

Is Malaysia a Secular or a Theocratic State?¹

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Let me begin by saying that, based on the Federal Constitution, Malaysia is a secular state and not a theocratic Islamic state.

However, there is, at present, a perceivable lack of appreciation among Malaysians that Malaysia is a secular state and not a theocratic Islamic state. This is, to some extent, due to the fact that the issue had been politicised by our political leaders. For example, in 2001, the then Prime Minister Tun Mahathir Mohamad declared that Malaysia was an “Islamic state”.³ Let me say at the outset that this is a mere political statement and nothing more than that. With respect to the then Prime Minister, such a statement should not have been made as it may cause — and indeed it has caused — unnecessary confusion among Malaysians.

In order to know whether Malaysia is a secular state or an Islamic theocratic state, we have to examine our Federal Constitution both as to its history and its provisions. For, only upon embarking such an exercise will we have a better and clearer understanding of the relationship between the religion of Islam and our system of government in the context of constitutional law.

Historical perspective

Therefore, let us examine the history of our Federal Constitution in order to determine whether Malaysia is a secular state or otherwise. On Malaysia’s historical development, in 1956 the Reid Commission⁴ was tasked with the responsibility to draft the Federal Constitution. This Commission came up with a report known as the Reid Report. In its Report⁵ the Reid Commission states at paragraph 169:

“169. We have considered the question whether there should be any statement in the Constitution to the effect that Islam should be the State religion. There was universal agreement that if any such provision were inserted it must be made clear that it would not in any way affect the civil rights of non-Muslims. In the memorandum submitted by the Alliance it was stated —

¹ Adapted from a presentation at the Dayak National Congress in Kuching, Sarawak on 9 November 2019

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³ *The Constitution of Malaysia*, Andrew Harding, Hart Publishing, 2012, p 231; *Judging in God's Name: State Power, Secularism, and the Politics of Islamic law in Malaysia*, Tamir Moustafa, Oxford Journal of Law and Religion, Vol 3, No 1 (2014), 152, p 161.

⁴ The members of the Reid Commission were Justice Lord Reid, a Lord of Appeal in Ordinary, nominated by the Government of the United Kingdom; Sir Ivor Jennings, Master of Trinity Hall, Cambridge, nominated by the Government of the United Kingdom; Sir William McKell, a former Governor-General of Australia, nominated by the Australian Government; Mr. B Malik, a former Chief Justice of the Allahabad High Court, nominated by the Government of India; Mr. Justice Abdul Hamid of the West Pakistan High Court, nominated by the Government of Pakistan. These nominations were duly approved by Her Majesty the Queen of the United Kingdom and Their Highnesses the Rulers of the Malay States.

⁵ *Report of the Federation of Malaya Constitutional Commission 1957* (London, Her Majesty's Stationery Office) (Reid Commission, 1957)

... the religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religion and shall not imply that the State is not a secular State.”

There is nothing in the draft Constitution to affect the continuance of the present position in the States with regard to recognition of Islam or to prevent the recognition of Islam in the Federation by legislation or otherwise in any respect which does not prejudice the civil rights of individual non-Muslims. The majority of us think that it is best to leave the matter on this basis, looking to the fact that Counsel for the Rulers said to us — ‘It is Their Highness’ considered view that it would not be desirable to insert some declaration such as has been suggested that the Muslim Faith or Islamic Faith be the established religion of the Federation. Their Highnesses are not in favour of such a declaration being inserted and that is a matter of specific instruction in which I myself have played very little part.’ Mr Justice Abdul Hamid is of the opinion that a declaration should be inserted in the Constitution as suggested by the Alliance and his views are set out in his note appended to this Report.

As the Reid Report has referred to the opinion of Mr Justice Abdul Hamid (a member of the Commission nominated by the Government of Pakistan), let us read what Mr Justice Abdul Hamid has to say in the Report:

Note of Dissent by Mr Justice Abdul Hamid

11. It has been recommended by the Alliance that the Constitution should contain a provision declaring Islam to be the religion of the State. It was also recommended that it should be made clear in that provision that a declaration to the above effect will not impose any disability on non-Muslim citizens in professing, propagating and practising their religions, and will not prevent the State from being a secular State. As on this matter the recommendation of the Alliance was unanimous their recommendation should be accepted and a provision to the following effect should be inserted in the Constitution either after Art 2 in Part I or at the beginning of Part XIII.

Islam shall be the religion of the State of Malaya, but nothing in this article shall prevent any citizen professing any religion other than Islam to profess, practise and propagate that religion, nor shall any citizen be under any disability by reason of his being not a Muslim.

12. A provision like the one suggested above is innocuous. No fewer than 15 countries have a provision of this type entrenched in their Constitutions. Among the Christian countries, which have such a provision in their Constitutions, are Ireland (Art 6), Norway (Art 1), Denmark (Art 3), Spain (Art 6), Argentina (Art 2), Bolivia (Art 3), Panama (Art 36) and Paraguay (Art 3). Among the Muslim countries are Afghanistan (Art 1), Iran, (Art 1), Iraq (Art 13) Jordan (Art 2), Saudi Arabia (Art 7) and Syria (Art 3). Thailand is an instance in which Buddhism has been enjoined to be the religion of the King who is required by the Constitution to uphold that religion (Constitution of Thailand, Art 7). If in these countries a

religion has been declared to be the religion of the State and that declaration has not been found to have caused hardships to anybody, no harm will ensue if such a declaration is included in the Constitution of Malaya. In fact in all the Constitutions of Malayan States a provision of this type already exists. All that is required to be done is to transplant it from the State Constitutions and to embed it in the Federal.

Subsequently, a Working Party was jointly appointed by the British Government, the Conference of Rulers and the Government of the Federation of Malaya to study the Reid Report in detail. This Working Party came up with a White Paper in July 1957 known as the Constitutional Proposals for the Federation of Malaya 1957.⁶ Paragraph 57 of this Report unequivocally states:

Religion of the Federation

57. There has been included in the proposed Federal Constitution a declaration that Islam is the religion of the Federation. This will in no way affect the present position of the Federation as a secular State, and every person will have the right to profess and practise his own religion, and the right to propagate his religion, though this last right is subject to any restrictions imposed by State law relating to the propagation of any religious doctrine or belief among persons professing the religion of Islam.

Thus, upon reading the above constitutional documents, it is clear that it was the intention of the drafters of the Federal Constitution that the Federation of Malaya of 1957 was meant to be a secular nation and not a theocratic nation. That this is so was reiterated by Malaysia's first Prime Minister, Tunku Abdul Rahman in 1958, in a speech before the Federal Legislative Council:

I would like to make it clear that this country is not an Islamic state as it is generally understood, we merely provided that Islam shall be the official religion of the State.⁷

The pertinent provisions of the Federal Constitution

A close consideration of Malaysia's basic law or the Federal Constitution highlights the following features, which uphold its position as a secular state:

- i. While Islam is declared to be the State religion, the Constitution stipulates that its position is subject to the provisions on fundamental liberties, citizenship, the separation of the legislative, executive and judicial powers in Malaysia, federal-state relations, finances, elections, public services, etc. [Art 3(4)]
- ii. The Constitution proclaims itself to be the supreme law of the Federation, as opposed to the holy book of any religion. [Art 4(1)]

⁶ *Constitutional Proposals for the Federation of Malaya 1957* (London, Her Majesty's Stationery Office), (United Kingdom Colonial Office, 1957)

⁷ Hansard, May 1, 1958

- iii. The Constitution guarantees the Rule of Law and Separation of Powers i.e. Malaysia's laws are made, executed upon and interpreted by three secular institutions, namely, Parliament, the Yang di-Pertuan Agong (or the Cabinet or any other person as determined by Parliament) and the Courts respectively. [Arts 39, 44 and 121]
- iv. The Constitution confirms that decisions in Parliament are made by a majority; a basic feature of democracies, and not theocracies. [Art 62(3)]
- v. The Constitution regards "written law" and "common law" as the applicable laws in Malaysia. Substantive Islamic law is not considered "law" under the present legal framework; it must be legislated for. [Art 160 and 74(2)]
- vi. The creation of key religious authorities i.e. the Majlis Agama, the Mufti and the Syariah courts, are all pursuant to laws passed by a secular institution i.e. the State Legislative Assembly. [Item 1 of State List]
- vii. All Ministers of Cabinet, members of the Houses of Parliament and Judges take an oath of office which requires them to "preserve, protect and defend" the Constitution, as opposed to any religion. [Sixth Schedule]
- viii. The Constitution guarantees freedom of religion for all persons. [Art 11(1)]
- ix. The Constitution does not create a Head of the religion of Islam for Malaysia.
- x. There is no religious qualification with respect to any office in Government; thus, a person of any religious affiliation can be a member of the Legislature, Executive or Judiciary in Malaysia.

The opinions of scholars

On Malaysia's system of governance, Professor R H Hickling writes:

"... as a general proposition Muslim law cannot be regarded as "the law of the land." Islam is indeed the religion of the Federation, just as the protestant Church is the established Church of England: but in each case, the state is a secular state, and it is wise to keep religion out of law (as well as out of politics) for the two mix ill."⁸

The issue of whether Malaysia is a secular state continues to be a feature of Malaysian socio-political discourse despite the above sources being available. To compound matters, there is scant regard by the Federal Government in providing legal education in schools and in the media of Malaysia's position as a secular state.

⁸ *Malaysian Law*, RH Hickling, Professional Law Books Publishers, 1988, pp. 143 – 144

Judicial authority

The legal issue of whether the laws in Malaysia are secular or religious has been answered by the Supreme Court in the case of *Che Omar bin Che Soh v Public Prosecutor*.⁹ In 1988 the Supreme Court was moved to interpret Art 3 in an appeal against a death sentence for drug trafficking and possession of firearms. The counsel for the appellant contended that since Islam is the religion of the Federation, as declared by Art 3, and that the Federal Constitution is the supreme law of the Federation, the imposition of the death penalty was unconstitutional, being contrary to Islamic injunction. The Court rejected the argument, holding that the development of the law by the British in Malaya had the effect of transforming the legal system into a secular one; and that the constitutional declaration that Islam is the religion of the Federation did not mean that laws passed by Parliament must be imbued with Islamic religious principles; for, to hold otherwise, would be contrary to the constitutional and legal history of the Federation and also to the Civil Law Act 1956 that provides for the reception of English common law in this country.

The Supreme Court stated:

“It is the contention of Mr. Ramdas Tikamdas that *because Islam is the religion of the Federation, the law passed by Parliament must be imbued with Islamic and religious principles* and Mr. Mura Raju, in addition, submitted that, *because Syariah law is the existing law at the time of Merdeka, any law of general application in this country must conform to Syariah law*. Needless to say that this submission, in our view, will be *contrary to the constitutional and legal history of the Federation* and also to the Civil Law Act which provides for the reception of *English common law* in this country.

...

... the law in this country is still what it is today, *secular law, where morality not accepted by the law is not enjoying the status of law.*¹⁰ [*Emphasis added*]

Recent case of *Indira Gandhi*

I take the view that one of the basic structures of the Malaysian Constitution is that it provides for a secular system of government.

As far as the application of the doctrine of basic structure in Malaysia goes, the case of *Indira Gandhi* is the most important of all the cases.¹¹ It concerns a Hindu couple with three children. Several years into the marriage, the couple’s relationship soured. The husband left, converted to Islam and took physical custody of the youngest child, who was 11 months old at the time. He then took steps to convert the children to Islam. The conversion was registered. The wife sought to set aside the conversion in judicial review proceedings on the grounds that the conversion was not in accordance with

⁹ [1988] 2 MLJ 55

¹⁰ *Ibid*, at 56D–G (left) and 57A–C (left)

¹¹ *Indira Gandhi v The Director of Islamic Affairs Perak* [2018] 1 MLJ 545

the procedure as prescribed by the relevant Syariah Enactment of Perak. The High Court granted the relief sought.

However, the Court of Appeal by majority reversed that decision on the ground that the ordinary courts had no jurisdiction to deal with the subject matter of the review. It held that the matter was within the exclusive province of the Syariah Court established by written law enacted by the State of Perak.

On further appeal, the Federal Court reversed and restored the decision of the High Court. The Federal Court restored in full the judicial power, which was purportedly removed by Parliament through the amendment in 1988. Although the rulings made by the Federal Court do not specifically say that constitutionally Malaysia is a secular State, nonetheless in my view the rulings impliedly further entrench the constitutional position that Malaysia is a secular nation. The rulings are as follows:

1. As a matter of interpretation, it is “the foundational principles of a constitution” that shape its basic structure.
2. The principle of separation of powers is part of the basic structure of the Constitution.
3. The judicial power of the Federation is part of the basic structure of the Constitution. As such, the constitutional amendment Act that amended Art 121 in 1988 which curtails and purportedly eliminates the judicial power vested in the judiciary is confirmed void.
4. The power of judicial review forms part of the basic structure of the Constitution. As such any attempt by Parliament to oust or exclude the power of judicial review is ineffective. It follows that ouster clauses are unconstitutional and void.
5. The features of the basic structure cannot be abrogated or removed by a constitutional amendment.
6. Since the power of judicial review is part of the basic structure of the Constitution, Art 121(1A) cannot and does not prevent the ordinary courts from reviewing the acts of Islamic institutions established under statute to ascertain whether they have acted *ultra vires* their statutory powers, including the erroneous treatment of a subject as falling within the jurisdiction of a Syariah Court.

I will go further to say that in view of the adoption of the doctrine of basic structure by the Federal Court in *Indira Gandhi*, there is no possibility of Parliament amending the Federal Constitution to turn Malaysia from a secular state into an Islamic state. For, to do so, would affect a basic structure of the Federal Constitution, the basic structure being that Malaysia is a secular state. This must be the necessary implication of the above judgment.

Islam: The Constitutional Position in Sabah and Sarawak

The Constitutional arrangement regarding Islam as the religion of the Federation and the guarantee of religious freedom was revisited at the formation of Malaysia.

Historical background: The Cobbold Commission

After the governments of the UK and the Federation of Malaya had come to the view that the inclusion of the two British colonies of North Borneo and Sarawak in the proposed Federation of Malaysia was desirable and in the best interest of the peoples of these State entities, the Cobbold Commission¹² was formed, *inter alia*, to ascertain the views of the peoples of these colonies on the question of the two colonial entities joining in to form Malaysia and to make recommendations in the light of their assessment.

Government Paper: ‘Malaysia and Sarawak’

In early 1962, the Colonial Governments of Sarawak and North Borneo issued Government Papers to announce the setting up and work of the Cobbold Commission. These Government Papers assured the peoples of North Borneo and Sarawak on the matters, which are considered important to them, in particular, with regard to the position of Islam and their freedom of religion. The Government Paper “Malaysia and Sarawak”¹³ states unequivocally at paragraph 15 as follows:

“People have wondered whether the fact that Islam is the official religion of the Federation of Malaya would affect religious freedom in Sarawak as part of Malaysia. This has been clarified at the recent Consultative Committee Meeting. Although Malaysia would have Islam as the official religion of the enlarged Federation there would be no hindrance placed on the practice of other religions. Complete freedom of religion would be guaranteed in the Federal Constitution. Sarawak has at present no established religion and it would not be required to accept Islam as its State religion.”

Government Paper: ‘North Borneo and Malaysia’

The corresponding Government Paper, “North Borneo and Malaysia”¹⁴ in turn states at paragraph 10:

“The deliberations of the Consultative Committee have done much to clarify the position of religion in Malaysia. Islam is the official religion of the Federation of Malaya. Although Malaysia would have Islam as the official religion of the enlarged Federation there would be no hindrance placed on the practice of other religions. Complete freedom of religion would be guaranteed in the Federal Constitution. North Borneo, which at present has no established religion, would not be required to accept Islam as its State religion.”

Memorandum on Malaysia

¹² Members of the Cobbold Commission were Lord Cobbold, former Governor of the Bank of England, chairman of the Commission; Mr. Wong Pow Nee, Chief Minister of Penang; Mr. Ghazali Shafie, Permanent Secretary to the Ministry of Foreign Affairs; Mr. Anthony Bell, former Governor of Sarawak; and Mr. David Watherston, former Chief Secretary of Malaya.

¹³ “Malaysia and Sarawak” published by Authority of the Government of Sarawak (Kuching, 1962).

¹⁴ “North Borneo and Malaysia” published by Authority of the Government of North Borneo (Jesselton, 1962).

The reference to the Malaysia Solidarity Consultative Committee in both Government Papers is significant. It provides the context to the assurance on religious freedom made by the respective Colonial Governments. Such freedom will be freely exercisable in a nation that is secular and not a religious state. The “Memorandum on Malaysia”¹⁵ at paragraph 13 states as follows:

“The Committee directed a great deal of attention to the question of Islam as the religion of the Federation. It is satisfied that the acceptance of Islam would not endanger religious freedom within Malaysia nor will it make Malaysia any less secular. The present Constitution of the Federation of Malaya, which would serve as the basis for the new Federation has adequately guaranteed that other religions may be practised in peace and harmony in any part of the Federation.”

The Cobbold Commission Report

The Cobbold Commission Report¹⁶ records deep anxieties over the position of Art 3 of the Federal Constitution, which provides that Islam is to be the religion of the Federation. The concerns and anxieties of the non-Muslims and non-Malay components of the population stemmed from the concern over the prospect of Malay/Muslim domination. The two Malayan members of the Commission recorded the responses of Muslims and non-Muslims to Art 3. Muslims, they note, would welcome the provision. However, among non-Muslims there was a range from outright rejection to non-objection by a “*substantial number who would not object to the present practice in the Federation of Malaya, as they are satisfied with the provisions for fundamental liberties and freedom of religion in the Malayan Constitution*” (paragraph 148(e)(ii)). The Malayan members then made the following recommendation in the Cobbold Commission Report:

“Taking these points fully into consideration, we are agreed that Islam should be the national religion for the Federation. We are satisfied that the proposal in no way jeopardises freedom of religion in the Federation, which in effect would be secular.”

The Inter-Governmental Committee Report

The Cobbold Commission Report was followed by the efforts of the Inter-Governmental Committee (**IGC**) to work out the constitutional arrangements for the new Malaysian Federation including safeguards for the special interests of Sabah and Sarawak. Five political parties of Sabah decided to submit a joint memorandum to the IGC setting out the areas, which they considered to be most crucial to Sabah and its people. These matters, now popularly referred to in Sabah as “the Twenty Points” were the agenda for the work of the IGC comprising representatives of the 3 entities set up for the purpose of arriving at a consensus on the issues. Top on the list of this memorandum subsequently popularly referred to as the “20 Point Memorandum” is

¹⁵ “Memorandum on Malaysia” dated 3 February 1962, submitted by the Malaysia Solidarity Consultative Committee.

¹⁶ Report of the Commission of Enquiry, North Borneo and Sarawak 1962 (London, Her Majesty’s Stationery Office), (Cobbold Commission, 1962).

Religion. Sarawak also submitted a memorandum containing 18 points to serve as a basis for the deliberations of the IGC. The Report of the IGC¹⁷ recommended in paragraph 15 that:

‘No amendment is required to Art 3(1), which provides “Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation”.’

That being said, however, it is questionable whether the IGC’s recommendations in relation to religion are truly upheld. For instance, paragraph 15(1) of the Report of the IGC states that:

“As in the case of Penang and Malacca (Art 3(2)), the Heads of State in the Borneo States should not be Head of the Muslim religion in the State; but Art 3(3) should be left **unamended** so as not to confer on the Yang di-Pertuan Agong the position of Head of the Muslim religion in the Borneo States.”
[*Emphasis is mine.*]

Contrary to the above, Art 3(3) of the Federal Constitution was amended in 1976¹⁸ to read as follows:

“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.”

Further, paragraph 15(4) of the Report of the IGC states that:

“Article 38(2)(b) and (6)(d), which deals with the functions of the Conference of Rulers relating to the extension of religious acts, observances and ceremonies to the Federation as a whole, should not apply to the Borneo States.

However, Art 38(2)(b) and (6)(d) of the Federal Constitution still provide that the Conference of Rulers shall exercise its functions of, and may act in their discretion in any proceedings relating to its functions of agreeing or disagreeing to the extension of any religious acts, observances or ceremonies to *the Federation as a whole*. While the IGC’s recommendation may be observed in practice,¹⁹ it would be ideal if the Federal Constitution were amended to be in line with the IGC’s recommendation.

Notwithstanding the above, Art 3 of the Federal Constitution which was included in the Merdeka Constitution of 1957 and then agreed to be retained by the State entities of

¹⁷ Report of the Inter-Governmental Committee, 1962 (London: Her Majesty’s Stationery Office).

¹⁸ Interestingly, according to the Hansard, all the members of Parliament from Sabah and Sarawak who were present in Parliament during the passing of the Bill on 13 July 1976, supported the Bill.

¹⁹ Article VIII of the Malaysia Agreements provides:

“The Governments of the Federation of Malaya, North Borneo and Sarawak will take such legislative, executive, executive or other action as may be required to implement the assurances, undertakings and recommendations contained in Chapter 3 of, and Annexes A and B to, the Report of the Inter-Governmental Committee signed on 27th February, 1963, in so far as they are not implemented by express provision of the Constitution of Malaysia.”

Sabah and Sarawak in the Malaysian Constitution of 1963 must be construed in the light of both sets of legislative documents. It needs hardly be gainsaid that the reason for retaining the said Article 3 without any modifications or further qualifications are the solemn assurances of the Malayan members of the Cobbold Commission on both the secular nature of the new Malaysia as well as the guarantee of freedom of religion.

From the constitutional history of the Merdeka Constitution of 1957, which then became the Malaysian Constitution of 1963, the legislative intent of Arts 3 and 11 becomes plain. Both sets of constitutional documents explicitly guarantee religious freedom in the context of a polity that is secular albeit with a special position for Islam as the official religion of the Federation. The Merdeka Constitution of 1957 guaranteed non-Muslims that in such a nation, their religious freedom will be honoured and their civil rights will be respected. On this basis, the Malaysian Federal Constitution of 1963 is built on the Merdeka foundation to guarantee the religious rights of native Bumiputra Christians in the Borneo State entities of Sabah and Sarawak which they enjoyed long before and up to Malaysia Day in terms acknowledging that “*complete freedom of religion would be guaranteed in the Federal Constitution*” and further that “*there would be no hindrance placed on the practice of other religions*”.

About the author



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