Foraging for Rights to Forge a Nation: Is It Time to Reconstitute the Malaysian Constitution?*

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Introduction

Fundamental human rights and citizen identity are two indispensable and related features of a constitution and a nation-building project. The critique of this paper is that developments in the judicial interpretation of constitutional rights in Malaysia and government policies with regard to ethnic relations have left gaps in the protection of the individual person and continue to jeopardise the realisation of national unity. After 50 years, it is imperative that we undertake a second look at the Malaysian Federal Constitution with the aim of achieving consistency with international human rights values.

Constitutionalism

War, famine and plague in the 16th and 17th centuries combined to accelerate the emergence of the modern "nation-state" concept. Religious intolerance was understood as a major cause of atrocities committed, thus necessitating the abridgement of religious influence by reason. Simultaneously, however, theological persuasion was used to justify the administration of states in accordance with "God's law". The necessity of controlling strife and conflict while assigning to the common individual the power to direct his own destiny gave rise to the theory of a centralised system of governance to maintain order. Further, security of the person and property was considered vital to existential longevity based on economic expediency.[1] Seeking "a situation in which a concentrated form of public political authority was exercised uniformly throughout a given territory, irrespective of the person who exercised it, or in whose name it was exercised" became part of the nascent model. A central government exercising sovereignty within its boundaries however gave rise to polarised state-individual relations.[2] The reach of the state whether as a

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1 Watson, Peter, *Ideas: A History from Fire to Freud*, London: Phoenix, 2006, pp 670–692. See also Tan, Kevin, Yeo, Tiong Min and Lee, Kiat Seng (eds), *Constitutional Law in Malaysia and Singapore*, Singapore: Malayan Law Journal Pte Ltd, 1991, pp 1–34.

2 Watson, ibid, at p 674.

monarchy, democracy, oligarchy or aristocracy and its correlation with the individual citizen was, and still is, an issue which continues to be debated. Out of this contest, the ferment of "constitutionalism" proliferated giving varying perspectives to the notion of constitutional rule.

Kraynak surveyed three commonly understood meanings of constitutionalism: a form of "higher law" to limit arbitrary rule by human governors, a "polity" or "regime" describing "the whole political and social order as it is shaped by the ruling group and its vision of the good life", and "institutional restraints on power that protect private rights – such as the separation of powers, electoral accountability, or systems of checks and balances".[3] Defined in instrumental terms, constitutionalism may consist of the "negative" curtailment of state power and/or the "positive" duty on the state to create virtuous citizens. Tocqueville's version however is less state-centric, relying heavily on the "social ethos" such as customs and culture to shape government:

> In modern democratic societies, by contrast, the ruling group does not shape the people, the state does not [mould] society, but "society governs itself for itself". This kind of authority differs from earlier kinds because it is not based on a distinction between a ruling part and a ruled part; the two parts are identical. No need exists for one part to [mould] and shape the other (as in a regime) because there is no challenge or resistance. The state does not [mould] society but is absorbed by society and becomes subordinate to society. This is a condition of sovereignty because there exists an unchallenged, indisputable, and all-absorbing power that dominates without ruling because there is no conceivable alternative to its power.[4]

An-Na'im explains the constitution as an agreed structure to manage a nation:

> In the formal sense of the term, the constitution of a state is the body of rules and regulations which create the various organs of government and determine their relationship to each other and the relationship between these organs and their private human subjects, whether in their individual or collective capacities.[5]

However, ritualistic adherence to structural formalities such as the holding of periodic elections is insufficient. The substantive content of a constitution is equally important. Chahil observed:

> At the same time, however, the main thrust of constitutionalism involves constitutional contents. Thus [the] question is whether the constitution truly delimits the manner in which the powers of government are exercised;

3 Kraynak, Robert P, "Tocqueville's Constitutionalism" (1987) 81(4) The American Political Science Rev 1175.

4 Ibid, at p 1179.

5 Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law*, New York: Syracuse University Press, 1996, p 70.

> whilst managing to enshrine the fundamental liberties of the governed. It is in the attainment of these aims that a constitution may be said to espouse constitutionalism.[6]

The foundational values which undergird a constitution must also be examined:

> A constitution properly so called must not only enforce effective limitations on the powers of government and impose positive obligations on it but must do so to achieve certain objectives. It has been said that a constitution is "that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community has agreed to be governed".[7]

The claims of social justice, individual liberties, political stability and economic growth, among others, are cited as core objects to be worked out by public reason although the "specific dictates of reason and objects of public good vary over time and place".[8] An overriding objective is to envisage a united nation in which every person has the equal protection of the law governed by rules under a constitution. Influential to this process is internal pressure from the citizens and external experiences of other societies. Consensual agreements on conduct between civilised nations culminating in international norms also play an important informative role. Left open is the possibility that constitutions may change either through legislative amendments or judicial elucidation for better or worse.

Regardless of how constitutionalism is to be defined, it should mark the advent of human rights protection and provide for the regulation of the relationship between a government and the people in the interest of building a plural yet integrated nation. From 1788 to 1948, it was reported that 82% of the constitutions adopted contained some provisions dealing with human rights[9] although the contemporary human rights movement born from the ashes of World War II only began to gain prominence after the adoption of the Universal Declaration of Human Rights ("UDHR") on December 10, 1948.[10] Usually viewed as part of the liberal tradition, "human rights" received

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6 Chahil, Sharon K, "A Study of the Relationship between Natural Rights Theory and the Doctrine of Constitutionalism Encapsulated within the Federal Constitution" [2005] 6 MLJ i at v.

7 Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law*, New York: Syracuse University Press, 1996, p 71.

8 Ibid.

9 Steiner, Henry J and Alston, Philip (eds), *International Human Rights in Context: Law, Politics, Morals*, 2nd edn, Oxford: Oxford University Press, 2000, p 988, citing van Maarseveen, H and van der Tang, G, *Written Constitutions: A Computerised Comparative Study*, NY: Oceana Publications, 1978, p 191.

10 UNGA Res 217A(III), UN Doc A/810 at 71.

validation and acceptance as a method of managing the polity fairly. The end of colonialism in many countries demanded the entrenchment of the right to self-determination and non-discrimination through the adoption of a democratic system of government. Democracy continued to have a strong foothold in the 1990s. Close linkages between democracy, rights and constitutionalism were drawn. Democratic governance replaced failed authoritarian or military states, which meant entrusting certain rights due to the individual previously not available. Fearing easy withdrawal of these rights, social contracts assured some degree of permanence of these rights. Constitutional liberalism defined the new world compact.[11] Governments became obligated to ensure that substantive principles of non-discrimination and basic liberties were promoted and protected. Violations of human rights became a global concern and repressive governments could no longer be insulated by the shield of territoriality or sovereignty. It is not surprising that rights instruments continue to regard democracy and human rights as two sides of the same coin.[12] Knotted features of the rule of law, independence of the judiciary, minority protection and the pluralist state are some of the key aspirations. Still, many countries fall short of the ideal despite enunciated constitutional coalescence of democracy and rights.[13] The schism between the state and individual is manifested when the former seeks insulation from criticism by appealing to a formalistic interpretation of its constitution, for example, by arguing that certain protective values or policy directives are to be narrowly defined, or are absent. Addressing these arguments may either lead one to directly oppose the state's narrow interpretation or advocate constitutional reform to include that which is lacking.

11 For a useful summary, see Steiner, Henry J and Alston, Philip (eds), *International Human Rights in Context: Law, Politics, Morals*, 2nd edn, Oxford: Oxford University Press, 2000, pp 988-999.

12 See arts 21 and 29(2), UDHR; arts 1 and 25, International Covenant on Civil and Political Rights (adopted December 16, 1966, entered into force on March 23, 1976) UNGA Res 2200A(XXI), 21 UNGAOR Supp (No 16) at 52, UN Doc A/6316, 999 UNTS 171 ("ICCPR"); Preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended by Protocol No 11 CETS No 155) (Convention opened for signature on November 4, 1950, entered into force on September 3, 1953; Protocol opened for signature May 11, 1994, entered into force November 1, 1998) CETS No 5 ("ECHR"); art 3, Protocol No 1 to the ECHR (opened for signature on March 20, 1952, entered into force on May 18, 1954) CETS No 9; Preamble and art 23, American Convention on Human Rights (adopted November 22, 1969, entered into force July 18, 1978) OAS Treaty Series No 36 ("ACHR"); Preamble and arts 13, 19, 20 and 21, African Charter on Human and Peoples' Rights (adopted June 27, 1981, entered into force October 21, 1986) OAU Doc CAB/LEG/67/3/Rev 5 ("ACHPR"); and Preamble and arts 1 and 24, Arab Charter on Human Rights (adopted May 23, 2004) reproduced in (2006) 24 Bost U I'nal LJ 147 ("ArCHR").

13 See Fareed Zakaria, "The Rise of Illiberal Democracy", Foreign Affairs (November/December 1997): *http://www.foreignaffairs.org/19971101faessay3809/fareed-zakaria/the-rise-of-illiberal-democracy.html* (accessed October 25, 2007); and Plattner, Marc F, "Liberalism and Democracy: Can't have One without the Other", Foreign Affairs (March/April 1998): *http://www.foreignaffairs.org/19980301faresponse1382/marc-f-plattner/liberalism-and-democracy-can-t-have-one-without-the-other.html* (accessed October 25, 2007).

What is the point being made here? The nature and scope of constitutions are always open to debate, and the danger of romanticising the original intent of the document must be emphasised. Constitutions were influenced by circumstances existing at the time of their birth. Conditions precipitating the inaugural contract may have since ceased to exist and the initial environment favouring the societal compact may have changed. Reference to a constitution's historicity to guide the discourse on its future is no doubt valuable, but to religiously confine one's perspective thereto would be to ignore important developments in human civilisation which may require substantial reform to the constitution. Fundamental human rights and citizenship or citizen identity are two indispensable and related features of a constitution and a nation-building project. Guaranteeing basic rights, in particular the right to non-discrimination, gives the citizen an equal share in the nation and a sentiment of ownership.

After 50 years, are changes to the Malaysian Federal Constitution necessary, specifically in relation to the issues of human rights and citizen identity, and if so, in which direction? In this paper, a case for constitutional reform to achieve consistency with international human rights standards is made. The next sections are critiques on two disconcerting developments in Malaysian constitutionalism to support the case: first, the judicial interpretation of fundamental liberties, and second, government policies that impact ethnic relations.

Human rights under the Malaysian Federal Constitution ("Constitution")

Like many other countries which broke free from the yoke of colonialism, the formation of Malaysia was not achieved in a simple, linear fashion. It remains a fascinating study in power politics and diplomacy, particularly in relation to the prudent management of multi-pronged interests based on ethnicity and religion.[14] The duty to address these interests, before independence of the Federation of Malaya could be declared in 1957,[15] fell to the five-man Federation of Malaya Constitutional Commission ("Commission")[16] tasked

14 See Mohamed Noordin Sopiee, *From Malayan Union to Singapore Separation: Political Unification in the Malaysia Region 1945–65*, Kuala Lumpur: Penerbit Universiti Malaya Sdn Bhd, 1974; and Harding, Andrew and Lee, HP (eds), *Constitutional Landmarks in Malaysia: The First 50 Years 1957–2007*, Selangor: Malayan Law Journal Sdn Bhd, 2007.

15 The Federation of Malaya achieved independence in 1957. Its name was changed to Malaysia on September 16, 1963 following the admission of Singapore, North Borneo (Sabah) and Sarawak. Singapore became an independent state on August 9, 1965. Malaysia joined the United Nations (UN) on September 17, 1957: *http://www.un.org/members/growth.shtml* (accessed October 25, 2007).

16 The Commission comprised Lord Reid and Sir Ivor Jennings (both nominees of the United Kingdom Government), Sir William McKell (nominee of the Australian Government), B Malik (nominee of the Government of India) and Justice Abdul Hamid (nominee of the Government of Pakistan).

to "make recommendations for a federal form of constitution for the whole country as a single, self-governing unit within the Commonwealth based on Parliamentary democracy with a bicameral legislature."[17]

The Commission proposed a draft chapter[18] on fundamental liberties which appeared to be more generous than that contained in the present Constitution.[19] Justifying its approach, the Commission wrote:

> A federal constitution defines and guarantees the rights of the Federation and the States: it is usual and in our opinion right that it should also define and guarantee certain fundamental individual rights which are generally regarded as essential conditions for a free and democratic way of life. The rights which we recommend should be defined and guaranteed are all firmly established now throughout Malaya and it may seem unnecessary to give them special protection in the Constitution. But we have found in certain quarters vague apprehensions about the future. We believe such apprehensions to be unfounded, but there can be no objection to guaranteeing these rights subject to limited exceptions in conditions of emergency and we recommend that this should be done.[20]

A package of rights as "grundnorm" secured within a constitutional framework for the durability and development of the human person was contemplated. Sadly however, the Commission's justification for this approach was far from clear: fundamental rights were, in its view, already secure but had to be entrenched to ensure they would continue, not because the entrenchment of such rights was a constitutional essentiality.[21] Nevertheless, some positive elements may be culled from the Commission's proposals, though this should be treated with controlled accolade.

In the Constitution, provisions made for basic rights which are indispensable to life echoed the UDHR.[22] Signs of liberalism such as focus on the individual were evident. Rights were to be enacted as part of the supreme law of the

17 Report of the Federation of Malaya Constitutional Commission ("Reid Commission Report"), London, 1957, 6 [3].

18 "Draft Constitution of the Federation of Malaya", Reid Commission Report, Appendix II.

19 Part II of the Constitution titled "Fundamental Liberties", lists certain core elements devoted to the protection of the human person in Malaysia: art 5 "Liberty of the person"; art 6 "Slavery and forced labour prohibited"; art 7 "Protection against retrospective criminal laws and repeated trials"; art 8 "Equality"; art 9 "Prohibition of banishment and freedom of movement"; art 10 "Freedom of speech, assembly and association"; art 11 "Freedom of religion"; art 12 "Rights in respect of education"; and art 13 "Rights to property".

20 Reid Commission Report, 69-70 [161].

21 See also Sheridan, LA, "Constitutional Problems of Malaysia" (1964) 13 ICLQ 1349.

22 The Preamble to the UDHR recognises "the inherent dignity and … the equal and inalienable rights of all members of the human family" as "the foundation of freedom, justice and peace in the world". Indispensable to promoting "social progress and better standards of life in larger freedom" is the vital component of respect for fundamental rights.

land[23] and thereby protected as an in-built constituent of the rule of law. Again, this sentiment is expressed in the UDHR.[24] As early as 1957, the conceptual value of human rights was recognised although the listed rights in the Constitution were not as extensive as those in the UDHR. Then in its infancy, the rights movement did not have substantial impact on the formation of the Constitution but the Commission's approach drew a striking parallel with a philosophy based on rights. Addressing the role of rights in an emergency, the Commission commented:

> Neither the existence of fundamental rights nor the division of powers between the Federation and the States ought to be permitted to imperil the safety of the State or the preservation of a democratic way of life. The Federation must have adequate power in the last resort to protect these essential national interests. But in our opinion infringement of fundamental rights or of State rights is only justified to such an extent as may be necessary to meet any particular danger which threatens the nation. We therefore recommend that the Constitution should authorise the use of emergency powers by the Federation but that the occasions on which, and so far as possible the extent to which, such powers can be used should be limited and defined.[25]

The notable feature of this observation by the Commission was the allusion to the overarching maintenance of a "democratic way of life". Essential to this was the strict curtailment of emergency powers and the suspension of rights only if necessary for a limited period of time. Similar exhortations are found in many human rights documents. Article 4(1), International Covenant on Civil and Political Rights ("ICCPR"), for example, states that:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[26]

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23 See Constitution, art 4(1).

24 The Preamble to the UDHR states that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law".

25 Reid Commission Report, 74 [172].

26 See also similarly worded provisions in ECHR, art 15(1); ACHR, art 27(1); and ArCHR, art 4(b). It is interesting to note that the ACHPR does not permit the derogation of rights in circumstances of an emergency: *Constitutional Rights Project and Others v Nigeria* [2000] AHRLR 227 (ACHPR 1999).

Growing collections of rights treaties and jurisprudence today bear testament to the Commission's approach in 1957 albeit in a limited fashion.[27] Invariably, rights had to be dispensed to the people as private sanctuaries within the democratic tent of a country having as its common goal a peaceful and united future. A freed nation without individual liberties is an illusory ideal. Logically, the Commission was keen to ensure that Malaya's ascent to self-governance would be received by the international community as a credible one. Despite some optimism, one would be hard-pressed to find immediate reasons, given by the Commission, for enshrining certain rights in Part II of the Constitution save for a descriptive paragraph[28] which is of little assistance. Why only certain rights and not others? How were the limitations crafted? What are the guiding principles in the event of conflict? Use of interpretative techniques requires some sort of arrowed preface to express the will of the people; the mere declaration of a democratic way of life is insufficient. To be fair, it is of course easy to deliberate on the approach of the Commission from a present day perspective inevitably influenced by substantial developments in the field of international human rights standards and greater understanding of the same. However, it could not be so simple when the Commission was in the throes of drafting the document set to launch a free and independent nation.

Proceeding with caution therefore, the protection of "fundamental liberties" given in Part II of the Constitution has nevertheless seen an obtuse watering-down of the same since independence. Three broad trends have emerged. Primarily, judges have resorted to "literalism" in the interpretation of constitutional liberties. This includes a slavish emphasis on compliance with technicalities and legalism to the exclusion of substantial, content-based construal of rights. Focus on the affected individual is lacking. The second trend which surfaces from the first is the adherence to local laws as forms of broad limitations to curtail rights in contradistinction to facilitating their positive assertion. Finally, despite Malaysia's express avowal of human rights standards in the global sphere, little reference has been made to the vast and growing body of international law to interpret rights within the context of the Constitution.

A few examples will suffice. Article 5(1) of the Constitution prohibits the deprivation of life or personal liberty, save in accordance with law. The definitions of "life" and "personal liberty" have been narrowly defined to

27 Harding was less kind. The Commission's proposals on fundamental liberties were described as feeble, spineless, weak, negative and paving the way for the Alliance Government to "impose important and far-reaching restrictions on fundamental rights, both in amending the draft Constitution, and by frequent, almost routine, legislative amendments in subsequent years": Harding, Andrew, *Law, Government and the Constitution in Malaysia*, Kuala Lumpur: Malayan Law Journal Sdn Bhd, 1996, 36.

28 Reid Commission Report, 70 [162].

exclude "all those facets that are an integral part of life itself and those matters which go to form the quality of life".[29] Hence, the protection in art 5(1) has been limited to circumstances in which the complainant is physically restrained or detained. It appears that there exists no right to earn a livelihood[30] or to travel overseas.[31] The subjugation of art 5(1) to "law" compounds the problem. In 1964, Sheridan cautioned that "there is little precedent for interpreting a constitution in the light of ordinary laws".[32] His fears have been vindicated. Comparatively recent legislation ousting judicial review challenges has been upheld in the case of *Sugumar*[33] despite those laws annulling the protection under art 5(1).

Similarly, by a terse reading of art 8 of the Constitution, the Federal Court in another decision held that access to justice "cannot amount to a guaranteed fundamental right" and the privative clause in question was permitted.[34] Art 8(1) provides that all persons are equal before the law and entitled to the equal protection of the law whilst art 8(2) proscribes discrimination on several grounds such as religion, race and gender in certain circumstances. In a recent case however, a flight stewardess was dismissed after she became pregnant, and she challenged the dismissal on the ground of gender discrimination.[35] The Federal Court found that there was no discrimination after applying the narrow and archaic "formal equality model" whereas the "substantive equality model"[36] would have been more appropriate in the light of international

29 *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 AMR 2817 at 2859; [2002] 3 MLJ 72 at 101, FC. See also Das, Cyrus, Dato' Dr, "'Life' under Article 5: What should it be?" (2002) XXXI No 4 INSAF 68.

30 Cf *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 AMR 1617; [1996] 1 MLJ 261, CA.

31 See *Government of Malaysia & Ors v Loh Wai Kong* [1979] 2 MLJ 33, FC. Presumably, the maturing concept of "peoples' rights" in international human rights discourse such as the right to peace, environment and development are similarly shut out: see arts 19-24 ACHPR; Alston, Philip, "Peoples' Rights: Their Rise and Fall" in Alston, Philip (ed), *Peoples' Rights*, Oxford: Oxford University Press, 2001; and Murray, Rachel and Wheatley, Steven, "Group and the African Charter on Human and Peoples' Rights" (2003) 25 Hum Rts Q 213.

32 Sheridan, LA, "Constitutional Problems of Malaysia" (1964) 13 ICLQ 1355.

33 *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 AMR 2817; [2002] 3 MLJ 72, FC. Contrast this with the human rights position in ICCPR, art 2(3), which demands that any person whose rights or freedoms are violated shall have an effective remedy to be determined by competent judicial authorities. Ouster clauses are strictly impermissible even if it is part of domestic legislation. See *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* [2000] AHRLR 186 (ACHPR 1995) and *Civil Liberties Organisation v Nigeria* [2000] AHRLR 243 (ACHPR 1999).

34 *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* [2004] 2 AMR 317 at 333; [2004] 2 MLJ 257 at 267, FC. For a critique, see Nik Nazmi Nik Ahmad, Fahri Azzat, Amer Hamzah and Edmund Bon, "The God-Provision" (March/April 2005) Infoline 44.

35 *Beatrice Fernandez v Sistem Penerbangan Malaysia & Anor* [2005] 4 AMR 1; [2005] 3 MLJ 681, FC.

36 For a discussion on the issue, see Zarizana Abdul Aziz, "Developing the Doctrine of Equality—Sameness and Differences", paper delivered at the 13th Malaysian Law Conference, Kuala Lumpur (November 16–18, 2005): *http://www.malaysianbar.org.my/content/view/2060/27/* (accessed October 25, 2007).

human rights standards. It further held that gender discrimination may not be impugned under art 8 unless it is committed by the Executive or its agencies. Violations by private individuals are immune from constitutional attack. This decision incurred the reproach by the international human rights community.[37]

Free speech has not faired any better. The law of sedition continues to be applied broadly[38] and severe restrictions on media publications are enforced.[39] Freedom of assembly is controlled by the issuance of permits by the police,[40] and freedom of association is illusory particularly in the formation of political parties.[41] Admittedly, the Constitution itself restricts the justiciability of any fetter to freedom of expression, assembly and association on the ground that the restrictions are not deemed necessary or expedient.[42] Laws which inherently nullify or impair liberties under the guise of constitutional restrictions are thus valid. Human rights' strict analysis of restrictions based on the two-pronged approach of legality and necessity in a democratic society[43] does not feature. This sidelining of human rights precepts is evident in relation to children's rights where Malaysia's accession to the Convention of the Rights

37 In 1995 and subject to several reservations, Malaysia acceded to the Convention on the Elimination of All Forms of Discrimination against Women (adopted December 18, 1979, entered into force September 3, 1981) UNGA Res 34/180, 34 UNGAOR Supp (No 46) at 193, UN Doc A/34/46 ("CEDAW"). Under art 2(e), Malaysia is to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise (i.e. non-state actors). During Malaysia's reporting to the UN on CEDAW, the implications of the *Beatrice* judgment were discussed. The Committee disagreed with the decision, reminding the government that CEDAW seeks to eliminate direct and indirect discrimination in both the private and public spheres of life. Among the Committee's recommendations, Malaysia is to clearly define discrimination against women in the Constitution or other legislation, and to implement a comprehensive law reflecting substantive equality of women with men: see UN Committee on the Elimination of Discrimination against Women, "Concluding Comments of the Committee on the Elimination of Discrimination against Women: Malaysia" (May 31, 2006) UN Doc CEDAW/C/MYS/CO/2.

38 See the Sedition Act 1948; *Public Prosecutor v Ooi Kee Saik & Ors* [1971] 2 MLJ 108, HC; *Mark Koding v Public Prosecutor* [1982] 2 MLJ 120, FC; and *Lim Guan Eng v Public Prosecutor* [2000] 2 AMR 1619; [2000] 2 MLJ 577, FC.

39 See the Printing Presses and Publications Act 1984; and *Public Prosecutor v Pung Chen Choon* [1994] 1 AMR 689; [1994] 1 MLJ 566, SC.

40 See the Police Act 1967; *Siva Segara v Public Prosecutor* [1984] 2 MLJ 212, FC; *Datuk Yong Teck Lee v Public Prosecutor & Anor* [1992] 1 AMR 340; [1993] 1 MLJ 295, HC; and *Wan Mohd Rafain Wan Ismail v Public Prosecutor* [2005] 7 MLJ 652, HC.

41 *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 5 AMR 702; [2006] 6 MLJ 213, CA.

42 See art 4(2) of the Constitution.

43 Whether state action or a certain law satisfies the test of necessity would require the state to demonstrate that the aim of the restriction imposed is legitimate (i.e. that it meets a pressing social need such as national security, public order or morality) and the means pursued are proportional to the aim: *Case of Handyside v The United Kingdom* (App No 5493/72) judgment of December 7, 1976, Series A No 24; and *Case of the Sunday Times v The United Kingdom* (App No 6538/74) judgment of April 26, 1979, Series A No 30.

of the Child[44] in 1995 and the resulting Child Act 2001 has had little impact. The detention of children is treated on a similar footing as the detention of adults, in breach of international norms.[45] Further, no reference was made to authoritative statements by the UN Committee on the Rights of the Child expressing concern about "the deprivation of liberty at the pleasure of the Yang di-Pertuan Agong or the ruler or the Yang di-Pertua Negeri which results in the undetermined length of deprivation causing problems in terms of the development of the child"[46] when the Federal Court held that s 97(2) of the Child Act 2001 was valid.[47] Religious rights are yet another thorny issue. Article 11(1) of the Constitution which appears to provide for absolute freedom of choice to profess and practise a religion[48] has been interpreted to be inapplicable to those of Malay descent.[49] Once again, a reading of the decisions will bear out a narrow approach taken by the judges, not in accord with international human rights law.

It has often been said that rights under the Constitution must be read broadly as the Constitution is a "living document".[50] The Constitution, it is submitted, must admit the realities of the passage of time and embody the idea of law within it as including rules of natural justice and equity consonant with internationally accepted customs and usages of civilised nations. But has this been so in Malaysia? The jurisprudence emanating from our judiciary has narrowed the scope of the rights chapter. By adopting a literalist approach, the judges have sought refuge in the technicalities of the law to defeat rather than protect the essence of rights.

Lest it be forgotten, the Commission felt that strong judicial supervision was required to uphold constitutional rights: "(t)he guarantee afforded by the Constitution is the supremacy of the law and the power and duty of the courts to enforce these rights and to annul any attempt to subvert any of them

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44 Adopted November 20, 1989, entered into force September 2, 1990 by UNGA Res 44/25, Annex, 44 UNGAOR Supp (No 49) at 167, UN Doc A/44/49 ("CRC").

45 See *Public Prosecutor v N (A Child)* [2004] 2 AMR 578; [2004] 2 MLJ 299, CA.

46 UN Committee on the Rights of the Child, "Concluding Observations: Malaysia" (February 2, 2007) UN Doc CRC/C/MYS/CO/1 at 23 [102]. See also UN Committee on the Rights of the Child, "General Comment No 10: Children's Rights in Juvenile Justice" (April 25, 2007) UN Doc CRC/C/GC/10.

47 See *Pendakwa Raya v Kok Wah Kuan* [2007] 6 AMR 269, FC.

48 Groves lists this freedom as absolute: Groves, Harry E, "Fundamental Liberties in the Constitution of the Federation of Malaysia" in Tun Mohamed Suffian, Lee, HP and Trindade, FA (eds), *The Constitution of Malaysia. Its Development: 1957–1977*, Selangor: Oxford University Press, 1978.

49 See *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Anor* [2004] 2 MLJ 119, HC; and *Daud bin Mamat & Ors v Majlis Agama Islam & Anor* [2001] 2 AMR 1953; [2001] 2 MLJ 390, HC.

50 See *Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, FC; *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64, PC; and *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 AMR 1617; [1996] 1 MLJ 261, CA.

whether by legislative or administrative action or otherwise."[51] Noteworthy in the Commission's draft chapter[52] was the express inclusion of powers by the apex court to review laws, and acts or decisions of public authorities on substantive grounds, as opposed to merely procedural ones.[53] This draft provision clearly delineated the powers of the Parliament, executive and judiciary. The jurisdiction of the judicial arm would remain intact and could not be ousted, thus protecting the "basic structure" of the Constitution.[54] Unfortunately, the final product did not reflect the recommended draft.[55] On hindsight, this is to be regretted. Amendments to the Constitution in 1988 removing the judicial power of the courts, the dismissal of the then Lord President, Tun Salleh Abas and the express separation of jurisdiction in matters falling within the purview of the Syariah courts hastened a raft of legislative ousters and roll-back of judicial jurisdiction, lending body-blows to the protection of human rights in Malaysia.[56] Of particular concern is the apparent deference by the judiciary to the executive and Parliament. Judicial

51 Reid Commission Report, 70 [161].

52 Reid Commission Report, Appendix II.

53 See Reid Commission Report, Appendix II, art 4, which is described in the marginal note as "Enforcement of the Rule of Law".

54 Note however that in *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70, the Federal Court was equivocal in accepting that the basic structure of the Constitution was constituted of the following five features which could not be destroyed by legislative intrusion: supremacy of the Constitution, constitutional monarchy, Islam as the religion of the Federation and that other religions may be practised in harmony, separation of powers between the legislative, executive and judicial institutions, and the federal character of the Constitution. See also *Mark Koding v Public Prosecutor* [1982] 2 MLJ 120, FC; and Chahil, Sharon K, "A Critical Evaluation of the Constitutional Protection of Fundamental Liberties: The Basic Structure Doctrine and Constitutional Amendment in Malaysia" [2002] 3 MLJ xii.

55 For a summary of the debate on some of the Commission's proposals, see Harding, Andrew, *Law, Government and the Constitution in Malaysia*, Kuala Lumpur: Malayan Law Journal Sdn Bhd, 1996, pp 21-45.

56 For several critiques, see Harding, Andrew, *Law, Government and the Constitution in Malaysia*, Kuala Lumpur: Malayan Law Journal Sdn Bhd, 1996, pp 129-152; Tun Salleh Abas, *The Role of the Independent Judiciary*, Kuala Lumpur: Promarketing Publications, 1989; Harding, AJ, "The 1988 Constitutional Crisis in Malaysia" (1990) 39 ICLQ 57; Wu, Min Aun, "Judiciary at the Crossroads" and Tan, Poh-Ling, "Paying the Price for Religious Freedom—A Non-Muslim Perspective" both in Wu, Min Aun (ed), *Public Law in Contemporary Malaysia*, Selangor: Addison Wesley Longman Malaysia Sdn Bhd, 1999; Salbiah Ahmad, "The Freedom of Religion Impasse and Powers of the High Court" (2003) XXXII No 3 INSAF 60; Ramdas Tikamdas, "National Security and Constitutional Rights: The Internal Security Act 1960" (2003) XXXII No 1 INSAF 75; Tan, Roger Kor Mee, "The Role of Public Interest Litigation in Promoting Good Governance in Malaysia and Singapore" (2004) XXXIII No 1 INSAF 58; Bon, Edmund, "Why are We so Complicated" [2005] LR 58; Abdul Aziz Bari, "Freedom of Religion in Malaysia: It is not Complicated" [2005] LR 263; Das, Cyrus, "Trends in Constitutional Litigation: Malaysia and India—No Longer a Shared Experience" [2005] LR 270; Sinnadurai, Visu, "The 1988 Judiciary Crisis and its Aftermath" and Thio, Li-ann, "Jurisdictional Imbroglio: Civil and Religious Court, Turf Wars and Article 121(1A) of the Federal Constitution" both in Harding, Andrew and Lee, HP (eds), *Constitutional Landmarks in Malaysia: The First 50 Years 1957–2007*, Selangor: Malayan Law Journal Sdn Bhd, 2007.

oversight of cases is absent unless expressly provided by legislation.[57] Inherent jurisdiction is a relic. On October 23, 2007, the Federal Court continued down this already precarious path. With uncompromising literalism, the Court held that owing to the peculiar features of the Constitution, the doctrine of separation of powers is not an essential part of the Constitution:

> In other words we have our own model. Our Constitution does have the features of the separation of powers and at the same time, it contains features which do not strictly comply with the doctrine. To what extent the doctrine applies depends on the provisions of the Constitution. A provision of the Constitution cannot be struck out on the ground that it contravenes the doctrine. Similarly no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, even though it may be inconsistent with the doctrine. The doctrine is not a provision of the Malaysian Constitution even though no doubt, it had influenced the framers of the Malaysian Constitution, just like democracy.[58]

Dismantling fundamental liberties of its meaning through judicial interpretation is one issue, but seemingly, the judiciary appears quite content with its declining status as a third pillar of the nation. It is nothing to be pleased about that the Constitution is at grave peril through a combination of instrumental weaknesses in the protection of fundamental liberties and the toleration of institutional genocide of the judiciary. An unjustified swing away from the Commission's proposals has occurred. Against this backdrop, it would be useful to particularly consider the state of the nation in the context of ethnic relations with a focus on the principles of non-discrimination and equal protection of the law.

An "ethnicised" Constitution?

Questions of citizenship and identity are important issues to be addressed within a notional constitution which seeks to draw together people with disparate goals and needs. For Malaysia's ethnically and religiously diverse society, this issue of integration is far from settled. Discussions on race and religion continue to be sensitive topics. The perennial fear is that any extended

57 See *Latifah bt Mat Zin v Rosmawati bt Sharibun & Anor* [2007] 4 AMR 621, FC. Interestingly, the battle of jurisdictions between the civil and Syariah courts in cases such as *Kaliammal a/p Sinnasamy v Pengarah Jabatan Agama Islam Wilayah Persekutuan (JAWI) & Lain-lain* [2006] 1 AMR 498; [2006] 1 MLJ 685, HC; *Lim Yoke Khoon v Pendaftar Muallaf, Majlis Agama Islam Selangor & Ors* [2007] 1 AMR 66; [2007] 1 MLJ 283, HC; *Saravanan a/l Thangathoray v Subashini a/p Rajasingam* [2007] 2 AMR 540; [2007] 2 MLJ 705, CA; and *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Yg Lain* [2007] 3 AMR 693; [2007] 3 CLJ 557, FC have given rise to two other possibilities according to Justice Abdul Hamid Mohamad's judgment in *Latifah*. First, neither court may be seised of jurisdiction, and second, either court may have jurisdiction over certain fragments of the case (i.e. mixed jurisdiction). The law is in disarray, and the Federal Court in *Latifah* has refused to conclusively pronounce on the matter, calling on Parliament to intervene instead. Further litigation on these issues is expected.

58 *Pendakwa Raya v Kok Wah Kuan* [2007] 6 AMR 269 at 279-280, FC.

debate on the topic will plunge the country headlong into the kind of communal riots observed on May 13, 1969.[59] Yet, avoiding honest and frank discourse on inter-ethnic relations has not helped the goal of achieving integration. Signs of distrust have emerged.[60] A recent opinion poll found that "[n]early half of Malaysians view themselves as members of their ethnic groups first" as opposed to being identified as Malaysians first, and "negative racial stereotypes remain deep seated and ingrained amongst a majority of Malaysians".[61] Further, a study in 2002 of 6,305 students in nine higher education public institutions found that the Chinese and Indian respondents were concerned about "ethnic risks" based on their understanding and experiences of the political system, governance and public policy in Malaysia. The Chinese respondents were especially negative towards the nation's social contract and questioned national policies as well as their own sense of loyalty to the country. At the same time, the Malay and Bumiputra[62] respondents were concerned about their economic parity.[63] Another survey revealed disconcerting polarisation in the interaction between university students of different ethnic groups. The survey also found that in conducting their daily activities on campus, those of the same ethnicity had closer ties with each other.[64] In addition, political differences in attitudes towards democracy have been permeated by strong ethnic differences. A 1994 study surmised that "[e]thnic differences continued to be associated with political differences" and "there were important differences among classes, especially among the Malays and Indians".[65]

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59 See Fauwaz Abdul Aziz, "Minister: Badruddin's May 13 Warning a 'History Lesson'", Malaysiakini.com (October 4, 2004): *http://www.malaysiakini.com/news/30519*, (accessed October 25, 2007). Cf Kua, Kia Soong, *May 13: Declassified Documents on the Malaysian Riots of 1969*, Selangor: SUARAM Komunikasi, 2007, argues that the incident was a coup d'etat to depose Tunku Abdul Rahman orchestrated by members of his party.

60 See Baradan Kuppusamy, "Racism Rife in Malaysia's Melting Pot—Survey", Inter Press Service News Agency (March 22, 2006): *http://www.ipsnews.net/print.asp?idnews=32593* (accessed October 25, 2007); and Baradan Kuppusamy, "Malaysia: Racial Melting Pot on the Boil", Inter Press Service News Agency (March 21, 2007): *http://www.ipsnews.net/print.asp?idnews=37032* (accessed October 25, 2007).

61 Merdeka Centre for Opinion Research, "Public Opinion Poll on Ethnic Relations" (February 21-26 and March 2-4, 2006), *http://www.fnfmalaysia.org/opinion_polls/docs/Ethnic%20Relation%20Perceptions%20Poll%20March%202006.pdf* (accessed October 25, 2007).

62 For a discussion on the term "Bumiputra", see Siddique, Sharon and Suryadinata, Leo, "Bumiputra and Pribumi: Economic Nationalism (Indiginism) in Malaysia and Indonesia" (1981–82) 54 Pacific Affairs 662.

63 Mansor Mohd Noor, "Perpaduan Masyarakat Pelbagai Etnik dan Kesejahteraan Sosial: Kajian Pengaruh Etnik dan Aliran Sekolah Ke Atas Pelajar Institusi Pengajian Tinggi Awam" in Roziah Omar, Sivamurugan Pandian, Abd Rahim Ibrahim, Chua, Soo Yean and Azrina Husin (eds), *Prosiding Konvensyen Kebangsaan Agenda Pembangunan Sosial Ke Arah Pembentukan Masyarakat Sejahtera dan Saksama*, Kuala Lumpur: Institut Sosial Malaysia, 2006.

64 Zaharah Hassan, Bahaman Abu Samah and Abu Daud Silong, "Persepsi Pelajar Universiti Terhadap Perpaduan Negara" in Zaharah Hassan and Abu Daud Silong (eds), *Readings on Ethnic Relations in a Multicultural Society: Perspectives and Research on National Unity and Integration*, Selangor: COLLA Research Group, 2006.

65 Welsh, Bridget, "Attitudes toward Democracy in Malaysia: Challenges to the Regime?" (1996) 36 Asian Survey 882, 903.

It has been said that deeply-held ethnic identification is a barrier towards an integrated society,[66] and there have been fresh concerns that the government's socio-economic policies have created an inter-ethnic cleavage.[67] Contributing to this has been the increasing role of Islam in the public administration of the country through government-sponsored programmes and policies.[68] The current Prime Minister's "Islam Hadhari" concept[69] is a continuation of the race to "out-Islam" the main Malay opposition party, "Parti Islam Se-Malaysia".[70] Given that Malay ethnicity and Islam are inextricably linked under the Constitution,[71] some nervousness has been felt by non-Muslims that their liberties will be curtailed in the future.[72]

How have these elements of friction come about? It is noted that the formation of our independent nation rested on an "informal bargain"; the Malays would control the political administration of the country while the non-Malays would be allowed citizenship subject to certain economic safeguards to the Malays. The Malay rulers would continue to wield limited power in certain administrative areas and there would be liberal assistance given to the Malays to encourage greater participation in the civil service and in economic pursuits

66 See Rabushka, Alvin, "Integration in Urban Malaya: Ethnic Attitudes among Malays and Chinese" 6 (1971) 6 Journal of Asian and African Stud 91.

67 See Welsh, Bridget, "Malaysia at 50: Midlife Crisis Ahead?" (April 2007) Current History 173.

68 See for example, Mauzy, Diane K and Milne, RS, "The Mahathir Administration in Malaysia: Discipline through Islam" (1983-84) 56 Pacific Affairs 617.

69 See "Islam Hadhari", Office of the Prime Minister of Malaysia (2004): *http://www.pmo.gov.my/website/webdb.nsf/is_frameset?openframeset* (accessed October 25, 2007) and Martinez, Patricia A, "'Islam Hadhari'—A Model for Islamic Countries?" in Schmidt, Axel (ed), *Dialogue + Cooperation Occasional Papers: Southeast Asia Europe*, Singapore: Friedrich-Ebert-Stiftung, 2006.

70 See Weiss, Meredith L, "The 1999 Malaysian General Elections: Issues, Insults and Irregularities" (2000) 40 Asian Survey 413; Martinez, Patricia "Malaysia in 2000: A Year in Contradictions" (2001) 41 Asian Survey 189; and Liow, Joseph Chinyong, "Political Islam in Malaysia: Problematising Discourse and Practice in the UMNO–PAS 'Islamisation Race'" (2004) 42 Commonwealth & Comparative Politics 184.

71 Article 160(2) of the Constitution defines a "Malay" as one who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay customs and (a) was before August 31, 1957 born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or (b) is the issue of such a person.

72 See Lee, Raymond LM, "Patterns of Religious Tension in Malaysia" (1988) 28 Asian Survey 400; Maznah Mohamad, "Is Malaysian an Islamic State?", Guardian Unlimited (September 21, 2006): *http://commentisfree.guardian.co.uk/maznah_mohamad/2006/09/post_406.html* (accessed October 25, 2007); Derichs, Claudia, "Malaysia in 2006: An Old Tiger Roars" (2007) 47 Asian Survey 148; Fernandez, Clarence, "Islamic State Label sparks Controversy in Malaysia", Reuters (July 25, 2007): *http://www.reuters.com/article/latestCrisis/idUSKLR130863* (accessed October 25, 2007); and Yoges Palaniappan, "PM: Yes, We ARE an Islamic State", Malaysiakini.com (August 27, 2007): *http://www.malaysiakini.com/news/71676* (accessed October 25, 2007).

through the allocation of licences and scholarships.[73] Today, arts 8 and 153 of the Constitution reflect the political compromise. Hence, the non-discrimination principle housed in art 8 must be read together with art 153 which allows exceptions for the protection and advancement of the Malays.

Whether the bargain has ensured national unity is another question. Absence of violent communal conflict does not necessarily mean the nation is integrated. The complexity of the bargain becomes evident when one considers the dilemma faced by the Commission in drafting proposals for the Constitution. It received what appeared to be two opposing terms of reference: to provide "a common nationality for the whole of the Federation" and to safeguard "the special position of the Malays and the legitimate interests of other communities".[74] There was a logical contradiction:

> Our terms of reference require that provision should be made in the Constitution for the "safeguarding of the special position of the Malays and the legitimate interests of other Communities". In addition, we are asked to provide for a common nationality for the whole of the Federation and to ensure that the Constitution shall guarantee a democratic form of government. In considering these requirements it seemed to us that a common nationality was the basis upon which a unified Malayan nation was to be created and that under a democratic form of government it was inherent that all the citizens of Malaya, irrespective of race, creed or culture, should enjoy certain fundamental rights including equality before the law. We found it difficult, therefore, to reconcile the terms of reference if the protection of the special position of the Malays signified the granting of special privileges, permanently, to one community only and not to the others.[75]

Clarity prevailed under the understanding that affirmative action should not continue indefinitely but must cease as integration among the multi-ethnic communities is forged:

> We found little opposition in any quarter to the continuance of the present system for a time, but there was great opposition in some quarters to any increase of the present preferences and to their being continued for any prolonged period. We are of the opinion that in present circumstances it is necessary to continue these preferences. The Malays would be at a serious and unfair disadvantage compared with other communities if they were suddenly withdrawn. But, with the integration of the various communities into a common nationality which we trust will gradually come about, the need for these preferences will gradually disappear. Our recommendations

73 Milne, RS, "'National Ideology' and Nation-Building in Malaysia" (1970) 10 Asian Survey 563, 564. See also M Shamsul Haque, "The Role of the State in Managing Ethnic Tensions in Malaysia: A Critical Discourse" (2003) 47 American Behavioral Scientist 240.

74 Reid Commission Report, 6 [5].

75 Reid Commission Report, 70-71 [163].

> are made on the footing that the Malays should be assured that the present position will continue for a substantial period, but that in due course the present preferences should be reduced and should ultimately cease so that there should then be no discrimination between races or communities.[76]

It is accepted that widespread economic deprivation among the Malays at the time of independence justified the adoption of special measures to assist them. However, it is interesting the Commission thought that with greater integration among the respective ethnic groups, the necessity for Malay privileges would be diminished. The Commission did not go on to explain how national integration would be achieved, but assumed that when it was, it would solve the issue. To posit the emergence of equality from a premise of inequality ignored the possibility that preferences for one ethnic group would further divide rather than unite. Would steps taken to advance the Malays in terms of their socio-economic status encourage the different ethnic groups to embrace a single Malaysian "race"?

Short-sighted as it was, the Commission was overly optimistic. It proposed the preservation of Malay privileges in limited areas of Malay reservations, quotas for admission to public services and in the issuance of permits or licences, and in connection with scholarships, bursaries and other educational aids. The Commission indicated that those preferences should not be increased and that a review after 15 years ought to be carried out.[77] Legitimising this within the Constitution is art 153 which empowers the Yang di-Pertuan Agong to take steps to safeguard the special position of the Malays. Forming an exception to the equal protection clause in art 8, discrimination in favour of the majority ethnic group is justified mainly by the rationale of achieving economic resurgence:

> The pursuit of special privileges came to be seen, therefore, and justified constitutionally, as essential to the creation of equality rather than as an exception to it … The rationale of positive discrimination is itself based on the concept of equality: to impose equality on already unequal groups simply perpetuates inequality, thereby defeating the very purpose of attainment of equality.[78]

The principle of non-discrimination is the cornerstone of human rights jurisprudence. Special measures, including positive discrimination for a specified period of time necessary to attain a well-defined goal is permitted.[79]

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76 Reid Commission Report, 72 [165].

77 See Reid Commission Report, 72 [165-167].

78 Harding, Andrew, *Law, Government and the Constitution in Malaysia*, Kuala Lumpur: Malayan Law Journal Sdn Bhd, 1996, pp 230-231.

79 CEDAW, art 4(1), mandates temporary special measures by State Parties to accelerate de facto equality between men and women. See also UN CEDAW, "General Recommendation No 5: Temporary Special Measures" (March 4, 1988) CEDAW A/43/38.

Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination,[80] which Malaysia has not ratified, states that:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Seen in this light, short-term implementation of policies favouring a particular ethnic group is permissible where the ultimate objective is equality. These policies however must be monitored and revised periodically, and once the objective is achieved, the privileges should end. The right approach cannot be to prolong the state of affairs but to speedily achieve the required aim. Again, the spirit of the Commission's proposals was lost when the Constitution failed to stipulate a time-frame for the continuance of the privileges.

The National Economic Policy ("NEP") introduced after the May 13, 1969 riots and replaced by the National Development Policy ("NDP") in 1990 sought to redress economic imbalance as a means of promoting national unity.[81] Adopting redistribution policies along ethnic lines, particularly with regard to Bumiputras has led to encouraging success in eradicating poverty in certain quarters. It has been said that as a result of these policies "[t]he disparity in wealth distribution among ethnic communities in Malaysia is no longer one where the Bumiputra find themselves at a severe disadvantage."[82] A new middle class Bumiputra has emerged and ethnicity ceased to be correlated with poverty. Nevertheless, in light of two research studies which found that the target of 30% Bumiputra ownership of national wealth has been met and in fact exceeded, the question arising is whether ethnically-based government policies have outlived their time.[83] One criticism is that intra-

80 Adopted December 21, 1965, entered into force on January 4, 1969 by UNGA Res 2106(XX), 660 UNTS 195 ("ICERD").

81 See M Shamsul Haque, "The Role of the State in Managing Ethnic Tensions in Malaysia: A Critical Discourse" (2003) 47 American Behavioral Scientist 240; Milne, RS, "The Politics of Malaysia's New Economic Policy" (1976) 49 Pacific Affairs 235; and Brown, Graham K, Siti Hawa Ali and Wan Manan Wan Muda, "Policy Levers in Malaysia", CRISE Policy Context Paper 4, Oxford: Centre for Research on Inequality, Human Security and Ethnicity (May 2004): *http://www.crise.ox.ac.uk/pubs/policycontext4.pdf* (accessed October 25, 2007).

82 Centre for Public Policy Studies, "Corporate Equity Distribution: Past Trends and Future Policy", Proposal for the 9th Malaysian Plan (2006), 1: *http://www.cpps.org.my/resource_centre/Corporate_Equity_Distribution.pdf* (accessed October 25, 2007).

83 See Beh, Lih Yi, "Bumi Equity hit NEP Target 10 Years Ago", Malaysiakini.com (November 1, 2006): *http://www.malaysiakini.com/news/58885* (accessed October 25, 2007); and Beh, Lih Yi, "World Bank: We're not involved", Malaysiakini.com (November 29, 2006): *http://www.malaysiakini.com/news/60245* (accessed October 25, 2007).

ethnic Malay disparities between the upper and lower class have increased where a minority is being enriched to the detriment of those within the group who are in need of assistance.[84] Further, and as the NEP, combined with the influence of Islamic resurgence has "managed to create a heightened sense of Malayness",[85] continuing NEP-like policies run the risk of inter-ethnic conflict when conditions of the economy do not experience high growth such that the non-Malays fail to achieve economic progress.[86] In sum, economic integration through the NEP and the NDP has brought about limited progress towards achieving the general aim of national unity.[87]

On the contrary, race-based affirmative action may have exacerbated ethnic divisions. Lim reviewed several academic articles based on empirical research[88] which found that Malay students justified the need for affirmative action "as an inherent right based on their indigenity" while the Chinese and Indians felt they were discriminated against.[89] The NEP appears to have made national unity "more elusive" as the political domination by the Malays has allowed greater control in the allocation of resources to the Malays through policies like the NEP, thus alienating non-Malays.[90] "[T]he ethnic preferential system has also reinforced ethnicity by defining more and more issues in ethnic terms".[91] It has been suggested that an ethnic-blind, needs-based approach would be more appropriate to enhance nation unity because it will improve the economic standing of the poor irrespective of ethnicity.[92]

More and more today, the question of a "Malaysian identity" is becoming intertwined with the issue of "Malay privileges", seen in political circles as a valid vote-securing issue. The rhetoric of ethnic superiority has become

84 See Centre for Public Policy Studies, "Overview", Proposal for the 9th Malaysian Plan, 2006.

85 Shamsul AB, "Why is Malaysia not Disintegrating? Islam, the Economy and Politics in Multiethnic Malaysia", Project Discussion Paper No 14/2001, Duisburg: Institute for East Asian Studies/East Asian Politics (April 2001), p 6: *http://www.uni-duisburg.de/Institute/OAWISS/download/doc/discuss14.pdf* (accessed October 25, 2007).

86 See Brown, Graham K, "Balancing the Risks of Corrective Surgery: The Political Economy of Horizontal Inequalities and the End of the New Economic Policy in Malaysia", Oxford: Centre for Research on Inequality, Human Security and Ethnicity (April 2005): *http://www.crise.ox.ac.uk/pubs/workingpaper20.pdf* (accessed October 25, 2007).

87 See Lim, Teck Ghee, "Social Integration of Different Ethnic Groups in South-East Asia, with Special Reference to Malaysia: A Review of the Literature and Empirical Material", Discussion Paper Series No 82, Geneva: International Institute for Labour Studies, 1995.

88 Ibid, at p 16.

89 Ibid, referring to Ong, Puay Liu, "Ethnic Quotas in Malaysia—Affirmative Action or Indigenous Rights?" (1989) 9 No 12 Aliran Monthly 24.

90 Ibid, referring to Lim, Mah Hui, "Affirmative Action, Ethnicity and Integration: The case of Malaysia" (1985) 8 Ethnic and Racial Studies 250.

91 Ibid, referring to Means, Gordon, "Ethnic Preference Policies in Malaysia" in Nevitte, Neil and Kennedy, Charles H (eds), *Ethnic Preference and Public Policy in Developing Countries*, Colorado: Lynne Rienner Publishers, 1986.

92 See Centre for Public Policy Studies, "Overview", Proposal for the 9th Malaysian Plan, 2006.

evident, but this is not surprising when the Constitution provides for limited discrimination based on race. But Hirschman has warned that "there is no conceptual basis for race except racism"[93] and it would be important to take heed of this nuanced statement. Surreptitiously, the political hegemony by the Malay majority appears to dictate a "Malay way" which appears to find a place in every facet of a citizen's life. The declining power of the Chinese parties to influence policies within the ruling government coalition has contributed to this domination.[94] Education, language and culture have become fraught issues, leading to a fragmentation of trust among ethnic groups. Sources of discontent such as these are hindrances to unity. In education, the promotion of ethnocentric Malay views in the name of nation-building[95] is worrying as is the failure to promote and improve national integration in schools.[96] Inequality in favour of the middle and upper class Malays, and the lack of opportunities in the admission to higher education for the rural Malays have caused intra-ethnic suppression of the disadvantaged Malays as well as inter-ethnic disquiet among the non-Malays.[97] In disregard of human rights protection for the native languages of minorities,[98] the choking of vernacular education has not gone down well with the Chinese and Indians,[99] particularly where multiculturalism is the platform on which the nation should be built, not "plural monoculturalism".[100] The National Culture Policy 1971 ("NCP")[101] again reflects an ethnocentric view. First, it provides that the culture of the country is based on the Malay culture of the people of our region. Second, other cultures are accepted only if it is consistent with the NCP. Third, the NCP is based on the religion of Islam. Explaining the NCP, the Minister of

93 Hirschman, Charles, "The Origins and Demise of the Concept of Race" (2004) 30 Population and Development Review 385, 408.

94 See Chin, James, "Malaysian Chinese Politics in the 21st Century: Fear, Service and Marginalisation" (2001) 9 Asian Journal of Political Science 78.

95 See Brown, Graham, "Making Ethnic Citizens: The Politics and Practice of Education in Malaysia", CRISE Working Paper No 23, Oxford: Centre for Research on Inequality, Human Security and Ethnicity (October 2005): *http://www.crise.ox.ac.uk/pubs/workingpaper23.pdf* (accessed October 25, 2007).

96 See Noriyuki Segawa, "Malaysia's 1996 Education Act: The Impact of a Multiculturalism-type Approach on National Integration" (2007) 22 Journal of Social Issues in Southeast Asia 30.

97 See Viswanathan Selvaratnam, "Ethnicity, Inequality and Higher Education in Malaysia" (1988) 32 Comparative Education Review 173.

98 See Skutnabb-Kangas, Tove, "Mother Tongue Maintenance: The Debate. Linguistic Human Rights and Minority Education" (1994) 28 TESOL Quarterly (Special-Topic Issue: K-12) 625; and Kamal K Sridhar, "Mother Tongue Maintenance: The Debate. Mother Tongue Maintenance and Multiculturalism" (1994) 28 TESOL Quarterly (Special-Topic Issue: K-12) 628.

99 See Yang, Pei Keng, "National Education after 44 Years (Part I)": *http://www.johorebar.org.my/content/view/102/27/* (accessed October 25, 2007); and Yang, Pei Keng, "National Education after 44 Years (Part II)": *http://www.johorebar.org.my/content/view/101/27/* (accessed October 25, 2007).

100 See Sen, Amartya, *Identity and Violence: The Illusion of Destiny*, New York: WW Norton & Company, 2007, pp 156-160.

101 See *http://www.heritage.gov.my/kekkwa/viewbudaya.php?id=3373* (accessed October 25, 2007).

Culture, Arts and Heritage has surprisingly said that the Malay language, the Malay culture and the religion of Islam is the "meeting point" of all ethnic groups in Malaysia.[102]

It is submitted that what began as provisions in the Constitution intended to assist the marginalised are now seen as being turned against the minority population of the country in more ways than one, violating their basic rights. Little assistance for the minorities may be found in the Constitution. Protection in the areas of language and culture is absent while the right to education is severely limited. It has been recommended that if preferential policies for the Bumiputras are to continue, the government needs to redefine the policies as "parts of affirmative action to overcome ethnic inequalities and injustices rather than as taken-for-granted (inborn) ethnic rights".[103] Communal-based politics is seen as an obstacle to nation-building, and the integration of the Chinese with the Malay population faces "political and institutional hurdles".[104] The abolishment of race-based politics and policies may reduce the level of antagonism currently present. At present however, the exclusion of human rights values in the government's model of governance will raise further apprehensions pertaining to what it means to be a Malaysian. Race and religion continue to dictate policies as opposed to other relevant considerations including principles of non-discrimination and minority protection.

Metamorphosing the Constitution

The ease with which the Constitution may be amended at the will of the government is well-known. From 1957 to 1977, the Constitution has been amended on no fewer than 23 occasions leading to a "truncation of safeguards which had been considered by the Reid Commission as vital for the growth of a viable democratic nation".[105] According to Shad Saleem Faruqi, as of 2005, the number of individual amendments is around 650.[106] What therefore does the future hold for constitutionalism in Malaysia?[107] The Constitution as we know it today is not perfect. The Commission attempted to entrench democratic ideals within the Constitution, among others, by including an

102 Datuk Seri Utama Dr Rais Yatim, "Ringkasan Ucapan YB Menteri KEKKWA dalam Perhimpunan Bulanan KEKKWA Bil 2/2007", (August 13, 2007): *http://www.heritage.gov.my/kekkwa/index.php?bahan=viewbudaya.php?id=432* (accessed October 25, 2007). Cf *Merdeka University Bhd v Government of Malaysia* [1981] 2 MLJ 356, HC.

103 M Shamsul Haque, "The Role of the State in Managing Ethnic Tensions in Malaysia: A Critical Discourse" (2003) 47 American Behavioral Scientist 240, 263.

104 See Freedman, Amy L, "The Effect of Government Policy and Institutions on Chinese Overseas Acculturation: The Case of Malaysia" (2001) 35 Modern Asian Studies 411, 435.

105 Lee, HP, "The Process of Constitutional Change in Malaysia" in Tun Mohamed Suffian, Lee, HP and Trindade, FA (eds), *The Constitution of Malaysia. Its Development: 1957–1977*, Selangor: Oxford University Press, 1978, pp 369-370.

106 See Zainon Ahmad and Phang, Llew-Ann, "The All-Powerful Executive", The Sun (October 1, 2005): *http://www.sun2surf.com/article.cfm?id=11381* (accessed October 25, 2007).

107 See also Lee, HP, *Constitutional Conflicts in Contemporary Malaysia*, Selangor: Oxford University Press, 1995, pp 100-125.

important chapter on fundamental liberties and measured provisions to facilitate national integration. However, the judges have interpreted these liberties to render them meaningless while the government has been obsessed with the redistribution of resources along ethnic lines.[108] The result is a divided society unsure of its direction.

Constitutionalism in Malaysia is limping. It must now allow a greater role for the human rights project to shape it and embody international standards of rights protection. Amendments are necessary to update the Constitution in line with developments in human rights. An informal bargain may have been engineered 50 years ago, but the tide of developments in internationalism and democracy calls for a second look at our ethnicised Constitution. It is an opportune time to envisage a constitutional humanism that places the individual at the heart of society while seeking to balance the interests of the state in managing a pluralist nation.[109] In particular, minority protection needs a prominent place in the constitutional framework, and so do matters of language and culture. New legislation such as a Minority Protection Act or Human Rights Act must be considered.

Commemorating 30 years of independence in 1987, an editorial in the Malaysian Bar's journal adopted the following view:

> In the final analysis the *raison d'etre* of our Constitution is to protect "disadvantaged persons" like minorities, the weak, the ignorant, the poor, the downtrodden, the uninfluential and the unpopular from what John Stuart Mill called "the tyranny of the majority". Further, the protection afforded to such disadvantaged persons ought to have better than that available to them during the colonial days; otherwise independence would have no real meaning for them. The original Constitution recognised their vulnerability; a considerable measure of protection was granted to them. However, post-Merdeka developments, by way of Constitutional amendments and Acts of Parliament, have made deep inroads into those Constitutional provisions, with the result that such disadvantaged persons may legitimately claim that 30 years of independence have not improved their lot.[110]

It ended with a proposal that steps be taken to strengthen the Constitution by returning as close as possible to the ideals guiding the drafting of the original document. A call to establish a Royal Commission to recommend reforms was made.[111]

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108 See Maznah Mohamad, "Ethnicity and Inequality in Malaysia: A Retrospect and a Rethinking", CRISE Working Paper No 9, Oxford: Centre for Research on Inequality, Human Security and Ethnicity (February 2005): *http://www.crise.ox.ac.uk/pubs/workingpaper9.pdf* (accessed October 25, 2007).

109 See Shakila Yacob, "Political Culture and Nation Building: Whither Bangsa Malaysia?" (2006) 3 Malaysian Journal of Social Policy and Society 22.

110 "The Case for a Review of the Federal Constitution" [1987] INSAF 4 at 7-8.

111 See also Harding, Andrew, *Law, Government and the Constitution in Malaysia*, Kuala Lumpur: Malayan Law Journal Sdn Bhd, 1996, pp 269-274.

Today, the need to review the Constitution is more urgent than ever. Problems which have arisen since independence point to an acute need for greater direction and an overhaul of the Constitution to imbue human rights perspectives as an important policy remit. Forces of change compel us to look ahead for a new vision where human rights are at the centre stage and not merely an impulse by-product of decolonisation. Despite the attacks on the Constitution, the surge of any reform rests on the people's aspirations, and whether we are willing to seek a constitutional resurrection.