

RELIGION, LAW, AND GOVERNANCE IN MALAYSIA

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Abstract: Although the number of provisions pertaining to Islam in the Federal Constitution of Malaysia is small, the substance of the religion practically permeates various aspects of governance in Malaysia. This seems to be quite natural given that Islam stands at the very heart of Malay civilisation and culture. Apart from this, the Malays form the majority of the country's population. This would explain why – despite the fact that Malaysia belongs to the Westminster and Common Law systems of government and law – the Islamic character and essence of the polity remain visible. This is indeed interesting given that the country was governed by Europeans for several centuries – starting with the Portuguese who defeated the Sultanate of Malacca in 1511. As of now, the author argues that it would be possible to have a full-fledged Islamic system within the existing constitutional framework. According to him, the Malaysian experience could serve as an example of how a modern system of governance could co-exist with traditional Islamic values and systems. In recent years, the country has made significant progress in the field of Islamic banking and finance, as well as the systemisation of Islamic courts and education. Even the civil courts have eventually been able to strike a balance between the modern idea of liberty and Islamic notions of rights; something that was evident even in cases involving the question of apostasy. Interestingly enough, all of these achievements have been accomplished *within* the existing framework of the Constitution.

Introduction

The Federal Constitution of Malaysia only provides a handful of provisions¹ that directly deal with Islam. These include the one which declares Islam as “the religion of the Federation”² as well as those protecting the position of Islam and Muslims; such as those prohibiting the propagation of non-Islamic religions to Muslims³ as well as the provision that allows the use of taxpayers’ money to assist Islam.⁴ However, as Muslims are in the majority and as the country’s life and history have always been closely-linked with Islam it is not easy to disentangle that religion

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from public life in Malaysia. Hence the place and influence of Islam in government policies, parliamentary debates and so on.

In recent years debates and controversies about the role and place of Islam in modern Malaysia have given rise to questions about the true character of the nation. Some have put forward the view that given the substantial numerical proportion of non-Muslims in the population – around 40 per cent – the country should emphasise the alleged secular nature of the federation; something that is quite at odds with the provisions of the Constitution cited above. Whatever the case one wonders whether the secular character is the pre-requisite for the prevalence of religious freedom in the country. For one thing such has been upheld throughout Islamic history. Indeed such a right is quite central in Islam.

The intricate relationship between religion, law and governance in Malaysia needs to be seen within the complex structure of the Malaysian Constitution and its history. Part of the reasons for this complexity is reflected in the character of the Constitution as a document that seeks to accommodate various interests and conflicting demands involving that of the centre and the states, royalty and commoners, the indigenous and the immigrant communities, Muslims and non-Muslims and so on.

The Roots and Evolution of the Existing System

As it stands Malaysia is a federation of 13 states and belongs to what is known as the Westminster system of government whereby the offices of head of state and head of government are separate. The head of state is a generally a figurehead and although the holder is vested with the discretionary power to appoint the head of government the latter is essentially there due to the support he or she has in parliament, the legislature. Here lies the reason why the government of the day is called the responsible government; something that underlines the fact that the government actually belongs to parliament.

Like the United Kingdom Malaysia is a monarchy. However it is interesting to note that the Malaysian Constitution shares some characteristics with that of the Indian republic; such as the federal system, provisions on fundamental liberties and emergency. In fact some of the prevailing laws such as the Penal Code, the Criminal Code, Contract Act 1950 and Evidence Act 1951 – which are the codifications of English common law principles – came to Malaysia via the republic which became a British colony much earlier.⁵

Despite the Westminster character there are several features that underline not only the uniqueness but more importantly the indigenous character of the Malaysian federation.⁶ These include the existence of Conference of Rulers, the assembly of constitutional heads, which have some significant powers including those concerning constitutional amendments and law-making process. Malaysia also has two parallel

systems of court; namely the civil judiciary as well as the Islamic or the *sharī'ah* courts.⁷ Although the latter system of court has less power and jurisdiction they are not amenable to review by the civil courts. This is one feature that makes the Malaysian judiciary quite different from the rest in the Commonwealth. But one must remember that the *sharī'ah* courts were already in place when the British came sometime in the late seventeenth century.

It is interesting to note that although the head of state – namely the *Yang di-Pertuan Agong* (HM the King) is a hereditary ruler – he is in office through an election conducted by the Conference of Rulers.⁸ And although the nine rulers are constitutional monarchs and thus subject to the ordinary constraints similar to other constitutional monarchies the rulers in Malaysia have some discretionary powers, especially those pertaining to religion which may, at times, become significant and crucial.

Be that as it may the land that is now known as Federation of Malaysia, both the states in the peninsula and Borneo, used to be under the suzerainty and control of fifteenth-century Malacca Sultanate. When the empire fell, following the attack by Portuguese forces in 1511, smaller sultanates emerged; beginning with the one in Perak around 1528. By the end of the nineteenth century there were nine sultanates throughout the peninsula. What these smaller sultanates have in common is that they continue the legacy and traditions of the Malacca Sultanate. All those nine sultanates survived, and it might be argued that had it not been for them Malaysia could have been a unitary today.

Although Malacca was not the first kingdom in the peninsula her role was important in strengthening the position and influence of Islam in the Malay life and culture. The Malacca Code – the sultanate's constitution – was also an Islamic criminal code which contained the provisions on *hudūd* (punishments for certain serious crimes) and *qisās* (retaliation) based on the Shāfi'ī legal 'school'. This was one of the examples that underline the centrality of Islam in the life and culture of the Malays. Scholars such as Syed Muhammad Naquib al-Attas, for example, have argued that the conversion of Malays to Islam – led by the sultans – has had the crucial impact of transforming their worldview and culture.⁹

It is important to note that although the Portuguese ruled Malacca for more than a century they did not leave significant traces as they spent the time fending off the attacks put up by the neighbouring sultanates. Thus when the Portuguese were eventually defeated by the Dutch in 1641 what was left were basically just some churches and secular buildings. The same was the case with the Dutch occupation. In any case, the reason why they attacked the Portuguese in Malacca was essentially to undermine the former sultanate's position as the rival to their commercial interests in Batavia. This explains why the Dutch eventually handed over Malacca to the English, following the signing of the Anglo-Dutch Treaty of 1824.

As far as the British were concerned, the handing over of Malacca was not the beginning of British rule in the peninsula. In fact, by then they had already acquired Penang from the Sultanate of Kedah, an act which took place in 1786. This was later followed by the acquisition of Singapore in 1819. The three Settlements put the British in a position to interfere in the affairs of the Malay states. This began with the conclusion of the Pangkor Treaty with the Sultanate of Perak in 1874 which was soon followed by three more similar treaties with Selangor, Negeri Sembilan and Pahang. The process was completed with the signing of a treaty with the Sultanate of Johor in 1905. Part of the reasons that have given the British the upper hand in those dealings was the prevalent succession disputes and wars in those states.

That notwithstanding it has to be emphasised that under those treaties the Malay states did not surrender their sovereignty. Indeed – as has been affirmed by some court decisions in London¹⁰ – the Malay rulers remained sovereign in their own right. In law, the Malay states were just protectorates, not colonies like the Straits Settlements of Penang, Singapore and Malacca, all of which were administered *directly* by the Colonial Office in London. As far as the Malay states were concerned, the British put in place what was known as indirect rule whereby the indigenous system and structures were retained though the actual running of the states was done by the British officers.¹¹ Under the treaties the sultans were required to act on the officers' advice. It was during the British administration that the councils to advise the rulers in matters pertaining to Islam and Malay custom were established.

The administrative framework continued until World War II. It is to be noted that during their brief though brutal occupation of the Malay Peninsula, the Japanese also chose not to interfere with the indigenous system. Like the British, they also used it to carry out their policies and programmes.

However, the British tried to change the status quo when they resumed control of the Peninsula after the Japanese defeat. They sought to implement the idea by putting pressure on the Malay rulers to surrender their sovereignty and their states, together with the three settlements, to form the Malayan Union of 1946. This was a complete departure from the pre-War arrangement whereby the Malay states, legally speaking, were sovereigns despite being British protectorates. The 1946 proposal included, among other things, common citizenship for *all*, irrespective of race, something that could not be accepted by the Malays.

The Malay opposition was instrumental in the non-implementation of the Union proposal. Eventually, it was repealed and the British came forward with the Federation of Malaya of 1948 as the compromise. The agreement for the purpose was signed by all the nine rulers, and it was basically the structure that laid down the foundation for many things, including the Independent Constitution 1957 which strengthened the federation structure. Unlike the loose Federated Malay States of

1895, formed by the four states that first came under British protection, the 1948 deal was indeed closer to the modern concept of a true federation. Under this arrangement, the jurisdictions of federal and states authorities were clearly spelt out. It is interesting to note, however, that while the status and position of the rulers as sovereign monarchs remain the federation created by the 1948 agreement was central-biased – something which arguably maintained the central idea of the Malayan Union in the newly-created federation.

Governance-wise the highest authority under the 1948 federation was the British High Commissioner who was essentially there to represent and exercise the authority and powers of the British Sovereign and the nine Malay rulers. It was under the 1948 arrangement, too, that the Conference of Rulers was formalised; prior to that the rulers had meetings with the British officers under what was known as *durbars* which started in 1897.

When the Reid Commission¹² was appointed to prepare the draft constitution sometime in 1956 they did not alter the framework and structure laid down by the Federation of Malaya Agreement of 1948. By and large they merely changed those structures and provisions that were at odds with democracy. These include the introduction of a paramount constitutional monarchy, the putting in place of an elected government and the insertion into the Constitution of a chapter on fundamental liberties. It is to be noted that the draft that was adopted as the Constitution of the Federation of Malaya was not the one submitted by commission. Instead it was the amended and revised version of the Reid Commission's draft prepared by a committee whose recommendations formed what was known as the White Paper.¹³

Be that as it may, the Constitution that stands today is different from the one that was adopted at Independence in 1957. Over the years many amendments have been made. These include the amendments made to accommodate the entry of Singapore, Sabah and Sarawak into the Federation in 1963. Singapore, however, was 'asked' to leave in 1965. Both Sabah and Sarawak enjoy a certain amount of special position not available to the original eleven states in the Peninsula. While some of the post-independence amendments were quite routine and inevitable, some were indeed fundamental as they deal with some critical issues such as those concerning emergency provision and the judiciary. The Emergency provision¹⁴ could have a far-reaching implication on democracy and constitutionalism as the Constitution is essentially suspended and most of the powers, including the legislative one, are placed at the hands of the federal executive. The Constitution also provides a provision to combat subversion which may go against the provision on fundamental liberties;¹⁵ something that has been used to enact controversial laws including the Internal Security Act (or ISA) of 1960 which allows detention without trial.

The Constitution as the Supreme Law

The Constitution states that it is the supreme law of the federation. Article 4(1) of the Federal Constitution emphasises, *inter alia*, that the Constitution is the supreme law of the Federation and that any law that is inconsistent with it shall be declared null and void to the extent of inconsistency. What the provision essentially seeks to establish here is to make the Constitution the benchmark of everything; from the laws passed by parliament to the policies of the government as well as the relationships between individuals and governments. One must remember, however, that despite the supreme character of the Constitution it all depends on what the courts have to say about it. As it stands, the Federal Court is essentially the constitutional court of the country.¹⁶

One also needs to bear in mind that the Constitution is not explicit on everything. Details and routines of state governing are virtually left at the hands of the executive. Which is why the executive is influential, and one often finds its tentacles virtually everywhere in the system. One must also remember that in a Westminster system the government virtually controls the legislature, and this means that even law-making is very much within the hands of the executive. As in other countries, the executive has an enormous say in the appointment of judges. Thus although the Constitution has provided safeguards for the independence of the judiciary it is not always easy for the judges to assert their independence, especially when it comes to adjudicating matters involving federal authorities, such as the executive. As shall be shown later, the court has been inconsistent in its rulings, and it appears that when it comes to the crunch, the judges tend to avoid a direct conflict with the government of the day. And this seems to be the trend even before the judiciary crisis in 1988, which ended with the dismissal of Lord President Salleh Abas, the then head of the judiciary.¹⁷

As in other countries, the making of the Constitution signified a new beginning. However, as shown above, the Constitution is also, in a way, a continuation of the past regimes; some of the characteristics are rooted in the Malacca days and the subsequent period before the advent of British administration. These include the position and role of the rulers, especially with respect to Islam and Malay customs. It is interesting to note that the provision which provides the 'special position' for the Malays under the Constitution today is exactly similar with the corresponding provision under the 1948 constitutional regime.

Meanwhile, the British administration has left quite an indelible mark in the system which includes the application of English common law. One must note, however, that this source of law can only be resorted to in situations whereby there is a *lacuna*. As far as the Malaysian legal system is concerned, the hierarchy of the sources of law has put the Constitution as the major and highest law. Next to

the Constitution are statutes, namely the legislations passed by federal and state legislatures. Other sources in the order of precedence are judicial decisions, English common law and customary laws. With regard to Islamic law, the Constitution and ordinary laws are silent on the matter. However, that does not mean that Islamic law has no place in the legal system. This is because some of the provisions in the Constitution, especially in the states, are either Islamic or Islam-friendly. These include the provisions which regulate the succession to the throne as well as the protection given to Islam as mentioned earlier. Apart from these provisions, some of the statutes, such as those on Islamic banking and Muslim matrimonial matters, are nothing but Islamic law codified and passed by the legislatures at the federal and state levels. It is not incorrect to say that Islam assumes quite a major influence in law-making process in Malaysia – something that is particularly evident in the area of Islamic criminal laws. These are some of the dimensions that have been overlooked by the proponents of view which asserts that Art. 4(1) of the Federal Constitution of Malaysia marginalises Islam in the system.

One of the unique characters of the Malaysian Constitution is that it has no preamble. Other modern constitutions such as the American one asserted the democratic nature of the instrument. Some others, such as the Constitution of India, declared the socialist and secular nature of the document. The accompanying document of the Malaysian Constitution, on the other hand, was quite unclear about the character of the Constitution. That notwithstanding it is not quite right to say that it is secular. This is in view of the fact that it has a provision declaring Islam as the religion of the Federation, a kind of state ideology, and that the rulers assume the position of the heads of religion in their respective states. Islam has effectively been given a special status when the Constitution says that it may receive state assistance.

Democracy and the Constitution

Like other modern constitutions, the Malaysian Constitution seeks to put a democratic polity in place. This was made clear by the Reid Commission in their report as well as in the Draft Constitution which they prepared. That notwithstanding, the commission was aware that such has to be done within the prevailing circumstances as well as the historical setting of the country. Hence the retention of traditional institutions and elements such as Islam, monarchical institution, Malay as official language,¹⁸ and the ‘special position’ of the Malays.¹⁹ But all these have been put in such a way that they are compatible with democracy. Hence the creation of a constitutional monarchy and the framework for responsible government. While Islam has been declared as “religion of the federation” other religions are allowed to be practised in peace and harmony throughout the federation. Similarly, the

privileges given to the Malays and the indigenous peoples of Borneo need to be reconciled with the legitimate interests of other communities.

One of the means to nurture and sustain democracy in the polity is the incorporation of provisions under the chapter on fundamental liberties, something that can be said as the bill of rights of the nation. Under this part certain rights such as personal liberty, religious freedom, right to freedom of speech and expression as well as right to property have been provided for. Although the provisions may be said to be quite outdated they seem to be capable of expansion; covering new issues and problems. Certain decisions of the court as well as the creation of the National Human Rights Commission in 2000 seem to be moving in this direction. But there seems to be no or less consistency on the part of the court here. While one may find the court is following the current trend in *Sagong Tasi*²⁰ – where the court upheld the proprietary rights of aborigines – it refused to acknowledge the right to religious freedom to a group of Muslim pupils who put on a turban in *Meor Atiquilrahman*²¹ – something that is quite within the scope of the constitutional provision.

In the meantime, the NGOs have been vocal to raise the issues critical in pushing the frontiers of Malaysian democracy further. It has to be admitted that while the Constitution has provided various provisions that sustain the fundamentals of democracy, their true contribution has been rather limited. This has been largely due to the lack of commitment from the part of the government as well as the courts when it comes to making the ideals of the Constitution a reality. This is evident in the various laws made by parliament, the policies pursued by the executive, as well as the way the court dealt with them over the years. Needless to say, democracy and democratisation require more than just a constitution: while the constitution provides the foundation and framework other factors, including the surrounding political culture, provide the flesh for the space created by the Constitution.

Given the prevalence of such a scenario, the significance of the Constitution as the supreme law has been reduced. To make matters worse, the ruling coalition has always been able to amend the Constitution to suit their political priorities since 1957. Such was possible as they never failed to retain the two-thirds majority-control in parliament. However, the coalition failed to maintain that control for the first time in the 12th General Elections in March 2008. At one point, the coalition was even on the brink of losing grip on federal power when the federal opposition almost managed to stage a floor-crossing in parliament. It is to be noted, however, that unlike in other countries, such as the recent general elections of 2010 in Britain and the formation of a coalition government there between the Conservatives and Liberals, the system in Malaysia is such that the opposition has been put under severe constraints and the ruling coalition, having been in power since independence, seems to have their tentacles everywhere in the system.

Indigenous Roots of the Constitution

As it has been alluded above, despite the democratic character the Constitution contains provisions that underline its local and indigenous roots and origin. These refer to the monarchy, Islam, Malay as the national language and the 'special position' of the Malays and natives of the Borneo states of Sabah and Sarawak.

It is difficult to deny that the incorporation of the above provisions has reduced the democratic character of the Constitution. As it stands the Constitution has excluded the above provisions from being subject to the equality provision,²² something that was obviously there to serve as the foundation for democracy. Some of the examples for the exceptions are the enlistment of only Malays in the Royal Malay regiment (the premier unit in the Malaysian armed forces),²³ the application of Islam in the area of personal laws²⁴ and the reservation of positions in the administration of the nine Malay states, such as the *menteri besar* (chief minister) and the state secretary, for the Malays.²⁵

Be that as it may the retention of indigenous character does not necessarily mean preserving absolutism. This is quite clear in the case of what is often described as the creation of constitutional monarchy in 1957. It has to be said that the Malay sultanates – as exemplified by the fifteenth-century Malacca Code – have never been absolute monarchies in the true sense of the word. Indeed, given the position of Islam in Malay society, it is quite a contradiction in terms to say that the pre-independence monarchy was an absolute one. While the sultans may not have been subject to limitations similar to those prevalent in the modern constitutions the fact remains that they were subject to the laws and limitations imposed by the religious doctrine.

A few words need to be said about the Conference of Rulers under the Constitution today.²⁶ Despite its roots in early British rule as well as the Federation of Malaya of 1948, its membership now has been extended to include the non-royal heads of state, namely the *Yang di-Pertua Negeri* of the states without rulers. As a matter of law, non-Muslims and non-Malays may be appointed to hold these posts. One needs to remember that apart from appointing the *Yang di-Pertuan Agong* (HM the King, Malaysia's paramount ruler), the Conference of Rulers also has some legislative powers including those concerning the amendments to the Constitution. In a way it may also influence state governing as the Constitution allows the Conference to discuss any matter it thinks fit as well as taking part in the appointment of key posts including the judges and the election commission. And as the federation does not have a head of religion like the states, the Conference of Rulers is essentially the guardian of the Islamic religion at the federal level. On several occasions the Conference has shown its ability to carry out the role of checks and balances.

With regard to the position of Malay as the national language, the Constitution has made it clear that such is not meant to deny the use and learning of other languages.²⁷ The Constitution even allows the use of public funds for these pursuits. What is required by the provision concerned is that when it comes to official use it has to be in Malay. Nonetheless both the government and the court seem to have failed to observe these provisions. Thus in *Merdeka University Berhad*²⁸ the court ruled that the government was right in rejecting the application to set up a private university as the proposed medium of instruction was Mandarin. This is obviously not in line with the provision which only required the use of Malay for official purpose. But strangely enough, when the government changed the language of instruction for mathematics and science in public schools, the court, in *Mohammad Syawwal bin Mohammad Nizar and Others*,²⁹ did not find it unconstitutional.

Islam as the Religion of the Federation³⁰

Although Art. 3(1) of the Federal Constitution and the similar provisions in the state constitutions declare that Islam is the religion of the federation, it has also been stated that this declaration would not derogate from other provisions of the Constitution. This is apparently perplexing; on the one hand the Constitution seems to declare Islam as the ideology or the faith of the nation but at the same time it has put restraint on the provision. But perhaps one should bear in mind the circumstances that prevailed during the constitutional negotiations way back in 1956–57.

It is a pity that the court – who has the role of clarifying the law that includes the provisions of the Constitution – has not been able to state clearly the scope of the provision concerned. In fact, the existing cases are not only conflicting but also do not display a clear and consistent stand on the provision on the part of the judiciary. As in the United States, the role to make rulings on constitutional issues is placed in the Federal Court – the highest court of the land – which virtually stands as the constitutional tribunal.

Despite the unclear impact of the provision, it is generally acceptable to say that Art. 3(1) provides the Federation with an identity; e.g. it is plausible to argue that by virtue of the provision it is not legal to conduct official functions in a manner contrary to Islamic teachings. The provision may also be cited as ground for the Islamic rites conducted to start the daily routines in parliament. In short, the scope of Art. 3(1) is enough to debunk argument that Malaysia or the Constitution is secular.

As a matter of law, one needs to go beyond Art. 3 when it comes to the position of Islam in the Constitution. Some of the relevant provisions include those concerning religious freedom, permissibility of using public funds for Islamic causes, the position of the *sharī'ah* courts,³¹ the non-application of emergency powers to Islamic matters³² as well as the state powers on religion within the federal framework

provided for by the Constitution.³³ One may also cite the constitutional provision which provides for the definition of what is a 'Malay', something which underlines the permissibility of acquiring the Malay or indigenous character that provides the qualification for certain privileges under the Constitution.

Issues pertaining to Islam are very much entangled in the issues involving the position of the rulers as well as the federal arrangement adopted by the Constitution. It can be recalled that the proposal to insert the declaration of Islam as the religion of the federation was met with apprehension by the rulers who feared that this would erode their position and powers with regard to Islam. Be that as it may, Islam and Malay custom were excluded from the purview of treaties between the rulers and the British during the nineteenth century.

It has to be said, however, that although Islam has been put under the jurisdiction of the states they have not been able to really assert their powers due to lack of expertise and financial resources. And this is quite inevitable given the central-biased nature of the federation that has put most of the resources and powers at the hands of the central authorities. Some of the states, namely the states which used to be part of Federated Malay States, even depend on the federal bureaucracy to carry out their routine state administration.

Islamic Institutions

Although Islam is a matter for the states, over the years the federal government has come to virtually take over the jurisdiction. While some of the institutions were created out of political expediency, some have come into being due to certain inherent problems within the federal set-up. The phenomenon may also allude to a certain amount of inability on the part of the rulers to assert their authority in matters pertaining to religion.

The most visible religious agency is obviously the Department of Religious Development (JAKIM), which is an agency under the purview of the Prime Minister. As it stands, the department is more of the religious wing of the ruling party. This is quite contrary to the recommendation of the White Paper which said that it should be put under the control of the Conference of Rulers. Apart from JAKIM, there is also the National Council of Religious Affairs chaired by the Prime Minister. Then, there is a National Fatwa Committee. Although this has no legal or constitutional basis, it has been able to influence public opinion when it comes to religious issues and controversies.

Apart from those department and councils, there are statutory bodies that have been created through parliament and ordinary laws. These include the Pilgrimage Board, the Islamic Foundation, the International Islamic University (IIUM) and so on. The Federal Government has also initiated the incorporation of *Bank Islam* and

an Islamic insurance company. Meanwhile, the government has set up religious schools throughout the country.

Moreover, although the Constitution has prevented the interference from the civil courts on the jurisdiction of the *shari'ah* courts the former actually are not barred from dealing with Islamic matters. This is due to the fact they have exclusive jurisdiction on the Constitution which are deeply immersed in Islam. It is to be noted that matters pertaining to Islamic banking have been put under the civil courts. As it has been alluded above, matters pertaining to Islam under the Constitution fall under the jurisdiction of the civil court – something which explains why cases dealing with apostasy and the right of Catholic Christians in the country to use the term 'Allāh' for 'God' in their publications have been dealt with by such courts.

The Position of Non-Muslims

The Constitution does *not* offer specific provisions pertaining to the position and rights of the non-Muslims. What the Constitution *does* provide are just provisions guaranteeing equality and non-discrimination. It also makes clear that religion and 'race' would not be used as the criteria for appointments to jobs and positions etc. When it comes to public service, the Constitution also guarantees impartial treatment.³⁴

However, unlike Islam, other religions are *not* entitled to government assistance. While there has been occasional assistance from the government, it is basically given on an *ad hoc* basis. Unlike the Islamic religion, non-Muslim clergy and priests do not receive salaries from the government. Having stated this, however, this does not mean that non-Muslims are not entitled to receive assistance. Indeed, from both the Islamic and democratic perspectives there are some good reasons to argue that the non-Muslims – who pay taxes, after all – should also receive state assistance. For one thing, the Constitution is silent and does not prohibit it.

The Constitution allows a non-Muslim Malay to be appointed as Prime Minister or a chief minister in the four states of Malacca, Penang, Sabah and Sarawak. Indeed they may also be appointed *menteri besar* (chief minister) in those nine Malay states if the rulers decided so.³⁵ As the law stands, there is no bar for non-Malays and non-Muslims from being appointed as the heads of state in the four states without rulers. That notwithstanding, it is not going to be easy for non-Muslims and non-Malays to become Prime Minister, for example. For one thing, it is difficult for them to win elections as their population has shrunk over the years. As it stands, the non-Muslim and non-Malay population stands at around 40 per cent. When the country attained independence in 1957 their population constituted slightly more than half of the entire population.

Given that, it seems quite difficult for the non-Muslims to assert equality. Furthermore, the Constitution has apparently put the Malays in a more commanding position. This includes the position of the Malays in the military which in turn dominates the composition of the public service. It has to be said however that the non-Muslims have been sensible and street wise over the years. They have never challenged the position of the indigenous elements. The cases they have taken to court were essentially those concerning their legitimate rights under the Constitution; such as the right to set up an educational institution funded by the private sector. It is heartening to note that in recent months there have been changes towards a more inclusive interpretation of Islam; both inside and outside the court.

State Bureaucracy

While it is the government of the day that has the final say over the routine governance the actual process is actually more complex than that. As in other Westminster systems government come and go but the polity remains. Whatever the shape and colour of the party or parties that form the government of the day, the nation – as symbolised by the monarchy and managed by the bureaucracy – remains.

In order to allow that to take place, the Constitution has provided for the creation of a neutral and competent public service. Instead of pledging their loyalty to the government of the day the Constitution expects them to be loyal to the nation as symbolised by HM the King, the *Yang di-Pertuan Agong*.³⁶ At the moment the number of public servants stands at around 1.3 million, and this includes members of the military and police force. Some of the mechanisms provided for by the Constitution are the service commission to deal with matters of appointment, promotion and discipline as well as the provisions which guarantee the security of tenure. But whatever the Constitution has to say, the fact remains that the huge majority of public servants are Malays and Muslims. There are various reasons for this state of affairs, such as the operation of certain constitutional provisions, particularly the one that reserves posts in the public service for the Malays.

As far as the religious establishment is concerned, it is put under the jurisdiction of the rulers. Included under this establishment are the mosques, religious departments, *bayt al-māl* (Muslim treasury), office of the *mufī* and so on. In the performance of their religious functions the rulers are assisted by the religious councils. Constitutionally speaking, the rulers, despite being constitutional monarchs, are not bound by the advice of the government of the day.

Unlike the situation in the United States, whereby the Constitution put fundamentals of democracy – the right to freedom of speech and expression, the

right to peaceful assembly and to form associations – beyond the reach of the legislature, the Malaysian Constitution has somehow allowed parliament to curb those rights. This has had quite a negative impact on democracy and governance in Malaysia. This underlines the reason why the demands for the abolition of certain restrictive laws, such as the Printing and Presses Act, the University and University College Act (UUCA), the Police Act, as well as the Society Act, are increasing. At the same time, there have been calls for the enactment of laws, such as the Freedom of Information Act and the repeal of the Official Secrets Act. Generally speaking, people are more aware to have a more transparent and accountable administration which stands at the very heart of the modern concept of governance.

How does Islam contribute to these issues? As a matter of fact, Islam stands at the very heart of all those issues – something which was unmistakably clear from the precedents laid down by the Prophet and his successors. Given the nature of Islam which encompasses *all* aspects of life, it is not quite possible to confine Islamic teachings to matters of rituals alone. This is perhaps something that could explain why the federal authorities – despite the federal division of powers – have somewhat encroached into matters pertaining to Islam which have been reserved for the states. As the Muslims are in the majority, they would like their banking, education or even internal security being conducted in the Islamic manner. It is interesting to note that in a recent decision the court declared it was wrong for the federal government to detain a blogger, who – they claimed – had insulted Islam. The court ruled that as Islam has been put under the rulers' jurisdiction, the federal police were wrong to detain him. The decision was, however, an exception.

Islam and Governance in Malaysia

One of the standard remarks made about Islam and public governance in Malaysia in recent years is that it is worrying; i.e. that it has had the impact of secularising the Constitution and this would have an adverse impact on the position of the non-Muslims in the country. One also finds assertions which contend that the increased tendency towards 'Islamisation' in the country has been due to the UMNO-PAS rivalry and their attempt to 'reach out' to their mostly rural Malay Muslim constituencies. Given the position of Islam in the Constitution, which is essentially the recognition of both history as well as the socio-political realities in the country, such remarks are obviously quite inaccurate.

Whatever one has to say about the alleged rise of 'Islamisation', the fact remains that efforts and policies favouring Islam were actually beginning under the administration of Malaysia's first Prime Minister, Tunku Abdul Rahman. This includes the annual Qur'ān recitation competition, the setting up of the Pilgrimage Fund Board,

as well as the Religious Division under the Prime Minister's Department, which is now known as JAKIM. These efforts were later continued by the succeeding administrations. Thus when the policy of infusing 'Islamic values' in public governance was put in place by the former Mahathir administration in the early 1980s, it was virtually just another version of commitment on the part of the government to 'promote Islam'. The same could be said about the policy of *Islam Hadhari*, pursued by the Abdullah Ahmad Badawi administration between 2003 and 2008. From the Constitution's point of view, what is important is that all these efforts should be within the framework of the legal provisions.

The position of the *shari'ah* courts is another issue that has been cited to show that the Islamic fundamentalism in on the rise. It has to be pointed out that the enhanced position of the court has been done through a proper constitutional amendment in 1988. In any case, it was just a clarification of a position that has been in existence even before independence. In the meantime, the systemisation of such courts – culminating with the creation of the federal-sponsored Islamic Court of Appeals (JKSM) – actually started with the setting-up of various committees during the mid 1980s.

Another issue that has attracted wide international attention is the issue of apostasy among Muslims. One must bear in mind that whatever be one's position, elsewhere the Constitution has provided – right from 1957 – the framework that can be used to criminalise it. As the law now stands, apostasy is a crime according to Islamic law which is penalised under the Malaysian legal system. While this position may not be compatible with international public opinion (and with the United Nations Charter of Human Rights, for that matter, of which Malaysia is a signatory), one needs to bear in mind the position of the Malaysian Constitution: the definition and concept of 'Malayness' has been closely linked with the Islamic faith. This, in turn, is crucial when it comes to provisions pertaining to the 'privileges' accorded to the Malays, as well as the right to succeed for the heirs to the throne in the Malay states. Interestingly enough, the National Human Rights Act 1999 has made it clear that reference to the Universal Declaration of Human Rights of 1948 can only be made if such is consistent with the Constitution of Malaysia.

Perhaps it is necessary to state that the system is also not always favourable to the Muslims. Court decisions, such as *Meor Atiqulrahman*, *Hajah Halimaton Saadiah*,³⁷ and *Jamaluddin bin Othman*,³⁸ are some of the examples whereby Islam and Muslims have taken quite a backseat. These cases show that *Lina Joy*³⁹ – whereby apostasy was not upheld as a matter of right – is not quite the general trend. One should also bear in mind that the recent High Court decision⁴⁰ in the *Catholic Herald* issue – on the use of Allāh among the non-Muslims – was not quite warmly received by the majority of the country's Muslims.

Concluding Remarks and Recommendations

Contrary to public perception, the issue of Islam is obviously quite central to the Constitution. Indeed, it may be said that Islam forms part of the essence and foundation of the constitutional framework.

- Therefore, in future, any kind of ‘Islamisation policies’ should proceed *within* the existing framework of the Constitution.
- That being the position, there is thus no question of ‘Islamisation through the back door’ or that Islamic programmes and policies should be the result of rivalry between Malay-Muslim parties to put up more ‘Islamic credentials’ (although I am well aware of the fact that a very large number of people of all faiths in and outside the country will arrive at a different conclusion). As such it is plausible to say that given the nature of the provisions in the Constitution most of the Islamic programmes and policies have been carried out within those limitations and framework. And the good news is that in the aftermath of the 2008 General Elections it is no longer possible to amend the Constitution the way it was done before.
- Of no less importance is the fact that the people – especially the non-Muslims – are more aware of their rights, particularly those enshrined in the Malaysian Constitution. This should not be seen as a threat by the authorities and the Muslim community at large, but rather as a change for true nation-building. This writer would even argue that the recent controversial decision pertaining to the *Catholic Herald* permit shows that the Constitution has actually provided enough space for the non-Muslims to assert their rights.
- However, it remains to be seen whether those rights will actually be granted in practice by the relevant authorities, as the *Lina Joy* court decision – and its aftermath, i.e. the public criticism of that decision in the media and elsewhere – has also shown.

In closing then, this author would argue that the *Catholic Herald* controversy, for example, has also underlined that a substantial section within the Muslim community understands and is willing to adopt a more inclusive interpretation of Islam to accommodate their non-Muslim fellow citizens.

Notes

1. For the provisions and cases on the Federal Constitution of Malaysia see Abdul Aziz Bari and Farid Sufian Shuaib, *Constitution of Malaysia: Text and Commentary* (Kuala Lumpur: Pearson-Prentice Hall, 2009, 3rd ed.). For an overview of the Constitution see, e.g., Abdul Aziz Bari, *Malaysian Constitution: A Critical Introduction* (Kuala Lumpur: The Other Press, 2003).

2. Federal Constitution, Art. 3(1). See Abdul Aziz Bari, *Islam dalam Perlembagaan Malaysia* (Petaling Jaya: iMAP, 2005). See also Shamrahayu A. Aziz, "Islam as the Religion of the Federation: Its Scope and Implication" (2006) 14 IIUMLJ 33.
3. Federal Constitution, Art. 11(4).
4. *Ibid.*, Art. 12(2).
5. See Ahmad Ibrahim and Ahilemah Joned, *The Malaysian Legal System* (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1987).
6. See Abdul Aziz Bari, "Westminster System in Asia: The Malaysian Variation", *US-China Law Review* 4, no.1 (2007), 1–8 and 16.
7. For more on this see, e.g., Farid Sufian Shuaib, *Syariah Courts in Malaysia: Power and Jurisdiction* (Kuala Lumpur: LexisNexis, 2007, 2nd ed.).
8. For more on this see, e.g. Visu Sinnadurai, "Yang di-Pertuan Agong: The Appointment Process under the Federal Constitution" [1989] 1 SCJ 65. See also, Tunku Sofeah Jewa, Salleh Buang and Yaacob Hussain Marican (eds), *Tun Mohamed Suffian. An Introduction to the Constitution of Malaysia* (Petaling Jaya: Pacifica Publications, 2007, 3rd ed.), 28–37.
9. See Syed Muhammad Naquib al-Attas, *Islam dalam Sejarah dan Kebudayaan Melayu* (Kuala Lumpur: Penerbit UKM, 1972). See also his *Islam and Secularism* (Kuala Lumpur: ABIM, 1978), 161–75.
10. See cases such as *Mighell v Sultan of Johore* [1894] AC 194, *Duff Development* [1924] AC 797 and *Pahang Consolidated Company* [1932] MLJ 47.
11. For more on this see Rupert Emerson, *Malaysia: A Study in Direct and Indirect Rule* (Kuala Lumpur: University of Malaya Press, 1970).
12. See Colonial Office, *Report of the Federation of Malaya Constitutional Commission 1957* (London: HMSO, 1957), Cmnd. no. 330.
13. See Colonial Office, *Constitutional Proposals for the Federation of Malaya* (London: HMSO, 1957) Cmnd. no. 210.
14. Federal Constitution, Art. 150.
15. *Ibid.*, Art. 149.
16. *Ibid.*, Arts 128 and 130.
17. For some insights, see e.g. H.P. Lee, *Constitutional Conflicts in Contemporary Malaysia* (Kuala Lumpur: Oxford University Press, 1995), 43–85.
18. Federal Constitution, Art. 152.
19. *Ibid.*, Art. 153.
20. *Sagong bin Tasi and Ors v Kerajaan Negeri Selangor* [2002] 2 MLJ 59 and [2005] 6 MLJ 28.
21. *Meor Atiquhrahman bin Ishak v Fatimah bte Sihi* [2006] 4 MLJ 605.
22. Federal Constitution, Art. 8.
23. *Ibid.*, Art. 8(5)(f).
24. *Ibid.*, Art. 8(5)(a).
25. *Ibid.*, Art. 8(5)(e).
26. *Ibid.*, Art. 38. See also Abdul Aziz Bari, *Majlis Raja-Raja: Kedudukan dan Peranan dalam Perlembagaan* (Kuala Lumpur: Dewan Bahasa dan Pustaka, 2002).
27. Federal Constitution, Art. 152(1).
28. *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356.
29. *Mohammad Syawwaal bin Mohammad Nizar and Ors v Kerajaan Malaysia* (Ref: Mahkamah Tinggi Kuala Lumpur Saman Pemula No. R2-24-05-06).
30. For some insights, see e.g. Shamrahayu A. Aziz, "Islam as the Religion of Malaysian Federation: Its Scope and Implications" (2006) 14 IIUMLJ 33.
31. Federal Constitution, Art. 121(1)(a).
32. *Ibid.*, Art. 150(6)(a).
33. *Ibid.*, Ninth Schedule, List II – State List.
34. *Ibid.*, Art. 136.
35. See, e.g., *Laws of the Constitution of Johor*, Art. 4(4).

36. See Abdul Aziz Bari, “The Monarchy and State Governing”, in: Abdul Razak Baginda (ed.), *Governing Malaysia* (Kuala Lumpur: MSRC, 2009), 75–90.
37. *Hjh Halimatussaadiah bte Hj Kamaruddin v Public Service Commission, Malaysia and Anor* [1994] 3 MLJ 61.
38. *Jamaluddin bin Othman v Menteri Hal Ehwal Dalam Negeri, Malaysia and Anor* [1989] 1 MLJ 368.
39. *Lina Joy v Majlis Agama Islam Wilayah Persekutuan and Ors* [2007] 4 MLJ 585.
40. *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri and Anor (No.2)* [2010] 2 CLJ 258.