Freedom of Religion after the *Catholic Herald*

By Kairos Guest Writer

The Catholic Herald decision

The recent Court of Appeal decision in *MenteriDalamNegeri&Anor v Titular Roman Catholic Archbishop of Kuala Lumpur*[1](Catholic Herald case) has resulted in much confusion as to whether the term 'Allah' is prohibited only in the Catholic Herald or also in the Bahasa Malaysia and Iban versions of the Al-Kitab, and in church services. This is of significant public importance and the judgment of the Federal Court on June 23 to refuse leave to appeal the decision of the Court of Appeal has denied Malaysians the right to clarify many issues raised in the Court of Appeal decision. The clarification sought was not merely about whether the Court of Appeal's decision was limited to the prohibition in the Herald in line with the decision of the Home Minister under the Printing Presses and Publications Act 1984 but also the Court of Appeal's interpretation of articles 3 and 11 of the Federal Constitution.

The Federal Government made a decision on 19 May 1986 to prohibit four words, 'Allah, Kaabah, Solat and Baitullah' from being used in non-Muslim publications. Following this the Ministry of Home Affairs issued a notice to this effect (Bil KKDN.S.59/3/6/A Klt.2) dated 5 December 1986 to Christian publishers to comply with the directive. The Catholic Herald continued to use the term 'Allah' in the Bahasa Malaysia version of their newsletter. They received five show cause letters from the Home Ministry which nevertheless continued to approve their publication permit in spite of the breach of the terms, subject to them not using the term 'Allah' in their publication and printing the word 'Terhad' in front of the publication which meant that it was restricted to circulation in churches only and even then among Christians only. Thefirst condition became the subject of judicial review in the High Court.

The Catholic Herald stated that the prohibition against the use of the term 'Allah' by non-Islamic publications was unconstitutional and interfered with religious freedom. The Home Ministry stated that it was constitutional under the anti-propagation provision in Article 11(4) of the Federal Constitution which was supported by Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactments in many states and also that the Home Minister had the power to restrict the use of the term 'Allah' in the interests of public order and security under the Printing Presses and Publications Act 1984.

Although the argument pertaining to the Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactments was not raised in the Court of Appeal decision on *MenteriDalamNegeri&Anor vTitular Roman Catholic Archbishop of Kuala Lumpur,* it was raised in the High Court decision in *Titular Roman Catholic Archbishop of Kuala Lumpur v MenteriDalamNegeri&Anor*[2]and has been used by JabatanAgama Islam Selangor (JAIS) in an incident involving a church[3] and when seizing

[1] [2013] 8 Current Law Journal 890

[2] [2009] Malayan Law Journal Unreported 1258.

[3]'Church Leaders Slam Raid by State Islamic Department' The Star Online August 5, 2011

bibles from the Bible Society of Malaysia.[4] It is an important part of the discussion on the scope of power of Muslim authorities over non-Muslims.

The Non-Islamic Religions (Control off Propagation Amongst Muslims) Enactment 1988 of Selangor which is replicated in most other states in Malaysia controls and restricts the propagation of non-Islamic religious doctrines and beliefs among persons professing the religion of Islam. The controversial provisions in this Enactment relates to sections 2, 9, 10,11 and 12.

Section 9 states that a person commits an offence if he in any published writing, published speech or statement, speech or statement addressed to any gathering of persons or speech or statement which is published, broadcast and which at the time of its making he knew or ought reasonable to have known would be published or broadcast, uses any of the words listed in Part I of the Schedule or any of its derivatives, or variation, to express or describe any fact, belief, idea, concept, act, activity, matter or thing of or pertaining to any non-Islamic religion. Part 1 of the Schedule comprises the word 'Allah' which is the source of litigation between the Herald and the Home Minister. The Non-Islamic Religions (Control off Propagation Amongst Muslims) Enactment 1988 of Selangor which is implemented by virtue of article 11(4) of the Federal Constitution is supposed to criminalise actions by non-Muslims that attempt to propagate non-Muslim religions to Muslims in Selangor.

The High Court stated that although article 11(4) of the Federal Constitution provides that 'State law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam', article 11 nevertheless contains guaranteed fundamental liberties which are part of the basic structure of the Constitution and Parliament cannot enact laws that violate the basic structure.[5]The court also stated that fundamental liberties under article 11 must be interpreted generously and the test to be applied is whether it directly affects the fundamental rights or its inevitable consequence on the fundamental rights such that it makes their exercise ineffective or illusory. Therefore section 9 of the Enactment must be read in conjunction with article 11(4) which means that a non-Muslim will be committing an offence if the word "Allah' is published with the intention of propagation to a Muslim but there would be no offence if it was published to a non-Muslim.

The High Court went on to say that when the state seeks to limit fundamental rights of citizens, it is important to assess whether the objective it is seeking to achieve is sufficiently important to justify limiting the fundamental right in question, whether the measures designed to restrict that right have a rational nexus with the objective the state is trying to achieve and whether the means used by the relevant state action to infringe the right asserted is proportionate to the object it seeks to achieve.[6]

The High Court stated that the preamble in the state Enactments showed that it was clearly to prevent propagation of non-Muslim religions to Muslims. Section 9 exceeded its objective by restricting the rights of another religion (Christianity) to use words among its own adherents. By no

[4]'JAIS Raids Bible Society of Malaysia' The Star Online, January 2, 2014

[5] Her Ladyship was quoting Sri Ram FCJ in *Sivarasa v BadanPeguam Malaysia &anor* [2010] 2 Malayan Law Journal 333.

[6]*Sivarasa v BadanPeguam Malaysia &anor* [2010] 2 Malayan Law Journal 333

stretch of the imagination can could section 9 of the State enactments be argued to be proportionate to the object is seeks to achieve and the measure is arbitrary and unconstitutional. The concern expressed by the Home Ministry that copies of the Herald could fall into the hands of Muslims was also dismissed on the grounds that there is no requirement of any guarantee to be given by anyone in order to profess and practice and even propagate their religion. There are sufficient laws to be enforced against persons who propagate non-Muslim religions to Muslims. The High Court also dismissed arguments that due to information technology, the Herald which has gone online could be used to propagate to Muslims, on the grounds that this is not sufficient justification to restrict fundamental liberties under article 11(1). It was later argued at the Court of Appeal by the Herald's lawyers that the even the Al-Kitab has gone online and can be read by anyone including Muslims and yet it was permitted to be published subject to certain conditions.

Other provisions in the State Enactments do not criminalise non-Muslims texts in any form unless they are used for the purposes of propagation but section 9 criminalises the use of certain words that are deemed sensitive to Muslims although there is no nexus to propagation. In other words, there need not be evidence of those words being used to propagate to Muslims. Section 9 clearly extends beyond the jurisdiction of the Enactment and article 11(4). It is actually a provision that tries to criminalise actions by non-Muslims that offend Muslims regardless of whether it amounts to proselytisation.[7] This is not the purpose or intention of article 11(4).

Nevertheless section 9 has been used in the recent cases, the most recent being JAIS' raid on the Bible Society of Malaysia (BSM), and seizing several hundred copies of the Al-Kitab from the premises of BSM which it has refused to return on the grounds that these documents contain the term 'Allah' which is prohibited under section 9 of the State Enactment. The first criticism of JAIS is that they have no authority to seize the documents as this can only be done by the police. This view may be incorrect as **section 10** of the Enactment states that the **Ruler in Council may in writing authorize any public officer to exercise the powers of an authorized officer** under this enactment. Under section 2(1) an 'authorized officer' means a public officer authorized under Section 10 to exercise the powers of the authorized officer under this Enactment.

The **Government Gazette of Selangor, dated 9 December 1999** gives Islamic authorities the power to enforce the Enactment. The Gazette states that under the Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactment 1988, 'authorization of authorized officer' that 'In the exercise of powers conferred by section 10 of the Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactment 1988, the **Ruler in Council has authorized the public officers named in the Schedule** to exercise the powers of authorized officers under the Enactment.' The authorized officers under the Schedule are, **Secretary of the Majlis Agama Islam, Head of Enforcement of the Islamic Religious Department of Selangor, Deputy Director of Research of the Islamic Religious Department of Selangor, Syariah Legal Adviser of the Islamic Religious Department of Selangor, All District Religious Officers in the State of Selangor and all police officers of the rank of inspector and above**.[8] The Head of Enforcement of the Islamic Religious Department (JAIS) has appears to have been clearly authorized to enforce the Enactment.

[7] Shad SaleemFaruqi, 'The Kalimah Allah Issue: The Peninsular Malaysia Perspective' Malaysia Today May 5, 2014 at http://www.malaysia-today.net/the-kalimah-allah-issue-the-peninsular-malaysian-perspective/

[8] Sel (R) 31014/1: Sel. KMMK:4/20/99.

An authorized officer is given power under section 12 to investigate the commission of any offence under this Enactment and may **arrest without warrant** any person suspected of having committed any such offence. Section 13 states that an authorized officer making an investigation under section 12 **may by order in writing require the attendance before himself of any person who appears to the officer to be acquainted with the circumstances of the case, and such person shall attend** as so required. If such person fails to attend as required by the order, the authorized officer may report the failure to a Magistrate who may thereupon issue a warrant to secure the attendance of the person as required by the order.

Section 14 states that an **authorized officer** making an investigation under section 12 **may examine orally any person supposed to be acquainted with the facts and circumstances of the case** and shall reduce into writing any statement made by the person so examined. The **person being questioned shall be bound to answer all questions relating to the case** put to him by the authorized officer provided that he may refuse to answer questions which would have a tendency to expose him to a criminal charge or penalty or forfeiture. This provision means that persons called as witnesses are bound to answer all questions. Section 11 also states that all offences and cases under this Enactment shall be deemed to be seizable offences and seizable cases for the purposes of the Criminal Procedure Code.

The question that arises is whether the State can designate authorities from Islamic religious departments to investigate the commission of any offence by non-Muslims pertaining to the Enactment and give such authorities power to arrest without warrant any person suspected of having committed any such offence? Does the State have the authority to give these religious officers the power to compel non-Muslim witnesses to answer questions?

Section 2 of the Enactment defines an 'authorized officer' as a public officer. Section 6 of the Interpretation Act defines a 'public' officer as a person lawfully holding, acting in for exercising the functions of a public office. The definition of 'public office' means an office in any of the public services which under Article 132(1)(g) of the Federal Constitution includes the public services of each State. A public officer under para 42 of the 11th Schedule of the Federal Constitution is defined as; '*A reference in any written law to any public officer by the usual or common title of his office shall, if there be such an office customarily in the Federation or any State and unless the contrary intention appears, be read and construed as referring to the person for the time being holding or carrying out the duties of that office in the Federation or State, as the case may be*.'

The authority and services rendered by Islamic authorities, are rendered to a segment of the population (Muslims) within any state. They deal with the personal law of Muslims and do not render services to the general public. The services of Islamic authorities should not therefore be considered as part of public services of the state. This conclusion however could be challenged on the grounds that Islamic authorities are paid from Consolidated Accounts of the State which is normally used to pay public officers, thus making them public officers.

Does the Ninth Schedule List II protect non-Muslims from arrest by religious officers from Islamic departments under section 12 of the Enactment or its equivalent in another State? In other words, does it clearly show that religious officers are not public officers as they only have authority over a segment of the population in the States? Para 1 of the Ninth Schedule reads;

Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, etc, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of ***Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law****; the control of propagating doctrines and beliefs among persons professing the religion of Islam**; the determination of matters of Islamic law and doctrine and Malay custom.*

Para 1 of List II is often interpreted to deal with the State's power to enact Islamic law and also to limit the power of Syariah courts over non-Muslims. Under Para 1, the state's jurisdiction is over;
1. Islamic law which includes offences by Muslims except in areas covered under the Federal List,
2. Syariah courts which will not have jurisdiction over non-Muslims and its jurisdiction in respect of offences are restricted to matters within Para 1 except where allowed by Federal Law,
3. Control of propagating doctrines and beliefs among persons professing the religion of Islam,
4. Determination of matters of Islamic law and doctrine and Malay custom.

The State's power to enact laws dealing with the matters above lies with the State Legislative Assembly which also comprises non-Muslim representatives but the**implementation**and **enforcement** of these laws are left to the various Islamic departments in the State. The anomaly is that the enforcement of theNon-Islamic Religions (Control of Propagation Amongst Muslims) Enactment is over non-Muslims unlike the other provisions in para 1 which envisages implementation and enforcement by Islamic authorities over Muslims. The Selangor Government Gazette shows that the interpretation taken by the State of Selangor is that **all** matters mentioned in para 1 of List II are within the powers of the Islamic enforcement authorities. However Professor Emeritus Shad SaleemFaruqi states that since the 'Constitution specifically asserts that Syariah Courts have jurisdiction only over persons profession the religion of Islam, **it is arguable therefore that Syariah authorities likewise have jurisdiction only over Muslims'.** He states that State laws under article 11(4) are addressed to non-Muslims, andthe enactments pursueant to article 11(4) are civil laws that are **only enforceable by civil authorities** in civil courts**.**[9]

The Federal Court in *Sivarasa v BadanPeguam Malaysia &anor*[10] stated that article 11 contains guaranteed fundamental liberties which are part of the basic structure of the Constitution and Parliament (and therefore any State) cannot enact laws that violate the basic structure.[11]

It is against the basic structure of the Federal Constitution for Islamic authorities to be given power to arrest non-Muslims and to seize any material suspected to have been used for propagation. The Enactment itself appears not to have envisaged this when it was first passed in 1988. The powers

[9] Shad SaleemFaruqi, 'The Kalimah Allah Issue: The Peninsular Malaysia Perspective' Malaysia Today May 5, 2014 at http://www.malaysia-today.net/the-kalimah-allah-issue-the-peninsular-malaysian-perspective/
[10] [2010] 2 Malayan Law Journal 333.
[11] Her Ladyship was quoting Sri Ram FCJ in.

given to authorized officers, to investigate, arrest without warrant, seize, require an offender to appear before such officer, require such offender to answer questions and to report such failure to appear to a Magistrate are powers commonly granted to the police. This is further borne out by section 11 which also states that all offences and cases under this Enactment shall be deemed to be seizable offences and seizable cases for the purposes of the Criminal Procedure Code. The expansion to the commonly accepted definition of 'authorized officer' was gazetted only in 1999. Furthermore attempts to grant religious enforcement authorities powers under the Criminal Procedure Code are beyond the scope of the States as this can only be done by Parliament. The Code clearly operates within the 'secular' legal system and religious enforcement authorities should not be part of this Code especially when there are Syariah Criminal Procedure Codes within which these authorities operate. Therefore the Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactment 1988 Selangor shouldonly be enforced by the police and religious enforcement officers may be called as expert witnesses to testify in the civil courts.

Until section 9 and the definition of 'authorised officer' is declared unconstitutional, JAIS may be said to have acted lawfully when it entered the premises of the Bible Society Malaysia on January 2, 2014.They also acted lawfully by referring the case to the Attorney General's office. However they have unlawfully continued to hold on to the bibles by refusing to adhere to the Attorney General's decision not to prosecute BSM's officers on the grounds that no offence had been committed. It is clear that any prosecution must take place in the civil courts and that any action is subject to the Attorney General's decision to prosecute. JAIS refusal to return the bibles[12] shows that it is ill-suited to comply with secular laws and that it will not subject itself to the jurisdiction of secular authorities. It is for this reason that the constitutionality of section 9 of the Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactment 1988 Selangor and the Gazetted definition of 'authorised officer' should be raised in the courts to seek further clarification.

The jurisdiction given to Islamic enforcement officers over non-Muslims is not only in the Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactment 1988 Selangor but also under **section 42** of the **Administration of the Religion of Islam (State of Selangor) Enactment 2003**.[13] This section states that every member, officer and servant of the Majlis shall be deemed to be a public servant within the meaning of the Penal Code.[14] The definition of public servant is in section 21 of the Penal Code. Section 21 (g) of the Penal Code refers to;
(g) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;
(h) every officer of Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience.

There is nothing in the Penal Code to lead to the assumption that Islamic authorities fall within the definition of 'public servant'. Furthermore the enforcement of offences under the Penal Code is carried out by primarily by the police as stipulated in the Criminal Procedure Code (CPC).[15] There are

[12] 'MAIS and JAIS Refuse to Return Bibles' The Star Online, 14 June 2014.
[1313]Enactment No 1 of 2003.
[14][Act 574].
[15]Section 3 of the Criminal Procedure Act, Act 593.

references in the CPC to 'Penghulu' and 'other person authorized to make an arrest' but it appears that this does not cover the Islamic authorities for two reasons;The first is that there exists a separate Syariah Criminal Code for the various States to administer offences under Syariah law. The second reason is thatthe CPC states that 'Nothing in this Code shall be construed as derogating from the powers or jurisdiction of the High Court'[16] which clearly shows the 'secular' and 'civil' nature of this statute.

The Islamic authorities in Selangor have been included within the definition of 'public officer' in the Penal Code although the Code is a 'secular' statute enacted by Parliament. It is unlikely that the intention in Penal Code or Criminal Procedure Code was to empower Islamic enforcement authorities to exert power over Muslims or non-Muslims. Instead the State has exceeded its authority by defining its religious enforcement officers as 'public officers' or 'public servants' in Federal statutes. It is questionable whether even Parliament may amend these laws to include Islamic enforcement officers within the definition of public officer and clearly state laws cannot exceed the authority of the state and expand the definition of public servant or public officer in Federal legislation.

It is not clear why the Administration of the Religion of Islam (State of Selangor) Enactment 2003 has extended the definition of public servant to encapsulate the Penal Code. Perhaps it is an attempt to have power over Chapter XV of the Penal Code, offences relating to religion or it may be part of a bigger plan to align *Syariah* and the common law in preparation for the harmonization of both laws conducted by the Attorney General's chambers. There have been statements by former judges to the effect that Islamic laws such as *hudud*can be enforced on the whole population by inserting such offence into the Penal Code.[17]It is unlikely that Islamic authorities would permit non-Muslims judges to adjudicate over cases pertaining to *hudud* which is perceived by most Muslims as part of Islamic law.This would render non-Muslims subject to Islamic laws in the civil courts with judges deliberately selected due to their religious persuasion to preside over cases involving hudud. This would result in a new set of constitutional issues which will not be addressed here.

While it may appear far-fetched to think that the Islamic authorities have power to enact laws and to arrest non-Muslims, or that Parliament would enact hudud through the Penal Code, it should be noted that there is a silent re-writing of the Constitution taking place without taking into account historical documents on the interpretations of articles 3 and 11 of the Federal Constitution or the discussions between the Malayan government and North Borneo and Sarawak on freedom of religion.

The State Legislative Assembly of Selangor has by gazetting the definition of 'authorised officer' in the Non- Islamic Religions (Control of Propagation Amongst Muslims) Enactment 1988 has encroached on List 1 of the Ninth Schedule of the Federal Constitution which places criminal law clearly within the powers of the Federal Government.[18] Article 75 of the Federal Constitution states that if any State law is inconsistent with a federal law, the federal law shall prevail and the State law

[16]Section 4.
[17] Abdul Hamid Mohamed, 'Implementation of hudud in Brunei: Differences between Brunei and Malaysia' Public Talk, International Institute of Advanced Islamic Studies (IAIS) 11 February 2014.
[18] Para 4, List I, Ninth Schedule.

shall, to the extent of the inconsistency, be void. The definition of 'authorised officer in the Schedule of the Selangor Gazette is unconstitutional as it extends the categories of public officer to a category not envisaged by the Federal Constitution. In a similar manner, section 42 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 is also ultra vires the power of the states and should be removed in all states that have inserted similar laws into their Administration of the Religion of Islam Enactmentsand Non- Islamic Religions (Control of Propagation Amongst Muslims) Enactments.

It is often a misperception that East Malaysia does not have similar provisions in their Islamic law enactments. Section 30 the Administration of Islamic Law Enactment 1992 Sabah[19] is similar to section 42 of the Selangor Administration of the Religion of Islam (State of Selangor) Enactment 2003. The provision is repeated in section 43 of Sabah's MajlisUgama Islam Negeri Sabah Enactment 2004. Furthermore, a fatwa issued by the State Mufti of Sabah and gazetted on 1 June 2003 under section 35 of the 1992 Enactment[20] states that certain terms including the term 'Allah' in *non-Muslims' religious materials* are prohibited and encapsulates usage of the term in writing, print and audio visual materials. A fatwa is not binding on non-Muslims but section 35(3) states that 'Upon publication in the Gazette, a fatwa shall be binding on every Muslim resident in the State of Sabah as a dictate of his religion and it **shall be his religious duty to** abide by and to **uphold the fatwa**. Furthermore (4) states that **a fatwa shall be recognized by all courts in the State of Sabah as authoritative** of matters laid down therein.

Will the fatwa be used to seize Al-Kitab as was done in Selangor? On2nd December 1981, the Federal Government gazetted the prohibition against the Al-Kitab in Malaysia in the Government Gazette (P.U.(A) 15/82) under section 22 of the Internal Security Act. After receiving appeals by Christian groups at the time, the Government made a special exception through the Government Gazette P.U.(A) 134 on 13 May 1982 that the possession, publication or use of the Al-Kitab was permitted only in churches and by Christians throughout Malaysia. The Al-Kitab has to have the terms 'Christian Publication Only' on the cover. With the presence of a fatwa stipulating terms that cannot be used by another religion and placing a duty on Muslims to 'uphold the fatwa', similar issues faced by Selangor may be faced in Sabah in future. Furthermore section 35 of the 1992 Enactment attempts to bind the civil courts by stating that a fatwa shall be recognized by **all** courts as authoritative. The would include civil courts and is an attempt to usurp the jurisdictional power of the courts. The fatwa should be declare unconstitutional to the extent that it usurps the power of the civil courts and attempts to interfere with the fundamental liberties under articles 11(1) and (3) of the Federal Constitution.

The Federal Court through a majority decision in the **Catholic Herald** case refused to address the validity of section 9 of the Selangor Non- Islamic Religions (Control of Propagation Amongst Muslims) Enactment 1988. The Federal Court stated that under article 4(4) of the Federal Constitution, the validity of law made by Parliament or State legislatures shall not be questioned on the ground that Parliament or the State has no power to make such law except in proceedings where one party has specifically asked for a declaration that the law is invalid. Such proceedings shall not commence without leave of a judge from the Federal Court. The basis of the Herald's

[19] Enactment No. 13 of 1992.
[20] No JPBN 308/6

action at the High Court was to question the reasonableness of the Minister's decision in placing a limitation on the Herald's publication permit and the Herald did not at that time seek leave from the Federal Court to question the validity of section 9.

Implications of the Catholic Herald decision

The Federal Court refused to grant leave to the Catholic Herald to appeal the decision of the Court of Appeal (CA). This means that the decision of the Court of Appeal remains as law. The Court of Appeal's decision is not limited to Peninsula Malaysia and applies to Sabah and Sarawak regardless of the often quoted 10 point agreement which is merely a cabinet decision which cannot overrule the decision of a court of law. It is important therefore to interpret the decision of the Court of Appeal and the grounds for refusal to appeal given by the majority judgement in the Federal Court as accurately as possible in order to determine the state of the law.

1. Is Islam superior to other religions under article 3?

In its decision the CA referred to the Indian case of *Collector and District Magistrate v S Sultan*[21] which held that 'It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order.' The CA therefore held that the usage of the word 'Allah' in the Malay version of the Herald, without doubt had the potential to disrupt the even tempo of life of the Malaysian community. The CA went on to state that 'Such publication will surely have an adverse effect upon the **sanctity of Islam as envisaged under article 3(1)<u>and</u>the right for other religions to be practiced in peace and harmony inany part of the Federation**. Any such disruption of the even tempo is contrary to the hope and desire of **peaceful and harmonious co-existence of other religions other than Islam in this country**. **The CA went on to state that the welfare of an individual or group must yield to that of the community and that this is the <u>correct interpretation</u> of the term 'peace and harmony' in article 3(1) and freedom of religion under article 11(1) of the Federal Constitution.**

The Court's judgment has several implications; the first is about the sanctity of Islam as envisaged under article 3(1) which will be addressed here, the second refers to 'any part of the Federation' which includes Sabah and Sarawak thus implying that the use of the term 'Allah' will disrupt the even tempo of life there **although there has been no objection to the term being used in those states and it has in fact been in use prior to the formation of Malaysia**.[22] The final implication is that any disruption will affect the religious liberty of non-Muslims as it shows that they cannot co-exist with Islam. This final implication is momentous as **the CA implies that articles 3(1) and 11(1) do not provide fundamental and inalienable rights of freedom of religion to non-Muslims but are instead, subject to the tolerance of Muslims. This is clearly against the spirit of the Federal Constitution as will be shown here**.

Article 3(1) states that 'Islam is the religion of the Federation but other religions may be practiced in peace and harmony in any part of the Federation.' The CA stated that **the words "in peace and**

[21] AIR 2008 SC 2096.

[22] Titular Roman Catholic Archbishop of Kuala Lumpur v MenteriDalamNegeri&anor (2009) MLJU 1258 para 12 (xii, xiv, xv).

harmony" are words with significance. The article places Islam on par with other basic structures of the Constitution as it is the third is order of precedence of the articles that were within the confines of Part 1 of the Constitution and it is pertinent to note that the Fundamental Liberties Articles were grouped together subsequently under Part II of the Constitution. If this reasoning is accepted then it would mean that the rest of the Constitution is not part of its basic structure and that the further the articles are from the beginning of the Constitution, the less important they are.[23] Richard Malanjum FCJ in his dissenting judgment at the Federal Court in the *Herald* case stated that the CA seemed to have adopted a 'first come' basis and questioned whether this means that the judiciary is inferior to the executive and legislature as articles on the role of the judiciary come after articles on the executive and legislature. His Lordship stated that the basic structure of the Constitution is sacrosanct and that the various documents pertaining to the formation of the Federation must not be cast aside as historical artifacts.

According to the CA, **article 3** was not in the draft proposed by the Reid Commission and only cameabout**after negotiations, discussions, objections and consensus between all racial and religious groups**.The Court also stated that **the purpose and intention of the words, "in peace and harmony" in article 3(1) is to protect the sanctity of Islam as the religion of the country and also to insulate against any threat to the religion of Islam**. The most possible and probable threat to Islam in the context of this country is the propagation of other religions to the followers of Islam. That is why article 11(4) of the Constitution came into place.

However, this is interpretation of article 3 by the CA is incorrect as although the Alliance Memorandum[24] proposed that Islam should be made the official religion,[25]the Reid Commission decided not to make any provision relating to an official religion. Officially the Commission cited the request of the Rulers to retain religion as a state matter and not to accede to the request of the Alliance on the grounds that it would infringe their position as head of Islam in their respective States. In private however, the Commission was concerned over the contradiction between the Alliance's declaration that Malaysia would be a secular state and the provision for Islam to be the official religion of the Federation.[26]**Jennings' private notes on the Commission's report states that he felt that the religion of a minority (in reference to Malays forming less than half the population then) should not be formally established. He stated that 'I do not think that Islam needs the power of the State to support it.'[27]**

There were concerns expressed by various non-Muslim organisations urging the Commission not to create an official religion for the Federation.[28]There was also a confidential letter from the Secretary of State to the Commission stressing the need to ensure that the Constitution

[23]This 'first past the post' doctrine could in turn means that articles 153 and 160 are quite unimportant compared to article 8.
[24] UMNO/SUA, 154/56, Alliance memorandum to Reid Commission, 27 September 1956
[25]Ibid, 391.
[2626] CO889/1 (37), Minutes of the 34th meeting of the Constitutional Commission, 26 September 1956.
[27]B/X/7/III, Jennings Papers, "Comments on the Reid Report", Ivor Jennings (undated).
[28]CO889/1, (2), (4) and (11).Submissions by the Eurasian Union (3) August 1956 hearing, Malayan Tamils Association, (6 June 1956, Memorandum) and Straits Chinese British Association, Malacca (7 June 1956, Memorandum).

guaranteed the freedom of religion.[29] Justice Abdul Hamid from Pakistan initially agreed with the other members of the Commission that reference to an official religion should be omitted, but later changed his mind in Rome although the fact that he changed his mind was not documented in his note of dissent.[30]**He stated that the Alliance proposal should be adopted on the grounds that it was 'innocuous' pointing out that at least 15 countries had similar provisions in their constitutions.**[31] Justice Abdul Hamid stated that there was no opposition from any important quarter to Islam becoming the State religion. This was incorrect in light of the initial objection by the Rulers and also by certain non-Muslim groups.

The CA in the Herald case made the assumption that there was a strong Muslim majority in Malaya which was intent upon defending Islam from threats of conversion and article 3 was meant to defend their position. The CA's position that peace and harmony meant that other religions could be practiced only if they posed no threat to Islam is not borne out by historical evidence. There was instead **concern among the members of the Commission that if Islam were made the official religion, it would affect the religious rights of the majority of the population**. This had less to do with Islam as a religion than with the fact that any recognized State religion would jeopardize the peace and harmony of multiracial Malaya. This is borne out by Jennings private notes mentioned earlier. **Hence the terms in "peace and harmony" were intended to guarantee the protection of the rights of other religious groups against a State religion and not to protect the State religion against other religions. Justice Abdul Hamid's view that the provision was "innocuous" bears out this view.**

In 1956 when negotiations were on-going, the socio-political conditions in Malaya were multi-ethnic and multi-religious. Society was fragmented due to the existence of three distinct communities with diverse cultures and religions who were independent of each other. The Reid Commission paid particular attention to this by ensuring the fundamental liberties of all communities were safeguarded. The CA's views that Islam was superior because it was placed at the beginning of the Constitution and that it had to be safeguarded, thus other religions were subject to Islam's definition of "peace and harmony" is not supported by historical documents. The Reid Commission's White Paper para 57 and 58 reads that the declaration that Islam is the religion of the Federation does not affect the present position of the Federation as a secular state. Every person has a right to profess and practice his own religion subject to any restrictions imposed by State law on the propagation of non-Muslim religions to Muslims.

Fernando writes that Tunku Abdul Rahman argued strongly before the Working Party chaired by MacGillivray and four representatives each from the Alliance and Rulers[32] that there should be an article declaring Islam as the official religion in the new Constitution as contained in the Alliance memorandum to the Reid Commission.[33] This was due to pressure from within UMNO and Malay opposition parties which had made this a bone of contention in their criticism against the Reid

[29]CO 889/1, C.C. (56) Minutes of 23 Meeting of Commission, 25 August 1956.
[30] B/X/7/III, Jennings Papers, "Malayan Saga" Note by Jennings , 2 February 1957.
[31] Reid Report 1957, 95 – 105.
[32] The Working Party met 23 times between 22 February 1957 and 27 April 1957
[33] J. M. Fernando, The Making of the Malayan Constitution, (The Malaysian Branch of the Royal Asiatic Society, Kuala Lumpur, 2002) 161-163.

Report.[34] The Alliance made two concessions to the objection of the Rulers and concerns expressed by non-Muslims which were, that the Rulers would remain the Head of religion in their various States andthat the practice and propagation of other religions in the Federation would be protected under the Constitution.[35] Fernando also writes that the Colonial Office was apprehensive at first but was assured by the Alliance leaders during the London Conference in May 1957 that "they had no intention of creating a Muslim theocracy and that Malaya would be a secular State".[36]The Federation of Malaya Constitutional Proposals (White Paper) made it clear that every person had the right to profess and propagate his own religion except that propagation of non-Muslim religions to Muslims was not permitted if the states legislated against it.[37]

There is further support for this argument in that the Malayan members of the Cobbold Commission, Ghazali Shafie and Wong Pow Nee had assured the people of Sarawak and North Borneo that Article 3 would not prevent freedom of religion in those states as Malaya was a secular state. It is unlikely that North Borneo and Sarawak would have agreed to form Malaysia if Islam was superior to their religions as this was one of the contentious issues raised by the representatives of the Chinese and non-Muslim native communities. Furthermore, the 20 Point agreement with North Borneo clearly stated that while there was no objection to Islam being the national religion of Malaysia there should be no State religion in North Borneo, and the provisions relating to Islam in the present Constitution of Malaya should not apply to North Borneo. This provision was further safeguarded in the Malaysia Act 1963 and the Federal Constitution, until it was amended later. It is unlikely that such provisions which challenged the 'superiority' of Islam would have been permitted if Malaya was not formed on the basis that it was a secular state.

The implication of the CA's decision on article 3 was raised by Richard Malanjum FCJ in his dissenting judgment. His Lordship stated that the CA's interpretation of article 3(1) derogated from the significance of articles 3(4), 11(1) and 11(4) which was contrary to the documented evidence on the formation of the Federation being a secular state (as discussed earlier). **Che Omar bin CheSoh v Public Prosecutor[38]**clearly supported this view. However as the majority decision in the Federal Court did not address this issue and the interpretation of the article 3 by the CA remains the law.

2. Is the essential and integral part of the religion test the correct test to be used?

The CA stated that**religious practices are not a fundamental right but a privilege**. **Religious practices are *confined* to what is an essential and integral part of the religion.**The name 'Allah' does not appear in the Old or New Testaments and there is no such word in the Greek New Testament. In the Bible, God has always been known as Yahweh and therefore the word or name 'Allah' is not an integral part of the faith and practice of Christianity. The CA concluded that 'the

[34] CO1030/524 (300) MacGillivray to Secretary of State, 8 April 1957,
[35] UMNO/SUA 154/56 Minutes of Alliance ad-hoc political sub-committee meeting, 2 April 1957.
[36]CO1030/494 (20) Memo by Jackson, 23 May 1957; CO1030/496 (10) Minutes of 1st Working Party meeting, London Conference, 14 May 1957.
[37] Para 57, *The Federation of Malaya Constitutional Proposals 1957.*
[38] [1988] 2 Malayan Law Journal 55

application for judicial review on matters of the nature as in this appeal, militates against the spirit of "peaceful and harmonious" co-existence of other religion [sic] in this country.'

Who decides what is an essential and integral part of the religion?Will this concept apply only when religious practices threaten public order or will it extend to other circumstances?

In *Hajjah Halimatussaadiah Hj Kamaruddin v Public Services Commission Malaysia &Anor*[39] the court held that the Government is entitled to forbid non-essential and optional religious traditions in the interest of the public service. Purdah was not considered as a religious practice as it was not a requirement under Islam since there was no express mention of such a requirement in the Quran. In *Fatimah Sihi & Ors v Meor Atiqulrahman Ishak & Ors*[40] the court held that there was no evidence that a 'serban' was mandatory and an integral part of Islam.

These decisions are similar to Indian decisions in *State of West Bengal v Ashutosh Lahiri*[41]where the Indian court upheld the decision of the authorities to deny the sacrifice of a cow by Muslims on Id Kurban (Hari Raya Haji) on the grounds that it was not an essential part of Islam as a camel or a goat could be substituted for the cow and *Javed v State of Haryana*[42] where the Indian court held that the protection offered under the Indian Constitution (Articles 25 and 26) in respect of religious practice was restricted to religious practice which forms an essential and integral part of the religion. The CA also referred to the Indian Supreme Court decision of *Commissioner of Police v Archarya Jagadishwarananda Avadhuta*[43] which pertained to a decision of the police commissioner to refuse permission to a religious sect, Ananda Margis who wanted to perform the tandava dance with skulls and knives on the streets of Calcutta. The Indian Supreme Court used a similar test on whether a practice is an essential and integral part of the religion but decided that it was essential and integral and the AnandaMargis could perform their dance subject to conditions imposed to preserve public order.

The CA used the Indian decisions and concluded that a practice may be a religious practice but may not be an essential and integral part of practice in that religion. The test used was **whether the nature of the religion would be changed without the impugned part of that practice**. The implication of this test was that only the permanent essential part which is *perceived to be mandatory* is protected by the Constitution.

The principle drawn from the Indian cases is that freedom of religion extends only to practices and rituals that are an essential and integral part of the religion. It is the court's task to assess the sufficiency of the evidence required to establish the existence of such practice. Therefore a "practice" or set of beliefs must not only exist but be "essential" to that religion. In this respect, the courts rejected what could be called the "assertion test", whereby a practitioner could simply assert that a particular practice was a religious practice.

[39][1994] 3 Malayan Law Journal 61.
[40] [2005] 2 Malayan Law Journal 25
[41]AIR [1995] SC 464.
[42]AIR 2003 SC 3057.
[43] [2004] 2 LRI 39 AR

The Federal Court in *Meor Atiqulrahman* used a slightly different test which was not cited by the Court of Appeal in the *Catholic Herald* decision.[44] The Federal Court stated that it was only concerned with the words 'practise his religion'. The Court acknowledged that the integral part of the religion test could permanently prohibit religious practices which are not considered an essential part of the religion which according to the Court, would not be right. The test used by the Federal Court is that there must be a religion, there must be a practice which is a practice of that religion and the court will have to consider the importance of the practice in relation to the religion. If it is compulsory or integral, the court would give more weight to it. If it is not, the court, depending upon its importance, may give lesser weight to it.

Nevertheless, if the CA in the Herald had used this test, it could have arrived at the same conclusion – that the use of the term 'Allah' is not an essential and integral part of the Christian religion. Although this would clearly have been a practice in the Christian religion for many years, the Court based on the internet resources referred to, held that the differences of opinion meant that it was not an integral part of the Christian religion.

Professors Shad Saleem Faruqi and Andrew Harding have stated separately that freedom of religion should not be restricted only to what is integral and essential. If something is permitted, it is a fundamental right even if not mandated.[45] Professor Harding also observed that the courts interpreted freedom of religion as freedom to practice religion only in ways that are essential to the faith when the correct position should be to ask whether there is any consideration that prevents a person from practicing their religion in the way they think fit.[46]

The view that only essential practices that are integral to the religion should be permitted, should not be adopted as it infringes on religious freedom under article 11. It is submitted that Professors Shad Faruqi and Harding's views reflect the correct position. Religious practices are part of religious freedom which is a fundamental right and the correct question is whether there is any consideration that prevents a person from practising their religion in the way they think fit? This leaves it up to individuals to act in accordance with their faith. It is particularly important in religions which have no clear leader or decision-making body who can decide what is integral to the faith. This is the case even in Islam where there are influential and highly respected clerics and religious leaders but no single acknowledged authority who has the power to issue binding edicts for all Muslims including the Sunni or Shia sects. The gap in Malaysia has been filled by Muslim religious leaders using Western style legislation from institutions with authority such as the State Legislative Assembly or State Religious departments with consent of the rulers, to issue laws that decide on what is integral to the Islamic religion.

There will be instances where religious practices by one group may offend religious beliefs of another group. This was the case in *State of West Bengal v AshutoshLahiri* where the practice of slaughtering cows by Muslims during a religious festival offended the religious beliefs of Hindus in India who consider cows to be sacred. The court should not have applied the 'essential and integral

[44] *MeorAtiqulrahmanIshak&Ors v Fatimah Sihi&Ors*[2006] 4 Current Law Journal 1

[45] Shad SaleemFaruqi, Storm in a Teacup, The Star, 23 January 2014, 40.

[46] Andrew Harding, 'Language, Religion and the Law: A Brief Comment on the Court of Appeal's Judgment in the Case of the Titular Roman Catholic Archbishop of Kuala Lumpur' Praxis Chronicle of the Malaysian Bar (Oct – Dec 2013).

part of the religion' test but should have used the simple test suggested by Professor Harding, which is whether there is any *consideration* that prevents a person from practicing their religion in the way they think fit?

There should be two factors that the court ought to refer to when determining whether there is such consideration; the first is whether the practice of that religion infringes on the *religious freedom* of the group attempting to stop it. Where this is not the case, the court should disregards any attempt to stop a religious practice. However where relevant the court should also consider whether there is a likelihood that the religious practices of certain groups may affect public order and morality which is already provided by article 11(5) of the Federal Constitution.[47]

There is of course the likelihood that the threat of public order and morality can be used to restrict religious freedom indiscriminately. In *State of West Bengal v Ashutosh Lahiri* public order and morality was used to restrict the right of Muslims to slaughter cows at the risk of public disorder as Hindus may have been angered by such actions. In the *Herald* case, the CA's observation that the events that unfolded soon after the High Court's judgment points to the fact that protests *after* the court's decision was used to justify the Minister's decision which was made *before* the suit was initiated in court. This was not lost on Richard Malanjum FCJ in his dissenting judgement in the Herald. His Lordship stated that one of the grounds for which the appeal should be allowed was whether occurrences of disturbance and disorder *post* the High-Court judgement could justify the ban as ruled by the CA.

The correct response is that any group claiming that the religious practices of another group are against public order and morality, will have to provide sound reasons as to why this is so. Rioting and public disorder by groups objecting to the religious practices of another group should be inadmissible as it would encourage them to disturb public order as a way to achieve their ends. This will also serve to rein in groups that whip up public sentiment to cause riots or public disorder in order to force the hand of the courts and police. Instead, the group claiming that another religious group's practices should provide clear proof as to how it poses a threat to public order.

The test in cases like *Hajjah Haalimatussaadiah* and *Meor Atiqurrahman* should have been, whether there was any consideration that prevented them from practicing their religion in the way they think fit? In other words, the test that should have been used is whether their practices infringed upon other Muslims' and non-Muslims' right to practice their religion. If there were cleims that their religious practices were a threat to public order, the court should require clear proof of this. The use of purdah may affect public order as it can be misused by the wearer to protect their identity when committing harm but the burden is on the group or person claiming this to provide sound reasons that it indeed poses such a threat. The fact that it is not in the Quran is a secondary matter. It is difficult however to see how the use of the serban, affects public order or morality.

It should be noted that the states would probably enact legislation against or in support of practices which Islamic religious affairs departments consider unIslamic and may also issue fatwa which has the force of law under the various administration of Muslim law enactments of the states.Whether

[47] Article 11(5) This article does not authorize any act contrary to any general law relating to public order, public health or morality.

this is an infringement of Muslims' freedom of religion under article 11(1) or whether State law can clearly legislate on such matters under List II is another issue which will not be discussed here.

The requirement of public orderand morality in article 11(5) of the Constitution forces religious groups to take into account the community in which they practice their religion and permits all parties to achieve a compromise where the offence to another religious group is real. Deciding on factors that affect public order and morality also permits the courts to work within boundaries as opposed to the 'essential and integral part of the religion' test which not only tries to place boundaries on diverse religious practices but also treads on the sacred by allowing lay persons to comment on religious issues of which they know very little. This wasdemonstrated by the CA's use of internet sources and reference to unknown authors coupled with attempts to interpret Hebrew and Greek translations of Christian religious texts without expertise in the original texts. The CAcited various sources with contradicting opinions to reach the conclusion that there is no consensus among Christians as to whether the word 'Allah' may be used as a reference to God which led to the further conclusion that the term "Allah" is not an essential and integral part of the Christian religion. In this, Court did not acknowledge that Christianity like most non-Muslim religions does not have a single rule for all its adherents and discussions, debate and dissent is permitted and even strongly encouraged in some cases. The Court interpreted the difference of opinion and dissent through the lens of Malaysian Islam which legislatesthe manner in which Islam is interpreted and where there is a final authority in the form of the State Ruler or the Yang di PertuanAgong who makes pronouncements on what is an essential or integral part of the Islamic religion.

The CA's decision has widespread implications as it means that only mandatory parts of religious practices would be protected andnon-Muslim religions can be subject to strict doctrinal tests. The concept of legislating faith in Islam has been extended to non-Muslim religions although there is no parallel development in non-Muslim religions as each person acts according to his or her faith. Without an oversight body to decide on the essential practices in non-Muslim religions on which practices are integral to the faith, the lacuna or gap is filled by the courts.

Zainun Ali FCJ commented in her dissenting judgment that some issues of theology, religious and ecclesiastical concerns are beyond the reach of the court. Her Ladyship stated that the learned judges in the CA should have confined themselves strictly to the legal issues raised since the question of the truth or otherwise of the disputed tenets of religious belief and faith, the correctness or otherwise of religious practices and inward beliefs and allegations are all beyond the competencies of judges of facts and law. These questions are clearly not questions of law or fact or factual issues capable of proof in a court of law by admissible evidence. Judicial method is equipped to handle only objectively ascertainable facts, directly or by inference and from evidence which is probative. Her Ladyship went on to caution that judges should not overreach themselves for they are not omniscient. The alleged historical or other facts taken for affidavit evidence and the internet are in themselves unverified, uncorroborated and therefore inadmissible. Richard Malanjum FCJ in his dissenting judgment also stated that the CA has made the essential and integral part of the religion test exclusive without due consideration to other provisions in article 11 all of which allow other religions to profess, practice and manage their own affairs.

The majority judgement at the Federal Court stated that the Minister's decision was never premised on theological considerations as it was based on public orderand security and therefore the views

expressed by the CA are mere obiter. This means that their decision on this matter is not binding on lower courts but merely of persuasive authority.The weight of this pronouncement is questionable. Is it referring to the pronouncement of the CA that the term 'Allah is not an essential and integral part of the Christian religion? In pronouncing this as obiter, is it stating that the CA's statements are persuasive and may be raised in another forum in future? The Federal Court did not clearly state that courts should not be involved in issues of theology or ecclesiastical concerns or that the 'essential and integral part of the religion' test is an incorrect interpretation of freedom of religion. The outcome is that the courts are free to continue to use the 'essential and integral part of the religion' test in future and there is uncertainty as to whether the Court of Appeal's decision is limited to the Herald or prohibits all non-Muslims from using the term "Allah".

3. Whether the Court's decision extends to all publications using the term 'Allah' including the Al-Kitab or is it limited to the Herald only?

The CA stated that the Al-Kitab and the Herald are two publications of entirely different character. The Al-Kitab is the Malay version of the Bible and is obviously meant only for Christians. Moreover the Ministry of Home Affairs has already specified the condition that the Al-Kitab could be used in churches and among Christians only; and that the words, 'BukanUntuk Orang Islam' are to be printed clearly and conspicuously on the front page of the Al-Kitab. The Herald however is a newsletter or in the same category as a newspaper (albeit with restricted circulation) which is used or likely to be used as the mouthpiece for the Catholic church to disseminate information on the activities of the Catholic church or the Catholic congregations. The online accessibility of the Herald means that it can be read by Muslims. The CA's view therefore was that the permission given by the Ministry for the printing and publication of Al-Kitab in which the word " Allah" appears cannot be treated in the same manner as the printing and publication of the Herald with the usage of the word 'Allah'.

At first glance, this appears to be a clear statement to the effect the the Court's decision is only limited to the Herald. Nevertheless as illustrated earlier in this paper, the Court pronounced that the term 'Allah' is not an **essential and integral part of the Christian religion**. The Federal Court in *Meor Atiqulrahman*, stated that a total prohibition would be viewed more seriously by the Courts than a partial prohibition. It went on to state that prohibiting the applicant from wearing a serban to school was a partial prohibition only as the applicant could use it during prayers in school and also outside of school hours. Had the CA in the *Catholic Herald* decision considered this view, it may have explained more clearly whether the restriction is a total prohibition or a partial prohibition which was limited to the Bahasa Malaysia version of the Catholic Herald only.

The CA stated that usage of the word 'Allah' in the Malay version of the Herald, without doubt had the potential to disrupt the even tempo of life of the Malaysian community. Furthermore the online accessibility of the Herald had a bearing on the Court's decision that it was a threat to public security. The Al-Kitab is also accessible online and the use of the term Allah in the Al-Kitab has clearly disturbed the even tempo of life in Selangor as described earlier. Richard Malanjum FCJ stated that the *Herald*'s legal action pertained only to the Bahasa Malaysia section but the CA's decision seemed to sanction a sweeping, general prohibition against the use of the word 'Allah' by all non-Muslims in all forms on all occasions which was unjust to non-Muslim groups like the Sikhs

who were not party to the case. His Lordship also stated that if the leave to appeal were not granted, the CA's decision would have been accepted as correct law which is binding on all lower courts and Malaysian citizens. The majority decision in the Federal Court did not provide any clarification on this issue.

This means that where the term 'Allah' is used in any non-Muslim publication, the publication may be seized by the authorities gazetted under the various Control of Propagation of Non-Muslim Religions enactments in the various states and the persons in control of such publications may even be charged under such enactments. Although the Ministry of Home Affairs granted permission for the Al-Kitab to published as long as it was circulated among Christians and clearly indicated that it was not for Muslims, there have been incidents where the Al-Kitab has been seized under these enactments.

In states like Sabah which does not have such an enactment, the Home Minister may restrict such publications under the Printing Presses and Publications Act 1984 on the grounds that it threatens public order and security. Alternatively, persons who use the term in their conversation or church worship may be charged under the Sedition Act 1948 on the grounds that the words are seditious as they may 'promote feelings of ill will and hostility between difference races or classes of the population in Malaysia'. The Al-Kitab could be prohibited from publication or circulation either under the relevant provisions of the PPPA or by an application to the Court under section 10 of the Sedition Act which states that the Court may prohibit the circulation of seditious publication if the public prosecutor can satisfy the court that the seditious publication would lead to unlawful violence or have the object of promoting feeling of hostility between different classes or races of the community. The Court once it is satisfied shall require every person having any copy of the prohibited publication in his possession, power, or control to deliver every such copy into the custody of the police.

Conclusion

As a result of the decision by the Court of Appeal in the *Catholic Herald*, the law as it currently stands appears to be that the term 'Allah' should not be used by any non-Muslim group in Malaysia as it is not an essential and integral part of the religion. Article 11 only protects what is mandatory in a religion which according to the CA's interpretation is a severely restricted freedom. Article 11 has to be read with article 3 which was inserted to protect the sanctity and supremacy of Islam. This means that other religions can be practiced in peace and harmony throughout the Federation as long as it does not affect the sanctity of Islam.

Clearly the provisions on freedom of religion in Sabah and Sarawak are not very different from Peninsular Malaysia other than the absence of enactments to prevent propagation. However as illustrated earlier, the absence of such enactments is of no real consequence as the Minister in the *Herald* case based his decision on the Printing Presses and Publications Act 1984. Judgements from the Court ofAppeal and Federal courts are binding on the High Court and lower courts regardless of any interpretation of these judgments by the Malaysian Cabinet or other politicians.[48]

[48] This paper has not dealt with matters to administrative law pertaining to the Minister's exercise of his discretion.