

CHAPTER 12

MEDIATION: RELIGIOUS AND CULTURAL DISPUTES*

Religious And Cultural Conflicts

Malaysia is a multi-ethnic and multi-religious country with Muslim, Hindus, Buddhists and Christians living together harmoniously. Its citizens are not only given freedom to practice their religious beliefs and cultures but are also thought to be tolerant and respectful to other religious beliefs and cultural practices.¹ Undoubtedly, these values are vital for harmony to prevail in society and the country. Harmonious ties among the different races and cultures² are necessary for the progress and betterment of the country. To touch on the sensitive aspects of another's religious beliefs and cultural practices is in fact treading on dangerous grounds.³ Hence, when sensitive issues affecting different

* This chapter is contributed by Ashgar Ali Ali Mohamed, Adnan Yaakob and Chithra Latha Ramalingam.

1 See e.g. Federal Constitution art.11(1):

Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.

2 Edward Tylor in 1871 defined culture as, 'that complex whole which includes knowledge, belief, art, law, morals, custom, and any other capabilities and habits acquired by man as a member of society': see J Prinz 'Culture and Cognitive Science' *The Stanford Encyclopaedia of Philosophy* (Fall 2016 Edn) at <https://plato.stanford.edu>; TS Elliot in the chapter 'The three senses of culture' stated that the term culture may be construed to be in mind the progress of "an individual, of a group or class or of a whole society"': *Notes Towards Definition of Culture* (2010).

3 In *Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 8 CLJ 890 at [92], Abdul Aziz Rahim JCA noted that 'religious issues are sensitive issues which may cause disaffection or discontents in a cosmopolitan society, which in turn may lead to the disturbance of the current life of the community resulting in disturbance of public order.'

ethnic and religious groups in the community arise, the dispute ought to be settled amicably *vide* mediation in the interest of achieving greater unity among the people.

The root of the cross-religious and cross-cultural problems in Malaysia is the lack of understanding of each other's religious beliefs and cultural practices. Not long ago, about 100 Muslim demonstrators gathered outside the *Al-Ikhlasih* Mosque in Pantai Dalam protesting against a complaint made by a non-Muslim to the Prime Minister's office on the noise level of the *azan* (Muslim's call for prayer) aired every morning over the loudspeakers from a mosque near his residence in Pantai Hill Park condominium.⁴ A copy of the complaint letter was also forwarded to the Department of Islamic Development Malaysia (JAKIM) and the Selangor Islamic Religious Department (JAIS). In the complaint letter, the complainant had urged *inter alia*, the mosque authority to be sensible to other races by at least lowering the volume of *azan* over its loudspeakers.

The protestors were outraged by the complaint and had demanded for stern action against the complainant for threatening national harmony. The complainant had subsequently apologised and expressed regret over his excessive move, driven mainly due to his lack of knowledge of the importance of *azan* to Muslims. In fact, this incident is not new in this country. In 2008, the then Selangor executive councillor was arrested under the now repealed Internal Security Act 1960 when she had urged a mosque in Puchong to stop playing the *azan* over its loudspeakers.⁵ It is noteworthy that for Muslims it is obligatory

4 The said mosque is situated in a Malay-majority neighbourhood known as Bangsar South — a new commercial development area. It has been in use for more than three decades while the complainant had been in the neighbourhood for only five years.

5 Ashgar Ali Mohamed, Adnan Trakic 'Significance of the Muslim's call for prayer (*azan*) with reference to its practice in Malaysia' [2011] ShLR xlvi.

to observe the five daily prayers⁶ in the mosque and for every prayer, *azan* is performed as a call to all Muslims to congregational prayers.⁷ It serves to remind the believers to discard all worldly activities at prayer time and gather together in a mosque to perform the obligatory prayers in congregation.⁸ The *azan* or call for prayers over the loudspeakers at a mosque has been the practice not only in Malaysia but also in many Muslim countries around the globe.

Yet another example which had sparked debate in Malaysia recently is the barring of Muslim women with *hijabs* from working at the hotel frontline such as receptionists, servers or waitresses. Some have contended that the prohibition was not discriminatory as it is an international practice. Those who defended the wearing of *hijab* at the workplace stated that whatever the international policy may be, it is beyond doubt that the international company should take into account the local religious beliefs and sensitivities. For the Muslims guarding chastity and appropriate dressing is guided by their religious beliefs. The criteria of modest dressing for women in the presence of strangers and non-*Mahram*⁹ are contained in the divine law.

6 The prescribed prayers for the Muslims which are obligatory to be performed every day are: *Fajr* (dawn); *Dhuhr* (noon); *Asr* (afternoon); *Maghrib* (sunset); and *Isha'a* (nightfall).

7 In fact, a person who fails to perform the Friday prayers in a mosque within his *kariah* for three consecutive weeks without *uzur syarie* or without any reasonable cause shall be guilty of an offence and shall on conviction be liable to a fine not exceeding RM1,000 or to imprisonment for a term not exceeding six months or to both. See Syariah Criminal Offences (Federal Territories) Act 1997, s. 14. The word 'within his *kariah*' means an inhabitant of a district of the mosque (*Kariah masjid*), see Administration of Islamic Law (Federal Territories) Act 1993, s. 2.

8 *Allah* (*s.w.t.*) says in the *Qur'an*, *Surah Jumua* 62: 9:

O you who believe (Muslims)! When the call is proclaimed for the prayer on the day of Friday (*Jumua* prayer), come to the remembrance of *Allah* [*Jumua* religious talk (*Khutbah*) and *Salat* (prayer)] and leave off business (and every other thing). That is better for your if you did but know!

9 *Mahram* refers to either her husband or any male relative with whom her marriage is permanently prohibited. Relationships prohibiting marriage, see Islamic Family Law (Federal Territories) Act 1984, s. 9.

The *Qur'an* has prescribed the criteria of modest dressing for women as follows:

And tell the believing women that they should lower their gaze and guard their sexual organs, and not display their adornment, except that which is apparent of it; and they should draw their head coverings over their bosoms, and not display their adornment except to their husbands or their fathers or their husbands' fathers, or their sons or their husbands' sons, or their brothers or their brothers' sons or their sisters' sons, or their women, or those whom their right hands possess, or male servants who lack sexual desire, and children who are not aware of women's nakedness; and that they should not strike their feet in order to make known what they hide of their adornment. And O you believers, Turn you altogether towards *Allah*, that you may attain bliss.¹⁰

It is clear from the above that a Muslim woman must be properly covered in the presence of strangers and non-*mahram* relatives.

It is undeniable that indecent and provocative dressing may attract despicable acts and behaviours such as sexual harassment. The *Qur'an* states the reasons for decent clothing as follows:

O *Prophet!* tell thy wives and daughters, and the believing women, that they should cast their outer garments over their persons (when abroad): that is most convenient, that they should be known (as such) and not molested: and *Allah* is Oft-Forgiving, Most Merciful.¹¹

It must be admitted that even women who are modestly dressed have occasionally experienced sexual harassment. It is important to state however that in a society where women are dressed modestly and

10 *Surah Al Nur* 24: 31.

11 *Surah Al Ahzab* 33: 59.

decently, it could avoid unnecessary glances and further advancements from the opposite sex, and thus, could minimise the risk of being sexually harassed.¹²

In fact, in some Muslim countries, such as Saudi Arabia and Iran, it is compulsory for women to wear the headscarf or *hijab* at the workplace, while in other countries such as Egypt, Jordan, Syria, Algeria and Bosnia, among others, it is merely optional and not forced upon the women. In Yemen and United Arab Emirates, the majority of the women prefer to adorn the *hijab*. In Malaysia, it is optional for Muslim women to wear *hijab* at the workplace with the exception in some Islamic organisations and institutions of higher learning where wearing the *hijab* is compulsory for women. Other than this, many women in government and private organisations have chosen to wear the *hijab* although it is not compulsory for them. However, a veil covering the full face or *niqab* is not allowed among the female employees at the workplace based on the decision of the Supreme Court in *Hjh Halimatussaadiyah Bte Kamaruddin v. Public Services Commission, Malaysia & Anor*.¹³ The court held *inter alia*, that the prohibition against wearing attire covering the face by female civil officers at the workplace does not violate the appellant's constitutional right to profess and practise her Muslim religion.

12 It is forbidden that any person should look at the *awrah* (intimate parts of the body) of another, whether of the same or the opposite sex, and whether with or without desire. The *Prophet (s.a.w.)* said that:

‘The eyes also commit *zina* (illicit sexual intercourse), and their *zina* is the lustful look.’

Therefore, it is obligatory for a woman to cover her entire body. This is further strengthened by a *hadith* whereby the *Prophet (s.a.w.)* said that: ‘The second glance is prohibited’.

13 [1994] 3 CLJ 532.

In the above case, the appellant, a clerk in the Perak State Legal Adviser's office, was dismissed after she persisted in wearing the *niqab* at the workplace in contravention of a government circular which prohibited female civil servants from wearing attire covering the face during office hours. The court relied on the opinion of the *Mufti* that Islam does make it obligatory for a Muslim woman to wear a *purdah*. The court also noted that while art. 11 of the Federal Constitution protects the practice of one's religious belief, art. 11(5) clearly forbids any act which may lead to public disorder, affect public health or public morality. The service circular was issued for the purpose of preserving public order. It must be noted that the prohibition is only in relation to *niqab* and does not extend to *hijab*, and thus, no employer should indiscriminately bar female Muslim employees from wearing *hijab* at the workplace.¹⁴

More recently is the case of *A Child & Ors v. Jabatan Pendaftaran Negara & Ors*,¹⁵ where the Court of Appeal had allowed an illegitimate child born to a Muslim couple to use his biological father's name as his surname. The above decision had run contrary to the *fatwa* issued by the National *Fatwa* Committee of the National Council for Islamic Affairs in 2003 which provides *inter alia*, that a child conceived out of wedlock cannot be ascribed to the name of his father but must be ascribed to the surname 'bin Abdullah'.

The court noted *inter alia*, that the Births and Deaths Registration Act 1957 (BDRA) makes no distinction between a Muslim child and a non-Muslim child; the Act does not say that an illegitimate Muslim child's surname must be 'bin Abdullah'; a *fatwa* cannot prevail over the BDRA, which is Federal law; there is nothing in the Act that envisages the application of any substantive principle of Islamic law in the registration process and that the National Registration Department (NRD) director-general's jurisdiction is a civil one and he is not obligated to apply, let alone to be bound by a *fatwa* issued by a religious body.

14 See Ashgar Ali Mohamed 'Respect Muslim women's right to wear hijab at the workplace' 6 Malaysian Court Practice Bulletin (2017) pp. 1-5.

15 [2017] 7 CLJ 533.

The court's decision was also partly grounded on the basis that the child has the right to live with dignity, an inviolable right of every individual. Ascribing 'bin Abdullah' to a Muslim child born out of wedlock in the official documents such as the birth certificate and identification card carries a negative stigma where the innocent child would be subjected to humiliation, embarrassment and public scorn for the rest of his or her life.

It is to be noted that an illegitimate child under Islamic law is not attributable legally to his/her biological father and this ruling cannot be altered by a mere argument of possible negative stigma an innocent child would be subjected to. In fact, in Islam adultery and fornication are considered despicable acts and a heavy punishment has been prescribed for its commission namely, the death penalty and hundred lashes, respectively.¹⁶ All legal schools of Islam are unanimous that the minimum gestation period for a child to be deemed legitimate is six months. The *Syariah Criminal Offences (Federal Territories) Act 1997* provides that a woman who gives birth to a fully developed child within a period of six *qamariah* months from the date of her marriage shall be deemed to have been pregnant out of wedlock. If a child is born less than the aforesaid period or a child born out of wedlock, the lineage is not established to the putative father.

It is admitted that the birth registration and the right to a name and nationality is a civil right of every child as provided in various national and international instruments such as the United Nations Convention on the Rights of the Child which Malaysia ratified in 1995 and the Child Act 2001, among others. An illegitimate child can be acknowledged by the father pursuant to the Legitimacy Act 1961 provided that certain conditions set therein are observed. This Act however does not extend its application to Muslims. In Islam, an illegitimate child can only be related to his/her mother and has no relationship with his/her biological father.

16 See Ashgar Ali Mohamed 'Offences relating to decency under Islamic law and its practice in Malaysia' (2014) 1 *Syariah Law Report* pp. cclxvi-cclxviii.

Further, the Islamic Family Law (Federal Territories) Act 1984 provides that the custody of illegitimate children appertains exclusively to the mother and her relations. Even the citizenship status of the illegitimate child depends on the citizenship of the mother. Hence, Islam emphasises on the legitimate offspring from a valid wedlock where in it a child will have several rights such as the right to inherit, right to maintenance, the father's right to act as a guardian of its person and property until maturity.

Aside from the above, the country has also witnessed the unilateral conversion of children by a single parent as in the case of *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals*.¹⁷ It is not disputed that the parents or guardian, would determine the religion of the child until he or she attains the age of 18 after which the child has the freedom to decide his or her own religion.¹⁸ The above however does not apply to Muslims as conversion to another religion among Muslims is a crime under the *Syariah Criminal Offences Act and Enactment of the states*.¹⁹ It is inaccurate to dictate that when one of the parents embraces Islam, the religious status of the children must automatically be changed to Islam.

Common sense would dictate that the child's religion would follow that of the custodian whom the child is living with, and this would have followed a decision of the court based on the best interest of the child. If there is a joint custody, the child should remain in the religion of both the parents until the child is 18 years of age, when he/she may then

17 [2018] 3 CLJ 145, FC.

18 'Child' refers to a person below the age of 18 and this is in line with the UN Convention on the Rights of the Child. The Interpretation Acts 1948 and 1967 states that 'infant' has the same meaning as minor and a 'minor' is defined as a person who has not attained the age of majority prescribed by the law applicable to him. The age of majority in Malaysia is 18 years. These special provisions have been drawn up for the child as they are very susceptible and can be affected emotionally by their surroundings.

19 See Ashgar Ali Mohamed 'Offences relating to decency under Islamic law and its practice in Malaysia' (2014) 1 *Syariah Law Report* pp. ccxlv-cclxviii.

choose his or her own religion. This means that both parents would have access to the child and as such, the child would be exposed to both religions and would then be given a right to choose his/her own religion when he/she turns eighteen. In fact, in Islam there is no compulsion in religion. A person cannot be compelled to accept Islam and they are free to profess and practice their religion which is guaranteed in the Federal Constitution. A person may enter the fold of Islam when he/she has decided to convert to Islam.

Further, the recent decision by the Terengganu *Syariah* High Court to whip two women who pleaded guilty of attempting to commit lesbian sex had raised some criticism within and outside Malaysia. The Muslim and non-Muslim activists expressed diverse opinions on the sentence which was carried out in accordance with the *Syariah* Criminal Procedure (Terengganu) Enactment 2001. Some say the execution of the sentence does not show a true image of justice in Islam. Some say corporal or physical punishments are harsh and barbaric, and have harmful and long-lasting physical and psychological effects. It is important for people to know the rationale of whipping as a punishment under the civil and *Syariah* system and the manner in which it is carried out before jumping to conclusions.

It may be noted that whipping under the civil legal system is administered pursuant to the Criminal Procedure Code and the punishment is carried out on male offenders for committing serious offences, such as rape, incest, violence, theft, robbery, kidnapping, extortion and trafficking in firearms and drugs. It is also prescribed for lesser offences, such as illegal immigration, bribery and criminal breach of trust. Women, men above age 50 except those convicted of rape and unnatural offences, and men sentenced to death shall not be subjected to whipping. The whipping is carried out on naked buttocks of offenders by specially trained officers. A cane about 1.09m long and 1.25cm thick is used for serious offences and violent crimes, such as drug trafficking, causing grievous hurt, armed robbery and rape. A thinner cane is used for white-collar crimes, such as bribery and criminal breach of trust. A medical officer is required to be present to certify that the offender is fit for punishment. The whipping can leave permanent physical and psychological scars. But public interest demands that law and order be

maintained at all times and deterrent sentences ought to be imposed on serious offences. The punishment in criminal cases is punitive and reformatory. The purpose is to make offenders repent for the action, deter them from repeating such acts and deter others who might be tempted to commit a crime.

In comparison, whipping under *Syariah* is sanctioned by the *Qur'an*, in such cases as fornication, slandering a chaste woman and consuming liquor. The *Syariah* Criminal Procedure (Federal Territories) Act 1997 provides, among other, that the whipping should be inflicted in a standing position for a male and sitting position for a female. A male offender must wear clothes that cover the region between the navel and the knee while female offenders must be fully clothed. The whipping rod, excluding the handle, shall be of the same type and made either from *rotan* or a small branch of a tree without segments or joints, and its length no more than 1.22m and its thickness no more than 1.25cm. The whipping rod must be used with average force without lifting the hand over the head so that the offender's skin is not cut. After inflicting a stroke, he shall lift the rod upward and not pull it. The whipping may be inflicted on all parts of the body, except the face, head, stomach, chest or private parts.

If the offender is pregnant, the execution shall be postponed until the end of two months after delivery, or after a miscarriage, if that is the case. After each stroke, the person executing the punishment must lift the cane upward and not pull it. The whipping may be inflicted on any part of the body, except the face, head, stomach, chest or private parts. As from the above, whipping is sanctioned by divine law and the provisions of the state laws are in agreement with divine laws and thus, there is no basis of levelling criticism on whipping of the Muslim offender and in this case, the Muslim female offender.²⁰

20 See Ashgar Ali Mohamed 'Whipping as punishment from civil and Shariah perspectives with reference to its practice in Malaysia' 5 Malaysian Court Practice Bulletin (2018) pp. 1-9.

The religious tension had also escalated following the High Court's decision in *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Anor*,²¹ where the decision had sparked a spate of attacks on houses of worship.²² In this case, the High Court allowed the applicant's application for an order of *certiorari* to quash the decision of the first respondent which had prohibited them from using *inter alia*, the word 'Allah', in their Malay version of *The Herald* — the Catholic weekly publication. The above decision of the High Court was however overturned by the Court of Appeal which held *inter alia*, that the usage of the word 'Allah' in the Malay version of *The Herald*, without a doubt, 'had the potential of disrupting the even tempo of the Malaysian community.'²³ Such publication would have an adverse effect upon the sanctity of Islam as envisaged under art. 3(1) of the Federal Constitution. It was further stated that the word 'Allah' is not an integral part of the faith and practice of Christianity, in particular that of the Roman Catholic Church. Hence, the court concluded that the intended usage of 'Allah' in the Malay version of *The Herald* would cause unnecessary confusion within the Islamic community. In particular, Abdul Aziz Ab Rahim JCA stated:

... in the context of Muslim society in Malaysia the Arabic term "Allah" is used to refer to God in the religion of Islam without any translation or modification to its meaning. Therefore I agree that the use of word "Allah" in *the Herald* to describe or refer to God among the Christians would create confusion among the Muslims as the concept of God in Islam and in Christianity is world apart — in the former it refers to the concept of oneness of God whereas in the latter it refers to the concept of Trinity of God.

21 [2010] 3 LNS 2, HC.

22 See 'Malaysia's highest court backs a ban on Allah in Christian bibles' *The Guardian* 23 June 2014 at <https://www.theguardian.com/world/2014/jun/23/malaysia-highest-court-allah-bible-ban>.

23 See *Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 8 CLJ 890, CA.

An application for leave to appeal to the Federal Court was however dismissed by the Federal Court.²⁴

The above are examples where religious conflicts which could have been resolved using mediation and not *vide* street demonstration or litigation in the ordinary courts, as this has the potential of triggering religious tensions between Muslims and non-Muslims in this country. It cannot be denied that religious conflicts are highly sensitive matters and thus, should be handled carefully and wherever possible, be resolved peacefully with a view of finding a common win-win solution and not a court decision wherein there is a winner and a loser as in the *Titular Roman Catholic* case, for example.

Aside from religious disputes, Malaysia has also witnessed a mammoth task in resolving clashes between races and its cultures. Cultural diversity has brought about social interactions where it is most evident within the three major races who are presumed to co-exist in tolerance and harmony. Unfortunately, more often than not, stoking the fire of racial and religious tension²⁵ has been present in the name of political affinity²⁶ that inadvertently brings about racial and cultural disputes.

Although there has not been much academic writing on politics, racial and cultural disputes, existing news media reports suggest that political propaganda may induce racial and cultural tensions amongst various groups of ethnicities.²⁷ This is not novel in that under the previous

24 *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors* [2014] 6 CLJ 541, FC.

25 Wong Chun Wai 'There is no place for bigotry' *The Star* 16 October 2016 at <https://www.thestar.com.my/opinion/columnists/on-the-beat/2016/10/16/there-is-no-place-for-bigotry/>.

26 N Balakrishnan '“Cina babi” and 8 other disturbingly racist remarks by Malaysian politicians in 2015' *SAYS* 9 December 2015 at <https://says.com/my/news/the-most-racist-remarks-made-by-malaysian-politicians-in-2015>.

27 See 'Time for politicians to be disciplined for a better Malaysia' at <https://komas.org/time-for-politicians-to-be-disciplined-for-a-better-malaysia>.

governmental administration,²⁸ a certain individual holding high position in the government had made racial slurs towards the Chinese by referring to them as '*Cina Babi*' and many others have hidden behind parliamentary privilege²⁹ and uttered derogatory words such as 'Sit down *apek*' (old man) and '*balik tongsan*' (go back to China).³⁰ Further racism in the business environment has previously been reported where the same individual in September 2015 with his party members had marched to protest in Petaling Street also known as Chinatown where the traders were predominantly Chinese.³¹

In addition to this there had also been several racial disputes in the business environment for example the then Agriculture and Agro-Based Industries Minister had called for a national boycott of Chinese goods that was published in his *Facebook* page.³² It was believed that the traders who were Chinese were making a profit from the Malays. Although police reports were lodged against the individual on his racist statements, no constructive action was taken against him. In fact, even more galling was the fact that others from the ruling government had blatantly supported and defended the Minister's comments as stated, that the statement was 'well intended' and was not aimed at the Chinese

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- 28 See 'Najib's army of "Red shirt" pro-government supporters promise peaceful rally amid fears of racial backlash against racial Chinese' *South China Morning Post* at <https://www.scmp.com/news/asia/southeast-asia/article/1858413/najibs-army-red-shirt-pro-government-supporters-promise>.
- 29 See 'Amid outcry over "Balik Tongsan", UMNO MP says been called tambi' *Malay Mail Online* 8 November 2015 at <http://www.themalaymailonline.com/malaysia/article/amid-outcry-over-balik-tongsan-umno-mp-says-been-called-tambi>.
- 30 See 'Baling MP ordered to retract "*balik tongsan*" remark' *The Malaysian Insider* 4 November 2015.
- 31 See 'Himpun 16: Jamal Yunos wants action against Petaling Street vendors' *The Star Online* 16 September 2015 at <http://www.thestar.com.my/news/nation/2015/09/16/red-shirt-jamal-wants-action-petaling-st-vendors>.
- 32 See 'Unity minister defends Ismail Sabri over racially tinged FB post' *The Malaysian Insider* 2 February 2015.

traders. It is appalling that instead of defending the very notion of unity, they have created a false defence in the name of political cronyism. The Federal Constitution³³ supports cultural cohesion and has entrenched the protection of citizen rights by prohibiting racial discrimination in the country.

It may be added that any person who insults or brings into contempt for example, the religion of Islam; ridiculing the practices or ceremonies relating to the religion of Islam; or degrades or brings into contempt any law relating to the religion of Islam; is an offence under the *Syariah Criminal Offences (Federal Territories) Act 1997*. Similarly, any person who derides, insults, ridicules or brings into contempt the verses of *Al-Quran* or *Hadith* shall be guilty of an offence and shall on conviction be liable to a fine not exceeding RM5,000 or to imprisonment for a term not exceeding three years or to both.³⁴ It is also an offence for a person to destroy, damage or defile any mosque or surau or other place of worship or any of its equipment with the intention of insulting or degrading the religion of Islam. If convicted, the punishment is a fine not exceeding RM3,000 or to imprisonment for a term not exceeding two years or to both.³⁵ Again, a person who displays, on or in respect of any food or

33 Article 8:

- (1) All persons are equal before the law and entitled to the equal protection of the law.
- (2) Except as expressly authorised 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.

...

Article 12:

- (1) Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth—

...

34 *Syariah Criminal Offences (Federal Territories) Act 1997*, s. 8.

35 *Ibid* s. 32.

drink which is not *halal*, any sign which indicates that such food or drink is *halal*, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding RM5,000 or to imprisonment for a term not exceeding three years or to both.³⁶ The above mentioned offences are within the jurisdiction of the *Syariah* Court and only in respect of acts committed by Muslims.

Likewise, a non-Muslim who insults the religion of Islam or other religions or cultural practices of others may be charged under s. 298A(1) of the Penal Code for causing or likely to cause disharmony, disunity, or feelings of enmity, hatred or ill-will or prejudices, or attempts to prejudice, or is likely to prejudice, the maintenance of harmony or unity between persons or groups of persons professing the same or different religions. It carries a maximum of five years imprisonment, if found guilty.³⁷ In *Tan Jye Yee & Anor v. PP*,³⁸ the appellants were charged in the sessions court under the above section of the Penal Code for the offence of posting on their *Facebook* a *Hari Raya* greeting, the contents among which were the photographs of the appellants enjoying *bak kut teh*³⁹ with the '*Halal*' logo.

³⁶ *Ibid* s. 42.

³⁷ Penal Code, s. 298A provides:

(1) Whoever by words, either spoken or written, or by signs, or by visible representations, or by any act, activity or conduct, or by organizing, promoting or arranging, or assisting in organizing, promoting or arranging, any activity, or otherwise in any other manner—

(a) causes, or attempts to cause, or is likely to cause disharmony, disunity, or feelings of enmity, hatred or ill will; or

(b) prejudices, or attempts to prejudice, or is likely to prejudice, the maintenance of harmony or unity,

on grounds of religion, between persons or groups of persons professing the same or different religions, shall be punished with imprisonment for a term of not less than two years and not more than five years. ...

³⁸ [2013] 1 LNS 1244, HC; [2015] 2 CLJ 745, CA.

³⁹ *Bak kut teh* is a pork rib dish cooked in broth popularly served in Malaysia and Singapore: See https://en.wikipedia.org/wiki/Bak_kut_teh.

In *Public Prosecutor v. Mohamed Nor & Ors*,⁴⁰ it was stated that s. 298A(1) is:

... designed to preserve law and order to maintain a state of harmony, unity and goodwill between persons or groups of persons professing the same or different religions that are being practiced in this country by preventing such persons from causing or attempting to cause disharmony or disunity or feelings of enmity, hatred or ill-will, and that the offences of the nature committed by the four respondents will have the effect of jeopardising Islamic unity, in the result, prejudicing the maintenance of unity and harmony in the country.

In this case, the first and fourth respondents were charged for acting in a manner likely to prejudice the maintenance of unity on grounds of religion between persons professing the Islamic religion by acting as *Bilal* during the performance of Friday prayers, an offence under s. 298A of the Penal Code. The second and third respondents were also charged under the same section but acting as *Imam* and *Khatib*, respectively.

More recently, the Sessions Court had sentenced an unemployed non-Muslim man to seven months' jail and fined him RM10,000, in default two months' jail, for insulting Islam and the *Prophet Muhammad* (*s.a.w.*) in a post on his *Facebook* account.⁴¹ Earlier, three non-Muslim men were charged in the Sessions Court with 11 counts of insulting *Prophet Muhammad* (*s.a.w.*) and Islam on social media.⁴²

It is worth mentioning that this country ascribes to a 'mixed legal system' or 'pluralistic system' namely, the Common Law system and Islamic legal system and this is sanctioned by art. 121(1A) of the Federal Constitution. Both systems function within the limits set by the Federal Constitution and there is no one system superior to the other. The application of the Common Law system in Malaysia was a

40 [1985] 1 LNS 25, SC.

41 See 'Jobless man jailed seven months, fined RM10k for insulting Islam, Prophet Muhammad' *Star Online* 11 March 2019 at <https://www.thestar.com.my>.

42 'Three men charged with insulting Islam, Prophet Muhammad' *Malay Mail* 8 March 2019 at <https://www.malaymail.com/news/malaysia>.

direct result of the British administration of the Malay Peninsula and the Borneo states for more than 150 years which had left greater impact upon the law of the country. Under the common law system, the parties, and not the judge, have the primary responsibility of conducting the proceedings by defining the issues in dispute and advancing the evidence to substantiate their claims. The judges can only make law through interpretation of statutory laws and customary rules. The practical legal rules contained in the Islamic legal system are derived from the *Qur'an* and the *Sunnah*. The codified Islamic law of a Muslim state must be in conformity with the *Qur'an* and the *Sunnah*. Further, the judges of the *Syariah* courts are persons who are highly experienced and knowledgeable in Islamic principles and law.

Tolerance Of Other Religious And Cultural Practices

In Malaysia, Islam has a special position where art. 3(1) of the Federal Constitution provides 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 Islamic religion in art. 3 is dealt with in the context of acts related to rituals and ceremonies.⁴³ Generally, Muslims are allowed to practice Islam as their way of life.⁴⁴ Further, art. 11(1) of the Federal Constitution provides that every person has the right to profess and practice his religion, subject to certain restrictions as provided for under art. 11(4) namely, that the propagation of any religious doctrine or belief among persons professing the religion of Islam may be controlled or restricted by law. The purpose of this restriction is to provide the States with the power to pass a law to protect the religion of

43 See *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ 55, SC; *Fatimah Sihi and 2 Ors v. Meor Atiqubrahman Ishak and 2 Ors* [2004] 1 LNS 647, CA.

44 However, in *Fatimah Sihi and 2 Ors v. Meor Atiqubrahman Ishak and 2 Ors* [2004] 1 LNS 647, the Court of Appeal held that whether or not the wearing of a *serban* forms an integral part of the religion of Islam involves a question of evidence and it was for the respondents to adduce sufficient, relevant, and admissible material to prove that the wearing of a *serban* was mandatory in Islam, something which the respondents were unable to do. This decision was affirmed by the Federal Court: see *Meor Atiqubrahman Ishak & Ors v. Fatimah Sihi & Ors* [2006] 4 CLJ 1.

Islam from being exposed to the influences of the tenets, precepts and practices of other religions or even of certain schools of thought and opinion within the Islamic religion itself.⁴⁵

Be that as it may, major religions of this country emphasise on their followers that they should be considerate and tolerant to the others. In Islam, elements of tolerance can be traced back to the days of the *Prophet (s.a.w.)* where the Muslim community co-existed with their non-Muslim fellow citizens. When the *Prophet (s.a.w.)* migrated to Madinah in 622 CE⁴⁶ he was faced with the communities of Jews, Christians, and polytheists. The importance of tolerance in Islam can be best proven by referring to the *Qur'anic* verses and the teachings of the *Prophet (s.a.w.)*. The basis for the religious tolerance promoted by the religion of Islam can be clearly seen in the *Qur'an*, in *Surah Al-Kafirun* 109: 1-6 which states:

Say: O ye that reject Faith!
I worship not that which ye worship,
Nor will ye worship that which I worship.
And I will not worship that which ye have been wont to worship,
Nor will ye worship that which I worship.
To you be your Way, and to me mine.

The above verse clearly affirms the peaceful co-existence of plural society. Muslims must be allowed to practice their religion in peace in the same way as other religions have their own right to be practiced in peace. Islam strongly prohibits compulsion in the religion. It has been clearly stated in the *Qur'an*:

Let there be no compulsion in religion: Truth stands out clear from Error: whoever rejects evil and believes in *Allah* hath grasped the most trustworthy hand-hold that never breaks. And *Allah* heareth and knoweth all things.⁴⁷

45 See *Mamat Daud & Ors v. The Government of Malaysia* [1988] 1 CLJ Rep 197, SC.

46 Common Era or CE is a method used to identify a year: see https://en.wikipedia.org/wiki/Common_Era.

47 *Surah Al-Baqara* 2: 256.

The importance of peaceful co-existence between religious groups was highlighted by the *Prophet (s.a.w.)* through the signing of *Sahifah al-Madinah* (Madinah Constitution). This constitution is a document which ensured the smooth administration of the state where the obligations, responsibilities and certain restrictions imposed on the parties residing in Madinah, the Muslims and non-Muslims, were clearly stated. It is an excellent document that promotes tolerance, peaceful co-existence, and mutual help between the Muslims and non-Muslims.

Article 1 of the Constitution provided:

This is a document from Muhammad the *Prophet (s.a.w.)*, governing relations between the Believers i.e. Muslims of Quraysh and Yathrib and those who followed them and worked hard with them. They form one nation — *Ummah*.⁴⁸

This article reinforces the importance of tolerance which Muslims and non-Muslims must have in order to live harmoniously as one nation. All citizens of Madinah regardless of their religion, race, or ancestry were protected and considered as members and citizens of the State. Furthermore, art. 16 provides that the Jews who follow the Believers will be helped and will be treated with equality.⁴⁹

Further to the above, there are many *hadith* of the *Prophet (s.a.w.)* which emphasise on the correct and good treatment of non-Muslims in the Muslim state. The *Prophet (s.a.w.)* is reported to have said:

Beware! Whoever is cruel and hard on a non-Muslim minority, or curtails their rights, or burdens them with more than they can bear, or takes anything from them against their free will; I (*Prophet Muhammad*) will complain against the person on the Day of Judgment.⁵⁰

48 See art. 1 of the *Sahifah Al-Madinah*.

49 See art. 16 of the *Sahifah Al-Madinah*.

50 *Sunnan Abu Dawud*.

Again:

Whoever hurts a non-Muslim citizen of a Muslim state hurts me, and he who hurts me annoys God.⁵¹

There are many other practical examples where the *Prophet (s.a.w.)* demonstrated high levels of tolerance and kindness towards the non-Muslims in an Islamic state.

Hence, to ensure the peaceful and harmonious living between different ethnic and religious groups, there must be positive tolerance among them. In the same way as Islam requires its followers to have tolerance towards the non-Muslims, the non-Muslims are also expected to have a strong sense of tolerance towards the Muslims. Tolerance of the *azan*, *halal* food, burning of joss sticks and ceremonial gifts as offerings to ancestors during the *Hungry Ghost* festival and *Thaipusam* are the examples which Malaysians should understand and respect.

Further, the *Rukun Negara*, which was introduced following the May 13, 1969 riots, was aimed at achieving national and racial harmony and unity, and a key ingredient to ensuring success and stability of the country. One of the important components therein is the principle of good behaviour, which encompasses the duty to be considerate of others, and not to make fun of religious beliefs and cultural practices of others. To touch on the sensitive aspects of others religious beliefs and cultural practices is unacceptable as it could weaken the unity among people. Hence, for the sake of unity among Malaysians, it is highly undesirable to have the preferences based on religion such as Muslim-only laundry, Muslim-only patrons, Muslim-only cutlery and Muslims-only seating arrangements at certain public places, among others. If allowed, it would only create a negative perception of Islam and the Muslims.

Likewise, advertisements that are discriminatory or offensive in nature against any particular race, religion or group in society must also be avoided. Discrimination on the basis of religious and racial differences is against the vein of art. 8(1) of the Federal Constitution which

51 Al-Bukhari.

provides for equality before the law for all persons; and art. 11(1) that gives every person the right to profess and practice his or her religion. These constitutional provisions must be respected and safeguarded.

Mediation Of Religious And Cultural Conflicts

Socrates said that if complexity belongs to a culture, then democratic culture is a complexity of complexities.⁵² The cultural and religious conflicts have been in existence since time immemorial in many countries⁵³ and the people have used mediation as a successful mechanism to solve such disputes between the individualist and collectivist.⁵⁴ Certainly the religious and cultural conflicts in Malaysia has never arisen from nothing, where in fact the divide and rule policy during the British colonialism has been said to instigate religious and cultural conflicts⁵⁵ thereby creating antagonistic sentiments towards other religious and cultural groups. Conflicts between religion and culture may bring out a highly charged atmosphere in respect of customary traditions or religious interest, therefore the dispute has to be resolved as peacefully as possible. As stated earlier, being a multi-religious and multi-cultural society, it is important for Malaysians to be extra-sensitive to another person's beliefs and cultural practices. To question one's religious or customs or raise objection to it is indeed harmful and detrimental to our peaceful co-existence.

52 GM Mara *The Civic Conversations of Thucydides and Plato: Classical Political Philosophy and the Limits of Democracy* (2008) p. 190.

53 JT Barrett, J Barrett *A History of Alternative Dispute Resolution: The Story of Political, Social and Cultural Movement* (2004).

54 Wellbeing of community as opposed to individuals.

55 S Ray 'Beyond Divide and Rule: Explaining the Link between British Colonialism and Ethnic Violence' *Nationalism and Ethnic Politics* Vol. 24(4) 2018 pp. 367-388.

The religious and cultural issues must be resolved amicably via mediation⁵⁶ rather than being emotional and staging demonstrations to express remorse and displeasure or litigating disputes in the courts, among others. As noted earlier, legal intervention by courts could more often than not create a rift between the already existing volatile relationships. The decision in *Indira Gandhi's*⁵⁷ case is a clear example where the court unanimously had taken a very true, fair and just decision.⁵⁸ In this case, the applicant, the mother, had challenged the validity of all her three children's conversion to Islam by her then husband (who had converted to Islam) and the courts gave the decision in her favour. The husband absconded with the last child refusing to abide by the decision.⁵⁹

Perhaps this unfortunate separation between the mother and the child by the husband could have been avoided if the case had been resolved through mediation.⁶⁰ The Inspector-General of Police (IGP) has personally vouched for this case and has stated that he 'wanted a happy ending' such as the outcome of mediation for a win-win scenario.⁶¹ This is a case of religious interest which ultimately serves as a group interest, therefore a maternal loss outweighs any material loss and the 'relationship' element is seen to be most important.

56 Mediation has been defined as 'the intervention of an acceptable, impartial and neutral third-party who has no authoritative decision-making power to assist contending parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute': see CW Moore *The Mediation Process: Practical Strategies for Resolving Conflict* (4th Edn, 2014).

57 *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145, FC.

58 The judges were made up of a five-man panel, chaired by the former Court of Appeal president Tan Sri Zulkefli Ahmad Makinudin and the other four learned judges were also of Islamic faith.

59 JV Tham '3 key points that helped Indira Gandhi win her case against unilateral conversion' 1 February 2018 at <https://says.com/my>.

60 'IGP: We'll spare no efforts to bring Indira's daughter home' 29 July 2019 at <https://www.nst.com.my/news>.

61 *Ibid.* The IGP said 'Don't talk about religion here; it's about a mother-daughter relationship. It's very sad and I want a very happy ending to this'.

One of the most important roles of a mediator is to impartially communicate effectively between people of two separate religions and culture. In this case, Islam and Hinduism is not of the same culture and therefore does not consist of mutual perceptions and values, whereby both parties have their own system of beliefs based on their religions.⁶² This causes tension within the society and clashes between religiousness and civil obedience or between religion and politics. However, what is most complex would be in a country with conflicting laws which is religious-political complex, and this is ever present in many countries that are in the advance stage of civilisation.

In as much as the court provides an outcome, it can be argued that the process of the intended meaning may have failed to create the harmony between two individuals of separate religions and further the characteristics of religion and culture *per se* is complicated. Keeping in mind that a society is further divided into working class and affluent class categories where legal technicality of phrases may have been lost in translation in that the language is highly informational, that may not allow for comprehension by the middle or lower class society and therefore the losing party may refute and decline to accept the decision made even if it comes from the highest authority.

The key objective of mediation is to create a more socially cohesive and inclusive nation. It should also be considered to be a bridging concept plainly, a mediating concept that punctures across the various disconnect between cultures and religion and beyond. Mediation will allow for the increase of sensibility to the various cultures and religions whilst at the same time raise fundamental questions on the rights of citizens.⁶³ It is undisputable that mediation is effective in resolving conflicts between people of different faiths or cultures. Besides saving

62 'A religion requires not only a body of priests who know what they are doing, but a body of worshippers who know what is being done': TS Elliot *Notes Towards the Definition of Culture* (2010).

63 B Meyer 'Mediation and the genesis of presence. Toward a material approach to religion' (inaugural lecture 2012).

time and money, mediation is flexible and informal and this allows the disputants to work together with the guidance of the mediator to arrive at a solution that would satisfy both their interests, hence creating a win-win solution. Through mediation the parties can come to appreciate the differences and sensitivities of another person's religion and culture. The parties can be made to understand the need to tolerate each other's beliefs and cultural practices.

The mediator does not lay down a decision but helps to facilitate a flow of thought and lends ideas to the parties who would then come to a consensus by themselves. Further, as mediation is done behind closed doors, it remains private and confidential. Once the disputing parties have reached their own settlement, it preserves post-conflict relationships and thereby preserves and maintains harmony in the community. This is unlike litigation or arbitration which is unreasonably expensive, time-consuming, emotionally draining and labour-intensive with a largely unpredictable outcome.

For effective mediation of religious disputes, the first and most important criterion to be a mediator is that he/she must be someone who is highly respected in the community/society such as an elderly *Imam* of a mosque, religious leader, chief of the village or the community leader. The mediator should be seen by the disputants to be experienced and that they are in a position to give constructive advice. Further, the mediator should have the ability to calm down the negative atmosphere between the disputants. Undoubtedly, mediation is an art by itself which can be acquired through years of mediating.

In as much as mediation could be said to be the perfect solution, however there are factors that need to be addressed such as whether the mediator has been trained to be culturally aware in the methods and style of communicating with the relevant affected persons. In mediating religious and cultural disputes, the mediator has to be skilful in negotiation and culturally sensitive to all acts justified by the culture. In other words, a mediator is required to display absolute religious and cultural intelligence in the cultural realism within Malaysian society.

Inter-cultural communication is crucial to cultural kinship because the force of insensitive cultural language may create more conflicts instead of adding value.⁶⁴

Cultural factors relating to people and the problem, must be determined by pre-mediation assessment, but bias and stereotypes of particular cultures should be avoided. This is because the role of the mediator is handled by a person, hence the awareness of the individual mediator's culture and the implications to the mediation will play a crucial role in establishing the neutrality and the fairness of the process.

The priority in Malaysia will be to increase efforts to strengthen civil society. The challenge will be to decide and identify which alternative dispute resolution mode would be a better fit in cultural and religious dispute resolution. This is due to the complexity and the interactives of multireligions and multiculturalism practices in Malaysia. This is pertinent to the concerned parties where they will be able to interact across the religion and cultural divides and reconcile their differences.

It is worthwhile noting that the Singapore Community Mediation Centre has a panel of carefully selected and trained mediators. They are respected members of society coming from all walks of life, including professionals and grassroots leaders who are highly capable of effectively mediating the inter-cultural and inter-religious conflicts. It may be added that if the disputants are of the same or different religion, it will help if the mediator has a sound background on comparative religions. With a commitment attached to the post, the mediator should be able to uncover the interests of the disputants at a time when they are in confrontation; to build bridges across the religious divides; and to offer creative solutions including assessing alternatives for them. It is important that mediators should be approachable with a kind and friendly disposition so that people are not apprehensive in approaching them to solve their disputes or even for a follow-up.

64 K Lücke, A Rigaut 'Cultural issues in International Mediation' EU as Mediator June 2002.

Conclusion

For the promotion of harmony in a multi-racial and multi-religious society like Malaysia, a peaceful community and a good neighbourhood free from enmity and vengeance is highly desired. It is a gateway to racial harmony and breeds a more closely integrated community. Insulting or bringing into contempt the religion or culture of another or ridiculing the religious ceremonies and practices of others is certainly an undesired conduct that could create irrational tension and disharmony among different races and religious communities. The religious and cultural conflict must be resolved amicably so that the disputing parties could come up to a common term and continue living harmoniously. Mediation can be the conduit for Malaysia and her multicultural citizens to achieve a sense of peace and sister/brotherhood.⁶⁵

Through mediation the community ties can be strengthened in that the parties can come to appreciate the differences and sensitivities of another person's culture and religion. In an attempt to achieve a harmonious society, the disputants can be made to understand the need to tolerate each other's cultures and religious beliefs. The mission of mediation is to provide an attractive, practical and convenient solution to their disputes. The above is so honoured in Islam where it has been likened to an act of charity. Abu Hurairah reported that the *Prophet* (*s.a.w.*) had once said that:

There is a *sadaqa* (charity) to be given for every joint of human body, and for every day on which the sun rises, there is a reward of a *sadaqa* for the one who established *sulh* (conciliation) and justice among people.⁶⁶

65 Article 1 of the Universal Declaration of Human Rights: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

66 *Hadith* 26.