

On Modernity, Democracy, and Secularism: Reflections on the Malaysian Experience*

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Abstract

As a myriad of challenges confront today's Muslims, some modernists believe the solution lies in democracy. However, they are divided on the strategy of making democracy take root in Muslim countries. Inspired by Turkey, a number of modernists call for the secularisation of the political system. Specifically, they propose that Islam is confined to a private creed, without legal, political, or economic influence in the government. Some even take a position that secularism is the sine qua non of democracy and modernity. This article is a reaction to this proposition by reflecting on Malaysia's experience with democracy and modernisation. As background, the article discusses briefly the ongoing debate on the compatibility of Islam and democracy. It then looks at Art 4 of the Malaysian Constitution to assess the extent to which Malaysia can be called a secular state before concluding that the Malaysian system is a mixed one where, as a matter of constitutional law, Malaysia is a parliamentary democracy with strong secular and Islamic institutions. In discussion that follows, the article offers analysis of several of the reasons why secular and Islamic traditions have enjoyed a peaceful co-existence. The article also evaluates measures put in place by the Malaysian Government to counter the growing appeal of political Islam during the 1980s that threatened the delicate balance between the secular and the religious. The article concludes by outlining some of the new challenges confronting Malaysia that must be addressed before the Malaysian system can mature as a viable alternative to the unbridled secularism of Turkey.

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I. Introduction: A Tribute to the Late Professor Ahmad Ibrahim

In early 2007, when I was asked to present a paper at the seminar on 'Ahmad Ibrahim: Pemikiran Dan Sumbangan Ilmiah', an event to honor the late Professor Tan Sri Ahmad Ibrahim, the picture of the late Professor with his *songkok* instantly came to mind. Indeed, the beloved late Cambridge-educated Professor was never seen in public without his *songkok*. His constant wearing of the *songkok* coupled with Western-styled attire suggested both cultural and religious significance as well as the co-existence of the secular and the religious in his mind. Regardless of what it could suggest, this image surfaces whenever I think of secularism in the Malaysian context.

Secularism, the theme of the paper I decided to present at the seminar, was one of the many areas of Professor Ahmad's scholarly interest. His article, 'The Position of Islam in the Constitution of Malaysia,' inspired subsequent academic writings on secularism in Malaysia. However, secularism was not a mere scholarly interest to Professor Ahmad; it was the subject covered by 'The Malaysian Legal System', a course he taught me when I was a first-year student at the Law Faculty, University of Malaya, decades ago. I recall arguments and counter arguments to support the proposition that Malaysia is a secular state. The interplay between Arts 3 and 4 of the Constitution was central to our class discussion. These two articles continue to be the focus of many scholars. Those and other Constitutional provisions, laws, and public policies that have emerged since I left Malaysia continue to fuel the secular versus Islamic state debate. The controversial *Lina Joy*¹ ruling by the Federal Court is still fresh in our minds.

Although central to my paper, I have decided to approach the subject differently. Instead of devoting my paper solely to the secular versus Islamic state debate, I thought bringing the themes of modernity and democracy into the discussion would be worthwhile. To be sure, many Muslim modernists take the position that secularism is the *sine qua non* of modernity and democracy. My paper is largely a reaction to this proposition.

What would Professor Ahmad say about democracy and modernity?

As far as I know, there is no record of Professor Ahmad's scholarly work on these two themes. If any such reference could be found, I am sure that he would have had some very interesting things to say.

¹ *Lina Joy v Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585.

What one can say is that he was a modern man who lived by democratic principles. And I know this as his former student, colleague, and co-author.

A modern man himself, Professor Ahmad worked tirelessly to modernise many areas of Malaysian law. There is insufficient space or time here to go into detail of his huge contributions to the modernisation of Malaysian law. Close to my heart is his work on improving the status of women. He was a man ahead of his time. Long before the feminist movement gained popularity and became fashionable, he established himself as a champion for women's rights. Indeed, the advancement of Malaysian women can be attributed directly to the vision, leadership, and work of Professor Ahmad.

What kind of a democrat was Professor Ahmad?

One answer can be found in how he approached his role as the Dean of the Law Faculty, University of Malaya from 1972 to 1983. There he adopted an open and democratic style. Not once did he let the superiority of his knowledge stand in the way of his relationships with his young academic staff. We were encouraged to speak our minds and were given a great degree of freedom in shaping and running our courses. His commitments to democratic values were not limited to these simple gestures. He modernised the famous lexicon of democracy 'all men are created equal' to read as 'all persons are created equal', ensuring that regardless of their gender, all were treated equally. I was a beneficiary of his egalitarian spirit when I, as a 25 year-old, was invited to collaborate in the writing of *The Malaysian Legal System*.² Obviously, he believed that despite the disparities in our positions, status, and wisdom, I, a junior member of his academic staff, could contribute significantly to the book.

As a tribute to such a modern and democratic man, I have therefore decided to focus my paper on the relationship between modernity and democracy, on the one hand, and secularism, on the other. On the assumption that democracy is necessary for Muslim countries to modernise, I would like to show that strict secularism as adopted by Turkey may not be necessary for democracy to take root. Using Malaysia as an example, I offer a third way for Muslim countries that wish to modernize, and yet want to avoid the Turkish model of unbridled secularism. That third way is a blend of a secular and Islamic system.

² Ibrahim, A & Joned, A, *The Malaysian Legal System* (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1987).

The story of Malaysia's transformation from a former British colony to its modern state now impacted me and others in my generation in a deeply personal way. In a sense, Malaysia's journey was my own journey.

Needless to say, Professor Ahmad played a critical role in that journey. As the founding Dean of University of Malaya's Law Faculty and that of International Islamic University, and through his many contributions in the area of legal reform as well as his selfless and tireless service to the nation, he has left us a legacy of deep respect for the rule of law and legal institutions as well as legal fraternity, from which we can build in order to achieve greater heights as we continue to modernize and democratise. As Malaysia celebrates her accomplishments, a paper that reflects on Malaysia's journey can remind us of the many contributions of this great man.

If Professor Ahmad were alive today, how might he respond to this paper? I would rather not speculate, knowing well that I have attempted to deal with a complex and difficult issue without any background in political science or Islamic study. However, I hope he would see that living abroad has made me even more appreciative of the blessings of this country of ours.

II. Islam and Democracy: The Ongoing Debate

The Muslim world is in disarray. Iraq continues to be plagued by the Sunni-Shiite violent conflict. In Darfur, Sudan, the story is more or less the same, while in Iran, nuclear ambitions, rather than economic development, seem to have become the national obsession. Elsewhere in the world, Muslims are subject to repressive governments, failed economies, or social injustices.

Indeed, there is a myriad of problems confronting today's Muslims, with no clear consensus on the best solutions. Tun Dr Mahathir Mohamad passionately calls upon Muslims to put aside their differences and in unity return to the noble teachings of Islam.³ For his part, and deeply troubled by the current portrayal of Muslims as violent, extremist, and intolerant, former Prime Minister Dato' Seri Abdullah Badawi advocates *Islam Hadhari*, an approach for bringing Muslims to the primacy values and principles that formed the foundation of Islamic civilisation.⁴ Elsewhere, Islamic scholars and thinkers link

³ Mohamad, M, 'Returning to Islam's Roots' in *Far Eastern Economic Review*, October 9, 2003, at p 34.

⁴ See, eg, Badawi, B, 'Islam Hadhari' (2005) 1 *Malaysian Management Review* 40 at p 64.

many of the problems confronting Muslims to their root - the inability of Muslims to reconcile Islam and modernity. As such, the answer then would likely be to develop modern interpretations of Islamic principles so that they can be adapted to new situations and realities. George W Bush proposed a different solution to the crisis: the democratization of Muslim countries. Thus was born the Freedom Agenda, the post-September 11 American foreign policy that promotes democracy around the world regardless of the costs, in terms of lives and blood, to those involved. Critical of the Freedom Agenda, Barack Obama seeks a new approach to promoting democracy as he focuses on building bridges between the West and the Islamic world.⁵

Leaving aside George W Bush's Freedom Agenda or Barack Obama's new approach to democracy promotion, how do Muslims feel about democracy? To begin with, there has been no consensus among Muslims on the fundamental issue of the compatibility of Islam and democracy. The diverse views on this issue are reflected by the following words of John L Esposito:

[On democracy] a diversity of voices within the Islamic world are now debating issues of political participation. Secularists argue for the separation of religion and state. Rejectionists (both moderate and militant Muslims) maintain that Islam's forms of governance do not conform to democracy. King Fahd of Saudi Arabia says that 'the democratic system prevalent in the world is not appropriate in this region . . . The election system has no place in the Islamic creed, which calls for a government of advice and consultation and for the shepherd's openness to his flock, and holds the ruler fully responsible before his people.' Extremists agree, condemning any form of democracy as *haram*, forbidden, an idolatrous threat to God's rule (divine sovereignty). Their unholy wars to topple governments aim to impose an authoritarian 'Islamic' rule. Conservatives often argue that popular sovereignty contradicts the sovereignty of God, with the result that the alternative has often been some form of monarchy.⁶

As Muslim leaders and thinkers debate this issue, everyday Muslim citizens by far appear to be comfortable with democracy. Referring to a survey by Freedom House, a commentator asserts that many majority-Muslim countries

⁵ Carothers, T, 'Democracy Promotion Under Obama: Finding a Way Forward' *Policy Brief No: 77* (Washington, DC, Carnegie Endowment for International Peace, February 2009), available at <http://www.carnegieendowment.org/publications/?fa=view&id=22767&prog=zgp&proj=zdr1>.

⁶ Esposito, J, 'Practice and Theory', in *New Democracy Forum: Islam and the Challenge of Democracy - Can Individual rights and popular sovereignty take root in faith? Ten Responses*. Reprinted by Boston Review: A Political and Literary Forum, April/May 2003 Issue.

have moved toward democracy and freedom, a development that indicates that Muslims do not find democracy and Islam are indeed mutually exclusive. In the words of this commentator: '[T]he steady progress of record represents a powerful argument against the proposition that Islam is incompatible with democracy or that Islam is necessarily an impediment to the spread of freedom. Rather, the principal obstacle for further progress in the region remains an entrenched culture of political authoritarianism that predominates in the core countries of the Arab world.'⁷

Enlightened and modern political leaders view Islam and democracy as not at all incompatible. Some would even argue that a democratic system of government should be favored over other systems. According to Tun Dr Mahathir, '[T]he Prophet left it to his followers to choose a leader among themselves. One can say that a system where the leader is chosen by an electorate is much more Islamic than otherwise.'⁸ This democratic governing system is supported by what one writer calls Islam's 'anti-authoritarian streak that is evident in every Muslim land today.'⁹

To be sure, countries like Malaysia, Indonesia, Turkey, and Pakistan have all embraced democracy. Thus, the issue is not whether Islam and democracy are incompatible, but rather whether Arab countries, as opposed to Muslim countries, are willing to become democracies. It is not difficult to hold elections. The real challenge is how to make a democratic system take root.

Inspired by Turkey, many in the West believe secularism is the key. They contend that for a democratic system to work in Islamic countries, it is necessary to confine Islam to a private creed, without legal, political, or economic influence in the government. In their view, not only is secularism crucial for the sustenance of democracy, it will also bring Muslims to contemporary civilization. An editor of a major Turkish newspaper writes 'The West, led by the United States, sees that Turkey is the only country where Islam and democracy go hand in hand. They see a country with an overwhelming majority

⁷ Puddington, A, *Freedom in the World 2006: Middle East Program Amid Global Gains* (New York: Freedom House, 2005), available at <http://www.freedomhouse.org/uploads/pdf/essay2006.pdf>.

⁸ Mohamad, *supra*, n 3.

⁹ Zakaria, F, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (New York: WW Norton & Co, 2003) at p 124.

of Muslims can uphold contemporary values and establish a viable democratic system through secularism.’¹⁰

Many Muslims share this view. A few go as far as placing secularism as a precondition for democracy. In the words of a prominent Turkish academician, ‘if we didn’t have secularism, we wouldn’t have democracy.’¹¹ For them, secularism liberates people from the coercive powers of the state, while at the same time helping Muslims to find a new and better way of being religious. In an interview with a leading *New York Times* journalist, a prominent Iraqi spiritual leader called for a secular constitution for post-war Iraq because ‘if we separate religion from state, that would be the end of despotism and it would liberate religion as well as the human being.’ When young people come to religion, not because the state orders them to but because they feel it themselves in their hearts, it actually increases religious devotion.¹² The problem of the Middle East, according to this cleric, ‘cannot be solved unless all the states in the area become secular.’

Many more Muslims, on the other hand, disagree. They contend that separating religion from state is not possible because, unlike Christianity, life cannot be compartmentalised in the private and public spheres in Islam. They are also concerned with the opposition on the part of dogmatic scholars, making it impossible to achieve success. In the words of Tun Dr Mahathir:

[Muslim reformers] wanted to ‘modernize,’ to emulate the Europeans. Some went so far as to believe that only by discarding Islam and becoming secular could Muslims regain their pre-eminence. They achieved very little success in the face of strong opposition by the influential orthodox scholars. The problem was that some of the reformers were too influenced by the European concept of the separation of state and church. This may be possible in the Christian context. It is not the Muslim world.¹³

While secularism may be the bedrock of Turkey’s democracy, the experience of other countries tells a different story. In many of these countries, confused, if not abusive, secular governments have become associated with the persecution of Islamic organizations. Aspirations for a modern Islamic

¹⁰ Cevik, I, ‘Why Terrorists Target Turkey’, *The Wall Street Journal*, November 21, 2003.

¹¹ Boland, V, ‘In Ataturk’s Shadow: Guardians of a ‘secular religion’ standwatch over changing Turkey’, *Financial Times*, 3 May 2007.

¹² Friedman, T, ‘Dinner with the Sayyids’, *The New York Times*, 10 August 2003.

¹³ Muhamad, *supra*, n 3.

society have been mistaken for a quest for Taliban-like Islamic state. In these countries, the governments and elites stand accused of being anti-religious and secularism does not mean neutrality in religious matters.

At issue then is the following: is secularism crucial for democracy to take root in an Islamic country? An answer to this question can be found in Malaysia's experience with democracy. In the discussion that follows, this paper will argue that Malaysia is an example of a modern democratic society without strict separation of state and religion. Support for this position can be found in the text of the Constitution as well as the manner in which the Constitution has been lived. This compromise has allowed Malaysia to modernise, meet the challenge of extreme ideologies, build a prosperous nation, and pursue economic and social justice for all of its citizens.

III. The Malaysian Constitution: Construing Article 4

The term 'secularism' has been defined to mean 'the belief that religion and ecclesiastical affairs should not enter into the functions of the state'.¹⁴ A 'secular state,' therefore, refers to a state that is officially neutral in matters of religion, neither supporting nor opposing any particular religious beliefs or practices. Defined such, a secular state stands in sharp contrast to an 'Islamic state,' a state where God, rather than people or law, is supreme. In such a society, an Islamic moral order governs the legislative, political, and economic affairs of the society.¹⁵

With the foregoing definitions in mind, I discuss below the extent to which Malaysia can be called a secular state.

Like those of many other former British colonies, Malaysia's political and legal systems are based on Western secular models. The Constitution provides for federalism and a parliamentary system of government. It also declares its own supremacy – stating in Art 4 that '[t]his Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.' In addition

¹⁴ Webster Unabridged Dictionary.

¹⁵ Esposito, JL (ed), *The Oxford Dictionary of Islam* (New York: Oxford University Press, 2003). (4) The statement of the then Prime Minister Tunku Abdul Rahman on 1 May 1958 in the Legislative Council that 'I would like to make it clear that this country is *not* an Islamic state as it is generally understood. We merely provide that Islam shall be the official religion of the state.' The MCA position is available at <http://thenutgraph.com/mca-malaysia-is-a-secular-state>.

to proclaiming its own supremacy, Art 4 also subordinates the status of other laws, including Islamic law. Since in an Islamic state, God, rather than the country's constitution, is supreme, Art 4 counters the proposition that Malaysia is an Islamic state. In other words, Art 4 provides support for the idea of Malaysia as a secular state.

However, other provisions in the Constitution raise questions as to the nature of Malaysia's purported secularism. Consider, for example, Art 3, which declares Islam the religion of Malaysia. While Art 3 also reaffirms the right of non-Muslims to practice other religions, the status it accords Islam as 'the religion of the Federation' makes it possible for Muslim prayers to be offered at official functions. This status of Islam, furthermore, allows the federal and state governments to establish and maintain mosques and other Islamic institutions and incur the necessary expenditure for these purposes and spend money on the administration of Islamic law and affairs.

Based on the text of Art 3 and the resulting financial consequences of Islam's privileged status alone, it should be clear to one that neither the text nor the interpretation of the Constitution can support strict separation between state and religion in Malaysia.

How can this position be reconciled with the report of the Reid Constitutional Commission and other historical records making clear that the Constitution's framers intended Art 3 to have no effect on Malaysia's status as a secular state? Quoting the memorandum submitted by the Alliance, the report of the Reid Constitutional Commission stated 'the religion of Malaya shall be Islam. The observance of this principle shall not impose any disability on non-Muslim natives professing and practicing their religions and shall not imply that the State is not a secular state.'¹⁶ In response, one could contend that while the framers of the Constitution did indeed intend to establish a secular state, the

¹⁶ See, Ibrahim, A, 'The Position of Islam in the Constitution of Malaysia', in *Readings on Islam in Southeast Asia*, Ibrahim, A *et al*, (compilers) (Singapore, Institute of Southeast Asian Studies, 1985) at p 211. In addition the Reid Constitutional Commission, the Political Education Bureau of the Malaysian Chinese Party (MCA) supports its contention that Malaysia is a secular state by citing the following historical accounts and statements:

(1) The statement of the Alliance and Umno chief Tunku Abdul Rahman on 22 February 1957 when the Working Party, comprising the Alliance and the rulers' representatives and the High Commissioner, met to review the Reid Commission draft on the possibility of the provision on religion being misinterpreted. He told the Working Party that 'the whole Constitution was framed on the basis that the Federation would be a secular state.'

'secular state' envisioned by them required no strict separation between state and religion. Rather, the framers intended Islamic law and institutions would continue to govern the personal matters of Muslims, whereas secular law and institutions would govern other areas.

The former Supreme Court's decision in *Che Omar bin Che Soh v Public Prosecutor*¹⁷ has often been offered as support for the position that Malaysia is a secular state. One, however, can read the decision as merely reaffirming the limits imposed by the Constitution on the areas to which Islamic law is applicable as well as its territorial reach. After stating that Islamic law is only applied in 'a narrow confinement of marriage, divorce, and inheritance', the Court added 'the law in this country is still what it is today, secular law.' Reaffirming that in areas outside that 'narrow confinement of marriage, divorce, and inheritance' Muslims and non-Muslims are governed by *secular law* is not the same as saying that Malaysia is a *secular state*, as the term is commonly understood to mean.

What the ruling in *Che Omar* stands for is that there are two major legal systems that have prevailed in Malaysia - civil and Islamic.¹⁸ Where the Islamic system is supported by government funds, as permitted by the Constitution, Malaysia does not meet the strict definition of a secular state that requires a government to be neutral on religious matters.

(2) The failure of the Colonial Office to object at the London Constitutional talks in May 1957 to the inclusion of an official religion after being assured by the Alliance leaders that they 'had no intention of creating a Muslim theocracy and that Malaya would be a secular state'.

(3) The statement of Tun Tan Siew Sin on behalf the Alliance to the federal legislature pertaining to the inclusion of the official religion ... does not in any way derogate from the principle, which has always been accepted, that Malaya will be a secular state and that there would be complete freedom to practise any other religion.

The MCA position is available at <http://thenutgraph.com/mca-malaysia-is-a-secular-state>.

¹⁷ [1988] 2 MLJ 55.

¹⁸ *Che Omar* is an important decision for two other reasons. One reason relates to its discussion on the system that existed before the British's intervention and how the concept of human sovereignty was replaced by the concept of the ruler as God's representative on earth. The other reason pertains to its claim that 'all laws including administration of Islam law had to receive its validity through a secular fiat'. To a large extent, this statement is applicable to this day - legislation that codify Islamic law or legal principles derive their validity from Parliament or State legislative bodies, both of which are secular institutions. Note that there are other cases, such as *Mohd Habibullah v Faridah* [1993] 1 SCR 229, which have also reaffirmed the dual system. See, Hickling, RH, *Malaysian Public Law* (Petaling Jaya: Pelanduk Publications, 1997) at pp 92-93.

Based on the foregoing, an argument can be made that Malaysia is not a secular state in the strictest sense of the term.

We noted earlier that Art 4, which relegates Islamic law inferior to the Malaysian Constitution, counters the proposition that Malaysia is an Islamic state. This, however, does not stop three Malaysian prime ministers to proclaim otherwise. Two years ago, when he was Deputy Prime Minister, Datuk Seri Najib Tun Razak declared that Malaysia was an Islamic state and not a secular one - 'Islam is the official religion and we are an Islamic state ... We have never been secular ...'.¹⁹ This has been the position of other Malaysian leaders, including Tun Dr Mahathir, who declared that Malaysia was an Islamic state based on 'the opinion of *ulamaks* who had clarified what constituted an Islamic country'.²⁰ In the view of the former Prime Minister Datuk Seri Abdullah, Malaysia was an Islamic country because significant elements of the country's legal and administrative system have Islamic foundations.²¹

Clearly, what constitutes an Islamic state varies from people to people. For example, for Prime Minister Datuk Seri Najib Tun Razak, the criterion seems to be the status of Islam as the official religion of Malaysia. On the other hand, Tun Dr Mahathir would defer to the opinion of the *ulamaks*. Different tests may yet be used by future political leaders. These tests notwithstanding, as a constitutional matter, Malaysia has been established as a parliamentary democracy with strong secular and Islamic institutions. In other words, the Malaysian system is a mixed one. Such is also the view of Professor Dr Shad Salcem Faruqi of Universiti Teknologi Mara. Commenting on the 2007 statement of the then Deputy Prime Minister Datuk Seri Najib Razak to the effect that Malaysia is an Islamic, and not a secular state, Professor Faruqi stated that 'Malaysia is never secular but at the same time, it is not an Islamic state. We are neither here nor there. ... We walk the middle path ... We are a hybrid state. Our system are [sic] all mixed ...'.²²

¹⁹ 'Malaysia is an Islamic state, and has never been secular: Najib', *The New Sunday Times*, July 19, 2007. Available at www.bernama.com/bernama/v3/news_lite.php?id=273699.

²⁰ 'Dr M says it again: Malaysia is already an Islamic nation', *New StraitsTimes*, October 3, 2001.

²¹ Statement by then Deputy Prime Minister Abdullah Ahmad Badawi, *Utusan Malaysia*, October 1, 2001.

²² Reactions and comments to then Deputy Prime Minister Datuk Seri Najib's 2007 secular/Islamic state statement can be found at <http://newsgroups.derkeiler.com/Archive/Soc/soc.culture.malaysia/2007/07/msg00818.html>. See *supra*, n 17 and the accompanying text. The author of 'Islamic State v Secular State - The Malaysia case', likewise, of the same view, concluding, after analyzing *Che Omar*, that Malaysia is 'neither here nor there, neither Islamic nor secular.' The article is available at <http://www.legal-bytes.com/blog/?p=34>.

IV. More Than 50 Years of Co-Existence

For more than fifty years, secular and Islamic traditions have shared a co-existence that permitted Malaysia to modernise and democratise. To be sure, the constitutional underpinnings were critical for the co existence to be possible. However, these alone would have been inadequate; one must also appreciate the unique relationship between secularism and Islam in Malaysia's history and the role each has played in the different stages of Malaysia's modernisation. This subject merits a serious study. Pending that, I would submit that there are at least three reasons why secular and Islamic traditions have enjoyed a peaceful co-existence for more than 50 years.

One reason relates to the manner in which secularism came to Malaysia. Secularism did not come to Malaysia by force. As such, Malaysia's early experience with secularism was very different from that of Turkey or Iran during the reign of the last Shah. In Turkey, secularism was a result of a deliberate secularization process, embarked by Mustapha Kemal Ataturk to modernize Turkey following the demise of the Ottoman Empire. Ataturk's modernization process was particularly aggressive, as he was determined to 'westernise' Islam and remove it from public life and politics. He went as far as closing religious schools, imposing Western dress, and prohibiting women from wearing the veil.²³

In contrast, secularism did not come to Malaysia in order to secularize the Malays. Rather it was introduced by the British in order to take control of the administration of the Malay states and provide infrastructure needed to encourage economic enterprise.²⁴ One example was the introduction of a Western-based new tax system and centralised collection in Perak soon after the signing of the Pangkor Treaty.²⁵ The new tax system and subsequent secular institutions introduced contributed significantly to the rapid economic and political progress in Malaysia during the late 19th and first four decades of the 20th century. It was during this period that Malaya became the world's leading producer of tin and rubber, two commodities that formed the foundation of

²³ Armstrong, K, *The Battle for God* (New York: Ballentine Books, 2000) at pp 191-192.

²⁴ Khoo, KK, *Malay Society - Transformation & Democratization* (Petaling Jaya: Pelanduk Publications, 1991) at p 161. See also, Consolidation of the Colonial Regimes in Malaysia, in Bastin, J *et al*, *Malaysia: Selected Historical Readings* (Kuala Lumpur: Oxford University Press, 1996) at p 228.

²⁵ Andaya, BW and Andaya, LY, *A History of Malaysia* (London: Macmillan Education, 1982) at p 161.

Malaysia's export economy. Western-styled legislative and executive institutions were adopted to foster further economic development. The examples were the Federal Council (for the former Federated Malay State) and the State Councils (for the Unfederated Malay States). These institutions played important part in framing public policies, and in the long term contributed significantly to political education of Malaysians and helped to prepare the country for self-governing. Similarly, modern legislation based on principles of English law that were enacted played a crucial part in sustaining and stimulating commercial activities. In summary, while secular institutions were introduced by the British for their own interests, they played a critical role in Malaysia's economic and political developments.

The second reason relates to the attitude of the British towards Islam and Malay customs, which was 'one of extreme caution,' an attitude that was responsible for the policy not to 'intervene in all matters related to Islam or even Malay customs and traditions.' This policy was one result of their experience in India and in their other colonies. Presumably, the British wanted to avoid the pitfalls associated with forcing secular and external ideas against the grain of traditional values. This explains why no attempts were made to secularize the personal law of Muslims and traditional ties between the rulers and the *rakyat* were preserved.²⁶ At the heart of the British's Residential System was the concept of indirect rule, 'to preserve the accepted customs and traditions of the country, to enlist the sympathies and interests of the people of our assistance, and to teach them the advantages of good government and enlightened policy.'²⁷ Where possible, Islamic institutions were also preserved. As a result, Islam remained influential in politics and the public life of the Malays. More pertinently, the Malays had no reason to be hostile toward secularism or secular institutions, making it possible for the two systems to co-exist.

The third reason concerns how Islam came to the Malay world. Like secularism, Islam was not forced on the Malays. A consensus among historians is that Indian-Muslim traders brought Islam to the Malay world. Islam subsequently spread rapidly in the region upon the conversion to Islam by the Malacca sultanate in the early 15th century. Doctrinal simplicity of Islam, its tolerance and adaptability were appealing to the Malays.²⁸ As a result, they

²⁶ Khoo, *supra*, n 24 at p 128.

²⁷ Sadka, E, *The Protected Malay States, 1874-1895* at p 105, as quoted by Andaya, *supra*, n 25 at p 172.

²⁸ McAmis, RD, *Malay Muslims: The History and Challenge of Resurgent Islam In Southeast Asia* (Michigan: WMB Eerdmans Publishing Co, 2002) at p 13.

felt no compulsion to do away with practical and progressive elements of pre-Islam custom, and many survived to this day as part of Islamic family law. Borrowing from other traditions has never been an issue. There was cultural openness that, arguably, thrived under the British. One example was the requirement that students who attended secular schools also received religious education and retain their Malay culture. Thus, those who attended the Malay College at Kuala Kangsar wore 'the *baju, sarong* and *songkok*,' attended Koran classes and observed Muslim holidays despite 'the cricket, rugby, prefects and other trappings of the British public school image.'²⁹ The same applied to those who attended regular schools. Even though religious, the Malays did not consider such devotion would require the rejection of secular or Western culture and habits simply on the account that the latter were not Islamic. This attitude is another explanation for the peaceful co-existence between the two traditions.

V. The Rise of Political Islam of the 80's and Malaysia's Responses

Balancing the interests of elements in the society can be extremely challenging. World events in the Muslim heartlands can have profound impacts in Malaysia. This was certainly the case following the rise of political Islam in the 1980s. This era is important in the history of modern Malaysia. To counter religious extremism and intolerance associated with the era, the Government embarked on several aggressive industrialisation and modernisation programs. As a result, the middle class of Malaysia became enlarged, an element that is crucial for the future of democracy as well as stability in Malaysia. The accomplishments of this era show that, contrary to the claim of many, a country needs not be completely secular to be modern and democratic. Specifically, this era shows that, more so than secularism, what is needed is a government that is responsive to the desire and the inspirations of Muslims.

Malaysia's experience in the 1980s has certainly showed that modernity and democracy are possible without the Muslims turning their backs against Islam. A personal, albeit cursory, reflection on this era could be helpful.

After the 1979 Iranian Revolution, considered by many to be the rebirth of political Islam, Muslims across the Middle East and Southern Asia, many of whom were dismayed by what they saw as the excessive materialism and spiritual emptiness of rapidly advancing Western culture and values, began to see the 'Islamic state' as a way of reaffirming their own culture and values, as

²⁹ Andaya, *supra*, n 25 at p 229.

well as their personal identities. Coupled with their disappointment with the abilities of secular governments to govern and manage society, quite a number of educated Muslims began to see an Islamic state as a desirable alternative to a secular system.

Additionally, the generation of educated Malay-Muslims that came of age in the 1980s had more interest than our parents in an Islamic identity, believing it unnecessary to slavishly imitate the West in order to be modern. A large proportion of us, especially those from rural areas, owed our success to the government's New Economic Policy/National Development Policy, which gave us the opportunity to improve our economic status through, among other things, scholarships for higher education. We found modernity complex, however, and feared that without strong faith, there was a danger of losing ourselves. Many of us turned to religion for answers, and even became more religious than our own parents. This new religious fervor threatened the nation's delicate balance between Islam and secularism, and frightened non-Muslims. It also posed threats to the Government's development policies, because radical elements, albeit small in number, rejected modernity and technology altogether. Even more distressing was the way in which some radicals resorted to violence to promote their demands for a pure Islamic state, calling themselves the 'Army of Allah,' and attacking houses of worship of minority religions.

The Malaysian leadership understood the challenge and to its credit undertook several measures to respond to this new situation. First, and on the premise that economic development was fundamental to countering the growing appeal of religious extremism, the Malaysian leadership understood that efforts to eradicate rural poverty must continue. Additionally, in order to sustain economic growth, the Government formulated an aggressive industrialization and modernization program, a program that transformed Malaysia from a subsistence to an export economy.

Today, Malaysia has emerged as one of the most dynamic and rapidly-growing economies in the world. Not too long ago, the International Monetary Fund reported that Malaysia has made significant progress towards achieving advanced country status. Indeed, our material living standards are the envy of many.

To complement material developments and to demonstrate its commitment to Islam, Malaysia's political leaders embarked on an aggressive policy to absorb Islamic values in the government, especially those with 'the broader objectives of Islam which have universal appeal.' The Government undertook measures

to demonstrate that Islam was compatible with a modern economy, including the establishment of an Islamic Bank and the development of Islamic capital markets, offering innovative Sharia-compliant products as alternatives to their Western-based counterparts. This was followed by more efforts to modernize Islamic courts and develop the skills of Islamic judges. In the foreign-relations arena, Malaysia became more active in international Islamic organisations and meetings, thereby earning a reputation as a moderate voice in the Islamic world.

The Government's approach has been successful. Despite the rising tide of political Islam, Malaysia's Muslims today remain essentially moderate. Arguably, Malaysia offers another model for developing democracy in the Islamic world. Turkey, for example, bans traditional Muslim attire, including headscarves for women, at public functions. Malaysia imposes no such restrictions (except for those governed by Government General Orders circulars and other regulations). Malaysia pursues modernisation with a bold, progressive, and humane interpretation of Islam. Thus, Sharia-prescribed punishments such as whipping, stoning to death and Islamic amputation of limbs are rejected as 'cruel.' In a similar vein, a religious court ruling that allowed men to divorce their wives by simply sending them SMS text messages was overturned because 'it was contrary to Malay culture.' This is not to say that the battle with Islamic orthodoxy for progressive interpretation of Islamic principles is over. Indeed, it continues as recently demonstrated by the controversy over the prohibition against the practice of certain kinds of yoga practice.

VI. New Challenges to The Prevailing Balance

As Malaysia continues to modernize and democratize, more issues will certainly surface that cause societal tension and threaten to disturb the prevailing balance between secular and Islamic traditions. Indeed, these issues are aplenty and complex. One issue relates to attempts to expand the jurisdiction of the Syariah courts to cover matters beyond those listed in the relevant administration of Islamic law enactments. Proponents of the expansion rely on Art 121(1A) of the Malaysian Constitution. In particular, they contend Art 121 (1A), added by an amendment made in 1988 to Art 121, widens the jurisdiction of the Syariah courts to cover matters in item 1 of the State List. Applying what some commentators call 'the restrictive approach' to Art 121(1A) construction, the Supreme Court in *Latifah bte Mat Zin v Rosmawati bte Sharibun*,³⁰ rejected

³⁰ [2007] 5 MLJ 101. The court also stated at paras 50-53 that Art 121(1A) was intended to prevent any conflict in the future between the decisions of the Syariah courts and those of the civil courts; it was not intended to oust the jurisdiction of civil courts.

this contention. The Supreme Court held that a particular matter only falls under the jurisdiction of a Syariah Court when there is a statute that specifically confers such jurisdiction; whether or not the state legislature has power to enact law on such matter is not determinative.³¹ Undoubtedly, left unchecked, such expansion would tip the prevailing balance in favor of the religious.

Another challenging issue concerns the restrictions imposed on the freedom of Muslims to renounce Islam, which human right advocates argue violate several provisions of the Malaysian Constitution. Until recently, Muslims who sought to embrace a different religion had done so quietly, in large part to preserve family harmony or to avoid legal penalties. This option is no longer tolerable, and a number of Muslims look to the courts to uphold their right to religious freedom.³² The relevant communities then take sides, causing further tension that upsets the secular-religious balance.

As Muslims become more assertive of their religious freedom, the old fear that Malaysia will become a pure Islamic state returned to non-Muslims. Their specific fear is that the Islamisation of the Malaysian system would go beyond principles that have universal appeal and diminish their religious freedom. The renewed fear could also be linked to the September 11 attacks on the United States. While the attacks helped to discredit the Taliban-type religious intolerance, they failed to assure non-Muslims of their right to freely practice their religions. Inevitably, the issue of whether Malaysia is an Islamic state, once again, dominates the public debate, prompted the then Prime Minister

³¹ Depending on how it is construed, Art 121(1A) can have other far-reaching implications. This subject has been discussed extensively elsewhere. See *eg*, Hamzah, WA, and Bulan, R, *An Introduction to the Malaysian Legal System*, (Selangor: Penerbitan Fajar Bakti, 2003) at pp 207-209. Another good discussion on the problems posed by Art 121(1A) can be found in the transcript (available at <http://www.article11.org/Resources/Rapporteurreport.pdf>) of the proceedings of the forum on 'Federal Constitution: Protection for All', organised by Art 11 and the Malaysian Bar Council 12 March 2006, Petaling Jaya.

³² In *Lina Joy v Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585, the appellant, born Muslim, sought to renounce Islam and have the word 'Islam' on her national identity card removed, asserting she was no longer a Muslim and had converted to Christianity. Relying on certain provisions in the National Registration Regulations, the National Registration Department (NRD) refused to do so without a certification or order of the Syariah Court to that effect. The majority of the Federal Court ruled against the appellant, holding that NRD was legally justified in requiring that the appellant produce a certification or order of the Syariah Court to show that she had renounced Islam. The case raised several important constitutional issues, including the scope of Arts 8, 11, and 121(1A) of the Malaysian Constitution. For other conversion cases, see the transcript on the forum on 'Federal Constitution: Protection for All', *supra*, n 31.

Abdullah Badawi to call for religious moderation as well as the initiation and the reinforcement of interfaith dialogues. The renewed fear and the strategies to address it are explained as follows:

Since 11 September 2001, the issue of religious worship and freedom has become more pronounced in Malaysia and has provoked sentiments on whether the country is an Islamic state. This sentiment has prompted the Prime Minister to address Christians on Malaysia's position on religious freedom and the role of Christian and other communities in the country. His prescription is for religious moderation as he proclaims that as Prime Minister, he is not a leader of Muslims but a Muslim leader for all Malaysians. He cautions that a conflict between religion and civilization can lead to less trust and goodwill between Islam and Christianity. Hence, there is the need for a concerted effort to initiate and reinforce interfaith dialogues that were evident over the centuries.³³

To be sure, the foregoing are only some of the challenges confronting Malaysia. It would take all involved to address them. In addition to political leaders, democratic institutions, notably the judiciary, must step up to the plate to act with great courage to address these issues.

If democratic institutions play their respective roles, I am confident that the Malaysian political system will continue to mature as a viable alternative to the unbridled secularism of Turkey. For over 50 years, secular and Islamic traditions have co-existed in harmony, and I am confident that the spirit of accommodation and tolerance that binds us as a society would enable us to maintain the balance between the secular and the religious in years ahead.

As we ponder the future, two questions come to mind. First, aside from short-term gains to some politicians, are there real benefits to be derived from calling ours an Islamic state? When such a label brings about anxiety on the part of non-Muslims as well as moderate Muslims, would we be better off without it? Abdullahi Ahmed An-Na'im, a renowned Islamic scholar, argues the idea of an Islamic state is not based on Syariah or the Islamic tradition. Rather, it is based on the European idea of state and law.³⁴ As the notion of an Islamic state finds no support in Syariah or the Islamic traditions, there is a compelling reason for a multi-religious country like ours not to be identified as one.

³³ Chin, T, 'Editorial', *Malaysian Management Review*, *supra*, n 4.

³⁴ See, An-Na'im, AA, *Islam and the Secular State: Negotiating the Future of Shari'a* (Cambridge: Harvard University Press, 2008). An Na'im also argues Islam and the State should be separated.

The second question concerns the type of Islamic government that is desirable. My position is that a government that places the core teachings of Islam above all else is indeed Islamic. Beyond concepts and labels and the intellectual debate that they inspire, the former Prime Minister Datuk Seri Abdullah Badawi has the following to say:

A government that is just, a government that is trustworthy, that becomes people-centered, that is Islamic. That is a government everyone can accept, that non-Muslims can accept. So we must see what the government professes, what the government does, what the government effects, what are their concerns, and if it is good, that is Islamic. A government can have Islamic values, without the label of Islam. Between theatre and substance, I would declare more for the substance.³⁵

VII. Concluding Comments

There is now a broad consensus that the way forward is for Muslim countries to democratise and modernise. At issue is whether secularism is critical for both to occur. Using Turkey as a model, many in the West believe this to be the case. Turkey is a case of unbridled secularism that abides so strictly to the concept of separation of state and religion that the government has been accused of placing secular values above those of democracy; the banning of headscarves in schools and government offices is a case on point. Malaysia offers another model – a blend of a secular and Islamic system.

If this system has worked in Malaysia, it is because of Malaysia's unique history, constitution, dynamism, culture openness, as well as economic success. As such, the model may or may not work in other countries. Each country must find its own approach to progress. Above all, each country must have political leadership that is enlightened, committed and courageous. It is then, and only then, that a government can gain the trust of the Muslims to do what is required to meet the challenge of modernity.

³⁵ *The Financial Times*, 29 January 2007.

Kepentingan dan Perkembangan Hak untuk Mendapatkan Peguam Semasa Siasatan dalam Sistem Perundangan Jenayah di Malaysia*

Zulazhar bin Tahir**

Abstrak

Hak untuk mendapatkan peguam adalah hak yang amat penting dalam sesuatu perbicaraan jenayah. Oleh yang demikian, Art 5(3) Perlembagaan Persekutuan membenarkan seseorang yang ditangkap untuk berhubung dengan peguam pilihannya. Namun begitu, sebelum wujudnya Akta A1274, secara amalannya hak seseorang yang ditangkap tersebut bermula semasa beliau ditangkap tetapi tidak boleh dikuatkuasakan serta-merta. Selalunya, hak ini hanya diberikan selepas berakhirnya siasatan yang dijalankan oleh pihak berkuasa. Hak ini juga selalunya akan diketepikan atas alasan kehadiran peguam akan mengganggu proses siasatan yang sedang dijalankan. Malahan melalui keputusan-keputusan kes juga menunjukkan bahawa mahkamah turut bersetuju dengan apa yang berlaku. Akibat daripadanya, sering kali berlaku kes-kes kekasaran semasa siasatan terhadap tertuduh. Bagi mengelakkan daripada berlakunya kejadian-kejadian sebegini maka Akta A1274 telah diperkenalkan dengan harapan agar hak-hak seseorang yang ditangkap akan lebih terjamin. Artikel ini akan melihat perkembangan yang berlaku mengenai hak untuk mendapatkan peguam di Malaysia sebelum dan selepas pindaan. Selain daripada itu, kepentingan mengapa hak untuk mendapatkan peguam ini harus diberikan kepada tertuduh semasa ditangkap juga akan dibincangkan.

(Right to counsel is one very important right of an accused person in a criminal trial. Hence, Art 5(3) of the Federal Constitution allows a person arrested to have access to a counsel of his choice. Nevertheless,

* Artikel ini adalah sebahagian daripada hasil kajian PhD penulis yang sedang dijalankan.

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