

**"UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS?":
EXPLORING THE 1973 SABAH CONSTITUTIONAL AMENDMENT
THAT DECLARED ISLAM THE STATE RELIGION**

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When North Borneo agreed to join Malaya, Singapore and Sarawak to form the Federation of Malaysia, among the guarantees that it requested was that Islam not be designated the state religion of Sabah. The request arose out of various missions carried out to ascertain the wishes of the Sabahans. However, in 1973, the State Constitution of Sabah was amended to insert Article 5, which declared Islam to be Sabah's state religion. Although this exercise of the "popular sovereignty of the people" might not be out of place in the context of "representing the popular will of the people", this particular constitutional amendment is peculiar when examined in light of various historical constitutional documents related to North Borneo because the amendment suggests that historical antecedents are not relevant in shaping a constitution. A constitution cannot be divorced from the history of its people but at the same time, putting a large premium on history would result in an outdated constitution: it has often been said that a constitution must be flexible to accommodate the wishes of the present generation of citizens. Accordingly, the validity of Article 5 must be scrutinised from all angles to determine whether its assumption of "representing the popular will of the people" is valid. This process ensures that constitutional change is not solely subject to the whims of the legislative body, which might be dictated by political concerns and personal ambitions due to the nature of politics and the political process.

Keywords: North Borneo, Sabah, constitutional amendment, state religion

INTRODUCTION

During the momentous events leading to North Borneo's membership in the Federation of Malaysia, the major political parties of Sabah drew up a document, the content of which they demanded be protected as North Borneo's constitutional safeguards. This document is known as the Twenty-Point Agreement, Point 1 of which stressed that "there should not be any State Religion for North Borneo". Unfortunately, this particular pre-Malaysia demand of the

people of Sabah was not protected when the State Constitution of Sabah was amended in 1973 to declare, "Islam is the religion of the State"¹. This matter has never been discussed and the magnitude of its constitutionality could be far reaching. Although the constitutional amendment was passed by the Sabah State Legislative Assembly, one must examine its validity because the Twenty-Point Agreement clearly states "that there should not be any State Religion for North Borneo".

There seems to be a notion that because the legislature represents the popular will of the people, it can pass any legislative measures that it likes. While that is certainly the case in the United Kingdom, which is known for its parliamentary supremacy, Malaysia has a written constitution and accordingly, its institutions do not and cannot supersede its written constitution. Thus, because Sabah has a written constitution, it is that constitution that is supreme, as opposed to the legislative body. The case of *Ah Thian v. Government of Malaysia* [1976] 2 MLJ 112 has truly entrenched the principle that the doctrine of "parliamentary supremacy" does not apply to Malaysia and that legislative bodies do not have the absolute power to make any laws that they want.

A crucial doctrine that limits legislative power to pass constitutional amendments is the "doctrine of basic structure". Under this doctrine, the Court may invalidate any constitutional amendment that destroys a country's constitutional identity. In applying this doctrine to Sabah, the state's constitutional identity can be studied by examining the classical documents that pre-date the formation of Malaysia. Thus, when examining the *Twenty-Point Agreement*, one can most likely conclude that Sabah's constitutional identity has been eroded by the 1973 constitutional amendment.

However, identifying the exact features and characteristics of Sabah's constitutional identity cannot be made by merely listing the matters that were agreed upon during the pre-Malaysia constitutional negotiations. This is because allowances must be made for the effects of the forces of change: individuals, communities, societies and countries are not immune to change. It has been said, "nothing endures but change". However, allowing the state to unilaterally decide constitutional identity is tantamount to condoning "the tyranny of the majority", in which decisions are made based on narrow and partisan political interests.

Although the legislature is the proper forum to decide the feasibility and necessity of a constitutional amendment, it must strictly adhere to its constitutional identity. Likewise, although the Sabah Legislative Assembly has the legal right to amend the State Constitution, there should be certain limits that would render null and void any amendment that destroys the identity of the State Constitution. It is trite that people should always be alert to and/or suspicious of the representative quality of the legislature, in which the interests that are debated and defended might not necessarily coincide with the people's legitimate interests. Even if and when the two do coincide, there is still room for disagreements about

the "tyranny of the majority" a concept that deplores the use of legislative assemblies to dominate the interests of the minority/marginalised.

This article explores the significance of Islam as the state religion with reference to the historical documents of Sabah/North Borneo. This is important because a discussion of Islam in the context of Sabah/North Borneo without examining its constitutional history would not do justice to Sabah's evolution. This discussion will explore the 1973 constitutional amendment to determine whether the history of Sabah/North Borneo received due recognition during the 1973 constitutional amendment process. The historical discourse notwithstanding, an important point that must be addressed is the nature of the amendment and its effect on the constitutional framework, in which mere or sole reliance on historical precedents would not adequately support any constitutional order whose very nature involves the processes of change and evolution.

PRE-MALAYSIA CONSTITUTIONAL DOCUMENTS

Report of the Commission of Enquiry (1962)

After a May 27, 1961² speech given in Singapore by Tunku Abdul Rahman Putra, the first Prime Minister of the Federation of Malaya, regarding the possibility of the creation of a political association between Malaya, Singapore, Brunei, Sarawak and North Borneo, a delighted British Government prepared the initial groundwork leading to its establishment. After several meetings in London between the British and the Federation of Malaya governments, it was decided that it was "necessary to ascertain the views of the peoples of North Borneo and Sarawak"³, and a Commission of Enquiry was established for that purpose.

Prior to the enquiry of this Commission of Enquiry, which was led by Lord Cobbold, the Government of North Borneo published a paper in support of the creation of the Federation of Malaysia entitled *North Borneo and Malaysia*.⁴ Paragraph 10 of the document mentions the position of Islam:

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

Thus, even before the Commission of Enquiry started its work in North Borneo, the paper entitled *North Borneo and Malaysia* provides evidence of the constitutional nature of Islam's position in North Borneo. It might be argued that because this document was prepared by the colonial government (which was not democratically elected), it could not claim to reflect the wishes of North Borneo's people. However, the submissions made to the Commission of Enquiry show that North Borneo's people did not want Islam to be Sabah's state religion.

In Chapter 2 of the *Report of the Commission of Enquiry* (hereinafter known as the *Cobbold Commission Report*), which addressed the situation in North Borneo, paragraph 102 states that Islam in North Borneo was a religion practiced by a minority.⁵ This statement is significant because it frames the issue concerning the suitability of Islam as Sabah's state religion. The Commission of Enquiry noted that although the Muslim community had requested that Islam be made the religion of the Federation, the Commission had also received requests from people of other religions not to make Islam Sabah's state religion.⁶ Clearly, there were divergent views of the issue that most likely followed religious and communal lines.⁷ The only groups that favoured Islam as Sabah's state religion were Muslims and the United Sabah National Organisation (USNO) political party, which owed its strength to the Muslim community.⁸

Although there were relatively few objections to Islam being made the religion of the Federation, there was clearly a strong objection to Islam being made Sabah's state religion. Tied to this objection was the concern that North Borneo's societal make-up would be adversely affected. Taxpayers money could be used for Islamic purposes in Malaya because Islam was the religion of the Federation; however, the idea of publicly subsidised Islamic activities did not receive support from non-Muslims in North Borneo. However, it is interesting to note the differing views of the Malayans and other members of the Commission regarding this matter. Lord Cobbold and the other British members stated as follows:

...there remain provisions in the existing Federal Constitution of Malaya that Islam is the national religion and that certain public expenditure may be incurred for Islamic purposes. All Muslim communities would welcome the provision that Islam should be the national religion of the Federation. However, even with the guarantees of freedom of religion for the Borneo States, we have met with strong resistance from many non-Muslim communities to the idea that these federal provisions should apply to the Borneo territories. We consider that this is a matter for the peoples of Borneo Territories (which have a non-Muslim majority) to decide for themselves at a later stage, when fully elected representative bodies have been constituted. Therefore, in

the meantime we recommend that the federal provisions should not be extended to the Borneo Territories.⁹

However, the Malayan members of the Commission stated that:

...a great many would be prepared to consider that Islam might be made the national religion provided that it should not be the religion of their particular state...There remain, however, some objections to the existing Constitution of the Federation of Malaya that certain public expenditure may be incurred for Islamic purposes. We feel unable to make any positive recommendation in this respect because this resistance, though strong, is small, and any recommendation for a constitutional provision to meet this objection will do violence to the present provisions in the Malayan Constitution, which the weight of opinion does not require. We therefore limit ourselves to recording the point.¹⁰

It is perplexing to note how the Malayan members dismissed concerns about the subsidisation of Islamic activities by taxpayers' money as "small", compared to the observation of the British members that there was "a strong resistance from many non-Muslim communities": it is a fact that non-Muslims were approximately two-thirds of the population of North Borneo at the time. It is even more interesting to note that this dismissal was made after observing that "a great many" people did not want Islam to be Sabah's state religion. Unfortunately, there was no unanimous decision concerning the position of Islam in Sabah, and the Commission was left to merely record the various opinions expressed by members of the Commission.

Report of the Inter-Governmental Committee (1962)

After the Commission of Enquiry completed its task and "unanimously agreed that a Federation of Malaysia is in the best interests of North Borneo and Sarawak"¹¹, the governments of The Federation of Malaya and the United Kingdom established an inter-governmental committee to "work out the future constitutional arrangements" for the new Federation of Malaysia and constitutional safeguards for North Borneo and Sarawak.

The Report of the Inter-Governmental Committee (1962) unfortunately does not contain any constitutional safeguard regarding the people's wish that Islam should not be Sabah's state religion. Its silence on the matter is truly strange in light of the clear wishes and aspirations that had been expressed in the Cobbold Commission Report.

Paragraph 15 of the Report of the Inter-Governmental Committee (1962) illustrates and explains the issue of religion in the new constitution. Although it says nothing about the inclusion or non-inclusion of Islam as Sabah's state religion, several important points raised were relevant in distinguishing the position of Islam as the predominant religion in West Malaysia and its position in Sabah. First, Article 11(4) of the Constitution of the Federation of Malaya allowed state governments to "...control or restrict the propagation of any religious doctrine or belief among persons professing the Muslim religion". This was due to Islam's special position in the Malay States. Paragraph 15(2) of the Report of the Inter-Governmental Committee (1962) did not allow the immediate and wholesale importation of such a provision into the new Sabah Constitution, stating that such a provision "would need to be passed by a two-thirds majority vote of the total membership of the State Legislative Assembly".

Second, in line with the concern that taxpayers' money would be used to subsidise Islamic activities in Sabah, paragraph 15(3) states as follows:

Federal law should not provide for special financial aid for the establishment of Muslim institutions or instruction in the Muslim religion for persons professing that religion in respect of North Borneo and Sarawak without the concurrence of the State Government concerned.

The above constitutional safeguards should not be taken because since paragraph 30 of the Report of the Inter-Governmental Committee (1962) stated that matters about religion required special protection.

Agreement Between The United Kingdom of Great Britain and Northern Ireland, and The Federation of Malaya, North Borneo, Sarawak and Singapore

The final pre-Malaysia constitutional document of relevance to this issue is the agreement between The United Kingdom of Great Britain and Northern Ireland, The Federation of Malaya, North Borneo, Sarawak and Singapore (also known as the "Malaysia Agreement"). Annexure A of that agreement contains the Malaysia Bill, which consists of the provisions of the new Constitution of The Federation of Malaysia. Article 64 mirrors the arrangement contained in the earlier paragraph 15(3) of the Report of the Inter-Governmental Committee (1962), and Article 65 mirrors the arrangement contained in the related paragraph 15(2). Later, in the new Constitution of The Federation of Malaysia, Article 64 of the Malaysia Bill was inserted as Article 161C, and Article 65 was inserted as Article 161D.¹²

When the Malaysia Bill was debated in the British Parliament, similar guarantees were made in the parliamentary speeches. When opening the debate

during the second reading of the bill in the House of Commons, Nigel Fisher, the Under-Secretary of State for the Colonies said (in the last paragraph of his speech) that "although Islam will be the religion of the federation, there will be no State Religion in the Borneo States."¹³ Similarly, when the bill was read for the second time in the House of Lords, the Marquess of Lansdowne reiterated the point:

Although Islam will be the religion of the federation, there will be no State Religion in the Borneo States, and no law can be enacted restricting the propagation of other religious doctrines, even among Muslims, without a two-thirds majority of the State Assemblies. I should perhaps mention that in Sarawak 23 per cent of the population is Muslim, and in North Borneo I think it is 37 per cent. This was a matter to which the Borneo leaders attached the greatest importance.¹⁴

THE 1973 CONSTITUTIONAL AMENDMENT IN SABAH (ENACTMENT NO. 8 OF 1973)

Despite the solemn guarantees, on 25 September 1973, the Constitution of the State of Sabah was amended in 1973 to include the provision designating Islam as Sabah's state religion¹⁵ through Enactment No. 8 of 1973. The provision received the assent of the *Yang di-Pertua Negeri* on 27 September 1973.

A paper entitled "*The Enfranchisement of Bona Fide Sabahans*"¹⁶ that was presented at the United Nations and the Parliaments of Belgium and Holland attacked the contravention of Point 1 of the Twenty-Point Agreement relating to Islam by stating as follows:

We were promised that there would be no state religion in North Borneo in perpetuity and the provision relating to Islam in the present Constitution of Malaya should not apply in North Borneo. This right has been taken away.¹⁷

It must be noted that it was Sabah's State Legislative Assembly that contravened Point 1 of the Twenty-Point Agreement when it amended Sabah's State Constitution. The Constitutional Amendment Bill, 1973, was introduced for a second reading in the State Legislative Assembly of Sabah by Said bin Keruak, who was Sabah's Minister for Agriculture and Fisheries. The bill proposed to establish Islam as Sabah's state religion and Bahasa Malaysia as Sabah's language to be used for all official purposes.

Said bin Keruak offered an alternative view as Islam had not been designated as Sabah's state religion during the early days of Sabah's membership in the Federation of Malaysia. According to him, "the State Government of Sabah

was of the opinion that it was not yet time for the state to accept the reality that the religion for the State of Sabah was Islam". He continued, "this was because the State Government believed that it was unwise to declare any religion for the State of Sabah because during that time, Malaysians were not yet firm in their conviction concerning such matters".

The minister seemed to indulge in a "creative interpretation" of history, especially because no reference was made to the report by the Commission of Enquiry that had been sent to Borneo to "ascertain the views of the people of North Borneo and Sarawak".

Additionally, his speech appears to have a strong autocratic and paternalistic undertone, assuming that it is the State Government that decides what is beneficial for the whole populace, as opposed to the people deciding for themselves. In contrast to the colonial government's conduct of a survey of the views of the people of North Borneo, this display of paternalism in the State Legislative Assembly is a bit disconcerting. Additionally, it is strange to note that there was no acknowledgement of the statistics related to Sabah's population during the early days of the Federation, and nor was there a tacit acknowledgement that Point 1 (that North Borneo should have no state religion) of the Twenty-Point Agreement was agreed to by leaders from all of North Borneo's major political parties.

The minister's justifications in proposing the amendment and thus departing from the established version of history were twofold: first, there had been a demographic change that increased the Muslim population, which had "successfully influenced the State Government regarding their religion"; and second, "in line with the basic concept accepted by Malaysians in Sabah that Islam is the religion of Malaysia", the amendment was only to harmonise the State Constitution of Sabah with the Federal Constitution of Malaysia. During the legislative debate, this argument was later reiterated by two other members.

The minister also said that the amendment would not encroach upon the people's right to freedom of religion, a promise that was further supported by four other members during the debate on the motion. Only six members of the Sabah State Legislative Assembly¹⁸, including the minister, took part in the debate, and the substance offered in the speeches of the other five assemblymen was relatively similar to the points made by the minister. Of these five assemblymen, Dzulkifli Abdul Hamid and Anthony Gibbon made arguments that stood in stark contrast to those made by the others. Aside from the usual "change in demographics" argument and the "freedom of religion" guarantee, Dzulkifli Abdul Hamid raised a strange argument regarding the complex amalgamation of the notion of a single culture and preserving unity. He first noted that the goal of having one culture was to unite the people and that Islam was suitable for that particular purpose. Next, his argument endorsed "preserving unity" and argued that Islam was the most suitable tool for that purpose. Although quoting verses from the Holy Quran and various *Hadis* (sayings of the Prophet) was not out of

the ordinary (and which he also did), Dzulkifli Abdul Rahman also remarked that "if only God the Most Holy would bestow guidance so that all of our citizens would embrace Islam, I am confident that our country will be stronger, more peaceful and prosperous forever and ever".

Anthony Gibbon, the only non-Muslim Assemblyman who took part in the debate, said only, "Islam must also be respected like the other religions that are already here now". Nothing was mentioned about the pre-Malaysia pact that Islam would not be designated Sabah's state religion. It is even stranger to note that although other non-Muslim Assemblymen were present in the State Legislative Assembly—including Herman Luping, Edwin Chan Foo Sang, Peter J. Mojuntin and Pang Tet Tshung—none of these non-Muslim Assemblymen spoke on the issue. Interestingly, Herman Luping has published his doctoral thesis¹⁹ as a book entitled *Sabah's Dilemma: The Political History of Sabah, 1960–1994*; the book does not contain any material about what transpired during the debate on this particular constitutional amendment.

None of the other assemblymen offered a dissenting opinion, and following the committee stage, after which the bill was reported back to the State Legislative Assembly without modification, the bill was passed unanimously. Subsequently, in a probable bid to reinforce its new "Islamic" image, Sabah claimed the title *Negeri Sabah Darus Saadah*²⁰ during a 1977 visit by the *Yang di-Pertuan Agong*.²¹ If the legitimacy of this constitutional amendment were based solely on the speeches delivered during the debate, one would feel obliged to conclude that it is valid because it passed through the legislative procedures. However, when viewed against a political background in which *realpolitik* dictates that a politician's real duty is towards his political superiors, then the legitimacy of this amendment is in doubt.

CASELAW ANALYSIS

Taking into account Sabah's interesting constitutional history, particularly the different stages that it passed through during its transformation from the British colony of North Borneo into the State of Sabah, it would seem that the accompanying constitutional documents could be consulted and in fact, could be used to buttress Sabah's specially granted constitutional safeguards. However, none of the cases to examine the historical documents and their relationships to Sabah has offered a detailed historical review of the creation of the State of Sabah within the Federation of Malaysia.

In *Pusat Berkuasa Negeri Sabah v. Sugumar Balakrishnan* [2002] 3 MLJ 72, the Court had an opportunity to examine the special nature of the state's immigration powers with reference to the pre-Malaysia constitutional agreements. In that case, the respondent had worked in Sabah since 1975. Because he was not a local, he was required to apply for a special work pass, similar to any other

person from West Malaysia who came to Sabah to work. The respondent was about to be entitled as "belonging to Sabah" with reference to the immigration law due to his long stay when his entry permit was cancelled and he was declared a *persona non grata*. After his application for *certiorari* was rejected by the High Court, the Court of Appeal agreed to hear his case. One contentious issue was whether decisions made by the immigration department under Part VII of the Immigration Act in the context of an immigration matter in Sabah could be reviewed. The Federal Court accepted the submission of the State Attorney General of Sabah, who urged the court to consider the objectives and the history of the special nature of Sabah's control over its own immigration laws. The Federal Court favoured the State Attorney General and referred to the provision concerning Sabah's control over its own immigration affairs in the Malaysia Agreement and the Inter-Governmental Committee Report 1962, which stated that Sabah would have complete control in deciding who to admit. The court also looked at Article 9, Clause 3 of the Federal Constitution in concluding that due to the special place that Sabah enjoys in Malaysia, its parliament is empowered to make laws that restrict movement and residence.

In *Muhammad Tufail Bin Mahmud & Ors v. Dato Ting Chek Sii* [2009] 4 MLJ 165, the Federal Court was faced with the issue of whether an advocate and solicitor from the Peninsula could appear as counsel in a case concerning an appeal from the High Court of Sabah and Sarawak that had been fixed for hearing in Putrajaya. The Federal Court examined the special nature of the exclusive right of audience enjoyed by lawyers in Sarawak by tracing the subject matter through the historical documents of the Cobbold Commission Report, the Inter-Governmental Committee Report and the Malaysia Agreement, and upheld the Sarawakian lawyers' exclusive right of audience in cases originating in Sarawak. The Federal Court stated as follows:

Reading the Cobbold Commission Report, the IGC, the Malaysia Act, the Advocates Ordinance of Sarawak and all that culminate in article 161B of the Constitution, the plain and obvious intention is that legal practitioners in Sabah and Sarawak are protected from the intrusion of practitioners from other regions, particularly Malaya (now politically referred to as West Malaysia or Semenanjung Malaysia).²²

In *Robert Linggi v. The Government of Malaysia* [2011] 2 MLJ 741, the issue was the power of the *Yang di-Pertua Negeri* over judicial appointments. Pursuant to a 1994 constitutional amendment, The *Yang di-Pertua Negeri* Sabah's power to appoint judicial commissioners under the pre-amended provisions of Article 122A(3) and (4) had been removed by the new Article 122AB, which does not even mention *Yang di-Pertua Negeri*. The plaintiff challenged the constitutionality of the amendment and of the Judicial Appointments

Commission Act 2009. The court referred to Article VIII of the Malaysia Agreement together with the Inter-Governmental Committee Report of 1962 to buttress the point that the manner and organisation of the High Court of Sabah and Sarawak was very special and that this special nature, which required the consent of the *Yang di-Pertua Negeri* to be amended, could be traced to safeguards contained in the pre-Malaysia constitutional documents. The court also referred to relevant portions of the earlier cases of Sugumar Balakrishnan and Tufail to give weight to the binding nature of the Inter-Governmental Committee Report of 1962 and the Malaysia Agreement, which provide some guarantees of the special nature of Sabah and Sarawak, together with the rules governing the special relationship between the federal government and the states of Borneo. The court stated that the Malaysia Agreement and the Inter-Governmental Committee Report must be treated with utmost reverence.

In *Re Mohamed Azahari Matiasin* [2011] 2 CLJ 630, the issue was whether a lawyer from the Peninsula could be allowed to appear on behalf of a client in an arbitration proceeding in Sabah. The counsel for the applicant cited the well-known case of *Zublin Muhibbah Joint Venture v. The Government of Malaysia*, in which the court had allowed an American attorney to participate in a local arbitration proceeding. In the *Zublin Muhibbah Joint Venture* case, the court explained that the "exclusive right to appear and plead in all Courts of Justice in Malaysia", as enjoyed by the lawyers under the Legal Profession Act, had no relevance to that case because "an arbitral forum is not a Court of Justice in Malaysia"²³. The court distinguished the *Zublin Muhibbah Joint Venture* case by referring to the different words used in the Legal Profession Act and the Sabah Advocates' Ordinance.²⁴ The Legal Profession Act used the phrase "exclusive right to appear and plead in all Courts of Justice in Malaysia", which appears to limit the lawyers' exclusive right to Court appearances. However, the Sabah Advocates' Ordinance uses the phrase "the exclusive right to practise in Sabah"²⁵, which is necessarily wider and embraces proceedings conducted in *arbitral fora*. The court also reviewed the legal history of the exclusive rights of legal practitioners in Sabah and Sarawak by referring to the related judgments in *Muhammad Tufail Bin Mahmad & Ors v. Dato Ting Chek Sii*. Specifically, the court referred to the reasoning in Tufail's case that cited the Cobbold Commission Report and the Inter-Governmental Committee Report of 1962.²⁶ The court also referred to the special protectionist measures used by the employment sector in Sabah by virtue of recommendations made by the Cobbold Commission of Enquiry and the Malaysia Solidarity and Consultative Committee (MSCC).²⁷ Finally, when confronted with opposing arguments—a policy argument was pitted against a historicoo-legal argument—the court had no difficulty in ruling in favour of the latter.

All of the disputes in these four cases were decided by referring to the historical documents relating to Sabah, primarily the Malaysia Agreement and the Inter-Governmental Committee Report 1962. The court referred to those

historical documents and placed a strong emphasis on the special rights and privileges guaranteed by such documents. However, a closer look at the cases above reveals that the court did not wholly rely on those constitutional documents. In *Pusat Berkuasa Negeri Sabah v. Sugumar Balakrishnan*, the Federal Court did not base its decision entirely on the Report of the Inter-Governmental Committee, 1962. Although the Federal Court did acknowledge the significance of the document, it also looked to textual provisions of the Federal Constitution, namely Article 9(3) and Article 161E(4), in deciding whether the State Authority of Sabah had an "untrammeled" power in immigration matters compared to other states in Malaysia. In *Re Mohamed Azahari Matiasin*, the gravamen of the court's decision was the Sabah Advocates' Ordinance. The court used a literal approach in referring to the specific words contained in the ordinance and decided that Sabah's lawyers possess an exclusive monopoly and right of audience in court and arbitral proceedings compared to the limited exclusive right for court proceedings only enjoyed by lawyers in West Malaysia.

Of all of these cases, it is obvious that the case of *Robert Linggi* is the most relevant in light of the constitutional amendment's polemic related to designating Islam Sabah's state religion. Unfortunately, the learned judge was only mechanically citing the saving provision of "concurrence from the *Yang di-Pertua Negeri*"²⁸. After acknowledging that the contentious issues in the case were classified as special matters requiring "concurrence from the *Yang di-Pertua Negeri*", and after reiterating the special status of the Inter-Governmental Committee Report of 1962 and the Malaysia Agreement, the Court merely verified that the assent of the *Yang di-Pertua Negeri* had been obtained. It would have been more beneficial for legal practitioners and constitutional law scholars had the court delved further into the issue of whether the constitutional amendment would fit into the state's constitutional identity. The court was indeed presented with an opportunity to do so, especially after it referred to Tun Suffian's words in *Ah Thian v. Government of Malaysia* [1976] 2 MLJ 112:

The doctrine of the supremacy of Parliament does not apply in Malaysia. Here, we have a written constitution. The power of Parliament and of State Legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.

This "instrumental" view of treating the law as a mere "means to an end"²⁹ deprives constitutional scholars and legal practitioners the opportunity for a deeper and meaningful discussion on the validity of constitutional amendments, particularly in the context of Sabah, which has an interesting legal history. What is interesting is that the actual provisions of the Cobbold Commission Report are only rarely referenced. Even if such a reference had been made, the Cobbold Report was merely cursorily mentioned: Only minute details from the Inter-Governmental Committee Report were cited. A pertinent observation that could

be made is that none of the cases cited made any mention of the Twenty-Point Agreement.

Could the Twenty-Point Agreement be used as an authority to support the argument that Islam should not be Sabah's state religion? None of the historical documents mentioned the Twenty-Point Agreement, despite the fact that the Twenty-Point Agreement was agreed upon by a coalition of Sabah's political parties on the eve of Sabah's decision to join in creating the Federation of Malaysia.³⁰ If a credible amount of weight could be attached to input from the MSCC, it is reasonable to suggest that similar weight could also be given to the Twenty-Point Agreement. It has been argued that the only constitutional documents with binding authority are the Malaysia Agreement and the Inter-Governmental Committee Report, 1962 because they were signed on behalf of the respective governments.³¹ Although this view does indeed carry much weight, especially in the realm of international law, in which treaties signed by state parties are considered sources of international law, it is certainly unfair to dismiss the importance of the Twenty-Point Agreement in the context of Sabah's legal history, particularly with respect to the status of Islam. Not only did the majority of North Borneo's people clearly object to Islam as state religion in the pre-Malaysia constitutional documents, the final British Governor of North Borneo, Sir William Goode remarked in his memorandum as follows:

...in North Borneo, there is emotional distrust of accepting Islam as the official religion of Malaysia. The Malay States and Brunei have always been Muslim states. North Borneo has not, nor have Sarawak and Singapore.³²

THE DOCTRINE OF "BASIC STRUCTURE"

The issue regarding the validity of the constitutional amendment can be discussed with reference to the doctrine of "basic structure", a doctrine that empowers the court to nullify a constitutional amendment that has the effect of destroying a constitution's "basic structure". The doctrine also discusses whether a constitution possesses some permanent features that cannot be amended or repealed. Many writers have referred to Indian jurisprudence to implant this doctrine in Malaysia. Although comparative constitutionalism does indeed allow for such an endeavour, a study of the earliest examples of Malaysia's written constitutions reveals that the doctrine of "basic structure" is neither alien nor foreign.³³

From the decisions in the cases of *Government of the State of Kelantan v. Government of the Federation of Malaya & Tunku Abdul Rahman Putra Al-Haj* [1963] 1 MLJ 355, *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187 and *Phang Chin Hock v. Public Prosecutor* [1980] 1 MLJ 70, the court seems to have placed considerable emphasis on the constitution's textual

provisions, specifically, the procedures for effecting a constitutional amendment. No analysis was offered regarding the importance of the substance of a constitutional amendment. To limit the discourse of the validity of constitutional amendments to whether a constitution is "controlled" or "uncontrolled" with reference to its special procedures on constitutional amendments would be an incomplete legal discourse. It was only in the case of *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [Civil Appeal No:01-8-2006(W)] that the Court forcefully elaborated and used the doctrine of basic structure. In that case, which involved whether the court should inquire into the harshness and/or injustice of a law and whether the ballot box would be a better avenue and remedy, Gopal Sri Ram FCJ clearly expounded the doctrine of the constitution's "basic structure" by pointing out that such a concern would have no merit in Malaysia because, unlike the UK Parliament, which is supreme, the Malaysian Parliament "is limited by the constitution, and they cannot make any law they please".

If the only issue relevant to Sabah's constitutional amendment relates to procedure, then that would be the end of the matter because the amendment was passed with more than a two-thirds majority. Additionally, although the 1962 Commission of Enquiry unanimously recommended that the states should be allowed to retain "their individual identity,"³⁴ the Commission also noted at the very beginning of its recommendations they were not to endure for eternity: The Commission alluded to the sovereignty of the people of Borneo, stating in paragraph 148(b) that "...the power of amending the constitution of each state belongs exclusively to the people in the state..."

When the procedural journey of this constitutional amendment is examined, it is clear that the bill was passed unanimously by all 35 members present, and that only 3 members were absent from the State Legislative Assembly proceedings on that particular day. The amendment clearly garnered the support of a majority of more than two-thirds of the total number of the members of the State Legislative Assembly. Justifying the amendment based on procedure alone is unfortunately incomplete because it does not address the issue of whether the amendment destroyed the "constitutional identity" of Sabah.

CONSTITUTIONAL IDENTITY

Ascertaining the identity of a country solely by relying on its historical past does not give a true picture of its constitutional identity because a country is not immune to the forces of change. With respect to this problem, this writer recommends placing reliance on the analysis by Gary Jeffrey Jacobsohn in his book, entitled *Constitutional Identity*.³⁵ According to Jacobsohn, a country's constitutional identity results from the pull of opposite features and claims that exist in any constitutional set-up and which is also known as the concept of "disharmony". This involves a certain degree of mediating and reconciling the

different influences to which a country is exposed, but a country, similar to an individual subject to the influences of his peers, family, friends, and social interactions, is not solely determined or dictated to by its past. A country that does not change and is impervious to changes would have legitimacy problems. In the context of Sabah, the Commission of Enquiry (1962) reiterated the principle that the Constitution of Sabah would be susceptible to changes and amendments made by the people of Sabah themselves.³⁶

By proclaiming Sabah an Islamic State while ignoring the major traditional, indigenous, non-Muslim element of Sabah's identity, the resulting identity is flawed since it was made in an autocratic manner that did not consider the important processes of moderating and balancing Sabah's internal features. These processes of "building and repudiating, incorporating and negating" can "result in legitimating and entrenchment of aspirations"³⁷. Referring to the *hansard*, the most oft-quoted reason of many of the members debating the motion was the need to achieve uniformity with the other states and although this reason in itself is synonymous with the forces of change, it should have also considered the "legacy" of the pre-Malaysia constitutional documents together with the "historical narrative" of the majority of the indigenous communities concerning Islam.

MODELS OF CONSTITUTIONAL AMENDMENT AND SOVEREIGNTY

It has been written that there are "three models of constitutional amendment: textual, political and substantive"³⁸. The "textual model" refers strictly to the textual provisions of the constitution,³⁹ the "political model" refers to the power of the other branches of the government in carrying out policies affecting a constitutional change,⁴⁰ and the "substantive model" refers to the power of the judiciary in nullifying the decisions of the government by examining the content of the constitutional amendment pursuant to the justification that such actions destroy the "basic structure" of the constitution.⁴¹ Attached to each of these models is a corresponding and distinctly varying value of sovereignty.

The concept of sovereignty "entails legal, political and sociological dimensions that often cannot be disentangled from each other"⁴². Both the textual and substantive models uphold the supremacy of the constitution. The only difference between them is that the substantive model looks to the "spirit of the constitution"⁴³ and goes further than the textual model by holding that even if the procedures of the constitutional amendment have been respected, the amendment can be declared null and void, for example, if it destroys the constitution's identity. Thus, it is unsurprising to note that the substantive model entails the concept of "judicial sovereignty"⁴⁴ whereby the "judiciary is exclusively responsible for interpreting the constitution"⁴⁵. Conversely, the "political model" entails the concept of popular sovereignty.⁴⁶ An example is in the United States,

in which "sovereignty of the people" cannot be controlled nor restricted "either by conventional practice or written constitutional procedures"⁴⁷.

A concept that is interconnected with the above discussion on sovereignty relates to the degree of legitimacy bestowed on the political process in a state with its own distinct model of constitutional amendment.⁴⁸ It has been stated that the American political process is regarded by the American "political model" as a "vehicle for achieving legitimacy"⁴⁹, whereas in the states that have the "substantive model", the political process is not the determining factor of legitimacy.⁵⁰

Reviewing the majority of the legal precedents, Malaysia does indeed have a strong presumption of the "textual model". Unfortunately, this model does not do justice to the real aspirations of the people. It is admittedly easier and more expedient to resort to this model, especially when it cloaks the state with a veneer of legality and legitimacy because the state can and will argue that it has fulfilled procedural requirements while receiving majority support. However, all that it does is sacrifice the spirit of the law, thereby causing its content to be suspect. It would be a paradox if the state of Sabah, in trying to immerse itself in an Islamic identity, chose Niccolo Macchiavelli's political philosophy of the "ends justify the means" as its guiding philosophy.

How are these different models of constitutional amendment be of relevance to Sabah? Now, when Article 43 of the Sabah State Constitution is examined, it is clear that the "political model" does not apply to Sabah because Article 43(1) states that any amendment can only be made through an enactment of the State Legislative Assembly. Article 43 also requires a special majority of at least two-thirds of the total number of the members during the second and third readings.

If the previous trend of merely following the textual provisions of the constitution is followed, it would not be difficult to conclude that the 1973 constitutional amendment is valid because it complies with the procedural requirement of the special majority of at least two thirds. Indeed, this "textual model" trend has been applied in several prominent Malaysian cases. The court even applied the "textual model" in the case of *Robert Linggi* regarding the constitutionality of the amendment to the power of the *Yang di-Pertua Negeri* of Sabah in appointing High Court judges. However, the "substantive model" cannot simply be dismissed.

Malaysia is arguably on the threshold of taking a stand related to its model of constitutional amendment. From the previous long line of cases that either dismissed or inadequately addressed the issue of "basic structure", Gopal Sri Ram's *ratio* in *Sivarasa Rasiah v. Badan Peguan Malaysia & Anor*⁵¹ signalled the urgent need for the Malaysian judiciary to cogently take note of that doctrine. Furthermore, the said *ratio*, which boldly proclaimed the existence of "basic structure" in the Malaysian Federal Constitution, was followed and approved in the subsequent cases of *Titular Roman Catholic Archbishop of Kuala*

Lumpur v. Menteri Dalam Negeri & Anor [2010] 2 MLJ 78,⁵² *SIS Forum (Malaysia) v. Dato' Seri Syed Hamid Bin Syed Jaafar Albar (Menteri Dalam Negeri)* [2010] 2 MLJ 377,⁵³ *Arumugam a/l Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors* [2010] 3 MLJ 412⁵⁴ and *Mohd Hilman & Ors v. The Government of Malaysia & Ors* [Civil Appeal No. W-01(1M)-636-2010]. These recent cases upholding the doctrine of "basic structure" conventionally focused on the protection of fundamental liberties. Arguably, the court might develop this doctrine further to include the discourse of "constitutional identity".

CONCLUSION

The issue of Islam in Malaysia has never been simple. The historical narrative of Islam in Malaysia is synonymous with the initial embrace of a marginalised identity, which then was transformed into the dominant position, taking into account Malay's shared pride and deep feelings concerning Islam. Indeed, Malaysia had Islamic sultanates during the pre-colonial days, which have been modified into constitutional monarchs in the various Malay states. In the context of Sabah, although at a certain point in its past it was under the contested suzerainty of the Brunei⁵⁵ and Sulu Sultanates, it was clear that upon breakaway from its British colonial master, the majority of the people in North Borneo had unpleasant memories of their treatment by the Brunei and Sulu overlords.⁵⁶ Upon the creation of "Sabah", the records show that Muslims were only a minority. It was believed that there was no danger of North Borneo being "swamped" by Muslims.

This point was raised in the British Parliament. During the Second Reading of the Malaysia Bill in the House of Commons on 19 July 1963, Mr. R. W. Sorensen posed the following question to the Under-Secretary of State for the Colonies:

With the possibility of wholesale conversions that take place to any religion, and in the case of Sarawak, say, among the [Dayaks] to Islam, is there not a real possibility that there might be the two-thirds, who could then impose upon the people of Sarawak the same unfortunate restrictions as are being imposed upon the people of Malaya?⁵⁷

The reply to that question was as follows:

Theoretically, there is that possibility. In practice, however, I should have thought that there was not much likelihood of it. I am conscious of the fact that the honourable Member knows that part of the world very well, whereas I, unfortunately, have never

been there, and so I do not enter into an argument with him on the practical considerations, because for all I know I may be on difficult ground. However, in theory, certainly it could be done, but in practice I am advised that it is very unlikely to happen because of the relatively small number of Muslims in the two countries.⁵⁸

Although the Under-Secretary was advised that "it is very unlikely to happen", in the past, mass conversions to Islam have been zealously carried out in Sabah.⁵⁹ The unfortunate backlash is the effect of quality versus quantity, in which there have been many cases of converts who wished to renounce Islam.⁶⁰ Merely proclaiming Islam as the state religion, without the accompaniment of a truly Islamic system that covers the legal, political, economic and social systems, would certainly defeat the rationale of an "Islamic state"⁶¹. This is the fundamental problem in all Muslim societies where a greater emphasis is put on the form and appearance of Islam than on its substance. The controversy surrounding the use of the word "Allah" by Christians in Malaysia proves this point. Instead of critically looking for better ways to internalise Islam as Malaysia's "the way of life", to continuously improve and streamline socio-economic policies with Islam to fulfil the requirements of Islamic notions of socio-economic justice, more attention has been given to the relatively less important matter of prohibiting Christians from using the word "Allah". Looking at the Court of Appeal's judgement, it is this writer's contention that the rationale given by the judges was far from satisfactory. Other than the failure to deal adequately with the Applicant's affidavit relied upon by Justice Lau Bee Lan in the High Court's judgement,⁶² the Court of Appeal did not look at whether the Quran allows Christians to use the word "Allah". Instead of considering this very important matter, the judges were content to examine whether the Bible uses the word "Allah", to which the answer is no.⁶³ Had the Court of Appeal looked at the Quran to determine whether Islam allows non-Muslims to use the word "Allah", the judges would and could have arrived at a different conclusion.⁶⁴ Of course, it is very interesting to note that immediately following the Court of Appeal's judgement, the Prime Minister said that Christians in Sabah and Sarawak could continue to use the word "Allah" and that "the Court of Appeal decision to uphold the Home Ministry's ban on the use of 'Allah' in the Catholic publication *The Herald* does not affect the Christians of Sabah and Sarawak"⁶⁵.

Although the focus of most of the discussions concerning Sabah's constitutional amendments has been a mixture of history, law and politics, it remains to be seen whether the current crop of politicians will learn the lessons of history. The political contestations reflected in Sabah's constitutional amendments are also strongly and deeply connected to the contest for resources. This makes the issue of Islam in Sabah more than just religion. The Constitution of Sabah belongs to all of Sabah's people and it should not be seen as a privileged

area belonging only to the *wakil rakyat*.⁶⁶ The post-colonial discourse of power and hegemony must be utilised by the people of Sabah to deconstruct for themselves the nature of power and politics in Sabah and see for themselves the real identity and motivations of their elected representatives.

NOTES

1. Article 5A, Sabah Constitution.
2. Paragraph 2, Report of the Commission of Enquiry, North Borneo and Sarawak, 1962 (The Cobbold Commission Report).
3. Paragraph 4, *ibid*.
4. "North Borneo and Malaysia", published by authority of the Government of North Borneo, Appendix E, Commission of the Enquiry, Cobbold Commission Report.
5. "...Islam is the religion of around a third of the population..." See also paragraph 116: "...At the time of the 1960 census as many as 172,324 or about 38% of the population of North Borneo were Muslims..."
6. Paragraph 118, sub-para (d): "...on the other hand, representations were made by many other persons of other religious faiths that because Muslims were in a minority in North Borneo there was no case for forcing Islam on the country as the religion of the State..." See also paragraph 123, sub-para(d) on representations from the Chinese community.
7. Paragraph 142: "...We have given indications earlier that for a number of reasons, opinions tend to run on racial and communal lines..."
8. Paragraph 131.
9. Paragraph 148(e)(i).
10. Paragraph 148(e)(ii).
11. Paragraph 1, Report of the Inter-Governmental Committee, 1962.
12. Articles 161C and 161D have been repealed.
13. HC Deb 19 July 1963 vol. 681, page 927.
14. HL Deb 26 July 1963 vol. 252 cc932-79, at c937.
15. Article 5A: "Islam is the religion of the State; but other religions may be practiced in peace and harmony in any part of the State".
16. Daniel John Jambun, President of CigMa (Common Interest Group Malaysia), at <http://max-cdn.loyarburok.com/wp-content/...a-fide-Sabahans-by-Daniel-John-Jambun.pdf/>
17. Page 3.
18. Datuk Haji Abdul Malik Bin Jangkat, Tuan Haji Dzulkifli Haji Abdul Hamid, Tuan Haji Mohd Dun Bin Banir, Datuk Haji Farid T. S. Tan and Datuk Anthony Gibbon.
19. Herman James Luping, "*The Kadazans and Sabah Politics*" (PhD diss., Victoria University, Wellington, 1985). <http://researcharchive.vuw.ac.nz/handle/10063/768/>
20. The Malay states have their own individual titles, such as *Darul Ehsan* for Selangor, *Darul Ridzuan* for Perak and *Darul Makmur* for Pahang.
21. Programme booklet on the visit of His Majesty *Yang di-Pertuan Agong* and Her Majesty *Raja Permaisuri Agong* to Sabah, 27–30 June 1977, National Archives, 1998/0025478.

22. Paragraph 42.
23. Page 637.
24. Paras.19–21, page 643.
25. Section 8(1).
26. Pages 644–647.
27. Page 647.
28. Article 161E(1): "...no amendment shall be made to the Constitution without the concurrence of the *Yang di-Pertua Negeri*..."
29. Brian Z. Tamanaha, *Law as a Means to an End* (New York: Cambridge University Press, reprinted 2009).
30. On 13–14 August 1962, Mr. Donald Stephens, soon to be the first Chief Minister of Sabah, held a meeting with the leaders of the political parties in North Borneo, such as United Kadazan National Organisation (UNKO), United Sabah National Organisation (USNO), the Democratic Party, the United Party and United National Pasok Momogun Organisation (UNPMO), and a memorandum was drawn up to express the demands for certain safeguards for Sabah, which was later handed over to Lord Lansdowne, the Chairman of the Inter-Governmental Committee; see page 624, British Documents on the End of Empire: Malaysia by A. J. Stockwell.
31. In *Fung Fon Chen @ Bernard & Anor v. The Government of Malaysia & Anor* [2012] 6 MLJ 724, the Court similarly relied upon the *Malaysia Agreement* in dismissing the defendant's application to strike the case of the Plaintiff, who had complained that the defendants had failed to fully pursue the Borneonisation of federal public services in Sabah; see also J. C. Fong, *Constitutional Federalism in Malaysia* (Kuala Lumpur: Thomson Sweet & Maxwell Asia, 2008).
32. A. J. Stockwell, ed., *British Documents on The End of Empire: Malaysia Series B*, Vol. 8 (United Kingdom: The Stationery Office, 2004).
33. The 1911 Trengganu Constitution and the 1895 Johor Constitution.
34. Paragraph 148(b).
35. Supra.
36. Paragraph 148(b), supra.
37. Page 107.
38. Richard Albert, "Nonconstitutional Amendments", supra, at pages 11–12.
39. Ibid. page 13.
40. Ibid. pages 15–20.
41. Ibid. pages 20–31.
42. Ibid. at page 32.
43. Ibid. at page 34.
44. Ibid.
45. Ibid.
46. Ibid. at page 35.
47. Ibid. at page 38.
48. Ibid.
49. Ibid.
50. Ibid. at page 40.
51. Supra.
52. At paragraph 51.
53. At paragraph 31.

54. At paragraphs 18–19.
55. This writer has interviewed several members of the *Pengiran* class (members of the nobility) in the area of Benoni, Papar, and it can be observed that the pride of being descended from a people who were once the representatives of the Sultan of Brunei in administering the areas of Putatan, Papar, Kimanis and Sipitang still runs high.
56. Memorandum by Sir William Goode: "There is no traditional feeling of loyalty towards Malay royalty. Memories among the Dusuns or former Brunei overlordship are unhappy." British Documents on the End of Empire: Malaysia, supra.
57. HC Deb 19 July 1963 vol. 681 cc922–1006, at c927.
58. Ibid. at cc927–928.
59. See Bruce Ross-Larson, *The Politics of Federalism: Syed Kechik in East Malaysia* (Singapore: Bruce Ross Larson, 1977); Paul Raffaele, *Harris Salleh of Sabah* (Hong Kong: Condor Publishing Pty Co, 1986); P. J. Granville Edge, *The Sabahan—The Life and Death of Tun Fuad Stephens* (Dataran Palma, Selangor: The Writers' Publishing House, 1999).
60. See Hj Awang Sharin Alimin, "Murtad: Kesan dan Cara Mengatasinya di Sabah" (Apostasy: Consequences and Ways to Overcome them in Sabah) (Project Paper for Diploma in Islamic – Administration and Judiciary, [DAIJ0UIA 1992/1993]); also in Joseph Gimbad @ Yusuf Jasmin, "Pengislaman dan kemurtadan Bumiputera Sabah: Tinjauan kepada masyarakat Kadazan/Dusun" (Islamisation and Apostasy of the Bumiputera in Sabah: A Survey Among the Kadazan/Dusun Community) (Project Paper for Bachelor's Degree in Syariah, Universiti Malaya, 1987/1988).
61. Scheherazade S. Rehman and Hossein Askari, "How Islamic are the Islamic Countries?" *Global Economy Journal* 10, Issue 2, (2012). DOI: 10.2202/1524-5861.1614, May 2010.
62. *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Anor* [2010] 2 MLJ 7, at paragraphs 21–22.
63. *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLJ 468, at paragraphs 51–53 (Apandi Ali JCA), 135 (Zawawi Salleh JCA).
64. <http://www.themalaymailonline.com/malaysia/article/why-get-emotional-allah-not-exclusive-to-muslims-says-oxford-theologian>; Associate Professor Dr. Mohd Asri Zainul Abidin, who was previously the *mufti* for the State of Perlis and later had a stint as a visiting scholar at Oxford's Centre of Islamic Studies, also wrote in his blog that the Quran allows non-Muslims to use the word "Allah": http://drmaza.com/english_section/?p=94.
65. <http://www.thestar.com.my/News/Nation/2013/10/22/Govt-to-honour-10point-solution-Christians-in-Sabah-and-Sarawak-can-continue-using-Allah.aspx/>
66. "Elected representatives of the people".