

Freedom of Religion under the Malaysia Agreement and the Federal Constitution

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Background to the formation of Malaysia

The Federation of Malaysia came into existence in 1963 comprising Malaya, North Borneo (subsequently known as Sabah), Sarawak and Singapore. Malaysia was an 'artificial political creation'¹ due to the merging of interests of various groups namely the British and Malaysians. As a result of the Second World War, there was a shift in colonized peoples' perception of their European colonisers who had been defeated by Japan in many Asian territories. Europeans were unable to contain revolutionary movements in their colonies and the ensuing battles were a strain on their national treasuries which were financing the rebuilding of post-war Europe. Britain relinquished their hold over several colonies including Malaya by the late 1950s.

By the time Malaya gained independence, the British were confident that the leadership and most of the population were firmly anti-communist.² However the same could not be said of Singapore which was vital to British military interests not only under the Anglo-Malayan Defence Agreement 1957 which required Britain to protect Malaya mainly against the Communist insurgency, but also as part of its joint defence strategies with Australia and New Zealand. Singapore was granted self-government in 1959 but its political situation was unstable as the People's Action Party (PAP) which won the 1959 elections had a left-wing segment comprising trade union members who wished to use more radical means of achieving complete independence and social reform. This segment left the PAP in 1961 to form the Barisan Sosialis which had popular support, leaving the PAP with only a slight majority in government. The British suspected that Barisan Sosialis had been infiltrated by communists and were keen to support PAP leader Lee Kuan Yew known for his anti-communist views.³ They were not prepared to grant full independence to Singapore if the government was influenced by Communist propaganda as this would pose a threat to its military interests as well as to Malaya. The British were of the opinion that a merger with Malaya would address these threats sufficiently.

The Malayan government was opposed to the idea of a merger not only due to Singapore's political problems but also because it would tilt the ethnic balance in Malaya resulting in a Chinese majority in Malaya and Singapore. In order to make the idea of a merger between Malaya and Singapore more attractive, the British proposed that Sarawak, North Borneo and Brunei which were British dependencies would join Malaya and Singapore to reduce the possibility of a Chinese majority entity. The Malayan Government was prepared to consider the proposal as it feared a communist takeover of Singapore

¹ Tan Tai Yong, *Creating Greater Malaysia: Decolonization and the Politics of Merger* (Institute of Southeast Asian Studies, Singapore, 2008) 3.

² Anthony J Stockwell, 'Colonial Planning during World War Two: The Case of Malaya' (1974) 2 (3) *Journal of Imperial and Commonwealth History*, 141.

³ Milton Osborne, *Singapore and Malaysia* (Ithaca, 1964), 16-20

through Barisan Sosialis which would pose a threat to Malaya.⁴ The British were also concerned that if Sarawak, North Borneo and Brunei were granted independence, they would quickly be subject to territorial claims by Indonesia and the Philippines.

On 27 May 1961, at a Press luncheon in Singapore, Malaya's Prime Minister, Tunku Abdul Rahman spoke about the possibility of forming an association with Singapore, North Borneo and Sarawak. Representatives of Malaya, Singapore and the Borneo territories discussed the proposal further at the Commonwealth Parliamentary Association Regional Meeting in July 1961. As the representatives of the Borneo territories expressed doubts as to whether the proposed merger with Malaya would be acceptable to the locals, it was subsequently agreed that a commission of enquiry would be established to assess local opinion in North Borneo and Sarawak and subsequently make recommendations.⁵ The Malaysia Solidarity Consultative Committee (MSCC) chaired by Donald Stephens with members from Singapore, Malaya, North Borneo and Sarawak, was tasked to obtain the views of various groups in the Borneo Territories. Brunei representatives attended as observers and were not committee members.⁶

Initial views on official religion of Sarawak and religious freedom

The MSCC's memorandum stated that its aims and objectives formulated at its first meeting in Jesselton on 24th of August 1961 was to collect and collate views and opinions concerning the creation of Malaysia and to disseminate information on the question of Malaysia. It was also to initiate and encourage discussions on Malaysia and **to foster activities that would promote and expedite the realization of Malaysia.** The neutrality of the Commission was questionable in light of this clearly stated aim.

The Committee's Memorandum stated in para 13 entitled 'Islam as the Religion of the Federation and Religious Freedom', that it was satisfied that the acceptance of Islam as the religion of the Federation would not endanger religious freedom within Malaysia nor will it make Malaysia a State **less secular.** The MSCC went on to state that the present constitution of the Federation of Malaya would serve as a basis for the new federation and adequately guaranteed that other religions could be practised in peace and harmony and that every person would have the right to profess and practice his religion. Every religious group was assured of its right to manage its own religious affairs and to acquire and own property and hold and administer it in accordance with the law. The MSCC was referring article 3(1) of the Federal Constitution and article 11 (1) and (3). In para 14 the Committee examined the position of Islam and stated that it had no objection to North Borneo, Sarawak and Singapore adopting the same position as Penang and Malacca which were states without Malay rulers. The Constitution in each of these states (North Borneo, Sarawak and Singapore) would confer on the Yang di-Pertuan Agong the position of Head of the Muslim religion in the state. The state legislation would make laws for regulating Muslim religious affairs and for constituting a Council to advise the Yang di-Pertuan Agong in matters relating to the Muslim religion. Para 15 of the MSCC Report states that the Federal Constitution had firmly established constitutional guarantees for the people and that these guarantees would continue under the

⁴ Matthew Jones, 'Creating Malaysia: Singapore Security, the Borneo Territories, and the Contours of British Policy 1961 – 63' (2000) 28 (2) *Journal of Imperial and Commonwealth History* 85 – 109.

⁵ J M Gullick, *Malaysia and Its Neighbours* (Routledge and Kegan Paul Limited, London, 1967) 61.

⁶ Report of the Malayan Solidarity Consultative Committee 3 February 1962.

Constitution of the Federation of Malaysia. The Committee noted that Malaysians had recourse to the courts to invalidate any attempt by either the legislature or the executive to undermine those rights. The Committee therefore appeared to throw its full support behind supremacy of the Constitution of the Federation of Malaya under article 4 which would be retained by the Constitution of the Federation of Malaysia.

The MSCC's report was followed up with visits to Malaya by representatives of North Borneo and Sarawak sponsored by the Malayan government. These visits were aimed at showcasing the economic development in Malaya which would be extended to their own territories if they joined Malaya. As a result, the representatives from Sarawak and North Borneo began to perceive the formation of Malaysia in a favourable light. A White Paper was issued by the Sarawak leadership indicating the benefits of forming the Federation of Malaysia.⁷

Para 15 of this White Paper stated that locals were concerned as to whether the role of Islam as the official religion of the Federation of Malaya would affect religious freedom if Sarawak became a part of Malaysia. It stated that that **complete** freedom of religion would be guaranteed in the Federal Constitution and that **'Sarawak has at present no established religion and it would not be required to accept Islam as its State religion.'** A similar statement was made in Para 10 of the White Paper issued by the leadership of North Borneo.

The difference between the MSCC's statement and the White Paper issued by the leadership of Sarawak lies between para 14 of the MSCC's Report and Para 15 of the White Paper. The MSCC's report indicated that Sarawak would have the same status as Penang and Malacca; the Yang di-Pertuan Agong would be the Head of Islam in the State and the State Legislative Assembly (Council Negeri in Sarawak) would make laws to regulate Muslim religious affairs and constitute a council to advise His Majesty on matters related to Islam. The White Paper clearly stated that Sarawak has no established religion and would not be have to accept Islam as its State religion.

The implications of the differences between the MSCC and the White Paper are that the MSCC envisaged that articles 3 and 11 of the Constitution of Malaya provided sufficient safeguards for freedom of religion while the White Paper appeared to disregard articles 3 and the safeguards under article 11. Furthermore, the MSCC envisaged that Islam would be the state religion in Sarawak while the White Paper rejected this recommendation outright and adding that there was no requirement for Sarawak to accept Islam as its State religion. The difference between the MSCC's report issued in 3 February 1962 and the White Paper issued in January 1962, raises questions about the true nature of local opinions on freedom of religion in Sarawak. The Deputy Under-Secretary at the Colonial Office stated in his tour of Borneo in January 1962 he found that '...apart from Malays in Sarawak great majority of population of

⁷ HMSO, 'Malaysia and Sarawak' (Kuching: Government Printing Office, 1962)

both colonies is at present opposed to Malaysia now...What is said by hospitably entertained delegates in Kuala Lumpur is no safe indication of opinion in these territories.⁸

Recommendations pertaining to freedom or religion in the Cobbold Commission's Report

As a result of the British and Malayan agreement to enter into discussions on the merger of North Borneo and Sarawak, a commission of enquiry was established comprising delegates from both nations. The Commission of Enquiry was headed by Lord Cameron Cobbold former governor of the Bank of England and was commonly known as the Cobbold Commission. Other members of the Commission were Anthony Abell and David Watherson who were representatives of the British government and Ghazali Shafie and Wong Pow Nee who were representatives of the Malayan government.

Prior to the commencement of the Commission's work, the Sarawak White Paper had been translated into major languages and residents and district officers were given instructions to distribute it as widely as possible. The challenge however was to explain the complex merger proposal to locals in rural areas and elicit their views as many of them were illiterate. The Commission found that in urban areas, the government's administrative staff had to ensure that the public was not misled.⁹ There was tension between Malayan members of the Commission and British officers in North Borneo and Sarawak as Tunku Abdul Rahman envisaged that the role of the Commission was to work out constitutional details while the British government envisaged that it was to assess the views of locals in North Borneo and Sarawak to the proposals.¹⁰

The Commission reported that non-Malay natives in certain parts of the country had unhappy recollections of Brunei domination in the past which they equated with Malay domination a perception exacerbated by the proposed name of 'Malaysia' for the new federation, Malay as the national language and Islam as the national religion.¹¹ There were also differences of opinion towards several issues including the acceptance of Islam as the national religion for Malaysia as a whole and in particular, its application to Sarawak.¹² The Ibans in the Third Division presented resolutions to the Commission amongst which was freedom of religious worship.¹³ In more remote areas, the Ibans who opposed the proposal expressed their fears of Malay domination of Sarawak and stressed that they wanted to be treated as equals by the Malayan government.¹⁴ The Ibans in the Second Division reiterated many of the views of the Third Division Ibans but emphasized the need for freedom of religion as 'there is at present, i.e., freedom to profess, practice and propagate any religion. There was a general feelings that Sarawak

⁸ Martin to Lord Perth, 31 Jan 1962. Goode papers, box 2, file 1 cited in Matthew Jones, 'Creating Malaysia: Singapore Security, the Borneo Territories, and the Contours of British Policy 1961 – 63' (2000) 28 (2) *Journal of Imperial and Commonwealth History* at p92.

⁹ Cobbold Report Section B paras 15 – 16.

¹⁰ Matthew Jones, *Conflict and Confrontation in Southeast Asia, 1961 – 65: Britain, the United States and the Creation of Malaysia* (Cambridge, Cambridge University Press, 2001) 80.

¹¹ Cobbold Report Section C 'Political Developments and Racial Relations' para 23.

¹² Cobbold Report Section D, 'General Observations on Evidence', para 38 (b).

¹³ Cobbold Report Section E, 'Summary of Evidence from Various Racial Groups and Political Parties' para 42 (6)

¹⁴ Cobbold Report Section E, 'Summary of Evidence from Various Racial Groups and Political Parties' para 46

should be a secular State and the suggestion was made that if Muslims were given assistance from Federal funds, other religions – Christianity was specially mentioned – should enjoy similar treatment.¹⁵

The Malays were the second largest native groups who were concentrated mainly in the First Division. The Commission noted that they were mostly in favour of the proposed merger and in their opinion, Islam should be the national religion, but there should be freedom for other religions.¹⁶ The Melanau's of which 70 percent are Muslims were also in favour of the merger but non-Muslim Melanau's were opposed to a State religion for Sarawak.¹⁷ The Kedayans the majority of whom were Muslims also viewed the proposed merger in the same light as the Malays although they wanted their local customs safeguarded.¹⁸ Land Dayaks, Kenyah, Kayan, Muruts and Bisayahs were generally not in favour of the proposed merger as they did not want independence or they wanted more time to think over the proposal. The Muruts also known as Lun Bawang, a large number of which were evangelical Christians emphasized freedom of worship and **freedom to propagate** their faith.¹⁹

Where political parties were concerned, Sarawak United Peoples' Party (SUPP) which was predominantly Chinese were against the merger and specifically stated that they were not agreeable to Islam as the national religion or Malay as the national language.²⁰ The Committee noted that the Chinese who were not members of SUPP held the same view but the Commission deduced that they were influenced by SUPP which the Commission felt had been infiltrated by Communist elements. The Sarawak National Party (SNAP) which comprised predominantly Ibans made the point that the Constitution of Malaysia had to guarantee freedom of conscience and the right to profess, practice and **propagate** any religion freely.²¹

The recurrent themes put forward by all groups which made representation to the Commission showed concern over immigration, special privileges, preservation of native culture, official language and religion. The Commission's Report indicated that freedom of religion and the role of Islam as the official religion of Malaysia was split between Muslims and non-Muslim natives regardless of their cultural background. Non-Muslims were opposed to a state religion for Sarawak and some pressed for freedom of religion and propagation while Muslims showed a preference for Islam as the national religion but indicated that freedom for others to practice their own religion. Clearly, religion was a major issue for the people of Sarawak. There was also much anxiety over domination by the Federation of Malaya and that Sarawak would not be accepted on equal terms.

The Cobbold Commission's work extended from February to April 1962. At the end of March 1962, Lord Cobbold, writing to the Colonial secretary stated that '...the bulk of the population would prefer to see continuation of British rule...almost every utterance from Malaya tends to confirm suspicions here that

¹⁵ Cobbold Report Section E, 'Summary of Evidence from Various Racial Groups and Political Parties' para 49 (g)

¹⁶ Cobbold Report Section E, 'Summary of Evidence from Various Racial Groups and Political Parties' para 54 (j)

¹⁷ Cobbold Report Section E, 'Summary of Evidence from Various Racial Groups and Political Parties' para 60

¹⁸ Cobbold Report Section E, 'Summary of Evidence from Various Racial Groups and Political Parties' para 69

¹⁹ Cobbold Report Section E, 'Summary of Evidence from Various Racial Groups and Political Parties' paras 66 – 72.

²⁰ Cobbold Report Section E, 'Summary of Evidence from Various Racial Groups and Political Parties' para 80 (e)

²¹ Cobbold Report Section E, 'Summary of Evidence from Various Racial Groups and Political Parties' para 90 (j)

the Malayan Government intends to gobble up Sarawak quickly on their own terms...'²² The British members of the Commission felt very strongly that sufficient safeguards should be put in place to protect the people of Sarawak. One of the suggestions from the British members was to have a transitional period to hand over the administration of Sarawak to the new Malaysian government. The Malaysian government would in the meantime handle external affairs, defence and internal security for Sarawak and North Borneo.²³ Tunku Abdul Rahman objected to this proposal and made it clear through the Malayan members of the Commission that the Malayan government was prepared to end all discussions on the formation of Malaysia.²⁴ The British were keen to ensure the formation of Malaysia which would reduce the security threat in Singapore. As a result this recommendation was not included in the Cobbold Commission's final report. It is unclear whether other recommendations which were not acceptable to the Malayan government were also not included in the Report.

The Cobbold Commission made its recommendations in a final report to ministers on 21 June 1961. It was agreed by all members of the Commission that it would be impractical to draw up an entirely new constitution for the Federation of Malaysia. They also agreed that the states should be given autonomy and safeguards in certain matters which were not granted to states in Malaya. They also were anxious for a **'guarantee whereby no amendment, modification or withdrawal of whatever special powers or safeguards may be given can be made by Central Government without the positive concurrence of the Government of the State concerned.'** They also reiterated the principle that **the power of amending the Constitution of each State belongs exclusively to the people in the State.**²⁵

The Commission members were divided on the issue of religion. The Chairperson and British members found that non-Muslim communities were **most insistent that there should be complete religious freedom as to worship, education and propagation in the Borneo Territories.** They therefore recommended that the State Constitution specifically provide for such freedoms. They also reported that while Muslim communities welcomed article 3 of the Federal Constitution of Malaya, there was strong resistance from many non-Muslim communities to Islam as the official religion in spite of guarantees of freedom of religion. **Their view was that the people of the Borneo territories which had a non-Muslim majority should decide this matter at a later stage.** They recommended that the provisions pertaining to Islam as the official religion should not apply to North Borneo and Sarawak.

The Malayan members of the Commission held a different view noting that all Muslim communities welcomed the provisions on Islam as the official religion while a substantial number of non-Muslims did not object to the provision as they are satisfied that the provisions on fundamental liberties and freedom

²² Cobbold to Maudling, 31 March 1962, PREM 11/3866 cited in Matthew Jones, 'Creating Malaysia: Singapore Security, the Borneo Territories, and the Contours of British Policy 1961 – 63' (2000) 28 (2) *Journal of Imperial and Commonwealth History* 85 – 109, at 93.

²³ Memorandum by Anthony Abell and David Watherstone relating to arrangements for a transitional period to Lord Cobbold 21 June 1962, CO 1030/1028 no. 4 cited in Tan Tai Yong, '*Creating Greater Malaysia: Decolonization and the Politics of Merger*' (Institute of Southeast Asian Studies, Singapore, 2008) 164 – 165.

²⁴ Tunku to MacMillan, "The Tunku's Rejection of the Cobbold Report" 4 July 1962 PREM 11/3867 cited in Tan Tai Yong, '*Creating Greater Malaysia: Decolonization and the Politics of Merger*' (Institute of Southeast Asian Studies, Singapore, 2008) 165.

²⁵ Cobbold Report 'Recommendations' Section A para 148 (b)

of religion was adequate. The Malayan members noted that while a number of non-Muslims were anxious that there should be no national religion for the Federation, a great many of them were prepared to consider that Islam might be made the national religion **provided that it should not be the religion of their particular State**. The Malayan members after considering these views were agreed that Islam should be the national religion for the Federation as it does not jeopardise the freedom of religion in the Federation, **which in fact would be secular**. They were unable to make recommendations about strong objections by a small group of locals, to provisions in the Federal Constitution of Malaya that certain public expenditure may be incurred for Islamic purposes.²⁶

The tenor of the recommendations by Anthony Abell and David Watherston showed their concern over the views of the local population and although they recommended that North Borneo and Sarawak merge with Malaya, they stressed that due regard should be taken of the special position of the two territories, racial complications, their physical distance from Kuala Lumpur and their political immaturity compared with Malaya and Singapore. They stressed that the British government had very clear obligations towards the peoples of the two territories, in particular Sarawak, deriving particularly from the Cardinal Principles²⁷ enacted by the Rajah of Sarawak.²⁸ The Cardinal Principles stated that Sarawak was the heritage of the local people and held in trust for them. It emphasized social and education rights, protection for the people of Sarawak against rights inconsistent with their rights, easy access to justice, freedom of expression and worship, service by public servants, meritocracy, self-government in due course and a general policy to enable the people of Sarawak to live in happiness and harmony together.

The Inter-Governmental Committee's recommendations on constitutional arrangements for religious liberty

Although there were reservations by British administrators in North Borneo and Sarawak, the British and Malayan government issued a joint public statement on 1st August 1962 indicating that they would conclude a formal agreement within six months to transfer sovereignty of North Borneo, Sarawak and Singapore by 31 August 1963. It was also stated that detailed constitutional arrangements, including **safeguards for the special interests of North Borneo and Sarawak**, would be drawn up after consultation with the legislatures of the two territories. These safeguards would cover freedom of religion, education, representation in the Federal Parliament, the position of indigenous races, control of immigration, citizenship and the State Constitutions among other things.²⁹ It was decided that an Inter-Governmental Committee (IGC) would be established to work out constitutional arrangements for the creation of Malaysia. The Marquess of Lansdowne, British Minister of State for Colonial Affairs chaired the IGC which had several sub-committees comprising the constitutional, fiscal, legal and judicial, public service and departmental organization sub-committees. The other members of the IGC comprised the

²⁶ Cobbold Report 'Recommendations' Section A para 148 (e).

²⁷ Cobbold Report 'Recommendations by Sir Anthony Abell and Sir David Watherston' Section B paras 150 and 151.

²⁸ Preamble to Order No C-21 (Constitution of Sarawak) 1941; Sarawak (Constitution) Order in Council 1956.

²⁹ 'Joint Public Statement issued by the British and Malayan Governments on the 1st August 1962' in Inter-Governmental Committee Report, Annex C, p 67.

Deputy Prime Minister of Malaya who was vice-chairman of the Committee and representatives from North Borneo and Sarawak.

On 26 September 1962 the Council Negri of Sarawak (State Legislative Council) adopted a unanimous motion to welcome in principle the creation of Malaysia by 31 August 1963 on the understanding that the special interests of Sarawak would be safeguarded. The Council Negri listed 18 safeguards commonly known as “18 points” which were along similar lines to safeguards proposed by the North Borneo leading political parties. These were minimum safeguards demanded prior to merging with Malaya and covered religion, language, education and other matters of concern which had been raised before the Cobbold Commission.

The IGC’s proposals on freedom of religion were meant to reflect the findings of the Cobbold Commission which reported that with the exception of the Muslims, the majority of locals in North Borneo and Sarawak did not wish for any State Religion and wished for freedom to practice, worship and propagate their religion. Chapter 3 of the IGC Report sets out the proposed constitutional arrangements. The IGC recommended that article 3(1) should not be amended as it states that other religions may be practised in peace and harmony in any part of the Federation. Article 3 was interpreted by the IGC which also comprised Malayan representatives as a provision that permits freedom of religion in Malaya which would be extended to North Borneo and Sarawak after the formation of Malaysia. Under the heading of ‘Religion’ it was stated that the Heads of State in the Borneo States would not be the Head of the Muslim religion in the State. Furthermore, article 3(3) which read ‘The Constitution of the State of Malacca and Penang, shall each make provision for conferring on the Yang di-Pertuan Agong the position of Head of the Muslim religion in that State.’ should not be amended so as not to confer on the Yang di-Pertuan Agong the position of the Head of the Muslim religion in the Borneo States. The IGC Report also stated that the guarantee for religious freedom in article 11 of the Federal Constitution of Malaya would be retained. It was agreed that article 11(4) which permits State law to control or restrict the propagation of any religious doctrine or belief among persons professing the Muslim religion, would require a two-thirds majority vote of the total membership of the State Legislative Assembly. The restriction against article 11(4) applying to the Borneo Territories means that there was probably freedom to propagate to Muslims in Sarawak although there is no evidence that this was a widespread practice. This requirement was meant to act as a constitutional safeguard as it stipulated clearly that two-thirds of **total membership** of the State Legislative Assembly had to vote in favour of such a law.

The IGC also proposed that Federal Law should not provide special financial aid for the establishment of Muslim institutions or to instruct persons professing the Muslims religion in North Borneo and Sarawak without the State Government’s concurrence. In addition, the Federal Constitution should be amended to state that where Federal law provides for special financial aid for Muslim institutions or Muslim religious education in pursuance of article 12(2) the North Borneo and Sarawak governments should be given proportionate amounts for social welfare purposes in those states. Furthermore, article 38(2)(b) and (6)(d) dealing with the functions of the Conference of Rulers relating to religious acts, observances and ceremonies to the Federation as a whole should

not apply to the Borneo States.³⁰ The limitation on the role of the Conference of Rulers in article 38 (2)(b) and (6)(d) showed that the deliberations of the Conference should not apply to Sarawak. In other words, Sarawak's official religion was not Islam and it did not have any other official religion. The IGC recommended that any modifications to the special constitutional arrangements made in respect of a Borneo state should have additional safeguards which are; the consent of the State Government to these modifications in cases where this is required and that such amendments should only be to the extent of bringing the State in line with the states in Malaya.³¹

The Constitutional safeguards recommended by the IGC reflected that the issue of freedom of religion was so important to the locals, that it was specifically discussed and constitutional safeguards to prevent Islam from being the State religion were advocated. The reason as stated earlier had to do with Sarawak's history with Malay Muslims in Brunei which resulted in suspicion towards the religion of Islam. **It also reflected that the IGC did not view propagation of any religion to others of a different religion, as a threat to peace and harmony in Sarawak.**

Although the Chairman of the IGC voiced dissatisfaction that the proposed merger was too rushed for the local people to understand the issues properly³² the IGC Report was published on 27 February 1963. A treaty known as the Malaysia Agreement was signed between the United Kingdom, Malaya, Singapore, North Borneo and Sarawak was signed on 9 July 1963.³³

The Malaysia Act³⁴ was passed by Parliament together with amendments to the Federal Constitution to incorporate the constitutional amendments recommended by the IGC. Although article 1(2) of the Federal Constitution equates North Borneo and Sarawak with the other states in the Federation, there are many provisions which afforded greater constitutional safeguards to Sabah, Sarawak and to a lesser extent, Singapore. This is significant as it meant that there were four entities at the time of the formation of Malaysia comprising Malaya, Singapore, North Borneo and Sarawak.

Safeguards in the Malaysia Act 1963 pertaining to religious liberty

Article 3(2) of the Federal Constitution states that the Ruler of each State is the head of the Muslim religion. Article 3(3) requires the States of Malacca and Penang to provide in their respective constitutions for the Yang di-Pertuan Agong to be the head of the Muslim religion in those states. Section 7 of the Malaysia Act added 'Singapore' to the list of states in article 3(3) but North Borneo (known as Sabah in the Federal Constitution) and Sarawak were deliberately left out of article 3(3) in accordance with the recommendations of the IGC. Section 7(3) makes it clear that although the

³⁰ Report of the Inter-Governmental Committee, 1962, Chapter 3 'Proposed Constitutional Arrangements' pp9 - 10.

³¹ Report of the Inter-Governmental Committee, 1962, Chapter 3 'Proposed Constitutional Arrangements' pp28 – 29.

³² Tory to Commonwealth Relations Office, 3 September 1962, CO 1030/1038 cited in Tan Tai Yong, *'Creating Greater Malaysia: Decolonization and the Politics of Merger'* (Institute of Southeast Asian Studies, Singapore, 2008) 168.

³³ United Nations Treaty Series No 10760.

³⁴ Malaysia Act 1963 (no 26).

Conference of Rulers in article 38(2)(b) of the Federal Constitution has the authority to extend religious acts, observances and ceremonies to the Federation as a whole, this would not extend to Sabah and Sarawak. This provision was added in article 38(7) of the Federal Constitution. The Head of Sarawak known as 'Governor' (subsequently Yang di-Pertua Negeri³⁵) is defined in section 5 of the Malaysia Act as Head of State in a state not having a Ruler.³⁶

Section 64 of the Malaysia Act relates to Muslim education in Borneo States. Clause (1) states that 'No Act of Parliament which provides as respect a Borneo State for special financial aid for the establishment or maintenance of Muslim institutions or the instruction of the Muslim religion or persons professing that religion shall be passed without the consent of the Governor.' This means that any Act of Parliament referring to Borneo States which provides for financial aid to establish Muslim institutions (such as Baitulmal) or maintenance of such institution (such as Majlis Agama Islam) or instruction in the Muslim religion (this includes instruction of those prior to conversion and may cover propagation of Islam to non-Muslims) or instruction of persons professing that religion (religious classes in schools, religious classes for adults) shall not be passed without the consent of the Governor. Under Clause (2), if any such aid is given out of public funds, the Federal government would pay a sum to be applied for social welfare in Sabah and Sarawak. The sum was calculated based upon a formula laid out in clause (2) with reference to Clause (3). Section 64 was incorporated into Article 161C of the Federal Constitution.³⁷

Section 65 of the Malaysia Act states that 'Notwithstanding Clause (4) of Article 11, there may be included in the Constitution of a Borneo State, provision that an enactment of the State Legislature controlling or restricting the propagation of any religious doctrine or belief among persons professing the Muslim religion shall not be passed unless it is agreed to in the Legislative Assembly on second or third reading or on both by a specified majority not being a majority greater than two-thirds of the total number of members of the assembly.' Section 65 is slightly different from the IGC's recommendation. It implies that the Constitution of Sarawak may make provisions for an enactment of the State Legislature controlling or restricting the propagation of any religious doctrine or belief among Muslims. If the Sarawak Constitution does not so require, then any enactment to restrict propagation among Muslims requires a simple majority of the Council Negeri.

Section 66 of the Malaysia Act states that no amendment shall be made to the Constitution without the concurrence of the Governor of the Borneo States if it affects the operation of the Constitution regarding several matters, one of which is the religion of the State. This provision was incorporated into article 161E.

Repeal of the additional safeguards for Sabah and Sarawak

³⁵ Constitution (Amendment) Act 1976 (Act 354) clauses 41 and 42.

³⁶ Constitutional (Amendment) Act of 1963 amended article 160 to reflect this definition

³⁷ Constitutional (Amendment) Act of 1963.

Articles 161C, D and E are within Part XIA which is entitled 'Additional Protections for Borneo States'³⁸ which were additional safeguards resulting from the Malaysia Agreement. The additional safeguards were in the form of requiring consent from either the Governor (Article 161C) or the State Legislative Assembly (Article 161D). Any amendment to the Constitution requires a majority of two thirds of both houses of Parliament³⁹ with certain exceptions⁴⁰ where only a simple majority is required.

Article 161C and D were amended by the Constitutional (Amendment) Act 1976 (Act 354) which was effective from 27 August 1976. Clause 3 of the Amendment Act added the words Sabah and Sarawak to article 3(3) of the Constitution which meant that the Constitution of Sabah and Sarawak in addition to Penang and Malacca has to make provision to confer on the Yang di-Pertuan Agong the position of Head of Islam in those states. Clauses 13 and 46 of the Amendment Act repealed articles 38(7), 161C and D. The focus of the Constitutional (Amendment) Act 1976 was the amendment to add a proviso to article 5(4) which permitted the authorities to delay in producing a person before a magistrate within twenty four hours if he or she were arrested under laws pertaining to restricted residence. The Hansard reports show detailed discussions surrounding the amendment to article 5 but there was no discussion on the amendment to article 3(3) or repeal of articles 161C and D.⁴¹ These amendments were approved by two-thirds of the Dewan Rakyat and Dewan Negara and are deemed to have been carried out according to the procedure in article 159(3) of the Federal Constitution. The amendments to the Sarawak Constitution followed soon after⁴² where article 4A was added to make the Yang di-Pertuan Agong as the Head of the Religion of Islam in the State. Furthermore, the Dewan Undangan Negeri was required by law to make provision for regulating Islamic religious affairs and for constitution a Council to advise the Yang di-Pertuan Agong on matters relating to the religion of Islam.⁴³ This amendment to the Constitution was added approved by the Yang di-Pertua Negeri on 18 December 1976.

Impact of the amendments to article 3(3) and repeal of articles 161C and D

The amendments to the Constitution which affected the additional safeguards for Sabah and Sarawak were carried out in accordance with article 159(3) and are therefore valid. These articles are not entrenched provisions in the manner of article 159(5) which states that a law making an amendment to specific articles in the Constitution or to article 159(5) itself shall not be passed without the consent of the Conference of Rulers. These amendments were against the spirit of the Malaysia Agreement and the findings of the Cobbold Commission and specific recommendations of the IGC on freedom of religion in Sarawak. Furthermore, the amendments to the Federal

³⁸ This was subsequently amended to 'Sabah and Sarawak' in section 19(1)(b), (2) of the Constitutional (Amendment) Act 1981 (A514) effective from 27 August 1976.

³⁹ Article 159(3).

⁴⁰ Article 159(4).

⁴¹ Dewan Rakyat Report 12 July 1976 and Dewan Negara Report 9 August 1976.

⁴² The amendments were made on 26th August and signed by the Yang di-Pertua on 18 December.

⁴³ Sarawak Constitution (Amendment) (No 2) 1976

Constitution in 1963 took cognizance of the Malaysia Agreement and those recommendations. The 1976 amendments have been effect for almost forty years and it will be difficult if not impossible to challenge them after a long period of time especially as these amendments were approved by members of Parliament representative Sabah and Sarawak.

The impact of these amendments is that there is no need for the consent of the Yang di-Pertua of Sarawak prior to enacting laws for special financial aid to establish or maintain Islamic institutions or to provide Islamic religious instruction. Sarawak is in the same position as the states in Peninsular Malaysia in receiving such aid and there is no requirement for this aid to be given to Sarawak to be distributed for social welfare purposes which would benefit both Muslims and non-Muslims. The only possible argument to preserve freedom of religion in Sarawak albeit a weak one may be found in article 161E (2)(d) which does not permit amendments to the Constitution without the consent of the Yang di-Pertua Negeri of Sabah and Sarawak if the amendment affects the operation of the Constitution as regards religion in the State. However this means that laws or policies affecting freedom of religion in Sarawak which do not require an amendment to the Federal Constitution would not be in breach of article 161(2)(d).

There is no law in Sarawak preventing propagation of non-Muslim religions to Muslims but it would require a simple majority in the Sarawak State Legislative Assembly to enact such a law. Furthermore, any attempt to propagate non-Muslim religions to Muslims in Sarawak may result in a fresh interpretation of article 3(1) which states that ‘...other religions may be practised in peace and harmony in any part of the Federation’. It may be argued that any religion that allows propagation to Muslims is not being practised in ‘peace and harmony’. It will also probably result in the argument that although freedom of religion is guaranteed in article 11 (to non-Muslims at least), clause (5) states ‘this Article does not authorize any act contrary to any general law relating to public order, public health or morality.’ It is likely that even without an anti-propagation enactment propagation to Muslims is not permitted as it affects public order. This argument was raised in *Lina Joy v Majlis Agama Islam Wilayah Persekutuan*.⁴⁴

The background to the restriction on religious liberties under the Constitution (Amendment) Act 1976 (Act 354).

The amendments to the Federal Constitution were made amidst changes to the political and social environment in Peninsula Malaysia. This period coincided with the implementation of the New Economic Policy (NEP) consequent to the racial riots in May 13, 1969. The Government led by the United Malay National Organisation (UMNO) pursued policies in favour of the Malay-Muslim majority which benefited them in terms of business opportunities, employment and promotion in the civil service, education and scholarships. The purpose was to improve the economic position of the Malays. Nevertheless, although article 153 of the Federal Constitution clearly accords the Malays and natives of Sabah and Sarawak a special position, it also maintains that the legitimate interests of other communities must also be

⁴⁴ [2004] 2 Malayan Law Journal 119

protected. The policies pursued under the NEP were overwhelmingly in favour of Malays at the expense of other ethnic communities resulting in Malay hegemony,⁴⁵ increased Malay political power and racial polarisation.

It was at this point in time that Islamic resurgence began to make its presence felt in Peninsula Malaysia. It began as a social movement which later metamorphosed to become a political force. The purpose of the social movement popularly known as the '*dakwah*' movement was to proselytize and also to encourage Muslims to live in accordance with the teachings of the Quran. Its proponents comprised mostly urban Muslim youths and the movement gained momentum in institutions of higher learning and through public lectures in mosques.⁴⁶ The popular face of this movement was depicted by the Angkatan Belia Islam Malaysia (ABIM), Darul Arqam and Jamaat Tabligh. As Malays perceived Islam as part of their identity, the rise in Malay political power caused Islam to be more prominent after the NEP was implemented. The government established Pusat Penyelidikan Islam (Islamic Research Centre) in 1971, Yayasan Dakwah Islamiah (YADIM) and Institute Dakwah dan Latihan Islam (INDAH) in 1974⁴⁷ while Pertubuhan Kebajikan Islam SeMalaysia (PERKIM) became active around this time although it had been established in 1960 by Tunku Abdul Rahman, Malaysia's first Prime Minister. Under Tunku's chairmanship, PERKIM focused on propagation of Islam to potential converts and strengthening new converts' understanding of Islam and was not perceived as part of a political movement to Islamise society.⁴⁸ The government financed the construction of mosques and Islamic institutions, religious schools and Islamic faculties in local universities, facilitated television and radio programs with Islamic content and established a fund for Muslims to perform the *haj* among other things.

It was during this period that Parti Islam Se Malaysia (PAS) posed a more serious challenge to UMNO than before. PAS membership comprised Malay nationalists and religious leaders known as *ulama*. PAS' policies focused on Malay nationalism and were ethnocentric rather than Islamic. After the 1969 racial riots, PAS' president, Asri Muda decided in 1973 that PAS would ally itself with UMNO to unite the Malays against the perceived threat from the Chinese community.⁴⁹ The presence of PAS *ulama* within government and the growing momentum of the *dakwah* movement resulted in increased Islamisation of public life. It was during this period that alcohol and non-halal food was prohibited at government functions and dress codes based upon Islamic injunctions for decent dressing were prescribed in the civil service.⁵⁰ PAS left the Barisan Nasional in 1977 after an acrimonious dispute and in 1982, Asri Muda was replaced by Yusof Rawa who was from the *ulama* faction. Since then PAS has been under the leadership of *ulama* who by virtue of their religious training lay claim to knowledge about Islam compared to UMNO

⁴⁵ A Whiting, 'Desecularising Malaysian Law?' in P Nicholson and S Biddulph (eds) *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Netherlands, Martinus Nijhoff, 2008) 230.

⁴⁶ M Abu Bakar, 'Islamic Revivalism and the Political Process in Malaysia' *Asian Survey* 21 (1981) 1040.

⁴⁷ Hussin Mutalib, *Islam and Ethnicity in Malay Politics*, (Singapore, Oxford University Press, 1988) 49.

⁴⁸ Ahmad Fauzi Abdul Hamid, 'The Formative Years of the Dakwah Movement: Origins, Causes and Manifestations of Islamic Resurgence in Malaysia' (2002) 10(2) *Journal IKIM* 87.

⁴⁹ Mohamed Nawab Mohamed Osman, 'Towards a History of Malaysian Ulama' *South East Asia Research* (16(1) 117 – 140.

⁵⁰ J Funston, 'The Politics of Islamic Reassertion: Malaysia' in A Ibrahim, S Siddique and Y Hussain (eds) *Readings on Islam in Southeast Asia* (Singapore, Institute of Southeast Asian Studies, 1985) 171.

Muslims who received 'secular' education. PAS pushed for an Islamic agenda claiming that UMNO's brand of Islam was too liberal and not a reflection of Islam.⁵¹

The UMNO-led government was also under pressure from ABIM which pursued a more confrontational method of voicing its opinions to the government. ABIM members comprised students in campuses of local institutions of higher learning and it played a pivotal role in increasing Islamic consciousness among Muslim students. ABIM was the first to discuss the establishment of an Islamic state in Malaysia as part of its objective of upholding an Islamic way of life in line with the teachings of the Quran and Hadith. It contributed to Islamic resurgence through educational programs, facilitating student discussion groups and study circles as well as publishing newspapers and tracts for public circulation. It was influenced by the ideology of the Muslim Brotherhood in Egypt and Jamaat-i-Islami in Pakistan. ABIM accused the government of corruption and for upholding secularism. UMNO reacted by co-opted ABIM leader Anwar Ibrahim into UMNO in order to neutralize ABIM which resulted in a rift in the organization between radical Muslim members who joined PAS and other members who felt that Anwar would be able to Islamise the government from within.⁵²

There was a genuine desire by Muslims to live their life according to the dictates of Islam and to eschew unIslamic practices. However in part, UMNO's Islamisation policies were to increase Malay hegemony as Islam is perceived as part of Malay rights. This was one of the reasons that drove Islamisation policies both in the Peninsula and Sabah and Sarawak.

The Malayan government was in favour of Malay-Muslim hegemony when it proposed a merger with North Borneo and Sarawak to counter the threat to Malay political power from Singapore. In the 1963 Sarawak election, the Federal Government proposed Abdul Rahmah Yakub a Muslim Melanau leader of Parti Barisan Anak Jati (BARJASA) as Chief Minister although the most number of seats had been won by SNAP and Parti Pesaka Anak Sarawak (PESAKA) which were dominated by non-Muslim Dayaks. SNAP and PESAKA rejected this suggestion and proposed that Temenggung Jugah from PESAKA should be appointed governor while Stephen Kalong Ningkan the leader of SNAP should be the chief minister. The Federal Government rejected the suggestion for governor and Abang Haji Openg Abang Sapiee a Malay aristocrat was appointed to that position a few days before Malaysia was formed.⁵³ Following the dismissal of Ningkan in 1966, Tawi Sli from PESAKA was appointed as Chief Minister but when the Bumiputera party won the most number of seats in the 1970 election, its leader Abdul Rahman Yakub was elected as chief minister.⁵⁴ Bumiputera and PESAKA merged in 1973 to form Pesaka Bumiputera Bersatu (PBB) which has been the dominant political party in Sarawak politics since.

⁵¹ Farish A Noor, 'Blood, Sweat and Jihad: The Radicalization of the Political Discourse of the Pan-Malaysian Islamic Party (PAS) from 1982 Onwards' (2003) 25 2) *Contemporary Southeast Asia* 200.

⁵² Ahmad Fauzi Abdul Hamid, 'The Maturation of Dakwah in Malaysia: Divergence and Convergence in the Methods of Islamic Movements in the 1980s' (2003) 11(2) *IKIM Journal* 59.

⁵³ Faisal S Hazis, *Domination and Contestation: Muslim Bumiputera Politics in Sarawak* (Singapore, ISEAS Publishing, 2012) 78 – 84.

⁵⁴ Faisal S Hazis, *Domination and Contestation: Muslim Bumiputera Politics in Sarawak* (Singapore, ISEAS Publishing, 2012) 80 – 82.

Abdul Rahman Yakub consolidated Muslim bumiputra political power by appointing Malays and Melanau Muslims to high ranking positions in the State.⁵⁵ The amendments to the Federal Constitution in 1976 which removed many of the safeguards guaranteeing religious liberty in Sabah and Sarawak occurred under Rahman Yakub's leadership. Malay dominance in Sarawak had been enhanced through an Islamisation programme similar to the programme carried out by the Federal Government by the establishment of the Angkatan Nahdatul Islam Bersatu (BINA) which had a similar role to PERKIM in the Peninsular and was intended to facilitate conversions. Although the organization was established in 1969 before Rahman Yakub became Chief Minister, it circumvented article 161C which requires an Act of Parliament that provides for special financial aid for the instruction in the Muslim religion or persons profession that religion, to obtain the approval of the governor. These conversions were sometimes genuine but were often for economic or political reasons⁵⁶ as can be deduced from Rahman Yakub's promises to contribute RM150, 000 to build a long-house to Ibans who had converted to Islam. He also established syariah courts in Sarawak and introduced a Majlis Islam Bill to facilitate the administration of these courts.⁵⁷

Abdul Taib Mahmud, Rahman Yakub's nephew took over the position of chief minister in 1981. Although he is not Malay, Muslim bumiputera leadership advanced the Malay-Islamic agenda. Islam was used to unite the various bumiputera groups to consolidate their support in the form of votes for PBB and its allies. Taib continued the process of Islamisation in Sarawak by introducing Syariah laws that are modeled upon the laws in the Peninsula comprising the Syariah Court Ordinance, Family Law Ordinance, Syariah Civil Procedure Ordinance, Syariah Criminal Procedure Ordinance, Syariah Criminal Offences Ordinance and Syariah Evidence Ordinance. The State government set up Islamic institutions such as Baitulmal and Wakaf Board, Jabatan Agama Islam Sarawak (JAIS), Fatwa Council, Islamic Affairs, Malay Cultural Board, and a state mufti's office. It also facilitated the construction of mosques, surau and religious schools which are used as meeting places for prayer and socialization which promotes Muslim unity.⁵⁸ Nevertheless the Islamisation policies in Sarawak are not on the large scale as in Sabah where Chief Minister Tun Mustapha Harun effected large scale conversions of non-Muslim bumiputera, citizenship to Filipino Muslim refugees⁵⁹ and the Federal Government and civil service purportedly gave citizenship to Pakistanis, Indians, Indonesians among others as long as they were Muslims in order to obtain votes and consolidate Malay Muslim power in Sabah.⁶⁰

Currently, although Sarawak has a non-Muslim majority, it is in a similar position to the states in Peninsular Malaysia with reference to the Yang di-Pertuan Agong as the head of Islam, the enactment of Islamic laws for the administration of Islam and Islamic institutions. It differs from the Peninsular in two

⁵⁵ P Searle, *Politics in Sarawak 1970 – 1976: The Iban Perspective* (Singapore, Oxford University Press, 1983) 136.

⁵⁶ T Gabriel, *Christian-Muslim Relations: A Case Study of Sarawak, East Malaysia* (Avebury, Aldershot, 1996) 6.

⁵⁷ Faisal S Hazis, *Domination and Contestation: Muslim Bumiputera Politics in Sarawak* (Singapore, ISEAS Publishing, 2012) 86 - 88

⁵⁸ Faisal S Hazis, *Domination and Contestation: Muslim Bumiputera Politics in Sarawak* (Singapore, ISEAS Publishing, 2012) 189 – 196.

⁵⁹ Olaf Schumann, 'Christians and Muslims in Search of Common Ground in Malaysia' (1991) 2(2) *Islam and Christian-Muslim Relations*, 242.

⁶⁰ Boo Su-Lyn, 'Ex-NRD Man Admits Giving IC to Immigrants' *Malaysiakini* 17 January 2013.

ways as Islam is not the State religion unlike other States in the Peninsular and Sabah and there are no laws to prohibit propagation to Muslims in Sarawak unlike many states in the Peninsular.

Future implications to amendments pertaining to freedom of religion in the Federal Constitution

In hindsight, it is arguable that the amendments to the Constitution in 1976 pertaining to fundamental liberties under section 5 and the additional safeguards for Sabah and Sarawak, affected the basic structure of the Constitution and were not therefore valid. However it can be deduced that any legal challenge at that point in time, using the basic structure of the constitution argument would most likely have been dismissed by the courts.

In *Phang Chin Hock v Public Prosecutor*⁶¹ one of the issues before that court was whether Parliament's power to amend the Constitution was limited as it could not enact laws or amend the Constitution in a manner that destroyed the basic structure of the Constitution. The Federal Court held that it would not make a decision as to whether Parliament's power extended to destroying the basic structure of the Constitution but that 'Parliament may amend the Constitution in any way they think fit, provided they comply with all the conditions precedent and subsequent regarding manner and form prescribed by the Constitution itself.'⁶² The Federal Court refused to follow Indian decisions in *IC Golak Nath & Ors v State of Punjab*⁶³ and *Kesavananda Bharati v State of Kerala*⁶⁴ which stated that Parliament is not permitted to make amendments which destroy the basic structure of the Constitution. Suffian FCJ justified the court's refusal on the grounds that the Indian Constitution was drafted by the Indian Constituent Assembly after Independence and it was a reflection of the will of the Indian people whereas the Malaysian Constitution was negotiated between the British, Malay Rulers and Alliance Government and later the Malayan Legislative Council and legislature of the Malay states. There was no opportunity for the Malayan people to draft their own constitution and it was envisaged that the Constitution being a living document would be subject to amendments to reflect the desires of the people. The Federal Court went on to state that 'Whatever may be the features of the basic structure of the Constitution, none of the constitutional amendments complained of ... have destroyed the basic structure of the Constitution.'⁶⁵

The Federal Court in *Mark Koding v Public Prosecutor*⁶⁶ stated that article 63(4) which limits the freedom of speech in Parliament was a valid amendment⁶⁷ and it was unnecessary for the court 'to consider the question whether or not Parliament has power to so amend the constitution as to alter its basic structure whatever that may be.'⁶⁸ The Federal Court in *Phang Chin Hock* and *Mark Koding* did not deny that the Federal Constitution has a basic structure that is not subject to amendment. Instead it

⁶¹ [1980] 1 Malayan Law Journal 70

⁶² [1980] 1 Malayan Law Journal 70 at 73.

⁶³ AIR 1967 SC 1643

⁶⁴ AIR 1973 SC 1461

⁶⁵ [1980] 1 Malayan Law Journal 70 at 74.

⁶⁶ [1982] 2 Malayan Law Journal 120

⁶⁷ Section 3 Constitution (Amendment) Act 1971 (A30)

⁶⁸ *Mark Koding v Public Prosecutor* [1982] 2 Malayan Law Journal 120 at 122.

refused to address the issue on the facts of the cases before the court. It did not overrule Abdoolcader J's decision in **Public Prosecutor v Datuk Harun bin Haji Idris & Ors**⁶⁹ which held that article 8(1) of the Federal Constitution is part of the basic structure of the Constitution. Furthermore Suffian FCJ's statement in **Phang Chin Hock** about the lack of participation by Malaysians when the Federal Constitution was drafted, is not convincing in light of documentation which shows that the Alliance represented Malaysians and engaged in in-depth discussions with the Reid Commission and subsequently the British government when the Constitution was drafted.⁷⁰ In addition, his Lordship's statements pertaining to the lack of negotiating power of the Alliance prior to independence of Malaya in 1957 even if true, do not apply to the Malayan government's power of negotiation during the Malaysia Agreement as Malaya was by then a sovereign nation.

In a recent decision, **Sivarasa Rasiah v Badan Peguam Malaysia & Anor**⁷¹ the Federal Court supported arguments that the constitution has a basic structure that cannot be amended. The court agreed that the former Federal Court decision of **Loh Kooi Choon v Government of Malaysia**⁷² which followed English decisions supporting Parliamentary supremacy was erroneous as the doctrine of Parliamentary supremacy does not apply in Malaysia where the Constitution is supreme.⁷³ The Federal Court in **Sivarasa Rasiah's** case stated that

'...it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part of the basic structure must be worked out on a case by case basis. Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution.'⁷⁴

The Court also held that fundamental liberties had to be interpreted liberally. The Court of Appeal by a majority decision in **Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors**⁷⁵ held that restrictions on fundamental liberties in Part II of the Federal Constitution had to be reasonable and Parliament could not impose laws to restrict freedoms in any manner it deemed fit. In this case the court was referring to freedom of speech. The court interpreted the decision in **Sivarasa Rasiah** to mean that

'the fundamental rights guaranteed by Part II of the Federal Constitution form part of the basic structure of the Federal Constitution, thereby giving recognition for the first time, albeit in a limited fashion, to the doctrine of basic structure of the Constitution as enunciated by the Supreme Court of India almost 40 years ago in the landmark case of *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461. This is a remarkable departure from the position taken by the Federal Court 33 years ago in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187. In

⁶⁹ [1976] 2 Malayan Law Journal 116

⁷⁰ J M Fernando, *The Making of the Malayan Constitution* (MBRAS, Kuala Lumpur, 2002)

⁷¹ [2010] 2 Malayan Law Journal 333

⁷² [1977] 2 Malayan Law Journal 287

⁷³ *Ah Thian v Government of Malaysia* [1976] 2 Malayan Law Journal 112.

⁷⁴ ⁷⁴ [2010] 2 Malayan Law Journal 333 at 341.

⁷⁵ [2011] 6 Malayan Law Journal 507

that case the Federal Court was urged to adopt the doctrine, but the court then refused to do so.⁷⁶

It is arguable whether the amendments to the Constitution in 1976 which affected the provisions pertaining to religion in Sabah and Sarawak affected the basic structure of the Constitution. The basic structure of the Constitution argument is usually raised with reference to amending fundamental liberties in Part II of the Constitution. This covers right to liberty, equality, freedom of speech, assembly, association, speech, religion, right to education and property as well as prohibition against forced labour, slavery, retrospective criminal laws, repeated prosecutions and banishment. Articles 3(3), 38(7), 161C and D are not within part II of the Constitution. Furthermore, these amendments took place almost four decades ago and it is unclear whether a legal challenge to these amendments can be raised after so many years. Nevertheless a strong bench may be prepared to hold that the basic structure of the Constitution was affected by some of the amendments in the Constitutional (Amendment) Act 1976 (Act 354).

Lessons to be learned

Currently freedom of religion in Sarawak is not very different from other states in Malaysia. There are several issues on freedom of religion facing Malaysia as a whole. These are whether article 3 renders Malaysia an Islamic State with its adherent implications, whether freedom of religion in article 11 is available to all or non-Muslims, the jurisdiction of the courts and syariah courts in article 121(1A) and the restriction of the use of certain words deemed exclusive to Islam. The doctrine of basic structure of the Constitution can be utilize to prevent future amendments that amount to infringements of fundamental liberties namely freedom of religion.

In 2001 Dr Mahathir Mohamed who was Prime Minister at the time announced that Malaysia is an Islamic state. This contradicted historical documents⁷⁷ and judicial decisions⁷⁸ that Malaysia was a secular state. Muslim academics in the face of overwhelming evidence to the contrary, claimed that the Reid Commission's report stating clearly that article 3 does not affect Malaya's status as a secular nation, did not reflect the true intention of the Malayan government. They also claim that Islam was sidelined by the British government and it should be placed at the centrestage in accordance with the intention of article 3.

There is clearly a desire on the part of many Muslims to introduce syariah as the source of laws in Malaysia. This is understandable in light of the resurgence of Islamic consciousness which has been heavily influenced by political Islam. There are strong beliefs that the Islamic state must be visible in terms of moral policing and criminal laws known more commonly as hudud laws. This is part of freedom of religion in article 11 and Muslims are fully entitled to their beliefs. However the problem lies in denial that the aspirations of Muslims have changed greatly since the independence of Malaya and formation

⁷⁶ [2011] 6 Malayan Law Journal 507 at 523.

⁷⁷ Reid Commission Report para XXX

⁷⁸ Che Omar bin Che Soh v Public Prosecutor

of Malaysia was negotiated. Instead of negotiating amendments to the Constitution in line with these aspirations, many Muslim politicians, religious leaders and academics have applied fresh interpretations to the Constitution that was never the intention of the British government, Malay Rulers or leaders of the Alliance who subsequently formed the Malayan government.

The MSCC, Cobbold Commission and IGC Report provide insight into the intention of the parties that negotiated the Malayan Constitution and later amendments to the Malaysian Constitution. The Malayan government was not prepared to amend article 3(1) of the Federal Constitution on the grounds that it guaranteed freedom to practice other religions in peace and harmony. The MSCC which was representative of the Malayan government clearly stated that article 3 placed Islam as the official religion which did not affect the secular nature of the state. This was a clear statement that the Malaya was meant to be a secular nation. This view was reiterated by the Malayan members of the Cobbold Commission who were representative of Malaya which at the time was a sovereign nation. If the intention of the Alliance members was to form an Islamic state, they would not have attested to Malaya's status as a secular nation.

If the intention of the Alliance was for Malaya to be an Islamic state, the Malayan government would not have agreed to the safeguards on freedom of religion in the Borneo States. Article 11(4) did not apply to these states, article 3(3) was initially not amended to render the Yang di-Pertuan Agong the Head of Islam in the Borneo States and article 38(7) specifically restricted the function of the Conference of Rulers pertaining to religious acts, observances and ceremonies from applying in the Borneo states. In addition, article 161C restricted the provision of financial aid to Muslim institutions or to advance the Muslim religion unless the Governor's consent was obtained. These concessions to the Borneo States would not have been carried out by an Islamic state.

On another note, the restriction in article 161D to the application of article 11(4) on propagation of non-Muslim religions to Muslims shed some light on the intention of article 11. In Lina Joy's case, the court held that the definition of 'Malay' in article 160 of the Federal Constitution precludes a Malay from converting out of Islam. While this is a strong argument, some doubt can be cast on this view. The first is due to article 11 which guarantees freedom of religion without restricting it to non-Muslims only. This lends support to the argument that article 3 was meant to be an 'innocuous provision' similar to provisions in the Constitution of XXXX which stated that Christianity was the state religion but the state was secular. It would have been a simple matter to stipulate this in the Federal Constitution especially in light of formalization of Islamic institutions and legislation pertaining to Islam during British colonisation. However this was not stipulated clearly in the Federal Constitution which lends credence to arguments that freedom of religion applied to Muslims and non-Muslims. The presence of article 11(4) which permits the states to restrict propagation to Muslims can be interpreted in two ways; one is that there is no freedom of religion for Muslims which is supported by the anti-propagation clause in the Constitution and article 160 which defines 'Malay' as a person who speaks the Malay language, embraces the culture and is Muslim, while the other interpretation is that the Alliance, Malay rulers and British government respected and understood the concept of freedom of religion which applied to Muslims and non-Muslims but active propagation to Muslims was not permitted. This is supported by the odd result in

article 160 is read with article 11 as it would mean that Malays do not have freedom of religion but Muslims who are not Malay have the freedom to convert out of Islam.

Another reason to support a more liberal interpretation of article 11 comes from the Malayan government's concession in article 161D that any anti-propagation law would not apply to the Borneo States unless specifically approved by two-thirds of the State Legislative Assembly in those States. At the time of the IGC Report, there were Malay Muslims residing in the Borneo States. The exclusion of article 11(4) of the Constitution meant that propagation to Muslims was permitted in these States although not in Peninsular Malaysia. There were considerable number of Malays in Sarawak who fell within the definition of Malay in article 160 but the Malayan government did not attempt to protect them from propagation by non-Muslims at the formation of Malaysia.