



RETURNING TO THE CONSTITUTION'S PATH OF MODERATION

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Malaysia (July 2019-June 2021)
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INTRODUCTION

Our nation is undergoing several painful trials. I will not dwell on them. Instead, I will join you in fervent prayer that we succeed in converting adversity into opportunity for a happier, healthier and more equitable society.

I am mindful that in four weeks' time, the sun will rise on our 64th Merdeka and the 64th anniversary of our Constitution.

I wish, therefore, to pay tribute to our document of destiny and to embark on a journey of renewal on the Constitution's forgotten path of moderation, compassion and compromise.



Let me begin by pointing out that a Constitution is not just a legal document. It is linked with philosophy and politics. It has as its backdrop the panorama of history, geography, economics and culture. More than other fields of law, a Constitution reflects the dreams, demands, values and vulnerabilities of the body-politic.

A Constitution that will endure must not depart too far from the values, the spirit and the social and economic needs of the people. At the same time – and herein lies the great challenge – a Constitution must be idealistic, aspirational and transformative. It must hitch itself to the stars.



A Constitution must contain within it seeds of change for a just, new social order. It must balance continuity and stability with the need for social change.

In a fragmented and ethnically divided society (as Malaya was in 1957 and even more so in 1963) the Constitution must seek to weld people together into one common nationality, to build bridges where walls existed. That is why in 1957 and 1963, the Constitution walked the middle path of compromise, moderation and accommodation between the special needs of Malays, the natives of Sabah & Sarawak and the legitimate interests of the minorities who made Malaya their one and only one abode.

AUTONOMY & LEGAL PLURALISM: In a country if there are regions, states or provinces that exhibit significant differences from the rest of the country, then the Constitution must recognize their uniqueness, accept legal pluralism and maintain unity in diversity by granting special autonomy to such regions. For this reason, when in 1963 the Federation of Malaya merged with Sabah, Sarawak and Singapore to constitute the new and vastly enlarged nation of Malaysia, the three new states were admitted on terms and conditions that were far more favourable than were offered to the peninsular states in 1957.



The issue of the special rights of Sabah is hardly a unique phenomenon. Quebec in Canada, Kashmir in India (till August 2019), Aceh in Indonesia and Mindanao in the Philippines are beneficiaries of special asymmetrical constitutional arrangements.



PEACEFUL CO-EXISTENCE

Till the end of the last century Malaysia was an exemplar to the rest of the world – especially Asia and Africa – on peaceful coexistence between the various races and religions.

Malaya (later Malaysia) taught the world how to achieve a balance between modernity and religion, democracy and development, market capitalism but with some state control over the economy, nationalism and internationalism.



We managed social engineering and social change peacefully and without a revolution, violence and instability.

Unlike Northern Ireland, Yugoslavia, Chechnya, Afghanistan, Pakistan, Iraq, Lebanon, Libya, Syria, Palestine, Yemen, Sri Lanka, Southern Philippines, Southern Thailand, Myanmar and East Timor we have had peace and prosperity, stability and fair degree of social harmony.

No region, race or religion is at war with another or with the central government.



To some extent this moderation and balance is owed to the pragmatism, flexibility and give-and-take spirit of our Federal Constitution, our “document of destiny”.

All Constitutions are “balancing acts”. In Malaya (later Malaysia) the competing demands and expectations of the Malays and the non-Malays, the Rulers and the *rakyat*, the British and the Malayans, the people of Malaya and the people of the Borneo States had to be harmonized.

Though the actual drafting of the Federal Constitution was undertaken by the Reid Commission, the framework assumptions of our “document of destiny” were influenced by Malaya’s historical experiences beginning with Dato’ Sir Onn bin Dato Jaafar’s struggles for independence and the craft of Tunku Abdul Rahman, our Bapa Malaysia, of welding together the major races under one multi-racial Alliance.

This presentation will examine the extent to which our Constitution supplies the legal foundation for moderation, tolerance, harmony and national unity.

My humble submission is that even in its “ethnic clauses” the Constitution reflects a remarkable spirit of compromise, compassion and moderation. And that is one of forefathers’ proud legacies to this nation – legacy partly forgotten, not understood and not honoured.



CONSTITUTIONAL BASIS FOR NATIONAL UNITY

Despite many weaknesses and imperfections, our Constitution sought to provide workable arrangements for the people of our multi-hued nation to live together in peace and harmony.

INDIGENOUS FEATURES

In recognition of the fact that for centuries before Merdeka, Malaya was regarded as the land of the Malays; that poverty and under-development amongst the Malays was very pronounced; that due to discriminatory colonial policies on education, economic development and import of labour, there developed an undesirable identification of race with function; and the struggle for independence was initiated and waged by several Malay organisations with the cooperation of non-Malay counterparts, the Merdeka Constitution incorporated a number of features indigenous to the Malay archipelago. Prominent among these were:

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SULTANATE: The Malay Sultanate was preserved but transformed to a constitutional monarchy (Article 71). The system has worked well at the federal level and in most of the states.

ISLAM: Despite opposition from the Reid Commission, and from some States of the Federation, Tunku insisted that Islam be adopted as the religion of the Federation but with freedom to other communities to practise their religion in peace and harmony (Article 3(1)). However Article 3(1) was accompanied by Art. 3(4) that nothing in this Article derogates from any other provision of the Constitution

SYARIAH LAWS: Schedule 9 provides for the existence of syariah laws and syariah courts to deal with matters of Islam.

However, the syariah applies only in 24 areas enumerated in the Constitution's Ninth Schedule, List II, Para 1. Syariah law does not apply in areas assigned to the Federal List or covered by federal law. (Regrettably, some state assemblies do not understand this limitation)

Further, there is a clear provision that syariah courts shall have no jurisdiction over non-Muslims. (Regrettably, some syariah courts and officials do not follow this restriction).



MALAY SPECIAL POSITION: The historical tradition of a “special position” for the Malays and (in 1963) the natives of Sabah and Sarawak was continued in Article 153. The Reid Commission’s recommendation of a 15-year time limit for Article 153 was rejected by Tunku and his Alliance partners.

MALAY RESERVES: Malay reservation lands were recognized (Article 89).

BM: Bahasa Melayu in Rumi (and not in Jawi) was entrenched as the official language for all official purposes but with freedom to other communities to preserve their languages and to use them for non-official purposes (Article 152).

CUSTOMARY LAWS: Special protection for the customary laws of the Malays and (since 1963) native law in Sabah and Sarawak exists even in times of emergency (Article 150(6A)).



RURAL WEIGHTAGE DURING ELECTIONS: There is weightage for rural areas (which are predominantly Malay) in the drawing up of electoral boundaries (Twelfth Schedule).

STATE POSTS: The historical reservation of some top posts in the State Executive for Malays was continued.

PREACHING OF RELIGION TO MUSLIMS: As this is an issue with public order implications, legal restrictions are permitted on preaching of any faiths to Muslims (Article 11(4)). The restriction applies to all persons – whether Muslim or non-Muslim.

MUSLIM APOSTASY: Procedural restrictions exist in most State laws against apostasy by Muslims.

PROTECTION FOR NON-MALAYS

However, the Malay-Muslim features in the Constitution are balanced by other provisions suitable for a multi-racial and multi-religious society. The Constitution is replete with safeguards for the interest of other communities. Notable features are as follows:

CITIZENSHIP: Citizenship rights are granted to all persons on a non-ethnic and non-religious basis (Articles 14-19). The concept of *jus soli* (citizenship by birth in the country) was part of the Constitution in 1957 and was used to grant citizenship to 1.2 million non-Malays in a country with a then population of about 6.2 million. However, *jus soli* was removed from the Constitution in 1963.



ELECTORAL PROCESS: The electoral process permits all communities an equal right to vote and to seek elective office at federal and state levels. Race and religion are irrelevant in the operation of the electoral process (Article 119).

FUNDAMENTAL RIGHTS: The chapter on fundamental rights grants personal liberty, protection against slavery and forced labor, protection against retrospective criminal laws and repeated trials, freedom of movement, protection against banishment, right to speech, assembly and association, freedom of religion, rights in respect of education and right to property to all citizens irrespective of race or religion (Articles 5-13). Subject to a few exceptions fundamental rights are available to all persons equally.



FEDERAL POSTS: 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, religion or gender. All this talk that some top posts are reserved for a particular race is popular politics and has nothing to do with the law.

EDUCATION: Education is free at the primary and secondary levels and is open to all irrespective of race or religion. However, university education is subjected to strict quotas (Article 153).

To open up educational opportunities for non-Malays, private schools, colleges and universities (both national and international) are allowed. Foreign education is available to whoever wishes to seek it.



FINANCIAL ASSISTANCE FOR EDUCATION: Government education scholarships and loans are given to many non-Malays though this is an area where a large discontent has developed over the proportions allocated.

PROTECTION DURING AN EMERGENCY: Even during a state of emergency under Article 150, some rights like citizenship, religion and language are protected by Article 150(6A) against easy repeal.

SABAH & SARAWAK'S SPECIAL RIGHTS: The spirit of give and take between the races, regions and religions is especially applicable in relation to Sabah and Sarawak. These states enjoy special legislative, executive, judicial and financial powers: Schedule 9. Though a lot of discontent has arisen lately, this is not the fault of the Constitution but of lack of fidelity to the spirit of the basic charter.



CONSTITUTIONAL SUPREMACY - ARTICLE 4(1): Though Islam is the religion of the Federation, Malaysia is not an Islamic state. The Constitution is supreme. The syariah does not override the Constitution (Article 3(4)).

RELIGIOUS FREEDOM: The syariah does not apply to non-Muslims. All religious communities are allowed to profess and practise their faiths in peace and harmony. State support by way of funds and grant of land is often given to other religions. 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.



VERNACULAR LANGUAGES: Though Bahasa Melayu is the national language for all official purposes there is protection by law for the formal study in all schools of other languages if 15 or more pupils so desire. There is statutory protection for the existence of vernacular schools and legal permission to use other languages for non-official purposes.

MALAY RESERVES: Though Article 89 reserves some lands for Malays, it is also provided that (i) no non-Malay land shall be appropriated for Malay reserves and (ii) that if any land is reserved for Malay reservations, an equivalent amount of land shall be opened up for non-Malays.

ARTICLE 153: Article 153 on the special position of Malays is hedged in by a number of limitations. (i) Along with his duty to protect the Malays and the natives of Sabah and Sarawak, the King is also enjoined to safeguard the legitimate interests of other communities. (ii) The special position of the Malays applies only in the public sector. (iii) It applies in only four prescribed sectors and services – licences and permits; civil service positions; post-secondary education; scholarships and education facilities. (iv) In these sectors the YDPA may reserve such proportions as “may be necessary” and as “he may deem reasonable”. The use of the word proportion implies that monopoly or exclusivity was not contemplated by the Constitution.

(v) In the operation of Article 153, no non-Malay or his heir should be deprived of what he already has. (vi) No business or profession can be exclusively assigned to any race. No ethnic monopoly is permitted. (vii) Article 153 does not override Article 136. Quotas and reservations are permitted at entry point but once a person is in the public service he should be treated equally. (viii) Though there is no time limit for Art 153 reservations, the Constitution allows the YDPA to exercise his functions “in such manner as may be necessary”.



Though Art 153 is entrenched in the Constitution, policies under it are not carved out in granite and are open to review on concepts of necessity and reasonableness.

UNITY DOES NOT MEAN UNIFORMITY: Our legal system creates the conditions in which a dazzlingly diverse people can live together in peace, prosperity and harmony. Among the remarkable measures our past leaders adopted were the following:



- The various communities were allowed to maintain their distinct ethnic identities, cultures, religions, languages, lifestyles, dresses, foods, music, vernacular schools etc.
- Culturally the country is a rich cultural mosaic. Barring a short period after 1969 when ethnic practices like lion dances were not permitted, and forced integration was experimented with, the overall effort of the last 62 post-independence plus two pre-Merdeka years has been to find some areas of cooperation and to allow distinctiveness in other spheres of existence.



- 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 from taking alcohol, have gambling permits, rear pigs and dress in their own or the ways of the West.
- Political parties, business and cultural associations are allowed to be organized on ethnic or religious lines so much so that Malaya (later Malaysia) began its tryst with destiny looking a little bit like a rainbow with colours that are separate but not apart.



Some success has indeed been achieved to discover that which unites us and to tolerate that which divides us. Sometime ago we scored fairly well on the World Peace Index, being ranked 19 out of 153 states evaluated.

Sadly, there are dark clouds over the horizon and racism and religious bigotry are becoming mainstream. Internet and the social media are giving wings to hate speech. Moderation is seen with suspicion. Extremism has become mainstream.



POLITICS OF ACCOMMODATION

In addition to the above legal provisions, the rainbow coalition that has ruled the country for the last 62+2 years is 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 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 and to transfer funds to and from abroad. In general, economic opportunities have given to everyone a stake in the country.

The non-Malay contribution to the building of the economic infrastructure of the country has given the country prosperity as well as stability.



DARK CLOUDS OVER THE HORIZON

Sadly, we have suffered a regression. Since the nineties racial and religious polarization has reached alarming levels.

In many areas the Constitution's negotiated compromises are not being followed.

Ethnic and religious ideology and racial politics is causing a hardening of cultural boundaries. We have become a "nation of strangers".

In many corners of the world walls of separation are being dismantled. Sadly, in our society these walls are being fortified.



GOVERNMENT'S ROLE TO RESTORE OUR FOREFATHERS' VISION OF A SHARED DESTINY

What 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 celebrate 4 years of political freedom we need to restore moderation, recapture the spirit of 1957 and 1963 and reintroduce our winning formula for living together. The task is very large and holistic. Only a few proposals can be mentioned.

1. 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 multi-culturalism. This diversity is here to stay. We should regard it as an asset despite its many challenges.

2. IMPROVE CONSTITUTIONAL LITERACY: We need to impart in our education system, knowledge of the Constitution's glittering generalities, especially its provisions on inter-ethnic relations.

If we read about the making of the Constitution, we will see that by far and large the forefathers of our Constitution especially Bapa Malaysia, Tunku Abdul Rahman, 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 familiarization 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 experiment in peaceful co-existence in a nation of dazzling diversity.

PROVIDE A NEW STATUTORY, INSTITUTIONAL FRAMEWORK FOR 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).

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.



The National Unity Council should be upgraded to a statutory status (much like the Race Relations Boards of the UK) or converted to a statutory Community Mediation Council.

Race relations training should be part of the agenda. A Community Mediation Council as well as the Inter-Faith Council could be incorporated into a new National Harmony Act.



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.

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.

ROLE OF MALAY RULERS

Their Majesties are protectors and defenders of all of their subjects. They can do much to promote moderation, nip extremism in the bud and to build bridges of understanding. We note with gratitude the positive role played by the Rulers of Johor, Perak, Perlis and Negeri Sembilan.

The Conference of Rulers is authorized by Art 38(2) to deliberate on any matter that it thinks fit.

DECLARATION ON RELIGIOUS & 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 polarizes communities and often leads to violence. Existing provisions in the Penal Code, Communications & Multimedia Act, Printing Presses & Publications Act and the Sedition Act need to be buttressed by a National Harmony Act.



WE NEED TO LEARN FROM OTHERS: In many societies including Singapore, UK and the USA, 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.

ROLE OF ORDINARY CITIZENS

1. RECOGNISE THAT OUR CULTURES ARE INTERMINGLED AND INTERDEPENDENT: For centuries Malay, Chinese Indian, Indonesian, Thai, Kadazan-Dusun, Iban and European cultures have mixed in our soil to constitute our rich cultural mosaic. “There is far more cross-cultural mingling, sharing and co-dependence among us than we care to recognise, admit or celebrate”. (Patrick Pillai). 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. We should not be ashamed to acknowledge our mixed heritage.

2. 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.

3. DISTINGUISH RACISM FROM RACE CONSCIOUSNESS: We need to distinguish between racism (which is hatred for others and a desire to keep them down) and race-consciousness which is a positive desire to help the upliftment of a community, not necessarily your own.

4. CONSTITUTIONAL LITERACY: We must familiarise ourselves with the Constitution's carefully crafted clauses on ethnic compromises.

5. WE MUST ACKNOWLEDGE AND DEVELOP MULTIPLE IDENTITIES (Datuk Dennison)

6. WE NEED TO ADOPT MODERATION AS A WAY OF LIFE

7. WE MUST RECOGNISE HUMAN RIGHTS FOR ALL, NOT ONLY FOR OURSELVES

8. WE MUST WELCOME SOCIAL ENGAGEMENT

9. WHILE VENERATING OUR RELIGION, WE MUST NOT CONDEMN OTHER FAITHS



10. WE MUST NOT STEREOTYPE ANY RACE OR RELIGION

11. WE MUST BE THE CHANGE WE WISH TO SEE IN THE WORLD

12. Let me end with words of advice from Kofi Annan:



**AS WE WALK THROUGH THE MEADOWS OF
OUR MIND, LET US CONFRONT IGNORANCE
WITH KNOWLEDGE, BIGOTRY WITH
TOLERANCE AND ISOLATION WITH THE
OUTSTRETCHED HAND OF GENEROSITY.**