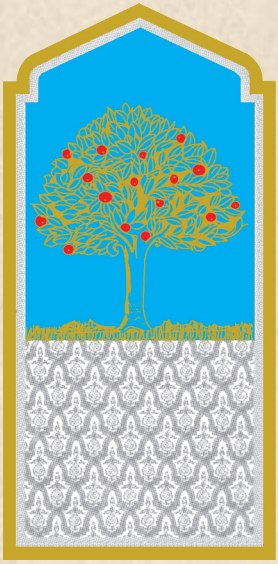

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LESSONS FROM A SECULAR STATE: ESSENCE OF THE CONSTITUTION AND ITS IMPLICATION ON JUDICIAL INTERPRETATION OF HUMAN RIGHTS PROVISIONS IN TURKEY AND MALAYSIA

Farid Sufian Shuaib
Murat Tumay

Abstract

Malaysia and Turkey, to a different degree and in different areas, continue to construct an Islamic identity. However, a clear divergence of position pertaining to religion can be seen in their respective constitutions, in particular with regard to the position of Islam and secularism. It is interesting to examine the constitutional position of religion and its consequence and influence in the construction of the constitution and legislation. The paper looks at the text of the constitutions and the approaches taken by the apex court in the two countries. The paper also looks at the jurisprudence of the European Court of Human Rights since Turkey is a signatory of the Convention for the Protection of Human Rights and Fundamental Freedoms. The opposing positions taken by the two constitutions with regard to the influence of religion in public affairs surprisingly offers a coherent approach in constitutional construction.

Keywords: Religion, Constitution, Islam, Secularism, Turkey, Malaysia

Introduction

Although both countries are Muslim majority, the constitutions of Malaysia and Turkey diverge markedly on the position of the religion of Islam. One (Malaysia) proclaims Islam as the religion of the federation and the other (Turkey) proclaims to be secular. The consequence of such constitutional proclamation is significant in construing other provisions in the constitution. If one could search for the essence of the constitution, it would colour the interpretation of the constitutional provisions and sculpture it to be in line with the essence. Provisions on fundamental liberties for instance could in turn be moulded to fit the essence of the constitution impacting the application of the rights based provisions to be in line with either the secular or religious nature of the constitution.

Secular State and Islam

According to Syed Naquib al-Attas, secularism "disenchants nature and desacralizes politics" without completely deconsecrating values since secularism brings up "its own system of values".[1] Such a concept, according to him, is contrary to Islam. In its application to state matters, secularism refers to divorcing affairs of the state – including legal and policy matters – from religious doctrines.[2] The absolute nature of Islam with its absolute vision of the oneness of God would not be able to accept the idea of "deconsecration" of values.[3] The Qur'ān asks for total submission to God[4] and affirms that the only religion acceptable to God is Islam.[5] Thus true obedience and real submission in the life of a person must be undivided and continuous.[6] As one scholar puts it, "the Qur'ān makes it abundantly clear that the ultimate purpose of all creation is

[1] Syed Naquib al-Attas, *Islam and Secularism* (Kuala Lumpur: ISTAC, 1993), 19.
[2] Charles Taylor, *A Secular Age* (Cambridge: Belknap Press, 2007). See also Khairil Izamin Ahmad "A Secular" Malaysia? Toward an Alternative Democratic Ethos" *Intellectual Discourse* 21, no.2 (2013), 147.
[3] Syed Naquib al-Attas, *Islam and Secularism*, 33.
[4] Al-Qur'ān, Sūrah al-Nisā' 4: 125.
[5] "If anyone desires a religion other than Islam, never will it be accepted of him" (*Surah Āli 'Imrān* (3):85).
[6] Syed Naquib al-Attas, *Islam and Secularism*, 62, 72.

the compliance of the created with the will of the Creator".[7] The will of the Creator is found in the *Sharī'ah*. Thus it would be unacceptable to disregard the *Sharī'ah* in the affairs of the state.[8]

With regard to Islam and the state, some have questioned whether it is possible to have Islam as the underlying philosophy of the state. Abdullahi Ahmed An-Na'im opined that Islamic law "lose(s) its religious authority and value when enforced by the state" since religious observance must be completely voluntary.[9] According to him, a secular state is religiously neutral and "does not claim or pretend to enforce *Sharī'ah*". Although the state should not enforce *Sharī'ah* as a political institution the state could be influenced by "the interest and concerns" of its citizens.[10] For Wael B Hallaq it is impossible to have Islam as the basis for governance of a modern state.[11] For others the prevalence of Islam in the constitutional framework raises concern about its impact on democratic principles.[12] The disconnecting of the constitution of the state from Islam could be seen in the transformation of the Ottoman Empire into a modern Turkish nation state under the Kemalist rule.[13]

An Example of a Secular Constitution

It is interesting to compare the study of the character of the Malaysian Constitution with that of Turkey as the Turkish Constitution invokes the principle of secularism in several places; firstly by specifically declaring that the Republic of Turkey is a democratic, secular and social state.[14] The Constitution of Turkey

[7] Muhammad Asad, *The Principles of State and Government in Islam* (Kuala Lumpur: Islamic Book Trust, 1980), 2.

[8] Asad, The Principles of State and Government in Islam, 4-6.

[9] Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Cambridge: Harvard University Press, 2008), 4.

[10] An-Na'im, Islam and the Secular State: Negotiating the Future of Shari'a, 3.

[11] Wael B Hallaq, The Impossible State: Islam, Politics and Modernity's Moral Predicament (New York: Columbia University Press, 2013).

[12] Nadirsyah Hosen, *Shari'a & Constitutional Reform in Indonesia*, (Singapore: Institute of Southeast Asian Studies, 2007).

[13] Dietrich Jung, "Secularism": A Key to Turkish Politics," *Intellectual Discourse* 14, no. 2 (2006): 129.

[14] Article 2 of the Republic of Turkey Constitution.

provides that the exercise of rights and freedom should not endanger the democratic and social order of the state.[15] In taking the oath of office, the members of the legislation swear to remain loyal, *inter alia*, to the democratic and secular republic.[16] Secularism is considered sacred by the Constitution to the extent that it is treated as irrevocable.[17]

At the time of the establishment of modern Turkey as a Republic in 1923, Turkey was not constructed as a secular state. The Constitution of 1924 up to 1928 had included a provision stating "the religion of Turkish state is Islam".[18] This sentence was removed from the Constitution in 1928 and the term "laicism" was introduced into the Constitution in 1937. Since then secularism has become a very important principle of the Turkish constitutional system. Article 2 of the 1982 Constitution regulates that 'The Republic of Turkey' is a secular state.[19] According to the preamble, one of the requirements of secularism is that "there shall be no interference whatsoever by sacred religious feelings in state affairs and politics". Article 24 of the Constitution regulates the "abuse of religious" feelings as a limit of freedom of religion and conscience. According to articles 68 and 69, the violation of the principle of secularism is also regarded as a reason for dissolving political parties.[20] At the same time however political parties are "indispensable elements of the democratic

[15] Article 14 of the Republic of Turkey Constitution.

[16] Article 81 of the Republic of Turkey Constitution, in reference to the Members of the Grand National Assembly.

[17] Article 4 of the Republic of Turkey Constitution.

[18] The original Article 2 of the Republic of Turkey 1924 Constitution,

[19] Article 2 of the Republic of Turkey 1982 Constitution.

[20] Vahit Bıçak, Zühtü Arslan, *Constitutional Law in Turkey* (The Netherlands: Kluwer Law International, 2016), 43. An author remarks that "dissolution" phenomenon arises from a point of "mentality" which has explained below: "If there is a problem in the decisions of dissolution of political parties in Turkey, that problem does not arise from Article 69, but from the Constitutional Court itself. Therefore, the criticisms should better be directed to the Constitutional Court instead of Artice 69. The solution is then, not to change Article 69, but the Consitutional Court changes its opinion." Bülent Algan, "Dissolution of Political Parties by the Constitutional Court In Turkey: An Everlasting Conflict Between the Court and the Parliament?," *Ankara University Faculty of Law Review* 816, no. 60 (2011).

political life".[21] Thus it is arguable that although at the beginning of the foundation of the Turkish Republic the state was not envisaged as a secular state, later developments constitutionally transformed it into a secular state.

Even though secularism is one of the fundamental principles of state, it is not defined anywhere in the Turkish Constitution. A secular state is said to contain no recognition of one state religion, and there is equality of religions and religious organisations before the law.[22] However in Turkey from the very beginning a strict separation of state and religion is not established. The state exerts a certain degree of control over religion. One of the arguments for justifying this control is to argue that unlike other religions, Islam is not only a system of faith but also as a system of law, a social and political ideology and a way of life.[23] Although the state has no official religion, the Constitution provides for the establishment of Department of Religious Affairs (*Diyanet İşleri Başkanlığı*) to provide religious services for believers.[24] This department is supposed to exercise its functions according to the principle of secularism.[25]

In the narrative of secularism in Turkey the courts have taken the position that "legal regulations must not be enacted according to religious rules",[26] "no religion is adopted as a 'state religion' by nature of a secular state",[27] the principle of secularism "prevented the State from manifesting a preference for a particular religion"[28]

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[21] Article 68 of the Republic of Turkey 1982 Constitution. Also see: Maurice Duverger, *Siyasi Partiler*, trans. Ergun Özbudun (Ankara: Bilgi Yayinevi, 1974), 85.

[22] William Chislett, Turkey's Conundrum: Are the Country's Versions of Secularism and Political Islam Compatible? (WP), Elcano Royal Institute, http://www.realinstitutoelcano.org/documentos.

[23] Ergun Özbudun, *Constitutional Law* 38 (1987).

[24] Vahit Bıçak and Zühtü Arslan, *Constitutional Law in Turkey*, 43.

[25] Article 136 of the Republic of Turkey Constitution.

[26] Constitutional Court (General Assembly), Merits No: 1989/1, Dec. No: 1989/12 (7 March 1989).

[27] Constitutional Court (General Assembly), Merits No: 1997/62, Dec. No: 1998/52 (19 June 1998), on allegation of unconstitutionality of eight year of continuous and compulsory primary education for all citizens.

[28] Council of State (Chamber of Eight), Merits No: 2006/4107, Dec. No: 2007/481 (28 December 2007); Council of State (Chamber of Eight), Merits No: 2007/679,

and secularism is an "indispensible condition of democracy".[29] In other words, the essence of the Constitution dictates the policy of the state or informs the state of what policy it should adopt.

The policy set by the essence of the Constitution in turn enables the state to transform the policy into action. In this respect, the importance of secularism allows the state to take any necessary actions to preserve the secular nature of the state which includes the dissolution of political parties and restricting freedom of manifesting religions.[30] Hence, both cases of *Refah Partisi* (The Welfare Party)[31] and *Fazilet Partisi* (The Virtue Party),[32] which were dissolved because both were "becoming a centre of the activities contrary to the principle of secularism", showed the persistent manner of the Constitutional Court of Turkey in deciding to dissolve political parties.

The court may distil the essence of the Constitution from the constitutional history. In the context of Turkey, the European Court of Human Rights observed that the Turkish Republic was founded on the principle of secularism starting with the proclamation of the Republic in 1923.[33] This could be seen in the abolition of the caliphate in March 1923, repealing of the constitutional provision declaring Islam as the religion of the state in 1928 and an amendment giving secularism a constitutional status.[34] Article 2 of the Turkish Constitution provides that:

> "The Republic of Turkey is a democratic, secular (*laik*) and social State based on the rule of law that is

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Dec. No: 2008/1461 (29 February 2008), where in both cases requests of annulment provisions preventing the "exemption" from "lesson of religious culture and morals" as a compulsory lesson in the curriculum of primary and secondary schools.

[29] Refah Partisi (The Welfare Party) and Others v Turkey [2003] ECHR (13 February 2003).

[30] Refah Partisi (The Welfare Party) and Others v Turkey [2003] ECHR (13 February 2003); Leyla Sahin v Turkey [2005] ECHR 819.

[31] Constitutional Court (Dissolution of (a) Political Party), Merits No: 1997/1, Dec. No: 1998/1 (16 January 1998).

[32] Constitutional Court (Dissolution of (a) Political Party), Merits No: 1999/2, Dec. No: 2001/2 (22 June 2001).

[33] *Leyla Sahin v Turkey* [2005] ECHR 819.

[34] Vahit Bıçak and Zühtü Arslan, *Constitutional Law in Turkey*, 42.

> respectful of human rights in a spirit of social peace, national solidarity and justice, adheres to the nationalism of Atatürk and is underpinned by the fundamental principles set out in the Preamble of the Turkish Constitution."

The opinion of the Constitutional Court of Turkey is that "secularism had acquired constitutional status by reason of the historical experience of the country", and being a secular state she cannot use religion in making law as religion has no role in politics.[35] This interpretation is a reflection of very strict and exclusive French type secularism (*laicism*) that is not compatible with democratic secularism. In this definition, the Turkish Constitutional Court interprets secularism as a social engineering project whose role is to secularise society. By doing that it confuses *secularism* with *secularisation*. Secularisation refers to particular social processes, including the erosion of religion's role in public life. These are gradual and bottom-up social processes based on people's demands and choices. Secularism, on the other hand, is a constitutional regime that determines the political boundaries between the state and religion. A neutral secular state should not take a position for or against the secularisation of society. The absence or existence of religious symbols and discourses in social life, therefore, should have no place in the policy agenda of a secular state. If a secular state pursues policies to secularise the society it is obvious that it will lose its neutrality.[36] The Turkish Constitutional Court's attempts to shape the programmes of political parties within the boundaries of "constitutional ideology" may be seen as a reflection of the "judicialisation of politics". But this will inevitably lead to a legitimacy problem. If the Constitutional Court wants to overcome this problem it should accept the "rights-based" approach in its judgements.[37]

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[35] Explained by the European Court of Human Rights in *Leyla Sahin v Turkey* [2005] ECHR 819.

[36] Ahmet Kuru, "Secularism in Turkey: Myths and Realities*" Insight Turkey* 10, no. 3 (2008), 103.

[37] Murat Tumay, The European Convention on Human Rights: Restricting Fundamental Rights in a Democratic Society with Special Reference to Political

The pivotal role of the constitutional essence in construing the basic law could be seen in the readiness of the European Court of Human Rights to be sympathetic to the secular cause of the Republic of Turkey by regarding the dissolution of the political party *Refah Partisi* (which aspired to give some roles to Islam in public life), the prohibition of wearing Islamic headscarves[38] and dismissal from the University of Istanbul of a final year medical student.[39] It is interesting to note that the action of *Refah Partisi* in advocating plurality of a legal system where followers of different religion may have their own laws applicable to them is contrary to secularism since people would have to reveal their religion and the system undermines the legislative and judicial unity of the state. What caused the European Court of Human Rights to decide *Refah Partisi* in a freedom-restricting way was, it seems, a misunderstanding about Islam. The Court sees Islam as in conflict with democracy, which is not the case. On the contrary, although it is not in practice in most of the Muslim countries, the only political regime which could be said to be compatible with the fundamentals of Islam is democracy.[40]

What could have been seen from these Turkish cases is the willingness of the European Court of Human Rights to deduce the character or the essence of a state from the constitutional provisions and the constitutional history of a nation.[41] Such essence of a state then would colour the development of the law and executive actions as could be seen in the *Refah Partisi* and *Leyla Sahin* cases.

Party Dissolution Cases, unpublished PhD thesis (2007), 206.

[38] The Constitutional Court of Turkey also nullified an amendment of Article 10 and Article 42 of the Constitution which would have legalized "wearing the headscarf" on university campuses. Constitutional Court (General Assembly), Merits No: 2008/16, Dec. No: 2008/116 (5 June 2008).

[39] Refah Partisi (The Welfare Party) and Others v Turkey [2003] ECHR (13 February 2003); Leyla Sahin v Turkey [2005] ECHR 819.

[40] Murat Tumay, The European Convention on Human Rights: Restricting Fundamental Rights in a Democratic Society with Special Refernce to Political Party Dissolution Cases, 286.

[41] But see also seemingly a new direction taken by the courts in Individual Application Case of Tuğba Arslan (General Assembly of Constitutional Court of Turkey), App. No: 2014/256 (25 June 2014); Individual Application Case of D.Ö. (First Chamber of Constitutional Court of Turkey), App. No: 2014/3977 (30 June 2016).

Furthermore, the European Court of Human Rights agrees the state has power to restrict fundamental liberties in protecting secularism to the extent of limiting the freedom of association, freedom of speech and freedom of religion.

This paper seeks to draw a parallel approach in searching for the essence of the Malaysian Constitution.

History and Character of the Malaysian Constitution

Constitutions are practices, conventions and rules regarding the system of government. We could see a strong Islamic influence in the system of government of the early Malay kingdoms. Before the coming of Islam to the Malay world, the Malay kingdoms were much influenced by Hinduism and Buddhism but the coming of Islam transformed the Malay Sultanates. For instance, the title of rulers as *maharajah* was changed to *sultan* to reflect the Islamic influence. Apart from this senior positions such as *muftī* and *qāḍī* were created and established to advise the rulers on Islamic matters and to adjudicate disputes based on Islamic law. This was reflected in the constitutional framework of the Sultanates of Melaka as explained in the *Sejarah Melayu*.[42]

The special position of Islam in the governance of the administrations of the Malay Peninsula represented by the Malay Sultanates was recognised by western colonial powers such as the British. This was evident in the terms of the treaties entered between the British and the various Malay Sultanates. As an example, below is the provision found in the treaty between the British and the Perak Sultanate that says:

> "That the Sultan receive and provide a suitable residence for a British Officer to be called Resident, who shall be accredited to his Court, and whose advice must be asked and acted upon all questions other than those touching Malay Religion and Custom."[43]

[42] Malaysian Branch of Royal Asiatic Society, *Sejarah Melayu: The Malay Annals*, (MS Raffles No 18: New Romanised Edition) (Kuala Lumpur: Malaysian Branch of Royal Asiatic Society, 1998).

[43] J. De V. Allen, A. J. Stockwell, and L. R. Wright. *A Collection of Treaties and*

In working towards the independence of Malaya, the British continued to recognise the position of the Malay Rulers and the Head of State of the Malay States by entering into the Federation of Malaya Agreement 1948 with them. The agreement between the British and the Sultans provides for work to be done towards eventual independence of the Malay States.[44]

The Reid Commission was the commission established through the agreement of the Malay Rulers, the British and elected representatives consisting of Tunku Abdul Rahman and others.[45] The Commission consisted of jurists from the Commonwealth countries namely the United Kingdom and Pakistan including Lord William Reid, Sir Ivor Jennings, Sir William McKell, Justice B Malik and Justice Abdul Hamid. In deliberating whether to have a provision that says Islam is the state religion, the majority report decided against it. The report says:[46]

> "We have considered the question whether there should be any statement in the Constitution to the effect that Islam should be the State religion. There was universal agreement that if any such provision were inserted it must be made clear that it would not in any way affect the civil rights of non-Muslims. ... The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religions and shall not imply that the State is not a secular State."

However, a dissenting member of the commission opined that the proposal by an alliance consisting of parties representing people of different religions and races should be respected and agreed with. The dissenting note by Mr. Justice Abdul Hamid says:

Other Documents Affecting the States of Malaysia, 1761-1963, Vol I, (London: Oceana Publications, 1981), 390-392.

[44] See Abdul Aziz Bari, *The Monarchy and the Constitution in Malaysia*, (Kuala Lumpur: Intitute for Democracy and Economic Affairs, 2013), 118-119.

[45] Colonial Office, Report of the Federation of Malaya Constitutional Conference Held in London in January and February 1956 (London: HMSO, 1956).

[46] *Report of the Federation of Malaya Constitutional Commission* (London: HMSO, 1957). The report is usually referred to as the Reid Commission Report.

> "It has been recommended by the Alliance that the Constitution should contain a provision declaring Islam to be the religion of the State. It was also recommended that it should be made clear in that provision that a declaration to the above effect will not impose any disability of non-Muslim citizens in professing, propagating and practising their religions, and will not prevent the State from being a secular State. As on this matter the recommendation of the Alliance was unanimous their recommendation should be accepted."

Subsequently, the question of inclusion of a provision that provides for Islam as the state religion was considered by the Working Committee of the Legislative Council, a committee tasked with examining the proposal of the Reid Commission. Finally, the opinion in the dissenting note in the Reid Commission Report was adopted. However, the White Paper (an official paper clarifying the position of the government) explaining the decision to include the provision asserts that the status of Islam as the religion of the Federation would not jeopardise the rights of non-Muslims. The White Paper says:

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

The basic document of the new nation, namely the Federation of Malaya also gives prominence to the Islamic character of the nation. Numerous provisions give distinction to Islam. Article 3 of the Federal Constitution provides that Islam is the religion of the Federation. With regard to freedom of religion, in addition to guaranteeing the right to profess, to practice and to propagate to all

religious adherents, the Constitution sees it fit to allow restriction of propagation among Muslims.[47]

The prominent place of Islamic law and the special court system in administering the law were made clear by the Federal Constitution in giving the States powers to enact laws on Islamic matters and to create *Sharī'ah* offences.[48] In 1988 the Federal Constitution was amended to provide that civil courts have no jurisdiction in matters that *Sharī'ah* courts have jurisdiction.[49]

These provisions where Islam is put on a higher pedestal than other religions show that Islam is embedded in the Constitution. It is not only in aspects of the legislative and judiciary that Islam is incorporated in the working of the Constitution, the executive is also full of provisions giving prominence to Islam. For instance, the hereditary Rulers are constitutionally required to be Muslims. The States that have Rulers as Head of State require having a Muslim as the Head of Government.

Such provisions that give a special position to Islam do not stop at this. The Head of State of the Federation, namely the Yang di-Pertuan Agong, declares in the Oath of Office as prescribed by the Federal Constitution that he will protect Islam.[50] Contrary to the principle of neutrality of the state towards religion under secularism, the Federal Constitution specifically allows the Federal government and the State governments to establish and to maintain Islamic institutions.[51]

What do all these provisions tell us about the character and essence of the Federal Constitution? It tells us that Islam is the essence of the Constitution. The essence of the Constitution was not created out of thin air but is a reaffirmation of the constitutional characteristic and constitutional history of the States forming the Federation of Malaya, which was later known as Malaysia.

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[47] Article 11 of the Federal Constitution.

[48] Article 74-76 of the Federal Constitution. Item 1 of the State List under the 9th Schedule.

[49] Article 121(1A) of the Federal Constitution. For questions raised about the impact of the amendment, see for instance Farid Sufian Shuaib, *Powers and Jurisdiction of Syariah Courts in Malaysia*, 2nd Ed., (Petaling Jaya: Lexis Nexis, 2008).

[50] The Fourth Schedule of the Federal Constitution.

[51] Article 12 of the Federal Constitution.

Judicial Observation

Is the conclusion that Islam is the essence of the Malaysian Constitution supported by case law? The case of *Che Omar bin Che Soh v PP* has often been cited as an authority to give credence to the opinion that the Malaysian Constitution is secular in character.[52] It was argued in that case that reading the provision that says Islam is the religion of the federation together with another provision that says the Federal Constitution is the supreme law means that Islam is the supreme law under the Constitution and every law should be consistent with Islam.[53] The Supreme Court rejected this contention and observed that such is not the meaning intended by the framers of the Constitution. The Federal Court in *Subashini a/p Rajasingam v Saravanan a/l Thangathoray* had reaffirmed that the status of Islam as the religion of the Federation does not construct the supremacy of Islamic law under the Federal Constitution.[54]

On the other hand, these rulings could not be extended to mean that Islam has no place in the Malaysian legal system. This conclusion is misconceived since what the apex court concluded is the non supremacy of Islamic law under the Federal Constitution, not the non applicability of Islamic law in Malaysia. The High Court's decision in *Meor Atiqulrahman bin Ishak* had observed this misunderstanding on the implication of *Che Omar bin Che Soh* and emphatically said that the case could not be used as an authority to deter the application of Islamic law.[55] The fact that a law is not supreme does not mean that such a law could not be applied. If every non supreme law could not be applied, only the Federal Constitution is left to be applied.

The Supreme Court in *Che Omar bin Che Soh* used the term secular in the judgment. However, the term is used to explain that in Malaysia legislation is made through the legislative process – a

[52] Che Omar bin Che Soh v PP [1988] 2 MLJ 55.

[53] Articles 3(1) and 4(1) of the Federal Constitution.

[54] Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals [2008] 2 MLJ 147. See also Indira Gandhi a/p Mutho v Patmanathan a/l Krishnan (anyone having and control over Prasana Diksa) [2015] 7 MLJ 153.

[55] Meor Atiqulrahman Bin Ishak and others v Fatimah Bte Sihi and others [2000] 5 MLJ 375.

process outside religious institutions – and thus could be termed secular. The Court did not say that the Federal Constitution must exclude religious consideration or Islamic law could not be legislated. The emphasis is that law – in the context of the case - refers to legislations, namely the Dangerous Drug Act 1952 (Revised 1980) and Firearms (Increased Penalties) Act 1971, and is not received directly from religious source but has to go through a legislative process. The Supreme Court certainly did not say that secularism is the essence of the Malaysian Constitution.

The issue of the character of the constitution is also relevant in cases discussing the doctrine of the basic structure. Under this doctrine, there is an implied restriction in the power to amend the constitution in that the amendment should not destroy the basic structure. According to the Indian cases where this doctrine originated, one of the basic structures of the Indian Constitution is its secular character.[56] In applying the doctrine to Malaysia, it was proposed by counsels that the parallel structure in Malaysia is that "that the religion of the Federation shall be Islam and that other religions may be practised in harmony".[57] Although the Court in *Phang Chin Hock v PP* declined to decide on the applicability of the doctrine in Malaysia, the Supreme Court did not reject the replacement of the secular character in the Indian Constitution with Islam as the religion of the Federation in the Malaysian Constitution. Malaysian case law also reiterates the embedded nature of Islam in the Constitution. The High Court in *Meor Atiqulrahman bin Ishak v Fatimah bte Sihi* observed that Islam is put on a higher pedestal under the Federal Constitution.[58] Considering that the various special positions of Islam emanate from provisions in the Constitution, Islam is not mere window dressing to adorn the Constitution. The same sentiment is repeated in *Lina Joy v Majlis Agama Islam Wilayah*, where the High Court asserted that "Islam has been given the special status of being the main and dominant religion of the Federation" and

[56] Kesavananda Bharati v State of Kerala [1973] SCR Supp 1.
[57] Phang Chin Hock v Public Prosecutor [1980] 1 MLJ 70.
[58] Meor Atiqulrahman Bin Ishak and others v Fatimah Bte Sihi and others [2000] 5 MLJ 375.

where article 3(1) creates an obligation for the Federation to protect, defend and promote Islam.[59]

Similar to the approach taken by the European Court of Human Rights in reading the provisions on secularism in the Constitution of the Republic of Turkey to affirm the validity of the regulation in restricting the freedom of religion of Muslim female university students in wearing headscarves, the Court of Appeal in *Menteri Dalam Negeri v Titular Roman Catholic Archbishop of Kuala Lumpur* had considered Islam's position as the religion of the Federation to be the essence of the Malaysian Constitution, affirming the validity of the order given by the Minister in not allowing the use of the word Allah in the official magazine of the Catholics in Malaysia.[60] According to the Court, the restriction is necessary to prevent confusion on the concept of oneness ascribed to Allah in Islam and the concept of trinity for God in Christianity. This reasoning is parallel to the grounds of the judgment in *Leyla Sahin* where the European Court of Human Rights affirmed the validity of restricting the wearing of headscarves since the rule is to protect the group of university students who do not wear headscarves from being influenced or pressured to wear it which is, according to the court, a practice that is contrary to the essence of the Turkish Constitution namely, secularism.

According to the European Court of Human Rights, the essence of the Turkish Constitution could even trump or at least modify fundamental liberties. In this respect the freedom to practice one's religion by wearing headscarves could be validly denied in protecting and preserving secularism. The Malaysian courts in *Titular* had done the same thing in restricting the freedom of expression, in the event the exercise of such freedom jeopardises the exalted position of Islam.

This approach of protecting the essence of the constitution is not confined to the Turkish Constitution. The European Court of

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[59] *Lina Joy v Majlis Agama Islam Wilayah & Anor* [2004] 2 MLJ 119. The Court referred to Mohammad Imam, "Freedom of Religion under the Federal Constitution of Malaysia – A Reappraisal" [1994] 2 CLJ lvii.

[60] Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur [2013] 6 MLJ 468.

Human Rights also adopted the same approach in upholding the decision of the French government in refusing to renew a contract of a social assistant in the psychiatric unit of a public hospital because she refused to stop wearing the head covering - on the ground of abiding by and protecting the secular character of the French Constitution.[61] Additionally, the Court of Justice of the European Union which is based in Luxembourg, having the task to interpret European Union law, also considered the secular character of the Constitution of Belgium in allowing employers to prohibit the wearing of headscarves by Muslim front desk employees taking into account the principle of secularism.[62]

One may question whether the approach taken by the European Court of Human Rights and the European Union Court of Justice is consistent with its own framework of human rights.[63] For instance, the decision was characterised as being paternalistic in dictating what a woman should not wear. Nevertheless, such an argument would not detract from the position of primacy of secularism within the Turkish constitutional framework.

Reading the above Malaysian case law, admittedly one could not find an exactly similar articulation on essence of the constitution. The Malaysian courts in fact use the accepted principle of harmonious construction in moulding the language of the provisions. This is an often repeated and employed principle of constitutional construction in Malaysia. *Dato Menteri Othman Baginda* is among the *locus classicus* in introducing and applying this principle.[64] Reading these two approaches of harmonious construction and essence of the constitution, the similarity in both approaches is in the requirement to read the provisions of the Constitution together and not in isolation. Furthermore, Islam in contrast to other characters of the Constitution is given prominence because of the express

[61] *Ebrahimian v France* (2015) ECHR 26 November 2015.

[62] Samira Achbita v G45 Secure Solutions (2017) CJEU (14 March 2017).

[63] See for instance Jill Marshall, "Freedom of Religious Expression and Gender Equality: Sahin v Turkey" *Modern Law Review* (2006) 69, 452; Nicholas Gibson, "Unwelcome Trend: Religious Dress and Human Rights following *Leyla Sahin vs Turkey*" *Netherlands Quarterly of Human Rights* 25 (2007), 599.

[64] Dato Menteri Othman Bin Baginda & Anor v Dato Ombi Syed Alwi Bin Syed Idrus [1981] 1 MLJ 29, FC.

provision of article 3(1) declaring it to be the religion of the Federation, and numerous other articles in the Constitution that give a prominent place to Islam.

Conclusion

Constitution as a document that expresses the cardinal principles that are held dear by communities should be able to express the character and the essence of the basic document. As has been shown by the European Court of Human Rights the essence of the constitution should mould and shape the application of the provisions of the constitution. The strength of the essence could be seen in the restrictive interpretation of fundamental liberties by the European Court of Human Rights to be in line with the secular nature of the constitution. The Malaysian courts have adopted the same approach by articulating the construction through the principle of harmonious construction for the resulting interpretation to be in line with the religious nature of the Malaysian Constitution.[65]

[65] Farid Sufian Shuaib, "The Courts and Approaches to Constitutional Interpretation" *IIUM Law Journal* 8 (2000), 151.

TRANSLITERATION TABLE

CONSONANTS

Ar=Arabic, Pr=Persian, OT=Ottoman Turkish, Ur=Urdu

	Ar	Pr	OT	UR		Ar	Pr	OT	UR		Ar	Pr	OT	UR
ء	ʾ	ʾ	ʾ	ʾ	ز	z	z	z	z	گ	–	g	g	g
ب	b	b	b	b	ڑ	–	–	–	ṛ	ل	l	l	l	l
پ	–	p	p	p	ژ	–	zh	j	zh	م	m	m	m	m
ت	t	t	t	t	س	s	s	s	s	ن	n	n	n	n
ٹ	–	–	–	ṭ	ش	sh	sh	ş	sh	ہ	h	h	h[1]	h[1]
ث	th	th	th	th	ص	ṣ	ṣ	ṣ	ṣ	و	w	v/u	v	v/u
ج	j	j	c	j	ض	ḍ	ẓ	ż	ż	ی	y	y	y	y
چ	–	ch	çh	ch	ط	ṭ	ṭ	ṭ	ṭ	ة	-ah			-a[2]
ح	ḥ	ḥ	ḥ	ḥ	ظ	ẓ	ẓ	ẓ	ẓ	ال	al[3]			
خ	kh	kh	kh	kh	ع	ʿ	ʿ	ʿ	ʿ					
د	d	d	d	d	غ	gh	gh	ğ	gh					
ڈ	–	–	–	d	ف	f	f	f	f					
ذ	dh	dh	dh	dh	ق	q	q	k	q					
ر	r	r	r	r	ك	k	k/g	k/ñ	k					

[1] – when not final
[2] – at in construct state
[3] – (article) al - or 1-

VOWELS

		Arabic and Persian	Urdu	Ottoman Turkish
Long	ا	ā	ā	ā
	آ	Ā	Ā	–
	و	ū	ū	ū
	ي	ī	ī	ī
Doubled	ي	iyy (final form ī)	iy (final form ī)	iyy (final form ī)
	و	uww (final form ū) uvv (for Persian)	uv	uvv
Diphthongs	و	au or aw	au	ev
	ى	ai or ay	ay	ey
Short	ـَ	a	a	a or e
	ـُ	u	u	u or ü o or ö
	ـِ	i	i	i

URDU ASPIRATED SOUNDS

For aspirated sounds not used in Arabic, Persian, and Turkish add h after the letter and underline both the letters e.g. جھ jh گھ gh

For Ottoman Turkish, modern Turkish orthography may be used.

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