



**Congressional Human Rights Caucus
Staff Briefing on**

**Matters of Life and Death in Malaysia:
Does the Recent Election Point to a Trend Toward Religious Tolerance?**

8 April 2008

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Due to Malaysia's strategic geopolitical situation and its unique experiment with a dual civil and Islamic law system, the status of religious liberty in Malaysia has an influence not only on the 26 million people living in Malaysia, but also on the entire region of Southeast Asia and beyond into the Islamic world.¹

Constitutional Structure

Malaysia is a constitutional monarchy. The Federal Constitution provides for a bicameral legislature, a cabinet style executive, and an independent civil judiciary.

Article 3 of the Federal Constitution declares Islam as the state religion, but also provides that all religions may be practiced in peace and harmony. The declaration of Islam as the state religion did not establish a theocracy, but was considered at independence to be a ceremonial nod to history.²

Article 11 of the Malaysian Constitution provides the right of every person to profess and practice his religion, including the right to propagate it. However, Clause 4 of Article 11 restricts "propagation of religious doctrine or belief among persons professing the religion of Islam."³ Additionally, the Federal Constitution's Article 160 defines an ethnic Malay as a person who "professes the religion of Islam, habitually speaks the Malay language, and conforms

¹ There are currently 56 countries, including Malaysia, in the Organization of the Islamic Conference.

² The supreme court (now called the Federal Court) considered the effect of Islam as the state religion in *Che Omar Che Soh v. Public Prosecutor* (1988) 2 MLJ 55, and established that the Constitution merely provided for the ceremonial role of Islam under the Constitution. The Court held that it was civil (as opposed to Islamic) law that governed the country.

³ Article 11 states: "Every person has the right to profess and practice his religion and, subject to Clause (4), to propagate it." Clause (4) of Article 11 states: "(4) State law and in respect of the Federal Territories of Kuala Lumpur and Lubuan, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam."

to Malay custom.”⁴ Article 160’s conflation of ethnicity and religion has presented problems for the religious freedom of ethnic Malays.

The most troublesome legal structure in the constitution is the dual Sharia and civil court systems as envisioned by Article 121 in the Federal Constitution.⁵ All citizens are subject to civil laws. Non-Muslims are to be governed exclusively by civil law. Muslims, however, are also governed by Sharia in specifically enumerated matters, usually having to do with family law (*e.g.* marriage, divorce) and property rights (*e.g.* inheritance). In those enumerated areas, Sharia courts have limited jurisdiction.⁶ Sharia courts and their jurisdiction are statutory constructions of the state legislatures. This means that the jurisdiction and functioning of the Sharia courts vary by state.

Sharia’s jurisdictional reach in Malaysia is intended to extend exclusively over Muslims. However, the question of who is a Muslim has presented serious barriers to religious exercise among non-Muslims in cases dealing with conversion, burial, and other sensitive topics over which the Sharia courts claim jurisdiction.

Dual Judicial System

Malaysia has seen a proliferation of cases in which civil courts have refused to hear the cases of non-Muslims on the grounds that Sharia courts have jurisdiction, and of cases in which non-Muslims are subjected to Islamic law in the Sharia courts. Following are some recent examples of such cases.

- Lina Joy: Last year, Lina Joy, *née* Azlina binti Jailiani, sought to change her legal religious identity because she converted to Catholicism, but the civil courts ruled her case was the purview of Sharia judges. Malaysia’s Sharia courts recognised conversion out of Islam in only one previous case – posthumously, for a deceased woman who reconverted out of Islam to the Buddhist faith of her birth. Most potential apostate cases before the

⁴ According to Article 160, “‘Malay’ means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and - (a) was before Merdeka Day born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or (b) is the issue of such a person.” The provision may have been less a declaration that Malays must be Muslim, as a formula for identifying ethnic Malays for the purposes of preferential treatment in Article 153, discussed, *infra*.

⁵ Article 121, Clause (1) provides for civil courts. Clause (1)(A) of Article 121 then reads, “The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.” However, Article 121 does not confer jurisdiction on the Sharia Courts. Rather, the Sharia Courts must be first established by the legislature, which must then invest the state Sharia courts with jurisdiction over enumerated matters. This means that it is not for the civil courts to confer jurisdiction on the Sharia courts.

⁶ The Ninth Schedule to the Federal Constitution sets out the Federal and State Lists of subjects on which the federal and state governments can legislate. There is also a Concurrent List of subjects on which both the federal and state governments can legislate. For enumerations of areas where Sharia courts have jurisdiction, see 9th Schedule, List 1 (clause 4(e)), which outline “Islamic personal law relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession, testate and intestate” as the purview of state governments.

Sharia court in Malaysia have resulted in “re-education” sentences at camps that are meant to re-indoctrinate that person in the Muslim faith. The civil judges argued that allowing Ms. Joy, an ethnic Malay born to a Muslim family, to be declared a non-Muslim before the civil courts would “consequently be inviting the censure of the Muslim community.” Ms. Joy is now in hiding.

- Wong Sau Lan: The day after Wong Sau Lan died, her husband, Ngiam Tee Kong, received a letter from Malaysia’s Federal Territory Islamic Council, created by the government to govern Muslim affairs, that stated Wong had converted to Islam six days before her death. The Islamic Council made this claim on the say-so of a traditional healer Wong had consulted in her final illness; the traditional healer happened to be Muslim. Under directions from the Islamic Council, the hospital where Wong died would not release her body to Mr. Ngiam unless he first agreed that she was a Muslim, which designation would mean that she would receive a Muslim burial. But Mr. Ngiam, himself a Buddhist, was adamant that his wife was baptised as a Christian in November, never converted to Islam, and remained a Christian at her death. Three weeks after Wong’s death, the civil court ordered her body released to her husband only after the Islamic Council determined that her conversion was not properly carried out according to Sharia, and withdrew its case. Had the Council proceeded in its conversion claim, the case would undoubtedly have fallen into the jurisdictional chokehold of the Sharia courts.
- Subashini Rajasingam – Malaysia’s highest court threw out a petition by Subashini Rajasingam, a Hindu, to prevent her estranged husband, Muhammad Shafi Saravan Abdullah, *né* Saravanan Thangathony, from registering the younger of the couple’s two sons as Muslim. Mr. Shafi had already registered their other son to Islam without her knowledge and Ms. Subashini fears she will lose custody and visitation rights of both children if Mr. Shafi is permitted to “convert” their second son. Ms. Subashini’s fear is well-justified. In rejecting her pleas, one of the high court judges made clear that since the father of her children is now a Muslim, Ms. Subashini must take her case to the Sharia courts, which are not bound to protect her constitutional rights.

These cases are about more than jurisdictional questions. In simultaneously enforcing religious law and civil law in a multi-religious society, Malaysia has seen the gradual erosion of fundamental rights of non-Muslims in the name of Islam in areas affecting childhood to death. Because non-Muslims have limited standing in a Sharia court, the integrity of due process and impartial rule of law can also be said to have been brought into question. Further, because the state enactments of Sharia mandate Sharia for Muslims in that state, Muslims who do not wish to be governed by Sharia may also be said not to enjoy the full protections of the Federal Constitution and civil law, since in practice, the civil courts have declined to enforce constitutional norms on Sharia courts.

Treatment of Minorities

The Malaysian Constitution has special provisions in Article 153 for safeguarding the rights and privileges of the Bumiputra, as ethnic Malay and other indigenous peoples are collectively known, which comprise about 60% of the population. Ethnic Malays have traditionally been Muslim.⁷

While ethnic and racial discrimination alone is a grave concern, the conflation of race and religion is particularly problematic in its effects on the freedom of conscience and the ability to change one's beliefs. Belief in a particular religion is often influenced by the context of birth, family teaching, and communal values, but it is also and ultimately informed by personal and intellectual pursuit of truth. Racial discrimination is at core based on the actual or perceived physical characteristics of a person, characteristics that simply cannot adapt or change. However, what one believes according to conscience is subject to maturation and change. The following examples provide some context for the impact of ethnic and racial distinctions on the right to freedom of conscience and belief in Malaysia:

- **Bible Bans** – According to an April 2005 proclamation by the Prime Minister Abdullah, Malay-language Bibles are required to have “Not for Muslims” printed on the cover. Additionally, Malay language Bibles are only allowed in churches and Christian bookstores and are not allowed in ethnic Malay homes. The AFP reported that Prime Minister Abdullah said he was responding to concerns that the Bible published in Malay would be distributed in an effort to spread Christianity among Muslim-Malays.⁸ The restrictions could be said to be supported by the constitution's prohibitions against propagation of any religion other than Islam among ethnic Malays.

More recently, in February, customs officials embargoed dozens of English-language bibles at the border, causing a stir over state control of religious publications after customs officials told the woman from whom the bibles were seized that all religious books needed to be cleared.⁹

As with restrictions on conversions of ethnic Malays into other religions, an irony remains that the Federal Constitution, purporting to afford ethnic Malays preferences, discriminates against ethnic Malays who are alone not permitted access to non-Muslim religious literature in their maternal language.

⁷ The Federal Constitution Article 160's definition of Malays as Muslim suggests that an ethnic Malay no longer professing Islam and recognised as such would lose his or her status as a Malay, and an attendant benefits flowing from Article 153.

⁸ See <http://www.malaysiakini.com/news/35456>.

⁹ See <http://www.msnbc.msn.com/id/22993135/> The AP has also reported on the controversy over a ban of the word “Allah” by non-Muslims.

- Internal Security Act detentions of Hindus – Last December, five Hindu Rights Action Force leaders were arrested under the Internal Security Act, a draconian law that allows for indefinite detention without charge or trial, for their participation in a November rally for minority rights. Malaysian authorities had denied the Hindu activist group a permit for staging a protest, despite the lawful procedure with which the group proceeded. When the Hindu group decided to hold the rally nonetheless, Malaysian police intervened, using tear gas, batons, and water cannons. Outstanding charges still remain against detained Hindu activists.

Effect of March 8, 2008 Election Results

The 14-party Barisan Nasional (BN or National Front) coalition has been the ruling political alliance since independence. The main party in the National Front is Prime Minister Abdullah Badawi's United Malays National Organisation (UMNO) party.

The main opposition parties formed a five party banner called the Barisan Rakyat (People's Front) during the March 2008 elections, and agreed to a non-aggression pact, making sure there would be no intra-coalition competition against the National Front candidates. The Barisan Rakyat consisted of:

1. Democratic Action Party (DAP),
2. Pan-Malaysian Islamic Party (PAS),
3. Parti Keadilan Rakyat (PKR or the People's Justice Party, of former Prime Minister Anwar Ibrahim),
4. Parti Sosialis Malaysia (PSM), and
5. United Pasok Nunukragang National Organisation (PASOK).

Formation of the Barisan Rakyat suggests that the opposition has prioritised breaking the National Front's hold on power over the potentially specialised interests of their own natural demographics. For example, PAS has before promoted Islamic law for all Malaysian citizens, but removed Islamic state from its party manifesto this election cycle and fielded a non-Muslim candidate, indicating PAS's willingness to accommodate non-Muslims. The DAP is largely Chinese but has put forward Indian candidates and has a record of exposing abuses against any non-Muslims. The PKR advocated for economic politics that would no longer be race-based.

The National Front won a simple majority in the parliamentary election with 140 or 63.1% of 222 seats. This was considered a major setback for the National Front as it did not maintain 2004's two-thirds supermajority, required to pass amendments to the Malaysian Constitution. Opposition parties won 82 of 222 seats in parliament (36.2%). The National Front also shockingly lost control of an additional four of 13 state governments. Previously, only one state government (Kelantan) was controlled by the opposition (by PAS).

The National Front faced tension over rising prices, corruption, and crime, which were the main concerns of the election. However, recent court rulings against religious minorities that people viewed as politically or policy driven fed into the perception of an erosion of good governance

and functioning rule of law. Further, the demographic parallel between ethnicity and religion in Malaysia make religious freedom a consistently tense undercurrent in the public discourse.

UMNO has faced resentment from ethnic minorities over its promotion of the New Economic Policy (NEP), instituted after 1969 race riots. The NEP instituted affirmative action in favour of Malay Muslims in education, business, housing, and other sectors. The NEP was intended to last for 20 years, but has been prolonged in the form of the National Vision Policy. The Prime Minister has stated that the elections show democracy works in Malaysia, and defeat is a part of the democratic process. The UMNO convention takes place later this year, and there are questions as to whether Badawi will be able to retain his position as Prime Minister.

The most influential byproduct of the most recent elections is a general sense that minorities do have a voice, and that these voices matter. Polemics have been broken up and more choices have been put before the people. State-by-state election results show that voters did not entirely vote along ethnic lines, or along lines dividing the ethnocentric from more multi-ethnic parties. This suggests the electorate's attention was on actual policy platforms, and were perhaps voting more against the National Front than for particular candidates.

Political changes in recent elections may not overturn the series of disastrous court rulings on religious freedom, some of which are discussed, *supra*. However, the elections signal a greater voice for religious and ethnic minorities. A sense of voice and of increased democratisation is important not only for religious and ethnic minorities that have suffered from economic discrimination and from unfavourable court decisions stripping civil courts of jurisdiction over their cases, but also for Muslim dissenters who do not favour further Islamisation in Malaysia.

Of additional note are:

- a federal investigation begun in late 2007 into the Lingam Tapes judicial corruption affair is due to report its findings; a Royal Commission of Inquiry was to investigate the allegation of corruption in the judicial appointment process;
- the widely respected Zaid Ibrahim was appointed as Law Minister in charge of legal affairs and judiciary reform.

These two events signal optimism for the integrity of the legal system, and thus, religious freedom, and may be good indicators of whether reform will be reality in the Malaysian judiciary. Additionally, two states, including Kedah, which is PAS-governed, have begun Non-Muslim Religious Committees, which did not exist before.

It will take some time to see how well PAS and the other Barisan Rakyat parties work together in the opposition governments. The UMNO has had to become more Islamic to counter PAS's identity as the Islamic party in the past, and it's uncertain how UMNO will react now that PAS has aligned with the opposition to win seats.

The main policy differences going forward are likely to center on racial equality, which, because racial demographics so closely align with religious affiliation in Malaysia, will have an impact on religious minorities. PAS has not articulated what it means when it calls for an Islamic state or whether and how elements of that agenda would affect its policies going forward. Although PAS has before advocated for Islamic law for non-Muslims, saying that Islamic law would be good for all, their advocacy for social justice, human rights, and equal opportunity leaves the question open how they would deal with religious freedom issues where the Muslim community is affected by conversion or interfaith intra-family conflicts, particularly now that it has removed an Islamic state from its party manifesto.

Recommendations

1. Judicial reform and improvement of the rule of law are the primary means by which religious freedom can be advanced for people of all faiths in Malaysia. Civil court decisions ceding jurisdiction to the Sharia courts are widely viewed as having been politically and policy driven.¹⁰ A point to keep in mind is that the Federal Constitution already provides for special treatment of ethnic Malays and Muslims. Thus, challenges to the well-functioning of the judicial system are not merely policy-driven, but lie also in the constitutional framework. However, the Federal Constitution does establish religious freedom for people of all faiths and thus provides the legal basis for enforcement of religious freedom in the courts. The issue, then, is a question of implementation at the judiciary level.
2. Congress should take advantage of ongoing Free Trade Agreement (FTA) talks before November 2008 elections in the US as an opportunity to discuss the treatment of religious minorities. The National Front's current vulnerability gives the US leverage right now to introduce these issues in firmer ways. The FTA should be premised on indications of governance by rule of law, and of sustainable democracies and markets.¹¹ Such indicators include a truly impartial judiciary, and protection of fundamental freedoms, including religious freedom.
3. US Ambassador Keith should initiate bilateral dialogue on rule of law and religious freedom issues at the state level, especially in the states now governed by the opposition parties. Although most regulations are federally based, Sharia enactments in each state vary, and thus the state governments have influence over the role of Sharia in public life.

¹⁰ A judge in the Lina Joy case argued that allowing Ms. Joy to be declared a non-Muslim before the civil courts would "consequently be inviting the censure of the Muslim community."

¹¹ US Ambassador to Malaysia James Keith has stated: "The key to attracting [American companies to invest in and trade with Malaysia] would be to create a system that is as transparent as possible so that we can convince them that Malaysia is a good place to do business." *US Seeks to Conclude FTA*, The Star, March 14, 2008, at <http://thestar.com.my/news/story.asp?file=/2008/3/14/nation/20641666>.