

The Rise and Risks of the Burgeoning Religion Bureaucracy

| by Lim Heng Seng |

The Federal Constitution is the supreme law of the nation. It lays down the framework and basic structures for the governance of the Malayan nation. The Constitution is both foundational and fundamental for the nation and its people to continue to strive, survive and thrive together. When Sabah and Sarawak joined Malaya to constitute the enlarged federation of Malaysia, these basic structures were carefully considered and were critical to these two regional entities agreeing to confederate with Malaya. There was an unequivocal reassertion of the secular nature of the Malaysian nation and the position of religion in this constitutional arrangement.

The character of the Malaysian nation and polity

Secular or Islamic state

The polemics surrounding the question whether our nation is a secular or an Islamic state cannot be resolved by stating innocuously that we are neither. Between the two, the legislative history of the Federal Constitution points towards the determination that we are essentially a secular state. In making Islam the religion of the then Malayan Federation, and subsequently retaining it as the religion of the Federation of Malaysia, the historical documents show that in clarifying the position, every effort was made to establish our nation as a secular and

not an Islamic polity. Islam was declared by Art 3(1) to be the religion of the Federation. This was not to bear upon any other provision of the Constitution; hence the anxious non-derogatory provision in Art 3(4). Using a double negative, it is recorded that this does not imply that the state is not a secular state.¹ This was followed by the declaration in the legislative assembly that the provision was in no way to affect the present position of the Federation as a secular State.² In the very early days of the Malayan Parliament, the Prime Minister made it clear that the newly independent nation is not to be an Islamic State as it is generally understood.³ At the formation of the enlarged Federation of Malaysia, it is documented that Art 3 will not make Malaysia a State less secular. Further, it was also placed on record that the retention of Art 3 would not change the character of the enlarged federation of Malaysia which in effect would be secular.⁴

There are at least three aspects to the concept and idea of a secular state. First is the principle of the separation of church and state. The governing institutions of the state are to be set apart from the institutions of religion. In this regard, the legal order and administration of justice is premised on civil rather than religious laws. The legal order and justice system is administered by civil courts and law departments. Second, the state is to be religiously neutral. It should not establish or support any particular religion. It should adopt a non-preferential and non-interventionist stance towards all religions. Third, the secular state upholds the principle of freedom of religion. All religions may be freely practised in peace and harmony. The secular state is underpinned by a deep and abiding commitment to pluralism and multiculturalism in a free and democratic society.

1 Reid Commission on the formation of Malaya

2 White Paper on the Constitutional Proposal for the Federation of Malaya (Legislative Council Paper No. 41 of 1957) tabled in the Legislative Council

3 Tunku Abdul Rahman (*Hansard*, 1 May 1958)

4 Cobbold Commission on the formation of Malaysia

Exceptional features in constituting Malaysia as fundamentally a secular nation

There are certain features of the Malaysian Constitution that somewhat qualify the fundamental character of Malaysia as a secular state. By the provision making Islam the religion of the Federation, Islam is accorded an official status in the sense that Islamic rites and rituals may be applied for federal official and ceremonial purposes.

With regard to the constituent states of the Malaysian federation, several Islamic matters are set out in the State List. This means that these matters are legislative fields for which the state legislative assemblies are authorised to enact laws. The constituent states have legislative powers over a range of Islamic matters including Islamic personal and family law, charitable and religious trusts, Islamic religious revenue, mosques and the determination of Islamic law and doctrine as well as the constitution, organisation and procedure of Syariah courts. With regard to the creation and punishment of offences by persons professing the religion of Islam against the precepts of Islam, such offences are subject to jurisdiction being conferred by Federal law. In the federal territories created since 1972, legislative competency over Islamic matters vested in the federal legislature; i.e. Parliament. Such federal jurisdiction with respect to matters of Islam cannot be exercised extra-territorially over the constituent states but only within the Federal Territories and certainly not for the whole Federation.

Pursuant to these legislative powers, the constituent states (and the Federal Territories) have enacted various legislation with the corresponding establishment of institutions for the administration of such legislation.

These range from the Council of Islamic Affairs to the Office of the Mufti, fatwa committees and the Syariah Court with a host of other agencies and departments which exercise powers vested in them by state legislation.

Federal and constituent states' powers with respect to Islam

Islam is fundamentally a matter within the jurisdiction of the constituent states of the Federation of Malaysia. Federal involvement at the national level in Islam is severely circumscribed to the specific legislative areas identified for federal involvement in matters relating to Islam. In the 1957 Constitution, the Federal government was permitted to provide special financial aid for instruction in Islam and also to institutions providing such instruction. In 1976, this was extended to the establishment and maintenance of Islamic educational institutions for which public funds may be incurred.

With authority over Islam and Islamic institutions being vested in the constituent states, the Federal Government would have minimal control over these matters. The potency of centralised federal power in these areas was quickly understood. From as early as 1995, at an UMNO annual general meeting, there were calls for a constitutional review to provide for Islamic affairs to be placed under Federal jurisdiction. These efforts at legislative change came to naught. Legislative change by amendments to the Federal Constitution to assert federal power would clearly be resisted by the constituent states and thus futile. Federal efforts were then directed at administrative measures to be undertaken by the Department of Islamic Affairs (JAKIM) in the exercise of the executive authority of the federal government. From benign efforts to coordinate and harmonise Islamic laws, they morphed

into various executive actions and the birth of institutions, departments and agencies as well as federal-sponsored research institutes, welfare and economic agencies and various NGOs. These constitute what is today the federal religion bureaucracy which exercises and asserts powers in the governance of the Malaysian nation beyond what was envisaged in the constitutional settlement at Merdeka and, subsequently, Malaysia Day.

Significance of Federal involvement in Islamic matters and the rise of the religion bureaucracy

The Federal religion bureaucracy today consists of a Minister of Cabinet rank who is in charge of Islamic affairs. He is assisted by a Deputy Minister. JAKIM, under the Prime Minister's Department, does not confine its role to Islamic affairs and matters affecting Muslims, but has a major say in the formulation of policies and laws of the government.

There is a very worrying dimension to federal engagement with Islamic affairs. Federal involvement in Islam through JAKIM and the other agencies of the federal government became problematic with serious repercussions on the governance of a multi-racial, multi-cultural and multi-religious Malaysia. This is significant as the lion's share of powers is vested in the federal government. And it applies also to sources of revenue. Federal funding of and involvement in the promotion and establishment of Islam outside the areas stipulated in the Constitution distort the fundamental underpinnings and foundation of a secular federal central government. The involvement of the constituent states, with limited powers and funds, would, in contrast, be less overwhelming in terms of impact on administration and its implications on the populace.

There is a growing concern that the essential character of Malaysia as a secular state is being undermined by the religion bureaucracy. Article 3 is being asserted to give a meaning quite contrary to the intention of the Federal Constitution. The argument is that Art 3 is to be construed as supervening and therefore overriding the foundational provisions of the Constitution which constitute the basic structures of our supreme law.

This phenomenon is found in all three branches of government. With regard to the governance of the Malaysian nation and its multi-racial citizenry, many concerns and issues have arisen out of the impact that the functioning of the religion bureaucracy has on federal and state governments and their governance. These include:

- Law-making by Parliament: Constitution or the Syariah as the overarching supreme law of the land?
- Repository of ultimate judicial Power: Does it vest in the High Court and Superior Courts or in the Syariah Courts?
- Governing doctrine of governance and administration: Is it by the Rule of Law or by the Rule of Diktats of Religion Bureaucrats?
- Freedom of religion: Mutual Respect or Religious Intolerance and Imposition?
- Common nationality: Equal citizenship or *dhiminized* or diminished half citizens?

Law-making by the legislative branch

All legislation enacted, whether at federal or state level, must pass the test of constitutionality and consistency with other laws. There are disturbing signs that legislation intended for general application are now subject to the scrutiny of religion bureaucrats. They have proven themselves capable of impeding the adoption or implementation of such laws. The Domestic Violence Act 1994 [Act 521] could not be brought into force for almost two years as certain provisions were deemed by the then Pusat Islam (now elevated to JAKIM) to be contrary to Islamic law. They could not be implemented in their present form until given the imprimatur of the religion bureaucracy. The same fate befell proposed law reforms seeking to preserve the status quo of parties to a civil marriage where one spouse has converted to Islam. It appears that in addition to constitutionality and compatibility with other laws, Syariah compliance is now an integral part of the law-making process as is evident from the functioning of the Syariah Division set up in the Attorney General's Chambers.

Law enforcement by the executive branch

At the executive or administrative level, non-Muslim and Muslim citizens alike are worried about the conduct of certain administrators who give scant regard to the civil laws enacted by Parliament or even orders of the judicial arm of the state. They claim a higher adherence to Syariah enactments, Syariah Court judgments and religious diktats (fatwas) and even to what they perceive to be the requirements of their religion. The police have declined to enforce orders of custody issued by the High Court. Officers of the National Registration Department refuse to apply national registration laws on the registration of children considered to be born

out of wedlock as the issue of their fathers. School authorities impose apartheid-like rules on innocent children in national schools. Enforcement officers impose guidelines imposed by JAKIM when implementing laws on publications. The conduct of these administrators manifests a wilful disregard for the twin pillars of the Federal Constitution, i.e. the Rule of Law and the Supremacy of the Constitution.

Justicing and adjudication of disputes by the judicial branch

Article 121 vests the judicial power of the Federation in two High Courts of coordinate jurisdiction: the High Court of Malaya and the High Court of Borneo (now the High Court of Sabah and Sarawak). Beyond the two High Courts are the Court of Appeal and the apex Federal Court.

Judicial independence is imperative. Dispensation of justice requires men and women of integrity, independence and competence. In particular, in the context of an aggressive and expansionist religion bureaucracy and Syariah Court, there is unfortunately a tendency for judges to give precedence to Syariah laws and courts. This goes to the extent of abdicating jurisdiction over matters which they are constitutionally obligated to decide under the notion that such matters are within the jurisdiction of the Syariah courts. To some extent, this can be attributed to a misinterpretation of Art 121(1A) of the Federal Constitution which was engrafted into the provision constituting the two High Courts of Malaya and the appellate and apex Federal Court. This has emboldened the religion bureaucracy to continue to encroach into matters that are constitutionally outside their authority.

A serious consequence from all this is that civil courts have virtually surrendered their judicial power and authority to the *Syariah* Court in matters which are well within their own jurisdiction. They involve, *inter alia*, the religious status of a litigant, the freedom of a citizen to profess his own religion, the legal result of a person whose spouse had converted to Islam and family law matters such as marriage and custody. This creates a situation where the non-Muslim citizen may have constitutional rights but will be bereft of remedies, a severe travesty of justice and a clear violation of the Rule of Law and the principle of Constitutionalism.

Impact on freedom of religion and freedom from religion

Religious freedom is one of the fundamental liberties guaranteed under the Constitution. Commonly accepted limitations premised on public order, health and morality are placed on this freedom. This freedom is given to individuals and to religious groups. It consists of a cluster of rights as well as protection against denials of such rights. Everyone has a right to profess, to practise and, subject to certain restrictions, to propagate his religion. He may do so in peace and harmony in any part of the nation. It is universally extended to everyone. Freedom from compulsion in matters of religion and protection against religious discrimination are also guaranteed. Individual freedoms and group or denominational autonomy include the right to manage its own religious affairs, to establish and maintain institutions for religious or charitable purposes; and to acquire and own property and hold and administer it in accordance with law. Every religious group also has the right to establish and maintain institutions for the education of children in its own religion

The power and influence of the religion bureaucracy in matters of governance have given rise to grave concern about the attendant negative impact on freedom of religion of Malaysians and their religious rights. This is made to bear on and to the detriment of non-Muslims as well as Muslims, who are subject to moral policing and being considered as having deviated from orthodox Islam, as determined by the state.

There are uncomfortable parallels in the restraints on and interference with religious freedom with the treatment of non-Muslims (or *dhimmi*s) under an Islamic state founded on orthodox Islamic ideology as propounded by certain Islamic scholars who are ardent proponents for the establishment of an Islamic state in place of a secular polity such as Abdul A'la Maududi.⁵

Common nationality: Equality and non-discrimination or marginalisation and diminished or 'dhimminized' citizenship?

The Federal Constitution provides for the common nationality of all citizens who are entitled to equality before the law, freedom from discrimination and the equal protection of the law.

A *dhimmi* in an Islamic state is a person who has a diminished status. The restrictions and obligations placed upon the *dhimminized* citizen demeans his personhood and his dignity. By being treated as a second-class citizen he can be lawfully discriminated against in the way he lives, works and worships. He is not a full citizen but enjoys a fractionised citizenship, depending on the degree to which the Islamic state will impose the full rigours of *dhimmi* laws, rules and practices.

5 *Islamic Law and the Constitution* (11th Ed, Islamic Publications (Pvt.) Ltd, 1992)

Dhimmi policies and practices clearly subject a non-Muslim to discriminatory treatment. This is inconsistent with the principle of common nationality, equal citizenship and the guarantee of equal protection of the law and the attendant protection against discrimination on the grounds of religion.

Conclusion

Considering the association of political power with control over Islam and Muslims, there is a legitimate concern on the part of the federal government that fundamentalist, meaning extremist or militant, expressions of Islam, might have serious public order and national security implications. One can, however, question whether such dangers cannot be properly managed by the exercise of the Federal Government's jurisdiction over public order and security without the necessity for federal encroachment into and assertion of control over the religion of Islam contrary to the constitutional settlement vesting such power in the constituent states.

Islam must remain constitutionally a state and not a federal matter. The federal government should not exceed the constitutional role defined for it in the administration of Islam. As set out in the Federal Constitution, the authority of the Federation would only be with respect to matters of Islam within the Federal Territories and not for the whole Federation. For the whole Federation, it will extend to but is limited to the exceptional areas specifically circumscribed in the Federal Constitution.

The role asserted by the religion bureaucracy can only be viewed as an unlawful interference with, and a usurpation of, the constitutional powers of the three organs of constitutional governance. This role is perceived to be the cause of the twin phenomenon of religionising of governance and marginalisation of minorities. This burgeoning power centre has gradually undermined the essence of the Malaysian polity founded upon the pillars of a civil non-religious system of governance of the nation with her multi-racial, multi-cultural and multi-religious Malaysia citizenry. These pillars must be reasserted and restored, and the negative consequences and impact of the religion bureaucracy must be identified and decisively dealt with as matters of urgent priority in the new Malaysia that has dawned upon our nation. **LH-AG**

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