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FIFTY FIVE YEARS OF INDEPENDENCE: REVISITING THE FEDERAL CONSTITUTION – LEGAL CHANGES AND IMPACT

By
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This is the first time I am trying to speak in public with my third voice which, by the grace of Allah, hopefully will come back after losing it twice in four surgeries in two years. I'll see how far I can go. In the event I am unable to proceed, there is someone on standby to read my speech for me.

The topic that is given to me covers 55 years of my life. The remaining fifteen years is the earlier part.

I was born in a *kampung* in Province Wellesley North surrounded by rice fields during the Japanese occupation. I lived through Malayan Union unknowingly, the Federation of Malaya which I learned about in Malay school, the struggle for Independence when I was able to read Malay newspapers, saw the first General Election, heard the historic shout of "Merdeka" through the first radio in the kampong with I bought with my saving from my Federal Minor Scholarship, followed the formation of Malaysia, stranded in Kampung Baharu during the Mei 13th incident twelve days after I reported for duty at the Attorney General's Chambers. The rest you might know.

I think, I have lived during the most important period in the history of the country, tasted the fruits of Independence and played a part, no matter how minor, in its history.

Ladies and gentlemen,

I have been asked to revisit the Federal Constitution pointing out the legal changes and impact. I have not written a thesis on it. Instead, I have picked a few topics and will share with you some of my thoughts and experience.

To start with, let us remind ourselves of a bit of history. Beginning with the fall of the Sultanate of Melaka in 1511, colonisation (by whatever name you call it) of the Malay Peninsular was a story of colonisation of areas ruled by the Malay Rulers by European powers. The British did it through force, war and persuasion followed by treaties entered with the Malay Rulers. It was a colonisation of the Malay Peninsular ruled by the Malay Rulers. Those unsuccessful rebellions or resistance led by Dol Said, Dato Maharaja Lela, Dato Sagor, Dato Bahaman, Tok Gajah, Mat Kilau or Tok Janggut were all Malay rebellions or resistance against the British. Malayan Union was opposed by the Malays. The struggle for Independence began as a Malay affair. A great majority of Chinese and Indians, at that time, still looked to China and India,

respectively, as their motherland, while a group of Chinese had the ambition to seize power and turn the country into a communist State, following the success of the Communist Party in China. The Chinese and the Indians joined in later in the negotiation for independence with the British, when independence was imminent, to protect their own interests.

During the negotiation for independence, "Pan-Malayan Islamic Party (PMIP - now PAS) proposed that the then Straits Settlements of Penang and Melaka be turned into "Malay States" with a view to extending Malay privileges to ensure that the special position on the Malays in these two states would be protected.[i]

In Kelantan, an organisation called Kelantan Malay United Front was formed in late 1955. The organisation campaigned for Kelantan to secede (keluar) from the Federation. They wanted to restore the supremacy of the Islamic religion, Malay language and Malay customs and feared that independence would mean that the Malays were being degraded to accept Chinese and Indians as Ministers.''[ii]

In Johore, Sultan Ibrahim opposed the federation proposal arguing instead for the retention of the British Advisor State. He was supported by the Johore Malays National Organisation which wanted Johore to be an independent State under British protection after Johor's secession from the Federation.[iii]

The Labour Party, in its memorandum to the Reid Commission, called for the establishment of a unitary government for an independent Malaya, contending that retaining the Sultans and States in a federal government structure would produce a feudal state. [iv]

However, it was basically the Alliance Party's proposals that were finally accepted and written in the Federal Constitution that still survives until today.

It should be noted that the original Article 1 of the Federal Constitution as it stood on Merdeka Day read as follows:

"1. (1) The Federation shall be known by the name of Persekutuan Tanah Melayu (in English the Federation of Malaya)."

In spite of the fact that the Malay Peninsular was colonised from the Malays, Malay leaders tried to oppose it, later the Malays objected the Malayan Union, struggled for Independence, Malay youths sacrificed their lives to fight Communist insurgency, yet the Malays did not tell the British, "You took it from us. You return it to us." Instead, they were prepared to share power with non-Malays after Independence. Indeed, in the 1st General Election in 1955, there were very few seats with non-Malay majority. To give more representation in Parliament to non-Malays, Malay-majority constituencies were given to non-Malay candidates to contest on Alliance Party tickets. Otherwise, there would be no Indians in Parliament.

Professor Shad Saleem Farouqi in his book Document of Destiny: The Constitution of the Federation of Malaysia" which I had the honour to write the foreword and to launch has this to say at page 710:

"As a result of the "social contract" between the various races, millions of migrants to British Malaya were bestowed with citizenship by the Merdeka Constitution. It is believed that the number of citizens in Malaya doubled at the stroke of midnight on August 31, 1957 due to the constitutional grant."

How many countries that obtained their independence from the British during the same period still have their original Constitutions today? India, Singapore, Malaysia, yes. Any country in Africa? I doubt. In many other countries, the Constitution had been suspended or replaced by as many Generals or Colonels or even by democratically-elected leaders.

I attribute that to the spirit and practice of understanding, toleration and compromise between the main races in Malaysia besides the prosperity that we enjoy since independence. Remove those factors, we don't know what will happen.

How many countries which have achieved independence about the same time as Malaysia, have develop the way we have, have remained peaceful, maintained law and order with Parliament and the Judiciary functioning? Certainly, we are among the few. So, all said and done, by and large, we must have been doing something quite right since Independence.

Our Constitution is ours. It was drafted to suit the circumstances in our country, the historical background, the political reality, the racial compositions, the social, educational and economic situation of the people. We may be different and we have done things our way. For example, what do we do with the nine Rulers after the formation of the Federation? We cannot have nine Kings on the throne at the same time. To pick one and discard the rest forever, would not be fair. We allowed them to choose one at a time among themselves to reign for five years. We are the only country in the world to have such a system and it works.

In some countries, when there are general dissatisfactions with the royalty, the royalty would either be deposed or even assassinated. In Malaysia, we amended the Constitution and created a Special Court to try them in accordance with law[v]. And, it is a farmer's son standing in front of you now who presided the first full trial in that Court where the Defendant was a reigning Ruler of a State and former Yang DiPertuan Agong. And, what is important is that the judgment which turned out to be against him, was complied with. Show me one country in this world where such a thing happens.

At the Constitutional Court Judges' Conference in Manila in 2006, just before the conference closed, I made a comment: *I notice that the participants in this conference could be divided into two groups: one from countries with Constitutional Court and one without. I also notice that those with Constitutional Court have the problem of enforcing their judgments while those without Constitutional Court do not have such a problem. Is that the reason why those countries need Constitutional Court? Or, is it in spite of the Constitutional Court?* The participants applauded, but the Chairman, a Professor from Germany, did not quite like it and he said curtly: *"A very good point. We'll discuss it next year."* (The conference was sponsored by a German NGO and they were propagating the Constitutional Court.)

Interestingly, at that conference there was a Chief Justice of the Constitutional Court from one country who had no court at that time because the Constitutional Court in his country had been abolished by the army. On the first day, after I presented my paper, a Constitutional Court Judge from Indonesia stood up and said, "I salute Malaysia. If I were to pass judgments like you do, there would be riots." Then he went on to say, "I envy Malaysia. Not long ago Malaysia was sending students to study medicine in in Indonesia. Now Indonesians are going to Malaysia for medical treatment. I don't know what is wrong with us."

Unfortunately, Malaysians always have the "imported goods are better" mentality. When they hear that other countries have Constitutional Courts, they also want a Constitutional Court here. They don't realise that Constitutional Court is a by-product of the Continental System and is not needed in the common law system. In those countries, Constitutional courts were established, besides hearing cases involving the interpretation of the Constitution, to hear election petitions and judicial review cases. Our courts are already hearing such cases every day.[vi]

Common law countries, including England, United States, Australia, Singapore, New Zealand, Canada, India and others do not see the need to establish a separate a Constitutional Court. I say, we don't need it too. Do not waste tax payers' money and create more problems.

When talking about equality, we should not merely compare the wording of the Malaysian Constitution with that of the Constitution of United States. For example, we have such provisions as Article 153 which, on the face of it, looks discriminatory. But, the Indian Constitution has more such provisions. We should realise that, in United States, the settlers, being superior in arms, had wiped out the natives and declared to the world that they are equal. In 2005, I spoke at the Maxwell School of Citizenship and Public Affairs, University of Syracuse, U.S.A.[vii] After my speech a white American Professor stood up and said: *"After listening to you, I wonder what the United States would be like if the Indians are still the majority."* I replied, *"The United States could be like Malaysia".* Talking about freedom and equality, compare the objections that Muslims face to build a mosque in Europe or U.S., even before 9/11, with the ease that the followers of other religions enjoy to build temples, churches and *gurdwaras* here.

I believe that to understand the Constitution one has to know the history and the circumstances that had made it what it is. Similarly, in interpreting the Constitution, one should do so in the spirit in which the Constitution was promulgated. We respect the principles of Constitutional interpretation. We respect the universal human values, human rights and obligations. We respect the views of Judges from other jurisdictions. But we should not forget our own history and the local circumstances. We should not follow blindly what other Judges in other jurisdictions say. We adopt the principle but, in applying it, we should take into account the local circumstances, public policy and public morality of Malaysia, and other relevant factors.[viii] On the other hand, they might not even look at the judgments of our courts.

Take same-sex marriage, for example. Are we going to declare that the law that a marriage must be between a man and a woman unconstitutional on the ground that it contravenes the provision regarding equality before the law or because it restricts

individual freedom? Are we not going to consider the fact that Islam is the religion of the Federation, that Islam does not recognize such marriage? Are we not going to consider that all religions followed by Malaysians do not recognize such marriage? Are we not going to consider the public morality of Malaysians?

On the issue of interpretation of the Constitution, I don't agree with the view of the Indian Supreme Court that some provisions of the Constitution cannot be amended because those provisions form part of the basic structure of the Constitution? That is rewriting the Constitution under the pretext of interpretation. Similarly I don't agree that in the appointment of Judges, the requirement for the Prime Minister to "consult" the Chief Justice means that he must obtain the "concurrence" or "consent" of the Chief Justice. In other words, the word "consult" is substituted with the word "concurrence" or "consent. To me, that is an abuse of the power of interpretation.

I do not for one moment say that the Constitution must remain static. Indeed, the Constitution is a living document. But, it is not for the court to rewrite the Constitution under the pretext of interpreting it. That is a matter for the Parliament. I had said before: "No Judge is a Parliament". I still hold the same view. After all, members of Parliament are law makers elected by the people. If people through their votes indicate that they want changes to the Constitution, Parliament is the proper authority to do it. That is democracy. That is separation of powers. That is rule of law.

When the amendments are done in accordance with the provisions of the Constitution, the Court should give effect to it. That is why in Pendakwa Raya v Kok Wah Kuan (2007) 6 AMR 269, when considering the amendments to Article 121(1), I said:

"……to say that the amendment has no effect does not make sense. There must be. The only question is to what extent?"

Who are we, Judges, to say:

"….. I am unable to accede to the proposition that with the amendment of art. 121(1) of the Federal Constitution (the amendment) the Courts in Malaysia can only function in accordance with what have been assigned to them by federal laws." – Richard Malanjum CJ (Sabah and Sarawak in the same case.

The doctrine of separation of powers applies equally to the three branches of the government.

I have been asked to touch on Article 121(1A). Modesty aside for a moment, I think, among the Judges, I have written the most on it, both in my judgments, lectures, papers, speeches and articles.[ix]

I will make two points here. First, do not think that with the amendment all problems regarding conflict of jurisdiction have been solved. That is the mistake made by most people, especially Shari'ah lawyers and scholars as well as academicians. What about cases in which one party is a Muslim and

the other is not? Connected with it, is Majlis Agama Islam or Bank Islam *"a person professing the religion of Islam"*? What about cases in which there are Shari'ah as well as common law issues and issues arising from written laws under the jurisdiction of the Civil court e.g. Contracts Act, National Land Code and others? What if, in a Shari'ah court case, a constitutional issue arises?

Secondly, the amendment is not a license to expand the jurisdiction of Shari'ah Courts and to oust the jurisdiction of the civil courts. Take sodomy for example. A similar offence had been in the Penal Code since long before the establishment of the Shari'ah courts. Is an offence under the Penal Code not part of criminal law? The Federal Constitution provides that criminal law is a Federal matter within the jurisdiction of the civil court. A similar offence is later created in the Syari'ah Criminal Offences Enactments of the States. Arguments are then put forward that the offence is within the jurisdiction of the Shari'ah Court and not the Civil court anymore, by virtue of the amendment. Unfortunately, when the issue came up before the Court of Appeal in the case of Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor [1999] 1 AMR 281, the court failed to address the issue of constitutionality of the section 25 of the Syariah Criminal Offences (Federal Territories) Act 1997 (Act 559). To me, that section is unconstitutional and void.

I ran through the amendments made to Part II (Fundamental Liberties) of the Constitution over the last 55 years. There are consequential amendments like changing the words "a High Court" for the words "the Supreme Court" (Act 26/1963) or adding provisos to Art 5(4) for purpose of clarification. Article 8 was amended in 2001 to add the word "gender" making discrimination on the ground of "gender" or sex unconstitutional to emphasize the equal status of women. (Act A 1130).

Perhaps the most controversial amendment to the Constitution on the subject is the Constitution (Amendment) Act 1971 (Act 30). A new Clause (4) was added to Article 10:

In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2)(a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152,153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.

Parliament then amended the Sedition Act 1948 accordingly. The new restrictions also applied to Members of Parliament. Article 159, which governs Constitutional amendments, was amended to the effect that amendments to those provisions would also require the consent of the Conference of Rulers. These amendments were made as a result of the May 13 incident.

Tun Mohamed Suffian, L.P delivering the judgment of the Federal Court in the case of Mark Koding v Public Prosecutor (1982) 1 LNS 15, inter alia, said:

Before departing from this case, we would make two observations. First, Malaysians take pride in the fact that our country is a parliamentary democracy and we have

since independence held free general elections every five years as enjoined in the Constitution. Malaysians with short memories and people living in mature and homogeneous democracies may wonder why in a democracy discussion of any issue and in Parliament of all places, should be suppressed. Surely it might be said that it is better that grievances and problems about language, etc. should be openly debated, rather than that they be swept under the carpet and allowed to fester. But Malaysians who remember what happened during May 13, 1969, and subsequent days are sadly aware that racial feelings are only too easily stirred up by constant harping on sensitive issues like language; and it is to minimize racial explosions that the amendments were made.

I would like to stress a few points here. First, Part III referred to in the amendment is on citizenship. Secondly, Article 152 not only protects the National Language but also the use, teaching and learning of other languages. Thirdly, Article 153 does not only talk about the special position of the Malays and the natives of Sabah and Sarawak but also about the legitimate interests of other communities. So, do not think that the restriction is only in respect of the National Language, the special position of the Malays and the natives of Sabah and Sarawak and the Rulers. It also applies to citizenship, the use, teaching and learning of other languages as well as the legitimate interests of other communities. The restriction applies across the board, not one-sided as it is often made out to be.

Speaking for myself, as I have said at the beginning of this paper, I was caught in Kampung Baharu during the May 13 incident twelve days after I reported for work. I saw it, I experienced it and I say, it is better to shut the mouth of a few people or even to lock them up for a while than to risk people killing each other simply because they are of different race. Anyway, I understand that Sedition Act 1948 is one of the Acts that would be amended. That is welcomed but I hope the new found freedom will not be abused. Remember that right and responsibility are inseparable.

We should not compare the kind of freedom that we practice in Malaysia with that of in the United States or some Western countries. It is not our religion, culture or upbringing to slander the prophets, not only Muhammad (s.a.w.) but also Isa (a.s.) or anybody for that matter in the name of freedom of speech; peeping on people in their privacy, taking their photographs secretly and publishing them in the name of freedom of the press. Neither do I subscribe to uncontrolled owning on guns in the name of individual freedom, human right or whatever. On the day I was writing this line, newspapers reported another senseless murder of 26 people including 20 young children at an elementary school in Newtown, Connecticut, U.S. by a gunman.[x] If you talk about individual right to own guns, don't those innocent children have a right to live?

We have to balance individual liberty against public safety and interest. To me, public safety and interest must supersede individual liberty. There is no such thing as absolute freedom. There is no right without responsibility. Human beings do not live individually. Even wild animals follow the rules of the herd. Even ants, when in a group, walk in a line, stop and kiss one another as they pass, perhaps a kind of greetings.

A few words about preventive detention laws. Now that they have been

repealed, they are not an issue anymore. However, let us look back when we had them. When I was a Judge, to me, as they were valid laws, I gave effect to them. Whether they were desirable or not was a matter of policy for the Government to decide.

The Courts in Malaysia accepted them as valid laws. However, the Courts had been very strict in applying those laws. Courts had issued writs of habeas corpus on the slightest non-compliance with the provisions of the law or regulations thereof, e.g. where only one copy of the form for the detainee to make representation was given to the detainee when the regulation says that two copies should be given, even though had made the representation and his appeal to the Advisory Board had been heard and disposed of.[xi]

At the Constitutional Court Judges' Conference mentioned earlier, I posed this question: *Which is better, to have detailed provisions of the law and regulations governing such detentions or not to have any law at all but such detentions are done all the same?* I am referring to Guantanamo. In the first model (Malaysian model), there is a right to make representation to an independent tribunal which makes recommendations to the appropriate authority whether the detention should be extended or not. From the day a person is arrested, he may, through his counsel, challenge his arrest and subsequent detention in Court and ask for a writ of habeas corpus to be issued. And, as I have mentioned, the Courts have always been very strict in ensuring that every provision of the law or regulation has been complied with. Such applications are argued in open court, written judgments are handed down and there is a right of appeal right up to the highest Court in the country.

In the second model (US model), there is no bad law, so to speak. But, people are arrested in other countries and detained in yet another country without trial. What legal remedies do they have? To whom do they make representations? How are they going to argue that their arrests and detentions have not been in compliance with the law or regulation thereof when there is no law or regulation governing their arrests and detentions, in the first place? Which is better?

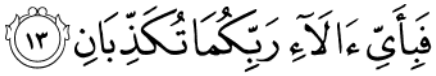
Now those laws have been repealed. We welcome it. At the same time, no group should take it as a sign of weakness and take advantage of the new situation. Otherwise they are only justifying the reintroduction of those laws, which can still be done, if necessary. For the love of Malaysia, let us not do anything that makes it necessary for or justify the reintroduction of those laws.

It has been proved in the last 55 years that Malaysia has enough to offer to everybody. What is needed is to improve the governance and accountability and eradicate corruption and poverty. But, everyone has to work hard and not merely expect handouts and subsidies. No group should be greedy and think only of its own interest. They should remember the tolerance and compromise that had been practiced in the past. And, politicians should think beyond five years!

Ladies and gentlemen,

Looking back, I am reminded of one Chapter in the Qur'an in which out of the total of 78 verses in it, one verse was repeated 31 times. I am referring to Chapter 55 (Surah

Al-Rahman) and the verse is:



"So which of the favours of your Lord would you deny?" – Sahih International.

Why does Allah repeat it so many times? Perhaps it shows how ungrateful human beings are and they have to be repeatedly reminded. Wallahu a'lam.

Thank you.

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[i] JC Fong: Constitutional Federalism in Malaysia p. 28
[ii] Ibid p. 27
[iii] Ibid.
[iv] Ibid.
[v] Article 182.
[vi] For a full discussion on this, please see "Resolving Constitutional Issues: is the Constitutional Court the Answer?" (11 August 2007). http://www.tunabdulhamid.my
[vii] See "Democracy In Practice In Malaysia: Some Observations' (7 April 2005). http://www.tunabdulhamid.my
[viii] See Loh Kooi Choon v Government of Malaysia (1977) 2 MLJ 187 @ pp 188-189 per Raja Azlan Shah FJ; Public Prosecutor v Kok Wah Kuan (2007) 6 AMR 269; (2008) 1 MLJ 1 @ p 17 per Abdul Hamid Mohamad PCA. Adegbenro v Akintola (1963) 3 WLR 63 P.C. per Vicount Redcliff
[ix] See Conflict of Civil and Shari'ah Law: Issues and Practical Solutions in Malaysia (21 September 2006); Sistem Kehakiman di Malaysia: Satu Wawasan (2 April 2001); Civil and Chariah Courts in Malaysia: Conflict of Jurisdiction (24 October 2000)
[x] New Straits Times 16 December 2012 page 1.
[xi] Aw Ngoh Leang v Inspector General of Police & 2 Ors (1993) 1 AMR 201