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'Constitution-Building and Constitutional Culture: The case of Malaysia'

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Background

When the negotiations for independence began in Malaya in the early 1950s, the British colonial government set a host of pre-conditions to ensure a smooth transfer of power from the British to the locally-elected political representatives. One of them was the promulgation of a constitution that was acceptable to the locals. Thus, at the beginning of the constitution-making process, the British government fixed specific terms of reference to guide the constitution-making exercise. They included: (1) parliamentary democracy with a bicameral legislature; (2) a strong central government with a measure of autonomy for the states; (3) the provision of a machinery for central-state consultation on certain financial matters specified in the constitution; and (4) safeguarding the special position of the Malays and the legitimate interests of other communities.[1]

These aspects were, of course, not wholly alien to Malaya after decades of British occupation. For instance, the first steps to democracy took place through municipal council elections in late 1951. Before that, a multi-party system organised along ethnic lines had already emerged, with UMNO (a Malay nationalist party) as the dominant party. The first cross-ethnic political coalition was born in 1952, comprising UMNO and MCA (a Chinese party). Strengthened by the membership of an Indian party (MIC), the Alliance went on to win – by a landslide – the first federal legislative elections in 1955.

A federal arrangement was also not unfamiliar to Malaya – a treaty signed in 1895 created the Federated Malay States (FMS), consisting of the four protected Malay States (Selangor, Perak, Pahang, and Negeri Sembilan), and this became the basis for the federal structure created at independence. The FMS centralised executive power, resulting in the 'marginalization of the individuality of the various States'.[2] In 1948, the Federation of Malaya Agreement and the Constitution of the Federation of Malaya, both which inspired the 1957 independence constitution, constitutionalised arrangements and principles of governance that had already been largely observed under colonial rule – a system of constitutional monarchy, where State rulers' (sultans) authority would largely be limited to matters of Islam and Malay customs; a legislature and executive (cabinet) at both federal and state levels in ways that reflect the Westminster traditions; a recognition of the special status of Malays (who were already benefiting from preferential policies in the civil service and education); and a federal system of government with most legislative and executive power being vested in the central government.

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1 *Report of the Federation of Malaya Constitutional Commission* (21 February 1957), DO35/6282.

2 Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart 2012), 21.

Constitutional Culture and New Constitutional Arrangements Pre- and Post-Independence

A. Fundamental Liberties

The introduction of a bill of rights in the 1957 independence Constitution was one of the key issues that required a shift in the then-prevailing constitutional culture. This was an initiative of the Reid Commission (the constitution-drafting body comprising five jurists from the Commonwealth), who drew heavily on the Indian Constitution.[3] Local leaders involved in the constitution-making process, especially those from UMNO and MCA, were apprehensive of a bill of rights, as they thought that it could hamper government decision-making.

The Malays were anxious to protect their special privileges and interests, which would contradict the right to equality sought by the non-Malays. For the Chinese, maintaining a solid political alliance with UMNO was thought to be the best and most practical means of securing their rights and interests.[4] To a large extent, this reflects the prevailing thought pattern and culture that underpinned the political coalition – that any ethnic grievances and protection of interests were matters for political bargaining and negotiation, obviating the need for concrete, constitutional rights guarantees.

Although the Alliance leaders eventually accepted the incorporation of a bill of rights, they only agreed on thin guarantees of fundamental liberties. There are nine rights provisions in the Constitution, and the freedoms of speech, assembly, and association are curtailed by broadly-worded claw-back provisions that allow Parliament to restrict such rights where it deems 'necessary and expedient'. There are also provisions on emergency powers and 'powers against subversion' that allow substantial restrictions on human rights.

The adverse consequences of this arrangement and the political elites' lack of enthusiasm for rights protection became apparent before and then in the early years of independence. Malaya was in a state of emergency from 1948-1960 due to Communist insurgency, and this period saw the enactment (and continued enforcement) of a host of repressive laws. The *Sedition Act 1948*, the *Internal Security Act 1960*, and the *Printing Presses Act 1948* are some notable examples. The *Official Secrets Act* – first enacted in 1972 – has also significantly affected the parameters of freedom of speech and information in post-independent Malaya. The point here is that despite the enactment of a bill of rights, the full enforcement of such rights did not follow. Instead, fundamental liberties were consigned to executive mercy and authority – a situation facilitated not just by carefully-crafted provisions of the Constitution, but also by the leaders' lack of regard for human rights and constitutional democracy.

B. Federal-State Relations: The Malaysia Agreement 1963

The 1957 *Federal Constitution*, by design, created a strong central government with limited autonomy for the states.[5] The state of emergency in the years preceding and following independence reinforced the powers the federal government vis-à-vis the states. This centre-heavy arrangement, backed both by the constitutional provisions and the prevailing constitutional culture, had to be reconfigured with the creation of the Federation of Malaysia. Under the 1963 Malaysia Agreement, the Federation

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3 Charles O H Parkinson, *Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories* (OUP 2007), 73.

4 Ibid 90.

5 Harding, above n 2, 51.

comprised Malaya, Sarawak, North Borneo (Sabah), and Singapore. There was a series of constitutional amendments to address the status of the three new states (Sarawak, Sabah, and Singapore), their legislative powers, and their autonomy.[6]

Sabah and Sarawak joined the Federation as 'equal partners' but what sets them apart from the other partner (ie, West Malaysia) is the broader measure of autonomy that they enjoy. This is manifested in various aspects. First, Sabah and Sarawak retain power over immigration – an arrangement that emerged out of concerns that migration may place Sabahans and Sarawakians at a disadvantage socially and economically. Second, both state legislatures have exclusive control over land and local government. This was crucial to safeguard native customary land and rights in the two states. Third, while the 1957 *Federal Constitution* makes Islam the 'religion of the Federation', under the terms of the Malaysia Agreement, this provision would not be applicable to Sabah and Sarawak (hence there would be no state religion in both states). The driving factor here was the distinct ethnic, religious, and cultural fabric of the two states – while the Malays (who are, by constitutional definition, 'persons professing the religion of Islam') make up 60 per cent of the population in West Malaysia, Muslims comprised only 23 percent and 37 percent of the population in Sarawak and Sabah, respectively. Fourth, both states have special powers to veto any constitutional amendments affecting their interests, including amendments that affect the High Court of Sabah and Sarawak and their judiciary.

The federal-state balance of power needed recalibration in light of the Malaysia Agreement (at least with regard to Sabah and Sarawak), but this was not always forthcoming. In fact, it has been put to the test on a number of occasions. An instructive case involved the dismissal of the Chief Minister of Sarawak (Stephen Kalong Ningkan) in 1966, who had irked the federal government in Kuala Lumpur through his proposed reforms on native land rights. The federal government deemed that Ningkan no longer had the confidence of the state legislature (on the basis of a letter signed by 21 pro-Kuala Lumpur members of the state legislature), and the Prime Minister demanded Ningkan's resignation. Ningkan defied federal orders, proceeded to put the matter to constitutional test at the High Court, and retained office after a judgment in his favour. The federal government then responded by declaring a state of emergency, which ended with Ningkan's dismissal from office.

In Sabah, the federal government flexed its muscles on immigration matters through the infamous 'Projek IC' (Identity Card Project) scandal. This involved the issuance of Malaysian identity cards to illegal migrants (mainly from Southern Philippines and Indonesia) in order to alter the state's religious demography in order to bolster the then-ruling coalition's political dominance.[7] A more recent example concerns the position of Islam, with the 'Allah' controversy being a case on point. In 2013, the Court of Appeal upheld a federal government ban against Christians using the word 'Allah' in their Malay-language publications. Although this case originated in West Malaysia, there are implications for the Sabahans and Sarawakians, especially those who have migrated to West Malaysia and continue to practice and preach their religion using the Malay language. Shortly after the Court of Appeal decision, the federal government – concerned about the political implications of the ban in East Malaysia – clarified that the decision does not affect Christians in Sabah and Sarawak and that they could continue to use the word 'Allah' there (but not in West Malaysia). Yet, months later, reports

6 Singapore left the Federation in 1965, so this section will only consider the position of Sabah and Sarawak.

7 See James Chin, 'Federal-East Malaysia Relations: Primus-Inter-Pares?' in Andrew Harding and James Chin (eds), *50 Years of Malaysia: Federalism Revisited* (Marshall Cavendish 2014), 173–177.

emerged about the continued confiscation of bibles and publications for violating the ban against the use of 'Allah'.

The consequence of a federal government that remains jealous of its authority is clear from these examples, but there is a more important lesson for constitutional implementation – special constitutional guarantees have not proven to be availing to States' autonomy and interests, due to the prevalence of federal politics and patronage politics (factors that are especially relevant to underdeveloped but resource-rich Sabah and Sarawak). With regard to religion, an important point to bear in mind here is that even though individual states are constitutionally empowered to regulate matters of religion (especially Islam), the federal government has played an instrumental role in shaping the content of Islamic laws throughout the federation through a federal-level Islamic department overseen by the Prime Minister's Office.

C. Constitutional Change and the Role of Islam

The evolving influence of Islam on the constitutional order in Malaysia proves the point that changes in, or adaptation of, the constitutional culture are important to effect constitutional change. As I explained earlier, the 1957 constitution-making process constitutionalised Islam as the religion of the Federation. The intention was not to create an Islamic theocracy; rather, it was a response to demands from sections of the Malay community who were anxious that Malaya would 'lose' its key historical and cultural attributes, especially with the growing non-Malay (non-Muslim) population.[8] The political leaders and constitutional drafters nonetheless assured that the status of Islam would not trump constitutional rights guarantees, especially the freedom of religion for non-Muslims. They affirmed that the provision was 'innocuous', that it would not alter the secular nature of the Federation, and that it would model the British arrangement vis-à-vis the Church of England.

In the 1980s, the government introduced a series of initiatives to respond to the religious overtones of Muslim social and political movements in Malaysia, inspired as they were by the Iranian revolution. *Dakwah* (religious preaching) movements proliferated, calling for stronger adherence to Islamic ideals and principles. One such initiative was a constitutional amendment in 1988 that stripped the civil courts of jurisdiction in matters that are exclusively within the *Shariah* jurisdiction. Such matters are spelled out in the *Constitution*, and they are primarily limited to personal law and 'offences against the precepts of Islam'. However, within sections of the Muslim community, the amendment was a big step in strengthening the pre-eminence of Islam in the constitutional and legal orders – it was seen as placing the *Shariah* courts on par with the civil courts.

The development of a constitutional culture that treats Islam as a distinct and dominant force in the social, legal, and political orders quickly followed. The government pursued state-sponsored Islamic symbolism, established institutions (including administrative bodies) to support the development of Islam, used state-sponsored media to propagate the 'official' Islamic doctrine and praxis, and embarked on reforms of Islamic laws nationwide. Reforms did not only entail reformulating the content of Islamic laws; it also meant efforts to modernise,[9] standardise, and expand the corpus of laws applicable to Muslims. Although the federal government was never keen on pursuing the

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[8] Dian A H Shah, *Constitutions, Religion and Politics in Asia: Indonesia, Malaysia and Sri Lanka* (Cambridge University Press, 2017), 28, 43–44.

[9] Donald L Horowitz, 'The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change' (1994) 42(2) *American Journal of Comparative Law* 233, 253.

implementation of a full panoply of Islamic laws (including Islamic criminal law punishments such as *hudud*)[10] in the way that the opposition Islamic party (PAS) advocated, it was also impossible for the government to ignore the forces of Islamic revivalism and the demands that accompanied them, such as the 'upgrading' of Islamic institutions. The then-Prime Minister – to undercut the political appeal of PAS – declared Malaysia as an 'Islamic state'.

All this shaped public psyche about the role of Islam, and it then became manifested in subsequent judicial decisions. Before the 1988 amendment, the Supreme Court reinforced the limited role of Islam in the constitutional order and reiterated that Malaysia is a secular state. However, following the amendment, civil courts have been largely reluctant to adjudicate any matter that implicates Islam (deciding instead that such matters should be adjudicated at the *Shariah* courts) and in some cases, the courts have elevated Islamic interests and principles above religious freedom guarantees. This illustrates that a new constitutional culture requires the involvement (and affects) not only of the government, but also the civil society, legislature, courts, the media, and state administrative bodies.

Lessons from the Malaysian Experience

The three case studies illustrate that the development of a new constitutional culture involves a range of actors and stakeholders. In the case of Islam, for example, the shift in government policy was a response to changing social and political dynamics. Although the 'Islamisation' initiatives were instituted to serve the government's political agenda, subsequent mobilisation through state religious bodies, the judiciary, the education sector (especially with the establishment of an international Islamic university in the 1980s), state-sponsored media, and grassroots organizations has significantly transformed the role of Islam in the constitutional order.

The Malaysian experience also shows that context is important, because it shapes how political actors respond to new constitutional arrangements or the need to develop a new constitutional culture. For instance, the fact that Malaysia was under emergency from 1948-1960 meant that the needed shift in constitutional culture with regard to fundamental liberties was never forthcoming. Faced with threats of Communist insurgency, the government felt that unencumbered executive power and repressive laws were necessary to preserve national security and public order. In short, instead of working toward constraining its powers according to the rule of law and the limits spelled out in the Federal Constitution, then-prevailing conditions were used to justify exercises of executive authority with few checks and balances. In 1969, just as the external threats were finally eliminated, the May 13 ethnic riots led to another proclamation of emergency and a range of policies that further constricted the practice of and space for constitutional democracy in Malaysia.

Another important aspect concerns the salience of politics, especially identity politics and political culture. These were crucial determinants in shaping the choices made during constitution-building – forming a consensus on divisive issues during the constitution-making process was facilitated by political bargains not only between ethnic groups but also between competing political authorities (ie, elected representatives versus the state monarchy). Beyond that, the Malaysian experience also illustrates that constitutional implementation and shifts in constitutional culture may well hinge on prevailing political dynamics and the political interests of the government. In the case of Sabah and Sarawak, for instance, the federal government – under the then-ruling coalition *Barisan Nasional* –

[10] Ibid, 243.

was politically dominant in the two states.[11] With patronage politics operating to suppress dissenting voices, the government had no political will or incentive to enforce the terms of the Malaysia Agreement.

As Malaysia moves forward after the May 2018 political change, issues of constitution-building will remain relevant. The six decades of single-coalition rule saw the gradual weakening and manipulation of the rule of law and rule of law institutions. Initiating and executing reforms, however, will require not only compromise and moderation, but also a shift in constitutional culture. At a general level, such reforms may include reviving constitutional conventions that were previously disregarded; setting up independent commissions that are faithful to their legal mandates; rebuilding an independent judiciary dedicated to the rule of law; and reinforcing limits on unbridled executive power.

Various concrete proposals have followed: the government announced its commitment to ratify the major international human rights treaties; there are talks of reforming religious bodies and recalibrating federal-state relations in Islamic matters; the federal government has initiated plans to 'restore' the status of Sabah and Sarawak under the Malaysia Agreement; and a bill to enforce a two-term limit on the prime ministerial office is reportedly set to be tabled in the next parliamentary sitting in 2019. Yet, as some of these reforms are being mooted and discussed, populist pushbacks (often with ethnic undertones) have intensified, and these have far too often proven difficult to ignore. It remains to be seen how the new Malaysian government will react, but these developments raise crucial questions about constitution-building and its relationship with constitutional culture. How does a country drive constitution-building and reforms where there is a lack of constitutional culture for fundamental rights, institutional checks and balances, and limits on executive authority?

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[11] Sabah and Sarawak were known as the *Barisan Nasional* coalition's 'fixed deposits'.