

CONSTITUTIONAL CHALLENGE TO FREEDOM OF RELIGION IN SCHOOLS IN MALAYSIA

TIE FATT HEE[†]

UNIVERSITY OF MALAYA, MALAYSIA

The issue of freedom of religion in many countries is often associated with the right to wear religious attire and symbols. In the public school system, widespread debate on the right of students to wear religious attire such as Islamic headscarves, Sikh kirpans, and crucifixes continues. Legal and public policy considerations remain crucial determinants of whether students shed their right to wear religious attire at the school gate. Public policy, safety, and security considerations, often dictate the policy of many countries. In addition, national interests and socio-cultural-political considerations also exert a significant influence on the scope of freedom of religion. In the United Kingdom and France, the law has clearly established the right of public schools to prohibit the wearing of religious attire, in particular, the headgear or the hijab. The latter's approach was based on its historical policy of laïcité. Canada and the United States seem to share a more neutral accommodative path. This discussion examines how the court in Malaysia, a multiethnic, multireligious heterogeneous country where the majority of the population consists of Muslims, seeks to interpret and balance the right to freedom of religion against the concepts of public policy and interest. It discusses the approach adopted by the judiciary in accommodating freedom of religious expression in public schools namely, the wearing of a religious head covering while at the same time, seeking to maintain a fragile social fabric of unity in diversity — a complicated juggle between affirming the secularity of the constitution and advocating a pro-Islamic vision of the state.

I INTRODUCTION

The forces of globalisation have affected cultural identities and practices that are associated with freedom of religion. Laws and policies have changed to accommodate these developments. Many countries have faced tremendous tension in coping with issues related to freedom of religion that can be emotional, divisive, and even destructive in nature. In some jurisdictions, the judicial approach towards a constitutional challenge to religious practices and observances may contrast sharply with a long tradition of adherence to religious symbols. Sometimes, national policies of neutrality and secularity clash with religious traditions and customs.¹ This can be observed in countries like Canada, France, Turkey, and Malaysia. Countries such as Canada and the United States seem to be more accommodating of the various forms of religious expression with a particular focus on neutrality while others tend to apply a more restrictive and formally secular approach.²

At the international level, the *Universal Declaration of Human Rights* (1948) (UDHR)³ and the *International Covenant of Civil and Political Rights* (1976) (ICCPR)⁴ represent two important documents that are intended to safeguard freedom of religion. According to Article 18 of the UDHR:

[†]Address for correspondence: Dr Tie Fatt Hee, Associate Professor, University of Malaya, Level 2, Block C, UM City Campus, Jalan Tun Ismail, 58200 Kuala Lumpur, Malaysia. Email: tiefh@um.edu.my

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

In this regard, the United Nations Human Rights Committee has also said that freedom of religion encompasses practices and observances such as the right to wear religiously distinctive clothing or head coverings.⁵ In addition, the United Nations *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*⁶ (1981) promotes freedom to practise one's religion as well as freedom from any form of discrimination.

Countries which are signatories to the *UDHR* sometimes fail to comply strictly with the provisions contained in the document. They have faced the dilemma of how to protect national interests while at the same time, complying with international demands. Barnett has described this dilemma succinctly.

While international law in this area paints freedom of religion with broad brushstrokes, individual countries must apply the larger philosophy at home based on individual circumstances and the interpretation of freedom of religion within domestic constitutional laws.⁷

In the European community, provisions in the *European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)*⁸ specifically guarantee freedom of thought, conscience, and religion. An example is Article 9(1) of the *European Convention* that states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

However, Article 9(2) does envisage some limitations on the freedom to manifest religious belief:

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Generally, in the EC, the legislative and judicial treatment of issues related to freedom of religion varies due to subjectivity in interpretation of the European Convention. In the United Kingdom, in *Shabina Begum v Governors of Denbigh High School*,⁹ the House of Lords upheld the ban on the jilbab in 2006. It overruled the Court of Appeal's decision that the school was obliged to consider the claimant's religious rights provided for under Article 9(1) of the *European Convention of Human Rights (ECHR)*. Similarly, in *R (on the application of X) v Head Teacher and Governor of Y School*,¹⁰ Silber J held that the refusal to allow a pupil to wear the niqab to school did not interfere with the pupil's right to manifest her religious beliefs as she could have accepted the offer of a place at another school that has good academic results, which was easy for her to get in, and where she could wear her niqab. In June 2008, Turkey's highest court, the Constitutional Court, ruled that legislation passed in February 2008 that allowed women attending state universities to wear headscarves as an observance of their Islamic beliefs violated secular principles enshrined in the Constitution. On the other hand, the law related to the wearing

of religious attire and symbols to public school in France is clear as a result of social, political, historical, and cultural reasons. Nonetheless, private schools, universities, and other public places allow students to wear a headscarf or other conspicuous religious symbols. The law seems to be a ‘narrowly defined reassertion of religious neutrality within the French public’.¹¹ France has, perhaps, a different approach as it has applied its historical policy of *laïcité* in a way that enforces strict secularism in the public domain, relegating overt forms of religious expression to the private sphere.¹²

Malaysia, with its continuous process of ‘Islamisation’¹³ and the related political need to advocate a pro-Islamic state is another nation which has confronted the issue of the right to wear religiously symbolic attire to school.

II CONSTITUTIONAL FRAMEWORK ON FREEDOM OF RELIGION IN MALAYSIA

In Malaysia, the Federal Constitution (*FC*) is the supreme law of the country. According to Article 4 (1) ‘This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void’.¹⁴ The *FC* provides that all persons have the right to profess and practise their religious belief.¹⁵ Article 11 of the *FC* seeks to define and guarantee the constitutional right to freedom of religion of all individuals in a complex multiethnic and multireligious society as follows:

1. Every person has the right to profess and practice his religion and, subject to clause (4), to propagate it.
2. No person shall be compelled to pay any tax the proceeds of which are specifically allocated in whole or in part for the purposes of a religion other than his own
3. Every religious group has the right:
 - (a) to manage its own religious affairs;
 - (b) to establish and maintain institutions for religious or charitable purposes; and
 - (c) to acquire and own property and hold and administer it in accordance with law.
4. State law and in respect of the Federal Territories of Kuala Lumpur and Labuan, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.
5. This article does not authorise any act contrary to any general law relating to public order, public health or morality.

On the other hand, although the *FC* envisages a multiethnic and multireligious society, it seeks to establish Malaysia as an Islamic state. This is promulgated by Article 3 of the *FC* which defines the religion of the Federation as:¹⁶

- (1) Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.
- (2) In every State other than States not having a Ruler the position of the Ruler as the Head of the religion of Islam in his State in the manner and to the extent acknowledged and declared by the Constitution of that State, and, subject to that Constitution, all rights, privileges, prerogatives and powers enjoyed by him as Head of that religion, are unaffected and unimpaired; but in any acts, observances or ceremonies with respect to which the Conference of Rulers has agreed that they should extend to the Federation as a whole each of the other Rulers shall in his capacity of Head of the religion of Islam authorize the Yang di-Pertuan Agong¹⁷ to represent him.

- (3) The Constitution of the States of Malacca, Penang, Sabah and Sarawak shall each make provision for conferring on the Yang di-Pertuan Agong the position of Head of the religion of Islam in that State.
- (4) Nothing in this Article derogates from any other provision of this Constitution.
- (5) Notwithstanding anything in this Constitution the Yang di-Pertuan Agong shall be the Head of the religion of Islam in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya; and for this purpose Parliament may by law make provisions for regulating Islamic religious affairs and for constituting a Council to advise the Yang di-Pertuan Agong in matters relating to the religion of Islam.

On a plain reading of the language used in Article 3(1) of the *FC*, persons of religions other than Islam are able to practise and observe their individual personal beliefs in peace and harmony. Hence, the fundamental liberty of freedom of religion enshrined in Article 11 of the *FC* is not in any way affected by Article 3 of the *FC*. This provision also suggests the sensitivity of the framers of the *FC* towards the country's multiracial and multireligious populace. The entire language of Article 3 of the *FC* 'accurately reflects the compromise reached between the Malay Rulers, the Alliance coalition parties representing the major races of Malaya and the British Government'.¹⁸ Despite this apparent tolerance, however, it should be noted that persons who are not followers of the Islamic faith cannot propagate any religious doctrine or belief to others who profess the religion of Islam.¹⁹

The other provisions in the *FC* that relate to freedom of religion are Article 8, Article 12(1), Article 12(2), and Article 12(3). Article 8 guarantees equality of all persons before the law and prohibits any form of discrimination against other citizens, on the grounds of religion, except as authorised by the *FC*. Article 12(1) prohibits any form of discrimination based on the ground of religion. In addition, Article 12(2) allows religious groups to establish and maintain institutions for the education of children according to their own religion. Further, Article 12(3) prohibits individuals from being required to receive instruction or take part in a ceremony or act of worship other than that of one's own religion.

Under the *FC*, the right to freedom of religion is not an absolute fundamental constitutional right. There are limitations embedded in the *FC*. In the important and controversial case of *Teoh Eng Huat*,²⁰ for example, the Supreme Court held that minors, defined as those who are under eighteen years of age, do not have a constitutional right to choose their own religion. Parents and guardians have the right to determine their children's religion as well as to protect their children's interests and wellbeing.²¹ The constitutional guarantee is also lost when an act or conduct in pursuance of one's religious belief conflicts with any general law concerning public order, public health, or morality.²² Similarly, the different states in Malaysia have the constitutional power to prohibit the propagation of religions other than Islam to Muslims.²³ A particular state may endorse the religion of the majority given the fact that 'Islam is and has been for many centuries identified as part of the Malay persona'²⁴ and in light of the powerful affiliation between race and religion.

III SCHOOL DISCIPLINE AND POLICY ON SCHOOL UNIFORM

In Malaysia, the Ministry of Education (*MOE*) is the only organisation vested with the formal authority to decide and establish regulations on school discipline. The *MOE* issues to all public schools, from time to time, professional circulars on the guidelines and procedures governing new school regulations.²⁵ Regulations may be broad in scope and comprehensive in nature and are legally binding on all public schools. They encompass a wide range of sanctions and punishment

for most major types of student misdemeanour. They cover, for example, the enforcement of discipline in school,²⁶ overcoming the problem of gangsterism, drugs, and safety in school,²⁷ and the procedures for punishment of and disciplinary action in relation to students.²⁸

The *MOE* provides primary school headmasters and secondary school principals, however, with some discretionary power to establish their own set of school rules and regulations. These rules and regulations are supplementary to the *MOE* issued regulations as they seek to cover situations that the *MOE* may have overlooked. Schools seldom face a similar set of disciplinary problems. Differences in the type of disciplinary problems can be a result of differences in local custom, culture, socio-economic status, and in the geographical location of the school. In this context, administrators in urban schools, for example, usually face a more complex set of disciplinary problems than their colleagues in rural schools. A 'one size fits all' approach to maintaining school discipline with one specific set of rigid and standard set of rules and regulations can be ineffective, and problematic. It is perhaps appropriate, therefore, that school administrators have discretionary power to establish their own particular set of rules and regulations to solve this, and other, problems, on condition that they are not contrary to the *MOE*'s regulations.

In relation to a mandatory school uniform, the *MOE* has issued professional circulars that contain a set of regulations which govern the type of uniform that pupils must wear when they attend public schools.²⁹ The prescribed uniform requires primary school boys to wear navy-blue shorts, a white short-sleeved shirt, white rubber shoes and socks. Parents and guardians can request permission for their children to wear long navy-blue trousers. Male secondary school students are required to wear dark olive shorts or, upon request by parents or guardian, long pants instead. All primary school headmasters, secondary school principals, and teachers in public schools are required to ensure that primary school pupils and secondary school students abide by the *MOE*'s regulations. Nevertheless, schools are given some degree of freedom to introduce supplementary regulations as they can take into account circumstances that are peculiar to their community. It will be seen, later in the article, that these supplementary rules have generated some controversy.

IV FREEDOM OF RELIGION AND SCHOOL UNIFORM

The decision of the Federal Court in the case of *Meor Atiqulrahman bin Ishak dll lwn Fatimah bte Sihi dll*³⁰ is significant as it highlights how the courts seek a balance between safeguarding public interests and an individual's constitutional right to freedom of religion. The case was heard at first instance in the lower High Court and, subsequently, appealed to the Court of Appeal and the Federal Court.

In this case, three primary school pupils³¹ wore a 'serban' (also referred to as a 'turban'), a manifestation of their faith, to school in addition to their school uniform. The headmistress advised them to comply with the School Regulations of 1997³² (*SR 1997*) — a set of rules that the headmistress, as authorised by the *MOE*, had established in the school itself. Regulation 3 of the *SR 1997* stipulates specifically that the uniform for male primary pupils shall consist of a pair of blue-black long trousers, a white short-sleeved shirt, white rubber shoes and socks. The *SR 1997* followed most of the *MOE*'s rules and regulations. However, the headmistress added an additional supplementary rule, which is Regulation 3(f)(v) *SR 1997*. It allowed Muslim pupils to wear a black or blue-black 'songkok'.³³ Another regulation, specifically, Regulation 3(i)(i) *SR 1997* prohibited pupils from wearing a 'jubah'³⁴, 'serban'³⁵, or 'purdah' to school.³⁶

Regulation 3(i) (i) *SR 1997* became highly contentious in the case. The headmistress asked the plaintiffs' father and guardian to see her when the pupils did not heed her advice — a demonstration of compliance with the principle of natural justice and the right to be heard. She sought their cooperation to ensure that the plaintiffs complied with the *SR 1997*. However, the father and guardian refused to cooperate and as a result, the pupils continued to wear the 'serban' to school. The headmistress subsequently sent two letters to the father and guardian informing them about the plaintiff's breach of the *SR 1997*. She advised the pupils to replace the 'serban' with a 'songkok' to avoid disciplinary action. Nevertheless, they did not follow her repeated request for cooperation. The State Director of Education then wrote to the father and guardian to stress that pupils have to observe the school regulations in the interest and welfare of the school as well as the community. The pupils refused to comply with this advice. The headmistress then sent a letter to the father and guardian to inform them that the school had expelled the pupils. The plaintiffs challenged their expulsion in court. They sought a court order declaring that their expulsion from school was null and void and alleged that they had a right to education. The defendants contended that the expulsion was lawful on the basis that the plaintiffs had breached Regulation 3 of the *SR 1997*.

A The Right of Schools to Establish their Own Rules

The High Court decided in favour of the plaintiffs and held that the headmistress had acted *ultra vires*. In allowing the plaintiff to seek the declaration, the court ruled that the *SR 1997* violated the *FC*. It opined that the headmistress had no jurisdiction to prevent pupils from wearing a 'serban'. In this respect, the court stated that the *MOE* was the only authority that could decide on the policy related to school uniform. It accepted the plaintiff's argument that the *MOE* had already set out the policy on school uniform in its earlier professional circulars distributed to all schools throughout the country. The court pointed out that *MOE's* professional circular on school uniform³⁷ did not prohibit pupils from wearing a 'serban' to school since it was 'silent' with respect to this particular type of religious attire. The High Court decided that the prohibition and expulsion order were invalid and added that Muslims have a constitutional right to follow and practise their religion.³⁸ It is valid to wear a 'serban' under the Islamic law of 'Hukum Syarak' as well as under the *FC*.

The court referred to Article 25 of the Constitution of India that defined the term 'religion' as follows:

Religion is a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in god or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it will not be correct to say that religion is nothing else but a doctrine of belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion and these forms and observances might extend even to matters of food and dress.³⁹

This decision followed an earlier court's finding which determined that the term 'Islam' or 'Islamic religion' in Article 3 of the *FC* in that context means only such acts as relate to rituals and ceremonies.⁴⁰ On another principle of law, the High Court also found that the headmistress failed to give notice to the plaintiffs to show cause. The High Court ordered the headmistress to reinstate the plaintiffs to school. Consequently, the headmistress appealed to the Court of Appeal.

B *Religious Head Covering and the Test of Integrality*

The Court of Appeal approached the issue by applying the test of integrality, with reference to a number of decisions of the court in India.⁴¹ In his judgment, Gopal Sri Ram JCA applied a test of integrality, saying that it is a question of evidence whether the wearing of a 'serban' forms an integral part of the religion of Islam.⁴² The question of whether the headmistress had violated the pupils' right to profess and practise the religion of Islam depends on whether the right to wear a 'serban' constitutes an integral part of the religion of Islam. He claimed the support of a number of authorities in this view.

Gopal Sri Ram JCA referred to the case of *The Commissioner, Hindu Religious Endowments, Madras, v Sri Lakshmindra Thirtha Swamiar*.⁴³ Article 25 of the Indian Constitution confers on an individual the freedom of conscience and free profession, practice, and propagation of religion (similar to Article 11(1) of the *FC* in Malaysia). According to the Supreme Court in India, 'besides a code of ethical rules that are accepted by its followers, a religion also prescribes rituals, observances, ceremonies, and modes of worship — these are regarded as integral parts of the religion'. The forms and observances also extend to food and dress. Article 25 provides the constitutional guarantee of the protection of freedom of religious opinion and acts done in pursuance of a religion.

Gopal Sri Ram JCA also referred to the Australian case of *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth*.⁴⁴ He cited Latham CJ of the High Court of Australia who dealt with s 116 of the Australian Constitution which forbids the Commonwealth to prohibit the 'free exercise of any religion'. In the case, Latham J made the following comments:

It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil government should not interfere with religious 'opinions', it nevertheless may deal as it pleases with any 'acts' which are done in pursuance of religious belief without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of S. 116. The Section refers in express terms to the 'exercise' of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts, which are done in the exercise of religion. Thus, the Section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion.⁴⁵

In his decision, Gopal Sri Ram JCA agreed with Das Gupta J's opinion on the two principles that govern Articles 25 and 25 of the Indian Constitution, discussed in *Sardar Syedna Taher Saifuddin Saheb v State of Bombay*.⁴⁶ Das Gupta J had stated as follows:

The first is that the protection of these articles is not limited to matters of doctrine or belief; they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship, which are integral parts of religion. The second is that what constitutes an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices, which are regarded by the community as a part of the religion.⁴⁷

Similarly, the Supreme Court in Malaysia also applied the test of integrality in *Hajjah Halimatussaadiah bte Hj Kamaruddin v Public Services Commission Malaysia & Anor*.⁴⁸ In this instance, the court held that the wearing of a 'purdah' by a female Muslim was not an integral part of the religion of Islam. Judge Dzaidin SCJ reiterated that:

It is trite that Art 11(1) of the Constitution guarantees the freedom of religion, where every person has the right to profess and practise his religion. However, such right is not absolute as Art 11(5) provides that this article does not authorize any act contrary to any general law relating to public order, public health or morality. In the context of Service Circular 2 of 1985 prescribing the mode of dress and prohibiting the wearing of an attire covering the face by a lady officer in the public service during work, we are of the opinion that such prohibition does not affect her constitutional right to practice her religion. ... we accept the opinion of Dato' Mufti Wilayah Persekutuan that Islam as a religion does not prohibit a Muslim woman from wearing, nor requires her to wear a purdah.⁴⁹

Thus, the court held in the present case, *Meor Atiqulrahman bin Ishak dll lwn Fatimah bte Sihi dll*, that the respondents must bear the burden of proof that the wearing of the 'serban' was mandatory in Islam. The respondents must adduce sufficient relevant admissible evidence to prove that the practice was compulsory in nature. However, the respondents failed to confirm that the practice was mandatory and an integral part of Islam. The court found that there was not a shred of evidence to prove that it was mandatory for a Muslim to wear a 'serban'.

The Court of Appeal, therefore, decided for the headmistress. It did not concur with the High Court's interpretation of Article 11(1) of the FC. The High Court had invoked Article 3 of the FC in construing Article 11 of the FC. Article 3 FC states that Islam is the religion of Malaysia while Article 11 FC express that all individuals have a right to profess and practise one's own religion. The Court of Appeal did not find it expedient to take this interpretive approach. The courts, therefore, 'adopted disparate interpretative approaches towards the reading of Article 11 of the FC'.⁵⁰

The Court of Appeal also acknowledged that the school has the power, at common law, to prescribe the appropriate dress code for pupils. Overall, this decision suggests a reluctance to interfere with the right of schools to manage their own affairs except when there is a breach of the duty to act fairly. Subsequently, the parent and guardian appealed to the Federal Court.

V THE JUDICIAL APPROACH TO CONSTITUTIONAL RIGHT TO RELIGION IN SCHOOL

The Federal Court affirmed the judgment of the Court of Appeal.⁵¹ Nevertheless, it did not agree with the Court of Appeal on the issue of the test of integrality. Abdul Hamid Mohamad FCJ disagreed with the test of integrality as

it would lead to the following results: so long as a practice is an integral part of a religion, any restriction or limitation, even regulatory, would be unconstitutional. On the other hand, if the practice is not an integral part of a religion, it can even be prohibited completely. ... A constitution is expected to be in force so long as the country exists but circumstances may change dramatically from time to time, even from place to place. On the other hand, a practice may not be an integral part of the teaching of a religion, in the Islamic sense, it may be a 'sunat' eg. performing the 'sunat' prayers. Using this test, it can be prohibited absolutely and forever. I do not think that this is right.⁵²

Abdul Hamid Mohamad FCJ reiterated that the constitutionality of a practice depends on other factors, rather than only on the test of integrality. Firstly, one has to consider the following factors: whether there is a religion; whether there is a practice; and, whether the practice is a practice of the religion. It is at the latter part that the question of whether the practice is an integral part of the religion becomes relevant. Secondly, the seriousness of the prohibition must be considered. The court noted that the Al-Quran was silent on the wearing of a 'serban'. It also opined that the practice seems to be of little significance. The school had prohibited pupils from

wearing the 'serban' as part of the school uniform during school hours. However, the school did provide some form of flexibility as it allowed the pupils to wear the 'serban' during their prayers in the prayer room. As such, there was no complete prohibition in school.

Finally, the circumstances in which the prohibition was made must be taken into account. The court reiterated that Malaysia is a multiracial, multicultural, multilingual, and multireligious country that is united, peaceful, and prosperous. The court duly recognised the vital role and vast experience of teachers and principals in maintaining school discipline through the formulation of a set of school regulations for the general good of all. Additionally, it invoked the 'danger of polarisation' argument associated with racial and religious sensitivities amidst a multiracial population. The court seemed to place greater priority on national interests and emphasised the importance of racial integration. After considering these factors, the court held that the *SR 1997* that prohibits pupils from wearing the 'serban' as part of the school uniform during school hours did not contravene the provision of Article 11(1) of the *FC*.

In general, one may infer that the Federal Court's decision reflects the impact of policy considerations on freedom of religion and the right of students to wear religious attire to school. The court appears to emphasise the importance of maintaining racial integration and harmony in school. The risk of increased polarisation among the country's multiracial and multireligious population appears to have become a major concern of the judiciary.

The primacy of religious rights in Malaysia is crucial in maintaining social stability in a delicate social fabric with a multicultural and pluralistic populace.⁵³ The restriction on the wearing of religious attire in public schools may also serve to promote the theme of unity in diversity even though in the long term, it has an effect on 'undermining the overarching principle of religious freedom'.⁵⁴ The Federal Court's decision to allow the prohibition of wearing a 'serban' to public school illustrates an attempt to reduce the problem of maintaining religious harmony in a divided society and defuses a potentially divisive issue. In the words of Barnet L, it is 'rooted in a constitutional proportionality test that balances the right to freedom of religion against the possible threat to safety, security and public order'.⁵⁵ On the other hand, this may not be a legitimate argument if one considers that the prohibition means the loss of an opportunity for pupils from a different faith to develop a better understanding of the Islamic religion and diversity of religious practices and observances.

VI CONCLUSION

In every democracy, the judiciary faces a delicate task of seeking a balance between protecting the freedom to practise personal beliefs and, at the same time, maintaining public order. In most instances, the courts tend to adopt a conservative approach due to the need to protect public interests. In Malaysia, for example, the restriction on religious freedom, in the form of restrictions on the right to wear religious attire to school may be rationalised on this basis. The Federal Court's decision in *Meor Atiqulrahman bin Ishak dll lwn Fatimah bte Sihi dll* has specifically established that each public school has the legal right and authority to formulate its own set of rules and regulations concerning school uniform. It duly acknowledged that teachers and principals must be accorded respect and credit for maintaining school discipline. The threat of religious radicalism may increase in the near future. Teachers and principals need to take a more pro-active approach to meet this tremendous challenge albeit in a legally appropriate manner.

Keywords: constitutional right to freedom of religion; practice and observance of religious belief; right to wear religious attire in public school; policy consideration; national interest.

ENDNOTES

1. See Barnett L, 'Freedom of Religion and Religious Symbols in the Public Sphere' (2006). <<http://www.parl.gc.ca/information/library/PRBpubs/prb0441-e.htm>> at 7 September 2007.
2. Ibid.
3. See generally, the *Universal Declaration of Human Rights* (1948).
4. Malaysia is not a signatory to the ICCPR even though 125 countries, including 23 Muslim states, have adopted it.
5. Human Rights Committee, General Comment 22, Article 18, CCPR/C/21/Rev. 1/Add 4 (20 July 1993), [4].
6. United Nations *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*. <[http://www.unhcr.htm/menu3/b/d_intole\(11\).htm](http://www.unhcr.htm/menu3/b/d_intole(11).htm)> at 7 September 2007.
7. Ibid [1].
8. See generally, *European Convention for the Protection of Human Rights and Fundamental Freedoms*. <<http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/O/English.Anglais.pdf>> at 9 September 2007.
9. [2006] UKHL 15; [2006] 2 All ER 487.
10. [2007] EWHC 298 (Admin), [2007] ELR 278, [2008], 1 All ER 249.
11. Justin Vaisse, 'Veiled Meaning: The French Law Banning Religious Symbols in Public Schools' (2004) U.S.-France Analysis Series March 2004. Article 1 of the new statute reads 'The wearing of symbols or articles of clothing by which students ostensibly display religious affiliations is forbidden in public schools through high school'. See the report (in French) at <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf> at 10 September 2007.
12. Ibid.
13. The process of Islamisation began in the 1970s when the ruling government tried to counter the growing influence of, and to outdo, a strong Islamic opposition religious party. The government embarked on the process of allocating more public fund to build mosques, religious educational institutions, and the International Islamic University to demonstrate its commitment towards contributing to the growth and development of Islam in the country. The oil boom of 1973, and the effects of the 1979 Iranian Revolution, allowed the Gulf States to bankroll efforts to 'Arabise' the Muslims in South East Asia. During the 1980s, the headscarf became ubiquitous among Malay women.
14. The term 'Merdeka Day' refers to the day when Malaysia became independent, that is, 31 August 1957,
15. *Federal Constitution*, Article 11(5).
16. *Federal Constitution*, Article 3 inextricably showed the identification of religion with race with the political primacy of the Malay people. See Poh-Ling Tan, 'Paying the Price for Religious Freedom — A Non-Muslim Perspective' in Min Aun Wu (ed), *Public Law in Contemporary Malaysia* (1999) 135.
17. The term 'Yang di-Pertuan Agong' refers to 'His Majesty the King'.
18. Tommy Thomas, 'Is Malaysia an Islamic State?' (2005) *The Malaysian Bar* - Article on Constitutional Law <<http://www.malaysianbar.org.my/content/view/2066/271.html>> at 9 September 2007.
19. Muslims commit the offence of apostasy when they seek to renounce their faith. Apostasy involves complex questions of constitutional importance especially when some States in Malaysia have enacted legislations to criminalise it. The case of Lina Joy that involves the issue of apostasy has become a battleground of Malaysian political and cultural identity, and of freedom of religion. The case highlights what some analysts believe is the 'Arabisation' of Malaysian Islam, a dynamic that can also be seen in Indonesia. Federal Constitution it was obvious intends to renounce from Islam, he is actually exercising his rights in the 'syariah' law context, which has its own jurisprudence relating to apostasy. See the decision of the Federal Court of *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585. [*Lina Joy v Federal Territory Islamic Council and others* [2007] 4 MLJ 585].

20. See *Teoh Eng Huat v. Kadhi of Pasir Mas, Kelantan & Majlis Ugama Islam dan Adat Istiadat Melayu, Kelantan* [1986] 2 MLJ 228, [1990] 2 MLJ 306. The Supreme Court held that ‘In the wider interests of the nation, no infant shall have the automatic right to receive instruction relating to any other religion than his own without the permission of the parent or guardian’. The decision is crucial in defusing the potential religious exploitation of children in the future — a dangerous political issue in Malaysia. See A Harding, *Law, Government and the Constitution in Malaysia* (1996) 204.
21. *Federal Constitution*, Article 12(4).
22. *Federal Constitution*, Article 11(5).
23. *Federal Constitution*, Article 11 (4).
24. Ibid [5]. See Poh-Ling Tan, ‘Paying the Price for Religious Freedom — A Non-Muslim Perspective’ in Min Aun Wu (ed), *Public Law in Contemporary Malaysia* (1999) 135. In Malaysia, almost 70% of the population of 26 million comprises Malay.
25. The Director General of Education usually signs the Professional Circulars (‘Surat Pekeliling Ikhtisas’, Kementerian Pelajaran Malaysia) letters on behalf of the Ministry of Education. These circulars are documents that contained the regulations governing public school management and students affairs.
26. See generally ‘Professional Circular No.8/2001 Enforcement of School Discipline’, Ministry of Education (‘Surat Pekeliling Ikhtisas Bil.8/2001 Pemantapan Pengurusan Disiplin di Sekolah’, Kementerian Pelajaran Malaysia). <http://www.moe.gov.my/tayang.php?laman=surat_pekelling&unit=utama&bhs=ne&info=4.htm> at 10 September 2007.
27. See ‘Professional Circular No.6/2000 Overcoming the Problem of Gangsterism, Drugs, and Safety’, Ministry of Education (‘Surat Pekeliling Ikhtisas Bil.6/2000 Menangani Masalah Keselamatan, Dadah & Gangsterism’, Kementerian Pelajaran Malaysia). <http://www.moe.gov.my/tayang.php?laman=surat_pekelling&unit=utama&bhs=ne&info=5.htm> at 10 September 2007.
28. See ‘Professional Circular No.7/1995 Procedures on Punishment and Disciplinary Action on Students’, Ministry of Education (‘Surat Pekeliling Ikhtisas Bil.7/1995 Tatacara Mengenakan Tindakan & Hukuman Terhadap Pelajar di Sekolah’, Kementerian Pelajaran Malaysia). <http://www.moe.gov.my/tayang.php?laman=surat_pekelling&unit=utama&bhs=ne&info=5.htm> at 10 September 2007.
29. See ‘Professional Circular No.3/1983 Students’ School Uniform’, Ministry of Education (‘Surat Pekeliling Ikhtisas Bil.3/1983 Pakaian Seragam Murid-Murid Sekolah’). <http://www.moe.gov.my/tayang.php?laman=surat_pekelling&unit=utama&bhs=ne&info=5.htm> at 10 September 2007
30. [2000] 5 MLJ 375.
31. At the material time, the pupils aged 8, 9, and 11 years were studying in Standard 2, 3, and 5 respectively. The plaintiff was the father of the Standard 2 and 3 boys as well as the guardian of the Standard 5 boy. See, *Meor Atiqulrahman Ishak & Ors v. Fatimah Sihi & Ors*. [2006] 4 CLJ 1.
32. The primary school headmistress had established its own school regulations, the School Regulations of 1997 (*SR 1997*).
33. A black coloured hat that has a shape almost like a square.
34. A piece of robe worn by Muslims.
35. A piece of long white cloth worn around the head and is sometimes referred to as a ‘turban’.
36. A full-face veil commonly used by Muslim women to conceal the entire face, ears, hair and head. However, it has a slit for the eyes.
37. ‘Professional Circular No. 9/1975’, Ministry of Education (Surat Pekeliling Ikhtisas Bil. 9/1975’), above n 31.
38. *Federal Constitution*, Article 11(1).
39. Vol 41 CN 68.
40. See generally, *Che Omar bin Soh v PP* [1988] 2 MLJ 55, 55.
41. See, *Fatimah bte Sihi & Ors. v. Meor Atiqulrahman bin Ishak & Ors*. [2005] 2 MLJ 25.
42. *The Commissioner, Hindu Religious Endowments, Madras, v Sri Lakshmindra Thirtha Swamiar AIR* [1954] S C 282, *Sardar Syedna Taher Saifuddin Saheb v State of Bombay AIR* [1962] SC 853, *Javed v State of Haryana AIR* [2003] SC 3057, and, *Commissioner of Police v Acharya Jagadishwaranada Vadhuta* [2004] 2 LRI 39.
43. AIR [1954] S C 282.

44. 67 CLR 116 .
45. Ibid 127.
46. [1962] SC 853.
47. Ibid.
48. [1994] 3 MLJ 61.
49. Ibid.
50. See generally, Li-Ann Thio and Jaclyn Ling-Chien Neo, 'Religious Dress in Schools: The Serban Controversy in Malaysia' (2006) 55 *International & Comparative Law Quarterly* 671.
51. See, *Meor Atiqulrahman bin Ishak & Ors v. Fatimah bte Sihi & Ors.* [2006] 4 CLJ 1.
52. Ibid.
53. See generally, A Harding , *Law, Government and the Constitution in Malaysia* (1996) 202.
54. Ibid 202.
55. Ibid [3].