way affect the present position of the Federation as a *secular* state' (1957: [57]). Tunku Abdul Rahman, the first Prime Minister of Malaya, restated this principle in Parliament on 1 May 1958, about a year after Independence, when he said: 'I would like to make it clear that this country is not an Islamic state as it is generally understood; we merely provide that Islam shall be the official religion of the state' (*Parliamentary Hansard* 1958).

The text of the constitution states that Islam is the religion of the Federation, but the accompanying report states that the Federation is a secular state. Equivocation is not unusual in constitutional texts and commission reports in order for them to placate different and competing interest groups; but what we see here is not just equivocation, but contradiction. It may not be an irreconcilable contradiction, but it is a

contradiction nonetheless. There is a perceptible conflict between the text of the constitution and the accompanying report. The Commission says one thing in the report, but does another thing in the constitutional text. If we follow what the report says, then it raises the question of why art 3(1) was inserted at all. If we follow the text of the constitution, what then should we make of the repeated assurances by the Commission and the founding Prime Minister that the new Federation was to be a secular state? One nullifies the other. Malaysians were saddled with the paradoxical puzzle of figuring out how a state can simultaneously have an official religion while remaining secular. Instead of binding the people, the Constitution left the people in a bind.

Adding to the puzzle is art 11(1), which guarantees that ‘every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it’; Clause (4) provides that state and federal law ‘may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam’. Art 11(1) may not exactly mean what it says. In the case of *Lina Joy*, the majority of the Federal Court ruled that the right to profess and practise one’s religion does not extend to the right to convert out of Islam (see Neoh 2008). In the Federal Court’s judgment, religious profession is distinguished from religious conversion – the former is protected and guaranteed by the Constitution, while the latter is not. The current interpretation of the religious conversion law creates an asymmetrical situation, in which non-Muslims can freely convert to Islam, but Muslims cannot convert out of Islam. Conversion out of Islam is criminalised as apostasy. In addition to the distinction between profession and conversion that was introduced by the Federal Court, art 11 stipulates another distinction – between profession and propagation. The restriction on propagation similarly creates an asymmetrical situation: Muslims can propagate Islam to non-Muslims, but non-Muslims cannot propagate non-Islamic beliefs to Muslims.

Another conundrum was added to the Constitution through a constitutional amendment in 1988. Art 121(1) confers judicial power on the High Courts in Malaya and in Sabah and Sarawak. Art 121(1A)

was inserted in 1988, stating that ‘the courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah [i.e. Islamic] courts’. Just as there is uncertainty over the function and effect of art 3(1), there is a similar uncertainty over the function and effect of art 121(1A). If Malaysia is not already an Islamic state by virtue of art 3(1), is art 121(1A) a step in that direction? More specifically, does art 121(1A) create two parallel, co-equal and mutually exclusive jurisdictions between the common law courts and the syariah law courts, or do the common law courts maintain supervisory jurisdiction over the syariah law courts?

The common law tradition was introduced into British Malaya during the colonial era. The post-colonial Constitution endorsed the continued operation of the common law after independence (see Neoh 2010). Article 160 of the Constitution stipulates that the word ‘law’ in the Constitution includes the common law, and art 162 preserves the continuity of pre-independence laws, including the common law (affirmed in *Che Omar bin Che Soh v Public Prosecutor*). In providing for the common law system to be the national legal system, syariah law is not entirely abrogated. Since independence, the role of Islamic law has been preserved in a formalised syariah court structure that operates under the jurisdiction of the respective states (see sch 9 of the Constitution). However, the syariah courts are inferior courts in the sense of having limited jurisdiction *ratio personae* and *ratio materiae*: syariah law only applies to ‘persons professing the religion of Islam’ and its field of operation is limited to the matters enumerated in the Constitution, which mostly relate to personal and family law (Thio 2007: 197).

Prior to the insertion of art 121(1A), the orthodox view was that the common law was the general law of the land that was applicable to both Muslims and non-Muslims in matters of public and private law, while limited legal space was provided for syariah law to operate in the periphery in matters of personal and family law. Barry Hooker divides interacting legal systems into two classes: dominant and servient. A dominant system manifests itself as the sole determinant

of legality within a territorial boundary and enjoys institutional and political superiority, while a servient legal system exists 'subject to the demands and through the forms of the dominant system' (Hooker 1975: 453-4). Using Hooker's taxonomy, common law is the dominant legal system in Malaysia with general jurisdiction, while syariah law is the servient legal system with limited jurisdiction. On this reading, syariah law exists 'only for the purpose of providing personal law for Muslims' in matters of marriage, custody, inheritance and the like, and it is not intended to be a source of public law values (Harding 2002: 167). What many Malaysian public law scholars thought was settled became unsettled with the addition of art 121(1A). In recent times, there is the increasing assertion that the syariah law courts and the common law courts are equal and equally dominant, and that both are sources of public law values. This argument was brought to new heights in the Allah case when it was argued that public law can be used – and should be used – to defend the sanctity of Islam.

## 2 Competing Narratives

'Constitutions are, in part, a story that a country tells about itself' (Evans 2009: 437). Understood as narratives, the constitution becomes, not merely a set of rules to be observed, but a normative world – a *nomos* – in which we live (Cover 1983: 4). A *nomos* imposes a vision on reality. The gap between vision and reality is bridged through the creation of a narrative, which explains the reality – both past and present – and tells us how we can make the vision a future reality. The contest of constitutional interpretation is a contestation over the creation of meaning through narrative. However, the nature of hermeneutics, including legal hermeneutics, is that meaning is radically unstable. The unity of meaning and the unifying force of narrative are constantly being shattered – 'shattered, in fact, with its very creation' (Cover 1983: 16). There may be a stable written text, which we call the Constitution, but there is seldom a stable narrative about the meaning of the text. Whichever story the state chooses, 'alternative stories still provide normative bases for the growth of distinct constitutional worlds' (Cover 1983: 19).

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The nature of constitutional narratives is such that there will be a multiplicity of constitutional worlds, a multiplicity of *nomoi*. Each *nomos* – each constitutional world – has its own internal coherence which weaves together, not only a collection of rules, but also ‘a disparate group of characters, settings, activities, and tensions into a meaningful whole’, in which ‘characters are sifted into minor or major, good or evil, passive or active’ (Evans 2009: 438).

Competing constitutional narratives are traceable to the constitutional text insofar as they are competing *textual* narratives. By telling different stories about the genesis and telos of the text, different ideological groups endow the text with different, even opposing, meanings. Hence, a constitutional text often has a multiplicity of readings, that is, one can often read the constitutional text in multiple ways depending on the framing narratives that one adopts (see Neoh 2013). To the extent that the meanings of the text are dependent on the accompanying narratives, there is no sharp distinction between text and narrative. And to the extent that the constitutional narratives are presented as interpretations of the text itself, competing narratives are refracted as textual inconsistencies. Consequently, law, text and culture merge into a composite whole.

In Malaysian constitutional discourse, two main competing narratives are told about the origin and the future of the Malaysian polity. On the one hand is the *evolutionary* story of an orderly transition of power from British Malaya to the independent Malaysia which maintained the largely secular structure of the state; on the other hand is the *revolutionary* story of a largely Muslim people’s movement that overthrew the yoke of colonial rule and set up a new state with Islam as the religion of the state (Evans 2009: 454). The latter story is revolutionary in two senses. The word ‘revolution’ has two seemingly contradictory meanings: it is often used to denote the destruction of the old political structure and the start of a new political era, but this meaning of the word ‘revolution’ is superimposed upon an older meaning of the word, whose root word is revolve, which denotes a return to the old or original position. The two meanings of the

word revolution, as applied to the Islamic story in Malaysia, are not contradictory, but complementary. What the proponents of the Islamic narrative are arguing is that the declaration of independence marks a radical break from colonial rule *and* a return to the pre-colonial Islamic rule, whether real or imagined. Insofar as the evolutionists tell the story of a progressive future towards a gradual realisation of individual and civil rights, we can call them liberals; insofar as the revolutionists tell the story of a return to an imagined collectivist past, we can call them conservatives.

The *evolutionists* tell the story of how the Constitution was 'drafted by a group of men who shared a common law, Westminster government background'; and how the Constitution was designed to ensure 'continuity and connectedness to the community of British former colonies, with some indigenous elements to recognise the particularities of Malaysian culture and history' (Evans 2009: 449). They emphasise the Reid Commission Report, which states that the new Federation would be a largely secular state. The state secularism referred to by the Reid Commission is a continuation of a particular kind of colonial secularism which is marked by a non-interventionist stance by the state in matters of religion (Yeoh 2011: 93).

The evolutionists posit a restrictive reading of art 3 which limits the role of Islam to largely ceremonial matters. With regard to the freedom of religion, they emphasise the centrality of the protection provided under art 11(1) as the bedrock of interreligious harmony in Malaysia. While they argue for a restrictive reading of art 3, they argue for an expansive reading of art 11(1). With regard to the jurisdictional disputes, they emphasise the superiority and primacy of the common law courts over the syariah courts. According to the evolutionists, the common law courts predated the Constitution as courts of general jurisdiction; and the Constitution entrenches that juridical order. The common law courts are the ultimate guardian and custodian of the Constitution.

The *revolutionists* tell a very different story: from their point of view, the Reid Commission was an attempt by the British to maintain

colonial power in postcolonial Malaysia by suppressing the Islamic identity of Malaysia (Evans 2009: 450). By delegitimising the Reid Commission, they elevate the importance of art 3 which makes Islam the religion of the Federation. In a symmetrical reversal of the position of the evolutionists, the revolutionists argue for an expansive reading of art 3 and a restrictive reading of art 11(1). The restrictive reading of the freedom of religion provision under art 11(1) would mean, *inter alia*, that conversion out of Islam is excluded from the protection of the freedom of religion. Therefore, pursuant to an expansive reading of art 3, the state may take action to advance the position, and thereby safeguard the superiority, of Islam in the Federation. With regard to the jurisdictional disputes, they argue for the equality of power and status between the common law courts and the syariah law courts. What the revolutionists want to achieve may be characterised as a form of constitutional theocracy, which embeds principles of theocratic governance within the framework of constitutionalism (Hirschl 2010: 2). They articulate their theocratic aspirations through the language of the constitution. Their narrative brings together post-colonial forms of governmentality with pre-colonial imaginings.

The normative claims of the Islamic revolutionists rest on a particular historical narrative that goes as follows:

After the Malay rulers and people embraced Islam in the 15th century, attempts were made to modify Malay customs so as to conform to Islam and to adopt Islamic law; the process can be seen in the various versions of the Malacca [code] (Ibrahim 1981: 21).

This process, so the story goes, was in train prior to colonisation. According to the revolutionists, 'Muslim law *would have* [become] the law of Malaya *had not* British law stepped in to check it' (Ibrahim 1981: 21; see also Dawson & Thiru 2007: 158). In this story, 'a counter-factual narrative of an imagined, non-colonised Malaysia is developed as though there was only one possible, natural development of Malaysian society absent colonialism' (Evans 2009: 463). Their argument relies explicitly on a counter-factual narrative, rather than on a factual narrative of the actual history of constitutional development

in Malaysia. They situate their reading of the constitution within this counter-factual narrative. Counter-factual narratives are no less potent than factual ones.

### 3 Bureaucratic Simplification

While at the discursive level, there may be competing narratives in circulation, the government has to get on with the job of governing the population. Bureaucrats have to get on with the job of administration. Without resolving the national identity tensions, the governmental and bureaucratic strategy has been to divide and categorise Malaysians by race and religion. The transition 'from colonialism to nationalism' was accomplished through the framework of race and religion (Mohamad 2008: 296). Race and religion were essentialised 'for the administrative ease of multicultural management' (Mohamad 2008: 294).

Of particular importance is the identity of ethnic Malays. What it means to be a Malay is entrenched in the Constitution: under art 160, "Malay" means a person who professes the religion of Islam, habitually speaks the Malay language, and conforms to Malay custom'. Malays are, by *constitutional* definition, Muslims; and the Federal Court in *Lina Joy* tells us that they have no constitutional right to convert out of Islam. Hence, to say that a Malay person is a Muslim is a legal tautology. The definition of Malayness is important because that ethnic status carries with it certain special privileges, some of which are entrenched in art 153 of the Constitution. Therefore, the boundary separating Malays from non-Malays has to be patrolled rigorously. The Allah ban plays a crucial role in fortifying the Malay-non-Malay, or Muslim-non-Muslim, border. The ban is, inter alia, a form of border patrol.

James Scott posits legibility to be the central concern of modern statecraft. State officials often take exceptionally complex, local social practices, and create a standard map or grid whereby these practices can be centrally recorded and monitored; statecraft is devoted to rationalising and standardising complex social practices into a legible and administratively more convenient format for purposes of political surveillance (Scott 1998: 2-3). The executive ban on non-Muslims from

using the word Allah, along with the subsequent judicial endorsement of it, is part of this state project of legibility. We see the dynamics of simplification, division and hierarchisation in the control of language use. If you are a Muslim, your God is Allah. If you are a non-Muslim, your God is Tuhan, which is another Malay word for God. Reordering the social landscape by renaming it is a vital step in the project of legibility. Names, even or especially the name of God, play an essential role in determining cultural identities and affiliations (Scott, Tehranian & Mathias 2002: 6). They impose a certain vision and division on society. As the quotation from Nietzsche in the epigraph indicates, the power to name is an exercise of sovereign power that is, at once, awesome and awful.

While the concept of legibility explains the logic of governmentality, there is a subset to that logic, namely, the specific logic of religious administration within the bureaucratic structure of the Malaysian government. While Scott focuses on legibility, Geertz focuses on rationalisation as a process of cultural and religious change that entails a standardisation and systematisation of cultural and religious practices. This rationalising process is characterised by

two analytically separate sets of entailments: first, a rethinking and reconfiguring of key symbols and their meanings to better accommodate them to each other and to changing social and cultural realities; and, second, institutional or social organizational changes that help motivate, buttress, or sustain this rethinking and reconfiguring (Peletz 1993: 67).

Translated into the Malaysian context, a Geertzian argument will proceed as follows. First, there is an effort by the Islamic bureaucrats to reconfigure the symbols of Islam in a way that asserts their exclusivity and superiority; and they have identified the word 'Allah' as one such key symbol. Hence, they need to make the term special to Muslims, vis-à-vis non-Muslims. Second, to enforce this new configuration, they need to deploy the full apparatus of the state, including its laws, to enforce this exclusivity. The religious bureaucratic administration, with the backing of the other arms of government, has many formal

enforcement mechanisms at its disposal, such as the withdrawal of publishing permit and the seizure of Malay-language Christian bibles with the word Allah in them.

The monopoly on Allah as the name of the Islamic God strengthens and elevates the official ethnic category of Malay-Muslim that the state created. I said earlier that, under the current regime, if you are a Muslim, your God is Allah; if you are a non-Muslim, your God is Tuhan. However, the division is not so neat: if you are a Muslim, you are still allowed to use the word Tuhan; the first of the five national precepts is *Kepercayaan kepada Tuhan* (Belief in God). Thus, Muslims have monopoly over Allah, but share Tuhan with non-Muslims. This twist is unsurprising, because, for the purpose of communication between different religious groups in a multi-religious setting, the Malay language needs a generic term to refer to God. Hence, Tuhan becomes the generic term for God as well as the term that the state wants non-Muslims to use when referring to their specific God(s). As a generic term, Tuhan includes Allah. This twist changes the power play between Allah and Tuhan.

By containing and restricting Allah to Muslims, Allah is made specific and exclusive to Muslims. This investment of exclusivity to Allah, vis-à-vis Tuhan, can be understood through the lens of the Durkheimian sacred–profane dichotomy. Durkheim uses the sacred–profane dichotomy to delineate the natural from the supernatural. The natural is common, everyday and therefore profane. The supernatural is set apart, special and therefore sacred. The Malaysian state seems to go one step further than Durkheim to make this distinction within the supernatural realm itself. Within the pantheon of Gods, there is the common, general and generic Tuhan and the special, protected and exclusive Allah. Under the current regime, the exclusively Islamic Allah is a sacred term, while the generic Tuhan is a profane term.

In this project of legibility, not only does the government have to impose categories on society, it has to make the categories mutually exclusive and, to a certain degree, antagonistic. Hence, one of the rationales given by the government to justify the restriction on the

word Allah is that its usage by non-Muslims, especially Christians, will *confuse* Muslims and ‘draw them to Christianity’ (*International Herald Tribune* 7 January 2008: [10]). This rhetoric portrays Christianity as the antagonistic ‘Other’ who must be kept at bay at all cost. The rhetoric of confusion reinforces the idea of border patrol: first, Muslims have to better demarcate its religious boundary ‘whose sanctity and overall integrity have been (or are perceived to have been) seriously threatened’; second, they have to ‘stave off the confusion, disorder, and chaos’ that are ‘frequently implicated in threats to sanctified boundaries’ (Peletz 1993: 92). We will see this rhetoric and motif of confusion resurfacing in the judicial judgment that we will examine in the next section.

The legibility and the rationalisation theses are, by and large, a correct explanation of the bureaucratic rationality underlying the promulgation of the initial regulation, which prohibits non-Muslims from using the term Allah. The plausibility of these theses are reinforced by the fact that the ever expanding Islamic departments within the state bureaucracy have their own administrative hierarchies and priorities, and the initial regulation on the use of the word came from within the state bureaucracy, not from their political masters. Once the regulation was out in the open, in the public sphere, their political masters endorsed it and simply went along with it.

Bureaucratic rationality taps into the larger discursive narratives, but simplifies them in the process, the result of which is the presentation of half-digested narratives in terms of policies. Behind every government policy is a larger, richer and denser network of competing narratives. The same logic applies with regard to the colonial administration as much as the postcolonial government. The colonial period marked a key turning point in the institutionalisation of religious authority and the state appropriation of religion on the Malay Peninsula, especially when the colonial regime introduced what could be termed as ‘Anglo-Muslim’ law:

the law was ‘Anglo’ in the sense that the concepts, categories, and modes of analysis followed English common law, and it was ‘Muslim’ in the sense that it contained *fragments* of Islamic jurisprudence that

were applied to Muslim subjects (Moustafa 2014: 157).

As a consequence of that process, the rich, diverse and varied hybrids of Islamic practice and Malay custom were simplified and codified in a half-digested form. The ‘expansion and empowering of state-controlled Islamic administrative hierarchies that began under colonial rule continued after Independence’, which ‘led to the more centralised and standardised (rationalised) implementation of Islamic religious law’ (Peletz 1993: 78).

The legitimacy of the religious administration in Malaysia – whether in the colonial past or the postcolonial present – ‘rests on the emotive power of Islamic symbolism, but its principal mode of organisation and operation is fundamentally rooted in the Weberian state’ (Moustafa 2014: 167). One of ways by which the government taps into the emotive power of the Islamic narrative is through semantic shifts: ‘Muslim law’ was renamed as ‘Islamic law’ and ‘Muslim court’ was renamed as ‘Syariah court’. These shifts in terminology ‘exchanged the object of the law (Muslims) for the purported essence of the law (as Islamic)’, thereby elevating the government’s religious credentials (Moustafa 2014: 160). The regulation on the use of the word Allah and the state-sanctioned (re)definition of it to refer exclusively to the Islamic God is another semantic shift in the same direction. It ignores – or rather, simplifies – the complex and variegated use of that term among the diverse religious communities in Malaysia. Allah was never, hitherto, exclusive to Islam. The government is not codifying a preexisting practice; rather, it is attempting, through the coercive force of the state, to create a practice, or in the famous words of Hobsbawm (1983), to invent a tradition. Instead of merely ‘speaking in God’s name’ (El Fadl 2001) or ‘judging in God’s name’ (Moustafa 2014), the Malaysian government goes a step further in dictating God’s name.

#### **4 Constitutional Contestation**

Where the bureaucracy simplifies, the people complicate. The people complicate the simplistic picture by appealing to larger narratives. The postcolonial unsettlement that is discussed in Part 1 gives rise to the

competing narratives that are discussed in Part 2. While the process of bureaucratic rationality may attempt to impose a simplified view of the state onto the population as discussed in Part 3, the people could always appeal to those larger competing narratives to advance their claims and challenge the bureaucratic simplification. This process of challenging bureaucratic rationality by recourse to foundational narratives and counter-narratives is what I term 'constitutional contestation'. Through these competing narratives, constitutional contestations hark back to the postcolonial settlement. If there was no settlement that could be found, then a settlement would have to be constructed and imputed to the past or to 'the founding fathers'.

The Catholic Church in Malaysia decided to move their dissatisfaction and disaffection over the Allah ban into the arena of constitutional contestation. They purported to find support for their cause in the constitution. Given that the Malaysian constitution engages in double speak and presents a double vision of the Malaysian polity, it is unsurprising that the Catholic Church was able to find its voice and vision in the same constitutional text as fundamentalist Muslims. Opposing groups could raise their discordant voices and present their conflicting visions in and through the same document. The Catholic Church went to the court to seek the protection of the constitution and claim the right that is promised to them. They advanced their claim by presenting a liberal, progressive, evolutionary narrative of law, religion and state in Malaysia. The High Court agreed with their narrative.

At the High Court, Lau Bee Lan J began with the principle that the freedom of religion is a constitutional right; and any restrictions on a constitutional right should be construed strictly (Lau J 2010: [19]). The Constitution draws a distinction between the profession of a religion, which is guaranteed under art 11(1), and the propagation of a religion, which is restricted under art 11(4). Construing the guarantee broadly and the restriction strictly, the state cannot ban the use of the word Allah if it is used in the course of the profession of a religion, although the state may be able to ban it if it is used in the course of the propagation of a non-Islamic religion to Muslims. In any case, there

cannot be a blanket ban on the use of the word. Turning her mind to the recurrent and supposed fear of ‘confusion’, she cautioned that

the court has to consider the question of ‘avoidance of confusion’ as a ground very cautiously so as to obviate a situation where a mere confusion of certain persons within a religious group can strip the constitutional right of another religious group to practice their religion under art 11(1) and to render such guaranteed right as illusory (Lau J 2010: [65]).

With respect to art 3(1), she declared that the Catholic Church has the right to use the word ‘Allah’ pursuant to the constitutional guarantee that non-Islamic religions may be practised in peace and harmony in any part of the Federation, and that the constitutional provision of Islam as the religion of the Federation does not empower the Home Minister to prohibit the Church from using the word Allah (Lau J 2010: [89]).

The Home Minister appealed and presented a conservative and revolutionary narrative of law, religion and state in Malaysia. The Court of Appeal agreed with the Home Minister and overturned the decision of the High Court. In a previous paper examining the case of *Lina Joy*, which effectively upheld Malaysia’s apostasy laws, I asked rhetorically whether Malaysian common law judges had become Islamic theologians as well (Neoh 2008: 11). The question was meant to carry a tinge of sarcasm. However, in light of the Court of Appeal decision on the Allah matter, the question no longer sounds sarcastic at all. The answer now is clearly yes: the Court of Appeal judges have become theologians, and Malaysia has a particular brand of constitutionalism, which I shall call ‘theological constitutionalism’. So versatile is the Malaysian constitution that even theological concerns could find their voice in the constitution. Consequently, theological concerns could now be spoken of, and rearticulated, in the constitutional tone of voice.

Like Lau Bee Lan J at the High Court, Apandi Ali JCA at the Court of Appeal addressed the two-pronged provision of art 3(1), but he addressed it in a directly opposite way. Art 3(1) states that ‘Islam is the religion of the Federation; *but* other religions may be practised

in peace and harmony in any part of the Federation'. The two prongs are separated by the conjunction *but*. Again, we hear the constitution speaking in two voices. Apandi JCA began by asserting that the first prong of art 3 'places the religion of Islam at par with the other basic structures of the Constitution' (Apandi JCA 2013: [31]). He then went on to posit that the insertion of the phrase 'in peace and harmony' in the second prong with regard to the practice of non-Islamic religions is meant 'to protect the sanctity of Islam as the religion of the country and also to insulate against...any possible and probable threat to the religion of Islam' (Apandi JCA 2013: [29]). Apandi JCA interpreted the phrase 'in peace and harmony', not as supporting the freedom of non-Muslims to practice their religion, but as a limitation on that freedom: that freedom is subject to the superiority of Islam in the Federation. Even the freedom of religion guarantee under art 11 is subject to the supposed superiority of Islam under art 3(1). Hence, if the government decides that the usage of the word Allah by non-Muslims would constitute a possible and probable threat to Islam, it could impose the ban consistent with art 3(1). The threat does not have to be actual, but only possible and probable; and the relevant threat here is to Islam as a religion, not to national security or public order.

Thereafter, the tone of the judgment switched from legal analysis to theological exposition. Apandi JCA claimed that

to refuse to acknowledge the essential differences between religions will be an affront to the uniqueness of world religions[:] due recognition must be given to the names given to their respective Gods in their respective Holy books; such as 'Yahweh' the God of the Holy Bible; 'Allah' the God of the Holy al-Quran and 'Vishnu' the God of the Holy Vedas' (Apandi JCA 2013: [52]).

Apandi JCA deemed it appropriate and within his area of judicial competence to go around categorising and naming gods, including the gods of others. The second judge on the bench of three, Abdul Aziz JCA, went a step further in theologising this matter. According to Aziz JCA, the name Allah 'is sacred to the Muslims and is placed on the highest position and its sanctity must be protected'. Allah 'refers to

“oneness” and cannot be part of the concept of Trinity of Father, Son and the Holy Ghost of the Christian faith’; Allah ‘is a special name for the Muslim’s God’ (Aziz JCA 2013: [92]).

Aziz JCA then returned to the recurrent theme of confusion: ‘the use of the word “Allah” ... to describe or refer to God among Christian[s] would create confusion among Muslims as the concept of God in Islam and in Christianity is world[s] apart’ (Aziz JCA 2013: [92]). The third judge, Zawawi Salleh JCA, extended the confusing logic of confusion further: according to him, if the word ‘Allah’ is to be employed by Christians, ‘there will be a risk of misrepresentation of God within Christianity itself ... in other words, the potential for confusion is not confined only to Muslims but also to Christians’ (Zawawi JCA 2013: [139]).

This ‘potential for confusion’ is akin to the following scenario: if I call my father Papa, and you call your father Papa, there is a risk that you will be confused that my Papa is your Papa, and your Papa is my Papa, or that we have the same Papa. The state therefore has to protect, not only Muslims, but also Christians from confusing their Gods. To prevent such confusion, Zawawi JCA had to step in to clear the air by proclaiming *ex cathedra* that ‘Allah is not the God of the Bible; Allah is a proper name and the only God in Islam’ (Zawawi JCA 2013: [137]).

The Islamic theology that is presented by these three judges at the Court of Appeal is judicial theology, not classical or even orthodox Islamic theology. It is a judicial hybrid of Malaysian constitutional politics and Islam. Hence, scholars such as Tamir Moustafa, who criticised the Malaysian state for perverting the true Islamic jurisprudential tradition, may be correct, but that critique misses the point. As Moustafa himself recognised, ‘religious law is transformed as a result of incorporation as state law ... [and] subverted as a result of state appropriation’ (Moustafa 2014: 2). The Malaysian state’s Islamic law is itself ‘a break from the very tradition that it claims to represent’ (Moustafa 2014: 16). It is *sui generis* – truly one of a kind – for in no other Muslim-majority country in the world is there such a ban on the word Allah – nowhere else but in Malaysia.

The three Court of Appeal judges are living constitutionalists: they are grafting Islamic supremacy into the constitution and expanding the role of Islam beyond that which was envisaged at the time of founding. They may even be redemptive constitutionalists in the Coverian sense. They have a particular political-theological imagination of the Malaysian brand of Islam and a particular vision of the social order of the Malaysian nation. They have, in the words of Cover, a particular *nomos*. 'A *nomos* is a present world constituted by a system of tension between reality and vision... our visions hold our reality up to us as unredeemed' (Cover 1983: 9). These judges see the Malaysian constitution, as drafted by the founders, with its liberal and largely secular foundations, as fallen and in need of transformation, and crucially, redemption. They have a constitutional vision in which Islam would be preeminent. While the text of the constitution stays the same, they are investing it with new meanings, and in so doing, redeem the constitution from the colonial drafters. In an ironic twist, liberals in Malaysia are the originalists – they are the ones who appeal to original intent and insist that the constitution, as drafted by the founders, has liberal and largely secular foundations.

The theological constitutionalism in Malaysia is a distinctly postcolonial project. The political governance of colonial British Malaya was largely secular. However, 'colonial secularism' was marked, not by any deep philosophical or ideological commitment to secularism, but by an 'antipathy to religion', specifically 'native religion' (Yeoh 2011: 93). Native religion had, in various colonies, been the rallying point for rebellion against the colonial government. Hence, the role of native religion in the colonies had been actively marginalised and privatised by the colonial government. Postcolonial theological constitutionalism is the effort to reassert the nativist religious identity politically. In Malaysia, that desire to elevate native religion in the politics of identity is done through Islamising the constitution – but the paradox is that Islam is not exactly native either.

If postcolonialism is 'the politics of narration and counter-narration', the current constitutional battle is reflective of the 'unresolved identity

tensions stretching from colonialism to nationalism' among the various religious communities in Malaysia (Mohamad 2008: 296, 311). Islam is defined in opposition to Christianity, with the latter constructed as the remnant of colonialism.

### 5 Conclusion

On 23 June 2014, the Federal Court, the apex court in Malaysia, in a 4-3 decision, refused to grant the Catholic Church leave to appeal. After three judicial decisions on this matter – at the High Court, the Court of Appeal and the Federal Court – the contestation of constitutional narratives about law, religion and state will continue *beyond* the Federal Court. The judiciary does not have the final word – it never does. That is one of the reasons why judges write dissenting opinions. Dissents appeal directly to the people and to the future. It signals that today's judgment is not final. A dissenting judgment builds a counter-narrative to the judicial narrative of the majority judgment. The judicial narrative of the majority is but one of the many narratives that are available for picking by the people.

Neither judicial ruling nor bureaucratic simplification could restrict or constrict the people's imagination. All decisions could be revisited and challenged judicially or extrajudicially. It could be revisited judicially when a subsequent court is presented with the opportunity and invited to overturn its precedent. It could be revisited and challenged extrajudicially, either in a constitutional manner through an amendment to the constitution or in an extraconstitutional manner through a political revolt. The losing side in a judicial battle can always live to fight another day. As this paper has tried to argue, the Malaysian Constitution contains an arsenal of weapons for *both* sides of the battle. To push the metaphor further, one could say that the Malaysian Constitution is at war with itself!

There is, however, a silver lining in this constitutional battle. This contestation is happening within the framework of the constitution. Even when the judges are rewriting the constitution through reinterpretation, they at least try to couch what they are doing in terms

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of constitutional law. The contest is in the courts, not on the streets, at least not yet. While the Malaysian Constitution may not have the benefit of stability, ironically, it may have the benefit of longevity. By allowing the two competing camps – the Islamic, conservative, revolutionists *and* the secular, liberal, evolutionists – to appeal to the same constitutional text, the ideological battle is contained within the constitution. The ideological battle is reframed and recast as a *constitutional* battle. The battle is a pitched battle, not a total warfare. In a bleak world, this is an achievement of sorts for constitutionalism in Malaysia.

## Notes

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## References

- Cover R 1983 'Nomos and Narrative' *Harvard Law Review* 97: 4–68
- Dawson B and S Thiru 2007 'The Lina Joy Case and the Future of Religious Freedom in Malaysia' *LAWASIA: Journal of the Law Association for Asia and the Pacific* 2007: 151–162
- El Fadl K 2001 *Speaking in God's Name: Islamic Law, Authority and Women* Oneworld Publications Oxford

- Evans C 2009 'Constitutional Narratives: Constitutional Adjudication on the Religion Clauses in Australia and Malaysia' *Emory International Law Review* 23: 437-468
- Federal Parliament of Malaysia 1 May 1958 *Parliamentary Hansard* House of Representatives Kuala Lumpur
- Fernando J 2002 *The Making of the Malayan Constitution* Malaysian Branch of Royal Asiatic Society Kuala Lumpur
- 2006 'The Position of Islam in the Constitution of Malaysia' *Journal of Southeast Asian Studies* 37: 249-266
- Harding A 2002 'The Keris, the Crescent and the Blind Goddess: The State, Islam and the Constitution in Malaysia' *Singapore Journal of International and Comparative Law* 6: 154-180
- and H P Lee eds 2007 *Constitutional Landmarks in Malaysia: The First 50 Years* LexisNexis Kuala Lumpur
- Her Majesty's Stationery Office 1957 *Report of the Federation of Malaya Constitutional Commission 1957*
- Hirschl R 2010 *Constitutional Theocracy* Harvard University Press Cambridge
- Hobsbawm E and T Ranger eds 1983 *The Invention of Tradition* Cambridge University Press Cambridge
- 1983 'Introduction: Inventing Traditions' in Hobsbawm and Ranger 1983: 1-14
- Hooker B 1975 *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* Clarendon Press Oxford
- Ibrahim A 1981 'Islamic Law in Malaysia' *Journal of Malaysian and Comparative Law* 8: 21-51
- 'Malaysian Christians warn that Allah ban hurts country's moderate Muslim image' *International Herald Tribune* 7 January 2008
- Mohamad M 2008 'Malay/Malaysian/Islamic: Four Genres of Political Writings and the Postcoloniality of Autochthonous Texts' *Postcolonial Studies* 11: 293-313
- Moustafa T 2014 'Judging in God's Name: State Power, Secularism, and the Politics of Islamic Law in Malaysia' *Oxford Journal of Law and Religion* 3: 152-167

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- Neoh J 2008 'Islamic State and the Common Law: A Case Study of Lina Joy' *Global Jurist* 8: art 4
- 2010 'Legitimacy of the Common Law in Post-Colonial Malaysia' *LAWASIA: Journal of the Law Association for Asia and the Pacific* 2010: 59-82
  - 2013 'Text, Doctrine and Tradition in Law and Religion' *Oxford Journal of Law and Religion* 2: 175-199
- Nietzsche F 1996 *On the Genealogy of Morals* Trans D Smith Oxford University Press Oxford
- Pelutz M 1993 'Sacred Texts and Dangerous Words: The Politics of Law and Cultural Rationalization in Malaysia' *Comparative Studies in Society and History* 35: 66-109
- Scott J 1998 *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* Yale University Press New Haven
- Tehranian J and J Mathias 2002 'The Production of Legal Identities Proper to States: The Case of the Permanent Family Surname' *Comparative Studies in Society and History* 44: 4-44
- Sunstein C 2007 'Incompletely Theorized Agreements in Constitutional Law' *Social Research* 74: 1-24
- Thio L 2007 'Jurisdictional Imbroglia: Civil and Religious Courts, Turf Wars and Article 121(1A) of the Federal Constitution' in Harding and Lee 2007: 197-226
- Yeoh S G 2011 'In Defence of the Secular? Islamisation, Christians and (New) Politics in Urbane Malaysia' *Asian Studies Review* 35: 83-103

## Cases

- Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55
- Lina Joy v Majlis Agama Islam Wilayah Persekutuan* [2007] 4 MLJ 585
- Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLJ 468 (Apandi Ali, Abdul Aziz Abdul Rahim and Zawawi Salleh JJCA)
- Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor* [2010] 2 MLJ 78 (Lau Bee Lan J)