

# MULTICULTURALISM AND NATION BUILDING

in a Plural and 'Divided Society': The Case of Malaysia



Institute of Strategic and  
International Studies (ISIS) Malaysia

**SHAD SALEEM FARUQI**



# **MULTICULTURALISM** **AND NATION BUILDING**

in a Plural and 'Divided Society': The Case of Malaysia

SHAD SALEEM FARUQI



Institute of Strategic and  
International Studies (ISIS) Malaysia

Published by

**Institute of Strategic and International Studies (ISIS) Malaysia**

1 Persiaran Sultan Salahuddin

PO Box 12424

50778 Kuala Lumpur

Malaysia

[www.isis.org.my](http://www.isis.org.my)

© ISIS Malaysia 2021

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form, or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the publisher.

The views and opinions expressed in this book are those of the author and may not necessarily reflect those of ISIS Malaysia.

ISBN: 978-967-19810-0-9

Designed by Good News Resources Sdn Bhd

Printed by Trendpack Sdn Bhd

# CONTENTS

---

## *Preface*

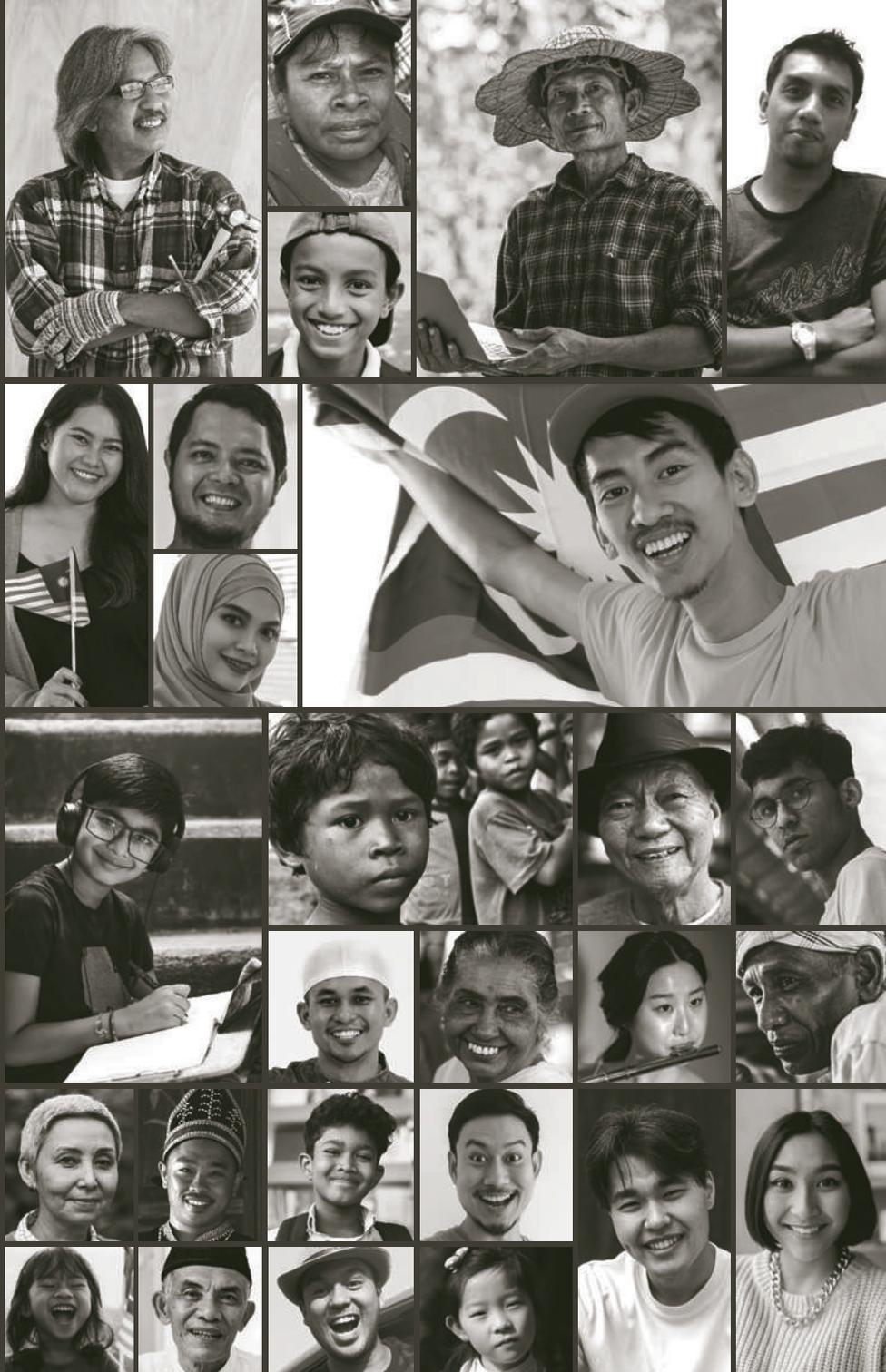
I.	Introduction	7
II.	Nation Building and the Drafting of the Federal Constitution	13
III.	Indigenous Features in the Federal Constitution	17
IV.	Safeguards for Minorities	23
V.	Special Position of Sabah and Sarawak in the Federation	39
VI.	Counting Our Blessings	49
VII.	The Post-Merdeka Generation and the Decline of the 'Social Contract' in Peninsular Malaysia	55
VIII.	The Islamic State Debate: Malaysia's Middle Path	65
IX.	Sabah and Sarawak's Discontents	79
X.	Towards a Shared Destiny	89

	<i>About the Author</i>	100
--	-------------------------	-----

	<i>About ISIS Malaysia</i>	102
--	----------------------------	-----

	<i>About the Noah Foundation</i>	104
--	----------------------------------	-----

# PREFACE





Nation building in plural and “divided” societies poses special challenges everywhere. In some countries, the “melting pot” ideology is employed. In others, the model of a mosaic is adopted. The multi-ethnic leaders of Malaysian independence in 1957 settled for the second approach. They painstakingly weaved a rich cultural mosaic. The plurality of lifestyles this engendered gave rise to an extraordinary multifaceted society that till the ’90s, supplied a model to many other diverse regions of the world. Since the ’90s, however, identity politics based on race, religion and region, has taken centre stage. If this tide is to be reversed and Malaysia is to recapture its place of honour in the community of nations, much needs to be done to repair bridges of inter-communal harmony and to dismantle walls of separation between the religions, races and regions.



## CHAPTER

## I

# Introduction

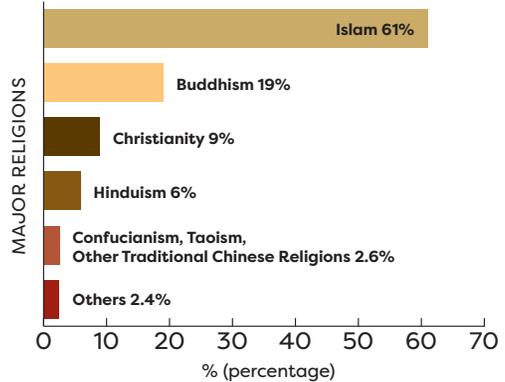
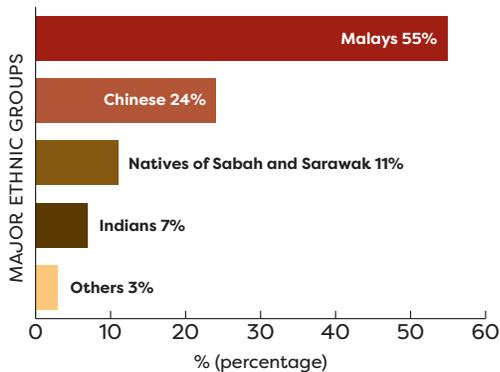
---

**M**alaysia is a Southeast Asian country strategically located along the Straits of Malacca and the southern part of the South China Sea. At its northern tip, it shares a border of 506km with Thailand. At its south, lie Singapore and Indonesia. Across the South China Sea, lie the East Malaysian states of Sabah and Sarawak which share a 1,782km border with Indonesia and a 381km border with Brunei. Malaysia's area is 329,847 sq km. There are two non-contiguous regions – one in the west and the other in the east and these are separated by more than 1,000km of the South China Sea. Malaysia's coastline is 4,675km. Geographically, it consists of coastal plains rising to lush green hills and mountains, the tallest of which reaches 4,100m. Malaysia's main natural resources are tin, petroleum, timber, copper, iron ore, natural gas and bauxite. The climate is tropical; the soil is fertile with rainfall all-year round.

The country's population is about 30 million people of which the urban population is about 72%.

## DIVERSITY

Malaya was at one time the home to many Malay kingdoms. Due to the policy of the British colonialists of encouraging non-Malay immigration, Malaya became a multi-ethnic, multicultural and multireligious mosaic. The major ethnic groups today are: Malays (55%), Chinese (24%), natives of Sabah and Sarawak (11%), Indians (7%), and others (3%). The major religions are Islam (which is the official religion) professed by 61% of the population, Buddhism (19%), Christianity (9%), Hinduism (6%), Confucianism, Taoism, other traditional Chinese religions (2.6%) and others (2.4%). The common spoken languages are Malay (the official language), English, Chinese (Cantonese, Mandarin, Hokkien, Hakka, Hainanese and Foochow), Tamil, Telegu, Malayalam, Punjabi, Thai, Iban, Kadazan (and other languages indigenous to Sabah and Sarawak).



## **POLITICAL HISTORY**

Malaysia gained independence from Britain in 1957. At its inception, it was called the Federation of Malaya consisting of 11 states. In 1963, the British territories of Sabah, Sarawak and Singapore joined the Federation of Malaya to constitute a much enlarged, new entity called Malaysia. In 1965, Singapore was expelled from the federation due to acute differences with the federal government on fundamental policy issues.

## **ADMINISTRATION**

Administratively the country consists of 13 states and three federal territories. Of the 13 states, 11 states and two federal territories are in West Malaysia and two states and one federal territory are across the South China Sea on the Borneo island.

## **LEGAL SYSTEM**

Legally, the country is a unique constitutional monarchy consisting of nine hereditary Malay rulers who take turns to occupy the federal throne. Nine of the 13 states have a hereditary sultan. Four states have a governor appointed by the king on the advice of the prime minister. The government is modelled on the British parliamentary system. Unlike Britain, Malaysia adopts a federal system which guarantees to all 13 states some legislative, executive, judicial and financial autonomy. The East Malaysian States of Sabah and Sarawak have additional provisions for autonomy.

## PARLIAMENT

The federal parliament is bicameral. The 13 state legislatures are unicameral. Elections are held every five years and there is universal adult suffrage at age 21.<sup>1</sup>

## SOURCES OF LAW

The sources of law reflect the country's legal pluralism. There is a Federal Constitution which is the supreme law of the federation.

Below the supreme constitution are civil and criminal laws enacted by federal and state legislatures in areas assigned to them by the Federal Constitution's Schedule 9, Lists I, II and III.

Under the authority of parliament or the state assemblies, delegates frame a great deal of subsidiary legislation.

In limited areas, mostly of family and personal laws, the Shariah applies to Muslims. However, the *hudud* has not been given legal recognition, though there are increasing calls for its adoption.

Malay custom is given statutory recognition in Malay personal law matters. A remarkable feature is that Malay customary law is applied by the Shariah courts side by side with the Shariah. In Sabah and Sarawak, native law is applied to the indigenous people of the states by each state's hierarchy of native courts.

British common law is statutorily allowed reception.

## COURT SYSTEM

The court system reflects the country's legal diversity. First, there is a hierarchy of ordinary, civil and criminal courts which handle the bulk of legal disputes. The civil and criminal courts have broad jurisdiction over all citizens and are, in general, of superior status than the Shariah courts, the native courts and administrative tribunals whose jurisdiction is strictly confined by the law to enumerated fields of law.

Second, in limited areas of Muslim law,<sup>2</sup> each state has its own hierarchy of Shariah courts. Since 1988 a constitutional amendment to the Federal Constitution by way of Article 121(1A) has strengthened the constitutional position of Shariah courts by stating that in their specified fields, the Shariah courts are not subject to control by the civil courts.

Third, in the East Malaysian states of Sabah and Sarawak, native courts have jurisdiction over natives in limited areas of family life.

Fourth, specialised tribunals exercise jurisdiction in limited areas assigned to them by the law.

The overall legal picture is that the subjection of citizens to the laws of the land is partly influenced by their religion or race. Muslims are subject to the ordinary law of the land in matters of public law, commercial law, crime and in most areas of civil law. In addition, Muslims and Malays are subject to the Shariah and to Malay customary law in enumerated areas of personal law and minor religious offences not covered by the federal Penal Code. Thus, male homosexuality, which is a crime under Section 377A of the federal Penal Code cannot also be a concurrent offence in the Shariah courts and the attempt by the Selangor assembly to legislate such a law was unconstitutional.<sup>3</sup>

Non-Muslims are subject exclusively to ordinary laws. The Shariah does not apply to them.<sup>4</sup> For the natives of Sabah and Sarawak, the situation is complex. They are subject to all the civil and criminal laws of the land. In addition, they are governed by state native laws in enumerated areas of personal law. Natives, who are Muslims, are also answerable to the Shariah courts in enumerated matters of personal law.

## SOCIAL WELFARE

Though Malaysia is not a full-fledged welfare state, there are many affirmative, socio-economic measures in place. Public hospitals are highly subsidised and provide medical benefits on payment of token fees. Life expectancy is around 74 years. Primary and secondary education is totally free. Literacy rate is about 90%. There is price control of essential goods and services.

---

### Endnotes

- <sup>1</sup> The voting age was reduced to 18 by a much-celebrated constitutional amendment in 2019, but the relevant provisions on the new voting age and automatic registration have not yet been brought into effect.
- <sup>2</sup> Schedule 9, List II Item 1 enumerates about 25 topics of personal law and “offences against the precepts of Islam” on which Shariah courts may be conferred jurisdiction by their respective State Assemblies.
- <sup>3</sup> *Iki Putra Mubarak v Kerajaan Negeri Selangor* [2021] 2 MLJ 323.
- <sup>4</sup> Federal Constitution, Schedule 9, List II, Item 1.

## Nation Building and the Drafting of the Federal Constitution

---

**N**ation building in a plural and “divided” society poses special challenges everywhere.<sup>1</sup> In some countries, the “melting pot” ideology is employed. This involves the effort, either by force or through encouragement, for people of diverse backgrounds to come together, submerge their distinct identities in something bigger and evolve a new personality for all or some purposes. In many southeast societies like Thailand and Indonesia, this “melting pot” technique has brought diverse people together to build a united nation with a distinct personality. For instance, in Indonesia, there is a strong emphasis on a common language, a common ideology (the *pancasila*) and the adoption of indigenous “Indonesian” names by people of various ethnicities.

The other model is that of a mosaic. This involves the recognition that the law cannot by force extinguish the special regard that a substantial number of people in every

country have towards their religion, race, region, culture, language or tribe. Efforts to promote a national identity should involve the recognition that unity cannot mean uniformity. It has to be a unity in diversity. We can all be friends – but only in spots. In other areas where we do not see eye to eye, we have to live and let live, to permit diversity and differences and to tolerate these differences if not to appreciate them.

---

A Malaya stamp marking Merdeka Day on 31 August 1957 with the first prime minister Tunku Abdul Rahman and Malayans of various races.



The multi-ethnic leaders of Malayan independence in 1957 settled for the second, mosaic approach.<sup>2</sup> During the pre-Merdeka era, there were negotiations between the political leaders of the Malays and non-

Malays, the rulers and the *rakyat* (citizens) as well as the British and the Malayans on the shape of the nation's document of destiny. The spirit of this era was that of give and take, compromise, moderation and inclusivity. There was an absence of the kind of ideological, religious, racial, regional or tribal extremism that has torn many societies asunder.<sup>3</sup> This "reconciling

the irreconcilable” during the pre-independence ethnic bargaining did not come easy. The pressures on the Malay leaders to not give away too much and to preserve the “Malay character” of a traditionally Malay land were immense. Fortunately, they resisted the temptation to carve out a system in which they could single-handedly control the existing political and economic systems. A middle path of moderation is evident if we examine the constitution in relation to its “ethnic clauses”.

The various communities were allowed to maintain their distinct ethnic identities, cultures, religions, languages, lifestyles, dresses, foods, music, vernacular schools, etc. Political parties and business and cultural associations were allowed to be organised on ethnic lines. Vernacular schools were allowed. Malaya began its tryst with destiny looking a little bit like a rainbow in which the colours are separate but not apart.

Barring a short period after the racial riots of 1969 in the Klang Valley, when ethnic practices like the Chinese lion dance were not permitted and forced integration was experimented with, the overall effort of the last 64 plus two pre-Merdeka years has been to find some areas of cooperation and to allow distinctiveness in other spheres of existence.

The forefathers of the constitution were guided by the belief that there was a place for everyone under the Malaysian sun; that everyone must have a stake in the country; that everyone must get something; and no one must get everything.

Some scholars may view the Malayan constitutional arrangement as “consociational”. A consociational state is one which has major internal divisions along ethnic, tribal, religious or linguistic lines. None of the groups is large enough to form a majority government by itself. For this reason, the elites of each community come together to forge a consensus on divisive issues and avoid the dangers of non-cooperation and conflict.<sup>4</sup> The elites agree to share power. There is mutual understanding about

what should not be vetoed. Representation of each community on the organs of the state is proportional. Each segment has some autonomy and individuality and culturally based community laws and practices are allowed. Political stability is achieved due to behind-the-scenes consultations among the elites of the major groups. The survival of the power-sharing arrangement avoids conflict and violence.

Whether Malaya (later, Malaysia) adopted a majoritarian, democratic, electoral system or whether it is a consociational state, is a matter of dispute. What is clear is that for the last six decades, the state has survived, thrived and remained peaceful. Some success has indeed been achieved to discover that which unites Malaysians and to tolerate that which divides them. In the year 2020, Malaysia scored fairly well on the Global Peace Index, being ranked 20th out of 153 states evaluated.<sup>5</sup>

---

#### Endnotes

- <sup>1</sup> See generally, Ratnam, K. J. 1961. "Constitutional Government and the 'Plural Society': Some General Observations." *Journal of Southeast Asian History* 2 (3) October: 1-10; The Canadian Multiculturalism Act, 1988; Lijphart, Arend. 1984. *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*. New Haven: Yale University Press; Horowitz, Donald L. 1993. "Democracy in Divided Societies." *Journal of Democracy* 4 (4): 18-38; Huntington, Samuel P. 1972. "Foreword." In *Conflict Resolution in Divided Societies*, by Eric A. Nordlinger. Occasional Papers in International Affairs No. 29. Cambridge: Mass: Harvard University; Brown, Michael E., Owen R. Coté, Jr., Sean M. Lynn-Jones and Steven E. Miller, eds. 1997. *Nationalism and Ethnic Conflict*. Cambridge: Mass: MIT Press; Lerner, Hanna and Ash Bali. 2016. "Constitutional Design Without Constitutional Moments: Lessons from Religiously Divided Societies." *Cornell International Law Journal* 49 (2): 227-308; Guelke, Adrian. 2012. *Politics in Deeply Divided Societies*. Cambridge: Polity Press; John, Elijah Okon and Usoro I. Usoro. 2016. "Plural Society and the Challenge of Democratic Practice in Nigeria." *Developing Country Studies* 6 (1); Lustick, Ian. 1979. "Stability in Deeply Divided Societies: Consociationalism versus Control." *World Politics* 31 (3) April: 325-344.
- <sup>2</sup> Kobkua Suwannathat Pian. 2017. *Tunku: An Odyssey of a Life Well-Lived and Well-Loved*. Kuala Lumpur: University of Malaya Press.
- <sup>3</sup> See generally, Fernando, Joseph M. 2002. *The Making of the Malayan Constitution*. Malaysian Branch of the Royal Asiatic Society (MBRAS) Monograph 31.
- <sup>4</sup> Lijphart, Arend and Markus M. L. Crepaz. 1991. "Corporatism and Consensus Democracy in Eighteen Countries: Conceptual and Empirical Linkages." *British Journal of Political Science* 21 (2) April: 235-246.
- <sup>5</sup> [visionofhumanity.org](https://www.visionofhumanity.org), statisticstimes.com, 11 June 2020.

CHAPTER  
III

## Indigenous Features in the Federal Constitution

---

**F**or hundreds of years, Malaya has been the homeland of the Malays. It is understandable, therefore, that when the Merdeka Constitution was drafted it reflected a number of features indigenous to the Malay archipelago, among them the following:

### THE MALAY SULTANATE

The Malay sultanate consisting of nine hereditary Malay rulers was preserved but converted to a constitutional monarchy.<sup>1</sup> The Yang di-Pertuan Agong (king) and the state rulers are required by federal and state constitutions to act on the advice of the elected government in the whole range of their constitutional functions



---

The throne room in Istana Arau, Perlis.

except in a small area where personal discretion has been conferred. Even in this area, constitutional conventions limit royal discretion. In the overall scheme of the constitution, the monarchs are required to reign, not to rule.

### **OFFICE OF THE YANG DI-PERTUAN AGONG**

A unique system of an elected federal monarch was created. The nine Malay rulers take turns to become the nation's king for a designated period of five years.<sup>2</sup>

## **CONFERENCE OF RULERS**

This unique royal institution was created and vested with some critical constitutional functions like the election or removal of the king; the power to approve or veto federal laws in 10 enumerated areas; the right to be consulted on some appointments; and the right to deliberate on any matter of national policy.<sup>3</sup> In some respects, the conference has the power to provide check and balance, to caution, to advise and to warn and to be the “constitutional auditor” for the nation.

## **ISLAM**

Islam was adopted as the religion of the federation but with freedom to adherents of all other religions to practise their faiths in peace and harmony: Article 3(1).

## **SHARIAH**

The Shariah was compulsorily applied to the Muslim-Malay majority in limited areas (mostly of personal law) enumerated in Schedule 9, List II of the Federal Constitution.

## **MALAY CUSTOMS**

Along with application of the Shariah, there was special protection for the customary laws of Malays in specified areas. The responsibility of enforcing Malay customs and harmonising them with the Shariah was assigned to the Shariah courts.

## **PROPAGATION OF RELIGION TO MUSLIMS**

Due to the public order implications of proselytisation activities, an agreement was reached to permit the states of the federation to impose legal restrictions on the preaching of any religious doctrine or belief to Muslims by persons without official accreditation: Article 11(4).

## **AFFIRMATIVE ACTION IN FAVOUR OF THE MALAYS**

One of the unique features of the constitution is that affirmative action policies in favour of the politically dominant but economically weak Malay majority are entrenched in Article 153 of the basic law. In 1963, this “special position” was extended to the natives of Sabah and Sarawak.

Article 153(1) grants a “special position” to the Malays and the natives of Sabah and Sarawak by making them eligible for preferential treatment through quotas and reservations in four specified areas of economic and social life. These areas are:

- (i) positions in the public services;
- (ii) scholarships, educational or training privileges or special facilities;
- (iii) permits or licences for the operation of any trade or business; and
- (iv) post-secondary educational institutions.

## **CONCEPT OF A ‘MALAY’**

The concept of a “Malay” was defined broadly and with porous borders. Under the constitution, a person is a Malay if:

- (i) he professes the religion of Islam;

- (ii) habitually speaks the Malay language;
- (iii) conforms to Malay custom; and
- (iv) has roots in the soil due to birth in Malaya or Singapore or descent from one parent who was born or domiciled in Malaya or Singapore.

What is remarkable is that an ethnic category was defined with no element of ethnicity!<sup>4</sup> The consequence of such a porous definition is that millions of persons with non-Malay ethnicity may qualify for the status of a Malay.

### **MALAY RESERVES**

To ensure that some part of the land heritage remains in the hands of the indigenous communities, Malay reserve lands were created: Article 89.

### **NATIONAL LANGUAGE**

Bahasa Melayu was adopted as the national language for all official purposes: Article 152.



**ONE OF THE UNIQUE features of the constitution is that affirmative action policies in favour of the politically dominant but economically weak Malay majority are entrenched in Article 153 of the basic law. In 1963, this “special position” was extended to the natives of Sabah and Sarawak.**

## **ELECTORAL DISTRICTS**

The constitution permits weightage for rural areas in the drawing up of electoral boundaries.<sup>5</sup>

## **MALAY REGIMENT**

Enlistment in the Malay regiment is restricted to Malays: Article 8(5)(f).

---

### **Endnotes**

- <sup>1</sup> Articles 70-71.
- <sup>2</sup> Article 32.
- <sup>3</sup> Article 38.
- <sup>4</sup> Article 160(2).
- <sup>5</sup> 13th Schedule.

## Safeguards for Minorities

---

**A** broader look at the Federal Constitution indicates that even where the law confers special rights or privileges on the Malays and the natives of Sabah and Sarawak, there is concomitant protection for the interests of other communities. The Malay-Muslim features are balanced by other provisions suitable for a multiracial and multireligious society. The constitution is replete with safeguards for the interest of other communities. In popular parlance, this is often referred to as the “social contract” between the various races. This interethnic bargain involved a *quid pro quo*. The constitution embraced the indigenous features of the Malay archipelago – Malay sultans, Malay language, Malay privileges, Malay reserve land, Malay custom, Islam and weightage for Malay-dominated rural constituencies at election time. At the same time, the negotiated settlement gave to non-Malays equal citizenship rights, religious, cultural, educational and economic freedoms far beyond what many other plural societies give to their minorities. Malay political dominance and Chinese economic power went hand in hand. The social contract

envisaged a dazzlingly plural and diverse society in which the races, religions, cultures and regions were like the colours of a rainbow – separate but not apart.

This bold experiment of retaining separate cultures, languages, way of life, separate political and economic associations, and separate marriage and interpersonal laws has preserved the uniqueness of the various communities. Regrettably, it has also kept the walls of separation and exclusiveness standing high.

Pluralism is Malaysia's greatest asset as well as her greatest challenge. Instead of a melting pot, Malaysia is a rich cultural mosaic. The plurality of lifestyles this engendered gave rise to an extraordinary multifaceted society that supplied a model to many other diverse regions of the world. Notable safeguards for the non-Malay communities are as follows:

### **A SUPREME CONSTITUTION**

Unlike the United Kingdom, where there is no written constitution, Malaya in 1957 adopted a written and supreme charter. Articles 4(1) and 162(6) of the Federal Constitution affirm the supremacy of the basic law over all pre-Merdeka and post-Merdeka legislation. These articles imply that parliament is not supreme. There are procedural and substantive limits on parliament's competence. State assemblies are, likewise, limited in their legislative competence. Citizens' guarantees cannot be extinguished arbitrarily. Courts have the power to nullify federal and state legislation if there is inconsistency with the supreme constitution. On 18 or so occasions since Merdeka, this power of judicial review was exercised with telling effect. Likewise, executive actions can be tested in the courts for their constitutionality.

## **MALAYSIA IS NOT A THEOCRATIC STATE**

The declaration in Article 4(1) of the supremacy of the constitution implies that Malaysia is not a theocratic state with supremacy of the Shariah.<sup>1</sup> The constitution and not the Shariah is the supreme law of the land. Though Islam is the religion of the federation, Malaysia is not an Islamic state. The Shariah does not apply to non-Muslims.

## **FREEDOM OF RELIGION**

In Article 11(1), all religious communities are allowed three aspects of religious freedom. First, to profess their faith. This right is absolute. Second, to practise their faiths in peace and harmony. This right is subject to public order, public health or morality. Third, to propagate their religion but without infringing Article 11(4) which allows restrictions on propagating any religion to Muslims.

Under Article 12, government support may be given to all religions. In practice, most of it is allocated to Islam as it is the official religion. Missionaries and foreign priests are allowed entry into the country. Every religious group has the right to establish and maintain religious institutions for the education of its children.

Though there is recurring tension on contentious religious issues like conversion of people from one religion to another, Malaysia has avoided communal strife that mars many countries like India.

Culturally the country is a rich cultural mosaic. Secularism and religion live side by side. Mosques and temples and churches dot the landscape. Despite the prohibitions for Muslims, non-Muslims are not forbidden to take alcohol, have gambling permits, rear pigs and dress in their own or the ways of the West.

## HUMAN RIGHTS

In response to the humanitarianism of the era after World War II, the constitution, in Articles 5 to 13 and elsewhere, protects a number of political, civil, cultural and economic rights. The chapter on fundamental liberties grants personal liberty, an arrestee's right to know the grounds of arrest, right to consult with a lawyer, right to habeas corpus, protection against slavery and forced labour, protection against retrospective criminal laws and repeated trials, and (subject to some exceptions), a right to equality. There is also freedom of movement, protection against banishment, right to speech, assembly and association, freedom of religion, rights in respect of education and right to property for all citizens irrespective of race or religion.

## CITIZENSHIP RIGHTS

Though there are several categories of citizenship, they are not based on ethnicity or religious faith. The concept of *jus soli* (citizenship by birth in a land) was part of the constitution in 1957 and was used to grant citizenship to nearly 1.2 million non-Malays on Merdeka Day. However, *jus soli*<sup>2</sup> was removed from the constitution in 1963.

## MULTI-PARTY STATE

Since independence, Malaya (later Malaysia) has been a functioning multi-party state. The ruling coalition (Alliance/Barisan Nasional) remained in power at the federal level from 1955 to 2018. But the opposition-led Pakatan Harapan seized victory in the 2018 general election. Additionally, several state governments have now and then been captured by opposition parties.

A unique (and troublesome) feature of Malaysian politics is that most of the successful political parties are organised on narrow racial, regional or religious grounds. However, due to the 66-year-old tradition of multi-ethnic coalitions, the election manifestos of the government and most opposition parties tend to cater to all interests and to transcend narrow racial or religious lines.

### **ELECTORAL DEMOCRACY**

The constitution provides for periodic elections, universal adult suffrage and an independent Election Commission. The electoral process permits all communities an equal right to vote and to seek elective office at both federal and state levels. Race and religion are irrelevant in the operation of the electoral process.

### **FEDERALISM**

Unlike the unitary system in the United Kingdom and Singapore, Malaysia has a federal form of government. There is an elected legislature at both the federal and



### **THE RULING COALITION**

(Alliance/Barisan Nasional) remained in power at the federal level from 1955 to 2018. But the opposition-led Pakatan Harapan seized victory in the 2018 general election. Additionally, several state governments have now and then been captured by opposition parties.

state levels. It is not uncommon for non-Malay opposition parties to win state elections in states like Sabah, Sarawak, Penang, Selangor and Perak.

## **EDUCATION**

Education in primary and secondary national schools is free and is open to all irrespective of race or religion. However, due to Article 153(8A), university education is subjected to ethnic quotas. Therefore, to open up educational opportunities for non-Malays, private schools, colleges and universities are allowed. Foreign education is available to whoever wishes to seek it. Government loans for higher education are available to all citizens irrespective of religion or ethnicity. Government education scholarships are given to many non-Malays though this is an area where a large discontent has developed over the proportions allocated.

## **PUBLIC SERVICES**

At the federal level, membership of the judiciary, the cabinet of ministers, parliament, the federal public services and the special commissions under the constitution are open to all irrespective of race or religion. Article 136 forbids discrimination against public servants on the ground of race. The cumulative effect of Articles 136 and 153 is that at entry point, reservation of such proportion of public service positions as the Yang di-Pertuan Agong may deem reasonable is permitted. But once a person is in the public service, there should be no discrimination on the ground of race. Regrettably, a wide gap exists between theory and the ground reality.

## **PROTECTION OF RIGHTS DURING AN EMERGENCY**

Even during a state of emergency under Article 150, some rights like citizenship, religion, language, Islamic law, Malay custom, and native law and custom in Sabah and Sarawak are protected by Article 150(6A) against easy repeal.

## **SPECIAL AMENDMENT PROCEDURES**

Though the constitution is amendable, its amendment requires special and difficult procedures. This is a safeguard for the rights of minorities. Unlike ordinary laws which can be amended or repealed by simple majorities of legislators present and voting, most constitutional provisions are entrenched against easy repeal. Under the Federal Constitution, one or more of the following procedures apply:

- Special two-thirds majority of the total membership of the two houses in the federal parliament is required.
- In respect of some provisions, the consent of five out of nine Malay rulers in the Conference of Rulers is needed.
- If the amendment affects the special rights of Sabah or Sarawak, the consent of the governors of the states is also mandated.
- Any amendment to the territorial boundaries of a state requires the consent of the state assembly concerned as well as the concurrence of the Conference of Rulers.

## NATIONAL LANGUAGE

The constitution and the laws require us to honour and promote the national language but there is considerable latitude to use English and other languages. The pre-eminence and official position of the Malay language is deeply entrenched in our constitution. Article 152(1) prescribes that the national language shall be the Malay language and shall be used for all official purposes. “Official purpose” is defined in Article 152(6) to mean any purpose of the federal or state governments or a public authority. The official position of the Malay language is further reiterated in the National Language Act 1963/67, the Education Act 1996 and the Private Higher Educational Institutions Act 1996. The Education Act, for example, puts it succinctly in section 17(1) that “the national language shall be the *main* medium of instruction in all educational institutions in the national education system”.



Despite the firm resolve to promote Bahasa Melayu (BM), one notes that the drafters of the constitution were also desirous of maintaining some flexibility and open-endedness to empower parliament, the Yang di-Pertuan Agong (acting on advice), the minister of education and the states of Sabah and Sarawak to preserve and promote, for specific as well as broad purposes, any other language, especially English, the native languages in Sabah and Sarawak and the ethnic languages of other communities. The exceptions from compulsory use of BM are many and the discretion of the government is wide and the use or non-use of other languages is a matter of political judgment and educational vision. The following are the main exceptions to the use of BM as the *main* medium of instruction:

- Article 152(1)(a) provides that no person shall be prohibited or prevented from using (otherwise than for official purposes), teaching or learning, any other language.
- Federal and state governments have the right to preserve and sustain the use and study of the languages of any other community: Article 152(1)(b).
- Article 152 safeguards the country's multilingual character. The constitution permits linguistic diversity and puts special emphasis on familiarity with and use of English in several sectors. Article 152(2) provides that for a period of 10 years after Merdeka and thereafter until parliament provides, English may be used in parliament, in state assemblies and for all other official purposes.
- The National Language Act in section 5 provides that with the permission of the presiding officer, English may be used in parliament or any state assembly.
- Article 152(3) and sections 6-7 of the National Language Act provide that all post-September 1967 laws at federal and state levels must be in two languages: Malay and English, the former being authoritative.
- Article 152(4) and (5) when read with section 8 of the National Language Act provide that all court proceedings shall be in Malay. However, the presiding judge may permit use of English.
- Article 161(3) and (4) state that any restrictions on the use of English in judicial proceedings relating to Sabah and Sarawak cases, cannot become law without the consent of the legislatures of these states.
- Article 161(5) allows the use of native languages in Sabah and Sarawak for purposes of native courts, native codes and native customs.
- The National Language Act (NLA) in section 2, commands the use of Malay for all official purposes. However, it contains a number of very

significant exceptions. Section 4 provides that “the Yang di-Pertuan Agong may permit the continued use of the English language for such official purposes as may be deemed fit”. It is noteworthy that this provision has no time limit and is not confined to any particular sphere. However, a gazette notification has outlined the areas where English may be used. This notification can be added to and expanded in the government’s discretion. Such a discretion is indeed exercised in relation to International Islamic University Malaysia (UIAM), Universiti Teknologi Mara, many public and private universities and colleges and the 69 fully residential schools. In tertiary institutions, all twinning programmes and external courses use English. Many continuing education programmes in government departments employ English. National TV and radio use the whole spectrum of languages spoken in the country.

- The application of the NLA in Sabah and Sarawak is not automatic. The NLA applies in Sabah and Sarawak only if the state legislatures adopt it: NLA section 1(2).
- The federal and state governments have a very wide power “to use any translation of official documents or communications in any other language for such purposes as may be deemed necessary in the public interest:” section 3, NLA.
- Under the Education Act 1996, the national language need not be the main medium of instruction in national-type (vernacular) schools established under section 28. In addition, section 17(1) authorises the minister to exempt any other educational institution from use of Malay as the main medium of instruction. The power of the minister is broad enough to extend to all types of primary and secondary schools. The permutations of law and policy are immense. Under section 143, the minister of education has discretion to exempt any educational

institution or any class or classes of institutions from the act except as to registration.

- English is a compulsory subject in all national primary and secondary schools. No statutory guidelines are given as to how many hours per week, the language of English may be taught and therefore the minister's discretion is very wide to enhance the teaching and learning of the language and the level of competence that must be attained and whether a pass or credit in English is a prerequisite to obtaining the necessary certificate or accreditation.
- The Private Higher Educational Institutions Act 1996 in sections 73(3) and 75 provide much latitude and autonomy. Section 75(1)(a) implies that Malay need not be the main medium of instruction but in such a case it shall be a compulsory subject in the curriculum.
- In the broad spirit of Article 152, the Education Act 1996 in section 2 provides that the Chinese or Tamil language shall be made available in national primary and national secondary schools if the parents of at least 15 pupils in the school so request.
- Likewise, indigenous languages, Arabic, Japanese, German or French or any other foreign languages may be made available if it is reasonable and practicable so to do.
- The Private Higher Educational Institutions Act 1996 permits private universities to flourish and gives them considerable autonomy in the matter of language of instructions but with the requirement that the Malay language shall be taught as a subject and shall be a prerequisite to the award.

In sum, the constitution and the laws require us to honour and promote the national language but, at the same time, to keep the windows of our mind open to the world

by learning and using English and other foreign languages. With the permission of the Yang di-Pertuan Agong or the minister, the use of English and other languages in our schools and universities is not illegal. The minister's discretion is very wide to enhance the teaching and learning of the English language and the level of competence that must be attained as a prerequisite to obtaining the necessary certificate or accreditation.

It is clear, therefore, that the law permits considerable flexibility and many permutations of the law and policy are possible. Any changes are a matter of courage and imagination. Though Bahasa Melayu is the national language for all official purposes, Article 152(1) gives a right to teach, learn and use any other language for non-official purposes. There is protection in the National Education Act for the formal study in all schools of other languages if 15 or more pupils so desire. Likewise, there is legal protection in the National Education Act for the existence of "national-type" vernacular schools. Their existence is passionately supported by the non-Malay minorities of West Malaysia and equally strongly opposed by some Malay groups.

### **MALAY RESERVES**

Though Article 89 reserves some lands for Malays, it is also provided that no non-Malay land shall be appropriated for Malay reserves and that if any land is reserved for Malay reservations, an equivalent amount of land shall be opened up for non-Malays. Alienation of or grant of temporary occupation licences over state land to non-Malays is not uncommon.

## **SPECIAL POSITION OF MALAYS AND NATIVES OF SABAH AND SARAWAK**

In its formulation, Article 153<sup>3</sup> is a fairly moderate provision that balances the special position of the Malays and the natives of Sabah and Sarawak with the legitimate interests of other communities. The article calls on the federal government to protect the “special position” of the Malays and the natives of Sabah and Sarawak by establishing quotas and reservations in four areas: entry into the public services; scholarships and educational facilities; post-secondary education; and licences and permits.

Article 153 on the special position of Malays and the natives of Sabah and Sarawak is hedged in by many limitations. First, along with his duty to protect the Malays and natives, the king is also enjoined to safeguard the legitimate interests of other communities. Second, the special position of the Malays and natives applies only in the public sector and in only four prescribed sectors and services and not across the board in all areas of life. Third, in the operation of Article 153, no non-Malay or his heir should be deprived of what he already



**ARTICLE 153 DOES NOT  
override Article 136  
which clearly states  
that “all persons of  
whatever race in  
the same grade in  
the service of the  
federation shall,  
subject to the terms  
and conditions of  
their employment, be  
treated impartially”.**

has. Fourth, no business or profession can be exclusively assigned to any race. No monopoly is permitted in favour of the “Bumiputeras”. Fifth, Article 153 does not override Article 136 which clearly states that “all persons of whatever race in the same grade in the service of the federation shall, subject to the terms and conditions of their employment, be treated impartially”. Tun Suffian informs us that the way to harmonise Article 153 with Article 136 is that quotas and reservations are permitted at entry point but once a person is in the public service, he should be treated equally.<sup>4</sup> Sixth, the article imports requirements of necessity and reasonableness. The Yang di-Pertuan Agong (i.e. the government) shall exercise his functions “in such manner as may be necessary ...” and “ensure the reservation ... of *such proportion as he may deem reasonable*”. All these qualifications permit Article 153 policies in the future to be built on need and not on race and to ensure reasonable proportions of Malays, natives and non-Malays in all public sectors.

### DEFINITION OF A ‘MALAY’

A most fascinating aspect of the constitution is that the ethnic category of a “Malay” is defined in Article 160(2) in a non-ethnic manner. A person is a “Malay” if:

- (i) he is a Muslim;
- (ii) follows Malay *adat* (custom);
- (iii) speaks Bahasa Melayu habitually; and
- (iv) has roots in Malaya/Singapore by either birth in Malaya or Singapore before Merdeka Day or descent from one parent who was born or domiciled in Malaya/Singapore before Merdeka Day.

Fascinatingly an ethnic category is defined without any ethnic requirement. The definition permits persons of non-Malay stock to qualify as Malays. Conversely persons of Malay stock who fail the four requirements will not qualify as Malays.

### **POLITICS OF ACCOMMODATION**

In addition to the above legal provisions, the rainbow coalitions that have ruled the country during most of the 64 years were built on an overwhelming spirit of accommodation between the races, a moderateness of spirit and an absence of the kind of passions, zeal and ideological convictions that in other plural societies have left a heritage of bitterness.

### **USING THE ECONOMY TO UNITE THE PEOPLE**

In the commercial and economic area, there is right to property, freedom of trade and commerce, a relatively open, globalised economy, encouragement to the non-Malay dominated private sector to invest in the economy, freedom to import and export, to transfer funds to and from abroad.

In general, economic opportunities have given to everyone a stake in the country. The tremendous non-Malay contribution to the building of the economic infrastructure of the country has given the country prosperity as well as stability.

In sum, the document of destiny that was adopted as the constitution bore the mark of idealism as well as realism. It blended the old and the new, the indigenous and the imported. According to Hickling, the ideas of Westminster and the experience of India mingled with those of Malaya to produce a unique form of government.

The Malay-Muslim features of the constitution are balanced by other provisions suitable for a multiracial and multireligious society. Malay privileges are offset by safeguards for the interest of other communities. The spirit that animates the constitution is one of moderation, compassion and compromise between the Malay majority and the non-Malay minorities on their mutual rights and privileges in a democratic, federal, monarchical and non-theocratic system of government.

Sixty-four years into independence, the Federal Constitution, though amended significantly in many parts, is still the apex of the legal hierarchy. It has endured. It has preserved public order and social stability. It has provided the framework for Malaysia's hitherto spectacular economic prosperity. It has reconciled the seemingly irreconcilable conflict of interest between ethnic and religious groups in a way that has few parallels in the modern world.

---

#### Endnotes

- <sup>1</sup> *Che Omar Che Soh v PP (1988)*.
- <sup>2</sup> *Jus soli* refers to the right to citizenship in a land by virtue of birth in that land.
- <sup>3</sup> See also Article 161A(4) for Sabah and Sarawak.
- <sup>4</sup> Tun Mohamed Suffian's *An Introduction to the Constitution of Malaysia*, edited by Tunku Sofia Jeewa, Salleh Buang and Yaacob Hussain Merican. 2007. Third edition. Selangor: Pacifica Publications, p. 173.

## Special Position of Sabah and Sarawak in the Federation

---

**W**hen Sabah, Sarawak and Singapore<sup>1</sup> joined hands with Malaya to reconstitute the Federation of Malaya into the much larger and more diverse Federation of Malaysia, the significantly amended Federal Constitution granted them a number of iron-clad guarantees of their autonomy and special position. Eighty-seven out of 181 articles and 10 out of 13 schedules of the Federal Constitution were amended. Thirty-five new articles were inserted into the Federal Constitution. The special position of Sabah and Sarawak in the federal set-up gave to pluralism a territorial dimension.

There was ample justification for this special treatment. The 1963 pact between the Federation of Malaya, the United Kingdom, North Borneo (Sabah), Sarawak and Singapore was drawn up after a lengthy process of bargaining and negotiations.



---

A Sarawak native weaving mats for sale. The state retains its cultural and religious distinctiveness.



The delegates of Sabah and Sarawak made very clear to the inter-governmental committee (IGC) headed by Lord Lansdowne with the then deputy prime minister Tun Abdul Razak as the deputy chairman that special treatment was a pre-condition for constituting Malaysia. Sabah summarised its demands in the famous “20 points”. Sarawak expressed them in “18 points”. The sanctity of the IGC report and Malaysia Agreement has been reiterated by Malaysian courts in several cases: *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* (2002), *Datuk Hj Muhammad Tufail Mahmud v Dato’ Ting Cheuk Sii* (2009), *Robert Linggi v Government of Malaysia* (2011) and *Fung Fon Chen@ Bernard v The Government of Malaysia* (2012).

It is noteworthy that for a few days before 16 September 1963, North Borneo (Sabah) and Sarawak had both gained some measure of self-government (but not independence) from Great Britain (Sabah on 31 August 1963; Sarawak on 22 July 1963). The 1963 pact between the Federation of Malaya, United Kingdom, North Borneo, Sarawak and Singapore was not a mere domestic agreement but an international treaty giving international law basis to the guarantees for Sabah and Sarawak.

Sabah and Sarawak’s cultural and religious distinctiveness from Peninsular Malaya justifies special treatment. Sabah and Sarawak contribute huge territories and massive resources to the federation. Their combined area is 198,069 sq km, exceeding Peninsular Malaysia’s 131,681 sq km. The coastline of the two states is 2,607km compared to the peninsula’s 2,068km.

There were (and still are) severe problems of poverty and underdevelopment in these states.

Special autonomy for some regions is not unknown in other nations. Kashmir in India (till August 2019), Quebec and Nunavut in Canada, Northern Ireland in the United Kingdom and Corsicans in France are some examples.

For the above reasons, the Federal Constitution was amended significantly in 1963 to accommodate the demands of the new states for more autonomy.

### **ENLARGED LEGISLATIVE POWERS**

The Supplementary State List in Schedule 9 confers additional powers on these states in eight matters, including native law and custom, ports and harbours and, in Sabah, the Sabah Railway. The Supplementary Concurrent List for Sabah and Sarawak extends the legislative competence of these states to cover nine matters, including shipping under 15 tonnes, charities, theatres. The two states have special powers to legislate on federal matters like carriage of goods by land: Borneo States (Legislative Powers) Order 1963 and Article 95C(1).

### **FEDERAL POWER TO HAVE UNIFORM LAWS**

The federal parliament may legislate on state matters for promoting uniformity of laws of two or more states: Article 76(1)(b). This power of the federal parliament is not applicable to Sabah and Sarawak: Article 95D. Land, agriculture, forestry and local government are exclusive to Sabah and Sarawak.

### **AMENDING THE CONSTITUTION**

The power of amending the Federal Constitution, which belongs to the federal parliament, is not as extensive in relation to Sabah and Sarawak as it is in relation

to the West Malaysian states. Under Article 161E(2), the consent of the governors of Sabah and Sarawak is required to a constitutional amendment affecting the special position of these states: *Robert Linggi v Government of Malaysia* (2011) and *Fung Fon Chen@ Bernard v The Government of Malaysia* (2012).

### **FEDERAL POWER AND INTERNATIONAL TREATIES**

Under Article 76(l)(a), parliament may make laws with respect to any matter enumerated in the state list for implementing any treaty with a foreign nation or any decision of an international organisation. But if the law affects Islamic law or the custom of the Malays or native law and custom in Sabah and Sarawak, then there is a duty to consult with the states concerned: Article 76(2). Though the duty to “consult” does not impose a duty to obey, consultative processes do help to safeguard the interests of the state.

### **NO STATE RELIGION IN SABAH AND SARAWAK**

Due to the large non-Muslim population in Sabah and Sarawak in 1963, there was no state religion in the constitutions of Sabah and Sarawak in 1963.<sup>2</sup> In 1963, the Federal Constitution contained Article 161C, which provided that if financial support is given by the federal government for Islamic institutions and Islamic education in the Borneo states, the consent of the state governor must be obtained. Further, an equivalent amount will be allocated for social welfare in these states.<sup>3</sup> This article was deleted in 1976.

Article 161D of the Federal Constitution (now repealed) provided an exception to Article 11(4). In the Borneo states, a state law restricting the propagation of any religious doctrines to Muslims may not be passed without a special two-thirds majority.

## **NATIVE COURTS**

In Sabah and Sarawak, besides Shariah courts, there is a system of native law and native courts.

## **HIGH COURT FOR SABAH AND SARAWAK**

The high court has two wings – one in Malaya and the other in the states of Sabah and Sarawak. Appointment of the chief judge of the Sabah and Sarawak high court requires consultation with the chief minister of these states: Article 122B(3).

## **APPOINTMENT OF JUDICIAL COMMISSIONERS**

Prior to 1994, it was the law that judicial commissioners in the high court for Sabah and Sarawak shall be appointed by the Yang di-Pertua Negeri (governor of the state) on the advice of the chief justice of Sabah and Sarawak. Accordingly, Article 122AB (as amended in 1994) to transfer this power to the Yang di-Pertuan Agong on the advice of the prime minister after consulting the chief justice of the Federal Court arouses the criticism that it is a violation of Article 161E(2)(b) and therefore unconstitutional and null and void: *Robert Linggi v Government* (2011).

## **REPRESENTATION IN THE DEWAN RAKYAT**

Ideally, a state's representation in the elected house should be proportional to the state's population. Sabah has 25 members of parliament (MPs); Sarawak 31. Together, Sabah and Sarawak have 56 out of 222 or 25.2% of the MPs in the Dewan Rakyat. This is disproportionately large based on their population. However, this was meant to give Sabah and Sarawak a strong voice in parliament.

## **EMERGENCY POWERS**

Even during an emergency under Article 150, the native law or customs of Sabah and Sarawak cannot be extinguished by an emergency law of the federal government: Article 150(6A).

## **DEVELOPMENT PLANS**

In relation to national development plans, Article 92(1) empowers the Yang di-Pertuan Agong to proclaim an area of a state as a “development area”. Thereupon, parliament has power to give effect to the development plan notwithstanding state powers on the matter. Under Article 95E(3), Sabah and Sarawak are excluded from national plans for land utilisation, local government and development unless the consent of the Yang di-Pertua Negeri is obtained.

Policies of the National Land Council and National Council for Local Government are not binding on Sabah and Sarawak: Article 95E(2).

## **FISCAL FEDERALISM**

“Money represents power”. The federal government’s stranglehold over most of the lucrative sources of revenue is not as strong in relation to Sabah and Sarawak as it is in relation to other states. In several areas, Sabah and Sarawak enjoy fiscal privileges that are not available to the peninsular states. Under Article 112B, Sabah and Sarawak are allowed to raise loans for their purposes with the consent of Bank Negara. These states are allocated special revenues to meet their needs above and beyond what other states receive: Article 112C(1)(b). Sabah and Sarawak are also entitled to earnings (taxes, fees and dues) on eight sources of revenue like

ports and harbours, import and excise duty on petroleum products, export duty on timber and other forest produce and state sales tax: Article 112C and Schedule 10, Part V. These states enjoy some special grants: Articles 112C(a) and 112D. There are special rules about state audits: Article 112A.

### **SPECIAL POSITION OF THE NATIVES**

Under Article 153, the natives of Sabah and Sarawak enjoy a special position similar to that of the Malays of Peninsular Malaysia. Article 153 is, however silent about whether the special protection has applicability throughout Malaysia or has a limited territorial reach only within Sabah and Sarawak.

### **IMMIGRATION**

The mobility of non-residents to Sabah and Sarawak is restricted.<sup>4</sup>

### **LAWYERS**

Under Article 161B, there is restriction on non-resident lawyers practising before the courts of Sabah and Sarawak: *Datuk Hj Muhammad Tufail Mahmud v Dato' Ting Cheuk Sii* (2009).

### **ENGLISH AND NATIVE LANGUAGES**

Sabah and Sarawak enjoy special protection in relation to the use of English and native languages (Article 161). Sarawak exercises its rights but not Sabah.

## **MALAY RESERVES**

There is non-application of Malay reserve lands to these states: Article 161A(5).

## **APPOINTED ASSEMBLY MEMBERS IN SABAH**

The Sabah assembly is allowed six appointed members in addition to 48 elected assemblymen.

---

### **Endnotes**

- <sup>1</sup> As Singapore was excluded from the Federation of Malaysia on 9 August 1965, this essay will confine itself to Sabah and Sarawak's special position.
- <sup>2</sup> But the constitution of Sabah was later amended to make Islam the official religion of Sabah.
- <sup>3</sup> Article 161C was deleted in 1976.
- <sup>4</sup> Article 161E(4) and Part VII Immigration Act, Act 155.



## Counting our Blessings

---

**T**he end of August will mark the 64th anniversary of Malaya's independence. Our joy is tempered by the testing times we are living in. Nevertheless, let not the things we wish for make us forget the things we have. Let me, therefore, enumerate those unique features of our society that have helped us to survive and thrive for 64 years as an independent and successful nation. Perhaps there are some things in Malaysia's struggles that are worthy of emulation by friends and foes alike. I can think of 12 sterling achievements of our socio-legal system.

1<sup>st</sup>

Our peace and social harmony. We are not at war with any nation or with ourselves. There was the confrontation with Indonesia in 1964; one major racial riot in 1969; and a communist insurgency up to the '80s. Today, no religious, racial or regional grouping is at arms against the government.

2<sup>nd</sup>

The wondrous durability of political cooperation among the country's racial, religious and regional groups. The political alliance, painstakingly forged by the forefathers in 1954, was built on an overwhelming spirit of accommodation, a moderateness of spirit, an absence of the kind of passions, zeal and ideological convictions that in other plural societies have left a heritage of bitterness and violence. Sixty-four years (58 years in the case of Sabah and Sarawak) of uninterrupted power-sharing between the races, religions and regions is perhaps unparalleled in the world.

3<sup>rd</sup>

Sterling achievement of the country's enduring and endearing interethnic harmony. Despite the frequent sniping at each other, Malaysians, in general, tolerate as well as celebrate our dazzling diversity. Instead of creating a melting pot, our forefathers painstakingly weaved a rich cultural mosaic. The plurality of lifestyles this engenders has given rise to an extraordinarily multifaceted society. For 64 years, Malaysia has provided the world with a rare example of how a fragmented multi-ethnic and multireligious polity can be welded together in a common nationality.

4<sup>th</sup>

Significant achievement in the eradication of hard-core poverty and suffering. Louis Armstrong in his immortal song reminded us how universal the desire is for a human being to want a place in the sun and to have a chance to give his kids a better life. The country has vigorously facilitated this quest. Through socio-economic measures, such as free primary and secondary education, there has been tremendous upward social mobility among the masses.

5<sup>th</sup>

Malaysia has used its economy to preserve social peace. We adopted pragmatic, globalised economic policies long before globalisation. There is wide scope for economic initiative and market enterprise. Before the devastation caused by COVID-19, a

strong economy had acted as a glue to bind our people, first, by forging interethnic economic partnerships and, second, by giving to every community a share and a stake in a delectable economic pie.

There is a vibrant private sector, dominated by the dynamic and commercial-savvy Chinese and Indian communities that have contributed immensely to Malaysia's economic prosperity. At the same time, an activist public sector helps the politically dominant Malay elites and the economically depressed Malay middle class to participate in more and more economic enterprises.

By utilising the economic genius of its enterprising minority communities, Malaysia enjoyed a sustained economic prosperity that was, up to now, matched by very few Asian and African societies.

6<sup>th</sup>

The outstanding feature of Malaysia is the peaceful and cooperative manner in which social engineering is being accomplished. Malaysia has successfully transformed a wide swathe of its poverty-stricken indigenous majority from rural-agriculture to urban-industrial



BEFORE THE devastation caused by COVID-19, a strong economy had acted as a glue to bind our people, first, by forging interethnic economic partnerships and, second, by giving to every community a share and a stake in a delectable economic pie.

and created a broad middle class within one generation. Unlike some other societies with a similar problem of identification of race with economic function, the government in Malaysia did not, like in Uganda or Zimbabwe, expropriate the wealth of one community to bestow it on another. Instead, it embarked on a pragmatic expansion of opportunities to give to every community its share in the pie. The country's efforts have reduced the tensions that flared in 1969 due to the economic gaps between the majority-minority communities. Social justice is, of course, a continuing journey. Besides interethnic disparities, attention must also turn to widening intraethnic gaps.

7<sup>th</sup>

The characteristic feature of the Malaysian polity is the development of a culture that avoids open confrontation, that emphasises behind-the-scene negotiations and compromises on a whole range of religious, ethnic, cultural, linguistic, economic and human rights issues. Unlike other societies where social conflict is almost always played out in the streets, Malaysia imposes severe controls on mass protests. This has adverse human rights implications but has avoided the continuous cycle of political and religious violence that bedevils many democratic societies like the United States.

8<sup>th</sup>

The remarkable feature is that Malaysia as a Muslim country was, till the '90s, an exemplar of a moderate, multicultural and tolerant society. Secularism and Islam co-existed in harmony and symbiosis.

Unfortunately, the last two decades have seen the rise of political Islam and the increasingly divisive argument of adopting an Islamic state, but the government has handled religious ideologues fairly successfully by adopting many Islamic measures but maintaining the broad secular, capitalistic, democratic and globalised features of Malaysia's multi-ethnic and multireligious society.

9<sup>th</sup>

The admirable feature is the emancipation of women. In the workplace, in schools and in universities, women are easily outnumbering men. The quest for gender equality and dignity is, of course, a continuing challenge.

10<sup>th</sup>

Malaysia has successfully kept the armed forces under civilian control. There has been no attempted *coup d'état* and no “stern warnings” from military generals to the political executive. Malaysia has kept the armed forces out of politics by creating a subtle check and balance between the armed forces and the police force.

11<sup>th</sup>

The commendable attribute is the unique federal set-up in the country. The way the Malaysian constitution concedes the special aspirations of Sabah and Sarawak could provide a paradigm for accommodation for the restive regions of Afghanistan, Iraq, Mindanao, Southern Thailand and other hotbeds of conflict. Not everything is working well, however, between the federal government and the (former) Borneo states. This will be discussed below.

12<sup>th</sup>

The extra-constitutional military-industrial-media complex that, behind the scenes, dictates domestic and foreign policy in many democratic countries like the United States, has not been able to displace civilian control over military and industrial decisions in Malaysia.





CHAPTER  
VII

## **The Post-Merdeka Generation and the Decline of the ‘Social Contract’ in Peninsular Malaysia**

---

**D**espite the achievements outlined in the previous chapter, there is no doubt that dark clouds of disunity loom on the Malaysian horizon. Regrettably, as is the fate of all social bargains, once the original authors pass from the scene, the descendants do not always appreciate the rationale behind the original compromises. Later governments have to walk the tightrope between the need to honour the pacts of the past and to accommodate new demands and expectations.

The Malaysian constitution is undergoing such a process of readjustment and reinterpretation. There is a lively and inconclusive debate about what the document of destiny actually ordained and how far the imperatives of the constitution should be modified to meet the new aspirations of the electorate. The problem is made

worse by a general lack of constitutional literacy within the population and within the political and administrative elite.

In many areas, the spirit of moderation seems to have evaporated. We seem to be obsessed with what divides us and not what unites us. Accommodation and tolerance are giving way to extremism. Many aspects of the social system constantly remind us of our differences. For example, in all government forms, there is always an unnecessary column for disclosing your race and religion.

### **CHALLENGES TO THE 'SOCIAL CONTRACT'**

Many people who are unable or unwilling to see the constitution as a whole, and who are unable to see the woods along with the trees, are denying the existence of the “social contract”. Their argument is that no such words as “social contract” are found in the constitution. Indeed, that is correct: these significant words are nowhere mentioned explicitly in the constitution. However, neither are the concepts of “democracy”, “rule of law”, “separation of powers” and “independence of the judiciary” explicitly stated. Are these principles of constitutionalism also not part of the heart and soul of our document of destiny? A constitution is always more than its black-letter words. It personifies some values and assumptions. It consists of some implied, un-enumerated, non-textual ideals. In the special context of Malaysia, any denial of the “social contract” would involve denial of the memorandum on interethnic issues that was submitted by the Alliance to the Reid Commission.

Some commentators take a different approach than of denial of the ethnic compact. They argue that the so-called social contract was a flawed understanding 64 years ago. Times have changed and contemporary ideals of good government require a new thinking of our constitutional arrangements.

There is always merit in the submission that the law must never stand still and must always respond to the felt necessities of the times. However, it must be noted that if radical new thinking is encouraged, if fundamental departures from the framework assumptions of 1957 are contemplated, then this is a game that two can play. There are extremists within all communities and if they have a chance, they will challenge many fundamental features of the basic document and question the wisdom of many significant compromises. This challenge may tear society apart.

Ideal templates, often borrowed from the West, generally do not work. A constitution must reflect the peculiarities, the vulnerabilities and the social necessities of each society in a way no foreign template can contemplate. The inevitability of autochthonous features<sup>1</sup> is difficult to avoid in any constitution.

Constitutions do not exist to support abstract ideals. Ultimately, the basic law must work. It must keep society together. It must solve problems. The experience of divided societies like Lebanon, Cyprus, India (in relation to Kashmir), Philippines



**THERE IS A LIVELY  
and inconclusive  
debate about what  
the document of  
destiny actually  
ordained and how  
far the imperatives  
of the constitution  
should be modified  
to meet the new  
aspirations of the  
electorate.**

(in relation to Mindanao), and Canada (in relation to Quebec) indicates that in certain circumstances, pragmatic solutions work better than ideal solutions. Malaya (later, Malaysia) is one such case. A flawed but workable document containing a meticulously worked out *quid pro quo* was accepted as the chart and compass for the nation. A “constitution without constitutional moments” was drawn up by the elites<sup>2</sup> of various communities to keep society together.

The solution to the present uncertainties and dissatisfactions is to improve our constitutional literacy, sit down together at the table of fellowship to devise a plan to restore the 1957 and 1963 constitutional scheme of things, to bridge the wide gap between theory and practice and the promise of 1957 and the performance of 2021. Radical changes must be shunned. Evolution is always better than revolution.

### ETHNIC TENSIONS

After the 1969 racial riots, the Malay features of the constitution were enhanced. Since the 1990s, the Islamic dimension of the constitution has gained great prominence. The spirit of the constitution that the special position of the Malays and the natives of Sabah and Sarawak was to be offset by safeguards for the legitimate interests of other communities is not being properly enforced. Perhaps the Sedition Act hampers open scrutiny of affirmative action policies and actions even when these policies sometimes go overzealously beyond the permitted borders.

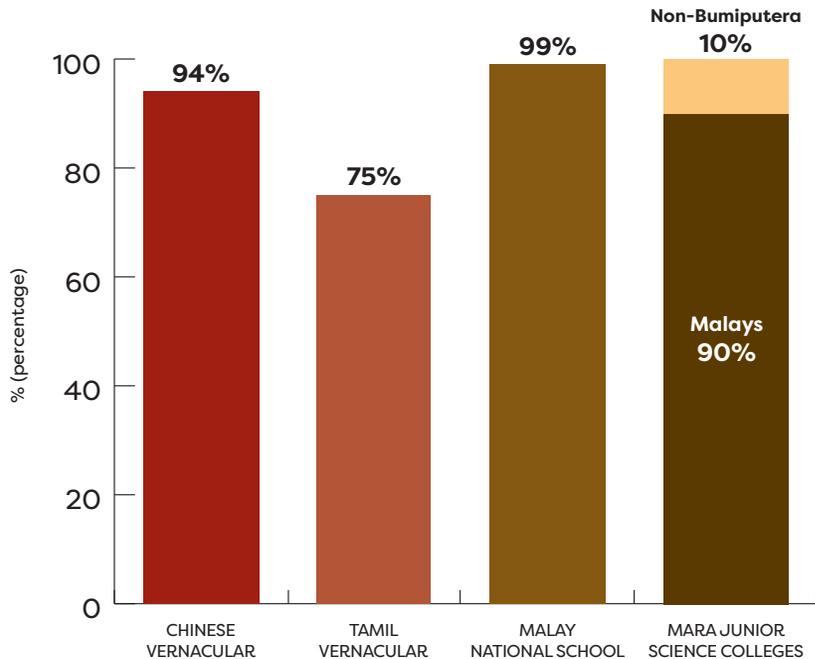
There is considerable overzealousness in the enforcement of Article 153 reservations and quotas. The spirit of Article 153 (special position of Malays and the natives of Sabah and Sarawak) was one of moderation. Article 153 does not contemplate monopolies for the Bumiputeras or total exclusion of other communities. It requires the Yang di-Pertuan Agong to safeguard the legitimate interests of other communities. It states that reservations and quotas for Bumiputeras in the public services do not override the requirement in Article 136 to treat all public sector employees equally.

The late Tun Suffian told us how Article 153 and 136 can be reconciled. At entry point, Article 153 prevails. Such quotas and reservations as the Yang di-Pertuan Agong deems necessary are allowed. But once a person is already in government employment, Article 136 applies and there is a constitutional obligation to treat everyone equally. In the true spirit of any of the social engineering programmes that have been launched from time to time, we need to strike a delicate balance between Articles 153 and 136.

## EDUCATION

Our educational system runs contrary to the belief that if people must live together, they must learn together. Our primary and secondary education system is causing much disunity. Our national schools have transformed into Islamic religious schools. They are, therefore, shunned by the minorities and the elites of Malay society. The alternatives to national schools are Chinese and Tamil vernacular schools, Islamic religious schools, and international schools for the children of elites.

Vernacular schools though not guaranteed by the constitution, are allowed by the Education Act. From the point of national unity, vernacular schools attract the frequent objection: how can we have national unity with a segregated school system? How can our children live together if they do not learn together? The figures are quite stark. Ninety-four percent of Chinese attend a Chinese vernacular school for their primary education. About 75% of Indians attend a Tamil vernacular school and 99% of Malays attend a national school. Most Chinese and Indians, however, end up in national secondary schools while the best and brightest Malays are shipped off to boarding schools meant exclusively for Malays. (Exceptions are the Mara Junior Science Colleges, which have a 10% non-Bumiputera quota). All in all, the primary and secondary education system emphasises our differences and not our commonalities.



The silver lining to the dark cloud is that Chinese vernacular schools, due to their high educational reputation, are attracting more and more non-Chinese pupils, including Malays. Up to 22% of Chinese vernacular school population is now, non-Chinese. The irony of the situation is that “national schools” have increasingly become parochial; Chinese vernacular schools are increasingly becoming more national.

At the tertiary level, most of the 20 public universities are open to all races but subject to strict Article 153 quotas. However, there is one public university totally reserved for “Bumiputeras”.

## RELIGIOUS EXTREMISM

There is considerable evidence that departure from the fundamental features of the pre-Merdeka compromises is widespread. Foremost among the emerging demands is the call by some groups for an Islamic state with *hudud* laws. Neither the Alliance in 1957 nor the components of the ruling Barisan Nasional or the Pakatan Harapan ever had an agreement on this significant new direction. The opposition coalition is also deeply divided on this issue. On this matter, politics and administrative policy have trumped and displaced the constitution. A sort of “authoritarian populism” has taken hold.<sup>3</sup>

The debate on whether Malaysia is an Islamic or secular state is a political shadow-play. No one familiar with the original constitutional papers will deny that a theocratic state was never in contemplation. Nor was American style secularism desired or considered desirable. Malaya, later Malaysia, sought to walk the middle path. The state should not be indifferent to, or hostile towards, religions. It must promote a tolerance that comes not from the absence of faith but from its living presence.

Over the years many issues have aroused race and religious sensitivities. One of them is attempted Muslim apostasy in which the courts tend to side with the authoritarian populism sweeping the country.<sup>4</sup> Another painful issue is the conversion of infants to Islam when one party to the marriage converts to Islam. In a spate of family law disputes between couples, one of whom converted to Islam, the courts seem to be motivated by religious allegiance rather than the constitution. In one case, a Hindu lady’s husband had converted to Islam, absconded with the kids, and with the help of the Shariah establishment had converted the kids to his new religion. A high court decision in the mother’s favour was not enforced by the police on the ground that there was a contradictory Shariah court order. Only in 2019, did the Federal Court set things right by

declaring that in the matter of a minor's conversion, both parents have a say and neither parent can unilaterally convert the child's religion.<sup>5</sup> The police have, however, not yet been able to enforce the Federal Court order.

The severe competition between Christian evangelists and Muslim missionaries is also raising the social barometer in the country. It is alleged by some Muslim groups that the constitutional ban on preaching of other religions to Muslims in Article 11(4) is often surreptitiously flouted. In 2021, the Majlis Agama Islam Selangor (MAIS) came out with a controversial 129-page publication called *Pendedahan Agenda Kristian* to "expose the Christian agenda". Muslim public opinion is opposed to the Christian demand for use of the word "Allah" in Christian sermons in the peninsula and sees it as an unnecessary innovation given the Article 11(4) ban on proselytisation.<sup>6</sup> Suspicions often get aroused even by well-intentioned social and charitable work by Christian missionaries among Muslims. Even non-Muslim elected representatives who reach out to their Muslim constituents with aid are often criticised as attempting to proselytise.

In the past decade, there have been isolated incidents of church bombings, arson at mosques, throwing of pig parts near *surau* and proposals to remove all crosses, statues and Christian images from missionary schools. The bigots in all communities are relying on fears to fan hatred. Fortunately, the citizens have remained calm and have not taken the bait offered by the extremists.

Since 1969, racism and religious bigotry have become mainstream. Moderates are maligned as traitors to their race or religion. Most of them prefer to remain quiet and live in the shadows. Whether it is an enlightened former mufti or a minister who transcends race and religion, his loyalty to his race, religion and country is questioned. Same is the case when someone seeks to build bridges rather than barricades towards other races and religions. However, those who spew hatred, denigrate other races and religions seem to enjoy wide latitude

because populist rhetoric is a tool employed by the ruling elite to perpetuate their rule.<sup>7</sup>

There are also difficult and unresolved issues in conflicts between Shariah and civil courts. All in all, ethnic and religious relations are clearly under strain.

---

#### Endnotes

- <sup>1</sup> Autochthony refers to the state of being home-grown, rooted in native soil, indigenous and native rather than imposed from abroad.
- <sup>2</sup> It is noteworthy that the Malayan/Malaysian constitution has no stirring preamble in the name of its people.
- <sup>3</sup> Munro-Kua, Anne. 2017. *Autocrats vs The People: Authoritarian Populism in Malaysia*. Revised and updated edition. Selangor: SUARAM.
- <sup>4</sup> *Lina Joy v Majlis Agama Islam Wilayah Persekutuan* (2007).
- <sup>5</sup> *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak* (2018).
- <sup>6</sup> Court decisions have gone both ways. See *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri* (2014). But a different attitude was adopted in *Jill Ireland v Menteri Dalam Negeri* (2021).
- <sup>7</sup> Munro-Kua, *Autocrats vs The People*.



CHAPTER  
VIII

## The Islamic State Debate: Malaysia's Middle Path

---

**T**he constitution of Malaysia in Article 3(1) provides that Islam is the religion of the federation but all other religions may be practised in peace and harmony. The word “Islam” is mentioned at least 36 times in the Federal Constitution. The words “mufti”, “kadi besar” and “kadi” at least once each.

In the Federal Constitution's Schedule 9, List II, Paragraph 1, state legislatures are permitted to legislate for the application of Islamic laws to persons professing the religion of Islam in a variety of areas, including personal and family law, succession, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions, trusts, *zakat*, *fitrah*, *baitulmal*, similar Islamic religious revenue and mosques.

The state legislatures are also authorised to create and punish offences by Muslims against the precepts of Islam, except in relation to matters within the jurisdiction of the federal parliament. Shariah courts may be established by state law and it is declared that they shall have jurisdiction only over persons professing the religion of Islam. In the exercise of powers within their jurisdiction, Shariah courts are independent of the civil courts: Article 121(1A).

What are the legal, political, moral, social and economic implications of Article 3(1), Article 121(1A) and List II of Schedule 9? During the last three decades, an engaging debate has been raging about whether Malaysia is an Islamic or secular state. The non-Muslims of the country are adamant in their assertion that Malaysia's constitution is, and was from the beginning, meant to provide a secular foundation. The opposition Muslim party, Parti Islam SeMalaysia (PAS) agrees with them that the constitution is secular. But it says this in an accusatory tone and has made it clear that once in power, it will amend the basic law to convert Malaysia into an Islamic state.

The Muslim party, United Malay National Organisation (UMNO), during the prime ministership of Tun Dr Mahathir Mohamad dismissed the proposal by PAS on the grounds that Malaysia is already an Islamic state and, therefore, no constitutional amendments are needed. It rested its case on the fact that Muslims constitute the majority of the population. The constitutional monarchs at the federal and state levels are Muslims. The political executive, the civil service, the police, the army, the judiciary and the legislatures, while multiracial, are under the control of Muslims. The federal and state constitutions are replete with Islamic features. Islamic practices are gaining ground. Islamic economic and religious institutions thrive with state support.

The Islamic state discussion is riddled with the error that a state must be either theocratic or secular. In fact, many hybrid versions exist and ideological purity

– even if desirable – is not easily possible. Whether the Malaysian polity is “Islamic” or not depends also on whether one views things in a purely *de jure* (legal) way or whether one brushes into the legal canvas the *de facto* realities. It is submitted that the differences of opinion over whether Malaysia is an Islamic or secular state are attributable partly to semantics – the assignment of different meanings to the same word by participants in a discourse. Opinions are clashing because there is no litmus test or universally agreed list of criteria to typify a social or legal system as theocratic or temporal. The problem is compounded by the fact that there is no ideal or prototype secular or Islamic state that one could hold up as a shining model or paradigm of one or the other. As in other religious, political and economic systems, diversity and differences are part of Islamic ideology and of the practice of 57 or so Muslim-majority countries. The Shias and the Sunnis (and within the Sunnis the Hanafi, Shafei, Maliki and Hambali schools), are not always in agreement over details. As in every other system that depends on human endeavour for realisation, there is a massive gap between theory and reality and promise and performance. A theoretical discussion



**THERE IS NO IDEAL or prototype secular or Islamic state that one could hold up as a shining model or paradigm of one or the other. As in other religious, political and economic systems, diversity and differences are part of Islamic ideology and of the practice of 57 or so Muslim-majority countries.**

of the fundamentals of secularism and theocracy may help to understand the constitutional position in Malaysia.<sup>1</sup>

### **SECULAR STATE**

A secular constitution separates the state from the church and law from religion. The functions of the state are confined to mundane matters and religion is left entirely to religious establishments. There is no legally prescribed official or state religion and no state aid is given to any religion or for any religious purposes. Freedom of religion is, however, generally guaranteed and private religious activities by individuals, groups and associations are not interfered with except on grounds of public order, national security, public health or public morality. Well-known examples of secular states are India, the United States, Singapore and Turkey.

### **THEOCRACY**

In contrast with secular states, in theocracies religion is interwoven into the fabric of government. “Theocracy” literally means rule by god. In political science, the term has come to mean either one of two things. First, the temporal ruler is subjected to the final direction of the theological head because the spiritual power is deemed to be higher than the temporal and the temporal is to be judged by the spiritual. Iran has such a constitutional rule. Second, the law of god is the supreme law of the land. The divine law is expounded and administered by pious men as god’s agents on earth. Saudi Arabia and the Vatican are theocracies of this kind.

## FEDERAL CONSTITUTION'S SECULAR HISTORY

Malaysia's document of destiny does not contain a preamble. The word "secular" does not appear anywhere in the constitution. However, there is historical evidence in the Reid Commission papers that the country was meant to be secular and the intention in making Islam the official religion of the federation was primarily for ceremonial purposes. In the white paper dealing with the 1957 constitutional proposals, it is stated: "There has been included in the proposed Federal Constitution a declaration that Islam is the religion of the federation. This will in no way affect the present position of the federation as a secular state ...."

This view of a secular history is strongly challenged by those who argue that before the coming of the British, Islamic law was the law of the land. With all due respect, such a picture oversimplifies an immensely complex situation. A look at the legal system prior to Merdeka indicates the presence of a myriad of competing and conflicting streams of legal pluralism.



**FREEDOM OF RELIGION**  
is, however, generally  
guaranteed and  
private religious  
activities by  
individuals, groups  
and associations are  
not interfered with  
except on grounds of  
public order, national  
security, public health  
or public morality.

The Neolithic people who lived in the alluvial flood plains of Malaya between 2500 BC and 1500 BC possessed their own animistic traditions. Likewise, the Mesolithic culture (encompassing the Senois of central Malaya, the Bataks of Sumatra and the Dayaks of Borneo), the Proto-Malays and the Deutero-Malays had their own tribal customs.

The Malacca sultanate extended to Sumatra in the 15th century.  
Source: Wikipedia

Hinduism from India and Buddhism from India and China held sway in Southeast Asia between the 1st and the 13th centuries

and left an indelible imprint on Malay political and social institutions, court hierarchy, prerogatives and ceremonials, marriage customary rites and Malay criminal law. The incorporation of the patriarchal and monarchical aspects of law are said to have been influenced by Hindu culture. Some of these influences linger until today.



In Peninsular Malaysia, Chinese traders brought with them their own way of life and the close relationship between Malacca and China

during the days of the Malacca Sultanate opened the door to Chinese influence on Malay life.

Before 1963, Sabah and Sarawak were guided by their native customs and by British laws. The influence of Islam was marginal.

Islam came to Malacca only in the 14th century from various regions in Arabia, India and China. But it gained a legal footing in Malaya only in the 15th century. Since then, the legal system of the Malays shows a fascinating action and reaction between Hindu law, Muslim law and Malay indigenous traditions. In some Malay states like Malacca, Pahang, Johor and Terengganu, vigorous attempts were made to modify Malay customs and to make them conform to Islamic law. But these attempts were thwarted by the British who relegated Islamic law primarily to personal matters. R. J. Wilkinson said that “there can be no doubt that Muslim law would have ended by becoming the law of Malaya had not British law stepped in to check it”.<sup>2</sup> There is very little doubt that at the time of Merdeka the “Islamic law” that existed in Malaya was “an Islamic law which (had) absorbed portions of the Malay *adat* (custom) and, therefore, not (the) pure Islamic law”.<sup>3</sup>

## CASE LAW

It was held in *Che Omar Che Soh v PP* (1988) that though Islam is the religion of the federation, it is not the basic law of the land and Article 3 (on Islam) imposes no limits on the power of parliament to legislate. Islamic law is not and never was the general law of the land either at the federal or state level. It applies only to Muslims and only in areas outlined in Item 1 of List II of the 9th Schedule. In the law of evidence, for example, the Evidence Act applies to the exclusion of Islamic law: *Ainan v Syed Abubakar* (1939). Under Schedule 9, List II the Shariah courts have limited jurisdiction only over persons professing the religion of Islam. It must be noted, however, that the high court in *Meor Atiqulrahman Ishak v Fatimah bte*

*Sih* (2000) did not follow the *Che Omar Che Soh* decision. It held that Islam is *ad-deen* – a way of life. Regulations violating Article 3 can be invalidated. However, the high court was overruled by the Court of Appeal and the Federal Court on this point.

## **ADAT (CUSTOM)**

One must also note the very significant influence of Malay *adat* on Malay-Muslim personal laws. In some states like Negri Sembilan, *adat* displaces religion in some areas of family law.

## **CONSTITUTIONAL SUPREMACY**

Under Article 4(1) of the Federal Constitution, the constitution and not the Shariah is the supreme law of the federation. Any law passed after Merdeka Day which is inconsistent with the constitution shall, to the extent of the inconsistency, be void. Despite the process of Islamisation since the early '80s, no constitutional change has been made to weaken Article 4(1) or to put the Shariah on a higher pedestal than the law of the constitution. Under Article 162(6) and (7) any pre-Merdeka law which is inconsistent with the constitution, may be amended, adapted or repealed by the courts to make it fall in line with the constitution.

Article 160(2) of the constitution, which defines “law”, does not mention the Shariah as part of the definition of law. The term “law” includes written law, common law and custom or usage having the force of law.

Though Islam is adopted as the religion of the federation, it is clearly stated in Article 3(4) that nothing in this article derogates from any other provision of the constitution. This means that no right or prohibition, no law or institution is extinguished or abolished as a result of Article 3’s adoption of Islam as the religion of the federation.

This is what was held in *Che Omar Che Soh*. A controversial parliamentary law on drug trafficking which provided for mandatory death sentences and a presumption of guilt cannot be invalidated on the sole ground that it is un-Islamic.

### **HIGHER STATUS OF SECULAR AUTHORITIES**

If by a theocratic state is meant a state in which the temporal ruler is subjected to the final direction of the theological head and in which the law of God is the supreme law of the land, then clearly Malaysia is nowhere near a theocratic, Islamic state. Shariah authorities are appointed by state governments and can be dismissed by them. Temporal authorities are higher than religious authorities. Except for those areas in which the Shariah is allowed to operate, the law of the land is enacted, expounded and administered by secular officials.

### **SENIOR FEDERAL POSTS**

The Yang di-Pertuan Agong must, of course, be a Muslim. But Islam is not a prerequisite for citizenship or for occupying



**ISLAM IS NOT A prerequisite for citizenship or for occupying the post of the prime minister. Members of the cabinet, legislature, judiciary, public services (including the police and the armed forces) and the commissions under the constitution are not required to be of the Muslim faith.**

the post of the prime minister. Members of the cabinet, legislature, judiciary, public services (including the police and the armed forces) and the commissions under the constitution are not required to be of the Muslim faith. In the 6th Schedule, the oath of office for ministers, parliamentary secretaries, speaker of the Dewan Rakyat, members of the Dewan Rakyat and senators, judges and members of constitutional commissions is quite non-religious in its wording and does not require allegiance to a divine being or to Islam.

### **ISLAMIC FEATURES IN THE CONSTITUTION**

The constitution of Malaysia in Article 3(1) provides that Islam is the religion of the federation but all other religions may be practised in peace and harmony. There are many significant implications of the declaration of faith in Article 3(1).

### **SECULARISM REJECTED**

The implication of adopting Islam as the religion of the federation is that Malaysia is not a full-fledged secular state. Government support for the religion of Islam is permitted. The government is not required to maintain neutrality between religions.

### **EDUCATION**

Islamic education and way of life can be promoted by the state for the uplifting of Muslims. Article 12(2) provides that it shall be lawful for the federation or a state to establish or maintain Islamic institutions, provide instruction in the religion of Islam to Muslims and incur expenditure for the above purposes.

## **RELIGIOUS INSTITUTIONS**

Taxpayers' money can be utilised to promote Islamic institutions and to build mosques and other Islamic places of worship and to keep them under the control of state authorities.

## **SHARIAH COURTS AND ARTICLE 121(1A)**

The constitution permits Islamic courts to be established and Shariah officials to be hired. The jurisdiction of the Shariah courts is protected by Article 121(1A) against interference by ordinary courts.

## **PREACHING TO MUSLIMS REGULATED**

Propagation of one's religion to others is part of the constitutional right to freedom of religion under Article 11. However, this right is subject to one important limitation. Missionary activity among Muslims may be regulated. Under Article 11(4), state law and (for federal territories) federal law may control or restrict the propagation of any religious doctrine among Muslims. This article is directed not only at non-Muslim attempts to convert Muslims but also at propagation to Muslims by unauthorised Muslims. The application of such laws, however, poses a serious constitutional dilemma. Shariah courts cannot have jurisdiction over non-Muslims and it appears that a federal criminal court will have to try a non-Muslim whose proselytising zeal violates a state law that was enacted to shield Muslims against missionary activities.

## **ISLAMIC MORALITY**

State enactments can seek vigorously to enforce Islamic morality among Muslims. For example, beauty and body building contests are forbidden to Muslims in many states. In areas permitted by the Federal Constitution's 9th Schedule, List II, Paragraph 1, Islamic civil and criminal laws are applied to all Muslims.

## **ISLAMIC OFFENCES**

Paragraph 1 of List II of the 9th Schedule permits state legislation to create and punish offences by persons professing the religion of Islam against the precepts of that religion. However, the power of the state to enforce Islamic criminal law is severely circumscribed by Lists I and II of the 9th Schedule. The power of state assemblies in Schedule 9, List II, Item 1 to create and punish offences against the precepts of Islam is a residual power and not an unlimited or sovereign power. It is subject to a number of constitutional limitations.<sup>4</sup>

## **STATE CONSTITUTIONS**

All state constitutions in the Malay states prescribe that the ruler of the state must be a person of the Islamic faith. All state constitutions other than in Malacca, Penang, Sabah and Sarawak require that the chief minister (menteri besar) and state officials like the state secretary shall profess Islam. Except for Sarawak, Islam is the official religion in all states.

## CONCEPT OF A 'MALAY'

The concept of a “Malay” in Article 160(2) is inextricably tied up with observance of the religion of Islam.

## ISLAMIC INSTITUTIONS

Government-supported Islamic institutions abound. There is a National Council for Islamic Affairs, State Councils of Muslim Religion, Fatwa Committees, the Islamic Research Centre, Department of Religious Affairs, International Islamic University Malaysia (UIAM), Tabung Haji and Institute of Islamic Understanding Malaysia (IKIM).

## ISLAMIC PRACTICES

Quran competitions are held; the *azan* (call for prayers) and Islamic programmes are aired over radio and television. TV1 and TV2 devote at least 15 hours a week to Islamic programmes. Islamic salutations and prayers are offered at most government functions; Islamic form of dressing is becoming increasingly mainstream. In many government departments, Quranic verses are recited over the public address system at the beginning of the day.

## ISLAMIC ECONOMY

In the financial field, Islamic monetary institutions are being vigorously promoted. Among them are Bank Islam, *takaful* (Islamic insurance), Tabung Haji (Pilgrims

Management and Fund Board), Amanah Ikhtiar Malaysia, *qard hasan* (interest-free loans), *jual janji*, *wakaf*, *baitulmal*, *zakat* and *fitrah*.

On the issue of an Islamic versus a secular state, it can be stated categorically that on the existing law, the Malaysian legal system is neither fully secular nor fully theocratic. It is hybrid. It permits legal pluralism. It avoids the extremes of American-style secularism or Saudi, Iranian and Taliban type of religious control over all aspects of life. It mirrors the rich diversity and pluralism of its population. It prefers pragmatism over ideological purity; moderation over extremism. It walks the middle path. It promotes piety but does not insist on ideological purity. Muslims are governed by divinely ordained laws in a number of chosen fields. In other fields, their life is regulated by Malay *adat* and by non-ecclesiastical provisions enacted by democratically elected legislatures. Non-Muslims, in turn, are entirely regulated by secular laws.

---

#### Endnotes

- <sup>1</sup> Shad Saleem Faruqi. 2008. *Document of Destiny: The Constitution of the Federation of Malaysia*. Selangor: Star Publications, pp. 120-137.
- <sup>2</sup> Wilkinson, R. J. 1971. *Papers on Malay Subjects*. Kuala Lumpur: Oxford University Press.
- <sup>3</sup> Ahmad Ibrahim and Ahilemah Joned. 1987. *The Malaysian Legal System*. Selangor: Dewan Bahasa dan Pustaka, p. 54.
- <sup>4</sup> See the recent case of *Iki Putra v State of Selangor* in which a state law was held to trespass on the powers of the federal parliament to enact laws on criminal offences.

CHAPTER  
IX

## Sabah and Sarawak's Discontents

---

**F**ifty-eight years down the road, not all is well with the (former) Borneo states' relationship with the centre. In many areas, Sabah and Sarawak's autonomy has suffered retreat due to constitutional and political developments. A case in which Sabah's grievances were unsuccessfully sought to be articulated is *Fung Fon Chen @Bernard v The Government of Malaysia and Anor* (2012). The main grievances are as follows:

### FINANCES

There is discontent about inequitable sharing of resources and lack of fiscal federalism. There are allegations that these states do not derive the kind of financial benefit they deserve as a result of their contribution to the national coffers from petroleum, hydroelectricity and tourism. It is alleged that federal allocations to

the Borneo states do not take into account the huge direct and indirect federal earnings from these states.

Another major and extremely intricate complaint is that Sabah has not received the mandatory financial allocations that are due to it under the 1963 provisions. It is alleged that the Malaysia Agreement 1963 of 9 July 1963 and the 10th Schedule (Part IV Para 2(1)) had promised to Sabah 40% of the net revenue derived by the federation from the state.

There is unhappiness about the meagre 5% oil royalties. The federal government's answer is that under the constitution, all oil and oilfields are in federal hands (Schedule 9, List I, Para 8(j)). Sabah and Sarawak are entitled only to import duty and excise duty on petroleum products (10th Schedule, Part V, Para 1). The 5% oil royalty for Sabah and Sarawak is not derived from the constitution but from the freely negotiated Petroleum Development Act, the Petroleum Mining Act and the Assignment Deed between the states and Petronas.

### **AMENDMENTS TO FEDERAL CONSTITUTION**

A constitutional amendment that has symbolically diluted the special position of Sabah and Sarawak is Amendment Act A354 (1976) to amend Article 1(2). Previously, the article stated that the states of the federation shall be (a) the 11 states of Malaya ... (b) the two Borneo states ... and (c) Singapore. Sabah and Sarawak were mentioned separately to underline their special status. Now, Sabah and Sarawak are included in Article 1(2) as two of the 13 states. This is a status downgrade. It is worthy of exploration whether Amendment Act A354 (1976) to amend Article 1(2) was submitted to the governors of Sabah and Sarawak for their consent under Article 161E.

Despite a special procedural safeguard for Sabah and Sarawak, it is lamented that the state governors are federal appointees and side with the federal government against the states despite a constitutional obligation to follow the advice of the chief ministers. Due to this reason, “federalisation” of critical state matters, such as water (Act 26/1963) and tourism (Act A885), has taken place. Despite Article 2(b), which requires the consent of the state legislature and of the Conference of Rulers to the alteration of the boundaries of a state, the federalisation of Labuan was easily accomplished by the federal government in 1984.

Article 121(1) was amended in 1988 to emasculate the powers of the courts, including the High Court of Borneo. The power of the governors to appoint judicial commissioners was transferred to the Yang di-Pertuan Agong in 1994: *Robert Linggi v Government of Malaysia* (2011).

### **BORNEONISATION**

Borneonisation of the administrative services is producing too slowly. Despite the protection of Article 153 for the special



**ANOTHER MAJOR  
and extremely  
intricate complaint  
is that Sabah has  
not received the  
mandatory financial  
allocations that are  
due to it under the  
1963 provisions.**

position of the natives, there are complaints about poor implementation of laws, policies and promises. It is alleged that the protection of the special position of the natives under Article 153 is not vigorously enforced in contrast with strong affirmative action for Peninsular Malays throughout the nation.

### **ILLEGAL IMMIGRANTS**

The naturalisation of thousands of illegal immigrants (in violation of Article 19 requirements for naturalisation) has destroyed state autonomy in the matter of immigration. It is alleged that the constitutional right of the Borneo states to control immigration has been defeated by naturalisation of millions of illegal immigrants into Sabah.

### **ISLAMISATION**

The native, “non-Islamic” character of Sabah and Sarawak has been diluted over the years and Islamisation has been a key policy of the federal government since the '80s. This arouses some discontent within the largely non-Muslim natives of Sabah and Sarawak. There are complaints that the federal government is trying to Islamicise Sabah and Sarawak. Repeal of Articles 161C and 161D is clear proof of the point. The moves towards an Islamic state, the plan to introduce *hudud* laws, the attempt to export the peninsula’s hard-line Islamic trend arouse discomfort in Sabah and Sarawak.

Laws have been enacted to provide that in the case of Muslims, native law will not apply and the Shariah courts shall have jurisdiction. This has led to conflicts between Shariah and native courts. In the past, authorities in West Malaysia imposed hurdles

in the path of import into Sabah and Sarawak of Bibles in Bahasa Melayu. The Kalimah Allah controversy raised in the case of *Titular Roman Catholic Archbishop of KL v Menteri Dalam Negeri* (2014) has aroused the anger of Christians in the Borneo states.

### **FEDERAL CONTROL OVER POLITICS**

Despite the autonomy of states in prescribed areas, the federal government controls political and administrative processes in Sabah and Sarawak. The federal government manipulated the political processes to remove popularly elected chief ministers in Sarawak in 1966 and in Sabah in 1994. In order to topple Stephen Kalong Ningkan, the federal government went to the extent of resorting to a declaration of emergency in 1966.

### **GOVERNORS**

The federally appointed governors do not always protect the special interests of these regions.

### **REPRESENTATION IN DEWAN RAKYAT**

Though Sabah and Sarawak are handsomely represented in the Dewan Rakyat, their proportion of members of parliament is lesser than the 33% envisaged for Sabah, Sarawak and Singapore in 1963 in order to give these states protection against amendments requiring a two-thirds majority.

## **FEDERAL APPOINTMENTS**

In August 2017, there was unhappiness that when a vacancy arose in the post of the chief justice (CJ) of the Federal Court, the senior most judge of the Federal Court, Tan Sri Richard Malanjum, chief judge of Sabah and Sarawak,<sup>1</sup> was bypassed and the post was offered to Tan Sri (later Tun) Md Raus Sharif. Richard had been a Federal Court judge since 26 July 2006. In contrast, Raus had been a judge of the Federal Court (and president of the Court of Appeal) only since 12 September 2011. Raus was later elevated to the post of chief justice from which post he retired on 3 August 2017. To enable him to continue as CJ after the mandatory retirement age, he was appointed an additional judge under Article 122(1A) and, in an unprecedented (and it is submitted unconstitutional) move, reappointed as CJ under Article 122B.

## **DEFINITION OF A 'NATIVE'**

There was a political attempt some years ago to introduce the concept of “peribumi” to unite all natives under one concept and to extinguish individual nationalities.

The definition of “native” has aroused problems. For Sarawak, Article 161A(7) requires that a native must (i) belong to one of the named 28 races or (ii) be of mixed blood derived exclusively from these races. Many Sarawakians are descended from one native but the other parent does not belong to one of the 28 named races. For Sabah, Article 161A(6) defines a native in a gender biased way by emphasising male descent and ignoring the ethnicity of the mother.

## SABAH'S 20 POINTS

It is alleged that some of these fundamental points of agreement have not been honoured. Specifically, the autonomy in matters of religion, language and immigration have weakened. It must be noted, however, that on the issues of federalisation of Labuan, the incorporation of a state religion and the adoption of Bahasa Melayu over English, it is the Sabah assembly and not the federal government that amended the Sabah constitution.

## NATION'S AGE

There is yearly controversy about the nation's age. Should it be calculated from 31 August 1957 or 16 September 1963? East Malaysians note with displeasure that Malaysia Day was ignored by the federal government for 47 years till the then prime minister Najib Razak declared it to be a national holiday in October 2010. Sabah nationalist, Datuk Stan Yee, writing in the *Daily Express* of 2 September 2017 asserted that on 16 September 1963 "the federation of Malaya ceased to exist". A new nation was born.



THERE IS YEARLY controversy about the nation's age. Should it be calculated from 31 August 1957 or 16 September 1963? East Malaysians note with displeasure that Malaysia Day was ignored by the federal government for 47 years...

It must be noted, however, that the “new nation” retained more than 100 articles of the old constitution (but added or amended 80 others). Provisions about the Yang di-Pertuan Agong, the state rulers, the Conference of Rulers and Islam as state religion were retained. The prime minister of Malaya was retained as the leader of Malaysia. Malaya retained its seat in the United Nations but with a new name. The national anthem of the federation of Malaya was retained. A nation, like a person, is not defined by a mere name but also by its essential characteristics.

While it is true that Sabah, Sarawak and Singapore were not conquered, incorporated, absorbed or annexed and were admitted as equal contracting parties on very special terms, it is an exaggeration to say that Malaya’s Merdeka on 31 August 1957 ceases to have legal, political or historical relevance. As a comparison, the United States, constituted by the original 13 states of the union and their common constitution of 17 September 1787 is still referred to by its original date even though 37 out of 50 states came on board at different dates between 1787 and 1959.

## **SECESSION**

In the light of the above, a movement has sprung up asking for Sabah to secede from the federation. Legally speaking, our constitution contains no provision for the secession of any state from the federation. The disintegration of the federal union is not contemplated by the constitution. Any attempt at separation or incitement to secede will amount to treason and sedition under our criminal laws. Even the 20-point agreement with Sabah explicitly states in Para 7 that there is no right to secession. But what about Singapore? Contrary to what is believed by some, Singapore did not unilaterally secede from Malaysia. Its “separation” was accomplished by several mutual acts between the Malaysian federal government and the state government of Singapore. Among these were the Independence

of Singapore Agreement 1965 and the Constitution and Malaysia (Singapore Amendment) Act 1965. The latter made significant modifications to the 1957 Federal Constitution and the 1965 Malaysia Act and explicitly stated, “parliament may by this act allow Singapore to leave Malaysia”.

What about international law? One has to concede that the law of nations recognises the right of a people to self-determination. This law was born in an era of de-colonisation and embraces the notion that people who have a common historical, ethnic, cultural, linguistic, religious, ideological, territorial or economic identity have a right to determine the political and legal status of their territory. They may set up a new state or choose to become part of another state. In recent memory, Catalonia (2017), Crimea (2014), Timor Leste (1995) and Bangladesh (1971) travelled down the painful or blood-soaked path of national liberation. The principle of self-determination is recognised in Articles 1(2), 55, 73 and 76(b) of the United Nations Charter and in many other international documents. However, international law scholar Abdul Ghafur Hamid asserts that the legal right of self-determination applies primarily to colonised, trust and mandated



**THE DISINTEGRATION  
of the federal union is  
not contemplated by  
the constitution. Any  
attempt at separation  
or incitement to  
secede will amount to  
treason and sedition  
under our criminal laws.**

territories: “The effect of linking self-determination to decolonisation seems to deny a general right to secession of groups within a state”.

I believe that despite some ambiguity in international law, the various regions (states, cantons, provinces) of a federation do not have a legal right to walk away from the union. A unilateral act of separation is permissible in confederations like the European Union or Asean but not in a federation united by a written, supreme constitution which describes the territories of the federation.

Leaders of Sabah and Sarawak must, therefore, disassociate themselves from all separatist movements. Instead, they must negotiate with the federal government about their discontents.

Some in the peninsula feel that 58 years after Malaysia Day, the special rights and privileges must give way to more unity and uniformity on such issues as right to travel, live and work throughout the federation. Many people of Sabah and Sarawak, on the other hand, lament that they have been short-changed and that there is a distinct whittling down of the privileges promised to them in 1963.

---

#### Endnote

- <sup>1</sup> Tan Sri Richard Malanjum was, nevertheless, elevated to the post of chief justice by the Pakatan Harapan government in 2018. However, he was not conferred the coveted Tunship as is the case with all other chief justices.

## **Towards a Shared Destiny**

---

**W**hat can be done to strengthen our social fabric, strengthen our ethnic bridges, dismantle ethnic walls, heal and reconcile and develop a vision of unity? As we approach 64 years of political freedom, we need to restore moderation, recapture the spirit of 1957 and reintroduce our winning formula for living together. The task is very large and holistic. It is not the sole responsibility of the government. We all have a role to play.

### **RECOGNISE DIVERSITY AS AN ASSET**

All members of the political executive and the public services and all members of society need to come to terms with our diversity, heterogeneity, pluralism and multiculturalism. This diversity is here to stay. We should regard it as an asset despite its many challenges. Learning to live together in peace, harmony and mutual respect is the mark of a developed civilisation.

## OUR CULTURES ARE INTERMINGLED AND INTERDEPENDENT

For centuries, Malay, Chinese Indian, Orang Asli, Indonesian, Thai, Kadazan-Dusun, Iban and European cultures have mixed in our soil to constitute our rich cultural mosaic. Social scientist Patrick Pillai said: “There is far more cross-cultural mingling, sharing and co-dependence among us than we care to recognise, admit or celebrate”. Malaysia “is a society where three major cultures live together and more importantly, have probably contributed more than they think to each other’s cultural development”. Social science research can do much to highlight this reality.

Indonesia and India were to Malaya what Greece and Rome were to Europe. Hindu influences on Malay royal traditions, marriage customs, literature, language, drama and music are well illustrated.

Traditional Malay music and performing arts appear to have originated in the Kelantan-Pattani region with influences from India, China, Thailand and Indonesia. Johor art performances, such as Zapin and Hamdolok, as well as musical instruments, including gambus and samrah have apparent Arab and Persian influences. Dondang Sayang mixes influence from China, India, Arabia and Portugal.

The Malay language has been enriched with words from Sanskrit, Persian, Tamil, Greek, Latin, Portuguese, Dutch, certain Chinese dialects, Arabic, Javanese, Sundanese and English. It may surprise some Malays to know that many of the words closest to their religious and cultural heart have Sanskrit, Tamil or Hindi origin. Among them are: agama, asmara, bidadari, budi, manusia, neraka, nobat, pahala, puasa, sabda, syurga, suci, anugerah, bakti, dirgahayu, istana, kota, maha, putera, raja, wangsa, bahasa, bangsa, bumi, guru, harta, kedai, merdeka, nama, negara, perpustakaan, perdana menteri, pertiwi, wanita and warta. All this indicates an intermingling of many cultural streams – an intermingling that can be used to improve our frayed ethnic relations. We can begin to see “the other” as our distant cousin.

## **MANY OF US ARE IN DENIAL ABOUT OUR MIXED HERITAGE**

Many of us are the product of mixed marriages. We share heterogeneity, multiple identities, mixed ancestry and imbibe many cultural values from many shores. We grew up in hybrid cultures which in Patrick Pillai's words "seeped through porous ethnic borders". This is certainly true of the Penang Muslims, Malacca Chitties/ Peranakan Indians, Portuguese Eurasians, Terengganu Peranakan Chinese and Selangor Baweanese who are the subject of Pillai's learned sociological study of migrant communities.

Due to the administrative classification of West Malaysians into artificial, socially constructed "races" by the name of "Malay", "Chinese" and "Indian", the dazzling diversity within these groups remains largely unexplored. In fact, the country has more than 100 ethnic and sub-ethnic groups. Within the Malays, Indians and Chinese, we have many sub-groups. For example, the Malays of Kelantan and Terengganu are culturally linked to people from the South China Sea area and are quite different from the Malays of the west coast. The Orang Asli have three major groups and 18 sub-groups. These differences are swept under the carpet.

Sabah and Sarawak, likewise, have dazzling diversity.

## **ALL HUMAN BEINGS HAVE MULTIPLE IDENTITIES**

All human beings stand at the centre of a large number of concentric circles – each circle representing an object of his loyalty or commitment. Dr Denison Jayasooria argues that "We should not see ourselves and (other) people only from the lens of ethnicity; other identities are equally important dimensions of life and existence. Therefore, we need to make a shift from defining ourselves from a singular identity of race to encompassing other dimensions such as class, religion, culture, professions,

employment, neighbourhoods and even hobbies. These enable us to have a sense of belonging with others which creates new groupings of communities and moving beyond being identified by race indicator”.

### **IMPROVE CONSTITUTIONAL LITERACY**

We need to improve knowledge of the constitution’s glittering generalities, especially its provisions on interethnic relations. If we read about the making of the constitution, we will see that by far and large the forefathers of our constitution were animated by a remarkable vision and optimism of a shared destiny among the various peoples of the peninsula. “Out of many, one” was perhaps their creed. Their life was enlightened by a spirit of accommodation, compassion and tolerance. They abjured ideological purity of the political, economic and religious type. They walked the middle path of moderation. They gave to every community a stake in the nation. No group received an absolute monopoly of power or wealth. Every community received something to relish and cherish. Pluralism was accepted as a way of life and the unity that was sought was a unity in diversity.

The constitution, even in its “ethnic provisions” sought to avoid extreme measures and provided for a balance between the interests of the “Bumiputera” and “non-Bumiputera” communities. I believe that the lack of familiarity with the basic charter’s provisions even within the top echelons of the civil service, the police, parliamentarians and politicians is contributing to the present state of unease. This can be remedied. We can restore the spirit of 1957 and 1963. If we have to go forward as a united nation, we need to go back to the spirit of moderation, accommodation and compassion that animated the body politic in 1957 and 1963.

Our secondary schools and universities must have a familiarisation course on the basic features of the constitution and the reasons for the many delicate

compromises contained therein. Knowledge of the constitution is a prerequisite to good citizenship. Such knowledge will also help to moderate extremism and to give appreciation of one of the world's most unique and hitherto successful experiments in peaceful co-existence in a nation of dazzling diversity.

### **RECONCILING RACE AND RELIGIOUS CONFLICTS**

Conflicts are unavoidable in any vibrant society. What is necessary is to reconcile them with the least friction and to provide appropriate remedies when rights are infringed. It is time to consider a new legislative initiative. A national harmony act (or a race and religious relations act or a maintenance of religious harmony act) should be drafted after wide consultation. An equal opportunities commission was proposed by the National Economic Advisory Council in its report entitled New Economic Model for Malaysia (2010) but was not given consideration.

The National Unity Council should be upgraded to a statutory status (much like



**WE CAN RESTORE**  
the spirit of 1957 and  
1963. If we have to go  
forward as a united  
nation, we need  
to go back to the  
spirit of moderation,  
accommodation and  
compassion that  
animated the body  
politic in 1957 and 1963.

the Race Relations Board of the United Kingdom) or converted to a statutory community mediation council. There should also be a statutory interfaith council whose job should be to foster dialogue over all that unites us and to seek tolerance and compassion towards all that divides us. Race relations training should be part of the agenda. The community mediation council as well as the interfaith council could be incorporated into a new national harmony act. All in all, the new national harmony act should have a triple purpose.

First, to administer cautions and warnings whenever peace is poisoned by hate speech or actions. Second, to try to bring parties together through education and conciliation. To this end, a community mediation council could be set up. Singapore offers such an example. Third, to impose sanctions as a matter of last resort when conciliation fails. Sanctions, when imposed, need not be custodial. Community service, injunctions and damages may be better alternatives.

### **PROMOTE INTERFAITH STUDIES**

In schools, colleges and universities, interfaith studies should be encouraged as a step towards understanding, tolerance and unity. Most prejudices are born out of ignorance. With greater knowledge and understanding, we learn that it is not differences that cause disunity. It is intolerance of differences that leads to disunity and violence. We have to teach people that the primitive ethic of tribalism, racism or religious exclusiveness has no place in modern society. The circle of life has expanded. We are all brothers and sisters on this big blue marble.

Exposure to other religions and cultures will not weaken our faith. It may strengthen it. In our homes, classrooms and workplaces, we have to teach our wards and brethren that justice is the highest virtue. Justice is impossible unless we try to be objective. Objectivity is impossible unless we are prepared to be subjective from the other person's point of view. This entails that we must consciously try to view

the world through the other person's lenses, to step into the shoes of the other, to feel his or her pain. In sum we should, as the Bible said, do unto others as we wish to be done unto us. Or as Prophet Muhammad said: "No man is a true believer unless he desireth for his brother that which he desireth for himself".

## **RACIAL DISCRIMINATION**

Subject to the Article 153 quotas, racial discrimination must be prohibited in both public and private sectors. In both the public and private sectors, ethnicity reigns supreme. We are caught up in a vicious circle. The absence of a civil rights act or a race relations act prevents sanctions against ethnic discrimination that transgresses constitutional provisions. Both sides of the divide are to blame for ignoring the painstaking compromises and the gilt-edged provisions of the constitution. Lack of legal literacy about the constitution contributes to the eclipsing of the basic law. For example, Article 136 (on non-discrimination in the public services) is obviously ignored. Under the constitution's Article 153(5), Article 136's equality clause is not overridden by Article 153. On the other side of the divide, applicants to Chinese-dominated private sector enterprises are often asked at interviews: "How good is your Mandarin?" The prohibition of unconstitutional discrimination must be incorporated into the national harmony act.

## **DEPOLITICISE IMPLEMENTATION OF ARTICLE 153 PROGRAMMES**

The implementation of Article 153 policies by civil servants and politicians has not worked well. We need an impartial, professional body (like an affirmative action board) to handle this aspect of our social transformation. Article 153 does not mandate affirmative action in favour of the rich and the privileged. Article 153 is perfectly compatible with a needs-based affirmative action policy in favour of those who have, for whatever reason, been left behind.

## **AS FELLOW CITIZENS, WE MUST BUILD BRIDGES, NOT WALLS**

It is time for building ethnic bridges and dismantling walls; for healing and reconciliation; and for developing a vision of unity. We need to distinguish between racism (which is hatred for others) and race-consciousness which is a positive desire to help the upliftment of a community.

## **OUR EDUCATIONAL SYSTEM MUST BE REVAMPED**

An educational system must nurture tolerance, mutual respect and intercultural dialogue. It must bring the learners together, not separate them on grounds of race, religion or language. If young people do not learn together, how will they live together? The ethnic diversity of school teachers and school principals must be restored. We must use school sports as a uniting force.

## **DECLARATION ON RELIGIOUS AND RACIAL HARMONY**

Similar to the Rukun Negara let us put our heads together to draft such a declaration. It will act as a polestar for executive and judicial action and will exert normative influence on citizens.

## **CRIMINALISE HATE SPEECH**

Hate speech polarises communities and often leads to violence. Existing provisions in the Penal Code, Communications and Multimedia Act, Printing Presses and Publications Act, and Sedition Act need to be buttressed by a new law.

## **RACE- AND RELIGION-BASED POLITICAL PARTIES MUST OPEN UP TO OTHERS**

Dato' Onn Jaffar was a visionary who sacrificed his political career for this cause. In the '70s the idea of ADMO (Alliance Direct Membership Organisation) was revived but did not go anywhere. The idea of associate membership of race and religious parties has been put forward in some states. It is time to allow these ideas to germinate. In this day and age of humanism, race and religious polarisation, race and religious discrimination (other than affirmative action) are indeed rather odd.

## **WE NEED TO LEARN FROM OTHERS**

In many societies, including Singapore, the United Kingdom and the United States, the law is being used to socially engineer a more tolerant society. There is no shame in emulating others and building our garland with flowers from many gardens.

## **SABAH AND SARAWAK'S DISCONTENTS**

Leaders of the federal government must recognise that Sabah and Sarawak's restiveness is real and must be addressed. A thorough study of constitutional, legal and political instruments needs to be undertaken.

Balancing the concerns of equity and efficiency in intergovernmental financial relations is paramount. Petrol royalty issues have triggered separatist movements in many federations. There is a need to strengthen institutional mechanisms for regular, non-partisan dialogue between the federal government and Sabah and Sarawak so that the inevitable tensions that are inherent in a federal set-up can be resolved with the least friction. We need to recapture the spirit of accommodation, moderation and compassion that animated the leaders of the Malaysia Agreement

in 1963. The federal government and West Malaysians must rededicate themselves to the pacts of the past. People of the peninsula should open their eyes to the commendable example of interethnic and interreligious harmony in the Borneo states. Sabah and Sarawak, on their part, must recognise that growth and mutually agreed upon evolution are natural and necessary in any federal set-up. Federalism is a journey and not just a set of institutions and procedures.

### **WE NEED LEADERSHIP**

Jesse Jackson said that “Leaders of substance do not follow opinion polls. They mould opinion, not with guns or power or position but with the power of their souls”. In the United States, Abraham Lincoln freed the slaves despite hostile reaction from the South. Josip Tito kept Yugoslavia together. Gamal Nasser united the Arabs. Mahatma Gandhi and Jawaharlal Nehru in India rejected a Hindu theocratic set-up because of the presence of large minorities, including the Muslims. In Malaysia, Tunku Abdul Rahman painstakingly chiselled out compromises between diverse groups to give us a blueprint for living together in peace and harmony.

Political leaders, media personalities and community chiefs must condemn hate crimes and hate speech immediately, strongly, publicly and consistently. They must send out a message of tolerance and restraint. It is not enough to ignore the ignorant and the extremists.

### **ROLE OF THE MALAY RULERS**

The Malay sultans are the head of Islam and the protector of the Malays in their regions. At the same time, they are the sovereigns of all their subjects. Along with the Conference of Rulers, they can use their influence to moderate extremism,

promote interreligious and interracial tolerance and build bridges of understanding. Perhaps the Conference of Rulers should appoint a privy council of distinguished citizens to advise and counsel the conference to perform its constitutional function under Article 38(2) to “deliberate on questions of national policy ... and any other matter that it thinks fit”.



**Emeritus Professor Datuk Dr Shad Saleem Faruqi** was the fourth holder of the Tun Hussein Onn Chair of International Studies at ISIS Malaysia from 2019-2021. He is currently the holder of the Tunku Abdul Rahman Chair at the Faculty of Law, University of Malaya; fellow of the Academy of Sciences Malaysia; emeritus professor at Universiti Teknologi MARA, Shah Alam; and adjunct professor at Taylor's University. He was a member of the Judicial Appointments Commission (2018-2020); member of the post GE-14 government's Institutional Reform Committee; and member of the Malaysia Agreement 1963 (MA63) Committee (2018-2020). He has also served as a visiting professor at Universiti Sains Malaysia, Penang; associate professor at Universiti Islam Antarabangsa Malaysia; and adjunct professor at New England University, Australia.

He is the author of 10 books, including:

- *Document of Destiny: The Constitution of the Federation of Malaysia* (Star Publications, 2008);
- *Reflections on Life and the Law* (USM Press, 2017);
- (co-compiled with Sankaran Ramanathan) *Mass Media Laws and Regulations in Malaysia* (Asian Media Information and Communication Centre, 1998); and
- *Our Constitution* (Sweet & Maxwell Asia, 2019).

He has authored more than 600 articles in journals, periodicals and newspapers. He has done many national and international consultancies, including the drafting of the constitution of the Republic of Maldives in 1992.

# ABOUT ISIS MALAYSIA



**The Institute of Strategic and International Studies (ISIS) Malaysia** was established on 8 April 1983 as an autonomous research organisation. ISIS Malaysia has a diverse research focus, which includes foreign policy, security studies, economics, social policy, nation-building, technology, innovation and environmental studies. It also collaborates with national and international organisations to work on national development and international affairs.

ISIS Malaysia engages in Track Two diplomacy, and fosters regional integration and international cooperation through forums, such as:

- Asia-Pacific Roundtable (APR);
- ASEAN Institutes of Strategic and International Studies (ASEAN-ISIS);

- Pacific Economic Cooperation Council (PECC);
- Network of East Asian Think-Tanks (NEAT);
- Network of ASEAN-China Think-Tanks (NACT);
- ASEAN-India Network of Think-Tanks (AINTT); and
- Silk Road Think-Tank Network (SiLKS).

ISIS Malaysia is a founding member of the Council for Security Cooperation in the Asia Pacific (CSCAP) and manages its secretariat.

As the country's premier think-tank, ISIS Malaysia has contributed greatly to nation-building initiatives. It played an instrumental role in the Vision 2020 concept and the Knowledge-Based Economy Master Plan initiative. It also produced the National Interest Analysis on Malaysia's participation in the Trans-Pacific Partnership (TPP).

ABOUT  
**THE NOAH  
FOUNDATION**  
(Yayasan Mohamed Noah)



**The Noah Foundation** is a charitable, non-profit organisation established on the 23rd of June 1971 by the late Tan Sri Haji Mohamed Noah Omar, the nation's first speaker of the Dewan Rakyat (House of Representatives). Subsequently he was appointed President of the Dewan Negara (The Senate) from 1968 to 1970. Since its inception, the Noah Foundation, managed by its Board of Trustees, has administered funds for education, religious and charitable purposes.

Welfare and social work are high on the Foundation's list of priorities. Beyond the provision of aid and assistance to victims of floods, famine and natural disasters,

the Foundation seeks to preserve and improve human dignity by reaching out to the poor and needy.

Over the years, the Noah Foundation has funded among others the following projects:

- The establishment in perpetuity of the Mohamed Noah Fellowship in Asian Politics at the University of Cambridge, United Kingdom.
- The establishment in perpetuity of the Mohamed Noah Fellowship at the Oxford Centre for Islamic Studies, University of Oxford, United Kingdom.
- The Masjid Yayasan Mohamed Noah (the Mohamed Noah Foundation Mosque) at Sri Layang, Genting Highlands.
- Renovated and enhanced the orphanage, Asrama Puteri, Pertubuhan Kebajikan Anak-Anak Yatim Islam Muar, housed in the family home of the late Tan Sri Mohamed Noah in Muar, Johor.
- The Tun Hussein Onn Chair in International Studies at the Institute of Strategic and International Studies (ISIS) Malaysia.
- The main benefactor of The Tun Razak Lecture Theatre at Blavatnik School of Government, University of Oxford.
- Medical supplies and equipment to medical institutions and humanitarian aid missions.

The generosity and farsightedness of the late Tan Sri Mohamed Noah Omar in setting up the Noah Foundation have made all these possible.

Datin Paduka Dr Faridah bt Dato' Abdullah is Chairman of the Board of Trustees of the Noah Foundation. The Board of Trustees has strived and is committed to perpetuate the vision of the late Tan Sri Mohamed Noah Omar.

