

UNMASKING THE DEVIL: THE ROLE OF THE CIVIL COURT AND ISLAMIC RELIGIOUS AUTHORITIES IN THE BATTLE AGAINST RELIGIOUS EXTREMISM AND TERRORISM IN MALAYSIA

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Abstract

This paper sets out to examine the role of the court and the Islamic religious authorities in fighting religious extremism and terrorism in Malaysia. The judiciary has obligations to protect the people, to guarantee freedom and to dispense justice. It is the constitutional duty of the Islamic religious authorities to preserve the religion, to safeguard the Muslim and to insulate the teachings of Islam in Malaysia. Under the federal constitutional framework of the country, civil court and federal government do not deal with religious matters because it comes under the jurisdiction of Syariah laws and Syariah court of the states. However, in order to combat religious extremism and terrorism under the pretext of Islam, the demarcation of constitutional power and jurisdiction between federal and state governments is obscured. The federal government which has exclusive legislative and executive powers over criminal matters, public order and security have to collaborate with the Islamic religious authorities of the states in encountering threats coming from religious extremists and terrorists' groups. Although laws, policies, and agencies relating to internal security, public order and crime are under the jurisdiction of the federal government, the ideological, theological, and philosophical dimensions of religious extremism and terrorism

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have to be dealt with by the Islamic religious authorities of the states. The civil court on a few occasions faced with challenging tasks of upholding rights of those accused of religious terrorism while at the same time preserving public order, peace, and security of the country. This is a qualitative research which involves legal study and analysis of primary materials including constitutions, legislations, emergency ordinances and court cases, and secondary materials such as books, articles and expert opinions. The symbiosis of federal authorities especially the civil courts, with the Islamic religious authorities of the states is the focal point of this paper. To counter the terrorists' threats and combat the spreading of the dangerous extremists' ideologies the court and the Islamic religious authorities need to have mutual understanding and establish cooperation in achieving the common goal. Only then the fight against religious extremism and terrorism in Malaysia is sustainable and effective.

Keywords: Extremism, Terrorism, Religion, Human Rights, Court, Religious Authorities.

I. INTRODUCTION

Malaysia is a country proud of its multireligious, multiethnic and multicultural characters. Religious freedom is an important aspect of this democratic nation and freedom of religion is one of the fundamental liberties guaranteed and protected by the Federal Constitution. Respect and understanding are vital in preserving peace and harmony between the people of various races and religions living in the country. Tun Mahathir the former Prime Minister of Malaysia in one of his speeches provides a good illustration.

Islam is capable of coexisting with other religions too, including with those without any religion. In Malaysia we have a truly incompatible mix of Hindus, Buddhists and Taoists, and Muslims, with a small Christian minority thrown in. Strictly speaking we cannot even sit at the same table to eat. Muslims violently object to pork, which the Chinese love, but Muslims love beef, which the Hindus do not eat. But we can and we do sit at the same table to eat because we are sensitive toward each other's sensitivities.¹

Article 11 of the Federal Constitution proclaims that every person has the right to profess, to practise and to propagate his religion. This right can be claimed

¹ Mahathir Mohamad, "Islam, Terrorism and Malaysia's Response. Remarks by Prime Minister of Malaysia," accessed September 21, 2021, <https://asiasociety.org/new-york/islam-terrorism-and-malaysias-response>.

by anybody irrespective of religion, citizenship, gender, ethnic group, or others. However, the sanctity of religion has been undermined by groups of people who seem to have vile intentions. Not only have these people diluted the truth, but they also have created chaos and violence under the guise of religion. This has become a major global problem and Malaysia has not been spared.

In this country, initially religious extremism originated from deviant teachings whereby 'religion was used as a means to propagate mistrust among the populace and to undermine the democratically elected government. This was a result of misinterpretation of the Islamic faith according to the ideologies of some interest groups.'² The view is shared by Mahathir who stated, "Islam the religion is not the cause of terrorism. Islam ... is a religion of peace. However through the centuries, deviations from the true teachings of Islam take place. And so Muslims kill despite the injunction of their religion against killing especially of innocent people."³ Extremism stems from those with an uncompromising mindset with regards to their beliefs and convictions which pose as a threat to the nation. If efforts are not taken to wean these groups off extremism, they would degenerate into terrorists and strike blindly without regard for the life of the innocent and disrupt the peace and stability of the country.⁴ There have been many incidents of such nature which have occurred. On 7 July , 1979, an individual claiming to be Imam Mahdi had attacked and injured an imam at a mosque. In another incident serious acts of violence had been committed on Thursday 16 October 1960, when a group of heretical followers of another person claiming to be Imam Mahdi, attacked a police station. Confrontation involving armed military personnel and citizens during the Memali tragedy of November 1985 and Al-Ma'unah incident in July 2000 involved fatalities on both sides. These are examples of armed violence that were driven by the deviant teaching and radical ideology of local Islamic groups.⁵

² Ahmad Zahid Hamidi, "Malaysia's Policy on Counter Terrorism and Deradicalisation Strategy," *Journal of Public Security and Safety* 6, no. 2 (2016): 1.

³ Muhammad, "Islam, Terrorism and Malaysia's Response."

⁴ Hamidi, "Malaysia's Policy on Counter Terrorism."

⁵ Majlis Agama Islam Selangor [Selangor Islamic Religious Council]. *Ajaran Sesat: Merungkai Kekusutan & Kecelaruhan [Heresies: Unraveling the Tangles & Ignorance]* (Selangor Darul Ehsan: Majlis Agama Islam Selangor (MAIS) [Selangor Islamic Religious Council], 2015), 9-58.

Religious extremism and terrorism are becoming ever increasingly worrying and more difficult to contain because terrorist movements have gone beyond national boundaries, are highly organized, well financed and more sophisticated and advanced in terms of communication, strategy, and weaponry. As admitted by the former Deputy Prime Minister of Malaysia, who at that time was also the Minister of Home Affairs, since 2013 the Islamic State (IS) militancy or Daesh has become the fastest growing threat to Malaysia.⁶ The group is extremely dangerous because it espouses views and teachings that promotes the *takfiri* ideology. “*Takfiri* ideology is characterized by harsh literalist interpretations of Islam, which pronounce apostasy and disbelief against Muslims who espouse differing interpretations on religious matters, thus justifying the shedding of their blood. The ideology legitimized the murder of Muslims and other religious groups who oppose them.”⁷ According to Jaafar and Akhmetova the influence of the jihadist Salafism and Wahhabism led to the formation of local religious extremist cells such as *Tentera Sabiullah*, *Darul Dakwah* (House of Call to Islam), *Kumpulan Crypto* (Crypto Group), *Kumpulan Mohd Nasir Ismail* (Mohd Nasir Ismail’s Group), *Kumpulan Jundullah* (Army of God Group), *Kumpulan Revolusi Islam Ibrahim Libya* (Ibrahim Libya Islamic Revolution Group), *Kumpulan Mujahidin Kedah* (Kedah Mujahidin Group - KMK), *Kumpulan Perjuangan Islam Perak* (Perak Islamic Movement Group- KPIP), *Al-Maunah*, and *Kumpulan Mujahidin Malaysia* (Malaysian Mujahidin).

These extremists’ groups shared a common goal namely to topple down the government and demanded the creation of the administrative body that would be fully aligned with their own versions of Islam.⁸ The goal is in consonance with various statements and fatwas issued by some leaders of the groups that Muslims must refrain from voting and taking part in democratic political elections. They

⁶ Hamidi, “Malaysia’s Policy on Counter Terrorism.”

⁷ Naved Bakali, “Challenging Terrorism as a Form of Otherness: Exploring the Parallels between Far-Right and Muslim Religious Extremism,” *Islamophobia Studies Journal* 5, no. 1 (Fall 2019): 100.

⁸ Muhammad Izzuddin Jaafar and Elmira Akhmetova, “Religious Extremism and Radicalisation of Muslims in Malaysia: The Malay Ties with the Mujahidin, Al Qaeda and ISIS,” *Journal of Nusantara Studies (JONUS)* 5, no. 1 (January 2020): 105.

declare that these activities are forbidden (haram) for Muslims to participate.⁹ Thus, although Malaysia is a country that has Syariah laws and courts such extremists' groups still commits acts of violence and cause destruction to the society in the country. In fact, the reality is, as correctly observed by Anthony H. Cordesman, that globally the most extremist and terrorist violence occurs in Muslim states. The violence overwhelmingly consists of attacks by Muslim extremists on fellow Muslims, and not a clash between civilizations.¹⁰

Nevertheless, the war against terrorism must not jeopardize exercise of legitimate rights of the people. The judiciary has to carry out its obligations to protect the people, and at the same time guarantee freedom and dispense justice. It is the constitutional duty of the Islamic religious authorities to preserve the religion, to safeguard Muslims and insulate the true teachings of Islam in Malaysia. Under the federal constitutional framework of the country, the civil courts and federal government do not deal with religious matters because it comes under the jurisdiction of Syariah laws and courts of the individual states. However, to combat religious extremism and terrorism under the pretext of Islam, the demarcation of constitutional power and jurisdiction between federal and state governments is obscured. The federal government which has exclusive legislative and executive powers over criminal matters, public order and security must collaborate with the Islamic religious authorities of the states in encountering threats coming from religious extremists and terrorists' groups. Although laws, policies, and agencies relating to internal security, public order and crime are under the jurisdiction of the federal government, the ideological, theological, and philosophical dimensions of religious extremism and terrorism have to be dealt with by the Islamic religious authorities of the states. The civil court on a few occasions had faced the challenging tasks of upholding rights of those accused of religious terrorism while at the same time preserving public order, peace, and security of the country.

⁹ Mohamed Ali, *The Roots of Religious Extremism: Understanding the Salafi Doctrine of Al-Wala' Wal Bara'* (London: Imperial College Press, 2015), 7.

¹⁰ Anthony H. Cordesman, "Islam and the Patterns in Terrorism and Violent Extremism," *Center for Strategic and International Studies (CSIS)*, accessed July 14, 2021, <https://www.csis.org/analysis/islam-and-patterns-terrorism-and-violent-extremism>.

This paper sets out to examine the role of the court and the Islamic religious authorities in fighting religious extremism and terrorism in Malaysia. This qualitative research involves a legal study and analysis of primary materials including constitutions, legislations, emergency ordinances and court cases, and secondary materials such as books, articles, and expert opinions.

II. CONSTITUTIONAL SETTINGS

Article 11 of the Federal Constitution guaranteed the right to every person, including permanent residents, migrant workers, tourists, international students, asylum seekers and refugees, to religion.¹¹ The provision also states that nobody can be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own. Religious rights guaranteed under the constitution do not only apply to individual and personal capacities, but it also covers religious groups. The constitution protects the rights of any religious group to manage its own religious affairs. All religious groups have the constitutional rights to establish and maintain institutions for religious or charitable purposes. Rights to property are also guaranteed because it is stated that every religious group has the right to acquire and own property and hold and administer it. Freedom of religion had been upheld by the courts in several cases such as *Jamaluddin bin Othman v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor*¹² and *Minister for Home Affairs v. Jamaluddin*.¹³ Both the High Court and the Supreme Court in the said cases have maintained the right of the person to practise and propagate Christianity. Notwithstanding that under s 8(1) of the Internal Security Act 1980 (which has now been repealed), the Home Minister was given powers to detain a person to prevent him from ‘acting in any manner’ prejudicial to the security of Malaysia, the Minister has

¹¹ Maqsood Ahmad & Ors v. Ketua Pegawai Penguatkuasa Agama [Chief Religious Authority Officer] & Ors, 9 MLJ 596 (2019), <https://www.defendingforb.org/media/dt1awevp/maqsood-ahmad-ors-v-ketua-pegawai-penguatkuasa-agama-ors-2019-9-mlj-596.pdf>.

¹² *Jamaluddin bin Othman v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [Minister of Home Affairs, Malaysia] & Anor, 1 MLJ 368 (1989).

¹³ 1 MLJ, 418 (1989).

no power to deprive a person of his right to profess and practise his religion which is guaranteed under Art. 11 of the Constitution.

Religion is a nourishment to the soul. It brings peace to the mind and fulfils one's spiritual needs. It is meant to create peaceful way of life for human beings. Religion creates peace between a person and his creator, and it also creates harmony between a person with the nature and his surroundings. It also has the objective of establishing a peaceful environment for the society. Accordingly, the Federal Constitution of Malaysia does not authorize any act contrary to any general law relating to public order, public health, or morality. The express limitation of religious rights can be found in Article 11(5). In other words, religious rights guaranteed by the Constitution cannot be abused to disrupt public order. Any action even those associated with any religion may be limited if it endangers public health and undermine morality of the public, "The freedom to profess and practise one's religion should not be turned into a licence to commit unlawful acts or acts tending to prejudice or threaten the security of the country."¹⁴

The scope of right to practice religion has also been circumscribed by the courts as had been decided in several cases. One of the cases concerns a Muslim Chief Inspector of the police force who was dismissed subsequent to disciplinary actions taken against him.¹⁵ Among the disciplinary charges was for insubordination by committing polygamy without the permission of his superior. He claimed that the charge is unsustainable on the ground that it goes against his right to practise his religious belief and contended that the practice of polygamous marriage is permissible under the Islamic faith. He claimed that by denying his application to enter a polygamous marriage, which allowed by Surah An Nisa verse 3 of the Holy Koran, his superiors had infringed his freedom of religious practice which is constitutionally guaranteed under Article 11(1) of the Federal Constitution. The court however disagreed and explained that the verse means polygamous marriage is merely permissible in Islam, not obligatory. A

¹⁴ Minister for Home Affairs v. Jamaluddin, 1 MLJ 418 (1989).

¹⁵ Zakaria bin Abdul Rahman v. Chief of the Malaysian National Police & Anor, 3 MLJ 385 (2001).

Muslim is therefore not required, as a matter of religious obligation, to take upon more than one wife. As a matter of fact, there are certain conditions that need to be met before a Muslim is allowed to do so. Thus, it is not fundamentally wrong for the disciplinary authority to require any member of the police force to obtain prior permission from his superior officer before entering a polygamous marriage. Such a condition therefore could not be construed as infringing the constitutional guarantee to profess and practise his religion as contained in Article 11(1) of the Federal Constitution. Failure to obtain such a permission amounted to a breach of discipline. The court therefore decided that the officer had clearly acted contrary to good discipline in marrying his second wife after his request for permission to do so was turned down by his superior officer.

Another case concerned three primary school Muslim students who had been expelled from their school.¹⁶ The school had issued 'The School Regulations 1997' which stipulated, *inter alia*, that all students are prohibited from wearing 'jubah, turban (serban), topi, ketayap dan purdah'. Despite the prohibition, the students wore serban as part of their school uniform to school. Consequently, they were expelled. They challenged their dismissal in court and at the High Court the learned judge found in their favour and made a ruling, *inter alia*, that the School Regulations 1997 was unconstitutional.¹⁷ On appeal however the Court of Appeal reversed the judgment of the High Court.¹⁸ The appeal then reached the highest court in Malaysia, namely the Federal Court. The only constitutional issue submitted to the Federal Court is whether the regulations prohibiting the wearing of 'serban' by school pupils violated Article 11(1) of the Federal Constitution? The students argued that wearing serban is part of Islamic prophetic teaching, thus the regulations prohibiting students from wearing serban violated their rights to practise their religion which includes every religious practice that 'have some basis or become part of that religion whether they are mandatory or otherwise.' The right to practice religion can only be restricted if, by exercising such rights, it affects public order, public health, and public morality.

¹⁶ Meor Atiqulrahman bin Ishak and others v. Fatimah Binti and Others, 4 MLJ 605 (2006).

¹⁷ 5 MLJ 375 (2001).

¹⁸ 2 MLJ 25 (2005).

In course of the judgment, the Federal Court laid down the method in determining whether a particular religious practice is protected by the Constitution or not, “First, there must be a religion. Secondly, there must be a practice. Thirdly, the practice is a practice of that religion.” Once all the questions have been answered in the affirmative “The court should then consider the importance of the practice in relation to the religion. This is where the question whether the practice is an integral part of the religion or not becomes relevant. If the practice is of a compulsory nature or ‘an integral part’ of the religion, the court should give more weight to it. If it is not, the court, again depending on the degree of its importance, may give a lesser weight to it.” In this case, the Federal Court answered the first and the second questions in the affirmative. In its deliberation the Federal Court states that various factors should be considered in determining whether the ‘limitation’ or ‘prohibition’ of a practice of a religion is constitutional or unconstitutional under Article 11(1) of the Federal Constitution. Only the court can decide it when the matter comes before the court. In the course of making its decision, expert witnesses may be called to assist the court regarding a practice. In cases involving Islamic religious practice, the issue regarding the ‘hukum’ of the practice may be referred to the Shari’ah Committees (Fatwa Committees) in the States or the National Fatwa Council. In the current case, an expert opinion was called and he gave his opinion that the wearing of turban is ‘sunat’ or commendable. Contrary to the opinion of the expert witness, the judge concluded that it is not part of ‘Islamic prophetic teaching’ and went on to hold that the School Regulations 1997 in so far as it prohibits the students from wearing a turban as part of the school uniform during school hours does not contravene the provision of Article 11(1) of the Federal Constitution and therefore is not unconstitutional.

Another case of restriction of religious practices made by the court concerning dress and attire is *Hjh Halimatussadiyah bte Hj Kamaruddin v. Public Services Commission, Malaysia & Anor*.¹⁹ A Muslim female public servant was dismissed by the government for wearing attire covering the face or ‘purdah’ during office

¹⁹ 3 MLJ 61 (1994).

hours. Under para 2.2.1 of the Service Circular No 2 of 1985 pertaining to dress code for civil servants, women officers were prohibited from wearing among others 'any dress which covered the face during office hours'. She brought an action in the High Court challenging the validity of her dismissal by the Public Services Commission (PSC) but the action was dismissed by the High Court.²⁰ She then appealed to the Supreme Court, which was the highest court of the land during that time, based on several grounds, *inter alia*, that her constitutional right under Article 11(1) of the Federal Constitution to profess and practise her religion had been infringed. In its judgement, the Supreme Court held that the freedom of religion guaranteed under Article 11(1) of the Federal Constitution is not absolute as Article 11(5) does not authorize any act contrary to any general law relating to public order, public health, or morality. The prohibition against the wearing of attire covering the face by lady civil officers during work does not affect the appellant's constitutional right to practise her religion. The opinion of Dato' Mufti Wilayah Persekutuan that Islam as a religion does not require a Muslim woman to wear a purdah had been accepted by the court and therefore it concluded that the wearing of purdah had nothing to do with the appellant's constitutional right to profess and practise her religion.

As can be observed in the cases discussed above the right to practice religion had been restricted by the court on various occasions not because based on public order, public health or morality, but on the basis whether or not the action or practice is required or obligatory under that religion. It appears that only an action or practice which been classified as obligatory is certain to be protected by Article 11.

III. ISLAMIC RELIGIOUS AUTHORITIES AND RELIGIOUS EXTREMISM AND TERRORISM

The Islamic religious authorities play a very crucial role in providing legitimacy to the moderate Islamic worldview which is the true teaching of Islam.²¹ This

²⁰ 1 MLJ 513 (1992).

²¹ Siti Zubaidah Ismail, "Menangani Ajaran Sesat di Kalangan Umat Islam: Perspektif Undang-Undang dan Pentadbiran [Dealing with Heresies Among Muslims: Legal Perspectives and Administration]," *Jurnal Syariah* 18, no. 2 (2010): 247-276.

is true in Malaysia and maybe relevant to other countries and in some, a different context.²² Under the federal constitutional framework of Malaysia, Islamic religious administration and laws come under the exclusive purview of the individual states. Federal authorities cannot indulge into these matters as it would mean breaching the constitutional division of power between the federal government and the state as outlined in the Federal Constitution of Malaysia. Any executive action and legislative interference by the federal government on Islamic affairs and matters which come under the states' autonomy would be declared unconstitutional and *ultra vires* by the court as evidenced in the case of *Mamat Bin Daud & Ors v. Government of Malaysia [1988] 1 MLJ 119*. The issue before the court in the case is whether section 298A of the Penal Code, a federal law, which provides for offences causing, disharmony, disunity, or feelings of enmity, hatred or ill-will, or prejudicing, the maintenance of harmony or unity, on grounds of religion *ultra vires* Article 74(1) of the Federal Constitution and invalid, since the subject matter of the legislation is reserved for the State Legislatures and therefore beyond the legislative competency of Parliament. The Supreme Court declared that *section 298A* is a law with respect to which Parliament has no power to make law and it is invalid and therefore null and void and of no effect.

The importance to preserve the true teachings of Islamic religion and prevent any enmity among Muslims have been highlighted by Lord President (LP) Tun Salleh Abas (as he then was) in *Mamat Bin Daud*. Delivering judgment of the Supreme Court in the case, the Lord President stated "...[E]xcept that to allow any Muslim or groups of Muslims to adopt divergent practices and entertain differing concepts of Islamic religion may well be dangerous and could lead to disunity among Muslims and, therefore, could affect public order in the states. But the power to legislate in order to control or stop such practices is given to

²² In a report relating to terrorist recruitment in American correctional institutions, Mark S. Hamm states that 'the only way to combat the expansion of radical Islam is through the moderating voice of religious authority and intellectual agency'. Mark S. Hamm "Terrorist Recruitment in American Correctional Institutions: An Exploratory Study of Non-Traditional Faith Groups," *National Institute of Justice (NIJ)*, published December, 2007, <https://nij.ojp.gov/library/publications/terrorist-recruitment-american-correctional-institutions-exploratory-study-non>.

states as could be seen from Article 11, clause (4).”²³ His lordship further stated that it is the religious authorities of the states “...which can say what should be the proper belief, rule and concept of Islamic religion or what should not be its interpretation and what should be the rule in a particular given situation or case. Clause (4) is a power which enables states to pass a law to protect the religion of Islam from being exposed to the influences of the tenets, precepts and practices of other religions or even of certain schools of thoughts and opinions within the Islamic religion itself.”

The task to decide and determine on any issues and matter pertaining to Islamic religion clearly rests with the Islamic religious authorities of the states. Salleh Abas L.P had explained this succinctly as reproduced below:

“Surely, a legislation to deny a Muslim from holding a certain view or to prevent him from adopting a practice consistent with that view is a legislation upon religious doctrine. In its applicability to the religion of Islam, the impugned section must, in my view, be within the competence of State Legislative Assemblies only.... in so far as its application to Muslims is concerned, (it) is a law, the object of which is to ensure that Islamic religion practised in this country must conform to the tenets, precepts and practices allowed by states...In enacting this impugned section, I do not think that Parliament can really rely on its powers to legislate on public order because the exercise of such power comes into a direct conflict with state powers to legislate on, and control, the practices of Islamic religion.”

Terrorism is against the teachings of Islam. To protect the sanctity and the integrity of Islam, it is the obligation of the Islamic authorities to act against any people who misuse the name of Islam or abuse their religious positions and credentials. To achieve this objective, one of the methods used by the authorities is the requirement for any person who would like to teach or preach Islam must have sufficient and correct knowledge of the religion. This is done by the conferment of ‘Tauliah’, or official permission issued by the relevant religious authorities. The laws to this effect can be found in all states in the country and issued by the religious authorities of the respective states. The case of *Fathul Bari bin Mat Jahya & Anor v. Majlis Agama Islam Negeri Sembilan & Ors [2012]*

²³ Mamat Bin Daud and Ors v. Government of Malaysia 1 MLJ 119 (1988).

4 *MLJ* 281 highlights the importance and purpose of *Tauliah*. In this case the validity of section 53(1) of the Syariah Criminal Enactment (Negeri Sembilan) 1992 came into question. Under the section any person who engaged in the teaching of the religion without a *Tauliah* from the Tauliah Committee, except to members of his family at his place of residence only, was guilty of an offence punishable by a fine or jail or both. *Tauliah* is a pre-requisite before one can teach the Islamic religion. The Tauliah Committee, which comprises of the Mufti and between three and seven other persons with appropriate experience, knowledge, and expertise, had power to grant or withdraw a *Tauliah* for the purpose of the teaching of the Islamic religion or any aspect thereof. Section 53(1) was enacted pursuant to Article 74(2) read together with Item 1, State List, Ninth Schedule of the Federal Constitution which empowered the State Legislature to make laws for the creation and punishment of offences against the precepts of Islam' by persons professing the religion. The Federal Court, in upholding the provision and constitutionality of *Tauliah*, states that Tauliah was made 'not merely to prevent deviant teachings but also to maintain order and prevent division in the community'. 'The requirement of *Tauliah* is for the purpose of protecting the public interest (masalah) falls within the concept of *siyasah shari'yyah*. It was necessary in this day and age for the authority to regulate the teachings or preaching of the religion to control, if not eliminate, deviant teachings and safeguard the integrity of the religion. The integrity of the religion needs to be safeguarded at all costs.'

The necessity for the Islamic religious authorities to ensure that only qualified people with the correct understanding and knowledge of the religion are allowed to teach the religion became more apparent due to the findings that, in addition to social media, ISIS also uses *usrah* (an Islamic form of gathering) at the local educational institutions such as universities and colleges to spread the ideology. *Usrah* is an easy way in approaching and disseminating an extreme understanding of religion among the young people. The method proved to be effective as several cases were reported that Malaysians were captivated with the jihadi movement spread by their *naqib* (male leader) including a former

Malaysian army commander aged 29 reported to have joined ISIS after being influenced by his *naqib*.²⁴

Another mechanism that is being employed by Islamic authorities to thwart religious extremism and violence associated with religious movement is through the issuance of religious edicts or *fatwa*. Official fatwas made by the Fatwa committees of the respective States are point of reference when people are in doubt over certain religious issues and problems. The fatwas are made after the problems or questions sent for considerations to the Mufti have been deliberated, discussed, and researched by members of the committees, which make the fatwas very reliable and influential. Many fatwas have been issued to protect the people from being deceived into deviant groups and heresy. Fatwas on radical and extremist religious organization also have been issued to make the public aware of their subversive activities and violent means of operations. Thus, there are fatwas concerning the doctrines and teachings propagated by IS, JI, Al Qaeda, and others. The fatwas can be relied by the courts and governmental authorities in making decisions, and in some ways counter the propaganda and publicity made by the terrorists' organizations. As can be observed in the cases mentioned in this writing, many expert witnesses which have been called upon by the courts and enforcement agencies to assist in the trials and investigations are muftis and members of the fatwa committees. It shows that the enforcement agencies and security personnel as well as court of officers need to work in tandem with members of Islamic religious authorities.

The application of fatwa by Islamic religious authorities in circumscribing deviant and untrue teaching of Islam can be seen in the case of *Sulaiman bin Takrib v. Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications [2009] 6 MLJ 354*. In this case, the petitioners were charged in the Syariah Court for religious offences. The first petitioner was charged pertaining to defiance or disobedience of the fatwa, which was published in the Government Gazette for having in his possession a VCD that contained material that was contrary to Hukum Syarak or 'the precepts of Islam'. While

²⁴ Jaafar and Akhmetova, "Religious extremism and Radicalization."

the second petitioner, was also charged in the Syariah court for Syariah offences in expounding a doctrine relating to the religion of Islam which was contrary to the Hukum Syarak, or the precepts of Islam. Both petitioners sought to declare the Syariah enactments upon which they were charged as unconstitutional and invalid. The court disagreed with the petitioners. It was held that fatwas that have gone through the process as prescribed by the law become binding and have the force of law. The publication was done on the direction of the Ruler, who is the head of the religion of Islam in the State of Terengganu, on the advice of the Fatwa Committee of the State. The court also accepted the opinion of three expert witnesses who agreed that the term ‘the precepts of Islam’ covered the three main domains i.e., creed or belief (*aqidah* or *usuluddin*), law (*shariah*) and ethics or morality (*akhlak*) and included the teachings in the Qur’an and Sunnah. For present purposes of this paper, it is most important to highlight that all of them agreed that *aqidah* forms one of the precepts of Islam as used in the Constitution.

IV. THE COURTS AND CASES RELATING TO RELIGIOUS EXTREMISM AND TERRORISM

The Supreme Court in *Minister for Home Affairs v. Jamaluddin* warns that the freedom to profess and practise one’s religion should not be turned into a license to commit unlawful acts or acts tending to prejudice or threaten the security of the country. The freedom to profess and practise one’s religion is itself subject to the general laws of the country as expressly provided in clause (5) of Article 11 of the Constitution.²⁵ Thus the protection conferred by Article 11 of the Constitution cannot be a complete umbrella for all actions. This is also alluded to by the Supreme Court in *Mamat bin Daud & Ors v. Government* when it reminded that “Clause (5) of Article 11 of the Constitution assertively stipulates that that article which provides for freedom of religion does not authorise any act contrary to any general law relating to public order, public health or morality.” Based on this principle, there are many laws relating to public order,

²⁵ 1 MLJ 418 (1989).

public health or morality which could be used to restrict any unconstitutional religious action.

Obvious examples would be offences pertaining to religion in the Penal Code. In the Federal List of the Federal Constitution, which lists down exclusive legislative jurisdiction of the Parliament, item 3 deals with internal security generally and includes in paragraph (a) thereof public order. One of the laws made in pursuant to the legislative power of the Parliament is the Penal Code. Chapter XV of the Penal Code, which is a federal law, bears the heading 'Of Offences Relating To Religion'. It comprises sections 295 to section 298A. Offences relating to religion in the chapter include injuring or defiling a place of worship with intent to insult the religion of any class; disturbing a religious assembly; trespassing on burial places; uttering words, etc., with deliberate intent to wound the religious feelings of any person, and causing, etc. disharmony, disunity, or feelings of enmity, hatred or ill-will, or prejudicing, etc., the maintenance of harmony or unity, on grounds of religion.

Initially, according to Ahmad El-Muhammady Malaysia had employed the Internal Security Act (ISA) 1960 to deal with the threat of terrorism and violent extremism. Despite its good record of accomplishment in combating terrorism and the spread of radical ideas propagated by terrorist-extremist groups, the law was repealed due to incessant pressure from the oppositions, civil societies, and human right groups. It was replaced by new laws such as the Security Offences (Special Measures) (SOSMA) 2012, Prevention of Terrorism Act (POTA) 2015, Special Measures Against Terrorism in Foreign Countries (SMATA) 2015, Anti-Money Laundering and Anti-Terrorism Financing and Proceeds of Unlawful Activities (AMLATFPUA). Preexisting laws such as the Penal Code and Prevention of Crime Act (POCA) 1959 are also used.²⁶ The numerous laws which can be employed by the Malaysian authorities currently in combating terrorism and violent extremism activities associated with religion can be divided into two main groups. Firstly, ordinary laws, and secondly, special laws. Ordinary laws refer

²⁶ Ahmad El-Muhammady, "Radicalisation mode: Learning from Malaysian militant-extremists," in *Terrorist Deradicalisation in Global Context. Success, Failure and Continuity*. ed. Rohan Gunaratna and Sabariah Hussin (Oxon: Routledge, 2020), 156.

to laws made by federal legislature and state legislatures under their respective constitutional powers.²⁷ These laws must be consistent with other provisions of the Constitution, particularly Part II which deals with Fundamental Liberties. Any provision of these laws which is inconsistent with the constitution and infringe any rights guaranteed by the constitution shall be declared invalid by the court.²⁸

Special laws refer to laws made by the Parliament in pursuant to Article 149 which deals with special powers against subversion, organized violence, and acts and crimes prejudicial to the public. Under the provision, the Parliament can make laws designed to stop or prevent action whether inside or outside the Federation to cause Malaysian citizens to fear, organized violence against persons or property; to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; to procure the alteration, otherwise than by lawful means, of anything by law established; which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof, or which is prejudicial to public order in, or the security of, the Federation or any part thereof. Any provision of the law made in pursuance of Article 149 is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13. In other words provision of special law remains valid even it is inconsistent with constitutional rights of life and personal liberty; freedom of movement; rights to free speech, freedom of assembly and freedom of association, and rights relating to property. Laws that fall under the former category are Anti-Money Laundering and Anti-Terrorism Financing and Proceeds of Unlawful Activities (AMLATFPUA) 2001, Special Measures Against Terrorism in Foreign Countries (SMATA) 2015, and the Penal Code. Legislations which are made under the constitutional provision to combat subversion and organized violence are Security Offences (Special Measures) (SOSMA) 2012, Prevention

²⁷ For federal legislature the power is based on article 74(1) read together with List 1 and List 3 of the 9th Schedule to the Federal Constitution of Malaysia. For state legislatures their power is based on article 74 (2) read together with List 2 and List 3 of the 9th Schedule to the Federal Constitution of Malaysia.

²⁸ Article 4 (1) of the Federal Constitution of Malaysia.

of Terrorism Act (POTA) 2015, and Prevention of Crime Act (POCA) 1959. The repealed Internal Security Act (ISA) 1960 falls under this category. At least three criteria are being used by the police in Malaysia to determine what is considered terrorism, extremism and radicalization, and how these elements could pose threats to the national security.

First, the legal criteria: the acts that violate any statutes embodied in the national laws. This includes any belief systems and ideologies that may bring harm to public order and the national security. Second, from an Islamic perspective: any belief systems and ideologies that deviate from the mainstream Islam as defined by the state's religious authorities. Third, the acts that are against the universal values and may generate public disorder and threaten the national security.²⁹

The use of special law and preventive detention power can be seen in *Ahmad Yani bin Ismail & Anor v. Inspector General of Police & Ors MLJ [2005] 4 MLJ 636*. The detainees in this case were said to be associated with the *Jemaah Islamiah*. They were initially arrested under section 73 of the Internal Security Act 1960 and subsequently detained without trial pursuant to section 8 of the Act. They applied for the writ of Habeas Corpus. Among the issues discussed in this case was whether Article 149 overrides Article 11 which protects freedom of religion. Based on the allegations of fact, the court was of the view that the actions of the detainees were not only unlawful as being outside the limits of the Constitution but were a threat to national security. They had been identified to be engaged in activities which were described as militant activities. They had been actively involved in receiving instructions on armed warfare both in theory and through physical training. The movement propagated actions which included attempts to create unrest as well as overthrowing the government through armed rebellion. In the present case, the Minister formed the opinion that the activities of the applicants did not fall within the limits of professing and preaching of religion, a view which was shared by the judge. The argument that exercise of the powers under the ISA had the effect of curtailing the rights guaranteed to the applicants under Article 11 of the Federal Constitution was fallacious. The court held that

²⁹ El-Muhammady, "Radicalisation mode," 157-158.

even though Article 11 relating to freedom of religion is not mentioned alongside Articles 5, 9, 10 or 13, Article 11 of the Federal Constitution does not prevail or override Art 149 of the Federal Constitution. Furthermore, by permitting federal law to control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam under clause (4) of Article 11 clearly evinced the intention that the right accorded under Article 11 (1) of the Federal Constitution was not absolute. Hence the detention was valid and the use of ISA in this case did not restrict freedom of religion.

Similarly, in *Abdul Razak bin Baharudin & Ors v. Ketua Polis Negara & Ors* [2004] 7 MLJ 267 the detainees were arrested and detained under the ISA due to their activities and involvement with JI. They argued that their arrest and detention were against the freedom to practice Islam under Article 11 of the Federal Constitution. In dismissing the application for Habeas Corpus, the judge stated that after a thorough analysis of all the relevant facts, including the grounds and allegations of facts, he was not persuaded to conclude that the activities of the detainees can justifiably be said to fall within the intended constitutional provision of 'Freedom of Religion' entrenched in Article 11 of the Federal Constitution. The court held that the activities were rightly concluded by the Minister as being 'prejudicial to the security' of the country and must be 'prevented' as required under s8(1) of the Internal Security Act 1960.

The authorities had used the ISA as in the two cases above to arrest and detain the persons without trial. As pointed out earlier for the past three decades ISA, which is a special law, had been employed to combat organized violence and extremism imbued with religious perceptions. The law however since then had been repealed and can no longer be used against any person involved in terrorism related activities and organization. It seems that the tendency currently is to charge the suspects in court under ordinary laws. Recent court cases on terrorism activities associated with religious extremism involved the use of provisions in the Penal Code, namely Chapter VIA on offences relating to terrorism. The chapter can be divided into two, firstly provisions for suppression of terrorist acts and support for terrorist acts which consists of section 130B to

section 130M, and secondly provisions for suppression of financing of terrorist acts from section 130N to section 130TA.

In *Mohd. Nasuha bin Abdul Razak v. The Accuser Raya* [2020] 3 MLJ 530 the person was charged before the Kuala Lumpur High Court for four terrorism related offences under the Penal Code, namely sections 130J(1)(a), 130JB(1)(a) and 130N(b). The offences are for soliciting or giving support to terrorist groups or for the commission of terrorist acts; possession, etc. of items associated with terrorist groups or terrorist acts and providing or collecting property for terrorist acts. He pleaded guilty to all the four charges and was duly convicted. In *Mustaza bin Abdul Rahman v. Public Prosecutor* [2021] 1 MLJ 230 the accused was charged with committing offences relating to terrorism under the Penal Code for soliciting or giving support to terrorist groups or for the commission of terrorist acts and intentional omission to give information relating to terrorist acts. He was alleged to be involved in activities of 'Ikhwah Anshar Daulah Islamiyah', which the trial court agreed that it was terrorist group. During trial, the court granted 'protected witness' status to a witness under section 6 of the Security Offences (Special Measures) Act 2012 ('the SOSMA'). The accused was convicted on all charges. In *The Accuser Raya lwn Anuar bin AB Rawi* [2016] MLJU 533 an Imam and religious preacher was charged under Section 130JB of the Penal Code for possession of items associated with terrorist groups or terrorist acts and been found guilty by the court. The judge in this case noted that the opinion of expert witness that the materials in possession of the accused relate to Islamic State (IS) and Al-Qaeda.

Taking into consideration the increasing number of terrorism related cases which are connected to the group the court felt dutybound to restrict the phenomenon for the sake of peace and stability of the country. In *The Accuser Raya lwn Tengku Shukri bin Che Engku Hashim* [2018] 8 MLJ 645 the accused was charged for the offences under s 130J(1)(a) and (b) of the Penal Code for soliciting or giving support to terrorist groups or for the commission of terrorist acts. Based on Telegram conversations found in the mobile phone owned by the accused, the expert confirmed that the 'sumpah taat setia' (bay'ah) was referring

to a support group of IS i.e. *Ikhwan Anshar Daulah Islamiyah*. The accused then pleaded guilty to both charges and was sentenced with imprisonment. In *Public Prosecutor v. Aszroy bin Achoi [2018] 9 MLJ 702*, the accused was charged for offences in soliciting or giving support to terrorist groups or for the commission of terrorist acts and possession of items associated with terrorist groups or terrorist acts. Seventy-two images were extracted from the mobile phone and according to an academic researcher, forty-three out of the seventy-two images were associated with the terrorist group, IS. The accused also provided the police with a password to a Facebook account and the postings on this Facebook account showed that they supported the IS and promoted terrorism. He then was charged with two charges of terrorism under sections 130J(1)(a) and 130JB(1)(a) of the Penal Code and was later convicted for both charges. In *Public Prosecutor v. Razis bin Awang [2020] MLJU 132*, the accused was charged with two counts of offences. The first charge related to an offence in contravention of section 130J(1)(a) of the Penal Code of giving support to a terrorist group of “Islamic State” by making a loyalty pledge (bay’ah) and the second charge referred to a contravention of section 130JB(1)(a) of Penal Code for possessing nine photographs relating to the said group. During the trial expert witnesses on terrorist group of IS had been called to assist the court. At the end of the trial, he was found guilty of both charges and sentenced to a few years imprisonment.

In *Public Prosecutor v. Wan Mohamad Nur Firdaus bin Abd Wahab and other appeal [2019] 4 MLJ 692*, the accused was charged under sections 130J(1)(a) and 130JB(1)(a) of the Penal Code. His phone was found to have contained twenty-three images connected to the terrorist group Islamic State and had sworn an allegiance (bay’ah) to IS. He was convicted and sentenced to eight years and five years imprisonment for the two charges. On appeal the judges had allowed his appeal to reduce the sentence. The court stated that although terrorism offences were serious in nature, they should not be treated on equal footing for some acts of terrorism of which were more heinous than the others. The punishment and sentence should be commensurate with the degree of participation. In this

case, the court was of the view that the participation of the accused with the said terrorist group was passive and minimal.

Not all prosecutions for terrorism related offences were successful. In *The Accuser Raya lwn Siti Noor Aishah bt Atam [2017] 7 MLJ 461*, the accused was charged under section 130JB(1)(a) of the Penal Code for the offence of having in her possession twelve books containing elements of terrorism and associated with terrorist groups, namely Jemaah Islamiah, Islamic State, and al-Qaeda. In establishing the offence, the prosecution called several witnesses, opinions on *Usuluddin* (Islamic theology) and two experts on studies of violence. The three witnesses were of the view that the books showed elements of *Khawarij* or violence associated with JI, IS and AQ. One of the issues for the court's determination was whether the twelve books contained elements or were associated with a terrorist group. During trial, it was established that all twelve books were not banned yet and the failure of the Ministry to ban the books were not in concert and were inconsistent with the decision to make the possession of the books an offence under section 130JB(1)(a) of the Code. After considering all facts and arguments, the court held the accused was not guilty and she was acquitted and discharged with immediate effect.

From the laws and cases discussed above the offences, as rightly pointed out by Ahmad El Muhammady, can be divided into ideological offences and criminal offences. He defined ideological offences as 'offences committed based on ideological belief' that may not necessarily cause physical harm to the public such as possession of extremist materials such as images, videos, audio, symbols, flags, books, reading materials, promotion and supporting of extremist ideology, via posting in social media, taking the pledge of allegiance (bay'ah) and donation. Although an ideological offence potentially leads to terrorism and violence, it is not violent in itself. These types of offences have been classified as 'terrorism offences' in the Penal Code. Criminal offences are defined as the 'actual act of crimes' that cause physical harm to the public and individuals. Under current laws, there is no express distinction and treatment between ideological offences and criminal offences. It is viewed that ideological and criminal offences should

be treated differently.³⁰ People who commit ideological offences should not be subjected to similar treatment or punishment with people who commit criminal offences. Imposing severe punishment for ideological offences will produce an unintended consequence in the long run. Rather than punitive, the sentence for ideological offences should be restorative and rehabilitative.

V. CONCLUSION

The use of military capabilities in defeating terrorism, which is a part of the hard approach, is with the purpose of causing physical damage to terrorist organizations. Prosecution and detention of terrorists, which are also part of the hard approach, is aimed at stifling their activities. Despite such measures, the ideology underpinning the terror would remain intact. The application of soft approaches such as deradicalization and countering/preventing violent extremism which aims at tackling the ideological roots of terrorism are considered highly effective in dealing with the ideological problem. Malaysia has adopted the practical holistic counter-terrorism strategy which involves the use of hard and soft approaches with a dual focus, to eliminate the terrorist organization and to defeat the extremist ideology in its potential or actual forms. The holistic approach provides commensurate measures and proportionate reaction to terrorism related activities. The ever-increasing threat by religious extremists and terrorist groups requires the enforcement agencies to step up their efforts to protect the society and nation. At the same time the authorities need to be vigilant and more tolerant in dealing with cases of ideological offences so as not to impede lawful exercise of rights to free speech and expression, and legitimate religious rights. Innocent people who unknowingly fall into the trap of the terrorist organization also need to be assisted and not punished. The enforcement agencies, together with the courts and Islamic religious authorities must work in tandem to defeat not only terrorist organizations but its ideology as well. To counter the terrorists' threats and to combat the spreading of the dangerous extremists' ideologies the court and the Islamic religious authorities

³⁰ *Ibid.*, 165-166.

need to cooperate. Only then the fight against religious extremism and terrorism in Malaysia is sustainable and effective.

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