

## Religious revival and its contestation against the modern constitutionalism<sup>1</sup>

宗教の復興と近代立憲主義の揺らぎ：マレーシア憲法制定史から

Naoko KUWAHARA

桑原 尚子

Institute of Comparative Law, Waseda University, Visiting Research Fellow

早稲田大学比較法研究所招聘研究員

### I. RESEARCH OBJECTIVES AND SCHOLARSHIP DISCUSSIONS

This research explains how the very western idea of modern constitutionalism has transformed an indigenous concept of sovereignty and traditional relations between politics and religion, refocusing attention on language, ethnicity, religion and monarchy used for creating “imagined community” and “nations” in the multi religious-ethnic Malaysian society. The research explores historical roots of the recent challenges against the western constitutionalism in general, and constitutional monarchy in particular, contested by the religious revival. It also discusses how persons who were involved in the Constitutional drafting had understood and interpreted the new and unfamiliar idea of Western modern constitutionalism, and transferred it into the constitutions.

Religion is back in the public sphere although the major social science’s paradigm for interpreting the place of religion in modernity used to be the theory of secularization under which religious beliefs decline resulted from the rationalization of world views. At the same time, the world has witnessed the rise of constitutionalism<sup>2</sup>, in general, and judicial review, in particular, after the end of the cold war. With newly acquired judicial review procedures, national higher courts worldwide such as constitutional courts or supreme courts have been asked to resolve a wide range of issues from elections, human rights including the scope of freedom of expressions and religion, equality, or privacy, to highly political matters. This phenomenon is featured as “judicialization of politics” which is “ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies.”<sup>3</sup>

---

<sup>1</sup> This research conducts with generous financial support from the JFE 21<sup>st</sup> Century Foundation.

<sup>2</sup> Ackerman, Bruce, “The Rise of World Constitutionalism”, 83 *Virginia Law Review* 771, 1997.

<sup>3</sup> Hirschl, Ran, “The New Constitutionalism and the Judicialization of Pure Politics Worldwide”, 75 *Fordham Law Review* 721, 2006.

Hirschl (2010) raises attention on the recent emerging of “constitutional theocracy” under which we witness “the tremendous increase of popular support for principles of theocratic governance and the global spread of constitutionalism”, and, in fact, a billion people live. According to Hirschl, constitutional theocracy is differed from a pure theocracy in which the supreme religious leader is also the highest political leader, and rather it requires political figures to operate in accordance with constitution (Hirshl: Chapter1). On the other hand, “constitutional theocracy” protests against the strict separation of religion and state like France and the United States, and not only approves state religion but also ensure state religion as a source or the source of legislation and judicial interpretation (Hirshl: Chapter1). The phenomenon of “constitutional theocracy”, fundamentally differed from modern constitutionalism originated from the Western idea and based on secularism, seemingly contests against or proposes re-consideration modern constitutionalism. However, few have discussed legal questions regarding the phenomena of “constitutional theocracy” such as any relations between constitutionalism, theocracy and religious law because it seems that the legal scholarship has regarded theocracy and religious law as premodern and backward.

In this report, I have special focus on the transformation of the indigenous concept of kingship or “*kerajaan*” towards constitutional monarchy under the British colonialism and by transfer of the western modern constitutionalism to Malaysia among the research issues of discussion, rethinking significant factors to create “nations” in multi-ethnic society such as religion and kingship.

## II. THE CURRENT PHENOMENA ON MONARCHY IN MALAYSIA

While tens of thousands of people gathered in downtown in Kuala Lumpur and shouted “*bersih* (clean)” to protest against the government at the end of August in 2015, a few number of protesters chanted a different slogan, “*Daulat Tuanku* (Power to the Ruler)”, and waved Johor state flags. Prior to the mass demonstrations against the federal government, political tensions having arisen over a financial scandal implicated Prime Minister Najib Razak, Sultan of Johor made a public statement advising the government to address the current political and economic unstable situation, and said that:

I am aware of the grievances and complaints of my people. Indeed, in my positions as the ruler, I cannot interfere in the political affairs, but as the

ruler, it is my responsibility to ascertain the living condition of the people is good and prosperous<sup>4</sup>.

The Sultanate or Rulership is one of the traditional elements, like the Islamic religion and the Malay language, of the Malaysian Constitution in the sense that these elements have been practiced long before the British colonial rule [Mohd. Salleh ]<sup>5</sup>.

Monarchy has received little attention from the constitutional law scholars, and even it has been regarded as an obsolete topic of constitutional discussion. In Malaysia, however, monarchies become in recent years more powerful than they have been at any time since independence from the Britain in 1957. A new generation of Rulers and princes, including the royals of the States of Perak and Johor, publicly emphasize their roles as enlightened guardians of people and the Constitution, and are vocal over political, economic and social affairs [Harding 2012].

Supposed that the concept of Malay sultanate (*kerajaan*) or monarchy had been transformed into the Westminster-style constitutional monarchy during the British colonial period and then the existing Federal Constitution, the current Malaysian phenomenon in terms of monarchy presents a twofold question: how recipients have re/interpreted modern constitutionalism and its elements such as human rights, the relationship of state and religion, state neutrality, the distinction between the public and private sphere, and the individualistic concept of rights transferred from the West, in this case, constitutional monarchy; and what political and social conditions or factors have affected this re/interpretation of modern constitutionalism in a local context. The following discussion focuses on the first question with special reference to monarchy.

### III. LAW, POWER, AND AGENCY IN THE BRITISH COLONIAL CONTEXT

Broadly speaking, as Kolsky [2010] shows, there are two primary approaches to the study of law and empire: the first approach regards law as an instrument of colonial rule from the perspective of subaltern study [e.g. Guha: 1987], and the second approach emphasizes on the relationship between law, power and agency of indigenous people. The second approach proposes that “colonial law

---

<sup>4</sup> “Address current political and economical situation: Johor sultan”, *The Sun Daily*, 25 August 2015.

<sup>5</sup> He also included Malay privilege in the traditional elements.

sometimes constrained the very forms of power it made possible and provided avenues for resistance and maneuver” [Kolsky 2010: 974], and therefore, its study tends to focus on agency. Sharafi [2010] showed that, in the British India, the very British colonial product of personal law system<sup>6</sup> created a room for Indians to be able to maneuver colonial law on the basis on forum shopping, examining the acts of agency, i.e. litigants.

In the similar vein of the second approach, Hussin [2016] regards colonial law and institutions are “the product of negotiations” among colonial and local elites with varied motivation and unequal resources. Local elites maneuvered legal change in the British colonial period to expand or strengthen their powers and authorities, and realized their visions of new state [Hussin 2016]. One of the local elites was the Sultan of Johor Abu Bakar (1833-1895) who took advantage of the British colonial rule to centralize powers in his hands and legitimate his authority under the name of Islam and through “constitutionalism” in the late nineteenth century. Faced with both the increase of British colonial power and the domestic concern over royal succession, the Sultan of Johor adopted a constitution (*undang-undang tuboh kerajaan*) in 1895 which was the first constitution introduced to Southeast Asia. The constitution was regarded as a model of modernization or westernization of traditional governance for other states in the Malay Peninsula to partly avoid further intervention by British colonial power, and “an important precursor for constitutional monarchy in Malaysia” [Hussin 2016: chapter 5]. The Johor’s response to the increase of imperial pressure represented a common pathway that local elites institutionalize Islam in the late nineteenth and twentieth centuries [Hussin 2016: chapter 5]. In fact, the state of Terengganu adopted a constitution in 1911 which modelled the constitution of Johor with modification.

The British colonial rule in Malay states brought ambivalent effects on Malay ruler’s powers and authorities: on the one hand, the British authority took jurisdiction over revenue, tax, police, commercial affairs and general administration, and left jurisdiction over “matters of religion and customs of Malay” to the Malay

---

<sup>6</sup> The personal law refers to law which applies to “certain defined classes of people, defined either upon racial grounds” or “upon religious grounds”, or “occasionally upon both” [Hooker 1976: 1]. The personal law system, which the British introduced to Malaya, was established by India’s first governor-general, Warren Hastings in India [Kolsky 2010: 975]. Under Hasting’s plan for the administration for justice (1772), the theory was that “Indians should be governed by Indian principles, particularly in relation to law” [Cohn 1996: 26]. The Hasting’s plan created plural legal system in the personal law sphere including family law and inheritance, and plural judicial system for dissolution of disputes relating to personal laws.

rulers; on the other hand, it resulted in reinforcing Malay ruler to allow enjoying more autonomous powers over “matters of religion and customs of Malay” than the pre-colonial period. In the pre-colonial period, local chiefs, in practice, dealt with “legal” cases in accordance with a combination of *adat*, maritime and trading rules, and legal codes whose parts of sources were *shari’ah* [Hussin 2015: 156] although Malay rulers technically enjoyed undifferentiated authority over judicial, legislative and administrative matters. Authority of Malay rulers over Islam became central part of their authority in the colonial period [Hussin 2016: chapter 3]. The British colonial rule in Malaya, thus, resulted in depriving jurisdictional powers of local chiefs through the dual-jurisdictional system which conferred “general jurisdiction” on the British authority and confined jurisdiction over “matters of religion and customs of Malay” on Malay rulers<sup>7</sup>. In the pre-colonial period, more generally speaking, Malay rulers were far from absolute monarchy, rather they did not enjoy enforcing their will over *kerajaan*, and actual power incurred to chiefs [Gullick 1988]. Indeed Malay rulers played ceremonial role [Milner 1982: 46]. Gullick explained the reasons why the powerless Malay rulers had survived: the chiefs needed Malay rulers to legitimize their rule; and Malay rulers play religious function and they became “invested with an aura of sanctity and supernatural power” [Gullick 1988: 44-48].

#### IV. BRITISH EMPIRE AND LAW: CREATION OF “IMAGINED COMMUNITY”

*Kerajaan*, which was the pre-colonial Malay polity and literally meant “the condition of having *raja*” with Hindu conceptual influence, was a keyword to understand how people were governed. Observing writings from the nineteenth century to and earlier, Milner [1982: 113] concluded the Raja (the Malay ruler) was the only institution of social control, and his role played in the lives of his subjects was “as much moral and religious as political” in the pre-colonial Malay states. Milner put it:

Malays believed service to the ruler offered the opportunity for social and spiritual advancement. They understood that their position in this life and

---

<sup>7</sup> In terms of transformation of institution of Malay rulers in Malaya during the British colonial period, one group of scholars tend to focus on Malay rulers losing their powers [e.g. Emerson 1968], and another opposes the view to point out that the power enjoyed by Malay ruler had not been drastically deprived of [e.g. Gullick 1992; Milner 1995]. Gullick [1965], for example, regarded the Malay ruler was the “titular source of rank and authority” but the district chief was the institution exercised “real power” and owed administrative responsibility.

the next depended on the Raja; he was the bond holding men together, and the idiom through which the community experienced the world. Men were not so much subjects as extensions of the Raja: they were indeed the measure of his *nama* [Milner 1982: 113].

The subjects “considered themselves to be living neither in states nor under governments, but in a *kerajaan*, in the ‘condition of having a raja” [Milner 1982: 114]. Under such an old ideology of *kerajaan*, the subject (*rakyat*) was conceptualized as a part of the Raja exemplified by the maxim saying “the Ruler and subject can never be divided”, and *kerajaan* was conceptualized as the personal relationship between Ruler and subject [Milner 2012: 194, 195].

Malays considered themselves to be living not under *shariah* but under a particular Raja which was an institution deeply rooted in the Malay world's animistic and Indian-influenced past, and their primary object of loyalty was not Muslim community but their Raja [Milner 1981: 49]. Milner pointed out that “[t]his Malayo-Muslim polity, the raja-centred, ceremonial, *kerajaan*, stands in strong contrast to the image of an Islamic state as a community of faithful governed by *sharīa* law” [Milner 1981: 50]. Milner referred to continuity of Malay ruler's position after the arrival of Islam to Malay Peninsula, which was characterized by the ceremonial structure, the titles and the rituals represented the spiritual achievement of Malays with pre-Islamic origins, and by Malay ruler's suggestion to his loyal subjects to be rewarded by God which echoed “the Srivijayan ruler's promises of ‘eternal peace” [Milner 1981: 51]. He, however, insisted that Malay rulers were attracted to two features of the medieval Muslim world, the Persian-influenced notion of kingship and the mystical concept of Perfect Man, on the premise that “[t]he medieval Muslim world, however, certainly knew ‘kingship’, and in acquiring titles and formulate from that world which would support the Raja's position, Malays were not choosing an obscure or heterodox version of Islam” [Milner 1981: 53]. Having followed to the medieval Islamic tradition of kingship, Malay rulers adopted titles and formula from “the Persianized Muslim world” such as “Sultān”, “Shāh”, “God's Shadow on Earth (*ẓill Allāh fī 'l-ālam*)” and “Helper of the World and of the Religion (*Nāṣir al-dunyā wa 'l-dīn*)” to describe them [Milner 1981: 52].

The British having brought new Western concepts such as “state, government, race, progress, time” into the Malay Peninsula, the royal courts transplanted the concepts to re-conceptualize *kerajaan* to constitute territorial state

entity [Milner 2012: 196]. The Johor's constitution adopted in 1985 represented the ideological transformation of *kerajaan*: a new *kerajaan* referred to the state as an entity independent from the Ruler [Milner 2002: 215-216].

Beside the conceptual transformation of *kerajaan* represented by the Johor's constitution, political debate in Malay society also showed the transformation. In the British colonial period, ideological political debate relating to Malay society had gone on between the proponents of the traditional monarchy and the exponents of new ideas heavily influenced by both Islamic resurgent and European enlightenment thought [Milner 2002]. In this context, as Milner put it, the conception of Malay society had been contested between the monarchical vision of community (*kerajaan*), the community of Allah (*umat*), and the community based on Malay ethnicity (*bangsa*) [Milner 2002]. Challenged by both religious and relatively liberal ideologies, *kerajaan* was reformulated its concept in various discourses in the Malay literatures such as *al-Imam* influenced by Egyptian Islamic reformist journal *al-Manal*, a Malay newspaper *Utusan Malayu* [Milner 2002]. Milner concluded that *kerajaan* was reformulated to territorial concept from "an extension of rulership", and a Malay ruler was portrayed primarily as "a governor or administrator" [Milner 2002: 288].

The well-documented study of Malay rulers for making the Malaysian Constitution by Smith [1995] describes the negotiations and power struggles of transformation of Malay rulers' traditional power into "constitutional monarchy" based on British constitutional monarchy as a model among Malay rules, Malay political elites and British colonial officials. The Malaysian Federal Constitution as it exists today provides for Islam as the religion of the Federation (Art. 3 [1]), the rulers (sultans) of the former Federated and Unfederated Malay States as the heads of the religion of Islam in each state (Art. 3 [2]), the conference of rulers (Art. 38), and the states' jurisdiction over Shariah and the Shariah court (9th schedule, list II) as so-called "tradition". This "tradition" had been institutionalized through the relationship between the British colonial authorities, the sultans and local elites during the British colonial period.

Beside the transformation of traditional sultanate into constitutional monarchy, the institutionalization of Islam was characterized by the intertwining of the sultans and "Malayness", which is articulated in the present Federal Constitution. The institutionalization of Shariah was not comprehensive but only partial, enacted by statutes and case laws, and the institutionalization of the Shariah Court struggled against the secular courts over jurisdiction.

## V. Conclusion

The indigenous concept of kingship or “*kerajaan*” in Malay society was transformed relational to territorial concept to create nation state or “imagined community” under the British colonialism. Conceptual transformation of Malay Sultanate into constitutional monarchy accompanied with the institutionalization of Islam, as religion, and Shariah, resulting in the current “constitutional theocracy”.

## References

- Ackerman, Bruce. 1997. “The Rise of World Constitutionalism”, 83 *Virginia Law Review* 771.
- Hickling, R.H. 1991. *Essays in Malaysian law*. Malaysia: Pelanduk Publication.
- Hickling, R.H. 2001. *Malaysian Law: An Introduction to the Concept of Law in Malaysia*. Malaysia: Pelanduk Publication.
- Hirschl, Ran. 2006. “The New Constitutionalism and the Judicialization of Pure Politics Worldwide”, 75 *Fordham Law Review* 721.
- Hirschl, Ran. 2010. *Constitutional Theocracy*. Harvard University Press.
- Hooker, M.B.. 1976. *The Personal Laws of Malaysia*. Kuala Lumpur: Oxford University Press.
- Hussin, Iza R. 2016. *The Politics of Islamic Law: Local Elites, Colonial Authority, and Making of the Muslim States*. Chicago University Press.
- Kohn, Bernard S. 1996. *Colonialism and Its Forms of Knowledge: The British in India*. New Jersey: Princeton University Press.
- Gullick, J.M. 1988. *Indigenous Political Systems of Western Malaya*. London: Athlone.
- Milner, A.C. 1981. “Islam and Malay Kingship”, *The Journal of the Royal Asiatic Society of Great Britain and Ireland*, No.1, pp.46-70.
- Milner, A.C. 1982. *Kerajaan: Malay Political Culture on the Eve of Colonial Rule*. Arizona: University of Arizona Press.
- Milner, Anthony. 2002. *The Invention of Politics in Colonial Malaya*. Cambridge and New York: Cambridge University Press.
- Milner, Anthony. 2012, “‘Identity Monarchy’: Interrogating Heritage for a Divided Malaysia”, *Southeast Asian Studies*, Vol.1, No.2, pp.191-121.
- Milner, Anthony. 2014, “How ‘Traditional’ is the Malaysian Monarchy?”, Hooker, Virginia and Othman, Noraini eds. *Malaysia: Islam, Society and Politics*. Singapore: Institute of Southeast Asian Studies, kindle



edition.

Tun Haji Mohd. Salleh bin Abas. 1985. "Traditional Elements of the Malaysian Constitution", in Trindade, A. & Lee, H.P. eds., *The Constitution of Malaysia: Future Perspectives and Development*. Singapore: Oxford University Press, pp.1-17.

Smith, Simon C. 1995. *British Relations with the Malay Rulers from Decentralization to Malaya Independence, 1930-1957*. Kuala Lumpur: Oxford University Press.