

Islam as The State Official Religion: A Comparative Study on Indonesian and Malaysian Constitutions

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Abstract

The majority populations of Indonesia and Malaysia are moslems. The Freedom of religion in that countries is regulated in their constitutions. There are differences in positioning Islam on Indonesia and Malaysia Constitutions. To analyse the position of Islam in the both constitutions writer used the law comparison. The result shows that the Indonesian Constitution does not declare Islam as the state official religion. Islam has not special position. Islam is parallel with other religions. Legal consequently, Indonesian Constitution does not regulate issues related to Islam. Different from Malaysian Constitution which declare Islam as the state official religion. Islam has special position. Islam is treated higher than other religion. So, legal consequently, Malaysian Constitution regulates all issues dealing with Islam. By comparing Indonesian and Malaysian Constitutions, it is found out the strength of a constitution which determines Islam as the state official religion. Malaysian Constitution protects Islam in Malaysia. Malaysian Government can prohibit or take strict action to religious deviancy, apostate, inter-religions marriage, etc. Viewing the strength of a constitution which determines Islam as state official religion, MPR RI needs to have amendment in the Indonesian Constitution as a step to protect Islam and for the sake of moslems in Indonesia.

Keywords: Islam, Religious Life, Regulation, Protection

1. Introduction

In a state, religion is a reality in humans' lives. Everyone has belief on religion as guidance on life. Religion is the basic need which cannot be separated from humans' lives. Religion does not only deal with rituals but also values to be applied in social life. In the context of constitutional, religion values are expected to be applied in the life in the state. Each religion follows expects their religions values applied in the state. To create harmonious interactions among religion followers, it needs regulation concerning religion in constitution [1].

Talking about religion is a state is common because religion is social religious belief in a state. It is also common when the people in a country believe in different religion. However, there is tendency of the majority of certain religion followers to make their religion into state official religion which is written in the state constitution. More than 15 countries in the world regulated religion in their constitution, whether the majority of the populations are Christians, Moslems or Buddhists. In the state which regulated Christians in their constitutions are Ireland (Article 6), Norway (Article 1), Denmark (Article 3), Spain (Article 6), Argentina (Article 2), Bolivia (Article 3), Panama (Article 36), and Paraguay (Article 3). The states which regulate Islam in their constitutions are Afghanistan (Article 1), Iran (Article 1), Iraq (Article 13), Jordan (Article 2), and Syria (Article 3). While, the state which regulate Buddha in constitution is Thailand (Article 7). The

fact shows that the states which regulate religion in their constitutions do not complicate their people [2].

Indonesia and Malaysia are neighbouring countries and the majority of both populations are moslems. Historically, both countries have ever been colonized by Europeans. Indonesia got its independence from Dutch on August 17, 1945, and Malaysia, from British on August 31, 1957. Even though majority of both Indonesia and Malaysia are moslems, but both countries have different constitutional concepts dealing with Islam. The different constitutional concepts occur due to the differences on arranging the constitutions law systems, human rights concepts, freedom of religion concepts, and political situations which give big influence in determining Islam in Indonesian and Malaysian Constitutions. Besides that, both countries have different human rights concepts, freedom of religion, and so on.

This issue arises some questions such as: how is religion in Indonesian and Malaysian Constitutions? How is concept of freedom of religion in Indonesian and Malaysian Constitutions? How is Islam positioned in Indonesian and Malaysian the Constitution? What is the impact of Islam as the state official religion? This paper attempts to analyse all of those questions.

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2. Research method

Normative law research includes legal principles, legal systematics, legal synchronization, law comparison and legal history. This research applies law comparison. Law comparison is to compare of law in one state and that in other state. Normally, law comparison deals with descriptive, theoretical and evaluative principles. Law comparison is used to analyze the position of Islam in Indonesian and Malaysian Constitutions.

3. Result and discussion

3.1. Religion in the Indonesian and Malaysian Constitution

Regulation about religion is expressed in Article 29 (1) and (2) of the 1945 Constitution of Republic of Indonesia. Article 29 (1) says that The State shall be based upon the belief in the One and Only God. Then Article 29 (2) says that The State guarantees all persons the freedom of worship, each according to his/her own religion or belief.

This regulation shows that the state does not determine on certain religion. Anyway, the state does not separate it with religions affairs the state responsible on the existence of religion, religions life and harmonious relationship among religion followers. In Indonesia, the religion between the state and religion is seen from religions institutions, law dealing with religion and policies dealing with it. Practically, the connection between religion and state depends on the spirit of the state regulators [3].

Differently in Malaysian Constitution, regulation about religion is contained in Article 3 of the Federal Constitution of Malaysia. Article 3 (1) says that Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation. Article 3 (1) regulates that Islam as the state's religion which a shows the historical facts and cultural continuity which do not exist in a sudden [4]. What is implied in the constitution about the status of Islam is the continuity of the condition before independence [5].

According to Hashim Yeop A. Sani, that article puts the special position of Islam compared to other religions in Malaysia [6]. Non moslems feel objective with the special position of Islam in constitution because they are worried with the existence of other religions. Article 3 gives guaranty of freedom to non Islamic followers to practice their religions. Article 3 realistically guarantees them to worship their religions safely [7]. To ensure the human right of non moslems, Article 3(4) regulates that article parallel with other regulations in the constitution [8].

3.2. Freedom of Religion in the Indonesian and Malaysian Constitutions

Regulation about freedom of religion is contained in Article 28E (1) and (2), Article 28I (1), Article 28J (2), and Article 29 (1) and (2) of Indonesian Constitution. Article

28E (1) mentions that Every person shall be free to choose and to practice the religion of his/her choice, to choose one's education, to choose one's employment, to choose one's citizenship, and to choose one's place of residence within the state territory, to leave it and to subsequently return to it. Then Article 28E (1) mentions that Every person shall have the right to the freedom to believe his/her faith, and to express his/her views and thoughts, in accordance with his/her conscience.

Article 28I (1) mentions that The rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances. Furthermore Article 28J (2) mentions that In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.

Article 29 (1) mentions that The State shall be based upon the belief in the One and Only God. Then Article 29 (2) mentions that The State guarantees all persons the freedom of worship, each according to his/her own religion or belief.

From a few things in the constitution that it has the impression that Indonesian Constitution guarantees freedom of religion. However, the concept of religious freedom does not have clear guidelines. The provision of the rights of freedom of religious practice is not clear in the Indonesian Constitution has slit for the religious deviancy group to have activity with sheltering behind the right to freedom of religion in the Indonesian Constitution.

The emergence of the religious deviancy group of course raises the disturbing to the community and makes conflicts in the community. Therefore, the Indonesian government takes action against the law based on the religious deviancy group of Law Number 1/PNPS/1965. In terms of implementation, that rules seeks to protect the purity of the precepts of religion and protecting the peace religion. Religious practice must be based on rules that no disputes arise that can cause damage the solidarity and unity of the nation. With the assurance that the presence of religion is protected [9].

Differently in Malaysian Constitution, freedom of religion is contained in Article 11 of the Federal Constitution of Malaysia. Article 11(1) mentions that Every people has the right to profess and practice religion and, subject to clause (4), to develop her religion. Meanwhile, Article 11 (3) says, "Every religious group has the right

- a) manage the affairs of their own religion;
- b) establish and maintain the foundations for religious purposes or charitable and
- c) acquire and hold property and conduct based on the laws.

Article 11 (4) mentions that The Law of the State and the Federal Territories of Kuala Lumpur, Labuan and

Putrajaya, federal law may control or restrict the development of any purpose or religious beliefs of those who profess the religion of Islam. Then Article 11 (5) mentions that This does not allow any act contrary to the general law on public order, public health or morals [10].

From these provisions it was found that religious freedom was existing in Malaysia. Article 11 of (a) of the Federal Constitution explains that everyone has the right to profess and to practice his religion and subjected to clause 4, to distribute it. Article 11 (4), however, provides that the State Law or Federal Law (Law for the Federal Territories of Kuala Lumpur and Labuan) may be made to restrict the dissemination of religious doctrine among individuals who profess the religion of Islam. Article 11 (5) of the Federal Constitution is also clear that the right to practice their religion is not absolute, but qualified as a religious act which cannot be contrary to public order, public health or morals [11].

Andrew Harding point of view of religion freedom is not absolute in the Federal Constitution of Malaysia (Andrew Harding, 1996: 201). Furthermore, Tun Mohd. Salleh Abbas had a notion that the limitation was proper as an important response that related to the original fact that Islam is the religion to the Federation Constitution of Malaysia [12].

In dealing with freedom of religious practice must be made references to religious doctrine, the reference cannot be made to the source or other external perspective. In the context of the provisions of Islam, the reference must be made to the Islamic sources, namely the Qur'an, Sunnah and so on [13].

3.3. Position of Islam in Indonesian and Malaysian Constitutions

According to the census of 2010, Indonesia's population stood at 237.641.326 million. Followers of Islam total 87,18%, followers of Buddha total 0,72%, followers of Christian Protestant 6,96%, followers of Christian Catholic 2,9%, and followers of Hindu total 1,69%. Indonesia is not religious state. Indonesia is not a state which acknowledges one of the religions as the state official religion. Indonesia is "Pancasila" state which treats all religions equal. There is no religion more dominant among other religions. The separation of states issues and religions issues is not automatically makes Indonesia a secular state. Indonesian government has important role taking care of religion but not making Indonesia a religion state [3].

Indonesia applies religious doctrine and values in the life of the state as expressed in the first "sila" of "Pancasila" and in the opening of the 1945 Constitution of Republic of Indonesia. Moslems and other non moslems do not face obstacles in practicing their worship [14]. Regulations in Indonesian Constitution oppose secularism. Secularism is the view and the movement who argue that morality should not be based on religious doctrine and values. An important principle of secularism is human progress based on the human ability itself. Secularism separates religion and state. In the implementation, human

behaviour in society should be separated from religion. Religion is seen as a private affair with his God [15]. In Indonesian Constitution determines the state based on One Supreme God which is the basic principle of any religion. Constitutionally, having religion and faith are guaranteed by the state [3].

This fact is related to the history of determining Indonesian Constitution. Since Indonesian independence on August 17, 1945, religion is a debatable issue among the founding fathers. On June 22, 1945, BPUPKI set the first meeting to discuss the fundamental principle of the state. The discussion was done by the 9 committees among others: Ir. Soekarno, M. Hatta, A.A. Maramis, Abi Koesno Tjokrosoejoso, Abdul Kahar Muzakkar, H.A. Salim, Achmad Subarjo, Wahid Hasjim, and Mohammad Yamin. These 9 committees succeeded to formulate the state principle which consists of 5 points (5 Silas) which later known as Pancasila i.e: Believe in God with the obligation to practice Islamic law to moslems, just and civilized humanity, the unity of Indonesia, people led by wisdom and representatives deliberation and social justice for all Indonesian people.

After Indonesian independence, on August 17, 1945, BPUPKI once again set a meeting to legalize the draft of the constitution made before to become the state official constitution. Surprisingly, the first point "Believe in God and obligation to practice Islamic law to moslems" is change and replace to "Believe in One Supreme God". In historical record, that change was done by Mohammad Hatta who later became the vice president after considering suggestion from A.A. Maramis (the only christian in that 9 committee), and after consulting with Teuku Muhammad Hassan, Kasman Singodimedjo, and Ki Bagus Hadikusumo.

Political background is found in various writings about the change of the first point of Pancasila, it was found that there was threat from A.A. Maramis who represented people from Eastern part of Indonesian who were christians to part from Indonesia if the first point of Pancasila was not changed or replaced. This is the background why Indonesia, until this moment, has no state official religion.

On the other part, according to the census of 2010, Malaysia's population stood at 28.3 million. Followers of Islam total 61.3 %, followers of Buddha total 19.8 %, followers of Christian 9.2%), and followers of Hindu total 6.3% (<http://www.statistics.gov.my/portal>, 2010). Different from Malaysia Consitution, to ensure position of the human right of non moslems are not affected, Article 3 (4) mentions that nothing in this article derogates from any other provision of this constitution. This article is parallel with other regulation in constitution. The freedom of religion is regulated in article 11. Article 11(1) mentions that every person has the right to profess and practice his religion and, subject to clause (4), to propagate it. Clause 4 mentions that State law and in respect of the Federal Territories of Kuala Lumpur and Labuan, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam. Further more, clause (5) mentions that This Article does not

authorize any act contrary to any general law relating to public order, public health or morality [10].

The acknowledgement of Islam is not limited to the level of federation, because the states which have king and the king regulate which proclaim Islam as the state religion. Article 3 (3) mentions that The Constitution of the States of Malacca, Penang, Sabah and Sarawak shall each make provision for conferring on the Yang di-Pertuan Agong shall be Head of the religion of Islam in that State. For example, the Constitution of the State of Penang 1957 regulates the provisions of Chapter 2, Article 5 that Yang di-Pertuan Agong as the head of Islam in that particular state. Meanwhile, in Sabah the state has declared Islam as the official religion of that state [8].

Related to the position of Islam, Abdul Aziz Bari explains that some constitutions in the world which have determined special position of religion of the native is not opposing with the freedom of religion. Besides, it declares that the position of the native, law and human rights are not applied in fantasy. Religion and tradition of the native have strong reason to get higher position than other religion to keep stability. This special position is acceptable as long as it does not cause phobia of other religion which are declared officially are the position of English Church in England, Catholic School in Ireland or Syiah in Iran [16]. For that reason, it is reasonable when constitution of a state give special position to majority of certain religion religion followers.

Parallel to Abdul Aziz Bari's idea, Mohd Salleh Abas urges that the establishment of a modern state orients to European philosophy which separate the state and religion. Although the modern state separates religion and politics, but most constitutions regulate that the leader of the state must be someone who believes in certain religion. For example, in England, the King/Queen is Christian, in Thailand the king is Buddhist.

According to Mohd Salleh Abas, in the moment of determining the constitution, Hakim Abdul Malek (a member of the committee Reid) expresses that the regulation does not cause disadvantages if it offers protection. Some countries in the world have this same regulation. If certain regulation does not cause disadvantages. So, there is no reason not to declare Islam in constitution as state official religion [12].

3.4. Impact of Islam as the State Official Religion

Islam is not the state official religion in Indonesian Constitution. Thus, Islam has not privileged position. Islam is parallel with other religions. Islam not higher than other religions. Therefore, there are no regulate issues related to Islam in Indonesian Constitution.

Muslims do not succeed in making the rules relating to Islam in Indonesian Constitution. This means that Muslims do not succeed to put Islam in the constitution. So far, Muslims succeed to put Islam only in the act. This can be seen from the Marriage Act, Islamic Courts Act, Compilation of Islamic Law, Zakat Act, Hajj Act, etc. The

acts is part of national law that successfully fought by Moslems [17].

In the constitutional context, Article 28 and Article 29 of the 1945 Constitution of Republic of Indonesia does not explain the regulate issues related to Islam, but regulate related issues to freedom of religion. Freedom of religion in Indonesian Constitution is general issues, it is not specific issues.

Consequently from law perspective, for the non-Muslim faiths are free to develop their religion to Moslems, Muslims are free to apostate, everyone is free to practice the religious deviancy, and others. The absence of regulate related to Islam in Indonesian Constitution is a problem that requires a comprehensive solution.

Different from Malaysian Constitution, impact of Islam in Malaysian Constitution means Islam is higher than other religions. Malaysian Constitution set of regulate relating to Islam. For example, the rules on the declaration of Islam as the state official religion, freedom of religion, permission to use public money for the purposes of Islam, sharia court position in the legal system, position sharia courts in the legal system, Islamic law exception of emergency law and the establishment of Islam as a case history that lies within the jurisdiction of the state.

Meanwhile, the state constitutions declare the Kings as head of Islam and the establishment of Islamic Councils to help them carry out these powers [13]. Furthermore, the state authorities can establish sharia courts that have jurisdiction only over Moslems only, instead of jurisdiction over offenses under federal law [18]. Sharia Courts Act 1965 has been designed to give jurisdiction over offenses committed by persons of Islam. Islamic law should be determined for the purposes of federal law, the power of this determination is clearly given to Parliament [10].

According to Abdul Aziz Bari, in Malaysian Constitution, there are a variety of regulate related to the position of Islam, among others: the declaration of Islam as the state official religion in Malaysian Constitution (Article 3 (1); freedom of religion (Article 11); permission to use public money for the purposes of Islam (Article 12(2)); position of sharia courts in the legal system (Article 121(1A); Islamic law exception of emergency law (Article 150 (6A); setting dealings of Islam as a set in state jurisdiction, Ninth Schedule, List 2, Section 1 [10]. Article 160 (2) which gives the definition of Malay by putting Islam as the main bonding. Regulations are related to Islam can be seen in the context of Article 11 on freedom of religion that explains the virtues of Islam compared to other religions. So, also Article 12 (2) which permission the use of public money to help programs Islam. Besides that, the Ninth Schedule Malaysian Constitution allows the realization of sharia criminal offenses, including offenses of apostate. Furthermore, the regulation of the Kings in the State constitutions also took on Islamic principles. This position is covered by Article 71 (1) of the Federal Constitution of Malaysia [10].

Article 3 relating to Article 11. Article 11 expresses that every person has the right to profess and practice his religion and, subject to clause (4) to propagate it. The

condition was that the law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam. Article 11 gives special position of Islam. This position clearly visible in Article 11 (4) which prohibits the propagation of any religion is not Islam. Although the constitution does not mention the special it openly, but it shows that implications for other religions is not given such protection. Although Article 11 (4) be on one's own, but if Article 3 is not included in Malaysian Constitution, then there is a possibility of equal rights under Article 8, Clause (1) is raised in court.

The Federal Constitution allows enactment to regulations restricting the development of any religious doctrine or belief among persons professing the religion of Islam. Enactment regulates the development of the doctrine of Islam, including Islamic preachers. This has been done in many states. This reputation is not used for the Borneo States, but states that the constitution can enter in their regulation require the Majority of Members of the Legislative Assembly, to introduce such legislation. Therefore, the claim Islam as the state official religion in Malaysian Constitution are used for some parts of the Federation of Malaysia. According to Groves, this gives more power to the concept of religious pluralism, which became an important part of the original constitution [19].

4. Conclusion

The research result shows that Indonesian and Malaysian Constitutions regulate freedom of religion, but there is difference in positioning Islam in those constitutions. Indonesian Constitution does not express Islam as the state official religion. Islam is not treated special instead it is parallel with other religion. The legal consequence is that it does not regulate issues related to Islam. Differently, Constitution of Malaysia expresses Islam as the state official religion. Islam is treated special, it is higher than other religion. The legal consequence is that Malaysian Constitution regulate all issues related to Islam. The Malaysian Government can prohibit religious deviancy, apostate, inter-religions marriage, etc.

Based on the above exposure, this study clearly do not discuss about the Islamic state. This study discusses about the position of Islam in Indonesian and Malaysian Constitutions and the concept of freedom of religion in the Indonesian and Malaysian Constitutions.

After all, Indonesia and Malaysia is not an Islamic state. Although Malaysia is not an Islamic state, but Malaysian Constitution put Islam in a position that is higher than other religions. In addition, in the Malaysia Constitution has a clear concept about the right to freedom of religion, such as

the right to profess religion, the right to practice religion and the right to propagate religion.

Law is a political product. Possibility to amendments some provisions in the Indonesian Constitution depend political will MPR RI. In this case, there are opportunities to make amendments to some provisions in the Indonesian Constitution. This amendments is necessary to put Islam in a reasonable position and for to protect Islam in various religious deviancy, apostate, etc.

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