

The birth of the federal constitution

Citizens' Network Malaysia

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FEDERAL CONSTITUTION SERIES (PART 3)

This article is extracted from a teaching session by Emeritus Professor Shad Saleem Faruqi organised by CNBM on 8th November 2016.

Malaya's multi-racial alliance that was forged to struggle for independence earned a massive victory in the 1957 election, and basically demanded the early removal of the yoke of colonialism. The British empire at that time was having some problems post-World War Two, and when the Labour Party came into power, Britain was eager to give up many of its dependencies at least in the Far East.

The Reid Constitutional Commission (1956)

The London Conference of 1956 appointed a constitutional commission to draft independent Malaya's first constitution. And here is something very unusual. In most countries, the appointed commission would represent the people; it would represent the communities. Take India as an example. In 1946, The Indian Legislative Assembly became the constituent assembly to draft the constitution.

In Malaya, the rulers and alliance within themselves could not agree on who could be appointed to the constitutional commission. So the compromise was a totally independent commission comprising of outsiders - all outsiders!

I'm sorry to say this but not a single woman was chosen to be on the commission. There were Lord Reid, a distinguished British judge; Sir Ivor Jennings, the greatest constitutional authority in the Commonwealth; Sir William McKell, former Governor General of Australia; Mr Malik, a Hindu former High Court Chief Justice from India; and Justice Abdul Hamid of the West Pakistan High Court. So the composition was rather unusual.

I mention this to you because many of my Muslim brethren in criticizing the constitution say there was only one Muslim out of five – no wonder the constitution does not reflect the aspirations of the Muslim or Malay community! They forget that there was a deliberate attempt to have a Commission that was independent, which will be able to free itself from the pride, prejudices and passions of the party for whom the Constitution was being drafted.

The commission's terms of reference were to make recommendations for a number of things not unusual:

1. A written federal constitution, unlike in the UK, where there is no written Constitution; and
2. A Westminster style of parliamentary democracy instead of a presidential style of democracy.
3. A bicameral legislature
4. A strong central government
5. Safeguards for the position of the Rulers
6. Common nationality
7. Safeguards for the special position of the Malays and the legitimate interests of other communities

The 'social contract'

The Alliance drew up a 20-page memorandum for the Reid Commission, where ten of those pages dealt with the communal issues that you and I often call the 'social contract'.

To clarify, the word 'social contract' is a misnomer. In political science, 'social contract' really means the agreement between the 'rulers' and the 'ruled'. So the 'rulers' will protect the 'ruled' and the 'ruled' will obey the 'ruler' as long as they protect them. Here, however, the 'social contract' basically means within the communities, there were some give and take, some compromises about each other's rights and duties. Our term 'social

contract' will raise some eyebrows in political science but nonetheless that's the way we have been using this term and I want to qualify that.

Half of the memorandum by the alliance to the Reid Commission dealt with communal issues to cater to Malaya's dazzling diversities. On most issues the Reid Commission showed deference to the 'social contract' negotiated by the communities.

The Malaya draft constitution

The Commission held 118 public and private hearings between June and October 1956. I would like to point out that's quite a lot of meetings between just a few months. That is quite remarkable. It made recommendations on 20th February 1957 and submitted a draft constitution. The draft master plan provided for:

- A Supreme Constitution
- An independent judiciary with powers of judicial review
- A federal system of government with a heavy central bias
- A Westminster style of parliamentary democracy
- A constitutional monarchy at both state and federal levels
- A chapter on partially entrenched fundamental rights
- Extensive power to Parliament to suspend basic rights during times of subversion and emergency
- Special protection for the rights of the Malay rulers
- A chapter on partially entrenched fundamental rights
- Extensive power to parliament to suspend basic rights during times of subversion and emergency
- Special protection for the rights of Malay rulers
- Continuation of the historical provisions relating to Malay privileges

Discussions on the draft Malaya Constitution

Any of you who are involved in law making will know that laws are actually a very unsatisfactory compromise between conflicting interests. Someone jokingly said, "Two things don't enquire how they are made. One is your food. Please don't look into the kitchen how the food was made. Secondly don't look into the way your laws are made. The very brazen, unprincipled compromises that ultimately take place in order to meet the other side halfway." By way of humour I am saying that laws are not ideal. No laws are ideal because it involves compromises.

The original Reid proposal did not have Article 3 - Islam as the religion of the Federation. UMNO was very unhappy that no official religion was prescribed at the Federal level. While Islam was the religion of all the nine Malay states, there was no official religion prescribed in the Reid proposal. The Commission had rejected the Alliance's proposal, but only for the surprising reason that the Malay Rulers did not want Islam at the Federal level. The Malay Rulers felt that if Islam were to be at the Federal level, their position as the head of the religion of Islam in their own states would be undermined. So they said Islam should remain in their hands at the State level, with the Federal Constitution being primarily a secular one. The Reid Commission followed the Rulers and rejected the Alliance. UMNO objected to the matter of Islam being totally allocated to the States.

The Malay Sultans were very displeased that the role of Conference of Rulers was merely symbolic. They were ceremonial heads. They were to reign but not to rule, like the British Monarch. Rulers felt the power of the states especially in the area of finance was inadequate compared to the Federal government - and I think that's entirely correct.

Racing against time - the tripartite working party

Because of these objections, a tripartite working party was appointed. These were made up of four representatives of the British - High Commissioner MacGillivray as chairman, Chief Secretary to the Government Sir David Watherston, Attorney General Brodie, and EO Laird, the Secretary; four representatives of the Malay Rulers - Haji Mustapha Albakri, Shamsudin Nain, Tunku Ismail and Neil Lawson, Queen's Council and four representatives from the Alliance: Tunku Abdul Rahman, Dato Abdul Razak (later on Tun Razak), Ong Yoke Lin and VT Sambanthan.

With the clock ticking against it because the date of Merdeka had already been set, the Working Party had 23 meetings between 23rd February and 27th April. Everything obviously was done in a big hurry. Comparatively, we were drafting amendments to Akta Universiti Kolej in 2007 and it took two years because we had to listen to all sorts of groups. And here, the Constitution was drafted all in such a hurry. The tripartite committee made significant amendments both in substance and in form to the Reid Commission Proposal. And this is something generally not well understood even by Constitutional lawyers. Many Constitution lawyers have a very deferential view of the Reid Commission and perhaps rightly so. But I think there is insufficient understanding of the far reaching legal, political and substantive changes inserted into the Reid Proposals by the Working Party.

The revised Federal Constitution of Malaya

The 15-year time limit on Malay privileges was removed. Malay privileges were made an integral and entrenched part of the Constitution, so deeply entrenched that any time you modify any policies on Malay special position, you have to consult the Majlis Raja-Raja under Article 38 of the Constitution. Other clear provisions were added. Existing non-Malay rights will not be extinguished in order to create quotas for Malays. Article 153, specifically safeguard the rights of the non-Malays. They should not be extinguished to protect Malay rights.

Islam was adopted as the religion of Federation. But no alteration was made to the position of the Rulers as head of religion of Islam in their territories. So Rulers were the head of religion in their States. For federal territories, Islam will be the religion of Federation and the Yang Dipertuan Agong will be the head of religion at the Federation level. Also there would be full freedom to other communities to practice their own faiths, in peace and harmony. Article 3(1) clearly says Islam is the religion of the Federation but other religions may be practiced in peace and harmony. When we do the topic of religion, we will examine this issue. What do you mean by the word religion? Does religion mean “establish religion”? Does religion include cults that mushroom everywhere in the world? Is it the right to deviationist ideologies? Malaysia Constitution is not very good about protecting ideologies which are not mainstream. In some countries, any ideology is protected but in Malaysia only the mainstream ideologies are protected. But sadly the Constitution does not list out ideologies that are regarded mainstream in the way countries like Indonesia clearly list out the mainstream religions. Maybe we were better not to list the religions to allow growth. But that was not how the law behaved. Courts have allowed criminal persecution to go through for groups that claim to be non-mainstream religious groups.

The four British members of the working party were concerned that adoption of Islam as the religion of Federation would convert the country into a theocratic state. For this reason, documents were exchanged that despite the adoption of Islam as the religion of the federation, the country was not meant to be an Islamic theocracy. The White Paper explaining changes to the Reid Report states, '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, and every person will have the right to profess his own religion and the right to propagate his religion'. That was stated in the White Paper. I have to caution you not to attach too much importance to this statement. Legally, White paper is a policy paper. It is not the law. The law is what is laid down in the Perlembagaan. But I am sorry, in the Perlembagaan, the law is a bit different. We will come to that later on.

The role of Rulers was enhanced. In addition to the King and Deputy King, the Conference would have such powers as advising the King on important appointments under the Constitution. A number of appointments for example: appointment of judges and the appointment of the Auditor General, Election Commissions. The Conference of Rulers must be consulted. Please bear in mind, consultation is not the same thing as consent. The Conference is consulted; its consent is not needed. Prime Minister advises the King. The King seeks consultation but consultation does not mean consent of the Conference is needed. And also the Conference has the right to be consulted on matters affecting of national importance.

Let me clarify this. In Article 38(4), there is a remarkable provision. Though the Rulers only rule a small State, when they come to their Conference of Rulers' meeting, they can discuss any matters of importance. They can pull out any issues even if it is a Federal issue. They can demand information and discuss it. They can't give a directive but they can discuss it. They would have the right to be consulted on the matter of national importance, even immigration, religious relations, territorial. I am sure you remembered a few weeks ago, Majlis Raja-Raja issued a very significant statement about 2 things: One was of course lack of trust and confidence as a result of the 1MDB crisis. And secondly, rightly and very admirably expressed its concern about ethnic and religious concerns. Some politicians, some parties are sacrificing national harmony just for the sake of their narrow intents. So I think it's a very powerful statement and hats off to the Majesty for playing the role in the Article 38(4). Soon after their statement, I wrote a small comment in the Starpaper saying Majlis has the right to make the statement.

Also if there is a territorial change affecting the States, the Conference of Rulers must be consulted. If you want to take Wilayah Persekutuan out of Selangor, you have to get consent the consent of State Assembly of Selangor, you have to get consent of the

Conference of Rulers. I want to take Putrajaya from Selangor or Labuan from Sabah, you have to get consent from Maljlis Raja-Raja plus consent from State Legislator.

Tamil and Chinese languages. The permission to use Tamil and Chinese in the legislature was replaced, so there is no more permission on the use of Chinese and Tamil in legislature. But these languages could be used for non-official purposes and their teaching and learning a right. There is a right to learn the language, but there is no right to learn in the language – there is a distinction between the two.

How so? There is a right to learn the language. There is no right to use the language in the medium of instruction in schools. That's why Merdeka University Sdn Bhd lost their case in the court. They were thinking of having a university that would be using Mandarin as its medium of instruction. But of course the Merdeka University case has been overtaken by many events because not so many private universities had been created and many of them are using English. So the rule was that you must use English as education. And there was a lot of exceptions.

UMNO dropped its earlier demand that candidate for Parliamentary and Election must be proficient in Malay or English. I am glad it was dropped because it could have been a reflection of the American Constitution. Although American constitution is considered one of finest documents of liberty, the ground reality is not so fine. They wanted to discriminate against the blacks without writing in the electoral law that blacks cannot vote. One way was to require the blacks to pass a literacy test. So since the blacks have lesser education and depending on how you frame the literacy test, basically blacks were disenfranchised in many Southern States by requiring them to pass a literacy test. For a very long time, up to the middle of last century, literacy test for the blacks disenfranchised them. This proposal in Malaya sounded a little bit like that and I am glad it was dropped.

So Article 15(1) (of the draft Malayan constitution) was dropped because I think people should have the right to vote whether they are educated or uneducated. People should be allowed to vote whether they are poor or rich, learned or not so learned. Because literacy and wisdom are not one and the same thing. I know a lot of literate people who are extremely unwise. And a lot of not so literate people who actually have the crème of wisdom. And I would sit at their feet if I could.

Even for candidates in the electoral process, many countries have qualification requirements to be a candidate. Then I am afraid you are making Parliament an elitist institution. I know this point of view is there, that if you are an MP, you must be educated. As I said earlier, formal education is not everything. What about the poor people? What about the rubber tapper? What about the hawkers? What about the workers? They have the right to be represented in the Parliament because they have interests that can easily be jeopardized. I think Parliament should be open. Voting and contesting should be open to all irrespective of education or other qualification. Otherwise you are going to get a Parliament that is elitist. That is not democracy. It will be something else – eliterocracy perhaps?

Sharing of national revenues. No agreement was reached sadly between the Rulers and the Alliance on sharing of the national revenues and the issue is actually still on today: Federal and State division of financial power, for example petroleum royalty. This is a big issue in Sabah, Sarawak, Pahang, Kelantan and possibly Terengganu. Maybe other States which have a coastline. I am sorry to report to you, and I apologize to those from Sabah and Sarawak, Kelantan, Terengganu. I am sorry to report to you that all petroleum is in Federal hands. In the Constitution in 1957 and even in the 1963, all oil and oil fields are in Federal hands. Kelantan and Terengganu are protesting about the oil drill off their shores.

Actually it is a non-starter legally because extra-territorial jurisdiction is in Federal hands. Hence the territory of Kelantan does not extend into high sea. High sea is Federal jurisdiction. Territorial waters and economic zones are Federal jurisdiction. So the Constitution is perhaps badly negotiated at this particular point. It needs to change the way of the law. Oil and oil fields are in Federal hands, and so are income tax and road tax.

As I said earlier, for every RM1 the Federal government earns, the States earn only 10 cents. The royalty for Sabah and Sarawak, Terengganu, Kelantan are not spelled out in the Constitution. But what happened was in 1974 or so; Petroleum Development Act was passed where the Federal government gave its right to Petronas. Petronas then entered into agreement with all the States. Tunku Razali Hamzah at that time was Petronas chief and he signed on behalf of Petronas. Later on he became the Finance Minister. But these agreements were between Petronas and the States, and they provide for 5%. Sarawak is saying they want 20% - good luck, it's not in the Constitution.

Other considerations. All in all, these changes made by the Working Party strengthened the 'Malay features' of the Constitution. But there still was in my view, enough of a basic character for everyone to relish and to cherish. Malay privileges were balanced by safeguard for other communities. The spirit that animated the Constitution at least of the forefathers was one of tolerance, compassion and compromise. I think Tunku Abdul Rahman and his other colleagues from MCA and MIC should be nominated for the Nobel Peace Prize not because of the end of any war, but for creating the conditions for peace and harmony. But of course Nobel Prize does not always reward people who make peace. The President of USA, a Nobel Prize winner, is sending drones killing people every other day. He has not closed down Guatemala Bay Prison. Mahatma Gandhi has never been chosen for Nobel Peace Prize. Perhaps Gandhi was too big Nobel committee for peace prize. The man was actually, he was a giant of a man in the last century in terms of peace, in term of non-violence.

All in all, I think the Constitution was a compromise and there were a process of ratification. At the end of Working Party negotiations, some issues are unresolved: dual citizenship issues, issue of Malay reservation in Malacca, appointment of first Governors of Penang and Malacca. The dual citizenship issue was resolved by agreeing those having two citizenships would be allowed to do so and must choose within 1 year. The Malay reserve land in Penang and Malacca was resolved by proposing government in these States to set up a Trust to buy for the settlement of Malays. It was agreed the first Governors in Malacca and Penang should be appointed by the Queen. That I don't understand. Why would the Queen have the power once you have become independent? Appointment by the Queen with then concurrence of the Conference of Rulers after consultation with the Chief Ministers, the Chief Ministers of the 2 States.

An additional significant amendment at the London Conference was the entitlement of the Reid provision for the judiciary review of Executive and Legislative action. May I clarify that in Malaysia as in most Constitutions of the world, the Constitution is supreme. If the Constitution is supreme, it means the Parliament cannot be supreme. But what if they behave as supreme as they are prone to do? Whereas in the world, the power is stretched to its utmost limit, there should be a referee or umpire to show red card, yellow card or penalty points. The judges are that referee. Judges should have the power to strike down an act of Parliament or act of the State Assembly, and action of the Executive that are in violation of the Constitution.

In many countries like India, Parliament can restrict fundamental rights. Parliament may impose on the right. In this chapter - 'reasonable restriction'. What is 'reasonable restriction' is not for Parliament to decide but for the independent judiciary to decide.

Reid Commission recommended something like that. By the way, Reid borrowed a great deal or tries to borrow a great deal from Indian Constitution. But the Alliance was not in favour of it. The Alliance felt if judges were to start enquiring what is 'reasonable' or 'unreasonable, there will be a government run by judges. That's why 'reasonable' was dropped. For example Article 5(1) says, 'No persons shall be deprived of life and liberty save in accordance with law.' It did not say 'reasonable law'. It does not say, 'save in accordance to due process' stated in the USA Constitution where court says 'due process' means you must follow all the rules of natural justice and reasonableness. So its 'due process' clause in American Constitution and Indian Constitution was not adopted. Of course we are not meant to be as powerful as the courts in India or as of the courts in the USA.

Ratification of the Merdeka Constitution

Following the Tripartite Working Party Report, a lengthy process of ratification of the Malayan Constitution was held between the Federal Legislative Council, the Assembly of all the Malay States (who had their own legislators), the UK Parliament and the British Crown.

The debate took place in the Federal Legislative Council. It was stormy; it was deeply critical of the Alliance's compromises on the ethnic issues. The Malays felt too much was given away. The non-Malays felt too little was obtained, so everyone was dissatisfied. And if everyone is dissatisfied, something must be right. If both party are unhappy, there are middle path. I am only joking but that's how Tunku Abdul Rahman reacted as well. If everyone is unhappy, we must have done something right. Criticism came not only from other communities, the Malay of the Chinese or the Chinese of the Malays but from within. But the leaders of the Alliance stood firm and united for their settlement. For example, Parti Islam Malaysia (PAS) was very critical that not enough Islamic provision was incorporated into the Constitution.

At the stroke of midnight in August 31st 1957, at the Stadium Merdeka, The Duke of Gloucester, acting on the behalf of the British Queen, handed over to the Tunku, the Constitutional documents signifying the independence of the Federation of Malaya. Malaysia meets its destiny. A new nation was born, founded on the principles of liberty and justice and seeking the welfare and happiness of its people. I think beautiful statement – founded in the principles of liberty and justice and seeking the welfare and happiness of its people! It's a preamble; it's not a law. It's a merely a declaration of intent.

58 years down the road, one looks at the legal, political and social landscape. It is possible to say by far and large, the Constitution has worked well. This is a matter of personal opinion and merely subjective opinion. I am comparing Malaysian Constitution, with Philippines, with Thailand, with India, with Sri Lanka, with Pakistan and I say to myself, there is so much to be thankful for. Pakistan has changed many Constitutions. Thailand has changed many Constitutions. We at least stayed with the same Constitution for 58 years. Pakistan cannot make up its mind. One could say the Constitution had worked fairly well, has provided the foundation on which Malaysia's rock-solid political stability, spectacular economic prosperity and its (hitherto) exemplary record of racial, religious and regional harmony have been built. I acknowledge with the sense of embarrassment and shame and worry. I worry for my children and my children's' children, the racial and religious harmony, our hallmark, is being endangered. Up to now however things were okay. We may not love each other; at least we don't kill each other.

Most Malaysian took these blessing for granted. Now I must repeat that we don't kill each other. I don't know if you read in the papers. It must have been a few weeks ago, in some village in India, there were news spread a cow had been killed. The criminal person in the temple's public address system announced that XYZ had killed the cow. A mob descended on the house, dragged the man out, in front of his wife and children bludgeoned him to death in the ground that he killed the cow. Evidently, there has no proof that the cow was killed. These things do happen.

In India, Pakistan, I think 2 hundred thousand people died, so there has been bloody history in many countries. We all know what happened in Sri Lanka between the Tamils and Singhalese, Mindanao Southern Philippines, Myanmar. So we in that respect actually, we have been more fortunate.

Most Malaysian takes these blessings for granted. We must remember the country communal harmony is founded on the courage, conviction, sacrifices and compromises of the leaders of Alliance who had to grapple not only with the inter-ethnic rivalries but also with the demands of the radical within their own communities. I am afraid dark clouds are looming around the horizon in our country. Right now there are those who are doing the Constitution in because it does not fit with their vision of ideal society. I fully acknowledge that life is always larger than the law. No Constitution can encapsulate and anticipate the future. All Constitutions must remain dynamic. Change is not something that is necessary undesirable. Change is desirable. But it must be done in accordance to law prescribed by the Constitution.

I personally favour evolution rather revolution. Revolution don't necessary solve problems. They create their own problems. So I favour evolution, development of the Constitution. But before the changes made, we must follow the law. It is the gist of the law. To pass the law, you must follow the law, the pre-existing law. I am afraid a little bit of that is being violated right now. Reason for that is we have a problem with leadership. If I may quote Jesse Jackson, 'Leaders of substance do not follow opinion polls, they mold opinion not with guns, or power or position but with the power of their soul.' That what is lacking. Leadership is lacking. That's why some people are taking liberty with the Constitution. I do hope and pray that this will change. **END**

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