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## Malaysia's Constitutional Democracy

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### ABSTRACT

This paper aims to describe the following: 1. to define the concept of separation of power; 2. To discuss the social background of Malaysian constitution; 3. To examine the role of constitutional government in politics. Based on the discussion it is important to note that Malaysia's constitution is very much shaped by its socio-political legacy.

Constitution, Separation of Power, Emergency

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### INTRODUCTION

In Malaysia, separation of Powers between the Legislative, Executive and Judiciary is clearly expressed in the Constitution. This is in line with the practise and the theory stressing that the three organs of government must have a defined area of power (Montesquieu 1793). However, in Malaysia, the power is overlapping between Legislative and executive.

Division of powers between states and federal governments also exist in the Constitution. The Powers of the Government are divided between a Central government and a state Government. It is important to note that Federal Constitution is superior to any other states constitution in the country.

### THE BACKGROUND OF MALAYSIAN CONSTITUTION

After independence, the Malaysian constitution was patterned on those of Britain and India. Towards the end of the Japanese Occupation in 1945, Dr Burhanuddin Helmi (Malay Officer-in-charge of Islam and Malay Customs under the Japanese Military Administration) and Mustapha Hussain (Vice President of KMM) planned to gain Malaya's independence. Mustapha secretly drew up a Malaya *Merdeka* Constitution to be discussed at KRIS Conference in Kuala Lumpur in mid-August 1945. However, the constitution was not successful one.

The British then introduced the Malayan Union and Federal Constitution 1957. The first was rejected and the latter was accepted. There are socio-political factors that determine Malaysia's constitution:

- a) The two major colonial problems, communalism and communism had fused to form a political problem of a most formidable kind. On the one hand there was a middle-class communalism that had completely barred Malaya's constitutional progress towards self-government. Opposing it was a Chinese-inspired Communism that seeks to destroy colonial rule by direct action (Carnel 1953).
- b) The three main ethnic groups agreed to the term of reference stated by Constitutional Commission of the British administration and the Malay Rulers as follow:
  - Maintaining the status of Malay Rulers as sovereign in a parliamentary democratic country.
  - Preserving the special position of the Malays as the son of the soil (original people) of the country.

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- Surrendering the citizenship to the non Malay based on *Jus Soli*.
  - Islam as the religion of the Federation and to give freedom to other religions to celebrate their religions and cultures.
  - Malay language as official language and to give freedom to use each ethnic languages on personal basis
- c) However, the Reid Commission was more inclined towards the non-Malays, this situation contributed to the conflict in the constitutional proposals presented by the Alliance and the commission. To solve it, the British government had appointed a team of constitutional work of three British representatives, four representatives of the sultan and four representatives from the Alliance for the formulation of the final constitution (Carnell 1953). A negotiation has resulted in the Independence Constitution of 1957 (Carnell 1953).
- d) Consent of the Chinese in MCA and of the Indians in MIC in these matters is considered a "social contract" that is popularly talked about now. Federal claims by the Chinese and the Indians had no solid foundation and therefore the Reid Commission did not accept their recommendations (Manaf 1950).

## CONSTITUTION AND POLITICS

Malaysian constitution was established naturally as mechanism to face crises. The crises are ethnically, politically or economically based. The regressive measures taken since independence mostly stem from the legislation which impacted on constitutional liberties. Under the emergency provisions of the Constitution, once a state of emergency was proclaimed, the executive might invoke powers to override constitutional provisions.

As noted by a Government Report upon it, the 13 May tragedy was due to differences in interpretation of the constitutional structure by the different races in the country, and the growing political encroachment of the immigrant races against certain provisions of the Constitution which relate to Malay language and the position of the Malays, principally Articles 152 and 153; In the wake of 1969 incident, a constitutional amendment was adopted to outlaw criticism and questioning of Malay rights and prohibited any act, speech or publication that produced ethnic conflict. The reason for the ruling regime to amend the constitution was to create political stability, a stability that has given the country peace, economic growth and development; a stability that has enabled the Malays to stand tall among other races.

Following the 1969 rioting, the act was amended, widening the concept of sedition to cover matters with 'a tendency...to promote feelings of ill-will and hostility between different races or classes of the population of Malaysia and prescribed the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution. The Sedition Act, sections 3(I) (e) and (f). Part 3 of the constitution dealt with citizenship, primarily the conditions required for non-Malays. Article 152 established Malay as the national language, although it also guaranteed that using, teaching, or learning any other language cannot be prohibited or prevented. Article 153 obliged the government 'to safeguard the special position of *bumiputras* at the same time 'the legitimate interests of other communities must also be respected (Crouch 1997). When the Parliament was reconvened, a white paper was issued which proposed a series of constitutional amendments designed to achieve two main objectives- first, to remove sensitive issues from the realm of public discussion and second, to redress the racial imbalance in certain sectors of the nation's life.

In 1971 the constitution was amended to extend the application of the Sedition Act to Parliament itself and thus removed parliamentary privilege from discussion of these subjects and other issues considered sensitive. In Malaysia, the judicial review of the proclamation of a state of emergency was extremely limited because of amendments to the Constitution in 1981 (Tan 1997). The Official Secrets Act was another law tending to restrict the issues that the opposition could raise against the government. Before its amendment in 1986, the act covered the unauthorized publication of any information in the hands of the government, no matter how significant or widely known (Crouch 1997). For some time there had been a constitutional crisis in Sarawak, and this crisis had deteriorated to the extent that it now posed a very serious threat, not only to Sarawak but also to the whole of Malaysia.

The following passages appear in reference to the events in Sarawak: 'First, A constitutional crisis has occurred in Sarawak which the Yang di-Pertuan Agong is satisfied constitutes a grave emergency whereby the security of Sarawak is threatened; Second, there is already in force a Proclamation of Emergency issued on 3 September 1964, in respect to the whole Federation, the occasion for which is a matter of public knowledge; The Yang di-Pertuan Agong, in exercise of his powers under Article 150 of the Constitution has issued a further Proclamation in respect of Sarawak only, in order to deal with the present crisis as a distinct emergency additional to the emergency already proclaimed. Although the proclamation is made by the Head of state upon the satisfaction of the head of state of the grave emergency, an issue arises whether the head of state is to act on the advice of the Cabinet or own his own discretion (Lee 1995).

It is important to note that the constitution and politic are intertwined. The constitution itself is a guide to be followed by politicians to determine the pattern of national politics. For example, a bill to be introduced by the government in parliament must take into account the political demands made by the people and the political implication accepted by the people as a result of the bill. In short, the constitution and politic are interrelated.

- (a) To avoid becoming involved in the controversy aroused by the executive body, the legislative and the judiciary, Malaysia practices separation of powers. If the judiciary to interfere and criticize government policies, then this will cause it no longer seems independent and impartial. In the judicial system of any country, it is very important for the judiciary to be independent and not been influenced by any political party.
- (b) In a country where the federal system is practiced, the Malaysian constitution distributes powers between the federal and state governments. Preference goes to the federal government when it comes into legislative power and decision. For example, the power to make laws is given to the federal government against the state and is determined by the Ninth Schedule of the Constitution.
- (c) Malaysia is a country with a plural society. To that end, the government has taken steps to introduce a number of acts to curb racial issues from being used openly by the political parties from threatening political stability. Among the laws that were introduced are legislation to prevent subversive and even preventive detention - known as *purposive depoliticization*.

## CONCLUSION

The separation of power and the division of power is clearly defined in Malaysian Constitution. The nature of Malaysian Constitution is based on the multi-ethnic society and continuation of traditional political system. The Constitutional government aims at providing political security and stability.

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